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COMPETITION AND CONSUMER AMENDMENT (GIFT CARDS) BILL 2018

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EXPOSURE DRAFT EXPLANATORY MATERIALS



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# **Glossary**

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The following abbreviations and acronyms are used throughout this explanatory memorandum.

<b><i>Abbreviation</i></b>	<b><i>Definition</i></b>
ACL	Australian Consumer Law; Schedule 2 to the <i>Competition and Consumer Act 2010</i>
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ASIC Act	<i>Australian Securities and Investments Commission Act 2001</i>
CCA	<i>Competition and Consumer Act 2010</i>
Corporations Act	<i>Corporations Act 2001</i>



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# Chapter 1

## Gift Card Reforms

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### Outline of chapter

1.1 This Bill amends the ACL to provide gift cards with a minimum three year expiry period, require disclosure of the expiry date on gift cards and ban certain post-supply fees.

### Context of amendments

1.2 Gift cards are sold across Australia by a range of businesses, both large and small. One of the commonly used terms and conditions of gift cards are expiry dates. Of the gift cards sold by these businesses a certain percentage are not redeemed before they expire.

1.3 Many consumers experience the disappointment of an expired gift card, the most recent estimated losses from gift card expiry are considered to be in the order of \$70 million annually. When a gift card expires before it can be used a consumer experiences the personal detriment from the loss of value on a gift card. Many recipients of gift cards are not aware of the expiry dates for gift cards they are given. In these circumstances those consumers expect their gift cards to last for a reasonable time.

1.4 There is currently no uniform national regulation for the minimum length of time a gift card should be valid. On 18 October 2017, New South Wales (NSW) Parliament passed the *Fair Trading Amendment (Ticket Scalping and Gift Cards) Act 2017* (NSW) (the NSW Act). The NSW Act, which commenced on 31 March 2018, introduced a minimum three year expiry for gift cards sold in NSW.

1.5 Similarly, the South Australian Parliament recently introduced the *Fair Trading (Gift cards) Amendment Bill 2018* (SA) to impose a three year minimum expiry date for gift cards sold in South Australia.

1.6 These reforms will require gift cards to have a minimum three year expiry period – providing consumers with a reasonable period to use the value on the card before it expires.

1.7 To ensure that consumers are aware of the expiry date of the card, the reforms will also require gift card expiry dates to be

prominently displayed on the card. This is largely consistent with industry practice, with the majority of gift cards already displaying this information.

1.8 The reforms will also prohibit gift card issuers from charging certain post-supply fees, which can erode the balance on a gift card over time and operate as a de facto expiry date.

## Summary of new law

1.9 This Bill amends the ACL to provide gift cards with a minimum three year expiry period; require disclosure of the expiry date on gift cards and ban the charging of certain post-supply fees.

1.10 The amendments apply to gift cards supplied on or after 1 November 2019.

## Comparison of key features of new law and current law

<i>New law</i>	<i>Current law</i>
Gift cards will have a minimum three year expiry period.	No equivalent
Expiry date must to be displayed prominently on the gift card itself.	No equivalent
Certain post-supply fees cannot be charged after gift cards are issued.	No equivalent
Terms and conditions cannot allow certain post-supply fees to be charged.	No equivalent
Regulation-making power can exempt certain gift cards, persons and gift cards supplied in certain circumstances from the reforms.	No equivalent

## Detailed explanation of new law

1.11 The ACL does not apply to financial services and products, which instead are regulated by the ASIC Act and Corporations Act. This amendment provides, even if certain gift cards are a financial product, they will now also be regulated by the ACL for the purposes of these reforms. [*Schedule 1, item 1, subsection 131A(1) of the CCA*]

1.12 The ACL currently provides that a person is not considered a consumer if they acquire a good for the purposes of re-supply. This Bill provides that in relation to the re-supply of gift cards a person is not considered a consumer only if the re-supply is for trade or commerce. This amendment intends to distinguish between the re-supply of gift cards for business purposes and ad hoc transfers between individuals. *[Schedule 1, item 5, paragraph 3(2)(a) of the ACL]*

1.13 This means that, for example, when a gift card is bought for the purpose of providing as a gift the purchaser will still be considered a consumer and the transaction will be covered by the reforms.

### **Definition of gift card**

1.14 A gift card is defined 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. *[Schedule 1, items 4 and 6, subsection 2(1) and section 99A of the ACL]*

1.15 Regulations can also be made to add to or exempt items from the definition of gift card. A regulation-making power will enable the Government to make timely changes taking into account future changes in technology and products and to ensure the definition of gift cards remains fit for purpose. This will ensure only genuine gift cards are subject to the reforms and avoidance techniques can be addressed. Regulations may be made to avoid doubt and provide certainty to industry and consumers. *[Schedule 1, item 6, section 99A of the ACL]*

1.16 Items that are not commonly known to be a gift card include a credit card, charge card, debit card and public transport tickets. These items are therefore not captured by the reforms.

1.17 Items do not have to be only promoted as a gift product to be captured (as is required to obtain relief under *ASIC Corporations (Non-cash Payment Facilities 2016/211)*). Gift cards can be purchased for use by the purchaser and do not have to be gifted to others. For example, people may choose to buy gift cards when they are on sale for their own personal use.

1.18 The definition can include cards provided by insurance companies to policy holders to discharge a legal liability under the terms of a policy, for example where the card provided is in the same form as those available to the general public as a gift card.

### Three year minimum expiry period

1.19 A gift card is required to be redeemable for at least three years from the date the gift card is supplied. *[Schedule 1, item 6, paragraph 99B(1)(a) of the ACL]*

1.20 The expiry date must be set out prominently on the gift card itself. Displaying the expiry period on a separate document at the point of sale is not sufficient as the purchaser will not necessarily be the user of the card. *[Schedule 1, item 6, subparagraph 99B(1)(b)(i) of the ACL]* Where the date is displayed as MM/YY, that is no day within the month is specified, the expiry date must be the last day of the month otherwise that formulation is insufficient.

1.21 If the gift card does not expire, that must be stated on the gift card. For example, the gift card must include a statement that it 'does not expire', 'never expires', or has 'no expiry date'. *[Schedule 1, item 6, subparagraph 99B(1)(b)(ii) of the ACL]*

1.22 The obligations sit with the person who supplies the gift card in trade or commerce, which is not necessarily the person who gives the gift card to the end user.

1.23 For example, an employer buys gift cards from a business and gives them to their employees as a Christmas bonus. The business that supplied the gift cards to the employer must ensure it has met its obligations. The employer isn't providing the gift card to the employee in trade or commerce so the obligations do not apply to them.

1.24 Similarly, if a person purchased gift cards to give to their family and friends for their birthdays, the obligations would apply to the person who sold them the cards.

1.25 Companies donating gift cards, for example to be used as prizes or to charities, would generally be considered to be doing so for promotional purposes. As such, those companies would be making a supply under section 5 of the ACL and the obligations would apply to them.

1.26 If a gift card is supplied with less than a three year expiry date or if the expiry date is not prominently set out on the gift card, a pecuniary penalty may be imposed. The maximum pecuniary penalty is \$30,000 for a body corporate and \$6,000 for persons other than a body corporate. *[Schedule 1, items 6, 8 and 9, section 99B, subparagraph 224(1)(a)(v), subsection 224(3) (after table item 6) of the ACL]*

1.27 The three year minimum expiry period does not change consumers' rights in the event that the supplier of the gift card becomes insolvent or bankrupt. That is, they will continue to be treated as unsecured creditors.

### **Post-supply fees**

1.28 Post-supply fees can erode the balance on a gift card over time and operate as a de facto expiry date.

1.29 A person must not supply a gift card with terms and conditions that allow for prohibited post-supply fees to be charged. The reforms will also prohibit the charging of certain fees after the gift card has been supplied. *[Schedule 1, item 6, sections 99C and 99D of the ACL]*

1.30 The regulations will contain an exhaustive list of fees that can be charged after a card is supplied. Using regulations allows the Government to make timely changes based on the environment and changes to technology to ensure the list remains fit for purpose. *[Schedule 1, items 4 and 6, subsections 2(1) and 99C(2) of the ACL]*

1.31 A pecuniary penalty may be imposed for contravening these requirements. The maximum pecuniary penalty is \$30,000 for a body corporate and \$6,000 for persons other than a body corporate. *[Schedule 1, items 6, 8 and 9, sections 99C, 99D, subparagraph 224(1)(a)(v), subsection 224(3) (after table item 6) of the ACL]*

### **Void terms and conditions**

1.32 The supplier of the gift card must ensure the terms and conditions on the gift card do not reduce the expiry period earlier than three years and do not charge a post-supply fee otherwise a pecuniary penalty may be imposed. *[Schedule 1, item 6, section 99E of the ACL]*

1.33 The maximum pecuniary penalty is \$30,000 for a body corporate and \$6,000 for persons other than a body corporate. *[Schedule 1, items 6, 8 and 9, section 99E, subparagraph 224(1)(a)(v), subsection 224(3) (after table item 6) of the ACL]*

### **Regulation-making power**

1.34 Regulation-making powers have been inserted to provide for the ability to exempt certain gift cards, persons and gift cards supplied in certain circumstances from all or some of the requirements imposed by these reforms. *[Schedule 1, item 6 and 7 section 99F and 191E of the ACL]*

1.35 Allowing the regulations to exempt certain gift cards or those supplied in certain circumstances from all or some of the requirements will provide the Government with the necessary flexibility to make timely changes to support industry to adopt innovative marketing techniques to encourage demand and manage stock levels. It will also allow the law to adapt to changes developments in technology. *[Schedule 1, items 6 and 7 section 99F and 191E of the ACL]*

1.36 Allowing the regulations to exempt persons from all or some of the requirements will provide a flexible approach to ensure the regime only imposes obligations on the appropriate persons. *[Schedule 1, items 6 and 7 section 99F and 191E of the ACL]* For example, it may be appropriate to exempt gift cards supplied by charities.

1.37 The regulations would be subject to disallowance and therefore any exemptions provided for in the regulations will be subject to appropriate Parliamentary scrutiny.

## Offences

1.38 If a gift card is supplied and the expiry date of the gift card is less than three years, a person commits a strict liability offence. The maximum penalty is \$30,000 for a body corporate and \$6,000 for persons other than a body corporate. *[Schedule 1, item 7, section 191A of the ACL]*

1.39 If a gift card is supplied and the expiry date of the gift card does not appear prominently on the gift card itself, a person commits a strict liability offence. The maximum penalty is \$30,000 for a body corporate and \$6,000 for persons other than a body corporate. *[Schedule 1 item 7, section 191B of the ACL]*

1.40 If a gift card is supplied and the terms and conditions of the gift card allow for a post-supply fee to be charged, a person commits a strict liability offence. The maximum penalty is \$30,000 for a body corporate and \$6,000 for persons other than a body corporate. *[Schedule 1, item 7, section 191C of the ACL]*

1.41 If a person charges a post-supply fee, a person commits a strict liability offence. The maximum penalty is \$30,000 for a body corporate and \$6,000 for persons other than a body corporate. *[Schedule 1, item 7, section 191D of the ACL]*

1.42 The penalty provisions contained in this Bill are consistent with existing penalties in the ACL for similar offences. Strict liability offences are appropriate in this circumstance, as it is necessary to strongly deter misconduct that can have serious detriment for consumers. Strict liability offences also reduce non-compliance, which bolsters the integrity of the regulatory regime enforced by the ACCC. Strict liability is particularly beneficial to regulators as they need to deal with offences expeditiously to maintain public confidence in the regulatory regime.

1.43 The strict liability offences in this Bill meet all the conditions listed in the *Guide to Framing Commonwealth Offences*. For example, the fines for the offences do not exceed 60 penalty units for an individual or 300 penalty units for a body corporate. The application of strict liability, as opposed to absolute liability,

preserves the defence of honest and reasonable mistake of fact to be proved by the accused on the balance of probabilities. This defence maintains adequate checks and balances for individuals who may be accused of breaching such offences.

1.44 The civil penalty provisions contained in the Bill should not be considered ‘criminal’ for the purposes of human rights law. While a criminal penalty is deterrent or punitive, these provisions are regulatory and disciplinary. Further, the provisions do not apply to the general public, but to a sector or class of people who should reasonably be aware of their obligations under the CCA (e.g. companies and small business owners). Imposing the civil penalties will enable an effective disciplinary response to non-compliance. Finally, the civil penalties are for small amounts, with no sanction of imprisonment for non-payment of the penalty.

### **Enforcement and remedies**

1.45 The gift cards provision will sit in Chapter 3 of the ACL. The ACCC will have access to a range of remedies available to use to ensure any misconduct is addressed. For example, the ACCC may issue an injunction order to stop a person from supplying gift cards for a specified time period. The ACCC can also apply to make an adverse publicity order, requiring a person to disclose certain information specified by the order and for the person to disclose to the public.

1.46 In addition, the ACCC may issue an infringement notice if a person provides a gift card:

- without a minimum three year expiry period;
- that does not prominently set out the expiry date;
- charges a post-supply fee; or
- with prohibited term and conditions.

*[Schedule 1, item 2, after paragraph 134A(2)(e) of the CCA]*

1.47 The penalty for contravening this provision for a body corporate is 55 penalty units (currently \$11,500) and for an individual 11 penalty units (currently \$2,420). *[Schedule 1, item 3, section 134C (after table item 6) of the CCA]*

## **Application and transitional provisions**

1.48 The amendments apply to gift cards supplied on or after 1 November 2019.

1.49 This provides industry with sufficient time to adjust while also introducing important protections for consumers in time for the 2019 Christmas period.