18 March 2016

[By email: economics.sen@aph.gov.au]

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

Dear Committee,

Inquiry into the causes and consequences of the collapse of listed retailers in Australia

The Consumer Action Law Centre (**Consumer Action**) welcomes the opportunity to comment on the *Inquiry into the causes and consequences of the collapse of listed retailers in Australia* (**Inquiry**).

Our understanding is that this Inquiry has been prompted by the recent high-profile collapse of electronics retailer Dick Smith and the revelation that Dick Smith stores were selling gift cards at the same time that the business was contacting administrators—leaving consumers out of pocket as unsecured creditors, with no realistic prospect of obtaining a refund.[1] In our view, the collapse of Dick Smith clearly highlights the need to implement practical consumer protection to ensure that in the event of collapse, consumers are able to obtain refunds for unused gift cards. This would not be a difficult reform and would address the inherent unfairness of a situation such as Dick Smith's collapse. Given our particular interest in this issue, we have restricted our comments to points (d) and (e) of the Inquiry Terms of Reference.

Consumer Action has previously commented on gift cards consumer protections—most prominently in our 2012 submission to the Commonwealth Consumer Affairs Advisory Council (**CCAC**) inquiry *Gift Cards in the Australian Market* (**Attachment A**). In that submission, we made the comment that expiry dates on gift cards may constitute an unfair term, as may some limitations on the giving of change or other limitations on how credit can be used. We also recommended that CCAC investigate the costs and benefits of establishing a scheme to protect holders of gift cards when retailers become insolvent, and made particular reference to the Victorian Motor Car Traders Guarantee Fund, and the previous Travel Compensation Fund—which protect consumers in the motor vehicle and travel industries respectively.

[1] Frank Chung, *Dick Smith's worthless gift card sale*, news.com.au, January 14 2016 (http://www.news.com.au/finance/business/retail/dick-smiths-worthless-gift-card-sale/news-story/4cfea6656265f0936fbdf4b1d847ecd1)

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While we acknowledge that a similar scheme may not be practical for gift cards (given they are used across different industries, and most retailers are not licensed in the manner of vehicle traders and travel agents), we do believe that a requirement for retailers to quarantine gift card funds is possible. In the event that a retailer becomes insolvent, those funds could then be dedicated to refunding consumers. Further, we are aware such a scheme already exists in the live entertainment industry, under an industry code of practice administered by peak industry body Live Performance Australia (**LPA**). The *Live Performance Australia Ticketing Code of Practice – Industry Code* (**LPA Code, Attachment B**) provides a useful example of how consumer's funds may be protected, until such time as the purpose for which they were expended has been fulfilled.

Our comments are detailed more fully below.

About Consumer Action

Consumer Action is an independent, not-for-profit, campaign-focused casework and policy organisation. Consumer Action offers free legal advice, pursues consumer litigation and provides financial counselling to vulnerable and disadvantaged consumers across Victoria. Consumer Action is also a nationally-recognised and influential policy and research body, pursuing a law reform agenda across a range of important consumer issues at a governmental level, in the media, and in the community directly.

Gift cards and insolvency

As the Dick Smith collapse has shown, gift card holders are regarded as unsecured creditors in the event of a retailer collapse. This in turn means that receivers can refuse to honour the cards, effectively rendering them worthless, and consumers out of pocket.[2]

To remedy this situation, the Inquiry Terms of Reference proposes three potential measures under point (d):

(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.

Consumer Action supports both option (i) and (ii). Of the two, we hold the view that option (ii) offers the best prospect for strong consumer protection. In relation to point (iii), we believe it may cause retailers to withdraw gift cards from sale—which would be a negative outcome for consumers. We are of the view that many consumers like and value gift cards, so measures that would remove them from the market would not be in the consumer interest. Further, in the case of extremely large retailers, directors may not be in position to adequately refund all gift card holders, which essentially fails to solve the problem.

[2] Dana McCauley, *Calls for Coles and Woolworths to honour "worthless" Dick Smith gift cards*, news.com.au, January 7 2016 (http://www.news.com.au/finance/business/retail/calls-for-coles-and-woolworths-to-refund-worthless-dick-smith-gift-cards/news-story/f27572f34a656c662a0a8516f6a13bee)

While option (i) would preference gift card holders over other unsecured creditors, we believe that consumers in this situation do form a unique class of unsecured creditor—as they have essentially pre-purchased goods to the value of the card, deferring the choice of good purchased to a later time (and generally delegating that choice to another person, as a gift). This arguably places consumers in a unique position, and the argument could be made that they are entitled to be preferenced above other unsecured creditors. In practical terms, this would enable consumers who are holding gift cards to redeem those cards before stores physically close. It should also be noted that in some recent cases of insolvency, (such as that of Borders and Angus & Robertson), efforts have been made to ensure that consumer are informed and have an opportunity to redeem their gift card before a certain end date. This provides a useful precedent and is worth considering in the context of option (i).

Option (ii) is attractive as it avoids potential difficulties in preferencing consumers as unsecured creditors, and instead makes it clear that consumes are protected at the point of sale—essentially building a refund in the case of insolvency into the sale contract. To some extent, a gift card can be related to a ticket for a live performance event—in the sense that it is a pre-purchased right to enjoy a good at a later time. While the redemption of a gift card is more flexible (in that the time and place of the purchase is not dictated at the time of purchase, and the purchase may be made across a range of stock rather than for a single purpose), they do share strong conceptual similarities.

Under the LPA Code, it is made clear that consumers retain an interest in the money paid for their ticket, until such time as an event has been successfully held.[3] In order to ensure that this money is available for consumers in the event that the event is cancelled or in case of insolvency of a relevant party, the party in receipt of ticket proceeds (be they the event presenter, or a ticketing service provider), must ensure that the ticket proceeds are held in a trust account and are available for refund should the need arise. Furthermore, the terms and conditions of sale must make it clear to consumers that they will be entitled to a refund if the event does not proceed.

While the LPA Code is a voluntary code of practice, all LPA Members are required to comply with the Code as a condition of membership. Most major presenters and ticket service providers are members, ensuring that the Code has an extremely strong presence in the industry and generally dictates conduct around ticketing. Of course, the Australia Consumer Law (**ACL**) sits behind the LPA Code, which essentially operates to ensure that traders in the live entertainment industry are complying with consumer law—but in that capacity, it plays a useful role.

In Consumer Action's view, the purchaser of a gift card retains an interest in the money paid for that gift card until such time as the gift card has been successfully redeemed. As with a concert or theatre ticket, they have pre-purchased the right to enjoy a good at a later time. On that basis, we

[3] Part C, point 11 of the LPA Code states:

> "*Consumers have an interest in Ticket Proceeds, being the money paid for their tickets, until such time as the Event is held.*
>
> *In order to ensure that this money is available for Consumers in the case that the Event does not proceed or in the case of insolvency of a relevant party, the Authorised Seller or Presenter in receipt of Ticket Proceeds must comply with the requirements set out in this Part C*."

believe that retailers should be required to adhere to a similar system to that set out by the LPA Code, ensuring that consumers may be appropriately refunded in the event of retailer insolvency.

While we acknowledge that this may present practical accounting difficulties (after all, the flow of sales and redemption of gift cards is not as easy to track as it is for live event tickets), we do not believe those practical impediments should prevent effective consumer protection. Rather, we believe the principle of ensuring that consumers are adequately protected should drive efforts to develop a practical mechanism for doing so.

Please contact Zac Gillam, Senior Policy Officer on 03 9670 5088 or at zac@consumeraction.org.au if you have any questions about this submission.

Yours sincerely
CONSUMER ACTION LAW CENTRE

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Attachments:

Attachment A: CALC comment on 2012 CCAC inquiry *Gift Cards in the Australian Market*

Attachment B: LPA Ticketing Code of Practice – Industry Code