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Client Alert - Customer Loyalty Schemes

Introduction

Customer loyalty schemes were an enforcement priority for the Australian Competition and Consumer Commission (ACCC) in 2019, and in early December 2019 the ACCC released its final report on this issue. The report calls for a number of reforms to address consumer concerns over the way loyalty schemes are used by businesses in Australia and to remedy practices that may cause consumer detriment. The report focuses on consumer communication issues, the use of consumer data and competition issues.

The ACCC raises concerns over the lack of transparency around customer loyalty schemes - many consumers are simply not aware of changes to redemption value of loyalty points, expiry periods or taxes imposed on point redemption purchases. Customer loyalty schemes also raise competition concerns for the ACCC, as businesses can establish dominance through operating loyalty schemes in saturated markets, and use data obtained through these schemes to protect and promote their market position. The use of data obtained through consumer loyalty programs raises similar issues to those raised in the ACCC's *Digital Platforms Inquiry Final Report* (see our client alert [here](#)). We note that the ACCC did not make any recommendations in relation to the identified competition issues.

If your business operates a customer loyalty scheme, you may need to consider making changes to the terms, conditions and policies governing the collection of consumer data to reflect the recommendations in the ACCC's report. A summary of these recommendations is set out below.

Recommendation 1: Improving customer communications

The ACCC's report makes it clear that companies operating loyalty schemes need to communicate effectively with their customers. Terms and conditions of loyalty programs should be clearly presented to customers in a manner that allows them to properly review and understand their operation, rather than in a manner that is confusing or difficult to locate.

Loyalty schemes should also give consumers sufficient notification about changes to the scheme, and make sure that these changes are adequately flagged and not hidden or difficult to identify. For example, where a consumer's loyalty points are about to expire, any communication about the expiration of points must be clear and prominent, and frequent flyer loyalty schemes are recommended to communicate clearly to consumers where rewards seats are not available on particular routes.

In terms of changes to earn rate of loyalty points or changes to the redemption value of loyalty points, businesses operating customer loyalty schemes must communicate these changes with plenty of time for consumers to redeem their existing points balance, or provide some kind of compensation for the reduced value of loyalty points.

Recommendation 2: Prohibition against unfair contract terms and certain unfair trading practices

As with the ACCC's report on its Digital Platforms Inquiry, in this report the ACCC recommends that the Australian Consumer Law should be amended to prohibit the use of unfair contract terms through imposing significant pecuniary penalties on consumer loyalty operators that use unfair contract terms, rather than just rendering the terms void.

The ACCC has also recommended a prohibition against certain unfair trading practices, particularly in regards to conduct that has caused, or is likely to cause, a detriment to consumers. Such conduct includes where loyalty scheme operators change the terms on which goods or services are provided unilaterally, and fail to provide reasonable notice of these changes to consumers.

Recommendation 3: End the practice of linking payment cards to the loyalty scheme profiles of members

The report calls for Coles, Flybuis and Woolworths Group to end the practice of automatically linking customer's payment cards to their loyalty scheme profile to track purchasing behaviours and transaction activities when customers do not scan their loyalty card. The report notes this practice decreases consumer welfare from decreased privacy and increases the risk of profiling, discrimination and exclusion.

Recommendation 4: Improving data practices

Loyalty schemes would ideally provide customers with meaningful control over their data. Privacy policies can be opaque and this lack of clarity may prohibit consumers from controlling the collection, use and disclosure of their data. The ACCC recommends the following changes to improve data practices:

- review clickwrap agreements for unfair contract terms;
- standardise definitions within privacy policies (consistent with the Privacy Act) to improve clarity and accessibility;
- present relevant aspects of terms, conditions and privacy policies to consumers during key interactions to minimise information overload;
- outline the purpose for which consumer data is shared and draw this to consumers' attention;
- disclose all sources of third party advertising and consumer data used to inform such advertising;
- provide consumers with control over the collection, use and disclosure of their data (including pre-selected opt-outs for targeted advertising); and
- notify consumers of limitations to data controls (such as opt-outs).

Recommendation 5: Australian privacy law reform to strengthen protections over consumer data

The ACCC makes similar recommendations regarding strengthening the Privacy Act as those set out in its report on the Digital Platforms Inquiry. The ACCC recommends the Privacy Act should be amended to:

- update the definition of personal information to capture any technical data;
- require APP entities (being entities captured by the Australian Privacy Principles set out within the Privacy Act) to notify consumers when their personal information is collected directly or by a third party;
- require that consents by consumers be freely given, specific, unambiguous and informed (any settings for additional data collection must be pre-selected to "off");
- require consents whenever personal information is collected, used or disclosed by APP entities;
- require APP entities to erase personal information of consumers upon request, except in certain circumstances; and
- introduce direct rights for individuals to seek compensation for an interference with their privacy through court proceedings.

The ACCC is also considering the 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.

Conclusion

If you are an operator of a customer loyalty scheme, we recommend paying particular attention to these recommendations in relation to consumer disclosures and data practices. Now that this final report has been issued and the ACCC is currently considering further enforcement action against APP entities, it is a good time to review all terms and conditions, privacy and data collection policies to ensure compliance with the relevant legislation.

Please contact our team regarding any potential privacy, competition and consumer law risks specifically relating to your business.

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