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Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

via email: committee.sen@aph.gov.au

Dear Committee Secretary

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

The Australian Competition and Consumer Commission (ACCC) is pleased to provide you with the attached submission in response to the Inquiry into the causes and consequences of the collapse of listed retailers in Australia.

The ACCC's submission provides an outline to the ACCC's roles as they relate to company collapses, in addition to outlining consumer rights and expectations following company collapses.

The ACCC would be happy to provide further and more specific information on any matters relevant to the Committee, should it assist.

If you have any questions regarding any aspect of the ACCC's submission, please do not hesitate to contact me. Alternatively, you could contact Scott Gregson, Executive General Manager Consumer Enforcement on (02) 6243 1350 or by email (scott.gregson@acc.gov.au).

Yours sincerely

Rod Sims
Chairman

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

Role of the ACCC and other regulators

The Australian Competition and Consumer Commission (ACCC) is responsible for the promotion of competition and fair trading and provision of consumer protection. The role of the ACCC is to enforce compliance with the *Competition and Consumer Act 2010* (CCA). The CCA includes the provisions of the *Australian Consumer Law* (ACL) which contains specific prohibitions on certain practices, which in general terms applies across the economy and prohibit false or misleading representations and unconscionable conduct.

A business that is, in trade or commerce, carrying on business in Australia is required to adhere to the CCA and ACL. This includes businesses that may be under administration. The ACL provisions cover conduct such as misleading or deceptive conduct, false or misleading representations and provide for consumer guarantees. The ACCC has specific information on its website relating to consumer issues arising when a business is under administration, which can be found at <http://www.accc.gov.au/consumers/consumer-protection/when-a-business-goes-bust>.

The collapse of a listed retailer can lead to detriment for employees, suppliers and the customers of that retailer. In some instances, the ACCC or other Australian Consumer Law Regulators (ACL Regulators), become involved when a business collapses to facilitate consumer rights and ensure that the businesses continue to comply with the ACL obligations.

In some circumstances the collapse of listed retailers has followed a merger or acquisition of the business in the period prior to its collapse. The ACCC is responsible for the assessment and review of merger applications to prevent structural changes that substantially lessen competition in any market in Australia.

The ACCC assesses merger applications in line with section 50 of the CCA which prohibits mergers that have, or would be likely to have, anti-competitive effects. The ACCC assesses each merger application on its merits, according to the specific nature of the transaction, the industry and the particular competitive impact likely to result in each case. The ACCC undertakes informal merger review and formal merger clearance. Both are undertaken in line with ACCC guidelines, as published on our website. These guidelines can be found at <http://www.accc.gov.au/business/mergers/merger-reviews>.

A firm at risk of failing can distort the competitive dynamics of a market as it tries to maintain sufficient custom and cash flow. This activity by a failing firm has the potential to overstate the level of competition in the market. In these circumstances, the relevant counterfactual for merger assessment is the market without the failing firm as that firm is unlikely to remain in market.

In general, to demonstrate that a merger will not substantially lessen competition due to the prospective failure of one of the merger parties, it is necessary to show that:

- the relevant firm is in imminent danger of failure and is unlikely to be successfully restructured without the merger
- in the absence of the merger, the assets associated with the relevant firm, including its brands, will leave the industry
- the likely state of competition with the merger would not be substantially less than the likely state of the competition after the target has exited and the target's customers have moved their business to alternative sources of supply.

The Australian Securities and Investments Commission (ASIC) is responsible for the administration and enforcement of the *Corporations Act 2001*, the *Australian Securities and Investments Commission Act 2001* (ASIC Act), and other relevant legislation. This responsibility includes monitoring, regulating and enforcing corporations and financial services laws to protect consumers, investors and creditors and promote market integrity. ASIC also has responsibility for the regulation of administrators and liquidators.

Consumer protection in relation to financial services is the responsibility of ASIC and is not generally within the ACCC's jurisdiction. Gift cards are likely to be considered financial services products.¹ Additionally, matters concerning the conduct of any firm, including equity firms, in terms of compliance with Directors duties (including solvency issues) are the responsibility of ASIC and not within the ACCC's jurisdiction.

In relation to company collapses, in conjunction with other ACL Regulators, the ACCC has previously engaged with external administrators to ensure that consumer interests and consumer law is taken into account in their approach. Our advice to consumers will be consistent with our guidance, *When a business goes bust*, as outlined above. Additionally, ASIC publishes guidance material on their website to assist consumers and other creditors.

Gift cards, consumer guarantees and other issues

As noted above, gift cards are likely to be considered financial services products and accordingly are matters for ASIC consideration. ACL Regulators have and do advise that holders of gift cards are likely to be considered unsecured creditors. Consumers should note the position that appointed administrators are taking in relation to gift cards of a company under administration. If they advise that gift cards will not be honoured in full or in part they can approach the administrator to consider registering as an unsecured creditor.

Consumers who have made deposits on goods not received are also likely to be considered unsecured creditors. These consumers should also approach administrators to register as unsecured creditors.

In relation to consumer guarantees for consumers who have purchased branded items of other manufacturers prior to a company going into administration, ACL Regulators recommend consumers contact the manufacturer directly for a remedy. Consumers who have purchased branded items of the firm are likely to be considered an unsecured creditor. Consumers who may be considered unsecured creditors should approach the administrators to register as unsecured creditors.

In the above situations, consumers are placed in an unfortunate position, particularly where they have purchased goods or services, or have been provided with gift cards in the lead up to administration. The ACCC, in conjunction with ASIC and other ACL Regulators, often engages with receivers and administrators to ensure that consumer interests and consumer law is taken into account in their approach. We also expect that the company will continue to comply with its obligations under the ACL during the period of administration and while it continues to trade and can take action during this time to address any consumer law issues which may arise.

¹ ASIC Regulatory guide 185, *Non-cash payment facilities*, <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rq-185-non-cash-payment-facilities/>

In 2011-12, the Commonwealth Consumer Affairs Advisory Council (CCAAC) considered gift card issues. We direct the Committee to its discussion and recommendation.²

It is unfortunate that business failures can have significant impacts on consumers. It would be the decision of policy makers to weigh up the position of consumers when businesses go into external administration. The CCAAC report identifies a number of issues for consideration should this be contemplated.

² Commonwealth Consumer Affairs Advisory Council final report on *Gift cards in the Australian market*
<http://ccaac.gov.au/2012/07/06/gift-cards-in-the-australian-market/>