

## Customer Loyalty Schemes Review: ADMA response to the Draft Report

3 October 2019

The Association for Data-driven Marketing & Advertising (**ADMA**) is pleased to submit its response to the Australian Competition & Consumer Commission's (**ACCC's**) **Customer Loyalty Schemes Review Draft Report** on behalf of ADMA and its sister associations, Data Governance Australia (**DGA**) and the Institute of Analytics Professionals of Australia (**IAPA**).

Representing over 400 organisational members with a subscriber base of over 30,000 professionals, many of whom are on the cutting edge of the data revolution, ADMA is the principal industry body for data-driven marketing and advertising in Australia. We support data innovation and the expansion of the responsible use of data in marketing and advertising. This includes any marketing communication that uses data insights, including personal information, to engage with a consumer with a view to producing a tangible and measurable response.

Our submission responds to the four main recommendations in the Report, focusing primarily on the topics relating to privacy. We also respond to the ACCC's comments concerning 'competition issues' identified in the draft Report.

We would welcome the opportunity to participate in further consultation with the ACCC on these matters.

Kind regards

Andrea Martens  
**CEO**

## Executive Summary

### **Draft recommendation 1: Improve how loyalty schemes communicate with customers**

A key issue that bears greater emphasis than it has been given in the draft report is that the points or other rewards that members earn by transacting with these programs have real value to them. ADMA contends that, in comparison with other types of interactions between consumers and markets, these are relatively highly symmetrical in terms of the power balance between the business and its customers.

### **Draft recommendation 2: Prohibition against unfair contract terms and certain unfair trading practices**

#### **Terms and Conditions**

ADMA supports the principle of informing consumers about a loyalty scheme's policies, operations, and terms and conditions in simple and straightforward terms that the member can easily understand, including how to optimise the benefits of participation.

#### **Concerns about the expiry of points**

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

#### **Concerns about unilateral reductions in the redemptive value of points**

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

### **Draft recommendation 3: Improve the data practices of loyalty schemes**

ADMA is generally supportive of the recommendations of the draft report to improve the data practices of loyalty schemes. However, it is important not to conflate analytics involving **deidentified** data (to understand markets generically) with the use of personal information to target offers to individuals, the latter activity being clearly subject to the Australian Privacy Principles.

Current accounting standards do not enable data to be valued appropriately and separately from intangibles. Just as other business assets have protections, maintenance and strategies built around them, so should data

### **Draft recommendation 4: Strengthen protections in the Privacy Act and broader reform of Australian privacy law**

While ADMA accepts the draft report's conclusion that improvements are needed in data privacy practice in some areas, we disagree with the suggestion that these challenges can only be met by further changes to privacy and consumer protection laws, and we strongly oppose these recommendations. ADMA argues the APPs remain fit for purpose.

#### **Competition Issues**

ADMA welcomes the finding in the airline and supermarket sectors that customer lock-in effects and switching costs associated loyalty schemes do not appear to raise competition concerns. ADMA supports the ACCC's approach in considering the competitive effects of loyalty schemes on a case-by-case basis in enforcement investigations. Existing competition laws and penalties for breach are, in ADMA's view, adequate to meet current and future deterrence requirements in respect of anti-competitive conduct, and additional enforcement powers and sanctions are not indicated.

## Introduction

ADMA welcomes the review of loyalty schemes in Australia and the prospect for greater transparency and public awareness of how these programs operate and the costs and benefits associated with them. We share the view that there is scope for improvement so that members of loyalty schemes feel confident in engaging with them.

We agree with the report's conclusion that "Loyalty schemes can intensify competition between rivals and result in consumer benefits in the form of loyalty discounts and lower prices." However, these benefits may vary according to the design of the loyalty scheme.

While the report "focuses solely on consumer-facing loyalty schemes and not business-to-business or other schemes" it bears mentioning that, even within the subset of consumer-facing programs, there is considerable variety to the types of schemes on offer, making it difficult to make generalized statements about them.

ADMA also notes that the ACCC has confined its review to loyalty schemes with more than one million members. For these reasons, ADMA cautions against drawing sweeping conclusions about the sector based on the current review and recommends a further period of study before arriving at a settled view of loyalty programs.

The Draft Report defines loyalty schemes as "a form of marketing or promotional tool that incentivises consumers to make repeat purchases" however businesses tend to view their loyalty programs in terms of the stronger connection they create with their customers, rather than as an incentive to transact. While more revenue from repeat purchases is an obvious benefit in the longer term, it is the prospect of long-term **retention** of the customer that is the main driver.

As the draft report notes, loyalty schemes are "ubiquitous", have a long history in Australia and are a well-established feature of many product and service markets. They have served the Australian community well and the vast majority of their members are enthusiastic adherents. These consumers tend to be much more informed and active, as compared to their engagement with brands in a conventional retail context. ADMA questions whether the tone and skew of the report casts loyalty programs in an unduly negative light based on the complaints of just over one person per day, averaged over a five year period, whereas many millions of Australians interact daily with their loyalty memberships without problem or complaint.

ADMA suggests that an important question the next phase of the report should consider is how Australians might react if their loyalty programs were taken away or seriously compromised by new regulation.

### **Draft recommendation 1: Improve how loyalty schemes communicate with customers**

All successful businesses rely to some extent on the loyalty of their customer base. It has been estimated that it costs at least [five times](#) as much to acquire a new customer as it does to retain an existing one. It is no surprise then that loyalty schemes have become popular as a means of retaining customers across many different market sectors.

The tangible benefits that accrue to loyal customers help create a strong – even emotional – bond between consumers and brands (indeed, this is the 'holy grail' of modern marketing). In this context, loyalty and trust become synonymous and it would be almost unthinkable that a company would

disregard the importance of accurate and complete communication with its customers. Thus, effective communication is at the very core of a successful loyalty program and companies hardly need admonishment to focus in this area.

Loyalty programs are, by their very nature, transparent. Members sign up to a program actively. They provide their information with a clear understanding of the value exchange into which they are entering. This is borne out by the ACCC research (report p.9) which reveals that about half of members would buy from the brand anyway and consider the loyalty rewards to be a bonus.

A key issue that bears greater emphasis than it has been given in the draft report is that the points or other rewards that members earn by transacting with these programs have **real** value to them. A person who is able to take their family on a relatively inexpensive holiday thanks to the points they have earned tends to associate the enjoyment of the vacation with the businesses (airlines, hotels, credit card companies, etc) that made it possible.

The information that is collected is put back to the member in the form of an activity statement that shows them what benefit their activity has earned them in points. In this way members see the information they are providing, and they see the value that accrues from it. ADMA contends that, in comparison with other types of interactions between consumers and markets, these are relatively highly symmetrical in terms of the power balance between the business and its customers.

## **Draft recommendation 2: Prohibition against unfair contract terms and certain unfair trading practices**

### **Terms and Conditions**

ADMA supports the principle of informing consumers about a loyalty scheme's policies, operations, and terms and conditions in simple and straightforward terms that the member can easily understand, including how to optimise the benefits of participation.

ADMA notes 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. ADMA suggests that there is scope for businesses to work with regulators to arrive at a reasonable middle ground in terms of the quantity of information pushed at end users.

Typically, large loyalty schemes are continually reviewing their communications with customers balancing sufficient information to make informed decisions with easily digestible content.

### **Concerns about the expiry of points**

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

### **Concerns about unilateral reductions in the redemptive value of points**

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

### **Draft recommendation 3: Improve the data practices of loyalty schemes**

ADMA is generally supportive of the recommendations of the draft report to improve the data practices of loyalty schemes.

The draft report finds that: “Increasingly, 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.” In this regard, ADMA asserts that it is important not to conflate analytics involving **deidentified** data (to understand markets generically) with the use of personal information to target offers to individuals, the latter activity being clearly subject to the Australian Privacy Principles.

ADMA notes that (P.44) “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.” While this section goes on to hypothesize about the risks that deidentified data could potentially be reidentified, it must be noted that such a practice would be in breach of the APPs, which explains why it is not done.

#### **The link between ‘valuing’ data and better data practices**

The draft report correctly states that data associated with loyalty schemes is an important company asset. It makes only good business sense to treat such an important asset with due care and sensitivity. To that end, marketers are keen to work with all stakeholders including regulators to ensure the long term sustainability of these assets.

Unfortunately, current accounting standards do not enable data to be valued appropriately and separately from intangibles. Just as other business assets have protections, maintenance and strategies built around them, so should data.

Once data is able to be recorded on the balance sheet as an asset, good data practices - formalised data cleansing, management and security - will proliferate across industry. Organisations will have a financial incentive to tighten procedures and processes so that they can list data value on the balance sheet. Additionally, as part of this process, protecting the connection with each customer will become intrinsically tied to company valuation, encouraging organisations to be more transparent with customers and apply data practices that engender trust, strengthening the customer connection.

ADMA refers to the Australian Computer Society’s 2016 submission to the Productivity Commission on this issue:

Without accounting standards, there is little consistency as to the reporting of financial information. They ensure that financial statements from organisations are comparable, credible and allow for more economic decisions based on accurate and concise information.

In the current accounting standards environment, datasets are intangible assets; an identifiable nonmonetary asset without physical substance. Realistically, only at the time of considering a business sale, when determining market value, are datasets broader than the customer database considered by potential purchasers.

In the Digital Economy, data is a primary factor of production. The term ‘data capital’ fulfils the literal definition of economic capital: a necessary input for producing goods and services.

Government and businesses alike realise that data in the Digital Economy will generate probable future economic benefits.

In some cases, data capital substitutes for traditional capital. Companies like Facebook owe their stock valuation premium to their robust data capital. It is estimated that 84 per cent of the market value of S&P500 companies comes from intangible assets, including patents, software and data. While data shares characteristics with other kinds of intangible capital, it is unique. (Source: Paul Sonderegger: The Rise of Data Capital [www.oracle.com](http://www.oracle.com))

Technology firms are beginning to include data capital numbers in their quarterly meetings with analysts. However, perceptions of the value of data vary widely across sectors and industries. Unless the value of data can be made visible, tracked and systematised, it will be undervalued as a factor of production in the Digital Economy. Open data is nothing less than a fundamental building block of competitive advantage, a form of capital on par with financial and human capital.... Australia should also be at the forefront of systematising accounting frameworks for data through the creation of an Accounting Standard for Data.<sup>1</sup>

#### **Draft recommendation 4: Strengthen protections in the Privacy Act and broader reform of Australian privacy law**

While ADMA accepts the draft report's conclusion that improvements are needed in data privacy practice in some areas, we disagree with the suggestion that these challenges can only be met by further changes to privacy and consumer protection laws, and we strongly oppose these recommendations.

ADMA contends that Australia's existing principles-based privacy laws - deliberately constructed to be media neutral - remain well suited to meet current and future technology-driven changes to marketing and advertising communications. Varying the APPs to address perceived issues with loyalty programs would be a significant breach of that core principle of platform neutrality and would invite further tinkering each time a new market innovation comes along.

The APPs are principles-based law. This provides APP entities with the flexibility to tailor their personal information handling practices to their diverse needs and business models, and to the diverse needs of individuals. The APPs are also technology neutral. This is intended to preserve their relevance and applicability, in an environment of rapid and continuous change and emerging methods and technologies.<sup>2</sup>

The ACCC has not made the case for amending the APPs which:

- have only recently been strengthened by the addition of Compulsory Breach Notification;
- have been in place for under a decade in their current form; and
- are built upon the previous National Privacy Principles framework, which means that Australian businesses have, for a generation, conformed to a private sector privacy framework.

Australian businesses and consumers have more than 20 years' experience operating within a principles-based, technology-agnostic legal framework and both businesses and consumers have

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<sup>1</sup> ACS Submission to Productivity Commission Draft Report: Data Availability and Use

<sup>2</sup> <https://oaic.gov.au/assets/privacy/app-guidelines/app-guidelines-july-2019.pdf> p.4

learned and adapted their behavior along the way. This process of learning and adapting continues today and will undoubtedly do so on into the future.

When consumer privacy expectations fall out of alignment with business practice, the regulatory regime, both statutory and voluntary (via codes of conduct) together with the normative influences of market forces, have combined to bring them back into equilibrium. This is why organizational privacy policies and practices are constantly under review and amendment; to respond to changing technology and customer expectations. It is also why new privacy-enhancing technologies are constantly emerging.

### **The ‘Privacy Paradox’**

Observers of consumer online behavior have noted a ‘privacy paradox’ whereby consumers’ actions appear contrary to their expressed concerns about privacy. “There’s a growing gap between how brands use data to fuel their customer experiences and what consumers expect. Consumers demand that brands both protect and respect their data and use it to deliver experiences which make them feel known, valued and understood. This is challenging the role of marketers and the way they deliver brand value to consumers,” according to Jo Gaines of Salesforce. “Old school marketing where brands broadcast a message to a wide audience and picked off those who were receptive is over. Marketers used to take pride in the size and scale of their campaigns, but times have changed. Today, we define and measure the success of marketing on generating one to one relationships, proving to customers that we know them and delivering clear ROI to the business. The era of a personalised approach has moved from an aspiration, to a necessity.

### **Majority of Australian Consumers are ‘Data Pragmatists’**

ADMA argues that members of loyalty programs are nowhere near as vulnerable to power asymmetries as portrayed in the draft report. This is borne out by recent research that benchmarks Australian consumers against other developed countries in their participation in the data economy. The picture it presents is of a changing marketplace in which consumers are taking a greater interest in and control over their data footprint. This is welcomed by businesses that understand the link between loyalty, transparency and trust. They know that a more informed consumer is much more likely to feel confident engaging with brands in a true value exchange.

As a member of the Global Alliance of Data Driven Marketing Associations, ADMA participated in a global<sup>3</sup> research effort in 2018 to better understand consumer privacy expectations. The work maps Australian consumer attitudes to privacy against those of nine other countries around the world in which data-driven marketing channels are well developed. The findings of this new research represent an interesting counterpoint to surveys conducted periodically by the OAIC on Australian consumer attitudes to privacy. In particular, it reveals a more nuanced view of ‘consent’ and the value-exchange between consumers and brands.

The research found that about half (51%) of consumers across 10 global markets are what it dubs ‘Data Pragmatists’, people who are happy to exchange data with businesses as long as there is a clear benefit for doing so. Just over a quarter (26%) of global consumers are ‘Data Unconcerned’, people who show little or no concern about the use or collection of their personal data. Another one in four (23%) fall into the ‘Data Fundamentalist’ category, people who are unwilling to share personal information under any circumstances. Among this latter group, older Australians stand out as being relatively more cautious than their counterparts in other countries. By contrast, younger Australians tend to be more willing than average to enter into a value exchange involving their personal information.

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<sup>3</sup> Online survey of a minimum 1,000 respondents aged 18+ in each of 10 global markets exploring public attitudes towards privacy and data exchange. 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.

Importantly, the vast majority of global consumers (77%), including Australians, show no fundamental objection to engaging in the data economy. Global privacy concerns are high, but there is general satisfaction with the amount of data shared.

Similar to the findings of the OAIC, a majority of global consumers indicate a relatively high level of concern with the issue of online privacy, with an average of 74 percent across the 10 markets stating a degree of concern. Despite this, the majority of consumers surveyed across all markets claim that they are happy with the amount of personal information they currently exchange (for Australia, this figure 53%).

### **Consumers are taking control of the data exchange**

A significant proportion of global consumers believe that sharing personal data is part of the modern economy, with such opinions being the most pronounced in Germany, the UK and the USA where two-thirds agree. In Australia, the figure is 49 percent.

People were asked whether they agreed with the statement: *“On the whole I am happy with the amount of personal information I give to organisations these days”* A majority of consumers in all global markets agreed, ranging from 62% in Singapore to 53% in Australia and the Netherlands and 52% in the USA.

Across global markets, there is high awareness of the collection and use of personal information. A majority in almost all markets claim to feel more aware of how their data is used and collected, with agreement reaching almost three out of four in the Netherlands, Argentina and Spain. For Australia the figure was 61%.

The global data economy is maturing, with significant consumer awareness and acceptance of personal information as a tradeable asset. Survey participants were asked about a range of web-based services and whether they would prefer to pay for them with money or by providing their personal information in exchange for free access. Significant minorities of consumers globally said they would prefer to pay for services rather than exchange personal data, suggesting that consumers are taking control of their personal information and are becoming more cautious and discerning about its disclosure.

An average of 73% of respondents across global markets (72% in Australia) viewed their data as something that can be exchanged for products and services. Such attitudes suggest a clear trend towards a transactional relationship with the data economy.

At present, there is a perceived imbalance in who benefits most from the data economy, consumer or business. On average across global markets, 78% of consumers believe that industry benefits most from data sharing and just 9% believe that consumers currently benefit the most. However, younger consumers are more likely to believe that they currently benefit most from the data they exchange with industry; for example, 23% of 25-34 year olds in Australia hold this view.

### **Transparency is entrenched as a global priority for data exchange**

The vast majority of consumers across all markets claim that increased transparency over how their data is used and collected is critical when sharing personal information with businesses. Indeed, 86% of consumers globally state that transparency over how their data is used and collected is important when exchanging data with a company.

### **Broad interest in a range of incentives for data exchange beyond just monetary rewards**

Once control and transparency, the foundations of trust, are in place, significant minorities across global markets are interested in a wide range of incentives that can be offered in exchange for access to their personal information for the purpose of enabling transactions. For example, almost half (47%) of global consumers state they would be likely to share their personal data in exchange for free products/services, while a third (31%) would do so in exchange for personalised products and services.

Across global markets, there are clear differences in terms of the appeal of incentives for exchanging personal information. Indeed, consumers in markets such as Argentina, Germany and the UK show far more interest in incentives for data sharing compared to their counterparts in markets such as the Netherlands and Australia. For example, while 53% of German consumers would likely exchange their personal information in return for discounted products/services, this falls to 34% in Australia and just 30% in the Netherlands.

These findings suggest that Australian consumers have become relatively more careful about sharing their personal information and this has happened without increased intervention by government regulators on their behalf. Consumers are sending their own clear messages to business, dictating the terms upon which they are prepared to engage via channels that require a data exchange in order to function.

An important broader agenda here is to enable people to understand the value of their own data, and hence empowering consumers on issues of access to and control over data concerning them.

### **Competition Issues**

ADMA welcomes the finding in the airline sector that “It is not clear that customer lock-in effects and switching costs associated with Qantas Frequent Flyer have resulted in major barriers” and in the supermarket sector that, “to date, customer lock-in effects associated with supermarket loyalty schemes do not appear to raise competition concerns.”

CMO magazine reported recently that “According to the [Clarus Commerce 2019 Premium Loyalty Study](#), locking down customer loyalty is more difficult than ever as consumers are bombarded with offers from traditional retailers as well as those in the ever growing direct-to-consumer industry, giving them virtually unlimited choice. In response, brands are turning to loyalty programs in a bid to make an emotional connection with their best consumers.”<sup>4</sup>

ADMA supports the ACCC’s approach in considering the competitive effects of loyalty schemes on a case-by-case basis in enforcement investigations. Existing competition laws and penalties for breach are, in ADMA’s view, adequate to meet current and future deterrence requirements in respect of anti-competitive conduct, and additional enforcement powers and sanctions are not indicated.

End of Submission

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<sup>4</sup> <https://www.cmo.com.au/article/666049/accc-raises-concerns-about-loyalty-programs-selling-consumer-data/>