

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Competition and Consumer Act 2010

Treasury Laws Amendment (Gift Cards) Regulations 2018

Section 139G of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

On 20 September 2018, the Assistant Treasurer introduced legislation to create a national regime for the regulation of gift cards. This legislation, once passed, will insert provisions into the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010*) which provide that a person must not:

- supply a gift card to a consumer without a minimum three year expiry period – section 99B (or they commit an offence – section 191A);
- supply a gift card to a consumer without expiry information prominently disclosed on the gift card itself – section 99C (or they commit an offence – section 191B);
- supply a gift card to a consumer with terms and conditions that allow or require the payment of banned post-supply fees – section 99D (or they commit an offence – section 191C); and
- demand or receive banned post-supply fees – section 99E (or they commit an offence – section 191D).

Sections 99G and 191E of the Bill provides that regulations may limit the application of the requirements and related offence provision.

The purpose of the *Treasury Laws Amendment (Gift Cards) Regulations 2018* (the Regulations) is to insert provisions into the *Competition and Consumer Regulations 2010* (the CCA Regulations) to:

- specify items that are not gift cards;
- provide which fees can continue to be charged after a gift card is supplied; and
- exempt gift cards, persons or gift cards supplied in circumstances from some or all of the requirements.

The Regulations commence on the day after they are registered on the Federal Register of Legislation and apply to gift cards supplied on or after 1 November 2019.

A consultation paper on issues to be included in the regulations was released together with the draft Bill, from 26 July 2018 to 9 August 2018. Twenty-five written

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submissions were received and have been considered in the development of the Regulations.

Details of the Regulations are set out in the Attachment.

The Act does not specify any conditions that need to be met before the power to make the Regulations are exercised.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The *Competition and Consumer Regulations 2010* are exempt from sunseting.

The Regulation Impact Statement was published in full in the Explanatory Memorandum to the Gift Cards Bill.

Attachment

Details of the *Treasury Laws Amendment (Gift Cards) Regulations 2018*

Clause 1 – Name of Regulations

This section provides that the title of the Regulations is the *Treasury Laws Amendment (Gift Cards) Regulations 2018*.

Clause 2 – Commencement

This section provides that the Regulations commence the day after it is registered.

Clause 3 – Authority

This section provides that the Regulations are made under the *Competition and Consumer Act 2010 (CCA)*.

Clause 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other items in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Gift cards

Definition of gift cards

Section 99A of the Bill defines gift cards to mean an article that is commonly known to be a gift card or voucher, whether in physical or electronic form and is redeemable for goods or services. Section 99A also provides that regulations can be made to add to, or exempt items from, the definition of gift card.

As noted at paragraph 1.24 of the Explanatory Memorandum to the Bill, credit, charge and debit cards, public transport tickets, buy a certain number, get one free-style customer loyalty cards (e.g. coffee cards); and discount offers and advertising material are not commonly known as a gift card and therefore do not need to be specifically exempted.

Regulation 89A prescribes items that are not gift cards to make clear that certain cards are not subject to the reforms.

Reloadable pre-paid cards

Regulation 89A(a) prescribes that the definition of a gift card does not include cards that can be used to make a payment for goods and services and can have its value increased after it has been issued.

These cards are often referred to as reloadable prepaid cards. Such cards are not typically used as gift cards. They are more commonly used repeatedly by single individuals to make payments, initially with the preloaded value, but thereafter using funds they load onto the card.

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Reloadable pre-paid cards are considered to be financial products and are regulated by the *Corporations Act 2001*.

Note for consultation: This is similar to the exemption provided by the NSW regime [regulation 23A(1)(b)].

Pre-paid electricity, gas or a telecommunication service cards

Regulation 89A(b) prescribes that the definition of a gift card does not include cards that are only redeemable in relation to electricity, gas or a telecommunication service.

Cards of this kind are generally used by the person who purchased the card to pre-pay electricity, internet or mobile phone charges rather than as gift cards.

This exemption does not cover cards that can be redeemed for music streaming or video game services.

Note for consultation: This is similar to an exemption provided by the NSW regime [regulation 23A(1)(d)].

Post-supply fees

Section 99D of the Bill provides that a person must not supply a gift card with terms and conditions that allow for prohibited post-supply fees to be charged. Section 191C provides that it is an offence to do so.

Section 99E provides that a person must not demand or receive payment of a post-supply fee. Section 191D provides that it is an offence to do so.

Subsection 99D(2) of the Bill provides that regulations will be made to specify fees and charges that can be charged after a card is supplied.

Regulation 89B is an exhaustive list of permitted fees. These are fees or charges for:

- making a booking;
- disputing a transaction;
- the reissue of a lost, stolen or damaged card;
- foreign currency transactions; and
- payment surcharges.

The ban on post-purchase fees is not intended to include the fees that businesses normally charge to recover the costs of settling individual purchases made by consumers through payment systems. For example, these transactions may incur currency conversion fees (such as when a card is used for purchases at an overseas website), fees for disputed transactions and payment surcharges (e.g. charges which relate to the cost of renting and maintaining payment terminals for a payment system). For the avoidance of doubt, the list of permitted fees includes booking fees that

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merchants apply irrespective of payment methods; and fees merchants usually charge for replacing any types of cards.

The ban on post-purchase fees applies to fees charged to consumers for providing administrative support for the operation of gift cards. These fees have the potential to be a significant and ongoing source of consumer detriment affecting all consumers who receive a gift card. In particular, certain types of post-purchase fees could be used as a de facto expiry period (as the funds could erode unless the card is used by a certain date). Examples of fees that will no longer be allowed include card activation fees, balance checking fees, monthly account keeping fees and fees charged if the card is inactive for a period of time.

Businesses can also continue to charge upfront fees on purchases of gift cards, as consumers are able to make informed decisions about these fees at the point of supply of the gift card.

Exemptions from all of the requirements

Regulation 89C prescribes specific kinds of gift cards that are exempt from all of the requirements. That means this kind of gift card is not required to have a minimum three year expiry period, is not subject to the disclosure requirements and is not prohibited from charging post-supply fees.

Pre-owned gift cards supplied through a second-hand market

Regulation 89C(2) exempts pre-owned gift cards sold as second-hand goods from all requirements.

This exemption allows a person to supply gift cards that are second hand goods without complying with the minimum expiry period, the ban on post-supply fees or requirement to disclose expiry information.

The full exemption recognises that suppliers of second hand cards are unable to alter the expiry period on the gift cards or amend any terms and conditions of these cards relating to fees. Accordingly, the exemption eliminates the potential for the reforms to impede the operation of a market for pre-owned gift cards, which benefits consumers by allowing them to obtain some value for unwanted gift cards that would otherwise expire.

After 1 November 2019, it is expected that all new gift cards supplied to consumers will comply with the requirements of these reforms. Therefore, second hand gift cards are likely to already have the expiry date displayed on them and will not be subject to post supply fees in a majority of the cases.

Exemptions from the minimum three year expiry period

Regulation 89C(3) prescribes specific kinds of gift cards that are exempt from the requirement to have a minimum three year expiry period.

However, these kinds of gift card are still subject to the disclosure requirements (sections 99C and 191B) and prohibitions on post-supply fees (sections 99D, 99E, 191C and 191D). Applying these requirements meets the objectives of the reforms,

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including to reduce loss to consumers. In particular, displaying expiry information will make any shorter expiry period resulting from the exemptions clear to the user of the gift card. Similarly, the reasons for prohibiting post-supply fees are equally applicable to cards with shorter expiry periods.

Gift cards supplied/redeemable for goods or services only available for a limited time

Regulation 89C(1) exempts gift cards from the minimum three year expiry period where they are only redeemable for a particular good or service that is only available for a limited period of time from the requirement to have a minimum three year expiry period.

This exemption recognises that it would not be practical for a gift card to be redeemable after a particular good or service ceases to be available. This would typically occur when a voucher is supplied for one-off or time-bound event (e.g. a temporary exhibition, a festival, a one-night only concert, or a theatre production with a limited season) that cannot be exchanged for another event; or for gift cards redeemable for limited edition goods that are not available at any other time.

Note for consultation: This is similar to an exemption provided by the NSW regime [regulation 23A(1)].

Gift cards supplied as part of a temporary marketing promotion to the purchaser of a good or service in connection with that purchase

Regulation 89C(3)(a) exempts gift cards from the minimum three year expiry period where they are supplied to the purchaser of goods or services in connection with the purchase of the goods or services as part of a temporary marketing promotion. For example, a promotion in which consumers receive a \$100 gift card if they purchase a white good within the next calendar month.

This is one of three exemptions for temporary marketing activities, which address the potential for the reforms to reduce the viability of gift card offers made by businesses to consumers. New businesses typically use these offers to build up their customer base. Other businesses, especially small businesses, often use temporary promotions to manage demand during off-peak periods and to manage stock levels. A three year expiry period would reduce the ability of businesses to manage short term demand and stock levels using gift cards. If such offers are curtailed, it would also lead to detriment to consumers.

Note for consultation: This is similar to an exemption provided by the NSW regime [regulation 23A(1)(f)].

Gift cards supplied redeemable for particular goods or services supplied at a genuine discount

Regulation 89C(1)(b) exempts gift cards from the minimum three year expiry period where they are:

- only redeemable for a particular good or service (i.e. this will not apply to cards that are cash denominated cards); and

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- supplied at a discount on the market value of the good or service that a reasonable person would consider to be a genuine discount on the market value of the good or service.

For example, a health and wellness centre offers gift vouchers for a massage normally valued at \$100 for a price of \$65.

This is a second temporary marketing exemption, which is intended to not impede businesses wishing to clear inventory or increase demand for goods and services, while also ensuring that consumers receive a genuine discount.

The exemption references a ‘genuine’ discount as there is a risk that businesses could use small discounts to avoid the three-year expiry period requirements. It is impractical to specify a quantum for the size of a genuine discount given the potential for large variations in profit margins across individual businesses and industries more broadly. For this reason, the exemption references what a reasonable person would consider a genuine discount to ameliorate this risk as much as possible.

Note for consultation: This is similar to an exemption provided by the NSW regime [regulation 23A(1)(j)].

Gift cards supplied to certain charities and government agencies

Regulation 89C(3)(b) exempts gift cards from the minimum three year expiry period where they are supplied to:

- Local, state and commonwealth government agencies and authorities.
 - For example, where local councils, state and commonwealth departments may purchase gift cards to provide to residents following a natural disaster.
- An entity registered under the *Australian Charities and Not-for-profit Commission Act 2012* as having the purpose of advancing social or public welfare (subtype three).
 - For example, organisations whose purpose involves relieving the poverty, distress or disadvantage of individuals or families may supply gift cards to clients to achieve that purpose.

Government agencies and certain charities require the flexibility to contract for the provision of gift cards with expiry dates less than three years in order to suit particular program needs. An example is where a local government or charity is seeking to ensure welfare or disaster relief is used for immediate needs. Although this means these gift card users will not have the right to a three year expiry period, they may still contract with suppliers to provide a three-year period. Exempting this circumstance provides these consumers with needed flexibility.

Gift cards supplied as part of employee reward schemes

Regulation 89C(3)(c) exempts gift cards that are supplied as part of employee rewards schemes.

There are a myriad of different contractual and administrative arrangements for schemes operated by employers to provide gift cards as rewards to employees. For

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example, employers may manage a scheme in-house and provide gift cards for use at their own businesses or may engage a third party provider to manage or operate the scheme, with the employee being able to choose among a range of gift cards from other businesses. The particular arrangements of the scheme may affect the handover process of the gift cards, so that some employees may be handed a gift card by their employer while other employees may select it from a third-party website.

Regardless of the type of scheme, where gift cards are supplied as part of an employee reward scheme, they are exempt from the minimum three year expiry requirement. This will ensure a uniform approach for all employee reward schemes. Nonetheless, employees will be protected under the ACL as the gift cards must comply with the disclosure and post-supply fee requirements.

As these schemes are paid for by employers there is minimal risk of financial harm or detriment to the recipient employee.

Note for consultation: This is similar to an exemption provided by the NSW regime [regulation 23A(1)(f)].

Cards donated for promotional purposes

Regulation 89C(3)(d) exempts gift cards from the minimum three year expiry period where they are donated by the supplier for a promotional purpose.

This is the third temporary marketing exemption and allows businesses the flexibility to give away promotional gift cards to stimulate short term demand for goods and services. This is particularly important for new businesses seeking to build up a customer base, particularly small businesses. It also enables businesses to give away cards to schools and charities for fundraising without having to provide a three year expiry period, removing a disincentive for such donations.

Examples:

- Retail Pty Ltd is celebrating its first birthday. As part of celebrations, staff are handing out gift cards to the value of \$15 to anyone who passes by their shopfront on that day. Recipients are not obliged to purchase or exchange anything in order to receive the gift card. Cassidy accepts a gift card handed to her by an employee as she walks past the shopfront. In these circumstances, Retail Pty Ltd will not be required to provide Cassidy with a minimum three year expiry period as she received the gift card without sale or exchange.
- Ruth is asked by CPU Pty Ltd to attend a 1 hour focus group on how CPU Pty Ltd can improve its store layout and consumer experience. Ruth is required to attend the focus group in person and provide her personal details. In exchange, CPU Pty Ltd will provide all attendees with a \$50 gift card that can be spent at any shop. In these circumstances, CPU Pty Ltd will be required to provide Ruth with a minimum three year expiry period for her gift card.

As consumers receiving promotional cards without sale or exchange experience relatively minor detriment if the card expires before they can use it is appropriate to exempt them from the minimum expiry date requirement.

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Application of offences

Regulation 92A provides that the relevant offence provisions do not apply to gift cards specified in the Regulations.