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By email: [submissions@datagovernanceaus.com.au](mailto:submissions@datagovernanceaus.com.au)

Mr Murray Hyde  
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Dear Mr Hyde,

### **Submission: Data Governance Australia Draft Code of Practice**

Thank you for the opportunity to comment on the Data Governance Australia (**DGA**) draft Code of Practice (**Code**).

The collection, use and management of data by companies is of significant and growing interest for consumer advocates. We welcome industry efforts to better protect and promote the rights of people whose information is held by companies. However, we are concerned that this Code is unlikely to achieve this aim in its current form.

We understand that DGA intends to register the Code with the Australian Securities and Investments Commission (**ASIC**),<sup>1</sup> but that the Code will not be registered under the *Privacy Act 1988* (Cth) (**Privacy Act**). The Code does not appear to comply with ASIC requirements for effective industry codes,<sup>2</sup> nor does it extend substantially beyond basic legal obligations.

In our view, DGA may instead be well-placed to lead the development of strong principles to guide the protection of consumer rights across industries that collect and use their data.

Our comments are detailed more fully below.

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<sup>1</sup> 'Data Governance Australia publishes code of conduct', *Australian Financial Review*, 21 June 2017, <http://www.afr.com/technology/data-governance-australia-publishes-code-of-conduct-20170621-gwvdy5>.

<sup>2</sup> ASIC, *Regulatory Guide 183: Approval of financial services sector codes of conduct*, March 2013 (**RG 183**).

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## About Consumer Action

Consumer Action is an independent, not-for-profit consumer organisation based in Melbourne. We work to advance fairness in consumer markets, particularly for disadvantaged and vulnerable consumers, through financial counselling, legal advice and representation, and policy work and campaigns. Delivering assistance services to Victorian consumers, we have a national reach through our deep expertise in consumer law and policy and direct knowledge of the consumer experience of modern markets.

## Appropriateness of the Code

We welcome moves to tackle the challenges highlighted in the recent Productivity Commission review of the availability and use of data.<sup>3</sup> However, we doubt that this Code, in its current form, will be an effective tool to do this.

ASIC's RG 183 states that ASIC will 'expect code applicants to be able to show that their subscribers cover a majority of participants in the relevant sector'.<sup>4</sup> The Australian Competition and Consumer Commission's (ACCC's) *Guidelines for developing effective voluntary industry codes of conduct* similarly state that the relevant considerations include the nature, size, structure and cohesiveness of the industry.<sup>5</sup>

In light of the regulators' guidelines, this Code is unlikely to be effective, chiefly because it is:

- **Not championed by a strong, cohesive membership base.** While the DGA's membership may cover a range of sectors and large organisations, it does not appear to have a large or cohesive membership base. This contrasts with other industry bodies which have implemented codes of practice (such as the Australian Bankers' Association and Insurance Council of Australia), whose members operate in the similar sectors and have aligned goals and interests.
- **Unlikely to reach 'critical mass' across sectors.** With its broad scope across diverse industries, the Code is unlikely to be taken up by enough companies to establish its influence and significantly improve practices across these industries.

DGA is perhaps better placed to lead the industry response to the challenges of protecting consumers in the big data era by developing broader principles which could be taken up by a range of industry groups as they develop their own codes for data availability and use.

### Recommendation 1

DGA should develop robust best-practice principles to guide other industry bodies in their own self-regulatory responses such as codes of practice.

<sup>3</sup> Productivity Commission, *Data Availability and Use: Inquiry Report No 82*, 31 March 2017.

<sup>4</sup> ASIC RG 183.39.

<sup>5</sup> ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, July 2011, p 4.

## Objectives of the Code

The nine Code principles and the Code's focus on 'leading industry standards for responsible and ethical data use' are appropriate underpinnings for an industry response.

However, there is a disproportionate focus on industry interest over consumer needs. The Code Preamble states that the Code 'meets industry needs for a flexible, future-proof approach to self-regulation' and 'drives innovation by increasing consumer confidence and trust in the actions of members of the DGA'. It is unclear how increased consumer confidence and trust will be measured (see further our comments below on consumer trust).

ASIC's RG 183 states that:

*A code should clearly set out the objectives it intends to meet... For example, if one objective is to reduce undesirable practices within an industry, the code should as far as possible describe how subscribers can actually avoid such practices.<sup>6</sup>*

The ACCC guidelines for voluntary codes state that code objectives must be:

*... clearly spelled out objectives help explain to stakeholders and any interested party why the code was established and what it intends to achieve. A clear statement of objectives can be written in such a way that it is measurable. This means that when the code is reviewed its success or failure can be accurately assessed.<sup>7</sup>*

The Code is currently unlikely meet these standards. The Code's objectives are broad and principles-based. This may be appropriate for overarching principles to aid industry in responding to the challenges of data availability and use, but as a draft Code there is no detail of the risks and practices that the Code would address, nor any metrics by which to measure the success of the Code.

Genuine consideration of the challenges and risks of corporate control of data would:

- clearly identify consumer interests in the data which is collected, held, used and shared by companies,
- prioritise consumer control of this data,
- address the tensions inherent in facilitating 'innovative' use of data, while also protecting the rights of the people to whom that data relates, and
- mitigate the key risks of corporate control of data, for example, when collecting and sharing personal information and sensitive information.

This could be achieved by engaging a range of consumer and other advocates to identify the core issues and an effective self-regulation response.

### **Recommendation 2**

DGA should comprehensively analyse the consumer needs and rights arising from corporate data use and management, and set clear, consumer-focused goals for industry practices.

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<sup>6</sup> ASIC RG 183.57.

<sup>7</sup> ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, July 2011, p 6.

## Extension beyond legal rights

While the Code sets out principles for data collection and use, it does not appear to commit Code Organisations to do anything beyond complying with the Privacy Act and other laws. As noted above, ASIC RG 183 requires the standards in a code to 'do more than simply restate the law'.<sup>8</sup>

## The importance of consumer trust

Consumer confidence and trust in the way data is used is critical if benefits are going to flow from the use of data. Research has shown that there is a 'data trust deficit' where trust in organisations to use data appropriately is lower than trust in those same organisations in general.<sup>9</sup> Companies handling consumer data face significant challenges in showing that they can be entrusted with consumer data.

People 'use trust as a simple decision-making heuristic when assessing risk and making cost-benefit appraisals'.<sup>10</sup> As the complexity of a market increases, people's reliance on heuristics (or decision-making shortcuts) becomes more prevalent. Strong levels of trust are therefore critical to consumer participation and effective competition. As noted by Ross Gittins:

*Market economies run best on widespread trust: mutual trust between... businesses and their customers. Allow declining standards of behaviour to erode trust and the economy suffers. Customers become harder to persuade, argue more with counter staff, are surlier with call-centre staff and more inclined to take their business elsewhere. They resist 'upselling'. With less trust you waste a lot of money on increased security in its many forms. And governments react by multiplying laws and legal requirements.<sup>11</sup>*

As an example, innovation and complexity in the financial services market makes it challenging for consumers to navigate in search of products or services that meet their needs. Successive reviews in the financial services sector have sought ways to deal with this complexity and make the sector more trustworthy for consumers. The recent Financial Systems Inquiry recognised the significant potential for consumer detriment in this complex market, including fair treatment of consumers as a key theme in the Inquiry report and recommendations:

*Fair treatment occurs where participants act with integrity, honesty, transparency and non-discrimination. A market economy operates more effectively where participants*

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<sup>8</sup> ASIC RG 183.57.

<sup>9</sup> Royal Statistical Society, *Research on trust in data and attitudes toward data use / data sharing*, October 2014, <http://www.statslife.org.uk/images/pdf/rss-data-trust-data-sharing-attitudes-research-note.pdf>. Consumer Action discussed consumer trust issues in our submissions to the Productivity Commission Data Availability and Use Inquiry: see <http://consumeraction.org.au/public-inquiry-data-availability-use/> and <http://consumeraction.org.au/public-inquiry-data-availability-use-draft-report/>.

<sup>10</sup> Frederiks, E.R., Stenner, K. and Hobman, E.V. (2015). *Household Energy Use: Applying behavioural economics to understand consumer decision-making and behaviour*. *Renewable and Sustainable Energy Reviews* 41, 1385-1394.

<sup>11</sup> Gittins, R (2016). *We all pay the price when businesses break our trust*. *The Canberra Times*, 22 March 2016.

*enter into transactions with confidence they will be treated fairly... This includes providing consumers with clear information about risks; competent, good-quality [services] that takes account of their circumstances; and access to timely and low-cost alternative dispute resolution and an effective judicial system.*<sup>12</sup>

This again raises the question of whether this Code is an appropriate tool to improve industry practices, build trust and better promote consumer rights.

### **Recommendation 3**

DGA should identify gaps in the current legal protections of consumer rights in relation to data and effectively promote and protect those rights through any self-regulation.

### **Administration, enforcement, remedies and sanctions**

The effectiveness of a Code can be judged on how it is monitored and enforced, and the remedies and sanctions that apply when the Code is breached. An effective Code is administered by an independent body with effective remit and powers. Without any detail of the proposed Code Authority and administration arrangements, it is not possible to comment on these critical aspects. We note that ASIC's RG 183 provides detailed guidance on these aspects of industry codes.<sup>13</sup>

### **Recommendation 4**

Any independent data code authority should have strong monitoring, public reporting and enforcement powers. The remedies and sanctions under the code should provide effective recourse for consumers and deter breaches of the code.

### **Compliance with other ASIC requirements**

We have identified several points on which the Code is unlikely to meet ASIC's registration requirements. There are other specific reasons it may not. For example, a code should provide for mandatory independent reviews at least every three years,<sup>14</sup> and be developed through engagement with consumer representatives, ASIC and other stakeholders.<sup>15</sup> To our knowledge, broad consultation has not occurred, despite the code being close to completion.

While it is not currently mandatory for financial sector industry codes to be registered with ASIC, Treasury is now proposing that all codes must be approved by ASIC, and that companies engaging in the activities covered by a code must subscribe to that code.<sup>16</sup> In our view, this is a sound proposal to improve the quality and impact of industry self-regulation. In

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<sup>12</sup> Commonwealth of Australia (2014). *Financial System Inquiry Final Report*. <http://fsi.gov.au/publications/final-report/> Page 6.

<sup>13</sup> See in particular ASIC RG 183.68 – RG 183.73 (appropriate remedies and sanctions), RG 183.76 – RG 183.81 (effective and independent code administration), RG 183.79 – RG 183.81 (compliance is monitored and enforced).

<sup>14</sup> ASIC RG 183.82 – RG 183.84.

<sup>15</sup> ASIC RG 183.50.

<sup>16</sup> Treasury, *ASIC Enforcement Review: Position and Consultation paper 4—Industry Codes in the Financial Sector*, 28 June 2017, p 12.

light of the Treasury proposal, it would be prudent for all new codes applying to the financial sector to comply with RG 183 from the outset.

Generally speaking, we agree that more must be done to build consumer confidence and trust in the companies which hold their data. However, we would like to see more specific consideration of the rights and interests of consumers and the risks and challenges consumers face in protecting their personal data.

If you have any questions about this submission, please contact Susan Quinn on (03) 9670 5088 or at [susan@consumeraction.org.au](mailto:susan@consumeraction.org.au).

Yours sincerely,

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