



2 March 2012

By email: CCAAC@treasury.gov.au

CCAAC Gift Card Review
c/- The Manager
Consumer Policy Framework Unit
Infrastructure, Competition and Consumer Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Members

Issues paper: gift cards in the Australian market.

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the Commonwealth Consumer Affairs Advisory Council's (**CCAAC**) issues paper *Gift Cards in the Australian Market*.

This submission argues that:

- Traders should be prohibited from placing expiry dates on gift cards;
- CCAAC and the ACCC should develop tailored advice for traders regarding consumer rights and trader obligations regarding gift cards, and in particular the law regarding unfair contract terms;
- The ACCC should take targeted enforcement action focusing on the use of unfair contract terms in gift cards to bring attention to trader obligations.

We have respond to some key issues in the consultation paper, not every question. Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action provides free legal advice and representation to vulnerable and disadvantaged consumers across Victoria, and is the largest specialist consumer legal practice in Australia. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Consumer Action Law Centre

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We also operate MoneyHelp, a not-for-profit financial counselling service funded by the Victorian Government to provide free, confidential and independent financial advice to Victorians experiencing financial difficulty.

Expiry dates

We do not believe there is any reasonable justification for traders to impose expiry dates on gift cards, and these kinds of terms should not be permitted. The issues paper presents one rationale for expiry dates at page 12:

...in the case of expiry dates, some accounting considerations apply. Where it is uncertain whether a gift card will be redeemed — for example, if it has been lost or stolen — it may become unclear how to report the remaining balance. For this reason, Horne (2007) states that gift card issuers impose expiry dates to speed up the process and minimise the 'potential distortion in the reporting of financial conditions'. Other reports highlight the complexity for gift card issuers in presenting unused gift card revenues in financial statements.

We find this kind of reasoning wholly unconvincing. While we agree that there may be some uncertainty about whether gift cards will be redeemed, we do not believe this uncertainty could create a net detriment for traders. Unused gift cards are a windfall for traders, and their benefits would vastly outweigh any cost created by uncertainty. Even where old gift cards are eventually redeemed, we would suggest that inflation will offset any uncertainty costs by lowering the face value of credit being redeemed.

We would argue in any case that it should not be particularly difficult to predict the likelihood of gift cards being redeemed based on past experience and reporting (particularly for larger traders). It should be easier to predict the likelihood of very old cards being redeemed—presumably the likelihood would be small after a number of years has passed. This suggests that any real uncertainty would be limited.

In our view, the only reason traders place expiry dates on gift cards is that they benefit from the inertia of consumers who fail promptly use their cards. We do not believe expiry dates protect any legitimate interests of the traders involved. This being so, we recommend that traders should not be permitted to place expiry dates on gift cards. Indeed we believe they could possibly be unfair contract terms under section 23 of the Australian Consumer Law and so already be unlawful, particularly if the expiry date was not transparent.

Recommendation:

We recommend that traders be prohibited from placing expiry dates on gift cards.

Unreasonable restrictions on use of credit

We also have concerns that some gift cards include unfair or unreasonable restrictions on how credit can be used. Restrictions that may be unfair under some circumstances include limitations on the amount of change that can be issued.

We accept that traders may have legitimate reasons for limiting the amount of change they will give on a gift card purchase. Gift cards are issued on the understanding that the price paid will cover costs associated with issuing cards and allow a reasonable profit. By returning a large amount of change, those costs may not be covered and margins not achieved.

However, 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.

To illustrate, an example of a gift card term on page 18 of the issues paper regarding issuing change provides that:

Remaining value is stored for future use however the remaining value cannot be used towards the value of purchases in excess of the card's remaining value.

This term appears to us to be unreasonable. Many consumers using this card could find themselves in the position where there is not enough credit remaining on the card to buy anything in the store (or anything they wish to purchase), but the credit cannot be refunded or combined with cash to buy something else under the store's policy. This does not appear to protect the trader's interests and could clearly cause detriment to the customer. Again, it would appear that this kind of term may breach the unfair contract terms provisions in the ACL and so would be unlawful. For that reason it is arguable that further legislation is unnecessary to address this problem.

However, many traders are unaware of their ACL obligations and so may persist in using unfair terms relating to gift cards. As many consumers are also unaware of their rights under the ACL, these terms will not always be challenged and will be likely to cause detriment. A solution to this problem may be to develop tailored guidance to traders and consumers on consumer rights regarding gift cards and to support that guidance with targeted enforcement action.

Recommendation:

We recommend that:

- CCAAC and the ACCC develop tailored guidance for traders on consumer rights and trader obligations in relation to gift cards. This guidance could cover any problems raised by CCAAC's gift card inquiry, but should include an explanation of the unfair contract terms prohibition in section 23 of the ACL and how it relates to gift card terms.
- The ACCC take targeted enforcement action focusing on the use of unfair contract terms and any other key problems uncovered by the CCAAC inquiry to bring further attention to trader obligations.

Gift card holder rights in event of insolvency

The issues paper notes that gift card holders are typically considered to be unsecured creditors and upon the winding up of a company, will not receive their claims until priority payments have been made. Recent insolvencies, including that of the Borders and Angus & Robertson, have brought this issue to the public attention. While in those cases, efforts were made to ensure consumers were able to use gift cards before an end date, many consumers also were unable to redeem the full value of the card when they ended up as an unsecured creditor.

Some industries have introduced funds as consumer protection measures to protect consumers where traders become insolvent. In Victoria, if a licensed car dealer fails to supply a car, motorbike or commercial vehicle as a result of insolvency, a consumer can make a claim to the Motor Car Traders Guarantee Fund. If a licensed travel agent becomes insolvent, a consumer who has paid for travel arrangements may make a claim to the Travel Compensation Fund where travel insurance does not cover the loss. These schemes recognise that consumers often have little way to determine whether traders will become insolvent, and thus can protect them against unfair outcomes. The schemes can also improve consumer confidence when purchasing in those industries.

We recommend that CCAAC investigate further the costs and benefits of establishing a similar scheme to protect holders of gift cards when retailers become insolvent. We recognise that most retailers are not licensed in the same way of motor car traders and travel agents, so there may be some difficulty in establishing such a scheme. Given this, we recommend CCAAC undertake research into what other mechanisms can be established to protect consumers, such as the potential to require retailers to make provisions for potential claims by gift card holders in the event of an insolvency.

Recommendation:

We recommend that CCAAC investigate the costs and benefits of establishing a compensation fund or other mechanism to protect gift card holders when a trader that has issued them becomes insolvent.

Please contact David Leermakers on 03 9670 5088 or at david@consumeraction.org.au if you have any questions about this submission.

Yours sincerely

CONSUMER ACTION LAW CENTRE

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