

Submission on the Fair Trading (Gift Card Expiry) Amendment Bill

Submitted to: Economic Development, Science and
Innovation Committee

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Commerce Commission submission on the Fair Trading (Gift Card Expiry) Amendment Bill

Introduction

1. The Commerce Commission (the Commission) appreciates the opportunity to make a submission on the Fair Trading (Gift Cards Expiry) Amendment Bill (the Bill), which if enacted will insert a new section 24A into the Fair Trading Act (FTA) to prohibit the selling of gift cards with an expiry date of less than 3 years after the initial sale date.
2. The Commission is New Zealand's primary competition, fair trading, consumer credit and economic regulatory agency. We enforce legislation that promotes competition in New Zealand markets and prohibits misleading and deceptive conduct by traders.
3. As an enforcement agency, we do not take a position on the policy question as to whether the Bill should become law.
4. Rather, our comments focus on a practical enforcement consideration that might arise from enactment of the Bill as drafted and propose a change to the Bill to avoid impairing effective FTA enforcement if the Bill progresses into law.

Enforcement implications

5. The Bill as drafted creates a statutory obligation on traders that they must not sell a gift card (as defined) with an expiry date that is earlier than 3 years after its date of sale. The provision renders void any gift card with an expiry date earlier than 3 years and the expiry date is to be taken to be 3 years after the date of the sale.
6. However, as drafted, the Bill creates no offence for failure to comply with the statutory obligation, i.e. there is no penalty attached for non-compliance. We consider that this is an omission that should be rectified if the Bill progresses; otherwise, the objectives of the Bill could be readily undermined by traders who would face no effective sanction for non-compliance.
7. Presently, the Bill specifically excludes contravention of new section 24A from being treated as an offence under the FTA.
8. In our experience, it would be highly unorthodox to have a statutory obligation in the FTA that has no enforcement mechanism to deter non-compliance. As currently drafted, there is a significant likelihood that the prohibition would not be effectively enforced. This is because enforcement via consumers alone would rely on:
 - 8.1 Consumers knowing about the 3 year time limit in the FTA; and then
 - 8.2 Consumers knowing that they are able to take action through the Disputes Tribunal to enforce their rights; and then

- 8.3 The amount of the gift card being sufficiently significant to warrant consumers taking the step of enforcing their rights in the Disputes Tribunal.

Enforcement Effectiveness

9. We consider that it would be much more effective if the prohibition followed the standard FTA format and had an enforcement mechanism attached to it that would allow the Commission to take proportionate action against conduct that breaches the prohibition.
10. If there are concerns as to where the prohibition might best fit within the FTA to achieve this outcome, we strongly suggest the Committee consider replacing the proposed section 24A in the Bill (presently sitting under Part 1 of the FTA) with a new provision that would sit in Part 4A of the FTA (i.e., specifically including a new Subpart 5 under Part 4A). Part 4A deals with Consumer transactions and auctions and sets out rules applying to certain transactions and auctions. There would also need to be consequential amendments to section 40B(d) of the FTA to define breach of the provision as an infringement offence.
11. This would allow the Commission to issue infringement notices (and applicable infringement fees of \$1000 where required) or file a charging document (prosecuting the infringement offence through the courts, with a maximum fine of \$30,000 for a body corporate or \$10,000 for an individual), which may be considered an appropriate and proportionate enforcement response to breaches relating to the sale of gift cards. Being able to issue infringement notices for relatively straight-forward breaches of the FTA is an efficient and effective way of getting traders to immediately change their behaviour and comply with the law.
12. The Explanatory note to the Bill states that new section 24A is based on the provisions contained in the Fair Trading Amendment (Ticket Scalping and Gift Cards) Act 2017 (NSW). We note that the NSW provisions create an offence of selling to a consumer in NSW a gift card with an expiry date that is earlier than 3 years after the date of the gift card. These provisions provide for the issue of penalty notices in connection with a contravention of the prohibition.
13. We invite the Committee to consider further whether the existing law is likely to be sufficient to achieve its objectives as currently drafted.
14. If you have any specific questions on this submission, please contact Yvette Popovic in the first instance.