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Dear Committee Secretary

Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (AML Bill) - submission on behalf of Westfield Gift Cards Pty Limited

1 Abstract

Westfield believes that Westfield's gift card product is not intended to be regulated as a designated service under the Bill. However, the definition of "stored value card" (SVC) in the Bill needs to be amended for this policy objective to be achieved.

Issuing SVCs is intended to be a designated service. The relevant designated services are drafted to exclude low risk, low value SVCs from regulation. Unfortunately, the definition used for "stored value card" (SVC) does not apply to Westfield's gift card, or similar products, for technical reasons.

Unless the Bill is amended, the "low-value" exemption that is intended to apply to the gift card will not apply. Westfield's gift card (and many similar, low risk products) would attract the full force of the regime as "debit cards".

The drafting must be clarified before the Bill commences to prevent Westfield and other service providers being put to unintended cost and expense.

2 Introduction

We act for Westfield Gift Cards Pty Limited (ACN 113 171 663, AFS Licence number 288723) (WGC), and make this submission on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Bill) on behalf of WGC and the Westfield Limited Group of companies.

3 WGC Gift Cards

WGC currently offers the “Westfield gift card”, a gift card for use in Westfield shopping centres (**Gift Card**). The maximum value that can be loaded to a Gift Card is \$995. Gift Cards are non-reloadable. Gift Cards are only able to be used for making non-cash payments for goods and services while the cardholder is physically present at a store in Westfield shopping centres. They can be used on multiple occasions for this purpose. No “cash out” is available, including by way of refund on a cancelled transaction.

Importantly, the record of available value is not stored on the magnetic stripe of the Gift Card. The record of available value is stored on a central server.

The Gift Cards qualify as “gift facilities” under ASIC Class Order [CO 05/738]. This class order recognises the low risk and simple nature of the Gift Cards. Under the Class Order there is broad relief from the licensing, conduct and disclosure obligations in Chapter 7 of the *Corporations Act 2001*. The Reserve Bank of Australia, in its “Declaration No. 1, 2006 regarding purchased payment facilities” has also declared that the *Payment System (Regulation) Act 1998* does not apply to gift facilities within the meaning of the ASIC relief.

4 The apparent intention of the Bill

The Explanatory Memorandum to the Bill implies that the Bill is not intended to apply to products such as the Gift Card. It is stated that Items 21 to 24 of the designated services in Table 1 of clause 6 aim to “reduce compliance burdens on providers issuing stored value cards or increasing the monetary value of” SVCs (page 58).

Westfield submits that this policy aim is the appropriate outcome. The amount stored in the gift card is relatively low and so the money laundering and terrorist financing risk that is risk posed is also low. The uses to which value on a Gift Card may be put are more limited than the uses to which cash can be put. Value, once stored on the card, cannot be re-converted to cash. Accordingly, the costs of compliance with the Bill would be disproportionate to the risks created through their use of the gift cards. The Explanatory Memorandum specifically acknowledges such low-value products as “low risk”, so it would appear that the Bill intends to exclude such products from its operation. Unfortunately, the drafting does not achieve this aim.

At first blush, the Bill would not apply to the Gift Card, because its maximum value is \$995, and no cash-out is possible. The designated services set out in Items 21 to 24 of Table 1 in Section 6 make clear that a SVC with these properties will never involve the provision of a designated service. The maximum value of the Gift Card falls well below the relevant threshold.

If the Gift Card falls within the definition of SVC, then the provision of the Gift Card will therefore not involve the provision of a designated service, and would not be regulated under the Bill. This would be in line with the ASIC and Reserve Bank policy noted in 3 above. In Westfield's view, it would also be appropriate given the extremely low money laundering and terrorism financing risk posed by the Gift Card.

5 The definition of "stored value card" and its application to Gift Cards

SVC is defined in clause 5 to "include a portable device that is:

- (a) capable of storing monetary value in a form other than in physical currency; *and*
- (b) of a kind specified in the regulations."

No regulations exist as yet. Although the Explanatory Memorandum states that regulations are intended to be able to include special types of SVCs as technology develops, it is clear that **both** limbs of the definition must be satisfied for a product to qualify as a SVC.

This creates problems for the Gift Card as the monetary value is not stored **on** the portable device itself (i.e., the Gift Card), but on the central server. In addition, no regulations currently exist. Without regulations, it is impossible for **any** device to qualify as a SVC.

The Explanatory Memorandum notes relating to the definition of "stored value card" (page 48) do not provide any further information about what is intended and provide no basis for concluding that a product whose stored value is maintained centrally (as opposed to on the device itself) can qualify as a SVC.

Accordingly, WGC is concerned that the definition of SVCs does not cover its Gift Cards (or indeed most other gift cards, vouchers and other non-cash payment facilities - this includes public transport payment mechanisms and toll road passes).

6 The definition of "debit card" and its application to Gift Cards

If the Gift Card does not fall within the definition of SVC, then there is a risk that it would fall within the definition of a "debit card". Under the Bill, a "debit card" has the same meaning as in section 63A of the *Trade Practices Act 1974*. Section 63A defines "debit card" as:

- (a) an article intended for use by a person in obtaining access to an account that is held by the person for the purpose of withdrawing or depositing cash or obtaining goods or services; or
- (b) an article that may be used as an article referred to in paragraph (a).

An “article” includes a token, card or document.

As the definition of an “account” under the Bill is very broad and is not limited to financial institution accounts, the Gift Card may be thought of as an “article” that allows access to an “account” for the purpose of purchasing of goods or services, taking it within the definition of a “debit card”. This would immediately subject Gift Cards to record-keeping requirements under Part 10 of the Bill, and to all other provisions of the Bill as they commence. Following the commencement of Part 2 (Identification Procedures etc), it would become a criminal offence under section 139 to issue gift cards on an anonymous basis.

This goes against the apparent intention of the Bill to keep low value, low risk products such as Gift Cards outside its regime.

7 Proposed solution

To resolve this issue, we submit that:

- (a) the definition of “SVC” should be amended to clarify that it is irrelevant whether the monetary value is stored on the card itself or on a central server;
- (b) the definition of “debit card” should be amended to expressly state that if a product falls within the definition of a SVC, it is excluded from being a debit card for the purpose of Items 18 - 20 of Table 1 within clause 6; and
- (c) regulations to the Bill, particularly those that deal with the definition of SVCs should be proclaimed before any substantive provision of the Bill commences. This is essential because Part 10 (which deals with record-keeping requirements) is to commence immediately (Section 2, Item 13). If an industry is not intended to be covered by obligations under the Bill, this must be made clear before the obligations commence.

8 Drafting

Accordingly, we suggest that the definitions of “SVC” and “debit card” should be amended as follows:

stored value card includes ~~a portable device that is:~~

- (a) a portable device that is capable, whether on a stand-alone basis or in connection with other equipment, of storing monetary value in a form other than physical currency; and
- (b) a portable device of a kind specified in the regulations.

debit card has the same meaning as in section 63A of the *Trade Practices Act 1974* but does not include a stored value card.

The regulations should include a regulation to the following effect:

For the purposes of section 5, the definition of “stored value card” includes “gift facilities” within the meaning of ASIC Class Order [CO 05/738].

If you have any queries, please do not hesitate to contact James Moore, special counsel, on +61 2 9296 2257, email james.moore@malleasons.com, or Andrea Beatty, partner, on +61 2 9296 2068, email andrea.beatty@malleasons.com .

Yours faithfully

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