

EXPLANATORY STATEMENT

Issued by authority of the Assistant Treasurer

Competition and Consumer Act 2010

Treasury Laws Amendment (Gift Cards) Regulations 2018

Section 139G of the *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The *Treasury Laws Amendment (Gift Cards) Act 2018* (the Gift Cards Act) received Royal Assent on 25 October 2018 and will apply to gift cards supplied on or after 1 November 2019.

The Gift Cards Act inserts provisions into the Australian Consumer Law (Schedule 2 of the *Competition and Consumer Act 2010*) which provide that a person must not:

- supply a gift card to a consumer without a minimum three year expiry period-section 99B (or they commit an offence – section 191A);
- supply a gift card to a consumer without expiry information prominently disclosed on the gift card itself – section 99C (or they commit an offence-section 191B);
- supply a gift card to a consumer with terms and conditions that allow or require the payment of banned post-supply fees – section 99D (or they commit an offence – section 191C); and
- demand or receive banned post-supply fees – section 99E (or they commit an offence – section 191D).

Sections 99G and 191E of the Gift Cards Act provide that regulations may limit the application of the requirements and related offence provision.

The purpose of the *Treasury Laws Amendment (Gift Cards) Regulations 2018* (the Regulations) is to insert provisions into the *Competition and Consumer Regulations 2010* (the CCA Regulations) to:

- specify articles that are not gift cards;
- identify fees that are not considered post-supply fees; and
- exempt gift cards, persons or gift cards supplied in circumstances from some or all of the requirements in the Gift Cards Act.

The CCA Regulations are exempt from sunseting under the *Legislation (Exemptions and Other Matters) Regulation 2015* as they give effect to a number of intergovernmental agreements including the Intergovernmental Agreement for the Australian Consumer Law.

A consultation paper on the proposed exemptions, restrictions on fees and disclosure requirements was released together with the draft Bill from 26 July to 9 August 2018. Twenty-five written submissions were received and were considered in the development of the policy.

Draft regulations were released for public consultation from 18 to 31 October 2018. Five roundtable discussions with industry stakeholders were conducted and fourteen written submissions were received. Feedback obtained from all of the consultation rounds has been considered in the development of the final proposed Regulations.

Details of the Regulations are set out in the [Attachment A](#).

The Regulations commenced on the day after registration.

The Regulation Impact Statement was published in full in the Explanatory Memorandum to the *Treasury Laws Amendment (Gift Cards) Bill 2018* (the Gift Cards Bill).

A Statement of Compatibility with Human Rights is at [Attachment B](#).

The Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Details of the Treasury Laws Amendment (Gift Cards) Regulations 2018

Clause 1 – Name of Regulations

This section provides that the title of the Regulations is the *Treasury Laws Amendment (Gift Cards) Regulations 2018*.

Clause 2 – Commencement

This section provides that the Regulations commence on the day after registration.

Clause 3 – Authority

This section provides that the Regulations are made under the *Competition and Consumer Act 2010* (the Act).

Clause 4 – Schedules

This section provides that each instrument that is specified in a Schedule to the Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other items in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Gift cards

Definition of gift cards

Section 99A of the Gift Cards Act defines a gift card to mean an article that is commonly known to be a gift card or voucher, whether in physical or electronic form and that is redeemable for goods or services. Section 99A also provides that regulations can be made to add to, or exempt items from, the definition of gift card.

As noted at paragraph 1.24 of the Explanatory Memorandum to the Gift Cards Bill, credit, charge and debit cards; public transport tickets; buy a certain number, get one free-style customer loyalty cards (e.g. coffee cards); and discount offers and advertising material are not commonly known as a gift card and therefore do not need to be specifically exempted.

Regulation 89A prescribes items that are not gift cards to make clear that certain cards are not subject to the reforms.

Reloadable pre-paid cards

Regulation 89A(a) prescribes that the definition of a gift card does not include cards that can be used to make a payment for goods and services and can have their value increased after they have been issued. For avoidance of doubt, the increase in value may relate to the balance on the card at the time of supply or to any subsequent balance.

These cards are often referred to as reloadable pre-paid cards. Such cards are not typically used as gift cards. They are more commonly used repeatedly by single individuals to make payments, initially with the preloaded value, but thereafter using funds they load onto the card.

Reloadable pre-paid cards are considered to be financial products and are regulated by the *Corporations Act 2001*.

Pre-paid electricity, gas or telecommunications service cards

Regulation 89A(b) prescribes that the definition of a gift card does not include cards that are only redeemable in relation to electricity, gas or a telecommunications service.

Cards of this kind are generally used by the person who purchased the card to pre-pay electricity, internet or mobile phone charges rather than as gift cards.

This exemption does not cover cards that can be redeemed for music streaming or video game services.

Post-supply fees

Section 99D of the Gift Cards Act provides that a person must not supply a gift card with terms and conditions that allow for prohibited post-supply fees to be charged. Section 191C provides that it is an offence to do so.

Section 99E provides that a person must not demand or receive payment of a post-supply fee. Section 191D provides that it is an offence to do so.

Subsection 99D(2) of the Gift Cards Act provides that regulations will be made to specify fees and charges that are not considered post-supply fees and can be charged after a card is supplied.

Regulation 89B is an exhaustive list of permitted fees. These are fees or charges:

- for making a booking if the fees or charges are the same, or substantially the same, as those for making a booking using a payment method other than a gift card;
- for foreign currency transactions;
- in relation to the reissue of a lost, stolen or damaged card; and
- that are payment surcharges (within the meaning of section 55A of the Act).

The ban on post-supply fees is not intended to include the fees that businesses normally charge to recover the costs of settling individual purchases made by consumers through payment systems. For example, these transactions may incur fees for currency conversion fees (such as when a card is used for purchases at an overseas website) and payment surcharges (e.g. charges which relate to the cost of renting and maintaining payment terminals for a payment system). For the avoidance of doubt, the list of permitted fees includes booking fees that merchants apply irrespective of payment methods; and fees merchants usually charge for replacing any types of cards (including postage fees).

Payment surcharges are regulated by Part IVC of the Act which aims to ensure surcharges are not excessive and reflect the cost of using the payment methods for which they are charged. A limit on payment surcharges only applies to corporations acting in trade or commerce. However subsection 6(2F) of the Act extends the application of the surcharging provisions to certain persons who are not corporations where the payment surcharge was charged for processing a payment by means of an electronic communication (or similar means) and in the other relevant circumstances specified under section 6 of the Act.

The ban on post-supply fees applies to fees charged to consumers for providing administrative support for the operation of gift cards. These fees have the potential to be a significant and ongoing source of consumer detriment affecting all consumers who receive a gift card. In particular, certain types of post-supply fees could be used as a de facto expiry period (e.g. the funds could erode unless the card is used by a certain date). Examples of fees that will no longer be permitted include card activation fees, balance checking fees, monthly account keeping fees and fees charged if the card is inactive for a period of time. Fees are banned irrespective of whether they reduce the card balance or are charged separately.

Businesses can continue to charge upfront fees on purchases of gift cards, as consumers are able to make informed decisions about these fees at the point of supply of the gift card.

Minimum three year expiry period – gift cards exempt from this requirement

Regulation 89C(1) prescribes specific kinds of gift cards that are exempt from the requirement to have a minimum three-year expiry period.

Each of the exemptions in regulation 89C(1) include a requirement that the gift cards are for a particular good or service. This includes gift cards for an individual or class of good or service but not cash denominated cards. For example, a voucher redeemable for a movie is likely to be a gift card for a particular good or service, that is 'a movie'. Conversely, a \$20 'movie money' style voucher that allows the holder to spend a dollar value on any good or service at a cinema (e.g. a movie ticket, premium seating, a drink, confectionary, meals) is not likely to be for a particular good or service. Similarly, a Salon voucher for a one-hour massage or facial is likely to be for a particular good or service even though consumers can choose what type of massage or facial they receive. However a \$200 Salon voucher that the consumer can use to purchase any goods or services offered by the salon is unlikely to be for a particular good or service.

These kinds of gift cards are still subject to the disclosure requirements (sections 99C and 191B) and prohibitions on post-supply fees (sections 99D, 99E, 191C and 191D). Applying these requirements meets the objectives of the reforms, including reducing loss to consumers. In particular, displaying expiry information will make any shorter expiry period resulting from the exemptions clear to the gift card recipient. Similarly, the reasons for prohibiting post-supply fees are equally applicable to cards with shorter expiry periods.

Gift cards redeemable for particular goods or services only available for a limited time

Regulation 89C(1)(a) exempts gift cards from the minimum three-year expiry period where they are only redeemable for a particular good or service and the good or service is only available for a limited period of time.

This exemption recognises that it would not be practical for a gift card to be redeemable for a period of time that goes beyond when the particular good or service is available. This would typically occur when a gift card or voucher is:

- supplied for a one-off or time-bound event (e.g. a temporary exhibition, a festival, a one-night only concert, or a theatre production with a limited season) that cannot be used for another event; or
- redeemable for limited edition goods that are not available at any other time.

Gift cards redeemable for particular goods or services supplied at a genuine discount

Regulation 89C(1)(b) exempts gift cards from the minimum three-year expiry period where they are:

- only redeemable for a particular good or service; and
- supplied at a discount on the market value of the good or service that a reasonable person would consider to be a genuine discount on the market value of the good or service.

For example, a health and wellness centre supplies a gift voucher for a massage normally valued at \$100 for a price of \$65.

This exemption intends to allow businesses to continue to be able to use gift cards to clear inventory or increase demand for goods and services, while also ensuring consumers receive a genuine discount.

Businesses will still be required to display the expiry information prominently on the gift card allowing consumers to make an informed decision to trade off a genuine discount for a shorter expiry period.

The exemption references a ‘genuine’ discount to mitigate the risk that businesses could use small discounts to avoid the three-year expiry period requirements. It is impractical to specify a quantum for the size of a genuine discount given the potential for large variations in profit margins across individual businesses and industries more broadly. For this reason, the exemption references what a reasonable person would consider to be a genuine discount to minimise this risk.

Minimum three-year expiry period – circumstances exempt from this requirement

Regulation 89C(2) prescribes specific circumstances that are exempt from the requirement to have a minimum three-year expiry period. As with regulation 89C(1) gift cards supplied in these circumstances are still subject to the disclosure requirements (sections 99C and 191B) and prohibitions on post-supply fees (sections 99D, 99E, 191C and 191D) for the same reasons outlined above.

Gift cards supplied as part of a temporary marketing promotion to the purchaser of a good or service in connection with that purchase

Regulation 89C(2)(a) exempts gift cards from the minimum three-year expiry period where they are supplied to the purchaser of goods or services in connection with the purchase of the goods or services as part of a temporary marketing promotion.

Examples include promotions in which:

- consumers receive a \$100 gift card if they purchase a refrigerator from a white good retailer within the next calendar month; and
- an online clothing retailer makes an end of financial year offer to provide a \$20 gift card to consumers for use at the same business when they buy any three shirts in May or June.

This is designed to ensure businesses can continue to make temporary offers to consumers as part of marketing activities. New businesses typically use these offers to build up their customer base. Other businesses, especially small businesses, often use temporary promotions to manage demand during off-peak periods and to manage stock levels. A three-year expiry period would reduce the ability for businesses to manage short-term demand and stock levels using gift cards. Limiting such offers could cause consumers detriment.

Gift cards donated for promotional purposes

Regulation 89C(2)(b) exempts gift cards from the minimum three-year expiry period where they are donated by the supplier for promotional purposes.

This allows businesses the flexibility to give away promotional gift cards to stimulate short-term demand for goods and services. This is particularly important for new businesses seeking to build up a customer base, particularly small businesses. It also enables businesses to give away cards to schools and charities for fundraising without having to provide a three-year expiry period, removing a disincentive for such donations.

The exemption does not require the recipient to be a charity or for the sole purpose of the donation to be promotional purposes.

Examples include:

- **Example 1: Exempt**

Tim's Toys donates a gift card to the local school fete raffle as the owners like to contribute to the community that supports the small business. The gift card is clearly branded with "Tim's Toys" and increases awareness of his business amongst fete attendees.

In these circumstances, Tim's Toys will not be required to provide the school with a minimum three-year expiry period as the gift card was donated for promotional purposes.

- **Example 2: Exempt**

Retail Pty Ltd is celebrating its first birthday. As part of celebrations, staff are handing out branded gift cards to the value of \$15 to anyone who passes by their shopfront on that day. Recipients also have the option of having the gift card emailed to them. Recipients are not obliged to purchase or exchange anything in order to receive the gift card. A number of recipients accept a gift card as they are handed out by staff members, or choose to leave their email addresses with staff members.

In these circumstances, Retail Pty Ltd will not be required to provide recipients with a minimum three-year expiry period as the gift card was donated to them. Where emails are provided in this example, they are only used to provide access to the gift card.

- **Example 3: Not exempt**

Ruth is asked by CPU Pty Ltd to attend a 1 hour focus group on how CPU Pty Ltd can improve its store layout and consumer experience. Ruth is required to attend the focus group in person and provide her personal details. In exchange, CPU Pty Ltd will provide all attendees with a \$50 gift card that can be spent at any shop.

In these circumstances, CPU Pty Ltd will be required to provide Ruth with a minimum three-year expiry period for her gift card as Ruth has exchanged her time and personal details for the gift card.

It is appropriate to exempt gift cards donated for promotional purposes from the minimum three-year expiry requirement, as consumers receiving promotional cards which are given away (without sale or exchange) experience relatively minor detriment if the card expires before they can use it.

Gift cards supplied for the purpose of employee reward schemes

Regulation 89C(2)(c) exempts gift cards that are supplied for the purpose of employee rewards schemes from the minimum three-year expiry requirement.

This exemption is designed to ensure employers continue to have flexibility in designing reward scheme arrangements, and employees have flexibility and choice when accessing their rewards and bonuses.

Consultations identified a myriad of different contractual and administrative arrangements for schemes operated by employers to provide gift cards as rewards to employees. For example, employers may manage a scheme in-house and provide gift cards for use at their own businesses or may engage a third party provider to manage or operate the scheme, with the employee being able to choose among a range of gift cards from other businesses. The particular arrangements of the scheme may affect the handover process of the gift cards, so that some employees may receive a gift card directly from their employer while other employees may receive it from a third-party.

Regardless of the type, or complexity, of a scheme, where gift cards are supplied as part of an employee reward scheme, they are exempt from the minimum three-year expiry requirement. In this context it is intended that ‘scheme’ takes its ordinary

meaning, for example, a policy or plan officially adopted by a company. This will ensure a uniform approach for all employee reward schemes.

As these schemes are funded by employers, there is minimal risk of financial harm or detriment to the recipient employee. Employees will still benefit from the requirement to have expiry information displayed on the gift card and the ban on post-supply fees.

Gift cards supplied for the purpose of customer loyalty programs

Regulation 89C(2)(d) exempts gift cards that are supplied for the purposes of customer loyalty programs from the minimum three-year expiry requirement.

Businesses rely on loyalty programs to deliver bonus offers, rewards or incentives for the continuing loyalty of their customers.

Consultation identified a myriad of different contractual and administrative arrangements for customer loyalty programs including the form of consideration (e.g. how loyalty points or dollars were accrued) and how gift cards were issued (e.g. automatically or supplied in exchange for points), similar in nature to employee rewards schemes.

Regardless of the arrangements, gift cards supplied for the purposes of customer loyalty programs are exempt from the requirement to provide a minimum three-year expiry period. For example, suppliers may manage a scheme in-house and provide gift cards for use at their own businesses or may engage a third party provider to manage or operate the loyalty program, with customers able to choose among a range of products (including gift cards) from other businesses. The particular arrangements of the customer loyalty program may affect the handover process of the gift cards. For example, some customers may receive a gift card directly from the supplier with an option to use it in that store or other businesses, while other customers may receive the gift card from a third party business. All gift cards provided for the purposes of loyalty programs are exempt from the minimum three-year expiry period.

Requiring gift cards supplied for the purposes of customer loyalty programs to have a three-year expiry period may increase the costs that businesses incur running these programs (for example by having to manage gift card balances for three years). This may act as a disincentive for businesses to continue to offer rewards through customer loyalty programs – to the detriment of consumers.

Consumers still benefit from the requirement to have expiry information displayed on the gift card and the ban on post-supply fees.

Gift cards exchanged for other gift cards

Regulation 89C(2)(e) exempts replacement gift cards from the minimum three-year expiry period where a supplier agrees to exchange a gift card for another gift card (a replacement gift card) provided the expiry period for the replacement gift card is no sooner than the initial gift card's expiry period.

Consultations have suggested that gift cards in the form of vouchers for specific goods or services are sometimes given as gifts but are not always suitable for, or wanted by, the end user. In those circumstances, the holder of the gift card may not be entitled to a refund, but the supplier of the voucher may allow them to exchange it for another voucher.

Given that the intent of the reforms is to provide consumers with three-years to use their cards, this exemption ensures that the original expiry date is carried forward to the replacement card. This allows businesses to swap gift cards without needing to provide an additional three-year validity period.

- **Example 4: gift card changed for another gift card**

Megan receives a gift voucher from a friend for skydiving but is afraid of heights. She asks the supplier to swap the voucher for a one-day harbour cruise as it is of the same value and she would enjoy the cruise more. The original gift card was valid for three years, but only has 18 months remaining before it expires. The supplier allows her to swap the voucher and the validity period of the replacement voucher matches the original voucher so she has 18 months to redeem the replacement voucher. The supplier is exempt from the requirement to provide a three-year expiry period for the replacement voucher (but may choose to provide a longer expiry period if they wish).

Exemptions from all of the requirements

Regulation 89C(3) prescribes specific kinds of gift cards that are exempt from all of the requirements. These kinds of gift cards are not required to have a minimum three-year expiry period, are not subject to the disclosure requirements and are not prohibited from charging post-supply fees.

Supply of second-hand gift cards to consumers

Regulation 89C(3)(a) exempts pre-owned gift cards supplied as second-hand goods to consumers from all requirements.

This exemption allows a person to supply gift cards that are second-hand goods (regardless of whether the value on the card remains the same or has been eroded) without complying with the minimum expiry period, the ban on post-supply fees or the disclosure of expiry information requirements.

- **Example 5: Second-hand gift cards**

Mabel buys a gift card from Crystal's Creations and gives it to her friend, Joe, as a gift. Joe does not want the card and sells it to a second-hand gift card dealer. Crystal's Creations must meet the obligations under the Gift Cards Act when it supplies the gift card to Mabel. Neither Mabel nor Joe are engaging in trade or commerce so will not have to meet the obligations in the Gift Cards Act. The second-hand dealer is engaging in trade or commerce but is exempt under regulation 89(3)(a).

Gift cards acquired for re-supply are not considered to be second-hand if they have not previously been supplied to a consumer. For example, a person who acquires new gift cards for re-supply in trade or commerce is not a consumer (section 3 of the Australian Consumer Law), so will be re-supplying new gift cards rather than second-hand gift cards when they sell these cards to consumers. Such a circumstance may exist where an online retailer buys cards wholesale from a large retailer and then sells (re-supplies) them to individuals (consumers) through the retailer's website.

The exemption from all of the requirements recognises that suppliers of second-hand cards are unable to alter the expiry period on the gift cards or amend any terms and

conditions of these cards relating to fees. Accordingly, the exemption eliminates the potential for the reforms to impede the operation of a market for second-hand gift cards, which benefits consumers by allowing them to obtain some value for unwanted gift cards that would otherwise expire.

Gift cards supplied to certain charities and government agencies

Regulation 89C(3)(b) exempts gift cards from all of the requirements where they are supplied to:

- An entity registered under the *Australian Charities and Not-for-profit Commission Act 2012* as having the purpose of advancing social or public welfare (subtype three).

- **Example 6: certain charities**

A charity with the purpose of relieving the poverty, distress or disadvantage of individuals or families supplies gift cards to clients experiencing difficulties buying necessities. The gift cards are valid for one month as they are for immediate assistance and the charity wishes to reduce the likelihood of misuse through on-selling.

- Local, state and commonwealth government agencies and authorities.

- **Example 7: government agencies and authorities**

A local council purchases gift cards to provide to residents following a natural disaster. These cards are for short-term relief only and residents will have two months to use them.

Government agencies and authorities and certain charities require the flexibility to contract for the provision of gift cards with expiry dates less than three years in order to suit particular program needs and prevent misuse. Although these organisations will not have an express right to a three-year expiry period, they may still contract with suppliers to provide a three-year period if they wish.

Suppliers are not required to display expiry information on gift cards provided in these circumstances as government agencies and authorities and certain charities need to be able to retain a stock of gift cards for activation and deployment when required. In these circumstances, the government body or charity will often be a consumer (rather than a re-supplier). It would not be appropriate for the supplier to be liable if these organisations (as consumers) neglect to display expiry information on the cards. There is minimal risk of harm to end users as consultation indicates charities and governments already provide expiry information to gift card recipients and take steps to assist recipients to use them.

The post-supply fee exemption provides certain charities and governments with flexibility to suit particular program needs. These organisations will continue to have the ability to contract with suppliers to avoid undesirable post-supply fees. There is minimal risk of financial harm or detriment to the recipient of these gift cards given the types of organisations that distribute the gift card to the end user. Consultations indicate that these organisations prioritise the recipient's physical and mental wellbeing and usually provide gift cards for free.

Application of offences

Regulation 92A provides that the relevant offence provisions do not apply to gift cards that are exempted in the Regulations.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Treasury Laws Amendment (Gift Cards) Regulations 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Treasury Laws Amendment (Gift Cards) Act 2018* (the Gift Cards Act) received Royal Assent on 25 October 2018 and provides a number of requirements for supplying gift cards, including: a minimum three-year mandatory expiry period; disclosure of expiry information on gift cards; and a ban on post-supply fees associated with gift cards.

The purpose of the *Treasury Laws Amendment (Gift Cards) Regulations 2018* (the Regulations) is to insert provisions into the Competition and Consumer Regulations 2010 to:

- specify items that are not gift cards;
- identify fees that are not considered post-supply fees and can continue to be charged after a gift card is supplied; and
- exempt gift cards, persons or gift cards supplied in circumstances from some or all of the requirements in the Gift Cards Act.

The Regulations commence on the day after they are registered on the Federal Register of Legislation and apply to gift cards supplied on or after 1 November 2019.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.