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Senate Standing Committees on Economics  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Via email [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

**RE: Senate Standing Committees on Economics Inquiry into causes and consequences of the collapse of listed retailers in Australia**

The Retail Council welcomes the opportunity to contribute to this Inquiry and provide our views on the Terms of Reference.

The Retail Council is the voice of Australia's top retailers driven to achieve sustainable growth of retail in Australia for the benefit of the consumer, the industry and the economy.

This Inquiry has clearly been sparked by the recent closure of Dick Smith Electronics. It is always disappointing to see a business close, particularly such an iconic retail brand. We recognise that the past few months must have been extremely challenging for all employees, shareholders and customers.

Before we address the specific Terms of Reference, we would like to make three preliminary observations.

Firstly, like all corporations, Dick Smith Electronics, is subjected to the Corporations Act. This was the case when it was owned by an individual, owned as part of a larger listed retail group, owned by a private equity firm and when it, most recently, listed on the stock exchange. No matter what the business structure the Corporations Act has always applied. As such, we would remind the Committee that if there are specific concerns about breaches of the Corporations Act during any period of Dick Smith Electronics operations then these should be dealt with by the Australian Securities and Investments Commission.

Secondly, we remind the Committee that in a capitalist-based economy such as Australia, the role of Government is to set the legislative framework around which businesses can operate. In Australia's case the Corporations Act is the main method of doing this and ASIC is the main regulator charged with oversight. It is not the role of Government to determine which business structure is most appropriate for retail businesses, or indeed any business, to use. These decisions are made by owners and shareholders within the legal framework – not Governments.

Thirdly, and linked to the above point, Australia is a capitalist-based economy. In such economies some businesses will fail. That is the downside of capitalism but it is how it works. They will fail for many reasons – poor decision making, a downturn in customers, lack of interest in products – the list is endless. When they fail it inflicts a terrible toll on the people who have built the business, worked in the business, invested in the business and shopped at the business. But just because something terrible has happened does not automatically mean that it must have been as a result of illegal activity or that whatever structure that business had must be banned or that the decisions the owners made must be prevented from being made by other businesses. If there is illegal activity then ASIC and the courts are there to investigate and prosecute. In a capitalist economy it is not the role of Government to prevent business failure. It is the

role of Government to set the legal framework around how businesses can operate and if they step outside the law then it is the role of the regulator and the courts to prosecute.

Turning now to the specifics of the Inquiry and the Terms of Reference.

The Retail Council is extremely alarmed that this Inquiry appears to be targeting a specific sector and a specific business structure with no clear grounds for such targeting. The Inquiry is only about the retail sector and only about certain business structures. We are concerned that the Committee views listed retailers and private equity retailers as needing to be closely examined to the extent of holding a costly Senate Inquiry into them. Other industries that use these business structures are evidently not required to be investigated. Similarly, other business structures within the retail sector, such as sole operators or private-owned companies, are outside the scope of this Inquiry. It is not clear why this Senate Committee is only focused on investigating these specific business structures and only as they are used in the retail sector.

With respect to the Terms of Reference (a) to (c), the Retail Council has no information regarding the conduct of private equity firms, action by ASIC in its role as a regulator or the operation of the external administration system when a business fails. As far as the Retail Council is aware these system are operating as they were intended to and are not contributing to the failure of retail businesses. Again, we ask that if information regarding illegal activity is available regarding specific cases, such as the collapse of Dick Smith Electronics, then it should be provided to the appropriate authorities to properly investigate.

Turning now to the gift card matters raised in the Terms of Reference.

As the Committee will be aware, in 2012 the Commonwealth Consumer Affairs Advisory Council (CCAAC) conducted a wide ranging review of the Australian gift card markets, at the request of Consumer Affairs Ministers.<sup>1</sup>

The CCAAC Inquiry found that gift cards are a retailer service that is valued by consumers.

*There is evidence of a vibrant Australian gift card market which suggests that gift cards are a popular choice for consumers and that many Australian retailers benefit from offering gift card products. In addition, it is evident that the market is growing and that new gift card forms and functions are emerging. (pg 4)*

Part of the CCAAC Inquiry dealt with the operation of gift cards in a normal trading environment, such as expiry dates and terms of conditions. But the CCAAC Inquiry also looked at how gift card holders were treated in the event of insolvency, as per the issues raised in this current Senate inquiry.

Indeed, the CCAAC Inquiry looked at the specific issues also raised in this Inquiry's Terms of Reference.

- d. the effect of external administration on gift card holders and those who have made deposits on goods not delivered;
- e. the desirability of the following proposals in the event that gift card holders are unable to redeem their gift cards following the appointment of external administrators:
  - i. placing an obligation on external administrators to honour gift cards,
  - ii. a requirement that funds used to purchase gift cards be kept in a separate trust account by businesses,
  - iii. directors to be personally liable for the value of gift cards purchased; and

The key findings of the CCAAC Inquiry were:

*CCAAC finds that gift card products, when used as intended, have the potential to provide significant benefits to Australian consumers. CCAAC encourages policy makers to ensure that any new policies relating to gift*

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<sup>1</sup> CCAAC (2012) Gift Cards in the Australian Market, Final Report

*cards do not restrict consumers from benefiting through their engagement with the Australian gift card market. (pg 29)*

In terms of placing an obligation on external administrators to honour gift cards, that is making them secure creditors, the Retail Council believes that employees, contractors or other trade creditors, who have suffered a much greater financial and social impact than gift card holders, should not be relegated behind gift card holders in the event of an insolvency. This view was shared by CCAAC in its report. Indeed the Retail Council strongly objects to any move to elevate gift card holders above employees, investors and other unsecured creditors, as is being proposed by this Senate Inquiry.

*While it is unfortunate that some consumers have experienced losses where a gift card issuer has become insolvent, CCAAC believes that the holders of unredeemed gift cards should be treated equally with other unsecured creditors. (pg 5)*

*A similar approach proposed in submissions was to assign a higher priority to gift card holders in an insolvency process. Such an approach would have significant impacts on businesses, lenders, investors and employees, and place gift card holders above all other unsecured creditors, such as contractors or trade creditors that had supplied goods or services to a company without payment. There does not appear to be a compelling case for why gift card holders should receive a higher priority than other unsecured creditors of the gift card issuer. (pg 49)*

*Granting priority status to gift card holders where they are considered to be creditors would merely transfer welfare from one group to another. Gift card balances by their nature, are more likely to be used for discretionary expenditure. (pg 49)*

CCAAC also looked at the option of requiring trust funds to be established by retailers that offered gift cards and also dismissed this suggestion as a costly and out-of-proportion response.

*It was suggested that gift card holders could be protected from the insolvency of card issuing retailers through the establishment of a trust fund to hold gift card balances. It is claimed that this would ensure that even in the event of insolvency, funds would still be available to honour gift cards. It would also ensure that gift card issuers do not rely on money received from gift cards sales for other purposes, until the gift card has been redeemed. However, such an approach would necessarily reduce the working capital available to the entity while it is solvent, as well as reduce the amount available to meet the claims of all other creditors in the event of insolvency, effectively transferring welfare from one group of creditors to another. Such an approach could also be expected to increase the cost of operating a gift card program. (pg48/49)*

*Holding gift cards on trust is likely to be more expensive than alternative policy measures. As such, CCAAC does not consider that gift card issuers should be compelled to maintain a trust account for gift card balances. (pg 49)*

In other words, the CCAAC Inquiry, which was undertaken only a few years ago, found that the way in which gift card holders are treated by external administrators is appropriate (i.e. as unsecured creditors) and that setting up a trust requirement would be a costly and excessive regulatory response.

The Retail Council would argue that the proposal to make Directors personally liable for the value of gift card purchases is a similarly excessive response to the issue of gift card holders during insolvency. Directors are not personally liable for other debts owed by the insolvent company – such as employee entitlements and existing trade contracts so why would gift card holders, who have experienced a smaller financial impact, be treated with a higher level of priority.

Regulators should not use a sledgehammer to crack a nut. It is unfortunate when any business fails but the biggest financial and social impact of this failure is on owners, employees and business creditors. It is not on gift card holders.

The CCAAC Inquiry recommended improving consumer education around gift cards – such as lifting awareness about what happens in the event of a business failing – is a far more appropriate response than additional regulation.

The Retail Council encourages the Committee to revisit the CCAAC report, which was conducted by the Commonwealth Treasury, for an informed and independent overview of the gift card market in Australia and the appropriate ways forward.

Should you have any questions regarding the points raised in our submission please contact our Sydney office on (02) 8823 3515.

Kind Regards

Anna McPhee  
Chief Executive