

GIFT VOUCHERS AND EXPIRY DATES: WHEN THE GIFT STOPS GIVING¹

NICKY JONES*

I INTRODUCTION

A *Principal Issues*

This article will discuss consumer protection law in relation to a topic which has not received much attention, at least in Australian jurisdictions: expiry dates on gift vouchers. As the article will explain, gift vouchers are an increasingly popular choice of gift for many consumers in North America and, as a result, constitute a significant portion of the retail sales economy. However, many gift vouchers are lost or forgotten by their holders and so expire unused – resulting in enormous profits to the retailers who provide them.

The article will note the enactment in certain Canadian provinces and United States of America (USA) states of laws which prohibit retailers from imposing expiry dates on gift vouchers (or which set a minimum validity period). It will review contract and common law principles applicable in Australia to expiry dates on gift vouchers and the extent to which consumer protection, corporations and sale of goods legislation currently regulates expiry dates on gift vouchers.

This article will suggest that the windfall profits received by retailers as a result of unused and expired gift vouchers are inequitable and constitute unjust enrichment. If a consumer has paid for a gift voucher offering a good or a service, the good or service should be provided by the retailer. Yet Australian consumer protection regimes are of little assistance in this area. Currently, the retailer can rely on the gift voucher's expiry date to avoid providing goods or services under the voucher. Indeed, retailers have a commercial interest in their gift vouchers expiring unused. If Australian commercial and consumer trends in relation to gift vouchers follow those in Canada and the USA, gift vouchers will continue to provide a growing source of revenue – and unearned profits – for retailers.

The article argues that questions of equity arise in these situations and that consumer protection laws in Australia are deficient because they do not protect consumers from losses which result from the expiry of unused gift vouchers. In the absence of effective statutory provisions, a consumer can only seek to enforce an expired gift voucher on the basis of equitable and common law principles such as unconscionability or unjust enrichment. Yet, as

* BA(Hons), LLB(Hons) (UQ), Licence ès Lettres Modernes (Mention FLE) (Orléans), Grad Dip Legal Practice (College of Law), PhD (UQ), Lecturer in Law, University of Southern Queensland.

¹ The author would like to thank Professor Reid Mortensen of the School of Law, University of Southern Queensland and the anonymous reviewer for their helpful comments regarding an earlier draft of this article.

the article explains, none of these causes of action is readily available to the consumer who is seeking to enforce an expired and unused gift voucher. Since no statutory remedies are available either, the consumer is left without recourse.

This article will conclude with some suggestions for law reform in relation to consumer protection regimes in Australia. The principal suggestion is to examine Canadian and USA law reforms in this area to see whether Australian consumer protection laws could usefully be amended or enacted along similar lines to protect consumers holding gift vouchers.

B *Preliminary Definition and Assumptions*

A gift voucher may be understood as a token or card purchased from a retailer by a consumer and intended to be exchanged for goods or services (either to a specified monetary value or for specific goods or services) to be provided by the retailer at a future time. There are other terms which are used to refer to gift vouchers: gift cards (as they are commonly known in Canada and the USA), stored-value cards, pre-funded cards, non-cash payment facilities² and gift facilities.³

This article will confine its discussion to gift vouchers which are purchased by consumers paying full value and will assume that the moneys paid constitute valuable consideration for the vouchers and the goods or services promised under the vouchers.⁴ Further, it will be assumed that the gift vouchers have applicable expiry dates which are clearly and prominently displayed on the vouchers.⁵

II GIFT VOUCHERS IN CANADA AND THE USA

A *Gift Voucher Consumption*

Gift vouchers are an increasingly popular choice of gift for many people for a number of reasons: they relieve the donor from the time and effort involved in selecting a specific gift for a recipient whose tastes or preferences they may not always know. The recipients can use the vouchers to buy goods or services they might not otherwise have purchased or to purchase better quality goods or services. Finally, gift vouchers do not need to be wrapped, are easily posted to their recipients and give the recipients the freedom to choose a gift they really want.⁶

Studies from Canada and the USA indicate that gift vouchers have surged in popularity in those countries. In 2006, a study carried out by Statistics Canada found that the rate of gift

² See Australian Securities and Investments Commission, *Proposed Policy Statement for Non-Cash Payment Facilities*, Policy Statement 185 (2005).

³ See Australian Securities and Investments Commission, *Gift Facilities*, Class Order 05/738 (2005).

⁴ This assumption obviates the need to consider the question of whether the promises which constitute the agreements between the parties are supported by valuable consideration. It also excludes certain gift vouchers which offer goods or services at a discount.

⁵ As this article will explain, a gift voucher must have any applicable expiry date marked clearly on it to comply with Australian Securities and Investments Commission directives. This assumption confines the discussion to the sorts of commonly-encountered gift vouchers which are purchased in Australia and which comply with all requirements under Australian law and regulations. The primary question considered in this article is not, for example, whether expiry dates are or are not displayed sufficiently visibly on gift vouchers; rather, it is whether even a clearly-displayed expiry date is fair and should bind the consumer.

⁶ D Bahta, R Tsang and M Weise, 'Gift Cards: The Gift of Choice' (2006) *Statistics Canada Analytical Paper* 7. See also M Weise, 'Gift Cards: A Win-Win Way to Give' (2005) *Statistics Canada Analytical Paper* 5.

card sales by large retailers had increased from 53% in the 2003 Christmas season to 82% in 2005: an increase of 29% in two years.⁷

Gift cards are also attractive to retailers for a number of reasons. For example, the use of gift cards can reduce the number of unwanted gifts that are returned, a boon for retailers and consumers alike.⁸ Gift cards can also create or build store loyalty, drawing in new customers.⁹ Moreover, retailers that offer gift cards benefit from incremental sales, since consumers tend to spend more than the face value of gift cards by buying more expensive items than otherwise planned or by buying additional items once they are in the store. One retail consulting firm found that 20% of consumers spend almost double the initial face value of their gift cards. Retailers may also benefit when portions of gift card balances remain unredeemed since they gain from the interest earned on the outstanding balances until the gift cards are used.¹⁰ In 2008, the Retail Council of Canada noted that Canadian retailers sold ‘approximately \$3.5 billion in gift card sales’.¹¹ Similarly, in the USA, gift vouchers are now the second most popular gift item after clothing. A 2007 consumer protection report found that American consumers spend around US\$80 billion dollars annually on gift cards.¹²

These amounts suggest that gift card retailing is a significant part of the retail sales economy. However, it also represents a retail sector with unusually large disparities between sales and ultimate consumption. Many gift vouchers will never be redeemed – a further benefit to retailers – but will instead be misplaced or lie unused by consumers. There are various reasons why gift vouchers are not redeemed. More than one third of consumers surveyed in the USA stated that they had either lost their vouchers or had forgotten that they had them until the expiry date had passed. A USA consumer magazine calculated in late 2008 that around 25% of gift cards purchased in 2007 had still not been redeemed,¹³ while a financial services research and advisory firm estimated that, of the US\$80 billion spent on gift cards in the USA in 2006, about \$8 billion was never recouped. One large retailer alone received a \$42 million benefit to its income statement for unused gift cards more than two years old.¹⁴ Over 2006 and 2007, the electronics retailer Best Buy, which has a retail presence in the USA, Canada and China, added US\$135 million in unused gift card income to its total operating income.¹⁵

The same trends have been observed in Canada. According to the Consumers’ Association of Canada, one third of all gift vouchers remain unused, while one major retailer alone recently

⁷ Bahta, Tsang and Weise, above n 6, 3.

⁸ Weise, above n 6, 5.

⁹ Bahta, Tsang and Weise, above n 6, 7.

¹⁰ N Chande, *A Survey and Risk Analysis of Selected Non-Bank Retail Payments Systems*, Bank of Canada Discussion Paper 2008/17 (2008) 24. See also Weise, above n 6, 4-5.

¹¹ Retail Council of Canada, *Retail Council of Canada Welcomes New Gift Card Rules for BC* (2008) <<http://www.retailcouncil.org/news/media/press/2008/pr20080402.asp>> at 12 April 2009.

¹² ConsumerAffairs.com, *Gift Cards Include Hidden Costs* (2007) <http://www.consumeraffairs.com/news04/2007/11/holiday_gift_cards.html> at 10 April 2009.

¹³ CBC News, *Gift Cards: the Lure of Plastic* (2008) <<http://www.cbc.ca/consumer/story/2008/12/01/f-giftcards.html>> at 10 April 2009.

¹⁴ TowerGroup, *With Soaring Gift Cards Sales Poised to Exceed \$80 Billion in 2006, Unused Card Values are also on the Rise* (Press Release, 20 November 2006) <<http://www.towergroup.com/research/news/news.htm?newsId=1740>> at 24 August 2009. See also T Lewis, *Gift Cards an \$8 Billion Gift to Retailers* (2006) <http://www.consumeraffairs.com/news04/2006/12/gift_card_giveaways.html> at 10 April 2009.

¹⁵ Chande, above n 10, 24.

reported a C\$44 million profit from unredeemed gift vouchers.¹⁶ By any estimate, these amounts represent a considerable windfall for the retailers concerned.

B *Gift Voucher Expiry Date Legislation*

In a bid to protect consumers who purchase or receive gift vouchers, a number of Canadian provinces have enacted legislation enabling consumers to redeem their gift vouchers in perpetuity by prohibiting retailers from issuing or enforcing expiry dates on gift vouchers. The first province to take this step was Ontario, which amended its *Consumer Protection Act 2002* in 2007 to ban expiry dates on gift cards, gift certificates and gift vouchers displaying a monetary value.¹⁷ The relevant provisions, which came into force on 1 October 2007 and apply to all gift cards bought after that date, state as follows:

No expiry dates

- 25.3(1) No supplier shall enter into a gift card agreement that has an expiry date on the future performance of the agreement. O. Reg. 187/07, s. 3.
- (2) A gift card agreement with an expiry date on its future performance shall be effective as if it had no expiry date if the agreement is otherwise valid. O. Reg. 187/07, s. 3.

The purpose of the provisions was to ensure that consumers received what they paid for ‘by being able to redeem the full value of a gift card at any time’ regardless of when the card was used.¹⁸ Since then, other provinces, including Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia and Saskatchewan have also enacted similar legislation prohibiting (or limiting) expiry dates on retail gift vouchers.¹⁹ Legislative reforms are also on the agenda in two of the remaining provinces: the governments of Québec and Prince Edward Island are currently considering amending their *Consumer Protection Acts* to prohibit expiry dates on gift cards. In many cases the provincial legislation also addresses consumer concerns regarding many retailers’ failure to disclose gift card terms and conditions and fees which are applicable to gift cards.

Generally speaking, the expiry date legislation does not apply to pre-paid telephone cards or to cards provided by financial institutions, which are regulated under Canadian federal laws. Certain types of gift cards may also be exempt from the application of the legislation. For example, regulations made under the *Gift Cards Act 2008* of New Brunswick provide that the following types of gift cards are permitted to carry an expiry date:

- gift cards issued or sold for a charitable purpose;
- gift cards issued or sold for a specific good or service; and
- gift cards issued for a marketing, advertising or promotional purpose.²⁰

¹⁶ C Moore, *Alberta Gift Cards Lose Expiry Dates* (2008) Airdrie Echo <<http://www.airdrieecho.com/ArticleDisplay.aspx?archive=true&e=1282782>> at 12 April 2009.

¹⁷ *Consumer Protection Act 2002* (Ontario) s 25.3.

¹⁸ Ontario Ministry of Consumer Services, *Gift Cards – Frequently Asked Questions* (2008) <http://www.sse.gov.on.ca/mcs/en/Pages/Gift_Card_FAQ.aspx> at 16 February 2010.

¹⁹ *Gift Card Regulation, Alberta Regulation 146/2008, Fair Trading Act 2000* (Alberta) reg 2; *Business Practices and Consumer Protection Act 2004* (British Columbia) s 56.2; *Consumer Protection Act 1987* (Manitoba) s 171; *Gift Cards Act 2008* (New Brunswick) s 3; *Consumer Protection Act 1989* (Nova Scotia) s 33(d) (this section provides that gift cards are to be valid for a minimum of 36 months, rather than prohibiting their expiry dates); and *Consumer Protection Act 1996* (Saskatchewan) s 77.13.

²⁰ *General Regulation – Gift Cards Act, New Brunswick Regulation 2008-152, Gift Cards Act 2008* (New Brunswick) reg 3.

In the USA, most states now have legislation regulating fees, expiry dates and disclosure policies in relation to retailer-issued gift cards. Certain states, such as California, Connecticut, Florida, Maine, Minnesota, Montana, New Hampshire (for gift cards to the value of US\$100 or less), Oregon, Rhode Island and Washington, have enacted laws prohibiting any gift card expiry dates. Many other states have passed legislation to prescribe a minimum gift card validity period ranging from one to seven years, while some (such as Arizona, Georgia, Nebraska, Nevada, New York, South Carolina, Texas, Utah and Virginia) simply require that a gift card's expiry date be disclosed clearly on the card.²¹ At the federal level, legislation was passed in May 2009 to prohibit gift cards from expiring before five years from the date of purchase or the date on which funds were last added to the card.²² The relevant provisions will take effect on 22 August 2010.

III GIFT VOUCHERS IN AUSTRALIA

A *Gift Voucher Consumption*

Although it has been difficult to obtain information or statistics in relation to the purchasing and redemption of gift vouchers in Australia, the evidence that is available suggests that commercial and consumer trends evident in Canada and the USA are also being repeated here.

In 2006, marketing and public relations company B & T claimed that the corporate gift card market in Australia was a new trend that had 'big growth potential' and noted Woolworths' prediction that Australian companies would spend more than \$300 million on gift cards by the end of the year.²³ In December 2008, the Australian Retailers Association commented in relation to Christmas trading that 'gift vouchers [...] were again very popular', although it did not provide further details.²⁴

At the same time, there is some evidence of consumer dissatisfaction with gift vouchers. In Queensland, the Office of Fair Trading reported that consumer complaints about gift vouchers featured in the list of the top 10 most-complained-of products in 2008,²⁵ although it has proved difficult to ascertain the precise nature of these complaints.²⁶

However, in contrast to the Canadian and USA experiences, the question of consumer protection in relation to expiry dates on gift vouchers does not appear to have been raised, much less discussed, as an issue of consumer concern in Australian jurisdictions.

²¹ The USA National Conference of State Legislatures provides a useful summary of each state's gift card legislation, *Gift Cards and Gift Certificates Statutes and Recent Legislation* <<http://www.ncsl.org/default.aspx?tabid=12474>> at 7 September 2009.

²² *Credit Card Accountability Responsibility and Disclosure Act 2009* (US) s 401.

²³ A Swinburn, *Economic Woes to Hamper Christmas Spending* (2006) B&T <<http://www.bandt.com.au/articles/20/0C039720.asp>> at 16 August 2009.

²⁴ Australian Retailers Association, *The Outlook for Christmas Trading 2008* (2008).

²⁵ Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, The Hon Kerry Shine, 'Complaints and Queries to Office of Fair Trading Top 100,000 in 2008' (Press Release, 7 January 2009).

²⁶ The Queensland Office of Fair Trading has advised that it does not disclose nor publish information about the complaints it receives.

B *Relevant Law*

The holder of a gift voucher is entitled to use the voucher at her or his discretion and in accordance with the terms and conditions of its use. These terms and conditions may include express terms set by the retailer and conditions and warranties which apply under statute and at common law.

There are no express provisions at Commonwealth, State or Territory levels addressing expiry dates on gift vouchers (with the exception of certain Australian Securities and Investments Commission publications, as will be noted below) or protecting consumers from losses suffered as a result of expired gift vouchers. Although there appears to be some government interest in addressing this and other consumer protection issues associated with gift vouchers, at this stage, no Commonwealth, State or Territory laws address the issue of expiry dates and there do not appear to be plans to introduce any such provisions.

In the absence of express statutory provisions regulating expiry dates on gift vouchers, resort must be had to contract law and common law principles.

1 *Contract Law*

(a) *General Principles*

The generally accepted position in Australia in relation to gift vouchers and their expiry dates appears to be that if a gift voucher passes its expiry date still unused, the voucher holder has no remedy. This position is explained in the following excerpt from a Northern Territory government consumer brochure: ‘Gift vouchers are a contract. The person using the gift voucher has the right to receive goods to the value nominated on the voucher and is bound by any conditions specified on the voucher.’²⁷

The position is in accordance with general common law principles in relation to contracts, which hold that where there is a term in a contract which expresses the agreement of the parties, that term will be given effect unless to do so would be illegal or contrary to public policy.²⁸ Thus, as a general principle, a contract in which a retailer sets out specific terms and conditions, which may include terms of limitation such as an expiry date, could have the effect of making those express terms and conditions binding on the parties to the contract.

(b) *Terms of the Contract*

The courts will enforce a contract if there is complete consensus between the parties as to the terms of the agreement.²⁹ However, there is an initial question as to whether a gift voucher may be considered a contractual document or whether it should be regarded as a ticket or voucher which simply identifies the promised good or service, or the retailer providing that good or service. For example, a dry cleaning voucher has been held to be a document ‘that might reasonably be understood to be only a voucher for the customer to produce when collecting the goods’, rather than being a contractual document containing terms which form

²⁷ Consumer Affairs, Department of Justice, Northern Territory Government, *Be an Informed Consumer*, (no date) <http://www.nt.gov.au/justice/consaffairs/documents/Be_informed_consumer.pdf> at 16 February 2010.

²⁸ J Goldring et al, *Consumer Protection Law* (Federation Press, 5th ed, 1998) 31.

²⁹ D Khoury and Y Yamouni, *Understanding Contract Law* (LexisNexis, 7th ed, 2007) 15.

part of the contract.³⁰ Similarly, a ticket handed to a customer who hired two deck chairs was held to be a mere voucher, ‘nothing but a receipt’ to be presented to chair attendants upon request to provide evidence of payment and the period of hire rather than a contractual document.³¹

Even if a document is regarded as a mere voucher or receipt, it may still contain a statement which is intended to limit or exclude the liability of the person providing the service. Whether such a statement may be considered an essential term of the contract will depend on whether a reasonable person would expect to find such a term in a document of this nature. If not, the excluding statement will be ineffective. So, for example, even if a statement excluding liability is placed on the back (or front) of a ticket given to a person at the time of hiring an item, a court may find that a reasonable person would expect the ticket to be a mere voucher providing evidence of payment, rather than a contractual document.³²

An expiry date might also be considered an exclusion clause. If a recipient is aware of the existence of an exclusion clause, a court is likely to find that the clause forms part of the terms of the contract. Accordingly, the parties will be bound by the clause. If not, the court will need to decide whether the recipient should have been aware of its existence. This will depend on whether reasonable notice of the exclusion clause was given to the recipient. The court will seek to determine whether the ticket provider seeking the benefit of the clause did all that was reasonably expected to draw the recipient’s attention to the exclusion clause. The question of what constitutes reasonable notice will require the court to examine the circumstances surrounding the receipt of the ticket and to have regard to such matters as:

- the manner in which the ticket was provided to the recipient (for example, did the recipient have an opportunity to read and react to the exclusion clause?);
- the onerousness or otherwise of the exclusion clause (the more onerous the clause, the greater will be the specific notice required);
- the legibility of the exclusion clause; and
- the availability of the exclusion clause to the recipient.³³

In summary, whether a gift voucher is considered to be merely a ticket or receipt of payment or a contractual document, in order to be effective at common law an exclusion clause such as an expiry date should meet the following conditions:

- it should be a clause that a reasonable person would expect to find on a gift voucher;
- the purchaser of the gift voucher should have been aware of the existence of the expiry date; and
- the gift voucher provider should have done all that might reasonably be expected to draw the purchaser’s attention to the expiry date.

It is probably safe to say that a consumer who purchases a gift voucher would not find the display of an expiry date on the gift voucher to be either surprising or unexpected. Indeed, it may well be the case in Australia that a reasonable person would expect to find an expiry date limiting the duration of the voucher’s validity. On that basis, the expiry date might arguably be considered an essential term of the contract of sale for the voucher.

³⁰ *Causser v Browne* [1952] VLR 1, 6.

³¹ *Chapelton v Barry Urban District Council* [1940] 1 All ER 356, 359-61.

³² As in *Causser v Browne* [1952] VLR 1 and *Chapelton v Barry Urban District Council* [1940] 1 All ER 356.

³³ Khoury and Yamouni, above n 29, 191-6.

However, the question of whether the purchaser of a gift voucher should have been aware that the gift voucher displayed an expiry date, or whether the provider did all that might reasonably be expected to draw the purchaser's attention to the expiry date, is more difficult. Certain factors might help to determine this: whether the gift voucher was sold to the purchaser in a leisurely fashion which afforded the purchaser an opportunity to read and consider the expiry date, whether the expiry date allowed the purchaser ample time to redeem the gift voucher, and whether the expiry date was displayed clearly on the front of the gift voucher. If all of these criteria were met and if, moreover, at the time of sale the gift voucher's provider drew the purchaser's attention to the existence of the expiry date, the provider might readily argue that the expiry date was an essential term that should bind the purchaser.

Once it has been established that a particular statement is a term of the contract, the significance of the term remains to be determined; the greater its significance, the greater will be the remedy for its breach. So, for example, a condition is a term of considerable importance which 'goes to the root of the [contract]'.³⁴ If a condition is breached, the innocent party is entitled to treat the contract as if it has come to an end and to obtain a refund (in the case of a purchased item) or to sue the party in breach for damages. In contrast, a warranty is a contractual term of lesser importance, breach of which only allows the innocent party to sue for damages rather than to consider the contract to be at an end.³⁵ In order to determine whether a term is a condition or a warranty, the court will take into account factors such as the general nature of the contract considered as a whole and the importance attached to the term by the parties.³⁶ If the parties regard the statement as being a matter of importance, the statement is more likely to be regarded as a term of the contract.³⁷

The case law provides limited assistance with regard to whether an expiry date on a gift voucher might be an important term of the contract of sale (and therefore a condition) or a contractual term of lesser importance (a warranty). Although an expiry date does not directly affect the good or service to be provided under the gift voucher, nor is it 'of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise',³⁸ it is nonetheless a fundamental term which may substantially change the rights of the parties: its enforcement ends the validity of the voucher and prevents the gift voucher's holder from claiming the promised good or service.

Does an expiry date on a gift voucher go to the root of the contract? Would the parties regard an expiry date as being a matter of importance? An expiry date which sets the timeframe within which a gift voucher must be redeemed is arguably an important matter, particularly to the gift voucher's holder. If the holder does not redeem the voucher within the prescribed time, he or she receives nothing, despite valuable consideration having been provided for the voucher. That is strong evidence that an expiry date should be regarded as a term of the contract of sale for a gift voucher. If a gift voucher's expiry date is held to be an express term of the contract, the expiry date may operate to bind the parties.

³⁴ *Bettini v Gye* (1876) 1 QBD 183, 188.

³⁵ *Khoury and Yamouni*, above n 29, 165.

³⁶ *Ibid* 181.

³⁷ *Ibid* 165.

³⁸ *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, 641-2.

(c) *Privity of Contract*

(i) *General Principles*

Another issue which may be relevant to the question of whether a gift voucher's provider is entitled to enforce an expiry date concerns the doctrine of privity of contract. In accordance with this common law doctrine, only the actual parties to a contract can acquire legally enforceable rights or incur legally enforceable obligations under the contract. A third party is neither entitled to sue for any benefits nor subject to any obligations under the contract, even where the third party is a beneficiary of a promise made under the contract.

In the context of gift vouchers, the contract of sale is formed between the provider and the purchaser of the gift voucher who, as parties to the contract, are entitled to sue in relation to rights or obligations arising in relation to the gift voucher.

However, one of the most common uses and indeed a primary purpose of a gift voucher is to be given as a gift to a third party. Even where it may be established that a gift voucher's expiry date is an express term of the contract of sale as agreed between the purchaser and provider of the gift voucher, under the doctrine of privity of contract, if the gift voucher is given to a third party – who was not a party to that contract of sale – the third party recipient may arguably not be bound at law by the terms of that contract, including the expiry date. In other words, third party recipients of a gift voucher should not be bound by an expiry date to which they did not contractually agree.

Similarly, if third party recipients of a gift voucher wish to enforce rights under the voucher, such as suing to redeem the voucher, they are unable to do so. They are also unable to lodge a consumer complaint in relation to the voucher, since they do not have a valid contract with the voucher's provider. Instead, the purchaser of the voucher must pursue the provider or lodge the complaint. This unsatisfactory situation with regard to a gift voucher recipient's rights is confirmed in advice published by the New South Wales Office of Fair Trading.³⁹

The doctrine of privity of contract has been criticised for preventing third party beneficiaries from suing on a promise made under a contract for their benefit. The criticisms are based on arguments that the doctrine fails to give effect to express intentions of the contracting parties and can lead to unjust results, especially where a third party beneficiary has acted on the basis that the promise in the contract will be carried out.⁴⁰

(ii) *Judicial Circumvention*

Perhaps as a result of such criticisms, courts may in practice circumvent the doctrine of privity of contract by applying other legal principles which can operate to give a third party a remedy against the promisor. These principles may include finding that a trust has arisen under which the promisee (for example, the purchase of a gift voucher) is a trustee of the promise for the benefit of a third party (the recipient of the gift voucher). Indeed, in *Trident*

³⁹ New South Wales Office of Fair Trading, *Refunds and Repairs: Gift Certificates* <http://www.fairtrading.nsw.gov.au/Consumers/Refunds_and_warranties/Refunds_and_repairs.html> at 20 August 2009.

⁴⁰ See, for example, comments by Sir Donald Nicholls V-C in the Court of Appeal case of *White v Jones* [1993] 3 All ER 481, 490 and Lord Goff and Lord Nolan in the House of Lords in *White v Jones* [1995] 1 All ER 691; see also comments by Gaudron J in relation to third parties and unjust enrichment in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 173-7.

General Insurance Co Ltd v McNiece Bros Pty Ltd,⁴¹ Toohey J noted past judicial support for certain developments in the law that bypass privity of contract, such as finding that a promisee holds her or his right under a contract on trust for a third person to whom a benefit had been promised. His Honour further noted that there was considerable scope for development of the law of trusts in this direction.⁴²

However, the courts have been somewhat reluctant to find that contracts have been entered into ‘on trust’ for a beneficiary unless it is patently clear that that has been the case. In order for this principle to apply, it must be established from the parties’ words and all the surrounding circumstances that the promisee clearly intended to create a trust in favour of the third party beneficiary.⁴³ The courts will not resort to inferences to establish a clear intention to create a trust in favour of a third party beneficiary and such an intention cannot be inferred from a simple intention to benefit a third party.⁴⁴

Other principles which may be applied by the courts to circumvent the operation of the doctrine of privity of contract and to allow a third party a remedy against a promisor are restitution and unjust enrichment. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*, Gaudron J considered these principles and commented as follows:

In my view it should now be recognised that a promisor who has accepted agreed consideration for a promise to benefit a third party is unjustly enriched at the expense of the third party to the extent that the promise is unfulfilled and the non-fulfilment does not attract proportional legal consequences. [...] The possibility of unjust enrichment is obviated by recognition that a promisor who has accepted agreed consideration for a promise to benefit a third party owes an obligation to the third party to fulfil that promise and that the third party has a corresponding right to bring action to secure the benefit of that promise.⁴⁵

In the context of gift vouchers, such an enforceable obligation would allow the purchaser or third party recipient of a gift voucher to sue to enforce the voucher as against the voucher’s provider, the promisor who has accepted money for the gift voucher but has not provided the goods or services promised in accordance with the voucher. In other words, the gift voucher’s provider has benefited from the sale of the voucher. If the gift voucher expires before it is used, neither its purchaser nor a third party recipient has received any benefit from the voucher. The gift voucher’s provider has been unjustly enriched to the amount of the consideration paid for the expired voucher – and, as this article has already noted, for some North American corporations at least, such enrichment has resulted in considerable profits.

However, the difficulty for a consumer seeking to rely on this argument is that the principle of unjust enrichment as explained by Gaudron J in *Trident* relies on the promisor’s ‘non-fulfilment’ of a promise for which he or she has accepted payment. A gift voucher with an expiry date represents a promise by its provider to supply goods or services until the expiry of the voucher. Once the voucher’s expiry date has passed, the provider might argue that he or she is no longer required to supply the goods or services under the voucher and that therefore

⁴¹ (1988) 165 CLR 107.

⁴² Ibid 166; see also comments by Deane J, 146-7.

⁴³ Ibid 171; *Re Schebsman; Ex parte The Official Receiver; The Trustee v Cargo Superintendents (London) Ltd and Ors* [1943] 2 All ER 768, 779.

⁴⁴ *Re Schebsman; Ex parte The Official Receiver; The Trustee v Cargo Superintendents (London) Ltd and Ors* [1943] 2 All ER 768; *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70.

⁴⁵ *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 176.

there can be no question of an ongoing obligation or the ‘non-fulfilment’ of a promise under the voucher.

(iii) *Statutory Exceptions*

The doctrine of privity of contract remains a part of the law in much of the common law world, with the exception of certain jurisdictions which have recognised third party rights to varying degrees. These jurisdictions include New Zealand,⁴⁶ the United Kingdom,⁴⁷ New Brunswick⁴⁸ in Canada and Singapore,⁴⁹ as well as certain parts of Australia. In Queensland, Western Australia and the Northern Territory, legislation has been enacted to grant third party beneficiaries a right of action in relation to property, provided that certain conditions are met.⁵⁰ Section 55(1) of the *Property Law Act 1974* (Qld) states as follows:

(1) A promisor who, for a valuable consideration moving from the promisee, promises to do or to refrain from doing an act or acts for the benefit of a beneficiary shall, upon acceptance by the beneficiary, be subject to a duty enforceable by the beneficiary to perform that promise.

Section 55(3)(a) further provides:

(3) Upon acceptance—
(a) the beneficiary shall be entitled in the beneficiary’s own name to such remedies and relief as may be just and convenient for the enforcement of the duty of the promisor, and relief by way of specific performance, injunction or otherwise shall not be refused solely on the ground that, as against the promisor, the beneficiary may be a volunteer.

As a result of s 55 of the *Property Law Act 1974* (Qld), the doctrine of privity of contract does not apply in Queensland.⁵¹ In the context of gift vouchers, this means that the third party beneficiary of a gift voucher is entitled to take the same action as the voucher’s purchaser to enforce rights and obligations under the voucher. It may also mean that the third party beneficiary of a gift voucher is equally bound by terms and conditions in the contract of sale, including the expiry date. If so, this would mean that s 55 has the unfortunate effect of working against rather than for the third party consumer in circumstances such as these.

⁴⁶ *Contracts (Privity) Act 1982* (NZ).

⁴⁷ *Contracts (Rights of Third Parties) Act 1999* (UK).

⁴⁸ *Law Reform Act 1993* (New Brunswick) s 4.

⁴⁹ *Contracts (Rights of Third Parties) Act 2001* (Singapore).

⁵⁰ The relevant provisions are *Property Law Act 1974* (Qld) s 55; *Property Law Act 1969* (WA) s 11; and *Law of Property Act 2000* (NT) s 56. Note that property law statutes in all Australian jurisdictions also provide that a non-party to an instrument may take an immediate interest in land or other property under that instrument and is entitled to sue to enforce rights and remedies in relation to the instrument: see *Conveyancing Act 1919* (NSW) s 36C; *Property Law Act 1974* (Qld) s 13; *Law of Property Act 1936* (SA) s 34(1); *Conveyancing and Law of Property Act 1884* (Tas) s 61(1)(c); *Property Law Act 1958* (Vic) s 56(1); *Property Law Act 1969* (WA) s 11(1); *Civil Law (Property) Act 2006* (ACT) s 212; and *Law of Property Act 2000* (NT) s 12 (although the Qld and NT provisions restrict their application to real property alone).

⁵¹ *Re Davies* [1989] 1 Qd R 48 (although the court held at 49 that s 55 did not apply to the third party beneficiaries, since they had failed to communicate their acceptance within a reasonable time).

2 *Statute Law*

(a) *Consumer Protection Legislation*

The principal statute in Australian consumer protection law is the *Trade Practices Act 1974* (Cth) ('TPA'), which is intended to promote competition and fair trading and provide for consumer protection. Although the TPA contains no express provisions dealing with expiry dates on gift vouchers, one section dealing with unconscionable conduct may be worth noting. Section 51AB(1)⁵² states that '[a] corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.' In determining whether a corporation has contravened this section, a court may have regard to a number of factors. These include:

- the relative strengths of the bargaining positions of the corporation and the consumer; and
- whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation.⁵³

These factors may be relevant to the relationship between a consumer purchasing a gift voucher and the gift voucher's provider. For example, when purchasing a gift voucher, it is unlikely that the consumer will be in a strong bargaining position relative to the retailer providing the voucher. Indeed, this is particularly unlikely if the gift voucher's provider is a large retail corporation, as appears to be the case in Canada and the USA.⁵⁴ As Goldring et al have noted, 'in very few cases at all can the consumer be said to be the equal of the supplier or the manufacturer': individual consumers are relatively weak, while suppliers and manufacturers of goods and services are often large corporations. The power imbalance can cause consumers to feel awed and intimidated when they seek to negotiate with or obtain recourse against such a supplier or manufacturer.⁵⁵

It might also be argued that by purchasing the gift voucher and becoming bound by its expiry date, the consumer is required to comply with a condition that is not reasonably necessary to protect the legitimate interests of the gift voucher provider. An expiry date does not go to the heart of a corporation's legitimate interests. No retail corporations in the relevant parts of Canada and the USA have claimed that their legitimate interests or activities are unduly constrained by the legislative prohibitions on gift voucher expiry dates. Indeed, any such claim could be construed as supporting the expiry dates – and the resulting unearned profits for so many retailers – meaning that it would not be in their interests to oppose the legislation.

In view of these factors, perhaps it may be argued that by imposing an expiry date on a gift voucher it sells to a consumer, a retailer is engaging in unconscionable conduct prohibited under the TPA. After all, when it sells a gift voucher to a consumer, the retailer undertakes to supply the consumer with the good or service provided under the voucher. As long as it is

⁵² Note that s 51AB of the *Trade Practices Act 1974* (Cth) does not apply to the supply of services that are financial services: s 51AAB(2). In view of the scope of corporations law provisions discussed in the next section of this article, s 51AB might not apply to the sale of gift vouchers.

⁵³ *Trade Practices Act 1974* (Cth) ss 51AB(2)(a), (b).

⁵⁴ A 2008 Bank of Canada survey and risk analysis of non-bank retail payments systems found that 'customers tend to purchase gift cards from large, well-established retailers': Chande, above n 10, 28. Similarly, a 2005 study found that 'the concept of gift cards arrived first among retailers with a large infrastructure which supported their introduction. Such retailers generally have larger stores': Weise, above n 6, 2.

⁵⁵ Goldring et al, above n 28, 3.

able to trade, the retailer is bound to provide that good or service when the voucher is redeemed, and should do so no matter when this takes place.

If unconscionability were found not to apply, and in the absence of other factors such as fraud, misrepresentation, misleading or deceptive conduct, undue influence or duress on the part of the gift voucher's provider, the TPA would have no application to expiry dates on gift vouchers. For the same reason, the State and Territory fair trading legislation enacted to implement the provisions of the TPA would be unlikely to apply too.⁵⁶

(b) *Corporations Law*

Commonwealth corporations law contains some provisions governing gift vouchers and expiry dates, although these are primarily directed at the retailers who provide gift vouchers.

In November 2005, the Australian Securities and Investments Commission ('ASIC') published a 'Proposed policy statement for non-cash payment facilities' in which it noted that non-cash payment facilities are regulated under ch 7 of the *Corporations Act 2001* (Cth) ('Corporations Act'). According to s 763D(1) of the Corporations Act, 'a person makes non-cash payments if they make payments, or cause payments to be made, otherwise than by the physical delivery of Australian or foreign currency in the form of notes and/or coins'. The facility through which a person makes such a payment is the financial product regulated by the Corporations Act.⁵⁷ Under s 762C, a 'facility' includes intangible property, an arrangement or term of an arrangement, or a combination of any of these things. The ASIC policy statement explained that specific examples of non-cash payment facilities include 'gift vouchers and cards'.⁵⁸

Chapter 7 of the Corporations Act deals with financial services and markets, while pt 7.6 of that chapter contains provisions pertaining to the licensing of providers of financial services. Certain provisions set out the obligations of financial services licensees, which include stringent financial services training, compliance, reporting and dispute resolution measures: see ss 912A-912F of the Corporations Act. An expectation that Australian gift voucher providers comply with the financial services regulatory regime would impose a heavy burden indeed on retailers.

It would also stand in contrast to the approach in Canada, where a distinction is drawn between most retailer gift cards and cards issued by financial institutions, with the latter regulated under federal jurisdiction as financial products.

However, ASIC has further indicated that retailer gift vouchers would be exempt from complying with the Corporations Act, which requires that providers of financial products hold an Australian financial services licence. It noted the federal government's acknowledgement 'that there have been concerns about the unintended application of the financial services regulatory regime to certain kinds of [non-cash payment] facilities'.⁵⁹ According to Malcolm

⁵⁶ The following State and Territory provisions are equivalent *Trade Practices Act 1974* (Cth) to s 51AB: *Fair Trading Act 1987* (NSW) s 43; *Fair Trading Act 1989* (Qld) s 39; *Fair Trading Act 1987* (SA) s 57; *Fair Trading Act 1990* (Tas) s 15; *Fair Trading Act 1999* (Vic) s 8; *Fair Trading Act 1987* (WA) s 11; *Fair Trading Act 1992* (ACT) s 13; and *Consumer Affairs and Fair Trading Act 1990* (NT) s 43.

⁵⁷ *Corporations Act 2001* (Cth) s 763A(1)(c).

⁵⁸ Australian Securities and Investments Commission, *Proposed Policy Statement for Non-Cash Payment Facilities*, above n 2, 3.

⁵⁹ *Ibid* 4.

Rodgers, ASIC's Executive Director of Regulation, 'ASIC recognises that the broad terms of the definition in the Corporations Act means some facilities that are technically [non-cash payment] facilities do not require full regulation.'⁶⁰

In summary, this means that although some non-cash payment facilities, such as retailer gift vouchers and some stored value cards, are caught by the definition of 'non-cash payment facility', they should not be treated in the same way as other financial products and will be the subject of a 'flexible' regulatory approach.⁶¹ To this end, ASIC issued a class order in relation to gift facilities which grants:

unconditional relief to persons providing financial services in relation to gift facilities, such as gift vouchers or cards. This means that the licensing, conduct and disclosure obligations (as well as the hawking prohibition) in Chapter 7 of the Corporations Act will not apply.⁶²

The only reference to expiry dates in the class order is contained in the definition of 'gift facility'. This provides that where a gift voucher on or after 1 June 2006 imposes an expiry date on its use, that expiry date is required to be 'prominently set out on the device in a manner that makes it clear that it is an expiry date' or 'prominently displayed in a manner that could reasonably be expected to come to the attention of a person who is given or given use of the facility at the time it is given and at the time it is used and makes it clear that it is an expiry date'.⁶³

Accordingly, in order to qualify for relief from the various licensing, conduct and disclosure obligations in the Corporations Act, if a gift voucher's provider wishes an expiry date to apply to the use of the voucher, it must display the expiry date prominently and visibly and clearly identify it as an expiry date on the voucher. In addition to ensuring compliance with statutory financial services obligations, these requirements are also in accordance with common law principles already discussed in this article.

(c) *Sale of Goods Statutes*

In all Australian jurisdictions, sale of goods statutes codify the common law in relation to sale of goods transactions and contracts and imply terms into such contracts.⁶⁴ However, the status of gift vouchers under sale of goods statutes is a little unclear. In Queensland, s 4(1) of the *Sale of Goods Act 1896* (Qld) provides that a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. Section 3 defines the term 'goods' as follows:

goods includes all chattels personal other than things in action and money, and also includes emblements and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

⁶⁰ Australian Securities and Investments Commission, *ASIC Adopts a Flexible Approach to the Regulation of Non-Cash Payment Facilities*, Information Release 05-60 (2005).

⁶¹ Australian Securities and Investments Commission, *Proposed Policy Statement for Non-Cash Payment Facilities*, above n 2, 4.

⁶² Australian Securities and Investments Commission, *Gift Facilities*, above n 3, cl 5(d)(iii).

⁶³ *Ibid.*

⁶⁴ *Sale of Goods Act 1923* (NSW); *Sale of Goods Act 1896* (Qld); *Sale of Goods Act 1895* (SA); *Sale of Goods Act 1896* (Tas); *Goods Act 1958* (Vic); *Sale of Goods Act 1895* (WA); *Sale of Goods Act 1954* (ACT); and *Sale of Goods Act 1972* (NT).

Is a gift voucher a ‘good’ in accordance with this definition? Arguably, a gift voucher is not a conventional ‘good’; rather, it represents a promise by the retailer to provide a future good or service in accordance with the voucher at the time that the voucher is redeemed. When a consumer purchases a gift voucher, does the contract of sale apply to the purchase of the gift voucher itself (that is, the card or token) or to the future good or service?

According to s 8, a contract of sale may be of existing goods, owned or possessed by the seller, or future goods. Section 3 defines ‘future goods’ as ‘goods to be manufactured or acquired by the seller after the making of the contract of sale.’ Although ‘future goods’ would generally be understood to refer to items to be manufactured or ‘on-sold’ by the seller at a later time, such as, for example, furniture or white goods, perhaps it could also be understood to refer to the future supply of goods as promised in a gift voucher.

Another apparent problem lies with the statutory definition of ‘goods’, which does not include services. However, courts have found that a contract for the provision of services falls within the definition of a contract of sale of ‘goods’.⁶⁵ Accordingly, a gift voucher offering either a good or a service would appear to fall within the s 3 definitions in relation to goods. Alternatively, if the good the subject of a contract of sale were considered to be the physical voucher itself, rather than its promised good or service, the statutory definitions would clearly apply to all gift vouchers.

The *Sale of Goods Act 1896* (Qld) has a number of implications for contracts of sale of gift vouchers. For example, s 14, which sets out circumstances in which a buyer may waive a condition or treat its breach as a breach of warranty, would affect the remedies available to the consumer in the event of a breach, depending on whether an expiry date were held to be a condition or a warranty. Section 56 allows the parties to vary any implied rights, duties or liabilities by express agreement – as this article has already speculated, might the expiry date on a gift voucher be considered a detail on which the parties have expressly agreed?

There are also implications in relation to questions such as when the contract of sale is considered to be concluded and when property in the purchased goods is held to have passed to the buyer. In other words, is the contract of sale between the gift voucher’s provider and the consumer limited to the initial sale of the voucher or does it continue until the good or service promised in the voucher is provided? Similarly, when is property held to have passed to the consumer: when the initial purchase has taken place or when the promised good or service has been redeemed?

There is currently little or no case law or legal commentary which assists in the resolution of these questions.

IV CONCLUSION

As this article has shown, in Australia there are currently no statutory or common law protections under which a consumer may redeem or exchange a gift voucher once it has expired, or compel a retailer to honour, replace or refund such a voucher. Corporations law and common law principles require only that if the gift voucher is subject to an expiry date, the expiry date is to be displayed visibly on the voucher. The result is that a consumer wishing

⁶⁵ *E v Australian Red Cross Society* (1991) 31 FCR 299, 305-6, in which it was held that a contract for the supply of blood plasma to a patient was a contract for the provision of services but that such a contract fell within the meaning of ‘goods’ in s 71 of the *Trade Practices Act 1974* (Cth).

to use a gift voucher displaying an expiry date must be mindful of the date and use the voucher before its expiry, since he or she is effectively prevented at law from seeking a remedy after that time. Indeed, this is the advice proposed by consumer and fair trading offices around the country.⁶⁶

As has been recognised in Canada and the USA, gift cards and other stored value cards are now ‘an established retail convenience for many Canadian consumers’⁶⁷ and are among the fastest-growing products in the marketplace today. At the same time, the percentage of gift vouchers that expire unused in North American jurisdictions is testament to the all-too-human likelihood that a gift voucher will be lost or forgotten by its holder.

Gift vouchers are also a popular gift choice in Australia. Yet if a gift voucher expires unredeemed in Australia, the consumer is powerless at law to appeal against its expiry and to claim the good or service for which the voucher was purchased. This constitutes a clear example of the relative vulnerability of the individual consumer, who must generally accept a gift voucher on the terms on which it is offered and has little or no power to negotiate with the large retailers and corporations that sell gift vouchers to extend or abolish a voucher’s expiry date. Indeed, it is for that reason that consumer laws intervene in the commercial relationship: to reduce ‘real life’ inequalities in the marketplace by throwing the power of the state on the side of the consumer as a counter-force to the power of business.⁶⁸ It is for that reason, too, that consumer protection regimes in Australia should be reformed to introduce a ban on gift voucher expiry dates.

It may be argued that imposing an expiry date is contrary to public policy. As previously noted, under contract law, a term, even if it expresses the agreement of the parties, will only be given effect if to do so would not be ‘contrary to public policy’. Accordingly, once a gift voucher has been paid for, principles of public policy and indeed equity demand that the voucher’s provider perform its side of the contract by honouring the voucher, no matter when it is presented by the consumer. This was certainly the approach taken in the various Canadian provinces and USA states which have enacted consumer legislation banning expiry dates on gift cards.

This article concludes by suggesting that this is an area in which Australian consumer protections should be significantly strengthened. As this article has indicated, neither the TPA nor State and Territory legislation provides adequate protection for Australian consumers in relation to losses incurred as a result of expired gift vouchers. Yet such protection could be readily achieved by amending State and Territory consumer and fair trading laws to prohibit gift vouchers from bearing expiry dates. Such reforms would provide welcome relief to consumers who find themselves unable to use gift vouchers which have expired, while preventing the unjust enrichment of retailers who rely on expiry dates to refuse to deliver goods or services promised under their gift vouchers and who benefit from the expiry of such vouchers. This has already happened in most Canadian provinces and in many states in the USA.

However, in Australia there do not appear to be any prospects of consumer law reforms in relation to expiry dates on gift vouchers, nor even any discussions addressing this area of

⁶⁶ Including the Queensland Office of Fair Trading, the New South Wales Office of Fair Trading, Consumer Affairs Victoria and the Western Australia Department of Consumer and Employment Protection.

⁶⁷ Bahta, Tsang and Weise, above n 6, 7.

⁶⁸ Goldring et al, above n 28, 3.

consumer protection. It is also difficult to gauge the extent of the losses experienced by Australian consumers as a result of gift vouchers expiring unused, since there is limited retail information available in relation to expired vouchers. Nonetheless, anecdotal evidence suggests that this is as significant a problem for Australian consumers as it has been for consumers in Canada and the USA.

An alternative to State or Territory reforms might be the enactment of Commonwealth legislation to prohibit expiry dates on gift vouchers. While consumer protection generally falls within State and Territory jurisdictions, the TPA is testament to previous Commonwealth action in this area as well as to the benefits of such action, not least in ensuring that consistent consumer protection standards are imposed across the country. Indeed, the Commonwealth government is currently considering amendments to the TPA which would void standard form consumer contracts containing unfair terms.⁶⁹ Although the proposed amendments do not contain any consumer protections in relation to expiry dates on gift vouchers, they signal the Commonwealth's continued interest in implementing a national consumer law regime.

Introducing law reforms to prohibit expiry dates on gift vouchers at both Commonwealth and State and Territory levels would improve consumer protections in all jurisdictions. Moreover, such reforms would ensure that existing consumer protection laws were further aligned with their statutory and public policy objectives: to promote and encourage fair trading practices, to protect consumers against unfair or undesirable trading practices and to enhance the welfare of Australians by providing for consumer protection.

⁶⁹ Trade Practices Amendment (Australian Consumer Law) Bill 2009 (Cth) <http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r4154_first/toc_pdf/09139b01.pdf;fileType=application%2Fpdf> at 7 September 2009. See also the Senate Economics Legislation Committee's report on the Bill, *Trade Practices Amendment (Australian Consumer Law) Bill 2009 [Provisions]* (2009) Parliament of Australia, Senate <http://www.aph.gov.au/senate/committee/economics_ctte/tpa_consumer_law_09/report/report.pdf> at 21 September 2009.