



CCAAC Gift Card Review

Submission of the National Retail Association Limited

to

**Consumer Policy Framework Unit
Infrastructure, Competition and Consumer Division**

4 March, 2012



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The Manager
Consumer Policy Framework Unit
Infrastructure, Competition and Consumer Division
Treasury
Langton Crescent
Parkes ACT 2600

By Email: CCAAC@treasury.gov.au

Dear Sir/Madam

CCAAC Gift Card Review

Please find enclosed a copy of the submission of the National Retail Association (NRA). NRA is Australia's largest and most representative retail association. Its core constituency is the national retail chains.

Regards

A handwritten signature in black ink, appearing to be 'G D Black', written in a cursive style.

G D Black
Executive Director

No Case for More Regulation

The Australian Retail Sector is facing the toughest conditions it has experienced for decades. The adverse conditions impact most severely on retailers who rely on the discretionary spend of consumers. Non-food retail growth is currently averaging 1.5% per annum but many retailers are reporting negative growth. Current growth rates for many discretionary retailers are below what we experienced in the recession of the early 1990's.

This is a time when the retail sector needs the support of the regulatory environment, not the hindrance. This is the time when regulators should be facilitating discussion and acting on reform initiatives which will improve the competitiveness of retailers and foster growth and productivity.

Additionally in terms of regulation, the sector is currently adapting to the introduction of the new Australian Consumer Law. Surely, given this very important regulatory development, the prudent view would have been, in the absence of compelling reasons, to allow retailers to get on with maintaining business viability and keeping people in jobs, not to impose further burdens on retailers in terms of education, administration and compliance.

The Issues Paper deals with the current regulatory regime in the following terms:

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 and unconscionable conduct that are enshrined in legislation under the Australian Consumer Law (ACL) and 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.

It is noted that under the consumer protection framework, consumers who have received a gift card as a present may be required to obtain redress through the gift card purchaser. While this may lead to some practical difficulties for consumers, the consumer protection framework benefits all consumers as gift card issuers must achieve compliance at both the time gift cards are issued and redeemed.

In NRA's view there appears to be a strong case that the existing legislative regime adequately deals with the matters raised in the Issues Paper and that it is not appropriate, so soon after the finalisation of the national consumer law, to reopen the regulatory regime and impose further administrative and compliance obligations on retailers.

NRA notes the distinction between gift cards that are *financial products* and gift cards that are *consumer products* and the conclusion that the ACL does not apply to financial products.

However, NRA also notes that the Issues Paper concludes:

For gift cards considered to be a financial product, the ASIC Act includes provisions on misleading or deceptive conduct, false or misleading representations, unfair contract terms and unconscionable conduct that mirror the generic consumer protections of the ACL.

In NRA's view no compelling case for regulation exists. If the gift card issue were in need of detailed attention, the matter should have been (and would have been) addressed in the development of the Australian Consumer Law. Retailers are entitled to stability in the regulatory regime, not to be confronted with constant change.

Gift Cards are Good for Business and Very Popular with Consumers

The business case for the use of gift cards is extremely strong and is adequately set out on page one of the discuss paper:

Gift cards are a popular choice for consumers for a number of reasons. Gift cards offer ease and convenience in choosing a suitable gift, are easily posted or delivered and allow the recipient the freedom to choose a gift they want.

Retailers are also attracted to gift cards because they increase sales, reduce the return of unwanted gifts, build store loyalty and result in incremental sales as consumers may spend more than the face value on the gift card. Gift cards are also used for other commercially oriented uses including as a reward for staff performance, as part of customer loyalty and incentive programs, as a reward for participating in activities like surveys, or as a substitution for a cash payment, for example, instead of a refund or compensation to ensure good customer relations.

In terms of consumers, NRA submits that it is a reasonable expectation that, as with other products and services bought, consumers take appropriate steps to ensure that he or she is familiar with the conditions attached to the issue and use of gift cards. In this context, it is difficult to sustain a position, that new and additional laws (above the ACL) are needed to protect consumers.

Why the Review?

NRA notes in the first instance that there is limited empirical evidence available which establishes that any significant abuse is associated with the issue or use of gifts cards in Australia.

The forward to the Issues Paper indicates that:

Concerns relating to gift cards were raised by the Hon Paul Lucas MP, Attorney-General, Minister for Local Government and Special Minister of State for Queensland, at the 3 June 2011 Legislative and Governance Forum on Consumer Affairs (CAF) formerly the Ministerial Council on Consumer Affairs (MCCA) meeting. CAF noted concerns about the terms and conditions of gift cards and the potential for consumer detriment.

It appears therefore the review has been prompted by the Queensland Government which is, and was at the time, engaged in election mode.

In the Introduction on page 1 the Issues Paper notes:

Concerns about gift card terms and conditions have become prominent recently with the insolvency of some high profile Australian retailers. These reports have identified consumer losses due to a range of issues, including terms and conditions.

We don't believe that insolvencies in the retail sector gives rise to significant reasons warranting the introduction of regulation around the issue and use of gift cards.

On page 7 the issues paper notes:

Evidence from fair trading agencies indicates that consumers have encountered a range of common difficulties when using gift cards.

However the Issues Paper goes on to note:

It is important to note that the person who experiences these difficulties is not usually the person who purchases the gift card. This raises a number of issues with respect to the ability of retailers to clearly disclose important information to the person who will ultimately receive the gift card.

The Issues Paper also provides at Appendix 1 a list of typical complaints and presumably there is some suggestion (on the part of some) that this list of complaints justifies the introduction of regulation. For our part, we disagree. It is not sufficient to produce a list of complaints to form a credible basis for regulation. Firstly, across the retail sectors there are millions (or billions) of customer interactions or transactions each year. It is inevitable that complaints will arise for a variety of reasons. However, in NRA's view, these complaints do not constitute the norm, and there appears to be no evidence of any widespread problem by reference to the material and data included in the Issues Paper.

Further, in terms of the complaints listed below (Appendix 1), the Issues Paper does not disclose whether the complaints have been investigated and validated.

Appendix 1:

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	gift card which was given instead of a refund, had expired

and conditions	
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

NRA does not want to be unreasonably forensic in its response to the Issues Paper, but the retail sector is entitled to be satisfied that sufficient evidence of abuse or failure exists to warrant the review and the demands on resources that the review necessarily entails. The retail sector is obviously very sensitive to the potential for further regulation and compliance costs to be imposed at a time when the industry can least afford it.

While NRA acknowledges that there may be concerns raised in respect to the issue or use of gift cards and that complaints may have been made, we note that the issues paper does not appear to suggest nor divulge that the consequences of gift card use in Australia or the extent of complaint is of such a magnitude, that regulation is necessary. As the Issues Paper itself notes at page 12, competition and reputational factors should be sufficient to ensure fair and equitable conditions are attached to the issue and redemption of gift cards:

Nonetheless, competition between gift card issuers may encourage improved terms and conditions, and reputational considerations may discourage retailers from applying terms and conditions that go beyond protecting their reasonable business interests. For example, some gift card issuers offer favourable terms and conditions in order to attract a greater share of the gift card market.

NRA opposes regulation and suggests that education, awareness and the formulation of suitable guidelines would be sufficient measures to address the current level of concern.

Expiry Dates

NRA strongly asserts that retailers and gift card issuers are entitled to set expiry dates. There is widespread community awareness of the fact that this condition is attached to the use of gift cards.

Income collected from gift card sales are prepayments and liabilities in the issuers accounts. It is important that, over time, retailers can assess the extent of the liability as gift cards are redeemed. The issues paper acknowledges this at page 12:

For example, 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.

The timely redemption of gift cards is also in the consumers interest. Over time, the value of the gift card is reduced with the impact of inflation and price rises. It is not inappropriate to encourage gift card holders to redeem the gift card within a reasonable period of time from the issue date.

Insolvencies

Normal rules should apply in the event of insolvency. We do not know the basis upon which gift card holders should be ranked differently from other creditors. There does not appear to be any convincing argument advanced justifying the determination of special rules attaching to unredeemed gift cards.

Gift cards do not constitute cash – they are a de facto good or product. The gift card must be converted to a product. The gift card holder has a claim on a product not on cash.

The consumer is exposed to the same “risk” with gift cards as apply with respect to goods and services provided, where a deposit or upfront fee or a subscription in advance is required.

Within reason, the risk of business failure contributes to the view that consumers should be encouraged to redeem gift cards in a timely fashion.

Unredeemed Balances

The notion that there should be regulation associated with unredeemed balances is not sustainable. There is an element of “wastage” or goods and services partly foregone, in the purchase and consumption of all goods and services.

If a consumer subscribes to a magazine but only reads half – should consumers have a right to partial refund?

If a consumer buys an appliance but rarely uses it – is there a basis to claim some form of discount?

If a consumer subscribes to an internet data usage plan with a minimum data allowance, but never uses his or her full entitlement – should the consumer be entitled to claim a rebate?

There are many instances where a consumer is required to pay a subscription in advance or a make a down payment or a deposit in respect to a good or service to be purchased, but which is not yet ready for delivery. A payment in advance for legal representation or other professional service is not uncommon.

NRA strongly argues that it would be wrong to single out gift cards and contemplate regulation mandating record keeping and data collection related to unused gift card balances.

It is clear to us that if such a proposal is valid in respect to gift cards, then it is valid for the complete range of circumstances wherein a prepayment is made, and goods and services are not supplied in full up front. It would be unreasonable in our view to contemplate imposing very considerable compliance costs on retailers in this regard.

The Current Market

NRA notes that no reliable data is available. We have reservations about the Issues Paper relying on *Choice* as source when *Choice* is a principal advocate or lobbyist in this process. If estimates are to be made of the size of the gift card market we suggest that more objective and statistically valid and reliable data sources and methodologies should be relied upon (as opposed to *Choice* estimates).

Submission Filed By:

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