



Australian Government

The Treasury



# Gift cards in the Australian market

Final Report

July 2012

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ISBN 978-0-642-74831-7

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**Australian Government**  
**Commonwealth Consumer**  
**Affairs Advisory Council**

**Mr Colin Neave AM**  
**Chair of CCAAC**  
6 July 2012

Dear Assistant Treasurer,

At a meeting of the Ministerial Council on Consumer Affairs (MCCA) held on 3 June 2011, Ministers noted concerns relating to the purchase and use of gift card products. On behalf of Consumer Affairs Ministers, the Commonwealth Consumer Affairs Advisory Council (CCAAC) was requested to conduct a review of gift cards in the Australian market.

The findings of this report have drawn on research and consultation following the release of an issues paper. CCAAC invited written submissions from interested stakeholders on issues relating to the purchase and use of gift cards in the Australian market.

Gift cards are a market response to a consumer demand. While gift cards may have some disadvantages when compared with cash, CCAAC has found that on the whole, consumers benefit when giving and receiving gift cards. Gift cards are a convenient option for the gift giver and allow the gift card holder to select a gift that suits their needs.

While this review has uncovered difficulties where gift cards are not used in accordance with the terms and conditions that apply, CCAAC has been unable to find any overwhelming evidence of structural consumer detriment warranting a regulatory response. However, CCAAC accepts that in some cases there may be some dissonance between terms and conditions and consumer expectations, which is exacerbated by the fact that the purchaser is not likely to be the end user, thereby separating the end user from the transaction. CCAAC has found that there may be some scope to explore how existing consumer education activities could be promoted to consumers of gift card products. To assist consumers, CCAAC also encourages industry to develop and promote industry best practices when issuing gift cards.

I offer my thanks to and acknowledge the expertise and commitment of the CCAAC Subgroup in compiling this report. The Subgroup was led by Ms Deborah Healey and Mr Ray Steinwall, together with contributions from other colleagues, as well as assistance from the Queensland Office of Fair Trading, the Australian Securities and Investments Commission (ASIC) and the Commonwealth Treasury. I also thank those who provided submissions to CCAAC as well as those who met with CCAAC throughout the duration of the review.

I am pleased to enclose a copy of CCAAC's final report.

Yours sincerely

A handwritten signature in black ink that reads 'Colin Neave'.

Colin Neave  
Chairman, Commonwealth Consumer Affairs Advisory Council.

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## EXECUTIVE SUMMARY

Since the mid-1990s, gift cards have become an increasingly popular product for Australian consumers. While gift card use continues to grow, concerns about the risks for consumers who purchase and receive gift cards have been raised.

There is evidence of a vibrant Australian gift card market which suggests that gift cards are a popular choice for consumers and that many Australian retailers benefit from offering gift card products. In addition, it is evident that the market is growing and that new gift card forms and functions are emerging.

CCAAC has examined issues relating to gift cards by applying the OECD Consumer Policy Toolkit and supports it as a framework when assessing consumer problems and evaluating policy options.

Submissions from individual consumers raised concerns around some terms and conditions that apply, particularly where they restrict the gift card holder's use of the gift card. This included concerns about expiry dates, receiving change as well as fees and charges that may apply. Issues related to the administration of gift card programs – including the replacement of gift cards, the use of unspent monies and gift card holder rights in the event of insolvency – were also raised.

Some consumers have suggested that regulation should be introduced to require a minimum expiry date while others have suggested that consumer rights in the event of insolvency should be enhanced.

CCAAC found that there is a level of actual consumer detriment associated with the gift card market in relation to the terms and conditions of gift cards, particularly in relation to the expiration of gift cards and to a lesser extent some other terms and conditions.

One factor that contributes to the detriment is that the consumer who purchases the gift card is usually not the consumer who will use the card. Issuers need to ensure that they have done as much as possible so that the end user of the gift card is aware of any limitations on its use (including the expiry date).

It has not been possible to quantify the precise level of detriment based on the information available.

The question to be considered by policy makers is whether there are any regulatory or other responses to these areas of detriment which are likely to provide net benefits to consumers.

In relation to expiry dates, there is no strong evidence that setting a mandatory minimum expiry date would assist many consumers. CCAAC considers that for many issuers it would be unreasonable to set an expiry date of less than 12 to 15 months. However, shorter expiry dates may be reasonably necessary to protect the legitimate commercial interests of some, mainly small businesses. In all cases, CCAAC considers that gift card issuers must do as

much as they can to ensure that end users are made aware of the expiry date as well as any other important terms.

In situations of insolvency, there are often insufficient funds to meet the claims of all creditors. While it is unfortunate that some consumers have experienced losses where a gift card issuer has become insolvent, CCAAC believes that the holders of unredeemed gift cards should be treated equally with other unsecured creditors. While there have been some recent high profile retailer insolvencies, insolvency risks for gift card holders are relatively low.

CCAAC encourages industry to develop and promote best practice principles that support consumers when engaging with these products. To further promote industry best practice, CCAAC encourages industry participation in the ePayments code. CCAAC also encourages Australian Consumer Law (ACL) regulators to continue to explore how consumer awareness can be promoted to assist purchasers and holders of gift card products. Consumer Affairs Australia and New Zealand (CAANZ) and its advisory committees are encouraged to develop a coordinated strategic non-regulatory response, based on the findings of the CCAAC review into gift cards in the Australian market.

# THE COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL (CCAAC)

## CCAAC TERMS OF REFERENCE

CCAAC is an expert advisory panel, which provides advice to the Assistant Treasurer on consumer policy issues.

CCAAC's terms of reference are to:

- consider issues, reports and papers referred to it by the Minister and report to the Minister on their consumer policy implications, and in doing so take account of the need for well-functioning markets with confident consumers;
- identify emerging issues affecting Australian markets and consumers and draw these to the attention of the Minister; and
- when considering consumer policy issues, take account of their competition and other relevant economic implications.

## Membership

The membership of CCAAC consists of:

- Mr Colin Neave AM (Chair);
- Ms Carolyn Bond;
- Professor Stephen Corones;
- Ms Lynda Edwards;
- Ms Deborah Healey;
- Mr Gordon Renouf;
- Dr Rhonda Smith;
- Mr Ray Steinwall; and
- Mr Peter Kell.

## TERMS OF REFERENCE

The former Parliamentary Secretary to the Treasurer, now the Assistant Treasurer, on behalf of the Ministerial Council on Consumer Affairs,<sup>1</sup> invites the Commonwealth Consumer Affairs Advisory Council (CCAAC) to conduct a review of gift cards. CCAAC is requested to explore and develop options to better protect consumers who purchase or receive these products.

As part of the review, CCAAC is requested to examine:

- issues in relation to the purchase and use of gifts cards in Australia, for example, expiry dates, the discharge of low balances on gift cards, the disclosure of terms, conditions and fees of gift cards and the extent of unredeemed gift card balances;
- if there is consumer detriment, determine the level of consumer detriment arising from the terms and conditions of gift cards;
- the views of stakeholders affected by gift card sale practices, including consumers, retailers and other traders, insolvency practitioners and peak industry and consumer bodies;
- potential losses from insolvencies for consumers who hold a gift card;
- the effectiveness of international regulatory initiatives that seek to address consumer concerns related to gift cards and the appropriateness of these approaches to the Australian marketplace; and
- options to address any consumer detriment arising from the sale of gift cards.

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<sup>1</sup> The Ministerial Council for Consumer Affairs is now the COAG Legislative and Governance Forum on Consumer Affairs (CAF).

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## **GLOSSARY**

<b>ACL</b>	Australian Consumer Law
<b>ASIC</b>	Australian Securities and Investments Commission
<b>CAANZ</b>	Consumer Affairs Australia and New Zealand
<b>CAF</b>	COAG Legislative and Governance Forum on Consumer Affairs
<b>CCAAC</b>	Commonwealth Consumer Affairs Advisory Council
<b>CDRAC</b>	Compliance and Dispute Resolution Advisory Committee
<b>COAG</b>	Council of Australian Governments
<b>EIAC</b>	Education and Information Advisory Committee
<b>MCCA</b>	Ministerial Council on Consumer Affairs (now CAF)
<b>OBPR</b>	Office of Best Practice Regulation
<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>PRAC</b>	Policy and Research Advisory Committee

## Findings

### Part 1

#### *Defining the problem and formulating solutions*

CCAAC considers that policies implemented to address consumer concerns relating to the purchase and use of gift cards should be appropriate to the nature and underlying cause of consumer detriment. Policy solutions should be targeted appropriately and regulatory options should only be considered where they are supported by a cost benefit analysis. CCAAC supports the OECD Consumer Policy Toolkit as a framework through which consumer problems can be assessed and where policy options can be evaluated.

### Part 2

#### *Features of the Australian gift card market*

Evidence of a vibrant Australian gift card market demonstrates that gift cards are a popular choice for consumers and that many Australian retailers benefit from offering gift card products. Estimates provided in submissions to the Issues Paper suggest that the gift card market can be valued at between \$1.5 to 2.5 billion per year. However, CCAAC acknowledges the difficulty in estimating the size of the gift card market accurately. In addition, it is evident that the market is growing and that new gift card forms and functions are emerging.

#### *Gift cards and consumer welfare*

CCAAC finds that gift card products, when used as intended, have the potential to provide significant benefits to Australian consumers. CCAAC encourages policy makers to ensure that any new policies relating to gift cards do not restrict consumers from benefiting through their engagement with the Australian gift card market.

### Part 3

#### *Expiry dates*

CCAAC has identified some instances of personal consumer detriment with respect to the application of expiry dates on gift cards. There have been some circumstances where consumers have not redeemed the full value of their gift card before the expiry date.

CCAAC has not found any overwhelming evidence of systemic consumer detriment relating to expiry dates, however, there may be some merit in continuing to monitor to see whether any new evidence emerges. It would appear as though most gift cards are redeemed shortly after purchase, with most gift cards in the Australian market offered with an expiry period of at least 12 months. CCAAC also acknowledges that in some cases, depending on the individual circumstances of the gift card issuer, the application of an expiry date – including where it is less than 12 months – may be a reasonably necessary practice to ensure the operational viability of a gift card program.

CCAAC also finds that many gift card issuers offer grace periods and can provide flexibility in accordance with their customer service policies. While many issuers may offer this as a courtesy to their customers, this is not a universal practice. Also, it would appear

as though these policies may not always be implemented at the store level with consumers having to elevate a complaint before being offered an extension to their expired gift card. Issuers could consider how grace periods are applied at the store level to ensure that customer service objectives are achieved. CCAAC notes that some consumers may not try to use the card once they realise it has expired, and many will not complain.

Where consumers are aware that expiry dates apply, they are able to select a gift card that is appropriate to the receiver's needs. The existing consumer protections of the ACL and the ASIC Act may assist in reducing the incidence of cases where consumers are misled about expiry dates.

#### *Terms and conditions in the event of insolvency*

Companies placed into external administration are required to be administered in accordance with the *Corporations Act 2001* (the Corporations Act). Gift card holders are likely to rank as unsecured creditors in the event of insolvency. External administrators have an obligation to maximise any returns to creditors and are not required to honour the terms and conditions applied to gift cards at the time of purchase. This may cause some confusion where in doing so, a business in external administration appears to continue to operate as normal. This may be further exacerbated where a company in external administration offers to accept gift cards under different terms and conditions than were applied at the time of purchase. CCAAC finds that some consumers have limited understanding of their rights in the event of an external administration and while consumers are unlikely to take notice of general information on this topic, those who suffer detriment as a result of insolvency could benefit from access to clear information at that time.

#### *Receiving change*

CCAAC is not aware of evidence to suggest that there is significant loss to consumers due to policies relating to the provision of change. Most gift cards are designed to retain any residual balances on the gift card itself. Some issuers, as a courtesy, may provide change in certain circumstances and this may be considered a good business practice. Improved disclosure about gift card policies for the provision of change may assist consumers when choosing gift card products.

#### *Fees and charges*

There does not appear to be any reason why fees other than upfront fees should be applied to cover costs where gift card issuers retain gift card breakage and are able to make a return on sales. With the exception of some open loop gift card products, fees and charges do not appear to be common in the Australian market. Where there is transparency around fees, consumers have sufficient choice to allow them to avoid fees if they wish to do so. Most fees applied in Australia are limited to upfront fees paid when purchasing a gift card. Dormancy and other fees are not as common in Australia as they are in other countries.

It would be appropriate for ACL regulators to continue monitoring the Australian gift card market to observe whether there are any changes to the manner in which fees are applied.

### *Other issues relating to gift card terms and conditions*

In relation to restrictions on low value use or limitations with respect to retailers that accept gift cards, CCAAC notes that these restrictions have the potential to create difficulties for the consumer where they are not appropriately disclosed. However, CCAAC is not aware of any overwhelming evidence of structural consumer detriment from these issues.

## **Part 4**

### *Lost, damaged or stolen cards*

There are some practical difficulties for issuers seeking to replace lost or stolen cards. CCAAC is of the view that compelling issuers to maintain detailed records could be too costly to issuers and may have flow on costs to the consumer. Issuers that facilitate replacement cards where possible do so to the benefit of their customers. CCAAC interprets the current law as requiring issuers to replace cards that are damaged on arrival where a gift card holder can provide evidence of the purchase.

CCAAC is not convinced that this issue warrants the introduction of any kind of new record keeping requirements. However, CCAAC does believe that as a matter of good business practice, issuers should assist consumers to replace lost or stolen gift cards wherever possible. CCAAC notes that some gift card issuers encourage gift card holders to keep a proof of purchase or take note of any serial number so that they can have it replaced in the event that it is lost or stolen. While this may be possible for some gift card programs, CCAAC acknowledges that this may only be appropriate where the risk of fraudulent activity can be managed appropriately.

Furthermore, gift card holders are likely to benefit where the gift card purchaser provides them with a proof of purchase to assist them in replacing lost, damaged or stolen cards.

### *The use of unspent monies and interest accumulated on gift cards*

Gift cards are not intended for investment purposes and gift card issuers should not be expected to transfer interest payments to gift card holders. While the transfer of unredeemed balances to the gift card issuer may be seen as an injustice to the consumer, it is unclear how these concerns can be resolved. Allowing consumers to 'cash out' gift card balances could lead to significant consequences for suppliers of gift cards and it is not clear how applying the principles of abandoned property to gift card balances will benefit the gift card holder. Gift card issuers should encourage consumers to redeem their gift cards as soon as possible.

### *Gift card holder rights in the event of insolvency*

Granting priority status to gift card holders where they are considered to be creditors would merely transfer welfare from one group to another. Gift card balances by their nature, are more likely to be used for discretionary expenditure. Holding gift cards on trust is likely to be more expensive than alternative policy measures. As such, CCAAC does not consider that gift card issuers should be compelled to maintain a trust account for gift card balances. Greater education on the risks of insolvency could be beneficial for consumers who are exposed to these risks.

## Part 5

### *Enhancing consumer protection for gift card holders*

Consumer concerns relating to expiry dates are exacerbated by the product design of gift cards. Here, the tripartite nature of a gift card transaction means that it is not always easy for the recipient of the gift card to be aware of any critical terms and conditions that apply. While gift card issuers may refer to an expiry date within the terms and conditions of the product, this may not always be brought to the attention of either the purchaser or the receiver. The disclosure requirement that expiry dates are to be prominently displayed on the gift card itself, as provided by the ASIC class order, is an appropriate minimum standard.

However, some gift cards (for example those that are limited for use with one business) may not be covered by the ASIC class order. It would be good practice for all gift cards to disclose the expiry date, not a period of validity, on the card itself. CCAAC provides further guidance for businesses on minimum best practice gift cards terms and conditions at page 63 of this report.

While effective disclosure would assist consumers when purchasing and using gift cards, CCAAC is not aware of any overwhelming evidence of systemic consumer detriment warranting a mandatory minimum expiry date period. The consumer protection framework under the ACL and the ASIC Act provides some protection to consumers in relation to expiry dates of gift cards. Additional regulation may be unnecessary or lead to unintended consequences. This is particularly so given that the application of an expiry date may be a reasonably necessary practice to ensure the operational viability of some gift card programs. Where clearly disclosed to the consumer, expiry dates of less than 12 months should not be prohibited where they are applied to protect the reasonable interests of the gift card issuer.

The ASIC class order relating to gift cards provides some protection for consumers; however, there may be some scope for a review of the class order to ensure that it continues to meet its objectives.

## Part 6

### *Consumer education and awareness*

ACL regulators should continue to explore how consumers can be supported when purchasing gift card products. ACL regulators have already engaged in activities that could benefit consumers who purchase and receive gift card products. CCAAC notes the work of ASIC in educating consumers about insolvency risks as well as consumer rights in the event of insolvency.

ACL regulators could consider issuing a joint media release at key gift giving periods to raise consumer awareness. The effectiveness of this measure could be evaluated after a two year period where the need for any future education activities could be reassessed.

### *Business education and compliance promotion*

CCAAC notes the work of ACL regulators in promoting broader compliance with the ACL. Gift card issuers could be supported by the existing guidance on how the generic



consumer protection principles of the ASIC Act and the ACL apply to businesses. Any work to promote compliance should be targeted at businesses that may be less clear about their legal obligations. ACL regulators could explore whether there is broad industry compliance with the existing law in accordance with the relevant compliance and enforcement policies that apply.

#### *Assessing and evaluating consumer and business education campaign proposals.*

Education activities should be assessed in accordance with appropriate enforcement and compliance priorities. Any costs associated with these activities should be appropriate to the expected consumer benefits. CCAAC notes that ACL regulators have developed a number of resources to support the implementation of the ACL. CCAAC finds that any activities to increase consumer awareness in relation to gift cards should be integrated into current education activities where possible.

#### *Quasi-regulation*

Industry groups are encouraged to develop a set of best practice principles that can be promoted to their members. While industry participation in the ePayments code is encouraged, CCAAC does not consider that a voluntary code of conduct is likely to resolve some of the concerns raised by consumers. To avoid further calls for a regulatory response, industry may wish to explore whether there is any scope to promote best practice terms and conditions. This could be achieved through an accreditation or rating scheme based on a minimum set of requirements.

CCAAC proposes that industry be allowed time to develop and apply best practice standards with regard to gift cards. After three years, industry efforts to address current consumer concerns could be revisited.

CCAAC encourages ACL regulators to monitor any developments, or new evidence of systemic consumer detriment, that may arise. Should any new concerns arise, CCAAC considers that effective self-regulation should be considered as a first best option.

#### *Developing an strategic non-regulatory response*

CAANZ and its advisory committees are encouraged to develop a coordinated strategic non-regulatory response, based on the findings of the CCAAC review into gift cards in the Australian market. This response would support gift card holders and assist consumers in an evolving marketplace. Specifically, the Education and Information Advisory Committee (EIAC), the Policy and Research Advisory Committee (PRAC) and the Compliance and Dispute Resolution Advisory Committee (CDRAC) should work together to ensure that activities are coordinated.



## PART I—INTRODUCTION

Since the mid-1990s, gift cards have become an increasingly popular product for Australian consumers. While the use of gift cards continues to grow, concerns about the risks for consumers have been raised. This follows the insolvency of a number of high profile Australian and New Zealand retailers.<sup>2</sup>

At a meeting of the Ministerial Council on Consumer Affairs (MCCA)<sup>3</sup> held on 3 June 2011, Ministers noted concerns relating to the purchase and use of gift card products. On behalf of MCCA, the Hon David Bradbury MP, then Parliamentary Secretary to the Treasurer, now Assistant Treasurer, provided CCAAC with terms of reference to conduct a review of gift cards in the Australian market.

CCAAC has reviewed the operation of the Australian gift card market and considered a range of options to assist consumers in making the most of their gift cards. CCAAC also notes a number of suggestions made to gift card issuers to assist consumers when using gift card products. Importantly, the review has been informed through consultation processes which engaged consumers as well as key industry stakeholders.

### CONTEXT OF THE REVIEW

On 9 December 2011, the Hon David Bradbury MP released the *Gift Cards in the Australian Market* issues paper (the Issues Paper) for industry and community consultation. The period for submissions closed on 2 March 2012, and CCAAC received 75 written responses to the Issues Paper.

In addition, CCAAC conducted targeted consultation meetings with industry and consumer stakeholders.<sup>4</sup>

### DEFINING THE PROBLEM AND FORMULATING SOLUTIONS

Concerns about the use of gift cards in the Australian market can be broadly classified as those relating to:

- gift card terms and conditions (such as expiry dates); and
- the administration of gift card programs (such as whether gift cards can be replaced when they are lost, damaged or stolen).

Terms and conditions such as expiry dates have caused some difficulties for consumers who use gift card products. Some consumers suggest that some terms and conditions are unfair and in some cases, are poorly disclosed. It also appears that consumers have some concern over administration practices, particularly in relation to those that may impact on consumers

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<sup>2</sup> For example, the February 2011 appointment of external administrators for REDGroup Retail Pty Ltd, which owned and operated Angus & Robertson, Borders and Whitcoulls (New Zealand).

<sup>3</sup> Which has since been replaced by the COAG Governance and Legislative Forum on Consumer Affairs (CAF).

<sup>4</sup> See Appendix 1 for an outline of these consultation processes, Appendix 2 for a list of submissions and Appendix 3 for a summary of submissions.

in the event of insolvency. The Issues Paper outlined these concerns and invited interested stakeholders to comment on the issues.

Through examining the Australian gift card market, it is possible to review issues related to the purchase and use of gift cards in the light of the many benefits that are gained through their use. Policy responses can be regulatory or non-regulatory in nature and are best formulated to minimise any adverse impacts on the market. Policy responses should be justified through the material benefits afforded by the policy response.

## Identifying consumer detriment

Examining the nature and cause of consumer detriment assists in defining and assessing the problem. Consumer detriment can be described as a loss in consumer welfare such as where consumers are misled into making purchases they wouldn't otherwise make or where they pay more for purchases than they would if they were better informed.<sup>5</sup> It is noted that not all forms of consumer detriment warrant a policy response. Markets are often able to generate useful solutions to assist consumers in avoiding negative experiences.<sup>6</sup> Despite this, there may be circumstances where consumer detriment is of such significance that government intervention may be appropriate.

Consumer detriment can be classified as structural or personal.<sup>7</sup> Structural consumer detriment occurs where market conditions limit choice or result in inflated prices. By contrast, personal detriment occurs where individuals experience welfare losses associated with their individual experiences. Making such a distinction is useful in informing policy makers on the scope of potential policy responses.

## Assessing consumer detriment

In assessing possible policy responses, the underlying cause of any identified consumer detriment should be well understood. Consumer detriment, in the context of gift cards, appears to occur where the terms and conditions established by the gift card issuer are not effectively communicated to the final receiver of the gift card. For example where a gift card issuer fails to communicate that an expiry date applies, personal consumer detriment can occur where the holder fails to redeem the gift card within the expiry period despite their intention to do so. This type of personal detriment is caused by asymmetric information between the gift card holder and the issuer. By their nature gift cards are intended to be passed to a third party recipient. There is a higher responsibility to ensure key information is provided in a way that is likely to be read by the end user. Relying on the purchaser to convey terms and conditions is unlikely to result in adequate disclosure for the purposes of the receiver.

At the first instance policy responses may be more effective where they address the underlying cause of a problem. Understanding the cause of the problem is also important so that it can be considered in the light of existing consumer protection measures that may, to some extent, already address some of the underlying concerns.

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<sup>5</sup> Organisation for the Economic Co-operation and Development 2010, *Consumer Policy Toolkit*, p 52.

<sup>6</sup> For example, reputational mechanisms allow consumers to identify suppliers that are likely to offer suitable products.

<sup>7</sup> Organisation for the Economic Co-operation and Development 2010, *Consumer Policy Toolkit*, p 52.

## Assessing policy options through a cost benefit analysis

Decisions can be made more confidently where policy makers ensure that they are well supported by the available evidence. Evidence, which can be both qualitative and quantitative in nature, is essential in determining the costs and benefits of any proposed policy options. Commentary on the Issues Paper has also highlighted the need for an evidence based assessment of consumer detriment to ensure any 'cure' associated with intervention is 'not worse than the disease'.<sup>8</sup>

Where consumers have been able to successfully use gift card products, policy makers need to be aware of any negative impacts that potential policy responses may have on the broader gift card market. In particular, policy responses should be supported by a cost benefit analysis and through this lens are shown to be more favourable than alternative policy options.

One submission<sup>9</sup> referred to the Australian Government's own regulatory impact analysis requirements including that a Regulation Impact Statement (RIS) should be prepared where a decision made by the Australian Government is likely to have a regulatory impact on business. The Office of Best Practice Regulation (OBPR) specifies that a RIS should '... conduct a comprehensive assessment of the expected impact (costs and benefits) of each feasible [policy] option' and that '... costs and benefits, whether quantitative or qualitative, should be based on evidence, with data sources and assumptions clearly identified'.<sup>10</sup> It is noted that CCAAC is an advisory council and so the analysis of this report has not been prepared to fulfil the requirements of a RIS. However, all findings are made based on the available evidence and in recognition that further evidence may be needed if policy makers were to pursue regulatory options.

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<sup>8</sup> Griggs, L. 'Gift Vouchers - the forgotten present?' Competition and Consumer Law, February 2012, p 228.

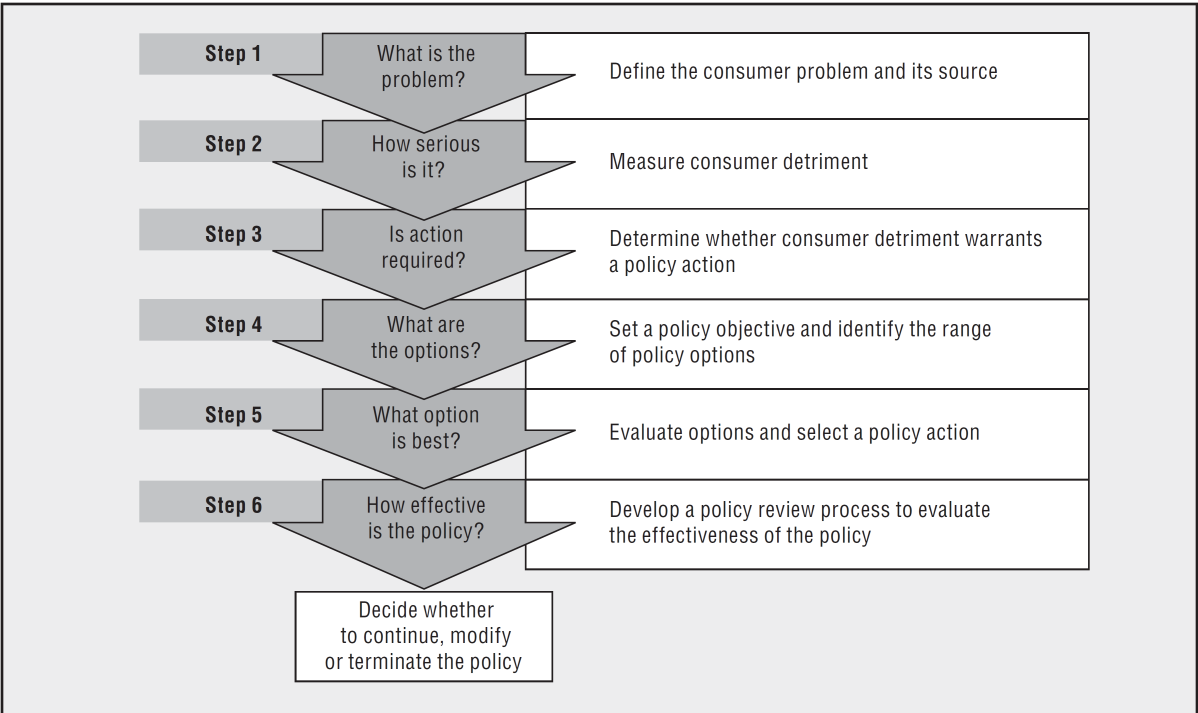
<sup>9</sup> Australian National Retailers Association, p1.

<sup>10</sup> Australian Government 2010, *Best Practice Regulation Handbook*, p 36.

# OECD Consumer Policy Toolkit

The approach taken by CCAAC to examine gift cards in the Australian market is consistent with the process of consumer policy making outlined within the Organisation for Economic Co-operation and Development’s (OECD) *Consumer Policy Toolkit* (the Toolkit).<sup>11</sup> The Toolkit is a key project of the OECD Committee on Consumer Policy and examines how behavioural economics can be used to support consumer policy development. The Toolkit provides a framework through which consumer problems can be assessed and where policy options can be evaluated (see Figure 1). CCAAC will analyse the issues relating to gift cards by applying the frameworks outlined within the Toolkit. CCAAC would also encourage policy makers to consider the Toolkit when reviewing the findings of this report.

**Figure 1: Process of consumer policy making**



Source: OECD Consumer Policy Toolkit.

## AUSTRALIA’S CONSUMER PROTECTION FRAMEWORK

Consumers are provided with a safety net of consumer rights that apply to the sale of all consumer goods and services. These consumer rights are based on generic principles that apply across all industries, businesses and to all consumers. This includes provisions on misleading or deceptive conduct, false or misleading representations, unfair contract terms, unconscionable conduct, product safety and consumer guarantees that are enshrined in legislation under the Australian Consumer Law (ACL) with mirror provisions in the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Together, these provisions allow consumers to engage confidently in markets while enjoying consistent consumer rights when purchasing goods and services.

<sup>11</sup> For information on the toolkit, including a companion prepared to provide practical guidance on its application in an Australian context, please see [http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer\\_policy/cp\\_policy\\_toolkit.htm](http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer_policy/cp_policy_toolkit.htm).

The ACL is a key part of the regulatory reforms under the Council of Australian Governments' (COAG) *National Partnership to Deliver a Seamless National Economy*. It applies in each State and Territory through application laws and is enforceable by all Australian courts and tribunals, including those of the States and Territories.

It is noted that under the consumer protection framework, consumers who have received a gift card and have experienced a loss may be reluctant to enforce their rights where relatively low values are involved.

In addition, the gift card holder's ability to enforce their rights under the contract has been discussed<sup>12</sup>. It would not appear as though the tripartite nature of a gift card transaction has presented any practical difficulties for gift card holders. CCAAC notes that at the first instance gift card holders are able to refer a complaint to the gift card issuer and if they remain unsatisfied, ACL regulators are able to receive a gift card holder's complaint and respond accordingly.

Australia's consumer protection framework applies generically across all industries and products. Industry specific regulation may be considered where unique challenges are associated with consumer participation in that market. For example, some financial products are subject to disclosure requirements due to the complex nature of these products. Any policy response to the issues examined is considered within this context.

Further information about the ACL, including guidance about enforcement and remedies, is available at [www.consumerlaw.gov.au](http://www.consumerlaw.gov.au).

## STRUCTURE OF THE REPORT

This report explores a variety of issues relating to gift cards, and contains a number of findings about the consumer detriment associated with gift card use as well as policy options that could be used to address any consumer detriment that has been found. Part II will examine the Australian gift card market and Parts III and IV will explore consumer issues relating to gift card terms and conditions as well as administration practices. The need for a regulatory approach will be assessed in Part V before non-regulatory options will be considered in Part VI.

## Findings

CCAAC considers that policies implemented to address consumer concerns relating to the purchase and use of gift cards should be appropriate to the nature and underlying cause of consumer detriment. Policy solutions should be targeted appropriately and regulatory options should only be considered where they are supported by a cost benefit analysis. CCAAC supports the OECD Consumer Policy Toolkit as a framework through which consumer problems can be assessed and where policy options can be evaluated.

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<sup>12</sup> See Jones, N (2009) 'Gift Vouchers and Expiry Dates: When the Gift Stops Giving', Queensland University of Technology Law and Justice Journal, 9(2) 213-231.

## PART II—THE AUSTRALIAN GIFT CARD MARKET

The popularity of gift card products appears to provide some measure of the benefits of their use for both consumers and gift card issuers. Gift cards are a market response to the consumer's need to fulfil their gift giving obligations and the issuer's desire to capture consumer spending. In this regard, many gift card transactions are mutually beneficial to both the purchaser and the issuer. Although there appears to be some risk that the receiver of a gift card may be unable to redeem its full value, overall, gift cards appear to provide significant benefits to consumers.

This section will outline features of the Australian gift card market and provide an explanation as to why gift cards have become popular for Australian consumers who purchase or receive them.

### FEATURES OF THE AUSTRALIAN GIFT CARD MARKET

As gift card use has increased, the Australian gift card market has become more sophisticated. As the market has expanded, new commercial opportunities have become available and new market participants have emerged. While gift cards are predominantly marketed for the purposes of gift exchange, they are being increasingly used for store promotions and to satisfy other marketing objectives.<sup>13</sup> This section will examine the key definitions used to describe features of the Australian gift card market, its main participants as well as the trends and dimensions that characterise it.

#### Key definitions

For the purposes of this review, a gift card is a form of credit that is designed to be purchased by one consumer (the purchaser) and given to another (the receiver). When provided in the form of a plastic card, the receiver of a gift card is able to access and spend the value associated with the device by swiping the card at a point of sale similar to the use of a debit card.

Gift cards make use of a range of forms and technologies. CCAAC does not seek to define gift cards by these attributes. While physical gift cards appear to be the most commonly used gift card form, developments in technology have allowed gift cards to be electronically delivered to the recipient via SMS messages, email or by smart phone applications. Some businesses may also provide gift cards in more traditional forms, including hand written certificates.

For the purpose of the review, gift cards do not include other forms of prepayment that are not intended or designed to be purchased, most commonly, by one person to be given to another person as a gift. For example, the review has not examined prepayment arrangements for mobile phones, internet access and other utility services, or group buying websites.<sup>14</sup>

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<sup>13</sup> For example, complimentary gift cards are used by some retailers to reward customer loyalty.

<sup>14</sup> The gift card review may concern these products to the extent that they share some of the core features that characterise gift card products.



There are, however, a range of products that may be purchased for personal consumption or as a gift. For example, credit for music download services or cinema vouchers may not be specifically marketed as gifts, but are often used for this purpose. These products are not excluded from consideration to the extent that the principles behind CCAAC's findings are capable of applying to these products.

The term 'breakage' is often used to refer to gift card balances that go unredeemed. This can be calculated for a specific gift card or for the market more broadly. Breakage represents a transfer of welfare from the consumer to the gift card issuer. When expressed as a percentage of total gift card sales, it can provide some measure of the level of consumer losses in the market.

CCAAC is aware of reports of industry wide breakage ranging from 3 to 30 per cent with some individual gift card issuers reporting breakage of less than 3 per cent. Upon investigating the level of breakage in the market, it would appear as though figures placed at 30 per cent are speculative and are not based on data relating to the Australian market. Industry analysts have indicated that the average breakage for the industry is between 6 and 7 per cent but that breakage rates can differ significantly depending on the market segment and the average transaction value.

## Gift card types

Gift cards are generally available in two forms including:

1. closed loop gift cards that are accepted or honoured at a single retailer or group of affiliated merchants (such as a chain of book stores or clothing retailers) as payment for goods or services; and
2. open loop gift cards that typically rely on a payment system (such as Visa or MasterCard) that can be widely used at a wide variety of retailers that accept or honour cards displaying that network.

Closed loop gift cards are more popular within the Australian market, with some estimating that open loop cards make up less than 10 per cent of gift card sales.<sup>15</sup> By contrast, in the United States open loop sales are estimated to account for between 20 and 25 per cent of total gift card sales.<sup>16</sup>

Open loop gift cards have unique characteristics and are usually issued by financial institutions. As such, these cards may be subject to rules that do not apply to closed loop gift cards. Gift cards issued by shopping centres may to some extent, share some characteristics that are common to open loop gift cards. Shopping centre gift cards are redeemable at participating retailers within a shopping complex but unlike open loop cards, cannot be used more broadly. The review has examined issues that may be common to both closed and open loop gift cards.

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<sup>15</sup> Australian Retailers Association and Australian Merchant Payments Forum.

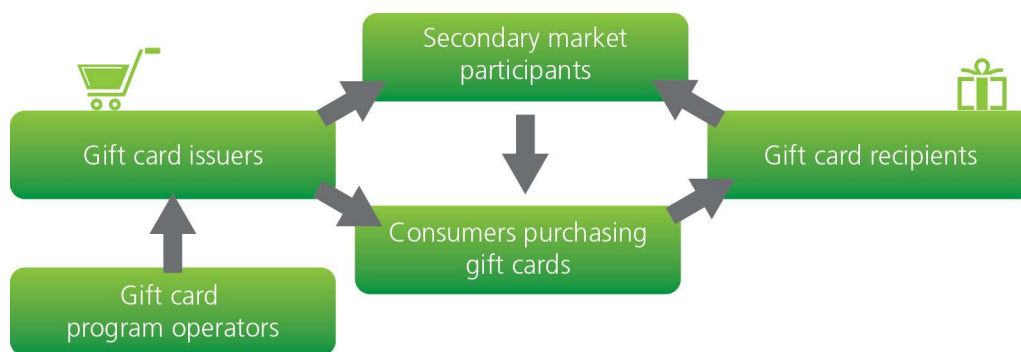
<sup>16</sup> Australian Retailers Association and Australian Merchant Payments Forum.

## Participants in the gift card market

There are a number of participants in the gift card market in addition to consumers who give and receive gift cards as illustrated in Figure 2. These include:

- *Gift card issuers* issue store credits and are ultimately responsible for honouring the redemption of issued gift cards. This is most commonly a retailer, a shopping centre or a bank. They may use the services of a gift card program operator to facilitate their gift card program.
- *Gift card program operators* maintain networks and information systems required for the use of gift cards. Some gift card issuers have commercial arrangements with gift card program operators.
- *Secondary market participants* are involved in the trading or distribution of gift card products. Research identified a small but growing 'second hand' market for gift cards in Australia. For example, some websites allow gift card holders to sell their gift cards for typically between 60 and 90 per cent of the original purchase price.<sup>17</sup>

**Figure 2: Gift card market participants**



## Trends and dimensions

While gift cards are a relatively new product, their popularity has grown rapidly. Paper gift vouchers and certificates have a longer history in the Australian retail market; however, plastic gift cards have become more common in the last decade<sup>18</sup>. Gift cards generally contain information on a magnetic strip which is readable by a retailer's point of sale processing systems. Gift card issuers are attracted to electronic gift cards as they are easy to use and difficult to forge. It would appear as though those with the technical sophistication to counterfeit gift cards are drawn to more lucrative targets such as credit cards.<sup>19</sup> Gift cards do not typically hold any value until they are activated upon purchase.

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<sup>17</sup> For example, see [www.cardlimbo.com.au](http://www.cardlimbo.com.au).

<sup>18</sup> Blackhawk Network, pp 3-4.

<sup>19</sup> JC Williams Group 2004, *Gift Cards Are Here to Stay*, Available at: [http://www.jcwg.com/resources/documents/70/Gift\\_Cards.pdf](http://www.jcwg.com/resources/documents/70/Gift_Cards.pdf) (accessed 22 May 2012).

Research and data on the Australian market is limited, however, submissions to the Issues Paper estimated the size of the Australian gift card market at between \$1.5 billion<sup>20</sup> and \$2.5 billion<sup>21</sup> annually. Also, in a joint submission to CCAAC the Australian Merchants Payment Forum (AMPF) and the Australian Retailers Association (ARA) submit that the total value of gift cards offered by six of its major members was approximately \$1.25 billion in 2011.

According to an online survey of 1295 adults conducted by Retail Decisions Australia, 62 per cent of respondents had received and 69 per cent had purchased a gift card in the last 12 months.<sup>22</sup> This same research indicated that the average value loaded on a gift card was \$57 and that categories such as clothing, household goods, and entertainment were popular purchases for gift card holders. According to a submission provided by the Australian National Retailers Association (ANRA), out of a survey of 1000 consumers, 20 per cent of respondents indicated that the bulk of their Christmas spending would be on gift cards. This is an increase from previous years and suggests that gift cards are becoming a more popular gift choice at Christmas.

Gift cards also appear to be a popular choice when selecting gifts for young people. In survey results provided by a submission made by the Australian Youth Forum, 87 per cent of respondents<sup>23</sup> had received a gift card in the last 12 months. The survey also revealed that some young people use gift cards in lieu of a credit card, and that in some circumstances, a gift card is preferable to cash as it provides greater control over what it is used for.

The gift card market has expanded substantially since the introduction of electronic gift cards. According to a submission made by the Blackhawk Network, a global third party gift card distributor, industry growth in Australia has averaged approximately 25 per cent over the last five years.

## Findings

Evidence of a vibrant Australian gift card market demonstrates that gift cards are a popular choice for consumers and that many Australian retailers benefit from offering gift card products. Estimates provided in submissions to the Issues Paper suggest that the gift card market can be valued at between \$1.5 to 2.5 billion per year. However, CCAAC acknowledges the difficulty in estimating the size of the gift card market accurately. In addition, it is evident that the market is growing and that new gift card forms and functions are emerging.

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<sup>20</sup> Mihm, U 2010 (Updated 20 April 2012), *Gift Card Traps*, CHOICE. Available at: <http://www.choice.com.au/reviews-and-tests/money/shopping-and-legal/shopping/the-trouble-with-gift-cards.aspx> (accessed 22 May 2012).

<sup>21</sup> Blackhawk Network, p 4.

<sup>22</sup> Horne, D 2010, 'Retail Decisions Prepaid Market – the Australian Gift Card Market', Retail Decisions and Global Prepaid Exchange.

<sup>23</sup> Of the respondents to this survey, 73 per cent were aged 24 years old or younger.

## GIFT CARDS AND CONSUMER WELFARE

A number of submissions, including those from both consumers and gift card issuers, identified a number of ways in which gift card use can impact on consumer welfare. Here, welfare is considered to be a measure of the degree of benefit that consumers gain through engaging in some type of activity, for example, giving or receiving gifts.<sup>24</sup> Some submissions commented on the positive benefits associated with the receiver's freedom to select a gift of their choice while others commented on the negative consequences of where a consumer has been unable to redeem a gift card. According to survey research by Retail Decisions Australia, 40.5 per cent of respondents had received gifts that were not wanted or needed.<sup>25</sup> From this, it would appear as though gift cards have the potential to be welfare enhancing when compared with alternative non-cash gifts. However, gift cards do not offer the same flexibility as cash and the receiver must exercise a higher degree of care to ensure that they are able to redeem its full value.<sup>26</sup>

More generally there is a significant body of economic literature that deals with the issue of consumer welfare when gifts are exchanged. Notably, this work includes an assessment of the welfare losses associated with receiving non-cash gifts.<sup>27</sup> Welfare losses are described as being equivalent to the additional benefit that would have accrued to the receiver had they been able to choose a gift of the same value.<sup>28</sup> Through this lens, unless the gift giver selects the very item that the receiver would have otherwise purchased with an equivalent amount of cash, the non-cash gift is revealed to be an inferior choice.

In some circumstances, the giver may be able to choose a gift that would be preferred by the receiver as they may be unaware of the product or the benefits which they provide. However, most gift givers choose gift card products because they are uncertain of the receiver's preferences.

### Giver and receiver benefits

Although useful, analysing consumer welfare through the receiver's benefit alone does not capture the full story. Gift exchanges exist as part of a social obligation as well as a desire to maintain good relationships with friends and family. While gift giving may be a benevolent act, there may also be a private benefit that accrues to the gift giver.

Gift giving can occur because the giver values how the receiver values the gift. For example, a grandparent may be glad to know that their grandchild enjoys a gift that they have been given. Altruism can be formally presented through models where the welfare of the gift giver increases with the welfare of the receiver.<sup>29</sup> Through these models, gift giving is seen as an outcome of welfare maximisation where the marginal benefit gained through another person's use of the gift is higher than the marginal benefit gained through the givers own use

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<sup>24</sup> As examined in Blackordy, C and Donaldson, D 1988, 'Cash Verses Kind, Self-Selection, and Efficient Transfers', *The American Economic Review*, Vol 78 No 4, pp 691-700.

<sup>25</sup> Horne, D 2010, 'Retail Decisions Prepaid Market – the Australian Gift Card Market', Retail Decisions and Global Prepaid Exchange.

<sup>26</sup> A comparison of gift choices can be found at Appendix 4.

<sup>27</sup> Waldfogel, J 1993, 'The Deadweight Loss of Christmas', *The American Economic Review*, Vol 83 No 5, pp 1328-1336.

<sup>28</sup> See Appendix 5 for a more detailed explanation.

<sup>29</sup> Becker, G 1981, 'Altruism in the Family and Selfishness in the Market Place', *Economica*, Vol 48 No 189, pp 1-15.

of the money required to purchase the gift. Here, the motivation behind giving is driven by the welfare of the receiver. Where this is the case, a non-cash gift may continue to be an inferior choice of gift where the giver is unaware of the preferences of the receiver.

### Constrained choice

There are circumstances where non-cash gifts may be valued by the giver despite constraining the choices available to the receiver. The gift giver may be motivated to select a gift based on other attributes that are contingent on the nature of the gift. For example, where a parent purchases an educational book for their child, they may not only benefit from the child's own enjoyment of the book, but they may also benefit because they value the book's educational properties.

Similarly, when purchasing a gift for a partner, or potential partner, there may be a signalling benefit to the giver.<sup>30</sup> The act of choosing an appropriate gift may signal to the receiver both the willingness of the giver to invest effort on behalf of the receiver while also indicating what the giver knows about the preferences of the receiver.<sup>31</sup>

While cash may offer greater flexibility in terms of the choices available to the recipient, it may be seen as impersonal and may fail to satisfy some of the other objectives of gift giving. Gift cards assist the giver in satisfying the dual objectives of providing choice to the receiver, while satisfying other objectives that may be unrelated to the receiver's benefit. For example, a parent may wish to provide their child with a gift card from a store where they know their child can choose a gift that they enjoy while sufficiently constraining their choice to ensure that an appropriate gift is chosen.

### Gift cards as a market response

At face value it is difficult to assess why some consumers prefer gift cards to cash. While gift cards offer the receiver some choice, they offer less choice than if cash were given. Survey research by Retail Decisions Australia found that up to 70 per cent of consumer respondents, as both givers and receivers, believed that gift cards were better than cash while 83 per cent indicated that the best feature of gift cards was the choice that it offered.<sup>32</sup> This seemingly contradictory result is perhaps best explained as a consequence of the complex incentives that drive gift exchange. This research also found that 73 per cent of respondents agreed that gift cards were the best option when they did not know someone well and that 76 per cent of respondents gave gift cards because they were a convenient choice.

### Findings

CCAAC finds that gift card products, when used as intended, have the potential to provide significant benefits to Australian consumers. CCAAC encourages policy makers to ensure that any new policies relating to gift cards do not restrict consumers from benefiting through their engagement with the Australian gift card market.

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<sup>30</sup> Mankiw, G 2006, 'The Economics of Gifts', *Greg Mankiw's Blog*. Available at <http://gregmankiw.blogspot.com.au/search?q=the+economics+of+gifts> (accessed 22 May 2012).

<sup>31</sup> Spence, M 1974, *Market Signaling*. Cambridge, MA; Harvard University Press.

<sup>32</sup> Horne, D 2010, 'Retail Decisions Prepaid Market – the Australian Gift Card Market', Retail Decisions and Global Prepaid Exchange.

## **PART III—GIFT CARD TERMS AND CONDITIONS**

This section of the report examines issues relating to the terms and conditions commonly applied to gift cards, such as expiry dates. Submissions from individual consumers<sup>33</sup> raised concerns around some terms and conditions that apply, particularly where they restrict the gift card holder's use of the gift card. An analysis of complaints received by ACL regulators also reveals that a majority of non-insolvency related complaints are due to dissatisfaction with terms and conditions that are applied.<sup>34</sup> The complaints data also reveals that some terms and conditions may be poorly disclosed to consumers.

In terms of addressing this consumer detriment, there is evidence that there are incentives to gift card issuers to mitigate consumer detriment and maintain a good reputation. A number of submissions<sup>35</sup> suggested that retailers issue gift cards as part of a broader marketing strategy and generally try to accommodate the needs of the gift card holder while ensuring that their business interests are protected. The ARA and AMPF joint submission highlighted that retailers want gift card experiences to be positive as recipients typically receive gift cards from their favourite retailer and are valued customers. Some retailers offer flexibility on the application of certain terms and conditions such as by providing grace periods to consumers with expired gift cards. These policies aim to reduce customer dissatisfaction and to reduce the risk of losing customers. Where this is a concern for the issuer, the potential for consumer detriment is mitigated by the issuer's own efforts to maintain a good reputation.

As noted in the Issues Paper, a number of the consumer protections provided within the ACL apply to gift cards that are not financial products. The ASIC Act includes mirror provisions for gift cards that are financial products. These laws protect consumers from misleading or deceptive conduct, false or misleading representations, unfair contract terms and unconscionable conduct around gift card terms and conditions. This section will specifically examine issues relating to gift card terms and conditions in the light of the existing legal framework, and assess the scale and nature of any associated consumer detriment.

### **GIFT CARD HOLDERS AND EFFECTIVE DISCLOSURE**

Before examining the specific issues relating to gift card terms and conditions, it is useful to examine how they apply where the holder is not the purchaser of the gift card. This may create some difficulties in achieving effective disclosure of terms and conditions where they apply.

For other complex products it is possible for the final user to have any important features as well as any terms and conditions that apply explained at the point of sale. However, for gift cards, the final user is not usually the purchaser. While the purchaser may be able to pass on any important information, it is unrealistic to assume that this would always occur. It would appear as though most issuers of gift card products address this concern by printing important information on the gift card itself, or on a holder or wallet. It is, however, noted

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<sup>33</sup> For example, John Mason, p 1. Susan Griffin, p 1. Graeme Wass, p 1.

<sup>34</sup> See Appendix 6.

<sup>35</sup> For example, Australian Retailers Association and Australian Merchant Payments Forum, p 8. Float & Therapies Pty Ltd, p 1.



that in some instances, the gift card holder may not always refer to this information. Where the card has an expiry date, key information should be provided in a way that is likely to be read by the end user.

## EXPIRY DATES

A common condition that applies to the use of a gift card is an expiry date. By issuing a gift card with an expiry date, traders are essentially representing that they will not honour the gift card unless it is redeemed by the recipient on or before the stated date. In conducting the review, CCAAC notes that:

- some gift cards are not subject to any expiry periods<sup>36</sup>;
- many gift cards are subject to expiry periods of between 12 months and 2 years<sup>37</sup>; and
- some gift cards are subject to expiry periods of less than 12 months<sup>38</sup>.

There is also significant disparity with respect to how strictly expiry dates are applied by gift card issuers. While some issuers refuse to honour a gift card once its expiry date has passed, it is apparent that others offer consumers a 'grace period' in the interests of promoting customer goodwill and loyalty.<sup>39</sup> However, grace periods will only be available to those who make such a request. Others may be discouraged from attempting to use the card on noticing that it has expired.

The majority of individual consumer submissions commented on the application of expiry dates on gift card products. Consumer submissions<sup>40</sup> expressed the sentiment that gift cards should be as good as cash and therefore should not expire or have other restrictive terms and conditions. The misperception that gift cards are equivalent to cash may have been inadvertently exacerbated (in part) by the marketing messages and language used by gift card issuers. However, by their very nature, gift cards are not cash and are subject to inherent restrictions and limitations. When consumers purchase a gift card they purchase a bundle of terms and conditions that allow them to acquire goods or services from a retailer, in a restricted manner. CCAAC accepts that in many ways gift cards are inferior to cash as a result of these restrictions.

Consumers should exercise caution when purchasing any kind of good or service.

Also, some commentators have noted that there may be some scope for competition between gift card issuers to encourage longer expiry dates 'where there is little retailer detriment from having an open period in which to spend'.<sup>41</sup>

The prospect of breakage revenue may also encourage the application of expiry dates. These revenues may allow gift cards to be issued for no additional charge. Most gift card programs

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<sup>36</sup> For example, gift cards issued by Bunnings, Toys 'R' Us, EB Games, sharedvalue.com.

<sup>37</sup> For example, gift cards issued Myer, JB Hi-Fi.

<sup>38</sup> For example, those offered by some small businesses or other promotional gift cards.

<sup>39</sup> Australian Retailers Association and Australian Merchant Payments Forum, p3.

<sup>40</sup> For example, Kathy Patterson, p 1. Diana Wang, p 1. Allan Radford, p 1.

<sup>41</sup> Griggs, L (2012) 'Gift Vouchers – the forgotten present?', Competition & Consumer Law News, February 2012, pp 228-230.

are operated at a cost to the issuer. Gift card program operators may impose fees at both the time a gift card is issued and redeemed, as well as other ongoing charges associated with the operation of the gift card program. From a broad assessment of the submissions, it would appear as though breakage can avoid the need for fees to fund the gift card program itself.

## Unfair Contract Terms

Some submissions<sup>42</sup> raised the possibility that some terms and conditions that are commonly applied to gift cards may already be in breach of the prohibition on Unfair Contract Terms (UCTs) in section 23 of the ACL.<sup>43</sup> The ACL provides additional guidance on the meaning of 'unfair' in section 24. It provides that the term will need to satisfy the following three elements:

- a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and
- b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

Some submissions suggested that expiry dates do not protect a legitimate interest of gift card issuers and therefore may be unlawful.<sup>44</sup> A range of reasons as to why expiry dates are applied are discussed below.

## The role of expiry dates

Gift card issuers apply expiry dates on gift cards for a number of reasons. Some submissions<sup>45</sup> indicated that expiry dates are applied to prevent the build-up of undeclared liabilities while others<sup>46</sup> indicated that expiry dates are necessary to ensure that services are provided within a reasonable period of time. Interestingly, other submissions<sup>47</sup> compared the redemption rates of gift cards that impose different expiry date periods and suggested that consumers were more likely to redeem a gift card where shorter expiry date periods apply. Retail groups have indicated that the majority of gift card balances are redeemed within the first three months with it being rare for a gift card to be redeemed after 12 months of being issued.<sup>48</sup>

A range of factors are likely to influence whether a gift card issuer imposes expiry dates, such as the nature of the business, its core activities, size, structure and financial position. It is noted that some retailers<sup>49</sup> issue gift cards that do not have any expiry date while other retailers commonly impose expiry date periods of 12 or 24 months. While different issuers – including small businesses – may have different needs with respect to the terms and

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<sup>42</sup> For example, the Consumer Action Law Centre, p 2.

<sup>43</sup> A parallel requirement exists in Section 12 BF of the *Australian Securities and Investments Commission Act 2001* for gift cards that are financial products.

<sup>44</sup> For example, the Consumer Action Law Centre submission, pp 2-3.

<sup>45</sup> For example, National Retail Association, p 6.

<sup>46</sup> For example, Carol Stanley, p 1.

<sup>47</sup> For example, Australian Retailers Association and Australian Merchant Payments Forum, Australian National Retailers Association, p 14.

<sup>48</sup> For example, Australian National Retailers Association, p 4.

<sup>49</sup> For example, Bunnings Warehouse, EB Games.



conditions that apply to gift cards, a number of general observations can be made with respect to the application of expiry dates.

### Undeclared liabilities

It has been suggested that expiry dates are necessary to prevent the build-up of undeclared liabilities. It is argued that without expiry dates, the card issuer is required to record an ongoing liability in the event that the gift card holder should decide to use the gift card. It is claimed that this is untenable for most issuers who require certainty and wish to record unclaimed balances as breakage. In addition, some submissions<sup>50</sup> commented that maintaining contracts and legal arrangements impose additional burdens and can increase the issuer's vulnerability to fraudulent activity. Furthermore, gift card issuers may incur gift card program management fees when maintaining gift card liabilities for extended periods of time. It is acknowledged that the certainty provided by applying expiry dates can be considered to be a good business practice from the point of view of the issuer; however, a key focus of this review is to consider the consumer impact of such terms and conditions, and whether there is any scope for issuers to provide more flexibility to consumers.

Some consumer submissions have highlighted that it should be possible to predict the likelihood of gift cards being redeemed based on past experiences.<sup>51</sup> CCAAC observes that unredeemed gift card balances can be accounted for using techniques that treat unredeemed balances as a current liability while recognising that some gift cards will never be redeemed.<sup>52</sup> Indeed it would appear as though at least some gift card issuers already use such practices where expiry dates are not applied.

As the accounting of gift card balances is not subject to specific regulation, it is possible for gift card issuers to account for unredeemed balances – and the associated breakage – even where expiry dates are not applied. Exceptions to this may apply where there is some uncertainty around redemption rates such as where gift card use is irregular, individual balances tend to be large, or where information is hard to gather. Here, expiry dates assist issuers in ensuring that unredeemed gift card balances are manageable and also assist in reducing their vulnerability to fraudulent activity where comprehensive record keeping has not taken place. These considerations may be particularly relevant for small to medium sized businesses.

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<sup>50</sup> For example, Blackhawk Network, p 6., Indue Ltd, p 8.

<sup>51</sup> Consumer Action Law Centre, p 2.

<sup>52</sup> For example, see *C Feinson (2011), 'The steep rise of gift card purchases by the consumer is changing the method of accounting and reporting of gift card income by corporate retailers', Journal of Business & Economics Research, Vol 6 No 4 pp 7-12* for an outline of some methods that can be used to account for unredeemed gift card balances.

## Ensuring supply

Some businesses, particularly those that offer services, apply expiry dates because they need to ensure that they supply the goods or services as described. There are a number of reasons why the capacity of a business to supply may vary over time. Some have identified that the cost structure of a particular business may vary over time and that where services are provided, expiry dates can ensure that amounts paid for the gift card appropriately reflects the cost to the business when the gift card is redeemed.<sup>53</sup> Alternatively, a business may offer a service that is conditional upon having relevant licenses or permits, for example recreational charter flights, for which the gift card issuer is unable to guarantee supply indefinitely.

Gift card issuers operate in unique environments that may require different terms and conditions, including expiry date periods, to be applied. Businesses need to consider whether a decision to issue gift cards is compatible with their chosen business model. However, it is recognised that expiry dates can assist both businesses and consumers where there may be some uncertainty over whether a business can supply a good or service into the future. They facilitate the business' ability to issue a gift card where they may otherwise be unable to and ensure that the consumer redeems the gift card within the period where the supply of goods or services can be guaranteed.

It is noted that a gift card that can be thought of as credit for use at a particular business is different to a prepayment for a particular good or service. For example, offers made through group buying websites for a particular good or service, paid for in advance, are distinct from gift card products which can be used to purchase a wide range of goods or services offered by a business. Concerns relating to the supply of goods or services are typically dealt with by businesses either through changing prices (as would be the case where costs increase) or by supplying through alternative means with prices changing accordingly. As a result, many of these concerns only apply where a business offers a very specific kind of good or service and are unlikely to apply to the broader gift card market.

## Redemption rates

A number of submissions commented that even where longer expiry dates are applied, this does not necessarily improve redemption rates. While some reports<sup>54</sup> suggest that up to 30 per cent of gift card balances go unredeemed, other reports have been to the contrary<sup>55</sup>. The ARA and AMPF joint submission suggested that gift cards issued by AMPF members have a redemption rate of 98 per cent within the expiry period<sup>56</sup> with higher redemption rates for gift cards that have shorter expiry periods. In addition, the Australian National Retailers Association suggested that based on member's data, the majority of gift card balances are redeemed within three months of being issued. This would appear to suggest that longer expiry dates may not necessarily assist in reducing breakage.

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<sup>53</sup> For example, Judith Powell, p 1.

<sup>54</sup> Choice (2010) 'Gift card traps', 1 July 2010, Cardlimbo, p 2.

<sup>55</sup> Australian Retailers Association and Australian Merchant Payments Forum, p 3.

<sup>56</sup> It is further estimated that when grace periods are taken into consideration, only 0.2 per cent are not redeemed.

Submissions<sup>57</sup> indicated that a number of large retailers offer formal grace periods in addition to the stated expiry date. This may provide relief to some consumers who have a recently expired gift card. This may be useful where a consumer remembers receiving a gift card on the anniversary of the event on which they received it (such as on their next birthday). CCAAC is aware of some complaints made to ACL regulators about expiry dates on gift cards offered by issuers who have grace period policies in place. This could indicate that at the store level, customer service policies may not be fully implemented or that customer service staff may not be empowered to make decisions relating to accepting expired gift cards.

More generally, grace periods offered may be less useful to consumers where they are unaware of the expiry date or do not request to make use of this flexibility.

In addition, the longer a consumer is in possession of a gift card, the higher the risk that the business will cease to trade, including as a result of an insolvency process. It is relevant to note that this risk is a further reason why it is in a consumer's best interest to redeem a gift card as promptly as possible.

While CCAAC is not satisfied on the available evidence that it can determine the impact of longer expiry dates, figures provided by industry stakeholders are consistent with the behavioural economics literature. Behavioural theory indicates that it is possible for longer expiry dates to induce consumers into becoming more relaxed about their responsibilities in ensuring they redeem their gift card.<sup>58</sup> This effect could offset the number of cases where gift cards cannot be redeemed due to expiry dates where they otherwise would have been redeemed. For the reasons outlined above, it is possible that significantly longer expiry dates may not necessarily assist in reducing breakage and could even operate to reduce redemption rates. In that respect, and from a consumer protection perspective, caution should be exercised with respect to any proposal for prohibiting expiry dates or mandating longer minimum expiry periods.

### Promotional gift cards

Some gift cards are issued for promotional purchases. These gift cards are typically given from the issuer to the receiver as a gesture of good will to the consumer or to honour a commitment as part of a loyalty program. Gift cards are also donated to assist local fundraising efforts, and may reflect a temporary capacity to donate goods or services. Expiry dates on these cards may be less generous than those offered on purchased gift cards as the card issuer seeks to encourage their use within a shorter period of time.<sup>59</sup>

In general terms, CCAAC considers that it is reasonable for gift cards issued by retailers on a genuinely complimentary basis to be treated differently to gift cards that have been paid for by consumers.

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<sup>57</sup> For example, Wright Express Australia Pty Ltd, p 5.

<sup>58</sup> Tversky, A; Shafir, E 1992, 'Choice under conflict: The Dynamics of Deferred Decision', *Psychological Science*, Vol 3 No 6, pp 358-361.

<sup>59</sup> For example, where gift cards are issued as part of a promotion to encourage additional spending during non-peak periods.

## Expiry dates and issuer type

Gift card issuers can be placed into a range of categories. Each category has differentiated incentives with respect to expiry dates. Issuer categories can be characterised by some of the following dimensions:

- size and number of outlets;
- reliance on repeat patronage;
- whether the issuer is a third party; and
- the market power of the issuer.

Gift card issuers face stronger incentives to achieve customer satisfaction where negative consumer experiences have a cost to the business. Customer dissatisfaction can lead to a loss in repeat business but also negative word of mouth effects.

It could be argued that larger businesses with many outlets are more susceptible to word of mouth effects while certain retail categories rely more on repeat business. On the other hand, gift card issuers that sell gift cards for use at another retailer<sup>60</sup> may be less affected by negative consumer experiences. The same may also be true where the consumer may be unable to transfer their business to an alternative supplier.

The bulk of Australian gift cards are issued by medium to large retailers for use at the store from where it is purchased. In addition, these retailers rely on repeat purchases and have multiple outlets and so have much to lose from negative publicity from consumer experiences with gift cards. The Australian retail market is competitive in most categories with a significant amount of choice available to Australian consumers. From this, it is apparent that for most issuers operating within the Australian gift card market, unfair expiry date policies cannot be applied without repercussion. Subsequently retail industry groups have noted that most gift cards offered within the Australian market commonly have expiry periods of 12 month or longer.<sup>61</sup>

Gift card issuers that impose expiry periods of less than 12 months may do so because there is an operational reason justifying a shorter expiration period. While it may be suggested that shorter expiry dates are intended to increase breakage, it would appear as though most gift card issuers offer gift cards to promote sales. Gift card issuers may be less willing to apply unexpectedly short expiry periods in an attempt to deliberately increase breakage as this could create negative consumer experiences. If expiry dates were applied in an unreasonable manner, the generic consumer protections of the ACL may provide some relief to consumers. CCAAC is satisfied that the majority of businesses apply expiry dates in a reasonable manner.

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<sup>60</sup> For example, shopping centre gift card programs or unauthorised gift card issuers.

<sup>61</sup> For example, the Australian National Retailers Association, p 6. the Australian Retailers Association and Australian Merchant Payments Forum, p 6.

## Differences in terms and conditions relating to expiry dates

As the bulk of gift cards in the Australian market are valid for a period of more than 12 months, some consumers may come to expect that all gift cards are valid for at least this period of time. Consequently, consumers may experience some difficulties when using gift cards with short expiry periods.

Differences in terms and conditions are primarily a result of the diversity of gift card products available on the market. It is up to an issuer, within the bounds of the law, to determine expiry date policies; and so they are inevitably differentiated to reflect the operational needs of each issuer. CCAAC observes that these differences can be accommodated where they are brought appropriately to the attention of the consumer. Where this does not occur, consumers may experience difficulties where expiry date policies do not conform to standard industry practice.

## Findings

CCAAC has identified some instances of personal consumer detriment with respect to the application of expiry dates on gift cards. There have been some circumstances where consumers have not redeemed the full value of their gift card before the expiry date.

CCAAC has not found any overwhelming evidence of systemic consumer detriment relating to expiry dates, however, there may be some merit in continuing to monitor to see whether any new evidence emerges. It would appear as though most gift cards are redeemed shortly after purchase, with most gift cards in the Australian market offered with an expiry period of at least 12 months. CCAAC also acknowledges that in some cases, depending on the individual circumstances of the gift card issuer, the application of an expiry date – including where it is less than 12 months – may be a reasonably necessary practice to ensure the operational viability of a gift card program.

CCAAC also finds that many gift card issuers offer grace periods and can provide flexibility in accordance with their customer service policies. While many issuers may offer this as a courtesy to their customers, this is not a universal practice. Also, it would appear as though these policies may not always be implemented at the store level with consumers having to elevate a complaint before being offered an extension to their expired gift card. Issuers could consider how grace periods are applied at the store level to ensure that customer service objectives are achieved. CCAAC notes that some consumers may not try to use the card once they realise it has expired, and many will not complain.

Where consumers are aware that expiry dates apply, they are able to select a gift card that is appropriate to the receiver's needs. The existing consumer protections of the ACL and the ASIC Act may assist in reducing the incidence of cases where consumers are misled about expiry dates.

## TERMS AND CONDITIONS IN THE EVENT OF INSOLVENCY

Recent external administrations<sup>62</sup> have raised community awareness of the insolvency risk to gift card holders. There is limited understanding of the external administration framework within the community. Submissions to the review expressed confusion about the practice of retailers operating 'as normal' following the appointment of receivers, while varying the terms and conditions of previously sold gift cards.<sup>63</sup> Examples of this include where a retailer only accepts a gift card where the customer spends twice its value in store, or no longer accepts the card at all. Complaints received by ACL regulators also reveals that external administration provides one of the more common reasons for complaints made about gift cards.<sup>64</sup>

It is understandable that this could lead to some confusion as the store continues to trade and does not conform to what the public expects when a retailer is insolvent. In these circumstances, consumers perceive the retailer to have reneged on the agreement made at the time the gift card was purchased. However, a more accurate explanation of insolvency situations is not that the gift card terms have been 'changed' but rather that the liquidator has made a new offer to gift card holders to enable them to redeem their gift card balances. It is open to the gift card holders to reject this new offer and attempt to recoup the full gift card balance as a creditor; however, the external administrator's offer will often prove more valuable to the consumer.

Confusion is compounded by the external administrator's obligation to maximise the return to its creditors. While any offers made during an external administration may benefit gift card holders, these offers are only made so that any underlying asset value has the best opportunity of being realised. Greater consumer awareness of external administration risks in any prepayment situation would assist in both better informing consumers of their rights and assisting consumers to minimise their exposure to insolvency risk.

CCAAC notes that ACL regulators provide specific guidance for consumers on specific insolvencies that may affect gift card holders.<sup>65</sup>

Gift card holder rights in the event of insolvency will be discussed in Part IV.

## Findings

Companies placed into external administration are required to be administered in accordance with the *Corporations Act 2001* (the Corporations Act). Gift card holders are likely to rank as unsecured creditors in the event of insolvency. External administrators have an obligation to maximise any returns to creditors and are not required to honour the terms and conditions applied to gift cards at the time of purchase. This may cause some confusion where in doing so, a business in external administration appears to continue to operate as normal. This may be further exacerbated where a company in external administration offers

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<sup>62</sup> External administration is a generic term used in the *Corporations Act 2001* to refer to situations where an external party (a liquidator) is appointed to control a company or some of its assets. The term covers the appointment of a receiver to an asset, the appointment of a receiver and manager with control over all of the company's assets, the commencement of a voluntary administration, or winding up in insolvency.

<sup>63</sup> For example, Judith Powell, p 1. Laura Lindley, p 1. Phillip Lane, p 1.

<sup>64</sup> See Appendix 6.

<sup>65</sup> For example, the MoneySmart website may contain information relating to specific insolvencies as they arise.



to accept gift cards under different terms and conditions than were applied at the time of purchase. CCAAC finds that some consumers have limited understanding of their rights in the event of an external administration and while consumers are unlikely to take notice of general information on this topic, those who suffer detriment as a result of insolvency could benefit from access to clear information at that time.

## RECEIVING CHANGE

Some consumers have expressed dissatisfaction with their inability to receive change where small balances remain.<sup>66</sup> It is not uncommon for gift card issuers to provide change for small balances under a certain amount; however, they do so as a courtesy to their customers and are not required to do so under existing legal frameworks. Some submissions suggested that gift cards that are not fully redeemed may only have a very small remaining balance.<sup>67</sup> Where remaining balances are low, the consumer may be required to purchase a more expensive item by contributing money out of pocket or be unable to purchase an item due to restrictions on low value purchases.

### Change and the contractual nature of gift cards

Compelling gift card issuers to provide change to consumers could present some challenges where the gift card does not provide the consumer with any underlying monetary value but rather value in the form of store credit. Gift card issuers may be reluctant to provide change because the cost of goods sold is typically lower than the retail price. Accordingly, gift card issuers are likely to incur some costs when providing change to their customers.

Gift card issuers have indicated that most gift cards, by design, allow the consumer to retain any residual value for use at a later time.<sup>68</sup> While in most cases this may be a suitable way for consumers to retain remaining balances, there is some concern that consumers may experience difficulties when attempting to use any remaining value.

### Difficulties for consumers when using residual value

CCAAC acknowledges that in some cases, it can be difficult in practice for consumers to redeem any remaining value on a gift card without having to contribute additional funds at the point of sale. This may occur because the retailer does not sell items that closely reflect the remaining small balance, or because restrictions on low value use prevent the consumer from using the amount to purchase a low value item. As pointed out in some submissions, overly obtrusive restrictions may be in breach of consumer protection laws.<sup>69</sup> While less severe restrictions may inconvenience the consumer, they do not lose this value entirely as it is usually possible for the gift card holder to use it by either purchasing an item of an appropriate value or by adding additional funds.

While some gift cards may not provide consumers with the desired level of flexibility with respect to their use, all gift choices may have some disadvantages. As has been pointed out by some submissions<sup>70</sup>, the gift giver has chosen to give a gift card and all of the associated

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<sup>66</sup> Queensland Consumers Association, p 2.

<sup>67</sup> Universal Gift Card Pty Ltd, p 7.

<sup>68</sup> Myer, p 4.

<sup>69</sup> Consumer Action Law Centre, p 3.

<sup>70</sup> Reid Industry Group, p 1.

terms and conditions that relate to its use. Despite this, it may be that conditions such as restrictions on low value use are not made clear to the consumer upon purchase. In this regard these difficulties may result from poor disclosure as the gift giver may not have chosen to give a gift card had they been aware of these conditions.

To ensure that the products they purchase are appropriate to the needs of the receiver, gift givers have the responsibility to educate themselves about the products they choose to buy. This applies equally to purchases of gift cards as it does to any other alternative gift choice.

Consumers expect to receive change when using cash. Even where terms and conditions may clearly state policies relating to the provision of change, consumers are likely to have the same expectation for gift cards where these are promoted as being 'as good as cash'. Some consideration as to how gift card issuers could better communicate policies in relation to the provision of change may assist consumers in better understanding the nature of gift card products.

### **Consumer detriment and residual values**

It is noted that some stakeholders have indicated that the level of breakage associated with unredeemed balances is low.<sup>71</sup> The degree of consumer detriment associated with policies for the provision of change is naturally limited by the gift card holder's ability to decide on which items maximise the value to them from the gift card. While the gift giver and gift receiver may not be aware of policies relating to the provision of change before redeeming the gift card, they are usually made aware of such policies at the point of sale. At this time, the gift card holder is able to make a conscious decision as to how to best maximise their use of the gift card in the light of these policies. Depending on personal preference, consumers may maximise their use of the gift card by:

- adding funds to purchase an item that costs more than the gift card's value so as not to have any residual value on the gift card;
- purchasing a bundle of items so that any residual value is low or zero;
- purchasing a single item that may be below the face value of the gift card but that maximises the consumer's use of the gift card as it is the item that they most want to buy; or
- using any residual value to contribute towards another purchase at a later time.

The magnitude of any unredeemed residual value is not the sole measure of consumer detriment. For example, a consumer with a gift card valued at \$100 may prefer to purchase a tennis racquet worth \$90 and forgo \$10 of use than to purchase a cricket bat worth \$95 and forgoing only \$5 of use. The consumer is not necessarily worse off by purchasing the tennis racquet even though they may forgo a greater portion of the gift card's value.<sup>72</sup>

Ideally, the amount paid for the gift card would be the same amount as the purchased bundle of goods would cost had the gift card holder used cash. However, the gift card holder may still be maximising their own welfare even where this does not occur. The gift card

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<sup>71</sup> CCAAC meetings with industry groups on 11 May 2012

<sup>72</sup> A more general comparison of gift choices is at Appendix 4



holder is best placed to make the appropriate decisions to maximise their value from the gift card.

## Findings

CCAAC is not aware of evidence to suggest that there is significant loss to consumers due to policies relating to the provision of change. Most gift cards are designed to retain any residual balances on the gift card itself. Some issuers, as a courtesy, may provide change in certain circumstances and this may be considered a good business practice. Improved disclosure about gift card policies for the provision of change may assist consumers when choosing gift card products.

## FEES AND CHARGES

Fees and other charges can be applied to some gift card products. These fees may have a number of purposes ranging from changing the way that consumers use the products to cost recovery. Some submissions highlighted that closed loop gift cards in the Australian market are not typically subject to fees; however, fees do apply on some open loop gift cards.<sup>73</sup>

### Fees as an incentive

In other gift card markets, fees may sometimes be applied to encourage gift card holders to use them as soon as possible. For example, some gift card issuers may impose dormancy fees to encourage users to spend any outstanding balance as soon as possible. Alternatively, other fees may apply to discourage certain gift card redemption behaviours. For example, a gift card issuer may impose a transaction fee to encourage the gift card holder to redeem the entire gift card value in a single transaction. While these fees are not common in the Australian market, there may be other fees applied to gift cards in Australia. This includes replacement fees where gift cards are lost or stolen.

### Fees and cost recovery

Some fees may be applied to gift cards on a cost recovery basis.<sup>74</sup> This would appear to be particularly the case for open loop gift cards. While issuers of closed loop gift cards are able to make a return on the sales made with gift cards, open loop gift card issuers may have to rely on fees. These fees may be applied on a number of occasions including upon issue or per transaction. These fees ensure that gift card programs are profitable and that costs can be recovered.

### Fee transparency

Gift card issuers should be transparent about any fees that apply to the use of a gift card. While upfront fees may be more apparent, other fees such as dormancy or per transaction fees may not be clear to the gift card holder. Of the fees applied in the Australian gift card market, the most common fee type appears to be an upfront fee. For example, the Commonwealth Bank charges a \$5.95 issuance fee for their MasterCard Gift Card. While there may be some other fees to access post sale services such as a customer service hotline, it would appear as though other fees are uncommon in the Australian market.

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<sup>73</sup> Australian Retailers Association and Australian Merchant Payments Forum, p 6.

<sup>74</sup> Universal Gift Card Pty Ltd, p 6. Westfield, pp 2-3.

## Findings

There does not appear to be any reason why fees other than upfront fees should be applied to cover costs where gift card issuers retain gift card breakage and are able to make a return on sales. With the exception of some open loop gift card products, fees and charges do not appear to be common in the Australian market. Where there is transparency around fees, consumers have sufficient choice to allow them to avoid fees if they wish to do so. Most fees applied in Australia are limited to upfront fees paid when purchasing a gift card. Dormancy and other fees are not as common in Australia as they are in other countries.

It would be appropriate for ACL regulators to continue monitoring the Australian gift card market to observe whether there are any changes to the manner in which fees are applied.

## OTHER ISSUES RELATING TO GIFT CARD TERMS AND CONDITIONS

A number of other issues have been raised with respect to the terms and conditions that apply to some gift cards in the Australian market. These issues were not raised as key concerns for consumers.

### Restrictions on low value use

Some gift card issuers apply limitations on low value use. This may include restrictions on purchases of items below a certain value or limits as to how much can be loaded onto a particular gift card. Issues about restrictions on low value use were not raised as a major issue in the submissions received.

While CCAAC received few submissions<sup>75</sup> from gift card issuers commenting on restrictions on low value use, it would appear as though any restrictions of this kind are applied for operational reasons. CCAAC has learned that gift card issuers typically pay fees on a per transaction basis to gift card program operators. As may be the case with other forms of electronic payments, retailers may place restrictions on low value use where the cost – financial or otherwise – of accepting certain forms of payment is too high relative to the value of the transaction. It is reasonable for issuers to ensure that gift card programs are sufficiently profitable; however, any restrictions on low value use should only be imposed where they are reasonable to protect the legitimate commercial interests of the issuer. Furthermore, any restrictions that apply should be clearly disclosed to the consumer.

### Limitations with respect to retailers that accept gift cards

Some gift card products are advertised as being for use at a particular group of retailers. These retailers may be linked as being part of a chain, franchise group or shopping centre. Issues may arise where certain retailers within an identified group do not accept the gift card. While it may be made clear at the point of sale that a particular retailer within the group does not accept the gift card, on other occasions it may not be made clear to the purchaser, or final user of the gift card.

Where a gift card is marketed as covering a particular retail category and a number of exceptions apply, there is a clear need to disclose this to the consumer. Even where a gift card is not strictly advertised as such, any exceptions should be disclosed to the consumer if

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<sup>75</sup> Australian National Retailers Association, p 6.

it is reasonably likely that they would be left with such an impression. By way of example, a consumer is likely to assume that a shopping centre gift card can be used at any tenant retailer even if the gift card is not promoted as such. To comply with existing requirements under consumer law, the issuer should ensure that consumers are familiar with the participating retailers, including whether there are any notable exceptions.

The Shopping Centre Council of Australia has commented that consumers are made aware that shopping centre gift cards can only be used at participating retailers and that consumers are referred to a list of retailers that accept the gift card on a website. Furthermore, for some shopping centre gift cards, consumers are notified of any major retailers where the card is not accepted. However, evidence from consumers indicates that the quality of such disclosures may vary. CCAAC notes the importance of procedures at the point of sale to ensure that these disclosures are made consistently.

## **Findings**

In relation to restrictions on low value use or limitations with respect to retailers that accept gift cards, CCAAC notes that these restrictions have the potential to create difficulties for the consumer where they are not appropriately disclosed. However, CCAAC is not aware of any overwhelming evidence of structural consumer detriment from these issues.

## **PART IV—GIFT CARD ADMINISTRATION**

Some gift card administration practices have raised the concerns of some consumers and consumer advocates. These concerns are differentiated from those associated with gift card terms and conditions as they relate to how consumers are affected by the way in which gift card programs are managed, rather than their terms of use. Issues relating to gift card administration are not easily resolved. While some issues about terms and conditions relating to gift card programs can be resolved through more effective disclosure; issues about gift card administration are related to the processes that contribute to their operation and product design more broadly.

### **LOST, DAMAGED OR STOLEN CARDS**

The consultation process undertaken by CCAAC did not reveal significant concern in the community about how traders deal with consumer concerns where gift cards are lost, damaged or stolen. However, some consumers have made complaints to ACL regulators where gift card issuers do not replace gift cards. Gift card issuers often do not maintain a record of who has been issued with a gift card. Maintaining such a record may be further complicated where gift cards are passed on as a gift. It is noted that gift card issuers normally replace faulty gift cards that are presented by a consumer<sup>76</sup>, however, it is not universal practice to replace lost or stolen gift cards. While some businesses are able to replace gift cards for consumers who can provide proof of purchase to identify a lost card, the costs of replacing lost or stolen gift cards may mean that other businesses are unwilling to do so.

Where this applies to damaged gift cards, there may be cause for further concern. Under existing law, consumers should be able to expect gift cards that do not work on arrival to be replaced promptly with minimum fuss. In this regard, gift card issuers should ensure that facilities are available for consumers to have cards replaced. This includes maintaining records or systems that allow the issuer to replace a gift card when presented with one that does not work. From the submissions, it would appear as though gift card issuers are generally able to replace gift cards through a serial number that is provided on the gift card or by providing proof of purchase.

A related concern is where a gift card is not processed correctly at the point of sale. Where this occurs, any serial number is unable to be used to replace the gift card. As with other products, where the gift card holder is unable to provide a proof of purchase, there is a risk that consumers would be unable to have the gift card replaced. Due to the risk of fraud, many gift card issuers would refuse to replace gift cards without a proof of purchase.

### **Maintaining records**

It appears that most gift card issuers record information specific to the individual cards issued. Typically, at a minimum, this includes the amount of store credit contained on the card and the expiry date. This information is usually recorded for the purposes of facilitating gift card transactions. While information management systems may be capable of recording a richer set of information, including the details of the gift card holder, it may be practically

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<sup>76</sup> Myer, p3.

difficult for this information to be recorded at the point of sale. Without collecting information from the consumer at the point of sale, the gift card issuer would be unable to verify the details of any lost or stolen gift card.

### **Practical approaches to replacing lost or stolen gift cards**

It has been suggested that businesses selling gift cards could offer a personal registration number so that gift cards can be easily replaced if lost. However, as discussed, gift card issuers may not record the purchaser's details when issuing the gift card. Recording such information may also be an impractical measure if one customer buys several cards to give to different people at Christmas.

CCAAC considers that, where possible, gift card issuers are generally willing to work with consumers to replace gift cards where it is practical to do so. Consumer concerns about the replacement of lost, damaged or stolen gift cards appear to arise because, in some circumstances, it is not possible for the issuer to cancel the misplaced gift card or to know what value a new gift card should be issued with. In these circumstances it may be useful for the purchaser of the gift card to pass on the receipt or another proof of purchase to the recipient.

### **Findings**

There are some practical difficulties for issuers seeking to replace lost or stolen cards. CCAAC is of the view that compelling issuers to maintain detailed records could be too costly to issuers and may have flow on costs to the consumer. Issuers that facilitate replacement cards where possible do so to the benefit of their customers. CCAAC interprets the current law as requiring issuers to replace cards that are damaged on arrival where a gift card holder can provide evidence of the purchase.

CCAAC is not convinced that this issue warrants the introduction of any kind of new record keeping requirements. However, CCAAC does believe that as a matter of good business practice, issuers should assist consumers to replace lost or stolen gift cards wherever possible. CCAAC notes that some gift card issuers encourage gift card holders to keep a proof of purchase or take note of any serial number so that they can have it replaced in the event that it is lost or stolen. While this may be possible for some gift card programs, CCAAC acknowledges that this may only be appropriate where the risk of fraudulent activity can be managed appropriately.

Furthermore, gift card holders are likely to benefit where the gift card purchaser provides them with a proof of purchase to assist them in replacing lost, damaged or stolen cards.

### **THE USE OF UNSPENT MONIES AND INTEREST ACCUMULATED ON GIFT CARDS**

There have been some suggestions that interest accumulated on unredeemed gift card balances be transferred back to consumers. This issue raises questions about what consumers can expect when purchasing gift cards as well as what benefits they are capable of providing.

While some gift cards are regarded to be financial products, they are not investment products. Gift cards that are financial products are considered so because they are a non-cash payment facility. There are currently no laws enacted in Australia that compel those who collect deposits, to provide an investment return to the consumer. Indeed it is not

uncommon for transaction accounts held at financial institutions to offer near zero interest rates.

With the exception of a few open-loop gift cards, most gift cards are not offered by financial institutions. Gift card issuers are typically retailers that market and sell consumer goods or services. While gift card issuers may make a return through gift card breakage, CCAAC is not aware of any evidence suggesting that gift card issuers make a substantial return on interest earned on unclaimed monies.

### **Gift cards as a set of terms and conditions**

Where a gift card holder does not redeem a gift card, whether due to an expiry date or otherwise, the amount paid for the gift card is not usually refunded. This understandably causes some consumers to express concern that they have not received value for the money paid for the gift card.

Gift cards do not function like transaction accounts. Where gift cards are promoted as being for a particular dollar amount, consumers may interpret this as meaning that the gift card holds a monetary value. But when consumers purchase a gift card, they are in effect purchasing a set of terms and conditions that will allow them to acquire an amount of goods or services from a retailer. Consumers are typically unable to exchange a gift card for money and they must redeem the gift card in accordance with its terms and conditions.

### **Abandoned property laws**

Some submissions have suggested that unredeemed gift card balances should be treated similarly to other unclaimed moneys and should be remitted to the state.<sup>77</sup> This is commonly referred to as 'escheat'.

Escheat is a common law doctrine that developed out of feudal law. It ensured that when a landowner has died without an heir, the land could revert to the feudal lord (and later the state). This approach was adapted to apply to bank balances, where the owner of the account could not be located. If the owner was subsequently located they could reclaim the appropriated money from the state.

Provisions in the *Banking Act 1959* regulate unclaimed moneys held by authorised deposit taking institutions.<sup>78</sup> Unclaimed money is also regulated using context-specific regulation, for example, the *Commonwealth Superannuation (Unclaimed Money and Lost Members) Act 1999*. Several states and territories have generic legislation concerning unclaimed money.<sup>79</sup> State regulations usually determine money to be 'unclaimed' if it is held in an account without being operated on for a number of years.<sup>80</sup>

It is not immediately apparent how generic state unclaimed money laws apply to gift card balances because of difficulties reconciling gift card balances with the definition of 'money'

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<sup>77</sup> Shane Allen, p 1.

<sup>78</sup> *Banking Act 1959* (Cth) s 69 (11A).

<sup>79</sup> *Unclaimed Moneys Act 1950*(ACT), *Unclaimed Money Act 1995*(NSW), *Unclaimed Moneys Act 1891*(SA), *Unclaimed Moneys Act 1918*(Tas), *Unclaimed Money Act 2008* (Vic), *Unclaimed Money Act 1990*(WA). *Public Trustee Act 1978*(Qld) Pt 8, *Companies (Unclaimed Assets and Moneys) Act 1963*(NT).

<sup>80</sup> For example, NSW requires an inactivity period of 6 years. *Unclaimed Money Act 1995* (NSW) s 7.



in these acts. Gift cards are in essence a bundle of contractual rights and may not easily fall within the definition of money.

### **Alternative gift choices**

In terms of useability, gift cards may in many ways be a poor alternative to an equivalent amount of cash. Cash does not have an expiry date, and it can be used at almost any retailer.<sup>81</sup> But gift cards are not cash and should not be promoted as being another form of money. The secondary market for gift cards may offer consumers with the opportunity to sell their gift cards at a market price, but this is quite different to a consumer using a debit card to take money from an ATM. Accordingly the principles of abandoned property do not easily apply to gift cards. A gift card typically provides the holder with the right to redeem a particular gift card within a particular period and its value becomes negligible after this period has passed. Therefore applying the principles of unclaimed property may not provide consumers, or otherwise, with any practical benefit.

### **Unspent monies**

There are a number of issues that arise even if the principles of unclaimed property were applied to gift cards. These include the fact that a transfer of unspent moneys to the state would not benefit consumers directly. Any mechanism that would allow consumers to exchange their gift cards for cash may discourage gift card issuers from issuing them as they may cease to benefit from the sales generated through their use. There may also be cost implications to retailers if they were required to account for unspent monies and pay them to another entity.

Consumers who wish to avoid the risks associated with gift card products may be better served by choosing alternative products. Where consumers purchase gift cards for purposes other than gift giving they may be better off using flexible deposit or transaction accounts offered by financial institutions.

While CCAAC is unaware of any appropriate remedies to address consumer concerns about the use of unspent monies, gift card issuers may be in a position to better educate consumers about any terms and conditions that apply. In this regard, issuers could explore how more effective disclosure could be achieved and should ensure that promotion strategies are consistent with the true nature of the products offered.

### **Estimating gift card breakage**

Estimating gift card breakage is no easy task. While it may be possible to obtain data relating to the breakage rates of some individual gift card issuers, it is difficult to estimate this across the industry. From industry estimates and data, it would appear that the level of breakage in the Australian market is below 8 per cent, but above 3 per cent.

A discussion on breakage is relevant to the extent that policy options could assist in reducing breakage rates for consumers. Breakage can be the result of consumers losing or misplacing a gift card, being unable to redeem it before an expiry date, or failing to redeem remaining balances before expiry. Extending expiry dates, for example, may assist the subset of gift

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<sup>81</sup> Although some retailers, including those that operate through online platforms may not accept cash payments which may to some extent explain why consumers purchase some open loop gift cards.

card holders who are unable to redeem their gift card just after expiry. However, many gift card issuers offer grace periods or will replace a gift card where a customer has made a complaint, irrespective of how long it has been expired for. These policies may not necessarily be captured in reported breakage rates.

It would appear as though a majority of gift cards issued in the Australian market that go unredeemed are lost or forgotten about by the gift card holder. These consumers are more likely to benefit from messages that encourage them to use their gift cards as soon as possible rather than holding them for later use.

## Findings

Gift cards are not intended for investment purposes and gift card issuers should not be expected to transfer interest payments to gift card holders. While the transfer of unredeemed balances to the gift card issuer may be seen as an injustice to the consumer, it is unclear how these concerns can be resolved. Allowing consumers to 'cash out' gift card balances could lead to significant consequences for suppliers of gift cards and it is not clear how applying the principles of abandoned property to gift card balances will benefit the gift card holder. Gift card issuers should encourage consumers to redeem their gift cards as soon as possible.

## GIFT CARD HOLDER RIGHTS IN THE EVENT OF INSOLVENCY

Issues relating to terms and conditions in the event of insolvency were discussed in Part III. In addition to these issues, gift card holder rights in the event of insolvency have been presented as an issue for some consumers.<sup>82</sup>

The Issues Paper noted that if a gift card issuer enters insolvency, gift card holders will ordinarily be classified as unsecured creditors. The claims of gift card holders will then rank alongside all other unsecured creditors of the company. Sections 555 – 563AAA of the Corporations Act provide for the priorities of creditors' claims in the winding up of corporations.<sup>83</sup> In a winding up, the interests of unsecured creditors (including gift card holders) are subordinate to a number of other interests, including claims by secured creditors, the costs associated with the liquidation and wages owed to former employees.<sup>84</sup> As a result of this low ranking, gift card holders will often receive only a fraction, if any, of the total value of their claim.

Some consumers may be able to obtain practical redress by applying for a credit card 'chargeback'. This is a process whereby the gift card purchaser's bank, on the gift card holder's behalf, can apply to have the credit card transaction reversed. This can occur where goods or services have been paid for, but not supplied.

For other consumers, it was suggested that gift card holders could be protected from the insolvency of card issuing retailers through the establishment of a trust fund to hold gift card balances. It is claimed that this would ensure that even in the event of insolvency, funds would still be available to honour gift cards. It would also ensure that gift card issuers do not rely on money received from gift cards sales for other purposes, until the gift card has been

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<sup>82</sup> For example, Judith Powell p 1, Laura Lindley p 1, Phillip Lane p 1.

<sup>83</sup> *Corporations Act 2001* (Cth), s 555 – s 563AAA.

<sup>84</sup> *Corporations Act 2001* (Cth), s 556.



redeemed. However, such an approach would necessarily reduce the working capital available to the entity while it is solvent, as well as reduce the amount available to meet the claims of all other creditors in the event of insolvency, effectively transferring welfare from one group of creditors to another. Such an approach could also be expected to increase the cost of operating a gift card program.

A similar approach proposed in submissions was to assign a higher priority to gift card holders in an insolvency process. Such an approach would have significant impacts on businesses, lenders, investors and employees, and place gift card holders above all other unsecured creditors, such as contractors or trade creditors that had supplied goods or services to a company without payment. There does not appear to be a compelling case for why gift card holders should receive a higher priority than other unsecured creditors of the gift card issuer.

## **Findings**

Granting priority status to gift card holders where they are considered to be creditors would merely transfer welfare from one group to another. Gift card balances by their nature, are more likely to be used for discretionary expenditure. Holding gift cards on trust is likely to be more expensive than alternative policy measures. As such, CCAAC does not consider that gift card issuers should be compelled to maintain a trust account for gift card balances. Greater education on the risks of insolvency could be beneficial for consumers who are exposed to these risks.

## PART V—ASSESSING THE NEED FOR REGULATORY OPTIONS

CCAAC has identified that gift card products, when used as intended, have the potential to provide significant benefits to Australian consumers. However, CCAAC has also identified that there may be some instances of personal consumer detriment associated with some gift card transactions. This personal consumer detriment appears to arise where consumers do not redeem the full value of their gift card.

This part of the paper assesses whether there is a need for a regulatory response to these instances of consumer detriment. In doing so, the paper examines the regulatory responses that have been carried out in overseas jurisdictions.

### OVERSEAS LEGISLATION

Some jurisdictions have implemented regulation in response to consumer concerns relating to gift cards. In particular, legislation in Canada and the United States seek to address some of the same issues considered by CCAAC. Other common law jurisdictions such as New Zealand and the UK rely on generic consumer protection legislation.

#### New Zealand and the UK

The United Kingdom and New Zealand do not have any specific regulation of gift cards. Gift cards in these jurisdictions need to comply with generic consumer protection provisions similar to the ACL. In New Zealand the *Fair Trading Act 1986* prohibits misleading and deceptive conduct and the *Consumer Guarantees Act 1993* apply similar standards to Consumer Guarantees under the ACL. These include that the product be fit for any specified purpose for which it was supplied.<sup>85</sup> These laws are substantially harmonised with requirements under the ACL.

#### Canada

In Canada gift cards are subject to regulation at the provincial level. Notably, provincial laws in Canada do not apply to prepaid phone cards or bank issued prepaid purchase cards, as these are regulated at the federal level.<sup>86</sup>

#### Prohibition on expiry dates and fees

Prohibitions on expiry dates and fees apply in Canada. Cards that are issued for a specific good or service, and cards that are freely issued as promotions may be exempted by provincial law. As is the case with expiry dates, the use of fees and charges has also been prohibited. Cards that may be exempt from the prohibition include open loop cards that charge small dormancy fees, fees on cards issued for charitable purposes and charges for the personalisation or replacement of lost cards. Quebec is the only province that requires retailers to cash out small residual balances on request.<sup>87</sup>

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<sup>85</sup> *Fair Trading Act 1986* (NZ) s9, *Consumer Guarantees Act 1993* (NZ) s8.

<sup>86</sup> Manitoba Consumer Protection Office, Frequently Asked Questions About Prepaid Purchase Cards. Available at <http://www.gov.mb.ca/cca/cpo/faqprepaidretailers.html> (accessed 22 May 2012).

<sup>87</sup> Regulation Respecting the Application of the Consumer Protection Act, RRQ, c P-40.1, r 3, s 79.5 (CanLII).

## Disclosure

Every Canadian jurisdiction provides specialised disclosure requirements for terms and conditions that apply to gift cards. Most provinces require essential terms such as fees or expiry dates to be disclosed on the card itself.<sup>88</sup> This approach aims to ensure that the end user receives notice of terms and conditions, as packaging may be discarded by the purchaser.

## The United States

Regulation in the United States is focussed on expiration dates and post purchase fees. It should be noted that the federal protections operate as a baseline for consumers. State regulation can provide additional protection for consumers, but cannot be inconsistent with the federal protections.<sup>89</sup> This chapter does not attempt to provide a detailed analysis of the operation of gift cards in every US state. Instead it will examine the federal regulations and comment on regulatory trends at the state level.

## Regulatory action in the US

The US Federal Trade Commission (FTC) has a history of prosecuting gift cards issuers under generic consumer protection legislation. In 2007, the FTC settled actions against Restaurant Group Darden's and Kmart on behalf of gift card holders. The claims alleged the retailers misled consumers by providing inadequate disclosure of dormancy fees.<sup>90</sup> In both cases the fee disclosure was in fine print on the back of the card.<sup>91</sup> As part of the settlement, Darden's and Kmart agreed to refund consumers for fees inadequately disclosed on their cards.<sup>92</sup> Darden agreed to a number of improvements to its disclosure practices. Kmart had removed fees on its gift cards before reaching settlement with the FTC.<sup>93</sup> These actions indicate that regulators have been able to use the generic consumer protection laws to prevent the use of unfair terms and conditions on gift cards.

## Federal laws

In 2009 the US Congress passed the *Credit Card Accountability Responsibility and Disclosure Act* (Credit CARD Act). These laws limit the capacity of gift card issuers to apply expiry dates and fees on card balances. The US regulations apply to 'general use prepaid cards, gift certificates, and store gift cards.'<sup>94</sup> The sale or issue of a gift certificate, store gift card, or general-use prepaid card with an expiration date is prohibited, unless it complies with the following two requirements:<sup>95</sup>

1. the expiration date must be no earlier than 5 years from issue; and

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<sup>88</sup> Including Alberta, British Columbia, Ontario, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador.

<sup>89</sup> Electronic Fund Transfer Act of 1978, 15 USC § 1693r.

<sup>90</sup> United States of America Federal Trade Commission, Complaint Against Darden Restaurants, Inc. Available at <http://www.ftc.gov/os/caselist/0623112/070510cmp0623112c4189.pdf> (accessed 22 May 2012). United States of America Federal Trade Commission, Complaint Against Kmart Corporation. Available at <http://www.ftc.gov/os/caselist/0623088/0623088complaint.pdf> (accessed 22 May 2012).

<sup>91</sup> United States of America Federal Trade Commission, Complaint Against Darden Restaurants, Inc.

<sup>92</sup> United States of America Federal Trade Commission, Complaint Against Darden Restaurants, Inc.

<sup>93</sup> United States of America Federal Trade Commission, Complaint Against Kmart Corporation.

<sup>94</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1.

<sup>95</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1 (c).

2. the terms of the expiration must also be clearly and conspicuously stated.<sup>96</sup>

If the card is reloadable it cannot expire less than five years from the date on which it was last reloaded.<sup>97</sup> The prohibition on expiration applies only to the balance on the card, not the card itself. An issuer may expire a card if it provides a replacement card with the same loaded value at no cost.<sup>98</sup>

Dormancy fees, inactivity charges and service fees are generally prohibited unless they comply with the strict requirements of the statute. One off issuance fees are permitted,<sup>99</sup> as are fees on promotional cards that are provided for free.<sup>100</sup>

## Disclosure

Under the federal regulations, post purchase fees must be 'clearly and conspicuously' disclosed on the card or certificate itself.<sup>101</sup> Terms relating to expiry must also be 'clearly and conspicuously stated', however, they are not expressly required to appear on the card itself.<sup>102</sup>

## State regulations

A number of states provide additional protection to consumers using gift cards. Subject to exceptions for some card types, nine states prohibit expiry dates altogether. A further two provide for a minimum expiry term longer than the federal five years.<sup>103</sup> In addition, 18 states prohibit any post purchase fees. Eight states require retailers to provide cash change for small residual balances, although the maximum change given varies from less than \$1 to \$5 to 10 per cent of the remaining value.

## Unclaimed money provisions

The most common regulation adopted by states is the imposition of an unclaimed money or 'escheat' provision.<sup>104</sup> These provisions require expired card balances and/or balances that have been inactive for a defined period to be remitted either in whole or in part to the state. These provisions usually also provide for the reimbursement of the issuer if the card holder redeems the card after the escheat date but before expiry. Some of these provisions are justified on the grounds that they enable consumers to reclaim funds on gift cards indefinitely. They also arguably operate to remove the incentive on issuers to expire cards as they do not retain any breakage.

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<sup>96</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1 (c).

<sup>97</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1 (c).

<sup>98</sup> <http://www.federalreserve.gov/newsevents/press/bcreg/bcreg20100323a2.pdf>.

<sup>99</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1 (a)(3)(B).

<sup>100</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1 (b)(4).

<sup>101</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1 (b)(3)(A).

<sup>102</sup> Electronic Fund Transfer Act of 1978, 15 USC § 16931-1 (c)(2)(B).

<sup>103</sup> Massachusetts – seven years, North Dakota – six years.

<sup>104</sup> 30 states require balances to revert to the state.

## **ASSESSING THE BENEFITS OF OVERSEAS REGULATIONS**

The benefits of overseas approaches can be difficult to assess. While outcomes may vary for United States, Canadian and Australian consumers, it is not clear to what extent differences are due to market differences. For example, different trends exist in the American market such as the demand for reloadable quick service restaurant (QSR) prepaid cards. These cards are popular both as gifts and for personal use but have failed to take hold in Australia. In addition, open loop gift cards are more popular in the US market and fees are less common in Australia than in other jurisdictions. A comparison between markets would need to take account of these differences.

## **ENHANCING CONSUMER PROTECTION FOR GIFT CARD HOLDERS**

From the submissions it is evident that there are two issues in particular, where regulatory responses could be considered. Some consumers have suggested that regulation should be introduced to require a minimum expiry date while others have suggested that consumer rights in the event of insolvency should be enhanced.

In situations of insolvency, there are often insufficient funds to meet the claims of all creditors. In these circumstances not all interested parties will be able to recover the full amount they are owed. Substantive changes to improve the standing of gift card holders would necessarily come at the expense of other creditors. CCAAC is unaware of any compelling arguments as to why gift card holders should be treated differently to other unsecured creditors.

While concerns about expiry dates featured in complaints to ACL regulators, CCAAC has been unable to find any overwhelming evidence of systemic consumer detriment resulting from these concerns. These issues are discussed below.

### **Requiring minimum expiry dates**

It has been suggested that gift cards should have minimum expiry dates. In the Australian market, expiry periods are typically for between 12 and 24 months. Requiring minimum expiry dates requires some consideration as to what the minimum expiry period should be. This could be for a longer period than is commonly provided by gift card issuers, or could provide a floor on expiry periods that is consistent with those currently provided in the Australian gift card market.

### **Assessing costs and benefits**

Longer expiry periods, such as five years, are unlikely to resolve all of the concerns raised by consumers. Wright Express has indicated that 80 per cent of gift cards are redeemed within the first three to six months. Where the majority of gift cards are redeemed shortly after purchase, extended expiry periods are likely to provide only a marginal benefit to consumers. Based on the available evidence, CCAAC considers that longer expiry dates, required by law, are unlikely to benefit consumers.

A minimum expiry date that is consistent with those commonly applied in the Australian market may assist consumers where particularly short expiry dates make it difficult to redeem a gift card. It could assist in achieving consistency across the industry which would provide consumers with certainty with respect to the gift card expiry period.

The issue of expiry periods was also raised as part of a recent review of the Electronic Funds Transfer (EFT) Code. The EFT Code, which has since been replaced by the ePayments Code, requires its subscribers to adhere to the requirements of the code. The consultation process asked if EFT Code subscribers should be required to either:

- not use an expiry period; or
- comply with a minimum expiry period of 12 months combined with a right to refund of expired value for a further 12 months after expiry.

Almost all submissions to the EFT Code review agreed with a minimum expiry period of 12 months. The proposal of a further 12 month period in which a consumer could claim refunds for any expired value was rejected. A requirement of no expiry period or the additional 12 month period for refunds of expired value was argued to impose an unreasonable commercial and regulatory burden on some businesses.

While there may be some benefit to a standardised expiry date, a broad based requirement that applies to all gift card issuers could have some adverse consequences, particularly where operational considerations require the issuer to impose an expiry period of less than the standardised period. A 12 month minimum expiry date is discussed in more detail in Box 1. In addition, CCAAC observes that an overwhelming majority of gift cards issued in the Australian market are issued with an expiry period of 12 months or more, and that most gift cards are redeemed shortly after use.<sup>105</sup> As such, any new requirement may not provide consumers with any material benefits.

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<sup>105</sup> Wright Express has indicated that 80 per cent of gift cards are redeemed within the first three months.

### Box 1: The appropriateness of a 12 month minimum expiry date

While most gift cards in the Australian market appear to have expiry dates of 12 months or longer, it is noted that there are some gift cards where short expiry dates – such as three or six months – are applied. These gift cards usually fit into one of the following categories:

- gift cards, or vouchers, that are for a particular service; or
- gift cards issued by small businesses.

Given the diversity of businesses in the Australian market, it may be the case that some businesses apply short expiry dates because of their individual circumstances. As discussed in Part III, operational requirements may mean that it is only appropriate for a gift card to be issued with an expiry date of less than 12 months.

However, consumers may experience personal consumer detriment where they are unaware of the short expiry period. Through past experiences, consumers may have come to expect gift cards to have a minimum expiry period of 12 months. Because of this, it is appropriate for gift card issuers to specifically draw the consumer's attention to a short expiry date where it is applied. Improving disclosure for short expiry periods would be preferable to prohibiting expiry dates of less than 12 months as it addresses the underlying cause of the problem.

### The ASIC class order

As noted in the Issues Paper, some gift cards can be used to make non-cash payments and therefore can fall under the definition of 'financial products' in the Corporations Act.<sup>106</sup> Other gift cards can only be used for payment to a single 'person' and therefore are exempted from the definition under section 763D.<sup>107</sup> The Corporations Act imposes strict requirements on financial products, including licensing, conduct and disclosure obligations (as well as the hawking prohibition) set out in Chapter 7 of the Corporations Act. ASIC has provided a class order<sup>108</sup> granting unconditional relief from these requirements to gift card facilities that comply with a number of requirements including that:

1. the value on the card must be prepaid at the time of issue;
2. the card cannot be recharged with value except by reversal of a payment made or correction of an error;
3. cash cannot be withdrawn from the card, except to remove the remaining balance after one or more non cash payments where the amount remaining cannot be conveniently used;
4. the card can be used to make payments on more than one occasion;
5. the facility is only promoted or marketed as a gift product; and

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<sup>106</sup> *Corporations Act 2001* (Cth), s 763A(1)(c).

<sup>107</sup> *Corporations Act 2001* (Cth), s 763D(2)(a)(i).

<sup>108</sup> Class Order *Gift facilities* [CO 05/738].



6. where a card is presented to redeem the balance, the expiry date must be 'prominently set out on the device in a manner that makes it clear that it is an expiry date.'

The class order effectively requires gift cards that are financial products to have an expiry date, or period, clearly provided on the card itself in order to be exempt from product disclosure requirements that apply to other financial products. This requirement would appear sensible; however, CCAAC notes that there may be other ways to achieve effective disclosure such as on a wallet that accompanies the gift card.

## Findings

Consumer concerns relating to expiry dates are exacerbated by the product design of gift cards. Here, the tripartite nature of a gift card transaction means that it is not always easy for the recipient of the gift card to be aware of any critical terms and conditions that apply. While gift card issuers may refer to an expiry date within the terms and conditions of the product, this may not always be brought to the attention of either the purchaser or the receiver. The disclosure requirement that expiry dates are to be prominently displayed on the gift card itself, as provided by the ASIC class order, is an appropriate minimum standard.

However, some gift cards (for example those that are limited for use with one business) may not be covered by the ASIC class order. It would be good practice for all gift cards to disclose the expiry date, not a period of validity, on the card itself. CCAAC provides further guidance for businesses on minimum best practice gift cards terms and conditions at Part VI of this report.

While effective disclosure would assist consumers when purchasing and using gift cards, CCAAC is not aware of any overwhelming evidence of systemic consumer detriment warranting a mandatory minimum expiry date period. The consumer protection framework under the ACL and the ASIC Act provides some protection to consumers in relation to expiry dates of gift cards. Additional regulation may be unnecessary or lead to unintended consequences. This is particularly so given that the application of an expiry date may be a reasonably necessary practice to ensure the operational viability of some gift card programs. Where clearly disclosed to the consumer, expiry dates of less than 12 months should not be prohibited where they are applied to protect the reasonable interests of the gift card issuer.

The ASIC class order relating to gift cards provides some protection for consumers; however, there may be some scope for a review of the class order to ensure that it continues to meet its objectives.



## **PART VI—ASSESSING THE NEED FOR NON-REGULATORY OPTIONS**

Non-regulatory options can be classified broadly as any measure taken to address issues related to the purchase and use of gift cards, that do not involve a change in regulatory frameworks that apply to their purchase and use. Such measures can enhance market outcomes by providing appropriate information to consumers who purchase and use gift cards and greater clarity as to how existing regulation applies to businesses that issue them.

Complaints received by ACL regulators appear to suggest that in some cases, terms and conditions are not well disclosed to the consumer.<sup>109</sup> Both purchasers and gift card issuers share responsibility in ensuring that any important terms, conditions or administrative practices are understood by the receiver. Issuers are responsible for ensuring that information is available and effectively communicated. The purchaser is responsible for ensuring that they, and the receiver, have understood how the product works. While regulatory measures can work to standardise disclosure or simplify gift card products, non-regulatory responses can be used to promote the co-responsibility of gift card issuers and consumers.

While regulatory approaches can be used to the benefit of some consumers, they may also create difficulties when being implemented in practice. Adopting a range of non-regulatory measures can work to achieve beneficial outcomes for consumers without compromising the efficient operation of the Australian gift card market. This discussion is extended to include quasi-regulatory options – such as voluntary codes of conduct – which may provide more flexibility than alternative regulatory responses.

### **CONSUMER EDUCATION AND AWARENESS**

While electronic payment systems are not new to consumers, the popularity of gift cards presented in their more modern form has been a relatively new experience. Terms, conditions as well as administration practices that apply to some gift cards can vary substantially from other gift cards and from other forms of electronic payments.<sup>110</sup> Accordingly, issuers have a responsibility to make terms and conditions clearly available and understandable to consumers. Similarly consumers must be made aware that they cannot rely on the assumption of a ‘standard form’ gift card.

Efficient markets rely on the availability of information so that individual actors can make informed decisions. In practice this includes consumers having access to a broad range of information on a variety of products so that purchase decisions reflect the preferences of the consumer. In a well-functioning gift card market, it would be expected that purchasers would seek out gift cards with favourable terms and conditions to the extent that these are valued by the receiver. However, as is clear from the submissions<sup>111</sup>, purchasers rarely compare gift card products in this manner. Given the complexity of gift card terms and conditions, as well as a commonly held belief that all gift cards are alike and can be treated

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<sup>109</sup> See Appendix 6.

<sup>110</sup> A variety of the terms applied to gift cards is available in Appendix 8.

<sup>111</sup> Queensland Consumers’ Association, p 3. Blackhawk Network, p 9.

like cash, consumers may not instinctively think to do so. Greater consumer awareness around the variation of terms, conditions as well as administration practices may be beneficial.

## **Increasing consumer awareness**

There are a range of activities that ACL regulators and other consumer advocates have engaged in to improve outcomes for consumers of gift card products.<sup>112</sup> This work has been useful in highlighting key differences in gift card terms and conditions, but has also provided consumers with the tools to compare and select gift cards that suit their individual needs. Recent media reports as well as the CCAAC review have also contributed to this process. However, there may be some scope for further work in this regard.

Gift card purchases increase at specific times of the year. For example, gift card sales peak during the Christmas period and are popular at other times of the year such as Mother's and Father's Day. As suggested in some submissions<sup>113</sup>, consideration could be given to when consumer education activities could be targeted. ACL regulators could, for example, issue a joint media release highlighting that care needs to be taken when using gift card products before key gift giving periods.

While it may be possible for ACL regulators to provide information to consumers on their websites, this information is more likely to be accessed after a consumer has experienced a problem in using a gift card. Such a consumer is likely to be interested in information relating to their rights under the law. Messages that support consumers are likely to be more useful where they are expressed generically so that they can assist consumers when purchasing any kind of consumer good or service.

## **Existing consumer education activities**

A number of ACL regulators have placed information on their websites to assist consumers when purchasing and using gift cards.<sup>114</sup> This information assists consumers in understanding their rights under the law and also provides some practical guidance where a consumer believes that a gift card issuer has not acted in accordance with the law.

Some ACL regulators also provide tips to consumers when purchasing gift cards.<sup>115</sup> This information can assist consumers in being aware that terms and conditions apply and that there are some things that consumers should do to ensure that they get the most out of their gift card products.

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<sup>112</sup> For example, CHOICE has highlighted some of the key differences in terms and conditions that apply to gift cards.

<sup>113</sup> For example, Queensland Consumers Association, p 3.

<sup>114</sup> For example, see <http://www.consumer.vic.gov.au/shopping/daily-deals-and-gift-vouchers/gift-vouchers-and-gift-cards>.

<sup>115</sup> For example, see [http://www.ocba.sa.gov.au/consumeradvice/smartshopping/gift\\_vouchers.html](http://www.ocba.sa.gov.au/consumeradvice/smartshopping/gift_vouchers.html).

## The MoneySmart website

The MoneySmart website, which is administered and operated by ASIC, provides consumers with practical guidance to assist gift card holders. This information includes that gift cards should be kept safely, that gift card holders should check the expiry date, and that remaining balances will not necessarily be provided back in cash.

Figure 3: Gift card guidance on the MoneySmart website<sup>116</sup>

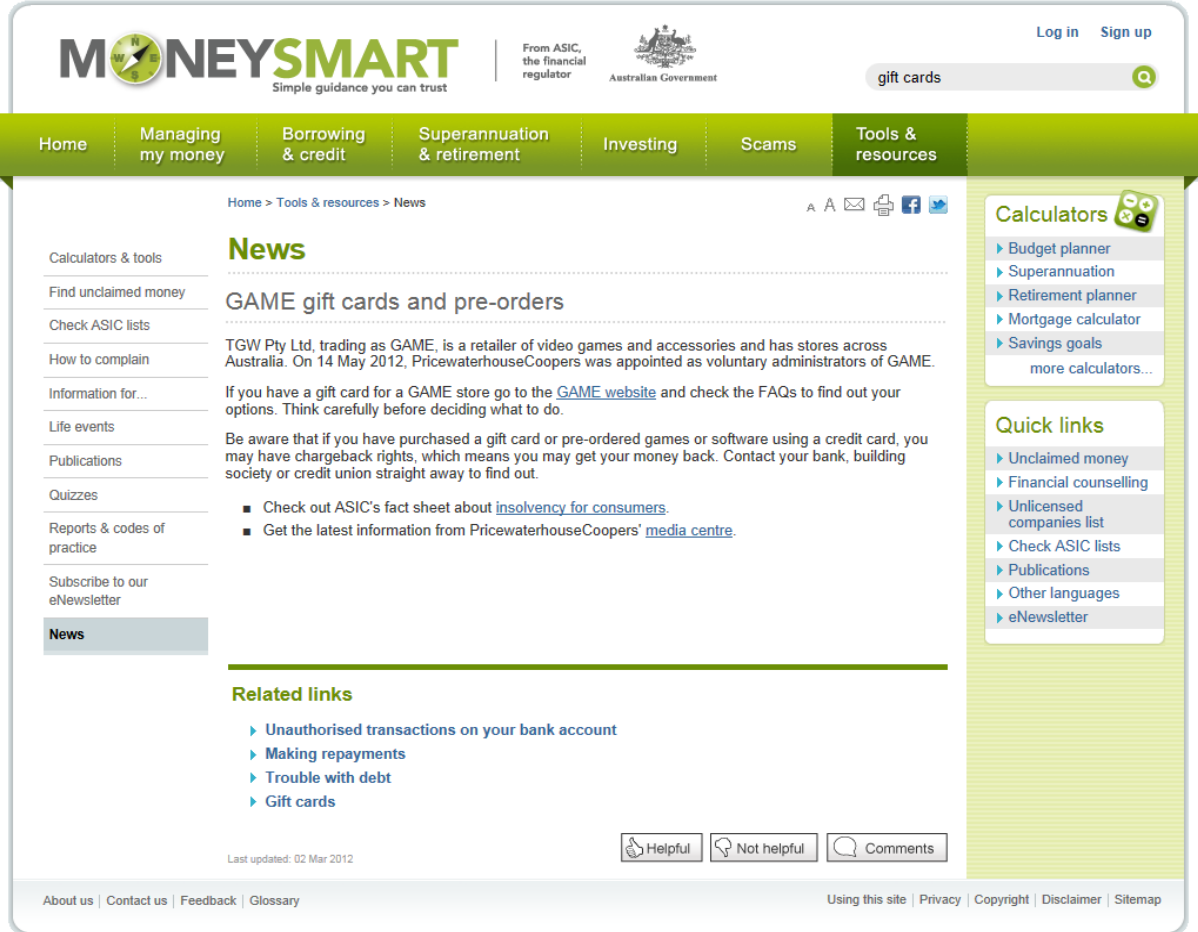
The screenshot displays the MoneySmart website interface. At the top, the MoneySmart logo is accompanied by the text 'Simple guidance you can trust'. To the right, it states 'From ASIC, the financial regulator' and 'Australian Government'. A search bar and 'Log in'/'Sign up' links are also present. A green navigation bar contains categories: Home, Managing my money, Borrowing & credit, Superannuation & retirement, Investing, Scams, and Tools & resources. The main content area is titled 'Different ways to pay' and includes a sub-section for 'Gift cards'. This section provides a definition of a gift card, notes that some are reloadable, and offers advice on treating them like cash and checking expiry dates. It also includes a section on getting cash back from the card. A 'Related links' section lists: Transaction accounts, Switching bank accounts, Banking and credit card scams, Prepaid cards, and Credit cards. On the right side, there are 'Calculators' (Budget planner, Savings goals, Compound interest, First home saver, Your net worth), 'Quick links' (Unclaimed money, Financial counselling, Unlicensed companies list, Check ASIC lists, Publications, Other languages, eNewsletter), and a 'Got a problem with a financial service?' section with a 'How to complain' button. At the bottom, there are 'Helpful', 'Not helpful', and 'Comments' buttons, and a footer with 'About us', 'Contact us', 'Feedback', 'Glossary', 'Using this site', 'Privacy', 'Copyright', 'Disclaimer', and 'Sitemap'.

The MoneySmart website also provides specific guidance to gift card holders who are experiencing losses due to a business going into administration. This information can be specifically targeted to individual businesses and can provide consumers with suggestions such as applying for a 'chargeback' through their bank where it has been purchased with a credit card.

<sup>116</sup> This webpage is available at: <https://www.moneysmart.gov.au/managing-my-money/banking/different-ways-to-pay> (accessed on 25 May 2012).

The MoneySmart website also refers to a factsheet on ‘insolvency for consumers’ that has been prepared by ASIC. This factsheet outlines how insolvencies may affect consumers, including where they may be considered as an unsecured creditor, such as where a gift card has not been used. This information outlines where consumers can go to for help, as well as providing an outline of the rights of unsecured creditors under the Corporations Act. It is common for ACL regulators to refer consumers to the MoneySmart website where complaints are made in relation to a business going into administration.

**Figure 4: Insolvency guidance on the MoneySmart website<sup>117</sup>**



**Consumer phone applications**

ACL regulators have also introduced shopping rights phone applications to support consumers when purchasing goods or services. Shopping rights phone applications operate on smart phones and can be downloaded for free. They are particularly useful for consumers as they provide instant and authoritative guidance to consumers whenever they may need it.

Shopping rights phone applications provide targeted information that is useful to consumers when consumers may be requesting a refund or exchange. This includes information on consumer rights when seeking to return a good. The applications also contain information relating to gift cards. For example, the MyShopRights phone application notes that:

<sup>117</sup> This webpage is available at: <https://www.moneysmart.gov.au/tools-and-resources/news> (accessed on 25 May 2012).

*'A store does not have to honour a gift voucher or gift card after the expiry date, unless they told you that they would.'* and

*'When you make a purchase using a gift voucher, the store is required to give you cash for the leftover value if they told you they would, or if it was stated in the terms of the voucher.'*

Shopping rights phone applications also allow gift card holders to place a reminder for before a gift card expires. This feature assists consumers in ensuring that any gift cards they hold are redeemed before the date of expiry. This feature can also work for any other goods or services where an expiry date may affect some part of the product's use.

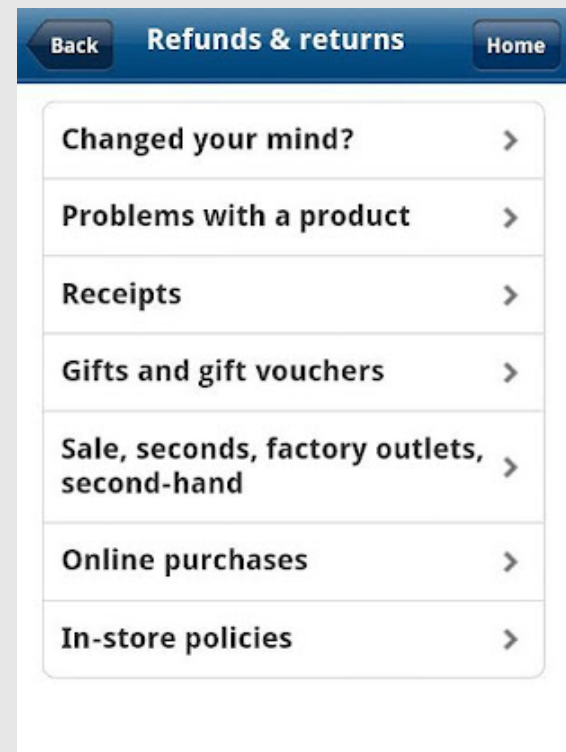
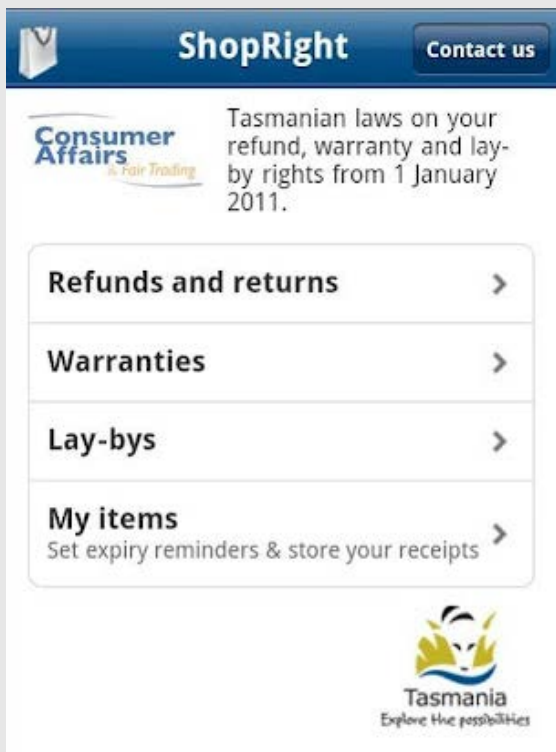
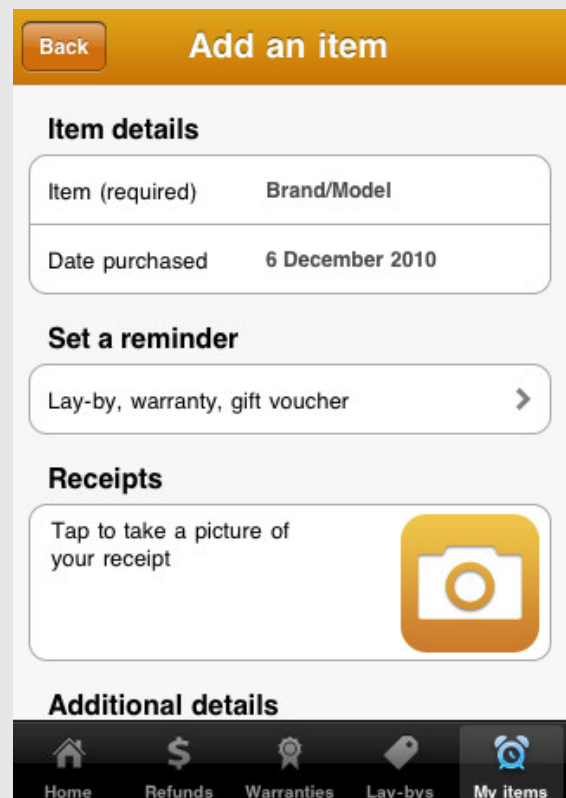
Overall, phone applications provide an innovative way for ACL regulators to inform consumers on their rights, but also to provide additional services – including reminders – that may be of assistance to gift card holders.

## **Findings**

ACL regulators should continue to explore how consumers can be supported when purchasing gift card products. ACL regulators have already engaged in activities that could benefit consumers who purchase and receive gift card products. CCAAC notes the work of ASIC in educating consumers about insolvency risks as well as consumer rights in the event of insolvency.

ACL regulators could consider issuing a joint media release at key gift giving periods to raise consumer awareness. The effectiveness of this measure could be evaluated after a two-year period where the need for any future education activities could be reassessed.

Figure 5: Phone application screenshots





## **BUSINESS EDUCATION AND COMPLIANCE PROMOTION**

It appears that most issuers act consistently with existing regulation, and the experiences of individual consumers may reflect isolated instances of non-compliance (rather than a systemic failure). Business education and compliance activities can benefit consumers where they achieve broader compliance with existing laws. While these may be useful, they should be considered in accordance with the broader compliance and enforcement priorities of ACL regulators.

### **Existing business education and compliance activities**

To support the implementation of the ACL on 1 January 2011, ACL regulators have worked together to produce general guidance on the ACL. This guidance assists businesses in ensuring that their trade practices are compliant with the ACL. To assist a broader range of businesses, this guidance explains the generic principles of the ACL. ACL regulators have produced a series of 'ACL Guides' on:

- avoiding unfair business practices;
- consumer guarantees;
- product safety;
- sales practices;
- unfair contract terms; and
- compliance and enforcement.

These guides have been developed by ACL regulators and are available on the ACL website located at <http://www.consumerlaw.gov.au>.

The Queensland Office of Fair Trading has also encouraged gift card issuers to apply a minimum set of terms, conditions and administration practices. This information is available on their website located at <http://www.fairtrading.qld.gov.au>.

### **Findings**

CCAAC notes the work of ACL regulators in promoting broader compliance with the ACL. Gift card issuers could be supported by the existing guidance on how the generic consumer protection principles of the ASIC Act and the ACL apply to businesses. Any work to promote compliance should be targeted at businesses that may be less clear about their legal obligations. ACL regulators could explore whether there is broad industry compliance with the existing law in accordance with the relevant compliance and enforcement policies that apply.

## **ASSESSING AND EVALUATING CONSUMER AND BUSINESS EDUCATION CAMPAIGN PROPOSALS**

While education activities may offer benefits to consumers, there are likely to be costs associated with the implementation of consumer and business education campaigns. Any cost associated with such campaigns should be consistent with the benefits they provide.

Non-regulatory approaches may provide additional positive benefits to consumers participating in a wider range of markets. In this regard, non-regulatory approaches have the potential to provide broad and far reaching benefits beyond their specific application to consumers of gift card products and their merit can be considered in this context.

Some activities are likely to be capable of being supported by existing infrastructure and can be implemented at relatively low cost. These should be pursued as a priority while more resource intensive proposals should be subject to an analysis of all associated costs and benefits. Finally, education activities should be targeted where they can offer the most benefit to consumers.

## **Findings**

Education activities should be assessed in accordance with appropriate enforcement and compliance priorities. Any costs associated with these activities should be appropriate to the expected consumer benefits. CCAAC notes that ACL regulators have developed a number of resources to support the implementation of the ACL. CCAAC finds that any activities to increase consumer awareness in relation to gift cards should be integrated into current education activities where possible.

## **QUASI-REGULATION**

According to the OBPR, quasi-regulation includes a wide range of rules or arrangements where governments influence businesses to comply, but which do not form part of explicit government regulation.<sup>118</sup> This could include voluntary industry codes of practice developed with government involvement, guidance notes, industry-government agreements and accreditation schemes.

Quasi-regulatory measures, as they could be applied to gift cards, may offer a range of benefits over more traditional regulatory approaches as they are more responsive to changes in technology and market conditions. They can be used to provide the industry with ownership over any new rules or guidelines that may apply and can offer flexibility where altering existing legal infrastructure is unsuitable. Australia's consumer protection framework is generic in nature, so including specific provisions relating to the purchase and use of gift cards may not be appropriate. Quasi-regulatory measures could be used to address market failures owing to any unique characteristics that create difficulties for the participants of a market.

### **A voluntary industry code**

A voluntary industry code could assist in addressing a range of issues relating to gift card products. It could be based on best practice principles that support consumers where gift card terms and conditions are applied. A voluntary industry code, could offer a range of benefits including greater flexibility, lower compliance costs and greater responsiveness to business conditions.

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<sup>118</sup> 2010 Best Practice Handbook, Office of Best Practice Regulation, Australian Government, p 34.



The Australian Government has issued guidance on developing voluntary industry codes.<sup>119</sup> The guidance expresses a preference for voluntary codes of conduct – which can be effectively developed, implemented and enforced by the participants in an industry – than more heavy handed regulatory approaches. The guidance further notes that if an industry has not sought to self-regulate to resolve an identified problem, any subsequent attempts to do so should be considered before a more heavy-handed regulatory response is considered.

### **Best practice promotion**

It is noted that some segments of the retail industry have expressed a willingness to explore self-regulatory options that could ensure that consumers are presented with reasonable and fair terms and conditions when purchasing and using gift cards. ANRA has proposed that a voluntary code of practice, acting as a minimum standard, be developed to increase consumer confidence in the gift card programs operated by signatories to the code. Other segments of the retail industry have commented that a voluntary code of conduct would impose unnecessary administrative burdens given that most retailers already comply with what might be considered to be best practice.<sup>120</sup>

Alternatively, best practice promotion could be achieved through an accreditation or rating scheme which would allow gift card issuers to highlight that above best practice terms and conditions apply. This approach would be different to a voluntary code of conduct as the focus would not be on enforcing rules, but rather promoting the beneficial features of an issuer's gift card products. This could improve consumer awareness of gift card terms and conditions, and encourage gift card issuers to respond to market incentives through product differentiation.

A discussion on minimum best practice standards which could be used as a basis for industry developed standards can be found in Box 2.

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<sup>119</sup> Policy Guidelines on Prescribing Industry Codes, Australian Government, May 2011, p.2. Available at: [http://archive.treasury.gov.au/documents/2035/PDF/Policy per cent20Guidelines per cent20on per cent20Prescribing per cent20Industry per cent20Codes.pdf](http://archive.treasury.gov.au/documents/2035/PDF/Policy%20Guidelines%20on%20Prescribing%20Industry%20Codes.pdf) (Accessed 29 May 2012).

<sup>120</sup> CCAAC meetings with industry groups on 11 May 2012.

## Box 2: Minimum best practice standards

In recognition of the benefits gained through issuing gift card products, industry could consider what it could do to further support consumers who purchase and receive gift card products. Industry best practice promotion requires some consideration as to what constitutes industry best practice. It is important that industry develops these standards so that they have ownership over them and can be widely embraced by market participants. More generally, the Australian Youth Forum's submission provided some practical suggestions as to how gift card issuers could assist consumers. This included that:

- gift card issuers have websites where gift card details can be checked;
- larger businesses have longer expiry dates;
- reminder emails be sent where an expiry date is approaching;
- gift cards come with a plain English summary of the terms and conditions; and
- lost or stolen gift cards can be cancelled and replaced.

While many gift card issuers have already implemented some of these suggestions, they could for example form part of any industry efforts to promote best practice terms and conditions to the broader market.

CCAAC considers that industry best practice should, at a minimum, include that:

- expiry dates should be more than 12 months unless a shorter expiry date is reasonably necessary to protect the legitimate interests of the gift card issuer;
- purchasers should be specifically alerted to the expiry date at the point of sale where it is for a period of less than 12 months;
- grace periods should be offered to the consumer, particularly where they have remembered to redeem a gift card after the anniversary of an event such as a birthday or Christmas;
- expiry dates and other important terms should be prominently listed on the gift card itself (in consideration that card holders or wallets supplied with the gift card are often discarded by the purchaser or recipient);
- lost, stolen, or damaged gift cards should be replaced where a consumer is able to provide a proof of purchase and it is possible to reissue a gift card;
- fees should not be applied unless they are upfront fees paid by the gift card purchaser or special fees applied when replacing lost or misplaced gift cards; and
- customer service and complaints handling procedures should be developed and complied with at the store level.

## The ePayments Code

The ePayments Code (the Code) was published on 20 September 2011. This voluntary code of practice regulates electronic payments, including online payments, internet and mobile banking, some non-cash facilities like gift cards, as well as BPAY, ATM, EFTPOS and credit card transactions. It provides a consumer protection regime for electronic payments. The code establishes a set of reasonable and fair terms, conditions, and administration procedures that support the existing consumer protection framework.

Those who subscribe to the code must begin complying with the new code by 20 March 2013. ASIC has indicated that all current members of the EFT Code – including banks, credit unions and building societies that provide retail banking services – are expected to resubscribe. Other providers of new payment services who may not have subscribed to the previous code are expected to sign up.

The Code offers a consumer protection regime that has broad applicability to electronic payment products and services that may not currently be subject to any industry codes or regulations. The code has the potential to regulate the application and disclosure of expiry dates on gift cards. The most important requirements for gift card issuers are that subscribers agree to:

1. not apply an expiry date of less than 12 months from activation of the card;
2. provide disclosure of the expiry date prominently on the device itself; and
3. give the consumer a method of checking the expiry date.<sup>121</sup>

ASIC has noted that it has some concerns that newer operators in the electronic payment market are now offering increasingly complex and high value products and are neither subscribing to, nor compliant with the Code. This leaves consumers without the protection of the requirements set out in the code.

ASIC suggests that a minimum expiry period that is consistent across all types of gift cards would help address a number of current issues with gift cards, but notes that currently this would require the subscription of all gift card issuers to the code.

Businesses that issue gift card products are able to subscribe to the Code. Products like gift cards would not be subject to the full requirements of the Code.<sup>122</sup> There is some scope to achieve consistency in terms, conditions and disclosure practices across different payment platforms. Legal commentary of the review also highlighted the benefits of streamlined regulation.<sup>123</sup> The Code provides for broad coverage across a range of electronic payment forms. Greater subscription to the Code, amongst gift card issuers, would be a positive step.

There are a number of benefits for gift card issuers subscribing to the Code. Subscription to the Code can allow consumers to be confident about purchasing and using gift card products

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<sup>121</sup> ePayments code. Available at <http://www.asic.gov.au/asic/asic.nsf/byheadline/ePayments-Code?openDocument> (accessed 22 May 2011).

<sup>122</sup> Products that do not store more than \$500 of value are deemed 'low value facilities' under the Code.

<sup>123</sup> Anastas, M. 'In the Spotlight: Gift Cards Under Review', *Australian Banking and Finance Law Bulletin*, March 2012, pp 162-164.

issued by Code subscribers. Where Code subscription is promoted to the consumer, gift card issuers are able to signal that they are offering a high quality product. The benefits of subscribing to the code are particularly pronounced where a gift card issuer may already operate a gift card program that is compliant with the Code.

On 11 May 2012, CCAAC held meetings with the retail peak bodies and gift card issuers. At these meetings, CCAAC expressed the view that some of the consumer concerns relating to the purchase and use of gift cards could be addressed through membership of the Code.

## **Findings**

Industry groups are encouraged to develop a set of best practice principles that can be promoted to their members. While industry participation in the ePayments code is encouraged, CCAAC does not consider that a voluntary code of conduct is likely to resolve some of the concerns raised by consumers. To avoid further calls for a regulatory response, industry may wish to explore whether there is any scope to promote best practice terms and conditions. This could be achieved through an accreditation or rating scheme based on a minimum set of requirements.

CCAAC proposes that industry be allowed time to develop and apply best practice standards with regard to gift cards. After three years, industry efforts to address current consumer concerns could be revisited.

CCAAC encourages ACL regulators to monitor any developments, or new evidence of systemic consumer detriment, that may arise. Should any new concerns arise, CCAAC considers that effective self-regulation should be considered as a first best option.

## **DEVELOPING A STRATEGIC NON-REGULATORY RESPONSE**

All components within a non-regulatory response should work together to achieve the objectives identified by CCAAC. A strategic non-regulatory response could work to improve business' understanding and compliance with existing obligations under the ACL, encourage gift card issuers to apply best practice terms and conditions as well as supporting businesses that exceed best practice. Consumer Affairs Australia and New Zealand (CAANZ) and its advisory committees are best placed to implement such a strategic response.



## PART VII—CONCLUSION

Under its terms of reference, CCAAC was required to explore and develop options to better protect consumers who purchase or receive gift card products. As part of the review, CCAAC has examined issues in relation to the purchase and use of gifts cards in Australia as well as the nature and cause of any consumer detriment that has been found. This has been informed through the views of stakeholders affected by gift card sale practices as well as the effectiveness of international regulatory approaches.

Within the Issues Paper released for public consultation, CCAAC presented a framework through which these issues would be examined. The Issues Paper noted that establishing the cause and degree of any consumer detriment is important before determining whether a policy response is required. It also noted that supporting evidence would assist in justifying any possible regulatory response.

The *OECD Consumer Policy Toolkit* has been used to better understand the issues as well as any need for options to address any consumer detriment arising from the sale of gift cards. In doing so CCAAC has explored consumer awareness of gift card terms and conditions, how and why gift card terms and conditions are applied as well as the accounting, record keeping and administration procedures that support the administration of gift card facilities.

CCAAC notes that gift cards are a market response to a consumer demand.

CCAAC acknowledges that while all terms and conditions are generally presented in a comprehensive manner, many consumers may not take the time to examine the details of the gift card contract. Gift card issuers have the responsibility to ensure that consumers have access to an appropriate level of information about the products that they buy and detailing terms and conditions on a website or on an associated document may not be sufficient in all circumstances.

Some gift cards are promoted as being ‘as good as cash’ and consumers may sometimes infer this from the messages that they receive from gift card issuers. Where the terms and conditions make them substantially different to cash, there is cause for the consumer to mistake how they work. Consequently, gift card issuers should consider how their broader marketing strategy is likely to shape consumer perceptions and understandings of how these products work. The existing consumer law framework may assist in ensuring that the appropriate information is provided to consumers.

Despite the concerns around the marketing of gift card products or disclosure of terms and conditions, CCAAC did not observe any structural market failures that warrant a regulatory response. CCAAC has found that there are clear instances of personal consumer detriment, but these do not justify a regulatory response. In particular, in determining this, CCAAC has considered the broader welfare considerations of the gift card market, and whether regulatory options are likely to provide meaningful assistance to consumers. Policy options such as requiring minimum expiry dates are unlikely to substantially increase redemption rates and may even work against consumers as they may be less likely to immediately redeem their gift cards.

It appears that many of the concerns relating to gift card products originate from recent insolvencies of notable Australian retailers. While it is understandable that consumers may

be frustrated by this, it is not clear that these issues can be easily resolved. CCAAC notes that there are many individuals who may suffer losses due to a business going into administration. Gift card holders, as unsecured creditors, may be unlikely to receive any proceeds from a liquidation process. CCAAC is unaware of any compelling arguments suggesting that gift card holders should be provided with priority status over other creditors. In addition, CCAAC finds that requiring gift card issuers to establish trust accounts to guard against losses to gift card holders may not be the most appropriate mechanism to protect gift card holders.

CCAAC has been asked to consider what practical options could be used to assist consumers. Australia's existing consumer protection framework may benefit consumers where gift cards are issued in accordance with consumer laws. In particular, the misleading and deceptive conduct provisions mean that gift card issuers cannot mislead consumers about the products which they are offering. CCAAC has found that most Australian retailers have a customer service focus and are likely to attempt to resolve a consumer complaint directly with the consumer. Where this does not occur, ACL regulators can offer alternative options for redress. On the other hand, a strategic non-regulatory response based on existing consumer education materials and activities could provide useful support to consumers when purchasing and using gift cards. CCAAC also encourages the industry to consider how participation in the ePayments code could be promoted. Industry should also consider how best practice terms and conditions could be promoted to avoid further calls for a regulatory response and to improve consumer satisfaction.



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## APPENDIX 1: THE GIFT CARD CONSULTATION PROCESS

In accordance with the terms of reference, this report has been informed by the views of stakeholders affected by gift card sale practices.

An Issues Paper titled *Gift cards in the Australian market* was released for public comment on 9 December 2011. Submissions closed on 2 March 2012 and submissions were received from a range of stakeholders. A total of 74 submissions were received; of these eight were confidential.

Written non-confidential submissions are available on the Treasury's website at [www.treasury.gov.au](http://www.treasury.gov.au). For a list of all non-confidential stakeholder submissions refer to Appendix 2.

In addition, a series of targeted consultations were undertaken based on the submissions, led by CCAAC member Mr Ray Steinwall. A panel met stakeholders on 11 May 2012 in Sydney, with additional discussions held via teleconference. A list of participants in the targeted consultations is set out below.

Participant	Date
<b>Sydney (face-to-face)</b>	
Australian National Retailers Association	11 May 2012
National Retail Association	11 May 2012
Australian Retailers Association and Australian Merchant Payments forum	11 May 2012
Wright Express	11 May 2012
Shopping Centre Council of Australia	11 May 2012
<b>Teleconferences</b>	
CHOICE	30 May 2012

## APPENDIX 2: LIST OF SUBMISSIONS

CCAAC received 75 submissions in response to this consultation. Of these submissions, eight were confidential.

Allan Radford	Performance Health Clinics
ANZ	Peter Kaus
Australian National Retailers Association	Phillip Lane
Australian Retailers Association	Phillip Lincoln
Australian Youth Forum	Queensland Consumers Association
Blackhawk Network	Queensland Law Society
Cardlimbo	Rae Elliot
Carol Davis-Khatri	Ray Murphy
Carol Stanley	Reid Industry Group
Choice	Rosaleen Anderson
Consumer Action Law Centre	Rosemary Huggins
Craig Macbride	Roxanne Holland
David Hall	Sandy Vigar
Debbie Croxford	Shane Allen
Derek Hackett	Shopping Centre Council of Australia
Diana Wang	Sue Gray
Doug Disher	Susan Griffin
Elaine Marley	Sylvia Yappas
Faruk Oturkmen	Tracey Marr
Float and Therapies	Universal Gift Card Pty Ltd
Glenn Wilson	Visa
Graeme Wass	Westfield
Heritage Bank	Wright Express Australia Pty Ltd
Indue Ltd	
James Wilson	
Jean Healey	
Jennifer Mullen	
Jim Bills	
Joel Krose	
John Mason	
Judith Powell	
Kathy Patterson	
Kim Thierfeldt	
Laura Lindley	
Law Council Of Australia	
Leila Agha	
Linda	
Linda Addison	
Lyn Kearney	
Marianne Van Weereld	
Mastercard	
Myer	
National Retail Association Ltd	
Nicky Jones	



# APPENDIX 3: SUMMARY OF SUBMISSIONS

Submission	Key Points
<b>Allan Radford</b>	<ul style="list-style-type: none"> <li>• Money does not expire and neither should gift cards. Gift cards are in reality just another form of currency.</li> <li>• Allowing a retailer to receive money and refuse to provide goods or services is immoral and is analogous to theft.</li> </ul>
<b>ANZ</b>	<ul style="list-style-type: none"> <li>• Many of the issues that apply to closed-loop gift cards do not apply to open-loop cards.</li> <li>• There is already regulation in place to protect consumers who purchase open loop cards.</li> <li>• Expiry dates are required as a condition of being part of the VISA payments facility.</li> </ul>
<b>Australian National Retailers Association</b>	<ul style="list-style-type: none"> <li>• The design, administration and manufacture of gift cards is far from costless.</li> <li>• The vast majority of gift card balances are redeemed within three months of being issued, with any remaining balance exhausted over the following nine months.</li> <li>• Retailers that offer two year expiry dates on gift cards report that it is quite rare for a gift card to be redeemed sometime between 12 and 24 months after being issued.</li> <li>• ANRA acknowledges that members have received complaints from gift card holders, primarily concerning the expiry date of a card or restrictions on use, however, the total number of complaints is extremely small (much less than one per cent) in comparison to the total number of gift cards issued.</li> <li>• Nominating a gift card expiry date provides the recipient with a greater incentive to redeem the card and place a reasonable limit on the cost of providing supporting information technology and administration.</li> <li>• Imposing an expiry date also creates a degree of certainty for the issuing retailer, and may have been chosen to reflect the accounting practices within the business.</li> <li>• Minimum purchase thresholds are in many instances a relic of past gift card systems; where gift cards were single use only, or the remaining balance on a gift card was not as easily amended or recorded.</li> <li>• Some retailers sell gift cards that cannot be used at every channel or service point within the issuing retailer but these restrictions are made known to the consumer.</li> <li>• There is also an opportunity for increased government-funded consumer education about gift cards.</li> <li>• Paying interest on gift cards would transform these products from being a promise to redeem for a purchase" into a financial product, which would result in the need for significantly more regulatory oversight and compliance costs for retailers.</li> <li>• The very limited circumstances that ANRA members might issue gift cards in lieu of a full cash refund remain in the interests of acting in good faith.</li> <li>• There is potential to focus on consumer education about their position in the event of insolvency and therefore consumer understanding of the risks involved in not redeeming gift cards in a timely manner — rather than changing the creditor priority of gift card holders in Australia.</li> <li>• ANRA's preferred approach is a voluntary code of practice that would include the following requirements:             <ul style="list-style-type: none"> <li>– Duration to expiry must be at least 12 months and either an expiry date or issue date (with length of validity) be printed clearly on the gift card or accompanying terms and conditions.</li> <li>– The gift card system should allow multiple purchases to be made, with stored value cards recording the decline in value either on the gift card or separately by the retailer.</li> <li>– The gift card should be accepted until the balance is zero (that is no low value purchases are excluded)</li> <li>– Customers should be able to check the remaining balance on their card after a transaction, or via a request in-person or online.</li> <li>– A copy of the key terms and conditions around the gift card use should be provided with the gift card at the time of sale (for example on packaging of the gift card), with full terms and conditions on the retailer's website and provided by the retailer directly on request. These key terms and conditions should clearly list any restrictions on use (for example not for use online, lost or stolen cards policy).</li> </ul> </li> <li>• An internal dispute process should be in place to deal with situations where a consumer thinks the retailer is not honouring the terms and conditions of the gift card.</li> </ul>
<b>Australian Retailers Association and Australian Merchant Payments</b>	<ul style="list-style-type: none"> <li>• In 2011, six major AMPF members issued more than 24 million gift cards which represent an estimated 68 per cent of the total Australian gift card market. These were all closed loop gift cards and represent around 75 per cent of closed loop gift cards issued in Australia. Total spend on these cards was approximately \$1.25 billion out of an estimated total market of between \$1.8 and \$2 billion in 2011.</li> <li>• According to the Global Prepaid Exchange (GPX)/Retail Decisions Australian Gift Card independent research conducted in 2009, a key factor in deciding to give a gift card is the dislike people have of giving or receiving an unwanted gift which is considered very wasteful in the current economic climate. A gift card allows the recipient to choose a gift they actually want. This is also important to retailers who prefer to reduce the number of gifts returned or exchanged by customers. In addition, 60 per cent of people receiving a gift card believed that it was better than</li> </ul>

<b>Forum (AMPF)</b>	<p>receiving cash. Less than 15 per cent of people disagreed with this proposition. 83 per cent of people receiving a gift card agreed that the best part is the choice such a card offers. 89 per cent believe that gift cards are easy to use.</p> <ul style="list-style-type: none"> <li>• For AMPF members, the average level of complaints is around 0.001 per cent of transactions as measured by calls received at merchants' customer service Help Desks.</li> <li>• Retailers want to provide a positive gift card experience to maximise the potential for future return visits. Any rules or limitations on the card which are too restrictive or any over-zealous interpretation by the retailer would be highly counter-productive to the whole purpose of the card.</li> <li>• Overall, around 98 per cent of gift cards issued by AMPF members are redeemed before expiry. The AMPF estimates that after allowing for grace periods, less than 0.2 per cent of gift cards issued by its members actually expire without being redeemed.</li> <li>• Open-loop cards often impose fees and charges which make closed-loop cards a more attractive option for consumers.</li> <li>• If new restrictions were applied, is possible they will increase issuer costs. If the cost increase was high enough, then potentially closed loop gift cards would no longer be offered free of charge to consumers.</li> <li>• It is common practice for a gift card to be sold mounted on some form of carrier. This carrier usually has the main terms and conditions printed upon it and also have the website and the telephone number where the purchaser or the redeemer may go to access the full terms and conditions. The retailer intends that the gift card should be given to the recipient while still mounted on the carrier.</li> <li>• The AMPF believes such a regulation would be counter-productive for consumers. The AMPF data shows that the longer the expiry period, the lower the redemption rate becomes. For cards expiring within 12 months, the redemption rate varies from 98 per cent to 99 per cent whereas for cards with longer expiry dates the redemption rate drops to 97 per cent.</li> </ul>
<b>Australian Youth Forum</b>	<ul style="list-style-type: none"> <li>• Young people are common recipients of gift cards and they think that gift cards are a good idea for young people in lieu of cash.</li> <li>• Most young people are unlikely to complain about their gift cards, but when they do they will usually talk to the retailer or their friends and family.</li> <li>• 68 per cent of survey respondents experienced some issue when it came to spending their gift card.</li> <li>• The most common cause of difficulty experienced by young people is expiry of the card (60 per cent).</li> <li>• Others experienced difficulties related to specific terms and conditions or closure of the relevant retail outlet.</li> <li>• Having the two year expiry date printed on the card, an on-line registration system, an email reminder system, and a gift card complaint number printed on the card were all suggested as practical measures that could assist consumers.</li> </ul>
<b>Blackhawk Network</b>	<ul style="list-style-type: none"> <li>• The gift card market in Australia is estimated to be reported between \$2billion and \$2.5 billion with millions of gift cards issued every year.</li> <li>• All card issuers provide consumer help lines and in Blackhawk's case, (where we issue the card ourselves) we often provide the first line of consumer enquiries via telephone.</li> <li>• It would appear that many consumers obtain their information from current affairs programs, which regularly fail to provide accurate or timely information on changes in the law.</li> <li>• Retailers as a general rule are sympathetic to a customer's concerns and will respect a customer's genuine complaint.</li> <li>• Many retailers, and card programs, including major retailer groups and some of the most popular cards in the market have a very flexible or 'no expiry' policy.</li> <li>• Australian consumers are generally well versed in terms and conditions and most consumers have an expectation that there will be some conditions.</li> <li>• The main difficulties with requiring a non-expiring card are: <ul style="list-style-type: none"> <li>– a contingent liability needs to be maintained for gift cards indefinitely as the gift card could be redeemed at any point in the future. This ties up significant funds, audit and compliance costs as well as making these funds un-available to the economy as a whole;</li> <li>– expiry dates assist greatly in reducing fraud; and</li> <li>– expiry dates assist with anti-money laundering obligations.</li> </ul> </li> <li>• In our experience, many retailers will agree to provide refunds or swap one gift card for another as part of their general consumer satisfaction processes. Most major retailers are well known to extend expiry dates, offer a 'grace period' or re-activate the card, where technically possible.</li> <li>• In the case of lost or stolen cards, as the purchase of gift cards is usually anonymous, it is virtually impossible to identify the validity of any potential claim.</li> <li>• In respect of gift cards that have already been sold and activated before the insolvency event, Blackhawk has generally already remitted the funds to the card issuer.</li> </ul>
<b>Cardlimbo</b>	<ul style="list-style-type: none"> <li>• The secondary market provides increased flexibility for consumers.</li> <li>• According to our data, 83 per cent of cards spent in first 6 months and around 10 per cent are unredeemed.</li> <li>• There is a high degree of variation in expiry dates. A standard minimum expiry date will enhance certainty and support educational efforts.</li> <li>• Terms and conditions should be communicated at point of sale and on the gift card itself.</li> <li>• Retailers should provide consumers with basic gift card services, including: <ul style="list-style-type: none"> <li>– A customer service contact</li> </ul> </li> </ul>



	<ul style="list-style-type: none"> <li>– The ability to check the balance of their gift card online or via the phone; and</li> <li>– An avenue for dispute.</li> </ul>
<b>Carol Davis-Khatri</b>	<ul style="list-style-type: none"> <li>• Gift vouchers can assist small businesses in increasing sales.</li> <li>• Businesses rely on repeat customers and do need to maintain good relations.</li> <li>• The businesses already have the money so the card should always be honoured.</li> </ul>
<b>Carol Stanley</b>	<ul style="list-style-type: none"> <li>• Gift cards issued as part of a charity fundraiser can sometimes have a shorter validity than those sold to consumers.</li> <li>• Costs can rise over time and so expiry dates are required to ensure that prices paid reflect the cost of the service.</li> </ul>
<b>CHOICE</b>	<ul style="list-style-type: none"> <li>• CHOICE supports the move to clamp down on anti-consumer practices relating to expiry and conditions of use in the \$1.5 billion gift card industry.</li> <li>• More than half of consumers surveyed in November 2011 experienced the biggest pitfall of gift cards — it expired before they were able to use its full value.</li> <li>• Retailer policies concerning honouring expired cards and grace periods are unclear and often rely on the goodwill and/or training of the shopfront worker.</li> <li>• Some cards disclose issue date and time period for expiry rather than the actual date of expiry, which can lead to consumers misunderstanding terms.</li> <li>• Some cards do not offer a website or phone number to check balances — it must be done in store.</li> <li>• Fees are more of a problem with Visa and MasterCard cards.</li> <li>• There is no evidence that seeking to extend expiry periods would do much to alleviate the issue of non-use. It may encourage hoarding of cards.</li> <li>• Raising consumer awareness of expiry dates will help reduce problems, as will competition in the industry.</li> <li>• The following approaches may address consumer concerns: <ul style="list-style-type: none"> <li>– Voluntary best practice terms for retailers, perhaps including an accreditation logo indicating compliance with the code.</li> <li>– Mandated disclosure requirements that require clear labels indicating when the card expires, not when it was issued, perhaps on the front of the card not the back. A page of fine print terms of conditions seems unlikely to reach or be read by the recipient.</li> </ul> </li> </ul>
<b>Consumer Action Law Centre</b>	<ul style="list-style-type: none"> <li>• Expiry dates do not protect any legitimate interests of the traders involved.</li> <li>• Traders should be prohibited from placing expiry dates on gift cards.</li> <li>• Unused gift cards are a windfall for traders, and their benefits would vastly outweigh any cost created by uncertainty from perpetual cards.</li> <li>• The rate of redemption of older cards would be low and would be predictable based on historical data.</li> <li>• Traders may have legitimate reasons for limiting the amount of change they will give on a gift card purchase. By returning a large amount of change, the costs of the card program may not be covered and margins not achieved.</li> <li>• Limitations on giving change or similar limitations on how credit can be used should not operate in a way that is unfair or unnecessary to protect the legitimate interests of the trader.</li> <li>• This will prevent residual amounts becoming stranded on the card.</li> <li>• Such terms may already be in breach of ACL unfair contract term provisions; however, these provisions are not well understood by many businesses.</li> <li>• The ACCC should take targeted enforcement action focusing on the use of unfair contract terms in gift cards to bring attention to trader obligations.</li> <li>• This could be remedied through tailored guidance to traders and consumers on consumer rights regarding gift cards and supporting targeted enforcement action.</li> <li>• In some cases consumers who purchase airline tickets or motor vehicles from traders that go insolvent are able to claim against a fund to reclaim their losses.</li> <li>• CCAAC could investigate further the costs and benefits of establishing a similar scheme to protect holders of gift cards when retailers become insolvent.</li> </ul>
<b>Craig MacBride</b>	<ul style="list-style-type: none"> <li>• Gift cards are just a more restrictive form of cash.</li> <li>• Consumer protection in this area is deficient when compared to other jurisdictions.</li> <li>• Companies which place an arbitrary time limit on gift card use are simply taking consumers' money and providing nothing for it, a clearly unfair practice.</li> <li>• Restrictions on transaction size are designed to prevent customers using what is, in effect, their own money.</li> <li>• Expiry dates and maintenance fees should be banned.</li> <li>• Apart from the case of insolvencies (an incredibly tiny proportion of the problem), the customer should always be able to receive 100 per cent of the value that was paid for the gift card, without restrictions.</li> <li>• Existing legislation has been working for many years in other countries.</li> </ul>
<b>David Hall</b>	<ul style="list-style-type: none"> <li>• There is some difficulty in redeeming gift cards that are only redeemable at designated stores and not authorised resellers and not online, particularly where significant distance has to be travelled to redeem the card.</li> </ul>
<b>Debbie Croxford</b>	<ul style="list-style-type: none"> <li>• If gift cards are paid for in cash then there should be absolutely no expiry date. Cash does not expire so neither should a gift card.</li> <li>• Lost or stolen gift cards should not be the stores responsibility or fault.</li> </ul>

<b>Derek Hackett</b>	<ul style="list-style-type: none"> <li>• There is no reason for gift cards to have an expiry date.</li> <li>• The fact that it costs the seller money to administer the scheme should surely be offset by the interest they would earn on the money waiting to be spent plus the money that is never redeemed.</li> </ul>
<b>Diana Wang</b>	<ul style="list-style-type: none"> <li>• Gift card should be treated as cash with no restrictions or expiry dates.</li> <li>• As there is no discount or bonus when using a gift card there is no reason to limit usage or apply an expiry date.</li> </ul>
<b>Doug Disher</b>	<ul style="list-style-type: none"> <li>• The only reason for expiry dates would seem to be to provide the trader with a windfall.</li> <li>• If an expired card is presented, the issuer should repurchase the card for the face value.</li> </ul>
<b>Elaine Marley</b>	<ul style="list-style-type: none"> <li>• Retailers are making a fortune out of expired cards — they take the money don't give anything in return. This is a loophole that needs to be closed.</li> <li>• Consumers do not see a reason for an expiry date on gift cards, they are given as a cash equivalent and should be there to use at the consumer's convenience.</li> <li>• Often expiry date information is too small to notice and most people are unaware that gift cards have an expiry date.</li> </ul>
<b>Faruk Ozturkmen</b>	<ul style="list-style-type: none"> <li>• Gift cards should always be redeemable for their original purchase price and should not expire.</li> </ul>
<b>Float and Therapies</b>	<ul style="list-style-type: none"> <li>• Gift vouchers are the life blood of small business when it comes back to profitability.</li> <li>• People buy gifts and give them on the terms clearly laid out on the voucher.</li> <li>• Recipients are aware of conditions but through complacency do not always adhere to the conditions.</li> <li>• Good business practice is to alleviate and help the customer.</li> <li>• Cash flow is the essence of small business. Business cannot afford to account for income on an unused basis as they are essentially bringing income forward by the advanced sale.</li> <li>• Regulation risks being bureaucratic such that small business will no longer issue gift cards</li> <li>• Any regulation on expiry dates should be limited to a 12 month expiry date with the conditions clearly and legibly explained.</li> </ul>
<b>Glenn Wilson</b>	<ul style="list-style-type: none"> <li>• If a gift card is purchased for the same value as store credit then the gift card should be treated as cash and should not expire.</li> <li>• If the issuer of the gift card wishes the holder to utilize the card within a certain time frame they can add an incentive to the card to encourage the user to act within a certain time frame.</li> <li>• If you lose a gift card it should be the same as losing cash.</li> <li>• Where the gift card is for a special offer for a limited time the buyer should be able to use the purchase value of the card as a credit towards the normal price.</li> <li>• There should be no limitations on using residual balances.</li> <li>• All terms and conditions should be on the card and on the attached paperwork which is to be kept separate.</li> </ul>
<b>Graeme Wass</b>	<ul style="list-style-type: none"> <li>• A gift card should be treated as though it is cash regardless of when it was purchased.</li> <li>• Gift cards should not have any restrictions applied when it comes to redeeming them.</li> </ul>
<b>Heritage Bank</b>	<ul style="list-style-type: none"> <li>• Open loop, scheme based prepaid cards are considerably different products from those producing the consumer issues that the Committee wishes to investigate and do not require further regulation.</li> <li>• Being open loop, scheme cards can be used at most merchants (including online) and card balances can normally be supplemented with cash to complete transactions.</li> <li>• Cash can typically be withdrawn at ATMs.</li> <li>• Cardholder's counterparty risk (in the case of insolvency) rests with the issuer, not a particular merchant, even if the card carries a merchant's brand.</li> <li>• Generally, under the Corporations Act these types of products are considered financial products and issuers must hold an Australian Financial Services Licence (AFSL), or hold authorisation from a licence holder, in order to Deal or Advise in relation to them.</li> <li>• This regulatory regime provides sufficient protection.</li> </ul>
<b>Indue Ltd</b>	<ul style="list-style-type: none"> <li>• Over-regulation of the gift card industry will create burdensome and expensive compliance requirements on gift card issuers.</li> <li>• Gift cards are simple and well understood product.</li> <li>• The adoption of burdensome compliance regimes will potentially dilute the gift card industry (especially for small retailers) or cause gift card issuers increase their fees and charges to cover the compliance costs.</li> <li>• Following the Canadian laws and imposing minimum expiration dates will impose significant costs to gift card issuers due to: <ul style="list-style-type: none"> <li>– gift card issuers being required to maintain contracts and legal arrangements with third party suppliers (such as settlement providers and gift card system providers) for an indefinite period of time. This is an impractical and burdensome requirement; and</li> <li>– the ongoing financial burden on gift card issuers' balance sheets (including potential financial reporting requirements and taxation and accounting issues).</li> </ul> </li> <li>• Gift cards that are open loop may have restrictions on low value use. These restrictions are usually imposed by the individual merchants who are not related to or associated with the gift card issuer.</li> </ul>

	<ul style="list-style-type: none"> <li>• There is very little variance between the terms and conditions of gift card products in the market place.</li> <li>• Gift card issuers may be able to issue a replacement gift card if the cardholder knows the gift card number. In our view, cardholder's are well informed that they should treat the gift card like cash.</li> <li>• There is also the potential that gift card issuers will struggle to receive funding from commercial entities (such as banks) if they issue gift cards were gift card holders entitled to preferential treatment in the event of insolvency.</li> <li>• In lieu of fees, the breakage earned by gift card issuers is how gift card issuers recover their expenses associated with administering the gift card products.</li> </ul>
<b>James Wilson</b>	<ul style="list-style-type: none"> <li>• If the card is for a store credit there should be no expiry date — it is the equivalent to money which has no expiry date.</li> <li>• If a card for a particular service expires it should revert to a store credit to the value of the original purchase.</li> <li>• Alternatively, gift cards could be refunded to the purchaser on expiry less a small processing charge.</li> <li>• The cost of providing the cards is offset by the benefit to the organisation that the recipient must buy from only that organisation.</li> </ul>
<b>Jean Healey</b>	<ul style="list-style-type: none"> <li>• Gift cards have been used as payment for labour. This is problematic where they expire.</li> </ul>
<b>Jennifer Mullen</b>	<ul style="list-style-type: none"> <li>• The cost of a good or service may increase over 12 months; however, the cash value should be honoured indefinitely.</li> <li>• Some gift cards for services can only be redeemed at the least popular times (excluding weekends) even though the same service was available for that value at any time.</li> <li>• If the receiver genuinely does not want a specified service they should be offered either a cash refund or choice of another service of equal value.</li> </ul>
<b>Jim Bills</b>	<ul style="list-style-type: none"> <li>• Some gift cards cannot be read, or are not activated properly and cannot be used.</li> <li>• Some businesses have grossly inadequate processes for managing the balance on cards, for example by reissuing a new gift card and providing cash to deal with remainder balances.</li> <li>• Gift cards should be regulated so that they do not have expiry dates or other restrictive terms and conditions.</li> </ul>
<b>Joel Krose</b>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>
<b>John Mason</b>	<ul style="list-style-type: none"> <li>• The retailer has been paid in full and there is no reason for any gift card to expire.</li> <li>• Gift cards can leave consumers unaware what the unused balance is.</li> <li>• Small balances should be refundable.</li> <li>• Many retailers have complex rules regarding how fast the unused balance expires.</li> <li>• Any conditions affecting unused balances should be clearly disclosed on the face of the gift card.</li> </ul>
<b>Judith Powell</b>	<ul style="list-style-type: none"> <li>• There are significant differences between cards that provide a store credit that can be used in exchange for any goods at a nominated retailer and cards or vouchers that can be exchanged for a specified experience.</li> <li>• In the case of a voucher for an experience a 12 month expiry date is fair because it allows the issuer to control for increases in the cost of providing the experience.</li> <li>• However, the current practice of imposing expiry dates on cards for store credit is unethical, as is any attempt to restrict the purchases that may be made using the gift card.</li> <li>• The policies that applied after some recent insolvencies are unfair.</li> </ul>
<b>Kathy Patterson</b>	<ul style="list-style-type: none"> <li>• Gift cards should not expire or have restrictions put on them.</li> <li>• The money paid for gift cards does not expire, so gift card balances should not expire.</li> </ul>
<b>Kim Thierfeldt</b>	<ul style="list-style-type: none"> <li>• If a business issues gift cards those cards should be seen as a liability for the company. This liability should be met irrespective of any expiry date.</li> </ul>
<b>Laura Lindley</b>	<ul style="list-style-type: none"> <li>• \$150 gift voucher could not be redeemed due to insolvency. Will not purchase them in future.</li> </ul>
<b>Law Council of Australia</b>	<ul style="list-style-type: none"> <li>• A gift card is the purchase of store credit ordinarily for use as a gift.</li> <li>• Revenue from expired gift cards arguably consists of a form of unjust enrichment.</li> <li>• Unless business can show a significant consumer benefit to the application of expiry dates they should be prohibited.</li> <li>• It should be possible to redeem small amounts for cash.</li> </ul>
<b>Leila Agha</b>	<ul style="list-style-type: none"> <li>• Expiry dates and other branding information that is clearly labelled on the face of the card may assist consumers in redeeming their gift cards.</li> <li>• Cash does not have an expiry date; these cards are supposed to be as good as cash.</li> <li>• There is often no flexibility or goodwill extended by some retailers.</li> <li>• There have been some difficulties in contacting gift card operators using telephone numbers provided on the back of gift cards.</li> </ul>

<b>Linda</b>	<ul style="list-style-type: none"> <li>• There are some objectionable terms and conditions associated with gift cards</li> <li>• Consumers expect gift card will be treated like cash.</li> <li>• Some retailers intentionally hide some of the less palatable terms and conditions from the purchaser.</li> <li>• Terms and conditions should be visible at point of sale (not behind counter) and salespersons should be required to indicate the expiry period.</li> </ul>
<b>Linda Addison</b>	<ul style="list-style-type: none"> <li>• The issuer takes cash for the gift card purchase and the cards should be returnable for a cash refunds.</li> </ul>
<b>Lyn Kearney</b>	<ul style="list-style-type: none"> <li>• If a gift card is purchased then the full amount should be honoured without any time constraints.</li> <li>• These monies are held in trust by the company for the benefit of the cardholder.</li> </ul>
<b>Marianne van Weereld</b>	<ul style="list-style-type: none"> <li>• Gift card should not have an expiry date and should be the same as cash.</li> <li>• It is better to just give cash, there are no restrictions and rules attached to it.</li> </ul>
<b>MasterCard</b>	<ul style="list-style-type: none"> <li>• Although frequently characterised as a form of 'store credit', it is arguably more fitting to describe gift cards as a form of prepaid instrument, the value of which can be redeemed at nominated locations.</li> <li>• From both a public policy and economic perspective, we strongly believe that greater adoption of open-loop products will substantially alleviate most limitations inherent in closed-loop systems, including, most importantly, those associated with the risk of insolvency.</li> <li>• In other jurisdictions, regulations that apply to gift cards use strict product definitions and generally reach only closed-loop products. Where open-loop products are covered, there are normally a range of exemptions so that gift card regulations do not interfere with other open-loop products.</li> <li>• Any regulation relating to gift cards should not apply to open loop cards.</li> <li>• MasterCard supports the imposition of reasonable fees to the extent there is adequate, clear and prior disclosure of such fees. Such fees provide a means for card issuers, program managers and distributors to secure some return on investment and cover the ongoing administrative costs.</li> </ul>
<b>Myer</b>	<ul style="list-style-type: none"> <li>• Having an expiry date encourages consumers to use their gift card within a period of time.</li> <li>• If gift cards are considered and are to be treated as cash, then it is the consumer's expectation that there is no limit to the value that can be redeemed in any one transaction.</li> <li>• A consumer who purchases a gift card does not expect the loaded value to diminish over time by deducting fees for redemption, balance enquiries etc.</li> <li>• The function of the gift card is to enable the consumer to continue to redeem the value on the card at the issuer's store until the value has been used up which is the way that Myer operates its gift card program. Requiring the issuing of change undermines this function.</li> <li>• Myer gift card terms and conditions are adequately disclosed to gift card purchasers and recipients. Major terms of use are printed on the back of the gift card and the gift card carrier and refer to the location of the full terms and conditions. Full terms and conditions are available on the website.</li> <li>• However, Myer does not consider gift card terms and conditions to be a major consideration for a purchaser or receiver of gift cards in their selection between different gift cards.</li> <li>• Consumers generally have a broad understanding that gift cards are a form of cash and can only be used at the issuer's store. In a retail environment, information at point of sale is not always appropriate or useful to the consumer.</li> <li>• There is no need to regulate. This is supported by the small number of complaints received in relation to gift cards.</li> </ul>
<b>National Retail Association Ltd</b>	<ul style="list-style-type: none"> <li>• The Australian retail sector is facing the toughest conditions experienced in decades</li> <li>• Regulation may create further burdens on retailers in terms of education, administration and compliance.</li> <li>• The existing consumer protection framework provides adequate protection for consumers with any existing problems capable of being dealt with under the generic consumer protection provisions of the ACL and the ASIC Act.</li> <li>• There is a responsibility for consumers to make themselves aware of the conditions attached to the use of gift cards.</li> <li>• There is limited empirical evidence available to establish that there is any significant abuse associated with the issue or use of gift cards.</li> <li>• There is widespread community awareness of the fact that expiry dates are attached to the use of gift cards.</li> <li>• It would be wrong to single out gift cards and contemplate regulation mandating record keeping and data collection related to unused gift card balances.</li> <li>• Education, awareness and the formulation of suitable guidelines would be sufficient measures to address the current level of concern.</li> </ul>
<b>Nicky Jones</b>	<ul style="list-style-type: none"> <li>• Gift cards now represent a significant proportion of consumer spending. CHOICE estimates \$1.5 billion was spent on gift cards in Australia in 2009/2010.</li> <li>• The Queensland Office of Fair Trading reported complaints relating to gift cards were in the top 10 most complained about products.</li> <li>• The inquiry should be limited to gift cards where the purchaser pays full value.</li> <li>• A large financial institution estimated that of the \$80 billion in gift cards sold in the US in 2006, \$8 billion of value would never be recouped by consumers.</li> </ul>

	<ul style="list-style-type: none"> <li>In the US, regulation at a state and federal level provides for minimum 5 year expiry date and limits post-purchase fees. Some states have further protection to ban expiry dates outright.</li> </ul> <p>Recommends:</p> <ul style="list-style-type: none"> <li>the prohibition on display or implementation of expiry dates;</li> <li>regulation similar to states and provinces in the US and Canada to be implemented through a new gift card act or through amendments to the CCA; and</li> <li>consumer complaint data collected by federal and state fair trading bodies to be made publically available.</li> </ul>
<b>Performance Health Clinics</b>	<ul style="list-style-type: none"> <li>Gift cards are very popular.</li> <li>Consumer expectations can be over demanding expecting compensation when a card is up to 6 months passed expiry on a particular offer that related to items purchase in bulk for one-off special sale.</li> <li>Government should not over regulate in favour of the consumer because of those few who cheat the system.</li> </ul>
<b>Peter Kaus</b>	<ul style="list-style-type: none"> <li>Consumers who spend \$50 or \$100 on a gift card, should have a longer time to redeem the card.</li> <li>Five years would be appropriate.</li> </ul>
<b>Phillip Lane</b>	<ul style="list-style-type: none"> <li>Insolvency devalued the gift card given to nephew.</li> <li>Expiry dates can be much sooner if the card is re-gifted/recycled.</li> </ul>
<b>Phillip Lincoln</b>	<ul style="list-style-type: none"> <li>The scope of the reform should be extended to include online daily deals which also impose expiry periods.</li> <li>Proprietors of online deals are already protected by limiting the number of offers that are taken up. It seems to me unfair to accept people's money for a limited offer and then impose an expiry date as well.</li> </ul>
<b>Queensland Consumers Association</b>	<ul style="list-style-type: none"> <li>Research is needed particularly on the incidence and extent of problems being experienced by consumers now, and likely to be in the future, and on possible solutions to these problems.</li> <li>Cautions against the use of data on complaints to regulators as the sole or even the main source of information about the extent and nature of consumer problems in this area.</li> <li>Some specific protections are needed which take account of the special features of gift cards, including that the fact that the card may have been given to the consumer may reduce the incentive to complain about unsatisfactory conditions, treatment, etc.</li> <li>Gift cards should provide: <ul style="list-style-type: none"> <li>a minimum expiry date of one year; and</li> <li>cash change of up to \$10 of any unused value on a gift card.</li> </ul> </li> <li>Before periods of increased consumer purchases of gift cards, for example Christmas, government agencies should remind consumers about some key issues to consider when buying and receiving gift cards.</li> </ul>
<b>Queensland Law Society</b>	<ul style="list-style-type: none"> <li>Terms and conditions associated are not made clear to the consumer.</li> <li>Retailers should be required to install signs that include a basic summary of terms and conditions that apply.</li> <li>The United States 'Consumer Deposit Priority' service may be an alternative to protect consumers who would otherwise be unsecured creditors.</li> </ul>
<b>Rae Elliot</b>	<ul style="list-style-type: none"> <li>Serious consideration should be given to adopting the American position.</li> <li>Government could contribute to making businesses more accountable and operate with more integrity.</li> </ul>
<b>Ray Murphy</b>	<ul style="list-style-type: none"> <li>Government has no ethical right to control business.</li> <li>The free market provides the best protection.</li> </ul>
<b>Reid Industry Group</b>	<ul style="list-style-type: none"> <li>Gift cards sold in regional locations that have limited access to the stores is a contributing factor to the increase in unredeemed cards.</li> <li>Gift cards should not be redeemable for cash. The giver chose a gift card not cash. This is an issue between the giver and the recipient, not the retailer and not the Government.</li> <li>Extending the expiry period may not make any difference.</li> <li>Profit is not budgeted from unredeemed gift cards.</li> </ul>
<b>Rosaleen Anderson</b>	<ul style="list-style-type: none"> <li>It is not acceptable that no circumstances or reasons for failing to redeemed cards within a set time limit are accepted.</li> </ul>
<b>Rosemary Huggins</b>	<ul style="list-style-type: none"> <li>While a gift card is unredeemed the goods will get more expensive and the recipient received less for the money stated on the card.</li> <li>They should always be able to be redeemed whenever the recipient decides.</li> <li>Businesses have no reason to put a time frame on the cards.</li> </ul>
<b>Roxanne Holland</b>	<ul style="list-style-type: none"> <li>Gift cards should not have expiry dates, and where they do, should allow the consumer to convert into cash with a 10 per cent fee.</li> </ul>
<b>Sandy Vigar</b>	<ul style="list-style-type: none"> <li>There should be no expiry date — the money has been paid, it should not be possible to void the card.</li> <li>There should be no fee or charge for use or redemption of cards.</li> <li>Terms and conditions should be attached to the card rather than available elsewhere.</li> </ul>

<b>Shane Allen</b>	<ul style="list-style-type: none"> <li>Existing legislation should prevent gift card issuers from retaining unused gift cards on expiry for example, through Unclaimed Money Acts.</li> <li>If a bank is holding money and cannot locate the account holder, the money does not become the property of the bank — but is to be transferred to the government.</li> <li>Legislation should prevent gift card issuers from contracting out of the obligation to perform the contract.</li> <li>The funds could be kept in a trust fund to be claimed when the issuer provides the goods or services.</li> <li>Unclaimed monies should revert to the government to be used for public purposes.</li> <li>This would also incentivise businesses to encourage consumers to redeem their gift cards.</li> </ul>
<b>Shopping Centre Council of Australia</b>	<ul style="list-style-type: none"> <li>CCAAC should adhere to the Guide for Ministerial Councils and National Standard Setting Bodies on Best Practice Regulation which requires a problem to be identified before considering a range of policy options including non-regulatory approaches.</li> <li>Consumer complaints should be considered in a proper context by citing the number of complaints as a proportion of the volume of gift cards sold in a year.</li> <li>Provided there is transparency on the part of the organisation which issues the gift card — which clearly addresses key matters such as expiry date; restrictions on low value use; fees and charges; and limitations on use — then there is no need for additional regulation by governments.</li> <li>It is important that gift cards have an expiry date. In the case of shopping centre gift cards this date is usually twelve months after the date of purchase. The onus should be on the gift card holder to fully redeem the gift card before the expiry date.</li> <li>There is no justification for standardising expiry dates since this is a matter which can vary from company to company for sound commercial reasons.</li> <li>Shopping centre companies which issue gift cards are in a different position to single retailers which do the same. Since the shopping centre company operates as an aggregator of tenants, its costs of administering and maintaining the gift card system are much higher than a single retailer issuer of cards.</li> <li>Shopping centre owners would like to be in a position where they could enforce all retailers within the shopping centre to accept their own gift card. Unfortunately, particularly in the case of major retailers (who often have their own gift card system), this not possible. Retailers accept gift cards at their own discretion and in some circumstances block gift card BIN numbers from working via their EFTPOS terminals. It is often the case that retailers without EFTPOS facilities are also unable to redeem the card, Once again this is a matter that is addressed in the terms and conditions of use of the gift card, ensuring appropriate disclosure is made.</li> <li>Requiring the issuer of a gift card to offer the customer a cash balance changes the nature of the transaction from being one of a gift card to being one of financial product, which is fundamentally different to the commercial intention of the gift card product.</li> </ul>
<b>Sue Gray</b>	<ul style="list-style-type: none"> <li>There should be no expiry date on gift cards.</li> </ul>
<b>Susan Griffin</b>	<ul style="list-style-type: none"> <li>There is no reason for expiry dates on gift cards.</li> <li>In the case where a service is being provided there may be a need to charge more for that service after a certain period but the consumer should not lose the value.</li> <li>The public need to be protected from companies who put unrealistic expiry dates on gift vouchers.</li> </ul>
<b>Sylvia Yappas</b>	<ul style="list-style-type: none"> <li>Gift cards should not have an expiry date as it should be treated as the same as cash.</li> </ul>
<b>Tracey Marr</b>	<ul style="list-style-type: none"> <li>There should be no expiry date or, after a certain period in which the card is not used, the money is returned to the purchaser.</li> </ul>
<b>Universal Gift Card Pty Ltd</b>	<ul style="list-style-type: none"> <li>Most of the problems identified in the Issues Paper relate to closed-loop cards, rather than open-loop cards which have robust consumer protection and product disclosure regulations in place.</li> <li>Any recommendations for regulatory reform proposed by CCAAC should relate only to closed-loop cards.</li> <li>Our cards are valid from between 13 and 19 months. We receive few complaints in regard to expiry. The expiry date is printed clearly on the card.</li> <li>The terms &amp; conditions on our cards indicate that change will not be given. Not one complaint about this has been received in 6 years. Any proposal to force merchants to give change on open-loop cards would cause merchants angst, because the Merchant Service Fee (MSF) would be calculated on a higher amount than the purchase amount.</li> <li>We will replace most lost/stolen Universal Gift Cards for a fee of \$15 to cover administrative costs.</li> <li>72 per cent of our cards are entirely redeemed, 27 per cent partially redeemed and 1 per cent wholly unredeemed.</li> <li>Open loop cards make money through issuance fees, interest on money held and breakage (unredeemed balances).</li> <li>If breakage were reduced, other fees may need to be increased (for example issuance fees, or the fees paid by cardholders for phone calls to customer service or for the replacement of lost/stolen cards).</li> </ul>



	<ul style="list-style-type: none"> <li>• Insolvency is less of an issue for open loop cards as the funds are held by the issuing bank.</li> </ul>
<b>Visa</b>	<ul style="list-style-type: none"> <li>• In light of the fact that open-loop prepaid products already offer a safe and convenient payment method, any further regulation of open-loop cards would be unnecessary and could reduce flexibility and innovation in the Australian prepaid market.</li> <li>• Visa supports the clear disclosure of terms and conditions, including expiry dates and fees.</li> <li>• Consumers of open loop products are protected from losses arising from the insolvency of particular merchants the value is typically held by an ADI.</li> <li>• Visa prepaid products allow consumers to use any remaining low balance to make a small value purchase at any merchant accepting a Visa card.</li> <li>• Visa does not set fee levels, however, the rapid growth of open loop cards in Australia supports the view that consumers believe the fee levels are justified in terms of the convenience and security offered by the products.</li> <li>• Open loop products rely on the ability to impose reasonable fees. Without this ability there is a strong possibility many open loop issuer would stop offering these products in Australia.</li> </ul>
<b>Westfield Group</b>	<ul style="list-style-type: none"> <li>• Some retailers do not accept shopping centre gift card programs as they have their own proprietary gift cards.</li> <li>• A list of retailers who accept these gift cards is made available to consumers on the website.</li> <li>• Issue fees are charged to facilitate the administration of gift card programs.</li> </ul>
<b>Wright Express Australia Pty Ltd</b>	<ul style="list-style-type: none"> <li>• Complaint volumes have been relatively very low. Of these 30 per cent relate to expiry dates.</li> <li>• Complaints about expiry dates are generally the result of the card being forgotten or misplaced rather than misunderstanding the expiry date.</li> <li>• Most retailers offer a 30 day grace period.</li> <li>• Terms and conditions generally appear on the packaging provided with the card and on the website.</li> </ul>



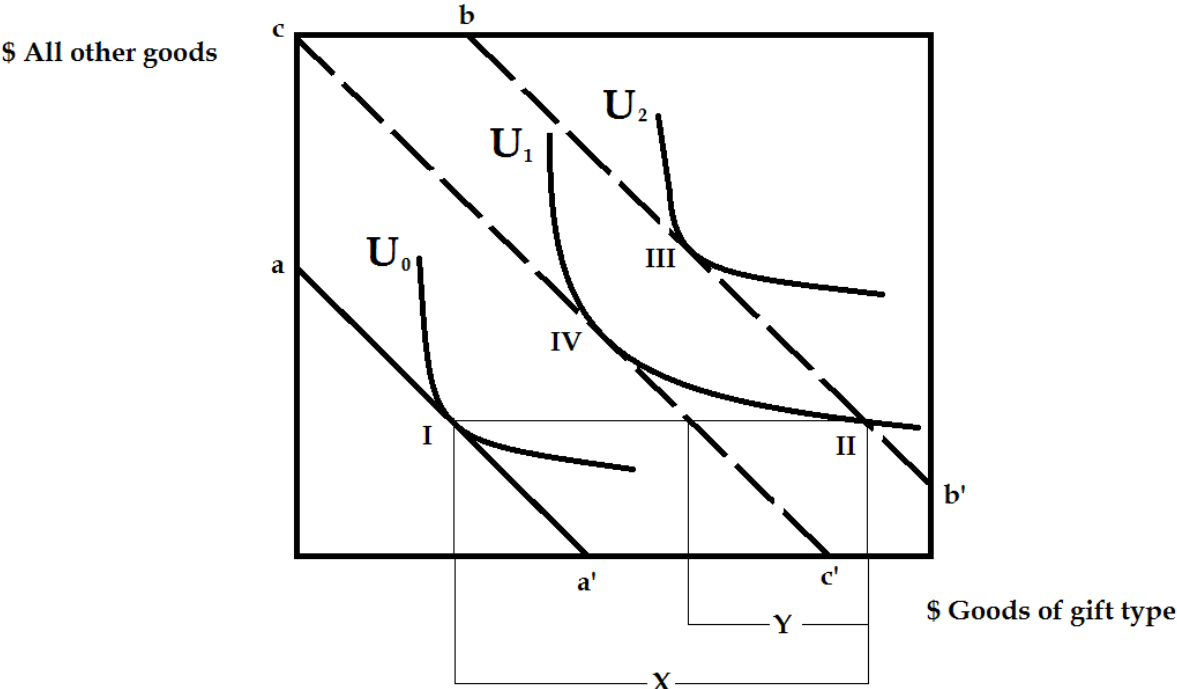
# APPENDIX 4: COMPARISON OF GIFT CHOICES

Factor affecting choice	Cash	Gift card	Actual product
<b>Difficulty of purchase</b>	N/A	can be easily purchased at the issuer's store or at supermarkets or service stations	the product may only be available at some retailers and may require some search
<b>Product characteristics</b>	simple product that is well understood by the community	complex product that requires some consideration as to the terms and conditions that apply	can be highly complex in terms of product features that need to be considered to ensure it is an appropriate gift choice
<b>Effort required to choose between alternatives</b>	N/A	some effort required to select gift card from appropriate issuer	high effort required to ensure that the gift choice is appropriate to the receiver's needs
<b>Benefit to the receiver</b>	of high benefit as the receiver can choose a gift of their choice	likely to be of high benefit as the receiver can choose a gift of their choice, but terms and conditions apply	the benefit to the receiver is dependent on the gift choice being appropriate to their needs
<b>Benefit to the giver</b>	requires minimal effort, but may not be appropriate to all gift giving situations	requires some effort, and may be appropriate to some gift giving situations	may require a lot of effort, however, a well-chosen gift is likely to be well received

# APPENDIX 5: GIFT CARDS AND CONSUMER WELFARE

This appendix examines consumer welfare in the context of gift cards from an economic perspective. In doing so it is possible to examine how gift card holders are affected when engaging in the market for gift cards.

The economic literature examines the welfare implications of gift giving where the receiver would have otherwise chosen a different gift. By not having a choice, the receiver is made worse off than they would be if they were able to choose their own gift. This welfare loss is called a deadweight loss as it is not simply a transfer of welfare from one individual to another, but rather welfare that is altogether lost. The deadweight loss to the gift receiver can be measured as the dollar amount that the receiver would be willing to give up in order to select their own gift, for example by receiving cash instead of a non-cash gift.



The diagram<sup>124</sup> demonstrates this principle by examining the receiver’s budget constraint (which measures the receiver’s total consumption possibilities) together with a line that represents consumption combinations where welfare, or utility, is the same across different consumption possibilities.<sup>125</sup> The horizontal and vertical axes measure the dollar value of goods in the receiver’s possession. The horizontal axis represents goods of the kind that are given to them as a gift. The vertical axis represents all other goods that could be consumed.

The receiver’s budget constraint is shown at aa’. Here, the receiver maximises their welfare, denoted by U<sub>0</sub>, by consuming the bundle of goods at point I. A gift, shown by distance X, is given to the receiver and their bundle is now at II on the hypothetical budget constraint at bb’. However, the receiver’s welfare, denoted by U<sub>1</sub>, is not maximised relative to alternative

<sup>124</sup> Adapted from Waldfogel, J 1993, *The Deadweight Loss of Christmas*, The American Economic Review, 83:5, pp 1328-1336.

<sup>125</sup> The welfare lines (U<sub>0</sub>, U<sub>1</sub>, U<sub>2</sub>) are convex to the origin to demonstrate the receivers preference for variety where U<sub>1</sub> is preferred to U<sub>0</sub> and U<sub>2</sub> is preferred to U<sub>1</sub>.

bundles of the same dollar value. If the receiver was given a dollar amount to the same dollar value of the gift,  $X$ , they would optimise their welfare, denoted by  $U_2$ , by consuming at III. The deadweight loss associated with consuming at II (instead of III) can be measured by the dollar amount of goods, shown by distance  $Y$ , that the receiver would be willing to forgo in order to consume at a consumption bundle of their own choosing, denoted by IV on the hypothetical budget constraint at  $cc'$ .

In summary, where the gift card holder is able to select their own gift, they can choose from alternatives that better suit their needs. Where a giver selects a gift, there is a chance that the receiver will not choose the gift that the receiver most prefers. Accordingly, the receiver can be made better off by providing them with the option to select their own gift.

## APPENDIX 6: COMPLAINTS DATA

All ACL regulators have received complaints relating to gift cards. CCAAC has had the opportunity to review these complaints and has found that many of these complaints relate to the recent insolvencies of some Australian retailers. There were, however, other complaints made in relation to the terms and conditions of gift cards as well as their disclosure.

For example, from January 2009 to July 2011 the following complaints were received in one jurisdiction.

<b>Issue</b>	<b>Number</b>	<b>Percentage of total complaints</b>	<b>Percentage of total complaints that do not relate to insolvency</b>
<b>Insolvency</b>	529	90 per cent	
<b>Dissatisfaction with terms and conditions</b>	29	5 per cent	50 per cent
<b>Poor disclosure of terms and conditions</b>	21	4 per cent	6 per cent
<b>Trader did not otherwise act appropriately</b>	8	1 per cent	14 per cent
<b>Total</b>	587		

## APPENDIX 7: SAMPLE OF TYPICAL COMPLAINTS

Complaint Type*	Details
Gift card administration	faulty gift card unable to be used on multiple attempts
Gift card administration	gift card received for use at a retailer that has since become insolvent
Gift card terms and conditions	a cinema voucher did not have an expiry date on it and the customer was told it had expired
Gift card terms and conditions	purchased cinema pass online with a \$6 booking fee not disclosed
Gift card administration	accommodation gift voucher was purchased with the hotel refusing to supply the service
Gift card terms and conditions	terms and conditions of gift card not adequately disclosed upon purchase
Gift card terms and conditions	gift card which was given instead of a refund, had expired
Gift card terms and conditions	sales staff misrepresented the terms and conditions of a gift card
Gift card terms and conditions	conditions of use not clear or apparent on website used to purchase a gift card
Gift card administration	gift card not accepted as it was considered to be non-genuine by the retailer
Gift card administration	a \$75 item was purchased with a \$100 gift card with the retailer refusing to give change or reissue the card with the remaining credit

\* This is not a representative sample as some complaint types are more common than others. Examples provided by State and Territory regulators, ASIC and the ACCC.

## APPENDIX 8: EXAMPLES OF GIFT CARD TERMS AND CONDITIONS

Gift Card			
Terms and Conditions*	A	B	C
<b>Gift card type</b>	<i>Chain store retailer</i>	<i>Chain store retailer</i>	<i>Shopping centre</i>
<b>Expiry date</b>	<i>The gift card is valid to make purchases for two years after it is issued.</i>	<i>Expiry dates do not apply.</i>	<i>The gift card is valid to make purchases for one year after it is issued.</i>
<b>Restrictions on low value use</b>	<i>The minimum that can be loaded onto a card is \$5, however, there are no restrictions on low value purchases.</i>	<i>Restrictions on low value use do not apply.</i>	<i>There are no restrictions on low value purchases, however, individual retailers may apply different conditions on use.</i>
<b>Fees and charges</b>	<i>N/A</i>	<i>N/A</i>	<i>\$1.95 payable upon purchase.</i>
<b>Limitations on use with respect to retailers that accept the gift card</b>	<i>Some specific exclusions including use at specific stores within a chain.</i>	<i>No specific exclusions within the chain.</i>	<i>Not all retailers within the shopping centre accept the gift card.</i>
<b>Receiving change</b>	<i>#Remaining value is stored for future use.</i>	<i>Up to \$9.95 can be given in change.</i>	<i>Remaining value is stored for future use.</i>
<b>Lost, damaged or stolen gift cards</b>	<i>Lost, damaged or stolen gift cards are not replaced.</i>	<i>Lost, damaged or stolen gift cards are not replaced.</i>	<i>Lost or stolen gift cards are replaced upon evidence of proof of purchase and card number.</i>

\*These examples are based on observed terms and conditions applied to gift cards in the Australian market.

#For this gift card the consumer is now able to use the remaining value to be used towards the value of purchases in excess of the card's remaining value.

