



**Customer Loyalty Schemes**

Deloitte’s Australian Privacy Practice

Submission on the ACCC Customer Loyalty Schemes Draft Report

3 October 2019

## About Deloitte's Australian Privacy Practice

Deloitte's Australian privacy practice specialises in providing strategic and operational advisory support to Australian businesses navigating the global privacy landscape, and is one of Australia's largest specialised privacy consulting practices. Each year Deloitte publishes the Australian Privacy Index, part of which examines detailed insights based on the survey responses of over 1000 Australian consumers on a range of privacy related topics. In addition, the Deloitte Australian Privacy Index ('Privacy Index') features a survey of up to 100 of Australia's largest brands to assess privacy trends occurring in the market.

First published in 2015, the Privacy Index has since delivered a range of contemporary insights into the changing nature of consumer sentiment in relation to privacy, including the increasing value of building a trusted brand image through transparent data handling practices.

## Introduction

On 5 September 2019, the Australian Competition and Consumer Commission (ACCC) released the Customer Loyalty Schemes Draft Report ('Draft Report') of findings and recommendations following a review of major customer loyalty schemes. As part of a broader compliance and enforcement priority, the objective of the review is to provide the ACCC with an understanding of the operation of customer loyalty schemes, including the collection, use and disclosure of consumer data, as well as the terms and conditions of the various schemes.

The ACCC has invited comment on the findings and recommendations of the Draft Report. We are pleased to provide our contemporary consumer insights and observations in this submission.

Deloitte's privacy research has highlighted a steady increase in the privacy awareness of Australian consumers over a number of years, particularly in relation to the personal information that they share and the transparency expected from the brands that they interact with. Trust has become the primary driver of consumer decision making and brand loyalty, with 65% of consumers surveyed as part of the 2019 Privacy Index ranking trust as their first consideration when deciding whether to provide an organisation with access to their personal information.<sup>1</sup>

Importantly, many of the insights revealed by the Privacy Index convey a desired personal information handling outcome that is apparently at odds with the way that many consumers ultimately interact with customer loyalty schemes. Despite this apparent paradox, it is clear that the majority of Australian consumers 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.

In this submission, Deloitte's Australian privacy practice provides comment on Chapter 4 of the Draft Report ('Data practices of customer loyalty schemes'), with a particular focus on Draft Recommendations 3 and 4 as they relate to privacy.

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<sup>1</sup> Deloitte Australia's Privacy Index 2019 – 'Trust: is there an app for that', p6.

## Draft Recommendation 3

### Organisations that improve their customer loyalty scheme data practices will better meet consumers' expectations and preferences

Draft Recommendation 3 of the Draft Report calls on customer loyalty schemes to increase consumers' understanding of how their personal information will be handled, and provide consumers with meaningful control over their data.<sup>2</sup> These objectives respond to growing consumer privacy concerns and the extent to which these concerns are influencing consumer behaviour. The Draft Report also highlights the mutual benefit that customer loyalty schemes stand to realise by enhancing consumer transparency, control and ultimately trust in relation to the use of their personal information.

The Draft Report identifies the following steps that customer loyalty schemes should take to achieve these objectives:

- Improve the usability of privacy policies, and communicate these to consumers in a manner that is consistent with *Privacy Act 1988* (Cth) ('Privacy Act') definitions.
- Simplify messages about privacy terms, conditions and policies provided to consumers during key interactions.
- Discontinue the practice of automatically linking consumers' payment cards to their profile for the purposes of behavioural monitoring and analysis when customer loyalty cards are not scanned.
- Identify third party data recipients, purposes of data sharing and third party data handling practices.
- Disclose third party advertising sources, advertising channels and data uses.
- Provide consumers with more meaningful control over the collection, use and disclosure of their data.

### Consumer attitudes towards privacy are changing rapidly

The Draft Report recognises that consumers are increasingly concerned about customer loyalty schemes' use of their data, and question whether organisations are using data responsibly. In particular, the Draft Report provides that consumers are wary of their personal information being shared with unknown third parties, or used for purposes beyond their consent, such as targeted advertising.<sup>3</sup>

The Deloitte Mobile Consumer Survey 2018 found that Australian consumers are becoming more aware of their privacy rights and are anxious about the way in which organisations collect, handle and use their personal information. 84% of consumers surveyed about privacy in relation to smartphone use were concerned about how organisations use, store and share their personal

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<sup>2</sup> ACCC Customer Loyalty Schemes Draft Report, p64.

<sup>3</sup> Ibid, p34.

information.<sup>4</sup> Furthermore, 76% of consumers (a 15% increase from the 2017 survey) believed that organisations share their personal information with third parties all or most of the time.<sup>5</sup> Of particular relevance to customer loyalty scheme providers, the majority of respondents (71%) indicated that they care more about their credit card details than any other type of personal information.<sup>6</sup>

## **Consumers are more likely to interact positively with organisations that they trust**

The Draft Report highlights consumers' desire for greater transparency and control over the way that customer loyalty schemes handle their data. Deloitte research shows that 76% of consumers were more comfortable sharing their personal information if they were able to see and edit what had been collected by organisations.<sup>7</sup>

Deloitte research also demonstrates that consumers are increasingly prepared to act on improving their privacy where control is currently lacking. For example, smart phone users surveyed as part of the 2019 Privacy Index indicated that they were likely to provide false information where possible (46%),<sup>8</sup> had deleted a mobile application due to privacy concerns (63%),<sup>9</sup> and actively used privacy enhancing applications (52%).<sup>10</sup>

The Draft Report has also considered the importance of brand trust to customer loyalty schemes. Deloitte's privacy insights have consistently found that consumers are more likely to engage with and provide personal information to trusted organisations.<sup>11</sup> In particular, transparent collection, use and sharing of personal information are essential components to fostering trust between consumers and organisations.

The 2018 Privacy Index found that 69% of consumers chose 'trust that a brand will use data appropriately' as the most important consideration in deciding to share their personal information.<sup>12</sup> 41% of consumers surveyed also indicated that they are comfortable allowing a trusted brand to transfer their personal information to third parties for clear benefits, a statistic which highlights the importance of trust in a relationship between consumers and customer loyalty schemes.<sup>13</sup> While most consumers display awareness that their personal information will be shared with third parties, 53% of consumers are willing to share personal information so long as it is shared in line with their expectations.<sup>14</sup>

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<sup>4</sup> Deloitte Mobile Consumer Survey 2018, p29.

<sup>5</sup> Ibid, p29.

<sup>6</sup> Deloitte Australian Privacy Index 2016 – 'Trust without borders', p8.

<sup>7</sup> Deloitte Mobile Consumer Survey 2018, p31.

<sup>8</sup> Deloitte Australian Privacy Index 2019 – 'Trust: is there an app for that', p16.

<sup>9</sup> Ibid, p16.

<sup>10</sup> Ibid, p16.

<sup>11</sup> Deloitte Australian Privacy Index 2018 – 'The symbiotic relationship', p3.

<sup>12</sup> Ibid, p14.

<sup>13</sup> Ibid, p17.

<sup>14</sup> Ibid, p17.

Despite organisations' desire to know their consumers intimately, trust is easily broken when personal information is used in ways not explicitly agreed to, such as irrelevant marketing (58%), cross selling (54%) and data trading (68%).<sup>15</sup>

## **Trust and transparency can become a competitive advantage**

The Draft Report emphasises the imbalance of bargaining power and significant information asymmetries that exist between consumers and customer loyalty schemes, signalling the need for organisations to align their privacy practices with changing consumer expectations.<sup>16</sup>

The 2018 Privacy Index found that only 18% of consumers choose 'tangible benefits' as the most important consideration in deciding to share their personal information with an organisation,<sup>17</sup> a sign of the complex decision making process, or lack of transparency, which leads consumers to enter customer loyalty schemes.

The 2017 Privacy Index indicated that only 32% of consumers felt that organisations had built meaningful trust with them, and that 91% of organisations believed that they could increase transparency in relation to the use of consumer data.<sup>18</sup> Organisations are therefore presented with an opportunity to create a competitive advantage by adopting consumer-centric privacy practices and providing a transparent value exchange. 92% of organisations recognised this potential, confirming that building trust with consumers was a competitive advantage.<sup>19</sup>

The 2019 Privacy Index revealed that consumers actively support organisations that they believe respect privacy.<sup>20</sup> 73% of consumers choose brands that they trust the most with their personal information, whilst 38% of respondents indicated that they were consumers of those organisations specifically because of their privacy practices.<sup>21</sup>

These statistics highlight the importance of strong privacy practices in a competitive economy, and the vital role of trust in developing deeper long-term consumer relationships and sustainable business models.

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<sup>15</sup> Ibid, p17.

<sup>16</sup> ACCC Customer Loyalty Schemes Draft Report, p34.

<sup>17</sup> Ibid, p14.

<sup>18</sup> Deloitte Australian Privacy Index 2017 – 'Trust starts from within'

<sup>19</sup> Ibid, p8.

<sup>20</sup> Deloitte Australian Privacy Index 2019 – 'Trust: is there an app for that', p9.

<sup>21</sup> Ibid, p9.

## Draft Recommendation 4

### Stronger Privacy Act protections can drive transparency and promote trust between consumers and organisations

#### Strengthened notification and consent requirements would have dual benefits for consumers and customer loyalty schemes

Draft Recommendation 4 of the Draft Report proposes a number of reforms to the Privacy Act which relate to notification and consent requirements, including:

- Strengthening existing notification requirements to reduce a perceived ‘information burden’ that is currently experienced by consumers, including increased requirements to provide clear and concise notice.
- Strengthening requirements to ensure that freely given, specific, unambiguous and informed consent be required by default whenever personal information is collected, used or disclosed by an entity subject to the Privacy Act.
- Configuring settings for additional data collection to be ‘off’ by default.<sup>22</sup>

The Draft Report has highlighted practices including click-wrap agreements, complex or ambiguous notice and a lack of meaningful consumer control over personal information as elements contributing to the need for strengthened privacy provisions.

Deloitte’s insights indicate that increased privacy protections under the Privacy Act, as well as a broader reform of Australian privacy laws would have the potential to benefit both consumers and brands.

#### *Consumer Benefits*

Strong notification requirements are a fundamental component of a robust privacy regulatory regime, and key to aligning consumer expectations with the objectives and data practices of customer loyalty schemes. Over a number of years, the Privacy Index has consistently highlighted the value that consumers place on transparency and control, particularly in relation to the collection, use and disclosure of their personal information.

For example, the 2019 Privacy Index indicated that 97% of Australians consider it important for organisations to provide clear and transparent notice of how personal information will be used.<sup>23</sup> Moreover, 68% of consumers surveyed indicated that they have read at least part of a privacy policy before deciding whether to engage with a mobile application.<sup>24</sup> A defined regulatory requirement that privacy notices be presented in a manner that is clear, concise and accessible, as proposed by Draft Recommendation 4, would significantly benefit consumers at a time when privacy awareness is continuing to increase.

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<sup>22</sup> ACCC Customer Loyalty Schemes Draft Report, p65.

<sup>23</sup> Deloitte Australian Privacy Index 2019 – ‘Trust: is there an app for that’, p13.

<sup>24</sup> Ibid, p13.

The Draft Report indicates that Australian consumers are positioned at a significant disadvantage due to information asymmetries, further compounded by poor engagement with privacy notices.<sup>25</sup> The 2018 Privacy Index found that 46% of Australian organisations provided small, unspecified or no reference to the major uses of data that they collect from individuals.<sup>26</sup>

Deloitte's insights also indicate a lack of meaningful engagement between Australian consumers and privacy notices, with 37% of respondents providing that they 'never' or 'rarely' read terms of conditions and privacy notices.<sup>27</sup> Ostensibly the result of an 'information burden', as termed in the Draft Report, consumers would be likely to benefit significantly from mandated requirements aimed at reducing the complexity, length and ambiguity of privacy notices and collection statements.

In relation to consent, the Draft Report states that, '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'.<sup>28</sup>

Mandatory express consent requirements for customer loyalty schemes, as proposed by Draft Recommendation 4, would likely reduce the concerns of Australian consumers who are increasingly alarmed by the unexpected use and disclosure of their personal information. Australians over the age of 65 are particularly concerned by current data practices, with 77% of the belief that organisations share their personal information with third parties all or most of the time, compared with 67% of respondents aged 18-24.<sup>29</sup>

Despite a heavy reliance on consumer engagement, a mandatory consent model for privacy in Australia would provide consumers with the opportunity to take more meaningful control of their data, and unlock the wider benefits of customer loyalty schemes in a more transparent way.

### *Brand Benefits*

As consumer privacy awareness increases, so too does the potential for organisations to benefit from strengthened regulatory requirements for notification and consent, as proposed by Draft Recommendation 4. Only 15% of respondents to the Deloitte Media Consumer Survey 2018 indicated that organisations were taking adequate steps to protect their personal information.<sup>30</sup> In 2017, 68% of respondents to the Privacy Index felt that organisations had neglected to build trust with them.<sup>31</sup>

There are signs that Australian organisations realise the importance of improved notice. The 2016 Privacy Index observed a 58% increase in organisations' layered privacy policies between 2015 and 2016.<sup>32</sup>

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<sup>25</sup> ACCC Customer Loyalty Schemes Draft Report, p34.

<sup>26</sup> Deloitte Australian Privacy Index 2018 – 'The symbiotic relationship', p9.

<sup>27</sup> Ibid, p16.

<sup>28</sup> ACCC Customer Loyalty Schemes Draft Report, p42.

<sup>29</sup> Ibid, p29.

<sup>30</sup> Ibid, p31.

<sup>31</sup> Deloitte Australian Privacy Index 2017 – 'Trust starts from within', p10.

<sup>32</sup> Deloitte Australian Privacy Index 2016 – 'Trust without borders', p15.

Providing consumers with an opportunity to make informed choices about the way in which their personal information is collected, used and disclosed is key to fostering trust between consumers and brands. The 2018 Privacy Index found that 70% of consumers have greater trust in brands that have transparent and clear privacy notices.<sup>33</sup> The detrimental impacts of a lack of trust between consumers and brands can be substantial, with 81% of respondents indicating that they would use false personal information in their dealings with an organisation due to privacy concerns.<sup>34</sup>

Mandatory notice and consent requirements, including pro-consumer default settings will have the potential to drive more meaningful consumer interaction with customer loyalty schemes, and the development of tailored offerings. A proposed strengthening of notification and consent requirements would also likely reduce unexpected collection, use and disclosure of data, particularly with third parties, which has been shown to be a significant cause of negative consumer sentiment towards organisations.

As detailed in our comments to Draft Recommendation 3, the 2018 Privacy Index found that consumers are most likely to lose trust in organisations that use their personal information for purposes beyond those that they are aware of, or that they have consented to.<sup>35</sup> In addition, the 2016 Privacy Index found that 67% of consumers are concerned with organisations sending their personal information outside of Australia.<sup>36</sup>

## **Consumers are prepared for greater individual rights and protections**

Draft Recommendation 4 of the Draft Report proposes introducing individual rights to the Privacy Act, including:

- Requiring entities subject to the Privacy Act to erase the personal information of a consumer without undue delay when receiving a request for erasure from the consumer, and when information is no longer required to provide a service to an individual.
- 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.<sup>37</sup>

Greater individual rights for privacy are an increasingly common component of strengthened global regulations. Deloitte's privacy insights indicate that Australian consumers are prepared to engage with regulatory changes that would provide them with greater control over the way that their data is collected, used and disclosed.

The Deloitte Media Consumer Survey 2018 found that 68% of respondents were interested in accepting greater responsibilities in relation to how their data is used and disclosed, if provided

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<sup>33</sup> Deloitte Australian Privacy Index 2018 – 'The symbiotic relationship', p16

<sup>34</sup> Deloitte Australian Privacy Index 2019 – 'Trust: is there an app for that', p16.

<sup>35</sup> Deloitte Australian Privacy Index 2018 – 'The symbiotic relationship', p17.

<sup>36</sup> Deloitte Australian Privacy Index 2016 – 'Trust without borders', p11.

<sup>37</sup> ACCC Customer Loyalty Schemes Draft Report, p65.

with the option to do so.<sup>38</sup> 76% of respondents also indicated that they would be more comfortable sharing their data if options such as a right to erasure were available.<sup>39</sup>

In keeping with rapidly changing consumer expectations, a significant number of Australian organisations have begun to implement capabilities that allow consumers to customise the way that their data is used. The 2019 Privacy Index found that 59% of organisations surveyed allowed consumers to partially opt out of their data being collected.<sup>40</sup> By contrast however, only 21% of applications informed consumers of their ability to delete or request the deletion of their data.<sup>41</sup>

### *Right to erasure*

Deloitte's insights indicate that Australian consumers see particular value in a right to request the erasure of their data, as proposed by Draft Recommendation 4.

Survey respondents to the Deloitte Media Consumer Survey 2018 almost unanimously (93%) believed that they should have the right to ask a company to permanently delete the data that is held about them.<sup>42</sup> Further, 76% responded that they would request permanent deletion of their personal information even if it resulted in a negative impact to their service, including a reduction in personalised features.<sup>43</sup>

Importantly, despite legislative requirements and recommended best-practice to the contrary, many Australian organisations currently retain personal information for longer than is reasonably necessary for a particular function or activity. The 2018 Privacy Index identified retention and destruction as an area of poor practice by many Australian organisations, with 67% of privacy policies reviewed providing little or no details on how long personal information is retained and used for.<sup>44</sup>

A defined right to erasure would potentially reduce the prospect of organisations retaining personal information indefinitely, or for periods exceeding consumer expectations. Moreover, a right to erasure would also align with consumer expectations, as demonstrated by our insights.

### *Direct right for privacy action*

The introduction of a direct right for individuals to bring actions or class actions for an interference with their privacy under the Privacy Act would be consistent with increased privacy awareness amongst Australian consumers.

It is also likely that the introduction of a direct right for privacy action would further raise the profile of privacy within organisations, reducing a compliance-only approach to management of personal information. The 2017 Privacy Index found that 58% of organisations indicated that privacy was important solely because 'it is a law that we need to comply with'.<sup>45</sup>

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<sup>38</sup> Deloitte Media Consumer Survey 2018, p31.

<sup>39</sup> Ibid, 31.

<sup>40</sup> Deloitte Australian Privacy Index 2019 – 'Trust: is there an app for that', p6.

<sup>41</sup> Deloitte Australian Privacy Index 2019 – 'Trust: is there an app for that', p23.

<sup>42</sup> Deloitte Media Consumer Survey 2018, p31.

<sup>43</sup> Ibid, p31.

<sup>44</sup> Deloitte Australian Privacy Index 2018 – 'The symbiotic relationship', p10.

<sup>45</sup> Deloitte Australian Privacy Index 2017 – 'Trust starts from within', p12.

## **Re-defining personal information can future-proof customer loyalty schemes**

The Draft Report has proposed an update to the definition of personal information provided in the Privacy Act, an amendment that has the potential to future-proof customer loyalty schemes. In particular, the ACCC has proposed:

- ‘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.’<sup>46</sup>

The Draft Report states that ‘a lack of clarity around how each loyalty scheme defines personal information contributes to consumers’ difficulty understanding how their data is being handled’.<sup>47</sup>

This apparent inconsistency, according to the Draft Report, is caused primarily by an unclear definition of personal information within the Privacy Act, which can be interpreted in a way not to include technical data such as IP addresses, device identifiers or location data that has the potential to identify an individual.<sup>48</sup>

Deloitte’s privacy insights indicate that, notwithstanding broader notification issues, the majority of Australian organisations demonstrate best-practice by providing specific notice to their consumers in relation to the personal information that they collect. Specifically, the 2018 Privacy Index found that 78% of organisations provided a detailed list of data types collected from individuals in their privacy policy, consistent with the current Privacy Act definition of personal information.<sup>49</sup>

## **Broader reform of Australia’s privacy regime would align with global trends**

Reform of Australia’s privacy regulatory regime as proposed by Recommendation 4 of the Draft Report, including stronger provisions for notification, consent and individual rights would more closely align Australian law with international regulations, and promote globally compliant practices amongst local organisations and customer loyalty schemes.

The 2019 Privacy Index highlighted that, ‘Despite last year’s implementation of the European General Data Protection Regulation (GDPR), some organisations continue to obtain, use and retain personal information without the consumer’s knowledge and meaningful consent’.<sup>50</sup> Whilst this regulation does not impact businesses that do not process the data of EU persons, given the Privacy Index surveys the top consumer brands, and given most of these are global brands or are Australian brands with global reach, this finding could be interpreted as either non-compliance with this regulation or setting a lower privacy bar for Australian-based consumers.

The adoption of proposed changes to Australia’s privacy regulatory regime, as detailed in Recommendation 4, presents an opportunity for organisations including those which offer

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<sup>46</sup> ACCC Customer Loyalty Schemes Draft Report, p65.

<sup>47</sup> Ibid, p52.

<sup>48</sup> Privacy Act 1988 (Cth), s6 (1).

<sup>49</sup> Deloitte Media Consumer Survey 2018, p8.

<sup>50</sup> Deloitte Australian Privacy Index 2019 – ‘Trust: is there an app for that’, p19.

customer loyalty schemes to meaningfully align their practices with global privacy standards that consumers are increasingly expecting.

## Final comment

Deloitte's Australian privacy practice welcomes proposed reforms that will increase transparency, promote privacy, and foster trust between consumers and customer loyalty schemes. We thank the ACCC for the opportunity to provide comment on the Draft Report.

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