



Australian Government

The Treasury



Gift cards in the Australian market

Issues Paper

December 2011

**Commonwealth Consumer Affairs Advisory Council
(CCAAC)**

Gift cards in the Australian market: Issues Paper

9 December 2011

© Commonwealth of Australia 2011
ISBN 978 0 642 74772 3

Ownership of intellectual property rights in this publication

Unless otherwise noted, copyright (and any other intellectual property rights, if any) in this publication is owned by the Commonwealth of Australia (referred to below as the Commonwealth).

Creative Commons licence

This publication is licensed under a Creative Commons Attribution 3.0 Australia Licence.



Creative Commons Attribution 3.0 Australia Licence is a standard form license agreement that allows you to copy, distribute, transmit and adapt this publication provided that you attribute the work. A summary of the licence terms is available from <http://creativecommons.org/licenses/by/3.0/au/deed.en>. The full licence terms are available from <http://creativecommons.org/licenses/by/3.0/au/legalcode>.

The Commonwealth's preference is that you attribute this publication (and any material sourced from it) using the following wording:

Source: Licensed from the Commonwealth of Australia under a Creative Commons Attribution 3.0 Australia Licence.

The Commonwealth of Australia does not necessarily endorse the content of this publication

FOREWORD

The Parliamentary Secretary to the Treasurer, the Hon David Bradbury MP, has provided the Commonwealth Consumer Affairs Advisory Council (CCAAC) with terms of reference to explore and develop options to better protect consumers who use gift card products.

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.

Since the mid-1990s, gift cards have become increasingly common in the Australian marketplace. For retailers and traders, gift cards are an effective way of increasing sales and building brand loyalty. For consumers, gift cards offer an easy and convenient way to purchase a gift for family and friends.

The issues paper outlines some concerns about gift cards, including the application of expiry dates and other terms and conditions.

While gift cards provide clear benefits to consumers, in some cases consumers are at risk of losing money, particularly when the purchaser or recipient is not aware of terms and conditions that apply. However, in some cases, terms and conditions are a necessary and reasonable way for traders to manage their gift card program and can provide certainty for both traders and consumers about how gift cards can be used.

In addition, the issues paper examines gift card holder rights in the event of business insolvency and issues in relation to the administration of gift card facilities.

Feedback from the community will help CCAAC:

- identify the issues facing consumers who purchase and receive gift cards;
- assess whether current consumer protection laws are adequate in addressing concerns specifically related to gift cards;
- seek community views about the treatment of outstanding gift card balances; and
- determine whether there are practical options to support consumers who purchase and use gift cards.

Establishing the cause and degree of consumer detriment is an important first step in determining whether a policy response is required. CCAAC looks forward to hearing the views of stakeholders on this important issue for Australian consumers.



Colin Neave AM
Chairman, Commonwealth Consumer Affairs Advisory Council

CONTENTS

FOREWORD	III
THE COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL (CCAAC)	VII
CCAAC terms of reference	vii
Membership	vii
REQUEST FOR COMMENTS	VIII
Terms of reference	ix
PART I — BACKGROUND	1
Introduction	1
Gift card features	1
The current market	2
Existing legislation	4
The Australian Consumer Law	4
Gift cards that are financial products	4
Gift card holder rights in the event of insolvency	5
PART II — ISSUES IN RELATION TO THE PURCHASE AND USE OF GIFTS CARDS IN AUSTRALIA	7
Key issues affecting consumers	7
Gift card terms and conditions	7
Gift card administration	10
Key issues affecting gift card issuers	12
PART III — INTERNATIONAL REGULATORY APPROACHES	13
Background	13
The United States	13
Canada	14
PART IV — OPTIONS	15
A framework for formulating a policy response	15
APPENDIX 1	17
SAMPLE OF TYPICAL COMPLAINTS	17
APPENDIX 2	18
EXAMPLES OF GIFT CARD TERMS AND CONDITIONS	18

THE COMMONWEALTH CONSUMER AFFAIRS ADVISORY COUNCIL (CCAAC)

CCAAC TERMS OF REFERENCE

CCAAC is an expert advisory panel, which provides advice to the Parliamentary Secretary to the Treasurer on consumer policy issues.

CCAAC's terms of reference are to:

- consider issues, reports and papers referred to it by the Minister and report to the Minister on their consumer policy implications, and in doing so take account of the need for well functioning markets with confident consumers;
- identify emerging issues affecting Australian markets and consumers and draw these to the attention of the Minister; and
- when considering consumer policy issues, take account of their competition and other relevant economic implications.

Membership

The membership of CCAAC consists of:

- Mr Colin Neave AM (Chair);
- Ms Carolyn Bond;
- Professor Stephen Corones;
- Ms Lynda Edwards;
- Ms Deborah Healey;
- Mr Gordon Renouf;
- Dr Rhonda Smith;
- Mr Ray Steinwall; and
- Mr Peter Kell (*ex officio*).

REQUEST FOR COMMENTS

The Commonwealth Consumer Affairs Advisory Council has developed this issues paper, *Gift cards in the Australian market* to:

- raise issues about the use of gift cards in Australia; and
- seek public and stakeholder comments in relation to these issues.

Responses are requested by 5:00pm on Friday, 2 March 2012 and can be submitted to:

CCAAC@treasury.gov.au

or

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

Phone: 02 6263 2111

Fax: 02 6263 3964

Confidentiality

It will be assumed that submissions are not confidential and may be made publicly available on the Treasury website (<http://www.treasury.gov.au>). If you would like your submission, or any part of it, to be treated as 'confidential', please indicate this clearly. A request made under the *Freedom of Information Act 1982* for a submission marked confidential to be made available will be determined in accordance with that Act.

TERMS OF REFERENCE

The Parliamentary Secretary to the Treasurer, on behalf of the Ministerial Council on Consumer Affairs,¹ invites the Commonwealth Consumer Affairs Advisory Council (CCAAC) to conduct a review of gift cards. CCAAC is requested to explore and develop options to better protect consumers who purchase or receive these products.

As part of the review, CCAAC is requested to examine:

- issues in relation to the purchase and use of gifts cards in Australia, for example, expiry dates, the discharge of low balances on gift cards, the disclosure of terms, conditions and fees of gift cards and the extent of unredeemed gift card balances;
- if there is consumer detriment, determine the level of consumer detriment arising from the terms and conditions of gift cards;
- the views of stakeholders affected by gift card sale practices, including consumers, retailers and other traders, insolvency practitioners and peak industry and consumer bodies;
- potential losses from insolvencies for consumers who hold a gift card;
- the effectiveness of international regulatory initiatives that seek to address consumer concerns related to gift cards and the appropriateness of these approaches to the Australian marketplace; and
- options to address any consumer detriment arising from the sale of gift cards.

¹ The Ministerial Council for Consumer Affairs is now the COAG Legislative and Governance Forum on Consumer Affairs (CAF).

PART I — BACKGROUND

INTRODUCTION

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. As the use of gift cards increases, understanding the conditions of their use and how consumers who use them can be protected is of increasing importance.

Gift card features

A gift card is a type of 'store credit' that is designed to be purchased by one consumer and given to another.

When provided in the form of a plastic card, a user of a gift card is able to access and spend the value associated with the device by swiping the card at a point of sale similar to the use of a debit card. However, gift cards make use of a range of forms and technologies, and it is not intended for this review to define gift cards in terms of these attributes. While a physical card would appear to be the most common way of issuing a gift card, developments in technology have allowed gift cards to be electronically delivered to the recipient via SMS messages (mobile gift cards), email (virtual gift cards) and smart phone applications.

For the purpose of the review, gift cards do not include forms of prepayment that are not intended or designed to be purchased, most commonly, by one person to be given to another person as a gift or present. For example, the review will not examine pre-payment arrangements for mobile phones, internet access and other utility services or group buying websites. However, there are a range of products that may be purchased for both personal consumption and as a gift. For example credit for music download services or cinema vouchers are not specifically marketed as gifts, but are often used for this purpose. These products are not excluded from consideration to the extent that they satisfy the main characteristics of a gift card product.

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.

Gift cards are generally available in two forms:

1. Closed-loop gift cards are accepted or honoured at a single retailer or a group of affiliated merchants (such as a chain of book stores or clothing retailers) as payment for goods or services.
2. Open-loop gift cards typically use a payment system (such as Visa or MasterCard) and can be used at a wide variety of retailers that accept or honour cards displaying that network.

Open-loop gift cards have unique characteristics and are usually issued by financial institutions. As such these cards may be subject to rules that do not apply to closed-loop gift cards. It is intended that this review examine systemic issues that may be common to both closed and open-loop gift cards.

The current market

While research and data on the Australian market is limited, some estimates report that \$1.5 billion worth of gift cards were purchased in the financial year ending June 2010.² The gift card market is still in its infancy, however retailers are competing to offer more attractive branded gift card products and there are signs of an emerging secondary market for gift cards in Australia.³



2 Choice (2010) 'Gift card traps', 1 July 2010, <http://www.choice.com.au/giftcards>.

3 For example, some retailers allow customers to personalise gift cards and there are websites where consumers can purchase and sell gift cards below face value.

The inherent value of a gift card is a type of store credit that can be exchanged for goods or services. This value is intangible and specific to a particular retailer or group of retailers. Despite this, there are a number of participants involved in the supply of gift cards in the Australian market. These include:

- gift card issuers that issue store credits and maintain the appropriate accounting systems required to facilitate the use of gift cards;
- payment system service providers⁴ who maintain the networks and information systems required for the use of gift cards; and
- secondary market participants⁵ involved in the trading of gift cards.

While the retailer for which the store credit can be used is often the same entity as the gift card issuer, it is noted that some gift cards are not issued directly by the retailer, or group of retailers, for which the card can be used. This may apply where a gift card can be used at more than one retailer or where a retailer outsources its gift card operations.

⁴ Including networks such as Visa and MasterCard and other card program providers.

⁵ Including retailers who on sell gift cards that are issued for use at a different retailer and websites such as <http://www.ebay.com.au> and <http://www.cardlimbo.com.au> where gift cards can be purchased or sold.

EXISTING LEGISLATION

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 purchaser⁶. 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.

The Australian Consumer Law

The ACL harmonises the consumer protection provisions of the *Trade Practices Act 1974* (TPA) and State and Territory fair trading laws. The full text of the ACL is set out in Schedule 2 of the *Competition and Consumer Act 2010* which is the principal consumer protection law in Australia.

The consumer protections provided within the ACL apply to gift cards that are considered to be a consumer product as distinct from a financial product. 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.

Gift cards that are financial products

The definition of 'financial product' in the *Corporations Act 2001* (Corporations Act) includes a facility through which a person makes non-cash payments. A person makes a 'non-cash payment' if they make payment, or cause a payment to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins. However, where a facility can only be used for payment to a single 'person', as defined by the Corporations Act, it is not a 'non-cash payment' facility and is therefore not a 'financial product'. To this effect, a gift card that can only be used at a single merchant would not be a financial product and so the consumer protections of the ACL would apply.

The sale of financial products is subject to the licensing and disclosure requirements of the *Corporations Act 2001* and the consumer protections of the ASIC Act. The Australian Securities and Investments Commission (ASIC) has the discretionary power to exempt a person or class of persons from the application of some or all of the provisions in the Corporations Act. Where certain disclosure requirements are met, *Class Order 05/738* provides an exemption from the application of the licensing and disclosure requirements in

6 See Jones, N (2009) 'Gift Vouchers and Expiry Dates: When the Gift Stops Giving', Queensland University of Technology Law and Justice Journal, 9(2) 213-231.

the Corporations Act for persons who provide gift cards.⁷ This exemption does not extend to the consumer protections of the ASIC Act and applies only to cards ‘promoted or marketed solely as a gift card product’.

Gift card holder rights in the event of insolvency

In relation to gift card holder rights in the event of insolvency, the Corporations Act provides for the ranking of claims. 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. Examples of priority payments include payments to cover administrator costs and employee entitlements.

Consultation questions:

- 1.1 What are the features that characterise the gift card market and what trends are likely to shape the manner in which consumers use gift cards into the future?
- 1.2 Why do consumers purchase gift cards and how are any advantages or disadvantages shared between the giver and receiver?
- 1.3 Does the existing consumer protection framework provide practical protections for consumers who experience problems or issues when they purchase or receive gift cards?
- 1.4 What specific features of the ASIC Act and the ACL should be promoted to consumers to better inform them of their rights in relation to gift cards?

⁷ For example if an expiry date applies to the gift card; the exemption will only apply where the date is clearly printed on the gift card.

PART II — ISSUES IN RELATION TO THE PURCHASE AND USE OF GIFTS CARDS IN AUSTRALIA

KEY ISSUES AFFECTING CONSUMERS

Evidence from fair trading agencies indicates that consumers have encountered a range of common difficulties when using gift cards. 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. It is also arguable that some terms and conditions are onerous for consumers and not reasonably necessary to protect the trader's legitimate commercial interests. Issues relating to gift cards can be divided into those relating to terms and conditions, and those relating to gift card administration.

Gift card terms and conditions

A number of issues facing consumers are the result of gift card holders being unaware of the terms and conditions that may apply. Some issues around the terms and conditions of gift cards include:

- **expiry dates** — one of the main issues facing some consumers is when gift cards expire before the gift card holder has attempted to have it redeemed and where expiry dates vary greatly in duration causing confusion for some consumers;
- **restrictions on low value use** — some gift cards apply terms and conditions where gift cards cannot be used to purchase items below a certain value;
- **terms and conditions in the event of insolvency** — recent concerns with gift cards have been around terms and conditions which cease to apply following the insolvency of the gift card issuer as well as any new restrictions that are applied (for example, where administrators have required gift card holders to spend an additional dollar for every dollar redeemed);
- **fees and charges** — there is the potential for periodic fees and charges that apply to the outstanding balance of a gift card, to erode the value of the card over time, eventually making the card worthless to the consumer;
- **limitations on use with respect to retailers that accept the gift card** — some affiliated merchant cards may appear as though they can be redeemed at a wider range of retailers than is possible, for example, some shopping centre gift cards cannot be used at all retailers within that shopping centre; and
- **receiving change** — some cards do not offer the customer the balance difference in cash if the card is used and the remaining funds are under a certain amount.

An examination of complaints data⁸ reveals that consumers experience problems around the terms and conditions applied to gift cards, with a large proportion of these problems being in relation to expiry dates. Many of the received complaints were the result of poor consumer understanding of the law, misrepresentations by sales staff, poor communication between trader and consumer, as well as differentiated consumer expectations about appropriate redemption timeframes or other terms and conditions.

It is apparent that traders use a variety of different mechanisms for informing consumers about terms and conditions, including by:

- providing information to the purchaser at the time of buying the gift card;
- posting information about terms and conditions on the trader's website; and
- printing or writing the relevant expiry date directly on the gift card or on a sleeve or accompanying card.

However, there appears to be significant disparity in the style and presentation of information about gift card terms and conditions between traders. In addition, a unique challenge for gift cards is that as well as ensuring the purchaser of the gift card understands the terms and conditions, it is equally important for the recipient of the gift card to be aware of, and understand, the terms and conditions.

These issues raise questions about whether there is effective disclosure as well as what terms and conditions does a reasonable consumer expect when purchasing and using gift card products.⁹ Some terms and conditions may benefit consumers indirectly, for example, tight deadlines imposed by expiry dates may force consumers to use their cards instead of forgetting and possibly even losing them.¹⁰ Nonetheless, terms and conditions are applied to protect the interests of the gift card issuer and may not necessarily be to the benefit of the consumer.

Commonwealth, State and Territory Governments have undertaken a range of activities aimed at better informing consumers about their rights when using gift cards. For example, ASIC's MoneySmart website contains guidance on the use of gift cards.¹¹ In addition, the ACCC has released guidance on consumer rights in the event of business insolvency.¹² Encouraging active consumer engagement with such information continues to be a challenge for all fair trading agencies. To assist gift card issuers, the Queensland Office of Fair Trading provides a set of guidelines which businesses offering gift cards are encouraged to meet.¹³

8 See Appendix 1 for a sample of typical complaints.

9 See Appendix 2 for examples of differences in gift card terms and conditions.

10 See Shu, SB & Gneezy, A (2010) '*Procrastination of Enjoyable Experiences*', Journal of Marketing Research, Vol. XLVII (October 2010), 933-944.

11 See <http://www.moneysmart.gov.au/managing-my-money/banking/different-ways-to-pay#gift>.

12 See <http://www.accc.gov.au/content/index.phtml/itemId/1009395>.

13 See <http://www.fairtrading.qld.gov.au/businesses-gift-cards.htm>.

Consultation questions:

- 2.1** What evidence is there to demonstrate that issues related to gift card terms and conditions lead to consumer detriment?
- 2.2** What experiences have individual consumers had with the terms and conditions that apply to gift cards, including the resolution of any complaints either direct with the gift card issuer or through a consumer affairs or fair trading body?
- 2.3** What are the specific issues associated with the application of terms and conditions including expiry dates, restrictions on low value use, changes in terms and conditions in the event of insolvency, fees and charges, limitations on use, and restrictions on receiving change? Please provide examples.
- 2.4** What flexible policies or 'grace periods' are offered by retailers to support gift card holders who are unsatisfied with the terms and conditions that may apply?
- 2.5** How do terms and conditions vary between gift cards and what expectations do consumers have with respect to the core terms and conditions that apply?
- 2.6** Broadly speaking, are terms and conditions of gift cards adequately disclosed to gift card purchasers and recipients? Please provide examples.
- 2.7** What specific information is useful to consumers at the point of sale?
- 2.8** How can information about gift card terms and conditions be effectively communicated to people purchasing gift cards as well as to those receiving gift cards?

Gift card administration

There are a number of issues that do not relate to terms and conditions, but rather more broadly to the accounting, record keeping and administration processes that support the issuing of gift cards. Some issues around the administration of gift cards include:

- **lost, damaged or stolen cards** — many gift card issuers will not replace a lost, damaged or stolen gift card with some suggesting that they should keep records that facilitate the replacement of gift cards;
- **the use of unspent monies and interest accumulated on gift cards** — some have suggested that consumers should benefit from funds accumulated through unspent gift cards and any interest that has been accumulated; and
- **gift card holder rights in the event of insolvency** — gift card holders are usually classed as unsecured creditors and may lose the right to redeem or refund their gift card in the event of insolvency.

An examination of complaints data¹⁴ reveals that a significant number of complaints made about gift cards are the result of business insolvency or closure. Consumers complained that even though the retailer was continuing to trade (for example, under the direction of an external administrator), they would not honour gift cards in line with consumer expectations. Some complaints were in relation to businesses that no longer existed, or were not trading under the same name or location.

A small number of complaints concerned the use of lost, damaged or stolen gift cards, where the card issuer had a policy of not replacing gift cards or was unable to determine whether a gift card had been issued to the complainant.

There are many practical considerations around the administration of gift cards. The maintenance of information systems for the purposes of tracking and recording gift card holders is likely to impose additional costs to gift card issuers, which may be passed on to consumers.

The treatment of unspent monies and interest accumulated on unused gift cards presents both an ethical and practical dilemma for gift card issuers and retailers. The choice of whether or not to redeem a gift card is a matter for the gift card recipient and is often out of the control of the gift card issuer. However, it is likely that balances are often unintentionally lost with the gift card issuer enjoying a substantial financial benefit where nothing has been provided in return.

Consumer risks related to the accounting, record keeping and administration processes of gift card issuers are typical of the risks faced by a range of other stakeholders. For example, in the event of insolvency, there are likely to be a range of unsecured creditors — including those who have paid deposits on consumer items — that are equally affected by the failure of a business. It is unclear whether gift card holders are substantially different from other stakeholders (for example, employees, suppliers or other unsecured creditors) such that they

¹⁴ See Appendix item 1 for a sample of typical complaints.

should be provided with additional protections. These issues are likely exacerbated where consumers are unaware of their rights under these circumstances.

More broadly, the extent to which these issues lead to consumer detriment depends on the degree to which gift cards are valued by consumers. In considering consumer risks, gift cards are typically low value products and by their very nature, are typically used to purchase non-essential goods and services. Although, recent trends suggest that gift cards are being used for higher value items and in some cases, for essential goods and services such as household groceries. It is also a common practice for retailers to issue refunds in the form of a gift card.

Consultation questions:

- 2.9 What evidence is there to demonstrate that issues related to gift card administration lead to consumer detriment?
- 2.10 What are the specific issues associated with lost or stolen cards, the use of unspent monies and interest accumulated on unused gift cards and gift card holder rights in the event of insolvency? Please provide examples.
- 2.11 Are the generic consumer protections afforded under the ACL and the ASIC Act capable of addressing concerns relating to gift card administration?
- 2.12 What accounting, record keeping and administration processes typically support gift card facilities?
- 2.13 Are there any market indicators which suggest that the Australian gift card market is not operating efficiently?

KEY ISSUES AFFECTING GIFT CARD ISSUERS

Some terms and conditions applied to gift cards may appear to be unfair. However, some terms and conditions protect the interests of the issuer and are required to ensure that gift cards can be properly managed and accounted for.

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)¹⁵ 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.¹⁶

On the issue of consumer awareness of the terms and conditions that apply to gift cards, issuers and retailers face a number of challenges in ensuring effective disclosure. Meaningful disclosure is inhibited by the tripartite nature of gift card transactions. Because the gift card purchaser is not usually the person who uses the gift card, it is difficult for gift card issuers to ensure that the recipient is meaningfully informed of the terms and conditions that apply. This is further complicated where the gift card issuer is a different entity to the retailer for which the store credit applies.

More generally, gift card issuers incur costs in maintaining the information systems and procedures required to issue gift cards and gift card issuers may expect a return on their investment in a gift card system. Whether this justifies the full suite of terms and conditions commonly applied to gift cards remains unclear.

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.¹⁷

Consultation questions:

- 2.14 What factors do gift card issuers consider when determining the terms, conditions and administration processes typically applied to gift cards?
- 2.15 Do consumers compare the terms and conditions of alternative gift card products when making gift card purchases? Please provide examples.
- 2.16 How would gift card issuers be affected if there were any restrictions on allowable terms and conditions, including expiry dates, applied to gift cards?

15 Horne, D (2007) ‘*Gift Cards: Disclosure One Step Removed*’, The Journal of Consumer Affairs, Winter 2007; 41(2), 341-350.

16 Kile, C (2007), ‘*Accounting for Gift Cards*’, Journal of Accountancy, 1 November 2007, 38-43.

17 For an example of differentiated terms and conditions, see Appendix 2.

PART III –INTERNATIONAL REGULATORY APPROACHES

BACKGROUND

International regulatory approaches operate within different legal frameworks to that of Australia. Australia's consumer protection framework is based on generic principles that apply to all consumers when purchasing goods and services. This limits the need for industry specific legislation. As such international regulatory approaches should be considered in this context.

The United States

More than 40 US states regulate gift cards in some fashion.¹⁸ A number of states:

- restrict or ban service fees or expiration dates;
- require the disclosure of fees or expiry dates;
- require that consumers have the option of receiving cash back on balances below a certain amount; and
- apply abandoned property laws to funds that have had no activity attributable to the card owner over a certain period.¹⁹

In August 2010, the US Federal Reserve Board (FRB) implemented the gift card provisions under the *Credit Card Accountability Responsibility and Disclosure Act of 2009*. The provisions require that gift cards sold in the US must have a minimum duration of 5 years from the time funds are loaded onto the card before any expiry date takes effect.

The United States also provides a 'consumer deposit priority' to unsecured claims of individuals' deposits to the amount of \$2,600 (the amount is revised every three years). In practice however the provision is rarely used due to companies commonly 'Reorganising' (under the US Bankruptcy Code) rather than going into liquidation.

18 More information regarding individual States' regulatory provisions can be found at: <http://www.consumersunion.org/pdf/State-Gift-Card-Laws.pdf>.

19 Keitel, P (2008) *The Laws, Regulations, Guidelines, and Industry Practices That Protect Consumers Who Use Gift Cards: Federal Reserve Bank of Philadelphia Discussion Paper*, July 2008, <http://www.paybefore.com/assets/0/58/7172696D-01EE-41F0-B721-B86D810DC348.pdf>.

Canada

Canadian provinces including Ontario, Manitoba, British Columbia, Alberta, New Brunswick, Nova Scotia and Saskatchewan have consumer protection laws in force specifically regulating gift cards.²⁰ While there are some differences between provinces, the most common features are that gift cards:

- cannot have expiry dates or dormancy fees; and
- the terms and conditions must be clearly disclosed to consumers.

In certain provinces and territories, an expiry date is permitted if the gift card is issued for charitable or promotional purposes or sold for a specific good or service. In addition, certain provinces and territories also permit very small dormancy fees and activation fees for open-loop gift cards.

Consultation questions:

- 3.1 Are there any other notable international regulatory approaches that specifically address the issues raised in this issues paper?

²⁰ For example, under the Saskatchewan *Consumer Protection Act 1996* expiry dates can only be applied in limited circumstances and there are additional requirements with respect to permitted fees and disclosure.

PART IV — OPTIONS

A FRAMEWORK FOR FORMULATING A POLICY RESPONSE

Establishing the cause and degree of any consumer detriment is important before determining whether a policy response is required. Supporting evidence would also assist in justifying any possible regulatory response. An additional important consideration is whether the existing consumer protection framework provides sufficient protections to address concerns specifically related to gift cards. As many of the issues that relate to the purchase and use of gift cards apply equally to other kinds of complex goods or services; if a policy response is required, generic solutions may apply.

There are three broad dimensions that require further consideration in relation to consumers and gift card issuers participating in the Australian gift card market:

- consumer awareness of gift card terms and conditions — through effective product disclosure at the point of sale and consumer education;
- best practice terms and conditions — that provide a ‘safety net’ of minimum standards that consumers would come to expect when purchasing gift cards; and
- best practice accounting, record keeping and administration procedures — that apply principles on the administration of gift card facilities.

These dimensions are complementary, but concern different issues. Policy responses could take a range of forms depending on the degree and cause of consumer detriment. The *OECD Consumer Policy Toolkit* provides a framework for identifying and analysing consumer market problems as well as identifying, evaluating and testing consumer policy instruments.²¹ This framework, as informed by comments received to the issues paper, will be used to determine the appropriateness of any suggested policy responses.

Policy responses could include non regulatory options such as an education campaign, the establishment of best practice terms and conditions as well as administration processes which could be voluntarily adopted by gift card issuers. Regulatory options that mandate product disclosure requirements, and require certain best practice terms and conditions as well as administration processes could also be considered where a regulatory response is justified.

²¹ For information on the toolkit, including a companion prepared to provide practical guidance on its application in an Australian context, please see http://www.consumerlaw.gov.au/content/Content.aspx?doc=consumer_policy/cp_policy_toolkit.htm.

Consultation questions:

- 4.1 How can consumers be further assisted to develop a practical understanding of how to enforce their rights under the generic consumer protection provisions of the ASIC Act and the ACL?**
- 4.2 What are fair terms and conditions in balancing the issues faced by consumers purchasing and using gift cards, and gift card issuers?**
- 4.3 What are fair gift card administration practices in balancing the issues faced by consumers purchasing and using gift cards, and gift card issuers?**
- 4.4 Are there any other possible policy responses to issues relating to the purchase and use of gift cards?**

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

**** This is not a representative sample as some complaint types are more common than others. Examples provided by State and Territory regulators, ASIC and the ACCC.***

APPENDIX 2

EXAMPLES OF GIFT CARD TERMS AND CONDITIONS

Terms and Conditions*	Gift Card		
	A	B	C
Gift card type	<i>Chain store retailer</i>	<i>Chain store retailer</i>	<i>Shopping centre</i>
Expiry date	<i>The gift card is valid to make purchases for two years after it is issued.</i>	<i>Expiry dates do not apply.</i>	<i>The gift card is valid to make purchases for one year after it is issued.</i>
Restrictions on low value use	<i>The minimum that can be loaded onto a card is \$5 however there are no restrictions on low value purchases.</i>	<i>Restrictions on low value use do not apply.</i>	<i>There are no restrictions on low value purchases, however individual retailers may apply different conditions on use.</i>
Fees and charges	<i>N/A</i>	<i>N/A</i>	<i>\$1.95 payable upon purchase.</i>
Limitations on use with respect to retailers that accept the gift card	<i>Some specific exclusions including use at specific stores within a chain.</i>	<i>No specific exclusions within the chain.</i>	<i>Not all retailers within the shopping centre accept the gift card.</i>
Receiving change	<i>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.</i>	<i>Up to \$9.95 can be given in change.</i>	<i>Remaining value is stored for future use.</i>
Lost, damaged or stolen gift cards	<i>Lost, damaged or stolen gift cards are not replaced.</i>	<i>Lost, damaged or stolen gift cards are not replaced.</i>	<i>Lost or stolen gift cards are replaced upon evidence of proof of purchase and card number.</i>

**These examples are based on observed terms and conditions applied to gift cards in the Australian market.*