



Woolworths Group Limited (Woolworths) submission on the ACCC's draft Customer Loyalty Report dated 5 September 2019

Introduction

As the operator of one of Australia's largest loyalty schemes, Woolworths understands that clarity, transparency and security are essential to customer trust, and is grateful for the opportunity to participate in the ACCC's review into customer loyalty schemes.

Woolworths takes its obligations under consumer and privacy laws seriously, and in addition has developed its own set of customer-focused data principles. We invest significant resources in updating and adapting the Woolworths Rewards loyalty scheme in a rapidly developing technology environment, including in response to consumer expectations and regulatory guidance; and are committed to being a retail market leader in that regard.

We are also proud of the simplicity of the Woolworths Rewards scheme and the benefits it delivers to consumers (including personalised offers and discounts), and consider that a balanced approach to communication, data practices and regulation is required.

Scope of submission

This submission:

- (i) describes some of the recent work Woolworths has undertaken to improve its already robust Woolworths Rewards consumer communications and data practices;
- (ii) identifies where Woolworths supports the Draft Recommendations; and
- (iii) addresses some points where Woolworths does not support the Draft Recommendations, in particular in respect of changes to the consumer and privacy legal framework.

For simplicity, we will address each of the Draft Recommendations by reference to the Woolworths Rewards loyalty scheme (so will not address other Woolworths Group loyalty schemes, for example the Dan Murphy's "My Dan's" loyalty scheme). Further, to avoid repetition with the Draft Report, the submission does not address in specific detail how loyalty schemes (including Woolworths Rewards) work, or general benefits that consumers and retailers get from such schemes. However, Woolworths is willing to consider providing additional information to the ACCC in that regard, should that be of assistance.

Against that background, we will address each of the Draft Report's Draft Recommendations in turn.

1. Draft recommendation 1: Improve how loyalty schemes communicate with customers

Woolworths supports the recommendation that consumers must have an opportunity to review and understand loyalty scheme policies and operations both prior to becoming a member and on an ongoing basis. In other words, consumers must provide informed consent to the terms and



conditions of the scheme. In compliance with the ACL, Woolworths Rewards members provide this consent in two ways. They:

- subscribe to the scheme, which is an entirely voluntary choice; and
- read and confirm acceptance of the terms and conditions of the scheme, along with the Privacy and Collection Notices, during the registration process.

That said, as part of Woolworths' commitment to continually improve the Woolworths Rewards scheme, it has made some recent changes to ensure consumers are presented with the information they need in new and engaging ways (which make the scheme even easier to understand), including:

- in May 2019, Woolworths Rewards replaced the format of its terms and conditions with an FAQ/Q&A style format, which more clearly and effectively communicates the terms and conditions to consumers in an intuitive, digestible and readable form; and
- 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, which means they are now easier for consumers to access and navigate.

Further improvements being explored include:

- updating the Group Privacy Policy and Collection Notices, along with the way that key provisions contained in those documents are presented, to make them easier for consumers to review and understand. For example, Woolworths is considering presenting the key provisions through a layered approach, including the use of infographics, images and videos, which will be more engaging and easier to digest than the current, primarily text based approach. User experience consumer testing will help shape our final approach; and
- providing consumers with greater visibility over the types of data which Woolworths collects, including where it is collected from, how it is handled, and with whom it is shared, taking a balanced approach to the challenge of ensuring that consumers are sufficiently informed but are not also overloaded with information. For example, Woolworths considers that informing consumers of the category of recipients with whom it shares data (for example, technology companies which support our business operations such as Salesforce), along with naming partners who play a particularly substantial or significant role in a service or are likely to be of interest to consumers (for example, Qantas), will be more effective than an exhaustive list of company names which consumers are unlikely to recognise or derive benefit from, which may change on an ongoing basis, and which may create challenges with respect to cybersecurity.

Woolworths is willing to discuss its recent and future improvements in respect of consumer communication further with ACCC if that would be of assistance.



2. Draft recommendation 2: Prohibition against unfair contract terms and unfair trading practices

Woolworths believes that interactions with all B2C and B2B consumers should be conducted fairly.

However, it does not support the ACCC's specific recommendations that unfair contract terms be prohibited (not just voidable) and that a concept of "unfair trading practices" be introduced and prohibited, including because:

- Draft Recommendation 2 is not currently underpinned by substantive evidence which demonstrates that it would be effective or necessary. Accordingly, Woolworths considers this recommendation is premature and that the CAANZ process must include an evidence-based review prior to any consultation.
- In any event, the current regulatory framework and environment comprehensively protect consumers against "unfair" contracts and trading practices (Chapters 2 and 3 of the ACL in particular). Together they empower the ACCC to effectively and efficiently address any use of unfair terms or trading practices (including in respect of the specific concerns raised in Section 3 of the Draft Report) by reference to long standing, well tested and well understood concepts including "unconscionable", "misleading" and "deceptive" conduct, and "false representations". Further, the ACCC already has a track record of prosecuting those who seek to rely on "unfair" contract terms, under the misleading conduct prohibition (by virtue of the respondent asserting reliance on a void contract term).
- At a time when the Federal Government is trying to ensure efficient and effective regulatory measures are in place, the introduction of an entirely novel and additional concept of "unfairness" would introduce unnecessary uncertainty in circumstances where the existing, robust regime is fit for purpose. However, Woolworths supports further consultation on this Recommendation and would welcome the opportunity to contribute to the CAANZ process.

3. Draft recommendation 3: improve the data practices of loyalty schemes

Woolworths supports the ACCC's recommendation that loyalty operators should consistently review their approach to presenting consumers with information about how they handle data. Some recently implemented and proposed Woolworths activities in that regard are described at Section 1 above. Further, Woolworths supports the recommendation that consumers should have meaningful control over their data.

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To address a specific example raised in the Draft Report, Woolworths does automatically link customers' payment cards to their profile when a Woolworths Rewards member presents both their payment card and Woolworths Rewards card when completing a transaction ("Card Linking"). The motivation for this is to benefit Woolworths Rewards members by using their purchasing history and transaction activities (even when they don't scan their Rewards card at the time of making a purchase) to provide them with highly relevant and personalised offers. This practice is undertaken with informed consumer consent (obtained when members agree to the terms and conditions and Collection Notice during the registration process), relates solely to transactions undertaken within the Woolworths Group (that is, Woolworths does not use, nor link, customers' payment cards with transactions undertaken at other retailers), and is only ever shared on an aggregated and anonymised basis primarily to better understand our customers' preferences.

Woolworths' view is that limiting or restricting the practice of Card Linking may have the effect of:

1. 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; and
2. depriving members of receiving a direct benefit in the form of:
 - (i) 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); and
 - (ii) bonus Rewards points, which may be awarded to them upon activation of an offer and which can be used to receive further discounts.

Members who do not wish to receive these personalised offers are able to unsubscribe from any marketing or promotional communications and/or cancel their Rewards membership entirely at any time without cost.

Woolworths submits that while reasonable minds may have different views about this practice, on any view it should not be prohibited in circumstances where consumers have provided their informed consent.

4. Draft recommendation 4: strengthen protections in the Privacy Act and broader reform of Australian privacy law

(a) 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

Woolworths supports ensuring that the definition of personal information can cater to current and future technological developments.



In particular, Woolworths supports the inclusion of technical data (including IP addresses and other location data) in the definition of personal information provided there is a sufficient nexus between that technical information and an individual.

This approach is consistent with Draft Recommendation 4 because that technical information would need to be “about an identified individual or an individual who is reasonably identifiable” to comprise personal information. It would however be beneficial to clarify this point noting that the Final Digital Platform Report (“DPI”) used different language (namely in recommendation 16(a), which suggests that all technical data that *may be used to identify an individual* automatically represents personal information). Woolworths considers such an approach would extend beyond the EU General Data Protection Regulation (“GDPR”) without any tangible benefit to individuals’ privacy or enhancing data protection.

(b) 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

Woolworths supports the objective of ensuring that consumers are meaningfully informed about data collection practices. It considers this can best be achieved by a principles-based approach which would achieve the object of Recommendation 4 without unduly burdening consumers with too much information.

Woolworths considers the following principles would be appropriate, and believes that the recent and planned Woolworths activities described at Section 1 above are consistent with them:

- making relevant information clearly and conveniently accessible to consumers;
- using icons, graphics and video in support of text;
- avoiding ‘nuisance’ or inconvenience caused by unnecessarily interrupting the consumer’s online activities, which can lead to disengagement with the message;
- using a ‘layered’ approach so that consumers do not need to trawl through a large amount of content to get a summary of what they need to know; and
- making the information available free of charge.

(c) 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’

Woolworths supports the recommendation that consent must be freely given, specific, unambiguous and informed. Where a consumer has no choice but to subscribe to a service, Woolworths understands the Commission’s recommendation that any additional data collection should be preselected to ‘off’. However, where a consumer has full discretion as to whether to join a particular

loyalty scheme, and also has given informed consent to settings selections which will be consistent with delivering the full consumer benefits of the loyalty scheme (as they do when they join Woolworths Rewards), a loyalty scheme operator should be able to proceed in accordance with that consent.

(d) 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

Woolworths is concerned that Draft Recommendation 4 proposes a fundamental change to Australian privacy law, by extending the requirement for consent to every circumstance in which a consumer's personal information is collected, used or disclosed (with limited exceptions).

Woolworths notes the recommendation in the DPI that personal information necessary for the performance of a consumer contract should be excluded from the general obligation to obtain consent. Woolworths is concerned that reasonable minds may differ as to what personal information is 'necessary' for an agreement and would welcome additional consultation and clarification. Further, Woolworths considers that where businesses use personal information in accordance with legitimate interests, this should be excluded from the general requirement for consent. This is in line with the GDPR and in practical terms would allow retailers to continue to engage in appropriate fraud prevention activities and broader commercial activities that consumers would reasonably expect and which typically have limited impact on those consumers.

(e) 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

Woolworths supports the general right of consumers to choose to have their personal information erased, insofar as this is practical and not unduly burdensome to business.

Woolworths is concerned that Draft Recommendation 4 has the potential to require significant resourcing, as previously noted by the OAIC, and that a careful balancing of the rights of individuals to privacy and the right of business to use data has to be undertaken:

The requirement in the proposed APP for an organisation to destroy or de-identify the personal information, in circumstances where the organisation is still authorised to use or disclose it under the Privacy Act ... has the potential to impose a significant burden on the organisation and disrupt its business practices. The OAIC considers that the existing measures in the APPs balance the need to give an individual control over the handling of their personal information with the regulatory burden on entities when carrying out their functions and



activities, and that the additional burden in the proposed new APP is unjustified and unnecessary.¹

Woolworths submits that greater consultation and guidance are needed to give business the certainty required to support compliance. Issues of primary importance include:

- whether the broader legal exceptions provided for in the GDPR to allow for retention of personal information are intended to be applied as part of this recommendation in the Australian context, including the exception to allow for retention of personal information for the establishment, exercise or defence of legal claims; and
- consideration of whether anonymisation would be sufficient to meet GDPR erasure requirements, as recently considered by the Austrian authorities²

(f) 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

Woolworths does not support this recommendation as it does not believe that this provides an efficient mechanism for consumers, noting the high cost of legal fees and difficulty consumers face in quantifying losses in privacy law cases.

The OAIC's most recent annual report provides that in the period dating 2017-18 compensation was paid in only 20% of all closed privacy cases and more than three quarters of privacy complaints brought to the OAIC settled for less than \$5,000. The cost of litigation accordingly is likely to be disproportionate to the outcomes.

Woolworths submits that the high cost of litigation also presents an area for consideration in the context of the DPI's recommended introduction of a statutory cause of action for serious invasions of privacy (recommendation 19).

Woolworths submits that there is a need for further consideration to appropriately support access to justice and the efficient resolution of disputes. This includes reviewing the suitability of class actions.

¹ Office of the Australian Information Commissioner, Submission 90, quoted in ALRC 'Serious Invasions of Privacy in the Digital Era' (2014) at <https://www.alrc.gov.au/publication/serious-invasions-of-privacy-in-the-digital-era-alrc-report-123/16-new-regulatory-mechanisms/deletion-of-personal-information/> viewed 23 September 2019

² DSB-D123.270/0009-DSB/2018