



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Customer loyalty schemes

## Draft report

September 2019

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## Opportunity for comment

You are invited to examine this draft report on customer loyalty schemes and comment on it by written submission to the Australian Competition and Consumer Commission (ACCC) by **3 October 2019**.

The final report will be prepared after submissions have been received and will be published in late 2019.

The ACCC prefers to receive electronic copies of submissions, either in PDF or Microsoft Word format which allows for the submission text to be searched.

Submissions, questions or queries about this draft report can be directed to [loyaltyschemes@acc.gov.au](mailto:loyaltyschemes@acc.gov.au).

## Confidentiality

To foster an informed and consultative process, all submissions will be considered public and will be posted on the ACCC's website.

Interested parties wishing to submit commercial-in-confidence material to the ACCC should submit both a public and a commercial-in-confidence version of their submission. The public version of the submission should clearly identify the commercial-in-confidence material by replacing the confidential material with an appropriate symbol or 'c-i-c'.

The fewer confidentiality restrictions placed on submissions, the more easily we can test information provided and reach accurate conclusions about the market. Therefore, we ask that information you claim confidentiality over be genuinely of a confidential nature and not otherwise publicly available. We request that you provide reasons in support of your claim, to assist us to better understand your claim and assess the information you provide.

We are committed to treating confidential information responsibly and in accordance with the law. Where we are provided with confidential information, we will, to the extent reasonably possible, seek to protect the confidentiality of that information. In some circumstances we may be legally required to produce confidential information. For example, we may be required to disclose information that is subject to a confidentiality claim pursuant to a court order or subpoena. If this occurs, we will endeavour to notify and consult with you about the proposed release of your information and measures (such as confidentiality orders) that may be taken to protect that information. It is also important to note that we may share confidential information internally with ACCC and AER staff and with our external lawyers and consultants.

For further information on the ACCC's treatment of confidential information, please refer to the [ACCC/AER Information Policy](#) publication.

## Privacy

For privacy reasons, personal information (e.g. home and email addresses, signatures, phone, mobile and fax numbers) may be removed from submissions before being published on the website. You may wish to remain anonymous or use a pseudonym; however, the ACCC may place less weight on the submission.

## Executive summary

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

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

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

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

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

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

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

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

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

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

## The objectives of customer loyalty schemes

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

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

Increasingly, for some loyalty schemes, this defensive strategy includes the collection and use of their customers' data in order to develop consumer insights, which may be shared with or sold to other businesses, and to target customers with tailored advertising. Some loyalty schemes may also use this data to deliver targeted and personalised advertising to their own customers on behalf of other businesses.

## Consumer issues

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

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

The ACCC has received complaints from customers of loyalty schemes that alleged they had not earned, maintained or redeemed their points in the manner they anticipated, with these consumers reporting that they did not obtain any benefits from participation at all. Complaints included that some operators of loyalty schemes:

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

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

of the ACL. To help facilitate well-informed engagement and thereby help consumers optimise the benefits of participation in loyalty schemes, the ACCC considers that loyalty scheme operators should do more to help consumers understand how their loyalty schemes operate, including by ensuring that consumers are provided with relevant information at the right time and in the right way to make informed decisions.

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

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

Loyalty scheme operators should review their approach to presenting the terms and conditions of loyalty schemes to ensure consumers have a genuine opportunity to review and understand their policy and operation.

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

The ACCC also notes that the findings in this report reflect those of the ACCC's Digital Platforms Inquiry.

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

#### **The ACCC's findings in this draft report reinforce the Digital Platforms Inquiry Final Report's recommendations for the need for a prohibition against unfair contract terms and certain unfair trading practices.<sup>1</sup>**

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

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

The scope of a prohibition on certain unfair trading practices should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance. The ACCC notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.

## **Data practices**

Membership of a loyalty scheme is voluntary and generally provided at zero monetary cost to the consumer. In exchange for the benefits provided by loyalty schemes, loyalty schemes derive value from consumers by collecting data, including personal information, about them. 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.

Loyalty schemes may collect consumer data both actively, for example information voluntarily provided by the consumer when joining the loyalty scheme, as well as passively,

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<sup>1</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, Recommendation 20 and 21, p. 26.

for example the background collection of data through a consumer's use of a platform, apps on a device or use of third party websites.

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

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

While Australian consumers have different preferences, attitudes and levels of awareness when it comes to the data they share with loyalty schemes, a number of surveys have suggested that many are concerned about sharing their data with companies, including loyalty schemes. The surveys reviewed in this draft report suggested that many consumers are concerned about the sharing of their data with unknown third parties and targeted advertising, and whether their data is being used responsibly. Many consumers are also seeking more transparency and control over the data they provide to loyalty schemes.

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

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

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

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

The ACCC encourages loyalty schemes to take steps now to address the concerns raised in this report, including by:

- reviewing their clickwrap agreements for unfair contract terms, including by assessing the potential consumer detriment of unilateral variation terms
- improving the clarity, accessibility, navigability and readability of privacy policies, including by using definitions consistent with those in the Privacy Act
- minimising information overload for consumers by prominently presenting relevant aspects of their terms, conditions and privacy policies to consumers during key interactions
- ending the practice of automatically linking customers' payment cards to their profile to track their purchasing behaviour and transaction activities when they do not scan their loyalty card
- outlining with which entities consumer data is being shared and for what purposes, and

drawing to consumers' attention how their data is being handled (including, for example, by providing a prominent notice during relevant interactions with customers)

- disclosing to consumers the sources of third party advertising, the sources of the consumer data used to inform that advertising, and the channels through which they may receive targeted advertising and how their consumer data may be used to generate leads (including, for example, via a regularly updated online notice)
- providing consumers of loyalty schemes with more meaningful controls over the collection, use and disclosure of their data to respond to consumer demands to align the data practices of loyalty schemes with the data preferences of consumers.

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

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

To remedy these issues, the ACCC has made a number of economy-wide recommendations in its Digital Platforms Inquiry Final Report about privacy law that are relevant.

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

##### **The ACCC's findings in this draft report reinforce the Digital Platforms Inquiry Final Report's recommendations for privacy law reform.<sup>2</sup>**

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

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

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<sup>2</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, Recommendations 16, 17 and 19.

- introducing direct rights for individuals to bring actions or class actions before the courts to seek compensation for an interference with their privacy under the Privacy Act.

As well as these recommendations for targeted amendments to the Privacy Act, the ACCC is also recommending broader reform of the Australian privacy regime to maintain effective protection of consumers' personal information in the longer term. This includes consideration of the current objectives and scope of the Privacy Act, and the introduction of a statutory tort of privacy as recommended by the Australian Law Reform Commission.

## Competition issues

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

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

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

Competition issues may arise not only in the primary market in which the loyalty scheme predominantly operates (for example, domestic air travel), but may also be extended to related markets through exclusive partnerships with firms supplying complementary products (for example, domestic airlines and car rental services).

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

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

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

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

## Shortened terms

ABS	Australian Bureau of Statistics
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
APP	Australian Privacy Principles
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CMA	Competition & Markets Authority (UK)
Cth	Commonwealth
EBIT	Earnings before interest and tax
EC	European Commission
OAIC	Office of the Australian Information Commissioner
OECD	Organisation for Economic Co-operation and Development
Privacy Act	<i>Privacy Act 1988</i> (Cth)
SKU	Stock-keeping unit

# 1. Introduction

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

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

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

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

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

The structure of this draft report is as follows:

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

## 1.1. Role of the ACCC

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

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

## 1.2. Methodology

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

In preparing this draft report, the ACCC has conducted a targeted consultation process seeking responses to voluntary information requests from major loyalty schemes operating in Australia. A list of loyalty scheme operators with which the ACCC has consulted can be found in **appendix A**.

The ACCC has also drawn on information and data from a range of sources, including desktop research (including a review of terms and conditions and privacy policies) and consumer reports data collected by the ACCC and other ACL regulators. Where appropriate, this report draws on analysis presented in the ACCC's Digital Platforms Inquiry Final Report<sup>3</sup>, particularly where issues around data practices and the intersection of privacy, competition and consumer protection regulations are concerned.

Further, the ACCC also commissioned an industry expert, Loyalty & Reward Co, to produce a report into the development, operation and monetisation of loyalty schemes, as well as their collection, use and disclosure of consumer data.<sup>4</sup> Key aspects of Loyalty & Reward Co's report are relied upon and highlighted as appropriate throughout this report.

## 1.3. Regulatory environment

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

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

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<sup>3</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019.

<sup>4</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019.

Key provisions of competition, consumer protection and privacy policy and law are outlined below.<sup>5</sup> This section also notes international developments regarding the regulation of loyalty schemes.

### 1.3.1. Competition and consumer protection regulatory framework

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

#### **Misleading or deceptive conduct**

Businesses must not engage in conduct that is misleading or deceptive or is likely to mislead or deceive, or make false or misleading representations about their goods or services.<sup>6</sup> It does not matter if there is an intention to mislead or not.<sup>7</sup> It includes express and implied representations—including, for example, statements about how user data is collected, used or shared—that are incorrect or likely to mislead.

#### **Unfair contract terms**

Terms that are deemed to be unfair in standard form contracts are considered to be void and cannot be enforced.<sup>8</sup> Loyalty schemes' consumer-facing terms and conditions of use and privacy policies would likely be considered standard form contracts, which would mean that they must comply with the unfair contract term provisions in the ACL.<sup>9</sup>

#### **Consumer guarantees**

When consumers buy a product or service, this product or service comes with automatic statutory guarantees under the ACL. For example, that a product will work and do what was asked for, and that services are supplied with due care and skill.<sup>10</sup> These are known as the consumer guarantees.<sup>11</sup> Businesses must provide consumer guarantees regardless of any other warranties they provide or sell to a consumer.

#### **Unconscionable conduct**

Businesses must not engage in unconscionable conduct in connection with the supply or acquisition of goods or services.<sup>12</sup> Although 'unconscionable conduct' does not have a precise legal definition, it generally refers to conduct that is against good conscience by reference to the norms of society<sup>13</sup>, and that goes beyond mere unfairness.<sup>14</sup>

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<sup>5</sup> Relevant provisions of the *Competition and Consumer Act 2010* (Cth), Australian Consumer Law and *Privacy Act 1988* (Cth) have not been reproduced, and have only been summarised in this section to facilitate understanding.

<sup>6</sup> ACL, ss. 18, 29, 33 and 34.

<sup>7</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 197 Gibbs J; *Yorke v Lucas* (1985) 158 CLR 661 at 666.

<sup>8</sup> ACL, s. 23(1).

<sup>9</sup> ACL, Part 2–3.

<sup>10</sup> ACL, Part 3–2, Division 1.

<sup>11</sup> Consumers can assert their consumer guarantee rights throughout the supply chain.

<sup>12</sup> ACL, ss. 20, 21 and 22.

<sup>13</sup> *ACCC v Lux Distributors Pty Ltd* (2013) FCAFC 90.

<sup>14</sup> *Attorney-General (NSW) v World Best Holdings Ltd* (2005) NSWCA 261 at (121), approved in *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) FCAFC 50 at (356) (Allsop CJ).

## ***Anti-competitive conduct***

Contracts, arrangements, understandings or concerted practices that have the purpose, effect or likely effect of substantially lessening competition in a market are prohibited under the CCA, even if that conduct does not meet the stricter definitions of other anti-competitive conduct such as cartels.<sup>15</sup>

## ***Misuse of market power***

A corporation with a substantial degree of power in a market is not allowed to take advantage of this power by engaging in conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.<sup>16</sup>

## ***Exclusive dealing***

Exclusive dealing generally occurs when one person trading with another imposes some restrictions on the other's freedom to choose with whom, in what, or where they deal. Exclusive dealing is against the law only when it substantially lessens competition.<sup>17</sup>

### **1.3.2. Privacy regulatory framework**

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

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

- (a) whether the information or opinion is true or not, and
- (b) whether the information or opinion is recorded in a material form or not.<sup>18</sup>

It is unclear whether the scope of personal information includes metadata such as IP addresses, other location data or other technical data.<sup>19</sup>

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

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

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

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<sup>15</sup> CCA, s. 45.

<sup>16</sup> CCA, s. 46.

<sup>17</sup> CCA, s. 47.

<sup>18</sup> Privacy Act, s. 6(1).

<sup>19</sup> See ACCC, [Digital Platforms Inquiry final report](#), June 2019, p. 409.

complaint from an individual or to investigate an entity on its own initiative (referred to as Commissioner-initiated investigations).<sup>20</sup>

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

## 1.4. International approaches

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

In Ontario, Canada, the provincial consumer law was amended in December 2016 to prohibit the expiry of rewards points due to the passage of time alone.<sup>21</sup> The legislation had retrospective effect to 1 October 2016. In November 2017, the Quebec National Assembly passed a law requiring that consumers be notified in writing of certain information before entering into a contract and to prohibit any stipulation under which the currency units (or points) a consumer receives under a loyalty scheme may expire on a set date or by the lapse of time.<sup>22</sup>

Between 2002 and 2013, Norway banned consumer loyalty schemes (frequent flyer programs) on domestic airline routes to encourage competition, based on loyalty effects locking in customers and increasing barriers to entry for new competitors in the Norwegian aviation market.<sup>23</sup> In 2013, the ban was lifted as the government formed the view that competition in the airline sector was by then more robust than when the regulation was introduced in 2007.

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<sup>20</sup> OAIC, [Commissioner initiated investigation reports](#), viewed 21 May 2019.

<sup>21</sup> Legislative Assembly of Ontario, Bill 47, [Protecting Rewards Points Act \(Consumer Protection Amendment\)](#), 2016.

<sup>22</sup> Bill 134: [An Act Mainly To Modernize Rules Relating To Consumer Credit And To Regulate Debt Settlement Service Contracts, High-Cost Credit Contracts And Loyalty Programs](#), Quebec National Assembly, passed and assented to 15 November 2017. See also: Canadian Marketing Association, [Consumer Protection/Loyalty Programs](#).

<sup>23</sup> OECD, [Airline competition — note by Norway](#), 18–19 June 2014.

## 2. Customer loyalty scheme background and characteristics

### Key points

- Three main types of loyalty schemes operate in Australia: coalition points-based schemes (with multiple partners), standalone point-based schemes (with no partners), and member benefits/discount-based schemes.
- Almost 90 per cent of Australian consumers are estimated to be a member of a loyalty scheme, with the average Australian carrying four to six loyalty cards.
- In recent years, Australia's four largest loyalty schemes have grown both in terms of membership and partners. In 2018, Qantas Frequent Flyer had 12.3 million members, Woolworths Rewards had 10.9 million, Velocity Frequent Flyer had 9.1 million and Flybuys had 8.3 million individual members.
- Some loyalty schemes can directly generate additional revenue, known as 'monetising' the scheme, from selling insights derived from members' data to other parties (explored further in chapter 4).
- The loyalty schemes of Qantas and Virgin Australia are significant contributors to their overall profits and report higher profit margins than other parts of their businesses.
- Key benefits of loyalty schemes that consumers perceive as being attractive include receiving rewards or discounts (either instant or delayed), access to exclusive offers, surprise gifts, and tailored communications and promotions.
- Key benefits of loyalty schemes for their operators and partners include building marketing databases and increased engagement with customers, as well as being a point of differentiation that can provide a competitive advantage.
- Loyalty schemes tend to be homogenous within an industry, as competitors adapt their schemes to match their rivals. Loyalty schemes are also designed to appeal to certain psychological or behavioural biases, which may result in consumers making inefficient purchasing decisions.

### 2.1. Customer loyalty scheme overview

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

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

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

## **Box 2.1: Main types of loyalty schemes operating in Australia**

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

### ***Coalition points-based schemes***

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

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

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

### ***Standalone points-based schemes***

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

### ***Member benefits/discount-based schemes***

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

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

## **2.1.1. History of loyalty schemes**

Early loyalty schemes were predominantly based on tokens or stamps that could later be redeemed for products or discounts with the issuer.<sup>24</sup> These types of schemes continue to be used today; however, in a number of sectors much more sophisticated coalition loyalty schemes have been developed to incentivise consumers to make repeat purchases.

The first modern coalition loyalty schemes were introduced in the airline industry in the United States following industry de-regulation in the late 1970s.<sup>25</sup> De-regulation led to a number of new entrants emerging in the industry, particularly low-cost airlines. For incumbents there arose a need to keep customers from switching to low-cost airlines.<sup>26</sup> A

<sup>24</sup> A McEachern, '[A history of loyalty programs, and how they have changed](#)', September 2018, viewed 21 May 2019.

<sup>25</sup> R Petersen, '[History of frequent flyer programs](#)', May 2001, viewed 16 July 2019.

<sup>26</sup> Venture Insights, '[Australian airline loyalty programs – reaching new heights](#)', 31 August 2017, p. 2.

response to this new price-based competition was to encourage loyalty through frequent flyer programs. American Airlines launched the world's first currency-based frequent flyer scheme in 1981.<sup>27</sup> It has since become one of the world's largest with more than 100 million members reported in March 2015.<sup>28</sup> The launch of the program and subsequent growth led others to introduce their own loyalty schemes.

In Australia, Qantas launched its loyalty scheme, Qantas Frequent Flyer, in 1987.<sup>29</sup> Flybuys was launched in 1994<sup>30</sup>, Virgin Australia (then trading as Virgin Blue) unveiled its Velocity Frequent Flyer program in 2005<sup>31</sup>, and Woolworths launched its Everyday Rewards program (now called Woolworths Rewards) in 2007.<sup>32</sup> These schemes have evolved significantly since they were launched, growing in terms of membership and partners. The loyalty schemes of Qantas and Virgin Australia, in particular, have grown to such an extent that they now generate revenue and profits of their own, as outlined further in this section.

Further detail on the history of Qantas Frequent Flyer, Velocity Frequent Flyer, Flybuys and Woolworths Rewards can be found in Loyalty & Reward Co's report to the ACCC.<sup>33</sup>

## 2.1.2. Consumer participation in loyalty schemes

It is estimated that almost 90 per cent of Australians are members of at least one loyalty scheme.<sup>34</sup> According to a survey of loyalty scheme members in the Asia-Pacific region conducted by Mastercard in 2017, the average Australian respondent belonged to 6.1 loyalty schemes.<sup>35</sup> Seventy nine per cent of Australian respondents stated they were members of a retail loyalty scheme, followed by airline (50 per cent), financial institution (43 per cent), restaurant (28 per cent), hotel (19 per cent) and entertainment (17 per cent).

Twenty two per cent of Australian respondents perceived that the loyalty scheme they consider most important to them has a significant influence on their shopping behaviour, and that retail loyalty schemes were the most important type of scheme to them. A survey by The Point of Loyalty in 2019 estimated that, on average, each Australian adult belongs to 4.3 loyalty schemes.<sup>36</sup>

A Canstar Blue survey of 3000 Australian consumers in 2018 found that almost 40 per cent of respondents did all their shopping with one supermarket chain and, of those, 54 per cent gave earning rewards points as a reason for their loyalty.<sup>37</sup> Canstar Blue also found that 23 per cent of respondents had switched to a different chain, with 21 per cent of those citing earning supermarket rewards points as the reason.

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

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<sup>27</sup> *The Economist*, '[Frequent-flyer miles: funny money](#)', December 2005, viewed 2 May 2019.

<sup>28</sup> M Schlangenstein, '[American Airlines now has the industry's largest loyalty program](#)', 24 March 2015, viewed 3 May 2019.

<sup>29</sup> Qantas Group, [Qantas data book 2018](#), p. 9.

<sup>30</sup> C Waters, '[Five loyalty lessons from Coles' flybuys revamp](#)', April 2012, viewed 6 May 2019.

<sup>31</sup> Virgin Australia, [Annual report 2005](#), p. 5.

<sup>32</sup> Woolworths Limited, [Annual report 2008](#), p. 4.

<sup>33</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.2.

<sup>34</sup> The Point of Loyalty, *for love or money 2019: Executive summary*, p. 9.

<sup>35</sup> Mastercard, [Achieving advocacy and influence in a changing loyalty landscape: a Mastercard Asia Pacific study](#), January 2018.

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

<sup>37</sup> Canstar Blue, '[Supermarket Satisfaction Ratings](#)', 2018, viewed 19 July 2019.

## Box 2.2: Perceived benefits of joining a loyalty scheme

Consumers perceive the key benefits of being a loyalty scheme member as receiving rewards (either instant or delayed), access to exclusive offers, surprise gifts, and tailored communications and promotions.<sup>38</sup> In 2018, a survey conducted by The Point of Loyalty about why consumers are motivated to join a loyalty scheme found that<sup>39</sup>:

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

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

**Table 2.1: Top five loyalty schemes in Australia, by number of members, 2018**

Loyalty scheme	Number of members
Qantas Frequent Flyer	12.3 million <sup>40</sup>
Woolworths Rewards	10.9 million <sup>41</sup>
Velocity Frequent Flyer	9.1 million <sup>42</sup>
Flybuys	8.3 million individuals/6.3 million households <sup>43</sup>
Priceline Sister Club	7.1 million <sup>44</sup>

Other large loyalty schemes in Australia include MYER One (over five million members)<sup>45</sup>, Cinebuzz Rewards (about 1.5 million members)<sup>46</sup> and the loyalty schemes of major hotel chains, such as Accor, Hilton, IHG and Marriott. Further, each of the major banks—Australia and New Zealand Banking Group Limited (ANZ), Commonwealth Bank of Australia (CBA), National Australia Bank (NAB) and Westpac Banking Corporation (Westpac)—and American Express run their own rewards programs for credit card holders.

The ACCC notes the figures above generally refer to the total number of members in a loyalty scheme, and that the number of active members may be significantly lower.<sup>47</sup> A survey by The Point of Loyalty in 2019 indicated that 47 per cent of surveyed respondents were active (within the past 12 months) in all of the programs they were enrolled in.<sup>48</sup> The ACCC understands that the active membership base of a loyalty scheme can vary significantly depending on the industry. In instances where loyalty schemes promote their total membership, this may overstate the extent of engagement with its members. However,

<sup>38</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

<sup>39</sup> The Point of Loyalty, *for love or money 2018*, p. 14.

<sup>40</sup> Qantas Group, [Qantas Group Performance FY18 Highlights](#), p. 14.

<sup>41</sup> Woolworths Limited, [Annual report 2018](#), p. 17.

<sup>42</sup> Virgin Australia, [Annual report 2018](#), p. 3.

<sup>43</sup> Flybuys allows multiple individuals from the same household to participate in their program under a single account.

<sup>44</sup> Australian Pharmaceutical Industries Limited, [Annual report 2017](#), p. 11.

<sup>45</sup> Myer, [Annual report 2018](#), p. 1.

<sup>46</sup> Event Hospitality & Entertainment Limited, [Annual report 2017](#), p. 9.

<sup>47</sup> Activity is usually defined as a member having either used a loyalty card or earned/redeemed a point in the past 12 months. However, for some schemes, such as Qantas Frequent Flyer or Velocity Frequent Flyer, this may be up to 18 or 24 months respectively.

<sup>48</sup> The Point of Loyalty, *for love or money 2019: Executive summary*, p. 9.

the ACCC also understands that even inactive members can be valuable to loyalty schemes, particularly in terms of targeted campaigns and other promotions to try to win them back.<sup>49</sup>

Members are generally removed from the membership base only if they actively cancel their account, which the ACCC understands occurs only infrequently.<sup>50</sup> Even in the case where members no longer present their loyalty cards, section 4.5.4 provides examples where some supermarket loyalty schemes continue to track the purchasing behaviour and transaction activities of members through the debit and credit cards that the schemes have linked to the members.

### 2.1.3. Financial profile of loyalty schemes operating in Australia

The ACCC estimates that from 2014–15 to 2017–18, major frequent flyer schemes generated over \$7.2 billion in revenue for their operators.<sup>51</sup> Coalition loyalty schemes may earn revenue by allowing airlines, credit card companies, retailers and other partners to purchase points for their customers. The schemes then earn interest on that revenue before the point is redeemed. Loyalty schemes also receive a benefit from ‘breakage’-points that are never redeemed by customers. It has been estimated that the breakage rate for Qantas Frequent Flyer is below 10 per cent of points issued.<sup>52</sup> This indicates that a substantial amount of value may be lost by consumers who do not redeem their points, with the value accruing to the loyalty scheme operators.

For Qantas and Virgin Australia, their loyalty schemes are significant contributors to the overall financial performance of their businesses, contributing profit margins of around 24 per cent<sup>53</sup> and almost 30 per cent<sup>54</sup> respectively.

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

#### Box 2.3: Valuing loyalty schemes’ rewards points

##### *Calculating the value of a point to consumers*

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

For example, if a one-way business class flight between Australia and Asia costs \$2300 (including taxes and fees), and a redemption opportunity costs 60 000 points and \$300 in taxes and carrier fees, then a consumer will perceive the value of one point as being 3.3 cents.<sup>55</sup> However, if 60 000 points are instead redeemed for headphones that would ordinarily have cost the consumer \$300, they will perceive the value of a point as 0.5 cents. More simply for Flybuys and Woolworths Rewards, the value of a point using the in-store cashback redemption is understood to be 2000 points = \$10, or 0.5 cents per point.

With this in mind, consumers may also need to consider the cost of earning a point. For instance, many credit cards offer a sign-up bonus but also require payment of an annual fee.

<sup>49</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 3.3.

<sup>50</sup> *ibid.*, section 2.1.

<sup>51</sup> Qantas Group, *2018 Annual report*; Virgin Australia, *2018 Annual report*; *2016 Annual financial report*.

<sup>52</sup> *Australian Financial Review*, ‘[Qantas loyalty program fails to fly at Woolworths](#)’, 31 October 2015, viewed 29 August 2019.

<sup>53</sup> *Australian Financial Review*, ‘[Qantas frequent flyer a growth engine](#)’, 23 August 2018, viewed 19 July 2019.

<sup>54</sup> Virgin Australia, *Annual report 2018*, p. 17.

<sup>55</sup>  $\$2300$  (the total fare) –  $\$300$  (taxes and carrier fees that need to be paid for the reward) =  $\$2000$ .  $\$2000/60\ 000$  points = 3.3 cents per point.

If a credit card is offering a sign-up bonus of 90 000 points with an annual fee of \$450, then each point costs 0.5 cents to earn. Similarly, if a shop charges a credit card surcharge of 1.5 per cent, the consumer may want to weigh up whether to use the credit card to earn points or to use a different payment method that may be cheaper or free.

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

### **Calculating the value of a point to a loyalty scheme**

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

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

Certain judicial and administrative authorities also suggest that customer loyalty points are unlikely to be assessed as income for taxation purposes.<sup>56</sup>

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

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

### **Box 2.4: Monetisation of loyalty schemes**

Loyalty & Reward Co reported that some loyalty schemes have the potential to directly generate additional revenue for a company<sup>57</sup>, and this may occur in the following ways:

- **Partners paying for members to earn coalition scheme points:** coalition loyalty schemes generate revenue when a partner pays for a member to earn points. When this occurs, loyalty schemes defer the revenue until the member redeems their points, keeping the difference between the amount the partner paid for the points to be issued and the cost of servicing the member's redemption of the points as profit. In circumstances where points expire ('breakage'), the loyalty scheme keeps the entirety of the amount the partner paid for the points as profit.
- **Earning interest on deferred revenue from points:** a coalition loyalty scheme can earn interest on its deferred revenue balance (the amount set aside to cover members redeeming their points), providing additional revenue, and may even use it as working

<sup>56</sup> *Payne v Commissioner of Taxation (Cth)* (1996) 66 FCR 299. See also Australian Taxation Office, *Income tax: Is a reward received under a 'consumer loyalty program' that results from private expenditure assessable?* TD 1999/34, 16 June 1999; Australian Taxation Office, *Income tax and fringe benefits tax: Flight rewards received under frequent flyer and other similar consumer loyalty programs*, TR 1999/6, 16 June 1999.

<sup>57</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 4 and section 5.3.

capital. A deferred revenue holding of several billion dollars is not unusual for a large coalition loyalty scheme operating in Australia.

- **Earning revenue by selling discount products to members:** loyalty scheme members can gain access to a range of discount products and services provided by third party suppliers. Loyalty schemes sometimes provide members with the full discount that has been negotiated with the third party supplier, but in some instances, they pass on only some of the discount and keep the difference.
- **Earning affiliate marketing revenue through members' online transactions:** some loyalty schemes promote third party websites or products to their member base and earn a percentage of the total amount spent if the member makes a purchase. The sales are tracked via affiliate links from the partner websites to the loyalty schemes' websites. The loyalty schemes then reward the member for these purchases, which may be via cash back, bonus points or other forms of credit.
- **Selling and supplying scheme-branded products and services:** some major loyalty schemes generate additional revenue by developing branded products and services to market to their members. For example, Flybuys promotes Coles-branded credit cards, insurance and personal loans, plus Flybuys Travel, while Qantas has developed epiQure Food & Wine Club, Qantas Golf Club, (co-)branded credit cards, Qantas Cash and Qantas Assure health insurance.

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

## Airlines

Qantas and Virgin Australia combined had approximately a 90 per cent share of the Australian domestic airline industry, with Qantas supplying 60.4 per cent of domestic seats flown in 2018 and Virgin Australia supplying about 30 per cent.<sup>58</sup> Qantas Frequent Flyer (100 per cent owned by Qantas) and Velocity Frequent Flyer (65 per cent owned by Virgin Australia and 35 per cent owned by Affinity Equity Partners) are loyalty schemes that are broadly similar in structure, as outlined earlier in box 2.1.

In 2011, Virgin Australia moved from being a low-cost airline to a full-service airline and began actively courting Qantas's high-value corporate customers. This included building invitation-only lounges, running a status-matching program to incentivise Qantas customers to fly with Virgin Australia, and expanding the Velocity Frequent Flyer program.<sup>59</sup>

As Virgin Australia became more competitive and drew corporate flyers away from Qantas, Qantas made a public commitment that it would defend its then 65 per cent domestic market share against competition from Virgin Australia.<sup>60</sup> A key to this was to leverage its frequent flyer base, but it also led to a price war between Qantas and Virgin Australia between 2012 and 2013. Qantas Loyalty has been Qantas's only business unit to report consecutive earnings growth since 2012. Similarly, Velocity Frequent Flyer has also experienced growth (albeit from a lower base) and has remained more profitable and more stable than Virgin Australia's other business units.

Tables 2.2 and 2.3 illustrate the significant contribution that the loyalty schemes make to the financial position of Australia's two largest airlines. Table 2.2 shows the earnings before interest and taxes (**EBIT**) and profit margins for Qantas Frequent Flyer and Velocity

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<sup>58</sup> IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, March 2019.

<sup>59</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.2.

<sup>60</sup> Centre for Asia Pacific Aviation, '[Australia domestic airline market outlook: Qantas Group reins in capacity as Virgin continues growth](#)', April 2015, viewed 19 July 2019.

Frequent Flyer between 2014 and 2018, indicating the importance of these schemes to their respective owners' profits.

**Table 2.2: EBIT and profit margin of Qantas Frequent Flyer and Velocity Frequent Flyer, 2014–15 to 2017–18**

	<b>QFF (EBIT)</b>	<b>QFF (Margin)</b>	<b>Velocity (EBIT)</b>	<b>Velocity (Margin)</b>
<b>2014–15</b>	\$315 million	23.1%	\$81.2 million	34.1%
<b>2015–16</b>	\$346 million	23.8%	\$139.7 million	42.6%
<b>2016–17</b>	\$369 million	24.5%	\$142.8 million	38.5%
<b>2017–18</b>	\$372 million	24.1%	\$110.1 million	29.6%

Source: Qantas Group, 2018 Annual report, Virgin Australia, 2018 Annual report, 2016 Annual financial report.

Table 2.3 shows the EBIT for Qantas's and Virgin Australia's respective loyalty units in 2017–18 compared with their other main business units: domestic airline, international airline and low-cost airline (Jetstar for Qantas and Tigerair for Virgin Australia), indicating that the loyalty schemes contributed a significant proportion of each firm's financial position.

**Table 2.3: EBIT for Qantas's and Virgin Australia's loyalty and other main business units (in \$ millions), 2017–18**

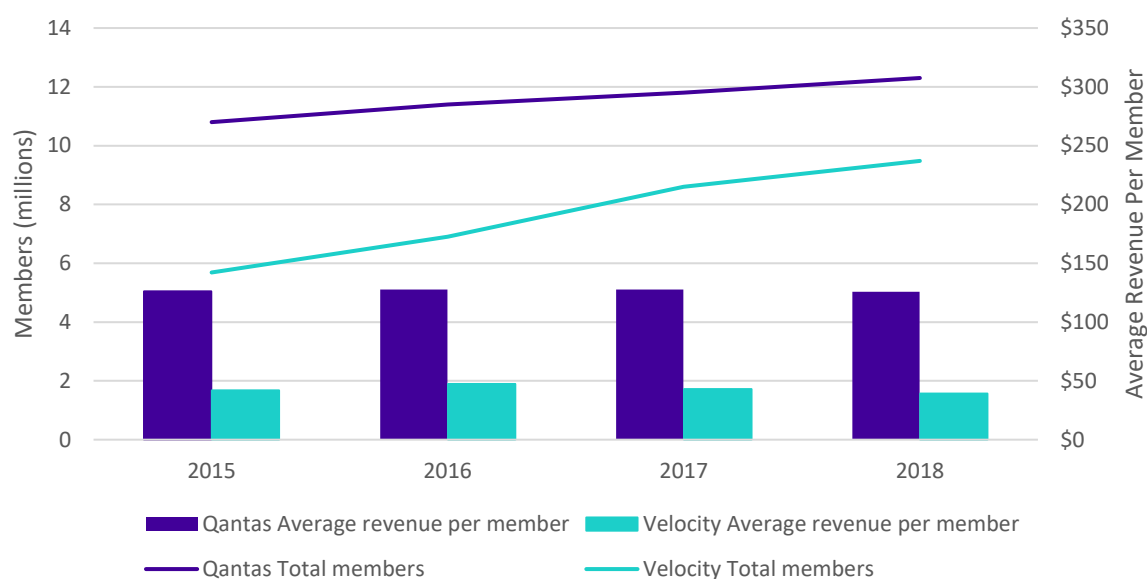
	<b>Domestic</b>	<b>International</b>	<b>Low cost airline</b>	<b>Loyalty scheme</b>
<b>Qantas</b>	+ \$768 million	+ \$399 million	+ \$461 million	+ \$372 million
<b>Virgin Australia</b>	+ \$246 million	- \$13 million	- \$36 million	+ \$110 million

Source: Qantas Group, 2018 Annual report, Virgin Australia, 2018 Annual report.

Coupled with these developments, the number of members in these loyalty schemes have increased year-on-year, while the average revenue per member has been relatively steady, particularly for Qantas. Figure 2.2 shows the total membership of Qantas Frequent Flyer and Velocity Frequent Flyer between 2015 and 2018 and the average revenue generated per member. It shows that growth rates during the period averaged at around 4.4 per cent for Qantas and 18.8 per cent for Velocity each year.

The higher average Velocity membership growth rate likely reflects that it started from a lower base than Qantas and is still building members. The relative stability of the average revenue generated per member—about \$125 per member in 2018 for Qantas and about \$40 for Velocity—indicates that these loyalty schemes can derive significant revenue growth from signing up new members.

**Figure 2.2: Total membership of Qantas Frequent Flyer (QFF) and Velocity Frequent Flyer (VFF) and average revenue per member, 2015–18**



Source: Qantas Group, 2018, 2016 and 2014 annual reports; Virgin Australia, annual reports 2014–2018.

## Supermarkets

In the Australian supermarket sector in 2018, Woolworths had a share of 37.5 per cent of national supermarket revenue and Coles had a share of 29.6 per cent, accounting for a combined 67.1 per cent industry share.<sup>61</sup> Woolworths runs its own loyalty scheme—Woolworths Rewards, while Coles owns 50 per cent of Flybuys, with the remainder owned by Wesfarmers.<sup>62</sup> Both programs have similar features, where consumers earn one point per dollar spent in store and 2000 points can be redeemed for \$10 off purchases (with one point being worth 0.5 cents).

Flybuys also allows its points to be converted to Velocity points (at a rate of 2000 Flybuys points to 870 Velocity points<sup>63</sup>, equalling one Flybuys point to 0.435 Velocity points), among other programs, while Woolworths Rewards points may be converted to Qantas Frequent Flyer points (at the rate of 2000 Woolworths Rewards points to 870 Qantas points).<sup>64</sup>

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

As with the loyalty schemes in the airline sector, the number of members in the Flybuys and Woolworths Rewards loyalty schemes also continues to grow year-on-year. Figure 2.3 shows the total membership of Flybuys and Woolworths Rewards between 2014 and 2018. The figure reflects that Flybuys allows multiple individual members from the same household to participate under a single account. The average yearly growth rate for Woolworths Rewards has been around 7.6 per cent over the past five years, whereas for Flybuys it has been about 6.9 per cent, when measured based on the number of household accounts created.

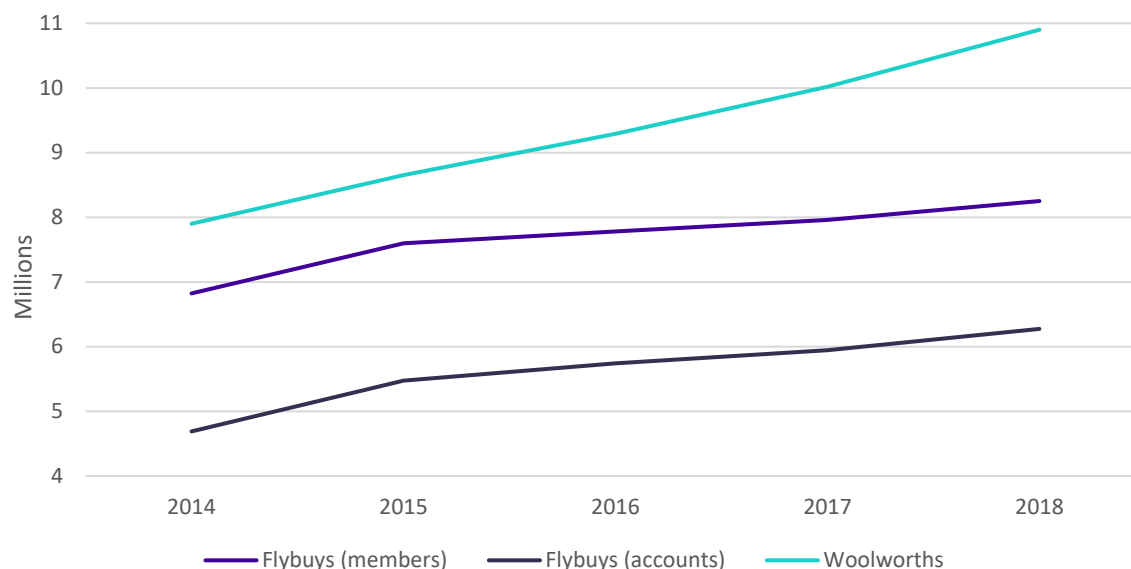
<sup>61</sup> IBISWorld, *IBISWorld Industry Report G4111 Supermarkets and grocery stores in Australia*, October 2018.

<sup>62</sup> Wesfarmers, '[Wesfarmers demerger of Coles](#)', 5 October 2018.

<sup>63</sup> Virgin Australia, [Flybuys](#), viewed 6 August 2019.

<sup>64</sup> Qantas, [Woolworths](#), viewed 6 August 2019.

**Figure 2.3: Total membership of Flybuis and Woolworths Rewards, 2014–18**



Source: Coles, Wesfarmers and/or Flybuis annual reports 2014–18; Woolworths Group annual reports 2014–2018.

### **Credit cards**

In the Australian credit card sector, ANZ, CBA, NAB and Westpac account for about 73.3 per cent of industry revenue.<sup>65</sup> IBISWorld estimated that in 2018, Further, Citigroup had a 10.5 per cent market share in issuing credit cards and HSBC had a 2.0 per cent share. The remainder of the industry is represented by domestic and foreign banks, credit unions, building societies and non-bank lenders such as American Express.

A survey conducted in 2019 by ME Bank of 1000 Australian credit card holders reported that almost 59 per cent of respondents used a rewards credit card.<sup>66</sup>

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

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

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

### **Hotels and car hire**

In the hotel industry, the four largest chains accounted for less than 40 per cent of industry revenue in 2018.<sup>67</sup> The major participants are Accor Asia Pacific (owner of Sofitel and Ibis, with a 7.1 per cent industry share), Event Hospitality & Entertainment Limited (owner of Rydges and QT, with a 4 per cent share), Marriott (with a 3 per cent share), Hilton (with a 2 per cent share) and Holiday Inn (with a 1 per cent share).

<sup>65</sup> IBISWorld, *IBISWorld Industry Report X0009 Credit card issuance in Australia*, May 2019.

<sup>66</sup> ME Bank, '[Rewards cards come at a cost to over a third of Aussie card holders](#)', 23 May 2019.

<sup>67</sup> IBISWorld, *IBISWorld Industry Report H4401 Hotels and resorts in Australia*, January 2019.

Similarly in the car rental industry, the four largest market participants also accounted for less than 40 per cent of total Australian passenger car rentals.<sup>68</sup> The major participants are Hertz (10.3 per cent share), Avis (9.9 per cent share), Europcar (5.4 per cent share) and National Roads and Motorists' Association Limited (owner of Thrifty, with a 3 per cent share).

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

Where exclusivity arrangements exist, these can have a significant impact on repeat business and therefore revenue. In its report, Loyalty & Reward Co outlined the impact an exclusive tie-up between Avis and Qantas Frequent Flyer in 2010 had on Hertz as follows<sup>69</sup>:

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

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

## Other industries

Companies in a number of other industries also run loyalty schemes. These include cinemas, telecommunications companies, clothing and other retailers, quick service restaurants, energy and utilities providers, and insurers. These schemes predominantly provide members with access to discounts and other rewards. In some instances, tiered approaches are used in these industries. In 2012, Hoyts launched a paid membership tier that provides members with additional benefits<sup>70</sup>, and in 2019, Telstra adopted a new points and tier status-based model.<sup>71</sup> Further information can be found in **appendix B**.

## 2.2. Customer loyalty scheme characteristics

This section provides a brief outline of the purpose and design of loyalty schemes, in so far as those matters relate to the substantive issues raised in the rest of this report. More detailed information can be found in Loyalty & Reward Co's report to the ACCC.<sup>72</sup>

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<sup>68</sup> IBISWorld, *IBISWorld Industry Report L6611 Passenger car rental and hiring in Australia*, April 2019.

<sup>69</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.1. Footnotes omitted.

<sup>70</sup> Hoyts, [Hoyts Rewards](#), viewed 19 July 2019.

<sup>71</sup> *B&T Magazine*, '[Telstra Announces Telstra Plus, A New Rewards Program for Customers](#)', 2 April 2019, viewed 14 April 2019.

<sup>72</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 3.

### 2.2.1. Purpose of loyalty schemes

The objectives of loyalty schemes for businesses include<sup>73</sup>:

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

Loyalty schemes may also contain mechanisms to discriminate between first-time or newly signed-up members, and repeat buyers or longer term members.<sup>74</sup>

These schemes also provide scheme operators with data about the habits of their customers, which can be used to profile them and target the promotion of goods and services in a way that is of most interest to the customer.<sup>75</sup> This data may also be used for other business development activities, such as improving product or service offerings. This is further discussed in chapter 4.

As noted in box 2.2, consumers perceive that loyalty schemes bring them a number of benefits. The key benefits of a loyalty scheme for its operators include<sup>76</sup>:

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

Affiliates and merchants may also perceive a number of benefits for participating in a coalition loyalty scheme<sup>77</sup>:

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

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<sup>73</sup> M Capizzi, R Ferguson and R Cuthbertson, 'Loyalty trends for the 21<sup>st</sup> Century', *Journal of Targeting, Measurement and Analysis for Marketing*, vol. 12, no. 3, 2003, pp. 199–212.

<sup>74</sup> R Caminal, and A Claici, 'Are loyalty-rewarding pricing schemes anti-competitive?', *International Journal of Industrial Organization*, vol. 25, 2006, pp. 657–674.

<sup>75</sup> D Graham, '[Data collection by loyalty programs](#)', Choice, January 2016, viewed 22 July 2019.

<sup>76</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

<sup>77</sup> *ibid.*

## 2.2.2. Design of loyalty schemes

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

### *Design elements*

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

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

### *Behavioural insights*

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

#### **Box 2.5: Psychological elements of loyalty scheme design**

As outlined in Loyalty & Reward Co's report, the key psychological insights applied to loyalty scheme design are as follows<sup>78</sup>:

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

<sup>78</sup> Loyalty & Reward Co, *Australian Loyalty Schemes: A Loyalty & Reward Co report for the ACCC*, June 2019, section 3.2.

tier to achieve it sooner.

- **Size heuristics:** consumers do not have the capacity, time or motivation to recognise and evaluate all the available information in our complex environment. This is also related to framing effects in behavioural economics (referred to in box 2.6). Consumers may not be able to adequately judge the value of a point, and loyalty schemes take advantage of this (for example by offering points with high numeric values but low, opaque actual dollar values) as an effective way to generate a perception of lots of value at a low cost.
- **Surprise and delight:** an approach that seeks to attract and nurture customers by offering unexpected rewards. Applications of surprise and delight campaigns within Australian loyalty schemes include premium airline and banking scheme members receiving periodic gifts, telecommunications customers being invited to select from a range of rewards, and supermarket scheme members being positively surprised at the check-out with a \$10 discount off their transaction because they have accumulated enough points.

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

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

As outlined by the Organisation for Economic Co-operation and Development (OECD)<sup>79</sup>, behavioural biases can affect how consumers perceive and approach understanding complex terms and conditions and other disclosures such as privacy policies. This affects how consumers engage with and participate in a given loyalty scheme.

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

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

<sup>79</sup> OECD, [Improving online disclosures with behavioural insights: Towards better outcomes for consumers](#), Directorate for Science, Technology and Innovation, 12 April 2018, p. 20.

through publicity—certain attributes can play an undue role in consumer decisions. Priming can influence preferences by making certain attributes salient.

- **Overconfidence:** Consumers tend to think that they are more likely to experience an outcome from some action that is better than the average expected outcome. For example, most drivers think that they are safer than the average driver.
- **Hyperbolic discounting and myopia:** Consumers tend to treat the present as if it were much more important than future time periods.
- **Time-inconsistency:** Consumers may make choices that are not consistent across time periods due to conflicts between short-term urges and long-term interests.
- **Social and cultural norms:** Consumers are often guided by the values, actions and expectations of a particular society or group. For example, when people are made aware of what others are doing, it can reinforce individuals' underlying motivations.

Practical examples of relevant behavioural biases:

- **Framing:** *A long-term member of a customer loyalty scheme regularly received correspondence from their operator, which typically consisted of promotional emails with subject lines like '... hurry up ...', or '... limited time only ...'. The consumer did not notice that the operator's regular promotional correspondence also contained important warnings that their point balance would expire unless they earned or redeemed points by a certain date. The consumer's entire point balance, accumulated over years, subsequently disappeared without their knowledge.*
- **Hyperbolic discounting:** *A consumer spontaneously joined a hotel loyalty scheme at the check-out desk, because the consumer regularly travelled interstate for work and wanted to obtain 'free' accommodation. However, the consumer did not read the scheme's terms and conditions, and was subsequently disappointed to learn that despite the substantial sign-on bonus points offered, 'free' accommodation was difficult or very expensive to obtain during the periods when it would have been most suitable to the consumer.*
- **Overconfidence:** *A consumer chooses a higher-cost credit card when lower-cost alternatives are available in order to chase rewards points. The consumer chooses the higher-cost rewards card thinking the bonus points will get them a cheap or free rewards flight, however, they end up paying about the same in an annual fee, interest and other charges as they would have paying outright for the flight, or potentially more. It has been estimated by the Reserve Bank of Australia that consumers could reduce their annual credit card costs by \$250 by shopping around for a more appropriate card that best suits their use patterns.<sup>80</sup>*
- **Information overload:** *Two airlines announced they had formed a strategic partnership, which involved a reciprocal arrangement of each other's frequent flyer programs. A consumer saw promotions about this reciprocal arrangement and without reviewing their own frequent flyer program's terms and conditions, assumed they could earn and redeem loyalty points at the same rate with the partner airline. The consumer booked a flight with the partner airline, and was disappointed to learn that they had earned a lower rate of points than they would have if they had booked directly with their own airline.*

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<sup>80</sup> M-A Doyle, *Consumer Credit Card Choice: Costs, Benefits and Behavioural Biases*, Reserve Bank of Australia, Research Discussion Paper 2018-11, October 2018.

### 3. Consumer issues and customer loyalty schemes

#### Key points

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

#### 3.1. Claimed consumer benefits from loyalty schemes

It is widely accepted that a loyalty scheme's core purpose is to achieve brand loyalty and drive increased custom—and Australia's major loyalty schemes submitted that this goal is possible only if they provide members with rewards that they value. In addition, many operators stated that it would be counter-productive if their members developed a negative perception of their scheme, as it would risk those members disengaging from the operator's overall business and potentially switching to a competitor. Thus according to these loyalty schemes, competitive pressure is the ultimate guarantee of consumer benefit.

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

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

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

### 3.2. Introduction to consumer complaints about loyalty schemes

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

For example, the ACCC and the state/territory consumer law regulators have received approximately 2000 reports about loyalty schemes in the five calendar years preceding December 2018.

A substantial proportion of these reports were about frequent flyer programs, which are among the largest and potentially most sophisticated types of coalition loyalty schemes in Australia.<sup>81</sup> Further, while the terms and conditions published by most loyalty schemes in Australia are typically long and complex, the terms and conditions for each of Qantas and Virgin are substantially longer in both word count and estimated reading time than those documents published by other loyalty schemes in Australia (see table 4.1 of this report for more information).

A large proportion of the reports about loyalty schemes reviewed by the ACCC were complaints, with consumers expressing concerns about a wide variety of issues.

### 3.3. Complaints about earning points

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

#### 3.3.1. Unilateral reductions in the 'earn rate'

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

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<sup>81</sup> As noted in section 2.1 above, coalition points-based schemes are more complex than other forms of loyalty schemes, including standalone points-based schemes and member benefits/discount-based schemes.

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

### **Box 3.1: Examples of unilateral reductions in the ‘earn rate’**

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

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

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

**Hotel loyalty schemes:** A number of consumers complained that certain hotel groups altered how consumers earn points in a way that effectively reduced the number of free nights that certain loyalty scheme members would earn. For example, one consumer reported joining a hotel’s loyalty scheme to earn multiple free nights’ stays, and said that they would have been entitled to four free nights under the original offer, but that this entitlement was reduced to one free night’s stay following this change to the hotel’s earn rate of loyalty scheme points.

### ***ACCC view on unilateral reductions in the earn rate***

Unilateral reductions to earn rates can be detrimental for consumers and potentially unfair. A contract term that allows for the unilateral reduction in earn rates may amount to an unfair contract term, where it:

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

The ACCC has concerns about how, when and why the earn rate of a loyalty scheme is varied, and considers there is a particular risk of detriment for consumers who have already acquired a significant number of points at the time a unilateral reduction to a loyalty scheme’s earn rate is implemented. In these circumstances, consumers are often left only with a choice to either continue with a significantly lower earn rate, to redeem a lower value reward than they originally intended, or to abandon the scheme entirely.

Loyalty scheme operators should consider how, when and why the earn rate is reduced, and specifically avoid relying on any terms or conditions that would be unfair for consumers.

### **3.3.2. Earning points with affiliates and partners**

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

understood that their earn rate would be significantly lower when they engaged with that affiliate.

### **Box 3.2: Complaints about earning points with affiliates**

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

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

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

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

### ***ACCC view on earning points with affiliates and partners***

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

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

### **3.3.3. The 'booking class'—an issue specific to frequent flyer schemes**

A significant number of consumer complaints concerned a flight's 'booking class', which is a specific issue relevant to earning frequent flyer points. Commercial flights are typically divided into different types of travel class (for example first class, business, economy), but flights are also commonly further sub-divided into additional categories, often referred to as the 'booking class', which are designated by a single-letter code (such as Y, B, J, C, etc.).

The booking class can determine a range of matters relevant to the loyalty scheme, including both the number of frequent flyer points and the number of status credits earned by a consumer on that flight.

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

### **ACCC view on the booking class**

While the booking class is neither hidden nor invisible for those booking tickets online, the contact data strongly suggests that there is widespread confusion about both the existence of the 'booking class' and its potential impact on their loyalty scheme's earn rate. The ACCC is concerned that frequent flyer operators are not providing consumers with sufficient information about the booking class, or its relationship to the rate at which frequent flyer points may be earned.

Airlines should consider how to improve their communication of information about the booking class to consumers, including its impact on the loyalty scheme's earn rate.

## **3.4. Complaints about maintaining points—expiry periods**

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

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

### **Box 3.3: Complaints about expiry periods**

The following are common complaints about expiry periods that consumers reported to the ACCC<sup>82</sup>:

- Many consumers indicated they were not aware of the existence of an expiry period, and did not believe it was reasonable for operators to 'steal' what many consumers regard as their property.
- Other consumers:
  - reported not receiving correspondence that the loyalty scheme operator had committed to send them (that is, a letter or email to warn consumers of the approaching expiry date and remind them to earn or redeem some points)<sup>83</sup>, or

<sup>82</sup> Similar complaints have been raised in respect of many loyalty schemes.

- having received such correspondence, claimed that the warning was unclear—for example, because it was hard to understand or was otherwise ‘hidden’ within a regular newsletter or promotional email (this complaint was often made after points had expired, and the consumer reviewed earlier correspondence from the operator).
- A number of consumers claimed that their points expired during a period of temporary stress in their private lives, during which time they disengaged from the activities in which they customarily earned or redeemed points (such as staying in hotels, taking flights, etc.), and became less attentive towards correspondence generally (including warnings about expiry dates). These consumers said that it was not fair for their points to expire during a period when it might be reasonable for their attention to be temporarily overwhelmed, and some even noted that the loss of their points compounded the stress incurred during the disruption to their life. Examples of such circumstances were:
  - parental leave and caring for a newborn child
  - serious illness of the consumer or a loved one
  - organising for families to relocate inter-state or internationally (which can be a further cause of disengagement if consumers temporarily reside overseas), and
  - separation or divorce proceedings (which can be a further cause of disengagement if it involves negotiations about the division of loyalty points).
- A number of consumers complained of not being informed about the termination of an agreement between their primary loyalty scheme and an affiliate program, following which all their loyalty points previously earned with the affiliate expired. In particular, these consumers complained that they continued spending with their primary loyalty scheme (such as a major retailer) under the belief that they were still earning points with the affiliate (such as a frequent flyer program), whereas the points previously earned with the affiliate had expired due to inactivity.
- Some consumers expressed concern about certain loyalty schemes’ ‘reclaim challenges’, where consumers may be offered the opportunity to regain expired points if they acquire a minimum number of points within a specified period. Many consumers considered these ‘reclaim challenges’ to be unreasonable, either because they should never have lost their points in the first place or because the cost of redeeming their points (that is, by acquiring relevant goods or services within the specified period) was unreasonable.

### **ACCC view on expiry periods**

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

The ACCC is concerned that relevant terms and conditions that facilitate the expiry of loyalty points may cause significant consumer detriment and be unfair for consumers. Expiry periods appear to be particularly detrimental for consumers who have accrued point balances with a significant redemptive value—in some instances accumulated over decades. The ACCC is similarly concerned that loyalty points may expire without adequate warning from operators about the need to earn or redeem points by a certain date.<sup>84</sup>

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<sup>83</sup> In many cases, it seems unlikely that the consumer would have been warned. For example, many loyalty scheme operators, including very large retail schemes, specify in their terms and conditions that they will *not* contact members to advise them that their points may expire.

<sup>84</sup> For example, several complainants reported losing hundreds of thousands of frequent flyer points, in some cases accumulated over decades, which would have otherwise entitled them to high-value rewards, allegedly including round-the-world flights in desirable travel classes.

Loyalty scheme operators should prioritise informing consumers about expiry periods and further consider when and how they communicate with consumers about the approaching date of any expiry period.

### 3.5. Complaints about redeeming points

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

#### 3.5.1. Unilateral reduction in the redemptive value of points

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

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

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

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

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

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

- **Hotel loyalty schemes:** A number of consumers complained about their chosen hotel reducing certain benefits or discounts available under their program, or, similarly, increasing the number of points required to obtain rewards and thereby devaluing their point balance. For example, one consumer complained that around four years after accumulating sufficient loyalty points for around five ‘free’ nights’ accommodation—by spending around 130 nights and tens of thousands of dollars with a certain hotel—the value of this same point balance was reduced, and the consumer was only entitled to approximately one ‘free’ night of accommodation.
- **Credit card schemes:** A number of consumers complained about instances where their points were devalued. This included instances where their credit card issuer increased the number of points required to obtain certain rewards (for example, gift cards) and/or reduced the ‘exchange rate’ with respect to an affiliate program (for example, a frequent flyer or hotel loyalty schemes). This meant that more credit card points were required to be transferred to obtain the same number of points with the affiliate.

## ACCC view on unilateral reduction in the redemptive value of points

Unilateral reductions in the redemptive value of points can be detrimental for consumers and potentially unfair. The ACCC has particular concerns about a unilateral reduction in the redemptive value of points for consumers who have already earned a significant number of points. In these circumstances, consumers have the unenviable choice of either continuing in a loyalty scheme where the number of points required to redeem one or more rewards has significantly increased, or redeeming a lower value reward than they originally intended, or abandoning the scheme entirely.<sup>85</sup>

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

### 3.5.2. Imposition of taxes and charges to redeem certain rewards

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

Most airlines typically incorporate the cost of external taxes and charges into the price of a flight, regardless of whether consumers book their flight with cash (that is, Australian dollars) or loyalty points (examples of such external taxes include security charges, departure taxes and airport fees). However some airlines (including Qantas) also require customers to pay additional ‘carrier charges’ for flights and/or upgrades booked with loyalty points, despite not levying such carrier charges on customers that book flights or upgrades using cash.<sup>86</sup> The quantum of any carrier charge may reflect the fare class of any booking, the mileage of the corresponding flight and the size of any fuel surcharge.

For example, Qantas imposes a carrier charge of \$14 to approximately \$1000 per booking when customers redeem their points for a flight or upgrade—with the carrier charge being higher for longer distance flights and comparatively desirable fares (for example, business class).<sup>87</sup> The cost of a carrier charge may therefore be significant for many consumers, particularly noting the additional requirement to pay external taxes and redeem thousands of loyalty points (likely tens of thousands for an international flight).

A flight’s origin may also influence the cost of any carrier charge in a way that may seem confusing or even arbitrary to many consumers. For example<sup>88</sup>:

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

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<sup>85</sup> This concern is conceptually similar in nature to that outlined above in section 3.3.1 of this report regarding unilateral reductions in the earn rate of points.

<sup>86</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 8.2.

<sup>87</sup> M Graham, ‘[The great Qantas Frequent Flyer rip-off](#)’, *The Australian Frequent Flyer*, 29 March 2018, viewed 21 April 2019. See also the Loyalty & Reward Co report, at table 5 and table 6, for additional examples of the carrier charges imposed by Qantas for selected one-way Classic Award economy flights.

<sup>88</sup> *ibid.*

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

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

### **Box 3.5: Complaints about taxes and charges**

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

- Many consumers denied any knowledge of airlines' policies to impose taxes and charges when they sought to redeem flights and upgrades. These consumers suggested that the imposition of such taxes and charges was inconsistent with the advertised benefits of participation in such schemes—namely, the ability to obtain 'free' flights or upgrades.
- Similarly, many consumers alleged that airlines displayed their taxes and charges in a manner that was unclear—or potentially even misleading. For example, some consumers were concerned that an airline's website did not identify the relevant taxes or charges to be imposed until after the consumer had earned sufficient points to obtain that reward.<sup>89</sup>
- Many consumers also complained that the quantum of additional payments the airline sought was itself unreasonable. For example, many consumers alleged that a flight to the same destination could be booked for a similar price as the total cost of taxes and charges imposed by their own scheme's airline—and without the need to redeem 'hard earned' points.
- Several consumers also stated that airlines' imposition of taxes and charges effectively offset the already parlous benefit of using points to book a flight or upgrade—noting the limited availability of seats during peak seasons and associated inconvenience of booking flights outside desired dates and times.
- Consumers also complained that airlines did not provide sufficient clarity about specific fees that appear to be aimed at recouping the cost of internal business operations, including significant charges imposed by airlines when consumers seek to change:
  - the time or date of a flight previously booked using points, and
  - the names of passengers booked on a flight that was obtained using points (for example, following marriage, or potential alignment of passengers' names in their passports with their booking, etc.).

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

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

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<sup>89</sup> Airlines may need to invest in their websites to address this concern. For example, in June 2019, Qantas upgraded its website to ensure greater clarity about the taxes and charges it imposes when consumers redeem points to obtain flights or upgrades.

is displayed on their websites, including improvements to the transparency around the 'booking flow'.

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

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

### 3.5.3. Restrictive redemption opportunities

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

#### Box 3.6: Examples of the limited availability of redemption opportunities

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

- failed to provide sufficient seats or upgrades for redemptive purposes on a wide variety of flights (both domestic and international), including when consumers sought to obtain redemptions on flights with distant departure dates (for example, up to 12 months in advance)
- failed to clearly communicate the availability of desirable redemptions such as free seats or upgrades, including by failing to identify:
  - that the number of seats and upgrades available for redemption on a particular route was limited—for example, multiple consumers alleged that airlines promoted that consumers could redeem a certain number of points for a free seat to various locations, but failed to clarify that the number of seats available for redemption was limited
  - the number of loyalty points actually required to redeem or upgrade a flight—for example, one consumer claimed their program's online 'points calculator' represented that they could fly in business class from Australia to Singapore return for 120 000 points, whereas the lowest number of points required to redeem such a seat was 470 000 points.<sup>90</sup>

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

- some consumers complained they could only redeem their points for a free night's accommodation at an inconvenient time (for example, hotels catering to business

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<sup>90</sup> The consumer also alleged that this failure to obtain a flight as promoted was despite their flexibility with dates and despite them checking availability up to six months in advance of departure.

travellers only offering weekend stays, or families unable to redeem during school holidays)

- several consumers noted that while rooms are often available for booking through a third party website, there is often no vacancy when they seek to book for the same dates through the hotel's own systems—which is required to obtain the benefits of membership (for example, cheaper rooms and room upgrades)
- other consumers complained about the practical difficulty of accessing certain advertised rewards. For example, one consumer alleged that they could only access their chosen hotel's 'best price guarantee' within 24 hours of making a reservation and by making a claim online (that is, this is not possible in person nor over the phone), which the consumer considered unduly restrictive.

### **ACCC view on restrictive redemption opportunities**

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

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

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

## **3.6. Conclusions on consumer issues with customer loyalty schemes**

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

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

Many consumers complained that some operators of loyalty schemes:

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

To ensure consumers can benefit from participating in loyalty schemes, the ACCC considers that operators should do more to help consumers understand their loyalty scheme's terms and conditions and any ongoing correspondence about potential promotions or other

changes to the program. Operators should respond to the behavioural insights that suggest that:

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

To help facilitate well-informed engagement and thereby help consumers optimise the benefits of participation in loyalty schemes, the ACCC considers that loyalty scheme operators should do more to help consumers understand how their loyalty schemes operate, including by ensuring that consumers are provided with relevant information at the right time and in the right way to make informed decisions. The ACCC is concerned about a range of business practices in the industry and calls on operators of customer loyalty schemes to review and consider their practices in the context of the ACL.

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

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

Loyalty scheme operators should review their approach to presenting the terms and conditions of loyalty schemes to ensure consumers have a genuine opportunity to review and understand their policy and operation.

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

Having placed the industry on notice, we encourage consumers to contact the ACCC to report concerns where these practices are continuing with their customer loyalty schemes. The ACCC will consider these reports in deciding whether enforcement action will be required to effect broader change.

The ACCC also notes that the findings in this draft report reinforce the benefit of certain changes to consumer law as recommended in the ACCC’s Digital Platforms Inquiry.

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

#### **The ACCC’s findings in this report reinforce the Digital Platform Inquiry Final Report’s recommendations for the need for a prohibition against unfair contract terms and certain unfair trading practices.<sup>91</sup>**

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

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

<sup>91</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, Recommendation 20 and 21, p. 26.

The scope of a prohibition on certain unfair trading practices should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance. The ACCC notes the current work on this issue being undertaken as part of the CAANZ process, and will progress its support for the recommendation through that forum.

## 4. Data practices of customer loyalty schemes

### Key points

- Consumer data is of significant value to loyalty schemes. The collection and analysis of consumer data is a key objective of loyalty schemes. The rich data loyalty schemes collect about consumers includes their demographic data, transaction history, interests, preferences, consumption patterns, buying behaviour and habits.
- Consumer data is primarily collected, analysed and used: to generate consumer insights to retain existing customers and obtain new ones; for business improvement and product development purposes; to personalise products and services; and for targeted advertising. Some schemes generate additional revenue by selling de-identified insight reports to third parties and advertise to their membership on behalf of third parties.
- While Australian consumers have different preferences, attitudes and levels of awareness when it comes to the data they share with loyalty schemes, a number of surveys have suggested that many are concerned about sharing their data with companies, including loyalty schemes. The surveys reviewed in this report suggested that many consumers are particularly concerned about the sharing of their data with unknown third parties and for targeted advertising, and whether their data is being used responsibly. Many consumers are also seeking more transparency and control over the data they provide to loyalty schemes.
- Consumers have little meaningful control over how their data is collected, used and disclosed. An imbalance of bargaining power and significant information asymmetries exist between consumers and loyalty schemes. This is primarily seen in the broad consents sought from consumers and the vague disclosures made to consumers about how their data will be used and with which third parties it will be shared.
- The ACCC is concerned about a range of data practices of loyalty schemes. In particular, the ACCC has concerns about loyalty schemes collecting, using and disclosing consumer data in ways that do not meet many consumers' expectations. This includes loyalty schemes engaging in the following practices:
  - seeking broad consents from and making vague disclosures to consumers about the collection, use and disclosure of their data
  - providing consumers with limited insight and control over the sharing of their data with unknown third parties
  - providing only a limited ability for consumers to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes.
- Loyalty schemes should take steps now to address the concerns raised by the ACCC to improve the transparency of their data practices and the ability of consumers to control how their data is collected, used and disclosed.
- The ACCC's view is that the issues of concern identified in this report have direct parallels with those identified in the ACCC's Digital Platforms Inquiry. These include concerns about:
  - insufficient transparency and meaningful consumer control over the collection, use and disclosure of consumer data
  - a lack of informed and genuine choice for consumers engaging in the digital economy
  - a lack of consumer protection and effective deterrence under existing laws governing data collection.

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

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

#### Box 4.1: Consumer data and personal information

Consumer data relates to any information a loyalty scheme may collect from and about consumers that is used, or intended to be used, to support commercial activities.<sup>92</sup> This includes data that consumers provide actively and voluntarily (for example, when registering or transacting), data that consumers generate and supply passively (for example, through social media or tracking of online browsing activity), and data that is inferred from other sources (for example, through analysis and insight generation).

Consumer data can be classified into two main types<sup>93</sup>:

- **Personal information:** data that can be used alone or in combination with other data to identify specific individuals. Privacy protections under the Privacy Act generally apply only to user data that constitutes 'personal information'. Under the Privacy Act, personal information is defined as '... information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable'.<sup>94</sup> The variation between the definition of personal information under the Privacy Act and the definitions used in the privacy policies of loyalty schemes is discussed below.
- **Non-personal information:** data that does not contain personally identifiable characteristics and cannot alone be used to identify individuals. This includes anonymous or de-identified data (data that has been stripped of any personally identifying information), pseudonymous data (data where personally identifying information has been replaced with artificial identifiers), and aggregated data (where personal or non-personal information from multiple individuals has been combined).

Where necessary, this chapter discusses issues arising under Australian privacy law, as this is the main regulatory framework applicable to loyalty schemes' data practices. This chapter also discusses data practices that may raise concerns under Australian competition and consumer laws, or more broadly in the context of consumer expectations around data practices. This report also includes observations from the ACCC's recently completed Digital Platforms Inquiry as they relate to consumer data.

### 4.1. Data flows between consumers and loyalty schemes

Loyalty schemes collect rich data about their members. The data collected includes metadata such as age, gender and address, as well as transactional data describing store-visiting and product-buying characteristics, spending patterns and timestamps of when interactions occur.<sup>95</sup>

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<sup>92</sup> Competition & Markets Authority (UK), [The commercial use of consumer data: report on the CMA's call for information](#), June 2015.

<sup>93</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, chapter 7.5.

<sup>94</sup> Privacy Act, s. 6.

<sup>95</sup> A Lloyd, J Cheshire and M Squires, 'The Provenance of Customer Loyalty Card Data', in P Longley, J Cheshire and A Singleton (eds), [Consumer data research](#), UCL Press, London, 2018.

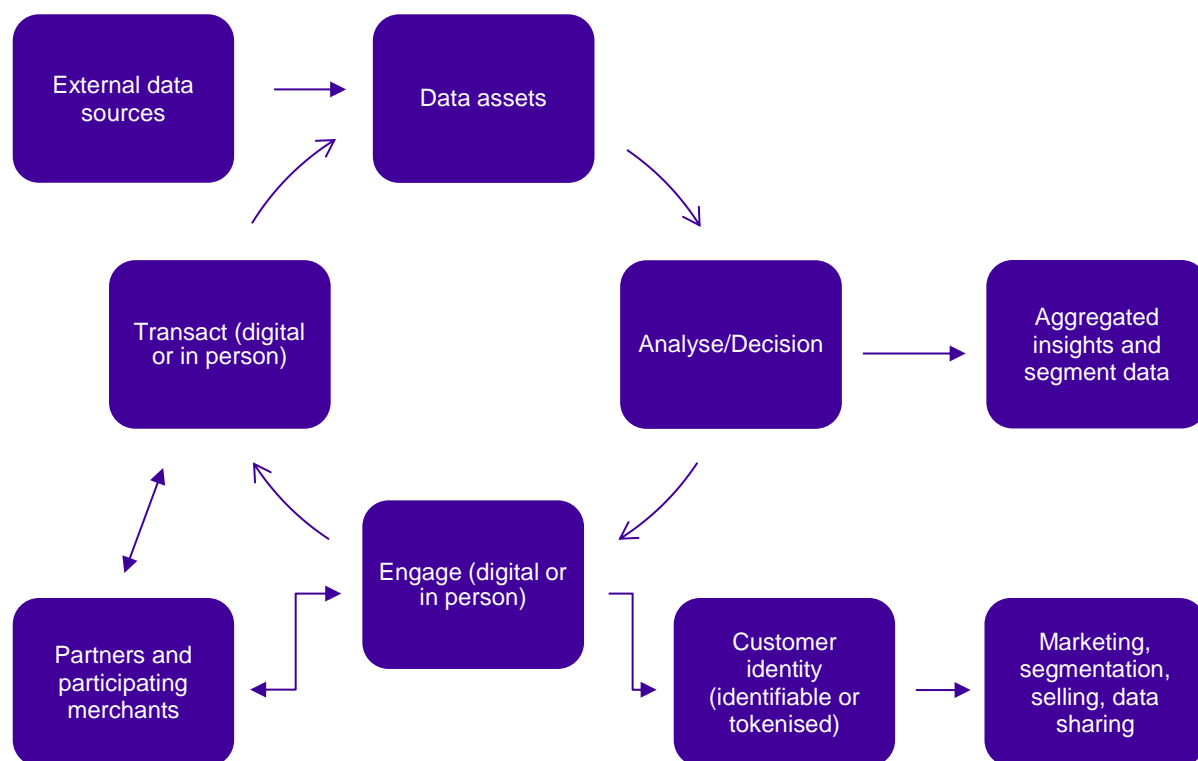
The data is primarily collected, analysed and used for customer relationship marketing purposes and to facilitate a better understanding of groups of customers, as well as individuals.

The main way of using this data is segmentation: dividing up a market into behavioural, demographic or psychological groups using a variety of indicators including ‘transaction frequency, average intervals, duration of activity’ and the number and value of goods or services purchased.<sup>96</sup> The data may be further enriched by linkages with external data sources, through which consumers can be further segmented into geographic, generational or cultural groups. For example, by linking a member’s postcode with publicly available data from the Australian Bureau of Statistics, a loyalty scheme could infer information about a member’s household’s income, educational level or cultural background. Additional data may also be sourced from data brokers or through data-sharing platforms.

Linkages with external data sources provide useful context around ‘social structures and common characteristics between people and places<sup>97</sup>’, as well as socio-economic status and other identifiers which may indicate how a consumer may react to a given advertisement or product offering. The additional data may also allow loyalty schemes to infer information about a member’s lifestyle, interests and social attitudes. This inferred information can be used to target the member with advertising and to improve business offerings. Insights generated from this data may be shared with partners, including suppliers (for example a supermarket chain sharing insights with product suppliers), or sold to unrelated third parties.

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

**Figure 4.1: Data flows of consumer data in loyalty schemes**



Source: Adapted from Credit Suisse.

<sup>96</sup> *ibid.*, p. 30.

<sup>97</sup> *ibid.*, p. 30.

These key capabilities are<sup>98</sup>:

- **customer engagement:** the ability to interact with customers and collect data through customer engagement, for example through online or in-store advertising, in person or through call centre reports. Insights generated through analytical and decision-making capabilities may be used to engage with members using targeted advertisements, including tailored communications and promotions. Loyalty schemes may rely on individual-level transaction data or exchange tokenised data with partners to identify which members should be targeted for a given promotion
- **transactional:** the ability to transact with customers and collect data about members' transactions (including with partners), for example when a customer makes a purchase
- **data assets:** the ability to access relevant data about members, including past transactions, previous engagement and demographic profiles, and to link this with external sources to enrich the data where appropriate
- **analytical and decision-making:** the ability to analyse customer transactions and engagement at scale (including using aggregated data), which may include artificial intelligence or machine learning to automate analysis and decision-making. Aggregated insights and segment data can be generated, and may also be shared with or sold to suppliers and other third parties.

## 4.2. Consumer data collected by loyalty schemes

Membership of a loyalty scheme is voluntary and generally provided at zero monetary cost to the consumer. For participating, consumers are offered discounts, rewards, tailored communications and promotions. In exchange businesses derive value from consumers by collecting data, including personal information, about them. The data collected typically includes name, age, gender, address and household size, as well as preferences, consumption patterns, buying behaviour and habits.

Box 4.2 highlights how loyalty schemes may collect consumer data, and the data that might be collected. Box 4.2 is structured on the basis that consumer data can be<sup>99</sup>:

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

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<sup>98</sup> Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

<sup>99</sup> OECD, [Exploring the economics of personal data: a survey of methodologies for measuring monetary value](#), OECD Digital Economy Papers, no. 220, 2013, p. 10.

## Box 4.2: Consumer data that loyalty schemes collect about consumers

Based on research from Loyalty & Reward Co<sup>100</sup>, the ways loyalty schemes collect data about their members are outlined below.

### *Consumer data actively provided to loyalty schemes*

- **Join process:** When a member joins a loyalty scheme they are usually asked to provide personal information such as their name, date of birth, email address and phone number. This forms the basis of their member profile. Once the registration process is complete, the member may be asked to provide further information about their likes and interests. Frequent flyer schemes may also request information about the member's status tier with other airlines, seat preference on flights, lifestyle interests and sport interests, the number of flights taken recently, whether they predominantly fly for leisure or business, and the member's favourite destination. Supermarket schemes may ask for information about the number of people in the household, if they have any pets and their internet and shopping habits, including whether they are looking to change insurers or credit cards.
- **Transactions (active):** When, where and how often a member transacts and how much they spend provides valuable data about the member's lifestyle, habits, interests, motivations and goals. This may be collected when the member purposefully identifies themselves by scanning their membership card or app in store, signing into their account online or via an app, or providing verification to a call centre agent. Transaction data may also be obtained from loyalty scheme-branded credit cards.
- **Surveys:** Loyalty schemes often invite members to participate in surveys. These can be used for two purposes: to capture attitudes and opinions about the loyalty scheme, and to collect additional data about the member.

### *Consumer data passively provided to loyalty schemes*

- **Apps:** When a member downloads a loyalty scheme app, they are generally requested to provide permission for the loyalty scheme to gain access to certain features and data, plus the ability to track location. This approval can provide extensive access including precise user location, access to the member's contacts, access to call logs, access to the camera and microphone, ability to read storage data, and the ability to read phone status and identity. Flybuys' privacy policy indicates its systems record information including 'software versions used, device types, device identifiers (like IP address), location data (where available and not disabled by the user), dates, times, file metadata, referring website, data entered, and user activity such as links clicked<sup>101</sup>'.
- **Ongoing engagement:** Digital assets allow some loyalty schemes to track behaviour at a micro level. This includes using click maps across websites, electronic direct mailing and heat maps for in-store visits. Using cookies<sup>102</sup>, some loyalty schemes can track different websites that a member visits to better understand what products and services they are interested in. Interactions with the customer service team may be tracked and stored against the member's profile, including the nature of the call or online messages.

Further, cookies can be used to facilitate real-time personalised activations of offers and promotions for members. Data technology agencies provide support to some loyalty schemes using platforms that can: identify individual members at the time they are

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<sup>100</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 5.

<sup>101</sup> Flybuys, [Privacy Policy](#), November 2018, viewed 29 May 2019.

<sup>102</sup> Cookies are small files that are placed on users' computers and store data on their activity and browsing specific to different websites. When a user visits a website, that website might automatically and invisibly send a cookie to the user's computer. This cookie then helps the website keep track of the user's visits and activity on the website and allows the website to deliver web pages tailored specifically to that user.

engaging with a range of digital channels (such as e-commerce websites); access their profile information (encompassing hundreds of datasets); and automatically trigger an individualised promotion for the member. This is designed to optimise advertising spend by investing in activities that have a high impact.

- **Linked household members:** Some loyalty schemes may link multiple members to a specific mailing address, allowing them to enhance their dataset by matching members living in the same household. Some loyalty schemes allow members to apply for a secondary card under the same account to enable both card-carriers to earn points. This household profile approach allows the loyalty scheme to view a much broader consumption profile than for an individual member, providing additional insights.
- **Social media:** Some loyalty schemes may use tools such as Facebook Connect to let members log in with their social media credentials. Using Facebook Connect allows sharing of data between the website and Facebook where detailed member data (for example the member's relationships, the female/male make-up and size of their friends list, education history, work history, friends' interests, how the member interacts with their friends, and their comment and wall post frequency) can be tracked and shared.

In Australia, Woolworths Rewards allows members to join using Facebook Connect. Its privacy policy indicates that, 'We collect personal information about Woolworths Rewards Members from other persons or entities. Such entities include ... digital services used by Woolworths Rewards Members (including social media platforms).'<sup>103</sup>

- **Transactions (passive):** Woolworths Rewards and Flybuys automatically link any payment card the member uses to their profile, enabling them to track any transaction the member makes across associated companies, even when the member does not scan their membership card.
- **Virtual/voice-controlled assistants:** Some major companies, such as Woolworths, are experimenting with the use of virtual home assistants (such as Google Assistant) to support new ways for customers to interact. Woolworths's ambition is for these to be developed into full AI conversational platforms that can be run at enterprise scale.<sup>104</sup>
- **Wi-fi-tracking platforms:** Qantas Frequent Flyer discloses that it collects data about members when they use free wi-fi in the Qantas Lounge and on the aircraft. This includes information about the member (the information they enter when accessing the service), their device and how they use the wi-fi service.<sup>105</sup>

### ***Consumer data that loyalty schemes infer from other sources***

- **Data brokers:** Data brokers, such as Quantum, Acxiom, Experian and Lexar, 'have highly detailed profiles on billions of individuals, comprising age, race, sex, weight, height, marital status, education level, politics, shopping habits, health issues, holiday plans, social media posts, income and more'.<sup>106</sup> They may provide database tools to some loyalty schemes to help them improve their member profiling, segmentation, or provide the data directly to a loyalty scheme to be matched against existing member profiles.
- **Data-sharing platforms:** Data-sharing platforms, such as Data Republic, allow companies to share data collected from their customers with other companies. This provides some loyalty schemes with access to many data points, which they can use to enhance their member profiles.
- **Database generators:** Some loyalty schemes engage third party data brokers to grow

<sup>103</sup> Woolworths Rewards, [Privacy Policy](#), May 2018, viewed 14 May 2019.

<sup>104</sup> R Crozier, '[Woolworths looks to large-scale conversational AI](#)', *IT News*, 21 January 2019, viewed 11 April 2019.

<sup>105</sup> Qantas, [Privacy Policy](#), 'Information we collect', 22 May 2018, viewed 30 May 2019.

<sup>106</sup> S Molitorisz, '[It's time for data brokers to emerge from the shadows](#)', *IT News*, 6 April 2018, viewed 16 April 2019.

their databases by partnering with other companies which offer an overlay or pop-up when online transactions with the loyalty scheme are conducted. The database generator uses machine learning to deliver highly personalised offers and advertising to target members.

- **Publicly available information:** Data held by some loyalty schemes can be further enriched by linkages with external data sources. For example, customer postcodes allow information from other external sources to be combined, generating insights into demographic attributes about the member.
- **Analytics:** Data enables some loyalty schemes to generate extensive insights into who their members are, how they behave, how they respond to different marketing campaigns and offers, what their consumption patterns are over time, what their life stages are and more. Some loyalty schemes employ large teams of analysts to code the complex queries required to unearth new and relevant insights. One approach is propensity modelling, which tries to predict how a member will respond to a campaign or offer based on how similar members responded.

### 4.3. The value of consumer data to loyalty schemes

Consumer data has a significant value to many loyalty schemes and is a key incentive for loyalty schemes to exist. Common commercial uses of consumer data include<sup>107</sup>:

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

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

#### 4.3.1. Consumer data for analysis and insights

Some loyalty schemes can use consumer data for analysis and the generation of consumer insights to understand how to retain existing customers and obtain new ones.<sup>108</sup> Choice noted that ‘retailers engage specialist analytic firms to create shopper profiles to go with otherwise anonymous shopper profiles’ to generate insights about consumers.<sup>109</sup> The United Kingdom’s Competition & Markets Authority (CMA) indicated that in some sectors the analysis of consumer data and generation of insights can be a key competitive asset in targeting offers.<sup>110</sup> These insights are used to develop a deep understanding of consumers and to influence their buying behaviour.

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

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<sup>107</sup> Competition & Markets Authority (UK), [The commercial use of consumer data: report on the CMA’s call for information](#), June 2015, p. 50.

<sup>108</sup> *ibid.*, p. 58.

<sup>109</sup> D Graham, ‘[Loyalty programs, data collection and privacy law](#)’, Choice, 15 January 2016, viewed 19 July 2019.

<sup>110</sup> Competition & Markets Authority (UK), [The commercial use of consumer data: report on the CMA’s call for information](#), June 2015, p. 56.

### 4.3.2. Consumer data for business and product development and improvement

Consumer data can be used by businesses to generate improvements across all stages of the value chain<sup>111</sup>, including in choosing store location and range selection for supermarkets and retailers, as well as the supply chain, product development, promotion and customer engagement. For example, consumer data can help firms identify potential gaps in a market—that is, unmet demand for products and services—and develop ways to address these gaps.<sup>112</sup>

In terms of business processes and strategy, consumer data can be used to<sup>113</sup>:

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

### 4.3.3. Consumer data for personalised products and targeted advertising

Some loyalty schemes use a combination of insights generated from de-identified consumer data and the transactions individual members make to create a profile of consumers. Data analysis is used to identify the goods or services an individual member is most likely to buy, based on knowledge about their interests, preferences or other characteristics.<sup>114</sup>

The CMA found that firms which use consumer data in this way seek to increase the consumption of their products or services by<sup>115</sup>:

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

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

The value to loyalty schemes using such practices is not only that conversion rates may be higher, but the use of consumer data in this way may also reduce the costs associated with poorly directed advertising and reduce customer annoyance levels from irrelevant advertisements.<sup>116</sup> Credit Suisse estimated that promotional activities comprise 20 per cent of a supermarket's value chain, and that improving the richness of personally identifiable consumer transactional data, combined with artificial intelligence and machine learning,

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<sup>111</sup> Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

<sup>112</sup> Competition & Markets Authority (UK), [The commercial use of consumer data: report on the CMA's call for information](#), June 2015, p. 57.

<sup>113</sup> *ibid.*, p. 58.

<sup>114</sup> Competition & Markets Authority (UK), [The commercial use of consumer data: report on the CMA's call for information](#), June 2015, p. 51.

<sup>115</sup> *ibid.*

<sup>116</sup> *ibid.*

could reduce the amount spent on promotions, as compared with sales made, by 6–10 percentage points.<sup>117</sup> Consumer data used for personalised products and targeted advertising is likely to have similar value to loyalty schemes in other sectors.

#### 4.3.4. Consumer data for directly generating revenue

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

Box 4.3 summarises Loyalty & Reward Co's findings about how loyalty schemes may generate direct revenue from consumer data.

#### **Box 4.3: How loyalty schemes directly monetise consumer data**

Based on research from Loyalty & Reward Co<sup>118</sup>, there are a number of ways loyalty schemes may directly generate revenue from the consumer data they hold, as follows.

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

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

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

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

Previously, Woolworths Rewards created analytical insight reports to sell to its product or service supplier base.<sup>119</sup> Through this, it provided extensive insights into what its customers look like and was able to compare them with customers who bought competitors' products. It has been reported that, as of July 2019, Woolworths would stop creating reports that tell brands how their competitors are performing in the same category. However, it will still provide a website that allows suppliers to view the segment profiles of their own customers.<sup>120</sup>

##### ***Selling access to digital marketing services***

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

<sup>117</sup> Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

<sup>118</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 5.5.

<sup>119</sup> AFN staff writers, '[Woolworths gives suppliers unprecedented access to consumer data](#)', Australian Food News, 9 January 2017, viewed 18 April 2019.

<sup>120</sup> J Thompson, '[Woolworths stirs a data debate with suppliers](#)', *Australian Financial Review*, 17 July 2018, viewed 18 April 2019.

behalf of third party clients.

Red Planet, owned by Qantas with access to the Qantas Frequent Flyer database, can provide this type of campaign approach. For example, if a loyalty scheme member is booking a flight to Perth, its database can determine whether the customer is likely to seek premium accommodation in the city area and can deliver website advertising to match.<sup>121</sup>

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

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

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

### ***Loyalty campaign services provided by credit card schemes***

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

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

In addition to this, loyalty schemes that collect consumer data may purchase or gain access to datasets held by data brokers to enhance the consumer data they hold. This includes<sup>122</sup>:

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

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<sup>121</sup> M Ward, '[Qantas launches data marketing business Red Planet, takes digital media buying in-house](#)', Mumbrella, 10 September 2014, viewed 18 April 2019.

<sup>122</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 5.5.

The ACCC understands that while the major loyalty schemes in Australia do not sell their members' personally identifiable consumer data, they do share or exchange de-identified, tokenised or hashed data about their members with third parties. Box 4.6, in section 4.5.5 below, discusses the risks this data could be re-identified.

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

One of the key findings from the ACCC's Digital Platforms Inquiry was that 'consumers have different privacy preferences and levels of privacy awareness'.<sup>123</sup> The ACCC formed the view that 'all consumers will be better off when they are sufficiently informed and have sufficient control over their user data such that they can make informed choices that align with their privacy and data collection preferences.'

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

##### 4.4.1. General attitudes to digital and online data practices

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

A survey of Australians conducted by the OAIC in 2017 found that 69 per cent of respondents were more concerned about their online privacy than they were five years earlier.<sup>124</sup> Only 10 per cent of respondents were comfortable with businesses sharing their information with other organisations and only 1 per cent were comfortable with receiving unsolicited marketing from organisations they had not dealt with before.<sup>125</sup> Almost nine in 10 respondents considered that it would be a misuse of data if<sup>126</sup>:

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

The OAIC survey also found that only one in five Australians (21 per cent) were comfortable with targeted advertising based on their online activities.<sup>127</sup> Consistent with this, a 2018 survey by the Consumer Policy Research Centre (CPRC) found that at least two-thirds of respondents indicated they were uncomfortable with most types of information being shared with third parties.<sup>128</sup> A further survey prepared for the CPRC also found that half of respondents found it unacceptable for companies to monitor their online behaviour to show them advertising and offers.<sup>129</sup>

The Australian National University's 2018 research into attitudes towards data governance also found that Australian consumers had low levels of trust in commercial entities appropriately handling consumer data, with levels of trust in those companies that

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<sup>123</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, chapter 7.

<sup>124</sup> OAIC, [Australian Community Attitudes to Privacy Survey](#), May 2017, p. i.

<sup>125</sup> *ibid.*, pp. ii, 9, 11.

<sup>126</sup> *ibid.*, pp. ii, 14.

<sup>127</sup> *ibid.*, p. ii.

<sup>128</sup> P Nguyen and L Solomon, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), Consumer Policy Research Centre, July 2018, p. 32.

<sup>129</sup> Roy Morgan Research, [Consumer Knowledge and Understanding of Consent to Data Collection, Usage and Sharing Research 2018](#), 10 March 2018, p. 5.

consumers use to make purchases being relatively low compared with other organisations.<sup>130</sup>

Further, some consumers appeared to be unaware of the impact of a privacy policy, namely, that it outlines the terms under which a consumer relinquishes control over their personal information and user data to the extent outlined in the policy. A survey prepared for the ACCC for its Digital Platforms Inquiry found that 36 per cent of Australian digital platform users agreed with the statement ‘when a digital platform has a privacy policy, it means it will not share my personal information with anyone else (including other digital platforms)’.<sup>131</sup> Similarly, a CPRC survey in 2018 found that 19 per cent of respondents believed that a company with a privacy policy would not share information with other websites or companies, and 22 per cent of respondents did not know enough to answer the question.<sup>132</sup>

The ACCC considered that a ‘factor contributing to this fundamental misunderstanding about the purpose and function of a privacy policy may be that the title of ‘privacy policy’ is a misnomer, given these policies tend not to outline privacy protections for users but rather tend to set out the extent of permissions granted to digital platforms’.<sup>133</sup>

#### **4.4.2. Members’ attitudes to loyalty schemes’ data practices**

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

A survey by Aimia, a global loyalty consultancy, of Australian loyalty scheme members in 2016 found that 41 per cent of respondents viewed their data as being highly valuable and considered that their online behaviour, such as web history and online purchases, as well as contact data, were the most valuable types of data.<sup>134</sup> The survey also indicated that the surveyed loyalty scheme members were concerned about the indiscriminate collection of their data and a lack of responsible data usage.

A 2019 survey of Australian loyalty scheme members by The Point of Loyalty, an Australian loyalty consultancy, found that around half (51 per cent of respondents) were comfortable with sharing their data with loyalty schemes to enhance their shopping experience<sup>135</sup>, which suggests a substantial number of members were also not comfortable doing so.

In addition, 27 per cent of respondents to the Point of Loyalty survey reported they felt the collection of personal information by loyalty schemes is an invasion of their privacy.<sup>136</sup> The survey further found that respondents’ concerns about providing their data to loyalty schemes included knowing how secure the data is (64 per cent), knowing how their data is used (48 per cent), and the reputation of the company asking for their details (37 per cent).<sup>137</sup> Fifty two per cent of respondents expressed specific concerns about the data held about them by loyalty schemes being hacked or subject to fraud.<sup>138</sup>

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<sup>130</sup> N Biddle, B Edwards, M Gray and S McEachern, [Public attitudes towards data governance in Australia](#), Australian National University, Centre for Social Research and Methods, no. 12, 2018, p. 12. On a scale from 1 to 10, where 1 was no trust at all and 10 was trust completely, the 2,150 respondents allocated a mean score of 3.8 to these organisations, indicating a low level of trust towards these companies across the sample.

<sup>131</sup> Roy Morgan Research, [Consumer views and behaviours on digital platforms](#), November 2018, p. 6.

<sup>132</sup> Consumer Policy Research Centre, [Submission to the ACCC Digital Platforms Inquiry](#), April 2018, p. 5.

<sup>133</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, p. 383.

<sup>134</sup> Aimia, *Aimia 2016 Loyalty Lens: Love me, love my data: how brands can use customer insight to inspire true loyalty*, 2016.

<sup>135</sup> The Point of Loyalty, *for love or money 2019: Executive summary*, p. 12.

<sup>136</sup> *ibid.*

<sup>137</sup> J Loh, ‘Data privacy is top priority for loyalty members, 52% consumers anxious over breaches and hacks’, Marketing, 24 June 2019, viewed 21 August 2019.

<sup>138</sup> The Point of Loyalty, *for love or money 2019: Executive summary*, p. 14.

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

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

There also appears to be a low level of awareness about the value of consumer data to loyalty schemes, and how and why consumer data is being collected, used and disclosed.<sup>139</sup> While surveys of loyalty scheme members did not delve deeper into consumers' concerns around the sharing of their data with third parties, such as loyalty schemes' partners or data brokers, general surveys of consumers' attitudes to these data practices reveal consumers are uneasy about their data being shared with third parties, particularly those they have not dealt with before, and about the use of online targeted advertising.

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

## 4.5. Consumer consents and disclosures in loyalty schemes' privacy policies

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

The ACCC's view is that consumer consents are not generally well informed, as they are provided in response to clickwrap agreements that contain take-it-or-leave-it terms. The ACCC also has concerns about how important information about the terms and conditions of these schemes and their data practices are communicated to consumers. The ACCC's analysis reveals that these issues arise from information asymmetries, behavioural biases and bargaining power imbalances. Box 4.4 details the role of behavioural biases in creating bargaining power imbalances between consumers and loyalty schemes.

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<sup>139</sup> See section 4.3, which discusses the value of consumer data to loyalty schemes and their partners, including how consumer data is used and the circumstances in which it is shared and monetised.

## Box 4.4: The role of behavioural biases

Presenting offers to consumers as ‘free’ is likely to exploit behavioural biases due to the emotional appeal of free offers.<sup>140</sup> This is because marketing a service as ‘free’ presents consumers with ‘a narrow way of thinking that focuses on only one or a few aspects of a more complex decision problem.’<sup>141</sup>

As a result, consumers are likely to focus more on the zero monetary cost of signing up to a loyalty scheme—as well as the potential rewards, such as discounts and points—and less on the potential costs of providing loyalty schemes with their data. While consumers are incentivised to think of the ‘free’ nature of loyalty schemes—and that they are being rewarded for shopping—the real value to loyalty schemes is in the vast amounts of consumer data they collect, use, share and monetise, as outlined in chapter 4.4.

The costs of consumers providing their data to loyalty schemes can include increased risk of data breach and cybercrime from increased online transmission, storage and disclosure<sup>142</sup>, which may result in both financial detriments, such as those associated with identity fraud and scams, as well as non-financial detriments, such as harm to health and safety and reputational injury.<sup>143</sup> Other costs include decreased privacy, potential increases in unsolicited targeted advertising and third parties leveraging information against the consumers’ interests, for example by engaging in price discrimination (where it allows businesses to take more of the consumer surplus through higher prices).

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

### 4.5.1. Clickwrap agreements and take-it-or-leave-it terms

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

The use of clickwrap agreements are commonplace in most online interactions. However, they are likely to contribute to consumers’ tendencies not to read the terms and conditions and privacy policies of loyalty schemes. In its Digital Platforms Inquiry, the ACCC found that less than one in five respondents (18 per cent) indicated that they read privacy policies for internet sites or apps most or every time, with three in five (60 per cent) indicating that they

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<sup>140</sup> D Friedman, ‘Free offers: a new look’, *New Mexico Law Review*, vol. 38, pp. 49–94, 2008, pp. 68–69; CJ Hoofnagle and J Whittington, ‘[Free: accounting for the costs of the internet’s most popular price](#)’, *UCLA Law Review*, vol. 61, pp. 606–670, 2014, p. 609.

<sup>141</sup> D Boush, M Friestad and P Wright, *Deception in the marketplace: the psychology of deceptive persuasion and consumer self-protection*, 2009; cited in CJ Hoofnagle and J Whittington, ‘[Free: accounting for the costs of the internet’s most popular price](#)’, *UCLA Law Review*, vol. 61, 2014, pp. 606–670.

<sup>142</sup> CJ Hoofnagle and J Whittington, ‘[Free: accounting for the costs of the internet’s most popular price](#)’, *UCLA Law Review*, vol. 61, pp. 606–670, 2014, p. 611.

<sup>143</sup> MK Ohlhausen (speech), [Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases](#), Federal Trade Commission (US), 19 September 2017, pp. 4–8.

rarely or never did so.<sup>144</sup> A survey by the CPRC in 2018 similarly reported that only 6 per cent of consumers surveyed read all the privacy policies or terms of use for all the products to which they had signed up.<sup>145</sup> However, the way documents are presented can have a significant impact on whether consumers read them.

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

#### **Box 4.5: Clickwrap agreements and engagement with terms and conditions**

Research conducted by the European Commission (EC) in 2016 found that few consumers (9.4 per cent) would click through to view the terms and conditions in a clickwrap agreement. The EC found, however, that a significantly higher proportion (77.9 per cent) would read or scan at least part of the terms and conditions if they were provided to users within the acceptance process (for example in an embedded window, box or table on the page).<sup>146</sup>

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

Conversely, Woolworths Rewards and Velocity Frequent Flyer have adopted an opaque approach to presenting consumers with their terms, conditions and privacy policies. As illustrated in **appendix C**, Velocity Frequent Flyer requires a consumer to start providing personal information before a link to the terms and conditions and privacy policy is presented. Woolworths Rewards presents a link to its terms and conditions during the joining process, within which a link to its privacy policy and collection notice is provided.

The ACCC notes that in 2016 the OAIC undertook a privacy review of Woolworths Rewards<sup>147</sup> and, among other things, recommended the scheme should consider 'separating the privacy related information from the broader terms and conditions and providing [it] as a separate document at the point of registration'. This recommendation does not as yet appear to have been implemented.

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

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

As detailed in the ACCC's Digital Platforms Inquiry, the ACCC's concerns around clickwrap agreements is that other approaches would better enable users to be aware of the terms, conditions and data practices employed by digital entities. The ACCC also has concerns around clickwrap agreements deeming consent to multiple separate agreements, particularly

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<sup>144</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, chapter 7, p. 396.

<sup>145</sup> P Nguyen and L Solomon, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), Consumer Policy Research Centre, July 2018, p. 31.

<sup>146</sup> European Commission, [Consumers' attitudes towards terms and conditions](#), 21 March 2016.

<sup>147</sup> OAIC, [Loyalty program assessment: Woolworths Rewards](#), July 2016.

where these incorporate unilateral variation clauses. Where loyalty schemes adopt an opaque approach to the presentation of terms, conditions and privacy policies, they are contributing to an information asymmetry between them and consumers, which exacerbates the power imbalance in respect of the use of consumer data.

The ACCC also has concerns that the terms and conditions and privacy policies are standard form contracts and do not clearly set out to each user what is occurring with their data specifically. As discussed below, there are particular issues around the opacity of how data is shared with and used by third parties, and the disclosure of these practices to consumers.

A further concern is that consumers may accept these terms despite being uncomfortable in order to access the service. For example, a CPRC survey found that, of the consumers surveyed who did read the privacy policies, 67 per cent had signed up even though they were not comfortable with the terms of use.<sup>148</sup> When asked why they signed up in spite of this discomfort, 73 per cent of respondents stated that it was the only way to access the product or service.<sup>149</sup> The ubiquity of take-it-or-leave-it terms in the loyalty scheme industry reflects the imbalance of the power relationship between them and consumers.

#### **4.5.2. Clarity, accessibility and readability of privacy policies**

Privacy policies are intended to tell consumers about the data practices of loyalty schemes. Clear and accessible privacy policies are a critical first step to ensuring that consumers can engage with loyalty schemes in an informed way to make decisions in their best interests.<sup>150</sup> As noted above, consumers, for a variety of reasons, do not tend to read the terms and conditions and privacy policies that are made available online. Good practices include bringing key elements of these to the consumer's attention at the time of joining and when relevant events occur, and ensuring those key elements are clearly and effectively communicated to consumers.

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

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<sup>148</sup> P Nguyen and L Solomon, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), Consumer Policy Research Centre, July 2018, p. 31.

<sup>149</sup> *ibid.*

<sup>150</sup> OECD, [STI Policy Note: Improving online disclosures with behavioural insights](#), April 2018.

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

Loyalty scheme	Documents analysed	Word count	Est. reading time <sup>151</sup>	Reading ease <sup>152</sup>	Date of document <sup>153</sup>
Flybuys	<a href="#">Flybuys Privacy Policy</a>	2178	11 minutes	32.8 — Difficult to read	November 2018
	<a href="#">Flybuys Terms and Conditions</a>	1476	7 minutes	47.4 — Difficult to read	Not dated
Qantas Frequent Flyer	<a href="#">Qantas Privacy Policy</a>	5140	25 minutes	35.2 — Difficult to read	22 May 2019
	Qantas Privacy Policy Summary <sup>154</sup>	547	2 minutes	40 — Difficult to read	Not dated
	<a href="#">Qantas Frequent Flyer Terms and Conditions</a>	20 604	1 hour 43 minutes	36.8 — Difficult to read	10 May 2019
Velocity Frequent Flyer	<a href="#">Velocity Frequent Flyer Privacy Policy</a>	2991	15 minutes	24.3 — Very difficult to read	Not dated
	<a href="#">Velocity Frequent Flyer – Privacy Statement – Membership Join</a>	844	4 minutes	32.1 — Difficult to read	Not dated
	<a href="#">Velocity Frequent Flyer Terms and Conditions</a>	27 661	1 hour 48 minutes	28.0 — Very difficult to read	Not dated
Woolworths Rewards	<a href="#">Woolworths Rewards Collection Notice</a>	1924	10 minutes	30.9 — Difficult to read	May 2018
	<a href="#">Woolworths Group Privacy Policy</a>	1795	9 minutes	40.7 — Difficult to read	January 2018
	<a href="#">Woolworths Rewards Terms and Conditions</a>	8228	41 minutes	46.9 — Difficult to read	22 May 2019

The average reading times to review the terms and conditions or the privacy policies of the major loyalty schemes vary from 7 minutes to over 1 hour and 45 minutes. These reading times are likely to significantly exceed the amount of time an average loyalty scheme member would spend trying to read these terms and conditions or privacy policies. The complexity of the language used is also likely to deter consumers from reading and processing the information they contain and would contribute to information overload.

<sup>151</sup> Calculated by dividing the number of words by the average reading speed of 200wpm. Rounded to the nearest minute.

<sup>152</sup> The Flesch Readability Score calculates readability of a document based on the average number of words per sentence, and the average number of syllables per word. It is an inverse scoring system; the higher the score, the easier a document is to read. Documents that score between 60.0 and 50.0 are classified as 'fairly difficult to read', which translates to around a US 10th to 12th grade school level; documents scoring between 50.0 and 30.00 are 'difficult to read', at a US college reading level.

<sup>153</sup> All documents were viewed on 13 June 2019.

<sup>154</sup> See figure B.1 in appendix B and discussion in section 4.5.1.

Qantas Frequent Flyer and Velocity Frequent Flyer have adopted the approach of also providing consumers with a Privacy Statement or summary, which is considerably shorter and is more likely to be read. However, in respect of Velocity Frequent Flyer, as noted above, this document is hidden behind a number of screens and does not feature as prominently as Qantas's summary does in its own joining process. Woolworths Rewards provides a short video about its privacy policy<sup>155</sup>; however, as noted above, the privacy policy is provided as a link within the terms and conditions. Therefore the privacy policy is unlikely to be read and the video is unlikely to be seen.

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

*'To make it easy for you to deal with Participants, including Coles, and Wesfarmers group companies, we may exchange and combine Personal Information with them for the purposes described in our respective privacy policies. You can find their privacy policies of [sic] their respective company websites.'*

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

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

The privacy policies of loyalty schemes are, in many instances, long, complex and hard to navigate. The length and complexity of these policies is likely to deter consumers from reading them. Loyalty schemes should adopt the approach of minimising information overload for consumers by ensuring relevant aspects of the terms, conditions and privacy policies are presented to them during key interactions. This may aid in consumers being more aware of the loyalty scheme's data practices.

Further, the need for consumers to track down a variety of privacy policies from various different web pages or from other entities imposes significant barriers on their understanding of the data practices that will apply to their data. This exacerbates the information asymmetries consumers already experience in understanding these issues and dealing with loyalty schemes. A consumer signing up to a loyalty scheme without being presented with its privacy policy on sign-up is much less likely to be aware of and understand the exact scope of the consumer data the loyalty scheme is collecting from them and how the data will be used and disclosed.

#### **4.5.3. Varying definitions in privacy policies**

Definitions in the privacy policies of Australian loyalty schemes vary, particularly in terms of 'personal information'. As noted in box 4.1, the consumer data collected by loyalty schemes can be categorised as personal information or non-personal information. Privacy protections under the Privacy Act generally apply only to data that constitutes 'personal information'. Under the Privacy Act, personal information is defined as information or an opinion, whether true or not, and whether recorded in a material form or not, about an identified individual, or an individual who is reasonably identifiable.<sup>156</sup>

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<sup>155</sup> Woolworths Rewards, [Privacy Video](#), May 2018, viewed 13 June 2019.

<sup>156</sup> Privacy Act, s. 6(1).

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

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

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

### **ACCC view on varying definitions in privacy policies**

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

#### **4.5.4. Disclosures about tracking members using payment cards**

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

Flybuys’s Privacy Policy states:

*‘We may collect your personal information, and that of additional members, from your interactions and transactions with us, Participants, Coles and Wesfarmers group companies. This includes using your Flybuys card or number or associated identifiers such as payment cards.’<sup>157</sup>*

<sup>157</sup> Flybuys, [Privacy Policy](#), November 2018, viewed 14 May 2019.

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

*'... We also collect Members' transaction history from the use of their payment card, which is matched to their Woolworths Rewards account. Our systems render payment card numbers unreadable (through the use of cryptographic hashing or encryption algorithm) and replace it with a randomised token number, which protects such details from unauthorised access or disclosure. Linking this token number with a Member's account enables us to collect the Member's transaction history even when they do not scan their Woolworths Rewards card at the point of sale ...'<sup>158</sup>*

The ACCC notes that this statement in particular emphasises the security processes Woolworths undertakes, and the benefit to Woolworths Rewards, and avoids outlining the risks and detriment to consumers—namely, the costs for consumers as outlined above in box 4.4 and the lack of informed consent associated with this process.

### **ACCC view on disclosures about tracking members using payment cards**

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

The practice of automatically linking members' payment cards to their profile to track their purchasing behaviour and transaction activities when they do not scan their loyalty card indicates a power imbalance between consumers and loyalty schemes. The ACCC is of the view that loyalty schemes should end this practice.

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

#### **4.5.5. Disclosures about consumer data sharing between loyalty schemes and third parties for marketing purposes**

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

### **Collecting consumer data from third parties for marketing purposes**

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

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<sup>158</sup> Woolworths Rewards, [Privacy Policy](#), May 2018, viewed 14 May 2019.

The value of consumer data to loyalty schemes increases as they combine it with additional datasets.<sup>159</sup> Through this process, they are able to derive greater insights from the consumer data they hold, including in relation to the targeting of members with advertising.

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

Source	How the collection from third parties is disclosed to members
<a href="#">Qantas Privacy Policy</a>	<p>‘There may be occasions when we collect information about you from someone else, such as ...</p> <ul style="list-style-type: none"> <li>• Third parties that provide us with marketing leads ...</li> <li>• ... Businesses for whom we provide marketing and data analysis services</li> <li>• Providers of third party websites, apps and social media platforms’.</li> </ul>
<a href="#">Velocity Frequent Flyer Privacy Policy</a>	<p>‘Our preference is to collect personal information about a Velocity member directly from the member. But we also collect personal information about a Velocity member from our related companies, Program Partners, and Airline Partners, as well as other people or organisations in the following circumstances: ...</p> <ul style="list-style-type: none"> <li>• third party suppliers that provide us with products and services, such as data enrichment, data analytics and business intelligence, market or product research, marketing services (including providing us with marketing leads), customer support (including call centre functions), running competitions and promotions, and payment fulfilment services.’</li> </ul>
<a href="#">Flybuys Privacy Policy</a>	<p>‘ ... We may also collect personal information from third parties including:</p> <ul style="list-style-type: none"> <li>• Public sources;</li> <li>• Information service providers (e.g. for data integrity purposes);</li> <li>• Providers who administer Coles-branded products and services such as payment cards and insurance ...</li> <li>• Participants, Coles and Wesfarmers group companies.’</li> </ul>
<a href="#">Woolworths Rewards Collection Notice</a>	<p>‘We collect personal information about Woolworths Rewards Members from other persons or entities. For example, we collect personal information for marketing purposes from other suppliers of goods or services who, like us, have an existing relationship with Woolworths Rewards Members. Such entities include our strategic partners, Earn Businesses, affiliated programs, suppliers of publicly available information and digital services used by Woolworths Rewards Members (including social media platforms)...</p> <p>At times, we combine different sets of data to add to the personal information we hold. An example of this is a history of a Member’s transactions from use of the same payment card.’</p>

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

<sup>159</sup> A Acquisti, L Wagman and C Taylor, ‘[The economics of privacy](#)’, *Journal of Economic Literature*, vol. 54. no. 2, 2016.

## Disclosing consumer data to third parties for marketing purposes

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

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

Source	How the disclosure to third parties is disclosed to members
<a href="#">Qantas Privacy Policy</a>	<p>‘ ... We may also disclose your information to:</p> <ul style="list-style-type: none"><li>• Providers of goods and services to members of our programs and clubs</li><li>• Service providers for our programs and clubs</li></ul> <p>They may use the information to assist us with our programs and clubs. Such activities may include:</p> <ul style="list-style-type: none"><li>• providing market research and marketing services.’</li></ul>
<a href="#">Velocity Frequent Flyer Privacy Policy</a>	<p>‘We combine and link personal information and non-identifying information we hold about Velocity members with other information collected from, or held by, others (including our Airline Partners, Program Partners, related companies or third parties) to better understand our members’ interests, preferences and interactions. This helps us enhance and personalise the membership experience and how we market to our members...</p> <p>We disclose personal information about Velocity members to our related companies, Airline Partners, Program Partners and trusted service providers to allow them to tell those members about products or services that may be of particular interest to them, based on membership details or transactions with us.’</p>
<a href="#">Flybuys Privacy Policy</a>	<p>‘flybuys may exchange your Personal Information with service providers engaged to assist with services including, working with a number of suppliers that carry out specific functions on our behalf, and include companies that assist us with:</p> <ul style="list-style-type: none"><li>• Technology services including application, development and technical support, processing, storing, hosting, and analysing data; ...</li><li>• Product development and market research ... ’</li></ul>
<a href="#">Woolworths Rewards Collection Notice</a>	<p>‘We disclose the personal information we collect about Woolworths Rewards Members to other persons and entities.</p> <p>For example, we disclose personal information to:</p> <p>our service providers (including to our information technology and marketing service providers) to assist us in carrying out our functions and activities; ...</p> <p>We also disclose aggregated and anonymised information to our trusted partners (including our suppliers) about Woolworths Rewards Members’ attributes, behaviours and preferences to enable them to market products and services that are likely to interest you based on those attributes, behaviours and preferences ... ’</p>

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

A further risk that arises from disclosures of consumer data to third parties is the potential for data breaches and the possibility of re-identifying consumer data. Box 4.6 outlines the risks of data breaches and the risks of re-identifying consumer data, especially as the number of data points collected about a given person continues to increase.

#### **Box 4.6: Risks of data breaches and data re-identification**

##### ***Data breaches***

As consumer data is shared more and more frequently, the risks of a data breach may increase. The lack of clarity and broad discretions and consents in privacy policies may also lead to low consumer awareness of the underlying risks of joining a loyalty scheme, such as data breaches of either the scheme or the partners to which consumer data is disclosed.

The costs of a data breach to consumers include exposure to cybercrime, which may result in financial detriments, such as those associated with identity fraud and scams, as well as non-financial detriments, such as harm to health and safety and reputational injury.<sup>160</sup>

While there have been no breaches of loyalty scheme data notified to the OAIC to date<sup>161</sup>, data breaches have occurred in other jurisdictions. For example, in 2018 the data of 500 million guests of Starwood Hotels (now Marriott International) was stolen in one of the largest reported data breaches in corporate history.<sup>162</sup> This data breach exposed personal information including the passport numbers and credit card details of hotel guests. This data breach also illustrates the value of the types of consumer data held by loyalty schemes to criminals.

##### ***Data re-identification***

The risk that datasets can be re-identified increases as they are combined and data analytics technologies become more advanced. Research has demonstrated that de-identified data can be re-identified. The ACCC also notes that the sensitivity of the consumer data may increase when it is combined with multiple datasets.<sup>163</sup> For example, in 2016, the Department of Health released a de-identified dataset that was later found to be re-identifiable by a University of Melbourne research team through linking known personal information, such as year of birth and known medical procedures.<sup>164</sup>

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

Privacy policies should clearly outline with which entities consumer data is being shared, and for what purposes. Where possible, consumers should be made specifically aware of the way their data is being handled and by which entities.

Consumers are placed at a significant disadvantage and denied the ability to make an informed decision about the collection and use of their data when privacy policies do not clearly outline who consumer data is shared with, and how it is being used. Such features of

<sup>160</sup> MK Ohlhausen (speech), [Painting the Privacy Landscape: Informational Injury in FTC Privacy and Data Security Cases](#), Federal Trade Commission (US), 19 September 2017, pp. 4–8.

<sup>161</sup> The ACCC notes that in 2015 Woolworths unintentionally emailed eVoucher details to 400 customers; however, this was not an issue associated with its loyalty scheme. See also OAIC, [Woolworths data breach – finalisation of enquiries](#), 21 July 2015, viewed 30 July 2019.

<sup>162</sup> H Kuchler, N Rovnick and C Hodgson, '[Marriott breach potentially exposed data of 500m guests](#)', *Financial Times*, 1 December 2018, viewed 19 July 2019.

<sup>163</sup> A Acquisti, L Wagman and C Taylor, '[The economics of privacy](#)', *Journal of Economic Literature*, vol. 54, no. 2, 2016. See also ACCC, [Digital Platforms Inquiry final report](#), June 2019, p. 411.

<sup>164</sup> OAIC, [Annual report 2017–18](#), p. 63.

privacy policies are therefore likely to exacerbate information asymmetries between loyalty schemes and consumers by providing consumers with an opaque view of privacy and data protections while simultaneously outlining broad discretions for loyalty schemes to collect, use and disclose user data.

#### 4.5.6. Disclosures about targeted and behavioural advertising

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

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

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

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

**Table 4.5: Loyalty schemes’ disclosures about targeted and behavioural advertising**

Source	Disclosures about targeted and behavioural advertising
<a href="#">Qantas Frequent Flyer Terms and Conditions</a>	<p>‘ ... Marketing consent: By becoming a Member, the Member provides their express consent to Qantas:</p> <p>...</p> <p>associating and combining data collected from third parties with the Member’s personal information and using and disclosing that combined personal information to tailor the Member’s experience and content, including third party content and otherwise in accordance with these Terms and Conditions.’</p>
<a href="#">Velocity Frequent Flyer Privacy Policy</a>	<p>‘We disclose personal information about Velocity members to our related companies, Airline Partners, Program Partners and trusted service providers to allow them to tell those members about products or services that may be of particular interest to them, based on membership details or transactions with us.’</p>
<a href="#">Flybuys Privacy Policy</a>	<p>‘We may provide marketing communications and targeted advertising to you on an ongoing basis by telephone, electronic messages (e.g. email), through our digital services, and by other means. These communications may relate to the products and services we, Participants, Coles, and Wesfarmers group companies provide, and other products which may be of interest to you.’</p> <p>‘We provide information and services through a range of digital and online services</p> <p>...</p> <p>These services may be operated by us as flybuys Digital Services to provide a consistent experience, personalise your use of each of those services and provide targeted marketing.’</p>

[Woolworths Rewards Collection Notice](#)

'We also disclose aggregated and anonymised information to our trusted partners (including our suppliers) about Woolworths Rewards Members' attributes, behaviours and preferences to enable them to market products and services that are likely to interest you based on those attributes, behaviours and preferences. This information is used to send you tailored or targeted advertising and is shared in a way that does not personally identify you. Such advertising may appear on the websites you visit in the form of banner advertisements, and/or on the social media sites you use.'

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

Box 4.7 provides an example of the unexpected channels through which targeted advertising may occur using consumer data from loyalty schemes. In this example, an Australian real estate data broker claims it can use data from a variety of sources, including loyalty schemes, to identify homeowners who may be willing to sell their house.

**Box 4.7: Case study—Loyalty scheme data and lead generation for real estate agents**

CoreLogic, a real estate data broker, has outlined the types of targeted marketing and lead generation the combination of consumer data with property data can effect for real estate agents.<sup>165</sup> CoreLogic stated that it was possible, in 2016, to combine datasets from NAB, Foxtel, Woolworths Rewards and News Corp held by Quantum, a data broker part owned by Woolworths, with its own property data. This would allow CoreLogic to identify homeowners using Facebook that would be most likely to sell their home based on their property details, spending patterns and media consumption.

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

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

In 2019, it appears this concept, or similar, is being used by CoreLogic in its SmartList product<sup>166</sup>, which claims to combine 'property, market and consumer data to help identify properties that are more likely to be listed and sold'.

<sup>165</sup> K Davis, '[Big Data Agents](#)', CoreLogic, 2 May 2016.

<sup>166</sup> CoreLogic, '[SmartList](#)', viewed 26 June 2019.

The ACCC is also concerned by targeted advertising practices that are presented to consumers as being provided by a company the consumer is directly transacting with, but are actually provided by a third party transaction marketing company. This practice raises concerns around consumers being adequately notified their personal information will be disclosed to the third party, as noted in section 4.5.6. It also raises concerns around whether this practice has the potential to mislead consumers about the true source of the targeted advertising they are receiving.

Box 4.8 outlines how Rokt, a transaction marketing company, presents targeted advertising to consumers which appears to emanate from the company they are transacting with, rather than the third party.

#### **Box 4.8: Case study—Transparency of Rokt’s third party targeted advertisements**

An emerging issue is the rise of transaction marketing companies, such as Rokt, which display targeted advertising through a pop-up to a consumer during their online transactions with another company.

In one example Rokt displayed pop-ups that appeared to be from Ticketmaster at the end of a consumer’s transaction with Ticketmaster, encouraging consumers to join the Velocity Frequent Flyer scheme.<sup>167</sup> Figure D.1 in **appendix D** is taken from a case study on Rokt’s website and illustrates how this worked.

It is unclear from the pop-up who is making the offer. While small text in the bottom right-hand corner states ‘Powered by Rokt’, all other aspects of the pop-up appear to be consistent with the colour scheme and branding of Ticketmaster. As outlined in relation to Hoyts, below, it is likely that Ticketmaster is sharing consumers’ personal information with Rokt to provide this service. However, Ticketmaster does not disclose in its privacy policy that consumer data is shared with Rokt, or what data is shared<sup>168</sup>, and does not make clear before the pop-up is presented that this is occurring or provide consumers with an opportunity to opt out of being presented with an offer based on their personal information.

In another example, Rokt presented a pop-up following the purchase of a movie ticket from Hoyts, as shown in figure D.2 in **appendix D**. Hoyts’s privacy policy states, ‘When you order our goods and services online, we may provide limited information about you to ROKT so that you can choose to opt-in to these personalised opportunities.’<sup>169</sup>

This indicates that personal information is shared before consumers have an opportunity to opt out. As with the previous example, the offers appear to be provided by Hoyts rather than the third party. Rokt obfuscating the source of the targeted advertising is a clear response to the uneasiness of consumers around the sharing of their data with third parties, particularly those they have not dealt with before, and about the use of online targeted advertising (as discussed in chapter 4.4).

The data practices of Rokt and its clients are of concern and may not be consistent with the preferences of many consumers, particularly in terms of the personal information that is shared to make these offers, and that they are presented to look as if they are offered by the company with which the consumer is directly transacting, rather than a third party.

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<sup>167</sup> Rokt, [‘Velocity Frequent Flyer surpasses 8 million members’](#), 2017, viewed 10 July 2019.

<sup>168</sup> Ticketmaster, [Privacy Policy](#), viewed 10 July 2019.

<sup>169</sup> Hoyts, [Privacy Policy](#), viewed 10 July 2019.

## **ACCC view on disclosures about targeted advertising**

Targeted advertising is a primary activity of loyalty schemes. However, consumers have expressed unease about companies monitoring their behaviour for the purposes of targeted advertising. Consumers are also uneasy about personal information being shared with third parties for advertising purposes. The opacity of the extent to which consumers are tracked online and the way targeted advertising is delivered exacerbates concerns. Similar to the issues identified with third party sharing of consumer data, it is unclear who the partners of the loyalty schemes are that may use targeted advertising. In terms of transaction marketing companies, it is unclear which company—whether it is the company a consumer is directly transacting with or a third party—is making targeted advertising offers.

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

### **4.6. Consumer control over their data handled by loyalty schemes**

Consumers who are concerned about the data practices of loyalty schemes but wish to continue to participate may benefit from being given the choice to meaningfully opt out of certain data practices in a way that suits their own privacy preferences. There appears to be demand for an increased ability to opt out of certain data practices. A survey conducted by the CPRC found that 95 per cent of Australians surveyed said they wanted companies to provide options to opt out of certain types of information they can collect, use or share.<sup>170</sup> A survey prepared for the CPRC also found that 89 per cent of respondents indicated that they selected opt-outs when they were available.<sup>171</sup>

This draft report has found a number of data practices from which consumers cannot easily opt out or which limit their ability to control how their data is handled. For example, as outlined in section 4.5.4, Woolworths Rewards continues to collect information about its customers even when they do not scan their loyalty card, by linking payment card information with a customer's loyalty card, and Flybuys may also engage in this practice. Further, as noted in section 4.5.5, consumers have limited insight into and control over how their data is shared with third parties, in particular for marketing purposes.

Loyalty schemes make representations about consumers having control over their data; however, in reality these controls do not appear to have a meaningful effect. This is particularly apparent when consumers attempt to opt out of targeted and behavioural advertising delivered through web browsers.

While Australia's major loyalty schemes allow consumers to opt out of a range of personalised offers, direct marketing communications and tailored advertising, typically delivered by email, opting out of targeted advertising delivered through a consumer's web browser is significantly more difficult and less effective. For example, the Flybuys Privacy Policy outlines the steps a consumer can take to opt out as follows:

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<sup>170</sup> P Nguyen and L Solomon, [Consumer data and the digital economy: emerging issues in data collection, use and sharing](#), Consumer Policy Research Centre, July 2018, p. 36.

<sup>171</sup> Roy Morgan Research, [Consumer knowledge and understanding of consent to data collection, usage and sharing research 2018](#), 10 March 2018, p. 6.

*'The services we may use from time to time include those offered by Google (including Analytics, Display Network, AdSense, and DoubleClick), Yahoo!, Adobe (including Marketing Cloud, and Analytics), Responsys, Microsoft, and Signal Digital, Inc. You can find more details in the individual privacy policies of those services, including information on how to opt-out of certain functions.'*<sup>172</sup>

As noted previously, because of time and other resource constraints, consumers are unlikely to undertake such a task to opt out of online targeted advertising. Another approach, which is contained in the cookies statements of Qantas Frequent Flyer and Woolworths Rewards, directs consumers to the website [www.youronlinechoices.com.au](http://www.youronlinechoices.com.au) to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes (and others). However, as outlined in box 4.9, this approach has significant limitations.

#### **Box 4.9: The limitations of opting out of targeted advertising using [www.youronlinechoices.com.au](http://www.youronlinechoices.com.au)**

While the Woolworths Rewards [cookies statement](#) and Qantas [cookies statement](#) direct consumers to [www.youronlinechoices.com.au](http://www.youronlinechoices.com.au) to opt out of targeted advertising delivered by third parties on behalf of the loyalty schemes, this comes with significant limitations.

Visiting the website reveals that opt-outs online work in specific situations and can be rendered ineffective if a consumer clears the cookies in their web browser or uses a different web browser or device. The website states the following limitations for opting out:

*'After you opt-out of online behavioural advertising from a particular company it is important to remember that:*

- **Opt-outs do not stop companies from showing you ads, they only stop companies from showing you targeted ads.**
- **Opt-outs Do Not Remove Ads:** *If you opt-out you will continue to see online ads. You may even see online ads from companies from which you opted-out.*
- **Opt-outs Do Not Prevent Data Collection:** *Companies can continue to collect data about your browsing activity after an opt-out—your opt-out only prevents them from using this data to serve you targeted ads or personalised content.*
- **Opt-Outs Apply Only to a Single Browser:** *If you opt-out from personalised advertising on Google Chrome, this does not apply to all browsers. For example, you need to opt-out separately on Firefox or Explorer. Opt-outs only apply to your browser, not your computer or device.*
- **Opt-outs can be erased by accident:** *Your opt-outs are recorded using cookies. (Cookies are small messages or signals that web servers pass to your web browser when you visit Internet sites.) So, remember, when you clear your cookies, you also erase your opt-outs.*
- **You Do Not Disable all Ads:** *When you browse the internet and see a website, video, or app that uses advertising services by other companies not listed on this site's opt-out preferences, you may still see personalised ads from those other companies.'*

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<sup>172</sup> Flybuys, [Flybuys Privacy Policy](#), viewed 10 July 2019.

## ***ACCC view on consumer control over their data handled by loyalty schemes***

The ACCC considers that providing consumers with more meaningful controls over the collection, use and disclosure of their data handled by loyalty schemes would respond to a consumer demand to align the data practices of firms with the data preferences of consumers.

Further, the bargaining power imbalances, information asymmetries and behavioural biases identified in this report may, as recommended in the ACCC's Digital Platforms Inquiry, be lessened by:

- stronger and more specific consent requirements
- default settings that enhance consumer choice and reflect consumers' privacy preferences. This includes defaulting to opt-in rather than opt-out-style settings.

### **4.7. Parallels with the ACCC's Digital Platforms Inquiry**

The issues of concern identified in this draft report have direct parallels with those identified in the ACCC's Digital Platforms Inquiry. In its Digital Platforms Inquiry, the ACCC detailed concerns about:

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

These concerns are mirrored in relation to customer loyalty schemes. The basis for these concerns are the problematic data practices that both digital platforms and customer loyalty schemes commonly engage in. These include:

- the use of clickwrap agreements and take-it-or-leave-it terms
- complex, lengthy, unclear and difficult-to-navigate privacy policies
- varying definitions in privacy policies
- the sharing of consumer data with third parties for marketing purposes and the opaque disclosure of the specific entities with which data is shared and for what purposes, as well as limited meaningful consumer control over this data practice
- the use of targeted and behavioural advertising, and the lack of a meaningful ability for consumers to opt out of this data practice.

In addition, this draft report also raised concerns about the tracking of consumers through their payment card in circumstances where they did not scan their loyalty membership card, and the lack of informed consent and genuine choice for consumers subjected to this practice.

As a result of these issues, consumers' ability to make informed choices is affected by the information asymmetry between loyalty schemes and consumers, the bargaining power imbalance between loyalty schemes and consumers, and consumers' behavioural biases. The ACCC is of the view that the findings in this draft report reinforce the ACCC's findings in our Digital Platforms Inquiry, and further support our recommendations for economy-wide changes in relation to privacy law.

## 4.8. Conclusions on loyalty schemes' data practices

The ACCC considers that there are a number of factors around the terms and conditions and privacy policies of loyalty schemes that prevent consumers from making informed choices that align with their privacy and data collection preferences. Consistent with findings made in the ACCC's Digital Platforms Inquiry<sup>173</sup>, these factors include an imbalance of bargaining power, and significant information asymmetries that exist between loyalty schemes and consumers. These are primarily seen in the broad consents that loyalty schemes seek from consumers, take-it-or-leave-it terms about the collection, use and disclosure of their data, and the vague disclosures loyalty schemes make to consumers about how their data will be used and with which entities it will be shared. Consumers also have limited capacity to control how loyalty schemes and third parties use their data, and limited meaningful ways to opt out of targeted online advertising served by third parties on behalf of loyalty schemes.

Loyalty schemes' data collection and analytic capabilities will continue to expand. The avenues for loyalty schemes to collect data about consumers already encompass a wide range of sources from the joining process, to ongoing engagement, transaction data, apps, social media and other public sources, and data held by data brokers and data-sharing platforms. Loyalty schemes have an incentive to continue to collect and analyse this data because of its value to them. A key value of the data is to be able to grow sales through targeted advertising and personalised offers to retain existing customers and draw in new ones. Such uses of consumer data have the potential to significantly reduce the costs of promotional activities for loyalty schemes. The ability to directly monetise consumers' data is also a growing area of revenue generation for loyalty schemes. This is achieved by generating consumer insight reports for third parties and advertising to their membership on behalf of third parties.

Many consumers continue to be concerned about the way their data is collected, used and shared, and whether it is being used responsibly. Most consumers are wary of their data being shared with third parties. Further, analysis of loyalty schemes' terms and conditions and privacy policies reveal that while there is some disclosure in privacy policies about the sharing of consumer data with third parties, they are opaque when it comes to understanding what data is being shared and with which entities. Ensuring that consumers can make meaningful choices around how their data is handled is one way to remedy the power imbalances, information asymmetries and behavioural biases identified in this chapter.

The ACCC is concerned about a range of data practices of loyalty schemes. In particular, the ACCC has concerns about loyalty schemes collecting, using and disclosing consumer data in ways that do not meet consumers' preferences. This includes loyalty schemes engaging in the following practices:

- seeking broad consents from and making vague disclosures to consumers about the collection, use and disclosure of their data
- providing consumers with limited insight and control over the sharing of their data with unknown third parties
- providing only a limited ability for consumers to opt out of targeted advertising delivered by third parties on behalf of loyalty schemes.

Loyalty schemes should take steps now to address the concerns raised by the ACCC to improve the transparency of their data practices and the ability of consumers to control how their data is collected, used and disclosed.

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<sup>173</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, chapter 7.

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

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

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

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

- reviewing their clickwrap agreements for unfair contract terms, including by assessing the potential consumer detriment of unilateral variation terms
- improving the clarity, accessibility, navigability and readability of privacy policies, including by using definitions consistent with those in the Privacy Act
- minimising information overload for consumers by prominently presenting relevant aspects of their terms, conditions and privacy policies to consumers during key interactions
- ending the practice of automatically linking customers' payment cards to their profile to track their purchasing behaviour and transaction activities when they do not scan their loyalty card
- outlining with which entities consumer data is being shared and for what purposes, and drawing to consumers' attention how their data is being handled (including, for example, by providing a prominent notice during relevant interactions with customers)
- disclosing to consumers the sources of third party advertising, the sources of the consumer data used to inform that advertising, and the channels through which they may receive targeted advertising and how their consumer data may be used to generate leads (including, for example, via a regularly updated online notice)
- providing consumers of loyalty schemes with more meaningful controls over the collection, use and disclosure of their data which respond to consumer demands to align the data practices of loyalty schemes with the data preferences of consumers.

The ACCC also considers that the issues of concern identified in this draft report have direct parallels with those identified in the ACCC's Digital Platforms Inquiry. These include concerns about:

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

To remedy these issues, the ACCC has made a number of economy-wide recommendations in its Digital Platforms Inquiry about privacy law. The ACCC is of the view that the findings in this draft report reinforce the ACCC's findings from our Digital Platforms Inquiry, and further support our recommendations for economy-wide changes in relation to privacy law. A summary of these recommendations is provided below.

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

The ACCC's findings in this draft report reinforce the Digital Platforms Inquiry Final Report's recommendations for privacy law reform.<sup>174</sup>

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

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

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

The relevant recommendations as proposed in the ACCC's Digital Platforms Inquiry are reproduced in full in **appendix E**.

Further, chapter 3 of this draft report discusses the benefit of certain changes to consumer law as recommended by the ACCC's Digital Platforms Inquiry. These include a prohibition against unfair contract terms and a prohibition against certain unfair trading practices. Such reforms would equally apply to addressing certain conduct related to the data practices of loyalty schemes.

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<sup>174</sup> ACCC, [Digital Platforms Inquiry final report](#), June 2019, Recommendations 16, 17 and 19.

## 5. Competition issues and customer loyalty schemes

### Key points

- Loyalty schemes can have pro-competitive effects and intensify competition between rivals leading to competing loyalty discounts and lower prices for consumers. Loyalty schemes can also reduce the flexibility of consumers' buying patterns and responsiveness to competing offers, which may reduce competition.
- The ACCC considers that loyalty schemes have the potential to raise competition concerns. In particular, the prevalence of loyalty schemes in many concentrated markets in Australia raises potential risks to competition.
- Loyalty schemes may be harmful to competition when they 'lock up' customers and introduce switching costs that increase barriers to entry and expansion for rival firms. If barriers are enduring and induce exit or deter entry, consumers are likely to be worse off.
- Loyalty schemes may also reduce price transparency in a market where it is difficult to compare the value of loyalty scheme rewards with competing price-based offers. This can result in consumers engaging in less frequent comparisons and making less-informed purchasing decisions.
- The ACCC may be concerned by risks to competition when a dominant firm exercises a loyalty scheme that has market saturation and has strong customer lock-in effects. In these circumstances, anti-competitive foreclosure effects can occur not only in the primary market in which the loyalty scheme predominantly operates (for example, domestic air travel), but may also be extended to related markets through exclusive partnerships with firms supplying complementary products (for example, domestic airlines and car rental services).
- Frequent flyer schemes have the potential to result in significant customer lock-in effects, as has occurred overseas. To date, Virgin Australia has succeeded in growing its loyalty scheme and market position. It is not clear that customer lock-in effects and switching costs associated with Qantas Frequent Flyer have resulted in major barriers.
- In the case of supermarket loyalty schemes, while customer loyalty in this sector is limited, there is the potential for stronger exclusivity effects to occur in future as the major supermarkets seek to leverage their growing digital and analytical capabilities using extensive customer data.
- Firms' increasing collection and use of data for analytical purposes also poses a risk to competition. Firms with large membership bases may be able to use collected data to raise barriers to entry and expansion of rivals, further entrenching their market position and creating or increasing their market power. This is a particular concern where data assets relating to consumers in specific sectors of the economy may be locked up among a small number of firms.
- The ACCC will consider the competitive effects of loyalty schemes on a case-by-case basis in enforcement investigations; merger and authorisation decisions, including with respect to analysing any substantial market power held by a firm; and the height of barriers to entry in a market in competition law matters.

## 5.1. Objectives of loyalty schemes from a competition perspective

Sellers have strong economic incentives to lock in consumers.<sup>175</sup> Loyalty schemes are a marketing device with the primary objective of attracting and retaining customers to maintain and grow market share.

Through relationship building, loyalty schemes seek to encourage customers to purchase frequently from a specific seller, increase purchase amounts over time and increase share of wallet at the focal provider/brand.<sup>176</sup>

Loyalty schemes seek to achieve their objective of gaining a long-term commercial advantage over rivals in a variety of ways:

- **consolidation of purchases:** Loyalty schemes that award points typically incentivise customers to consolidate their purchases with a single seller to accumulate the largest points balance possible to achieve a reward threshold. This is particularly the case for loyalty schemes that award points using a reward structure, where greater levels of expenditure earn proportionately greater rewards<sup>177</sup>
- **prompting additional purchases:** Loyalty schemes can create incremental demand and prompt additional, or an acceleration of, purchases. Multi-tiered loyalty schemes can have such an effect where each membership level or status tier—for example, silver, gold, platinum—brings additional benefits. Customers on the cusp of attaining a higher level, or in danger of slipping to a lower one, may accelerate or make additional purchases to secure the benefits of the relevant tier<sup>178</sup>
- **resistance to competing offers:** Loyalty schemes can affect consumer responsiveness to competitor offerings, potentially making consumers immune to competitive offers.<sup>179</sup> Customers can become more responsive to promotions in the form of reward points than to price discounts of the same monetary value. By introducing reward points or other non-monetary benefits such as increased service levels when attaining a higher status tier, it can become difficult to compare the value of a reward promotion with a competing price discount. This can reduce customers' sensitivity to competing price-based offers or otherwise result in them making less frequent price comparisons
- **raising customer acquisition costs:** Where customers have accumulated interests in an established loyalty scheme, this can make it difficult for competitors to alter the purchasing behaviour and entice them to switch.<sup>180</sup> The established loyalty scheme represents a sunk cost that a prospective entrant has to pay to compete with an incumbent.<sup>181</sup> This can raise customer acquisition costs for rival firms and may provide the established firm with a cost advantage over prospective entrants

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<sup>175</sup> Michael Porter has previously detailed, in outlining the five forces of commercial success for firms, that curbing buyer power by creating strong customer loyalty is a method firms use to reduce competition within an industry. See M Porter, 'How competitive forces shape strategy', *Harvard Business Review*, 1979.

<sup>176</sup> M Stone, D Bearman, SA Butscher, D Gilbert, P Crick and T Moffett, 'The effect of retail customer loyalty schemes—detailed measurement or transforming marketing?', *Journal of Targeting, Measurement and Analysis for Marketing*, vol. 12, 2004, pp. 305–318.

<sup>177</sup> J Nunes and X Dreze, 'Your loyalty program is betraying you', *Harvard Business Review*, April 2006, p. 4.

<sup>178</sup> *ibid.*

<sup>179</sup> *ibid.*, p. 3; J Zhang and E Breugelmans, The impact of an item-based loyalty program on consumer purchase behavior, *Journal of Marketing Research*, vol. 49, no. 1, 2012, p. 63.

<sup>180</sup> Y Liu, 'The long-term impact of loyalty programs on consumer purchase behavior and loyalty', *Journal of Marketing*, vol. 71, no. 4, 2007, p. 20.

<sup>181</sup> R Cairns and J Galbraith, 'Artificial compatibility, barriers to entry, and frequent-flyer programs', *Canadian Journal of Economics*, vol. 23, 1990, pp. 814–816.

- **insight into customer behaviours:** Loyalty schemes can provide useful data about customers that can produce insights about purchasing behaviour and allow the seller to target and tailor promotions to individual customers.<sup>182</sup>

Firms invest in loyalty schemes with the aim of gaining a competitive advantage over rivals by influencing customer behaviour to encourage repeat purchases and introduce customer resistance to competing offers or products. In this sense, loyalty schemes have a dual strategy—an offensive strategy of acquiring customers as well as a defensive strategy of retaining customers.

While loyalty schemes aim to steer purchasers to a specific seller, in doing so they can also create barriers to exit and keep customers from defecting to rivals.<sup>183</sup>

## 5.2. Potential impacts of loyalty schemes on competition

Loyalty schemes can have pro-competitive effects, but they also have the potential to reduce the flexibility of consumers' buying patterns and responsiveness to competing offers, which may reduce competition. Where a loyalty scheme creates strong customer lock-in effects and introduces switching costs, it is likely to have the effect of raising barriers to entry and expansion for existing competitors and prospective entrants.

Potential anti-competitive effects arise where otherwise efficient rivals or prospective entrants are prevented or deterred from competing, resulting in an incumbent firm or firms facing less competition and having the ability to reduce offers or increase prices.

In a market where a loyalty scheme has the result of foreclosing competition on a sustained basis, increased prices or lower quality offerings are likely to transpire in the longer term relative to any discounts offered by the loyalty scheme.

The potential impacts of loyalty schemes on competition have been the subject of broad consideration by competition authorities overseas, typically in the context of 'loyalty, fidelity discounts and rebates' that encompass practices aimed at both consumers and businesses.

In 2002, the OECD Competition Committee debated loyalty and fidelity discounts and rebates. While policy differences existed between members of the Competition Committee, there was general agreement that<sup>184</sup>:

- loyalty schemes can involve complex effects on competition and may result in potentially significant pro-competitive and anti-competitive effects
- loyalty schemes are more likely to raise competition concerns when practised by firms that have substantial market power
- the competitive effects of a loyalty scheme are highly dependent on the specific features of the scheme and the relevant markets in which they are established, such that a case-by-case approach by competition authorities is warranted.

In 2009, the International Competition Network formed a working group to analyse a range of loyalty discounts and rebate practices<sup>185</sup>:

*Many agencies indicated that single-product loyalty discounts and rebates are considered a legitimate form of price competition and are generally pro-competitive. While loyalty discounts and rebates can create efficiencies and can benefit*

<sup>182</sup> J Nunes and X Dreze, 'Your loyalty program is betraying you', *Harvard Business Review*, April 2006, p. 4.

<sup>183</sup> *ibid.*, p. 3.

<sup>184</sup> OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002.

<sup>185</sup> International Competition Network, *Report on the analysis of loyalty discounts and rebates under unilateral conduct laws*, June 2009, p. 2.

*consumers through lower prices, there is also general agreement that when exercised by a dominant firm or firms with substantial market power, they have the potential to cause anticompetitive harm in certain circumstances.*

Pro-competitive effects of loyalty schemes typically result from the offering of discounts, which can then result in competitive responses from rivals in the form of competing discounts. This typically leads to lower prices, aligning prices with marginal costs, and an increase in consumer welfare.<sup>186</sup>

By encouraging customers to consolidate their purchases with a single seller, a focusing effect can arise whereby customers make less frequent price comparisons. This can alter the predominant mode of competition in a market from rivalry at the margin to competition for a customer's total or near total requirements.<sup>187</sup>

The main competition concern that arises with respect to loyalty schemes is the potential for anti-competitive foreclosure. Broadly, the concern is that certain loyalty schemes have the potential to 'lock up' such a significant customer base that this will reduce the competitive constraint that potential rivals can offer, induce their exit, or prevent the entry of new rivals.

Loyalty schemes can deter entry where prospective entrants conclude that it will be exceedingly difficult to capture an economically viable market share or minimum efficient scale. A prospective new entrant may reasonably consider entry into a market as unprofitable because of the presence of a successful loyalty scheme that has recruited a large proportion of the available customer base.<sup>188</sup>

In analysing the potential for a loyalty scheme to have anti-competitive foreclosure effects, it is necessary to consider whether any market power is created or strengthened by the loyalty scheme and whether it is likely to be transitory or enduring in nature. Anti-competitive foreclosure is likely to occur in circumstances where<sup>189</sup>:

- existing rivals or new entrants are unable to match the ability of a loyalty scheme to compete for the total or near total requirements of a significant number of buyers leading to the exclusion or restriction of competitors, and
- once subject to less constraint by existing and potential competitors, the incumbent will find it profitable to raise its prices and, in response, firms will not likely enter, re-enter or expand their market shares.

As outlined in the following sections, loyalty schemes may be harmful to competition when they create significant customer lock-in effects and artificial switching costs resulting in persistent barriers to entry and expansion for rival firms.<sup>190</sup>

### **5.2.1. Switching costs and the customer lock-in effect**

Loyalty scheme rewards can raise switching costs for customers. Switching costs have a 'suction effect' on customer purchasing behaviour, funnelling purchases towards a single seller.

When a consumer has started to collect points with one provider, the problem they face is that switching to another provider may mean losing the points already collected with the first provider (in most schemes points expire after a set period of inactivity), or they will fail to

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<sup>186</sup> OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002, pp. 26, 170–171.

<sup>187</sup> *ibid.*, pp. 19–20, 26.

<sup>188</sup> European Competition Authorities, *Loyalty programmes in civil aviation: an overview of the competition issues concerning frequent flyer programmes, corporate discount schemes and travel agent commissions*, October 2005, p. 26

<sup>189</sup> OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002, pp. 27–28.

<sup>190</sup> *ibid.*, p. 157.

accrue further points in that scheme. Similarly, when a consumer has achieved a certain status tier with one provider, switching to another provider may mean losing the benefits associated with that status tier (for example, lounge access, priority boarding and eligibility for upgrades). Customers of a loyalty scheme face a form of switching cost when they forego the opportunity to advance towards their habitual seller's rewards.<sup>191</sup>

### Box 5.1: Loyalty scheme rewards and switching costs

As outlined in the Loyalty & Reward Co report<sup>192</sup>, academic research on loyalty schemes suggests that rewards can make switching more difficult or costly<sup>193</sup>:

- Loyalty schemes lure consumers with different types of rewards, some of which can make exit costly.
- Rewards can be immediate or delayed. Where consumers benefit from an immediate reward, they are then typically free to buy from another seller. However, delayed rewards, such as points or miles, can trigger a lock-in issue.
- Once a consumer has started accumulating points with a provider, switching to a different one implies losing the endowed progress to redeem the first provider's reward (for example losing the miles to redeem a plane ticket). With delayed rewards exit is not free.
- When exit is too costly, there is a 'lock-in' problem. The costs of lock-in may be reduced competition in the market among incumbents, less dynamic markets, and risk of abuses.

If loyalty scheme rewards are based on thresholds of accumulated points, a 'points pressure mechanism' will encourage customers to increase their purchase frequencies or volume to obtain the reward—the closer the customer is to obtaining a reward or reaching a threshold or status tier, the more likely they are to make additional purchases to gain it.<sup>194</sup> In the case of status tiers, points pressure can arise for customers who are close to qualifying for a higher tier or a negative pressure for a customer that is close to being downgraded.<sup>195</sup>

Loyalty schemes can have an effect similar to exclusive dealing. While loyalty schemes aimed at consumers do not demand exclusivity—consumers can join several loyalty schemes and simultaneously use alternative offers—in practice, they can provide strong incentives for consumers to direct purchases towards a single firm. Notwithstanding that a loyalty scheme is strictly non-exclusive in its offer, depending on the strength of the effect on customer purchasing behaviour, similar results to exclusivity may arise.

As well as offering a compelling alternative product or service, competitors seeking to attract customers that are members of a rival's loyalty scheme may also need to compensate for the points/rewards that a customer would perceive to have lost by switching away from the incumbent. This may hinder an equally efficient competitor from competing.

The extent to which a loyalty scheme is likely to have an anti-competitive effect in a market will depend on whether, and to what degree, it has such an effect on customer purchasing decisions that a significant number of consumers become effectively locked into making purchases from a single seller.

<sup>191</sup> OV Duque, 'The costs of loyalty. On loyalty rewards and consumer welfare', *Economic Analysis of Law Review*, vol. 8, no. 2, 2017, p. 447.

<sup>192</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.3.

<sup>193</sup> OV Duque, 'The costs of loyalty. On loyalty rewards and consumer welfare', *Economic Analysis of Law Review*, vol. 8, no. 2, 2017, pp. 414, 416.

<sup>194</sup> M Dorotic, P Verhoef and T Bijmolt, 'Loyalty programmes: current knowledge and research directions', *International Journal of Management Reviews*, vol. 14, 2012, pp. 219, 225.

<sup>195</sup> X Dreze and J Nunes, 'Feeling superior: the impact of loyalty program structure on consumers' perceptions of status', *Journal of Consumer Research*, vol. 35, 2009, pp. 890–905.

## Competition authority interventions involving frequent flyer loyalty schemes

The customer lock-in effects of frequent flyer loyalty schemes have raised competition concerns for European competition authorities, particularly in Scandinavian countries.

Frequent flyer loyalty schemes in Sweden and Norway have been found to maintain market structures in civil aviation markets, creating obstacles to new entry.

The Swedish and Norwegian competition authorities intervened against the use of a frequent flyer loyalty scheme by a dominant airline because they believed that its use had strong customer lock-in effects that constituted a significant barrier to entry in domestic aviation markets (see box 5.2).

### Box 5.2: Competition intervention against the EuroBonus frequent flyer loyalty scheme in Sweden and Norway

#### Sweden<sup>196</sup>

In Sweden, Scandinavian Airlines System (SAS) operated the EuroBonus frequent flyer loyalty scheme. SAS has generally held a strong position in the Swedish domestic civil aviation market with a market share of 80 per cent because of its earlier monopoly position.

In 1999, the Swedish Competition Authority found that SAS had abused its dominant position by operating its EuroBonus loyalty scheme on domestic routes. It deemed that in its capacity of dominant player, SAS made it difficult for other airlines to start up or maintain competitive domestic air services.

The Swedish Competition Authority's decision meant that SAS was no longer permitted to operate its frequent flyer loyalty scheme in such a way that points or the equivalent for the redemption of bonus awards could be earned on domestic flights.

SAS appealed to the Swedish Market Court. In 2001, the Market Court ordered SAS, on penalty of a fine, not to apply its EuroBonus loyalty scheme, or participate in schemes of a similar nature. The Market Court attached considerable importance to the structural state of the market for Swedish domestic air travel and the lack of adequate competitive conditions.

It concluded the EuroBonus loyalty scheme undoubtedly had a loyalty-inducing effect that restricted the possibilities of rivals outside the loyalty scheme attracting passengers to their services and made it more difficult for new entrants to become established. It found that conditions in the market were not conducive to the entry of new players and competition was restricted such that SAS's EuroBonus loyalty scheme could not be considered an acceptable competitive strategy.

The Market Court also noted that the application of the EuroBonus loyalty scheme had a price-raising effect although this could not be calculated in precise terms.

#### Norway<sup>197</sup>

SAS similarly operated the EuroBonus frequent flyer loyalty scheme in Norway. The market structure in Norway had comprised of two incumbents—SAS and Braathens—as well as a new entrant, Color Air, which offered a low-cost offering.

<sup>196</sup> Swedish Competition Authority, *There is no such thing as a free lounge – a report on frequent flyer programmes*, 2003, pp. 49, 73–75; OECD Policy Roundtables, *Loyalty and fidelity discounts and rebates*, 2002, p. 165; European Competition Authorities, *Loyalty programmes in civil aviation: an overview of the competition issues concerning frequent flyer programmes, corporate discount schemes and travel agent commissions*, October 2005.

<sup>197</sup> OECD, *Airline competition—note by Norway*, June 2014.

In 1999, Color Air filed for bankruptcy. The failed entry by Color Air was in part attributed to its inability to attract business travellers due to its lack of an attractive frequent flyer program that could compete with SAS's EuroBonus program.

By 2001, an almost bankrupt Braathens was allowed to merge with SAS under the failing firm defence. SAS returned to a monopoly position with an approximate 98 per cent market share in the Norwegian domestic civil aviation market.

In 2002, the Norwegian Competition Authority introduced a ban on earning frequent flyer points on any domestic routes in Norway for a period of five years. The main arguments for the negative effects of the EuroBonus frequent flyer loyalty scheme on competition were based on loyalty effects locking in customers and the barriers to entry for new competitors. The Norwegian Competition Authority viewed the intervention as an essential step towards re-opening the Norwegian civil aviation market for competition.

In 2003, shortly after the introduction of the ban on earning frequent flyer points, Norwegian Air Shuttle (NAS) entered on four domestic routes in Norway. According to NAS, the ban on EuroBonus was decisive for its entry into the Norwegian market.

In 2011, the Norwegian Competition Authority undertook an assessment to investigate whether there was a basis for a continued ban on earning frequent flyer points. It found that the loyalty-building effect of the frequent flyer program was still significant and continued to provide an incentive to collect all purchases from one airline. The Norwegian Competition Authority was concerned that competition could be weakened following a re-introduction of loyalty schemes in the Norwegian domestic airline sector as this would lead to business travellers choosing the airline with the most attractive loyalty scheme.

NAS gradually expanded into a nationwide network and its market share on domestic routes grew from 12 per cent in 2003 to 36 per cent in 2011. NAS is now one of Europe's leading low-cost airlines.

In 2013, the government removed the ban on frequent flyer programs on domestic air routes after reaching the view that competition in the domestic market was more robust than when the prohibition was introduced.

The German competition regulator, in connection with a merger clearance decision, imposed conditions on a dominant airline to open up its frequent flyer loyalty scheme to existing and future competitors on domestic routes. This commitment, alongside other measures, was aimed at allowing the entry of a new player and preventing further consolidation of the airline's dominant position on domestic routes (box 5.3).

### **Box 5.3: Conditions to open up the Miles & More frequent flyer loyalty scheme to existing and future competitors in Germany<sup>198</sup>**

In 1997, the German competition regulator (the Bundeskartellamt) investigated Lufthansa's Miles & More frequent flyer loyalty scheme and concluded that it created excessively strong customer ties. Lufthansa was considered to have a dominant position at least in partial areas of domestic civil aviation routes. The proceedings were closed after Lufthansa opened up the Miles & More scheme to Eurowings, the competitor that had initiated the proceedings.

In 2000, the Bundeskartellamt was notified of the proposed merger between Lufthansa and Eurowings. The merger was cleared subject to a range of commitments, including the opening up of the Miles & More frequent flyer loyalty scheme to existing and future

<sup>198</sup> OECD, *Loyalty and fidelity discounts and rebates*, 2002, p. 133; OECD, *Airline competition – note by Germany*, June 2014.

competitors on domestic routes. Other commitments involved the transfer of some domestic air services to a new operator and maintaining flight frequency and seating capacities on certain domestic routes.

By 2002, the general opening up of the Miles & More scheme was reported to have had positive effects with a new smaller competitor participating and a couple of regional carriers preparing to do so.

### 5.2.2. Reduced price transparency

Loyalty schemes can also have the effect of reducing price transparency in a market. This may occur where the loyalty scheme has a complicated reward structure or if it has the effect of consumers becoming increasingly sensitive to reward-based offers (and less sensitive to price-based offers). Where this occurs, depending on the degree of influence on a significant number of customers, there is potential for competing suppliers to have a reduced incentive to engage in price-based competition.<sup>199</sup>

Consumers experiencing difficulty in comparing products or services that meet their requirements is an undesirable outcome as it leads to less-informed purchasing decisions and inefficient outcomes in a market.

For a given product or service, the combination of a price-based offer with a reward benefit may increase difficulties in making meaningful comparisons with competing products and services that do not have such a reward benefit attached. Where a loyalty scheme reward provides a non-monetary benefit, this can exacerbate the difficulties in making meaningful comparisons. For example, frequent flyer loyalty schemes typically offer non-monetary rewards, such as the ability to achieve higher service levels (seat upgrades or achieving a superior membership status tier) which, from a value perspective, may be challenging to compare with a competing price-based offer. Where non-monetary rewards are a compelling aspect of a loyalty scheme, this can have the effect of reducing consumer sensitivities to price-based offers, which may restrict the ability of new entrants to compete.

Size heuristics can also add to the challenges in comparing the value of a loyalty scheme reward against competing offers. As detailed in chapter 2, box 2.5, size heuristics relates to the theory that consumers do not have the capacity and time to recognise and evaluate all the available information in a complex environment. Points-based loyalty schemes exploit size heuristics to make a reward appear of significant value (for example one million bonus points), which can overstate the value of the reward and add to the complexity of comparing prices.

Where a loyalty scheme reward relates to a product or service for which prices are already opaque or inherently complex—for example, because of myriad pricing structures or variables—the overlay of a loyalty scheme reward may further reduce price transparency, adding to existing obstacles for consumers to make informed switching decisions.

A reduction in price transparency can result in consumers engaging in less frequent comparisons with competing products and services, and being unaware of cheaper prices. This can increase the price differential required to entice customer switching and raise barriers to entry into the relevant market, particularly where customers have incomplete information or overestimate the value of the loyalty scheme reward.<sup>200</sup>

In certain markets, reduced price transparency can entrench established market structures by introducing customer resistance (buyer inertia) and decreasing competitors' chances of attracting customers away from the established firm.

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<sup>199</sup> OECD, *Loyalty and fidelity discounts and rebates*, 2002, p. 24.

<sup>200</sup> *ibid.*, p. 93.

### 5.3. Competitive effects of loyalty schemes in Australia

Consumer surveys broadly indicate that loyalty schemes have a significant degree of influence on consumer shopping behaviour in Australia, although other survey results also indicate that consumer satisfaction with loyalty schemes may be declining, which could reduce the extent of the customer lock-in effect for certain schemes. As detailed in the Loyalty & Reward Co report<sup>201</sup>:

- according to a survey conducted by Mastercard in 2018, 22 per cent of Australian respondents stated that the loyalty scheme they consider most important to them has a significant influence on their shopping behaviour<sup>202</sup>
- a Nielsen survey in 2017 found that 57 per cent of Australians are more likely to return to a retailer if they have a loyalty scheme in place, and 48 per cent will spend more if they know they are going to be rewarded<sup>203</sup>
- Accenture released a report in 2017 stating that consumers are dissatisfied with loyalty schemes.<sup>204</sup> Accenture conducted a survey of more than 25 000 consumers globally. CMO, a market research firm, has analysed the Australian data and noted that half of Australian consumers have switched brand or operators in the past year, while 79 per cent are retracting loyalty more quickly than they did three years ago.<sup>205</sup>

While firms develop loyalty schemes seeking to gain a competitive advantage over their rivals by introducing a point of differentiation, any competitive advantage enjoyed can be transitory as rival firms introduce their own loyalty schemes as a competitive response.

In Australia, as has occurred overseas, loyalty schemes are prevalent in a range of sectors where firms offer a relatively similar assortment of products and services. In many sectors, a number of competing loyalty schemes are offered by direct rivals, including by airlines, supermarkets, credit card, hotel and car rental providers.

In industries where loyalty schemes have market saturation and consumers hold multiple memberships with competing loyalty schemes, this may minimise their impact on competition between incumbents. However, market saturation of loyalty schemes in such industries can significantly raise barriers for new entrants.

#### Box 5.5: Loyalty schemes and market saturation effects

As outlined in the Loyalty & Reward Co report<sup>206</sup>, academic research suggests that when all companies in an industry have loyalty schemes, the market is characterised by an absence of change of the competitive situation.<sup>207</sup>

In an environment where the duopolistic players have large loyalty schemes with high member engagement, the competitive tension between them may be somewhat neutralised, but the ability for smaller companies or new entrants without a well-established loyalty scheme to compete may be inhibited.

<sup>201</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.1.

<sup>202</sup> Mastercard, [Achieving advocacy and influence in a changing loyalty landscape: a Mastercard Asia Pacific study](#), January 2018. The data is derived from a survey of 7000 respondents in the Asia-Pacific region, broken down by country.

<sup>203</sup> Nielsen, [Get with the program: card-carrying consumer perspectives on retail loyalty-program participation and perks](#), November 2016, viewed 20 April 2019.

<sup>204</sup> Accenture, *Seeing beyond the illusion: it's time you invest more wisely*, 2017.

<sup>205</sup> CMO, [Report: Australian consumers aren't happy with customer loyalty programs](#), 14 February 2017, viewed 13 June 2019.

<sup>206</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.3.

<sup>207</sup> L Meyer-Waarden and C Benavent, 'The impact of loyalty programmes on repeat purchase behaviour', *Journal of Marketing Management*, vol. 22, 2006, pp. 61–88.

As discussed above, loyalty schemes can result in a combination of pro-competitive and anti-competitive effects. For instance, in a market where there is strong competitive tension between established rivals, loyalty schemes may further intensify competition between existing players, while also strengthening the position of incumbents as a result of customer lock-in effects, raising barriers for prospective entrants. In this case, the most detrimental impact of rival loyalty schemes will be to maintain the current market structure and heighten barriers to entry. Concurrently, loyalty schemes may continue to promote dynamic competition and provoke competitive responses between rival firms.

The following sections consider the competitive effects of the major coalition loyalty schemes in the markets in which they predominantly operate (primary markets) and related markets in which partners of major coalition loyalty schemes operate (secondary markets).

### 5.3.1. Competitive effects of loyalty schemes in primary markets

The ACCC has considered the potential competitive effects of the major coalition loyalty schemes in Australia offered by airlines and supermarkets. In conducting this high-level assessment, the ACCC has focused on the following factors:

- the potential market power or dominant position of a certain firm, having regard to industry shares, market concentration and loyalty scheme membership base
- the suction effect of the loyalty scheme, having regard to participation rates in loyalty schemes as a proportion of a firm's overall customer base and the degree of active participation by members
- barriers to entry and the extent to which the loyalty scheme creates switching costs and provides compelling incentives to consolidate purchases with the firm.

The ACCC recognises that while loyalty schemes may have the effect of raising barriers to entry, in many industries there will be other sources of entry barriers, which are independent of loyalty schemes. In analysing the competitive effects of loyalty schemes, the ACCC has focused on the extent to which loyalty schemes may heighten barriers to entry.

The ACCC has relied on a combination of public and confidential information in its assessment of the major coalition loyalty schemes, including information and data requested from major loyalty scheme operators. Because of the commercially sensitive nature of certain information, the assessment and findings detailed below are limited in some cases.

#### **Airlines**

Qantas and Virgin Australia are the two airline groups providing scheduled domestic air passenger transport services on a national basis. There are also a number of regional and charter service operators.

Qantas is Australia's largest domestic and international airline. In 2004, Qantas implemented a dual-brand strategy, launching Jetstar, a low-cost carrier. Virgin Australia started domestic operations in Australia in 2000 as a low-cost carrier and subsequently re-branded to a full-service airline, seeking to attract a broader cross-section of passengers than the traditional low-cost carrier model.<sup>208</sup> In particular, Virgin Australia has increasingly focused on capturing a greater share of high-value business domestic business travellers.<sup>209</sup> The Velocity Frequent Flyer scheme is a core strategy in Virgin Australia's focus on capturing a greater share of the lucrative business traveller sector.<sup>210</sup>

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<sup>208</sup> ACCC, [Virgin Australia Holdings Limited – proposed acquisition of 60% of Tiger Airways Australia Pty Ltd](#), Public Competition Assessment, July 2013.

<sup>209</sup> IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, March 2019.

<sup>210</sup> *ibid.*

The domestic airline industry exhibits a high level of concentration—Qantas and Virgin Australia have a combined industry share of approximately 90 per cent.<sup>211</sup> This situation is not unique to Australia as the domestic air transport sector is highly concentrated in almost every country.<sup>212</sup>

Qantas established the Qantas Frequent Flyer loyalty scheme in 1987 and had a considerable first-mover advantage in signing up members. In 2005, Virgin Australia launched Velocity in direct competition with Qantas Frequent Flyer.

As detailed in Loyalty & Reward Co's report, the Qantas Frequent Flyer and Velocity coalition loyalty schemes have both evolved greatly over the past decade, enjoying significant growth in membership numbers, third party partnerships and profitability.<sup>213</sup>

Qantas holds a dominant position in Australia with an approximate 60 per cent domestic share. However, Qantas's domestic share has declined in the past five years, from 70 per cent in 2014, while Virgin Australia has steadily increased its position in recent years, from 22 per cent in 2015 to 30 per cent in 2019.<sup>214</sup> It appears that Virgin Australia's domestic share gains are, in part, because of the success of Velocity over the same period.

Between 2014 and 2018, Velocity almost doubled its loyalty scheme membership base from 4.7 to 9.1 million with an annual growth rate between 10 and 25 per cent.<sup>215</sup> Qantas Frequent Flyer has also grown its loyalty scheme membership base during this period from 10.1 to 12.3 million, achieving an annual growth rate in the range of 4 to 8 per cent.

The ACCC has also considered the participation rate in Qantas Frequent Flyer and Velocity as a proportion of Qantas and Virgin Australia's overall customer base and the total number of 'active' members in each respective loyalty scheme. The definition of active members will vary between loyalty schemes but generally involves earning or redeeming points within a specified period of 18 to 24 months.

In industries where loyalty schemes have market saturation, many consumers will have memberships with alternative schemes. Australian airline loyalty schemes have an average of one Australian frequent flyer membership for each Australian over the age of 15.<sup>216</sup> Market research has indicated that Velocity has increased its membership base as a result of Qantas Frequent Flyer members signing up for Velocity as a second membership—it is estimated that in 2017, 34 per cent of members were part of both Qantas Frequent Flyer and Velocity.<sup>217</sup> As detailed in Loyalty & Reward Co's report, Virgin Australia re-designed Velocity in 2011, offering a status-match campaign that allowed Qantas Frequent Flyer members to claim the same status with Velocity—a strategy that aimed to neutralise switching costs created by status tiers.<sup>218</sup>

The ACCC considers that the Qantas Frequent Flyer loyalty scheme has the potential to have a significant impact on barriers to entry and expansion in the domestic airline industry in Australia, particularly for the high-value business traveller segment. Qantas continues to hold a leading market position in the domestic airline industry. As well as its first-mover advantage in launching Qantas Frequent Flyer, it also benefits from its established large-scale network, including extensive flight coverage and airport lounge availability. Industry

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<sup>211</sup> *ibid.*

<sup>212</sup> *ibid.*

<sup>213</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

<sup>214</sup> IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, February 2014 and March 2019.

<sup>215</sup> See chapter 2.

<sup>216</sup> Venture Insights, '[Australian airline loyalty programs – reaching new heights](#)', August 2017, viewed 13 June 2019.

<sup>217</sup> *ibid.* analysis based on Roy Morgan Research's Single Source survey.

<sup>218</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

reports identify Qantas as the dominant provider of domestic air services to the business traveller sector.<sup>219</sup>

Over a number of years, Virgin Australia has improved its overall industry position, aggressively marketing Velocity and investing in new airport lounges, amassing a considerable membership base. Considering the growth of Velocity's membership base to date, it is not clear that such customer lock-in effects and switching costs associated with frequent flyer schemes have resulted in major barriers to entry.

The ACCC considers that frequent flyer loyalty schemes in Australia have the potential to heighten barriers to entry for prospective new entrants. However, while the combination of Qantas Frequent Flyer and Velocity may raise barriers to entry, other significant barriers exist in the domestic airline industry. These barriers to entry include the sunk costs associated with establishing a network of efficient scale and scope, securing airport terminal space, industry regulation such as operational restraints on new entrants, and the threat of strategic response to entry by the incumbents.

## Supermarkets

The supermarket and grocery retailing industry has a high level of concentration, with the four largest operators accounting for over 80 per cent of industry revenue in 2018–19.<sup>220</sup> Coles and Woolworths, the largest vertically integrated retailers, operate nationally and hold dominant positions accounting for over 65 per cent of industry revenue in 2018.

Coles and Wesfarmers jointly own the Flybuys loyalty scheme, initially launched in 1994. Woolworths launched its Everyday Rewards loyalty scheme in 2008. In 2011, Coles relaunched Flybuys, mailing 16 million membership cards to Australian households.<sup>221</sup> In 2015, Woolworths re-designed its loyalty scheme, relaunched as Woolworths Rewards.

Metcash is a grocery wholesaler operating under brands such as IGA and Foodland. Through the independent IGA banner, Metcash provides a loyalty scheme, IGA Rewards, which individual IGA stores can choose to offer to their customers.

ALDI opened its first Australian store in 2001 and now operates nationally, with over 500 stores. ALDI is a discount supermarket chain with a strong focus on price-based competition and does not offer a loyalty scheme. Over the past decade, Woolworths and Coles have maintained their dominant positions in supermarket retailing in Australia although ALDI has increased its industry share to approximately 10 per cent, largely at the expense of the major supermarket retailers.

In recent years, both Woolworths and Coles have increased their loyalty scheme membership levels. Despite Coles's first-mover advantage, Flybuys has a membership base of approximately 8.3 million customers<sup>222</sup>, compared with Woolworths's 10.9 million customers.<sup>223</sup>

The ACCC has also considered the participation rate in Woolworths Rewards and Flybuys as a proportion of Woolworths's and Coles's overall customer base and the total number of 'active' members in each respective loyalty scheme. While Coles and Woolworths have achieved strong membership growth, market research indicates that loyalty among supermarkets in Australia is limited.

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<sup>219</sup> IBISWorld, *IBISWorld Industry Report I4902 Domestic airlines in Australia*, March 2019.

<sup>220</sup> IBISWorld, *IBISWorld Industry Report G4111 Supermarkets and grocery stores in Australia*, October 2018.

<sup>221</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.2.

<sup>222</sup> Wesfarmers, [Annual report 2018](#), p. 36.

<sup>223</sup> Woolworths Group, [Annual report 2018](#), p. 17.

Location of supermarkets is a key competitive advantage as convenience is typically a paramount consideration when choosing a supermarket, as well as opening hours and product selection. Roy Morgan Research has found that while most consumers have a supermarket they mainly shop at, a relatively low proportion consolidate purchases exclusively with a single supermarket and more than three-quarters of consumers were found to have visited at least two different supermarkets in an average of four weeks.<sup>224</sup>

In addition, while few consumers shop exclusively at ALDI given its more limited variety of products relative to the major supermarkets, ALDI has successfully grown its share of industry revenue during a period when the major supermarkets have boosted their loyalty scheme membership levels.

To date, customer lock-in effects associated with supermarket loyalty schemes do not appear to raise competition concerns. However, it is not yet clear whether Coles and Woolworths will be able to create stronger exclusivity effects in future through the use of their extensive membership data and the potential to make offers through personalised communications and targeted marketing.

As detailed in Loyalty & Reward Co's report, a May 2019 Credit Suisse report indicated that 'Woolworths and Coles are almost uniquely positioned to leverage their growing digital capabilities to establish a competitive advantage in the promotional expenditure component of the food retail value chain. With material efficiency benefits feasible, it is likely that growing digitally-led efficiency will support market share gain and outperformance by Woolworths and Coles.<sup>225</sup>' The report states the growth will be at the expense of Metcash (IGA), which they see as relatively weak in digital marketing, and ALDI, which already runs a lean operating model and is therefore less able to take advantage of the potential cost savings that modern data-powered marketing approaches can deliver.<sup>226</sup>

The ACCC considers that supermarket loyalty schemes in Australia are likely to produce some consumer benefits, in particular through lower prices and discounts on purchasing. However, there is potential for the major supermarket loyalty schemes to maintain the current market structure and create obstacles to entry and expansion.<sup>227</sup>

### 5.3.2. Competitive effects of loyalty schemes in secondary markets

The ACCC has considered whether coalition loyalty schemes may result in the extension of customer lock-in effects and switching costs to a network of suppliers across different industries. While a firm establishes a loyalty scheme to gain a competitive advantage in the primary market in which it operates, loyalty schemes open to participating partner firms may also generate competitive effects in secondary markets in which the partner operates.

#### *Exclusive and non-exclusive partnerships*

The major coalition loyalty schemes have each developed partner networks. For the partner, an affiliation with a coalition loyalty scheme can enable a firm to promote its offers to the extensive membership base of the coalition loyalty scheme and differentiate itself from its competitors.<sup>228</sup>

Depending on the customer lock-in effects a loyalty scheme generates, loyalty scheme partnerships have the potential to raise barriers to entry and entrench the position of

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<sup>224</sup> Roy Morgan Research, '[Supermarket loyalty: what's that?](#)', September 2015.

<sup>225</sup> Credit Suisse Asia Pacific/Australia, *Australian food retail sector review: the digital opportunity: promotional expenditure in the food retail value chain*, 28 May 2019.

<sup>226</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 7.3.

<sup>227</sup> Labour Institute for Economic Research (Finland), [Customer loyalty programmes and consumers](#), 2017.

<sup>228</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, section 2.1.

dominant firms in secondary markets. Customer lock-in effects that may extend to a partner firm can be significant, especially where the partner offers a product or service that is complementary to that of the loyalty scheme firm and the partnership is exclusive.

Exclusive partnerships with some major coalition loyalty schemes have had significant competitive effects. As detailed in Loyalty & Reward Co's report, up until late 2010, Qantas Frequent Flyer had non-exclusive partnerships with competing car rental firms Hertz and the Avis Budget Group (operating the Avis and Budget car rental brands). In November 2010, Qantas Frequent Flyer formed an exclusive partnership with the Avis Budget Group, such that Hertz could no longer reward customers with Qantas Frequent Flyer points.<sup>229</sup> This had a significant negative impact on Hertz' revenue, which declined year-on-year in 2012 by 2.9 per cent, with a further decline in 2013 of 4.3 per cent. For the same period, Avis's revenue grew in 2012 by 4.6 per cent and in 2013 by a further 8.7 per cent. To offset the competitive strategy, Hertz negotiated a partnership with Velocity in August 2011.<sup>230</sup>

In other industries, the major coalition loyalty schemes partner with most or all of the companies in an industry, which may neutralise the potential competitive advantage. Credit cards are a primary example of non-exclusive partnerships with frequent flyer loyalty schemes. Both Qantas Frequent Flyer and Velocity have partnerships with several credit card providers, including each of the four major Australian banks, as well as American Express and Citibank. It appears that for credit card providers, partnering with frequent flyer loyalty schemes to reward customers is likely to be a defensive competitive strategy, rather than a point of differentiation.

The ACCC is aware of the potential for competition concerns to arise as a result of the four largest loyalty schemes in Australia—Qantas Frequent Flyer/Woolworths and Velocity/Flybuys—being locked in competing partnerships.

The ACCC considers that where a loyalty scheme has strong customer lock-in effects, an exclusive partnership between firms that offer complementary products has the potential to raise competition concerns. The ACCC is particularly concerned that exclusive partnerships between major loyalty schemes may serve to further entrench the market position of dominant firms in their respective industries and raise barriers to entry and expansion for their rivals.

### ***Price transparency issues***

Many partners of coalition loyalty schemes have developed offers specifically aimed at customers seeking to accumulate frequent flyer points. It is particularly common for ongoing contracts to include significant sign-up bonuses to entice consumer switching.

Common examples of point-based offers from coalition loyalty schemes partners include:

- credit card providers offering sign-up bonuses of 100 000 frequent flyer points on co-branded frequent flyer credit cards, in addition to consumers earning points per dollar spent
- energy retailers offering sign-up bonuses of up to 15 000 frequent flyer points on certain contracts, in addition to consumers earning points per dollar paid. For some energy plans, an increased points earn rate is offered where a customer waives pay-on-time discounts (for example, two points per \$1 including 10 per cent pay-on-time discount, or seven points per \$1 not including 10 per cent pay-on-time discount)
- telecommunications service providers offering sign-up bonuses of 20 000 frequent flyer points on certain contracts with a threshold monthly spend commitment and fixed

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<sup>229</sup> Qantas, '[News](#)', August 2010, viewed 15 May 2019.

<sup>230</sup> Velocity Frequent Flyer, '[Program Updates](#)', August 2011, viewed 15 May 2019.

contract duration (for example, available only on 12-, 24- or 36-month contracts with a sufficiently high monthly spend).

Given that points-based offers are essentially a marketing cost to the partner firm providing the product or service, in many cases such points-based offers or bonuses will involve a trade-off such as higher annual fees and longer fixed contract terms.

The ACCC considers that although points-based offers such as sign-up bonuses can intensify competition and provide consumer benefits, the combination of point-based offers with consumer contracts that are inherently complex or involve opaque pricing and discounting practices can increase existing difficulties for consumers to evaluate the actual value of the contract and make meaningful comparisons with competing products and services.

#### 5.4. Conclusions on competitive effects of loyalty schemes in Australia

The ACCC considers that loyalty schemes can result in a combination of pro-competitive and anti-competitive effects. These effects can be complex and will depend on the specific design of the loyalty scheme and the characteristics of the relevant markets in which they are established.

Loyalty schemes can intensify competition between rivals and result in consumer benefits in the form of loyalty discounts and lower prices. This is likely to occur where there is strong competitive tension in a market, and rivals are able to match the ability of a loyalty scheme to compete for a significant proportion of customers. However, loyalty schemes can also be harmful to competition when they create strong customer lock-in effects and artificial switching costs resulting in persistent barriers to expansion for rival firms. In some instances, loyalty schemes may reduce price transparency, making it difficult for consumers to compare the value of rewards with competing price-based offers. This may result in consumers engaging in less frequent price comparisons and making less-informed purchasing decisions.

The ACCC is of the view that airline frequent flyer schemes in particular have the potential to have significant customer lock-in effects, as has occurred overseas. To date, Virgin Australia has succeeded in growing its loyalty scheme and market position. It is not clear that customer lock-in effects and switching costs associated with Qantas Frequent Flyer have resulted in major barriers. In the case of supermarket loyalty schemes, while customer loyalty in this sector is limited, there is the potential for stronger exclusivity effects to occur as supermarkets seek to leverage their growing digital and analytical capabilities using extensive customer data.

The ACCC is concerned by the potential for competition concerns to arise where a dominant firm exercises a loyalty scheme that has market saturation and strong customer lock-in effects. In these circumstances, anti-competitive foreclosure effects can occur not only in the primary market in which the loyalty scheme predominantly operates (for example, domestic air travel), but may also be extended to related markets through exclusive partnerships with firms supplying complementary products (for example, domestic airlines and car rental services).

The ACCC is aware of the potential for loyalty schemes to result in anti-competitive effects. The prevalence of loyalty schemes in many concentrated and oligopolistic markets in Australia raises potential risks.

There is a potential that, with the increasing collection and use of data for analytical purposes, those firms with large membership bases will be able to use this to further entrench their market positions and raise barriers to entry and expansion for their rivals. This

is a particular concern where data assets relating to consumers in specific sectors of the economy may be locked up among a small number of firms.

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

## 6. Emerging issues and business practices related to customer loyalty schemes

As part of the research undertaken in the preparation of this draft report, the ACCC has identified the following emerging trends in the loyalty scheme sector:

- increased personalisation in loyalty scheme experiences
- increased price discrimination
- premium loyalty schemes
- blockchain and cryptocurrencies.

This chapter is intended to provide a brief overview of the development of these trends.

### 6.1. Increased personalisation in loyalty scheme experiences

Increasingly sophisticated data collection systems are enabling loyalty scheme operators to create progressively more personalised experiences for their consumers.

Historically the same communications, offers and products would be promoted to the entire membership of a scheme. Some of the larger schemes also macro-segmented data (for example by age, location or duration of loyalty scheme membership) and distributed separate, more tailored communications and offers to each segment. However, by these methods, consumers would tend to have a relatively generic experience and receive non-personalised marketing materials.

In recent years loyalty scheme operators, in particular the major loyalty schemes, have been utilising data technology agencies and data collection systems such as cookies, wi-fi tracking, stock-keeping unit capture, receipt scanning and beacons to develop profiles of their customers. Once this data is amassed, artificial intelligence machine learning communications and next-best-action platforms are used to deliver individually tailored experiences and marketing to consumers based on the preferences identified in their profile. These systems are used to identify individual consumers and their preferences when they access websites or apps to deliver real-time personalisation and are increasingly being utilised to identify consumers in store.

The aim of increasing personalisation is to maximise the impact of advertising spend via stimulation of higher consumer spend. These systems also assist in identifying and recognising high-value consumers.

The Woolworths Rewards scheme provides an example of how this works in practice. Its platform uses advanced algorithms to send its consumers a weekly catalogue of 'hyper-personalised' offers based on what they have purchased in the past.<sup>231</sup>

### 6.2. Increased price discrimination

A consequence of increasingly sophisticated data analytics and personalisation is that it may enable and encourage highly targeted price discrimination—businesses charging different prices to individuals based on their perception of the individual's ability or willingness to pay.

It is likely that the scope for personalised pricing will grow as the volume and quality of data collected by loyalty schemes expands and algorithms become more sophisticated. Loyalty schemes may be able to use the highly detailed profiles of their members' behaviours and

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<sup>231</sup> L Croft, "[We must treat data as a precious gift', says Woolies exec'](#), *B&T Magazine*, 1 March 2018, viewed 26 June 2019.

attributes to offer each a different price for a product or service. The ACCC has identified some limited examples of this occurring in Australia. Woolworths for example was publicly reported in 2013 stating that it was able to combine its insurance company's data with its rewards database to determine which customers were 'good insurance risk[s]' to target them with better insurance offers.<sup>232</sup>

Recent media reports suggest that price discrimination practices may be becoming more prevalent abroad. For example, some 'bricks and mortar' retailers appear to be trialling technology that would allow price discrimination based on customer data—including combining offline and online purchasing behaviour through loyalty programs tied to user accounts ('omnichannel shopping')<sup>233</sup> and installing 'smart shelves'—digital price displays that allow for quickly changing prices—in physical retail stores.<sup>234</sup>

Some consumers may gain from increasingly personalised pricing. For example, consumers with limited ability to pay may be offered a lower price for products they otherwise could not afford. However, many consumers are likely to pay more, particularly in circumstances where consumers have limited choice of who to buy from, or have a limited inclination to shop around.

### 6.3. Premium loyalty schemes

Premium loyalty schemes are those that members pay a fee to join. The number of companies offering such schemes and the membership of these schemes is rapidly increasing overseas. For example, Amazon Prime, which was launched in 2005, has more than 100 million members worldwide<sup>235</sup>, and Lululemon and CVS trialled premium schemes in the US in 2019.<sup>236</sup>

Membership fees are typically non-refundable and are often paid for a set period (for example \$99 for a 12-month membership). This encourages consumers to remain loyal to the company over this period to generate value from the investment of their membership fee.

In 2019, Amazon Prime and eBay Plus were both launched in Australia and this trend is expected to continue.<sup>237</sup> A study of loyalty schemes undertaken by Mastercard in 2017 found that 38 per cent of Australian respondents identified the fact they did not have to pay as the most important factor in selecting the loyalty scheme most important to them.<sup>238</sup> This response was not widely reflected in responses from other Asia-Pacific countries included in the study and this could potentially impact the emergence of premium schemes in Australia.

It is also noted that one of the four major loyalty schemes, Flybuys, trialled a premium loyalty scheme, 'Flybuys Max', in Australia in 2018.<sup>239</sup> Flybuys Max cost \$10 per month (or \$99 per year) and gave members access to benefits including a 5 per cent discount on fresh produce, free delivery of online orders over \$50 and access to a free movie-streaming service. At the time of publication, the Flybuys Max program has not been officially launched.<sup>240</sup>

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<sup>232</sup> W Ma, '[Woolworths: no ads, just data](#)', Adnews, 5 September 2013, viewed 21 August 2019.

<sup>233</sup> N Howe, '[A Special Price Just for You](#)', Forbes, 17 November 2017, viewed 21 August 2019.

<sup>234</sup> T Walker, '[How Much? The Rise of dynamic and personalised pricing](#)', The Guardian, 20 November 2017, viewed 21 August 2019.

<sup>235</sup> P Hatch, '[Winning your loyalty: Australia's retail data war is heating up](#)', *Sydney Morning Herald*, 3 January 2019, viewed 26 June 2019.

<sup>236</sup> B Pearson, '[Is 2019 the year of paid loyalty? Lululemon, CVS and Loblaw are game to find out](#)', *Forbes*, 4 January 2019, viewed 25 June 2019.

<sup>237</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 6.

<sup>238</sup> Mastercard, '[Achieving advocacy and influence in a changing loyalty landscape: a Mastercard Asia Pacific Study](#)', January 2018.

<sup>239</sup> Loyalty & Reward Co, *Australian loyalty schemes: a Loyalty & Reward Co report for the ACCC*, June 2019, chapter 6

<sup>240</sup> *ibid.*

## 6.4. Blockchain and cryptocurrencies

The emergence of blockchain and cryptocurrencies have created a number of new opportunities for loyalty schemes.

Traditional loyalty scheme platforms have tended to run on batch-processing systems, which meant that member transactions could be processed only periodically, resulting in a delay for the consumer between the transaction and receiving the points or rewards. This also incurred administrative costs for operators.

Blockchain platforms facilitate real-time transactions that can improve member experience and reduce administrative costs. It is therefore likely that these systems will be increasingly adopted across the loyalty scheme sector.

Blockchain also enables the development of cryptocurrencies. A number of Blockchain loyalty companies including Gatcoin, CampusCoin, Nexus Rewards, LoyalCoin and EZToken Rewards have been created, which offer members the opportunity to earn cryptocurrency as opposed to miles or points. According to a report from the University of NSW, 'many of the companies have positioned their approach as one which will disrupt the loyalty industry'.<sup>241</sup>

The University of NSW report argues that cryptocurrency may be a viable and popular alternative to the more traditional loyalty scheme rewards because<sup>242</sup>:

- cryptocurrency can be widely used and is not limited to products and services offered by traders aligned with the relevant operator
- unlike the loyalty points offered by many operators, cryptocurrency does not expire
- cryptocurrency can increase in value as it increases in popularity, unlike the loyalty points offered by certain loyalty schemes which have been devalued over time.

While none of the major loyalty scheme operators in Australia have adopted a scheme of cryptocurrency rewards at the time of publication, smaller cryptocurrency schemes are growing in popularity, with current memberships of up to 200 000.

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<sup>241</sup> P Shelper, A Lowe and S Kanhere, [Experiences from the field: Unify Rewards – a cryptocurrency loyalty program](#), 2018, viewed 26 June 2019.

<sup>242</sup> *ibid.*

## Appendix A—Consultation

In preparing this draft report, the ACCC consulted with the following loyalty scheme operators:

- American Express
- ANZ
- API Priceline
- CBA
- Flybuys
- Hilton
- IHG
- Marriott
- Myer
- NAB
- Qantas
- Telstra
- Virgin Australia (Velocity Frequent Flyer)
- Westpac
- Woolworths Rewards

## Appendix B – Common loyalty scheme design elements across different sectors

As part of this draft report, the ACCC commissioned an independent expert, Loyalty & Reward Co, to produce a report into the development, operation and monetisation of loyalty schemes, as well as their collection, use and disclosure of consumer data.

Appendix B is from Loyalty & Reward Co's report and outlines the key features of loyalty schemes operating in a number of different sectors.

Sector	Major companies	Scheme name(s)	Dominant scheme design element(s)
Airlines	Qantas Virgin Airlines	Qantas Frequent Flyer Velocity Frequent Flyer	Customers are rewarded for their loyalty with points and status credits which they earn through flights, spending with participating retail partners and using (co-)branded credit cards. Members can redeem their points for flights, flight upgrades, or non-flight rewards like hotels, car hire, gift cards and rewards products from the scheme operator's online rewards store. Increasingly, members are also able to spend their points directly with participating retailers. Status credits unlock status tiers which provide members with exclusive benefits when they fly, such as lounge access, priority boarding and bonus points.
Supermarkets	Woolworths Coles	Woolworths Rewards Flybuys	Members accumulate points when they spend on grocery items or with retailers within their coalition partner network. Points can be redeemed for shopping discounts, discounted gift cards or consumer goods. Woolworths Rewards members can earn Qantas Points and Flybuys members can transfer their points into Velocity Points.
Hotels	Hilton Marriott Intercontinental Hotels Group	Hilton Honours Marriott Bonvoy IHG Rewards Club	Schemes use a combination of member benefits, points and status tiers. The member benefits include members-only rates, free internet access and keyless mobile check-in via the app. As members spend, they are allocated a status tier which unlocks additional value such as free nights and complimentary breakfasts. Points are also earned for every dollar spent within the hotel and its network of partners and can be redeemed within the partner network or donated to charity.
Retail	Priceline Myer Spotlight	Priceline Sister Club MYER One VIP Club	The variety of loyalty schemes within retail is particularly broad. At a high level, two types of reward mechanism are used: points or member discounts. Members of these schemes generally have access to additional exclusive savings, VIP events, competitions and gifts. Some schemes incorporate status tiers, which are achieved based on annual spend.

	IKEA	IKEA Family	
	Dan Murphy's	My Dan Murphy's	
	Sephora	Beauty Pass	
	Mecca	Beauty Loop	
	Adairs	Linen Lovers	
	Amcal	Amcal Rewards	
	Country Road	Country Road Cardholder	
	Dymocks	Dymocks Booklover	
	EB Games	EB World	
Telecommunications	Telstra	Telstra Thanks, Telstra Plus	Members are provided with access to member benefits portals which host a wide selection of exclusive rewards such as pre-sale sporting or music events and discounts on experiences and products. In May 2019, Telstra launched a new points and status tiers model.
	Optus	Optus Perks	
Financial Services	Westpac	Westpac Altitude	This industry has long been using credit card loyalty schemes where members earn points for everyday purchases, which can be redeemed online for consumer goods and gift cards. Some schemes also provide the opportunity for members to redeem with third party partners.  Card-linked offers enable operators to link a special offer or discount directly to a consumer. The discount is applied automatically at the point of sale when the linked debit or credit payment card is swiped.  These loyalty schemes also provide exclusive early bird or discount offers to members for events and experiences.
	CBA	CommBank Awards	
	ANZ	ANZ Rewards	
	NAB	NAB Rewards	
	American Express	Membership Rewards	
Insurance	NRMA	NRMA Blue	Members have access to special offers and benefits from hundreds of partners. Some require members to pay for access to all the offers listed on the platform. Others are based on status tiers where status level, and therefore the types of benefits available to the member, is determined by the length of time the member has taken out a policy.
	BUPA	BUPA Plus	
	HCF	HCF Thank You	
	NIB	Be Rewarded	

	Medibank Youi	Medibank Offers YouiRewards	
Utility	AGL Red Energy Energy Australia	AGL Rewards	AGL Rewards is a member benefits loyalty scheme offering access to special offers and benefits from hundreds of partners. Members can access gift cards, movie tickets, accommodation, experiences and restaurants. AGL also offer members Flybuys points, while Red Energy offer Qantas Points and Energy Australia Velocity Points.
Cinemas	Event Cinemas/Village Cinemas Hoyts	Cinebuzz Rewards Hoyts Rewards	<p>These loyalty schemes issue their own reward currencies which are accumulated based on spend and other desired actions such as purchasing tickets online, using the app or reviewing a movie. The reward currencies can be used to access free tickets and Candy Bar items. Members of the loyalty scheme have access to additional benefits such as advanced screenings and member only promotions and pricing.</p> <p>Hoyts Rewards have an optional paid membership tier that unlocks additional benefits for the premium consumer. They have also partnered with Qantas as both an earning and redemption partner.</p>
Quick service restaurants (QSR) and cafes	McDonalds Domino's Starbucks	mymacca's Domino's Rewards Starbucks Rewards	Rewards are issued in the form of discount coupons or points. Members are often encouraged to download a branded app to access member exclusive discounts, skip the queue or partake in competitions. Some of these loyalty schemes also have their own reward currencies that can be tracked and managed from within the brands' respective apps. Members can generally redeem points on free food and drinks.

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

## Appendix C—Presentation of terms and conditions and privacy policies

As part of this draft report, in June 2019 the ACCC reviewed the sign-up processes for Australia's four largest loyalty schemes: Qantas Frequent Flyer, Velocity Frequent Flyer, Flybuys and Woolworths Rewards.

### Qantas Frequent Flyer

Illustrated below in figure C.1 is how Qantas Frequent Flyer presents information about its data practices to consumers during the sign-up process.

#### Figure C.1: Qantas joining process: Important information

##### Important Information

Qantas collects personal information about you in connection with Qantas Frequent Flyer (including products and services available to Qantas Frequent Flyer members):

- to market products and services to you, including the products and services of our partners and other third parties who we believe may have products and services in which you would be interested. This is one of the primary purposes of Qantas Frequent Flyer;
- to facilitate your participation in Qantas Frequent Flyer and other organisations loyalty programs, including by assessing your membership application, awarding you points, confirming your eligibility for, and providing any products and services associated with Qantas Frequent Flyer, and enhancing and personalising your use of Qantas Frequent Flyer;
- to improve our website and services, including by means of product development and market and behavioural research; and
- for operational management of Qantas Frequent Flyer.

Qantas may collect your personal information from you directly, including when you are logged into your Qantas Frequent Flyer account. We may also collect your personal information from others who interact with us on your behalf, our related bodies corporate and Jetstar branded entities, partner airlines, third parties providing services for Qantas Frequent Flyer and our program partners (such as when you register through one of our program partners or transact with them).

For the reasons described above, we may disclose your personal information to:

- partner airlines, oneworld® Alliance Airlines, and non-airline program partners. In particular, we will disclose your information to Emirates in the United Arab Emirates for the purpose of Emirates offering you membership in the Skywards frequent flyer program;
- our related companies;
- any third party providing services for Qantas Frequent Flyer, including assisting us in determining your eligibility for, and providing, Qantas Frequent Flyer products and services (including products and services available to members), administering the program, operating our call and service centres and providing market research and marketing services;
- our financial product card partners; and
- others to comply with our legal obligations.

These parties may be located overseas including in the United Kingdom, the United States, Germany, the Philippines and any country which you travel to or through in connection with your membership.

If all or any of the requested non-optional information is not provided, we will not be able to provide the services to you and membership may not be granted. If all or any of the remaining information is not provided, the services we provide to you may be affected.

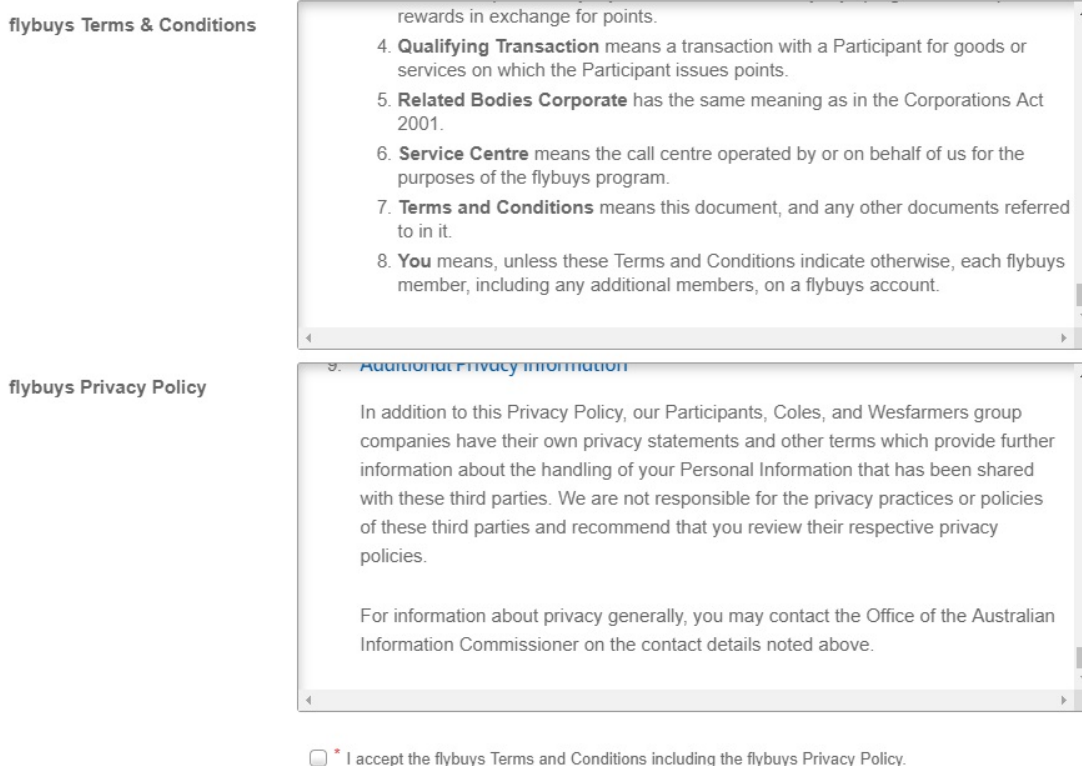
Our privacy statement is available at [qantas.com](https://www.qantas.com) and it contains more information about the above and also how you can seek access to, and correction of, your personal information. It also explains how you can complain about a breach of your privacy and how we will deal with your complaint. You can contact us by completing the form located at [qantas.com/privacyquestions](https://www.qantas.com/privacyquestions) or by writing to Qantas Customer Care at 10 Bourke Road, Mascot, NSW, 2020.

## Flybuys

Flybuys took a similar approach by embedding its terms and conditions and privacy policy in a window in the sign-up page, as illustrated in figure C.2.

**Figure C.2: Flybuys joining process: Embedded terms, conditions and privacy policy**

### Terms & Conditions and Privacy Policy



## Velocity Frequent Flyer

In relation to Velocity Frequent Flyer, links to the terms and conditions and privacy policy are not presented until the consumer has already provided a number of items of personal information and clicked through at least four screens. Further, the terms and conditions and privacy policy are then presented as links, rather than embedded in the joining page. Figure C.3 illustrates where the terms and conditions and privacy policy can be found during the join process for Velocity Frequent Flyer.

**Figure C.3: Velocity joining process: Providing personal information and clicking through multiple screens to find the terms and conditions and privacy policy**

**Step 1**

### LET'S START BY SETTING YOUR MEMBERSHIP DETAILS

**CONTINUE >**

Already have an account? [Log in](#)

**Step 2**

### TELL US ABOUT YOU

**i** First and last name should be as shown on your passport

**CONTINUE >**

**Step 3**

### LET'S STAY IN TOUCH

Home address  Business address

---

Mobile  Landline

**i** Enter your country code and area code (drop the 0), followed by your phone number. Number must contain a minimum of 7 digits.

**CONTINUE >**

**Step 4**

### FINALLY, LET'S SECURE YOUR ACCOUNT

---

**i** A Velocity PIN may be required for account verification and redemptions with eligible program partners

I agree to the above [Terms & Conditions](#) and have read the [Privacy Statement](#)

I'm not a robot

**JOIN**

## Woolworths Rewards

To access the Privacy Policy of Woolworths Rewards, registering members need to first click on a link to the terms and conditions, then scroll down to a section towards the bottom of the page titled, 'How will Woolworths be collecting, using and disclosing my personal information?' Within that clause the member must click on a link titled 'Collection Notice', which then directs them through to the Woolworths Rewards Privacy policy. This is illustrated in figure C.4. It is noted that in 2016, the OAIC undertook a privacy review of Woolworths Rewards<sup>243</sup>, and, among other things, recommended the scheme could consider 'separating the privacy related information from the broader terms and conditions and providing [it] as a separate document *at the point of registration*'. This recommendation does not as yet appear to have been implemented.

### Figure C.4: Woolworths Rewards joining process: Link to terms and conditions

Follow the steps below and within minutes you'll be ready to earn with Woolworths Rewards!

If you've already collected points on your temporary card, register today by providing these details later in the form.

Save time by using your Facebook account to join.

f FACEBOOK

### Let's create your account

\* marks mandatory fields

First name \*

Last name \*

Email \*

Password \*

Confirm password \*

Mobile phone number \*

Date of birth (dd/mm/yyyy) \*

\_\_/\_\_/\_\_\_\_

Gender\*

Please select an option

### Now, let's order you a card

If you have a temporary Woolworths Rewards card, please enter the number below. If not, skip this step.

Temporary card number

Where should we send your card?

Your address \*

Suburb \*

Postcode \*

State \*

State

Yes, I have read and accept the Woolworths Rewards [terms and conditions](#). \*

JOIN WOOLWORTHS REWARDS

<sup>243</sup> OAIC, [Loyalty program assessment: Woolworths Rewards](#), July 2016, viewed 18 April 2019.

## Appendix D—Example of targeted advertisements that lack adequate disclosure

Figure D.1 shows the Rokt pop-up some users encountered immediately after having purchased a ticket from Ticketmaster. The pop-up appears to be from Ticketmaster encouraging the consumer to join Velocity Frequent Flyer but is actually delivered by the third party transaction marketing company called Rokt.

Figure D.1: Rokt pop-ups on Ticketmaster encouraging consumers to join Velocity

### The user journey

# 1

**Rokt powers an engagement message to consumers, which entices them to join the Velocity Frequent Flyer program and enter a sweepstakes for a chance to win \$2,000 worth of Virgin Australia flights**

Your purchase is complete

As a thank you for your purchase... Join Velocity Frequent Flyer now and you could win \$2,000 worth of Virgin Australia flights. Tick the box to agree to the Velocity membership T&Cs, Privacy Policy, and Competition T&Cs.

First Name Last Name Email

Age Male Female Postcode

Join me up to Velocity Frequent Flyer. I agree to the Terms and Conditions and Privacy Policy.

Continue

Advertise Here Powered by ROKT - Privacy Policy

# 2

**Consumers continue through the Rokt journey**

ticketmaster

YOU'RE IN!

As a thank you for your purchase, join Velocity Frequent Flyer by checking this box and you could win \$2,000 worth of Virgin Australia flights. Tick the box to agree to the Velocity membership T&Cs, Privacy Policy, and Competition T&Cs.

Email jenny.smith317@rokt.com Age Gender

I agree to the Official Rules, ROKT Privacy Policy, and Ticketmaster Privacy Policy.

Sign up to Our Today and Tomorrow promo code good for \$25 off your first date.

\$10 off your first Uniquist Get unbeatable deals for up to 75% off the best stuff to do, eat, and buy.

Enter Now

YOU PAID \$48.75

Sun, Nov 7 @ 7:30pm

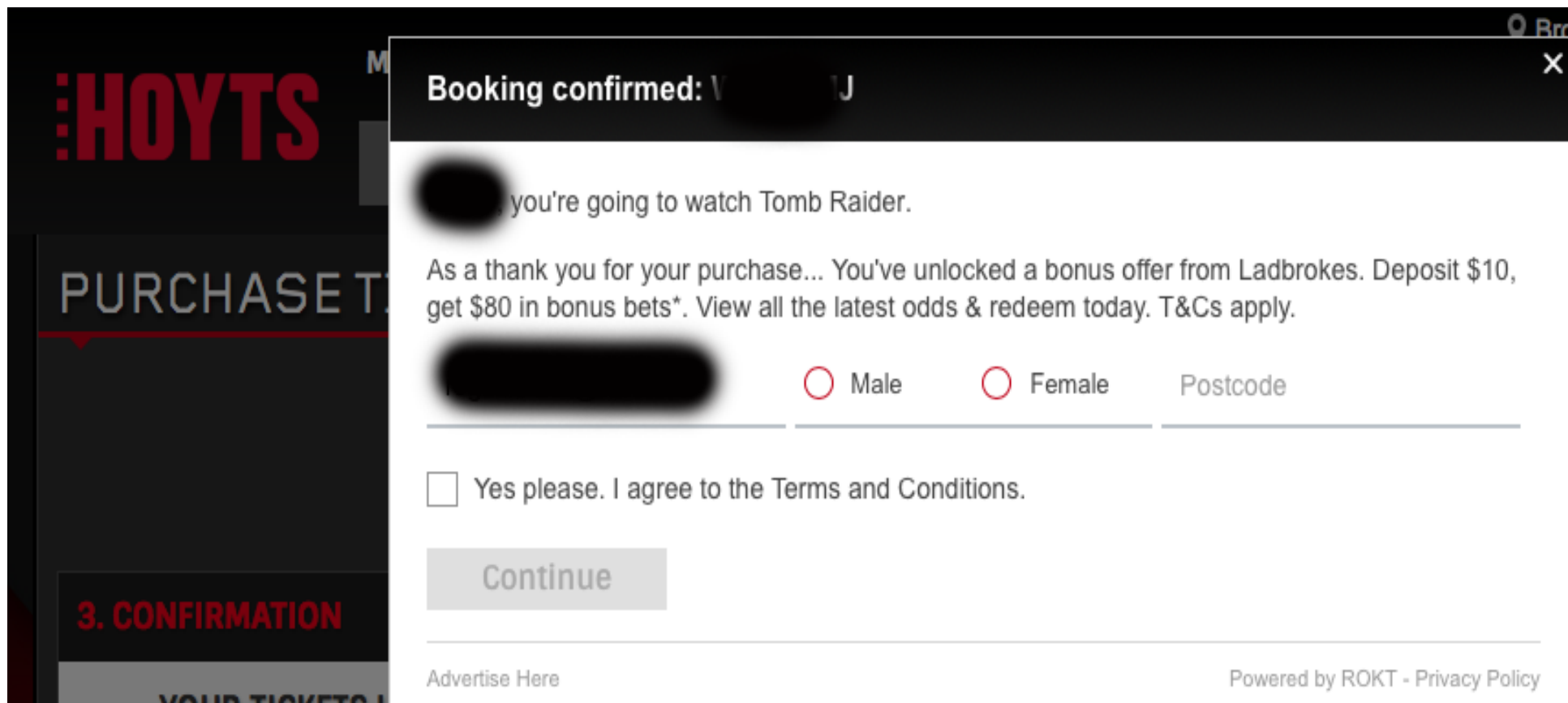
Velocity connects with customers just after they complete an online purchase. An attractive offer (i.e., sweepstakes, business class flights, etc.) drives referrals.

Once consumers engage with the offer, the referrals are generated and sent to Velocity's API

Source: Rokt.

Figure D.2 shows the Rokt pop-up some users encountered immediately after having purchased a movie ticket from Hoyts. The pop-up appears to be from Hoyts encouraging the consumer to join Ladbrokes, a gambling website, but is actually delivered by the third party transaction marketing company called Rokt.

**Figure D.2: Rokt pop-ups when transacting with Hoyts**



Source: Twitter.<sup>244</sup>

<sup>244</sup> See @HoytsAustralia, 6.17 pm on 20 March 2018. In relation to the given example, the ACCC understands that Hoyts no longer allows gambling advertising to be displayed through the Rokt platform.

## Appendix E—Relevant recommendations from the ACCC’s Digital Platforms Inquiry

The ACCC is of the view that the findings in this draft report reinforce the ACCC’s findings in our Digital Platforms Inquiry, and further support our recommendations for economy-wide changes in relation to privacy and consumer law.

The ACCC’s Digital Platforms Inquiry recommended a range of targeted amendments to the Privacy Act to strengthen protections (**Recommendation 16**) as well as recommending broader reform of Australian privacy regulation (**Recommendation 17**) and a statutory tort for serious invasions of privacy (**Recommendation 19**). It also recommended a prohibition against unfair contract terms (**Recommendation 20**) and a prohibition against certain unfair trading practices (**Recommendation 21**). These are reproduced below.

### Recommendation 16: Strengthen protections in the Privacy Act

- **16(a) Update ‘personal information’ definition:** Update the definition of ‘personal information’ in the Privacy Act to clarify that it captures technical data such as IP addresses, device identifiers, location data and any other online identifiers that may be used identify an individual.
- **16(b) Strengthen notification requirements:** Require all collection of personal information to be accompanied by a notice from the APP entity collecting the personal information (whether directly from the consumer or indirectly as a third party), unless the consumer already has this information or there is an over-riding legal or public interest reason.
  - The notice must be concise, transparent, intelligible and easily accessible, written in clear and plain language and provided free of charge, and must clearly set out how the APP entity will collect, use and disclose the consumer’s personal information. Where the personal information of children is collected, the notice should be written at a level that can be readily understood by the minimum age of the permitted digital platform user.
  - To provide consumers with a readily understood and meaningful overview of an APP entity’s data practices and as a means of reducing their information burden, it may also be appropriate for these requirements to be implemented along with measures such as the use of multi-layered notifications or the use of standardised icons or phrases.
- **16(c) Strengthen consent requirements and pro-consumer defaults:** Require consent to be obtained whenever a consumer’s personal information is collected, used or disclosed by an APP entity, unless the personal information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an over-riding public interest reason.
  - Valid consent should require a clear affirmative act that is freely given, specific, unambiguous and informed (including about the consequences of providing or withholding consent).
  - This means that any settings for data practices relying on consent must be pre-selected to ‘off’ and that different purposes of data collection, use or disclosure must not be bundled. Where the personal information of children is collected, consents to collect the personal information of children must be obtained from the child’s guardian.
  - It may also be appropriate for the consent requirements to be implemented along with measures to minimise consent fatigue, such as not requiring consent when personal

information is processed in accordance with a contract to which the consumer is a party, or using standardised icons or phrases to refer to certain categories of consents to facilitate consumers' comprehension and decision-making.

- **16(d) Enable the erasure of personal information:** Require APP entities to erase the personal information of a consumer without undue delay on receiving a request for erasure from the consumer, unless the retention of information is necessary for the performance of a contract to which the consumer is a party, is required under law, or is otherwise necessary for an over-riding public interest reason.
- **16(e) Introduce direct rights of action for individuals:** Give individuals a direct right to bring actions and class actions against APP entities in court to seek compensation for an interference with their privacy under the Privacy Act.
- **16(f) Higher penalties for breach of the Privacy Act:** Increase the penalties for an interference with privacy under the Privacy Act to mirror the increased penalties for breaches of the Australian Consumer Law.

## Recommendation 17: Broader reform of Australian privacy law

Broader reform of Australian privacy regime to ensure it continues to effectively protect consumers' personal information in light of the increasing volume and scope of data collection in the digital economy.

This reform should have regard to the following issues:

1. **Objectives:** whether the objectives of the Privacy Act should place greater emphasis on privacy protections for consumers including protection against misuse of data and empowering consumers to make informed choices.
2. **Scope:** whether the Privacy Act should apply to some of the entities which are currently exempt (for example small businesses, employers, registered political parties, etc.).
3. **Higher standard of protections:** whether the Privacy Act should set a higher standard of privacy protection, such as by requiring all use and disclosure of personal information to be by fair and lawful means.
4. **Inferred information:** whether the Privacy Act should offer protections for inferred information, particularly where inferred information includes sensitive information about an individual's health, religious beliefs, political affiliations.
5. **De-identified information:** whether there should be protections or standards for de-identification, anonymisation and pseudonymisation of personal information to address the growing risks of re-identification as datasets are combined and data analytics technologies become more advanced.
6. **Overseas data flows:** whether the Privacy Act should be revised such that it could be considered by the European Commission to offer 'an adequate level of data protection' to facilitate the flow of information to and from overseas jurisdictions such as the EU.
7. **Third party certification:** whether an independent certification scheme should be introduced.

## Recommendation 19: Statutory tort for serious invasions of privacy

Introduce a statutory cause of action for serious invasions of privacy, as recommended by the Australian Law Reform Commission. This cause of action provides protection for individuals against serious invasions of privacy that may not be captured within the scope of the Privacy Act.

The cause of action should require privacy to be balanced against other public interests, such as freedom of expression and freedom of the media. This statutory cause of action will increase the accountability of businesses for their data practices and give consumers greater control over their personal information.

### Recommendation 20: Prohibition against unfair contract terms

Amend the *Competition and Consumer Act 2010* so that unfair contract terms are prohibited (not just voidable). This would mean that civil pecuniary penalties apply to the use of unfair contract terms in any standard form consumer or small business contract.

### Recommendation 21: Prohibition against certain unfair trading practices

Amend the *Competition and Consumer Act 2010* to include a prohibition on certain unfair trading practices. The scope of such a prohibition should be carefully developed such that it is sufficiently defined and targeted, with appropriate legal safeguards and guidance.

The ACCC notes the current work on this issue being undertaken as part of the Consumer Affairs Australia and New Zealand (CAANZ) process, and will progress its support for the recommendation through that forum.