

Loyalty Pacific Pty Ltd

Submission on ACCC Customer Loyalty Schemes Inquiry Draft Report

3 October 2019

1 Executive Summary

Loyalty Pacific Pty Ltd (**flybuys**) welcomes the opportunity to contribute further to the Australian Competition and Consumer Commission (**ACCC**) inquiry into customer loyalty schemes and to comment on the ACCC's September 2019 draft report (**Draft Report**).

flybuys is pleased that the way in which it operates its program is fundamentally aligned with the ACCC's recommendations for change. flybuys has developed its program over many years on the basis of an ongoing commitment to transparency and fairness for its members.

Whilst flybuys also acknowledges that the Draft Report reflects the ACCC's general observations about the common practices of many large loyalty programs, flybuys is concerned to ensure that the ACCC's understanding of its practices is accurate. flybuys notes that several of the ACCC's observations about the industry are not reflective of the way in which flybuys operates and addresses these points in section 6 below.

Notwithstanding the above, flybuys acknowledges the ACCC's observations in the Draft Report in respect of certain practices of loyalty program operators in Australia. In light of these observations, flybuys intends to conduct reviews of aspects of its own program to identify areas of potential improvement in terms of fairness, transparency and accessibility.

Finally, the ACCC's recommendations address issues of some complexity and, in some instances, flybuys considers that there is a need for a more balanced approach. This submission also provides flybuys' suggestions on the ACCC's recommendations with a view to ensuring that, where possible, the simplicity of consumers' engagement with loyalty programs is not compromised and the significant benefits that many consumers derive from participation in loyalty programs are appropriately recognised.

2 Structure of this submission

This submission does not strictly follow the structure of the Draft Report or seek to address every issue raised. Instead, flybuys has organised its comments around five key themes:

- Section 3 provides a brief overview of the flybuys' program;

- Section 4 describes flybuys' ongoing commitment to transparency and fairness and where its current practices are broadly aligned with the recommendations of the ACCC;
- Section 5 summarises some changes that flybuys is considering implementing as a result of the ACCC's Draft Report;
- Section 6 clarifies how certain aspects of the flybuys program operate; and
- Section 7 highlights flybuys' concerns in relation to some of the recommendations made by the ACCC in the Draft Report.

3 Overview of flybuys' business

The flybuys loyalty program has been in operation since 1994.

Until recently, flybuys was a business unit of Coles, which was itself a wholly-owned subsidiary of Wesfarmers. In November 2018, Wesfarmers' Coles division was demerged into an independent ASX-listed entity. Following the demerger, Wesfarmers retained a 15% minority stake in Coles and a 50% stake in flybuys. Coles holds the other 50% stake in flybuys.

flybuys refers to all retailers of goods and services that participate in the flybuys program as "partners". flybuys works with approximately 25 points earning partners, of which approximately 11 are affiliates of flybuys (i.e. either shareholders or owned or operated by shareholders). Key partners of the flybuys program include Coles, Kmart, Target, Liquorland, Coles Express, NAB, AGL and eBay.

The flybuys loyalty program is one of several large Australian loyalty programs, with approximately 8.6 million active members and 6.7 million participating households.

With no participation fees, the flybuys program is capable of generating significant benefits for members based on points earned from their everyday shopping activities. In 2018, the total value of points redeemed by members was **[C-I-C]**.

flybuys considers that a good member experience is the core of its business and it is focused on providing a service that members value. It seeks to achieve this by partnering with a wide range of leading companies, ensuring members earn meaningful rewards for participation, and offering simple, transparent processes for points earning and reward redemption.

4 flybuys' current practices and its commitment to transparency and fairness

flybuys is pleased that there is fundamental alignment between flybuys' current practices and the ACCC's preliminary findings about how loyalty programs should operate. These issues are considered in more detail below.

4.1 Points values and redemptions

The ACCC considers that unilateral reductions in the earn rates and redemption values of points are detrimental to consumers and potentially unfair, especially to consumers who already have significant points balances at the time of a change and for whom the detriment of switching programs is arguably greater (pp 23 and 28, Draft Report). The ACCC separately expressed concern that consumers do not always have a good

understanding of the different earn rates that apply to different kinds of purchases (p 24, Draft Report).

flybuys' points earning framework has been relatively stable since 2012. As a coalition loyalty program, flybuys needs to accommodate the commercial differences of a range of partners (who operate in sectors with different margins on different products and services and different regulatory regimes). Nevertheless, flybuys aims to ensure that earn rates are as consistent as possible across its partner retailers. It is a strength of the flybuys program that members earn an easy-to-remember 1 point per \$1 spent at major "everyday shopping" retailers such as Coles Supermarkets, Kmart, Target and Liquorland. Significantly, there are only three out of flybuys' approximately 25 partners for which the earn rate is lower than 1 point per \$1 spent on certain spending. The earn rates for each partner (and any variations of the earn rate between products or services) are clearly disclosed and accessible on the flybuys website (<https://www.flybuys.com.au/collect#/>).

From time to time, a partner may exit the program or a new partner may join, but such changes are relatively infrequent and flybuys has an excellent track record of communicating with members about such changes in an orderly and timely fashion.

In relation to the redemption value of flybuys points, unilateral devaluations are not a feature of the flybuys program. flybuys can confirm that it has not devalued its points at any time in the past 20 years. Of particular note:

- There was a re-basing of the flybuys currency in 2012 associated with a major re-launch of the program. However, members were better off as a result of increased earn rates for new points which increased member "buying power" going forward. Additionally, the "buying power" of existing points balances was maintained.
- Since 2012, member points redemption value has always been retained at 0.5 cents per point or better. However, 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 or if entry fees for a venue increase, in line with normal retail practice.

The ACCC has also expressed the view that, where redemption opportunities are too limited, they have the potential to undermine the consumer benefits associated with participation in a loyalty program. flybuys agrees fully with this proposition. Commercially, flybuys also recognises that redemptions are a key member decision point – if it goes well, members may feel that their participation in the program has been affirmed and be inclined to continue their engagement in the program, whereas if they encounter unexpected restrictions or complexity, members may feel let down and disengage.

Any restrictions associated with the ordinary cash purchase of particular goods or services (such as age limitations associated with alcohol purchases) inevitably also apply to the redemption of those goods or services as a reward under the flybuys program. However, flybuys seeks to ensure any supplier-imposed restrictions are reasonable and any other restrictions are kept to an absolute minimum so as to afford members as seamless a redemption experience as possible.

Overall, flybuys offers more than 1,000 rewards with relatively few being subject to any restrictions at all beyond availability. Rewards do evolve and change over time (including to better reflect changing consumer preferences) and it is not practical to notify members of every change – or, flybuys submits, necessary given the wide range of other redemption choices available to members. Ultimately, reward restrictions and changes to rewards are matters that draw few complaints from flybuys' members.

The ACCC has separately raised concerns in relation to the expiry of points (p 26, Draft Report). flybuys' addresses this issue in section 5 below.

4.2 Data practices

Privacy and data security are at the forefront of all aspects of the flybuys program, and are embedded into the way in which flybuys operates its technical and operational systems. flybuys promotes a privacy conscious culture at all levels within the organisation, and implements a variety of measures and controls to ensure that it is compliant with all of its obligations under Australian privacy legislation. flybuys also takes account of global developments in relation to privacy and data regulation and their potential impact on the program in its current, as well possible future, state.

flybuys' commitment to the privacy of its members, and the strength of its operational privacy processes, including a privacy-by-design approach, was recognised by the Office of the Australian Information Commissioner (**OAIC**) in a privacy assessment report in relation to the flybuys program conducted in 2016. In undertaking this assessment, the OAIC conducted a detailed review of flybuys' privacy processes and endorsed a number of flybuys' practices, including the way in which it communicated with its members in respect of how flybuys handles their personal information. The key findings and recommendation set out in the OAIC report have formed a strong platform from which flybuys has been able to further develop its privacy practices over the last several years.

Recognising the critical importance of privacy to its members, flybuys is committed to the continuous monitoring and improvement of its privacy practices to ensure that they adapt and evolve as flybuys' business continues to grow, and to ensure that they are aligned with community expectations. Specific examples of how flybuys works towards achieving this in practice includes:

- adopting a rigorous process of reviewing and assessing any developments of its business that involve the use of member personal information prior to implementation (including engaging specialist external advisers to review such activities in the context of the existing Australian regulatory regime); and,
- undertaking continuous detailed reviews of its programmatic media business to ensure that the growth and development of the business is consistent with, and aligned to, flybuys' focus on privacy and transparency.

5 Implementing change

5.1 Initial reviews to be undertaken

While there is fundamental alignment between the preliminary recommendations of the ACCC in its Draft Report and flybuys' current practices, flybuys is also committed to the continuous improvement of the experience of its members and partners. In this context,

flybuys is therefore considering all of the ACCC's observations in detail with a view to identifying any potential improvements in relation to the following areas highlighted in the ACCC's Draft Report:

- **(communications)** member on-boarding process, and communications with members to ensure clarity and transparency in relation to key elements of the program;
- **(readability and transparency)** member terms and conditions and privacy policy in order to identify changes that will improve readability and transparency; and
- **(fairness)** member terms and conditions and privacy policy from an unfair contract terms perspective to identify any areas where its current terms could be adjusted.

These reviews will be conducted having regard to the ACCC's draft findings on consumer behavioural biases, consumer preferences and the level of consumer understanding of data privacy issues.

flybuys' aim is for any changes arising from its review to be implemented in a timely way, but it also recognises the importance of avoiding rolling sets of fragmented changes that have the potential to create "change fatigue" amongst members (serving only to reduce their engagement with flybuys terms and conditions, and operations). This is a particularly important consideration for flybuys (and presumably other loyalty program operators) given that there are a suite of legislative and regulatory reforms that have been proposed (including by the ACCC in its Digital Platforms Inquiry Final Report), but which are not likely to be implemented, or their final form known, for some time.

With relevant laws in a state of flux, it may be premature or impractical for loyalty program operators 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.

There is clearly a balance that needs to be struck in terms of timely implementation of changes that are straight-forward and unlikely to be affected by further legislative reforms. However, limiting the number of instances of substantive change to the program and associated systems will minimise the risk of consumer confusion and of reduced transparency where there is potential for the regulatory framework to shift in the near term.

5.2 Points expiry

An active flybuys member's points do not expire with time. This policy ensures that active members receive the full value of their loyalty to the program. Expiry of flybuys points only occurs if an account becomes inactive. flybuys regards an account as inactive if there are no points earned or redeemed on that account for 12 consecutive months. The flybuys [Terms and Conditions](#) make this clear. flybuys believes this policy to be fair and reasonable (given the nature of the program is earning rewards for everyday shopping), not unduly onerous, and compliant with the ACCC's draft recommendations.

Members may contact flybuys if they wish to object to the expiration of their points. If a member does so, flybuys may reinstate the points if it considers there is a sound reason for inactivity on the account; for example, if the member has been residing overseas for an extended period or suffering from a serious illness.

Contrary to the feedback received by the ACCC (p 25, Draft Report), flybuys receives very few inquiries in relation to the expiration of points.

flybuys is firmly of the view that, given the nature of the program, it is not unreasonable that points expire after 12 months of inactivity. However, 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.

6 Accuracy of ACCC's observations

The Draft Report makes several specific references to flybuys that do not accurately reflect the way in which flybuys operates its business. Specifically, flybuys would like to clarify the following aspects of flybuys' privacy practices described by the ACCC in the Draft Report.

6.1 Location data

The ACCC notes in the Draft Report that a number of loyalty programs collect location data from their members, including via loyalty apps. flybuys would like to clarify that it does not collect location data about its members via the flybuys app. If location data were to be collected via the flybuys app, flybuys would make this clear to members, explain the purposes for the collection and that members would have full control of their preferences.

6.2 Tracking consumer purchases via payment cards

flybuys understands that the ACCC is concerned with the practice of tracking consumer purchases via payment cards, and the linkage of payment information to the relevant members' profile. flybuys understands the basis for the ACCC's concerns when this type of activity is undertaken in the broad and opaque manner that the ACCC has described.

flybuys would like to clarify that it does not collect or append transactional data to a member's profile in respect of purchases made at a retailer where a member has not swiped their flybuys card. 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 better tailor offers to that member (e.g. by sending a Coles weekly special email). 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.

7 Disproportionate impact of some recommendations

flybuys is concerned to ensure that ACCC's recommendations on certain complex issues do not operate in a disproportionate manner or produce unintended

consequences. In this context, it considers that some of the preliminary findings merit further consideration and testing by the ACCC.

In particular, flybuys is concerned that some of the recommendations have the potential to have a disproportionate impact on the businesses and operations of loyalty programs with only limited benefits for consumers.

For example, flybuys is concerned with the impact that providing granular and widespread opt-outs, or specific opt-in requirements for particular data practices such as programmatic advertising, might have on the ability of a loyalty program to offer a valuable service to members.

flybuys acknowledges the importance of heightened control mechanisms and transparency around the use of personal information at a consumer level. However, this needs to be balanced against the value that loyalty programs derive from this information and the consequential impacts that would ultimately flow through to consumers from an erosion of this value. It is important to recognise that many loyalty programs like flybuys are at their core, marketing programs, and in the case of flybuys, consumers making the decision to join are fully aware of this, and are aware that they will be kept informed of their options in respect of earning and redeeming points. As the ACCC will appreciate, if loyalty programs were to offer greater or lesser value to members based on the extent of opt-ins or opt-outs that have been selected by members, this would work against having a single clear and transparent program that is capable of being easily understood. It may also result in loyalty programs being constrained in their ability to offer certain services for “free” or may result in the value of certain offerings and rewards being reduced (which potentially disproportionately impacts those members who are comfortable with the way in which their information is collected, handled and used).

It is also likely to be difficult to communicate effectively with consumers about the implications to the value they might receive from a program if broad opt-out mechanisms are required to be provided. For example, programmatic advertising is a common industry practice that flybuys believes is understood by customers. A customer who has no significant issues with this practice might nonetheless opt-out from it if there are broad mandatory opt-out options provided (or even defaults), without any real understanding of the implications for the value of their membership of the program overall. flybuys is concerned that the implications of opt-in or opt-out requirements are not fully understood, and imposing changes in these areas could significantly affect the customer value proposition across loyalty schemes in ways that have not been investigated.

It is also important that recommendations in respect of granular and widespread opt-outs, or specific opt-in requirements, are capable, in reality, of being implemented at a technical level, or without significant intrusion to customers through a multiplicity of communications seeking approvals. For example, where the delivery of particular services is dependent on third party technology providers such as in the context of programmatic advertising, the technical ability to opt-out of services on a granular basis may be limited by capabilities of the third party platforms.

8 Concluding comments

The Draft Report provides the loyalty program sector with a useful roadmap for improvement going forward. However, for the reasons outlined in this submission flybuys urges the ACCC to further test some of its preliminary findings in advance of issuing its final report.

flybuys is willing to supply any additional information it can to assist the ACCC in this regard.