SHOPPING CENTRE
COUNCIL OF AUSTRALIA

EXPOSURE DRAFT

COMPETITION AND CONSUMER AMENDMENT (GIFT CARDS) BILL 2018

SHOPPING CENTRE COUNCIL OF AUSTRALIA

The Shopping Centre Council of Australia (SCCA) represents Australia's major owners, managers and developers of shopping centres. A list of the SCCA's membership is available here.

Subject to the resolution of the issues raised in this submission, and in general terms, the SCCA supports the proposal to regulate nationally a requirement for gift cards to have a minimum three-year expiry period. As was detailed in our submission to the Consultation Regulation Impact Statement, a national approach is preferred to alternatives which were also subject to consideration, specifically, 1) banning the application of expiry dates altogether, and 2) status quo (i.e by default, allowing states and territories to continue to act unilaterally to impose what may be highly variable regulatory regimes).

Our comments in this submission are limited to the draft exposure Bill. We do not seek to re-prosecute our views on regulatory intervention in the operation of gift card schemes or the issues which were tabled in the context of the recent reforms in NSW.

We appreciated the opportunity to meet with Treasury officials during the consultation period on the Bill and would be pleased to meet with officials to discuss the issues raised in this submission.

EXPOSURE DRAFT

Display of day gift card ceases to be redeemable

The proposal to require the prominent disclosure on a gift card of the day it ceases to be redeemable (99B(1)(b)(i)) is unnecessarily prescriptive.

The current proposed wording in the draft exposure Bill does not accommodate for what is understood to be a relatively common industry practice with regard to the disclosure of expiry/validity periods, specifically the prominent disclosure of a period (e.g. three years) with reference to the actual date of issue of the card in a manner that makes it clear that it is an expiry date. This approach to disclosure is contemplated under the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211.*

In this regard, we note that the proposed approach seems inconsistent with the view expressed in the explanatory material which accompanies the exposure draft Bill, specifically the statement at 1.7 that "*...this is largely consistent with industry practice, with a majority of gift cards already displaying this information*".

While the prominent disclosure of an expiry/validity period is "*...largely consistent with industry practice*", the approach proposed to be regulated under the Bill does not necessarily reflect this practice.

There are a range of potential consequences of the proposal to require the disclosure of a specific date of expiry, including:

- A potential requirement for the bulk re-printing of gift cards (and disposal of existing stock) to satisfy the more prescriptive obligation (this may even be required of scheme operators which have already had to re-design and re-print their gift card stock to meet the obligations recently imposed in NSW);
- The need for new processes and staff retraining to avoid the potential for unintended human error in the calculation and/or transcription of a specific future expiry date, particularly in busy trading periods (e.g. pre-Christmas), which may cause consumer detriment; and
- Inconsistency with the parameters detailed in the *ASIC Corporations (Non-cash Payment Facilities) Instrument 2016/211*, which already applies to some gift card products.

In more general terms, there was no evidence provided in the Consultation Regulation Impact Statement, the consultation paper on the proposed regulation or the explanatory material which accompanies the Bill which demonstrates that consumers are challenged or confused by current approaches to the display of expiry dates and validity periods on gift cards.

The SCCA recommends that Treasury consider a more 'neutral' approach regarding the prominent display of expiry/validity periods on gift cards. For example, prominent display in a way where a gift card recipient could reasonably become informed of the period after which the gift card ceases to be redeemable.

'Supply', re-supply and liability

We note the exposure draft Bill proposes to tie the proposed new obligations, and associated enforcement provisions, to the 'supply' of a gift card in trade or commerce. This is a departure from the premise of the 'sale' of a gift card which was adopted in NSW.

Remaining cognisant of the complex supply chains associated with some gift card products, we note the potential for issues of liability to arise in the event of non-compliance within a supply chain (i.e. determining which person within the relevant supply chain may attract a penalty).

For example, a gift card issuer (i.e the 'original supplier') should not be held liable for a third-party re-supplying a non-compliant gift card to a consumer (e.g. in circumstances where the expiry date needs to be physically hand written on the card when supplied to a consumer, a retailer supplies a gift card which does not have the expiry date written on the card - in such a case, it is not within the control of the original supplier to ensure that the expiry date is marked on the gift card when provided to the consumer).

Similarly, a gift card issuer which provides cards to a third-party operator of a loyalty program pursuant to a commercial transaction should not attract a penalty if the operator of the loyalty scheme subsequently supplies a non-compliant card to a consumer under their loyalty program. It is understood that cards or vouchers supplied as part of a customer loyalty scheme are not proposed to be exempt from the new requirements.

We note that this scenario is not an issue in NSW as "*a card or voucher supplied as part of a customer loyalty or employee rewards program*" is currently exempt from the NSW regime (23A(f) of the *Fair Trading Regulation 2012*). (In our submission to the Consultation Regulation Impact Statement we expressed a view that the exemption framework currently applicable in NSW should be the basis of any future national framework).

Treasury should consider providing comfort to scheme operators which supply cards to third parties for re-supply, including for use in various schemes run by third-parties, by making explicit in the Bill that liability will sit with the entity which supplies a gift card to a consumer (not the entity which originally supplies the cards to a third-party which then supplies the cards to consumers).

It is also our understanding that, in the event that a gift card is supplied to a consumer in trade or commerce and the day the card ceases to the redeemable is less than three years from that supply, a gift card issuer – regardless of whether it was the card issuer or a third-party which supplied a non-compliant card – will still need to honour the gift card for three years from the date of supply (99B(2)).

Proposed commencement

If the passage of the Bill through the Parliament does not progress as swiftly as, we expect, Treasury currently anticipates (subject to CAF agreement), and/or if a final scheme requires the bulk re-printing of gift card stock, further consideration may need to be given to the currently proposed commencement timeframe of 1 November 2019.

Gift card issuers should not be expected to make decisions regarding stock management, including decisions to undertake resource intensive re-design and re-printing activities, in the absence of certainty about the regulatory framework.

CONTACT

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