Memorandum for the Office of the Australian Information Commissioner (OAIC)

Overview of draft CR Code

A. Purpose

1. This memorandum provides a briefing for the OAIC as to the rationale for the format and content of the draft CR Code. Commentary is not provided on every subparagraph – rather on those where we think that some explanation/ discussion is likely to be most useful.

2. This memorandum uses some abbreviations - AIR (affected information recipient), CRB (credit reporting body), CP (credit provider), CI (credit information), CRI (credit reporting information) and CEI (credit eligibility information) and CCLI (consumer credit liability information), RHI (repayment history information), SCI (serious credit infringement). These same abbreviations have been used in the Annexures to this Memorandum.

B. Format and style

3. The CR Code adopts a topic-based format, with topics addressed in the order in which tasks are likely to be performed by credit reporting system participants, that is:
   - Start-up tasks (agreements, training, credit reporting management policies)
   - CP information collection procedures
   - General requirements as to practices, procedures and systems
   - Specific types of credit information (CCLI, information requests, RHI, default information, payment information, publicly available information and court proceedings information, SCIs)
   - Transfer of CP rights to repayment
   - Permitted CRB disclosures
   - Security of information
   - CP and AIR use and disclosure of information

- Particular issues – victim of fraud protections, pre-screening
- Access, corrections and complaints
- Record keeping
- Monitoring, auditing and reporting.

4. This approach does not distinguish in separate paragraphs the obligations of CRBs, CPs and AIRs in the way that the legislation does. To do so would have resulted in much repetition, lengthened the Code and interrupted the sequential flow. Early consultation about the document format and approach was supportive of this approach. A minority of industry submissions have, however, indicated a preference for a segmented approach dealing with CRBs, CPs and AIRs separately.

5. As previously discussed with you, we have sought to put the CR Code into the context of Part IIIA of the Privacy Act 1988 by placing Code content (uncoloured rows) beneath a summary of the relevant Part IIIA requirements (blue rows). As the preamble to the Code states, it is the Code content (white rows) that are the CR Code provisions that we are applying to you to register. The legislative summary (blue rows) is merely for the information and assistance of readers.

C. Explanatory Notes

6. The draft CR Code includes a right hand column that sets out Explanatory Notes that provide guidance about the intent and ramifications of the provisions. The preamble to the Code clearly states that the Explanatory Notes are not part of the Code and are not mandatory. The inclusion of Explanatory Notes of this type is consistent with the approach of the current Credit Reporting Code of Conduct.

7. We submit that the OAIC should publish the Explanatory Notes on its website along with the CR Code. Our reasons are as follows:

   a) Whereas the Code provisions need to track the legislative language with all its complexities and its heavy dependence on detailed definitions, the Explanatory Notes have provided an opportunity to use much more accessible language and a discursive style. As a result, the Explanatory Notes greatly aid understanding of the Code. This accessibility assists consumer groups and industry alike. Publication of the Explanatory Notes on the OAIC's website ensures that all users of the Code continue to benefit from the assistance provided by the Explanatory Notes.

b) The Explanatory Notes have played a very important part in the garnering of support for Code provisions. The Joint Consumer Submission provides several examples of this. Equally industry participants have placed great emphasis on the Explanatory Notes as a pre-condition to their acceptance of a number of provisions. To publish the Code without the Explanatory Notes carries the risk of undermining the consensus that has been built.
c) Because the Explanatory Notes assist industry participants to understand the intent and ramifications of the Code, these Notes have the potential to assist in promoting consistent industry compliance with Code provisions. This should reduce complaints about non-compliance and help to make the OAIC's enforcement role easier.
d) Because the Explanatory Notes are being provided at the same time as the draft CR Code and the Notes are quite succinct, it should be possible for the OAIC to incorporate efficiently into its processes consideration of whether there is any aspect of the guidance that causes difficulty – and if so for those issues to be addressed. In any event, the preamble to the Code clearly states that the Commissioner is not bound by the guidance. As a result, we would suggest that the Explanatory Notes pose little downside risk for the OAIC.
e) On the other hand, if the Explanatory Notes are just issued as ARCA guidance for ARCA Members, they will only be accessed by a very small subset of industry participants that are bound by the Code. This would severely constrain the extent to which the guidance becomes generally accepted, with the result that the status of the guidelines will inevitably rapidly decline and compromise the aims of the guidance.

For these reasons, we would urge that the OAIC publish the CR Code with the Explanatory Notes.

D. Content

8. Paragraph 1.1: This provides that all CRBs, CPs and AIRs are bound by the CR Code. In the case of CPs, this will be the case whether or not they participate in the credit reporting system.

9. Paragraph 1.2(a): As a result of this paragraph, the CR Code picks up and uses Privacy Act definitions. For example, a CP is an entity that falls within sections 6G to 6K of the Privacy Act. Any entity, that is exempted by the Regulations for the purposes of those sections, is also thereby exempted from the CR Code.

10. Paragraph 1.2(f) and (g): These paragraphs have been included to clarify for industry what is required by an obligation to "destroy" digital records and accordingly to promote industry-consistent practices and compliant practices. These definitions are consistent with international best practice – see Information Commissioner's Office "Deleting personal data" issued 21 August 2012.

11. Paragraph 1.2(i): The definition of "month" has been inserted to give industry comfort that the monthly cycle provided for in paragraph 8 does not need to operate from the 1st day to the last day of each calendar month. Whilst not strictly necessary because the Acts Interpretation Act definition would in any event apply, we submit that this definition should be included to assist readers of the CR Code understand the RHI requirements.

12. Paragraph 2.1: A CP must enter into a written agreement with a CRB whose services the CP wishes to use. Paragraph 2.1 requires that this written agreement must oblige both parties to comply with Part IIIA and the CR Code. This enables, for example, a CRB to enforce as a matter of contract the obligation in the CR Code that the CP must upon the CRB's request, review its practices, procedures and systems to ensure that credit information that the CP discloses to the CRB is accurate, up-to-date and complete. So too a CRB could enforce as a contractual obligation the CP's obligation to provide access to a CRB auditor.

13. Paragraph 2.2: The training obligation has deliberately been limited to the main users of the credit reporting system, that is, CRBs and the entities to which CRBs can disclose information. The obligation does not extend to other types of AIRs (see paragraphs (c) to (e) of the definition in Section 6(1)).

14. Paragraph 3: This imposes an obligation on CRBs – but not CPs – to publish their credit reporting information management policy on their website. This recognises the central role of CRBs, at the hub of the credit reporting system. On the other hand, some CPs may be small businesses with minimal participation in the credit reporting system whose circumstances do not justify prescription as to the manner in which they make their policy publicly available.

15. Paragraph 4.1: This paragraph aims to ensure that individuals are provided by CPs with the most important information – without being inundated with so much information that they become overwhelmed or annoyed by the disclosures being made.

16. Paragraph 4.2:

a) Legal context

Section 21C provides a CP with two choices: it may either "notify" the individual of the notifiable matters or it may "otherwise ensure that the individual is aware of those matters". The normal meaning of "notify" is to inform or give notice. This suggests that the first alternative requires the CP to specifically inform the individual about each of the notifiable matters. The second alternative, on the other hand, requires a CP to ensure awareness of those matters. This does not require that each of the notifiable matters must be specifically disclosed. Active steps are required of the CP to "ensure" that the individual is aware of those matters – this suggests that the CP must notify the individual of the general nature of the information (that the information is about credit reporting). But the CP does not have to specifically inform the individual of each of the notifiable matters. Rather the CP can equip the individual to find out as much of the detail as they wish by making the information readily available to the individual and telling the individual how it can be accessed.

b) Code provision

Paragraph 4.2 sets out a procedure by which a CP may make an individual aware of notifiable matters. It requires the CP to have a clearly expressed statement of the notifiable matters on its website and to specifically notify the individual that the website includes information about credit reporting including the CRBs to which the CP is likely to disclose the individual's credit information and how that information can be accessed. This is a brief form of disclosure that would be particularly appropriate where information is collected from an individual over the phone. It would avoid the need for a lengthy statement to be read to the individual or the telephone call interrupted by playing a pre-recorded statement to the individual.

17. Paragraph 5.1: This provision closes a loophole in Part IIIA to the extent that it restricts the collection and disclosure of consumer credit-related information that is not within the Part IIIA definition of CI. But some exceptions are specified to deal with particular industry issues. These are discussed at length in Attachment A.

18. Paragraph 5.2: This imposes a prohibition on CPs working together to create a consistent numbering convention for account numbers. Whilst CPs have no intention of doing this, this prohibition has been included in response to privacy advocate concern about this.

19. Paragraphs 5.3 and 5.4: These establish broad obligations on CPs and CRBs to have practices, procedures and systems that ensure data integrity. This operationalises the CRBs' legislative obligation to take steps that are reasonable in the circumstances to ensure that the information it collects is accurate, up-to-date and complete and the information it discloses is accurate, up-to-date, complete and relevant. The CR Code, by imposing data integrity obligations on CPs and requiring agreements between CRBs and CPs to bind CPs to comply with the CR Code, establishes the framework for CRBs to meet their legislative obligation to have agreements with CPs that require them to ensure that disclosed credit information is accurate, up-to-date and complete.

20. Paragraphs 6.1 and 6.2 provide further precision as to what is meant by various of the elements of CCLI. This has been difficult given the huge range of consumer credit products. In particular, paragraph 6.2 has been exhaustively discussed with industry to ensure that it adequately caters for the range of possibilities – something that we believe we have now achieved.

21. Paragraphs 6.3 and 6.4 provide CPs with two possibilities when disclosing CCLI. The CP may either:

    a. disclose its name, the date of the credit and, after the credit ceases, the date of cessation; or
    b. disclose all aspects of the definition of CCLI.

    The first alternative takes account of historical practice whereby CPs have disclosed that they have a credit provider relationship with an individual and thereby position themselves to receive credit reports (see Section 20F Item 5) and to use these to assist the individual to avoid default (see Section 21H Item 5).

    The second alternative is based on an interpretation that, to the extent that CCLI encompasses more than just credit provider relationship information, it is intended to operate as one data set, the division of the CCLI concept into 7 paragraphs is a drafting construct only and the information required by the 7 paragraphs is meant to be read together.

    Paragraph 6.3 allows, however, for the possibility that information may not be available. This is particularly a transitional issue: for example, it may be that following commencement of the new Part IIIA a CP will disclose to a CRB credit that was entered into many years ago and the CP's records will not be able to establish the day that the consumer credit was entered into.

Consistent with the current Credit Reporting Code of Conduct and as a fairness measure for consumers, paragraph 6.4 imposes a 45 day timeframe for a CP to disclose when consumer credit ceases.

The Joint Consumer Submission makes no complaint about this approach to CCLI disclosure.

22. Paragraph 7: Consistent with the current Credit Reporting Code of Conduct, paragraph 7 enables a CP to make an information request where the CP does not know the amount of credit that the applicant is seeking. In practice, there are situations where individuals want a speedy response to their credit application and apply before they have determined exactly how much finance they need. To omit this provision as the Consumer Submission argues could potentially slow down the credit application process thereby inconveniencing (rather than protecting) consumers.

23. Paragraph 8.1: This defines consumer credit to be overdue if an individual has failed to make a payment and at least 5 days have elapsed since the CP's systems first classified the payment as in arrears. This definition is used in paragraph 8.2 with the result that a CP, that is able and chooses to disclose RHI, cannot disclose that the consumer credit is overdue until the 5 day grace period has elapsed. The 5 day grace period is a minimum: some CPs may choose to have a longer grace period. In discussions with consumer representatives prior to the release of the Public Consultation Draft of the CR Code, agreement was reached that 5 days would be a sufficient grace period. We were, therefore, disappointed that the Joint Consumer Submission argues for a longer period.

24. Paragraphs 8.2:

a. Legislative context

Section 6V defines RHI as information about:

- whether or not an individual has met an obligation to make a monthly payment in relation to consumer credit;
- the day on which the monthly payment is due and payable; and
- if the individual makes late payment – the day on which the individual makes payment.

Section 6V enables Regulations to make provision about whether or not an individual has met an obligation to make a monthly payment and whether or not a payment is a monthly payment. The Privacy Regulations Position Paper Summary Table suggests that a

Regulation will be made specifying that where an individual misses any or all repayments due in a month, the individual will be taken to have missed a repayment and that how a CP reports RHI will be dealt with in the CR Code.

b. Code provisions

Industry does not want to utilise the full scope of Section 6V. Rather CPs would like to disclose a narrower range of information to CRBs. Consistent with this, the draft CR Code restricts the RHI that may be disclosed by CPs to CRBs to a subset of what is permitted under Section 6V: a CP is only permitted to disclose whether or not the individual has met their payment obligations and, if the individual has not met one or more payment obligations, how overdue the most overdue payment is, with disclosure of this specified within age brackets (to be comprised of 30 day intervals).

To explain this in more detail:

- Paragraph 8 obliges a CP to disclose RHI in monthly blocks of time (referred to by industry as a tracking period). Paragraph 8 makes no requirement as to the day in the month on which each tracking period commences. So, for example, a credit contract that commences on 15 February could have a tracking of the 15th day in the month until the end of 14th day in the following month.
- A CP must disclose an individual as up-to-date for a tracking period even if there is an overdue payment at the end of that tracking period, if the grace period has not expired by the end of the tracking period.
- If an individual has more than one overdue payment on the last day of the tracking period, the CP only discloses to the CRB how overdue the most overdue payment is. To expand on the example given, if, on 14 June, there was a payment that was then 31 days overdue and a payment that was then 61 days overdue, the disclosure would be of the most overdue payment ie the payment that was 61 days overdue. Because the disclosure is in age brackets, this payment would be disclosed as being between 60 to 89 days overdue.
- If a payment is made during the tracking period, the payment is credited to the most overdue payment. Accordingly, to further expand the example given, if a payment were made in early June that equalled the amount of the payment that would otherwise have been 61 days overdue on 14 June, the CP's disclosure for the period ending

14 June would be that there was a payment that was between 30 and 59 days overdue.

- Paragraph 8 makes no requirement as to how soon after the end of a tracking period a CP must disclose RHI for that tracking period. To ensure the accuracy of the disclosure, a CP will need some days between the end of the tracking period and the day of disclosure to a CRB. So, for example, a CP may disclose on the 28th of the month the RHI for a tracking period ending on the 14th day of the month.

This approach has the advantage of being relatively simple. Consistent with the Act, it minimises the privacy intrusion to reporting that is based on 12 'snapshots' of the credit per year (ie once per month). It enables the 'snapshot' date to be chosen by reference to the payment cycle. But it does not mandate this – recognising that it is not possible to align a monthly 'snapshot' with the payment cycle for credit where, for example, payment has to be made every 14 days. The approach is consistent with the UK approach and ensures a consistent methodology in Australia so that a reader of a credit report can understand disclosure of late payments. Further, by comparing the month-to-month disclosure, it will be clearly apparent where an individual is making payments to address arrears.

CPs will not, however, disclose to CRBs the day on which the payments are due and payable. Nor will there be disclosure of the exact day on which the individual makes payment. Because disclosure will be made in age brackets, the exact number of days that the payment is overdue will not be disclosed. But for the reasons outlined above, we submit that to the extent that paragraph 8.2 does not permit disclosure of all of the information required by Section 6V, this does not result in a misleading or incomplete impression of the credit worthiness of the individuals the subject of the RHI. It is just a simpler construct that is less likely to result in disclosure errors being made.

25. Paragraph 9.1:

a. Scope

This has the effect of delaying a default listing where the individual has made a hardship request that is a regulated request, that is, the CP to which the request is made must consider and deal with that request in light of legislative or industry code requirements. The Explanatory Note to the CR Code definition of "hardship request" in paragraph 1.2(h) identifies that the National Credit

Code, the Telecommunications Consumer Protection Code and the National Energy Retail Law all impose requirements in relation to financial hardship notifications or requests. Paragraph 9.1 is aligned, therefore, with those other regulatory regimes which also include protections (suspension of credit management/ enforcement) to ensure that an individual is not disadvantaged by making a hardship request. Where, however, the CP is not subject to regulatory obligations where an individual asserts hardship, paragraph 9.1 does not apply.

b. Language

The Consumer Submission asked that the language of this provision should be consistent with the Telecommunications Consumer Protection Code. On the other hand, ARCA Members have asked that the language is made consistent with the National Credit Code. The use of the defined term "hardship request" and the definition of that term in paragraph 1.2(g) aims to accommodate the range of language used in the various regulatory requirements.

26. Paragraph 9.2: This has been included to prevent an individual from abusing paragraph 9.1 by making repeat hardship requests that do not raise new issues, but rather are made simply as a way of deferring the making of the default listing. The wording in paragraph 9.2 mirrors wording in the National Credit Code that is directed to the same purpose.

27. Paragraphs 9.3 and 9.4: These extract and clarify the default listing procedural steps that flow from Section 6Q and Section 21D. Consistent with the OAIC's guidance, we have specified that the CP must provide two notices to the individual – a demand notices as per Section 6Q and a final notice as per Section 21D – and all components of the amount listed must have been overdue for at least 60 days. Consistent with the current Credit Reporting Code of Conduct, we have specified that the notices must be sent to the individual's last known address. We set out in Attachment B further explanation of paragraphs 9.3 and 9.4.

28. Paragraph 10.1: This clarifies that a CP's obligation to disclose payment information only arises when there is nothing further owing in relation to the overdue amount that has been default listed. Paragraph 10.1 does not impose an obligation to disclose partial payments made towards a default listed amount. This would be difficult for industry and was not something that the Consumer Submission sought.

29. Paragraph 10.2:

    a. Legislative context

    Section 21E requires a CP to disclose payment information within a reasonable period of time.

    b. Code provision

    Consistent with the expectations in the Explanatory Memorandum, we have drafted the Code to introduce more precision as to the timeframe within which payment information must be disclosed – but only where the individual makes an urgency request. The Consumer Submission made no objection to this approach. Where the individual does not request urgent disclosure, CPs that are making monthly disclosure to a CRB would disclose the payment information at the time of the next month's disclosure.

30. Paragraph 11.1: This provision restricts the type of publicly available information that may be collected by CRBs. Whilst there was some desire by industry participants to be able to incorporate newspaper information or other widely available sources of information, consumer representatives were very concerned that this could incorporate information that is not reliable. Accordingly the provision limits the concept to government information. Paragraph 11.1(b) permits the information to be included in a different form, for example, the content can be extracted from a PDF document. Paragraph 11.1(b) also permits the payment of a fee to obtain the information, an approach consistent with the Privacy Act definition of "generally available publication".

31. Paragraph 12.1: Consistent with the expectations in the Explanatory Memorandum, this paragraph deals with what is needed to substantiate a serious credit infringement (SCI). These provisions are regarded by industry as setting a high test. They are strongly supported by the Consumer Submission.

32. Paragraph 12.2: This provides that a SCI, listed on the basis that the individual has been uncontactable, must be removed from the CRB's records if the individual gets into contact with the CP and pays or settles the debt with the CP. Some industry participants are uncomfortable about this and believe that this is an erosion of the principle that credit files should be a factual record of the individual's past. The majority of industry participants are, however, accepting of this provision which is strongly supported by the Consumer Submission.

33. Paragraph 13: The obligation to notify a CRB of a transfer of rights of CP aims to ensure the accuracy of the CRB's records. The importance of this is acknowledged in the Consumer Submission. Consistent with that submission, both parties have responsibility for making the disclosure and are in breach if this does not occur.

34. Paragraph 14.1: This addresses the possibility that disclosure, whether by a CRB or a CP, is inadvertently made about someone other than the person the subject of the request. As well as ensuring that the wrongly disclosed information is destroyed and relevant entities are informed of the mistake as to identity, paragraph 14.1 requires systemic issues to be addressed.

35. Paragraph 14.2: This requires a CRB to educate its CP and AIR customers about Part IIIA requirements. It is in very similar terms to paragraph 1.15 of the current Credit Reporting Code of Conduct.

36. Paragraph 15: Adding to the broad obligation in Section 20Q that a CRB must take reasonable steps to protect CRI and must impose a contractual obligation on CPs to do likewise, paragraph 15 introduces a specific obligation applicable to electronic information. The Consumer Submission encourages more detailed guidance and this is something that ARCA is happy to work with its Members to develop.

37. Paragraph 16.1:

    a. Legislative context

    Where a CP requests CRI for the purposes of assessing a consumer credit application, Section 21H Item 1 enables the CP to use the information for a broader range of uses than this ie for "internal management purposes … directly related to the provision or management of consumer credit by the CP". Concern has been expressed by consumer representatives and some industry participants that these words could encompass the CP using the information for marketing purposes. There has also been concern that the use of regulated information by AIRs is not sufficiently tightly constrained so as to prevent its use for marketing purposes.

    b. Code provision

    Paragraph 16.1 has been drafted to constrain the use of CEI or regulated information for marketing purposes; that is, assessing the likelihood that an individual may accept a marketing invitation or offer, or targeting or making a marketing invitation or offer to an individual.

Consistent with the desire of consumer representatives, the restriction imposed by paragraph 16.1 applies to CRB or CP derived information, not just CI. We have not, however, accommodated the Joint Consumer Submission recommendation that the restriction should constrain marketing pertaining to all financial products. Rather we have taken the view that Part IIIA is about credit and mortgage and trade insurance and that this is the proper scope of the paragraph 16.1 restriction.

Because the paragraph 16.1 restriction is in such broad terms, it is necessary to have a range of exceptions to enable activity that would otherwise have clearly been permitted by Part IIIA ie:

- use of pre-screening assessments as per Sections 20G and 20H;
- assessing an application for credit or mortgage or trade insurance that has been received from the individual; and
- excluding an individual from a direct marketing communication on the basis that the individual is at significant risk of defaulting.

38. Paragraph 16.2

a. Legislative context

Section 20F Item 5 enables a CRB to disclose CRI to a CP about an individual in relation to whom the CP has disclosed CCLI and the credit has not been terminated. Section 20H Item 5 enables the CP to use the CRI disclosed under Section 20F Item 5 "for the purpose of assisting the individual to avoid defaulting on his or her obligations in relation to the consumer credit".
Concern has been expressed that this route to obtain CRI is too open. For that reason, there was a desire on the part of some, although not all industry participants, to impose an additional obligation that further restricts the availability of CRI under Section 20F Item 5.

b. Code provision

Paragraph 16.2 effectively narrows the window opened by Section 20F Item 5 by adding a pre-condition to CRB disclosure for an Item 5 purpose: there must be objective indicators that the individual is at significant default risk. Two possibilities are allowed for:

- the CP can either rely on its internal data to identify individuals at significant risk of default; or
- the CP can specify parameters to the CRB that are indicative of significant risk of default - and the CRB can apply those parameters for the CP so that where the CP's indicators are tripped CRI can be provided by the CRB to the CP.

The Joint Consumer Submission supports paragraph 16.2 as closing a loophole but argues that the Code should restrict what action the CP can take after obtaining CRI on this basis. We think that this is not a proper role for the CR Code. Regulation of whether or when a CP can foreclose on secured property or offer refinance are matters that are appropriately dealt with by the National Credit Code – they are not privacy matters.

The Joint Consumer Submission also raises the issues of CRB alert services. This is discussed further in Attachment C.

39. Paragraph 16.3:

a. Legislative context

Section 21P requires a CP to provide an individual with a written notice of refusal where a credit application is refused and the refusal decision is wholly or partly based on CEI. The notice is required to state certain things and anything else required by the CR Code.

Consumer representatives have been concerned that a CP may obtain CRI but may avoid the requirements of Section 21P by taking the position that the CP did not rely at all on the CRI in making its credit refusal decision. Consumer representatives argue that if CRI was not at all important to the credit refusal decision then there would have been no need to obtain the CRI.

b. Code provision

Paragraph 16.3 addresses the consumer representative concerns by providing a 'bright line' test, that is, that a credit refusal notice must be given whenever a CP obtains CRI and then within the next 90 days refuses a credit application. The 90 day test is consistent with the National Consumer Credit Protection Act responsible lending requirements that accept that a CP assessment of suitability for a loan is valid for a 90 day period.

Paragraph 16.3 also adds to the content requirements for a credit refusal notice. The aim is to educate the consumer about credit reporting including the importance of CRI held by CRBs, the individual's right to access that information from the CRB free of charge and generic information about the sort of factors that influence a credit refusal decision. The intention is that each CP can determine for itself the factors that they consider are most important and prepare a generic letter to give to all individuals refused credit (or a number of generic letters for different types of credit). This approach does not adopt the suggestion in the Explanatory Memorandum that information

about the reasons for credit refusal should be tailored to the particular individual – this would not be possible in a systemised way and would be very expensive to implement. The Explanatory Memorandum proposed approach also does not take account of the fact that there are often successive rounds of credit worthiness inquiry and assessment, with a credit refusal occurring as soon as a lending barrier is identified – and to that extent even a tailored notice would quite often not be a fulsome statement of all the credit worthiness issues confronting the particular individual.

In Cameron ralph Navigator's pre-Public Consultation Draft discussions with them, consumer representatives told us that they supported the approach in paragraph 16.3(e).

40. Paragraph 17.1: This obliges a CRB to action an individual's request to establish a ban period and to explain to the individual the consequences. The Joint Consumer Submission proposes a more extensive role for CRBs where an individual requests the establishment of a ban period including that the CRB notifies all affected CPs and keeps track of their investigations. This recommendation has not, however, been adopted because Section 20K is very restrictive of what CRBs are permitted to do after a ban period is established: Section 20K(1) makes it clear that they are not able to use or disclose any CRI that they hold in relation to the individual.

41. Paragraph 17.2: This gives explicit effect to what must be implicit in Section 20K – that if a ban period has been established in relation to an individual and the CRB receives a request for CRI in relation to the individual, the CRB is able to explain to the requesting CP, mortgage insurer or trade insurer the existence of the ban and its effect. The Joint Consumer Submission makes no complaint about this provision.

42. Paragraph 17.3: This sets out procedures for ban period extensions.

43. Paragraph 18.1: This supports the marketing restriction in paragraph 16.1 by preventing CRBs from developing predictive tools (also referred to within industry as credit product optimisation services) for use by CPs to target their marketing. The Joint Consumer Submission, when commenting on this paragraph, refers to their comments about the marketing restriction and so presumably would like paragraph 18.1 to apply to financial products generally. We have not done so for the reasons explained earlier.

44. Paragraph 18.2:

a. Legislative context

Section 20G enables a CRB to assist a CP undertaking direct marketing by screening out individuals that do not meet the CP's eligibility requirements. The intention is that this supports the CP's responsible lending and that the marketing material does not go to those under financial stress. The concern that has been raised, however, is that Section 20G would actually allow, for example a short term lender, to target those under financial stress.

b. Code provision

Paragraph 18.2 addresses this concern by introducing a new restriction – a CP must not nominate eligibility requirements that are aimed at identifying those under financial stress.

45. Paragraphs 18.3 and 18.4 are procedural requirements applicable where an individual requests that their details are not used for the purposes of direct marketing.

46. Paragraph 19.1: This places an obligation on CRBs and CPs to obtain reasonable evidence as to a person's identity and entitlement to access information.

47. Paragraph 19.2: Consistent with the current Credit Reporting Code of Conduct, this obliges a CRB to provide free access to CRI where the individual has been refused credit by a CP.

48. Paragraph 19.3:

a. Legislative context

Section 20R(5) provides that a CRB must not charge an individual who requests access to CRI under Section 20R(1) if the individual has not made a request under that section for CRI in the previous 12 months. As noted elsewhere, it is proposed that the CR Code will give individuals a right to free access to CRI where the individual has been refused credit or where a correction request is granted, whether by a CP or a CRB. CRBs are able to charge for access in other circumstances and want to be able to promote their fee-based service. The concern by consumer representatives is that these promotional efforts will lead to individuals paying for CRI in circumstances in which they are entitled to free CRI.

b. Code provision

Paragraph 19.3 addresses consumer representatives' concern by requiring CRBs, when providing information about their fee-based service, to prominently explain individuals' entitlement to CRI free of charge. Moreover the free service must be as available and easy to identify and access as the fee-based service. These requirements address the issues raised in the Joint Consumer Submission.

49. Paragraph 19.4:

a. Code provision

This ensures that, where a CRB provides free access to CRI, comprehensive and clear information is provided. The paragraph underscores the legislative obligation to provide CRB derived information as well as credit information. Reasonable explanation and summaries are also required, something that has been contentious within industry but which is strongly supported by consumer representatives.

b. Other issues

The Joint Consumer Submission recommends that the Explanatory Notes to paragraph 19.4 should be incorporated into the Code provision. We think, however, that the current approach is sufficiently pointed and clear to ensure that individuals are provided with full and useful information.

EDR schemes have suggested that, where CRI is provided to an individual, there should be a note that correction requests and complaints may be made to the CRB and if the individual is still not satisfied the individual may take the matter to an independent EDR scheme with contact details provided. CRBs would prefer that this is not a mandated requirement but instead something that they can take on board themselves.

50. Paragraph 19.5: This imposes a similar content standard for CEI as for CRI provided to an individual on request. More flexibility is, however, provided for CPs than CRBs in relation to access arrangements and timeframes, recognising that unlike CRBs the production of this type of information is not core business.

51. Paragraph 19.6: Where an access request is made, CRBs and CPs are required under Part IIIA to provide access to information that is derived from the original data. As noted in the Explanatory Memorandum, this does not mean that they have to disclose the

methodology that led to that end point. Paragraph 19.6 reinforces this comment in the Explanatory Memorandum. The Consumer Submission expresses some discomfort about this paragraph, but only on the basis that it might be relied upon to avoid disclosure of credit scores. We think that this concern is misplaced given that paragraph 19.4 and 19.5 are not subject to paragraph 19.6. Moreover the Explanatory Notes to paragraph 19.4 expressly refer to the obligation on CRBs to disclose credit scores (CPs may not of course generate these as part of their derived data).

52. Paragraph 20.1: This provision clarifies what is expected of a CP that does not participate in the credit reporting system and yet receives a correction request about information that the CP does not hold. It makes it clear that the CP is not expected to manage the correction request through to finalisation. Further explanation and submissions in relation to this paragraph are set out in Attachment D.

53. Paragraph 20.2: This requires a CRB or CP, that is consulted about a correction request, to respond as soon as practicable. Explanatory Note 1 suggests that normally this should be within 10 business days. The Joint Consumer Submission recommends that this timeframe is entrenched in the Code. We have not done this because the timeframe will depend upon the extent of investigation that is required and circumstances will inevitably differ widely.

54. Paragraph 20.3:

a. Legislative context

Section 20T requires a CRB, that is satisfied that correction is appropriate, to take correction steps within 30 days or "such longer period as the individual has agreed to in writing". Section 21R is in similar terms for CPs. It is implicit in Sections 20T and 21R that a correction is not permitted to be made more than 30 days after a correction request is made, unless the individual has agreed in writing to this.

b. Code provision

Paragraph 20.3 requires a CRB or CP that cannot resolve a correction request within the 30 day period to:

- explain to the individual the delay, reasons for this and expected timeframe to resolve the correction request;
- seek the individual's agreement to an extension of time; and

- provide information about escalation rights to EDR and the OAIC.

Explanatory Note 2 to paragraph 20.3 draws attention to the implication that arises from the legislation that a CRB or CP, that is not satisfied that information is inaccurate, out-of-date, incomplete, irrelevant or misleading, will have to refuse a correction request if the individual is not prepared to agree to an extension of time to further investigate the matter.

The Joint Consumer Submission takes issue with paragraph 20.3 and appears to suggest that extensions of time should not be available. Instead the Submission proposes that if a CP is unable to substantiate the accuracy of the information within 30 days, the individual's correction request should be acceded to. We have not adopted this recommendation because it is at odds with the steps that the legislation explicitly provides for. Moreover it is impractical to expect that correction requests can all be investigated within 30 days. The matter may be very old, it may involve multiple parties and, if the request is made to a CP that does not hold the relevant information, some days will inevitably be used up identifying the entity that should be the primary decision maker in respect of the correction request and in the extra hand offs that will be needed in the to-ing and fro-ing between that entity, the recipient of the correction request and the relevant individual. In this regard, correction requests are like complaints – and even best practice complaint standards accept that timeframes have an aspirational aspect to them and there will be some complaints that take considerably longer than the usual timeframe. The requirement in paragraph 20.3 that an extension request must notify escalation rights ensures that an individual is made aware that a circuit breaker option exists, if the individual considers that the correction request is not being progressed as it should.

55. Paragraph 20.4:

a. Legislative context

Sections 20S and 20T provide that if a CRB is satisfied that CRI/ personal information is inaccurate, out-of-date, incomplete, irrelevant or misleading, the CRB "must take such steps (if any) as are reasonable in the circumstances to correct the information" Sections 21U and 21V impose similar obligations on CPs. Part IIIA does not, however, provide further prescription as to what is involved in correcting information.

b. Code provision

Paragraph 20.4 specifies that correction must be made of the credit information and reasonable steps must be taken to ensure that any future derived information is based on the corrected credit information. The Explanatory Note underscores the fact that historical records do not have to be corrected. The Joint Consumer Submission makes no complaint about this.

56. Paragraph 20.5: This provision enables the correction of default information in exceptional circumstances where the entry of the default information is not due to a lack of credit worthiness by the individual, but extenuating circumstances. Further explanation and submissions are set out in Attachment E.

57. Paragraph 20.6: Consistent with the Joint Consumer Submission, this requires a CRB to correct CRI by destroying default information where the statute of limitations prevents recovery of the overdue payment.

58. Paragraph 20.7: This provides a timeframe for the notification of a correction decision. It also requires a CRB or CP to provide the corrected information to the individual to check and to explain, amongst other things, that the individual has a right to obtain their CRI from a CRB free of charge to check a correction decision.

59. Paragraphs 20.8: This provides that a CRB or CP is not obliged to notify any previous information recipient about the updating of the individual's identification information. This is an additional requirement that protects an individual's privacy, consistent with the aims of Part IIIA. Attachment F provides further explanation and submissions in relation to paragraph 20.8.

60. Paragraph 20.9: Paragraph 20.9 applies where a correction is made and serves to limit the notification obligation by excluding third parties that received the pre-corrected information sufficiently long ago that they are unlikely to rely on the pre-corrected information - subject however to the qualification that notification is required if the individual nominates the third party. Attachment F also provides further explanation and submissions in relation to paragraph 20.9.

61. Paragraph 20.10:

a. Legislative context

Where an individual requests a CRB or CP to correct information of a type regulated by Part IIIA, Section 20T or Section 21V will apply. A correction request inevitably will include some expression of dissatisfaction and, given that "complaint" is generally understood to

mean an expression of dissatisfaction, there could be confusion as to whether the complaints handling requirements in Division 5 also apply.

b. Code provision

Paragraph 20.10 addresses the potential overlap between the correction and complaints provisions by providing that where Section 20T or Section 20V applies, the complaints handling requirements in Division 5 do not also apply.

62. Paragraph 21.1: This recognises that many CPs are already subject to regulatory requirements in relation to complaints handling. In the interests of avoiding conflicting obligations, those regulatory requirements are simply adopted. For other CPs and the CRBs, paragraph 21.1 provides that they must comply with ISO 100002-2006. This standard is well accepted as establishing best practice. It is referenced in ASIC's Regulatory Guide 165 and so is the basis for the obligations applicable to financial services/ consumer credit CPs. The Joint Consumer Submission makes no complaint about paragraph 21.1. Further explanation and submissions in relation to paragraph 21.1 are set out in Attachment G.

63. Paragraph 21.2: This requires that a CRB must be a recognised EDR scheme member. As noted by the Joint Consumer Submission, CRBs play a pivotal role in the credit reporting system and EDR scheme membership will assist individuals to obtain redress where a CRB has failed to meet its obligations.

64. Paragraph 21.3: This addresses the timeframe where a CRB or CP is consulted about a complaint. The issues here are as for paragraph 20.2 discussed earlier.

65. Paragraph 21.4:

a. Legislative context

Section 23B(4) provides that a CRB or CP must make a decision about a complaint within the 30 day timeframe required by Section 23B(5)(a) or such longer period as the individual has agreed to in writing pursuant to Section 23B(5)(b).

b. Code provision

Paragraph 21.4 sets out extension procedures where 30 days is insufficient time for a CRB or CP to decide their position about a complaint. Explanation Note 2 to paragraph 21.4 is in similar terms

to Explanation 2 to paragraph 20.3 and the issues discussed earlier apply equally here.

66. Paragraph 21.5 and 21.6:

a. Legislative context

Section 23C(2) imposes notification requirements on a CRB that receives a complaint that relates to its corrections obligations. The CRB must notify all CPs that have previously been provided with the CRI to which the complaint relates. Section 23C(3) imposes mirror notification requirements on CPs. Section 23C(6) provides, however, that notification is not required where this is impracticable.

b. Code provisions

Paragraphs 21.5 and 21.6 operate to limit the notification obligation in the interests of protecting the individual's privacy. The issues discussed in relation to paragraph 20.9 are equally applicable here - see Attachment F.

67. Paragraphs 22: This imposes a broad obligation to maintain adequate records to evidence compliance with Part IIIA and the CR Code. Specific requirements are also set out in paragraph 22.2. Consistent with the current Credit Reporting Code of Conduct, this includes obligations to retain detailed notes where information is disclosed under Part IIIA. The Explanatory Notes refer to the possibility of system records and provide other guidance.

68. Paragraphs 23.1 to 23.9:

a. Legislative context

Sections 20N(3)(b) and 20Q(2)(b) oblige a CRB to ensure that regular audits are conducted by an independent person to determine whether agreements with CPs are being complied with. As per Gilbert & Tobin's advice to ARCA, provided to the OAIC on 1 February 2013, Sections 20N and 20Q do not impose an obligation to regularly audit each CP – rather there must be regular audits of CPs collectively.

Section 20N(3)(a) provides that a CRB/ CP agreement must require the CP to ensure that credit information that they disclose to the CRB is accurate, up-to-date and complete. Section 20Q(2)(a) requires that a CRB/ CP agreement must require the CP to protect from misuse, interference, loss, unauthorised access, modification or disclosure CRI that is disclosed to them. It is clear from this that the audits must be

directed to determine compliance with those obligations (and that audits do not need to validate compliance with other obligations set out in the agreement).

Sections 20N(3)(c) and 20Q(2)(c) obliges CRBs to identify and deal with suspected breaches of their agreements with CPs. Suspected breaches may be identified through audits, in the course of dealing with correction requests and complaints, or as a result of day-to-day disclosure of credit information by CPs to CRBs.

b. Code provisions

Para 23.1 adds to the integrity framework by requiring a CRB to establish a risk-based monitoring program of its CP customers. The aim of the program is to monitor compliance with the obligations referred to in Sections 20N(3)(a) and 20Q(2)(a) and corrections obligations (the inclusion of corrections obligations was requested by consumer representatives during pre-Public Consultation discussions). Paragraph 23.2 sets out the components of the risk-based monitoring program – the concept is that CRBs will be able to undertake sophisticated monitoring using the range of information available to them to identify and address compliance issues. Moreover by locating the auditing program within a risk-based monitoring program, paragraph 23.2(d) enables CRBs to target audits effectively and to prioritise the CPs and the issues that give rise to the greatest risk of non-compliance. Gilbert & Tobin's advice is that this approach is not contrary to or inconsistent with Part IIIA.

Paragraphs 23.3 and 23.4 stipulate additional requirements as to who is eligible to conduct an audit. Paragraph 23.3 ensures that auditors have actual and perceived independence. If the auditor is an employee of a CRB, the CRB's organisational structure and supervision arrangements must allow for functional independence. For example, as per paragraph 23.5(a), an internal audit team or compliance team may be structured in a way that confers functional independence. Paragraph 23.4 stipulates expertise requirements for auditors. Paragraphs 23.7 and 23.8 oblige a CP to provide an auditor with reasonable access to their records and to take reasonable steps to rectify issues identified during audits. Paragraph 23.9 obliges CRBs to take action that is reasonable in the circumstances where a CP fails to comply with the obligations in their contracts with CPs (which must include an obligation to comply with Part IIIA and the CR Code). What is reasonable will depend on a variety of factors including whether the non-compliance is once-off or repeated, the significance of the detriment to the individuals involved, and the response of the CP when the CRB raises the issue with it.

These paragraphs have been extensively negotiated with industry with the aim of ensuring that oversight arrangements are robust and inspire stakeholder confidence. They provide sufficient flexibility to accommodate the huge diversity amongst the more than 15,000 CPs that utilise the credit reporting system and yet they provide enough certainty to appraise CP anxiety as to what will be involved, that auditing will deliver value for money by focusing efforts appropriately and that CRB enforcement action will be substantively and procedurally fair. Whilst most in industry accept these provisions, there are industry participants who continue to express concern about the possibility of unreasonable audit demands or disproportionate enforcement action. On the other hand, the Joint Consumer Submission, whilst supportive of the risk based approach, would like auditing levels to be prescribed in the CR Code and raise the possibility of setting an annual budget for monitoring or auditing. We have not adopted this approach. It would be extremely difficult to define a budget – what it should be for each CRB given their different circumstances and what is permitted to be included in the calculation of cost. Moreover a budget does not guarantee the robustness of the audit oversight. Instead we have adhered to a broad principles-based approach, with reporting to the OAIC (see CR Code paragraph 24.2) so that the OAIC is in a position to identify if a CRB is failing to meet its oversight and enforcement obligations. Separate from the Code, CRBs are working with ARCA to develop more detailed industry guidance and discussing, for example, the possibility of an audit of a CP being undertaken simultaneously by all CRBs with which the CP deals.

69. Paragraph 23.10: This constitutes a commitment by CRBs, CPs and affected information recipients to endeavour to resolve disputes in a fair and efficient way. There were discussions within industry as to whether the Code should prescribe a method of dispute resolution, for example, expert arbitration. But the preference was to allow flexibility for the method of dispute resolution most appropriate to the particular case.

70. Paragraph 23.11: This obliges CRBs to publish an annual report on its website, with key statistical information about corrections, complaints and SCIs and an overview of the CRB's monitoring and auditing activity. This is important transparency measure that has been included at the request of consumer representatives.

71. Paragraph 24.1: This gives regulator the ability to vary CR Code time limits – as per the current Credit Reporting Code of Conduct.

72. Paragraph 24.2: This obliges a CRB to provide regulator with comprehensive annual reports that covers correction requests, complaints, material breaches, systemic issues, statistical information and a summary of monitoring and audit activity. The reporting requirements have been framed to incorporate the requirements in the draft OAIC's Guidelines for developing codes.

73. Paragraph 24.3: This obliges a CRB to commission every 3 years an independent review to assess its compliance with Part IIIA and the CR Code. This ensures that CRBs, like CPs, are subject to independent scrutiny.