AUSTRALIAN COMPETITION & CONSUMER COMMISSION

Customer loyalty schemes

Final report

December 2019

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Contents

Australian Competition and Consumer Commission

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Executive summary

The Australian Competition and Consumer Commission (ACCC) has examined consumer and competition issues that are associated with consumer-facing customer loyalty schemes (loyalty schemes) in Australia, including the way in which loyalty schemes collect, use and disclose consumer data.

Consumer and competition issues arising from customer loyalty schemes are a current priority for the ACCC. The operators of loyalty schemes must ensure they comply with the Australian Consumer Law (ACL) and make sure their terms and conditions do not include any unfair contract terms. It is also paramount that the operators of loyalty schemes ensure consumers have a genuine opportunity to review and understand the policy and operation of loyalty schemes to avoid misleading and deceptive conduct.

A significant number of Australian consumers have reported experiencing a variety of issues participating in loyalty schemes. The ACCC and ACL regulators in states and territories have received approximately 2000 reports about loyalty schemes in the five years to December 2018.

The ACCC's review of the major loyalty schemes in Australia focused on the following key issues:

- **Consumer issues:** whether consumers are properly informed and receive the benefits advertised by loyalty schemes.
- **Data practices:** the collection, use and disclosure of consumer data by loyalty schemes and their partners.
- **Competition issues:** the potential impact of loyalty schemes on competing firms, in particular on new entrants.

The purpose of this report is to highlight the consumer and competition issues associated with loyalty schemes to both educate consumers and inform the industry of the ACCC's concerns with certain practices.

Based on the information gathered during this review, the ACCC is concerned about a range of business practices in the loyalty scheme industry which have the potential to cause widespread consumer detriment. They include loyalty schemes:

- that do not present their terms, conditions and privacy policies in a way that consumers can readily understand
- that make unilateral changes to their terms and conditions in a way that may be unfair to consumers
- collecting, using and disclosing consumer data in ways that do not align with consumers' preferences. This includes loyalty schemes not providing sufficient transparency and meaningful consumer control over the collection, use and disclosure of consumer data, and engaging in the following practices:
    - seeking broad consents from consumers and making vague disclosures to them about the collection, use and disclosure of their data
    - providing consumers with limited insight and control over the sharing of their data with unknown third parties
    - providing a limited ability for consumers to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes.

The ACCC has outlined in this report its concerns and views on certain practices, and calls on operators of loyalty schemes to review and consider these practices in the context of the ACL. In particular, loyalty schemes should consider whether consumers are being misled or subject to unfair contract terms. Further, loyalty schemes should review their approach to presenting terms and conditions to ensure consumers have a genuine opportunity to review and understand their policy and operation.

The ACCC notes that following the release of the Customer Loyalty Schemes draft report (draft report), some loyalty scheme operators have implemented or announced changes to their schemes, most with the aim of improving consumer understanding.

While acknowledging these changes, the ACCC remains concerned about a range of practices which persist within particular schemes and therefore continues to recommend changes to particular industry practices and consumer and privacy laws. The ACCC considers that these recommendations will both protect consumers and ensure consumer trust in the digital economy and data based innovation.

Having placed the industry on notice, the ACCC encourages consumers to contact us and report concerns where these practices are continuing with their loyalty schemes. The ACCC will consider these reports taking into account the principles and priorities in its compliance and enforcement policy before deciding whether enforcement action will be required to effect broader change.

The objectives of customer loyalty schemes

Loyalty schemes are ubiquitous in many sectors of the Australian economy and are particularly prevalent in the airline, supermarket, credit card, hotel and car rental industries. Consumer participation in loyalty schemes is high and the average Australian carries four to six loyalty cards.

Fundamentally, loyalty schemes are a marketing device with the primary objective of attracting and retaining customers. Many firms invest in loyalty schemes with the aim of gaining a competitive advantage over rivals by influencing customer behaviour to encourage repeat purchases and introduce customer resistance to competing offers or products. In this sense, loyalty schemes have a dual strategy—an offensive strategy of acquiring new customers as well as a defensive strategy of retaining existing customers.

Increasingly, some larger loyalty schemes also earn significant revenue from their schemes, including by allowing affiliated retailers and other companies to purchase points for their customers. In addition, some loyalty schemes collect and use their customers' data in order to develop consumer insights, which may be shared with or sold to other businesses, and to target customers with tailored advertising. Some loyalty schemes may also use this data to deliver targeted and personalised advertising to their own customers on behalf of other businesses.

Consumer issues

Consumers may benefit from their participation in loyalty schemes by receiving rewards such as discounts on products and services, and access to exclusive offers and service levels. They may receive these benefits on purchases they would have otherwise made.

Loyalty schemes can provide consumers with a range of options to earn rewards and, increasingly, customers of loyalty schemes are able to earn and spend points directly with a number of different merchants that participate within a loyalty scheme's partner network.

The ACCC has received complaints from customers of loyalty schemes that alleged they had not earned, maintained or redeemed their points in the manner they anticipated, with

many consumers reporting that they did not obtain any benefits from participation at all. Complaints included that some operators of loyalty schemes:

- failed to adequately advise them about critical components of their loyalty schemes, including the need to remain 'active' by earning or redeeming points within a specified period to avoid the expiry of points, or about the restricted availability of redemption opportunities, and
- made unilateral changes that unfairly restricted the benefits available under a loyalty scheme, for example, by unilaterally reducing the rate at which they could earn points, or the value of their points previously accumulated.

In response to the draft report, several loyalty scheme operators submitted that they are in the process of investigating certain measures, or in some cases had already implemented them, to help facilitate well-informed consumer engagement. For example, the ACCC notes that submissions to the draft report from Virgin Australia, Flybuys, Woolworths and Qantas have highlighted changes these loyalty schemes have made, or are seeking to make, some directly in response to matters raised in the draft report.

Despite these changes, the ACCC is concerned about a range of business practices in the industry and calls on operators of customer loyalty schemes to review and consider their practices in the context of the ACL.

Recommendation 1: Improve how loyalty schemes communicate with customers

Loyalty scheme operators need to review their approach to presenting terms and conditions of loyalty schemes and ensure changes are fair and adequately notified.

Loyalty scheme operators should review their approach to presenting the terms and conditions of loyalty schemes to ensure consumers have a genuine opportunity to review and understand their policy and operation. More specifically, loyalty scheme operators should provide consumers with relevant information at the right time and in the right way to make informed decisions, for example:

- Loyalty scheme operators should ensure that any notification about the approaching expiry of consumers' point balances (or detrimental changes to the rate consumers earn points or the value of those points) is sufficiently prominent and appropriately targeted. For instance, the subject line of any email notification about the approaching expiry of point balances might include a statement similar to 'Your points are about to expire'.
- Frequent flyer schemes should consider disclosing any particular routes, or corresponding seasons, or classes of travel on a route, where 'free' seats are not available.

If loyalty scheme operators contemplate a unilateral reduction in either the earn rate or redemptive value of points, then prior to making such a change, loyalty scheme operators should:

- provide existing members with prominent and timely advance notice and a genuine opportunity to redeem their existing point balance, and
- consider providing existing members with some form of compensation (potentially in the form of an increased point balance).

Loyalty scheme operators must ensure they comply with the ACL, including by avoiding statements that are incorrect or likely to create a false impression, and avoiding unfair contract terms.

The ACCC also notes that the findings in this report reinforce those of the ACCC's Digital Platforms Inquiry. In particular, the ACCC considers that certain conduct by customer loyalty schemes has the potential to cause substantial consumer detriment, which should be considered as part of proposed reforms to the ACL.

Recommendation 2: Prohibition against unfair contract terms and certain unfair trading practices

The ACCC's findings in this report reinforce the Digital Platforms Inquiry Final Report's recommendations for the need for a prohibition against unfair contract terms and certain unfair trading practices.[1]

Consistent with the Digital Platforms Inquiry Final Report's recommendations, the ACCC recommends that the Australian Consumer Law be amended:

- so that unfair contract terms are prohibited (and not just voidable)
- to include a prohibition against certain unfair trading practices.

The scope of a prohibition on certain unfair trading practices should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance. The ACCC notes, and is actively participating in, the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum. The ACCC's current view is that the prohibition should be directed at unfair conduct that has caused, or has the potential to cause, substantial detriment to consumers. The ACCC will continue to work through CAANZ in relation to this issue.

Data practices

Membership of a loyalty scheme is voluntary and generally provided at zero monetary cost to the consumer. In exchange for the benefits provided by loyalty schemes, many loyalty schemes derive value from consumers by collecting data, including personal information, about them. Increasingly, some loyalty schemes generate revenue from the data they collect about the habits, interests and preferences of their customers, which can be used to profile consumers to produce insights about their purchasing behaviour.

Loyalty schemes may collect consumer data both actively, for example, information voluntarily provided by the consumer when joining the loyalty scheme, as well as passively, for example, the background collection of data through a consumer's use of a platform, apps on a device or use of third party websites.

The data collected by some loyalty schemes about a consumer can be further enriched by linking it with external data sources, including from data brokers or through data-sharing platforms. These external data sources collect masses of information on consumers, which can be combined with relevant data a loyalty scheme holds about its customers.

The combining of data allows greater value to be extracted from many loyalty schemes' databases for the purposes of generating insights about consumers to enable targeted advertising and personalised marketing. This data can also be used not only to improve the offerings of the loyalty scheme operator, but also to share insights with other partners or sell those insights to third parties.

While Australian consumers have different preferences, attitudes and levels of awareness when it comes to the data they share with loyalty schemes, a number of surveys have

[1] ACCC, *Digital Platforms Inquiry final report*, June 2019, Recommendations 20 and 21, p. 26.

suggested that many are concerned about sharing their data with companies, including loyalty schemes. The surveys reviewed in this report suggested that many consumers are concerned about the sharing of their data with unknown third parties, targeted advertising, and whether their data is being used responsibly. Many consumers are also seeking more transparency and control over the data they provide to loyalty schemes as well as improved data practices, legislative protection and greater individual rights over their personal information.

The terms and conditions of loyalty schemes' privacy policies often prevent consumers from making informed choices that align with their privacy and data collection preferences. An imbalance of bargaining power and significant information asymmetries exist between consumers and the major loyalty schemes examined in this report. These are primarily seen in the broad consents that these loyalty schemes seek from consumers about the collection and use of their data, and the vague disclosures they make to consumers about how their data could be used and with which entities it could be shared.

In one example, the ACCC is aware that Flybuys and Woolworths Rewards disclose in their privacy policies that they may continue to track the purchasing behaviour and transaction activities of their loyalty scheme members when they shop at Coles or Woolworths Group stores, respectively, even if they do not scan their loyalty card by automatically linking any payment card used by the member to their profile.

The ACCC's view is that such practices affect the ability of consumers to make an informed choice that aligns with their privacy and data collection preferences by removing consumers' ability to control how and when their data is collected. When consumers no longer want to participate in a loyalty scheme they are unlikely to actively cancel their memberships due to the effort and time required to do so—rather, they will simply stop scanning their loyalty card when they shop. The ACCC considers that irrespective of disclosure in terms and conditions or privacy policies of this practice, consumers are unlikely to know that their data is collected and used by supermarkets in cases where they have chosen not to scan their loyalty card.

The ACCC is of the view that Coles, Flybuys and Woolworths Group should end the practice of automatically linking members' payment cards to their profile.

Recommendation 3: End the practice of automatically linking members' payment cards to their loyalty scheme profile

Coles, Flybuys and Woolworths Group should end the practice of automatically linking customers' payment cards to their loyalty scheme profile to track their purchasing behaviour and transaction activities when they do not scan their loyalty card.

Problematic data practices, in addition to impacting market efficiency, can cause consumer harm. These harms include decreased consumer welfare from decreased privacy, and risks to consumers from increased profiling and from discrimination and exclusion. More broadly, they may also lead to decreased consumer trust necessary to enable the continued economic and social benefits of personal data flows.

Recommendation 4: Improve the data practices of loyalty schemes

Loyalty schemes need to review their approach to presenting consumers with information about how they handle consumer data and provide consumers with meaningful control over their data.

Privacy policies of the loyalty schemes examined in this report are opaque and consumers are often unable to make informed choices about, and have limited control over, the collection, use and disclosure of their data.

Loyalty schemes should continue to take steps to address a number of the ACCC's concerns, including by:

- reviewing their clickwrap agreements for unfair contract terms, including by assessing the potential consumer detriment of unilateral variation terms
- improving the clarity, accessibility, navigability and readability of privacy policies, including by standardising definitions to be consistent with those in the *Privacy Act 1988* (Cth) (Privacy Act)
- minimising information overload for consumers by prominently presenting relevant aspects of their terms, conditions and privacy policies to consumers during key interactions
- outlining clearly with which entities consumer data is being shared and for what purposes, and drawing to consumers' attention how their data is being handled (including, for example, by providing a prominent notice during relevant interactions with customers)
- disclosing to consumers the sources of third party advertising, the sources of the consumer data used to inform that advertising, and the channels through which they may receive targeted advertising and how their consumer data may be used to generate leads (including, for example, via a regularly updated online notice)
- providing consumers of loyalty schemes with more meaningful controls over the collection, use and disclosure of their data which respond to consumer demands to align the data practices of loyalty schemes with the data preferences of consumers (including, for example, pre-selected and meaningful opt-outs for targeted advertising)
- where there are limitations to the controls (e.g. in relation to collection, use or disclosure settings such as opt-outs) that currently exist, these should be made clear to consumers.

Further, the ACCC's concerns identified in this report have direct parallels with those identified in the ACCC's Digital Platforms Inquiry Final Report. These include:

- insufficient transparency and meaningful consumer control over the collection, use and disclosure of consumer data
- a lack of informed and genuine choice for consumers engaging in the digital economy
- a lack of consumer protection and effective deterrence under existing laws governing data collection.

The ACCC is of the view that the findings from this review of loyalty schemes reinforces the ACCC's findings from its Digital Platforms Inquiry, and further supports our recommendations for economy-wide changes in relation to privacy law.

Recommendation 5: Strengthen protections in the Privacy Act and broader reform of Australian privacy law

The ACCC's findings in this report reinforce the Digital Platforms Inquiry Final Report's recommendations for privacy law reform.[2]

Consistent with the *Digital Platforms Inquiry Final Report's* recommendations, the ACCC recommends strengthening the Privacy Act by:

- updating the definition of 'personal information' in line with current and likely future technological developments to capture any technical data relating to an identifiable individual
- strengthening notification requirements to ensure that the collection of consumers' personal information directly or by a third party is accompanied by a notice of the collection that is concise, intelligible and easily accessible, written in clear and plain language, provided free of charge, and accompanied by appropriate measures to reduce the information burden on consumers
- strengthening consent requirements to require that consents are freely given, specific, unambiguous and informed, and that any settings for additional data collection must be preselected to 'off'
- ensuring that consents are required whenever personal information is collected, used or disclosed by an entity subject to the Privacy Act, unless the personal information is necessary to perform a contract to which a consumer is a party, required under law, or otherwise necessary in the public interest
- requiring entities subject to the Privacy Act to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, except in certain circumstances
- introducing direct rights for individuals to bring actions or class actions before the courts to seek compensation for an interference with their privacy under the Privacy Act.

As well as these recommendations for targeted amendments to the Privacy Act, the ACCC is also recommending broader reform of the Australian privacy regime to maintain effective protection of consumers' personal information in the longer term. This includes consideration of the current objectives and scope of the Privacy Act, and the introduction of a statutory tort for serious invasions of privacy as recommended by the Australian Law Reform Commission. The relevant recommendations as proposed in the ACCC's Digital Platforms Inquiry are reproduced in full in **appendix F**.

The ACCC notes it has undertaken enforcement action in relation to alleged misleading and deceptive conduct or misleading representations made by entities engaged in the digital economy. In particular, in relation to HealthEngine's alleged sharing of consumer data without adequate disclosure to consumers and Google's alleged representations around the data it collects, keeps and uses.[3] These proceedings are being defended and are currently before the Court. The ACCC will continue to consider whether any other conduct of entities engaged in the digital economy raises concerns under the *Competition and Consumer Act 2010* (Cth) and whether it is appropriate for the ACCC to take enforcement action.

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[2] ACCC, *Digital Platforms Inquiry final report*, June 2019, Recommendations 16, 17 and 19.

[3] ACCC, HealthEngine in court for allegedly misusing patient data and manipulating reviews, 8 August 2019; ACCC, Google allegedly misled consumers on collection and use of location data, 29 October 2019.

Competition issues

Loyalty schemes have the potential to raise competition concerns. This can occur depending on the extent to which loyalty schemes ‘lock up’ customers and introduce switching costs that increase barriers to entry and expansion for rival firms. If barriers are enduring and induce exit or deter entry, consumers are likely to be worse off.

While not all consumers are active members of the loyalty schemes they belong to, for a significant number of consumers, loyalty schemes can strongly influence their buying behaviour. This can have implications for the ability of smaller companies or new entrants without a well-established loyalty scheme to compete.

These risks to competition could be particularly concerning given the prevalence of loyalty schemes in many concentrated markets in Australia.

Competition issues may arise not only in the primary market in which the loyalty scheme predominantly operates (for example, domestic air travel), but may also be extended to related markets through exclusive partnerships with firms supplying complementary products (for example, domestic airlines and car rental services). The barriers to competition arising from large national coalition loyalty schemes may be particularly high for smaller, regional businesses.

Frequent flyer schemes have the potential to result in significant customer lock-in effects, as has occurred overseas. It appears that Qantas Frequent Flyer might have a significant impact on barriers to entry and expansion for the domestic business traveller segment. However, Virgin Australia has been successful to date in growing its Velocity loyalty scheme and market position and it is not clear that such customer lock-in effects and switching costs associated with frequent flyer schemes have resulted in major barriers to entry in this case.

In the case of supermarket loyalty schemes, while customer loyalty in this sector is currently limited, there is the potential for stronger exclusivity effects to occur in future as the major supermarkets seek to leverage their growing digital and analytical capabilities using extensive customer data.

Coalition loyalty schemes bring together a variety of partners under their programs, which allow members to earn and redeem points with a number of different merchants across the economy. The major coalition loyalty schemes in Australia are likely to assist in maintaining current market structures, while also producing consumer benefits.

The ACCC will consider any competitive effects of loyalty schemes on a case-by-case basis, including with respect to analysing any substantial market power a firm holds, and the height of barriers to entry in a market in competition law matters.

Shortened terms

ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
ADMA	Association for Data-driven Marketing & Advertising
AFF	Australian Frequent Flyer
Affinity	Affinity Equity Partners
AGR	Alliance for Gambling Reform
ANZ	Australia and New Zealand Banking Group
APF	Australian Privacy Foundation
API	Australian Privacy Index
APP	Australian Privacy Principles
CAANZ	Consumer Affairs Australia and New Zealand
CBA	Commonwealth Bank of Australia
CCA	*Competition and Consumer Act 2010* (Cth)
CMA	Competition & Markets Authority (UK)
CPRC	Consumer Policy Research Centre
Cth	Commonwealth
EBIT	Earnings before interest and tax
EC	European Commission
FARE	Foundation for Alcohol Research & Education
NAB	National Australia Bank
NAS	Norwegian Air Shuttle
NDC	New Distribution Capability
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
Privacy Act	*Privacy Act 1988* (Cth)
QDP	Qantas Distribution Platform
SAS	Scandinavian Airlines System
SKU	Stock-keeping unit
Westpac	Westpac Banking Corporation

1. Introduction

This report analyses competition and consumer protection issues in the Australian customer loyalty scheme industry, including in relation to data practices. This report focuses solely on consumer-facing loyalty schemes and not business-to-business or other schemes.

Customer loyalty schemes (loyalty schemes) are a form of marketing or promotional tool that incentivises consumers to make repeat purchases. Generally, a consumer must join such a scheme to access its benefits. Consumers then earn points (expressed in the relevant points currency or in dollars), a discount, or some other incentive when they indicate to a participating merchant their membership of the loyalty scheme by providing their details or loyalty card or signing in online. Where points are earned, they can often be redeemed for cashback on future purchases or outright for goods or services. Examples of loyalty schemes include frequent flyer programs, credit card rewards programs and frequent shopper programs.

Loyalty schemes are ubiquitous in the Australian market and are prevalent in many sectors of the economy. In particular, they are offered by airlines, banks, cinemas, hotels, restaurants and retailers. Larger loyalty schemes, such as Qantas Frequent Flyer, Velocity Frequent Flyer (part owned by Virgin Australia) and Flybuys (part owned by Coles and Wesfarmers) have developed as points-based coalition programs, in which merchants from different industries may participate by purchasing a loyalty scheme's points for their customers and offer these to their customers as a reward.

This report focuses on loyalty schemes in Australia with an active membership base of over one million. The key issues addressed in this review are:

- **consumer issues**: whether consumers are properly informed and receive the benefits advertised by loyalty schemes
- **data practices**: the collection, use and disclosure of consumer data by loyalty schemes and their partners (that is, their data practices, particularly as it is the loyalty function of a business that is usually responsible for collecting and storing customer data), and
- **competition issues**: the potential impact of consumer loyalty on competing firms, in particular on new entrants.

The structure of this report is as follows:

- chapter 2 sets out a profile of the loyalty scheme industry in Australia and the characteristics of loyalty schemes
- chapter 3 explores consumer protection issues, including in relation to information asymmetries, the terms and conditions of loyalty schemes, and the perceived and actual value of participating in loyalty schemes for consumers
- chapter 4 focuses on consumer protection issues related to the data practices of loyalty schemes
- chapter 5 examines potential competition issues arising from loyalty schemes, including the potential for heightened barriers to entry and expansion for competing firms and new entrants
- chapter 6 raises emerging issues identified with the development and operation of loyalty schemes.

1.1. Role of the ACCC

The Australian Competition and Consumer Commission (ACCC) is an independent Commonwealth statutory authority whose role is to administer and enforce the *Competition and Consumer Act 2010* (Cth) (CCA), the Australian Consumer Law (ACL), and a range of additional legislation, promoting competition and fair trading, and regulating national infrastructure for the benefit of all Australians.

The ACCC's role is to protect and strengthen the way competition works in Australian markets to improve the efficiency of the economy and to increase the welfare of Australians. This means the ACCC will take action where this improves consumer welfare, protects competition or stops conduct that is anti-competitive or harmful to consumers, and promotes the proper functioning of Australian markets.

1.2. Methodology

This review has been self-initiated by the ACCC under s. 28(1)(c) of the CCA, which gives the ACCC the power to 'conduct research in relation to matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws'. Under this provision, the ACCC does not have the power to compel information and documents from market participants.

To inform the ACCC's analysis, this review has drawn on information from various sources including major loyalty schemes' responses to voluntary information requests, written submissions and consultation. A list of loyalty scheme operators and other parties which consulted with the ACCC and/or provided non-confidential submissions can be found in **appendix A**.

The ACCC has also drawn on information and data from a range of sources, including desktop research (including a review of terms and conditions and privacy policies) and consumer reports data collected by the ACCC and other ACL regulators. Where appropriate, this report draws on analysis presented in the ACCC's Digital Platforms Inquiry Final Report[4], particularly where issues around data practices and the intersection of privacy, competition and consumer protection regulations are concerned.

Further, the ACCC also commissioned an industry expert, Loyalty & Reward Co, to produce a report into the development, operation and monetisation of loyalty schemes, as well as their collection, use and disclosure of consumer data.[5] Key aspects of Loyalty & Reward Co's report are relied upon and highlighted as appropriate throughout this report.

1.3. Regulatory environment

All relationships within the Australian loyalty scheme industry are governed by the statutory protections offered to consumers by the CCA, including the ACL. These include relationships between consumers, loyalty schemes, and participating affiliates, partners and merchants. Competition laws also govern relationships between industry participants and prohibit restrictive trade practices.

The intersection of privacy, competition and consumer protection regulations formed another key line of inquiry for this review. Where necessary, this report discusses issues arising under privacy law, as this is the main regulatory framework against which to assess concerns around the collection, use and disclosure of personal information. This report also discusses data practices that may also raise competition and consumer protection concerns.

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4 ACCC, *Digital Platforms Inquiry final report*, June 2019.

5 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019.

Key provisions of competition, consumer protection and privacy policy and law are outlined below.[6] This chapter also notes international developments regarding the regulation of loyalty schemes.

1.3.1. Competition and consumer protection regulatory framework

The CCA covers most areas of the market: the relationships between suppliers, wholesalers, retailers and consumers. Its purpose is to enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections in the ACL. The most relevant provisions of the CCA and ACL to this review are outlined below.

Misleading or deceptive conduct

Businesses must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive, or make false or misleading representations about their goods or services.[7] It does not matter if there is an intention to mislead or not.[8] It includes express and implied representations—including, for example, statements about how user data is collected, used or shared—that are incorrect or likely to mislead.

Unfair contract terms

Terms that are deemed to be unfair in standard form contracts are considered to be void and cannot be enforced.[9] Loyalty schemes' consumer-facing terms and conditions of use and privacy policies would likely be considered standard form contracts, which would mean that they must comply with the unfair contract term provisions in the ACL.[10]

Consumer guarantees

When consumers buy a product or service, this product or service comes with automatic statutory guarantees under the ACL. For example, that a product will work and do what was asked for, and that services are supplied with due care and skill.[11] These are known as the consumer guarantees.[12] Businesses must provide consumer guarantees regardless of any other warranties they provide or sell to a consumer.

Unconscionable conduct

Businesses must not engage in unconscionable conduct in connection with the supply or acquisition of goods or services.[13] Although 'unconscionable conduct' does not have a precise legal definition, it generally refers to conduct that is against good conscience by reference to the norms of society[14], and that goes beyond mere unfairness.[15]

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6 Relevant provisions of the *Competition and Consumer Act 2010* (Cth), Australian Consumer Law and *Privacy Act 1988* (Cth) have not been reproduced, and have only been summarised in this section to facilitate understanding.

7 ACL, ss. 18, 29, 33 and 34.

8 *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197 Gibbs J; *Yorke v Lucas* (1985) 158 CLR 661 at 666.

9 ACL, s. 23(1).

10 ACL, Part 2–3.

11 ACL, Part 3–2, Division 1.

12 Consumers can assert their consumer guarantee rights throughout the supply chain.

13 ACL, ss. 20, 21 and 22.

14 *ACCC v Lux Distributors Pty Ltd* (2013) FCAFC 90.

15 *Attorney-General (NSW) v World Best Holdings Ltd* (2005) NSWCA 261 at (121), approved in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) FCAFC 50 at (356) (Allsop CJ).

Anti-competitive conduct

Contracts, arrangements, understandings or concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market are prohibited under the CCA, even if that conduct does not meet the stricter definitions of other anti-competitive conduct such as cartels.[16]

Misuse of market power

A corporation with a substantial degree of power in a market is not allowed to take advantage of this power by engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.[17]

Exclusive dealing

Exclusive dealing generally occurs when one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal. Exclusive dealing is against the law only when it substantially lessens competition.[18]

1.3.2. Privacy regulatory framework

Data-driven markets, such as those in which many loyalty schemes operate, raise issues at the intersection between privacy, competition and consumer protection regulations. Accordingly, the operation of loyalty schemes, including their data practices, are governed under privacy, competition and consumer protection laws. The *Privacy Act 1988* (Cth) (Privacy Act) sets out the regulatory framework for the protection of 'personal information', including the Australian Privacy Principles (APPs), which applies to 'APP entities'. APP entities include any private and non-profit organisations with an annual turnover of more than $3 million and data companies.

Personal information is defined as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable:

(a) whether the information or opinion is true or not, and

(b) whether the information or opinion is recorded in a material form or not.[19]'

It is unclear whether the scope of personal information includes metadata such as IP addresses, other location data or other technical data.[20]

APP entities must handle, use and manage personal information in accordance with the 13 APPs set out in the Privacy Act, which include requirements to:

- maintain a privacy policy disclosing how personal information is collected, held and disclosed (APP 1)
- not collect personal information unless it is reasonably necessary (APP 3), and
- not disclose personal information for direct marketing purposes, unless exceptions apply (APP 7).

The Office of the Australian Information Commissioner (OAIC) is responsible for enforcing the Privacy Act and has powers to investigate an APP entity after receiving a privacy

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16 CCA, s. 45.

17 CCA, s. 46.

18 CCA, s. 47.

19 Privacy Act, s. 6(1).

20 See ACCC, *Digital Platforms Inquiry final report*, June 2019, p. 409.

complaint from an individual or to investigate an entity on its own initiative (referred to as Commissioner-initiated investigations).[21]

The OAIC's powers include making determinations on a privacy complaint, accepting enforceable undertakings from an APP entity and applying to the courts for an injunction or for civil penalties to be imposed on an APP entity for engaging in serious and repeated interference with privacy.

1.4. International approaches

In most jurisdictions, loyalty schemes are governed by the statutory protections offered under the general law, including competition, consumer protection and privacy regulations. However, a small number of jurisdictions have in the past regulated or continue to directly regulate some aspects of loyalty schemes.

In Ontario, Canada, the provincial consumer law was amended in December 2016 to prohibit the expiry of rewards points due to the passage of time alone.[22] The legislation had retrospective effect to 1 October 2016. However, the accompanying regulation, which came into force on 1 January 2018, provides an exception to this if a consumer has not earned or redeemed points during a specified period of time.[23] In November 2017, the Quebec National Assembly passed a law requiring that consumers be notified in writing of certain information before entering into a contract and to prohibit any stipulation under which the currency units (or points) a consumer receives under a loyalty scheme may expire on a set date or by the lapse of time.[24]

Between 2002 and 2013, Norway banned customer loyalty schemes (frequent flyer programs) on domestic airline routes to encourage competition, based on loyalty effects locking in customers and increasing barriers to entry for new competitors in the Norwegian aviation market.[25] In 2013, the ban was lifted as the government formed the view that competition in the airline sector was by then more robust than when the regulation was introduced.

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[21] OAIC, Commissioner initiated investigation reports, viewed 21 May 2019.

[22] Legislative Assembly of Ontario, Bill 47, *Protecting Rewards Points Act (Consumer Protection Amendment)*, s. 47.1(1), 2016.

[23] See *O Reg 388/17, s. 43.6(2)*; see also Frith, Mochrie & Jackson, *Not so happy new year: Ontario rewards points legislation coming into force January 1, 2018*, Osler, Hoskin & Harcourt LLP, 16 November 2017.

[24] Bill 134: *An Act Mainly To Modernize Rules Relating To Consumer Credit And To Regulate Debt Settlement Service Contracts, High-Cost Credit Contracts And Loyalty Programs*, Quebec National Assembly, passed and assented to 15 November 2017. See also: Canadian Marketing Association, Consumer Protection/Loyalty Programs.

[25] OECD, *Airline competition — note by Norway*, 18–19 June 2014.

2. Customer loyalty schemes background and characteristics

Key points

- Three main types of loyalty schemes operate in Australia: coalition points-based schemes (with multiple partners), standalone point-based schemes (with no partners), and member benefits/discount-based schemes.
- Almost 90 per cent of Australian consumers are estimated to be a member of a loyalty scheme, with the average Australian carrying four to six loyalty cards.
- In recent years, Australia's four largest loyalty schemes have grown both in terms of membership and partners. Qantas Frequent Flyer currently has around 12.9 million members, Woolworths Rewards has 11.7 million members, Velocity Frequent Flyer has 9.8 million members and Flybuys has 8.6 million individual members.
- Increasingly, some larger loyalty schemes also earn significant revenue from their schemes, including by allowing affiliated retailers and other companies to purchase points for their customers. The loyalty schemes of Qantas and Virgin Australia are significant contributors to their overall earnings and report higher profit margins than other parts of their businesses.
- In addition, some loyalty schemes collect and use their customers' data in order to develop consumer insights, which may be shared with or sold to other businesses, and to target customers with tailored advertising (explored further in chapter 4). Some loyalty schemes may also use this data to deliver targeted and personalised advertising to their own customers on behalf of other businesses.
- Key benefits of loyalty schemes that consumers perceive as being attractive include receiving rewards or discounts (either instant or delayed), access to exclusive offers, surprise gifts, and tailored communications and promotions.
- Key benefits of loyalty schemes for their operators and partners include building marketing databases and increased engagement with customers, as well as being a point of differentiation that can provide a competitive advantage.
- Loyalty schemes tend to be homogenous within an industry, as competitors adapt their schemes to match their rivals. Loyalty schemes are also designed to appeal to certain psychological or behavioural biases, which may result in consumers making inefficient purchasing decisions.

2.1. Customer loyalty schemes overview

This section provides an overview of the main types of loyalty schemes operating in Australia, followed by details on the history of loyalty schemes, consumer participation rates and a financial profile of major loyalty schemes.

Loyalty schemes in Australia operate across different sectors of the Australian economy, with the largest loyalty schemes—Qantas Frequent Flyer, Velocity Frequent Flyer, Flybuys and Woolworths Rewards—operating in the airline and supermarket sectors. Loyalty schemes also operate in the banking and finance (in particular, credit cards), hotel, car rental, telecommunications and retail industries.

Box 2.1 outlines the main types of loyalty schemes that are used in Australia.

Box 2.1: Main types of loyalty schemes operating in Australia

Three main types of loyalty schemes operate in the Australian market:

Coalition points-based schemes

A coalition loyalty scheme brings together a variety of partners under one program, and generally allows members to earn and redeem points with a number of different merchants across the economy. These types of schemes are often found in the airline, hotel, financial services and supermarket sectors.

Key examples in Australia include Qantas Frequent Flyer and Velocity Frequent Flyer. In these schemes, customers are rewarded for their loyalty with points and status credits which they earn through flights, spending with participating retail partners, and by using (co-) branded credit cards.

Flybuys and Woolworths Rewards also work in a similar way; however, they do not currently include status tiers.

Standalone points-based schemes

Standalone schemes generally do not have a variety of different partners participating in the program, and cover only the products or services of the business operating the scheme. This type of scheme design has been adopted as the predominant design across many retailers and cinemas in Australia. A key example is the MYER One scheme, where points are automatically redeemed for Myer gift cards once a certain amount of points have been earned. These schemes may also include other incentives, such as exclusive offers, VIP events, competitions and gifts. Some schemes incorporate status tiers achieved based on annual spend unlocking additional benefits.

Member benefits/discount-based schemes

Under member benefits schemes, members may be provided access to discounts, exclusive offers, VIP events, competitions and gifts, often through a member portal or an instant discount on purchases. Discounts may extend to products unrelated to the goods or services sold by the loyalty scheme operator, such as gift cards, movie tickets, accommodation, experiences and dining. Retailers, utilities companies, quick service restaurants and telecommunication companies offer these schemes.

Appendix B contains further details of the design elements of common loyalty schemes.

2.1.1. History of loyalty schemes

Early loyalty schemes were predominantly based on tokens or stamps that could later be redeemed for products or discounts with the issuer.[26] These types of schemes continue to be used today; however, in a number of sectors much more sophisticated coalition loyalty schemes have been developed to incentivise consumers to make repeat purchases.

The first modern coalition loyalty schemes were introduced in the airline industry in the United States following industry de-regulation in the late 1970s.[27] De-regulation led to a number of new entrants emerging in the industry, particularly low-cost airlines. For incumbents there arose a need to keep customers from switching to low-cost airlines.[28] A

[26] A McEachern, 'A history of loyalty programs, and how they have changed', September 2018, viewed 21 May 2019.

[27] R Petersen, 'History of frequent flyer programs', May 2001, viewed 16 July 2019.

[28] Venture Insights, 'Australian airline loyalty programs – reaching new heights', 31 August 2017, p. 2.

response to this new price-based competition was to encourage loyalty through frequent flyer programs. American Airlines launched the world's first currency-based frequent flyer scheme in 1981.[29] It has since become one of the world's largest with more than 100 million members reported in March 2015.[30] The launch of the program and subsequent growth led others to introduce their own loyalty schemes.

In Australia, Qantas launched its loyalty scheme, Qantas Frequent Flyer, in 1987.[31] Flybuys was launched in 1994[32], Virgin Australia (then trading as Virgin Blue) unveiled its Velocity Frequent Flyer program in 2005[33], and Woolworths launched its Everyday Rewards program (now called Woolworths Rewards) in 2007.[34] These schemes have evolved significantly since they were launched, growing in terms of membership and partners. The loyalty schemes of Qantas and Virgin Australia, in particular, have grown to such an extent that they now generate revenue and profits of their own, as outlined further in this section.

Further detail on the history of Qantas Frequent Flyer, Velocity Frequent Flyer, Flybuys and Woolworths Rewards can be found in Loyalty & Reward Co's report to the ACCC.[35]

2.1.2. Consumer participation in loyalty schemes

It is estimated that almost 90 per cent of Australians are members of at least one loyalty scheme.[36] A survey by The Point of Loyalty in 2019 estimated that, on average, each Australian adult belongs to 4.3 loyalty schemes.[37] According to a survey of loyalty scheme members in the Asia-Pacific region by Mastercard in 2018, the average Australian respondent belonged to 6.1 loyalty schemes.[38] Seventy nine per cent of Australian respondents stated they were members of a retail loyalty scheme, followed by airline (50 per cent), financial institution (43 per cent), restaurant (28 per cent), hotel (19 per cent) and entertainment (17 per cent).

Twenty two per cent of Australian respondents perceived that the retail loyalty scheme they consider most important to them has a significant influence on their shopping behaviour, and that retail loyalty schemes were the most important type of scheme to them.[39] This survey also found that 33 per cent of Australian respondents perceived that the most important loyalty scheme to them had a strong influence on their payment, shopping and travel behaviour.[40]

A Canstar Blue survey of almost 3000 Australian consumers in 2019 found that 28 per cent of respondents did all their shopping with one supermarket chain and, of those, 57 per cent gave earning rewards points as a reason for their loyalty.[41] Canstar Blue also found that 10 per cent of respondents had switched to a different chain in the past year, with 22 per cent of those citing earning supermarket rewards points as the reason.

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29 *The Economist*, 'Frequent-flyer miles: funny money', December 2005, viewed 2 May 2019.

30 M Schlangenstein, 'American Airlines now has the industry's largest loyalty program', 24 March 2015, viewed 3 May 2019.

31 Qantas Group, *Qantas data book 2018*, p. 9.

32 C Waters, 'Five loyalty lessons from Coles' flybuys revamp', April 2012, viewed 6 May 2019.

33 Virgin Australia, *Annual report 2005*, p. 5.

34 Woolworths Limited, *Annual report 2008*, p. 4.

35 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.2.

36 The Point of Loyalty, *for love or money 2019: Executive summary*, p. 9.

37 ibid.

38 Mastercard, *Achieving advocacy and influence in a changing loyalty landscape: a Mastercard Asia Pacific study*, January 2018.

39 ibid, p. 8.

40 ibid, p. 17.

41 Canstar Blue, 'Supermarket satisfaction ratings', 2019, viewed 21 October 2019.

Box 2.2 outlines the benefits that consumers perceive they receive by being a member of a loyalty scheme.

Box 2.2: Perceived benefits of joining a loyalty scheme

Consumers perceive the key benefits of being a loyalty scheme member as receiving rewards (either instant or delayed), access to exclusive offers, surprise gifts, and tailored communications and promotions.[42] In 2018, a survey conducted by The Point of Loyalty about why consumers are motivated to join a loyalty scheme found that[43]:

- 47 per cent of surveyed consumers indicated that they 'purchase from the brand/business anyway so might as well get rewarded'
- 43 per cent indicated the 'benefits and rewards offered are worthwhile'
- 9 per cent indicated they 'love the brand and its products/services'.

Listed below in table 2.1 are the top five loyalty schemes in Australia based on the number of members of the loyalty scheme.

Table 2.1: Top five loyalty schemes in Australia, by number of members, 2019

Loyalty scheme	Number of members
Qantas Frequent Flyer	12.9 million[44]
Woolworths Rewards	11.7 million[45]
Velocity Frequent Flyer	9.8 million[46]
Flybuys	8.6 million individuals/6.7 million households[47]
Priceline Sister Club	7.1 million[48]

Other large loyalty schemes in Australia include MYER One (over five million members)[49], Cinebuzz Rewards (almost 2.2 million members)[50] and the loyalty schemes of major hotel chains, such as Accor, Hilton, IHG and Marriott. Further, each of the major banks—Australia and New Zealand Banking Group Limited (ANZ), Commonwealth Bank of Australia (CBA), National Australia Bank (NAB) and Westpac Banking Corporation (Westpac)—and American Express run their own rewards programs for credit card holders.

The ACCC notes the figures above generally refer to the total number of members in a loyalty scheme, and that the number of active members may be significantly lower.[51] A survey by The Point of Loyalty in 2019 indicated that 47 per cent of surveyed respondents

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42 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

43 The Point of Loyalty, *for love or money 2018*, p. 14.

44 Qantas Group, *Qantas Group Performance FY19 Highlights*.

45 Woolworths Limited, *2019 Annual report*, p. 2.

46 Virgin Australia, *Annual report 2019*, p. 2.

47 Loyalty Pacific (Flybuys) submission, October 2019, p. 2. Flybuys allows multiple individuals from the same household to participate in their program under a single account.

48 Australian Pharmaceutical Industries Limited, *Annual report 2017*, p. 11. No membership figures were listed in the *Annual report 2018*.

49 Myer, *Annual report 2019*, p. 1.

50 Event Hospitality & Entertainment Limited, *Annual report 2019*, p. 9.

51 Activity is usually defined as a member having either used a loyalty card or earned/redeemed a point in the past 12 months. However, for some schemes, such as Qantas Frequent Flyer or Velocity Frequent Flyer, this may be up to 18 or 24 months respectively.

were active (within the past 12 months) in all of the programs they were enrolled in.[52] The ACCC understands that the active membership base of a loyalty scheme can vary significantly depending on the industry. In instances where loyalty schemes promote their total membership, this may overstate the extent of engagement with its members. However, the ACCC also understands that even inactive members can be valuable to loyalty schemes, particularly in terms of targeted campaigns and other promotions to try to win them back.[53]

Members are generally removed from the membership base only if they actively cancel their account, which the ACCC understands occurs only infrequently.[54] Even in the case where members no longer present their loyalty cards, section 4.4.4 provides examples where some supermarket loyalty schemes continue to track the purchasing behaviour and transaction activities of members through the debit and credit cards that the schemes have linked to the members.

2.1.3. Financial profile of loyalty schemes operating in Australia

The ACCC estimates that from 2015–16 to 2018–19, major frequent flyer schemes generated over $7.6 billion in revenue for their operators.[55] Coalition loyalty schemes may earn revenue by allowing airlines, credit card companies, retailers and other partners to purchase points for their customers. The schemes then earn interest on that revenue before the point is redeemed. Loyalty schemes also receive a benefit from 'breakage'—points that are never redeemed by customers. It has been estimated that the breakage rate for Qantas Frequent Flyer is below 10 per cent of points issued.[56] This indicates that a substantial amount of value may be lost by consumers who do not redeem their points, with the value accruing to the loyalty scheme operators.

For Qantas and Virgin Australia, their loyalty schemes are significant contributors to the overall financial performance of their businesses, contributing profit margins of almost 23 per–cent[57] and almost 30 per cent[58] respectively.

The difficulties with valuing a loyalty scheme's rewards points, and the gap between a consumer's perceived value of the point and the actual value of the points to the loyalty scheme, are outlined in box 2.3.

Box 2.3: Valuing loyalty schemes' rewards points

Calculating the value of a point to consumers

The simplest method for valuing loyalty scheme points generally assesses how much a consumer perceives a point to be worth.

For example, if a one-way business class flight between Australia and Asia costs $2300 (including taxes and fees), and a redemption opportunity costs 60 000 points and $300 in taxes and carrier fees, then a consumer will perceive the value of one point as being 3.3 cents.[59] However, if 60 000 points are instead redeemed for headphones that would ordinarily have cost the consumer $300, they will perceive the value of a point as 0.5 cents.

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52 The Point of Loyalty, *for love or money 2019: Executive summary*, p. 9.

53 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 3.3.

54 ibid, section 2.1.

55 Qantas Group, *2019 Annual report*; Virgin Australia, *2017*, *2018* and *2019 Annual reports.*

56 *Australian Financial Review*, 'Qantas loyalty program fails to fly at Woolworths', 31 October 2015, viewed 29 August 2019.

57 Qantas Group, *2019 Annual report*, p. 18.

58 Virgin Australia, *2019 Annual report*, p. 17.

59 $2300 (the total fare)–$300 (taxes and carrier fees that need to be paid for the reward) = $2000. $2000/60 000 points = 3.3 cents per point.

More simply for Flybuys and Woolworths Rewards, the value of a point using the in-store cashback redemption is understood to be 2000 points = $10, or 0.5 cents per point.

With this in mind, consumers may also need to consider the cost of earning a point. For instance, many credit cards offer a sign-up bonus but also require payment of an annual fee. If a credit card is offering a sign-up bonus of 90 000 points with an annual fee of $450, then each point costs 0.5 cents to earn. Similarly, if a shop charges a credit card surcharge of 1.5 per cent, the consumer may want to weigh up whether to use the credit card to earn points or to use a different payment method that may be cheaper or free.

Where consumers can calculate the value of a point to them, this allows them to make more informed decisions about how they earn and redeem points.

Calculating the value of a point to a loyalty scheme

When it comes to valuing the points from the perspective of a loyalty scheme, this becomes more complicated. Taking the example of the $300 headphones above, it may have cost the loyalty scheme $150 to fulfil the order. In this case, the cost of redeeming a point would be 0.25 cents, a difference of 0.25 cents per point, for the loyalty scheme. With seats on a flight, this difference may be even more pronounced, particularly if the airline is using its frequent flyer scheme to fill seats that would otherwise have been left empty.

Another aspect to assessing the value of loyalty scheme points is that they are not money and are not convertible to cash. The value of a point will generally depend on what it is being redeemed for and promotions or offers available at the time of redemption, as well as the prices partners pay for points earned by members of the loyalty scheme, or the amount paid by the loyalty scheme to partners for the redemption of points by its members. These amounts may vary depending on the scheme and the partners involved.

Certain judicial and administrative authorities also suggest that customer loyalty points are unlikely to be assessed as income for taxation purposes.[60]

The high levels of profitability reported for the Qantas and Velocity schemes are not shared by all schemes. The ACCC is aware that a number of loyalty schemes, particularly in the banking, finance, hotel and telecommunications sectors, are not necessarily run to generate direct profits but are rather considered as a marketing cost where the benefit lies in attracting new customers or encouraging existing customers to spend more with a given company.

Information is provided in box 2.4 on how loyalty schemes can be monetised.

Box 2.4: Monetisation of loyalty schemes

Loyalty & Reward Co reported that some loyalty schemes have the potential to directly generate additional revenue for a company[61], and this may occur in the following ways:

- **Partners paying for members to earn coalition scheme points**: coalition loyalty schemes generate revenue when a partner pays for a member to earn points. When this occurs, loyalty schemes defer the revenue until the member redeems their points, keeping the difference between the amount the partner paid for the points to be issued and the cost of servicing the member's redemption of the points as profit. In circumstances where points expire ('breakage'), the loyalty scheme keeps the entirety of

[60] *Payne v Commissioner of Taxation (Cth)* (1996) 66 FCR 299. See also Australian Taxation Office, *Income tax: Is a reward received under a 'consumer loyalty program' that results from private expenditure assessable?* TD 1999/34, 16 June 1999; Australian Taxation Office, *Income tax and fringe benefits tax: Flight rewards received under frequent flyer and other similar consumer loyalty programs*, TR 1999/6, 16 June 1999.

[61] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 4 and section 5.3.

the amount the partner paid for the points as profit.

- **Earning interest on deferred revenue from points**: a coalition loyalty scheme can earn interest on its deferred revenue balance (the amount set aside to cover members redeeming their points), providing additional revenue, and may even use it as working capital. A deferred revenue holding of several billion dollars is not unusual for a large coalition loyalty scheme operating in Australia.
- **Earning revenue by selling discount products to members**: loyalty scheme members can gain access to a range of discount products and services provided by third party suppliers. Loyalty schemes sometimes provide members with the full discount that has been negotiated with the third party supplier, but in some instances, they pass on only some of the discount and keep the difference.
- **Earning affiliate marketing revenue through members' online transactions**: some loyalty schemes promote third party websites or products to their member base and earn a percentage of the total amount spent if the member makes a purchase. The sales are tracked via affiliate links from the partner websites to the loyalty schemes' websites. The loyalty schemes then reward the member for these purchases, which may be via cash back, bonus points or other forms of credit.
- **Selling and supplying scheme-branded products and services**: some major loyalty schemes generate additional revenue by developing branded products and services to market to their members. For example, Flybuys promotes Coles-branded credit cards, insurance and personal loans, plus Flybuys Travel, while Qantas has developed epiQure Food & Wine Club, Qantas Golf Club, (co-)branded credit cards, Qantas Cash and Qantas Assure health insurance.

Loyalty schemes may also generate revenue from member data. This is explored further in chapter 4.

Airlines

Qantas and Virgin Australia combined had approximately a 90 per cent share of the Australian domestic airline industry, with Qantas supplying 60.4 per cent of domestic seats flown in 2018 and Virgin Australia supplying about 30 per cent.[62] Qantas Frequent Flyer is 100 per cent owned by Qantas. Velocity Frequent Flyer is currently 65 per cent owned by Virgin Australia and 35 per cent owned by Affinity Equity Partners (Affinity), however Virgin Australia announced in September 2019 that it is in negotiations with Affinity to buy back Affinity's share in Velocity.[63] The Qantas Frequent Flyer and Velocity Frequent Flyer loyalty schemes are broadly similar in structure, as outlined earlier in box 2.1.

In 2011, Virgin Australia moved from being a low-cost airline to a full-service airline and began actively courting Qantas's high-value corporate customers. This included building invitation-only lounges, running a status-matching program to incentivise Qantas customers to fly with Virgin Australia, and expanding the Velocity Frequent Flyer program.[64]

As Virgin Australia became more competitive and drew corporate flyers away from Qantas, Qantas made a public commitment that it would defend its then 65 per cent domestic market share against competition from Virgin Australia.[65] A key to this was to leverage its frequent flyer base, but it also led to a price war between Qantas and Virgin Australia between 2012 and 2013. Qantas Loyalty has reported consecutive earnings growth since 2015. Similarly,

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62 IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, March 2019.

63 Virgin Australia, *Virgin Australia Holdings Limited (ASX: VAH) update on Velocity Frequent Flyer*, 16 September 2019.

64 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.2.

65 Centre for Asia Pacific Aviation, 'Australia domestic airline market outlook: Qantas Group reins in capacity as Virgin continues growth', April 2015, viewed 19 July 2019.

Velocity Frequent Flyer has also experienced growth (albeit from a lower base) and has remained more profitable and more stable than Virgin Australia's other business units.

Tables 2.2 and 2.3 illustrate the significant contribution that the loyalty schemes make to the financial position of Australia's two largest airlines. Table 2.2 shows the earnings before interest and taxes (EBIT) and profit margins for Qantas Frequent Flyer and Velocity Frequent Flyer between 2015 and 2019, indicating the importance of these schemes to their respective owners' earnings.

Table 2.2: EBIT and profit margin of Qantas Frequent Flyer and Velocity Frequent Flyer, 2015–16 to 2018–19

	QFF (EBIT)	QFF (Margin)	Velocity (EBIT)	Velocity (Margin)
2015–16	$346 million	23.8%	$139.7 million	42.6%
2016–17	$369 million	24.5%	$142.8 million	38.5%
2017–18	$372 million	24.1%	$110.1 million	29.6%
2018–19	$374 million	22.6%	$122.2 million	29.7%

Source: Qantas Group, *2018-19 annual reports:* Virgin Australia, 2018-19 annual reports, *2016 Annual financial report*.

Table 2.3 shows the EBIT for Qantas's and Virgin Australia's respective loyalty units in 2018–19 compared with their other main business units: domestic airline, international airline and low-cost airline (Jetstar for Qantas and Tigerair for Virgin Australia), indicating that the loyalty schemes contributed a significant proportion of each firm's financial position.

Table 2.3: EBIT for Qantas's and Virgin Australia's loyalty and other main business units (in $ millions), 2018-19

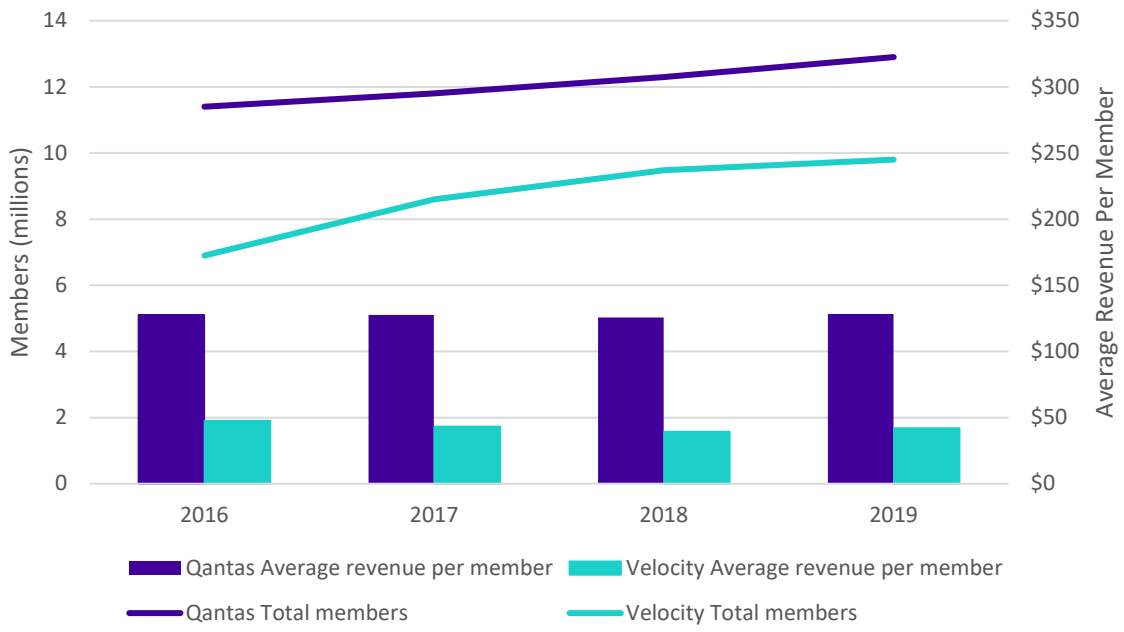
	Domestic	International	Low cost airline	Loyalty scheme
Qantas	+ $740 million	+ $285 million	+ $370 million	+ $374 million
Virgin Australia	+ $133.4 million	- $75.6 million	- $45 million	+ $122.2 million

Source: Qantas Group, *2019 Annual report*; Virgin Australia*, 2019 Annual report*.

Coupled with these developments, the number of members in these loyalty schemes have increased year-on-year, while the average revenue per member has been relatively steady, particularly for Qantas. Figure 2.1 shows the total membership of Qantas Frequent Flyer and Velocity Frequent Flyer between 2016 and 2019 and the average revenue generated per member. It shows that growth rates during the period averaged at around 4.5 per cent for Qantas and around 12.4 per cent for Velocity each year.

The higher average Velocity membership growth rate likely reflects that it started from a lower base than Qantas and is still building members. The relative stability of the average revenue generated per member in 2019—around $128 per Qantas Frequent Flyer member and around $42 per Velocity member—indicates that these loyalty schemes can derive significant revenue growth from signing up new members.

Figure 2.1: Total membership of Qantas Frequent Flyer and Velocity Frequent Flyer and average revenue per member, 2016–19



Source: Qantas Group, 2019, 2018 and 2016 annual reports; Virgin Australia, 2015-19 annual reports.

Supermarkets

In the Australian supermarket sector in 2019, Woolworths had a share of 37.5 per cent of national supermarket revenue and Coles had a share of 29.0 per cent, accounting for a combined 66.5 per cent industry share.[66] Woolworths runs its own loyalty scheme, Woolworths Rewards, while Coles owns 50 per cent of Flybuys, with the remainder owned by Wesfarmers.[67] Both programs have similar features, where consumers earn one point per dollar spent in store and 2000 points can be redeemed for $10 off purchases (with one point being worth 0.5 cents).

Flybuys also allows its points to be converted to Velocity points (at a rate of 2000 Flybuys points to 870 Velocity points[68], equalling one Flybuys point to 0.435 Velocity points), among other programs, while Woolworths Rewards points may be converted to Qantas Frequent Flyer points (at the rate of 2000 Woolworths Rewards points to 1000 Qantas Frequent Flyer points, equalling one Woolworths Rewards point to 0.5 Qantas Frequent Flyer points).[69]

Members may also earn bonus points if they bundle other products together such as Coles- or Woolworths-branded insurance or credit card products for their respective schemes, or through targeted offers on select grocery items. Flybuys appears to be a larger program in so far as it has more coalition partners with whom points can be earned or redeemed.

As with the loyalty schemes in the airline sector, the number of members in the Flybuys and Woolworths Rewards loyalty schemes also continues to grow year-on-year. Figure 2.2 shows the total membership of Flybuys and Woolworths Rewards between 2015 and 2019. The figure reflects that Flybuys allows multiple individual members from the same household

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66 IBISWorld, *IBISWorld Industry Report G4111 Supermarkets and grocery stores in Australia*, September 2019.

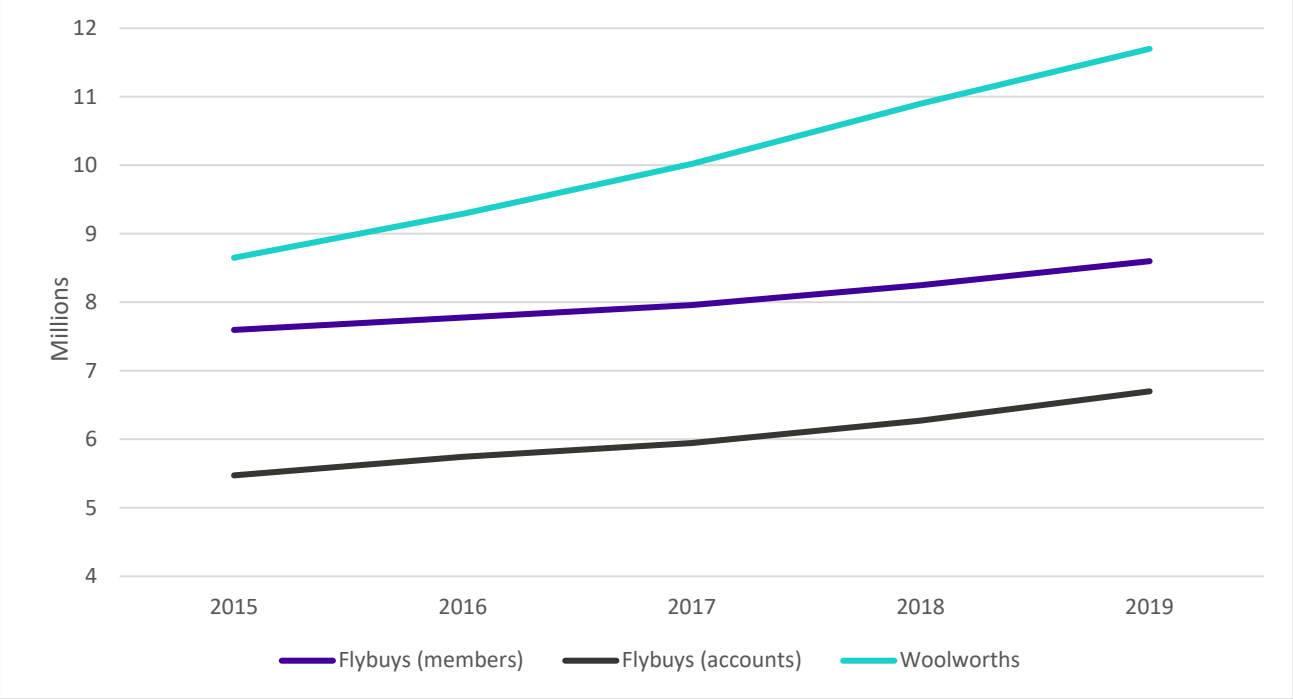
67 Wesfarmers, 'Wesfarmers demerger of Coles', 5 October 2018.

68 Virgin Australia, Flybuys, viewed 6 August 2019.

69 Woolworths Rewards, viewed 22 October 2019.

to participate under a single account. The average yearly growth rate for Woolworths Rewards has been around 8.2 per cent over the past five years, whereas for Flybuys it has been about 7.5 per cent, when measured based on the number of household accounts created.

Figure 2.2: Total membership of Flybuys and Woolworths Rewards, 2015-19



Source: Woolworths Group annual reports 2014–19; Coles, Wesfarmers and/or Flybuys annual reports 2014–18; Loyalty Pacific (Flybuys) submission, October 2019, p. 2.

Credit cards

In the Australian credit card sector, ANZ, CBA, NAB and Westpac account for about 73.3 per cent of industry revenue.[70] IBISWorld further estimated that in 2018, Citigroup had a 10.5 per cent market share in issuing credit cards and HSBC had a 2.0 per cent share. The remainder of the industry is represented by domestic and foreign banks, credit unions, building societies and non-bank lenders such as American Express.

A survey conducted in 2019 by ME Bank of 1000 Australian credit card holders reported that almost 59 per cent of respondents used a rewards credit card.[71]

Cards provided by most of the larger issuers include those that directly earn points with schemes including Qantas Frequent Flyer, Velocity Frequent Flyer and Flybuys. Providers may also offer their own rewards programs, issuing points which can also sometimes be converted to another loyalty scheme.

IBISWorld reported that the credit card sector is worth $9.3 billion per year, of which platinum, gold and rewards cards contributed 41.1 per cent of revenue. Over the past five years, these segments have remained broadly stable as a proportion of industry revenue.

The ACCC understands that credit card issuers provide rewards programs as part of the broader value proposition for the credit card on offer, and use their programs to target different market segments.

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[70] IBISWorld, *IBISWorld Industry Report X0009 Credit card issuance in Australia*, May 2019.

[71] ME Bank, 'Rewards cards come at a cost to over a third of Aussie card holders', 23 May 2019.

Hotels and car hire

In the hotel industry, the four largest chains accounted for less than 40 per cent of industry revenue in 2018.[72] The major participants are Accor Asia Pacific (owner of Sofitel and Ibis, with a 7.1 per cent industry share), Event Hospitality & Entertainment Limited (owner of Rydges and QT, with a 4 per cent share), Marriott (with a 3 per cent share), Hilton (with a 2 per cent share) and Holiday Inn (with a 1 per cent share).

Similarly in the car rental industry, the four largest market participants also accounted for less than 40 per cent of total Australian passenger car rentals.[73] The major participants are Hertz (10.3 per cent share), Avis (9.9 per cent share), Europcar (5.4 per cent share) and National Roads and Motorists' Association Limited (owner of Thrifty, with a 3 per cent share).

Participants in these industries tend to run their own loyalty schemes, which include a mixture of member discounts, earning and redeeming of points, and status tiers. However, they also generally allow members to earn and redeem points from coalition loyalty schemes, particularly airline frequent flyer schemes. This flexibility can act as a driver of repeat business.

Where exclusivity arrangements exist, these can have a significant impact on repeat business and therefore revenue. In its report, Loyalty & Reward Co outlined the impact an exclusive tie-up between Avis and Qantas Frequent Flyer in 2010 had on Hertz as follows[74]:

> *'Up until late 2010, Qantas Points could be earned at Hertz, Avis and Budget. In November 2010, an exclusive deal was negotiated between Avis, Budget and Qantas Frequent Flyer, which meant Hertz could no longer offer their customers Qantas Points. This had a significant negative impact on Hertz' revenue, which declined year-on-year in 2012 by 2.9 per cent, with a further decline in 2013 of 4.3 per cent. For the same period, Avis's revenue grew in 2012 by 4.6 per cent and in 2013 by a further 8.7 per cent. IbisWorld reported 'Avis (and Budget Rent A Car) have benefited from strategic partnerships with tourism service operators over the past five years, such as the partnership between Avis and the Qantas Frequent Flyer Program. These partnerships have provided the brands with a competitive edge over other passenger car rental companies, particularly in highly competitive positions within airports.' To offset the competitive strategy of Avis, Hertz negotiated a partnership with Velocity in August 2011.'*

The ACCC understands that hotels and car hire companies offer loyalty schemes as part of their value proposition for repeat customers, including the benefits that higher tier customers receive, particularly within the hotel industry. These benefits may include complimentary breakfasts, free upgrades to better rooms, guaranteed room availability and gifts on arrival.

Other industries

Companies in a number of other industries also run loyalty schemes. These include cinemas, telecommunications companies, clothing and other retailers, quick service restaurants, energy and utilities providers, and insurers. These schemes predominantly provide members with access to discounts and other rewards. In some instances, tiered approaches are used in these industries. For example, in 2019, Telstra adopted a new points and tier status-based model.[75] Further information can be found in **appendix B**.

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72 IBISWorld, *IBISWorld Industry Report H4401 Hotels and resorts in Australia*, January 2019.

73 IBISWorld, *IBISWorld Industry Report L6611 Passenger car rental and hiring in Australia*, April 2019.

74 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.1. Footnotes omitted.

75 *B&T Magazine*, 'Telstra Announces Telstra Plus, A New Rewards Program for Customers', 2 April 2019, viewed 14 April 2019.

2.2. Customer loyalty scheme characteristics

This section provides a brief outline of the purpose and design of loyalty schemes, in so far as those matters relate to the substantive issues raised in the rest of this report. More detailed information can be found in Loyalty & Reward Co's report to the ACCC.[76]

2.2.1. Purpose of loyalty schemes

The objectives of loyalty schemes for businesses include[77]:

- winning new customers (often with sign-on offers or instant discounts)
- maintaining or increasing the yield from existing customers—particularly high-value customers (often through delayed discounts or bundled discounts), and
- attracting or maintaining a greater share of members' purchases (with targeted advertising or personalised offers).

Loyalty schemes may also contain mechanisms to discriminate between first-time or newly signed-up members, and repeat buyers or longer term members.[78]

These schemes also provide scheme operators with data about the habits of their customers, which can be used to profile them and target the promotion of goods and services in a way that customers may be more receptive to.[79] This data may also be used for other business development activities, such as improving product or service offerings. This is further discussed in chapter 4.

As noted in box 2.2, consumers perceive that loyalty schemes bring them a number of benefits. The key benefits of a loyalty scheme for its operators include[80]:

- helping businesses build a marketing database, which may reduce their advertising costs and improve their marketing effectiveness
- helping businesses better engage with customers by developing meaningful relationships and increasing customer 'stickiness'
- helping businesses better understand their customers, meaning they can tailor communications, offers, products and services to increase customer receptiveness and therefore increase sales
- driving consumer advocacy of the business and its goods or services
- differentiating the business from its competitors and potentially providing it with a competitive advantage.

Affiliates and merchants may also perceive a number of benefits for participating in a coalition loyalty scheme[81]:

- being able to leverage off the large membership of an established coalition scheme and market to many more consumers than they could alone
- being able to attract new customers, particularly those who may change their behaviour to earn points in the given coalition scheme

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76 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 3.

77 M Capizzi, R Ferguson and R Cuthbertson, 'Loyalty trends for the 21st Century', *Journal of Targeting, Measurement and Analysis for Marketing*, vol. 12, no. 3, 2003, pp. 199–212.

78 R Caminal, and A Claici, 'Are loyalty-rewarding pricing schemes anti-competitive?', *International Journal of Industrial Organization*, vol. 25, 2006, pp. 657–674.

79 D Graham, 'Data collection by loyalty programs', Choice, January 2016, viewed 22 July 2019.

80 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

81 ibid.

- retaining existing customers by offering the opportunity to earn points in a coalition scheme.

2.2.2. Design of loyalty schemes

This section examines design elements and psychological insights that are applied by loyalty schemes, and the way these appeal to consumers' behavioural biases, contributing to information asymmetries and power imbalances between scheme operators and consumers.

Design elements

Loyalty & Reward Co reported that loyalty scheme designs tend to be homogenous within different sectors. This occurs because certain designs appear to suit certain sectors better and because competitors within industries observe each other and replicate those designs to neutralise their rivals' competitive advantages. **Appendix B** outlines key features of loyalty schemes operating in a number of different sectors, including that:

- both major airline loyalty schemes reward customers with points and status credits which they earn through flights, spending with retail partners and using (co-)branded credit cards
- both major supermarket loyalty schemes reward customers with points that can be redeemed for shopping discounts.

Behavioural insights

A further feature of loyalty schemes is the use of psychology in their design, and the way in which they are designed to appeal to behavioural biases.

Box 2.5: Psychological elements of loyalty scheme design

As outlined in Loyalty & Reward Co's report, the key psychological insights applied to loyalty scheme design are as follows[82]:

- **Operant conditioning**: a method of learning that occurs through rewards and punishments for behaviour, which induces the individual to make an association between a particular behaviour and a consequence. Loyalty schemes apply this by promoting a reward to members in return for specified behaviours and then rewarding them for those behaviours. This is aimed at encouraging members to keep engaging in the desired way.
- **Social identity theory**: consumers do not just feel emotional connections to preferred brands, but they adopt them as part of their identity. A loyalty scheme which serves to make the member feel a sense of exclusivity and belonging can play a central role in the member adopting the brand (sub-consciously or otherwise) as an element of their own self-definition. Being given free access to an airport lounge, or the use of status tiers, can act to engender stickiness between the member and the loyalty scheme, and make them less price sensitive.
- **Endowed progress effect**: when consumers feel as if they have started on the journey towards a reward, they feel compelled to complete the journey to claim the reward. Loyalty schemes can induce this by providing an artificial advancement towards a goal, such as through sign-on bonuses, by communicating to members their progress towards their goal, and by promoting the desirable reward they will earn if they complete the journey.

[82] Loyalty & Reward Co, *Australian Loyalty Schemes: A Loyalty & Reward Co report for the ACCC*, June 2019, section 3.2.

- **Goal gradient effect**: this effect states that the tendency to put in extra effort to achieve a goal increases with proximity to the goal. The same phenomenon can be observed in loyalty scheme status credits earning, where members have been seen to increase their consumption (more flights, more stays, more rentals) as they approach the next status tier to achieve it sooner.
- **Size heuristics**: consumers do not have the capacity, time or motivation to recognise and evaluate all the available information in our complex environment. This is also related to framing effects in behavioural economics (referred to in box 2.6). Consumers may not be able to adequately judge the value of a point, and loyalty schemes take advantage of this (for example by offering points with high numeric values but low, opaque actual dollar values) as an effective way to generate a perception of lots of value at a low cost.
- **Surprise and delight**: an approach that seeks to attract and nurture customers by offering unexpected rewards. Applications of surprise and delight campaigns within Australian loyalty schemes include premium airline and banking scheme members receiving periodic gifts, telecommunications customers being invited to select from a range of rewards, and supermarket scheme members unexpectedly receiving a $10 discount off their transaction because they have accumulated enough points.

Beyond these psychological elements, consumers' engagement with different aspects of loyalty schemes—from joining and the perceived value and rewards they gain, to engaging with the terms and conditions and privacy policies of loyalty schemes, and the intended effect of loyalty schemes in changing consumers' buying behaviour—is affected by behavioural biases such as those in box 2.6.

Box 2.6: Examples of behavioural biases that affect consumer understanding and participation in loyalty schemes

As outlined by the Organisation for Economic Co-operation and Development (OECD)[83], behavioural biases can affect how consumers perceive and approach understanding complex terms and conditions and other disclosures such as privacy policies. This affects how consumers engage with and participate in a given loyalty scheme.

The OECD provided the following behavioural biases and examples of how they may affect understanding and participation where complex terms and conditions are involved:

- **Information overload**: When faced with complex products or a bewildering array of choices, consumers may ignore possible choices or choose not to choose. Consumers may also rely on simple 'rules of thumb' or 'heuristics'.
- **Default and status quo effect**: Presenting one choice as a default option can induce consumers to choose that option. The power of default is related to the status quo effect, where consumers have a strong tendency to remain at the status quo.
- **Endowment effect**: Consumers often demand much more to give up an object than they would be willing to pay to acquire it: consumers value a good more highly when it becomes a part of their endowment. As such, consumers tend to be loss averse.
- **Anchoring**: Consumers 'anchor' decisions around the information that they think is the most important. This means consumers may fail to adjust their perception of the value of the offer sufficiently, even when additional information is provided.

[83] OECD, *Improving online disclosures with behavioural insights: Towards better outcomes for consumers*, Directorate for Science, Technology and Innovation, 12 April 2018, p. 20.

- **Framing**: Consumers are influenced by how information is presented. Presenting an option in a certain way may induce consumers to evaluate the choice from a particular reference point.
- **Priming effect**: When consumers are repeatedly exposed to something—for example, through publicity—certain attributes can play an undue role in consumer decisions. Priming can influence preferences by making certain attributes salient.
- **Overconfidence**: Consumers tend to think that they are more likely to experience an outcome from some action that is better than the average expected outcome. For example, most drivers think that they are safer than the average driver.
- **Hyperbolic discounting and myopia**: Consumers tend to treat the present as if it were much more important than future time periods.
- **Time-inconsistency**: Consumers may make choices that are not consistent across time periods due to conflicts between short-term urges and long-term interests.
- **Social and cultural norms**: Consumers are often guided by the values, actions and expectations of a particular society or group. For example, when people are made aware of what others are doing, it can reinforce individuals' underlying motivations.

Practical examples of relevant behavioural biases include:

- ***Framing**: A long-term member of a customer loyalty scheme regularly received correspondence from their operator, which typically consisted of promotional emails with subject lines like '… hurry up … ', or '… limited time only …'. The consumer did not notice that the operator's regular promotional correspondence also contained important warnings that their point balance would expire unless they earned or redeemed points by a certain date. The consumer's entire point balance, accumulated over years, subsequently disappeared without their knowledge.*
- ***Hyperbolic discounting**: A consumer spontaneously joined a hotel loyalty scheme at the check-out desk, because the consumer regularly travelled interstate for work and wanted to obtain 'free' accommodation. However, the consumer did not read the scheme's terms and conditions, and was subsequently disappointed to learn that despite the substantial sign-on bonus points offered, 'free' accommodation was difficult or very expensive to obtain during the periods when it would have been most suitable to the consumer.*
- ***Overconfidence**: A consumer chooses a higher-cost credit card when lower-cost alternatives are available in order to chase rewards points. The consumer chooses the higher-cost rewards card thinking the bonus points will get them a cheap or free rewards flight, however, they end up paying about the same in an annual fee, interest and other charges as they would have paying outright for the flight, or potentially more. It has been estimated by the Reserve Bank of Australia that consumers could reduce their annual credit card costs by $250 by shopping around for a more appropriate card that best suits their use patterns.*[84]
- ***Information overload**: Two airlines announced they had formed a strategic partnership, which involved a reciprocal arrangement of each other's frequent flyer programs. A consumer saw promotions about this reciprocal arrangement and without reviewing their own frequent flyer program's terms and conditions, assumed they could earn and redeem loyalty points at the same rate with the partner airline. The consumer booked a flight with the partner airline, and was disappointed to learn that they had earned a lower rate of points than they would have if they had booked directly with their own airline.*

[84] M-A Doyle, *Consumer Credit Card Choice: Costs, Benefits and Behavioural Biases*, Reserve Bank of Australia, Research Discussion Paper 2018-11, October 2018.

3. Consumer issues and customer loyalty schemes

Key points

- While loyalty scheme operators submitted that their programs benefit consumers by rewarding them for loyalty in a way that they value, a significant number of Australian consumers have reported experiencing issues participating in loyalty schemes.
- ACL regulators received approximately 2000 reports about loyalty schemes in the five calendar years preceding December 2018. The rate of reports have since increased, with the ACCC alone receiving over 250 reports to October 2019.
- Concerns about *earning points* focused on unilateral reductions in the rate at which points are earned, the extent to which points are earned with affiliate programs, and the 'booking class', which is an issue specific to frequent flyer schemes.
- Concerns about the *expiry of points* were particularly acute for consumers who had accrued point balances with a high redemptive value, and potentially accumulated over decades.
- Concerns about *redeeming points* included unilateral reductions in the redemptive value of points, the imposition of taxes and charges to redeem certain rewards, and restrictive redemption opportunities.
- If loyalty scheme operators do not adequately inform consumers about a loyalty scheme's policies, operations, and terms and conditions, consumers are unable to make well-informed decisions about whether to participate in the program, and if so, how to optimise the benefits of participation. The ACCC is concerned about a range of business practices in the industry and calls on operators of loyalty schemes to review and consider these practices in the context of the ACL.
- Loyalty scheme operators should review their approach to presenting the terms and conditions of loyalty schemes to ensure consumers have a genuine opportunity to review and understand their policy and operation. More specifically, loyalty scheme operators should take into account relevant behavioural insights when reviewing their business practices, and provide consumers with relevant information at the right time and in the right way to make informed decisions.
- Loyalty scheme operators must ensure they comply with the ACL, including by avoiding statements that are incorrect or likely to create a false impression, and avoiding unfair contract terms.
- Having placed the industry on notice, we encourage consumers to contact the ACCC to report concerns where these practices are continuing with their loyalty schemes. The ACCC will consider these reports taking into account the principles and priorities in its compliance and enforcement policy, before deciding whether enforcement action will be required to effect broader change.
- The ACCC also notes that the findings in this report reinforce the benefit of certain changes to consumer law as recommended in the ACCC's Digital Platforms Inquiry, including the prohibition on unfair contract terms and a prohibition on certain unfair trading practices.

3.1. Claimed consumer benefits from loyalty schemes

It is widely accepted that a loyalty scheme's core purpose is to achieve brand loyalty and drive increased custom—and Australia's major loyalty schemes submitted that this goal is possible only if they provide members with rewards that they value. In addition, many

operators stated that it would be counter-productive if their members developed a negative perception of their scheme, as it would risk those members disengaging from the operator's overall business and potentially switching to a competitor. The Association for Data-driven Marketing & Advertising (the ADMA) submitted, for example, that effective communication is important to the success of programs because operators are motivated by the creation of a bond between consumers and their businesses.[85] Thus according to a number of these loyalty schemes, competitive pressure is the ultimate guarantee of consumer benefit.

More specifically, Australia's major loyalty scheme operators typically claim that their programs:

- provide consumers with a real opportunity to earn points on purchases they would have made anyway, which can then be redeemed for a range of rewards that they value
- promote customer engagement with their businesses—including where relevant across multiple brands and multiple channels, including in store, online, through third party affiliates and even in-flight (for frequent flyer programs)
- utilise information about customer preferences and behaviours to provide loyalty members with content that is more likely to be relevant and appealing to those members, including product and service recommendations and offers and rewards that they will value.

The major loyalty scheme operators also submitted that the trend towards increased membership of loyalty schemes in Australia provides tangible evidence to support the proposition that consumers benefit from participating in loyalty schemes. Further detail about the extent of consumer participation in these schemes is provided in section 2.1.2.

3.2. Introduction to consumer complaints about loyalty schemes

While loyalty scheme operators submitted their programs benefit consumers by rewarding them for loyalty in a way that they value, a significant number of Australian consumers have reported experiencing issues participating in loyalty schemes.

For example, the ACCC and the state/territory ACL regulators have received approximately 2000 reports about loyalty schemes in the five calendar years preceding December 2018. The rate of reports have since increased, with the ACCC alone receiving over 250 reports to October 2019. A substantial proportion of these reports were about frequent flyer programs, which are among the largest and potentially most sophisticated types of coalition loyalty schemes in Australia.[86] Further, while the terms and conditions published by most loyalty schemes in Australia are typically long and complex, the terms and conditions for Qantas and Virgin are each substantially longer in both word count and estimated reading time than those documents published by other loyalty schemes in Australia (see table 4.1 of this report for more information).

A large proportion of the reports about loyalty schemes reviewed by the ACCC were complaints, with consumers expressing concerns about a wide variety of issues. In the ACCC's experience, the number of complaints about an issue often tends to understate the extent of potential harm, and this is particularly relevant where consumers have a limited awareness about an issue. For example, consumers cannot complain about problematic data practices that they do not know about.

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[85] ADMA submission, October 2019. pp. 3–4.

[86] As noted in section 2.1 above, coalition points-based schemes are more complex than other forms of loyalty schemes, including standalone points-based schemes and member benefits/discount-based schemes.

3.2.1. Relevance of consumer reports

In response to the draft report, some loyalty scheme operators expressed concern about the extent to which the draft report analysed consumer reports about loyalty schemes[87], with one submission stating that the number of reports did not justify the draft recommendations.[88]

However, the ACCC considers that the draft report's discussion about consumer reports provides an important starting point to guide the analysis of these issues, and complements a range of other analysis and research the ACCC has undertaken for this report (see Chapter 1 for further detail). In addition, the ACCC published 28 submissions in response to the draft report on its website, and many of these submissions tended to illustrate the issues raised in the consumer reports to the ACCC and other ACL regulators. The draft report process afforded loyalty schemes an opportunity to respond to these issues, and the ACCC has considered these responses in finalising the report.

Finally, the ACCC notes that some submissions sought clarity about whether particular conduct by specific loyalty schemes contravened the law.[89] The review into loyalty schemes was a self-initiated review without information gathering powers. It was outside the scope of this review to separately evaluate the extent to which each major loyalty scheme may (or may not) have engaged in one or more of the broad categories of conduct that are separately considered in sections 3.3–3.6 of this report. Further discussion about both the role of the ACCC and this review's methodology is at sections 1.1 and 1.2 of this report.

3.2.2. Application of behavioural insights to the ACCC's analysis of consumer reports

As noted in section 2.2.2 above, behavioural biases can affect how consumers perceive and approach understanding complex terms and conditions and other disclosures and practices by loyalty schemes. This in turn affects how consumers engage and participate in a loyalty scheme.

For example, many consumers:

- are loss averse, and have a tendency to prefer avoiding losses to acquiring equivalent gains (a behavioural insight known as the 'endowment effect'). Consumers' loss aversion helps illuminate why unilateral reductions in either the earn rate or redemptive value of points can be a source of concern for existing members of loyalty schemes. Existing members may react negatively to a detrimental change because they will often face a choice between continuing with a less desirable loyalty scheme, redeeming a lower value reward than originally intended, or abandoning their chosen program and relinquishing their existing point balance
- tend to treat the present as much more important than the future (referred to as 'hyperbolic discounting'), and tend not to invest time and energy in tasks that are not intrinsically satisfying or that they can avoid, such as reading loyalty schemes' terms and conditions or lengthy correspondence
- do not have the capacity, time or motivation to recognise and evaluate all the available information they encounter—particularly when faced with an 'information overload' in the form of lengthy or complex terms and conditions or correspondence.

The ACCC will have regard to these and other behavioural insights when assessing the extent to which various loyalty scheme practices have a detrimental impact on consumers.

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87 Qantas submission, October 2019, p. 5; Virgin Australia submission, October 2019, p. 8.

88 ADMA submission, September 2019, p. 3.

89 Virgin Australia submission, October 2019, pp. 7–8.

3.3. Length and complexity of terms and conditions

The length and complexity of loyalty schemes' terms and conditions has been a recurring theme in consumer reports to the ACCC and other state and territory ACL regulators, with consumers reporting similar issues across a wide range of different industries, including airlines, supermarkets and hotels. While there are numerous examples of reports about overly long or complicated terms and conditions in sections 3.4–3.6 of this report (regarding specific issues with earning, maintaining or redeeming loyalty points), these concerns appear to be particularly common with respect to certain issues; for example earning points with partners and affiliates[90], and the availability of consumer redemption opportunities.[91]

In response to the draft report, the ACCC received a number of consumer submissions that expressed dissatisfaction with loyalty schemes, and which specifically alleged that relevant terms and conditions were unreasonably lengthy and complex.[92] For example, one consumer submitted that reasonable consumers often struggle to obtain the advertised benefits of membership, because they find the conditions too arduous to manage and cannot afford the time or effort to adequately scrutinise the particular terms and conditions of loyalty schemes.[93]

Other submissions provided additional context about why many operators publish lengthy terms and conditions. For example, Qantas submitted that its frequent flyer program is subject to comparatively lengthy terms and conditions because (unlike loyalty schemes that operate in other industries), it offers more than one primary reward, and more than one main way of earning points.[94] The ADMA submitted, that:

> *'…businesses, particularly in the financial services sector, have been under sustained pressure for many years to increase the amount of information they provide their customers about the terms and conditions associated with products. This regulatory pressure has led many businesses to err on the side of 'over-communicating' with customers, resulting in information overload.'*[95]

Several operators submitted that they are in the process of investigating particular changes to their loyalty schemes' terms and conditions to improve their readability and transparency, and several operators stated that they had already implemented certain changes to help achieve this same objective. For example:

- Flybuys submitted that it would consider the ACCC's observations with a view to identifying potential improvements, including to its member on-boarding process and communications with members, and to the readability and transparency of the member terms and conditions of its privacy policy. These reviews would have particular regard to the ACCC's draft findings on consumer behavioural biases and consumer preferences.[96]
- Woolworths submitted that it had recently made changes to ensure its customers are presented with relevant information, including replacing the format of its terms and conditions and updating the registration page and relevant customer email templates. Woolworths added that it had commenced exploring further improvements, including to its Group Privacy Policy and Collection Notices.[97]

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90 See section 3.4.2 of this report for a discussion about earning points with partners and affiliates.

91 See section 3.6.3 of this report for a discussion about the restricted availability of consumers' redemption opportunities.

92 Birute Don submission, October 2019, p. 1; Orlando [surname removed] submission, September 2019, p. 2.

93 Merzi [surname removed] submission, September 2019, p. 3.

94 Qantas submission, October 2019, pp. 7–8.

95 ADMA submission, October 2019, p. 4.

96 Loyalty Pacific (Flybuys) submission, October 2019, p. 5.

97 Woolworths submission, October 2019, p. 2.

- Virgin Australia submitted that its Velocity program had 'taken on-board many of the ACCC's observations in the draft report', and updated the Velocity Member Terms and conditions and the layout of its website.[98]
- Qantas submitted that it had invested in providing helpful summaries of information to members where they will find it most useful and relevant and that members can also obtain useful information in a variety of other locations (e.g. its website, in its online booking engine and through its FAQs).[99]

ACCC view on the length and complexity of terms and conditions

The ACCC recognises that some loyalty schemes have introduced, or have indicated they are introducing, changes to improve the clarity and transparency of their terms and conditions. The ACCC also recognises that loyalty schemes need to balance between appropriate information disclosure and 'information overload' for consumers—which may sometimes represent a challenge for operators of loyalty schemes.

However, organisations in many different industries need to consider their approach to information disclosure as part of their regular business practice, and the ACCC remains concerned that not all operators of loyalty schemes are doing enough to ensure that their terms and conditions are appropriately accessible and transparent. For example, while loyalty schemes' terms and conditions may disclose various restrictions limiting consumers' ability to earn loyalty points or redeem rewards, these qualifications may not always sufficiently clarify certain overarching representations made by loyalty schemes (see further discussion about appropriate disclosure in chapter 4). In particular, as noted in the discussion about behavioural insights in section 2.2.2, the ACCC considers that it is important for consumers to be provided relevant information both at the right time, and in the right way—to facilitate their optimal participation in their chosen loyalty schemes.

3.4. Complaints about earning points

The rate at which consumers earn loyalty points when they purchase goods or services is a critical component of many loyalty schemes, because it helps determine the speed that consumers are able to redeem their chosen scheme's advertised rewards. This may help explain why concerns about earning points have been the subject of a significant proportion of relevant reports to the ACCC and other ACL regulators.

3.4.1. Unilateral reductions in the 'earn rate'

One of the key incentives that a loyalty scheme operator can offer to attract and retain new members is a comparatively attractive 'earn rate'. The terms and conditions of loyalty schemes that issue points typically provide the operator with the contractual right to unilaterally vary the earn rate.

In some cases, this can be positive for consumers—for example when operators offer bonus point promotions. However, a significant number of complaints were made about unilateral reductions in the earn rate of loyalty points.

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98 Virgin Australia submission, October 2019, pp. 1, 5–6.

99 Qantas submission, October 2019, pp. 7–8.

Box 3.1: Examples of unilateral reductions in the 'earn rate'

Particular concerns about unilateral reductions in earning power were raised about many schemes across a range of industries, including:

Telecommunications schemes: Consumers complained about a unilateral reduction in the earn rate offered by their telecommunications scheme via a coalition program, from three points per dollar to two points per dollar. For example, one consumer claimed that they would not have agreed to a two-year mobile phone contract with a telecommunications company, which the consumer signed shortly before the change was announced, had they known the telecommunications company would reduce the earn rate.

Credit card loyalty schemes: There were also a number of complaints about lower rates of earning loyalty points via credit cards. For example, one consumer reported being informed that their earn rate would be halved only two months after the credit card operator deducted the annual fee.

Submissions about unilateral reductions in the earn rate

In response to the draft report, the ACCC received some submissions indicating concern about operators unilaterally reducing the rate that consumer can earn loyalty points.[100] For example, the Australian Frequent Flyer (the AFF) submitted that unilateral changes to the earn rate of a loyalty scheme are unfair and that schemes should provide ample notice to members when changing earn rates as well as avoiding changes in the middle of fixed term contracts.

Some loyalty scheme operators referred to certain examples where particular program partners had made unilateral changes, but noted that relevant members received significant advance notice well before any reduction in the earn rate was implemented.[101]

ACCC view on unilateral reductions in the earn rate

Unilateral reductions to earn rates are detrimental for consumers and potentially unfair.

A contract term that allows for the unilateral reduction in earn rates may amount to an unfair contract term, if it:

- causes a significant imbalance in the rights and obligations of consumers and operators
- is not reasonably necessary to protect the legitimate interests of operators
- causes financial or other detriment to consumers if it were relied upon.

The ACCC has concerns about how, when and why the earn rates of loyalty schemes are varied, particularly if loyalty schemes reduce the earn rate without providing consumers with sufficiently prominent and timely advance notice.

As noted in section 3.2.2 above, consumers' loss aversion suggests there is a particular risk of detriment for consumers who have already acquired a significant number of points at the time a unilateral reduction to a loyalty scheme's earn rate is implemented. In these circumstances, existing members are often left with a choice to either continue with a significantly lower earn rate, to redeem a lower value reward than they originally intended, or to abandon the scheme entirely.

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[100] The Australian Frequent Flyer submission, September 2019, p. 3; Leon Loganathan submission, October 2019, p. 1.

[101] Virgin Australia submission, October 2019, p. 9.

If loyalty scheme operators contemplate a unilateral reduction in the earn rate, then prior to making such a change, loyalty scheme operators should:

- provide existing members with prominent and timely advance notice and a genuine opportunity to redeem their existing point balance, and
- consider providing existing members with some form of compensation (potentially in the form of an increased point balance).

Loyalty scheme operators should carefully think through how, when and why the earn rate is reduced, and specifically avoid practices that may amount to misleading or deceptive conduct. They should also avoid relying on any terms or conditions that would be unfair for consumers.

3.4.2. Earning points with affiliates and partners

A review of reports by consumers to the ACCC indicated widespread confusion about the extent to which consumers can earn loyalty points through interactions with affiliate or partner programs. In particular, many consumers complained they would never have signed up with their chosen loyalty scheme in the first place, or alternatively would never have acquired goods or services from their scheme's affiliate or partner, had they actually understood that their earn rate would be significantly lower when they engaged with that affiliate.

Box 3.2: Complaints about earning points with affiliates

Concerns about the manner in which points are earned with affiliates were particularly prevalent with respect to frequent flyer schemes and retail.

Frequent flyer schemes: Many consumers expressed surprise and frustration about earning fewer loyalty points (including status credits) when they booked a flight with their loyalty scheme's partner airline than they would have if they had booked a flight directly with their own loyalty scheme's airline. This complaint reflects consumers' ability to, for example, earn Qantas Frequent Flyer points on a flight operated by American Airlines, in circumstances where the flight is codeshared and the customer books with the corresponding Qantas flight number. Consumers cited a range of reasons why they believed their earn rate would be unaffected when they booked a flight with an affiliate airline, including that:

- the affiliate flight was codeshared under their own scheme's airline
- the affiliate flight was booked using the website of their own loyalty scheme's airline—including in circumstances where it was apparently not clear from the online booking portal which carrier was operating the flight
- the affiliate flight was going to a destination that their loyalty scheme airline did not offer—so the consumer considered it unreasonable to deny them what they considered was the 'standard' rate of earning their own loyalty scheme's points.

Retail loyalty schemes: Some consumers have complained that it was unclear whether they were able to earn loyalty scheme points at retail outlets located in certain geographic locations, or which belonged to certain sub-brands of a broader retail network (for example within smaller-format supermarkets, petrol retailers etc.). Some consumers have complained that it was not made sufficiently clear in certain promotions that retail outlets within a broader network were (or were not) participating in a loyalty scheme's promotions—which resulted in instances of consumer confusion at the point of purchase, and even retail purchases motivated by a (frustrated) desire to earn loyalty scheme points.

Submissions about earning points with affiliates

In response to the draft report, the ACCC received submissions that claimed a lack of transparency regarding earning points with affiliates and partners.[102] For example, the AFF submitted that members of frequent flyer programs are routinely disappointed after inadvertently booking a non-earning fare class when flying on a partner airline (this issue was also expressed in certain other submissions regarding the booking class, which is specifically addressed in section 3.4.3 below).[103]

Some frequent flyer loyalty scheme operators discussed this issue in submissions.

Qantas submitted that it encourages members to book flights with a Qantas code where possible if they want to maximise the number of points and status credits they receive, and that this information is now displayed clearly for consumers in the booking engine on Qantas' website.[104] In particular, Qantas submitted that it had made changes to its booking engine to provide more information to consumers about the number of points and status credits that will be credited for a particular flight and improve general understanding of earn eligibility.[105]

Virgin Australia submitted that it takes steps to ensure that any changes to its arrangements with affiliates and partners, including changes that affect earn rates, are clearly communicated to members in advance.[106] It also noted that Velocity's website contains dedicated partner pages for its program partners which detail the ways in which members can earn points with program partners and the applicable points earn rate (and status credit earn rate, where applicable).[107] Virgin Australia added that, in the process of reviewing its terms and conditions, it will consider specifically highlighting that earn rates may differ depending on which partner is operating the flight, and if applicable, the destination of the flight.

ACCC view on earning points with affiliates and partners

The ACCC notes the submissions of some frequent flyer programs outlined how they ensure their relationships with affiliates and partners are transparent, including with respect to recent and/or ongoing changes.

However, while the terms and conditions of the larger loyalty schemes examined for the purpose of this report generally disclose that interacting with a partner program can result in a different earn rate, certain programs' terms and conditions are lengthy and unclear, and it can be difficult for consumers to find the relevant information. The ACCC remains concerned that some loyalty schemes are not conveying with sufficient clarity the ways in which interacting with affiliates can lower a member's earn rate.

Loyalty scheme operators should consider all the circumstances surrounding any representations about their relationships with affiliates, and ensure statements about the rate at which points are earned are as clear as possible.

3.4.3. The 'booking class'—an issue specific to frequent flyer schemes

A significant number of consumer complaints concerned a flight's 'booking class', which is a specific issue relevant to earning frequent flyer points. Commercial flights are typically divided into different types of travel class (for example first class, business, economy), but

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102 Birute Don submission, October 2019, p. 1; Orlando [surname removed] submission, September 2019, p. 2.

103 The Australian Frequent Flyer submission, September 2019, p. 5.

104 Qantas submission, October 2019, p. 12.

105 ibid, p. 10.

106 Virgin Australia submission, October 2019, p. 10.

107 ibid.

flights are also commonly further sub-divided into additional categories, often referred to as the 'booking class', which are designated by a single-letter code (such as Y, B, J, C, etc.). The booking class can determine a range of matters relevant to the loyalty scheme, including both the number of frequent flyer points and the number of status credits earned by a consumer on that flight.

Many consumers complained that they purchased a flight with their chosen loyalty scheme's airline, only to discover that they had not earned the anticipated number of points, or the bonus points-multiplier from their status level, because the flight was in a lower booking class. One complainant further indicated that when booking flights online, they had no way of knowing what the tickets' booking class was—according to this complainant, it was effectively 'luck of the draw as to whether you earn points or not'. Another complainant indicated that they purchased a flight on the expectation of earning additional frequent flyer status points to obtain a higher status in the loyalty scheme, only to learn that this was not available because they had booked a flight in a lower booking class.

Submissions about booking classes

In response to the draft report, the ACCC received submissions raising concerns about a lack of clarity around the existence and/or effect of the booking class on consumers' ability to earn loyalty points or status credits.[108] In particular, the AFF submitted that some airlines make it too difficult to determine the booking class and that a lack of awareness about booking classes, and what it means for earning points and status credits, is particularly problematic with respect to booking flights with partner airlines.[109] The AFF in particular submitted:

> *'Neither Qantas nor Virgin Australia displays the booking class online and the only way to find this out is to use a complicated work-around…We believe airlines should display the booking class clearly on their websites, so those who want to know this information are able to do so when booking.'* [110]

Virgin Australia submitted that members understand that they will earn more points if they book fares in a higher booking class, which are generally more expensive – reflecting an appropriate loyalty reward for the member. It also submitted that consumers are provided with clear information that sets out how the choice of 'booking class' impacts the number of points a member will earn, noting that members can refer to tables which summarise the booking class and the rate at which Velocity points can be earned on a fare class.[111] Virgin Australia further submitted that it is considering whether there is a better way to communicate the impact that booking class may have on points earn to its members.[112]

Qantas submitted that it had updated its booking engine as part of its June 2019 suite of changes to its program to provide more information to consumers about the number of points and status credits they will be credited for a particular flight, and to improve general understanding of earn eligibility.[113]

ACCC view on the booking class

The consumer report data suggests that there is widespread confusion about both the existence of the 'booking class' and its potential impact on their loyalty scheme's earn rate,

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[108] Orlando [surname removed] submission, September 2019, p. 2; The Australian Frequent Flyer submission, September 2019, p. 5.

[109] The Australian Frequent Flyer submission, September 2019, p. 5.

[110] ibid, pp. 3–5.

[111] Virgin Australia submission, October 2019, p. 10.

[112] ibid.

[113] Qantas submission, October 2019, p. 10.

and the ACCC understands the concerns of stakeholders that information about the booking class should be more accessible. In particular, although information about the booking class and its impact on the rate at which loyalty points and status credits may be earned can be located if the consumer actively looks for it, the ACCC considers this information has often not been displayed prominently enough during the booking process.

The ACCC notes the submissions of some frequent flyer programs to this review and welcomes any changes that frequent flyer operators can implement to ensure consumers have access to sufficient information about the booking class, or its relationship to the rate at which frequent flyer points may be earned. This could include operators giving thought to improving their communication of information about the booking class to consumers, including its impact on the loyalty scheme's earn rate—particularly as it impacts on booking flights with affiliates or partner airlines.

3.5. Complaints about maintaining points—expiry periods

Loyalty schemes often contain provisions under which points 'expire', or disappear from consumer accounts after a specified period has elapsed without the consumer's participation in the program. In these circumstances, to prevent points expiring, it is necessary to earn or redeem points within the time specified by the loyalty scheme, which in Australia is generally between 12 and 36 months.

The cumulative value of points earned by consumers who subsequently disengage with a program can become significant over time. Some loyalty scheme operators have submitted that expiry periods are necessary to help them manage and plan their liability into the future—thereby helping their schemes remain as efficient and attractive as possible for active members into the future. However, issues with expiry periods are among the most common complaints about loyalty schemes.

Box 3.3: Complaints about expiry periods

The following are common complaints about expiry periods that consumers reported to the ACCC[114]:

- Many consumers indicated they were not aware of the existence of an expiry period, and did not believe it was reasonable for operators to 'steal' what many consumers regard as their property.
- Other consumers:
  - reported not receiving correspondence that the loyalty scheme operator had committed to send them (that is, a letter or email to warn consumers of the approaching expiry date and remind them to earn or redeem some points)[115], or
  - having received such correspondence, claimed that the warning was unclear—for example, because it was hard to understand or was otherwise 'hidden' within a regular newsletter or promotional email (this complaint was often made after points had expired, and the consumer reviewed earlier correspondence from the operator).
- A number of consumers indicated that their points expired during a period of temporary stress in their private lives, during which time they disengaged from the activities in which they customarily earned or redeemed points (such as staying in hotels, taking flights, etc.), and became less attentive towards correspondence generally (including

[114] Similar complaints have been raised in respect of many loyalty schemes.

[115] In many cases, it seems unlikely that the consumer would have been warned. For example, many loyalty scheme operators, including very large retail schemes, specify in their terms and conditions that they will *not* contact members to advise them that their points may expire.

warnings about expiry dates). These consumers said that it was not fair for their points to expire during a period when it might be reasonable for their attention to be temporarily overwhelmed, and some even noted that the loss of their points compounded the stress incurred during the disruption to their life. Examples of such circumstances were:

  - parental leave and caring for a newborn child
  - serious illness of the consumer or a loved one
  - organising for families to relocate interstate or internationally (which can be a further cause of disengagement if consumers temporarily reside overseas), and
  - separation or divorce proceedings (which can be a further cause of disengagement if it involves negotiations about the division of loyalty points).

- A number of consumers complained of not being informed about the termination of an agreement between their primary loyalty scheme and an affiliate program, following which all their loyalty points previously earned with the affiliate expired. In particular, these consumers complained that they continued spending with their primary loyalty scheme (such as a major retailer) under the belief that they were still earning points with the affiliate (such as a frequent flyer program), whereas the points previously earned with the affiliate had expired due to inactivity.
- Some consumers expressed concern about certain loyalty schemes' 'reclaim challenges', where consumers may be offered the opportunity to regain expired points if they acquire a minimum number of points within a specified period. Many consumers considered these 'reclaim challenges' to be unreasonable, either because they should never have lost their points in the first place or because the cost of redeeming their points (that is, by acquiring relevant goods or services within the specified period) was unreasonable.

Submissions about expiry periods

In response to the draft report, the ACCC received a number of submissions about expiry periods—variously identifying a lack of consumer awareness that points can expire, criticising operators' methods of informing consumers about when their points will expire, and suggesting that loyalty points should not expire at all.[116] For example, one submission stated that after discovering that his loyalty points had expired and contacting Qantas:

> *'a. I located these email[s] and their subject lines [titled 'Your January Qantas Points balance plus great offers for you', with an otherwise identical subject for the February email] did not state that points were going to be cancelled, rather, the message that my points would be cancelled was embedded within these emails.*
>
> *b. I noted to Qantas that I did not consider this appropriate for informing me as the emails appeared like any other monthly email from Qantas—I get a lot of junk email and rely on the subject line heading for prioritising which emails I allocate attention to.*
>
> *c. I also noted to Qantas that I would not willingly allow my points to expire if I had known about it.'*[117]

The AFF submitted that loyalty programs should do more to inform members when points are due to expire, and referred to certain loyalty schemes which '…have hidden these warnings within a monthly newsletter', and stated that operators should:

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[116] Birute Don submission, October 2019, p. 1; Leon Loganathan submission, October 2019, p. 1; Merzi [surname removed] submission, September 2019, p. 3.

[117] Alex [surname removed] submission, October 2019, p. 1.

> *'…at an absolute minimum, send a dedicated email to members with a subject line along the lines of "Your points will expire in X days", to give members ample opportunity to keep their accounts active.'*[118]

A number of operators noted the existing procedures they follow to warn members about approaching expiry of their loyalty points following relevant periods of member inactivity, and their policies by which consumers can recover expired points.[119] Certain other loyalty scheme operators submitted that following the release of the draft report, they were considering implementing additional measures to ensure that consumers are provided as much advance notice as possible about the approaching expiry of their loyalty points. For example:

- Flybuys, which currently has a policy not to notify consumers before their points expire, submitted that, '…as its members preferred method of interaction with Flybuys migrates increasingly to digital channels, Flybuys will review its electronic communication processes in light of the ACCC's recommendations, including potential account inactivity notices.'[120]
- Virgin Australia submitted that 'Velocity is also planning to expand its communication so that notice of expiry [which Virgin Australia submitted was via a dedicated email message] would be provided at both 60 days and 30 days prior to point balance expiry. It is anticipated that these changes will take effect before 31 December 2019.'[121]

ADMA submitted that it supports reasonable measures that would prevent points from expiring without first providing the member with a simple remedy.[122]

ACCC view on expiry periods

Reports to the ACCC suggested that the expiry of points is a source of considerable consumer angst and derives from a significant imbalance in the rights and obligations of consumers and operators.

Expiry periods appear to be particularly detrimental for consumers who have accrued point balances with a significant redemptive value—in some instances accumulated over decades. The ACCC is particularly concerned that loyalty points may expire without adequate warning from operators about the need to earn or redeem points by a certain date.[123] Loyalty scheme operators should prioritise informing consumers about expiry periods and further consider when and how they communicate with consumers about the approaching date of any expiry period.

The ACCC considers that loyalty scheme operators should notify consumers about the approaching expiry of point balances in a way that is sufficiently prominent and appropriately targeted towards relevant consumers. For example, the subject line of any email notification about the approaching expiry of point balances would preferably include a statement similar to 'Your points are about to expire'. Providing such clear notification in an email's subject line would be especially relevant for those consumers who do not frequently make purchases from their loyalty scheme, and who do not check their online portals, or who do not tend to open emails from their loyalty schemes to review updates.

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118 The Australian Frequent Flyer submission, September 2019, p. 3.

119 Qantas submission, October 2019, pp. 12–16; Virgin Australia submission, October 2019, pp. 10–11.

120 Loyalty Pacific (Flybuys) submission, October 2019, p. 6.

121 Virgin Australia submission, October 2019, p. 11.

122 ADMA submission, October 2019, p. 4.

123 For example, several complainants reported losing hundreds of thousands of frequent flyer points, in some cases accumulated over decades, which would have otherwise entitled them to high-value rewards, allegedly including round-the-world flights in desirable travel classes.

3.6. Complaints about redeeming points

Consumers obtain rewards under their loyalty schemes by redeeming points that they have 'earned' through their patronage. A substantial number of consumers complained about difficulty obtaining rewards.

3.6.1. Unilateral reduction in the redemptive value of points

Perhaps the most effective way for a loyalty scheme operator to attract and retain new members is through offering appealing rewards for a comparatively 'low' number of points. In many cases, operators can enhance their schemes' desirability by increasing the perception of the value of points for consumers—including through making available additional rewards or by reducing the number of points required to redeem an existing reward.

However, in certain circumstances, a loyalty scheme's terms and conditions allow operators to unilaterally reduce the value of loyalty points—including by reducing or even removing benefits available to members, and also by increasing the number of points required to redeem a specific reward.

Box 3.4: Examples of unilateral reductions in the redemptive value of points

Consumers reported concerns about unilateral reductions in earning power for a wide range of schemes, including:

- **Frequent flyer schemes:** A number of complaints were made about instances of where airlines have increased the number of points consumers require to upgrade their flights (for example, from economy to business class).

  A small number of complaints were received from consumers about the removal of a reward previously available to members with higher status levels (for example, 'gold' or 'platinum' status)—namely free upgrades to seats, including in the exit row where there may be additional leg room. One complainant stated that had they realised this reward would be removed, they would have considered membership with a different loyalty scheme (and potentially booked flights with a different carrier).

- **Hotel loyalty schemes:** A number of consumers complained about their chosen hotel reducing certain benefits or discounts available under their program, or, similarly, increasing the number of points required to obtain rewards and thereby devaluing their point balance. For example, one consumer complained that around four years after accumulating sufficient loyalty points for around five 'free' nights' accommodation—by spending around 130 nights and tens of thousands of dollars with a certain hotel—the value of this same point balance was reduced, and the consumer was only entitled to approximately one 'free' night of accommodation.

- **Credit card schemes:** A number of consumers complained about instances where their points were devalued. This included instances where their credit card issuer increased the number of points required to obtain certain rewards (for example, gift cards) and/or reduced the 'exchange rate' with respect to an affiliate program (for example, a frequent flyer or hotel loyalty schemes). This meant that more credit card points were required to be transferred to obtain the same number of points with the affiliate.

Submissions about unilateral reductions in the redemptive value of points

In response to the draft report, the ACCC received a number of submissions about loyalty scheme operators that had reduced the value of consumers' accrued point balances.[124] For example, the AFF noted that '…almost every loyalty program in the world has "devalued" members' points over time by increasing the cost of redemptions'.[125]

Several loyalty scheme operators noted that as much as they try to limit changes, some changes are inevitable to facilitate new initiatives and respond to evolving environments. For example:

- Flybuys submitted that the number of points required for a specific reward may change when the retail price of the reward changes, for example if a new model is released for a higher recommended retail price.[126]
- Qantas noted that, '…it is in the legitimate interest of the loyalty program operator and the consumer to allow change to occur—provided that members are given adequate notice of changes.'[127]
- American Express submitted that prior to its recent changes in April 2019, it:[128]
    - had not made material changes to its program's overall redemption rate for over a decade
    - ensured members were notified four months in advance
    - ran a range of promotions during the notice period allowing customers to transfer and redeem points at superior redemption rates.
- Virgin Australia submitted that:

> *'…it is not possible to freeze in time the benefits of a loyalty program. Over time…Adjustments are necessary to allow Velocity to respond to changes in third party commercial terms, fluctuating costs and demand, and market forces, and to ensure that the cost of maintaining the Velocity program does not unreasonably increase out of step with the value that it delivers to the business and engaged members… Velocity's focus in making any changes is to ensure that its members are fully informed of how the program works and are given notice of these changes to ensure that they are dealt with fairly and reasonably.'*[129]

ADMA submitted that it supports reasonable measures that would prevent points from being devalued without first providing the member with a simple remedy.[130]

ACCC view on unilateral reduction in the redemptive value of points

While the ACCC recognises that loyalty scheme operators may sometimes have a legitimate business interest to reduce the redemptive value of loyalty points, it considers that unilateral reductions are detrimental for consumers and in some cases potentially unfair. Relevant matters for operators to consider before devaluing points include the timeliness and prominence of any advance notice, whether members have been offered any remedy (e.g. a

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[124] John [surname removed] submission, September 2019, p. 1; Andrew [surname removed] submission, September 2019, p. 1; Merzi [surname removed] submission, September 2019, p. 2.

[125] The Australian Frequent Flyer submission, September 2019, p. 2–3.

[126] Loyalty Pacific (Flybuys) submission, October 2019, p. 3.

[127] Qantas submission, October 2019, pp. 16–17.

[128] American Express submission, October 2019, p. 1.

[129] Virgin Australia submission, October 2019, pp. 8–9.

[130] ADMA submission, October 2019, p. 4.

one-off increase in their point balance prior to devaluation), and the motivation for the change.

As noted in section 3.2.2 above, consumers' loss aversion suggests there is a particular risk of detriment for consumers who have already earned a significant number of points at the time of a unilateral reduction in the redemptive value of points. In these circumstances, consumers have the unenviable choice of either continuing in a loyalty scheme where the number of points required to redeem one or more rewards has significantly increased, or redeeming a lower value reward than they originally intended, or abandoning the scheme entirely.[131]

If loyalty scheme operators contemplate a unilateral reduction in the redemptive value of points, then prior to making such a change, loyalty scheme operators should:

- provide existing members with prominent and timely advance notice and a genuine opportunity to redeem their existing point balance, and
- consider providing existing members with some form of compensation (potentially in the form of an increased point balance).

Loyalty scheme operators should consider how, when and why the redemptive value of points is reduced, and specifically avoid practices that may amount to misleading or deceptive conduct, and avoid relying on any terms or conditions that would be unfair for consumers.

3.6.2. Imposition of taxes and charges to redeem certain rewards

One of the most common complaints about loyalty schemes concerned the imposition of unexpected or allegedly unreasonable taxes and charges at the point in time that consumers attempted to redeem their points to obtain a reward. These complaints were particularly common in the context of frequent flyer programs—specifically the imposition of certain taxes or charges when consumers seek to redeem their points for a free flight.

Most airlines typically incorporate the cost of external taxes and charges into the price of a flight, regardless of whether consumers book their flight with cash (that is, Australian dollars) or loyalty points (examples of such external taxes include security charges, departure taxes and airport fees). However some airlines (including Qantas) also require customers to pay additional 'carrier charges' for flights booked with loyalty points, despite not levying such carrier charges on customers that book flights using cash.[132] The quantum of any carrier charge may reflect various market conditions and varying demand – which may also incorporate the fare class of any booking, the mileage of the corresponding flight and the size of any fuel surcharge.

For example, Qantas imposes a carrier charge of $14 to approximately $1000 per booking when customers redeem their points for a flight—with the carrier charge being higher for longer distance flights and comparatively desirable fares (for example, business class).[133] The cost of a carrier charge may therefore be significant for many consumers, particularly noting the additional requirement to pay external taxes and redeem thousands of loyalty points (likely tens of thousands for an international flight).

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[131] This concern is conceptually similar in nature to that outlined above in section 3.4.1 of this report regarding unilateral reductions in the earn rate of points.

[132] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 8.2.

[133] M Graham, 'The great Qantas Frequent Flyer rip-off', *The Australian Frequent Flyer*, 29 March 2018, viewed 21 April 2019. See also the Loyalty & Reward Co report, at table 5 and table 6, for additional examples of the carrier charges imposed by Qantas for selected one-way Classic Award economy flights.

A flight's origin may also influence the cost of any carrier charge in a way that may seem confusing or even arbitrary to many consumers. For example[134]:

- a return economy reward flight to Australia from the United States may attract hundreds of dollars more in carrier charges than a return flight in the opposite direction (that is, *to* the United States *from* Australia)
- a return business class booking to Australia from Hong Kong, the Philippines or Brazil (where fuel surcharges are either regulated or banned) may cost hundreds of dollars less in carrier charges than a return flight in the opposite direction (that is, *to* Hong Kong, the Philippines or Brazil *from* Australia).

Airlines that impose carrier charges may argue that these charges help cover their operating costs (for example, for fuel) and help ensure that the number of loyalty points required to redeem a flight remains consistent over time. For example, airlines may argue that carrier charges help provide consumers with clarity about the number of points required to obtain a particular reward, and reduce any risk of an airline either reducing the earn rate for points, or increasing the number of points required for a reward.

However, many members of frequent flyer schemes have complained about the imposition of taxes and charges by airlines; in particular, when they seek to redeem their points for a flight.

Box 3.5: Complaints about taxes and charges

Specific issues identified in the report data about the imposition of taxes and charges by airlines when (attempting to) redeem points/rewards include the following:

- Many consumers indicated they did not have any knowledge of airlines' policies to impose taxes and charges when they sought to redeem flights. These consumers suggested that the imposition of such taxes and charges was inconsistent with the advertised benefits of participation in such schemes—namely, the ability to obtain 'free' flights.
- Similarly, many consumers alleged that airlines displayed their taxes and charges in a manner that was unclear—or potentially even misleading. For example, some consumers were concerned that an airline's website did not identify the relevant taxes or charges to be imposed until after the consumer had earned sufficient points to obtain that reward.[135]
- Many consumers also complained that the quantum of additional payments the airline sought was itself unreasonable. For example, many consumers alleged that a flight to the same destination could be booked for a similar price as the total cost of taxes and charges imposed by their own scheme's airline—and without the need to redeem 'hard earned' points.
- Several consumers also stated that airlines' imposition of taxes and charges effectively offset the already parlous benefit of using points to book a flight—noting the limited availability of seats during peak seasons and associated inconvenience of booking flights outside desired dates and times.
- Consumers also complained that airlines did not provide sufficient clarity about specific fees that appear to be aimed at recouping the cost of internal business operations, including significant charges imposed by airlines when consumers seek to change:

[134] ibid.

[135] Airlines may need to invest in their websites to address this concern. For example, in June 2019, Qantas informed the ACCC that it upgraded its website to ensure greater clarity about the taxes and charges it imposes when consumers redeem points to obtain flights or upgrades.

- the time or date of a flight previously booked using points, and
- the names of passengers booked on a flight that was obtained using points (for example, following marriage, or potential alignment of passengers' names in their passports with their booking, etc.).

Submissions about the imposition of taxes and charges to redeem certain rewards

In response to the draft report, the ACCC received a number of submissions from consumers who complained that the quantum of taxes or charges imposed by some frequent flyer operators when they redeem their points and obtain a free flight was roughly equal to, or in some cases more than, a normal discount economy airfare to the same destination.[136] Several submissions stated that the taxes and charges should be built into the 'redemption price', such that an award ticket is 'free'.[137]

The AFF submitted that more transparency about the existence and amount of carrier charges is required, and submitted that:[138]

- Qantas does not publish a list of the carrier charges applicable to its own flights anywhere, and members can only find out what these charge will be on any given route if they complete a 'dummy booking' on the Qantas website and they already have enough points in their account to make the booking
- it had found examples in the past where the taxes and charges payable on award bookings have been higher than the cost of a commercial ticket on the same flight.

Qantas' submission however noted that:[139]

- in June 2019, it announced a '…reduction in the Carrier Charges across all Classic Flight Rewards, and increased the Points required for a Classic Flight Reward in some cases'
- it had invested heavily in upgrading its online booking engine to enable taxes and carrier charges to be displayed clearly and prominently during the booking process and prior to redemption of points, and
- its taxes and carrier charges are displayed prominently in all marketing material promoting points redemption opportunities to a particular destination.

Qantas also submitted that the draft report incorrectly stated that it imposes taxes and charges when consumers redeem their points to obtain upgrades on flights (e.g. from Economy to Business).[140]

ACCC view on the imposition of taxes and charges to redeem certain rewards

The ACCC notes the consumer benefits that flow from consistency and certainty when redeeming points for a flight. Airlines submit that they can maintain such consistency and certainty by separately charging for variable taxes and (carrier) charges when consumers redeem their frequent flyer points to obtain flights. The ACCC also notes that certain airlines, including Qantas, have recently updated the way information is displayed on their websites, including improvements to the transparency around the 'booking flow'.

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[136] Andrew [surname removed] submission, September 2019, p. 1; Merzi [surname removed] submission, September 2019, pp. 1–2; Orlando [surname removed] submission, September 2019, p. 2.

[137] Leon Loganathan submission, October 2019, pp. 1–2; Merzi [surname removed] submission, September 2019, pp. 1–2.

[138] The Australian Frequent Flyer submission, September 2019, p. 1.

[139] Qantas submission, October 2019, pp. 17–18.

[140] ibid, p. 17.

The ACCC also acknowledges that Qantas does not impose taxes or charges on upgrades. However, the ACCC's analysis of the available information (including consumer reports to the ACL regulators and other sources) suggests there are particular issues regarding the imposition of taxes and charges by Qantas and other airlines when consumers seek to redeem points to obtain flights.

In particular, there is no doubt that many consumers consider the imposition of carrier charges to be unexpected, detrimental and somewhat arbitrary in nature, and the ACCC remains concerned about the extent to which relevant airlines inform consumers about these charges. In particular, the ACCC remains concerned that airlines imposing carrier charges are failing to adequately inform consumers redeeming points to obtain flights about either the existence or the quantum of carrier charges that apply.

Airlines that impose carrier charges should consider how to improve their communication of information about the existence and quantum of carrier charges that apply when redeeming points to obtain flights.

3.6.3. Restrictive redemption opportunities

Redemption opportunities are typically subject to a range of restrictions, depending on the loyalty scheme and the reward on offer. Restrictions on redemption opportunities may in part reflect variations in the cost of products and services over time. However, restrictive redemption opportunities have been the subject of many complaints, examples of which are in box 3.6 below.

Box 3.6: Examples of the limited availability of redemption opportunities

Frequent flyer schemes: Even though most airlines claim to 'reserve' a limited number of seats and upgrades for consumers to redeem on every route at the time that the corresponding flights are released—with additional seats and upgrades subsequently made available where there is significant spare capacity—many consumers complained that airlines:

- failed to provide sufficient seats or upgrades for redemptive purposes on a wide variety of flights (both domestic and international), including when consumers sought to obtain redemptions on flights with distant departure dates (for example, up to 12 months in advance)
- failed to clearly communicate the availability of desirable redemptions such as free seats or upgrades, including by failing to identify:
  - that the number of seats and upgrades available for redemption on a particular route was limited—for example, multiple consumers alleged that airlines promoted that consumers could redeem a certain number of points for a free seat to various locations, but failed to clarify that the number of seats available for redemption was limited
  - the number of loyalty points actually required to redeem or upgrade a flight—for example, one consumer claimed their program's online 'points calculator' represented that they could fly in business class from Australia to Singapore return for 120 000 points, whereas the lowest number of points required to redeem such a seat was 470 000 points.[141]

[141] The consumer also alleged that this failure to obtain a flight as promoted was despite their flexibility with dates and despite them checking availability up to six months in advance of departure.

Hotel loyalty schemes: A variety of complaints were received from consumers about difficulties accessing rewards offered by hotel loyalty schemes. For example:

- some consumers complained they could only redeem their points for a free night's accommodation at an inconvenient time (for example, hotels catering to business travellers only offering weekend stays, or families unable to redeem during school holidays)
- several consumers noted that while rooms are often available for booking through a third party website, there is often no vacancy when they seek to book for the same dates through the hotel's own systems—which is required to obtain the benefits of membership (for example, cheaper rooms and room upgrades)
- other consumers complained about the practical difficulty of accessing certain advertised rewards. For example, one consumer alleged that they could only access their chosen hotel's 'best price guarantee' within 24 hours of making a reservation and by making a claim online (that is, this is not possible in person nor over the phone), which the consumer considered unduly restrictive.

Submissions about restrictive redemption opportunities

In response to the draft report, the ACCC received several consumer submissions raising that some frequent flyer operators do not provide sufficient 'free' or 'award' seats on their routes for consumers to obtain by redeeming points.[142]

Similarly, several submissions stated that frequent flyer operators fail to communicate the availability of 'free' or 'award' seats on their flights.[143] For example, the AFF submitted that, while it may be understandable for award flight availability to be limited, airlines should make an effort to ensure there are a reasonable number of award seats to meet demand—submitting:

> *'It could be beneficial to consumers if airlines disclosed the total number of seats being made available on each route and class of travel—at the very least, in aggregate.'*[144]

Qantas submitted that it offers a range of different rewards through its frequent flyer program, but only 'Classic Flight Rewards and Upgrades are subject to availability restrictions'; with the number of 'Classic Flight Rewards' seats available on a flight depending on a range of factors, including the flight's date, season, destination and commercial demand.[145] Qantas also raised that prior complaints raised as part of the draft report may have conflated two different classes of Qantas rewards, being:[146]

- 'Classic Flight Rewards', which seats are sometimes referred to as being 'free' as they can only be obtained by redeeming Qantas points and paying applicable taxes and charges – but which seats are only available on certain Qantas flights (and only in limited numbers per flight)
- 'Points Plus Pay', which members can book on any Qantas flight where commercial seats are available using Qantas points or a combination of Qantas points plus cash—though members typically need to redeem a larger number of points to obtain these

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142 JF Consulting submission, October 2019, p. 1; Orlando [surname removed] submission, September 2019, pp. 1–2; Andrew [surname removed] submission, September 2019, p. 1.

143 Leon Loganathan submission, October 2019, p. 1; Orlando [surname removed] submission, September 2019, pp. 1–2.

144 The Australian Frequent Flyer submission, September 2019, p. 2.

145 Qantas submission, October 2019, pp. 18–19.

146 ibid.

seats (possibly due to their greater availability and flexibility, compared to 'Classic Flight Rewards').

Qantas also submitted that it had recently:

- announced, in June 2019, a recurring annual investment to provide additional Classic Flight Rewards, which it expected would result in over 30 per cent growth in International Qantas Classic Rewards in both the economy and premium cabins
- invested in significant advancements to its booking engine to improve the visibility of available Classic Flight Rewards for its members—including showing availability across a range of days and program partners.

ACCC view on restrictive redemption opportunities

If redemption opportunities are too limited, they have the potential to undermine the consumer benefits of participation in the loyalty scheme.

While the terms and conditions of loyalty schemes generally disclose the various restrictions on consumers' ability to redeem rewards, the ACCC is concerned that these qualifications are not sufficient to clarify representations made by loyalty scheme operators about the availability of rewards. For example, the terms and conditions of many loyalty schemes are lengthy, and it can be difficult for consumers to find the relevant information—not to mention recall the information when they seek to redeem their points long after they initially joined.

The ACCC also notes the AFF's suggestion that frequent flyer operators disclose the total number of 'free' seats that are available on each route, and in each class of travel—at least in the aggregate. The ACCC considers that it is reasonable for frequent flyer operators to consider disclosing if they offer any particular routes, or corresponding seasons, or classes of travel on a route, where 'free' seats are not available. Such disclosure may also tend to highlight the difference between this type of reward and other rewards (e.g. 'Points Plus Pay' in the case of Qantas), which may help ensure greater transparency by operators and thereby reduce the risk of consumers conflating these different reward types.

Loyalty scheme operators should consider how to improve their communication of the availability of rewards and prioritise notification of any restrictions on consumers' ability to redeem rewards (for example, the availability of seats or upgrades on particular routes for frequent flyer members and limitations on members' ability to access rewards under hotel loyalty schemes).

3.7. Ability of the Australian Consumer Law to address certain problematic practices

As noted throughout this report, many consumers raised issues around some loyalty schemes not meeting their expectations, particularly in relation to earning, maintaining or redeeming loyalty points. The report has also found a range of examples that indicate that the practices of some loyalty schemes may obscure the ability of consumers to make informed choices in relation to their membership of such schemes.

The ACCC notes that some submissions to the draft report expressed concern about the ACCC's draft recommendation to support a prohibition on certain unfair trading practices as well as a prohibition against unfair contract terms, as had been recommended in the Digital Platforms Inquiry. Concerns expressed particularly focused on whether there existed problematic conduct within loyalty schemes to support the need for such provisions, in particular, whether there was need for a new prohibition against certain unfair contract terms.[147]

[147] Woolworths submission, October 2019, p. 3; ADMA submission, October 2019, p. 6.

The ACCC considers that some consumer issues considered in this report have the potential to cause substantial detriment to consumers, and that consideration of the current protections offered by the ACL in relation to these practices is warranted.

3.7.1. Certain unfair trading practices

In the course of this review, the ACCC has identified certain conduct that it considers may be substantially detrimental to consumers, which is not expressly prohibited by the ACL. Such conduct, some of which is further discussed in chapter 4, includes:

- consumer consent or agreement to particular terms and conditions being included in long and complex contracts, or all or nothing click wrap consents, and providing insufficient time or information to enable consumers to properly consider the contract terms (e.g., see chapter 4 of this report)
- loyalty scheme operators unilaterally changing the terms on which goods or services are provided to consumers without reasonable notice, and without the ability for the consumer to consider the new terms. For example, if a loyalty scheme operator were to reduce the rate that consumers can earn loyalty points (particularly if it did so without adequate notice or offering any compensation), shortly after a consumer paid an annual fee and entered a consumer contract on the basis of a comparatively higher 'earn rate' (e.g., see section 3.4.1 of this report)
- loyalty scheme operators collecting and/or disclosing consumer data without express informed consent. For example, the provision of data to unnamed third parties or the collection of data from consumers who are not expressly participating in the program (e.g., see chapter 4 of this report).

In particular, the ACCC considers the prohibition should be directed at unfair conduct which has caused, or has the potential to cause, substantial detriment to consumers. The ACCC notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.

3.7.2. Prohibition against unfair contract terms

As discussed in chapter 4 there are information asymmetries and bargaining power imbalances between consumers and loyalty scheme operators, particularly in relation to the collection, use and disclosure of personal data.

However, as the laws currently apply, it is not a contravention of the ACL to include unfair terms in contracts and, therefore, penalties are not available where those provisions are contravened. Rather, if declared unfair, the provision is simply void. This issue is particularly acute where there are zero monetary price contracts, as often loyalty scheme memberships are, as the declaration of void terms will not have immediate impacts on a parties' financial rights and obligations.

The ACCC has recommended the introduction of a prohibition, backed by penalties, for the use of unfair contract terms, to increase the deterrent effect of the current law. The ACCC has made this recommendation in a range of fora including in submissions to the Government's Review of Unfair Contract Term Protections[148] and Parliamentary Joint Committee into the Franchising Code of Conduct[149] as well as the ACCC's Digital Platforms Inquiry Final Report.[150]

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148 ACCC, submission to Review of Unfair Contract Term Protections for Small Business, December 2018, pp. 1–2.

149 ACCC, submission to Parliamentary Joint Committee into the Franchising Code of Conduct, May 2018, pp. 5–6.

150 ACCC, *Digital Platforms Inquiry final report*, June 2019, Recommendation 20.

The ACCC notes that in August 2019, the Australian Government announced that it would consult on options to strengthen unfair contract term protections for small business.[151]

3.8. Conclusions on consumer issues with customer loyalty schemes

If consumers are not adequately informed about a loyalty scheme's policies, operations and terms and conditions, they will not be able to decide whether they wish to participate in the loyalty scheme and, if so, how to optimise the benefits of participation.

Consumers reported that they had not earned, maintained or redeemed their points in the manner they anticipated, with many of these consumers reporting that they did not obtain any benefits from participation at all. Many consumers also reported that if they had better understood how their chosen loyalty scheme's points were actually earned, maintained or redeemed, they would have switched to another scheme entirely.

Many consumers complained that some operators of loyalty schemes:

- failed to adequately advise them about critical components of their loyalty schemes, including the need to remain 'active' by earning or redeeming points within a specified period to avoid the expiry of points, or about the restricted availability of redemption opportunities, and
- made unilateral changes that unfairly restricted the benefits available under a loyalty scheme, for example by unilaterally reducing the rate at which they could earn points, or the value of their points previously accumulated.

To ensure consumers can benefit from participating in loyalty schemes, the ACCC considers that operators should do more to help consumers understand the terms and conditions of their loyalty schemes and any ongoing correspondence about potential promotions or other changes to the program. Operators should respond to the behavioural insights that suggest that:

- many consumers tend to treat the present as much more important than the future (referred to as 'hyperbolic discounting'), and tend not to invest time and energy in tasks that are not intrinsically satisfying or that they can avoid (such as reading loyalty schemes' terms and conditions or lengthy correspondence)
- many consumers do not have the capacity, time or motivation to recognise and evaluate all the available information they encounter—particularly when faced with an 'information overload' in the form of lengthy or complex terms and conditions or correspondence.

Operators should also take into account that many consumers are loss averse and have a tendency to prefer avoiding losses to acquiring equivalent gains (referred to as the 'endowment effect'). Consumers' loss aversion helps illuminate why unilateral reductions in either the earn rate or redemptive value of points can be a source of concern for existing members of loyalty schemes. This behavioural insight is particularly relevant for operators to consider before making detrimental changes to their loyalty schemes, including by reducing the earn rate or redemptive value of points.

While the ACCC recognises the changes that have been implemented (or are otherwise under consideration) by loyalty schemes to help facilitate improved engagement and thereby help consumers optimise the benefits of participation, the ACCC considers that loyalty scheme operators should do more to help consumers understand how their programs operate.

[151] Meeting of Ministers for Consumer Affairs, *Joint Communique*, 30 August 2019.

The ACCC remains concerned about a range of business practices in the industry and calls on operators of loyalty schemes to review and consider their practices in the context of the ACL.

Recommendation 1: Improve how loyalty schemes communicate with members

Loyalty scheme operators need to review their approach to presenting terms and conditions of loyalty schemes and ensure changes are fair and adequately notified.

Loyalty scheme operators should review their approach to presenting the terms and conditions of loyalty schemes to ensure consumers have a genuine opportunity to review and understand their policy and operation. More specifically, loyalty scheme operators should provide consumers with relevant information at the right time and in the right way to make informed decisions, for example:

- Loyalty scheme operators should ensure that any notification about the approaching expiry of consumers' point balances (or detrimental changes to the rate consumers earn points or the value of those points) is sufficiently prominent and appropriately targeted. For instance, the subject line of any email notification about the approaching expiry of point balances might include a statement similar to 'Your points are about to expire'.
- Frequent flyer schemes should consider disclosing any particular routes, or corresponding seasons, or classes of travel on a route, where 'free' seats are not available.

If loyalty scheme operators contemplate a unilateral reduction in either the earn rate or redemptive value of points, then prior to making such a change, loyalty scheme operators should:

- provide existing members with prominent and timely advance notice and a genuine opportunity to redeem their existing point balance, and
- consider providing existing members with some form of compensation (potentially in the form of an increased point balance).

Loyalty scheme operators must ensure they comply with the ACL, including by avoiding statements that are incorrect or likely to create a false impression, and avoiding unfair contract terms.

Having placed the industry on notice, we encourage consumers to contact the ACCC to report concerns where these practices are continuing with their loyalty schemes. The ACCC will consider these reports, taking into account the principles and priorities in its compliance and enforcement policy, before deciding whether enforcement action will be required to effect broader change.

The ACCC also notes that the findings in this report reinforce the benefit of certain changes to the consumer law as recommended in the ACCC's Digital Platforms Inquiry. In particular, as discussed earlier (in section 3.7 of this report), the ACCC considers that certain conduct by customer loyalty schemes has the potential to cause substantial consumer detriment, which should be considered as part of the proposed reforms to the ACL.

Recommendation 2: Prohibition against unfair contract terms and certain unfair trading practices

The ACCC's findings in this report reinforce the Digital Platforms Inquiry Final Report's recommendations for the need for a prohibition against unfair contract terms and certain unfair trading practices.[152]

Consistent with the *Digital Platforms Inquiry Final Report*'s recommendations, the ACCC recommends that the Australian Consumer Law be amended:

- so that unfair contract terms are prohibited (not just voidable)
- to include a prohibition against certain unfair trading practices.

The scope of a prohibition on certain unfair trading practices should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance. The ACCC notes, and is actively participating in, the current work on this issue being undertaken as part of the CAANZ process, and will progress its support for the recommendation through that forum. The ACCC's current view is that the prohibition should be directed at unfair conduct that has caused, or has the potential to cause, substantial detriment to consumers. The ACCC will continue to work through CAANZ in relation to this issue.

[152] ACCC, *Digital Platforms Inquiry final report*, June 2019, Recommendation 20 and 21, p. 26.

4. Data practices of customer loyalty schemes

Key points

- Consumer data is of significant value to loyalty schemes. The collection and analysis of consumer data is a key function of loyalty schemes. The rich data loyalty schemes collect about consumers includes their demographic data, transaction history, interests, preferences, consumption patterns, buying behaviour and habits.
- Consumer data is primarily collected, analysed and used: to generate consumer insights to retain existing customers and obtain new ones; for business improvement and product development purposes; to personalise products and services; and for targeted advertising. Some schemes generate additional revenue by selling de-identified insight reports to third parties and advertise to their membership on behalf of third parties.
- While Australian consumers have different preferences, attitudes and levels of awareness when it comes to the data they share with loyalty schemes, a number of surveys have suggested that many are concerned about sharing their data with companies, including loyalty schemes. The surveys reviewed in this report suggested that many consumers are particularly concerned about the sharing of their data with unknown third parties, targeted advertising, and whether their data is being used responsibly. Many consumers are also seeking more transparency and control over the data they provide to loyalty schemes, as well as improved data practices, legislative protection and greater individual rights over their personal information.
- Consumers have little meaningful control over how their data is collected, used and disclosed. An imbalance of bargaining power and significant information asymmetries exist between consumers and loyalty schemes. This is primarily seen in the broad consents sought from consumers and the vague disclosures made to consumers about how their data will be used and with which third parties it will be shared.
- The ACCC is concerned about a range of data practices of loyalty schemes. In particular, the ACCC has concerns about loyalty schemes collecting, using and disclosing consumer data in ways that do not meet many consumers' expectations. This includes loyalty schemes engaging in the following practices:
    - seeking broad consents from and making vague disclosures to consumers about the collection, use and disclosure of their data
    - providing consumers with limited insight and control over the sharing of their data with unknown third parties
    - providing a limited ability for consumers to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes.
- Problematic data practices, in addition to impacting market efficiency, can cause consumer harm. These harms include decreased consumer welfare from decreased privacy, and risks to consumers from increased profiling and from discrimination and exclusion. More broadly, they may also lead to decreased consumer trust necessary to enable the continued economic and social benefits of personal data flows.
- The ACCC notes submissions from some loyalty schemes following the draft report to the effect that they are implementing changes to their data practices. However, as outlined in this chapter, concerns remain.
- Loyalty schemes should continue to take steps to address the concerns raised by the ACCC to improve the transparency of their data practices and the ability of consumers to control how their data is collected, used and disclosed.

- The issues of concern identified in this report have direct parallels with those identified in the ACCC's Digital Platforms Inquiry. These include concerns about:
  - insufficient transparency and meaningful consumer control over the collection, use and disclosure of consumer data
  - a lack of informed and genuine choice for consumers engaging in the digital economy
  - a lack of consumer protection and effective deterrence under existing laws governing data collection.

The findings in this report reinforce the ACCC's findings in its Digital Platforms Inquiry, and further support the ACCC's recommendations relating to the need for privacy and consumer law reform.

This chapter focuses on the flows of data between consumers and loyalty schemes, including the use, collection and disclosure of consumer data (referred to collectively as 'data practices').

Box 4.1: Consumer data and personal information

Consumer data relates to any information a loyalty scheme may collect from and about consumers that is used, or intended to be used, to support commercial activities.[153] This includes data that consumers provide actively and voluntarily (for example, when registering or transacting), data that consumers generate and supply passively (for example, through social media or tracking of online browsing activity), and data that is inferred from other sources (for example, through analysis and insight generation).

Consumer data can be classified into two main types[154]:

- **Personal information**: data that can be used alone or in combination with other data to identify specific individuals. Privacy protections under the Privacy Act generally apply only to user data that constitutes 'personal information'. Under the Privacy Act, personal information is defined as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable: a) whether the information or opinion is true or not, and b) whether the information or opinion is recorded in a material form or not.'[155] The variation between the definition of personal information under the Privacy Act and the definitions used in the privacy policies of loyalty schemes is discussed below.
- **Non-personal information**: data that does not contain personally identifiable characteristics and cannot alone be used to identify individuals. This includes anonymous or de-identified data (data that has been stripped of any personally identifying information), pseudonymous data (data where personally identifying information has been replaced with artificial identifiers), and aggregated data (where personal or non-personal information from multiple individuals has been combined).

Where necessary, this chapter discusses issues arising under Australian privacy law, as this is the main regulatory framework applicable to loyalty schemes' data practices. This chapter also discusses data practices that may raise concerns under Australian competition and consumer laws, or more broadly in the context of consumer expectations around data practices.

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[153] Competition & Markets Authority (UK), *The commercial use of consumer data: report on the CMA's call for information*, June 2015.

[154] ACCC, *Digital Platforms Inquiry final report*, June 2019, chapter 7.5.

[155] Privacy Act, s. 6.

In response to the draft report, a number of loyalty schemes submitted that their data practices comply with the Privacy Act. In this regard, the ACCC observes that compliance with specific privacy laws and regulations will not necessarily satisfy obligations that arise under the CCA and ACL.

This report also includes observations from the ACCC's recently completed Digital Platforms Inquiry as they relate to consumer data.

4.1. Consumer data collected by loyalty schemes

Membership of a loyalty scheme is voluntary and generally provided at zero monetary cost to the consumer. For participating, consumers are offered discounts, rewards, tailored communications and promotions. In exchange businesses derive value from consumers by collecting rich data, including personal information, about them.

The data collected includes metadata such as age, gender and address, as well as transactional data describing store-visiting and product-buying characteristics, spending patterns and timestamps of when interactions occur.[156] The data can also help loyalty schemes identify a member's preferences, consumption patterns, buying behaviour and habits. The collected data can be:[157]

- actively and voluntarily provided by a consumer (for example, entering name and contact details in an online form)
- passively provided by a consumer (for example, observed data, including collection of location data from wi-fi networks, GPS or IP addresses, or data collected through a consumer's use of a platform, apps on a device or a consumer's use of third party websites)
- inferred from other sources (for example, by analysing data actively provided by a consumer, other user data passively collected or data from de-identified datasets and making deductions based on this combined data).

The data is primarily collected, analysed and used for customer relationship marketing and to facilitate a better understanding of groups of customers, as well as individuals. Further information about the extensive data loyalty schemes may collect about their members is provided in **appendix C.**

The main way of using this data is segmentation: dividing up a market into behavioural, demographic or psychological groups using a variety of indicators including 'transaction frequency, average intervals, duration of activity' and the number and value of goods or services purchased.[158] The data may be further enriched by linkages with external data sources, through which consumers can be further segmented into geographic, generational or cultural groups. For example, by linking a member's postcode with publicly available data from the Australian Bureau of Statistics, a loyalty scheme could infer information about a member's household's income, educational level or cultural background. Additional data may also be sourced from data brokers or through data-sharing platforms.

Linkages with external data sources provide useful context around 'social structures and common characteristics between people and places[159]', as well as socio-economic status and other identifiers which may indicate how a consumer may react to a given advertisement

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[156] A Lloyd, J Cheshire and M Squires, 'The Provenance of Customer Loyalty Card Data', in P Longley, J Cheshire and A Singleton (eds), *Consumer data research*, UCL Press, London, 2018.

[157] OECD, *Exploring the economics of personal data: a survey of methodologies for measuring monetary value*, OECD Digital Economy Papers, no. 220, 2013, p. 10.

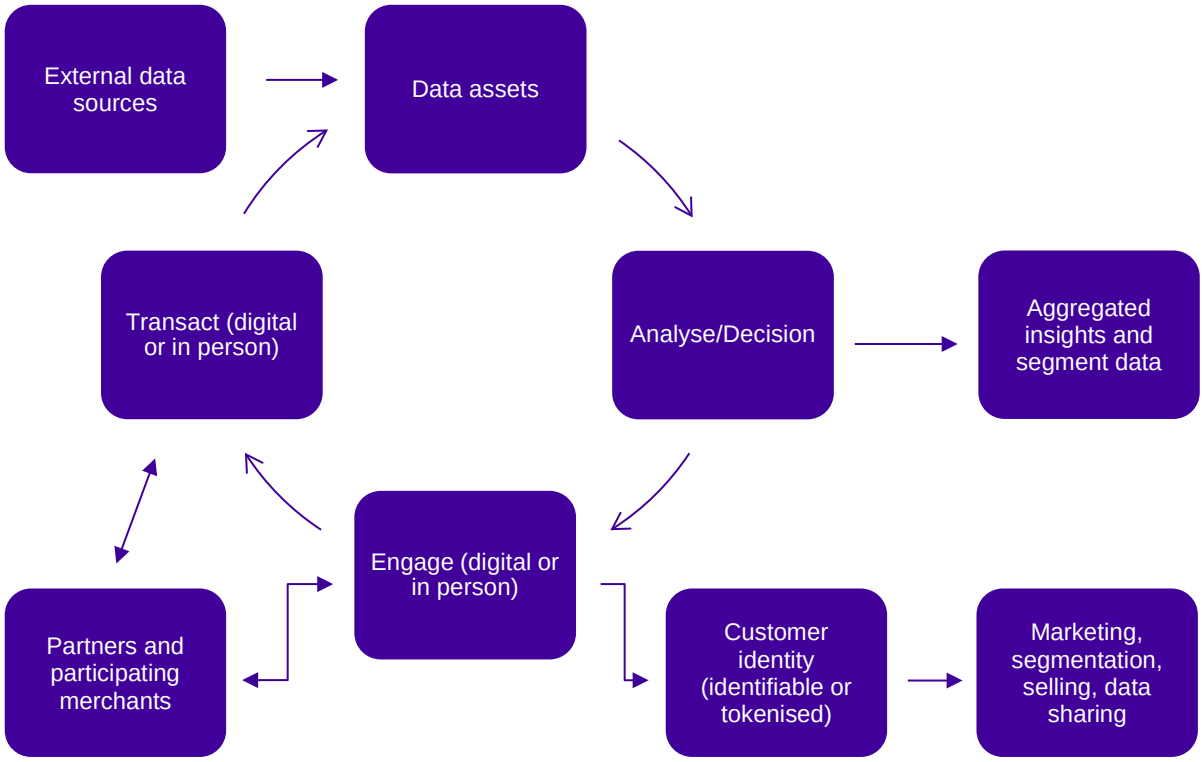
[158] A Lloyd, J Cheshire and M Squires, 'The Provenance of Customer Loyalty Card Data', in P Longley, J Cheshire and A Singleton (eds), *Consumer data research*, UCL Press, London, 2018, p. 30.

[159] ibid.

or product offering. The additional data may also allow loyalty schemes to infer information about a member's lifestyle, interests and social attitudes. This inferred information can be used to target the member with advertising and to improve business offerings. Insights generated from this data may be shared with partners, including suppliers (for example a supermarket chain sharing insights with product suppliers), or sold to unrelated third parties.

A number of the loyalty schemes examined in this report have established sophisticated systems and digital capabilities to manage, analyse and learn from the flows of data between the scheme, their partners and consumers. This is illustrated in figure 4.1.

Figure 4.1: Data flows of consumer data in loyalty schemes



Source: Adapted from Credit Suisse.

These key capabilities are[160]:

- **customer engagement:** the ability to interact with customers and collect data through customer engagement, for example through online or in-store advertising, in person or through call centre reports. Insights generated through analytical and decision-making capabilities may be used to engage with members using targeted advertisements, including tailored communications and promotions. Loyalty schemes may rely on individual-level transaction data or exchange tokenised data with partners to identify which members should be targeted for a given promotion
- **transactional:** the ability to transact with customers and collect data about members' transactions (including with partners), for example when a customer makes a purchase
- **data assets:** the ability to access relevant data about members, including past transactions, previous engagement and demographic profiles, and to link this with external sources to enrich the data where appropriate

[160] Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

- **analytical and decision-making:** the ability to analyse customer transactions and engagement at scale (including using aggregated data), which may include artificial intelligence or machine learning to automate analysis and decision-making. Aggregated insights and segment data can be generated, and may also be shared with or sold to suppliers and other third parties.

4.2. The value of consumer data to loyalty schemes

Consumer data has a significant value to many loyalty schemes and is a key incentive for loyalty schemes to exist. The ADMA noted in its submission to the draft report, for example, that current accounting standards do not enable data to be valued appropriately and separately from intangibles.[161]

This makes it difficult to quantify the value of data to loyalty schemes, but qualitative observations are set out below.

Common commercial uses of consumer data include[162]:

- customer analysis and insights generation
- business and product development and improvement
- personalised products and targeted advertising.

Some loyalty schemes have also created additional ways to generate revenue directly from the consumer data they hold.

4.2.1. Consumer data for analysis and insights

Some loyalty schemes use consumer data for analysis and the generation of consumer insights to understand how to retain existing customers and obtain new ones.[163] Choice noted that 'retailers engage specialist analytic firms to create shopper profiles to go with otherwise anonymous shopper profiles' to generate insights about consumers.[164] The United Kingdom's Competition & Markets Authority (CMA) indicated that in some sectors the analysis of consumer data and generation of insights can be a key competitive asset in targeting offers.[165] These insights are used to develop a deep understanding of consumers and to influence their buying behaviour.

The analysis and insights generated from this data are the basis upon which loyalty schemes are able to pursue business and product development and improvement, as well as personalised products and services and targeted advertisements. While these insights are generally developed for internal use, some loyalty schemes are now engaging with third parties and selling customised de-identified insights. Further discussion about the revenue generated from selling customer insight reports to third parties is provided in section 4.3.4, below.

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161 ADMA submission, October 2019, pp. 5–6.

162 Competition & Markets Authority (UK), *The commercial use of consumer data: report on the CMA's call for information*, June 2015, p. 50.

163 ibid., p. 56.

164 D Graham, 'Loyalty programs, data collection and privacy law', Choice, 15 January 2016, viewed 19 July 2019.

165 Competition & Markets Authority (UK), *The commercial use of consumer data: report on the CMA's call for information*, June 2015, p. 56.

4.2.2. Consumer data for business and product development and improvement

Consumer data can be used by businesses to generate improvements across all stages of the value chain[166], including in choosing store location and range selection for supermarkets and retailers, as well as the supply chain, product development, promotion and customer engagement. For example, consumer data can help firms identify potential gaps in a market—that is, unmet demand for products and services—and develop ways to address these gaps.[167]

In terms of business processes and strategy, consumer data can be used to[168]:

- make transactions more frictionless; for example, by retaining consumer data and using it to pre-fill forms and payment information
- tailor content or advice in online sales channels
- fine-tune warehousing and logistics, as well as decide on what to stock, where and when
- reduce the likelihood of returns by making recommendations to consumers more reliable.

4.2.3. Consumer data for personalised products and targeted advertising

Some loyalty schemes use a combination of insights generated from de-identified consumer data and the transactions individual members make to create a profile of consumers. Data analysis is used to identify the goods or services an individual member is most likely to buy, based on knowledge about their interests, preferences or other characteristics.[169]

The CMA found that firms which use consumer data in this way seek to increase the consumption of their products or services by[170]:

- personalising products and services, such as by developing products and services more closely suited to consumer segments' preferences and interests
- targeted advertising, which can increase the conversion rate—the ratio of those who saw an ad to those who made a purchase afterwards—as compared with generalised or mass advertising
- using data on consumers' previous purchases or areas of interest to cross-sell related products and services.

Targeted advertising is particularly relevant to online communications channels. For example, members of supermarket loyalty schemes may receive an email notification that an item they purchased in the past is on sale, or members of frequent flyer schemes may receive communications about where they could fly with their current points balance.

The value to loyalty schemes using such practices is not only that conversion rates may be higher, but the use of consumer data in this way may also reduce the costs associated with poorly directed advertising and reduce customer annoyance levels from irrelevant advertisements.[171] Credit Suisse estimated that promotional activities comprise 20 per cent of a supermarket's value chain, and that improving the richness of personally identifiable

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166 Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

167 Competition & Markets Authority (UK), *The commercial use of consumer data: report on the CMA's call for information*, June 2015, p. 57.

168 ibid, p. 58.

169 Competition & Markets Authority (UK), *The commercial use of consumer data: report on the CMA's call for information*, June 2015, p. 51.

170 ibid.

171 ibid.

consumer transactional data, combined with artificial intelligence and machine learning, could reduce the amount spent on promotions, as compared with sales made, by 6–10 percentage points.[172] Consumer data used for personalised products and targeted advertising is likely to have similar value to loyalty schemes in other sectors.

4.2.4. Consumer data for directly generating revenue

Australia's major loyalty schemes have developed business units that can generate revenue directly from the consumer data they hold. This is often a result of loyalty schemes selling services related to their capabilities in generating consumer insights and having access to a large membership base.

Box 4.2 summarises Loyalty & Reward Co's findings about how loyalty schemes may generate direct revenue from consumer data.

Box 4.2: How loyalty schemes directly monetise consumer data

Based on research from Loyalty & Reward Co[173], there are a number of ways loyalty schemes may directly generate revenue from the consumer data they hold, as follows.

Consumer insight reports created by loyalty schemes to sell to third parties

Consumer data held by loyalty schemes can be monetised by creating customised reports for partners or other third parties who are seeking consumer insights that they are generally unable to generate themselves.

One approach is database matching, where the other party provides its entire database to the loyalty scheme containing basic customer identifiers (such as email address or mobile phone number). The data is then matched against the loyalty scheme's database to determine which customers they have in common. This may be conducted using tokenised or hashed data—that is, using a unique identifier instead of a name or email address.

The loyalty scheme is then able to create a detailed insight report about the third party's customers using the data it possesses about them. Generally, the reports are de-personalised, and provide segmentation-style data summaries, such as demographic, behavioural, psychographic and other cohort clusters.

Previously, Woolworths Rewards created analytical insight reports to sell to its product or service supplier base.[174] Through this, it provided extensive insights into its customers and was able to compare them with customers who bought competitors' products. It has been reported that, as of July 2019, Woolworths would stop creating reports that tell brands how their competitors are performing in the same category. However, it will still provide a website that allows suppliers to view the segment profiles of their own customers.[175]

Selling access to digital marketing services

Some loyalty schemes have established separate digital marketing agencies to generate incremental revenue from their large marketing databases. The agencies use their data insights to implement targeted digital marketing campaigns (such as banner advertising) on

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[172] Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

[173] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 5.5.

[174] AFN staff writers, 'Woolworths gives suppliers unprecedented access to consumer data', Australian Food News, 9 January 2017, viewed 18 April 2019.

[175] J Thompson, 'Woolworths stirs a data debate with suppliers', *Australian Financial Review*, 17 July 2018, viewed 18 April 2019.

behalf of third party clients. Some loyalty schemes, such as Qantas Frequent Flyer, may also communicate with its members on behalf of third parties to promote their products or services.[176]

Red Planet, owned by Qantas with access to the Qantas Frequent Flyer database, can provide this type of campaign approach. For example, if a loyalty scheme member is booking a flight to Perth, its database can determine whether the customer is likely to seek premium accommodation in the city area and can deliver website advertising to match.[177]

The effectiveness of the digital advertising campaign can be more easily measured with the support of the digital agencies. Members who interacted with an advertisement, or even just had it appear on a website they visited, can be surveyed to understand the awareness of the advertising brand or the promotional message, the ability to recall the brand or message, and other measurable elements.

Another service provided involves database matching of website visitors. This delivers a detailed visitor profile report of the loyalty scheme members who have visited the third party's website, allowing it to tailor the site experience and better understand what transacting customers look like compared with those who do not transact.

Companies can also use the services of digital agencies to run panel research across large numbers of loyalty scheme members. The members are asked to answer surveys, and their responses are combined with their full data profile to generate comprehensive insight reports. In exchange, the member is given a number of the loyalty scheme's points.

Loyalty campaign services provided by credit card schemes

A third party company wishing to access new marketing channels can employ the services of a credit card loyalty scheme to run a short-term campaign offering members cash back, loyalty points, merchandise, gift cards and other rewards. The credit card loyalty scheme organises promotion of the campaign via its existing marketing channels, such as a credit card or frequent flyer scheme.

To engage with the campaign, the member of the loyalty scheme is generally invited to click an 'activate' button on the digital promotion to opt into the campaign. When they transact with the third party company using their registered card, the reward earned is processed automatically. At the end of the campaign, the third party company may be provided with a report detailing the campaign metrics and de-personalised segmentation-based insights about the members who engaged with the promotion.

In addition to this, loyalty schemes that collect consumer data may purchase or gain access to datasets held by data brokers to enhance the consumer data they hold. This includes[178]:

- obtaining datasets from data brokers to enhance their member profiles. These packages are often based on publicly available sources of information. Loyalty schemes may also join data exchanges to access data shared by other companies
- obtaining access to marketing databases generated by a data broker who has partnered with and used datasets obtained from other companies. The monetisation of the data occurs in two ways. Firstly, the company who a member transacted with (in this example, to buy a product online) receives a payment from the data broker for the data. Secondly, the data broker receives a payment from the sponsoring loyalty scheme for providing them with their new marketing database.

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[176] Qantas submission, October 2019, p. 22.

[177] M Ward, 'Qantas launches data marketing business Red Planet, takes digital media buying in-house', Mumbrella, 10 September 2014, viewed 18 April 2019.

[178] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 5.5.

The ACCC understands that while the major loyalty schemes in Australia do not sell their members' personally identifiable consumer data, they do share or exchange de-identified, tokenised or hashed data about their members with third parties. Section 4.7, below, discusses the risks this data could be re-identified and other consumer detriments.

4.3. Consumers' attitudes about the use of their data by loyalty schemes

One of the key findings from the ACCC's Digital Platforms Inquiry was that 'consumers have different privacy preferences and levels of privacy awareness'.[179] The ACCC formed the view that 'all consumers will be better off when they are sufficiently informed and have sufficient control over their user data such that they can make informed choices that align with their privacy and data collection preferences.'

A consumer survey conducted by the ACCC was one element informing this finding. It found that consumers are becoming increasingly concerned about their privacy and the use of their information online.

4.3.1. General attitudes to digital and online data practices

The general views towards privacy in the online environment found by the ACCC's Digital Platforms Inquiry are reflected in a number of other recent surveys of Australians.

Deloitte's response to the draft report, for example, submitted recent research based on responses by Australian consumers to its 2019 Australian Privacy Index (API) survey, which showed the majority of Australians are in favour of:

> *'…improved data practices, legislative protection and greater individual rights over their personal information, consistent with the recommendations proposed by the ACCC's Draft Report and preceding Digital Platforms Inquiry.'*[180]

Deloitte also submitted that there has been a steady increase in the privacy awareness of Australian consumers over time, particularly in relation to the personal information they share and the transparency they expect from the companies they interact with.

Deloitte also identified that trust has become the primary driver of consumer decision-making, with 65 per cent of surveyed respondents to the 2019 API ranking trust as their first consideration when deciding whether to provide an organisation with access to their personal information.[181] It further submitted that trust is easily broken when personal information is used in ways not explicitly agreed to, such as unexpected secondary purposes. Deloitte also found in its 2018 API survey that, for 68 per cent of respondents, data trading decreased their trust in a brand, as did irrelevant marketing (58 per cent) and cross-selling (54 per cent).[182]

The ADMA submitted that, according to a 2018 survey by the Global Alliance of Data Driven Marketing Associations across 10 countries[183], 53 per cent of Australian respondents were happy with the amount of personal information they currently give to organisations, 72 per cent indicated they viewed their data as something that can be exchanged for products and services, and 61 per cent claimed to feel more aware of how their data is used

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[179] ACCC, *Digital Platforms Inquiry final report*, June 2019, chapter 7.

[180] Deloitte submission, October 2019, p. 2.

[181] ibid.

[182] Deloitte submission, October 2019, pp. 4–5.

[183] The markets included Argentina, Australia, Canada, France, Germany, the Netherlands, Singapore, Spain, the UK and the USA. In total, 11 474 respondents were surveyed across the 10 markets, with a minimum of 1000 in each.

and collected.[184] However, in terms of the appeal of exchanging personal information for discounted products or services, the ADMA indicated only 34 per cent of Australian respondents indicated they were interested in this.[185]

A survey of Australians conducted by the OAIC in 2017 found that 69 per cent of respondents were more concerned about their online privacy than they were five years earlier.[186] Only 10 per cent of respondents were comfortable with businesses sharing their information with other organisations and only 1 per cent were comfortable with receiving unsolicited marketing from organisations they had not dealt with before.[187] Almost nine in 10 respondents considered that it would be a misuse of data if[188]:

- an organisation that a person had not dealt with before obtained their personal information
- personal information were revealed to other customers
- personal information were used for a purpose other than the one it was provided for.

The OAIC survey also found that only one in five Australians (21 per cent) were comfortable with targeted advertising based on their online activities.[189] Consistent with this, a 2018 survey by the Consumer Policy Research Centre (CPRC) found that at least two–thirds of respondents indicated they were uncomfortable with most types of information being shared with third parties.[190] A further survey prepared for the CPRC also found that half of respondents found it unacceptable for companies to monitor their online behaviour to show them advertising and offers.[191]

The Australian National University's 2018 research into attitudes towards data governance also found that Australian consumers had low levels of trust in commercial entities appropriately handling consumer data, with levels of trust in those companies that consumers use to make purchases being relatively low compared with other organisations.[192]

Further, some consumers appeared to be unaware of the impact of a privacy policy, namely, that it outlines the terms under which a consumer relinquishes control over their personal information and user data to the extent outlined in the policy. A survey prepared for the ACCC for its Digital Platforms Inquiry found that 36 per cent of Australian digital platform users agreed with the statement 'when a digital platform has a privacy policy, it means it will not share my personal information with anyone else (including other digital platforms)'.[193] Similarly, a CPRC survey in 2018 found that 19 per cent of respondents believed that a company with a privacy policy would not share information with other websites or companies, and 22 per cent of respondents did not know enough to answer the question.[194]

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184 ADMA submission, October 2019, p. 8.

185 ibid, p. 9.

186 OAIC, *Australian Community Attitudes to Privacy Survey*, May 2017, p. i.

187 ibid, pp. ii, 9, 11.

188 ibid, pp. ii, 14.

189 ibid, p. ii.

190 P Nguyen and L Solomon, *Consumer data and the digital economy: emerging issues in data collection, use and sharing*, Consumer Policy Research Centre, July 2018, p. 32.

191 Roy Morgan Research, *Consumer Knowledge and Understanding of Consent to Data Collection, Usage and Sharing Research 2018*, 10 March 2018, p. 6.

192 N Biddle, B Edwards, M Gray and S McEachern, *Public attitudes towards data governance in Australia*, Australian National University, Centre for Social Research and Methods, no. 12, 2018, p. 12. On a scale from 1 to 10, where 1 was no trust at all and 10 was trust completely, the 2,150 respondents allocated a mean score of 3.8 to these organisations, indicating a low level of trust towards these companies across the sample.

193 ACCC, *Digital Platforms Inquiry final report*, June 2019, chapter 7, p. 383.

194 ibid.

The ACCC considered that a 'factor contributing to this fundamental misunderstanding about the purpose and function of a privacy policy may be that the title of 'privacy policy' is a misnomer, given these policies tend not to outline privacy protections for users but rather tend to set out the extent of permissions granted to digital platforms'.[195]

4.3.2. Members' attitudes to loyalty schemes' data practices

More specifically, some loyalty scheme members have been surveyed about their attitudes towards the data collected by loyalty schemes, and how that data is used and shared. These surveys were carried out by loyalty scheme consultancies and are more likely to reflect the views of engaged loyalty scheme members rather than consumers in general.

A 2019 survey of Australian loyalty scheme members by The Point of Loyalty, an Australian loyalty consultancy, found that around half (51 per cent of respondents) were comfortable with sharing their data with loyalty schemes to enhance their shopping experience[196], which suggests a substantial number of members were also not comfortable doing so.

In addition, 27 per cent of respondents to the Point of Loyalty survey reported they felt the collection of personal information by loyalty schemes is an invasion of their privacy.[197] The survey further found that respondents' concerns about providing their data to loyalty schemes included knowing how secure the data is (64 per cent), knowing how their data is used (48 per cent), and the reputation of the company asking for their details (37 per cent).[198] Fifty two per cent of respondents expressed specific concerns about the data held about them by loyalty schemes being hacked or subject to fraud.[199]

A survey by Aimia, a global loyalty consultancy, of Australian loyalty scheme members in 2016 found that 41 per cent of respondents viewed their data as being highly valuable and considered that their online behaviour, such as web history and online purchases, as well as contact data, were the most valuable types of data.[200] The survey also indicated that the surveyed loyalty scheme members were concerned about the indiscriminate collection of their data and a lack of responsible data usage.

4.3.3. ACCC's views on consumer attitudes about the use of their data by loyalty schemes

A range of studies have identified that consumers have varying preferences, attitudes and levels of awareness about the use of their data by firms, including loyalty schemes. Around 4 in 10 loyalty scheme members indicated that they acknowledged the potential value of their data to loyalty schemes, and around half of loyalty scheme members expected to be rewarded for sharing their personal information, including transaction-level data and browsing habits. However, studies also suggested that many consumers are concerned about sharing their data with companies, including loyalty schemes. Studies suggested that most consumers are concerned about the sharing of their data with unknown third parties and targeted advertising, and whether it is being used responsibly.

There also appears to be a low level of awareness about the value of consumer data to loyalty schemes, and how and why consumer data is being collected, used and disclosed.[201]

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195 ACCC, *Digital Platforms Inquiry final report*, June 2019, p. 383.

196 The Point of Loyalty, *for love or money 2019: Executive summary*, p. 12.

197 ibid.

198 J Loh, 'Data privacy is top priority for loyalty members, 52% consumers anxious over breaches and hacks', *Marketing*, 24 June 2019, viewed 21 August 2019.

199 The Point of Loyalty, *for love or money 2019: Executive summary*, p. 14.

200 Aimia, *Aimia 2016 Loyalty Lens: Love me, love my data: how brands can use customer insight to inspire true loyalty*, 2016.

201 See section 4.2, which discusses the value of consumer data to loyalty schemes and their partners, including how consumer data is used and the circumstances in which it is shared and monetised.

While surveys of loyalty scheme members did not delve deeper into consumers' concerns around the sharing of their data with third parties, such as loyalty schemes' partners or data brokers, general surveys of consumers' attitudes to these data practices reveal consumers are uneasy about their data being shared with third parties, particularly those they have not dealt with before, and about the use of online targeted advertising. Further, research confirms consumers are also concerned about data trading, irrelevant marketing and cross-selling, with such practices having the potential to easily erode consumer trust.

Consumers also have varying preferences about how their data should be collected, used and disclosed. Consumers reasonably assume that loyalty schemes' data practices will be consistent with their preferences; however, they do not always align. A factor contributing to this disconnect between consumers' preferences and written privacy policies is, as noted above, that these policies tend not to outline privacy protections for users but rather tend to set out the extent of permissions granted to loyalty schemes. How some consumers would prefer loyalty schemes handle their data may go beyond existing legislative requirements. In addition, many consumers are also seeking more transparency and control over the way loyalty schemes handle their data, improved data practices, legislative protection and greater individual rights over their personal information.

4.4. Consumer consents and disclosures in loyalty schemes' privacy policies

The ACCC's Digital Platforms Inquiry outlined the ACCC's concerns around data practices that indicated a bargaining imbalance between digital platforms and consumers in relation to the collection, use and disclosure of consumer data. Similar issues around the nature of consumers' consents, the way loyalty schemes handle consumer data, and how privacy policies are presented to consumers arise in the context of loyalty schemes.

The ACCC notes that the OAIC has previously conducted a limited scope assessment[202] of the privacy policies of Flybuys, Qantas Frequent Flyer, Velocity Frequent Flyer and Woolworths Rewards, and identified some concerns with the presentation of privacy policies, as outlined in box 4.3.

As outlined earlier in this chapter, while certain data practices may comply with privacy laws and regulations, they may still give rise to concerns from a consumer protection or competition perspective where they form part of the terms and conditions of agreements between consumers and loyalty schemes.

Box 4.3: The OAIC's privacy assessments of Flybuys, Qantas Frequent Flyer, Velocity Frequent Flyer and Woolworths Rewards

The OAIC has conducted limited scope assessments of the Flybuys, Qantas Frequent Flyer, Velocity Frequent Flyer and Woolworths Rewards loyalty schemes.[203]

The OAIC's assessments included suggestions relating to the navigability and readability of privacy policies and collection notices, and the handling and use of personal information collected by these loyalty schemes. These suggestions included:

- providing further information about the countries in which the recipients of personal information disclosed overseas are likely to be located (for Woolworths Rewards)

[202] OAIC submission, October 2019, p. 4.

[203] OAIC, Loyalty program assessment: Woolworths Rewards (conducted February 2016), 1 July 2016; OAIC, Loyalty program assessment: Flybuys (conducted November 2015), 1 July 2016; OAIC, Management of personal information – Qantas Frequent Flyer (conducted May–June 2017), 2 October 2019; OAIC, Management of personal information – Velocity Frequent Flyer (conducted July 2017), 2 October 2019.

- simplifying the language used in privacy policies and collection notices, for example, through the use of graphics, videos, and other digital formats (for Qantas Frequent Flyer and Velocity Frequent Flyer).

In addition, the OAIC suggested to Qantas Frequent Flyer that it should change the title of its collection notice from 'Important Information' to something that indicates the potential to members that the notice relates to the collection of their personal information, and to highlight its unique relationship with Woolworths.

The OAIC's assessments of these loyalty schemes noted that privacy policies and collection notices should be regularly reviewed to ensure they adequately explain the use of a member's personal information, especially if the nature and scale of marketing and data analytics activities changes.[204]

The ACCC's view is that consumer consents are not generally well informed, as they are provided in response to clickwrap agreements that contain take-it-or-leave-it terms. The ACCC also has concerns about how important information about the terms and conditions of these schemes and their data practices are communicated to consumers. The ACCC's analysis reveals that these issues arise from information asymmetries, behavioural biases and bargaining power imbalances.

Box 4.4 details the role of behavioural biases in creating bargaining power imbalances between consumers and loyalty schemes.

Box 4.4: The role of behavioural biases

Presenting offers to consumers as 'free' is likely to exploit behavioural biases due to the emotional appeal of free offers.[205] This is because marketing a service as 'free' presents consumers with 'a narrow way of thinking that focuses on only one or a few aspects of a more complex decision problem.[206]'

As a result, consumers are likely to focus more on the zero monetary cost of signing up to a loyalty scheme—as well as the potential rewards, such as discounts and points—and less on the potential costs of providing loyalty schemes with their data. While consumers are incentivised to think of the 'free' nature of loyalty schemes—and that they are being rewarded for shopping—the real value to loyalty schemes is in the vast amounts of consumer data they collect, use, share and monetise, as outlined in chapter 4.2.

The costs for consumers of providing their data to loyalty schemes can include increased risk of data breach and cybercrime from increased online transmission, storage and disclosure[207], which may result in both financial detriments, such as those associated with identity fraud and scams, as well as non-financial detriments, such as harm to health and safety and reputational injury.[208] Other costs include decreased privacy, potential increases in unsolicited targeted advertising and third parties leveraging information against the consumers' interests, for example by engaging in price discrimination (where it allows businesses to take more of the consumer surplus through higher prices).

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[204] OAIC submission, October 2019, p. 4.

[205] D Friedman, 'Free offers: a new look', *New Mexico Law Review*, vol. 38, pp. 49–94, 2008, pp. 68–69; CJ Hoofnagle and J Whittington, 'Free: accounting for the costs of the internet's most popular price', *UCLA Law Review*, vol. 61, pp. 606–670, 2014, p. 609.

[206] D Boush, M Friestad and P Wright, *Deception in the marketplace: the psychology of deceptive persuasion and consumer self-protection*, 2009; cited in CJ Hoofnagle and J Whittington, 'Free: accounting for the costs of the internet's most popular price', *UCLA Law Review*, vol. 61, 2014, pp. 606–670.

[207] ACCC, *Digital Platforms Inquiry final report*, June 2019, chapter 7, p. 395.

[208] MK Ohlhausen (speech), Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases, Federal Trade Commission (US), 19 September 2017, pp. 4–8.

Presenting consumers with services marketed as 'free' in the form of a clickwrap agreement can exploit behavioural biases that lead consumers to provide their consent to a transaction without informing themselves of the content of the terms and conditions and without due regard to these other potential costs of providing their user data. Overloading consumers with information in terms and conditions and privacy policies also makes it difficult for them to engage with the decision to join the loyalty scheme, contributing to low consumer awareness and understanding of the risks of joining.

4.4.1. Clickwrap agreements and take-it-or-leave-it terms

In a clickwrap agreement, the terms and conditions for the use of a website or for using a product or service, such as a loyalty scheme, as well as the relevant privacy policy, are presented to the user during the joining process electronically. The user will agree to the terms and conditions, and privacy policy, by clicking a box that says 'I agree'. In some circumstances, the user is presented with the documents and is required to scroll to the end, theoretically having read the materials before agreeing. In practice it is unlikely they would have read the documents presented to them.

The use of clickwrap agreements are commonplace in most online interactions. However, they are likely to contribute to consumers' tendencies not to read the terms and conditions and privacy policies of loyalty schemes. In its Digital Platforms Inquiry, the ACCC found that less than one in five respondents (18 per cent) indicated that they read privacy policies for internet sites or apps most or every time, with three in five (60 per cent) indicating that they rarely or never did so.[209] A survey by the CPRC in 2018 similarly reported that only 6 per cent of consumers surveyed read all the privacy policies or terms of use for all the products to which they had signed up.[210] However, the way documents are presented can have a significant impact on whether consumers read them.

Box 4.5 outlines how likely consumers are to engage with documents presented in different forms of clickwrap agreements.

Box 4.5: Clickwrap agreements and engagement with terms and conditions

Research conducted by the European Commission (EC) in 2016 found that few consumers (9.4 per cent) would click through to view the terms and conditions in a clickwrap agreement. The EC found, however, that a significantly higher proportion (77.9 per cent) would read or scan at least part of the terms and conditions if they were provided to users within the acceptance process (for example in an embedded window, box or table on the page).[211]

Many Australian loyalty schemes have adopted a clickwrap approach to presenting consumers with terms, conditions and privacy policies during the joining process. However, they have adopted different approaches to this (see **appendix D** for screenshots of these sign-up processes). Qantas Frequent Flyer provides a summary of its data practices directly in the joining process, while Flybuys provides its terms and conditions and privacy policy as embedded boxes within the sign-up page. These approaches are more likely to result in consumers reading or at least scanning these materials and having a greater awareness of the general nature of the data practices of these loyalty schemes.

Up until recently, Woolworths Rewards and Velocity Frequent Flyer adopted a comparatively opaque approach to presenting consumers with their terms, conditions and privacy policies.

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209 ACCC, *Digital Platforms Inquiry final report*, June 2019, chapter 7, p. 396.

210 P Nguyen and L Solomon, *Consumer data and the digital economy: emerging issues in data collection, use and sharing*, Consumer Policy Research Centre, July 2018, p. 31.

211 European Commission, *Consumers' attitudes towards terms and conditions*, 21 March 2016.

For example, Velocity Frequent Flyer only presented a link to its terms, conditions and privacy policy after a consumer had already progressed through a number of screens in its joining process. Woolworths Rewards presented a link to its terms and conditions during its joining process, within which a link to its privacy policy and collection notice was presented.

Since the publication of the draft report, Velocity Frequent Flyer has changed its joining processes to more prominently provide links to its terms and conditions and privacy policy. Virgin Australia submitted that, as of 3 October 2019, it has updated the Velocity Frequent Flyer website to provide links to its terms and conditions, privacy policy and privacy statement on each page of its sign-up process.[212] Virgin Australia is also in the process of updating the 'two-step' join process to clearly display links to the Velocity Frequent Flyer terms and conditions, privacy policy and privacy statement.

The ACCC notes that the OAIC's limited scope assessment of Woolworths Rewards suggested, among other things, that the scheme should consider 'separating the privacy related information from the broader terms and conditions and providing [it] as a separate document at the point of registration'.[213] Woolworths submitted that it implemented this change in August 2019.[214]

Further, clickwrap agreements are by their nature presented on a take-it-or-leave-it basis, with no opportunity for the negotiation of terms. These are usually standard terms offered to all users of the service. While take-it-or-leave-it terms are offered for a range of reasons, there is no opportunity for consumers to negotiate about how much data is collected about them and how it is used and shared.

Submissions on clickwrap agreements and take-it-or-leave it terms

In response to the draft report, the Australian Privacy Foundation (the APF) submitted that evidence suggests disclosure does not work, and that even when consumers understand that the agreement may be manifestly unfair and poor value, they are unable to change the deal. The APF contended that the way data can be used should be changed, requiring separate and specific (in time) consent if data is to be shared with third parties.[215]

Qantas submitted that loyalty programs are different from digital platforms, in that consumers are not required to join to access Qantas products and services, membership is voluntary, and members understand that marketing products and services is a primary purpose of Qantas Frequent Flyer.[216] Qantas also submitted that it takes active steps to ensure consumer consents are well-informed, including by providing a summary of its data practices when someone is joining the scheme.[217]

ACCC view on clickwrap agreements and take-it-or-leave-it terms

The ACCC is of the view that approaches other than clickwrap agreements and take-it-or-leave-it terms would better enable users to be aware of the terms, conditions and data practices employed by digital entities, and to better engage with the digital economy.

The ACCC has concerns around clickwrap agreements deeming consent to multiple separate agreements, particularly where these incorporate unilateral variation clauses. The ACCC also has concerns that the terms and conditions and privacy policies are standard form contracts and do not clearly set out to each user what specifically will occur with their

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212 Virgin Australia submission, October 2019, pp. 5, 15.

213 OAIC, *Loyalty program assessment: Woolworths Rewards*, July 2016.

214 Woolworths submission, October 2019, p. 2.

215 APF submission, October 2019, p. 3.

216 Qantas submission, October 2019, p. 23.

217 ibid.

data. As discussed below, there are particular issues around the opacity of how data is shared with and used by third parties, and the disclosure of these practices to consumers.

A further concern is that consumers may accept these terms despite being uncomfortable in order to access the service. For example, a CPRC survey found that, of those consumers surveyed who reported reading a privacy policy or terms and conditions, 67 per cent indicated they had signed up even though they were not comfortable with the policies.[218] When asked why they signed up in spite of this discomfort, 73 per cent of respondents stated that it was the only way to access the product or service.[219] The ACCC notes that for some loyalty schemes, joining unlocks a range of additional services for a member that would not otherwise be available. These benefits may be necessary to fully utilise the service, such as access to alerts through an app about flight delays or other services, which may be necessary for certain types of users. The take-it-or-leave-it terms contribute to an imbalance of the power relationship between loyalty schemes and consumers.

Where loyalty schemes are opaque in their presentation of terms, conditions and privacy policies, they are contributing to an information asymmetry between them and consumers, which exacerbates the power imbalance in respect of the use of consumer data. This may also have the effect of reducing consumers' trust in the way organisations handle their data. This applies to digital platforms as it does to loyalty schemes as consumer understanding and consent is a vital part of consumers engaging with the digital economy.

4.4.2. Clarity, accessibility and readability of privacy policies

Privacy policies are intended to tell consumers about the data practices of loyalty schemes. Clear and accessible privacy policies are a critical first step to ensuring that consumers can engage with loyalty schemes in an informed way to make decisions in their best interests.[220] As noted above, consumers, for a variety of reasons, do not tend to read the terms and conditions and privacy policies that are made available online. Good practices include bringing key elements of these to the consumer's attention at the time of joining and when relevant events occur (salience), and ensuring those key elements are clearly and effectively communicated to consumers.

In reviewing the terms and conditions and privacy policies of Australia's four major loyalty schemes, the ACCC has found that they vary considerably in terms of their length, complexity, ambiguity and clarity. Table 4.1 outlines the length and complexity of the terms and conditions and privacy policies for Flybuys, Qantas Frequent Flyer, Velocity Frequent Flyer and Woolworths Rewards.

Table 4.1: Length and complexity of terms and conditions and privacy policies

Loyalty scheme	Documents analysed	Word count	Est. reading time[221]	Reading ease[222]	Date of document[223]
Flybuys	Flybuys Privacy Policy	2178	11 minutes	32.8—Difficult to read	November 2018

[218] P Nguyen and L Solomon, *Consumer data and the digital economy: emerging issues in data collection, use and sharing*, Consumer Policy Research Centre, July 2018, p. 31.

[219] ibid.

[220] OECD, *STI Policy Note: Improving online disclosures with behavioural insights*, April 2018.

[221] Calculated by dividing the number of words by the average reading speed of 200wpm. Rounded to the nearest minute.

[222] The Flesch Readability Score calculates readability of a document based on the average number of words per sentence, and the average number of syllables per word. It is an inverse scoring system; the higher the score, the easier a document is to read. Documents that score between 60.0 and 50.0 are classified as 'fairly difficult to read', which translates to around a US 10th to 12th grade school level; documents scoring between 50.0 and 30.00 are 'difficult to read', at a US college reading level.

[223] All documents were viewed on 31 October 2019.

	Flybuys Terms and Conditions	1476	7 minutes	47.4—Difficult to read	Not dated
Qantas Frequent Flyer	Qantas Privacy Policy	5140	25 minutes	35.2—Difficult to read	May 2019
	Qantas Privacy Policy Summary[224]	547	2 minutes	39.8—Difficult to read	Not dated
	Qantas Frequent Flyer Terms and Conditions	20 046	1 hour 40 minutes	37.0—Difficult to read	June 2019
Velocity Frequent Flyer	Velocity Frequent Flyer Privacy Policy	2991	15 minutes	24.3—Very difficult to read	May 2019
	Velocity Frequent Flyer – Privacy Statement – Membership Join	844	4 minutes	32.1—Difficult to read	November 2018
	Velocity Frequent Flyer Terms and Conditions	27 851	2 hours 19 minutes	28.4—Very difficult to read	October 2019
Woolworths Rewards	Woolworths Rewards Collection Notice	1954	10 minutes	30.5—Difficult to read	August 2019
	Woolworths Group Privacy Policy	1795	9 minutes	40.7—Difficult to read	January 2018
	Woolworths Rewards Terms and Conditions	8392	42 minutes	46.9—Difficult to read	October 2019

The average reading times to review the terms and conditions or the privacy policies of the major loyalty schemes vary from seven minutes to almost two hours and 20 minutes. These reading times are likely to significantly exceed the amount of time an average loyalty scheme member would spend trying to read these terms and conditions or privacy policies. The complexity of the language used is also likely to deter consumers from reading and processing the information they contain and would contribute to information overload.

Qantas Frequent Flyer and Velocity Frequent Flyer have adopted the approach of also providing consumers with a Privacy Statement or summary—taking only two to four minutes to read, which is considerably shorter and is more likely to be read. Woolworths Rewards provides a short video about its privacy policy[225]; however, it is provided within a link in the privacy policy that may be easily missed.

Another concern is the navigability of privacy policies and the ability of consumers to track who is collecting, using and disclosing their data. The Woolworths Rewards Collection Notice links to the Woolworths Group privacy policy. Flybuys, however, merely states:

> *'To make it easy for you to deal with Participants, including Coles, and Wesfarmers*

[224] See figure D.1 in appendix D and discussion in section 4.4.1.

[225] Woolworths Rewards, Privacy Video, May 2018, viewed 13 June 2019.

group companies, we may exchange and combine Personal Information with them for the purposes described in our respective privacy policies. You can find their privacy policies of [sic] their respective company websites.'

Similarly, while the Woolworths Rewards privacy video provides a general overview of their data practices, it does not assist consumers in understanding how Woolworths Rewards will address some of their key concerns, including the specifics around the sharing (collection and disclosure) of data with third parties.

Submissions on the clarity, accessibility and readability of privacy policies

In response to the draft report, the OAIC submitted that APP 1.3 requires APP entities to have a clearly expressed and up to date privacy policy explaining how personal information will be managed by the entity, and that it had made suggestions in its assessments of loyalty schemes regarding these matters.[226] Qantas submitted that the OAIC conducted an assessment of its compliance with APPs 1 and 5, which found that Qantas' notification practices met the relevant notification and awareness requirements of APP 5.[227] Virgin Australia submitted that its privacy policy is in compliance with APPs 1 and 5, and that this was confirmed by a review of its privacy handling practices by the OAIC.[228]

Loyalty Pacific submitted that it is considering identifying potential improvements in relation to its communications with members, the readability and transparency of its terms and conditions and privacy policy and whether these materials contain any unfair contract terms.[229]

Qantas submitted that while its privacy policy is comparatively long, it covers the entire Qantas Group and not only Qantas Frequent Flyer, and therefore must cover all services offered by Qantas Group and meet its international legal obligations as well.[230] Qantas also submitted that it is reviewing its privacy policy and assessing how to provide this information to consumers more clearly and simply.

Virgin Australia submitted that it is in the process of updating the Velocity Frequent Flyer terms and conditions, privacy policy and privacy statement to improve readability, shortening them, and looking at ways of presenting these materials to improve transparency and minimise information overload. These measures include using a layered approach, considering the use of pop-up boxes explaining key terms, and other aids such as videos.[231] Virgin Australia submitted it will undertake consumer testing in undertaking these changes, and undertake a communications campaign to inform its members of these changes.

Woolworths submitted that it is exploring changes to its data practices, including updating the group privacy policy and collection notices to make them easier for consumers to review and understand, for example, by using a layered approach, the use of infographics, icons or images and videos, and that user testing would shape the final approach.[232]

The APF submitted that it is an unfair practice to put important information about the terms and conditions and privacy policy in separate documents, potentially in different parts of a website, as consumers may not be able to appreciate the extent and implications associated with the fragmented terms.[233] POS Solutions submitted that small and medium sized

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[226] OAIC submission, October 2019, p. 5.

[227] Qantas submission, October 2019, p. 23.

[228] Virgin Australia submission, October 2019, pp. 12–13.

[229] Loyalty Pacific (flybuys) submission, October 2019, p. 5.

[230] Qantas submission, October 2019, p. 24.

[231] Virgin Australia submission, October 2019, p. 14.

[232] Woolworths submission, October 2019, pp. 2, 5.

[233] APF submission, October 2019, p. 2.

businesses with loyalty schemes may benefit from an industry body assisting with developing terms and conditions.[234]

ACCC view on the clarity, accessibility and readability of privacy policies

The privacy policies of loyalty schemes are, in many instances, long, complex and hard to navigate. The length and complexity of these policies is likely to deter consumers from reading them. Loyalty schemes should adopt the approach of minimising information overload for consumers by ensuring relevant aspects of the terms, conditions and privacy policies are presented to them during key interactions. This may aid in consumers being more aware of the loyalty scheme's data practices. As suggested by the OAIC in its limited scope assessments of the Qantas Frequent Flyer and Velocity Frequent Flyer schemes,[235] loyalty schemes could also consider using graphics, videos, and other digital formats to aid consumer understanding of their privacy policies.

Further, the need for consumers to track down a variety of privacy policies from various different web pages or from other entities imposes significant barriers on their understanding of the data practices that will apply to their data. This exacerbates the information asymmetries consumers already experience in understanding these issues and dealing with loyalty schemes.

4.4.3. Varying definitions in privacy policies

Definitions in the privacy policies of Australian loyalty schemes vary, particularly in terms of 'personal information'. As noted in box 4.1, the consumer data collected by loyalty schemes can be categorised as personal information or non-personal information. Privacy protections under the Privacy Act generally apply only to data that constitutes 'personal information'. Under the Privacy Act, personal information is defined as information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable.[236]

Under the privacy policies of Australia's major loyalty schemes, personal information is often not defined, or is taken to include various types of information that may not match the definition of 'personal information' under the Privacy Act. Table 4.2 provides an overview of how Qantas Frequent Flyer, Velocity Frequent Flyer, Flybuys and Woolworths Rewards define personal information in their privacy policies.

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[234] POS Solutions, October 2019, p. 1.

[235] OAIC, Management of personal information – Qantas Frequent Flyer (conducted May–June 2017), 2 October 2019; OAIC, Management of personal information – Velocity Frequent Flyer (conducted July 2017), 2 October 2019.

[236] Privacy Act, s. 6(1).

Table 4.2: Definition of personal information in loyalty schemes' privacy policies

Source	Definition of 'personal information'
Privacy Act	'information or an opinion about an identified individual, or an individual who is reasonably identifiable: (a) whether the information or opinion is true or not; and (b) whether the information or opinion is recorded in a material form or not.'
Qantas Privacy Policy	No definition. Lists types of personal information collected, which may or may not fall within the Privacy Act's definition.
Velocity Frequent Flyer Privacy Policy	No definition. Lists types of personal information collected, which may or may not fall within the Privacy Act's definition.
Flybuys Privacy Policy	'Personal Information means information which identifies you as an individual or from which you can be reasonably identified.'
Woolworths Group Privacy Policy	No definition. Lists types of personal information collected, which may or may not fall within the Privacy Act's definition.
Woolworths Rewards Collection Notice	No definition. Lists types of personal information collected, which may or may not fall within the Privacy Act's definition.

Submissions on varying definitions in privacy policies

In response to the draft report, the OAIC submitted that organisations should adopt the definition of personal information, as it is defined in Privacy Act, consistently across their policies.[237] The OAIC stated it had previously made similar suggestions in relation to the use of consistent definitions during targeted assessments of agencies and organisations and that doing so will ensure that organisations comply with their legal obligations under APP 1, including setting out the kinds of personal information collected, how and why it is collected, used and disclosed.[238]

Qantas submitted that it is more helpful to its members (many of whom are located outside of Australia) to provide examples of the types of personal information it collects rather than the definition provided in the Privacy Act.[239] Virgin Australia submitted that there is no requirement under the APPs for entities to define personal information in their privacy policies, but will review this along with the rest of its privacy policy.[240]

ACCC view on varying definitions in privacy policies

A lack of clarity around how each loyalty scheme defines personal information contributes to the difficulties consumers have in understanding how their data is being handled—further exacerbating the information asymmetries between them and loyalty schemes. Loyalty schemes should consider standardising their definition of personal information with that of the Privacy Act.

[237] OAIC submission, October 2019, pp. 5–6.

[238] See OAIC, Management of personal information—Velocity Frequent Flyer (conducted July 2017), 2 October 2019.

[239] Qantas submission, October 2019, p. 25.

[240] Virgin Australia submission, October 2019, p. 14.

4.4.4. Disclosures about tracking members using payment cards

The privacy policies of Flybuys and Woolworths Rewards disclose that they continue to track the purchasing behaviour and transaction activities of loyalty scheme members even if they do not scan their loyalty card by automatically linking any payment card used by the member to their profile. The loyalty scheme is able to collect, use and disclose to third parties the same information as if the member had actively scanned their card—without the need to compensate members with points. In effect, these loyalty schemes are able to continue to collect valuable member data without providing members with loyalty points in circumstances where a consumer is unlikely to be fully aware of the practice.

Flybuys's Privacy Policy states:

> *'We may collect your personal information, and that of additional members, from your interactions and transactions with us, Participants, Coles and Wesfarmers group companies. This includes using your Flybuys card or number or associated identifiers such as payment cards.*[241]*'*

In the case of Woolworths Rewards, its Collection Notice states:

> *'… We also collect Members' transaction history from the use of their payment card, which is matched to their Woolworths Rewards account. Our systems render payment card numbers unreadable (through the use of cryptographic hashing or encryption algorithm) and replace it with a randomised token number, which protects such details from unauthorised access or disclosure. Linking this token number with a Member's account enables us to collect the Member's transaction history even when they do not scan their Woolworths Rewards card at the point of sale …*[242]*'*

The ACCC notes that this statement in particular emphasises the security processes Woolworths undertakes, and the benefit to Woolworths Rewards, and avoids outlining the risks and detriment to consumers—namely, the costs for consumers as outlined above in box 4.3, below in section 4.8, and the lack of informed consent associated with this process. The ACCC also notes this particular issue does not appear to apply in circumstances where a credit card provider issues rewards points to its customers as part of a credit card facility.

Submissions on disclosures about tracking members using payment cards

In response to the draft report, the OAIC submitted that personal information may only be collected where it is reasonably necessary for, or directly related to, loyalty schemes' functions or activities.[243] The OAIC noted that the draft report provides that loyalty schemes are not compensating their members with points as a result of this tracking.

The OAIC also submitted that a higher threshold applies to the collection of information that is sensitive information, and that consumers may not appreciate that their purchasing behaviour and transaction activities may continue to be tracked even after they decide to stop using their loyalty card. This impacts consumers' ability to make meaningful decisions in relation to the collection, use and disclosure of their personal information by loyalty schemes and raises whether collection is by fair means.

The OAIC submitted that the Privacy Act provides privacy complaint mechanisms for individuals which contemplate that, in general, an individual will raise a privacy issue with a regulated entity first and if unresolved, may lodge a complaint with the OAIC.[244]

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[241] Flybuys, Privacy Policy, November 2018, viewed 14 May 2019.

[242] Woolworths Rewards, Privacy Policy, May 2018, viewed 14 May 2019.

[243] OAIC submission, October 2019, p. 6.

[244] OAIC submission, October 2019, p. 7.

Loyalty Pacific submitted that where a member makes a purchase at Coles without swiping their card, Flybuys may access the member's transactional data via Coles' systems solely for the purpose of allowing Flybuys to tailor offers to that member.[245] Loyalty Pacific also submitted that Flybuys does not have access to transactional data where a member's Flybuys card has not been swiped in respect of any other retailer, and Flybuys does not collect or store any payment card information with respect to its members in its systems.

Woolworths submitted that the purpose of card linking is to benefit consumers, by being able to provide them with relevant and personalised offers, and that it applies only to transactions undertaken within the Woolworths Group.[246] Woolworths submitted this is undertaken with informed consumer consent obtained when consumers agree during the join process. Woolworths is of the view that limiting or restricting this practice may have the effect of:

- 'disadvantaging members if they forget to bring or swipe their Rewards card, as their ability to receive personalised offers relevant to their preferences and habits will be limited'[247]
- 'depriving members of receiving a direct benefit in the form of:

  a) cost savings, by being notified about discounted offers on items that are relevant to them (which would have been included in the personalised offer sent to them because of Card Linking)

  b) bonus Rewards points, which may be awarded to them upon activation of an offer and which can be used to receive further discounts.'[248]

The AFF submitted that most members would not expect data to be collected about their purchases on occasions when they do not scan their loyalty card, and that the practice should end.[249]

ACCC view on disclosures about tracking members using payment cards

The ACCC has concerns about loyalty schemes that collect consumer data using an automatically linked payment card even where a consumer does not scan their loyalty card. The inadequate disclosure of this data practice is unlikely to meet most consumers' preferences around the collection of their data. In particular, consumers are not actively made aware of this during the sign-up process for either Flybuys or Woolworths Rewards, in circumstances where it is unlikely to be a standard data collection practice a consumer would expect to encounter. When consumers no longer want to participate in a loyalty scheme they are unlikely to actively cancel their memberships due to the effort and time required to do so—rather, they will simply stop scanning their loyalty card when they shop.

The ACCC considers that irrespective of disclosure in terms and conditions or privacy policies of this practice, consumers are unlikely to know that their data is collected and used by supermarkets in cases where they have chosen not to scan their loyalty card.

The ACCC considers that this practice affects the ability of consumers to make an informed choice that aligns with their privacy and data collection preferences by removing consumers' ability to control how and when their data is collected. In addition, such data practices may erode consumer trust in the use of such services which will impact on data driven innovations in the long run. The ACCC is of the view that Coles, Flybuys and Woolworths Group should end this practice.

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[245] Loyalty Pacific (flybuys) submission, October 2019, p. 6.

[246] Woolworths submission, October 2019, p. 4.

[247] ibid.

[248] ibid.

[249] The Australian Frequent Flyer submission, September 2019, p. 5.

Recommendation 3: End the practice of automatically linking members' payment cards to their loyalty scheme profile

Coles, Flybuys and Woolworths should end the practice of automatically linking customers' payment cards to their loyalty scheme profile to track their purchasing behaviour and transaction activities when they do not scan their loyalty card.

Recommendations made in the ACCC's Digital Platforms Inquiry to strengthen consent requirements, provide for default opt-in and enable the erasure of personal information may also assist in addressing some of the concerns identified. These recommendations are discussed below.

4.4.5. Disclosures about consumer data sharing between loyalty schemes and third parties for marketing purposes

Third party data sharing occurs when a consumer's data is transferred from one entity to another or when one entity allows another entity to access its collection of consumer data. Data may be shared by a third party with a loyalty scheme, or the loyalty scheme may share data with a third party. The ACCC is concerned by the opaque nature of how these data-sharing relationships work and the nature of the data that is exchanged.

Collecting consumer data from third parties for marketing purposes

The privacy policies of Flybuys, Qantas Frequent Flyer, Velocity Frequent Flyer and Woolworths Rewards each state that they may collect data about consumers from other sources, as outlined in table 4.3. This data is then combined with the existing data held by the loyalty scheme about individual members.

The value of consumer data to loyalty schemes increases as they combine it with additional datasets.[250] Through this process, they are able to derive greater insights from the consumer data they hold, including in relation to the targeting of members with advertising.

Table 4.3: Loyalty schemes collecting data from other sources about members for analytic or marketing purposes

Source	How the collection from third parties is disclosed to members
Qantas Privacy Policy	'There may be occasions when we collect information about you from someone else, such as … • third parties that provide us with marketing leads … • …businesses for whom we provide marketing and data analysis services • providers of third party websites, apps and social media platforms'.
Velocity Frequent Flyer Privacy Policy	'Our preference is to collect personal information about a Velocity member directly from the member. But we also collect personal information about a Velocity member from our related companies, Program Partners, and Airline Partners, as well as other people or organisations in the following circumstances: … • third party suppliers that provide us with products and services, such as data enrichment, data analytics and business intelligence, market or product research, marketing services (including providing us with marketing leads), customer support (including call centre functions), running competitions and promotions, and payment fulfilment services.'

[250] A Acquisti, L Wagman and C Taylor, 'The economics of privacy', *Journal of Economic Literature*, vol. 54. no. 2, 2016.

Flybuys Privacy Policy	' … We may also collect personal information from third parties including: • public sources • information service providers (e.g. for data integrity purposes) • providers who administer Coles-branded products and services such as payment cards and insurance … • participants, Coles and Wesfarmers group companies.'
Woolworths Rewards Collection Notice	'We collect personal information about Woolworths Rewards Members from other persons or entities. For example, we collect personal information for marketing purposes from other suppliers of goods or services who, like us, have an existing relationship with Woolworths Rewards Members. Such entities include our strategic partners, Earn Businesses, affiliated programs, suppliers of publicly available information and digital services used by Woolworths Rewards Members (including social media platforms)… At times, we combine different sets of data to add to the personal information we hold. An example of this is a history of a Member's transactions from use of the same payment card.'

As shown in table 4.3, the nature of the consumer data collected and the entities they are collected from are described in vague and non-specific terms. The lack of specificity and detail imposes a significant burden on consumers to understand precisely how their data will be used. None of the privacy policies provide a definitive list of third parties or partners from which loyalty schemes collect data. Further, the privacy policies do not appear to provide an avenue for consumers to opt out of these arrangements.

Disclosing consumer data to third parties for marketing purposes

The privacy policies of Flybuys, Qantas Frequent Flyer, Velocity Frequent Flyer and Woolworths Rewards each state that they may disclose data about consumers to third parties, as outlined in table 4.4.

Table 4.4: Loyalty schemes disclosing to third parties data about members for analytic or marketing purposes

Source	How the disclosure to third parties is disclosed to members
Qantas Privacy Policy	' … We may also disclose your information to: • providers of goods and services to members of our programs and clubs • service providers for our programs and clubs. They may use the information to assist us with our programs and clubs. Such activities may include: • providing market research and marketing services.'
Velocity Frequent Flyer Privacy Policy	'We combine and link personal information and non-identifying information we hold about Velocity members with other information collected from, or held by, others (including our Airline Partners, Program Partners, related companies or third parties) to better understand our members' interests, preferences and interactions. This helps us enhance and personalise the membership experience and how we market to our members… We disclose personal information about Velocity members to our related companies, Airline Partners, Program Partners and trusted service providers to allow them to tell those members about products or services that may be of particular interest to them, based on membership details or transactions with us.'

Flybuys Privacy Policy	'flybuys may exchange your Personal Information with service providers engaged to assist with services including, working with a number of suppliers that carry out specific functions on our behalf, and include companies that assist us with: • technology services including application, development and technical support, processing, storing, hosting, and analysing data; … • product development and market research … '
Woolworths Rewards Collection Notice	'We disclose the personal information we collect about Woolworths Rewards Members to other persons and entities. For example, we disclose personal information to: • our service providers (including to our information technology and marketing service providers) to assist us in carrying out our functions and activities; … We also disclose aggregated and anonymised information to our trusted partners (including our suppliers) about Woolworths Rewards Members' attributes, behaviours and preferences to enable them to market products and services that are likely to interest you based on those attributes, behaviours and preferences … '

As with the collection of consumer data from third parties for marketing purposes, there is a lack of clarity about what data is being disclosed to which entities. None of the privacy policies provide a definitive list of third parties or partners that receive consumer data from the loyalty schemes. This means that there is no way for a consumer examining a loyalty scheme's terms of use or privacy policy to know what entities may access their data, on what terms and for what purposes.

Submissions on disclosures about consumer data sharing between loyalty schemes and third parties for marketing purposes

In response to the draft report, Qantas submitted that it fully and clearly discloses what information it collects from and discloses about members in its Qantas Frequent Flyer terms and conditions and the Qantas Group privacy policy.[251] Qantas also submitted that it collects the majority of information directly from members, including when a member:

- signs-up or interacts with Qantas Frequent Flyer (e.g. name, address, email address)
- acquires a product or service from Qantas
- interacts with program partners or Qantas communication channels (e.g. email, website, contact centre)
- completes voluntary surveys and questionnaires.

Virgin Australia is of the view that its data sharing relationships are reasonably clear in its privacy policy and that it is not intending to be opaque.[252] Virgin Australia submitted that data sharing with third parties, including service providers and advertising agencies, is within the reasonable expectations of its members. Further, while Virgin Australia has proposed updating its privacy policy to provide greater clarity as to with which entities Velocity Frequent Flyer has a data sharing relationship, it has also submitted that providing a detailed list of third parties it shares consumer data with is not required under the APPs, would increase the length of the privacy policy, may pose a security risk for consumers, and may disclose commercially sensitive information.[253]

[251] Qantas submission, October 2019, pp. 25–26.

[252] Virgin Australia submission, October 2019, p. 16.

[253] Virgin Australia submission, October 2019, pp. 16–17.

Woolworths submitted that it is exploring providing consumers with greater visibility over the types of data it collects, including where it is collected from, how it is handled, and with whom it is shared.[254] Woolworths also submitted it considers informing consumers of the category of recipients is more likely to be of interest to consumers than an exhaustive list of company names which may change on an ongoing basis, and which may create challenges with respect to cybersecurity.

ACCC view on disclosures about consumer data sharing between loyalty schemes and third parties for marketing purposes

Privacy policies should clearly outline the entities with which consumer data is being shared, and for what purposes.

Consumers are at a significant disadvantage, and denied the ability to make an informed decision about the collection and use of their data, when privacy policies do not clearly outline the entities with which consumer data is shared, and how it is used. Such features of privacy policies are likely to exacerbate information asymmetries between loyalty schemes and consumers by providing consumers with an opaque view of privacy and data protections while simultaneously outlining broad discretions for loyalty schemes to collect, use and disclose user data.

In relation to the concerns raised by stakeholders about this measure increasing the length of a privacy policy, as noted in section 4.4.2 on clarity, accessibility and readability of privacy policies, loyalty schemes have available to them a range of techniques to improve consumers' understanding of their privacy policies. In relation to the issues raised about commercially sensitive information and cybersecurity, stakeholders did not provide specific detail on how these issues might arise.

4.4.6. Disclosures about targeted and behavioural advertising

Loyalty schemes use the insights generated from consumer data to run targeted marketing campaigns, which may include targeted advertising through a variety of online and offline channels.

In the online context, behavioural advertising matches the advertisements consumers see with their interests as known or inferred by marketing firms. Loyalty schemes may use cookies, pixels/web beacons, and other similar technologies to present targeted and personalised advertising to consumers. This may be displayed on the loyalty scheme operator's website, on the websites of its partners, or on other third party websites.

In the offline context, typical forms of targeted advertising include mail-out offers and offers on shopping dockets. However, as outlined below, the vast amounts of consumer data collected and opaque use of that data allow for it to be used in more subtle and non-traditional ways that may not align with consumers' preferences, and the advertising may come from undisclosed partners rather than the loyalty scheme itself.

Table 4.5 outlines the disclosures Australia's four largest loyalty schemes each make about targeted advertising to consumers.

[254] Woolworths submission, October 2019, p. 2.

Table 4.5: Loyalty schemes' disclosures about targeted and behavioural advertising

Source	Disclosures about targeted and behavioural advertising
Qantas Frequent Flyer Terms and Conditions	' … Marketing consent: By becoming a Member, the Member provides their express consent to Qantas: … associating and combining data collected from third parties with the Member's personal information and using and disclosing that combined personal information to tailor the Member's experience and content, including third party content and otherwise in accordance with these Terms and Conditions.'
Velocity Frequent Flyer Privacy Policy	'We disclose personal information about Velocity members to our related companies, Airline Partners, Program Partners and trusted service providers to allow them to tell those members about products or services that may be of particular interest to them, based on membership details or transactions with us.' '…[w]e use cookies, pixels and similar technologies to help us present targeted and personalised advertising and other content about us, our related companies, Airline Partners and Program Partners, on our website and third party websites' '[w]e use personal information that we hold about Velocity members to…deliver personalised and targeted content, marketing and advertising via email, our website and our mobile applications, or via third party websites including social media platforms. This may include information about products, services and membership benefits and those of our related companies, Airline Partners and Program Partners.'
Flybuys Privacy Policy	'We may provide marketing communications and targeted advertising to you on an ongoing basis by telephone, electronic messages (e.g. email), through our digital services, and by other means. These communications may relate to the products and services we, Participants, Coles, and Wesfarmers group companies provide, and other products which may be of interest to you.' 'We provide information and services through a range of digital and online services … These services may be operated by us as flybuys Digital Services to provide a consistent experience, personalise your use of each of those services and provide targeted marketing.'
Woolworths Rewards Collection Notice	'We also disclose aggregated and anonymised information to our trusted partners (including our suppliers) about Woolworths Rewards Members' attributes, behaviours and preferences to enable them to market products and services that are likely to interest you based on those attributes, behaviours and preferences. This information is used to send you tailored or targeted advertising and is shared in a way that does not personally identify you. Such advertising may appear on the websites you visit in the form of banner advertisements, and/or on the social media sites you use.'

While in many instances consumers will expect personalised and special benefits and offers, they may not anticipate the channels and sources from which they may receive targeted advertising, and may not even realise that they are receiving targeted advertising based on the consumer data they have provided to loyalty schemes. As indicated in table 4.5, the privacy policies reviewed do not clearly outline the extent to which consumers may be exposed to targeted advertising. The way consumers are targeted is likely, in many circumstances, to be inconsistent with their preferences.

Box 4.6 provides an example of the unexpected channels through which targeted advertising may occur using consumer data from loyalty schemes. In this example, an Australian real estate data broker claims it can use data from a variety of sources, including loyalty schemes, to identify homeowners who may be willing to sell their house.

Box 4.6: Case study—Loyalty scheme data and lead generation for real estate agents

CoreLogic, a real estate data broker, has outlined the types of targeted marketing and lead generation the combination of consumer data with property data can effect for real estate agents.[255] CoreLogic stated that it was possible, in 2016, to combine datasets from NAB, Foxtel, Woolworths Rewards and News Corp held by Quantium, a data broker part owned by Woolworths, with its own property data. This would allow CoreLogic to identify homeowners using Facebook that would be most likely to sell their home based on their property details, spending patterns and media consumption.

CoreLogic provided an example of how this could be used for generating leads. CoreLogic could use these datasets to identify a homeowner who may be interested in selling their four-bedroom-and-two-bathroom house. CoreLogic's database could identify homes in a given area with four bedrooms and two bathrooms, as well as how long the homeowners had lived in the house. The real estate agent using the database could refine the list to those properties owned for at least 10 years, as such homeowners are more likely to downsize. Additional datasets from Woolworths Rewards may indicate the homeowners have reduced their spending on groceries, while other transaction data may indicate they are spending more on entertainment and dining out. This may signal that the homeowners are now empty-nesters. The real estate agent could then target the homeowners with advertising on Facebook or get in contact with them in person.

CoreLogic goes a step further in advising real estate agents using this approach not to alienate homeowners. Namely, real estate agents are advised to use their 'data knowledge' to drive leading questions that they believe to be true, and not to disclose the lead's source.

In 2019, it appears this concept, or similar, is being used by CoreLogic in its SmartList product[256], which claims to combine 'property, market and consumer data to help identify properties that are more likely to be listed and sold'.

Submissions on disclosures about targeted advertising

In response to the draft report, Qantas submitted that its members are aware that one of the primary purposes of its program is to market products and services and to reward members for their eligible activity.[257] Qantas further submitted that its members can opt-out of receiving marketing materials, emails and digital advertising on third party websites by managing their account online.[258]

Virgin Australia submitted that its privacy policy outlines how members can control the amount and types of targeted advertising they receive, but noted that it is in the process of reviewing and updating its privacy policy and the ways consumers can opt-out of targeted advertising on third party websites.[259]

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[255] K Davis, 'Big Data Agents', CoreLogic, 2 May 2016.

[256] CoreLogic, SmartList, viewed 26 June 2019.

[257] Qantas submission, October 2019, p. 27.

[258] ibid, p. 28.

[259] Virgin Australia submission, October 2019, pp. 17–18.

ACCC view on disclosures about targeted advertising

Targeted advertising is a primary activity of loyalty schemes. However, consumers have expressed unease about companies monitoring their behaviour for the purposes of targeted advertising. Consumers are also uneasy about personal information being shared with third parties for advertising purposes. The opacity of the extent to which consumers are tracked online and the way targeted advertising is delivered exacerbates concerns. Similar to the issues identified with third party sharing of consumer data, it is unclear who the specific partners of the loyalty schemes are that may use targeted advertising. Further analysis of the ability to opt-out of targeted advertising is provided below.

The source of targeted advertising should be made clear to consumers, as well as the source of the consumer data used to inform that advertising. It should also be made clear to consumers the channels through which they may receive targeted advertising and how their consumer data may be used to generate leads. Consumers should be given the option to opt out of these practices. The lack of specificity and detail around targeted advertising imposes a significant burden on consumers understanding precisely how their data is being used and its implications. These types of vague and broad terms reflect the power imbalance between consumers and loyalty schemes.

4.5. Consumer control over their data handled by loyalty schemes

Consumers who are concerned about the data practices of loyalty schemes but wish to continue to participate may benefit from being given the choice to meaningfully opt out of certain data practices in a way that suits their own privacy preferences. There appears to be demand for an increased ability to opt out of certain data practices. A survey conducted by the CPRC found that 95 per cent of Australians surveyed said they wanted companies to provide options to opt out of certain types of information they can collect, use or share.[260] A survey prepared for the CPRC also found that 89 per cent of respondents indicated that they selected opt-outs when they were available.[261]

This report has found a number of data practices from which consumers cannot easily opt out or which limit their ability to control how their data is handled. For example, as outlined in section 4.4.4, Woolworths Rewards continues to collect information about its customers even when they do not scan their loyalty card, by linking payment card information with a customer's loyalty card. In respect of Flybuys, it can access members' transactional data from Coles even when that member has not swiped their Flybuys card. Further, as noted in section 4.4.5, consumers have limited insight into and control over how their data is shared with third parties, in particular for marketing purposes.

Loyalty schemes make representations about consumers having control over their data; however, in reality these controls are either unclear or do not appear to have a meaningful effect. This is particularly apparent when consumers attempt to opt out of targeted and behavioural advertising delivered through web browsers. Even in situations where consumers may have a limited ability to opt out of certain targeted and behavioural advertising practices, they may be unable to opt out of loyalty schemes collecting data about them from third parties (as outlined in section 4.4.5).

While Australia's major loyalty schemes allow consumers to opt out of a range of personalised offers, direct marketing communications and tailored advertising, typically delivered by email (with varying levels of ease, as outlined in **appendix E**), the effect of opting out of targeted advertising delivered through a consumer's web browser is unclear

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[260] P Nguyen and L Solomon, *Consumer data and the digital economy: emerging issues in data collection, use and sharing*, Consumer Policy Research Centre, July 2018, p. 36.

[261] Roy Morgan Research, *Consumer knowledge and understanding of consent to data collection, usage and sharing research 2018*, 10 March 2018, p. 6.

and may be ineffective. In circumstances where consumers are given some level of control to opt-out of either targeted advertising, as Qantas Frequent Flyer provides in its member settings, or from cookies, as Woolworths Rewards provides, there is a lack of clarity around how these mechanisms work and their limitations (see **appendix E**).

In other circumstances, consumers are directed to a variety of third party websites to opt out of behavioural advertising. For example, the Flybuys Privacy Policy outlines the steps a consumer can take to opt out as follows:

> *'The services we may use from time to time include those offered by Google (including Analytics, Display Network, AdSense, and DoubleClick), Yahoo!, Adobe (including Marketing Cloud, and Analytics), Responsys, Microsoft, and Signal Digital, Inc. You can find more details in the individual privacy policies of those services, including information on how to opt-out of certain functions.*[262]*'*

In the example of Velocity Frequent Flyer, consumers are given the following options to opt-out of targeted or behavioural advertising:

> *'You can change the amount of targeted online advertising you see from us by updating your cookie settings, changing your device or Velocity mobile application settings, or opting-out of the relevant digital platforms.'*[263]

As noted previously, because of time and other resource constraints, consumers are unlikely to undertake the task of reviewing options to opt out of online targeted advertising across multiple different websites, particularly in situations where it is not clear with which entities their data is specifically shared with. Further, it is likely impractical for most consumers to opt-out of using digital platforms.

Another approach, which is contained in the cookies statements of Qantas Frequent Flyer and Woolworths Rewards, as well as in the account settings for Woolworths Rewards (see **appendix E**), directs consumers to the website www.youronlinechoices.com.au to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes (and others). However, as outlined in box 4.7, this approach has significant limitations.

Box 4.7: The limitations of opting out of targeted advertising using www.youronlinechoices.com.au

While the Woolworths Rewards cookies statement and Qantas cookies statement direct consumers to www.youronlinechoices.com.au to opt out of targeted advertising delivered by third parties on behalf of the loyalty schemes, this comes with significant limitations.

Visiting the website reveals that opt-outs online work in specific situations and can be rendered ineffective if a consumer clears the cookies in their web browser or uses a different web browser or device. The website states the following limitations for opting out:

'After you opt-out of online behavioural advertising from a particular company it is important to remember that:

- *Opt-outs do not stop companies from showing you ads, they only stop companies from showing you targeted ads.*
- *Opt-outs Do Not Remove Ads: If you opt-out you will continue to see online ads. You may even see online ads from companies from which you opted-out.*

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[262] Flybuys, Flybuys Privacy Policy, viewed 10 July 2019.

[263] Virgin Australia, Velocity Frequent Flyer Privacy Policy, viewed 1 November 2019.

- *Opt-outs Do Not Prevent Data Collection: Companies can continue to collect data about your browsing activity after an opt-out—your opt-out only prevents them from using this data to serve you targeted ads or personalised content.*
- *Opt-Outs Apply Only to a Single Browser: If you opt-out from personalised advertising on Google Chrome, this does not apply to all browsers. For example, you need to opt-out separately on Firefox or Explorer. Opt-outs only apply to your browser, not your computer or device.*
- *Opt-outs can be erased by accident: Your opt-outs are recorded using cookies. (Cookies are small messages or signals that web servers pass to your web browser when you visit Internet sites.) So, remember, when you clear your cookies, you also erase your opt-outs.*
- *You Do Not Disable all Ads: When you browse the internet and see a website, video, or app that uses advertising services by other companies not listed on this site's opt-out preferences, you may still see personalised ads from those other companies.'*

Submissions on consumer control over their data handled by loyalty schemes

In response to the draft report, Qantas submitted that its frequent flyer members have a level of control over how their data is collected and used, including that consumers may:

- opt-out of receiving marketing material, emails, and digital advertising on third party websites by managing their profile settings in their online account
- blocking their cookies or clearing their browser cache
- cancelling their membership, and Qantas will cease collecting data about that member.[264]

Virgin Australia submitted that it is in the process of making changes to its online 'Preference Centre' to increase the level of control for its members over marketing communications, including targeted online advertising on third party websites, as well as in relation to how members use Velocity products and services.[265] Virgin Australia further submitted that currently members can opt-out of a range of communications categories of their choosing, and is also considering implementing a cookies policy.

ACCC view on consumer control over their data handled by loyalty schemes

The ACCC considers that providing consumers with more meaningful controls over the collection, use and disclosure of their data handled by loyalty schemes would respond to a consumer demand to align the data practices of firms with the data preferences of consumers. Where there are limitations to the controls that currently exist these should be made clear to consumers.

Further, the bargaining power imbalances, information asymmetries and behavioural biases identified in this report may, as recommended in the ACCC's Digital Platforms Inquiry, be lessened by:

- stronger and more specific consent requirements
- default settings that enhance consumer choice and reflect consumers' privacy preferences. This includes defaulting to opt-in rather than opt-out-style settings.

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[264] Qantas submission, October 2019, pp. 24, 28–29.

[265] Virgin Australia submission, October 2019, pp. 6, 18–19.

4.6. Parallels with the ACCC's Digital Platforms Inquiry

The issues of concern identified in this report have direct parallels with those identified in the ACCC's Digital Platforms Inquiry. In its Digital Platforms Inquiry, the ACCC detailed concerns about:

- insufficient transparency and meaningful consumer control over the collection, use and disclosure of consumer data
- a lack of informed and genuine choice for consumers engaging in the digital economy
- a lack of consumer protection and effective deterrence under existing laws governing data collection.

These concerns are mirrored in relation to loyalty schemes. The basis for these concerns are the problematic data practices that both digital platforms and loyalty schemes commonly engage in. These include:

- the use of clickwrap agreements and take-it-or-leave-it terms
- complex, lengthy, unclear and difficult-to-navigate privacy policies
- varying definitions in privacy policies
- the sharing of consumer data with third parties for marketing purposes and the opaque disclosure of the specific entities with which data is shared and for what purposes, as well as limited meaningful consumer control over this data practice
- the use of targeted and behavioural advertising, and the lack of a meaningful ability for consumers to opt out of this data practice.

In addition, this report also raised concerns about the tracking of consumers through their payment card in circumstances where they did not scan their loyalty membership card, and the lack of informed consent and genuine choice for consumers exposed to this practice.

As a result of these issues, consumers' ability to make informed choices is affected by the information asymmetry between loyalty schemes and consumers, the bargaining power imbalance between loyalty schemes and consumers, and consumers' behavioural biases. The ACCC is of the view that the findings in this report reinforce the ACCC's findings in our Digital Platforms Inquiry, and further support our recommendations for economy-wide changes in relation to privacy law.

4.7. Emerging risks and consumer detriment

The ACCC's Digital Platforms Inquiry examined a range of consumer detriments in relation to services offered for zero monetary cost in exchange for consumers' attention and their user data. The ACCC observed that these harms may extend to other industries across the Australian economy that collect, use or disclose the user data of Australians.[266] Outlined in box 4.8 are the harms the ACCC has identified that may arise when industries that collect, use or disclose user data engage in problematic data practices.

[266] ACCC, Digital Platforms Inquiry final report, June 2019, p. 449.

Box 4.8: Consumer harms arising from problematic data practices

The ACCC's Digital Platforms Inquiry identified the following consumer harms that arise from the problematic data practices of industries, which include:[267]

- Decreased consumer trust necessary to enable the continued economic and social benefits of personal data flows: Realising the benefits of personal data relies on maintaining consumer trust in data-driven technologies to enable the free flow of information. Trust is at the core of the relationship between business and customer and remains critical in the digital economy. If consumers perceive that they do not understand or cannot control an organisation's use of their personal information, they may seek ways to undermine the accuracy of the data collected or reconsider their relationship with that organisation.
- Decreased consumer welfare from decreased privacy: The detriments suffered by consumers through decreased privacy and control over data can result in numerous additional harms ranging from receiving unsolicited targeted advertising to data breaches exposing their personal or financial information. These harms cause increased risks of online identity fraud and the potential for more effective targeting of scams (leading to financial losses for individuals). For instance, poor data security may expose consumers to greater risk of their personal information of being hacked or stolen, which may result in financial loss, reputational damage, and emotional distress.
- Risks to consumers from increased profiling: The risks of detailed profiling of users include potential price discrimination by online retailers. Price discrimination may result in businesses setting higher prices for one group or person relative to another. In some instances, it may allow businesses, particularly monopolies, to take more of the benefit that would otherwise go to consumers through these higher prices. The increasing availability of data and use of sophisticated pricing algorithms, particularly by online retailers, increases the scope for businesses to engage in highly personalised pricing, effectively sorting customers into ever finer categories. However, the ACCC notes that, to date, there has been limited anecdotal evidence of individually personalised, online price discrimination. Price discrimination, as it applies to loyalty schemes, is further addressed in chapter 6 of this report.
- Risks to consumers from discrimination and exclusion: The specificity of advertising enables highly detailed segmentation of consumers that may be used to exclude or discriminate against groups of people. There is a risk that this could be used to unfairly discriminate against or exclude groups of consumers on the basis of information in their online profiles, which are usually opaque to consumers and do not provide a way for consumers to see or verify the information held about them or to appeal decisions made on the basis of that information.
- Particular risks to vulnerable consumers: The extensive amount of data available can be used to identify (or infer) an individual's vulnerabilities. The detriments identified above can be especially harmful to vulnerable consumers by placing them at risk of being targeted with inappropriate products or scams, discriminated against, or inappropriately excluded from markets.
- Decreased consumer welfare from reduced competition: information asymmetries and inequalities in bargaining power limit consumers' ability to access the product that best meets their data and privacy preferences and may reduce competition between firms over the quality of data and privacy protections.

[267] ibid, pp. 442–448.

A further risk that arises from disclosures of consumer data to third parties is the potential for data breaches and the possibility of re-identifying consumer data. Box 4.9 outlines the risks of data breaches and the risks of re-identifying consumer data, especially as the number of data points collected about a given person continues to increase.

Box 4.9: Risks of data breaches and data re-identification

Data breaches

As consumer data is shared more and more frequently, the risks of a data breach increase. The lack of clarity and broad discretions and consents in privacy policies may also lead to low consumer awareness of the underlying risks of joining a loyalty scheme, such as data breaches of either the scheme or the partners to which consumer data is disclosed.

The costs of a data breach to consumers include exposure to cybercrime, which may result in financial detriments, such as those associated with identity fraud and scams, as well as non-financial detriments, such as harm to health and safety and reputational injury.[268]

While there have been no breaches of loyalty scheme data notified to the OAIC to date[269], data breaches have occurred in other jurisdictions. For example, in 2018 the data of 500 million guests of Starwood Hotels (now Marriott International) was stolen in one of the largest reported data breaches in corporate history.[270] This data breach exposed personal information including the passport numbers and credit card details of hotel guests. This data breach also illustrates the value of the types of consumer data held by loyalty schemes to criminals.

Data re-identification

The risk that datasets can be re-identified increases as they are combined and data analytics technologies become more advanced. Research has demonstrated that de-identified data can be re-identified. The ACCC also notes that the sensitivity of consumer data may increase when it is combined with multiple datasets.[271] For example, in 2016, the Department of Health released a de-identified dataset that was later found to be re-identifiable by a University of Melbourne research team through linking known personal information, such as year of birth and known medical procedures.[272]

Submissions on emerging risks and consumer detriment

In response to the draft report, American Express submitted that the draft report did not appear to identify instances of harm or detriment to justify the recommendations for changes applying to them.[273] Submissions in response to the draft report raised a number of emerging risks and consumer detriment as relevant to loyalty schemes, including in relation to:

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268 MK Ohlhausen (speech), Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases, Federal Trade Commission (US), 19 September 2017, pp. 4–8.

269 The ACCC notes that in 2015 Woolworths unintentionally emailed eVoucher details to 400 customers; however, this was not an issue associated with its loyalty scheme. See also OAIC, Woolworths data breach – finalisation of enquiries, 21 July 2015, viewed 30 July 2019.

270 H Kuchler, N Rovnick and C Hodgson, 'Marriott breach potentially exposed data of 500m guests', *Financial Times*, 1 December 2018, viewed 19 July 2019.

271 A Acquisti, L Wagman and C Taylor, 'The economics of privacy', *Journal of Economic Literature*, vol. 54, no. 2, 2016. See also ACCC, Digital Platforms Inquiry final report, June 2019, p. 411.

272 OAIC, Annual report 2017–18, p. 63.

273 American Express submission, October 2019, p. 2.

- particular risks to vulnerable consumers, including children and people experiencing physical or mental health issues
- prohibitions on certain types of data collection, use and disclosure
- future risks.

Vulnerable consumers

The Alliance for Gambling Reform (the AGR) submitted that the ACCC should be guided by the principle that vulnerable people, particularly those experiencing gambling or alcohol harm, should not be exposed to the marketing of dangerous and addictive products.[274] The AGR and the Foundation for Alcohol Research and Education (the FARE) also submitted that particular care should be taken with the collection and use of sensitive and potentially exploitative data, such as data that points to dependency or mental health concerns.[275]

FARE submitted that consumers should have control over the extent to which they are exposed to the marketing of dangerous and addictive products, particularly those vulnerable to harm, whereas the AGR submitted that loyalty programs should be prohibited for products that incentivise harmful consumer behaviours.

Children and young people

The OAIC submitted that the ACCC's Digital Platforms Inquiry final report recommended additional protections for vulnerable groups, including children, given the substantial power imbalances and information asymmetries which exist between those groups and digital platforms.[276] The OAIC noted the increasing prevalence of loyalty schemes across the retail and entertainment sectors.

The AGR submitted the ACCC should be guided by the principle that children should not be tracked, surveilled and monetised, nor should their data be collected, disclosed or used for any profiling or marketing purposes.[277] FARE also submitted that children and young people should not be under surveillance, tracked and monetised, and nor should their data be collected, disclosed and used for any profiling or marketing purposes.[278]

FARE also expressed concerns around loyalty schemes deliberately or inadvertently targeting vulnerable people with alcohol advertising, and recommended that children under 18 should not be enrolled in loyalty schemes and their data should not be collected.[279] Mr Peter Kovesi submitted consideration should be given to the implications for consumers under 18, and that loyalty schemes should not be allowed to enrol children.[280]

Prohibitions on certain types of data collection, use and disclosure

The OAIC submitted that it is also important to ensure that consent is used to support real choice and control. This may require consideration of the need to constrain certain data or business practices which are contrary to consumers' expectations in relation to privacy. The OAIC noted that individuals are not always well placed to assess the risks and benefits of providing their personal information.[281]

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[274] AGR submission, October 2019, pp. 1–2.

[275] AGR submission, October 2019, pp. 1–2; FARE submission, October 2019, p. 1.

[276] OAIC submission, October 2019, p. 9.

[277] AGR submission, October 2019, pp. 1–2.

[278] FARE submission, October 2019, p. 1.

[279] ibid, pp. 2–5.

[280] Peter Kovesi submission, October 2019, p. 1.

[281] OAIC submission, October 2019, p. 10, referring to Office of the Privacy Commissioner of Canada, Consent and privacy: A discussion paper exploring potential enhancements to consent under the Personal Information Protection and Electronic Documents Act, May 2016.

FARE submitted there should be a blanket prohibition on the use of certain types of data, such as those that can reveal vulnerabilities such as mental health issues or dependency issues.[282]

Future risks

The APF submitted that the collection of data poses a substantial risk for the person who is the subject of the information as there is a potential long term risk that is difficult to assess and understand, particularly in terms of the potential future risk of data security threats and the potential for data misuse as technologies expand.[283]

Salinger Privacy's submission noted that the privacy of non-participants can be affected, particularly through the way algorithms work. Salinger Privacy submitted that as targeted advertising is based on data about classes of people with shared characteristics everyone with those characteristics is affected by the decision-making process of the underlying algorithm—even those that do not participate or who have not consented to the use of their data.[284] Salinger Privacy submitted that the two main weaknesses of Australia's current system of privacy protection for individuals are assumptions that privacy harms can be avoided through consumer choice and that harms can only occur if an individual is identifiable.[285]

Salinger Privacy argued that companies can hurt someone without knowing who they are and without personal information being used, by disambiguating them from the crowd through their attributes.[286] Salinger Privacy noted a recent research project where Facebook and Cornell University manipulated the news feeds of 700,000 Facebook users to trigger emotional outcomes, where the subjects were not aware they were part of a research project. Salinger Privacy also submitted such practices may be an additional challenge for those who are already socially or economically disadvantaged.[287]

ACCC view on emerging risks and consumer detriment

The ACCC recognises the risks and potential consumer detriment associated with problematic data practices. These issues affect all industries that collect, use and disclose personal information.

The ACCC understands that many loyalty schemes specifically permit children to join, including Qantas Frequent Flyer[288] and Flybuys.[289] It is likely that children signing up for these schemes are likely to lack the capacity to understand how their personal information is collected, used and disclosed. The ACCC outlined in its Digital Platforms Inquiry that consents to collect the personal information of children by APP entities should be obtained from the child's guardian. This is outlined in the reasoning behind Recommendation 16(c) from the ACCC's Digital Platforms Inquiry.[290] In addition, Recommendation 16(b) from the ACCC's Digital Platforms Inquiry recommended that where the personal information of children is collected, the notice should be written at a level that can be readily understood by the minimum age of the permitted user. [291]

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282 FARE submission, October 2019, p. 2.

283 APF submission, October 2019, pp. 2–3.

284 Salinger Privacy submission, October 2019, p. 4.

285 ibid, p. 5.

286 ibid.

287 ibid. p. 7.

288 Qantas, Qantas Frequent Flyer Terms and Conditions, June 2018, cl. 13.2.6. This term appears to contemplate that a Member may be under 15 years.

289 Flybuys, Terms and Conditions, cl. 1. This term states a Member is 16 years or older.

290 ACCC, Digital Platforms Inquiry final report, p. 35.

291 ibid.

The ACCC notes further that, in order to help businesses address some of these issues, the OECD has prepared a *Good Practice Guide on Consumer Data*.[292] A summary of the key business tips are provided for in box 4.10.

Box 4.10: Summary of key business tips from the OECD's *Good Practice Guide on Consumer Data*

Deceptive representations about consumer data practices

- Be transparent about your data practices.
- Honour the promises you make to consumers about how you collect, use, and secure their data, and respect their privacy choices.
- Make sure any claims about privacy and data security practices and commitments are accurate and truthful.

Misrepresentations by omission

- Tell consumers the full story about how their data will be collected and handled.
- Make it easy for consumers to find and use the privacy mechanisms you offer.
- Do not bury important information in links to privacy policies or terms and conditions.
- Do not use hard-to-understand legal terms or jargon to obscure your practices.

Unfair consumer data practices

- Treat consumers and their data in accord with fair business practices and consistent with their privacy choices.
- Do not share consumer data with third parties or others that may use it for fraudulent or deceptive purposes.
- Take care when sharing data to prevent others from using that data to target and prey on vulnerable consumers.

4.8. Conclusions on loyalty schemes' data practices

The ACCC considers that there are a number of factors around the terms and conditions and privacy policies of loyalty schemes that prevent consumers from making informed choices that align with their privacy and data collection preferences. Consistent with findings made in the ACCC's Digital Platforms Inquiry[293], these factors include an imbalance of bargaining power, and significant information asymmetries that exist between loyalty schemes and consumers. These are primarily seen in the broad consents that loyalty schemes seek from consumers, take-it-or-leave-it terms about the collection, use and disclosure of their data, and the vague disclosures loyalty schemes make to consumers about how their data will be used and with which entities it will be shared. Consumers also have limited capacity to control how loyalty schemes and third parties use their data, and limited meaningful ways to opt out of targeted online advertising served by third parties on behalf of loyalty schemes. Where some options have been provided to opt-out, it is often unclear how these work and what their limitations are.

Loyalty schemes' data collection and analytic capabilities will continue to expand. The avenues for loyalty schemes to collect data about consumers already encompass a wide range of sources from the joining process, to ongoing engagement, transaction data, apps, social media and other public sources, and data held by data brokers and data-sharing

[292] OECD, Good Practice Guide on Consumer Data, September 2019.

[293] ACCC, *Digital Platforms Inquiry final report*, June 2019, chapter 7.

platforms. Loyalty schemes have an incentive to continue to collect and analyse this data because of its value to them. A key value of the data is to be able to grow sales through targeted advertising and personalised offers to retain existing customers and draw in new ones. Such uses of consumer data have the potential to significantly reduce the costs of promotional activities for loyalty schemes. The ability to directly monetise consumers' data is also a growing area of revenue generation for loyalty schemes. This is achieved by generating consumer insight reports for third parties and advertising to their membership on behalf of third parties.

Many consumers continue to be concerned about the way their data is collected, used and shared, and whether it is being used responsibly. Most consumers are wary of their data being shared with third parties. Further, analysis of loyalty schemes' terms and conditions and privacy policies reveal that while there is some disclosure in privacy policies about the sharing of consumer data with third parties, they are opaque when it comes to understanding what data is being shared and with which entities specifically. Ensuring that consumers can make meaningful choices around how their data is handled is one way to remedy the power imbalances, information asymmetries and behavioural biases identified in this chapter, and to better equip consumers to participate fully in the digital economy.

The ACCC notes it has undertaken enforcement action in relation to alleged misleading and deceptive conduct or misleading representations made by entities engaged in the digital economy. In particular, in relation to HealthEngine's alleged sharing of consumer data without adequate disclosure to consumers and Google's alleged representations around the data it collects, keeps and uses.[294] These proceedings are being defended and are currently before the Court. The ACCC will continue to consider whether any other conduct of entities engaged in the digital economy raises concerns under the CCA and whether it is appropriate for the ACCC to take enforcement action.

The ACCC is concerned about a range of data practices of loyalty schemes. In particular, the ACCC has concerns about loyalty schemes collecting, using and disclosing consumer data in ways that do not meet consumers' preferences. This includes loyalty schemes engaging in the following practices:

- seeking broad consents from and making vague disclosures to consumers about the collection, use and disclosure of their data
- providing consumers with limited insight and control over the sharing of their data with unknown third parties
- providing a limited ability for consumers to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes.

[294] ACCC, HealthEngine in court for allegedly misusing patient data and manipulating reviews, 8 August 2019; ACCC, Google allegedly misled consumers on collection and use of location data, 29 October 2019.

4.9. Recommendations for change

4.9.1. Improving the data practices of loyalty schemes

In response to the draft report, submissions from the AGR[295], American Express[296], the APF[297], the ADMA[298], the FARE[299], Finder.com.au[300], the OAIC[301], Qantas[302], Virgin Australia[303], Woolworths[304], and Professor Allan Fels and Professor David Cousins (joint submission)[305], were broadly supportive or welcoming of draft recommendation 3. It was also supported by some individuals who made submissions.[306]

The FARE noted concern that this recommendation would only encourage loyalty schemes to improve their data practices, and instead proposed an opt-in arrangement and a blanket prohibition on the use of certain types of data, such as those that can reveal vulnerabilities including mental health conditions or dependency issues.[307]

The OAIC submitted that it supports recommendations to enhance the way in which personal information is collected, used and disclosed by APP entities to provide consumers with greater choice, transparency and control over how their personal information is used by loyalty schemes.[308] The OAIC also noted a number of steps loyalty schemes could take to improve their data practices, including[309]:

- mechanisms to enhance the specificity of consent, such as graduated[310] or tiered consent[311]
- adopting the definition of 'personal information' as it is defined in the Privacy Act consistently across privacy policies
- the timing of privacy notices can occur dynamically to ensure that information is provided to individuals at the right time and in a way that is easy to read and understand in context
- point in time notifications specific to interactions with customers
- undertaking a privacy impact assessment to map customer data flows and privacy risks that may emerge at various stages of collection, use and disclosure of personal information.

The OAIC also noted the resources it has available to assist loyalty schemes in reviewing their data practices, including its published guidance in relation to conducting privacy impact

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295 AGR submission, October 2019, p. 1.

296 American Express submission, October 2019, p. 2.

297 APF submission, October 2019, p. 4.

298 ADMA submission, October 2019, p. 5.

299 FARE submission, October 2019, p. 2.

300 Finder.com.au submission, October 2019, p. 2.

301 OAIC submission, October 2019, p. 4.

302 Qantas submission, October 2019, p. 4.

303 Virgin Australia submission, October 2019, p. 5.

304 Woolworths submission, October 2019, p. 3.

305 Allan Fels and David Cousins submission, October 2019, p. 1.

306 Birute Don submission, October 2019, p. 1; Leon Loganathan submission, October 2019, p. 1.

307 FARE submission, October 2019, p. 2.

308 OAIC submission, October 2019, p. 4.

309 ibid, pp. 4–9.

310 Where an individual can give consent to different uses of their data throughout their relationship with a service provider.

311 Where an individual may consent to disclosing increasing amounts of personal information in exchange for different products or levels of services.

assessments,[312] data analytics and the Australian Privacy Principles,[313] Australian Privacy Principles guidelines,[314] and developing an APP privacy policy.[315]

While Woolworths broadly supported Draft Recommendation 3, Woolworths specifically opposed ending the practice of linking customers' payment cards to their profile, and submitted that doing so may 'disadvantage' members through receiving fewer targeted offers (as discussed in section 4.4.4).[316] The ACCC notes its earlier observation that this practice is unlikely to be consistent with the preferences of many consumers.

Loyalty Pacific submitted it may be premature or impractical for loyalty schemes to implement all of the ACCC's substantive recommendations (particularly those that may require costly re-architecting of key systems) and communicate such changes to members as the outcome of proposed regulatory changes may not be known for some time.[317]

ACCC view on improving the data practices of loyalty schemes

The ACCC notes submissions from some loyalty schemes following the draft report to the effect they are implementing changes to their data practices. However, as outlined in this chapter, concerns remain.

The ACCC recommends that loyalty schemes should take steps to address the concerns raised by the ACCC to improve the transparency of their data practices and the ability of consumers to control how their data is collected, used and disclosed. Loyalty schemes should regularly review the materials they provide to consumers to ensure they comply not only with the Privacy Act, but their obligations under the consumer law. Loyalty schemes should also ensure their communications to consumers and data handling practices are in line with consumer expectations.

The ACCC is of the view that implementing the steps in Recommendation 4 would improve consumer welfare. The ACCC notes that Recommendation 4 has not changed significantly from the draft report.

Recommendation 4: Improve the data practices of loyalty schemes

Loyalty schemes need to review their approach to presenting consumers with information about how they handle consumer data and provide consumers with meaningful control over their data.

Privacy policies of the customer loyalty schemes examined in this report are opaque and consumers are often unable to make informed choices about, and have limited control over, the collection, use and disclosure of their data.

Loyalty schemes should continue to take steps to address a number of the ACCC's concerns, including by:

- reviewing their clickwrap agreements for unfair contract terms, including by assessing the potential consumer detriment of unilateral variation terms
- improving the clarity, accessibility, navigability and readability of privacy policies, including by standardising definitions to be consistent with those in the Privacy Act

[312] OAIC, Guide to undertaking privacy impact assessments, May 2014.

[313] OAIC, Guide to data analytics and the Australian Privacy Principles, March 2018.

[314] OAIC, Australian Privacy Principles guidelines, July 2019.

[315] OAIC, Guide to developing an APP privacy policy, May 2014.

[316] Woolworths submission, October 2019, pp. 3–4.

[317] Loyalty Pacific submission, October 2019, p. 5.

- minimising information overload for consumers by prominently presenting relevant aspects of their terms, conditions and privacy policies to consumers during key interactions
- outlining clearly with which entities consumer data is being shared and for what purposes, and drawing to consumers' attention how their data is being handled (including, for example, by providing a prominent notice during relevant interactions with customers)
- disclosing to consumers the sources of third party advertising, the sources of the consumer data used to inform that advertising, and the channels through which they may receive targeted advertising and how their consumer data may be used to generate leads (including, for example, via a regularly updated online notice)
- providing consumers of loyalty schemes with more meaningful controls over the collection, use and disclosure of their data which respond to consumer demands to align the data practices of loyalty schemes with the data preferences of consumers (including, for example, pre-selected and meaningful opt-outs for targeted advertising)
- where there are limitations to the controls (e.g. in relation to collection, use or disclosure settings such as opt-outs) that currently exist these should be made clear to consumers.

4.9.2. Strengthening protections in the Privacy Act and broader reform of Australian privacy law

In response to the draft report, submissions from the AGR[318], the APF[319], Deloitte[320], the FARE[321], Finder.com.au[322], the OAIC[323], and Woolworths[324], broadly supported or welcomed draft recommendation 4. It was also supported by individuals who made submissions.[325] American Express submitted it supports greater transparency around data practices to help customers make better decisions in relation to their data.[326]

The APF strongly supported this recommendation, and reiterated its position as made to the ACCC's Digital Platforms Inquiry, stating that the measures need to go further.[327] These measures include prohibiting the sharing of personal information with a third party as an unfair term, that sharing with third parties should only be permitted if separate and informed consent is obtained on a different day to making the agreement, and if data is to be shared, the privacy policy must set out exactly how the data is to be shared, with whom, and where, in specific detail. The APF also recommended the ACCC and OAIC should regularly audit the conduct of businesses to monitor how data is shared and monetised. One consumer submitted that data should be collected and used on an opt-in basis.[328]

The ADMA submitted that it accepted the draft report's conclusion that improvements in data practices are needed in some areas, but disagreed with draft recommendation 4 regarding the need for consumer and privacy law reform.[329] The ADMA submitted that the existing principles-based APPs remain suitable to address the issues raised in the draft report.

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318 AGR submission, October 2019, p. 1.

319 APF submission, October 2019, pp. 5–9.

320 Deloitte submission, October 2019, p. 11.

321 FARE submission, October 2019, p. 2.

322 Finder.com.au submission, October 2019, p. 3.

323 OAIC submission, October 2019, pp. 4, 9–12.

324 Woolworths submission, October 2019, pp. 4–7.

325 Birute Don submission, October 2019, p. 1; Leon Loganathan submission, October 2019, p. 1.

326 American Express submission, October 2019, p. 2

327 APF submission, October 2019, pp. 5–9.

328 Merzi [surname removed] submission, October 2019, p. 3.

329 ADMA submission, October 2019, pp. 2, 6.

Deloitte submitted that it welcomed the proposed reforms that will increase transparency, promote privacy and foster trust between consumers and loyalty schemes. Deloitte also submitted that these proposed reforms would have benefits for consumers and loyalty schemes, that consumers are prepared for greater individual rights and privacy protections, re-defining personal information may future-proof loyalty schemes, and that broader reform of Australia's privacy regime would align with global trends.[330]

The OAIC submitted that it supports recommended reforms to the Privacy Act made in the ACCC's Digital Platforms Inquiry, designed to increase transparency, choice and control over the handling of personal information and ensure that Australia's regulatory framework remains fit for purpose in the digital age.[331] The OAIC also provided a number of specific comments on each aspect of the recommendation, which were consistent with its submission in response to the Digital Platforms Inquiry final report.[332]

Woolworths broadly supported these recommendations.[333] However, Woolworths submitted it had concerns in relation to requiring that consents are required whenever personal information is collected, used or disclosed by an entity subject to the Privacy Act, and considered that where businesses use personal information in accordance with legitimate interests it should be excluded from the general requirement for consent. Woolworths also noted that personal information necessary for the performance of a consumer contract should be excluded from the general obligation to obtain consent. Woolworths did not support introducing direct rights for individuals to bring actions before the courts under the Privacy Act on the basis that litigation may be disproportionate to the outcomes.

Qantas submitted that these recommended legislative changes would require extensive review and consultation to ensure that any laws enacted are necessary to meet the identified need or deficiency and that businesses are able to comply.[334] Loyalty Pacific opposed Draft Recommendation 4 on the basis that it has the potential to have a disproportionate impact on the loyalty programs, with only limited benefits for consumers, citing the provision of granular and widespread opt-outs as an example.[335]

ACCC view on strengthening protections in the Privacy Act and broader reform of Australian privacy law

The issues of concern identified in this report have direct parallels with those identified in the ACCC's Digital Platforms Inquiry. These include concerns about:

- insufficient transparency and meaningful consumer control over the collection, use and disclosure of consumer data
- a lack of informed and genuine choice for consumers engaging in the digital economy
- a lack of consumer protection and effective deterrence under existing laws governing data collection.

To remedy these issues, the ACCC has made a number of economy-wide recommendations in its Digital Platforms Inquiry about privacy law. The ACCC is of the view that the findings in this report reinforce the ACCC's findings from our Digital Platforms Inquiry, and further support our recommendations for economy-wide changes in relation to privacy law. A summary of these recommendations is provided below.

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330 Deloitte submission, October 2019, pp. 6–11.

331 OAIC submission, October 2019, p. 4.

332 ibid, pp. 9–12.

333 Woolworths submission, October 2019, pp. 4–7.

334 Qantas submission, October 2019, pp. 32–33.

335 Loyalty Pacific submission, October 2019, pp. 6–7.

The ACCC notes the submissions of a number of parties that such changes warrant careful consideration. To this extent the ACCC notes that the consideration of these recommendations is presently before the Australian Government as part of its consultation on the Digital Platforms Inquiry Final Report.

Recommendation 5: Strengthen protections in the Privacy Act and broader reform of Australian privacy law

The ACCC's findings in this report reinforce the Digital Platforms Inquiry Final Report's recommendations for privacy law reform.[336]

Consistent with the *Digital Platforms Inquiry Final Report's* recommendations, the ACCC recommends strengthening the Privacy Act by:

- updating the definition of 'personal information' in line with current and likely future technological developments to capture any technical data relating to an identifiable individual
- strengthening notification requirements to ensure that the collection of consumers' personal information directly or by a third party is accompanied by a notice of the collection that is concise, intelligible and easily accessible, written in clear and plain language, provided free of charge, and accompanied by appropriate measures to reduce the information burden on consumers
- strengthening consent requirements to require that consents are freely given, specific, unambiguous and informed, and that any settings for additional data collection must be preselected to 'off'
- ensuring that consents are required whenever personal information is collected, used or disclosed by an entity subject to the Privacy Act, unless the personal information is necessary to perform a contract to which a consumer is a party, required under law, or otherwise necessary in the public interest
- requiring entities subject to the Privacy Act to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, except in certain circumstances
- introducing direct rights for individuals to bring actions or class actions before the courts to seek compensation for an interference with their privacy under the Privacy Act.

As well as these recommendations for targeted amendments to the Privacy Act, the ACCC is also recommending broader reform of the Australian privacy regime to maintain effective protection of consumers' personal information in the longer term. This includes consideration of the current objectives and scope of the Privacy Act, and the introduction of a statutory tort for serious invasions of privacy as recommended by the Australian Law Reform Commission.

The relevant recommendations as proposed in the ACCC's Digital Platforms Inquiry are reproduced in full in **appendix F**.

The ACCC notes that several submissions also proposed that the ACCC make additional recommendations more broadly in relation to data practices as they apply across the economy. However the ACCC views that given the remit of this self-initiated review, such issues were outside of the scope of this report.[337] Further, as noted above, the Government

[336] ACCC, *Digital Platforms Inquiry final report*, June 2019, Recommendations 16, 17 and 19.

[337] For example: FARE submission, October 2019, pp. 3, 6; OAIC submission, October 2019, pp. 9–12; Salinger Privacy submission, October 2019.

is currently considering recommendations from the ACCC's Digital Platforms Inquiry, including those reiterated in this report, in relation to certain economy-wide changes to consumer and privacy laws. The additional issues and proposed recommendations raised by stakeholders would be relevantly taken into account as part of the Government's broader consideration of potential changes to consumer and privacy laws.

4.9.3. Prohibition against unfair contract terms and a prohibition against certain unfair trading practices

Further, chapter 3 of this report discusses the benefit of certain changes to consumer law as recommended by the ACCC's Digital Platforms Inquiry. These include a prohibition against unfair contract terms and a prohibition against certain unfair trading practices. Such reforms would equally apply to addressing certain conduct related to the data practices of loyalty schemes. These include practices relating to:

- loyalty schemes collecting and/or disclosing consumer data without express informed consent
- loyalty schemes inducing consumer consent or agreement to data collection and use by relying on long and complex contracts, or all or nothing click wrap consents, and providing insufficient time or information that would enable consumers to properly consider the contract terms.

5. Competition issues and customer loyalty schemes

Key points

- Loyalty schemes can have pro-competitive effects and intensify competition between rivals leading to competing loyalty discounts and lower prices for consumers. Loyalty schemes can also reduce the flexibility of consumers' buying patterns and responsiveness to competing offers, which may reduce competition.
- The ACCC considers that loyalty schemes have the potential to raise competition concerns. In particular, the prevalence of loyalty schemes in many concentrated markets in Australia raises potential risks to competition. The barriers to competition arising from large national coalition loyalty schemes may be particularly higher for smaller, regional businesses.
- Loyalty schemes may be harmful to competition when they 'lock up' customers and introduce switching costs that increase barriers to entry and expansion for rival firms. If barriers are enduring and induce exit or deter entry, consumers are likely to be worse off.
- Loyalty schemes may also reduce price transparency in a market where it is difficult to compare the value of loyalty scheme rewards with competing price-based offers. This can result in consumers engaging in less frequent comparisons and making less-informed purchasing decisions.
- The ACCC may be concerned by risks to competition when a dominant firm exercises a loyalty scheme that has market saturation and has strong customer lock-in effects. In these circumstances, anti-competitive foreclosure effects can occur not only in the primary market in which the loyalty scheme predominantly operates (for example, domestic air travel), but may also be extended to related markets through exclusive partnerships with firms supplying complementary products (for example, domestic airlines and car rental services).
- Frequent flyer schemes have the potential to result in significant customer lock-in effects, as has occurred overseas. To date, Virgin Australia has succeeded in growing its loyalty scheme and market position. It is not clear that customer lock-in effects and switching costs associated with Qantas Frequent Flyer have resulted in major barriers in this case.
- In the case of supermarket loyalty schemes, while customer loyalty in this sector is limited, there is the potential for stronger exclusivity effects to occur in future as the major supermarkets seek to leverage their growing digital and analytical capabilities using extensive customer data.
- Firms' increasing collection and use of data for analytical purposes also poses a risk to competition. Firms with large membership bases may be able to use collected data to raise barriers to entry and expansion of rivals, further entrenching their market position and creating or increasing their market power. This is a particular concern where data assets relating to consumers in specific sectors of the economy may be locked up among a small number of firms.
- The ACCC will consider the competitive effects of loyalty schemes on a case-by-case basis in enforcement investigations; merger and authorisation decisions, including with respect to analysing any substantial market power held by a firm; and the height of barriers to entry in a market in competition law matters.

5.1. Objectives of loyalty schemes from a competition perspective

Sellers have strong economic incentives to lock in consumers.[338] Loyalty schemes are a marketing device with the primary objective of attracting and retaining customers to maintain and grow market share.

Through relationship building, loyalty schemes seek to encourage customers to purchase frequently from a specific seller, increase purchase amounts over time and increase share of wallet at the focal provider/brand.[339] In response to the draft report, Qantas submitted that consumers obtain financial and non-financial benefits from loyalty scheme participation, and that, from a consumer perspective, the opportunity to participate in a coalition scheme offers suppliers the ability to differentiate by offering points earning and redemption opportunities and also targeted promotional offers.[340]

Loyalty schemes seek to achieve their objective of gaining a long-term commercial advantage over rivals in a variety of ways:

- **consolidation of purchases:** Loyalty schemes that award points typically incentivise customers to consolidate their purchases with a single seller to accumulate the largest points balance possible to achieve a reward threshold. This is particularly the case for loyalty schemes that award points using a reward structure, where greater levels of expenditure earn proportionately greater rewards[341]
- **prompting additional purchases:** Loyalty schemes can create incremental demand and prompt additional, or an acceleration of, purchases. Multi-tiered loyalty schemes can have such an effect where each membership level or status tier—for example, silver, gold, platinum—brings additional benefits. Customers on the cusp of attaining a higher level, or in danger of slipping to a lower one, may accelerate or make additional purchases to secure the benefits of the relevant tier[342]
- **resistance to competing offers:** Loyalty schemes can affect consumer responsiveness to competitor offerings, potentially making consumers immune to competitive offers.[343] Customers can become more responsive to promotions in the form of reward points than to price discounts of the same monetary value. By introducing reward points or other non-monetary benefits such as increased service levels when attaining a higher status tier, it can become difficult to compare the value of a reward promotion with a competing price discount. This can reduce customers' sensitivity to competing price-based offers or otherwise result in them making less frequent price comparisons
- **raising customer acquisition costs:** Where customers have accumulated interests in an established loyalty scheme, this can make it difficult for competitors to alter the purchasing behaviour and entice them to switch.[344] The established loyalty scheme represents a sunk cost that a prospective entrant has to pay to compete with an

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[338] Michael Porter has previously detailed, in outlining the five forces of commercial success for firms, that curbing buyer power by creating strong customer loyalty is a method firms use to reduce competition within an industry. See M Porter, 'How competitive forces shape strategy', *Harvard Business Review*, 1979.

[339] M Stone, D Bearman, SA Butscher, D Gilbert, P Crick and T Moffett, 'The effect of retail customer loyalty schemes–detailed measurement or transforming marketing?', *Journal of Targeting, Measurement and Analysis for Marketing*, vol. 12, 2004, pp. 305–318.

[340] Qantas submission, October 2019, p. 32.

[341] J Nunes and X Dreze, 'Your loyalty program is betraying you', *Harvard Business Review*, April 2006, p. 4.

[342] ibid.

[343] ibid, p. 3; J Zhang and E Breugelmans, 'The impact of an item-based loyalty program on consumer purchase behavior', *Journal of Marketing Research*, vol. 49, no. 1, 2012, p. 63.

[344] Y Liu, 'The long-term impact of loyalty programs on consumer purchase behavior and loyalty', *Journal of Marketing*, vol. 71, no. 4, 2007, p. 20.

incumbent.[345] This can raise customer acquisition costs for rival firms and may provide the established firm with a cost advantage over prospective entrants

- **insight into customer behaviours:** Loyalty schemes can provide useful data about customers that can produce insights about purchasing behaviour and allow the seller to target and tailor promotions to individual customers.[346]

Firms invest in loyalty schemes with the aim of gaining a competitive advantage over rivals by influencing customer behaviour to encourage repeat purchases and introduce customer resistance to competing offers or products. In this sense, loyalty schemes have a dual strategy—an offensive strategy of acquiring customers as well as a defensive strategy of retaining customers.

While loyalty schemes aim to steer purchasers to a specific seller, in doing so they can also create barriers to exit and keep customers from defecting to rivals.[347]

5.2. Potential impacts of loyalty schemes on competition

Loyalty schemes can have pro-competitive effects, but they also have the potential to reduce the flexibility of consumers' buying patterns and responsiveness to competing offers, which may reduce competition. Where a loyalty scheme creates strong customer lock-in effects and introduces switching costs, it is likely to have the effect of raising barriers to entry and expansion for existing competitors and prospective entrants.

Potential anti-competitive effects arise where otherwise efficient rivals or prospective entrants are prevented or deterred from competing, resulting in an incumbent firm or firms facing less competition and having the ability to reduce offers or increase prices.

In a market where a loyalty scheme has the result of foreclosing competition on a sustained basis, increased prices or lower quality offerings are likely to transpire in the longer term relative to any discounts offered by the loyalty scheme.

The potential impacts of loyalty schemes on competition have been the subject of broad consideration by competition authorities overseas, typically in the context of 'loyalty, fidelity discounts and rebates' that encompass practices aimed at both consumers and businesses.

In 2002, the OECD Competition Committee debated loyalty and fidelity discounts and rebates. While policy differences existed between members of the Competition Committee, there was general agreement that[348]:

- loyalty schemes can involve complex effects on competition and may result in potentially significant pro-competitive and anti-competitive effects
- loyalty schemes are more likely to raise competition concerns when practised by firms that have substantial market power
- the competitive effects of a loyalty scheme are highly dependent on the specific features of the scheme and the relevant markets in which they are established, such that a case-by-case approach by competition authorities is warranted.

In 2009, the International Competition Network formed a working group to analyse a range of loyalty discounts and rebate practices[349]:

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[345] R Cairns and J Galbraith, 'Artificial compatibility, barriers to entry, and frequent-flyer programs', *Canadian Journal of Economics*, vol. 23, 1990, pp. 814–816.

[346] J Nunes and X Dreze, 'Your loyalty program is betraying you', *Harvard Business Review*, April 2006, p. 4.

[347] ibid, p. 3.

[348] OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002.

[349] International Competition Network, *Report on the analysis of loyalty discounts and rebates under unilateral conduct laws*, June 2009, p. 2.

> *Many agencies indicated that single-product loyalty discounts and rebates are considered a legitimate form of price competition and are generally pro-competitive. While loyalty discounts and rebates can create efficiencies and can benefit consumers through lower prices, there is also general agreement that when exercised by a dominant firm or firms with substantial market power, they have the potential to cause anticompetitive harm in certain circumstances.*

Pro-competitive effects of loyalty schemes typically result from the offering of discounts, which can then result in competitive responses from rivals in the form of competing discounts. This typically leads to lower prices, aligning prices with marginal costs, and an increase in consumer welfare.[350]

By encouraging customers to consolidate their purchases with a single seller, a focusing effect can arise whereby customers make less frequent price comparisons. This can alter the predominant mode of competition in a market from rivalry at the margin to competition for a customer's total or near total requirements.[351]

The main competition concern that arises with respect to loyalty schemes is the potential for anti-competitive foreclosure. Broadly, the concern is that certain loyalty schemes have the potential to 'lock up' such a significant customer base that this will reduce the competitive constraint that potential rivals can offer, induce their exit, or prevent the entry of new rivals.

Loyalty schemes can deter entry where prospective entrants conclude that it will be exceedingly difficult to capture an economically viable market share or minimum efficient scale. A prospective new entrant may reasonably consider entry into a market as unprofitable because of the presence of a successful loyalty scheme that has recruited a large proportion of the available customer base.[352] These issues may be heightened where a large national coalition loyalty scheme operates in concentrated primary or secondary markets alongside smaller firms potentially competing in those markets within a more limited geographical scope. Smaller, regional business may have their own loyalty schemes but are less likely to have the scale to attract coalition partners which may in turn hinder their ability to attract members and customers when competing against large-scale national competitors.

In analysing the potential for a loyalty scheme to have anti-competitive foreclosure effects, it is necessary to consider whether any market power is created or strengthened by the loyalty scheme and whether it is likely to be transitory or enduring in nature. Anti-competitive foreclosure is likely to occur in circumstances where[353]:

- existing rivals or new entrants are unable to match the ability of a loyalty scheme to compete for the total or near total requirements of a significant number of buyers leading to the exclusion or restriction of competitors, and
- once subject to less constraint by existing and potential competitors, the incumbent will find it profitable to raise its prices and, in response, firms will not likely enter, re-enter or expand their market shares.

As outlined in the following sections, loyalty schemes may be harmful to competition when they create significant customer lock-in effects and artificial switching costs resulting in persistent barriers to entry and expansion for rival firms.[354]

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350 OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002, pp. 26, 170–171.

351 ibid, pp. 19–20, 26.

352 European Competition Authorities, *Loyalty programmes in civil aviation: an overview of the competition issues concerning frequent flyer programmes, corporate discount schemes and travel agent commissions*, October 2005, p. 26

353 OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002, pp. 27–28.

354 ibid, p. 157.

5.2.1. Switching costs and the customer lock-in effect

Loyalty scheme rewards can raise switching costs for customers. Switching costs have a 'suction effect' on customer purchasing behaviour, funnelling purchases towards a single seller.

When a consumer has started to collect points with one provider, the problem they face is that switching to another provider may mean losing the points already collected with the first provider (in most schemes points expire after a set period of inactivity), or they will fail to accrue further points in that scheme. Similarly, when a consumer has achieved a certain status tier with one provider, switching to another provider may mean losing the benefits associated with that status tier (for example, lounge access, priority boarding and eligibility for upgrades). Customers of a loyalty scheme face a form of switching cost when they forego the opportunity to advance towards their habitual seller's rewards.[355]

Box 5.1: Loyalty scheme rewards and switching costs

As outlined in the Loyalty & Reward Co report[356], academic research on loyalty schemes suggests that rewards can make switching more difficult or costly[357]:

- Loyalty schemes lure consumers with different types of rewards, some of which can make exit costly.
- Rewards can be immediate or delayed. Where consumers benefit from an immediate reward, they are then typically free to buy from another seller. However, delayed rewards, such as points or miles, can trigger a lock-in issue.
- Once a consumer has started accumulating points with a provider, switching to a different one implies losing the endowed progress to redeem the first provider's reward (for example losing the miles to redeem a plane ticket). With delayed rewards exit is not free.
- When exit is too costly, there is a 'lock-in' problem. The costs of lock-in may be reduced competition in the market among incumbents, less dynamic markets, and risk of abuses.

If loyalty scheme rewards are based on thresholds of accumulated points, a 'points pressure mechanism' will encourage customers to increase their purchase frequencies or volume to obtain the reward—the closer the customer is to obtaining a reward or reaching a threshold or status tier, the more likely they are to make additional purchases to gain it.[358] In the case of status tiers, points pressure can arise for customers who are close to qualifying for a higher tier or a negative pressure for a customer that is close to being downgraded.[359]

Loyalty schemes can have an effect similar to exclusive dealing. While loyalty schemes aimed at consumers do not demand exclusivity—consumers can join several loyalty schemes and simultaneously use alternative offers—in practice, they can provide strong incentives for consumers to direct purchases towards a single firm. Notwithstanding that a loyalty scheme is strictly non-exclusive in its offer, depending on the strength of the effect on customer purchasing behaviour, similar results to exclusivity may arise.

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[355] OV Duque, 'The costs of loyalty. On loyalty rewards and consumer welfare', *Economic Analysis of Law Review*, vol. 8, no. 2, 2017, p. 447.

[356] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.3.

[357] OV Duque, 'The costs of loyalty. On loyalty rewards and consumer welfare', *Economic Analysis of Law Review*, vol. 8, no. 2, 2017, pp. 414, 416.

[358] M Dorotic, P Verhoef and T Bijmolt, 'Loyalty programmes: current knowledge and research directions', *International Journal of Management Reviews*, vol. 14, 2012, pp. 219, 225.

[359] X Dreze and J Nunes, 'Feeling superior: the impact of loyalty program structure on consumers' perceptions of status', *Journal of Consumer Research*, vol. 35, 2009, pp. 890–905.

As well as offering a compelling alternative product or service, competitors seeking to attract customers that are members of a rival's loyalty scheme may also need to compensate for the points/rewards that a customer would perceive to have lost by switching away from the incumbent. This may hinder an equally efficient competitor from competing.

In response to the draft report, Qantas submitted that loyalty schemes have features that reduce or eliminate switching costs, including that membership of a loyalty scheme:

- is voluntary and non-exclusive
- is not a requirement for purchasing goods or services
- offers members the ability to obtain benefits and rewards that they value in respect of purchases of goods and services that would have been made in any case
- is often provided free of charge to the consumer.[360]

Qantas also submitted that consumers are members of multiple loyalty schemes, which suggests they are complementary and that this demonstrates that consumers do not perceive switching costs as being high, and that loyalty schemes intensify competition between existing rivals.

The AFF submitted that loyalty schemes offer status matches as a way to remove the 'golden handcuffs', which incentivises flyers to switch.[361]

The extent to which a loyalty scheme is likely to have an anti-competitive effect in a market will depend on whether, and to what degree, it has such an effect on customer purchasing decisions that a significant number of consumers become effectively locked into making purchases from a single seller.

Competition authority interventions involving frequent flyer loyalty schemes

The customer lock-in effects of frequent flyer loyalty schemes have raised competition concerns for European competition authorities, particularly in Scandinavian countries.

Frequent flyer loyalty schemes in Sweden and Norway have been found to maintain market structures in civil aviation markets, creating obstacles to new entry.

The Swedish and Norwegian competition authorities intervened against the use of a frequent flyer loyalty scheme by a dominant airline because they believed that its use had strong customer lock-in effects that constituted a significant barrier to entry in domestic aviation markets (see box 5.2).

Box 5.2: Competition intervention against the EuroBonus frequent flyer loyalty scheme in Sweden and Norway

Sweden[362]

In Sweden, Scandinavian Airlines System (SAS) operated the EuroBonus frequent flyer loyalty scheme. SAS has generally held a strong position in the Swedish domestic civil aviation market with a market share of 80 per cent because of its earlier monopoly position.

[360] Qantas submission, October 2019, p. 30.

[361] Australian Frequent Flyer submission, October 2019, p. 6.

[362] Swedish Competition Authority, *There is no such thing as a free lounge—a report on frequent flyer programmes*, 2003, pp. 49, 73–75; OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002, p. 165; European Competition Authorities, *Loyalty programmes in civil aviation: an overview of the competition issues concerning frequent flyer programmes, corporate discount schemes and travel agent commissions*, October 2005.

In 1999, the Swedish Competition Authority found that SAS had abused its dominant position by operating its EuroBonus loyalty scheme on domestic routes. It deemed that in its capacity of dominant player, SAS made it difficult for other airlines to start up or maintain competitive domestic air services.

The Swedish Competition Authority's decision meant that SAS was no longer permitted to operate its frequent flyer loyalty scheme in such a way that points or the equivalent for the redemption of bonus awards could be earned on domestic flights.

SAS appealed to the Swedish Market Court. In 2001, the Market Court ordered SAS, on penalty of a fine, not to apply its EuroBonus loyalty scheme, or participate in schemes of a similar nature. The Market Court attached considerable importance to the structural state of the market for Swedish domestic air travel and the lack of adequate competitive conditions.

It concluded the EuroBonus loyalty scheme undoubtedly had a loyalty-inducing effect that restricted the possibilities of rivals outside the loyalty scheme attracting passengers to their services and made it more difficult for new entrants to become established. It found that conditions in the market were not conducive to the entry of new players and competition was restricted such that SAS's EuroBonus loyalty scheme could not be considered an acceptable competitive strategy.

The Market Court also noted that the application of the EuroBonus loyalty scheme had a price-raising effect although this could not be calculated in precise terms.

Norway[363]

SAS similarly operated the EuroBonus frequent flyer loyalty scheme in Norway. The market structure in Norway had comprised of two incumbents—SAS and Braathens—as well as a new entrant, Color Air, which offered a low-cost offering.

In 1999, Color Air filed for bankruptcy. The failed entry by Color Air was in part attributed to its inability to attract business travellers due to its lack of an attractive frequent flyer program that could compete with SAS's EuroBonus program.

By 2001, an almost bankrupt Braathens was allowed to merge with SAS under the failing firm defence. SAS returned to a monopoly position with an approximate 98 per cent market share in the Norwegian domestic civil aviation market.

In 2002, the Norwegian Competition Authority introduced a ban on earning frequent flyer points on any domestic routes in Norway for a period of five years. The main arguments for the negative effects of the EuroBonus frequent flyer loyalty scheme on competition were based on loyalty effects locking in customers and the barriers to entry for new competitors. The Norwegian Competition Authority viewed the intervention as an essential step towards re-opening the Norwegian civil aviation market for competition.

In 2003, shortly after the introduction of the ban on earning frequent flyer points, Norwegian Air Shuttle (NAS) entered on four domestic routes in Norway. According to NAS, the ban on EuroBonus was decisive for its entry into the Norwegian market.

In 2011, the Norwegian Competition Authority undertook an assessment to investigate whether there was a basis for a continued ban on earning frequent flyer points. It found that the loyalty-building effect of the frequent flyer program was still significant and continued to provide an incentive to collect all purchases from one airline. The Norwegian Competition Authority was concerned that competition could be weakened following a re-introduction of loyalty schemes in the Norwegian domestic airline sector as this would lead to business

[363] OECD, *Airline competition–note by Norway*, June 2014.

travellers choosing the airline with the most attractive loyalty scheme.

NAS gradually expanded into a nationwide network and its market share on domestic routes grew from 12 per cent in 2003 to 36 per cent in 2011. NAS is now one of Europe's leading low-cost airlines.

In 2013, the government removed the ban on frequent flyer programs on domestic air routes after reaching the view that competition in the domestic market was more robust than when the prohibition was introduced.

The German competition regulator, in connection with a merger clearance decision, imposed conditions on a dominant airline to open up its frequent flyer loyalty scheme to existing and future competitors on domestic routes. This commitment, alongside other measures, was aimed at allowing the entry of a new player and preventing further consolidation of the airline's dominant position on domestic routes (box 5.3).

Box 5.3: Conditions to open up the Miles & More frequent flyer loyalty scheme to existing and future competitors in Germany[364]

In 1997, the German competition regulator (the Bundeskartellamt) investigated Lufthansa's Miles & More frequent flyer loyalty scheme and concluded that it created excessively strong customer ties. Lufthansa was considered to have a dominant position at least in partial areas of domestic civil aviation routes. The proceedings were closed after Lufthansa opened up the Miles & More scheme to Eurowings, the competitor that had initiated the proceedings.

In 2000, the Bundeskartellamt was notified of the proposed merger between Lufthansa and Eurowings. The merger was cleared subject to a range of commitments, including the opening up of the Miles & More frequent flyer loyalty scheme to existing and future competitors on domestic routes. Other commitments involved the transfer of some domestic air services to a new operator and maintaining flight frequency and seating capacities on certain domestic routes.

By 2002, the general opening up of the Miles & More scheme was reported to have had positive effects with a new smaller competitor participating and a couple of regional carriers preparing to do so.

5.2.2. Reduced price transparency

Loyalty schemes can also have the effect of reducing price transparency in a market. This may occur where the loyalty scheme has a complicated reward structure or if it has the effect of consumers becoming increasingly sensitive to reward-based offers (and less sensitive to price-based offers). Where this occurs, depending on the degree of influence on a significant number of customers, there is potential for competing suppliers to have a reduced incentive to engage in price-based competition.[365]

Consumers experiencing difficulty in comparing products or services that meet their requirements is an undesirable outcome as it leads to less-informed purchasing decisions and inefficient outcomes in a market.

For a given product or service, the combination of a price-based offer with a reward benefit may increase difficulties in making meaningful comparisons with competing products and services that do not have such a reward benefit attached. Where a loyalty scheme reward provides a non-monetary benefit, this can exacerbate the difficulties in making meaningful

[364] OECD, *Loyalty and fidelity discounts and rebates*, 2002, p. 133; OECD, *Airline competition—note by Germany*, June 2014.

[365] ibid, p. 24.

comparisons. For example, frequent flyer loyalty schemes typically offer non-monetary rewards, such as the ability to achieve higher service levels (seat upgrades or achieving a superior membership status tier) which, from a value perspective, may be challenging to compare with a competing price-based offer. Where non-monetary rewards are a compelling aspect of a loyalty scheme, this can have the effect of reducing consumer sensitivities to price-based offers, which may restrict the ability of new entrants to compete.

Size heuristics can also add to the challenges in comparing the value of a loyalty scheme reward against competing offers. As detailed in chapter 2, box 2.5, size heuristics relates to the theory that consumers do not have the capacity and time to recognise and evaluate all the available information in a complex environment. Points-based loyalty schemes exploit size heuristics to make a reward appear of significant value (for example one million bonus points), which can overstate the value of the reward and add to the complexity of comparing prices.

Where a loyalty scheme reward relates to a product or service for which prices are already opaque or inherently complex—for example, because of myriad pricing structures or variables—the overlay of a loyalty scheme reward may further reduce price transparency, adding to existing obstacles for consumers to make informed switching decisions.

A reduction in price transparency can result in consumers engaging in less frequent comparisons with competing products and services, and being unaware of cheaper prices. This can increase the price differential required to entice customer switching and raise barriers to entry into the relevant market, particularly where customers have incomplete information or overestimate the value of the loyalty scheme reward.[366]

In certain markets, reduced price transparency can entrench established market structures by introducing customer resistance (buyer inertia) and decreasing competitors' chances of attracting customers away from the established firm.

5.3. Competitive effects of loyalty schemes in Australia

Consumer surveys broadly indicate that loyalty schemes have a significant degree of influence on consumer shopping behaviour in Australia, although other survey results also indicate that consumer satisfaction with loyalty schemes may be declining, which could reduce the extent of the customer lock-in effect for certain schemes. As detailed in the Loyalty & Reward Co report[367]:

- according to a survey by Mastercard in 2018, 22 per cent of Australian respondents stated that the loyalty scheme they consider most important to them has a significant influence on their shopping behaviour[368]
- a Nielsen survey in 2017 found that 57 per cent of Australians are more likely to return to a retailer if they have a loyalty scheme in place, and 48 per cent will spend more if they know they are going to be rewarded[369]
- Accenture released a report in 2017 stating that consumers are dissatisfied with loyalty schemes.[370] Accenture conducted a survey of more than 25 000 consumers globally. CMO, a market research firm, has analysed the Australian data and noted that half of

[366] ibid, p. 93.

[367] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.1.

[368] Mastercard, *Achieving advocacy and influence in a changing loyalty landscape: a Mastercard Asia Pacific study*, January 2018. The data is derived from a survey of 7000 respondents in the Asia-Pacific region, broken down by country.

[369] Nielsen, *Get with the program: card-carrying consumer perspectives on retail loyalty-program participation and perks*, November 2016, viewed 20 April 2019.

[370] Accenture, *Seeing beyond the illusion: it's time you invest more wisely*, 2017.

Australian consumers have switched brand or operators in the past year, while 79 per cent are retracting loyalty more quickly than they did three years ago.[371]

While firms develop loyalty schemes seeking to gain a competitive advantage over their rivals by introducing a point of differentiation, any competitive advantage enjoyed can be transitory as rival firms introduce their own loyalty schemes as a competitive response.

In Australia, as has occurred overseas, loyalty schemes are prevalent in a range of sectors where firms offer a relatively similar assortment of products and services. In many sectors, a number of competing loyalty schemes are offered by direct rivals, including by airlines, supermarkets, credit card, hotel and car rental providers.

In industries where loyalty schemes have market saturation and consumers hold multiple memberships with competing loyalty schemes, this may minimise their impact on competition between incumbents. However, market saturation of loyalty schemes in such industries can significantly raise barriers for new entrants.

Box 5.4: Loyalty schemes and market saturation effects

As outlined in the Loyalty & Reward Co report[372], academic research suggests that when all companies in an industry have loyalty schemes, the market is characterised by an absence of change of the competitive situation.[373]

In an environment where the duopolistic players have large loyalty schemes with high member engagement, the competitive tension between them may be somewhat neutralised, but the ability for smaller companies or new entrants without a well-established loyalty scheme to compete may be inhibited.

As discussed above, loyalty schemes can result in a combination of pro-competitive and anti-competitive effects. For instance, in a market where there is strong competitive tension between established rivals, loyalty schemes may further intensify competition between existing players, while also strengthening the position of incumbents as a result of customer lock-in effects, raising barriers for prospective entrants. In this case, the most detrimental impact of rival loyalty schemes will be to maintain the current market structure and heighten barriers to entry. Concurrently, loyalty schemes may continue to promote dynamic competition and provoke competitive responses between rival firms.

The following sections consider the competitive effects of the major coalition loyalty schemes in the markets in which they predominantly operate (primary markets) and related markets in which partners of major coalition loyalty schemes operate (secondary markets).

5.3.1. Competitive effects of loyalty schemes in primary markets

The ACCC has considered the potential competitive effects of the major coalition loyalty schemes in Australia offered by airlines and supermarkets. In conducting this high-level assessment, the ACCC has focused on the following factors:

- the potential market power or dominant position of a certain firm, having regard to industry shares, market concentration and loyalty scheme membership base

[371] CMO, 'Report: Australian consumers aren't happy with customer loyalty programs', 14 February 2017, viewed 13 June 2019.

[372] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.3.

[373] L Meyer-Waarden and C Benavent, 'The impact of loyalty programmes on repeat purchase behaviour', *Journal of Marketing Management*, vol. 22, 2006, pp. 61–88.

- the suction effect of the loyalty scheme, having regard to participation rates in loyalty schemes as a proportion of a firm's overall customer base and the degree of active participation by members
- barriers to entry and the extent to which the loyalty scheme creates switching costs and provides compelling incentives to consolidate purchases with the firm.

The ACCC recognises that while loyalty schemes may have the effect of raising barriers to entry, in many industries there will be other sources of entry barriers, which are independent of loyalty schemes. In analysing the competitive effects of loyalty schemes, the ACCC has focused on the extent to which loyalty schemes may heighten barriers to entry.

The ACCC has relied on a combination of public and confidential information in its assessment of the major coalition loyalty schemes, including information and data requested from major loyalty scheme operators. Because of the commercially sensitive nature of certain information, the assessment and findings detailed below are limited in some cases.

Airlines

Qantas and Virgin Australia are the two airline groups providing scheduled domestic air passenger transport services on a national basis. There are also a number of regional and charter service operators.

Qantas is Australia's largest domestic and international airline. In 2004, Qantas implemented a dual-brand strategy, launching Jetstar, a low-cost carrier. Virgin Australia started domestic operations in Australia in 2000 as a low-cost carrier and subsequently re-branded to a full-service airline, seeking to attract a broader cross-section of passengers than the traditional low-cost carrier model.[374] In particular, Virgin Australia has increasingly focused on capturing a greater share of high-value business domestic business travellers.[375] The Velocity Frequent Flyer scheme is a core strategy in Virgin Australia's focus on capturing a greater share of the lucrative business traveller sector.[376]

The domestic airline industry exhibits a high level of concentration—Qantas and Virgin Australia have a combined industry share of approximately 90 per cent.[377] This situation is not unique to Australia as the domestic air transport sector is highly concentrated in almost every country.[378]

Qantas established the Qantas Frequent Flyer loyalty scheme in 1987 and had a considerable first-mover advantage in signing up members. In 2005, Virgin Australia launched Velocity in direct competition with Qantas Frequent Flyer.

As detailed in Loyalty & Reward Co's report, the Qantas Frequent Flyer and Velocity coalition loyalty schemes have both evolved greatly over the past decade, enjoying significant growth in membership numbers, third party partnerships and profitability.[379]

Qantas holds a dominant position in Australia with an approximate 60 per cent domestic share. However, Qantas's domestic share has declined in the past five years, from 70 per cent in 2014 to just above 60 per cent in 2019, while Virgin Australia has steadily increased its position in recent years, from 22 per cent in 2015 to 30 per cent in 2019.[380] It

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374 ACCC, Virgin Australia Holdings Limited – proposed acquisition of 60% of Tiger Airways Australia Pty Ltd, Public Competition Assessment, July 2013.

375 IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, March 2019.

376 ibid.

377 ibid.

378 ibid.

379 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

380 IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, February 2014 and March 2019.

appears that Virgin Australia's domestic share gains are, in part, because of the success of Velocity over the same period.

Between 2016 and 2019, Velocity increased its loyalty scheme membership base from 6.9 to 9.8 million with an average annual growth rate of around 12.4 per cent.[381] Qantas Frequent Flyer has also grown its loyalty scheme membership base during this period from 11.4 to 12.9 million, achieving an average annual growth rate of around 4.5 per cent.

The ACCC has also considered the participation rate in Qantas Frequent Flyer and Velocity as a proportion of Qantas and Virgin Australia's overall customer base and the total number of 'active' members in each respective loyalty scheme. The definition of active members will vary between loyalty schemes but generally involves earning or redeeming points within a specified period of 18 to 24 months.

In industries where loyalty schemes have market saturation, many consumers will have memberships with alternative schemes. Australian airline loyalty schemes have an average of one Australian frequent flyer membership for each Australian over the age of 15.[382] Market research has indicated that Velocity has increased its membership base as a result of Qantas Frequent Flyer members signing up for Velocity as a second membership—it is estimated that in 2017, 34 per cent of members were part of both Qantas Frequent Flyer and Velocity.[383] As detailed in Loyalty & Reward Co's report, Virgin Australia re-designed Velocity in 2011, offering a status-match campaign that allowed Qantas Frequent Flyer members to claim the same status with Velocity—a strategy that aimed to neutralise switching costs created by status tiers.[384]

In response to the draft report, Qantas submitted that loyalty schemes have the potential to significantly enhance price competition between rivals where they provide consumers with another point of differentiation in assessing competitors' offerings.[385] Qantas further submitted that loyalty schemes are constantly required to demonstrate the benefits associated with ongoing membership and that there are many resources for consumers to compare and contrast the benefits of different loyalty schemes, including through information provided on their website and independent third party resources.

Virgin Australia submitted that the competition effects of loyalty schemes on primary markets should be considered on a case-by-case basis and should take into account the level of market power of participants within these markets.[386] Virgin Australia also submitted that the effect of Qantas Frequent Flyer is to create a high level of customer stickiness, increasing barriers to Virgin Australia's expansion into the business and corporate travel market and entrenching Qantas' position.

The ACCC considers that the Qantas Frequent Flyer loyalty scheme has the potential to have a significant impact on barriers to entry and expansion in the domestic airline industry in Australia, particularly for the high-value business traveller segment. Qantas continues to hold a leading market position in the domestic airline industry. As well as its first-mover advantage in launching Qantas Frequent Flyer, it also benefits from its established large-scale network, including extensive flight coverage and airport lounge availability. Industry reports identify Qantas as the dominant provider of domestic air services to the business traveller sector.[387]

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381 See chapter 2.

382 Venture Insights, 'Australian airline loyalty programs – reaching new heights', August 2017, viewed 13 June 2019.

383 ibid analysis based on Roy Morgan Research's Single Source survey.

384 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

385 Qantas submission, October 2019, p. 31.

386 Virgin Australia submission, October 2019, p. 20.

387 IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, March 2019.

Over a number of years, Virgin Australia has improved its overall industry position, aggressively marketing Velocity and investing in new airport lounges, amassing a considerable membership base. Considering the growth of Velocity's membership base to date, it is not clear that such customer lock-in effects and switching costs associated with frequent flyer schemes have resulted in major barriers to entry.

The ACCC considers that frequent flyer loyalty schemes in Australia have the potential to heighten barriers to entry for prospective new entrants. However, while the combination of Qantas Frequent Flyer and Velocity may raise barriers to entry, other significant barriers exist in the domestic airline industry. These barriers to entry include the sunk costs associated with establishing a network of efficient scale and scope, securing airport terminal space, industry regulation such as operational restraints on new entrants, and the threat of strategic response to entry by the incumbents.

Supermarkets

The supermarket and grocery retailing industry has a high level of concentration, with the four largest operators accounting for over 80 per cent of industry revenue in 2018–19.[388] Coles and Woolworths, the largest vertically integrated retailers, operate nationally and hold dominant positions accounting for over 66.5 per cent of market share in 2019.[389]

Coles and Wesfarmers jointly own the Flybuys loyalty scheme, initially launched in 1994. Woolworths launched its Everyday Rewards loyalty scheme in 2008. In 2011, Coles relaunched Flybuys, mailing 16 million membership cards to Australian households.[390] In 2015, Woolworths re-designed its loyalty scheme, relaunched as Woolworths Rewards.

Metcash is a grocery wholesaler operating under brands such as IGA and Foodland. Through the independent IGA banner, Metcash provides a loyalty scheme, IGA Rewards, which individual IGA stores can choose to offer to their customers.

ALDI opened its first Australian store in 2001 and now operates nationally, with over 500 stores. ALDI is a discount supermarket chain with a strong focus on price-based competition and does not offer a loyalty scheme. Over the past decade, Woolworths and Coles have maintained their dominant positions in supermarket retailing in Australia although ALDI has increased its industry share to approximately 10 per cent, largely at the expense of the major supermarket retailers.

In recent years, both Woolworths and Coles have increased their loyalty scheme membership levels. Despite Coles's first-mover advantage, Flybuys has a membership base of approximately 8.6 million customers[391], compared with Woolworths's 11.7 million customers.[392]

The ACCC has also considered the participation rate in Woolworths Rewards and Flybuys as a proportion of Woolworths's and Coles's overall customer base and the total number of 'active' members in each respective loyalty scheme. While Coles and Woolworths have achieved strong membership growth, market research indicates that loyalty among supermarkets in Australia is limited.

Location of supermarkets is a key competitive advantage as convenience is typically a paramount consideration when choosing a supermarket, as well as opening hours and product selection. Roy Morgan Research has found that while most consumers have a

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388 IBISWorld, *IBISWorld Industry Report G4111 Supermarkets and grocery stores in Australia*, October 2018.

389 IBISWorld, *IBISWorld Industry Report G4111 Supermarkets and grocery stores in Australia*, September 2019.

390 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.2.

391 Loyalty Pacific (Flybuys) submission, October 2019, p. 2.

392 Woolworths Group, 2019 Annual report, p. 2.

supermarket they mainly shop at, a relatively low proportion consolidate purchases exclusively with a single supermarket and more than three–quarters of consumers were found to have visited at least two different supermarkets in an average of four weeks.[393]

In addition, while few consumers shop exclusively at ALDI given its more limited variety of products relative to the major supermarkets, ALDI has successfully grown its share of industry revenue during a period when the major supermarkets have boosted their loyalty scheme membership levels.

To date, customer lock-in effects associated with supermarket loyalty schemes do not appear to raise competition concerns. However, it is not yet clear whether Coles and Woolworths will be able to create stronger exclusivity effects in future through the use of their extensive membership data and the potential to make offers through personalised communications and targeted marketing.

As detailed in Loyalty & Reward Co's report, a May 2019 Credit Suisse report indicated that 'Woolworths and Coles are almost uniquely positioned to leverage their growing digital capabilities to establish a competitive advantage in the promotional expenditure component of the food retail value chain. With material efficiency benefits feasible, it is likely that growing digitally-led efficiency will support market share gain and outperformance by Woolworths and Coles.[394]' The report states the growth will be at the expense of Metcash (IGA), which they see as relatively weak in digital marketing, and ALDI, which already runs a lean operating model and is therefore less able to take advantage of the potential cost savings that modern data-powered marketing approaches can deliver.[395]

The ACCC considers that supermarket loyalty schemes in Australia are likely to produce some consumer benefits, in particular through lower prices and discounts on purchasing. However, there is potential for the major supermarket loyalty schemes to maintain the current market structure and create obstacles to entry and expansion.[396]

5.3.2. Competitive effects of loyalty schemes in secondary markets

The ACCC has considered whether coalition loyalty schemes may result in the extension of customer lock-in effects and switching costs to a network of suppliers across different industries. While a firm establishes a loyalty scheme to gain a competitive advantage in the primary market in which it operates, loyalty schemes open to participating partner firms may also generate competitive effects in secondary markets in which the partner operates.

Exclusive and non-exclusive partnerships

The major coalition loyalty schemes have each developed partner networks. For the partner, an affiliation with a coalition loyalty scheme can enable a firm to promote its offers to the extensive membership base of the coalition loyalty scheme and differentiate itself from its competitors.[397]

Depending on the customer lock-in effects a loyalty scheme generates, loyalty scheme partnerships have the potential to raise barriers to entry and entrench the position of dominant firms in secondary markets. Customer lock-in effects that may extend to a partner firm can be significant, especially where the partner offers a product or service that is complementary to that of the loyalty scheme firm and the partnership is exclusive.

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[393] Roy Morgan Research, 'Supermarket loyalty: what's that?', September 2015.

[394] Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

[395] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.3.

[396] Labour Institute for Economic Research (Finland), *Customer loyalty programmes and consumers*, 2017.

[397] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

Exclusive partnerships with some major coalition loyalty schemes have had significant competitive effects. As detailed in Loyalty & Reward Co's report, up until late 2010, Qantas Frequent Flyer had non-exclusive partnerships with competing car rental firms Hertz and the Avis Budget Group (operating the Avis and Budget car rental brands). In November 2010, Qantas Frequent Flyer formed an exclusive partnership with the Avis Budget Group, such that Hertz could no longer reward customers with Qantas Frequent Flyer points.[398] This had a significant negative impact on Hertz' revenue, which declined year-on-year in 2012 by 2.9 per cent, with a further decline in 2013 of 4.3 per cent. For the same period, Avis's revenue grew in 2012 by 4.6 per cent and in 2013 by a further 8.7 per cent. To offset the competitive strategy, Hertz negotiated a partnership with Velocity in August 2011.[399]

In response to the draft report, Qantas submitted that other factors may explain the cause of this decline, but did not provide further information in relation to this issue.[400]

Virgin Australia submitted that the position of Qantas in terms of its airline and loyalty scheme and exclusive arrangements with partners may entrench its market position.[401] Further, Virgin Australia submitted that Qantas' exclusive arrangements with cornerstone partners in industries such as retail and fuel, which provides members with opportunities to earn Qantas points and to influence their purchasing patterns, may enhance Qantas' position, and may prevent access to new loyalty partners for competitors like Virgin Australia.

The ACCC also notes that it is assessing an application for authorisation between BP and Qantas in respect of their loyalty schemes. An outline of the analysis in the draft authorisation decision is provided in box 5.5.

Box 5.5: BP Australia and Qantas application for authorisation

In November 2019, the ACCC issued a draft determination proposing to grant authorisation allowing Qantas, BP Australia and independent BP petrol stations to collectively participate in the BP Rewards, Qantas Frequent Flyer and Qantas Business Reward programs.[402]

The ACCC considered that these arrangements would provide some public benefit, for example by giving consumers more opportunities to earn and use rewards program points, and that the arrangements are also likely to provide cost savings to the parties by allowing BP to negotiate with Qantas on behalf of BP petrol station owners, rather than each station owner needing to negotiate individually.

The ACCC did not consider that the planned arrangements would have a significant negative impact on competition, noting that while Qantas is Australia's largest loyalty reward scheme in terms of members, and BP is a major petrol retailer, there are many retailers—petrol and non-petrol—that could participate as partners in other loyalty programs.

In other industries, the major coalition loyalty schemes partner with most or all of the companies in an industry, which may neutralise the potential competitive advantage. Credit cards are a primary example of non-exclusive partnerships with frequent flyer loyalty schemes. Both Qantas Frequent Flyer and Velocity have partnerships with several credit card providers, including each of the four major Australian banks, as well as American Express and Citibank. It appears that for credit card providers, partnering with frequent flyer

398 Qantas, 'News', August 2010, viewed 15 May 2019.

399 Velocity Frequent Flyer, 'Program Updates', August 2011, viewed 15 May 2019.

400 Qantas submission, October 2019, p. 32.

401 Virgin Australia submission, October 2019, p. 20.

402 ACCC, *Proposal to authorise BP, Qantas loyalty scheme arrangements*, 22 November 2019.

loyalty schemes to reward customers is likely to be a defensive competitive strategy, rather than a point of differentiation.

The ACCC is aware of the potential for competition concerns to arise as a result of the four largest loyalty schemes in Australia—Qantas Frequent Flyer/Woolworths and Velocity/Flybuys—being locked in competing partnerships.

The ACCC considers that where a loyalty scheme has strong customer lock-in effects, an exclusive partnership between firms that offer complementary products has the potential to raise competition concerns. The ACCC is particularly concerned that exclusive partnerships between major loyalty schemes may serve to further entrench the market position of dominant firms in their respective industries and raise barriers to entry and expansion for their rivals.

Price transparency issues

Many partners of coalition loyalty schemes have developed offers specifically aimed at customers seeking to accumulate frequent flyer points. It is particularly common for ongoing contracts to include significant sign-up bonuses to entice consumer switching.

Common examples of point-based offers from coalition loyalty schemes partners include:

- credit card providers offering sign-up bonuses of 100 000 frequent flyer points on co-branded frequent flyer credit cards, in addition to consumers earning points per dollar spent
- energy retailers offering sign-up bonuses of up to 15 000 frequent flyer points on certain contracts, in addition to consumers earning points per dollar paid. For some energy plans, an increased points earn rate is offered where a customer waives pay-on-time discounts (for example, two points per $1 including 10 per cent pay-on-time discount, or seven points per $1 not including 10 per cent pay-on-time discount)
- telecommunications service providers offering sign-up bonuses of 20 000 frequent flyer points on certain contracts with a threshold monthly spend commitment and fixed contract duration (for example, available only on 12-, 24- or 36-month contracts with a sufficiently high monthly spend).

Given that points-based offers are essentially a marketing cost to the partner firm providing the product or service, in many cases such points-based offers or bonuses will involve a trade-off such as higher annual fees and longer fixed contract terms.

The ACCC considers that although points-based offers such as sign-up bonuses can intensify competition and provide consumer benefits, the combination of point-based offers with consumer contracts that are inherently complex or involve opaque pricing and discounting practices can increase existing difficulties for consumers to evaluate the actual value of the contract and make meaningful comparisons with competing products and services.

5.4. Conclusions on competitive effects of loyalty schemes in Australia

The ACCC considers that loyalty schemes can result in a combination of pro-competitive and anti-competitive effects. These effects can be complex and will depend on the specific design of the loyalty scheme and the characteristics of the relevant markets in which they are established, including the geographic scope of their competitors.

Loyalty schemes can intensify competition between rivals and result in consumer benefits in the form of loyalty discounts and lower prices. This is likely to occur where there is strong competitive tension in a market, and rivals are able to match the ability of a loyalty scheme

to compete for a significant proportion of customers. However, loyalty schemes can also be harmful to competition when they create strong customer lock-in effects and artificial switching costs resulting in persistent barriers to expansion for rival firms. In some instances, loyalty schemes may reduce price transparency, making it difficult for consumers to compare the value of rewards with competing price-based offers. This may result in consumers engaging in less frequent price comparisons and making less-informed purchasing decisions.

The ACCC is of the view that airline frequent flyer schemes in particular have the potential to have significant customer lock-in effects, as has occurred overseas. To date, Virgin Australia has succeeded in growing its loyalty scheme and market position. It is not clear that customer lock-in effects and switching costs associated with Qantas Frequent Flyer have resulted in major barriers in this case. In the case of supermarket loyalty schemes, while customer loyalty in this sector is limited, there is the potential for stronger exclusivity effects to occur as supermarkets seek to leverage their growing digital and analytical capabilities using extensive customer data.

The ACCC is concerned by the potential for competition concerns to arise where a dominant firm exercises a loyalty scheme that has market saturation and strong customer lock-in effects. In these circumstances, anti-competitive foreclosure effects can occur not only in the primary market in which the loyalty scheme predominantly operates (for example, domestic air travel), but may also be extended to related markets through exclusive partnerships with firms supplying complementary products (for example, domestic airlines and car rental services).

The ACCC is aware of the potential for loyalty schemes to result in anti-competitive effects. The prevalence of loyalty schemes in many concentrated and oligopolistic markets in Australia raises potential risks.

There is a potential that, with the increasing collection and use of data for analytical purposes, those firms with large membership bases will be able to use this to further entrench their market positions and raise barriers to entry and expansion for their rivals. This is a particular concern where data assets relating to consumers in specific sectors of the economy may be locked up among a small number of firms.

The ACCC will continue to consider the competitive effects of loyalty schemes on a case-by-case basis in enforcement investigations; merger and authorisation decisions, including with respect to analysing any substantial market power held by a firm; and the height of barriers to entry in a market in competition law matters.

6. Emerging issues and business practices related to customer loyalty schemes

As part of the research undertaken in the preparation of this report, the ACCC has identified the following emerging trends in the loyalty scheme sector:

- increased personalisation in loyalty scheme experiences
- increased price discrimination
- premium loyalty schemes
- blockchain and cryptocurrencies.

This chapter is intended to provide a brief overview of the development of these trends.

6.1. Increased personalisation in loyalty scheme experiences

Increasingly sophisticated data collection systems are enabling loyalty scheme operators to create progressively more personalised experiences for their consumers.

Historically, the same communications, offers and products would be promoted to the entire membership of a scheme. Some of the larger schemes also macro-segmented data (for example by age, location or duration of loyalty scheme membership) and distributed separate, more tailored communications and offers to each segment. However, by these methods, consumers would tend to have a relatively generic experience and receive non-personalised marketing materials.

In recent years, loyalty scheme operators, in particular the major loyalty schemes, have been utilising data technology agencies and data collection systems such as cookies, wi-fi tracking, stock-keeping unit (SKU) capture, receipt scanning and beacons to develop profiles of their customers. Once this data is amassed, artificial intelligence machine learning communications and next-best-action platforms are used to deliver individually tailored experiences and marketing to consumers based on the preferences identified in their profile. These systems are used to identify individual consumers and their preferences when they access websites or apps to deliver real-time personalisation and are increasingly being utilised to identify consumers in store.

The aim of increasing personalisation is to maximise the impact of advertising spend via stimulation of higher consumer spend. These systems also assist in identifying and recognising high-value consumers.

The Woolworths Rewards scheme provides an example of how this works in practice. Its platform uses advanced algorithms to send its consumers a weekly catalogue of 'hyper-personalised' offers based on what they have purchased in the past.[403]

6.2. Increased price discrimination

A consequence of increasingly sophisticated data analytics and personalisation is that it may enable and encourage highly targeted price discrimination—businesses charging different prices to individuals based on their perception of the individual's ability or willingness to pay.

It is likely that the scope for personalised pricing will grow as the volume and quality of data collected by loyalty schemes expands and algorithms become more sophisticated. Loyalty schemes may be able to use the highly detailed profiles of their members' behaviours and

[403] L Croft, ''We must treat data as a precious gift', says Woolies exec', *B&T Magazine*, 1 March 2018, viewed 26 June 2019.

attributes to offer each a different price for a product or service. The ACCC has identified some limited examples of this occurring in Australia. For example, in 2013, Woolworths was reported stating that it was able to combine its insurance company's data with its rewards database to determine which customers were 'good insurance risk[s]' to target them with better insurance offers.[404]

Recent media reports suggest that price discrimination practices may be becoming more prevalent abroad. For example, some 'bricks and mortar' retailers appear to be trialling technology that would allow price discrimination based on customer data—including combining offline and online purchasing behaviour through loyalty programs tied to user accounts ('omnichannel shopping')[405] and installing 'smart shelves'—digital price displays that allow for quickly changing prices—in physical retail stores.[406]

Retailers in particular are reported to be investing in omnichannel communications with loyalty members, with the primary drivers for investing in such loyalty initiatives reported to be to increase the average spend per customer visit and the frequency of customer visits.[407]

The Department of Infrastructure, Transport, Cities and Regional Development noted in its submission to the draft report that the rollout of the International Air Transport Association's 'New Distribution Capability' (NDC) standard may result in the potential for increased price discrimination in the airline market in Australia.[408] The NDC is a new data standard for airline booking systems which will enable airlines to offer personalised fares, potentially also based on personal data obtained from loyalty schemes.[409]

Concerns have been raised that airlines could use personalised pricing to offer higher ticket prices to customers less likely to be deterred by fare increases, such as business travellers or consumers with limited travel dates, with one hypothetical example raised of a consumer who might have looked up an obituary online and then searches for a flight to a city to attend the funeral.[410]

A submission from the AFF to the draft report referred to price discrimination technology such as Amadeus Dynamic Pricing promising to increase airlines' revenues by up to 7 per cent[411], also submitting that if loyalty scheme members' data is being used to facilitate price discrimination, members ought to be made aware of this.[412]

Some in the industry, however, have indicated that personalised pricing technology may be more likely to be used to offer discounts to customers with loyalty status and to generate bundled fares to fit a customer's profile.[413]

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404 W Ma, 'Woolworths: no ads, just data', Adnews, 5 September 2013, viewed 21 August 2019. This was also referred to in Salinger Privacy's submission, September 2019, p. 3.

405 N Howe, 'A Special Price Just for You', Forbes, 17 November 2017, viewed 21 August 2019.

406 T Walker, 'How Much? The Rise of dynamic and personalised pricing', The Guardian, 20 November 2017, viewed 21 August 2019.

407 Harvard Business Review Analytic Services, Beyond rewards: Raising the bar on customer loyalty, 15 October 2019, p. 11.

408 Department of Infrastructure, Transport, Cities and Regional Development submission, October 2019, p. 1.

409 ibid.

410 Teplis Travel, Schumer/ASTA concerned about dynamic pricing, 15 March 2018; R D'Ambrosio, Can airlines use the internet to offer discriminatory pricing? Travel Market Report, 14 March 2018.

411 Amadeus IT Group SA, Dynamic Pricing is the way forward to maximise airline revenue, viewed 31 October 2019. This was raised in Australian Frequent Flyer's submission, September 2019, p. 6.

412 Australian Frequent Flyer's submission, September 2019, p. 7.

413 Teplis Travel, Schumer/ASTA concerned about dynamic pricing, 15 March 2018.

Box 6.1: Qantas Distribution Platform

In 2018, Qantas launched its Qantas Distribution Platform (QDP) which uses the NDC standard and other technology to deliver customers more personalised experiences, including through recognising frequent flyer members to identify their unique preferences and by providing personalised relevant offers.[414]

On 1 August 2019, Qantas commenced its private 'Qantas Channel' model,[415] giving signed-up agencies access to a wide range of Qantas fares, products and other information sourced from the QDP and which is not currently available via traditional indirect booking systems.[416]

Agencies that do not sign up to the Qantas Channel may be required to pay a channel fee per flight segment booked, and will no longer be eligible to sell some previously available Qantas fares.[417]

Some consumers may gain from increasingly personalised pricing. For example, consumers with a limited ability to pay may be offered a lower price for products they otherwise could not afford. However, many consumers are likely to pay more, particularly in circumstances where consumers have limited choice of who to buy from, or have a limited inclination to shop around.

6.3. Premium loyalty schemes

Premium loyalty schemes are those that members pay a fee to join. The number of companies offering such schemes and the membership of these schemes is rapidly increasing overseas. For example, Amazon Prime, which was launched in 2005, has more than 100 million members worldwide[418], and Lululemon and CVS trialled premium schemes in the US in 2019.[419]

Membership fees are typically non-refundable and are often paid for a set period (for example $99 for a 12-month membership). This encourages consumers to remain loyal to the company over this period to generate value from the investment of their membership fee.

In 2019, Amazon Prime and eBay Plus were both launched in Australia and this trend is expected to continue.[420] A study of loyalty schemes by Mastercard in 2018 found that 38 per cent of Australian respondents identified the fact they did not have to pay as the most important factor in selecting the loyalty scheme most important to them.[421] This response was not widely reflected in responses from other Asia-Pacific countries included in the study and this could potentially impact the emergence of premium schemes in Australia.

It is also noted that one of the four major loyalty schemes, Flybuys trialled a premium loyalty scheme, 'Flybuys Max', in Australia in 2018.[422] Flybuys Max cost $10 per month (or $99 per year) and gave members access to benefits including a 5 per cent discount on fresh produce, free delivery of online orders over $50 and access to a free movie-streaming

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414 Qantas, Introducing the Qantas Distribution Platform, viewed 31 October 2019.

415 Qantas, The Qantas Channel is now live, 1 August 2019.

416 Qantas, Qantas transforms distribution model to deliver modernised content for travel agents, 7 February 2019.

417 Qantas, Agency information, viewed 31 October 2019.

418 P Hatch, 'Winning your loyalty: Australia's retail data war is heating up', *Sydney Morning Herald*, 3 January 2019, viewed 26 June 2019.

419 B Pearson, 'Is 2019 the year of paid loyalty? Lululemon, CVS and Loblaw are game to find out', *Forbes*, 4 January 2019, viewed 25 June 2019.

420 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 6.

421 Mastercard, *Achieving advocacy and influence in a changing loyalty landscape: a Mastercard Asia Pacific Study*, January 2018.

422 Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 6.

service. At the time of publication, the Flybuys Max program had not moved beyond its trial stage.[423]

6.4. Blockchain and cryptocurrencies

The emergence of blockchain and cryptocurrencies have created a number of new opportunities for loyalty schemes.

Traditional loyalty scheme platforms have tended to run on batch-processing systems, which meant that member transactions could be processed only periodically, resulting in a delay for the consumer between the transaction and receiving the points or rewards. This also incurred administrative costs for operators.

Blockchain platforms facilitate real-time transactions that can improve member experience and reduce administrative costs. It is therefore likely that these systems will be increasingly adopted across the loyalty scheme sector.

Blockchain also enables the development of cryptocurrencies. A number of Blockchain loyalty companies including Gatcoin, CampusCoin, Nexxus Rewards, LoyalCoin and EZToken Rewards have been created, which offer members the opportunity to earn cryptocurrency as opposed to miles or points. According to a report from the University of NSW, 'many of the companies have positioned their approach as one which will disrupt the loyalty industry'.[424]

The University of NSW report argues that cryptocurrency may be a viable and popular alternative to the more traditional loyalty scheme rewards because[425]:

- cryptocurrency can be widely used and is not limited to products and services offered by traders aligned with the relevant operator
- unlike the loyalty points offered by many operators, cryptocurrency does not expire
- cryptocurrency can increase in value as it increases in popularity, unlike the loyalty points offered by certain loyalty schemes which have been devalued over time.

While none of the major loyalty scheme operators in Australia have adopted a scheme of cryptocurrency rewards at the time of publication, some airline loyalty schemes overseas are adopting blockchain and cryptocurrency.

In February 2018, Singapore Airlines' KrisFlyer frequent flyer program announced an airline loyalty digital wallet capability using blockchain technology.[426] Customers who sign up will be able to convert their miles into KrisPay units and make purchases by scanning QR codes at partner merchants.[427] Air Asia's CEO is also reported to be planning to turn the airline's frequent flyer points into a cryptocurrency called BigCoin[428], to operate alongside its existing BigPay digital wallet service. Emirates' loyalty program, Emirates Skywards, has also recently entered into a partnership to use blockchain technology.[429]

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423 D Powell, *Netflix, Spotify, Woolworths? Supermarket launches subscription service*, Sydney Morning Herald, 17 September 2019.

424 P Shelper, A Lowe and S Kanhere, *Experiences from the field: Unify Rewards – a cryptocurrency loyalty program*, 2018, viewed 26 June 2019.

425 ibid.

426 Singapore Airlines, *KrisFlyer to launch world's first blockchain-based airline loyalty digital wallet*, CoinDesk, 5 February 2018.

427 A Baydakova, *Singapore Airlines' blockchain-based loyalty program takes off*, 25 July 2018.

428 M Tani, *AirAsia had talks with cash-strapped HNA over asset purchases*, Nikkei Asian Review, 20 March 2018.

429 Loyyal, *Loyyal announces endorsement from Emirates Skywards*, 13 October 2019.

Appendix A—Consultation

The ACCC consulted with a wide range of stakeholders and commissioned research throughout its review into loyalty schemes.

The ACCC would like to thank stakeholders, consumers and other interested parties for their time in providing submissions and responses to the ACCC's review.

A.1 Voluntary responses to ACCC information requests

In preparing the draft report, the ACCC conducted a targeted consultation process seeking responses to voluntary information requests from major loyalty schemes operating in Australia.

The following loyalty scheme operators provided responses:

- American Express
- Australia and New Zealand Banking Group (ANZ)
- Australian Pharmaceutical Industries (Priceline)
- Commonwealth Bank of Australia (CBA)
- Loyalty Pacific (flybuys)
- Hilton
- IHG Hotels Management
- Marriott International
- Myer
- NAB
- Qantas
- Telstra
- Virgin Australia (Velocity Frequent Flyer)
- Westpac
- Woolworths Rewards.

A.2 Non-confidential submissions and other consultations

The ACCC invited submissions after the release of the draft report and also undertook targeted consultations where relevant. Public submissions are available on the ACCC's website.

A list of parties that the ACCC received non-confidential submissions from and/or undertook consultations with are below:

- Alex [surname removed]
- Alliance for Gambling Reform
- American Express
- Andrew [surname removed]
- Association for Data-driven Marketing & Advertising
- Attorney General's Department

- Australian Frequent Flyer
- Australian Privacy Foundation
- Australian Securities and Investments Commission
- Birute Don
- Consumer Policy Research Centre
- Deloitte
- Department of Infrastructure, Transport, Cities and Regional Development
- Finder.com.au
- Foundation for Alcohol Research and Education
- Hoyts
- JF Consulting
- John [surname removed]
- Leon Loganathan
- Loyalty Pacific (flybuys)
- Merzi [surname removed]
- Office of the Australian Information Commissioner
- Orlando [surname removed]
- Peter Kovesi
- POS Solutions
- Professor Allan Fels AO & Professor David Cousins
- Qantas
- Rokt
- Salinger Privacy
- Virgin Australia (Velocity Frequent Flyer)
- Woolworths.

A.3 ACCC commissioned research

The ACCC commissioned an industry expert, Loyalty & Reward Co, to produce a report into the development, operation and monetisation of loyalty schemes, as well as their collection, use and disclosure of consumer data. The Loyalty & Reward Co report is available on the ACCC website.

Appendix B—Common loyalty scheme design elements across different sectors

As part of the loyalty schemes review, the ACCC commissioned an independent expert, Loyalty & Reward Co, to produce a report into the development, operation and monetisation of loyalty schemes, as well as their collection, use and disclosure of consumer data. The report is available on the ACCC's website: www.accc.gov.au/loyaltyschemes.

Appendix B is from Loyalty & Reward Co's report and outlines the key features of loyalty schemes operating in a number of different sectors.

Sector	Major companies	Scheme name(s)	Dominant scheme design element(s)
Airlines	Qantas Virgin Airlines	Qantas Frequent Flyer Velocity Frequent Flyer	Customers are rewarded for their loyalty with points and status credits which they earn through flights, spending with participating retail partners and using (co-)branded credit cards. Members can redeem their points for flights, flight upgrades, or non-flight rewards like hotels, car hire, gift cards and rewards products from the scheme operator's online rewards store. Increasingly, members are also able to spend their points directly with participating retailers. Status credits unlock status tiers which provide members with exclusive benefits when they fly, such as lounge access, priority boarding and bonus points.
Supermarkets	Woolworths Coles	Woolworths Rewards Flybuys	Members accumulate points when they spend on grocery items or with retailers within their coalition partner network. Points can be redeemed for shopping discounts, discounted gift cards or consumer goods. Woolworths Rewards members can earn Qantas Points and Flybuys members can transfer their points into Velocity Points.
Hotels	Hilton Marriott Intercontinental Hotels Group	Hilton Honours Marriott Bonvoy IHG Rewards Club	Schemes use a combination of member benefits, points and status tiers. The member benefits include members-only rates, free internet access and keyless mobile check-in via the app. As members spend, they are allocated a status tier which unlocks additional value such as free nights and complimentary breakfasts. Points are also earned for every dollar spent within the hotel and its network of partners and can be redeemed within the partner network or donated to charity.
Retail	Priceline Myer	Priceline Sister Club MYER One	The variety of loyalty schemes within retail is particularly broad. At a high level, two types of reward mechanism are used: points or member discounts. Members of these schemes generally have access to additional exclusive savings, VIP events, competitions and gifts. Some schemes incorporate status tiers, which are achieved

	Spotlight	VIP Club	based on annual spend.
	IKEA	IKEA Family	
	Dan Murphy's	My Dan Murphy's	
	Sephora	Beauty Pass	
	Mecca	Beauty Loop	
	Adairs	Linen Lovers	
	Amcal	Amcal Rewards	
	Country Road	Country Road Cardholder	
	Dymocks	Dymocks Booklover	
	EB Games	EB World	
Telecommunications	Telstra	Telstra Thanks, Telstra Plus	Members are provided with access to member benefits portals which host a wide selection of exclusive rewards such as pre-sale sporting or music events and discounts on experiences and products. In May 2019, Telstra launched a new points and status tiers model.
	Optus	Optus Perks	
Financial Services	Westpac	Westpac Altitude	This industry has long been using credit card loyalty schemes where members earn points for everyday purchases, which can be redeemed online for consumer goods and gift cards. Some schemes also provide the opportunity for members to redeem with third party partners. Card-linked offers enable operators to link a special offer or discount directly to a consumer. The discount is applied automatically at the point of sale when the linked debit or credit payment card is swiped. These loyalty schemes also provide exclusive early bird or discount offers to members for events and experiences.
	CBA	CommBank Awards	
	ANZ	ANZ Rewards	
	NAB	NAB Rewards	
	American Express	Membership Rewards	
Insurance	NRMA	NRMA Blue	Members have access to special offers and benefits from hundreds of partners. Some require members to pay for access to all the offers listed on the platform. Others are based on status tiers where status level, and therefore the types of benefits available to the member, is determined by the length of time the member has taken out a policy.
	BUPA	BUPA Plus	
	HCF	HCF Thank You	
	NIB	Be Rewarded	

	Medibank Youi	Medibank Offers YouiRewards	
Utility	AGL Red Energy Energy Australia	AGL Rewards	AGL Rewards is a member benefits loyalty scheme offering access to special offers and benefits from hundreds of partners. Members can access gift cards, movie tickets, accommodation, experiences and restaurants. AGL also offer members Flybuys points, while Red Energy offer Qantas Points and Energy Australia Velocity Points.
Cinemas	Event Cinemas/Village Cinemas Hoyts	Cinebuzz Rewards Hoyts Rewards	These loyalty schemes issue their own reward currencies which are accumulated based on spend and other desired actions such as purchasing tickets online, using the app or reviewing a movie. The reward currencies can be used to access free tickets and Candy Bar items. Members of the loyalty scheme have access to additional benefits such as advanced screenings and member only promotions and pricing.
Quick service restaurants (QSR) and cafes	McDonalds Domino's Starbucks	mymacca's Domino's Rewards Starbucks Rewards	Rewards are issued in the form of discount coupons or points. Members are often encouraged to download a branded app to access member exclusive discounts, skip the queue or partake in competitions. Some of these loyalty schemes also have their own reward currencies that can be tracked and managed from within the brands' respective apps. Members can generally redeem points on free food and-drinks.

Source: Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 3.

Appendix C—Consumer data that loyalty schemes collect about consumers

Box C.1 highlights how loyalty schemes may collect consumer data, and the data that might be collected. Box C.1 is structured on the basis that consumer data can be[430]:

- actively and voluntarily provided by a consumer (for example, entering name and contact details in an online form)
- passively provided by a consumer (for example, observed data, including collection of location data from wi-fi networks, GPS or IP addresses, or data collected through a consumer's use of a platform, apps on a device or a consumer's use of third party websites)
- inferred from other sources (for example, by analysing data actively provided by a consumer, other user data passively collected or data from de-identified datasets and making deductions based on this combined data).

Box C.1: Consumer data that loyalty schemes collect about consumers

Based on research from Loyalty & Reward Co[431], the ways loyalty schemes may collect data about their members are outlined below.

Consumer data actively provided to loyalty schemes

- **Join process:** When a member joins a loyalty scheme they are usually asked to provide personal information such as their name, date of birth, email address and phone number. This forms the basis of their member profile. Once the registration process is complete, the member may be asked to provide further information about their likes and interests. Frequent flyer schemes may also request information about the member's status tier with other airlines, seat preference on flights, lifestyle interests and sport interests, the number of flights taken recently, whether they predominantly fly for leisure or business, and the member's favourite destination. Supermarket schemes may ask for information about the number of people in the household, if they have any pets and their internet and shopping habits, including whether they are looking to change insurers or credit cards.
- **Transactions (active):** When, where and how often a member transacts and how much they spend provides valuable data about the member's lifestyle, habits, interests, motivations and goals. This may be collected when the member purposefully identifies themselves by scanning their membership card or app in store, signing into their account online or via an app, or providing verification to a call centre agent. Transaction data may also be obtained from loyalty scheme-branded credit cards.
- **Surveys**: Loyalty schemes often invite members to participate in surveys. These can be used for two purposes: to capture attitudes and opinions about the loyalty scheme, and to collect additional data about the member.

Consumer data passively provided to loyalty schemes

- **Apps:** When a member downloads a loyalty scheme app, they are generally requested to provide permission for the loyalty scheme to gain access to certain features and data, plus the ability to track location.

  This approval can provide extensive access including precise user location, access to

[430] OECD, *Exploring the economics of personal data: a survey of methodologies for measuring monetary value*, OECD Digital Economy Papers, no. 220, 2013, p. 10.

[431] Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 5.

the member's contacts, access to call logs, access to the camera and microphone, ability to read storage data, and the ability to read phone status and identity.

- **Ongoing engagement:** Digital assets allow some loyalty schemes to track behaviour at a micro level. This includes using click maps across websites, electronic direct mailing and heat maps for in-store visits. Using cookies[432], some loyalty schemes can track different websites that a member visits to better understand what products and services they are interested in. Interactions with the customer service team may be tracked and stored against the member's profile, including the nature of the call or online messages.

  Further, cookies can be used to facilitate real-time personalised activations of offers and promotions for members. Data technology agencies provide support to some loyalty schemes using platforms that can: identify individual members at the time they are engaging with a range of digital channels (such as e-commerce websites); access their profile information (encompassing hundreds of datasets); and automatically trigger an individualised promotion for the member. This is designed to optimise advertising spend by investing in activities that have a high impact.

- **Linked household members**: Some loyalty schemes may link multiple members to a specific mailing address, allowing them to enhance their dataset by matching members living in the same household. Some loyalty schemes allow members to apply for a secondary card under the same account to enable both card-carriers to earn points. This household profile approach allows the loyalty scheme to view a much broader consumption profile than for an individual member, providing additional insights.

- **Social media:** Some loyalty schemes may use tools such as Facebook Connect to let members log in with their social media credentials. Using Facebook Connect allows sharing of data between the website and Facebook where detailed member data (for example the member's relationships, the female/male make-up and size of their friends list, education history, work history, friends' interests, how the member interacts with their friends, and their comment and wall post frequency) can be tracked and shared.

  In Australia, Woolworths Rewards allows members to join using Facebook Connect. Its privacy policy indicates that, 'We collect personal information about Woolworths Rewards Members from other persons or entities. Such entities include … digital services used by Woolworths Rewards Members (including social media platforms).[433]'

- **Transactions (passive)**: Woolworths Rewards and Flybuys automatically link any payment card the member uses to their profile, enabling them to track any transaction the member makes across associated companies, even when the member does not scan their membership card.

- **Virtual/voice-controlled assistants**: Some major companies, such as Woolworths, are experimenting with the use of virtual home assistants (such as Google Assistant) to support new ways for customers to interact. Woolworths's ambition is for these to be developed into full AI conversational platforms that can be run at enterprise scale.[434]

- **Wi-fi-tracking platforms**: Qantas Frequent Flyer discloses that it collects data about members when they use free wi-fi in the Qantas Lounge and on the aircraft. This includes information about the member (the information they enter when accessing the service), their device and how they use the wi-fi service.[435]

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[432] Cookies are small files that are placed on users' computers and store data on their activity and browsing specific to different websites. When a user visits a website, that website might automatically and invisibly send a cookie to the user's computer. This cookie then helps the website keep track of the user's visits and activity on the website and allows the website to deliver web pages tailored specifically to that user.

[433] Woolworths Rewards, Privacy Policy, May 2018, viewed 14 May 2019.

[434] R Crozier, 'Woolworths looks to large-scale conversational AI', *IT News*, 21 January 2019, viewed 11 April 2019.

[435] Qantas, Privacy Policy, 'Information we collect', 22 May 2018, viewed 30 May 2019.

Consumer data that loyalty schemes infer from other sources

- **Data brokers:** Data brokers, such as Quantium, Acxiom, Experian and Lexer, 'have highly detailed profiles on billions of individuals, comprising age, race, sex, weight, height, marital status, education level, politics, shopping habits, health issues, holiday plans, social media posts, income and more'.[436] They may provide database tools to some loyalty schemes to help them improve their member profiling, segmentation, or provide the data directly to a loyalty scheme to be matched against existing member profiles.
- **Data-sharing platforms:** Data-sharing platforms, such as Data Republic, allow companies to share data collected from their customers with other companies. This provides some loyalty schemes with access to many data points, which they can use to enhance their member profiles.
- **Database generators:** Some loyalty schemes engage third party data brokers to grow their databases by partnering with other companies which offer an overlay or pop-up when online transactions with the loyalty scheme are conducted. The database generator uses machine learning to deliver highly personalised offers and advertising to target members.
- **Publicly available information:** Data held by some loyalty schemes can be further enriched by linkages with external data sources. For example, customer postcodes allow information from other external sources to be combined, generating insights into demographic attributes about the member.
- **Analytics:** Data enables some loyalty schemes to generate extensive insights into who their members are, how they behave, how they respond to different marketing campaigns and offers, what their consumption patterns are over time, what their life stages are and more. Some loyalty schemes employ large teams of analysts to code the complex queries required to unearth new and relevant insights. One approach is propensity modelling, which tries to predict how a member will respond to a campaign or offer based on how similar members responded.

[436] S Molitorisz, 'It's time for data brokers to emerge from the shadows', *IT News*, 6 April 2018, viewed 16 April 2019.

Appendix D—Presentation of terms and conditions and privacy policies

As part of this report, in November 2019, the ACCC reviewed the sign-up processes for Australia's four largest loyalty schemes: Qantas Frequent Flyer, Velocity Frequent Flyer, Flybuys and Woolworths Rewards.

Qantas Frequent Flyer

Illustrated below in figure D.1 is how Qantas Frequent Flyer presents information about its data practices to consumers during the sign-up process.

Figure D.1: Qantas joining process: Privacy

Privacy

Qantas collects personal information about you in connection with Qantas Frequent Flyer (including products and services available to Qantas Frequent Flyer members):

- to market products and services to you, including the products and services of our partners and other third parties who we believe may have products and services in which you would be interested. This is one of the primary purposes of Qantas Frequent Flyer;
- to facilitate your participation in Qantas Frequent Flyer and other organisations' loyalty programs, including by assessing your membership application, awarding you points, confirming your eligibility for, and providing any products and services associated with Qantas Frequent Flyer, and enhancing and personalising your use of Qantas Frequent Flyer;
- to generate (for Qantas and third parties) consumer insights about you in order to better understand your Member's preferences and interests, tailor your experience, enhance the products and services supplied to you and to tell you about the products and services of Qantas and its travel partners and program partners;
- to improve our website and services, including by means of product development and market and behavioural research; and
- for operational management of Qantas Frequent Flyer.

Qantas may collect your personal information from you directly, including when you are logged into your Qantas Frequent Flyer account. We may also collect your personal information from third parties, our related bodies corporate and Jetstar branded entities, partner airlines, third parties providing services for Qantas Frequent Flyer and our program partners (such as when you register through one of our program partners or transact with them).

For the reasons described above, we may disclose your personal information to:

- partner airlines, oneworld® Alliance Airlines, and non-airline program partners. In particular, we may disclose your information to Emirates in the United Arab Emirates for the purpose of Emirates offering you membership in the Skywards frequent flyer program;
- Woolworths Ltd, if you decide to link your Qantas Frequent Flyer Membership with your Woolworths Rewards account;
- our related companies;
- any third party providing services for Qantas Frequent Flyer, including assisting us in determining your eligibility for, and providing, Qantas Frequent Flyer products and services (including products and services available to members), administering the program, operating our call and service centres and providing market research and marketing services;
- our financial product card partners; and
- other parties in order to comply with our legal obligations.

These parties may be located overseas including in the United Kingdom, the United States, New Zealand, Germany, the Philippines and any country which you travel to or through in connection with your membership.

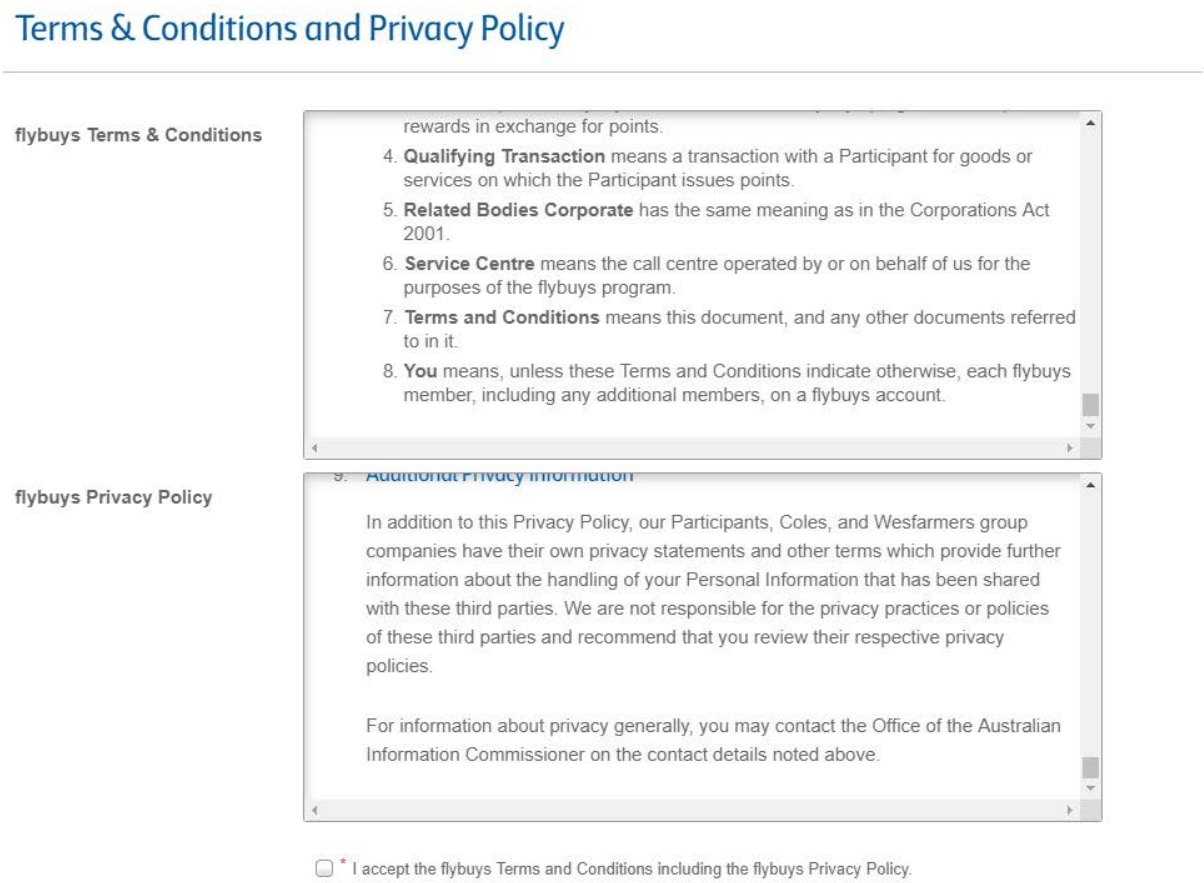
If all or any of the requested non-optional information is not provided, we will not be able to provide the services to you and membership may not be granted. If all or any of the remaining information is not provided, the services we provide to you may be affected.

Our privacy statement is available at qantas.com and it contains more information about the above and also how you can seek access to, and correction of, your personal information. It also explains how you can complain about a breach of your privacy and how we will deal with your complaint. You can contact us by completing the form located at qantas.com/privacyquestions or by writing to Qantas Customer Care at 10 Bourke Road, Mascot, NSW, 2020.

Flybuys

Flybuys took a similar approach by embedding its terms and conditions and privacy policy in a window in the sign-up page, as illustrated in figure D.2.

Figure D.2: Flybuys joining process: Embedded terms, conditions and privacy policy

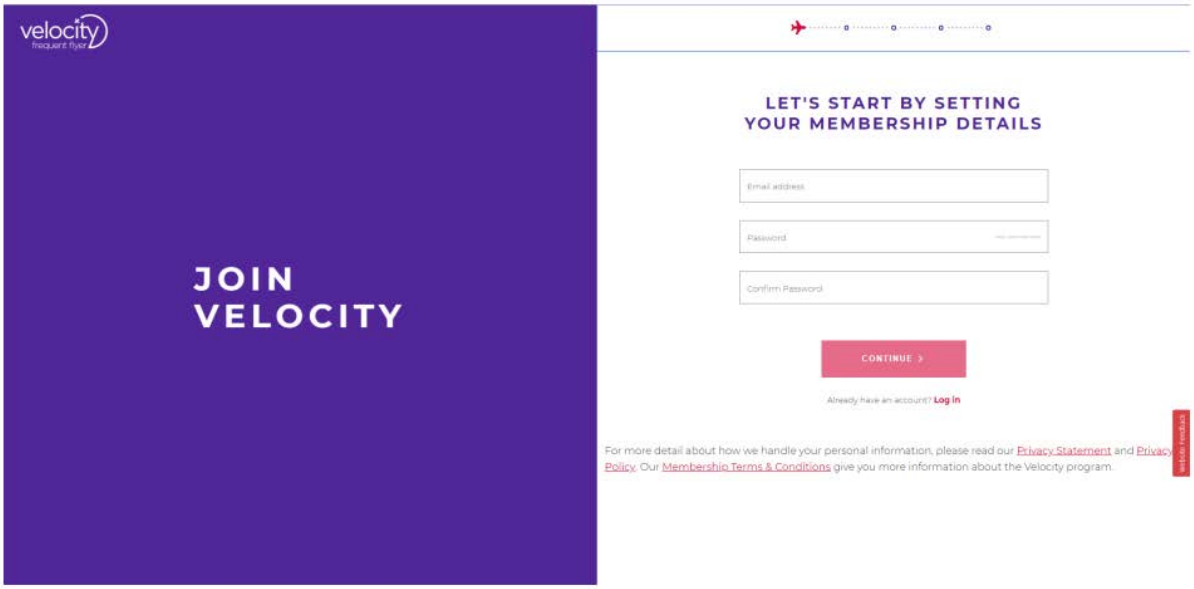


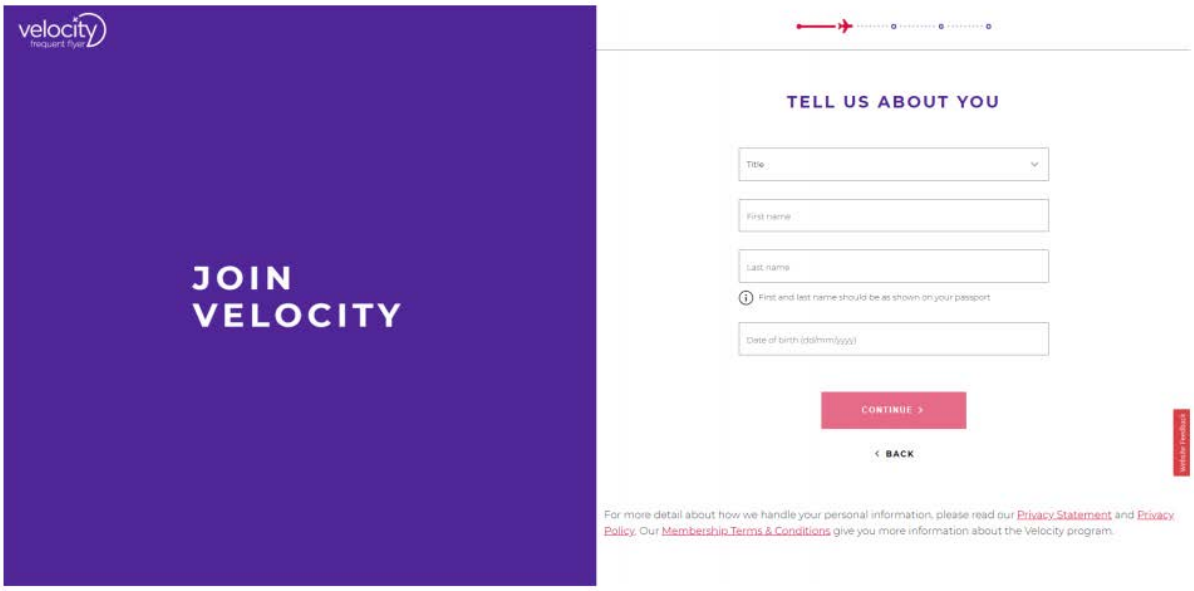
Velocity Frequent Flyer (after 3 October 2019)

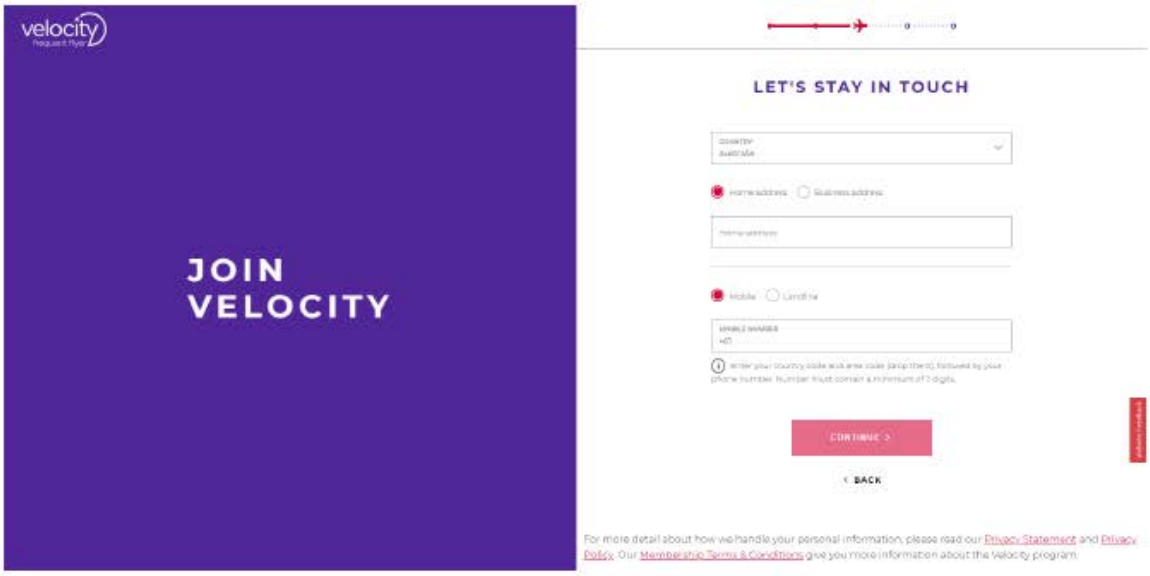
Virgin Australia submitted in response to the draft report that on 3 October 2019 it updated its joining process to provide links to Member Terms & Conditions, Privacy Statement and Privacy Policy to be available on every page of the Velocity Frequent Flyer join form on the Velocity website.

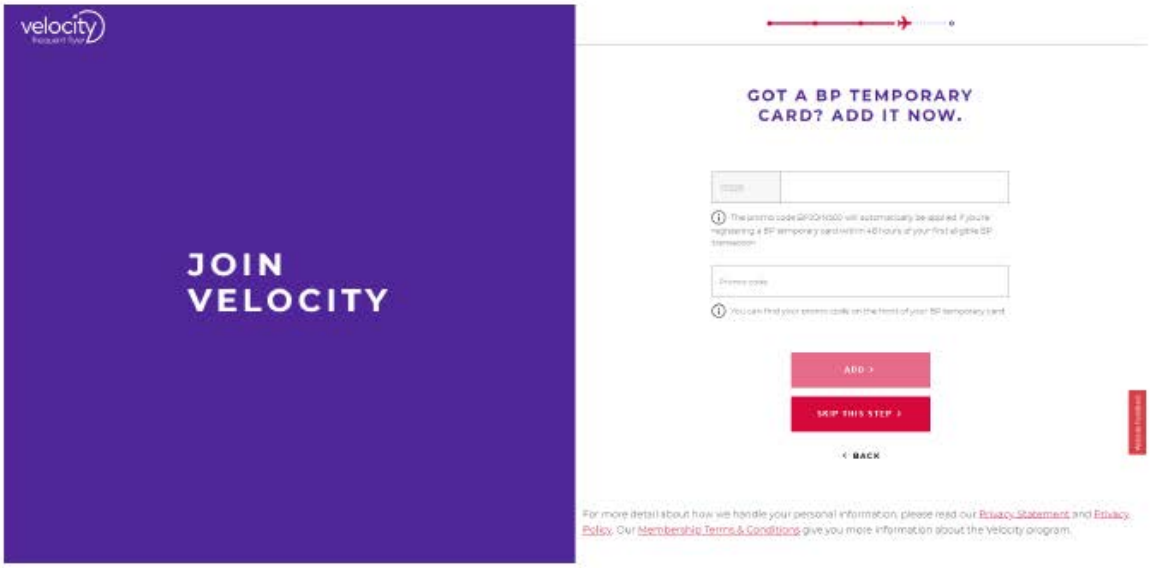
Figure D.3 illustrates where the terms and conditions and privacy policy can be found during the join process for Velocity Frequent Flyer.

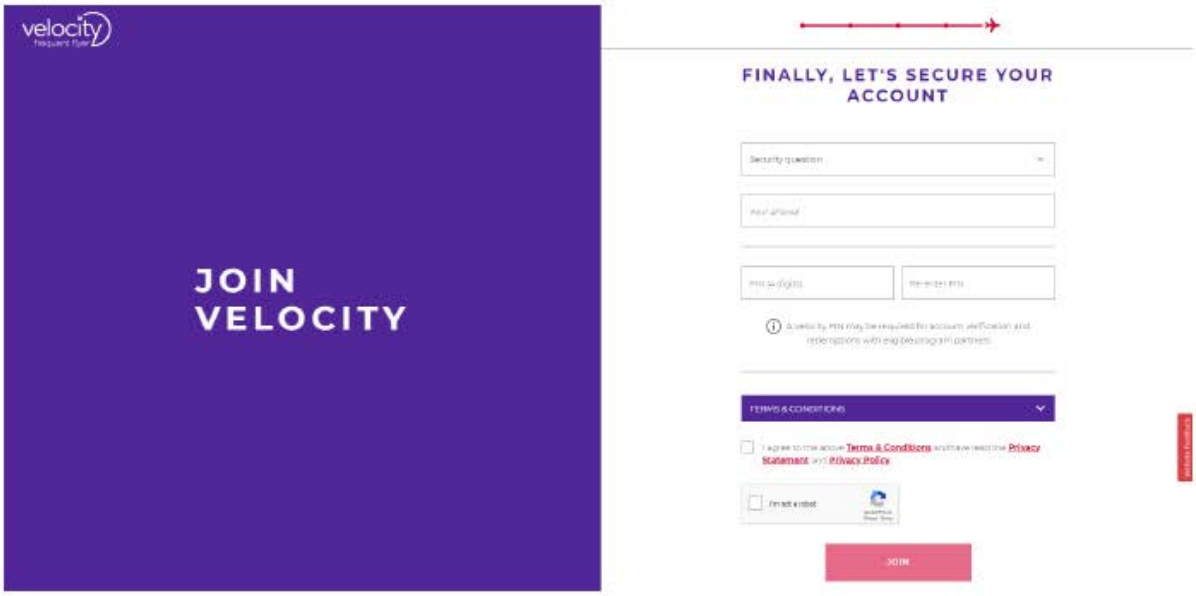
Figure D.3: Velocity joining process: Links to the terms and conditions and privacy policy






velocity
JOIN
VELOCITY
LET'S STAY IN TOUCH
CONTINUE >
< BACK
For more detail about how we handle your personal information, please read our Privacy Statement and Privacy Policy. Our Membership Terms & Conditions give you more information about the Velocity program.

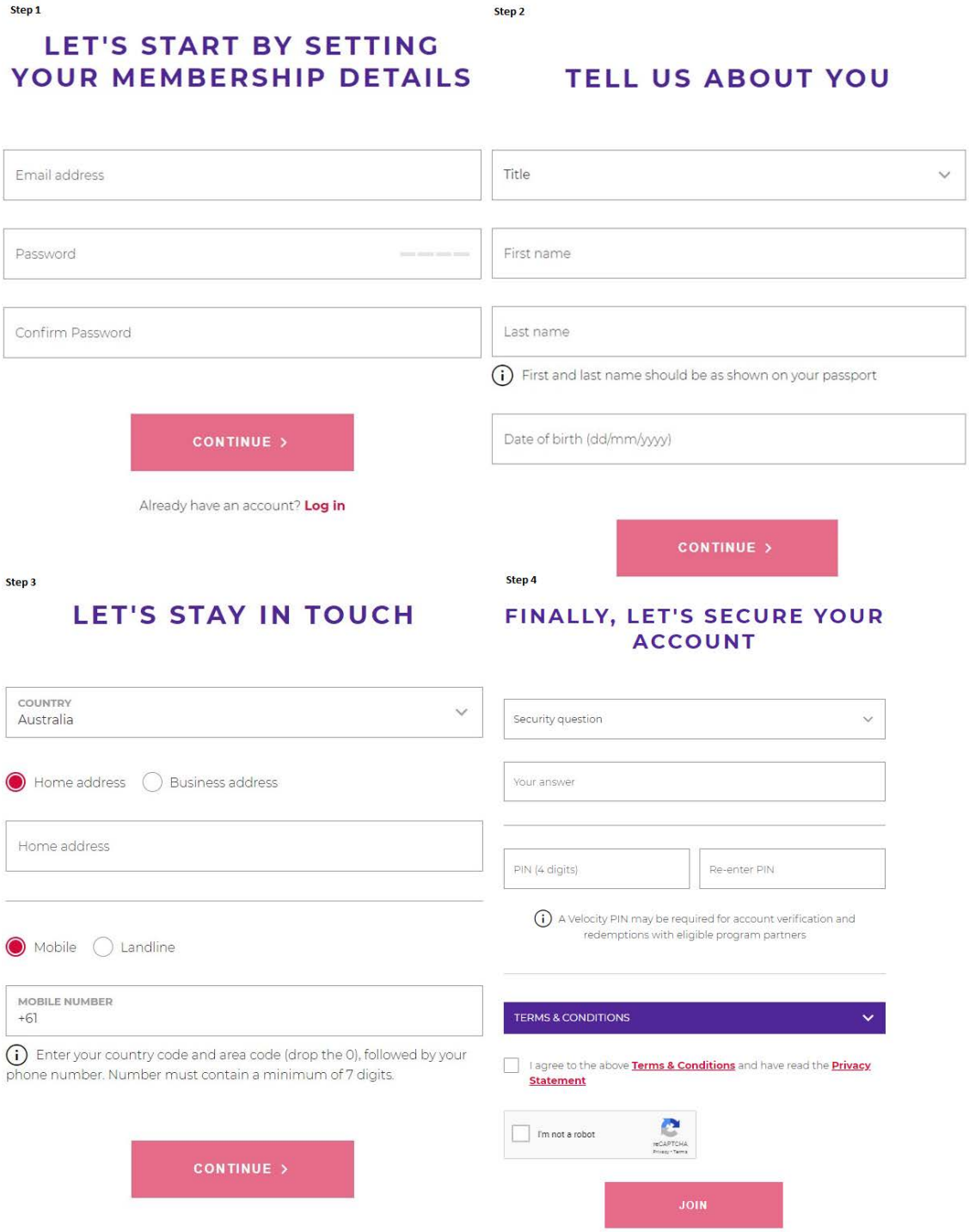

velocity
JOIN
VELOCITY
GOT A BP TEMPORARY CARD? ADD IT NOW.
ADD >
SKIP THIS STEP >
< BACK
For more detail about how we handle your personal information, please read our Privacy Statement and Privacy Policy. Our Membership Terms & Conditions give you more information about the Velocity program.


velocity
JOIN
VELOCITY
FINALLY, LET'S SECURE YOUR ACCOUNT
TERMS & CONDITIONS
JOIN

Velocity Frequent Flyer (before 3 October 2019)

In relation to Velocity Frequent Flyer, before 3 October 2019, links to the terms and conditions and privacy policy were not presented until the consumer had already clicked through at least four screens during the joining process. Further, the terms and conditions and privacy policy were then presented as links, rather than embedded in the joining page. Figure D.4 illustrates where the terms and conditions and privacy policy could be found during the joining process for Velocity Frequent Flyer before 3 October 2019.

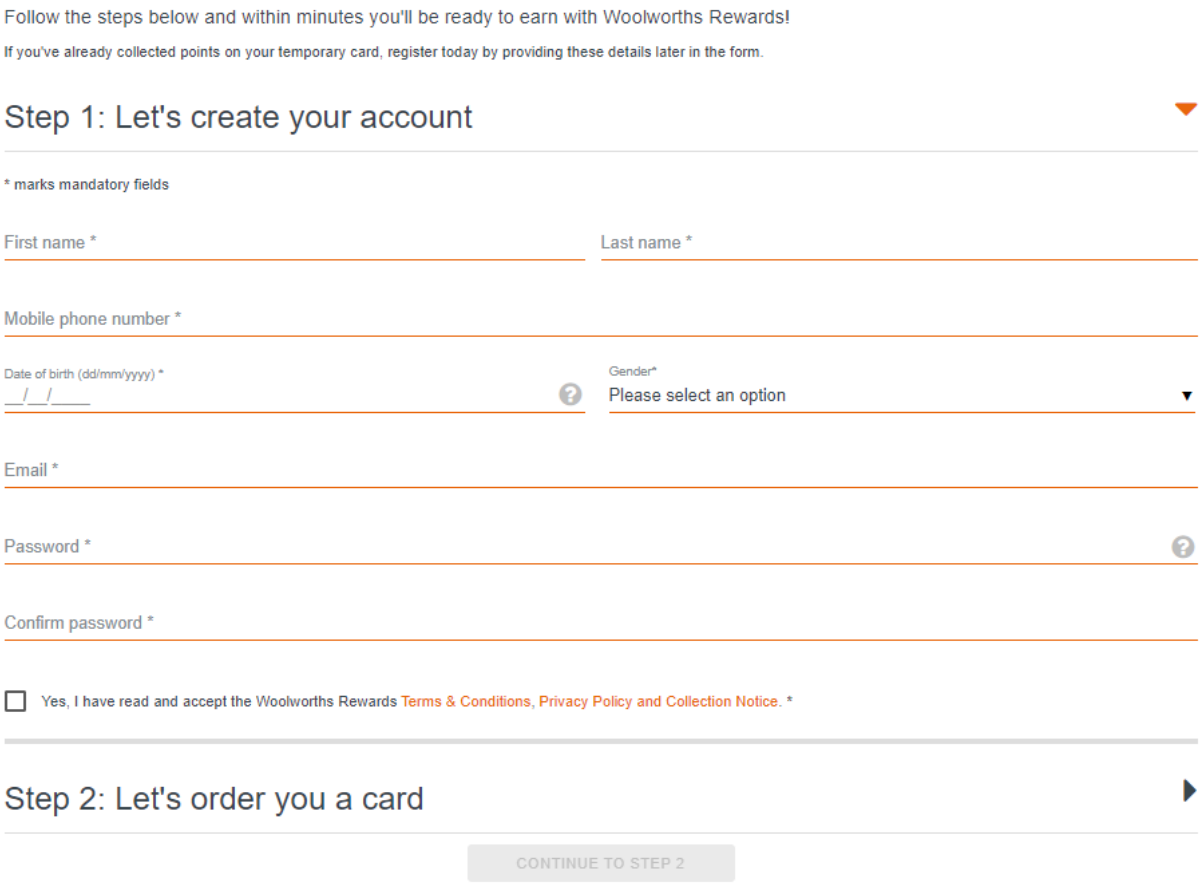
Figure D.4 — Velocity joining process (before 3 October 2019): Providing personal information and clicking through multiple screens to find the terms and conditions and privacy policy



Woolworths Rewards (after August 2019)

In a submission in response to the draft report, Woolworths Rewards stated that in August 2019, the Woolworths Rewards registration page, along with relevant customer email templates, were updated to include separate links to each of the terms and conditions, Privacy Policy and Collection Notice.

Figure D.5: Woolworths Rewards joining process (after August 2019): Link to terms and conditions, privacy policy and collection notice



Woolworths Rewards (before August 2019)

Before August 2019, to access the Privacy Policy of Woolworths Rewards, registering members needed to first click on a link to the terms and conditions, then to scroll down to a section towards the bottom of the page titled, 'How will Woolworths be collecting, using and disclosing my personal information?' Within that clause the member then had to click on a link titled 'Collection Notice', which then directed them through to the Woolworths Rewards Privacy policy. This is illustrated in figure D.6.

It is noted that in 2016, the OAIC undertook a privacy review of Woolworths Rewards[437], and, among other things, recommended the scheme could consider 'separating the privacy related information from the broader terms and conditions and providing [it] as a separate document *at the point of registration*.' Woolworths submitted in response to the draft report that it implemented this change in August 2019.

[437] OAIC, Loyalty program assessment: Woolworths Rewards, July 2016, viewed 18 April 2019.

Figure D.6 — Woolworths Rewards joining process (before August 2019): Link to terms and conditions

Follow the steps below and within minutes you'll be ready to earn with Woolworths Rewards!

If you've already collected points on your temporary card, register today by providing these details later in the form.

Save time by using your Facebook account to join.

FACEBOOK

Let's create your account

* marks mandatory fields

First name *

Last name *

Email *

Password *

Confirm password *

Mobile phone number *

Date of birth (dd/mm/yyyy) *

__/__/____

Gender*

Please select an option

Now, let's order you a card

If you have a temporary Woolworths Rewards card, please enter the number below. If not, skip this step.

Temporary card number

Where should we send your card?

Your address *

Suburb *

Postcode *

State *

State

Yes, I have read and accept the Woolworths Rewards terms and conditions. *

JOIN WOOLWORTHS REWARDS

Appendix E—Review of opt-out processes

As part of this report, in November 2019, the ACCC reviewed the opt-out processes for Australia's four largest loyalty schemes: Qantas Frequent Flyer, Velocity Frequent Flyer, Flybuys and Woolworths Rewards, in terms of both emails and other communications and targeted and behavioural advertising.

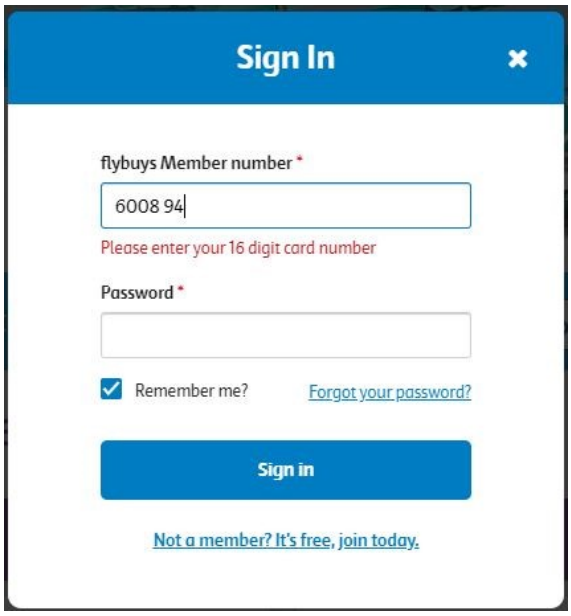
Flybuys

The process to opt-out of emails from Flybuys firstly requires a user to log into their account (steps 1a and 1b). This is somewhat more difficult than for other loyalty schemes as it requires the use of a member number, rather than an email address or username, which is provided for on a member's Flybuys card. It is only partially provided in emails to members.

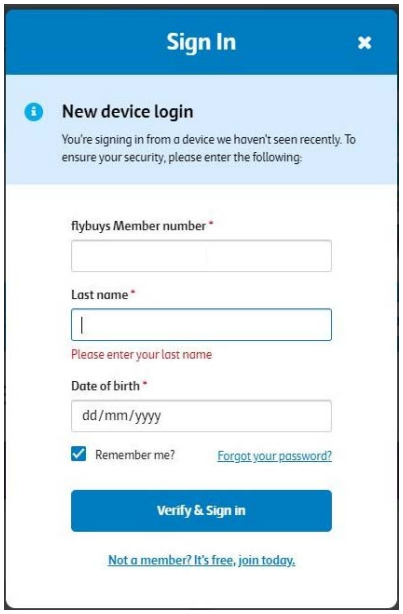
Then the member clicks the sprocket at the top of the screen (step 2a), which presents a pull down menu, where the member clicks 'Go to My Account' (step 2b). Then the member clicks 'Account details' (step 3) and then scrolls down to 'Cardholders' and clicks 'Manage card & profile (step 4). Then the member scrolls down to 'Communication Choices' and clicks 'Manage preferences' (step 5), where the member can manage the emails they are subscribed to (step 6). Flybuys does not currently offer an option to opt-out of digital targeted and behavioural advertising.

The ACCC notes it is not clear how to get to the relevant email subscription settings as it is not clearly labelled, and it requires significantly more screens to get to than for other loyalty schemes (see below).

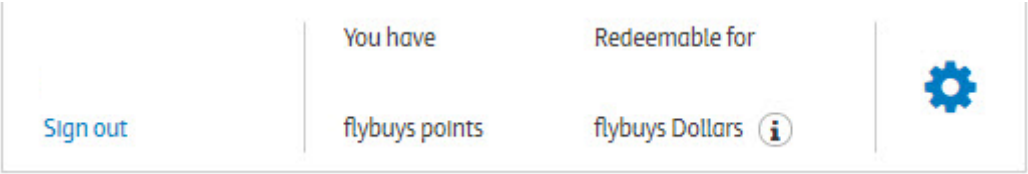
Step 1a: Login



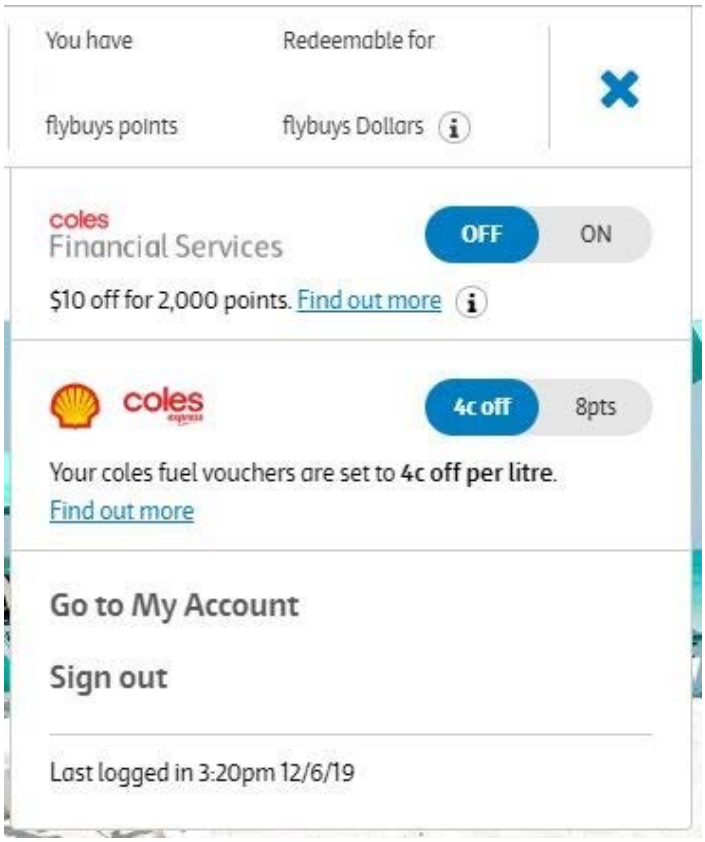
Step 1b: Login



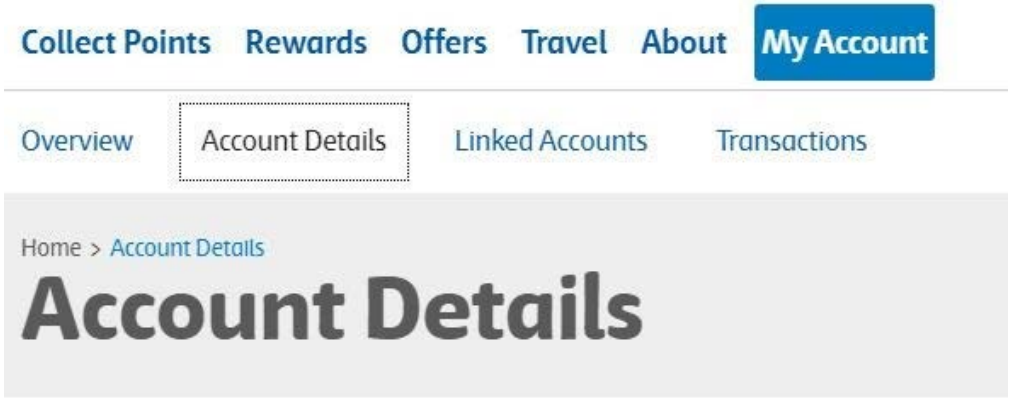
Step 2a: Sprocket



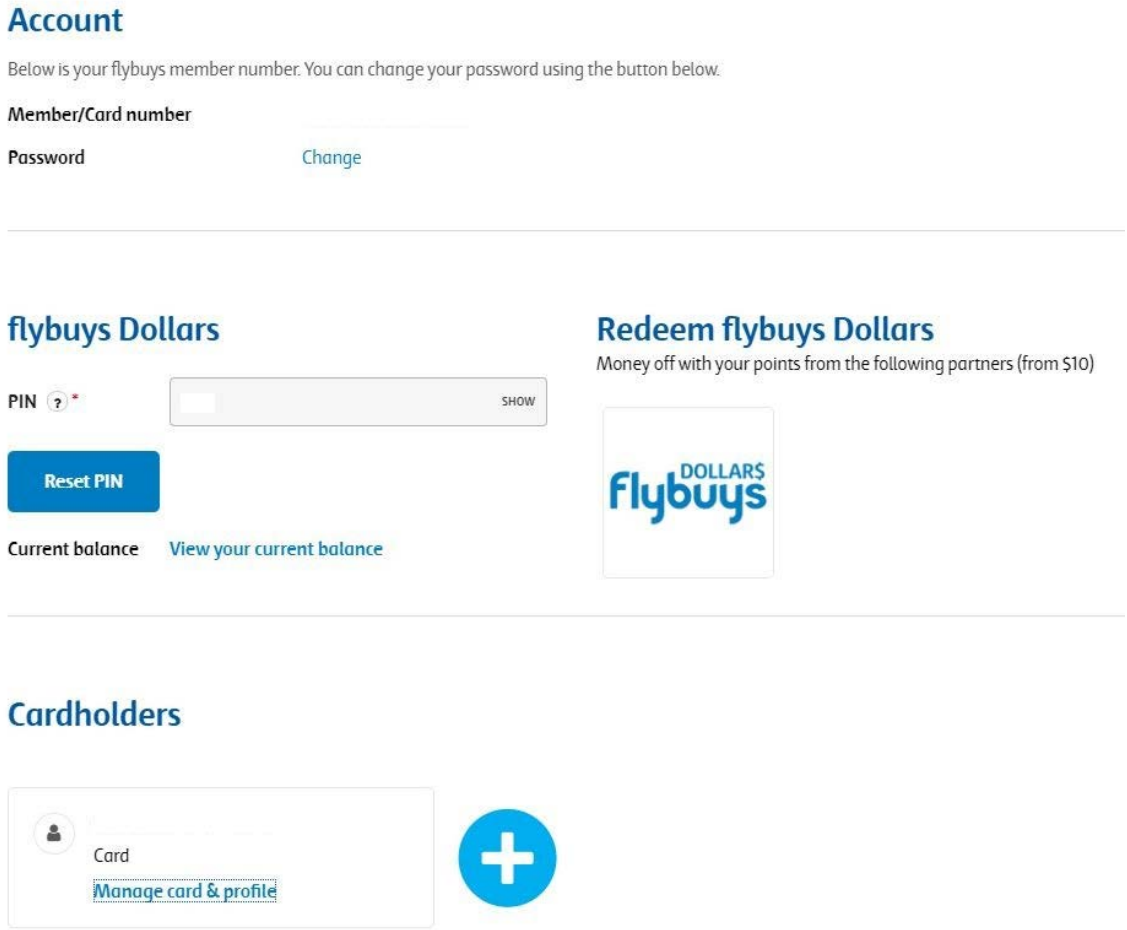
Step 2b: Go to My Account



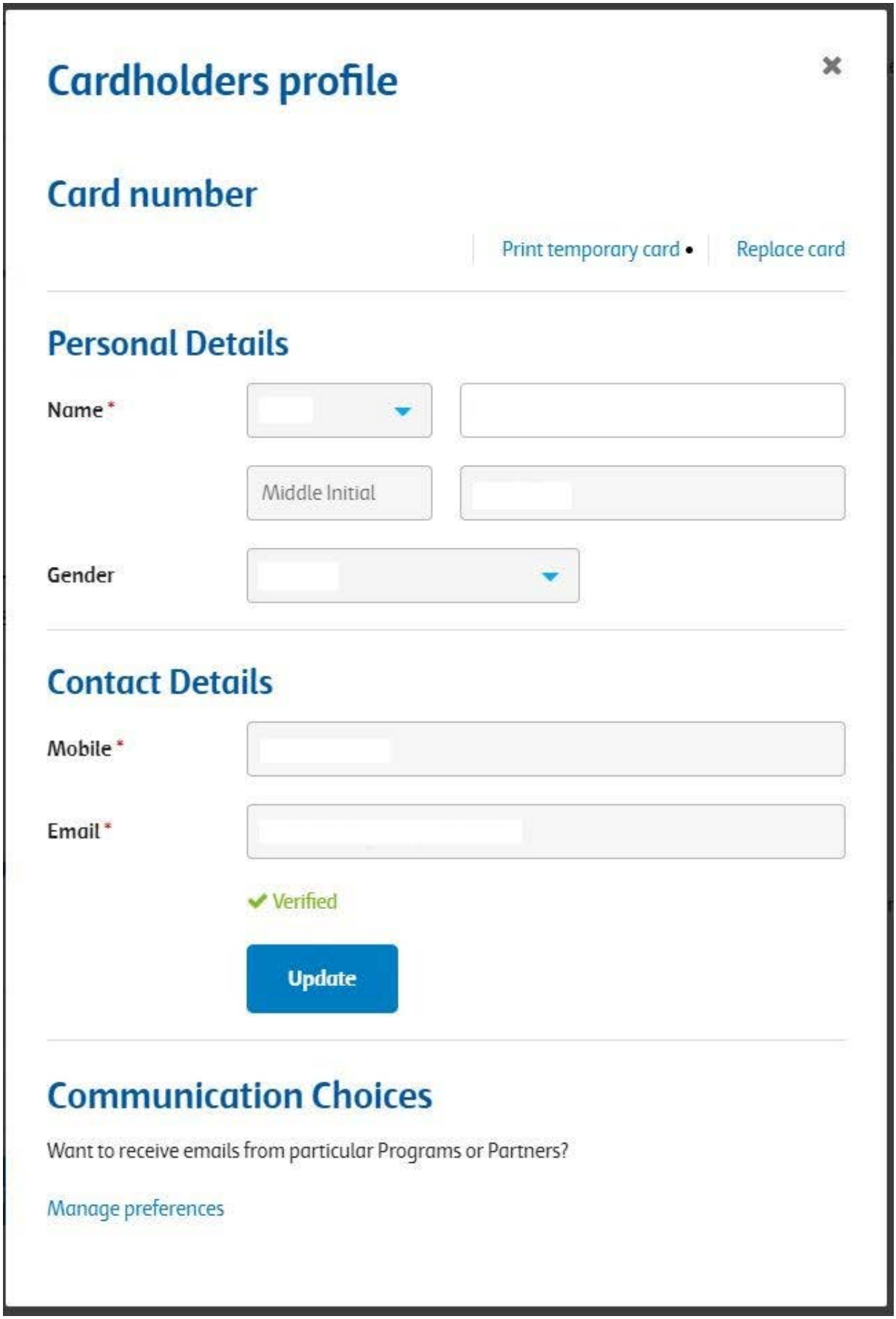
Step 3: Account details



Step 4: Manage card & profile



Step 5: Manage preferences



Step 6: Communication choices

Manage preferences

Your privacy is important to us. The flybuys privacy statement and privacy policy below disclose how we manage your personal information. You may also wish to manage your own communication preferences by selecting how we communicate to you. For example, you may no longer wish to receive offers or information about one of our partners. Please note your preferences may take up to 7 days to become active.

flybuys Privacy Policy

Loyalty Pacific Pty Ltd
ABN 82 057 931 334
Date: November 2018

1 Overview

Communication choices

Manage your communication preferences by removing the tick from emails you no longer wish to receive. Click on the communication type for more information. Remember you can come back at any time and amend your preferences. Please note your preferences may take up to 7 days to become active.

Liquor Offers

☐ **I would like to receive email communication regarding liquor offers**
You must be 18 years or older to receive liquor offers or communications.

Coles

☐ Product offer emails
☐ Your weekly specials emails
☐ Weekly exclusive offer emails
☐ Coles special announcement emails
☐ Supermarket Customer Survey emails
☐ Coles Online emails

Partners

☐ AGL emails
☐ Adidas emails
☐ Kmart emails
☐ Budget emails
☐ mycar emails
☐ Liquorland emails
☐ Coles Express emails
☐ NAB emails
☐ Coles Insurance emails
☐ Target emails
☐ Coles Mastercard emails
☐ First Choice liquor emails
☐ Medibank emails
☐ Kleenheat emails
☐ Liquor Customer Satisfaction Survey emails
☐ Medibank/Activity Tracker emails
☐ All Partner Direct Mail
☐ All Phone Call Telemarketing
☐ Garmin emails
☐ Medibank/Garmin emails
☐ Coles Landlord Insurance emails
☐ Your travel insights emails
☐ Your travel specials emails
☐ Coles Express Customer Survey emails
☐ ahm emails
☐ Fitbit emails
☐ Medibank/Fitbit emails
☐ Velocity Frequent Flyer emails
☐ flybuys Travel Cruises emails
☐ eBay emails
☐ Liquor Market emails
☐ flybuys Telco emails
☐ flybuys max emails
☐ Coles Personal Loans emails
☐ Kmart Customer Satisfaction Survey emails
☐ Discovery Parks emails
☐ Citi emails
☐ Shell Coles Express emails

flybuys program

☑ flybuys Program announcement emails
☐ flybuys Program statement emails
☐ flybuys Program rewards emails
☐ flybuys Product feedback emails

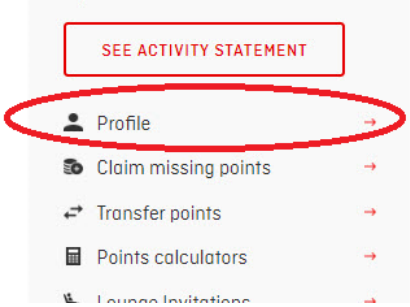
☑ If you wish to unsubscribe card holder from all flybuys email communications please uncheck this box.

Update my choices ›

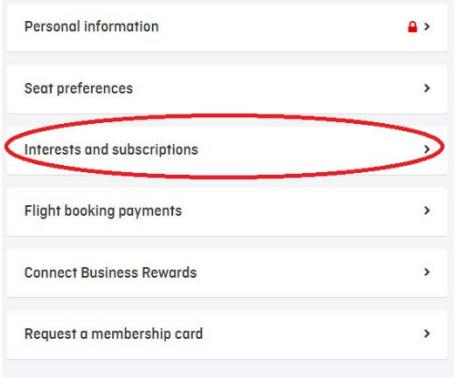
Qantas

The process to opt-out of emails from Qantas requires a user to log into their account, and click the profile link (step 1), click on a link entitled 'Interests and subscriptions' (step 2), and then to opt-out of the relevant email subscriptions (step 3a). To opt-out of targeted and behavioural advertising is the same, except the member will also select 'Digital Advertising' to opt-out (step 3b). The ACCC notes that this is explicitly an opt-out process, and that members are automatically opted-in to a variety of email subscriptions and targeted and behavioural advertising.

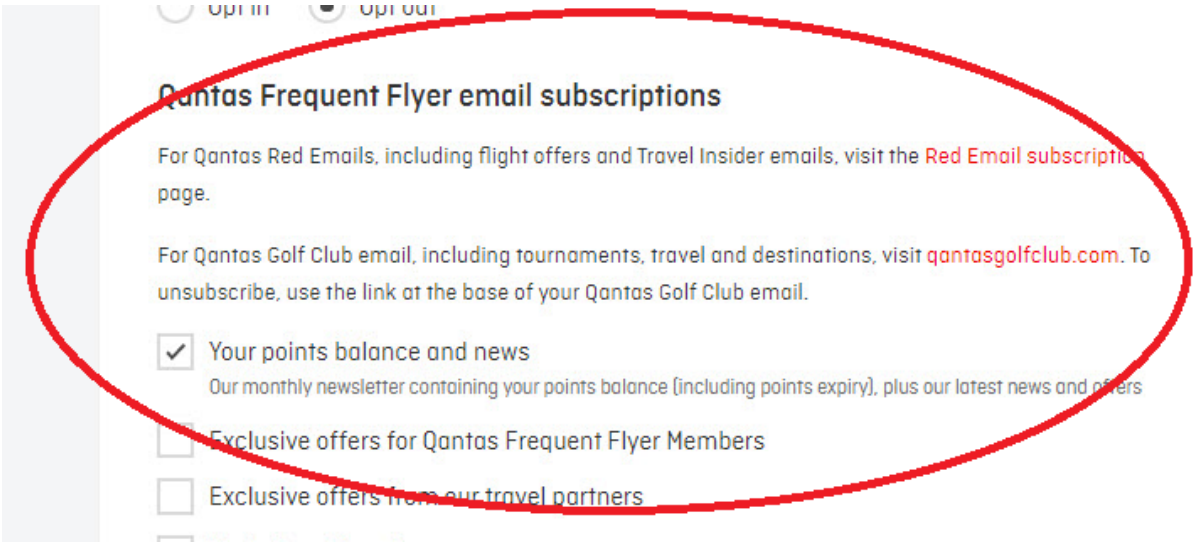
Step 1: Profile



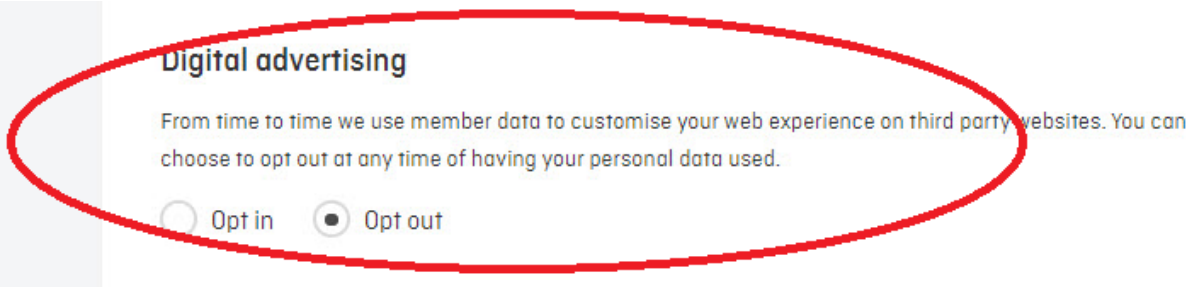
Step 2: Finding the relevant link



Step 3a: Email communications



Step 3b: Digital advertising



ACCC observations

The ACCC notes it could be clearer for members that 'subscriptions' refers to email subscriptions. Without clicking this link, it is also unclear that it is possible to opt-out of digital advertising.

The ACCC notes that while the Qantas privacy policy states that consumers can opt-out of email communications, it does not disclose that consumers can also opt-out of digital advertising. Neither the website nor the privacy policy discloses how the opt-out feature works and what its limitations are. Presumably, based on other mechanisms to opt-out of targeted advertising, such as Youronlinechoices.com.au (see box 4.7), there are a range of limitations.

Qantas should make it clearer to consumers in communications that they can opt-out of digital advertising, noting its limitations, and clarify the contents of its webpages by using links that more accurately reflect the content of the webpage.

Velocity Frequent Flyer

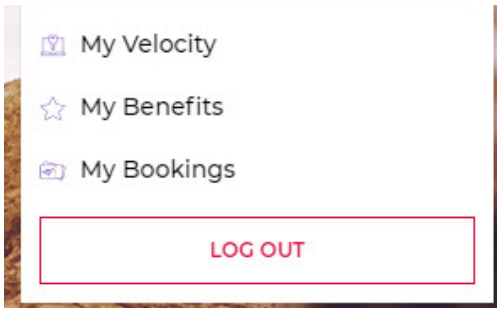
The process to opt-out of emails from Velocity requires a user to log into their account, and click the 'My Velocity' link (step 1), click on a pull-down menu entitled 'My Profile' and click 'My Preferences' (step 2), and then to opt-out of the relevant email subscriptions (step 3a). The ACCC notes this is an opt-out process, and members are automatically opted-in to a number of subscriptions.

Velocity does not currently offer an option to opt-out of digital targeted and behavioural advertising. Rather, Velocity states in its privacy policy:

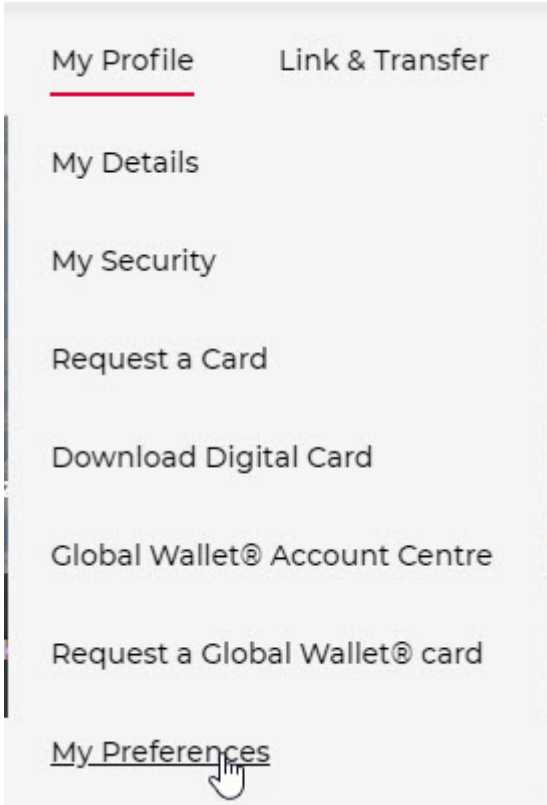
> 'You can change the amount of targeted online advertising you see from us by updating your cookie settings, changing your device or Velocity mobile application settings, or opting-out of the relevant digital platforms.'

The ACCC notes that it is likely to be impractical for most internet users to opt-out of using digital platforms.

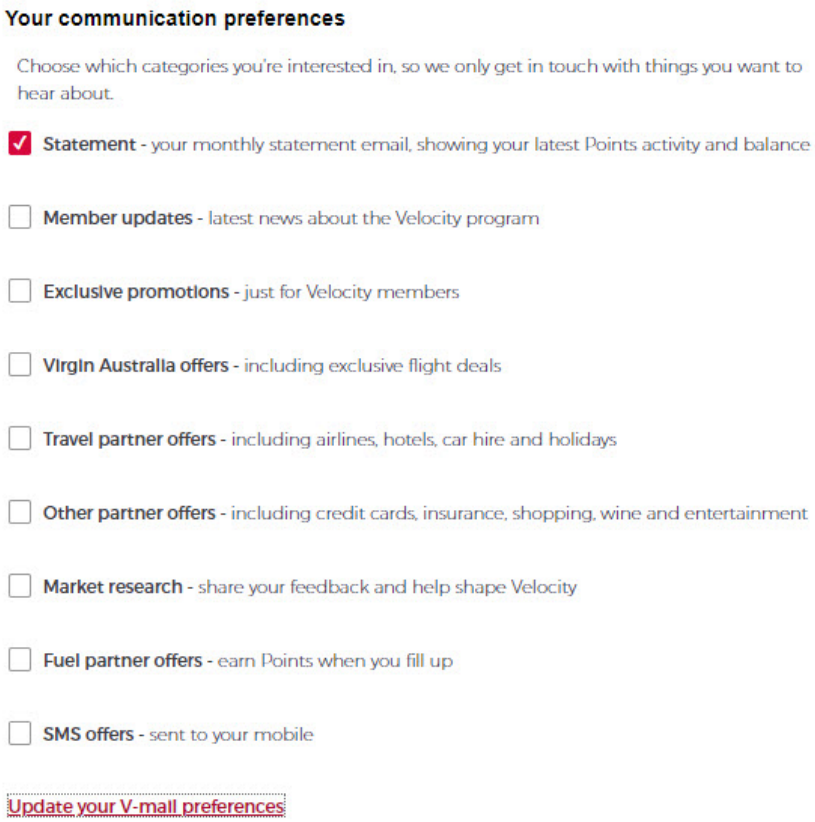
Step 1: Log-in and click My Velocity



Step 2: Click My Profile then My Preferences



Step 3: Opt-out of emails



Woolworths Rewards

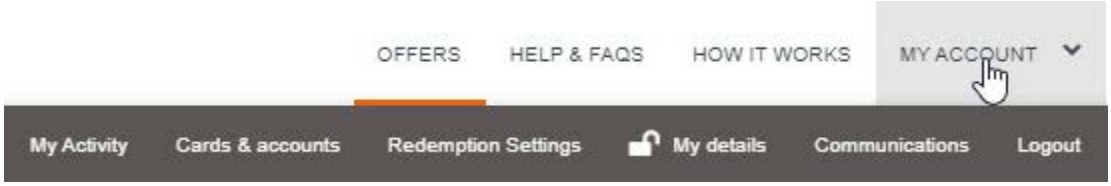
The process to opt-out of emails from Woolworths Rewards requires a user to log into their account, and click the 'My Velocity' link (step 1), click on a pull-down menu entitled 'My Profile' and click 'My Preferences' (step 2), and then to opt-out of the relevant email subscriptions (step 3a).

Woolworths Rewards does not currently offer an option to opt-out of digital targeted and behavioural advertising, however, does allow a member to opt-out of certain cookies. Woolworths states in relation to targeted advertising (as per Step 2):

> Tailored Advertising
>
> To opt out of receiving tailored advertising, you can go to the www.youronlinechoices.com.au website, which will allow you to opt out of tailored advertising for most Australian websites.
>
> You can also opt out of receiving tailored advertising on social media sites by changing your account settings on the relevant site.
>
> Please note that opting out of tailored advertising is device-specific. You will need to opt out for each device used to access online content. Opting out of tailored advertising does not mean that you will stop seeing ads online. Rather, it simply means that those ads will no longer be personalised to you.'

Further analysis of www.youronlinechoices.com.au is provided in Box 4.7, which outlines the significant limitations of this approach. The ACCC notes that the label of Communications is relatively clear. However, further information should be provided to consumers about the limitations of the cookies opt-out and how it works.

Step 1: Log in and go to the My Account pull down then Communications



Step 2:

Contact preferences

Let us know how you'd like us to stay in touch with you. (You can choose more than one option.)

I prefer to be contacted by

- [x] Email
- [ ] Phone
- [ ] SMS
- [ ] Mail

Subscriptions

As a Woolworths Rewards member, you have access to some great offers from Woolworths and our partners. Let us know what you'd like to hear more about.

Woolworths Rewards & Partners

What would you like to hear about?

Woolworths Insurance

Hear about a range of insurance options for extra peace of mind.

Woolworths Money

Liquor Offers

- [ ] I don't want to receive liquor offers and promotions.

Unsubscribe

- [ ] I don't want to receive any emails from Woolworths Rewards and its partners.

Tailored Advertising

To opt out of receiving tailored advertising, you can go to the www.youronlinechoices.com.au website, which will allow you to opt out of tailored advertising for most Australian websites.

You can also opt out of receiving tailored advertising on social media sites by changing your account settings on the relevant site.

Please note that opting out of tailored advertising is device-specific. You will need to opt out for each device used to access online content. Opting out of tailored advertising does not mean that you will stop seeing ads online. Rather, it simply means that those ads will no longer be personalised to you.

Tips for Protecting Your Account

There are many ways you can better protect your online security. Click here to learn more.

Opt out of cookies

- [x] Don't use cookies to personalise my experience.

You can block or disable cookies by changing the settings on the software your device uses to access the internet (your browser software). For example, depending on which browser your device uses, you may be able to disable third party cookies. If you configure your settings to disable session and certain persistent cookies, you may find that the websites you visit have only limited functionality.

Appendix F—Relevant recommendations from the ACCC's Digital Platforms Inquiry

The ACCC is of the view that the findings in this report reinforce the ACCC's findings in our Digital Platforms Inquiry, and further support our recommendations for economy-wide changes in relation to privacy and consumer law.

The ACCC's Digital Platforms Inquiry recommended a range of targeted amendments to the Privacy Act to strengthen protections (**Recommendation 16**) as well as recommending broader reform of Australian privacy regulation (**Recommendation 17**) and a statutory tort for serious invasions of privacy (**Recommendation 19**). It also recommended a prohibition against unfair contract terms (**Recommendation 20**) and a prohibition against certain unfair trading practices (**Recommendation 21**). These are reproduced below.

Recommendation 16: Strengthen protections in the Privacy Act

- **16(a) Update 'personal information' definition:** Update the definition of 'personal information' in the Privacy Act to clarify that it captures technical data such as IP addresses, device identifiers, location data and any other online identifiers that may be used identify an individual.
- **16(b) Strengthen notification requirements:** Require all collection of personal information to be accompanied by a notice from the APP entity collecting the personal information (whether directly from the consumer or indirectly as a third party), unless the consumer already has this information or there is an over-riding legal or public interest reason.
    - The notice must be concise, transparent, intelligible and easily accessible, written in clear and plain language and provided free of charge, and must clearly set out how the APP entity will collect, use and disclose the consumer's personal information. Where the personal information of children is collected, the notice should be written at a level that can be readily understood by the minimum age of the permitted digital platform user.
    - To provide consumers with a readily understood and meaningful overview of an APP entity's data practices and as a means of reducing their information burden, it may also be appropriate for these requirements to be implemented along with measures such as the use of multi-layered notifications or the use of standardised icons or phrases.
- **16(c) Strengthen consent requirements and pro-consumer defaults:** Require consent to be obtained whenever a consumer's personal information is collected, used or disclosed by an APP entity, unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an over-riding public interest reason.
    - Valid consent should require a clear affirmative act that is freely given, specific, unambiguous and informed (including about the consequences of providing or withholding consent).
    - This means that any settings for data practices relying on consent must be pre-selected to 'off' and that different purposes of data collection, use or disclosure must not be bundled. Where the personal information of children is collected, consents to collect the personal information of children must be obtained from the child's guardian.

- It may also be appropriate for the consent requirements to be implemented along with measures to minimise consent fatigue, such as not requiring consent when personal information is processed in accordance with a contract to which the consumer is a party, or using standardised icons or phrases to refer to certain categories of consents to facilitate consumers' comprehension and decision-making.

- **16(d) Enable the erasure of personal information:** Require APP entities to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, unless the retention of information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an over-riding public interest reason.
- **16(e) Introduce direct rights of action for individuals:** Give individuals a direct right to bring actions and class actions against APP entities in court to seek compensation for an interference with their privacy under the Privacy Act.
- **16(f) Higher penalties for breach of the Privacy Act:** Increase the penalties for an interference with privacy under the Privacy Act to mirror the increased penalties for breaches of the Australian Consumer Law.

Recommendation 17: Broader reform of Australian privacy law

Broader reform of Australian privacy regime to ensure it continues to effectively protect consumers' personal information in light of the increasing volume and scope of data collection in the digital economy.

This reform should have regard to the following issues:

1. **Objectives:** whether the objectives of the Privacy Act should place greater emphasis on privacy protections for consumers including protection against misuse of data and empowering consumers to make informed choices.
2. **Scope:** whether the Privacy Act should apply to some of the entities which are currently exempt (for example small businesses, employers, registered political parties, etc.).
3. **Higher standard of protections:** whether the Privacy Act should set a higher standard of privacy protection, such as by requiring all use and disclosure of personal information to be by fair and lawful means.
4. **Inferred information:** whether the Privacy Act should offer protections for inferred information, particularly where inferred information includes sensitive information about an individual's health, religious beliefs, political affiliations.
5. **De-identified information:** whether there should be protections or standards for de-identification, anonymisation and pseudonymisation of personal information to address the growing risks of re-identification as datasets are combined and data analytics technologies become more advanced.
6. **Overseas data flows:** whether the Privacy Act should be revised such that it could be considered by the European Commission to offer 'an adequate level of data protection' to facilitate the flow of information to and from overseas jurisdictions such as the EU.
7. **Third party certification:** whether an independent certification scheme should be introduced.

Recommendation 19: Statutory tort for serious invasions of privacy

Introduce a statutory cause of action for serious invasions of privacy, as recommended by the Australian Law Reform Commission. This cause of action provides protection for individuals against serious invasions of privacy that may not be captured within the scope of the Privacy Act.

The cause of action should require privacy to be balanced against other public interests, such as freedom of expression and freedom of the media. This statutory cause of action will increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

Recommendation 20: Prohibition against unfair contract terms

Amend the *Competition and Consumer Act 2010* so that unfair contract terms are prohibited (not just voidable). This would mean that civil pecuniary penalties apply to the use of unfair contract terms in any standard form consumer or small business contract.

Recommendation 21: Prohibition against certain unfair trading practices

Amend the *Competition and Consumer Act 2010* to include a prohibition on certain unfair trading practices. The scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.

The ACCC notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.