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By email: CRCode@arca.asn.au

Dear Damian

PRIVACY: CREDIT REPORTING – DRAFT CR CODE (V3.1)

The Australian Finance Conference (AFC) appreciates the opportunity to provide feedback on the Credit Reporting Code V3.1 (CR Code) and covering paper prepared by the Code Drafters on behalf of ARCA as the organisation approved by the AIC / Privacy Commissioner (the Commissioner) to develop the Credit Reporting Code (CR Code) to be registered by the Commissioner. We acknowledge and commend the efforts of ARCA, its Members, the Code Drafters and all involved in its production. We have also appreciated the opportunity for engaging in its development through our representation on the Code Industry Council (CIC) established by ARCA to facilitate industry participation in the process. The public consultation on the CR Code has provided a further avenue to raise matters of concern for our Members with a view to having them addressed through this process.

Background

The AFC membership includes a range of credit providers, vendor financiers, receivables managers and the three principal Australian consumer credit reporting agencies. AFC Members' operations cover the full range of lending financial services in both the consumer and commercial markets. The privacy reforms, particularly in relation to credit reporting, are also of interest to our associated bodies which predominantly operate in particular sectors of the commercial finance market; the Australian Equipment Lessors Association (AELA), Debtor and Invoice Financing Association (DIFA), Australian Fleet Leasing Association (AFLA) and Insurance Premium Financiers and the AFC-affiliated Mortgage Bridging Finance Association (MBFA).

The handling of personal information of customers and others is a critical component of our Members' business. Consequently, embedded within their organisations is a culture of privacy compliance. This reflects management of regulatory risk (eg from compliance obligations arising under the Privacy Act, National Consumer Credit Protection Laws, Voluntary Codes and common law "breach of confidentiality" obligations). For, AFC Members operating in the consumer credit market, potential loss of their Australian Credit Licence for non-compliance with general conduct obligations (which includes non-compliance with the credit reporting provisions of the privacy legislation) with the resultant inability to continue in the consumer credit market, acts as a significant incentive to ensure compliance.

More importantly, however, the compliance culture reflects acknowledgment by our Members that the personal information of both external stakeholders (eg customers; shareholders) and internal stakeholders (eg employees) is a critical asset to their businesses and consequently should be afforded the highest protection. Management of reputational risk equally drives compliance in this regard.

Credit Reporting Reforms & CR Code

Consumer demand drives the strong consumer credit market in Australia. Credit products have been made available to meet that customer demand. The customer is best placed to determine whether they have the capacity and commitment to repay credit. However, the credit provider has a commercial and prudential imperative to ensure that the customer's view of credit worthiness is realistic. Credit reporting is as essential tool in that assessment.

AFC is committed to achieving the shared goal of all involved with the credit reporting reforms. Continuing a credit reporting system that currently operates well and has done for several decades. The addition of new data elements provides the opportunity for revision and enhancement of current processes to enable better lending decisions designed around reciprocal information-sharing that facilitates participation in a manner that promotes the commercial imperatives of data integrity while minimising risk and cost.

Approach – What is the Purpose of the CR Code?

We note the background provided in the Covering Paper, that the draft CR Code has been *“written with the aim of providing the OAIC with a Code that represents a ‘balanced’ approach – meeting the reasonable expectations of industry, of consumers and of the regulator – rather than an industry preferred position”*. We acknowledge the value of ensuring the position of all is appropriately taken into account in the CR Code's development, but that Parliament's intention including in relation to the purpose of the CR Code remains paramount to any decision of substantive matter.

Credit reporting involves information exchanges largely between three categories of participants: customers, credit providers and credit reporting bodies. The process of information exchange is not complex with data flowing into and out of the system. What is unique is that the entity that operates as the hub for the information flows, the credit reporting body, does not generally have direct interface with the customer but relies on information flows from entities that make credit available to those customers.

Both customers and industry have a significant interest in ensuring the information is handled appropriately through the process. While driven by industry for sound, commercial reasons, customers of credit equally benefit through a credit reporting system that facilitates timely and well-informed lending decisions to meet customer needs. Like other stakeholders, the AFC shares the objective of achieving a system that *“appropriately balances the protection of the privacy of the individual's personal information with the interests of industry participants in carrying out their functions or activities; to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected”* including through *“responsible and transparent information-handling practices”* supported by a *“complaints process to address allegations of privacy interferences”*. These objectives are not merely those of the AFC, or industry, but reflect the policy positions of the Parliament as representatives of all facets of the Australian electorate; and have been included (in s. 2A Objects of this Act) together with the other amendments to reform and modernise the Privacy Act.

A central tenet of these objects is balance. Pivotal to any assessment of balance is the context or circumstances in which it is made. The amendments contained in the Privacy Amendment (Enhancing Privacy Protection) Act 2012 reflect a balance that has been arrived at through a democratic process underpinned by consultation that has seen all stakeholders,

often with competing interests, have a significant number of opportunities to represent the view of their particular constituencies. We have no doubt the consumer and / or privacy advocates would not agree that their views had been appropriately considered and equally industry might question a “balanced” outcome that, for example, inhibits the use of de-identified data (eg in section 20M). Nevertheless, the amendments are the outcome of that consultation. This context remains pertinent to the development of the rest of the framework that needs to be finalised to bring the amendments to fruition, including the making of regulations and registration of the CR Code.

Another relevant consideration in the process is the Government’s expectations in relation to the CR Code set out in their response to the ALRC’s recommendation 54.9 for a credit reporting code dealing with a range of operational matters to support the reformed Privacy Act and related regulations. In short, the Government indicated support for *“a clear and transparent code of practice, agreed to across the credit reporting industry, about how the credit reporting provisions and related provisions will operate in practice to ensure consistency across the industry in relation to matters such as access to information, data accuracy and complaint handling is necessary. The Code is to be developed by industry subject to satisfactory consultation requirements between the industry, advocates and the Commissioner as regulator. The Government “acknowledges that the credit reporting industry will be the main driver behind the Code” and by statutorily requiring the Commissioner to approve any code that is developed will “ensure that the Code appropriately balances the needs of industry to have efficient and effective credit reporting with the privacy needs of individuals”.*

It was also reflected in the initial stakeholder consultation endorsed by the CIC and undertaken at the behest of ARCA by the Independent Reviewer selected following an approval process in which the Government (including both the department and regulator) and advocates were included. A report produced on conclusion of that stakeholder consultation contained a number of recommendations for the CIC to consider in the development of the CR Code. These appear to remain relevant. Of note, the Reviewer recommended that: *“The draft Code should attempt to be a short, simple document, with a strong focus on the practical implementation of the objectives of the privacy legislation”.* This recommendation took into account the views of industry and advocates alike.

And most importantly, Parliament gave a clear indication that it saw the role of the CR Code as an instrument to provide process and practical or operational detail in the Explanatory Memorandum (at page 208):

“Clause 26N – What is CR Code

Subclause (2) states the matters that the CR code must deal with. The first requirement is that the CR code must set out how one or more of the provisions of Part IIIA are to be applied or complied with. This requirement addresses the fundamental purpose of the CR code, which is to provide detailed information on the application of, or compliance with, the credit reporting provisions, including operational and practical matters.”

This was noted in other areas also (eg see comments in relation to Clause 20G (pg 139); Clause 20K (page 140); Clause 21P (page 175) and a range of definitional matters covered in s. 6 and related provisions). This detail is essential to industry. Parliament also acknowledged the need for the Code to cover matters of particular relevance to customers (eg access, correction and complaint-handling). However, these also are process matters equally relevant to industry. And for complaint handling, industry equally has an interest in guidance on a process where industry players only may be involved (eg in cases of complaints between credit providers, or between a credit provider and credit reporting body in relation to the s. 20N Credit Information Quality Agreement).

Scope & Risk for Breach

We also now have a clear idea of the new broad range of enforcement powers and significant penalties available to the Commissioner in the event a regulated entity's information handling falls below the requirements of the Amended Act. For the new Part IIIA credit reporting provisions, this includes risk of breach in compliance with the registered CR Code. This is heightened by the increase in the value of a penalty unit for calculating the maximum amount of a fine that can be imposed under a Commonwealth law, as either a civil or criminal penalty, for offences committed after 28 December 2012. The per unit increase now sees the risk for breach of a civil offence provision under the Amended Act significantly increased even before its commencement. For example, after the 12 March 2014 commencement, disclosure of credit information by a credit provider other than in the circumstances permitted under s. 21D, opens the provider to a penalty of 2,000 units under the Amended Privacy Act. If the provider is a corporate entity the penalty is five times that amount. As a consequence, the change in the value of penalty units, would see a corporate credit provider if found to have breached a civil penalty provision potentially face a pecuniary penalty increased from \$1.1m to \$1.7m (an increase of 55%).

The increased risk for breach has also brought into stark relief the need for AFC Members to ensure the operational components of the legislative framework set down in the registered CR Code can be complied with. An operational framework that aligns with the scope of the law as amended is integral to this process. As a general comment, we note our Members remain of the view that the current draft CR Code appears to unnecessarily cover scope not contained within the amended law. More detail is provided in the attachment with a view to assisting revision by the Code Drafters.

Structure

The drafting style that has been adopted (albeit with apparent stakeholder support) appears at odds with both the amended provisions of Part IIIA and the current provisions (including the Code of Conduct) which, where relevant, differentiate application dependent on the class or category of regulated entity (eg CRB, CP or affected information recipients) and then for issues of relevance across category (eg complaint handling, staff training) deal with these assuming an application for all regulated entities. This approach has assisted understanding by allowing participants to easily determine the particular compliance obligations relevant to them. We suggest that an individual would also find this approach easier to understand and clearly know who should be doing what and when, and who and how to contact in the event that information is mishandled potentially interfering with their privacy.

It is with this background we submit that the CR Code was intended to be an operational Code, developed by industry given it is best placed to determine how legislative obligations can be effectively implemented. The position of the customer remains central to industry's consideration, but where the Government or Parliament has given clear indication of where a policy position should sit following consideration of all participants, the Code should align with that negotiated outcome, not look to re-open debate on policy positions. For this reason our comments are intended to focus on areas where industry is endeavouring to ensure value in the credit reporting system to the benefit of all participants. Explanation to support particular positions is provided.

We acknowledge that this has resulted in a lengthy outcome. Our intention is to add weight to support an industry-position, as required, to enable the Code Drafters, the Commissioner and other stakeholders to understand the commercial or operational drivers behind the recommended amendments. As industry will be required to operate within the CR Code requirements on a daily basis and face significant risk for getting it wrong it is imperative that industry has a clear understanding and ability to operate within the Code's framework.

We would be happy to discuss our comments or provide additional feedback as required.
Please feel to contact me or, Helen Gordon, Corporate Lawyer.

Kind regards.

Yours truly,

Ron Hardaker
Executive Director



AFC COMMENTS: CREDIT REPORTING DRAFT CODE V 3.1

AFC feedback consists of two components. General feedback is contained in the covering letter. Feedback on specific matters is set out below. We ask that the Code Drafters bear in mind our general comments when considering the following:

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
APPROACH / SCOPE OF CODE		<p>For reasons given in our covering letter, we understand that CR Code should have the objective of giving practical detail to facilitate industry operationalising the new Part IIIA provisions. We acknowledge that how this is designed needs to take into account consumer interests. Importantly the relevant consumer interest in the context of this reform is the individual's right to privacy in the handling of their credit information. An outcome that appropriately balances that right with the interests of industry participants in carrying out their functions or activities to facilitate an efficient credit reporting system while ensuring that the privacy of individuals is respected is central to development of the CR Code.</p> <p>The nature of the transaction and participants involved will mean that other balances (eg commercial imperatives vs. consumer protection like financial hardship rights), will be relevant to considerations within components of the CR Code. However, the CR Code should not be used as a de facto means of addressing perceived gaps in other consumer protection reform objectives (eg whether financial hardship processes are working or not). By this we are not saying that concerns in relation to these matters are not important or something that industry would not be interested in working to address. Rather that this is not the appropriate mechanism for them to be resolved.</p> <p>In relation to the matters noted below with a recommendation for omission, we ask that these be read on the basis that the omission is promoted as the additional requirements are either contrary to or inconsistent with Part IIIA and therefore beyond what might be anticipated under s. 26N(3). We suggest that this is not appropriate either in terms of the risk flowing from breach. Industry may wish to structure internal compliance to set a default compliance position beyond the legislative requirements, but this should only be left to individual players to determine or, if attempted in the Code, should be confined to areas that will have minimal operational impact. Industry is concerned about promising something that it cannot meet, especially when a breach of the Code will be a breach of the law.</p>
GUIDANCE NOTES		<p>We note the significant place that the current guidance (similar to that which appears in the Current Code – eg Part 2 Credit Providers Agreements with Individuals – Notes 33 – 36) has in the compliance programmes of our Members and others and the need for timely and clear understanding and guidance of what is to change to assist the implementation projects of our Members and others with the reformed provisions. In fact, accepting that it is not part of the legal obligations, from an implementation perspective many may consider the need for revision and release of the guidance provided in the current Code to reflect the new requirements to be the most critical aspect.</p>

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		We also suggest that (as has been done in the Explanatory Memorandum) including pictorial or diagrammatical descriptions, where appropriate, would be useful.
STRUCTURE / DEFINITIONS		As noted in our general comments, in line with the information flow pattern that has been adopted in the current framework and continued into the new Part IIIA which structures compliance from the position of the category of regulated entity, we suggest some consideration be given to revising the current structure. This would also allow relevant data sets for relevant entities (eg credit eligibility information for CPs; credit reporting information for CRBs; regulated information for Affected Information Recipients [AIRs]) to be used to minimise the need for a further Code definition (eg credit reporting data) to be included and reduce complexities when obligations for different categories of regulated entities are bundled together (eg CPs and AIRs) and the data being handled aggregates credit eligibility information and credit reporting information.
1. INTRODUCTION		<p>Suggest following revisions:</p> <p>The Privacy Act 1988 (Privacy Act) sets out in Part IIIA (Part IIIA) requirements applicable to credit reporting. Among other things, Part IIIA restricts the types of credit information that may be collected and reported disclosed to Credit Reporting Bodies (CRBs), the circumstances in which that information may be made available disclosed by a CRB to Credit Providers (CPs) and affected information recipients and the uses they may make their handling of that disclosed information. The Act contemplates that a registered CR Code will further define CRBs', CPs', and affected information recipients' obligations. CR Code obligations are binding - a breach of the CR Code is a breach of the Privacy Act. The CR Code is approved and overseen registered and enforced by the Information Commissioner.</p>
1.2 Definitions		
1.2 (c) Acquirer definition		<p>Acquirer is defined for relevant purposes in s. 6K of the Act. As a consequence, the same drafting style should be maintained which sees the term highlighted to alert readers to a definition (eg like collects) but does not otherwise seek to define it. Alternatively, if a definition is to be retained, it should refer readers to the s. 6K definition rather than seek to paraphrase it.</p> <p>We are also concerned that in the legislation the term acquirer is used for non-securitisation purposes (eg for credit providers that are debt purchasers) but the draft CR Code (eg in Clause 1.2(j)) transfer event definition includes securitisation. The operative provisions (ie Clause 14) are therefore impacted by an outcome which sees securitisation entities (as defined in s. 6J) apparently bundled within provisions relating to transfer events and acquirers.</p> <p><u>AFC Recommends:</u> Should the Australian Securitisation Forum not have engaged in consultation on the draft CR Code we suggest</p>

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		it appropriate to ensure those with specific knowledge of this specialist market have the opportunity to review and comment.
1.2 (e) Credit reporting data definition		<p>Typo: Defined terms should be bolded.</p> <p>As noted earlier – we submit a drafting style that mirrors the legislative approach distinguishing between category of regulated entity would overcome the need for this and allow the particular defined concept of regulated data for the particular regulated entity to be able to be used.</p>
1.2 (g) CRB destruction		<p>Typo: We note the reference to paragraph 5.4 needs revision. We assume it should be paragraph 5.3.</p> <p>“Generating any CRB derived information” – in line with the structure of the Act we suggest that this phrase should be should be worded to “cease deriving information from credit information or credit reporting information that has been omitted”.</p> <p><u>AFC Recommends:</u></p> <p>The obligation to destroy timeframes in Clause 1.2(g) should be aligned with those in the relevant provisions. For example s. 20W(2) allows a CRB up to a month after the retention period ends to destroy (or de-identify) the information. This timeframe also changes if a request for correction or a dispute is pending in relation to the information.</p>
1.2(h) CP destruction		<p>Under Part IIIA “retention period” is a defined concept only for the purposes of CRBs handling.</p> <p>The obligation on a CP to destroy credit eligibility information is set down in s. 21S but there is no specific time frame for destruction dictated. The obligation on a CP to destroy (or the rule on retention) turns on a determination by a CP that certain conditions have been met, namely, that the information is no longer needed for any purpose for which the information may be used or disclosed under Part IIIA Division 3 nor is the information required by or under an Australian law / court or tribunal order to be retained.</p> <p>This is reflected in the Explanatory Memorandum (at page 188HG) “....., CRBs have specific obligations in relation to the retention and destruction of credit reporting information. CPs do not have the same specific obligations and retention and destruction of CEI is dealt with by general rule, based on APP 11, contained in [Clause 21S] and supported by a civil penalty offence”. And further:</p> <p>“ Subclause (2) deals with retention and destruction, or de-identification of CEI. Subclause (2) applies where a CP holds CEI, the CP no longer needs the information for any purpose for which the information may be used or disclosed by the provider under this Division and the provider is not required by or under an Australian law, or a court or tribunal order, to retain the information. Where these conditions are met, the provider must take such steps as are reasonable in the circumstances to destroy the CEI or to ensure that it is de-identified.”</p>

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		<p><u>AFC Recommends:</u> The following words should be omitted from Clause 1.2(h): "...which can be retained for audit purposes until the retention period for the information ends."</p> <p>Generating any CP derived information – we note the comments in the above and suggest for the same reasons the drafting in this paragraph also needs revision in relation to CP derived information.</p>
1.2(i) Section 6Q Notice		<p>Typo: Query whether "section 6Q notice" should be bold. We also note that the reference to s. 6Q(b) appears incorrect. We assume it should be s. 6Q(1)(b).</p> <p>However, we also note that s. 6Q deals with two different situations where a CP is required to give an individual notice to enable the CP to disclose under s. 21D / the CRB to collect (under s. 20D; s. 20C(3)) default information about an individual.</p> <p>Default information covers either:</p> <ul style="list-style-type: none"> <input type="checkbox"/> overdue payment information relating to a credit contract where the individual is a borrower (s. 6Q(1)); or <input type="checkbox"/> overdue payment information relating to a guarantee given against any default by the borrower in repaying all or any of the debt deferred under a consumer credit contract and the individual is a guarantor (s. 6Q(2)). <p>The concepts dealt with in Clause 9.3 appear equally relevant to guarantor defaults (s. 6Q(2)) as they do to borrower defaults (s. 6Q(1)). We therefore suggest that the definition of a Section 6Q Notice should capture both the notice dealt with under s. 6Q(1) and that in s. 6Q(2).</p> <p><u>AFC Recommends:</u> That the definition of a Section 6Q be revised to ensure it can encompass a notice for default information for individuals that are dealt with either because they are borrowers (s. 6Q(1) notice) or because they are guarantors (s. 6Q(2) notice).</p> <p>We also suggest omission of words which attempt to paraphrase the notice requirements</p>
1.2(j) Transfer Event Definition		<p>s. 6K covers both consumer and commercial credit. A commercial credit provider is able to access credit reporting information for commercial credit purposes which includes overdue collections. A commercial credit provider is able to assign repayment rights to an acquirer. Following assignment, the acquirer will be taken to be the original credit provider for the commercial credit purpose of requesting credit reporting information for use in collecting overdues in relation to that commercial credit.</p>

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		<p>However, while an acquirer in s. 6K can cover both consumer and commercial credit, we understand that Clause 14 is designed to apply only to transfers (eg by way of assignment, etc) of consumer credit and the proposed definition in Clause 1.2(j) has been defined to include only consumer credit as a consequence. We submit that in line with this intention – the reference in Clause 14.2 to credit should be qualified with “consumer” to ensure aligned application between the definition and operative provision.</p> <p>We query whether s. 6K acquirer definition is a concept relevant to securitisation under s. 6J? If not – transfer event should not cover securitisation?</p>
2. Credit Reporting System Arrangements		
2.1 Subscriber Agreement		<p>We understand that the driver identified for inclusion of Clause 2.1 was legal efficacy. However, in the context of Part IIIA, including the prescribed terms to be included by a CRB in agreements with a CP and, on a general compliance level the severe consequences both face for breaches of Part IIIA, it remains unclear to the AFC why this Clause has been included.</p> <p>s. 20N(3)(a) and s. 20Q(2) prescribe terms that are to be included in an agreement between the CRB and a CP. The obligations are imposed on the CP.</p> <p>Conceptually, the CRB has an obligation to ensure the integrity or quality of data about individuals in the system but it is largely a conduit for that information as it does not collect directly from the individual but via third parties (eg CPs). Given the CP rather than the CRB is best placed to manage the quality of the data about individuals being input into the system (ie credit information) and the risk to the individuals if the data lacks quality, Parliament has provided the CRB with a statutorily based means of ensuring its data quality obligations at point of entry (and therefore going forward) can be met by contractually obliging the CP inputting the data (under s. 21D) to ensure the data meets the requisite data quality standard; namely is accurate, up-to-date and complete. This is coupled with a statutory obligation on the CRB to regularly monitor the CP’s compliance with that contractual obligation and take action in the event of suspected breach.</p> <p>For the same reason, contractual terms governing the security of the data disclosed by the CRB to the CPs (ie the data outputs) are also prescribed. This facilitates appropriate handling of that data by the CP once the CRB no longer physically has control of it. A monitoring obligation of the CP’s compliance with the contractual obligation to secure the information is also imposed on the CRB, as is an obligation to take action in the event of suspected breach.</p> <p>The contractual terms that have been statutorily prescribed do not cover CP (or CRB) compliance with Part IIIA more generally. The prescribed terms in relation to quality of inputted credit information and security of</p>

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		<p>outputted credit reporting information can be unilaterally imposed on the CP as part of a broader subscriber agreement. But, Part IIIA does not otherwise intrude on the terms of the commercial contractual subscription arrangements between the CRB and the CP which are, and should in our view, appropriately remain open to negotiation between the parties.</p> <p><u>AFC recommends:</u> Clause 2.1 be omitted.</p> <p>The statutory outcomes for CRBs and CPs for breaching the Part IIIA information handling requirements are significant. No higher standard of compliance by CRBs or CPs is likely to be achieved through a provision in the Code obliging the parties to bind each other to the prescribed standard.</p> <p>The monitoring obligations imposed on the CRB are limited to compliance by a CP with prescribed contractual terms relating to quality of inputted credit information and security of outputted credit reporting information when handled by the CP. The statutory obligation imposed on a CRB is confined to identification and taking action in relation to suspected breaches of the CP's agreement only in relation to the s. 20N(3)(a) + s. 20Q(2) matters. A CRB has no statutory obligation to impose via contract an obligation on a CP to comply with the other requirements of Part IIIA. A CP has no statutory obligation to impose via contract an obligation on a CRB to comply with Part IIIA. We also note that these comments are relevant and should be taken into account in relation to Clause 24.</p>
2.2 CCLI / Default Information – Subscriber Agreements – Termination Inhibitors		<p>We are concerned that Clause 2.2 is unnecessary on the basis that it covers obligations already dealt with adequately elsewhere.</p> <p>For example:</p> <ul style="list-style-type: none"> □ For default information: quite aside from anything in the subscriber agreement (including the s. 20N(3)(c) component), a CP (under s. 21E) is statutorily obliged to disclose payment information if they have disclosed credit information which is default information (similar to the current Part IIIA s. 18F(3)(4) obligations); □ For CCLI information: As noted later, the AFC supports the inclusion of Clause 6.4 – to cover off the obligation to notify closing of account if a CP has notified account open (similar to current Part IIA s. 18F(5) + Code 2.3). We understand the effect will be that there will be an ongoing legal obligation under the CR Code that would also operate again separately from any subscriber agreement. <p>We are also concerned that the Clause may raise competition issues because it could prevent CPs from making commercial decisions as to whether to continue or terminate agreements to purchase data from a particular CRB</p>

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		<p><u>AFC Recommends:</u></p> <p>Clause 2.2 as currently drafted should be omitted on the basis that it is unnecessary given:</p> <ul style="list-style-type: none"> □ the requirements on a CP under s. 21E to disclose payment information if it has disclosed default information; and □ the proposed Clause 6.4 which would oblige a CP to disclose cessation or termination of a consumer credit contract if it had disclosed CCLI to a CRB which would include the day the consumer credit contract was entered into. <p>These regulatory obligations would deal with the two data sets within default information and CCLI which could potentially adversely impact an individual's credit worthiness going forward if they changed and information of the change were not disclosed to / collected by the CRB for on-disclosure to future enquirers. The obligations are ongoing and operate regardless of any agreement with the CRB – though we note the s. 20N(3)(a) obligation on a CRB to ensure by agreement with the CP that credit information that the CP discloses is accurate, up-to-date and complete. We submit that the termination arrangements could adequately deal with this requirement.</p> <p>We also note, in line with the Explanatory Memorandum (at page 145), 20N Quality of credit reporting information:</p> <p><i>“The requirement for information to be ‘complete’ does not require credit reporting bodies to enter into agreements with credit providers to ensure that all available credit information about the individual is disclosed, or for credit providers to disclose all available credit information to the body”.</i></p> <p>To minimise concerns about completeness / currency / correctness of data once the CP ends the agreement, the CRB should be able to note the customer's record to alert future inquirers that the CP is no longer providing this data (similar to the approach in Clause 8.2 for RHI). We query whether a provision in the CR Code to enable the CRB to be able to include and disclose this note to a CP is required (and if so suggest Clause 2.2 be re-drafted to achieve this) or whether obligations on a CRB not to mislead etc in s. 20S adequately support this process or whether the note would not be regarded as credit information or credit reporting information and therefore not subject to Part IIIA (similar to other notes required under Part IIIA and the position reflected of their characterisation in the Explanatory Memorandum (eg for s. 20E(5) at page 136 for s. 20G(7) at page 140).</p> <p>This outcome would also minimise the anti-competitive concerns that potentially arise from the Clause as drafted.</p>
2.3 Training		<p>AFC questions whether Clause 2.3 is necessary given the obligations for regulated entities (eg for CRBs s. 20B(2); CPs s. 21B(2) + s.99A; Affected Information Recipients s. 22A(2)) to take reasonable steps to implement practices, procedures and systems relating to their compliance with Part IIIA. For example, as noted in the Explanatory Memorandum (pg 131): <i>“It is anticipated that credit reporting bodies will demonstrate</i></p>

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		<p><i>their compliance with this obligation by, for example, developing and maintaining training programs, staff manuals, standard procedures and any other relevant documents that demonstrate awareness of, and compliance with, their obligations under the Division and the registered CR code”.</i></p> <p>Should the Clause be retained, we note the following:</p> <p>Form: We suggest that the references to “deal with” should be replaced with the Act’s concept of “handling” credit reporting data. We also suggest consistency between references to what regulated entities are required to comply with. For example, Part IIIA and the CR Code (eg used in Clause 2.3(a)) vs. Part IIIA, regulations made for the purposes of that Part and the CR Code (eg used in Clause 2.1).</p> <p>Other: In line with the current Code (Clause 4.1) and the Government’s intention with the CR Code we suggest that if a specific clause dealing with the training / informing is included, that it specifies the particular areas of training that a Part IIIA regulated entity should focus on with the handling of credit reporting data by its employees, agents and contractors, as follows:</p> <ul style="list-style-type: none"> <input type="checkbox"/> the circumstances in which the information may be accessed, used or disclosed; <input type="checkbox"/> the procedures to be followed in response to a request by an individual for access to, or correction of, the information; <input type="checkbox"/> the procedures for handling disputes relating to credit reporting; and <input type="checkbox"/> the circumstances in which personal information relating to an individual’s credit worthiness may be disclosed by a CP (eg to another CP, a debt collector).
3. Open & Transparent Management of CRI	Part IIIA obliges each CRB, CP and affected information recipient to have a written policy about their management of credit reporting data including the types kinds of information they collect , how they collect and hold that information,...	<p>The policy does not have to be written. Suggest omission of qualification.</p> <p>Suggest “types” should be replaced with “kinds”</p>
3.1 Mandated form/availability of CRB Policy	A CRB must publish on its website its	We note that the statutory requirement for a CRB to have the policy is in Section 20B(3). The content of that policy is dealt with in Section 20B(4).

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	policy about the management of credit reporting information that is required by Section 20B(4).	<p>In Section 20B(3), Parliament has imposed a statutory obligation on a CRB to have a clearly expressed and up-to-date credit reporting information management policy. Parliament has also obliged a CRB to take such steps as are reasonable in the circumstances to make the policy available free of charge and has left at the CRB's discretion to otherwise determine the form in which the policy should be made available (Section 20B(5)). Although, Parliament noted that a CRB will usually make the policy available on the body's website (in Section 20B(5) Note). It did not require this, however.</p> <p>This was also reflected in the Explanatory Memorandum. The specificity given in relation to the form that a CRB must make the policy available in the Explanatory Memorandum related to the term "appropriate." Making a form available on a webpage was given as an example of what might be an appropriate form; it did not mandate a webpage as a required means of making the policy available. A CRB could use it, but was not legally obliged to do so.</p> <p>As a matter of practice, we acknowledge that a CRB is likely to use a webpage as one form of making the policy available and for this reason do not object to retention of Clause 3.1.</p> <p>We note is as illustrative of our general concern with this (and other following provisions) that the CR Code is imposing additional obligations on a CRB which are inconsistent with Part IIIA, in particular section 20B(5) by effectively mandating a form in which a CRB must make its credit reporting information management policy available rather than leaving it for the CRB to make its own decision of what is appropriate, based on its own particular circumstances, in this regard.</p>
4. Information Collection Procedures		
4.1 s. 21C Additional notification requirements		<p>Typo: Explanatory Note. We suggest omission of the words ...required by the legislation to be given. Obligation is to notify or otherwise ensure individual is aware. The form is not specified and, notification, for example, can be done orally.</p> <p>We suggest that rather than repeat the words of s. 21C, that a more general introduction be considered for Clause 4.1. For example:</p> <p><i>4.1 For the purposes of s. 21C(1)(a)(ii) the following matters are also required:</i></p> <p><i>(a) how the information</i></p>
4.1(b) CP – Disclosures to Third Party & Third Party		We submit that the Clause 4.1(b) obligations on a CP to notify details of a third party and the purposes for which it may be used by that third party should be confined to a third party that is a CRB. This is the focus of s. 21C and therefore should also be for Clause 4.1(b).

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Uses		<p>Third party disclosures to entities other than a CRB will be covered under the APP 5 requirements for CPs that are APP-regulated entities. In APP 5 there is an obligation for the CP to disclose the third party details (eg name or type) though not details of purposes for which the disclosed information may be used. Confining Clause 4.1(b) to CRB disclosures has the additional benefit of aligning the APP 5 and s. 21C requirements for CPs that are both regulated under Part IIIA and the APPs.</p> <p><u>AFC Recommends:</u> Revision of Clause 4.1(b) to disclosures to CRBs and purposes for which the CRB may use the credit information.</p>
4.1(e) Pre-screening process – CP Notification		<p>The drafting of Clause 4.1(e) raises two matters:</p> <p><u>Process of Individual Exercising the Opt-Out Right from Pre-Screening Assessments</u> We understand that the basis for inclusion turns on Parliament's intention expressed in the Explanatory Memorandum as follows: Clause 20G Use or disclosure of credit reporting information for the purposes of direct marketing (at page 140) <i>Paragraph 20B(4)(e) expressly requires credit reporting bodies to have policies about the management of credit reporting information which deal with pre-screening and how an individual may make an opt-out request. A credit provider is required by clause 21C to expressly notify the individual, at or before the time of collection of personal information, the details of the credit reporting bodies which the credit provider deals with and any other matters specified in the registered CR code. It is expected that these notification requirements and the credit reporting body's privacy policy will give the individual sufficient opportunity to opt-out of any pre-screening of direct marketing credit offers</i></p> <p>In this context, we suggest that while it may be appropriate for a CP to ensure the individual is aware of the right to request a CRB not to use credit information disclosed by a CP for the purpose of pre-screening for direct marketing offers from the CP, it is not appropriate for the CP to be required to provide detail on how this right might be exercised. This is a matter for the CRB and, in line with the above, anticipate that it will be covered in the CRB's data management privacy policy. Therefore at most the obligation on the CP should be to note that detail on the opt-out right process is available from the CRB policy and the detail about how to obtain a copy (provided by para (c)). We also note that the reference in Clause 4.1(e) should be to "request" not to "inform."</p> <p><u>Opt-Out of Pre-Assessment Screening Process vs. Opt-Out of Direct Marketing</u> For CPs that are APP-regulated entities – there must be provision to clearly distinguish the pre-screening opt-out process from their own marketing process.</p>

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		<p>The opt-out right for the pre-screening process operates, if exercised by the individual, to stop a CRB that has been given a list of customers which includes the individual's information from a CP from including the individual in an assessment to potentially screen them from receiving marketing offers through a third party mailing house.</p> <p>The pre-screening opt-out does not however stop the CP from sending marketing material to the individual directly. If the information being used by the CP to send the material is not credit eligibility information, Part IIIA does not apply. If the CP is an APP-regulated entity, APP 7 would be relevant and the up-front consent of the customer to use of his / her information for marketing purposes coupled with an opt-out in the marketing material would be a practical means of meeting compliance. Product-specific consents (eg for NCC-regulated credit card limit increase invitations) could also be dealt with through this process.</p> <p>There is significant potential for the individual to be confused by the process and understand that by opting out of pre-screening that they are opting out of all direct marketing from CPs (similar to the process of listing their name on the Do Not Call Register).</p> <p>A CP must be able to clearly distinguish the processes (eg pre-screening opt-out to prevent CRB use vs consent to use of non-CEI information by CP for direct marketing purpose) to minimise customer confusion.</p> <p><u>AFC Recommends:</u> Revision of Clause 4.1(e).</p>
4.1(f) Victims of Fraud Notice		We recommend Clause 4.1(f) include the following after " <i>likely to be a victim of fraud,</i> and has not expressly consented to the use or disclosure ".
		We question whether it might be useful for a "Summary of Rights under Part IIIA" process similar to that in place under the NZ Credit Reporting Privacy Code supported through a relevant CR Code provision be available to meet the obligations of a CP and / or CRB under Part IIIA.
5. Types of Credit Information		<p>Query whether heading needs revision to better reflect what the Clause covers. Clause not about the "types" of credit information but obligations on CRBs and CPs in relation to the handling of personal information that falls within the definition of "credit information."</p> <p>Typo: Various defined terms in list of types of credit information need to be bolded (eg identification information, CCLI, RHI, etc).</p>
5.1 Administrative Information		We understand that the basis for inclusion of Clause 5.1 stems from concerns that a CRB is not able to collect personal information from a CP that does not fall within the definition of the permitted categories of data listed

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		<p>in the s. 6N credit information definition and that the handling of this non-credit information personal information is critical to credit reporting and therefore should be facilitated through an appropriate permission.</p> <p>For legitimate data matching / data integrity purposes, we understand that information attributes (eg reference numbers) disclosed by a CP to a CRB under s. 21D(3) together with identity attributes and other more specific attributes (eg nature of credit, type of account) (ie together are “personal information”) may not meet the s. 6N definition of “credit information.” Consequently the CRB’s use and disclosure for credit reporting purposes (under s. 20E) may be inhibited. We also understand that these attributes that have been badged “administrative information” in Clause 5.1 and the process would see them used for a matching purpose to ensure accuracy of the balance of data disclosed (eg recorded against correct individual or correct account) but is otherwise not used and suppressed from disclosure when a CRB going forward discloses credit reporting information in relation to the individual for a permitted purpose.</p> <p>We submit that this process has been supported by the Privacy Commissioner to date through guidance provided in the current Credit Reporting Code. In particular, Clause 1.1 and Explanatory Note 2:</p> <p>1.1 A credit reporting agency recording an enquiry made by a credit provider in connection with an application for credit may include, within the record of the enquiry, a general indication of the nature of the credit being sought.</p> <p>2 Because of the size of the credit reporting system, and the large number and variety of credit applications recorded every year, it is accepted that an account type indicator should be allowed to be included in the file in order to facilitate speedy and accurate identification and verification by credit providers of the enquiries recorded in credit information files.</p> <p>3 Credit reporting agencies will advise members as to acceptable forms of account type indicator following consultation with the Privacy Commissioner.</p> <p>While this was confined to reporting in an inquiry and negative data environment, we submit the basis for it being permitted remains equally valid. In fact, the enhanced risk flowing from breach as a result of the mishandling of credit information in our view adds further weight to the need for a permitted process to facilitate accurate identification and verification of credit information for CRBs, CPs and individuals alike.</p> <p>Typo: References to Affected Information Recipients and administrative information (where relevant) should be bolded.</p>
5.2 CPs disclosure of credit information		<p>Typo para (c): data integrity and credit information should be bolded.</p> <p>Suggest references in paras (a) and (b) should be to “credit” information to align the requirement with the parameters of s. 20N(3)(a) and term bolded.</p>

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		Amend para (c) to reflect obligation in s. 20N(3)(a) is at point of disclosure. For example: <i>(c) ensure the data integrity of credit information it discloses.</i>
5.3 CRBs collection of credit information 4		Typo para (e): prohibited.
6. CCLI		
6.2 Open, limit & cessation / termination		<p>We suggest rather than restricting potential use of the terms defined in Clause 6.2 to specific data handling stages (eg collection or disclosure) that a more general approach is adopted. For example, <i>For the purposes of Part IIIA references to CCLI mean:</i></p> <p>Typo: Explanation – reference to “loan” should be omitted. Reference should just be to “<i>The maximum amount of credit available is determined at point of application</i>” .</p>
6.2 (c) Day credit terminated or otherwise ceases to be in force – assignment of debt to a debt purchaser.		<p>Typo: “debt” is an incorrect descriptor and should be replaced.</p> <p>We suggest that if the capture of a contract which remains on foot (ie has not been legally terminated but in practice effectively irrevocably ended) but as a result of default and failure to repay the balance outstanding has been accelerated and then assigned to a debt purchaser is understood to come within the parameters of Clause 6.2(c)(ii) this should be clarified in the Explanation.</p> <p>This appears to reflect the position adopted in the current Credit Code:</p> <p>Reporting discharge of credit commitments 2.3 Where a credit provider has informed a credit reporting agency that it was a current credit provider in relation to an individual, and the credit provider ceases to be a current credit provider in relation to the individual, the credit provider must as soon as practicable, but in any event no later than 45 days after ceasing to be a current credit provider, notify the credit reporting agency that it is no longer a current credit provider in relation to the individual.</p> <p>51 A credit provider ceases to be a current credit provider in relation to an individual where: (a) the credit provider legally assigns to a third party the debt owed to it by the individual concerned; (b) the individual’s debt is unenforceable by virtue of the statute of limitations.</p>
6.3 CCLI data sets aggregation		We note consultation currently underway with the Attorney-General’s Department in relation to what might be included in the data set in the CCLI s. 6(1)(e) definition relating to the terms and conditions of the consumer

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		credit that relate to the repayment of the amount of credit. We understand further detail on the parameters of the regulation should be released shortly and, if required, would appreciate the opportunity to provide further comment on Clause 6.3 to take this into account.
6.4 CP disclose open must disclose closed		Typo: Reference should be to “consumer” credit.
7. Information Requests		
7.1 Application stage - Limit unknown		Typo: Reference in Explanation to “credit report” should be replaced with “credit reporting information”. Also suggest “obtains” should be replaced with “requests” and the purpose of assessment of the application be included. For example: <i>This recognises that at the time that a CP requests credit reporting information from a CRB for the purpose of assessing a credit application, the CP may not know.....</i>
		We suggest that a type of account indicator or descriptor may be required to facilitate a process for the CRB to appropriately record details of the information request at point of inquiry / application (eg as covered in s. 6N(e)) similar to the process dealt with in the Current Code (at Clause 1.1 and Explanatory Note 2). These descriptors could align with and be used to support the type of credit descriptors should the application be approved and the CP disclose CCLI information in relation to the credit (covered in Clause 6.1).
8. Repayment History Information		
8.1 Grace periods for missed payments		Typo: “take” has been omitted from first line of paragraph.
8.2 CP ceases disclosing RHI		Typo: credit should be qualified by “consumer”
		We understand further detail on the development of the regulations to support the defined concept of “repayment history information” has been provided by the Attorney-General's Department. We intend to provide substantive comments on Clause 8 of the draft CR Code following further review of that material. This

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		will include consideration of the potential impacts of the provisions for credit providers that have, (eg through an ASIC instrument), been exempted from the obligation to hold an Australian Credit License but are regarded as providing “credit” for Privacy Act purposes.
9. Default Information		
9.1 New payment terms request – delay in default information disclosure		<p>We acknowledge the underlying concerns consumer representatives have in relation to potential detrimental impacts that the disclosure (or the threat of disclosure) of default information may have on a consumer legitimately pursuing hardship rights in situation of financial distress to reach agreement, where possible, with the CP to vary the terms of the credit contract to facilitate payment of the overdue amount and the balance outstanding going forward.</p> <p>As discussed in more detail below, “default” information for the purposes of the Privacy Act is a different concept from a “default” for the enforcement process set down for NCC-regulated consumer credit. While for the reasons given below it is likely that the NCC default notice process will be utilised to support the disclosure of default information process under the Privacy Act, in theory the two are different concepts.</p> <p>Whether or not a CP can disclose default information largely turns on the particular facts. In particular whether the individual is overdue 60 days or more in making a payment in relation to consumer credit and whether the requisite s. 6Q + s. 21D(3)(d) notice obligations have been met. If these facts can be established then in theory the CP is permitted to disclose / the CRB is permitted to collect the default information. In practice, if the Individual has responded to contact from the CP in relation to the overdue payment and is in negotiations with the CP we submit it unlikely that the CP would disclose the overdue / default payment. However, should the negotiations not resolve the issue, the CP would remain entitled to disclose the default information. Up-to-date default information is of value for both the individual and the industry (as also noted below in the discussion of Clauses 9.2 + 9.3).</p> <p>The timeframes and processes imposed on a CP under the NCC (eg s. 89A – stay of enforcement proceedings in the event of a hardship application) should not drive the process for Privacy Act credit reporting purposes.</p> <p>We understand that there is concern that the potential for default information to be disclosed may inhibit a consumer from legitimately pursuing rights to solicit changes of their contractual obligations in situations of hardship. We are also aware that the hardship process is a less structured process following amendment to the relevant sections in the NCC (effective 1 March 2013) and therefore the opportunity for the hardship process to be triggered is far greater. We note, however, that unlike the current provisions, the hardship process does not require the individual to request a particular type of variation (which may equate to a request for new payment terms in the language of Clause 9.1). We also note there is value for the individual in a process that facilitates the reporting of 60+ overdue payments when the individual is in discussions with a CP as a result of financial hardship as it assists other CPs to appropriately determine credit risk should the</p>

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		<p>individual apply for credit with another CP during negotiations with the original CP. This approach would also support the new Part IIIA framework in relation to the disclosure by a CP of new arrangement information (under s. 21D(3) + taking into account the s. 6S definition).</p> <p>In this regard we note Parliament's intention that the hardship variation process arrived at through agreement between the CP and the individual provided for in the NCCP Act are not included within the meaning of "new arrangement information."</p> <p>Explanatory Memorandum at page 127 - Clause 6S Meaning of new arrangement information</p> <p><i>In some circumstances prior to a default, the credit provider and the individual may agree on a hardship arrangement, as provided for in the NCCP Act. Hardship arrangements that satisfy the requirements of the NCCP Act are not included within the meaning of 'new arrangement information'. Similarly, any new arrangement made in relation to consumer credit where the credit provider has not disclosed default information or a serious credit infringement in relation to that consumer credit is not included in the meaning of 'new arrangement information'. It is considered that any such arrangements may appear to be too similar to hardship arrangements to effectively distinguish between them, and increase the risk that individuals may not seek hardship arrangements as permitted in appropriate circumstances.</i></p> <p>What appears intended is to distinguish the NCCP Act process designed to achieve interim relief for a temporary situation of financial difficulty from one in which a more holistic, ensuring variation is arrived at. This appears in line with the Commissioner's guidance in the current Code Notes 55E-55F which suggests inter alia that a revised schedule of repayments would not normally be regarded as rendering the individual no longer overdue).</p> <p>For situations of financial hardship where a more permanent change to the credit contract is required, the current process of default listing and new arrangement information statements (in s. 21D(3) + s. 6S new arrangement information definition) is relevant. is It builds from default information having been disclosed and then allows for a statement to be included in the credit reporting information relating to the individual to highlight that the terms and conditions of the original credit have been varied or has been effectively paid if the credit is refinanced. This was a deliberate decision made by the Parliament taking account of the views expressed in the Explanatory Statement.</p> <p>We suggest consideration of Clause 9.1 in the context of Parliament's intention and the need for credit reporting information to be a historic or factual record of an individual's credit worthiness; an outcome which is beneficial for the individual and the industry alike.</p>
9.2 & 9.3 Amount for Default Information Purposes		<p>Default information is relevant to an individual's credit worthiness both in relation to character and capacity to repay. While a CP derives benefit in terms of ensuring all relevant information, including default information, is taken into account when assessing credit risk of the individual; the individual is equally the beneficiary given for those facing financial difficulty this assists with management of over-commitment and for individual's without</p>

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		<p>negative data it assists the approval process. Both customers of credit and industry therefore benefit from default information which has integrity; is up-to-date, complete and accurate at the time of disclosure by the CP / collection by the CRB for future disclosure.</p> <p>The ALRC recommended (Recommendation 58-3) that the CR Code should promote data quality by setting out procedures to ensure consistency and accuracy of credit reporting information. These procedures should deal with matters including:</p> <ul style="list-style-type: none"> <input type="checkbox"/> the timeliness of the reporting of credit reporting information; <input type="checkbox"/> the calculation of overdue payments for credit reporting purposes. <p>The Government accepted this recommendation in its First Stage Response to the ALRC Privacy Report. In particular, the Government acknowledged that <i>“there are concerns about the differing approaches that members of the credit reporting industry are taking to ensure data quality of credit reporting information. In particular the ALRC expressed strong concerns about inconsistency in the practices relating to the listing of default payments”</i> (at page 121).</p> <p>Three key issues arise in the context of default listings or default information disclosures.</p> <ul style="list-style-type: none"> <input type="checkbox"/> What and when should an individual be notified or made aware of in relation to the practice? <input type="checkbox"/> What amount constitutes a “default amount” for the purposes of the listing? <input type="checkbox"/> When does a CP list a default? <p>The first question has been answered in the amendments.</p> <p>Under s. 21D(3)(d), if the information to be disclosed by a CP to a CRB is “s. 6Q default information,” the CP must have given the individual written notice stating its intention to disclose the information to the CRB and 14 days have passed since the giving of the notice.</p> <p>A second notice obligation is also imposed on the CP in relation to whether it can establish that the information is “s. 6Q default information.” The notice obligations depend on the capacity in which the individual is involved with the transaction (eg whether as a borrower or a guarantor). The notice is a key determinant of whether the information meets the s. 6Q definition or not. If it does not, then when it is disclosed by the CP to the CRB it is not a s. 21D disclosure of “credit information.” The ability for the CRB to handle it within the context of its credit reporting business is therefore inhibited. Because of the value it has to CP assessment and to the individual, a CRB will want to ensure that the information meets the parameters of the s. 6Q default information definition to ensure it can be held, used and disclosed as part of the Part IIIA credit reporting system.</p> <p>The criteria for information to meet the “s. 6Q default information” for a borrower, for example, is that the information must be:</p> <ul style="list-style-type: none"> <input type="checkbox"/> about a payment (including a payment that is wholly or partly a payment of interest) that is for \$150 or

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		<p>more;</p> <ul style="list-style-type: none"> <input type="checkbox"/> if the individual is at least 60 days overdue in making the payment; <input type="checkbox"/> it relates to consumer credit provided by a credit provider to the individual; and <input type="checkbox"/> the CP is not statute-barred from recovering the overdue. <p>The CP must have given the borrower written notice:</p> <ul style="list-style-type: none"> <input type="checkbox"/> informing the individual of the overdue payment; and <input type="checkbox"/> requesting the individual pays the amount of the overdue payment. <p>While the question of what and when notification is required can be established from the amendments. The amount and timing of listing remains less clear. In line with the Government's intention to implement the ALRC recommendation we support clarification via the CR Code of these questions.</p> <p>There are two relevant matters to the question of amount and timing.</p> <p><u>Current Part IIIA and Code</u></p> <p>The Commissioner has given guidance on the current Part IIIA in relation to a similar process for a CP to disclose overdue payments to a CRA in the Credit Reporting Code. Relevant extracts follow:</p> <p>CPs - Reporting overdue payments - To a credit reporting agency</p> <p>53 A credit provider must not give to a credit reporting agency personal information about an individual unless the credit provider has reasonable grounds for believing that the information is correct.</p> <p>54 Where an individual becomes overdue in respect of credit given by a credit provider the credit provider may not report the overdue payment to a credit reporting agency unless the credit provider has first notified the individual that the credit provider may lodge a report about the overdue payment against the individual with a credit reporting agency.</p> <p>55B Care and judgment should be exercised by the credit provider when reporting an overdue payment to a credit reporting agency, to ensure that such reporting accords with the requirement that information contained in credit information files is accurate, up-to-date, complete and not misleading (refer section 18G).</p> <p><i>History Paragraph 55B added in March 1995.</i></p> <p>55C An overdue payment reported by a credit provider to a credit reporting agency should generally reflect the amount which, if paid, would result in the individual no longer being overdue in respect of the debt. This may vary according to the terms of the particular loan. For example, with some loans the entire balance of the loan falls due where the individual falls into arrears by a certain amount, or on the occurrence of a particular event. Where this is the case, it should be reflected in the information</p>

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		<p>reported to the credit reporting agency. The amount to be reported will not necessarily be the amount recoverable at law, which may be affected by other contingencies not foreseen at the time of reporting. <i>History Paragraph 55C added in March 1995.</i></p> <p>55D A credit provider may seek amendment of overdue payment information previously reported to a credit reporting agency, where legal or other developments have occurred which affect the amount by which the individual is regarded as being overdue. Changes to the credit information file may be needed to ensure that the information remains accurate, up-to-date, complete and not misleading. <i>History Paragraph 55D added in March 1995.</i></p> <p>Paragraphs 55B, 55C and 55D were included in the Code following review by the Commissioner. As part of the review process, the Commissioner provided background to explain the reason for inclusion of the March 1995 amendments. In relation to these paragraphs he noted:</p> <p><i>These paragraphs have been added to the Explanatory Notes to provide guidance on the reporting of overdue payments by credit providers and credit reporting agencies.</i></p> <p><i>Background: This amendment was requested by the industry because of uncertainty about requirements associated with the reporting of overdue payments, including the appropriate amount to be reported.</i></p> <p><u>Other Debt Recovery Legislative Developments</u></p> <p>The process (in terms of amount and timing) of default listing for Privacy Act purposes has also been impacted by the enactment of the NCCP Act (including the National Credit Code) (and its predecessor the Uniform Consumer Credit Code and enabling Act). For NCC-regulated consumer credit, a CP is statutorily obliged to follow a notification process before it is lawfully able to begin enforcement proceedings against a debtor following default under a credit contract¹ (or a mortgage). While the process is relevant for any contractually defined default event, for our purposes a default event is likely to include a failure by the debtor to meet its contractual obligations to make the payments under the credit contract. Enforcement proceedings have also been defined for the purposes of the NCC (s. 204) to mean:</p> <ul style="list-style-type: none"> <input type="checkbox"/> proceedings in a Court to recover a payment due under the contract (or guarantee) or <input type="checkbox"/> taking possession of property under a mortgage or taking any other action to enforce a mortgage. <p>The process to enforce the contract (or mortgage) following default generally² includes a requirement to give the debtor a notice that includes prescribed information (under NCC s. 88(3) and Regulation 86 + Form 12; 12A). For the purposes of this analysis, this includes specification of:</p>

¹ We note that references to consumer credit and credit contracts in the context of the NCC should be read as covering consumer leases where relevant.

² There are cases where a default notice is not required as a pre-cursor to commencing enforcement action. If a CP took action whether default information can be disclosed, as we understand, will require a written notice to have been given to the individual debtor informing of the overdue payment and requesting

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		<ul style="list-style-type: none"> <input type="checkbox"/> the default; <input type="checkbox"/> action necessary to remedy it; <input type="checkbox"/> a period for remedying it (which must be at least 30 days from the date of the notice); <input type="checkbox"/> that a subsequent default of the same kind that occurs during the period specified for remedying the original default may be the subject of enforcement proceedings without further notice if it is not remedied within the period; and <input type="checkbox"/> that, under the Privacy Act, the debt may be included in a CRA's / CRB's credit information file about the debtor if: <ul style="list-style-type: none"> (i) the debt remains overdue for 60 days or more; and (ii) the CP has taken steps to recover all or part of the debt. <p>Also, if the credit contract contains an acceleration clause (defined in NCC s. 204), the CP has to meet further notice requirements before the acceleration clause can operate, namely:</p> <ul style="list-style-type: none"> <input type="checkbox"/> an additional statement of the manner in which the liabilities of the debtor (or mortgagor) would be affected by the operation of the acceleration clause; and <input type="checkbox"/> a statement of the amount required to pay out the contract as accelerated. We understand that the accelerated amount is generally calculated and stated as at a date disclosed in the notice rather than as at the end of the remedy period allowed in the default notice. This is within the tolerances and assumption calculation allowances included in the NCC and is used because of the practical difficulties involved in calculating an amount that will be owing at some time (possibly an unspecified number of days) in the future. As a matter of prudence, the CP may also state that the actual payout figure will vary depending on when payment is made. <p>With a view to streamlining compliance, CPs have tended to use the NCC default notice process in considering whether they are permitted to disclose 60 day overdue payments (also known a “defaults” for Privacy Act purposes) to a CRB permitted under the current Part IIIA. We anticipate that, to the extent possible, this will remain the case under the new provisions. Therefore, although both currently and from 12 March 2014, the statutory permission for listing overdue payments for the purposes of the Privacy Act are not contingent on a “default” for NCC purposes that would warrant a CP looking to take enforcement proceedings in a court to recover the debt owed or to repossess secured assets, and therefore require the CP to follow the NCC default notice process outlined above before being able to do so, we anticipate that a similar process to the current one will be followed.</p>

payment of the overdue amount. Also, the specific matters that are to be included may be limited if the CP has a reasonable belief that the default is not capable of being remedied.

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		<p>As a consequence, whether a CP has given written notice that meets the requirements of the Privacy Act for permitted disclosure of default information to a CRB will be heavily dependent on the information that is contained in the NCC s. 88³ default notice given.</p> <p><u>Outcome of Consideration</u> The amount of the default that can be listed turns on the interpretation of s. 6Q and the point in time when the default is disclosed.</p> <p>It also turns on the CPs process of debt recovery prior to enforcement. For example, when a customer misses a payment, a CP is likely to make contact after a number of days as part of its debt recovery / management process. If that contact were a written notice informing the individual:</p> <ul style="list-style-type: none"> <input type="checkbox"/> of the amount overdue and requesting payment, and <input type="checkbox"/> its intention to disclose the overdue information to a CRB; <p>the CP would be permitted to disclose the overdue if the amount remained unpaid for 60 days or more.</p> <p>The type of product (eg a instalment type repayment product like a home loan / credit card vs. a one-off fixed payment for goods or services provided on credit) is also relevant in relation to the process of listing. This was also considered by the Privacy Commissioner in the current Code although from the context of a CP managing an iterative overdue payment disclosure process driven by the type of product / repayment process following the listing of an overdue amount.</p> <p>Credit Reporting Code: CPs - Reporting overdue payments - To a credit reporting agency 49 In the case of an instalment loan where the individual is overdue in respect of a payment, the individual is considered to remain overdue until all arrears are brought up-to-date. That is, the credit provider is not required to make a series of reports of overdue payments and reinstatements in respect of the loan while the individual is still behind in payment.</p> <p>While not specifically dealing with the issue of the “amount” for overdue payment listing purposes, we submit that conceptually the process difficulties for iteratively reporting overdue payments is the same and the Commissioner’s views are equally relevant in this context. In short, a CP should not be required to list an amount as at the date in a notice when the amount overdue at the point of listing relating to the same credit contract has increased. The outcome would see CPs having to constantly interface with the CRB either separately listing each payment once overdue for 60 days or required to manage updates to the amount listed taking into account partial payments and allocation rules to determine relevant amounts. Neither outcome</p>

³ Or equivalent provision for consumer leases.

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		<p>appears appropriate either from an individual's credit worthiness assessment / information handling purpose or operational imperatives.</p> <p>Even if the CP were to utilise the NCC s. 88 default notice process as the s. 6Q process, it is left with a difficult decision of determining an amount to be listed where at the point in time that the individual is contractually responsible for paying the amount (ie the end of the period provided to remedy the default) the amount of the overdue would be different again from the amount of specified as overdue in the default notice. If the outstanding obligations have been accelerated this adds further complexity to the true picture of the individual's debt at that point in time.</p> <p>As a consequence, in line with the fundamental premise of data integrity that underpins the disclosure of credit information by a CP / collection by the CRB and the Commissioner's views expressed in the Explanatory Notes referred to above, we recommend that the amount that should be disclosed is the amount due at the date of listing. The individual has been provided adequate warning of the consequences of a failure to repay an overdue amount and an amount (accepting it is an estimate rather than actual); a consequence which fundamentally does not change if there is variation in the amount disclosed as overdue. It is also in the individual's interests for other CPs to have a true picture of the debt owed at the point it is considering another application for credit.</p> <p>We also note the importance for clarity on this issue given other obligations (eg to disclose payment information s. 21E) flow from it.</p> <p><u>AFC Recommends:</u></p> <p>For these reasons we support the inclusion of Clauses 9.2 and 9.3. We accept that whether the accelerated amount has been overdue for the requisite 60 days may turn on the terms of the contract and when the liability to repay the accelerated amount is triggered. However, should the contract terms provide, we further submit that a CP should be able to rely on a NCC s. 88 + s. 93 Default Notice (or consumer lease equivalent) as notice of the amount of repayment overdue given the combination of a guesstimate of the accelerated amount coupled with an indication that the actual amount may differ slightly (because of the variation in calculation assuming acceleration as at date of notice issue vs. date liability to pay the accelerated amount is triggered) without the need for a further written notice of the exact amount to be given to the individual and a further 60 days expire from the date the liability was triggered before that amount can be disclosed to a CRB. The individual's difficulty in servicing current credit arrangements should be highlighted at the earliest opportunity to assist further over-commitment, to the benefit of both the individual and the industry.</p>
9.3		<p>Typo: Second to last reference to CRB should be replaced with CP.</p> <p>"amount that is owing to the CRB-CP on the date of disclosure to the CRB of the default information"</p>

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
10. Payment information		
10.1 When overdue paid 10.1(c)		<p>AFC Recommends: We recommend references to “payment is made” should be changed to “payment is <u>received</u>” by the CP. The date a payment is received in cleared funds is a concept that better aligns with the CPs payment processes.</p> <p>Typo: fullstop should be omitted.</p>
10.2 Timeframe for CP disclosure of overdue payment		<p>We do not support the inclusion of a mandatory set timeframe in relation to the concept of “reasonable period” that has been used in s. 21E. What is reasonable will always depend on the particular circumstances. Therefore if an individual has made the payment and requested that as a matter of urgency the CRB be urgently notified this will be relevant to determining what is reasonable in the circumstances (as will factual questions around payment / cleared funds being received, etc).</p> <p>Parliament’s intention for the CR Code in this regard appeared to indicate an approach that did not set a timeframe, but which gave some broad guidance:</p> <p>Explanatory Memorandum Clause 21E Payment information must be disclosed to a credit reporting body(at page 163): <i>Where a credit provider has disclosed default information about an individual to a credit reporting body, and after the default information was disclosed the amount of the overdue payment was paid, the credit provider must disclose that payment information to the credit reporting body within a reasonable period after the payment is made. It is expected that the registered CR code will provide guidance to assist in determining what is a reasonable period.</i></p> <p>In contrast with other Clauses Parliament has indicated an expectation that a timeframe would be given (eg Explanatory Memorandum at pg 126 Clause 6Q Meaning of default information)</p> <p>Given the civil penalty that flows from breach of this provision we submit an approach which gives indicators of what might be relevant to questions of reasonable period is preferable to a set 5 business day timeframe. As a minimum, allowance for a process for a CP to seek extension of the timeframe with the individual’s consent may be an option that manages the risk appropriately both from the CP and the customer’s perspective.</p>
11. New Arrangement		

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
Information		
		<p><u>AFC Recommends:</u></p> <p>We recommend that an additional provision be included in Clause 11 to provide operational guidance to reflect the approach outlined by the Privacy Commissioner in the current Code which are equally relevant to decisions of whether the particular facts surrounding the payment would be regarded as “new arrangement information” for the purposes of s. 21D(3) + s. 6S (ie because they involved a substantial variation of the terms of the credit contract) and are permitted to be disclosed.</p> <p>We note relevant extracts:</p> <p>Credit Reporting Code</p> <p>CPs - Reporting overdue payments - To a credit reporting agency</p> <p>55E A credit provider may only report an arrangement for repayment to a credit reporting agency where the arrangement relates to an overdue payment or serious credit infringement which has been reported by the credit provider to the credit reporting agency. An arrangement for repayment may only be reported to a credit reporting agency where it is a formal written arrangement involving a substantial renegotiation of the terms of the loan. An arrangement would normally involve a significant variation of the individual’s obligations with regard to one or more of the main elements of the contract such as the period of the loan, or the size and frequency of repayments. For the purposes of paragraph 2.10 an arrangement would not include, for example, a verbal agreement to allow a one-off late payment. History Paragraph 55E added in March 1995.</p> <p>55F Where the arrangement has the effect of rendering the individual no longer overdue in respect of their payments under the loan and the credit provider has reported the overdue payment(s) to a credit reporting agency, then the credit provider is obliged under section 18F(4) of the Act to report to the credit reporting agency that the individual is no longer overdue. A revised schedule of repayments would not normally be regarded as rendering the individual no longer overdue. On the other hand, an arrangement where the overdue amount is ‘forgiven’ would most probably be regarded as having that effect. This distinction is important because the reporting of arrangements is optional, whereas reporting that the individual is no longer overdue is mandatory. The above examples are intended as general guidance only; in all cases the question of whether the arrangement has the effect of rendering the individual no longer overdue will depend on the intention of the parties as indicated by the terms of the arrangement and any other relevant circumstances. History Paragraph 55F added in March 1995.</p> <p>NOTE: Ex Mem – NCCP hardship modification ARE NOT new arrangement information pg 133HG Ex Mem</p>
12. Publicly		

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
Available Information		
12.1 Restriction on CRB Collection of Publicly Available Information		<p>The reason for the inclusion of Clause 12.1 which effectively restricts a CRB from collecting publicly available information from a government department or agency does not appear to have a policy basis supported by the Parliament or the Government.</p> <p>The Parliament expressed clear views in relation to parameters around this data set but did not mention any restriction in relation to the source being confined to a government department or agency: Clause 6N Meaning of credit information Explanatory Memorandum (page 124) <i>“The type of publicly available information that can be included in an individual's credit information is limited by paragraph (k). The publicly available information about the individual must relate to the individual's activities in Australia or the external Territories and the individual's credit worthiness. This limitation ensures that information about an individual's foreign activities is not included. In addition, the information must relate to the individual's credit worthiness. This is consistent with the purpose of the credit reporting system. The other restriction set out in paragraph (k) is that the information must not be court proceedings information about the individual or information that is entered on the National Personal Insolvency Index. Both of these types of information are publicly available, but the inclusion of these types of information about an individual are specifically dealt with by paragraphs (i) and (j), and separately defined in section 6(1) and clause 6U respectively”.</i></p> <p>We acknowledge that the Parliament indicated that the registered CR Code may have a role in relation to the concept of “publicly available information” as noted in the Explanatory Memorandum Clause 6N Meaning of credit information (at page 124) <i>“It is expected that the registered CR code will provide further explanation of the meaning of 'publicly available information' to assist in understanding this term and the types of information to which it applies. Whether information is publically available information is a decision that must be made on a case-by-case basis, taking into account all relevant circumstances, such as the extent to which access to the information is restricted in some way, for example by a fee”.</i></p> <p>The term “publicly available information” is undefined in the Act. In contrast, “generally available publication” is defined and has been amended to ensure technological neutrality in its application regardless of the form of in which the information is published and to explicitly state that a publication can meet the definition whether or not a fee is payable. What appears to distinguish the terms is the form in which the information is produced. Publicly available information is not confined to a particular source (ie a publication) but is information generally available to the public regardless of source. It may be that some information meets this definition but should not be regarded as within the term for the purposes of Part IIIA (eg a telephone directory). However, we note the additional requirements for any information which might meet the test of general public availability to be regarded as public information for the purposes of s. 6N and that it the need for it to have a bearing on the credit worthiness of the individual and relate to the activities of the individual in Australia (or the external</p>

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		<p>Territories).</p> <p><u>AFC Recommends:</u></p> <p>With this background, it is unclear why Clause 12.1 has been drafted as a prohibition on a CRB's collection activities. We recommend that in line with Parliament's intention that an approach which provides guidance on the types of information to which the term applies (eg whether or not it is published in print, electronically or in any other form) and confirmation that the data set may meet the definition regardless of whether a fee is payable or not should be adopted (eg similar to the approach for the definition of generally available publication). The Privacy Commissioner's Information Sheet (Private Sector) 17 – 2003: Privacy & Personal Information that is Publicly Available may also be a useful source in this regard.</p>
13. Serious Credit Infringement		
13.1(c) Clearouts		<p>We note the background in terms of the ALRC and Government response to concerns expressed by consumer representatives and others for the use of serious credit infringement listings where an individual is overdue in credit repayments and the CP cannot locate them but not as a result of a deliberate act to no longer comply with the credit contract obligations but more a case of inadvertence (eg because they have changed addresses and failed to notify the CP).</p> <p>The Government responded to the concerns and an amendment was made to the definition of serious credit infringement so that the definition in the new provisions (s. 6(1) in particular para (c)) to imposes additional obligations on the CP to take reasonable steps to make contact and defer disclosure for 6 month period from last contact.</p> <p>In our view, these additional statutory requirements represent an appropriate balance to address consumer representative concerns while allowing credit reporting participants to be put on alert to take appropriate action for customers that have clearly indicated an intention not to meet contractual obligations of another participant. We therefore are concerned with the shift in that balance resulting from the additional obligations imposed on a CP under Clause 13.1(c) as currently drafted that need to be complied with prior to an SCI being listed in reliance on s. 6(1)(c) of the SCI definition. We are also concerned that some of the required process may operate to interfere with an individual's privacy rights rather than protect them (eg process for leaving phone messages).</p> <p>We also fail to understand why the CR Code is being used to introduce a new requirement for a SCI disclosure to be contingent on a disclosure of default information having first occurred. A SCI is a quite separate legitimate avenue for a CP to alert other credit reporting participants of concerns with the credit worthiness of an individual. The behaviour of the individual in relation to the failure to meet repayments in the amount and at the contracted time may be such a blatant disregard of his / her contractual obligations that it warrants a listing</p>

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		<p>as a SCI.</p> <p>As a separate but related observation - we suggest that one of the matters that may wished to be specifically dealt with in Clause 4.1 (as a s. 21C required matter) is for the CP to give notice or otherwise ensure the individual is aware that it may disclose SCI to a CRB.</p>
13.2 Proposed removal of SCI listing when overdue paid		<p>We oppose a requirement in the CR Code that would detract from the historic value of the credit reporting information.</p> <p>If the SCI has been lawfully listed, there is a process to be followed in the event of an individual indicating an intention to honour the contractual obligations by entering into a varied contract to repay the overdue amounts or if the overdue is effectively paid out though the refinancing of the overdue amount under a new contract (s. 21D(3) + s. 6S(2) definition of new arrangement information). The listing against the SCI is noted accordingly. The reformed provisions reflect the current Code 2.10 process.</p> <p><u>AFC recommends:</u> Omit Clause 13.2.</p> <p>The obligation on the CP / CRB should be as required by Part IIIA (ie inclusion by CRB of CP disclosed s. 6S(2) new arrangement information statement in the credit reporting information relating to the individual).</p> <p>There should be no new obligation to remove the SCI and, in fact, we submit this would arguably be contrary to the obligation on the CRB in relation to data quality.</p>
14. Debt Purchasers / Assignees		
14.1 & 14.2		<p>Contrary to the view expressed in the Explanatory Notes, we are concerned that Clauses 14.1 and 14.2 are not enabling provisions (ie enabling both parties to notify) but operate to impose a joint and several notification obligation on both parties (ie the original CP and the acquirer). We accept that in practice it is likely that the parties via agreement will determine which has the contractual obligation to notify the CRB of the acquisition via assignment (subrogation or otherwise). However, the outcome of the retention of Clause 14.1, for example, would be that if the party contracted to notify the CRB fails to do so, the other party is effectively jointly and severally liable for a breach of the provision</p> <p>We submit that Clause 14.1 and 14.2 are not required as the process that they seek to achieve, is the likely outcome of existing provisions.</p>

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		<p>For example, the assignment of rights to repayment under a consumer credit contract by a CP effectively ceases the credit account with the CP. Therefore, in line with Clause 6.4, the CP is obliged to disclose this to the CRB (within 45 days of the cessation date) where the CP has disclosed account open CCLI information. The assignment will also have the effect of paying any overdue amounts and, to the extent that the CP has listed default information in relation to these, the CP will also be statutorily obliged to disclose payment information (under s. 21E). In practice, while the legal obligation rests with the original CP, the debt purchaser / assignee can be (and usually is to add value to the debt assignment process for the original CP) contractually obliged to make the disclosure to the CRB on behalf of the CP.</p> <p>The CRB subscriber agreement with the debt purchaser / assignee is also relevant. It will include the prescribed terms relating to quality of credit information (s. 20N(3)(a)) and security (s. 20Q(2)). These requirements coupled with the obligation on the CRB to monitor compliance will assist ensure the incoming debt purchaser / assignee CP discloses payment information that relate to default information disclosed by the original CP.</p> <p>AFC Recommends: Omission of Clauses 14.1 and 14.2 on the basis that:</p> <ul style="list-style-type: none"> <input type="checkbox"/> existing Part IIIA provisions adequately deal with the matters proposed to be covered; and / or <input type="checkbox"/> contrary to the explanation given, the proposed coverage introduces a compliance obligation for both parties better left to current practices which sees the legal obligation rest with the original CP but compliance met by the debt purchase / assignee via appropriate terms and conditions in the agreement contract).
15. Permitted CRB Disclosures		
15.1 Process for CRB to disclose CRI to CP		<p>We support a compliance outcome that provides a practical approach to compliance and certainty to facilitate information exchanges from a CRB to a CP which are contingent on an individual's specific consent (for a individual in relation to an application for commercial credit – this can be in writing if the application has been made in writing, or orally if made by phone). We note Parliament's intention in this regard in relation to CP to CP disclosures and suggest that the process could be equally followed (as it currently is) for a CRB / CP disclosure:</p> <p>Clause 21J Permitted CP disclosures between credit providers (at page 169): <i>"The consent of the individual (whether in writing or not) must be given to the credit provider who is to disclose the information or to the credit provider who will be the recipient of the information. It is not necessary for the consent to be given to both credit providers. Circumstances where the disclosing credit provider would be given the consent may include where the consent is not in writing. This would enable the disclosing credit</i></p>

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		<p><i>provider to confirm that the individual has provided express consent to the disclosure for the particular purpose”.</i></p> <p>We acknowledge as general industry practice that the interface between the CRB and CP is likely to involve some form of contact which would be regarded as “written” (eg including email, webpage interface). However we suggest that the form of the process (eg <u>written</u> statement) may not need to be dictated. This would therefore allow CPs to adopt a form that suits their business model. For example, the process should be able to occur verbally (eg initiated by a phone request by a CP) with the CP / CRB maintaining relevant file notes to substantiate the process in the event of dispute. We note that an obligation to note the file has been statutorily imposed for both the disclosing CP and the collecting CP (under s. 21G(6)).</p> <p>In this regard we note Parliament’s intention (at page 139 of the Explanatory Memorandum) in relation to the attributes of the note required to be made and the inclusion of Clause 23.1(c).</p> <p><u>AFC Recommends:</u> Omission of “written” in Clause 15.1.</p>
15.2 No EDRS		We note that the Government is proposing to include a regulation to exempt a credit provider for public policy reasons from the requirement to be an EDRS member. We also continue to promote a regulation to cover commercial credit providers in this regard also. We appreciate the regulation will be adequate to support relevant disclosures / collections between CRBs and the prescribed entities in relation to this issue.
16. Security of Credit Reporting Information		
17. Use and Disclosure of Credit Reporting Data by CPs & AIRs		
17.1 Marketing		<p>We note the drafting of Clause 17.1 reflects the outcome of discussions involving a group of industry participants and has endeavoured to take into account the concerns of consumer representatives.</p> <p>While it may be clear to those participants what the intended outcome of the drafting is, we suggest for others it may be far less clear.</p>

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		<p>As we understand, the operation of Clause 17.1 was not intended to intrude on the future internal management / "use" by a CP of positive data disclosed by a CRB for assessment of a consumer credit application to internally refine credit risk / eligibility tools to be used for generally assessing future applications for credit. This was clearly Parliament's intention expressed in the Explanatory Memorandum:</p> <p>Clause 21H Permitted CP uses in relation to individuals (at page 167). <i>This provision sets out the circumstances in which a use of credit eligibility information by a credit provider will be a 'permitted CP use' authorised Item 1 of the table provides that a disclosure of credit reporting information for the purpose of assessing an application for consumer credit made by the individual to the credit provider can be used for a 'securitisation related purpose' of the credit provider, or the information can be used for the internal management purposes of the provider that are directly related to the provision or management of consumer credit by the provider. Essentially, the information that has been disclosed under this item can already be used under paragraph 21G(2)(a) for a 'consumer credit related purpose', so this item permits these two additional uses to be made of this information. The other permitted purpose for which the information may be used under item 1 is internal management purposes of the credit provider that are directly related to the provision or management of consumer credit by the provider. This will allow the provider to use the information for the purposes of deriving 'CP derived information' about the individual, to manage its relationship with the individual as well as to manage its credit business as a whole. This would permit the credit provider to use the information for data management purposes, for example, or other activities necessary to run the consumer credit business of the provider."</i></p> <p>The drafting of Clause 17.1 was designed to maintain the status quo of the current negative data exchange process that sees CPs using internal data to develop marketing strategies (including upsell or cross sell strategies). The Clause has been drafted to reflect this by prohibiting use by the CP of the positive data obtained in the application process to market (e.g. cross sell / upsell) to an individual, not use of that positive data for development of credit risk / eligibility tools for individuals applying for consumer credit going forwards.</p> <p>We also note concern with the drafting of Clause 17.1(b) in the context of a CP's obligation to comply with the responsible lending process under the National Consumer Credit Protection Act (NCCP Act). A CP is required to assess a range of matters including a customer's requirements and objectives and financial situation as part of ensuring a customer is not provided with an unsuitable consumer credit product. This process may involve consideration by the CP of credit eligibility information disclosed by the CRB for use by the CP in assessing the application. Therefore, in theory if the customer applied for one product but through that process it was determined that product was unsuitable would Clause 17.1 as currently drafted prevent the CP from offering another product that better meets the customer needs and financial circumstances? We recommend this should not be the outcome.</p> <p>AFC Recommends:</p>

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		<p>Given the potential for misunderstanding, we recommend that Clause 17.1 clearly indicate:</p> <ul style="list-style-type: none"> □ firstly that Clause 17.1 does not prohibit CP use for refinement of credit risk / eligibility tool design purposes; and □ secondly, that Clause 17.1(b) be redrafted to enable CPs to legitimately and for NCCP Act compliance purposes (or other similarly legitimate cases) be able to offer or invite a customer to apply for a different product where the one applied for and for which the CEI was collected for application assessment purposes was assessed as “unsuitable” for responsible lending purposes.
17.2 Use for Avoiding Defaults		<p>The use of CEI permission which underpins Clause 17.2 (ie CRB disclosure: s. 20E(3) + s. 20F Table Item 5 + CP use: s. 21G(2)(b) + s. 21H Table Item 5) appears to be largely based on current Part IIIA provisions (eg CRA disclosure: s. 18K(1)(f) + CP use: s. 18L(c)).</p> <p>Parliament’s intention in relation to the new provisions is also relevant to this consideration. Relevant extracts from the Explanatory Memorandum follow:</p> <p>Item 11 Subsection 6(1) This item inserts the definition of consumer credit related purpose. We also note Parliament’s intention provided in the Explanatory Memorandum (at page 104-105): “.. While a credit provider is permitted to use credit eligibility information for the purpose of assisting an individual to avoid defaulting (see clause 21H), it is expected that the use for this purpose would only be necessary when the provider has a basis for believing that the individual may be at risk of defaulting. It would not be consistent with the definition of consumer credit related purpose for the provider to obtain regular disclosures from the credit reporting body simply to monitor or check an individual’s overall credit worthiness or behaviour.”</p> <p>Clause 20F Permitted CRB disclosures in relation to individuals (page 137 - 138) A disclosure under item 5 of the table permits disclosure of credit reporting information to a current credit provider of an individual. A current credit provider is a credit provider that holds credit liability information (a defined term) relating to consumer credit provided to the individual and that consumer credit has not been terminated or otherwise ceased to be in force. This provision allows credit reporting bodies to provide an individual’s credit providers with default information (or where a payment of a default has occurred, payment information) about the individual. This provision will also allow credit reporting bodies to provide other relevant credit reporting information. However, when read with item 5 in the table at clause 21H, any credit reporting information disclosed under this provision can only be used by the recipient credit provider for the purpose of assisting the individual to avoid defaulting on the individual’s consumer credit obligations to that credit provider.</p> <p>Clause 21H Permitted CP uses in relation to individuals (page 168) Item 5 of the table permits information that has been disclosed to a current credit provider of an</p>

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		<p><i>individual (that is, a credit provider who provides consumer credit to the individual that has not been terminated or otherwise ceased to be in force) to be used for the purpose of assisting the individual to avoid defaulting on his or her consumer credit obligations to the provider. When read with item 5 in the table at subclause 20F(1) this provision has the effect of limiting the use of any information disclosed to assisting the individual to avoid defaulting on the individual's consumer credit obligations to that credit provider. It would not be consistent with the purpose of the credit reporting system for the provider to obtain regular disclosures from the credit reporting body simply to monitor or check an individual's overall credit worthiness or behaviour</i></p> <p>Parliament has clearly indicated what should not occur in relation to disclosure / use of CEI for the purpose of assisting the individual to avoid default. The focus is on regular disclosures to simply monitor or check an individual's overall credit worthiness.</p> <p>We understand Clause 17.2 is intended to confirm Parliament's intention by putting some parameters around the permitted use. However, we suggest that as currently drafted (and contrary to the basis provided in the CR Code Explanation Note for 17.1), the parameters far exceed the behaviour that the Parliament indicated would not be permitted. It raises the evidentiary hurdle that would need to be met by a CP through the inclusion of the concepts "reasonable basis" and "significant risk." In our view, the wording of the Act is clear. The Explanatory Memorandum gives adequate and clear guidance of the behaviour that is not encompassed within the permission. Given the risk of breach for use not for a permitted purpose rests with the CP, we submit it should appropriately be left to the CP to determine how to comply with the Act's requirements. If it is determined that some clarification via Clause 17.2 is required, we submit a lessening of the compliance requirements (eg omission of "significant" risk to "at risk").</p> <p>We also suggest that in the Explanation Note for Clause 17.2 that dotpoint 2 be amended to change 90 to 60 days' overdue.</p> <p><u>AFC Recommends:</u> Revise Clause 17.2 to better reflect the behaviour that Parliament indicated was not encapsulated within the permission. We suggest the following: <i>For the purposes of permitted CRB disclosure (s. 20E(3) + s. 20F Table Item 5) and permitted CP use (s. 21G(2)(b) + s. 21H Table Item 5), regular disclosures to simply monitor or check an individual's overall credit worthiness is not permitted.</i></p>
17.3 Refusal of Consumer Credit		<p>To align with s. 21P we suggest the following introductory words be included Clause 17.3(b): <i>If the refusal is based on the credit eligibility of the individual,</i></p>
17.3(c)		<p>We recommend omission of this requirement as a matter required to be stated.</p>

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		<p>We support the message that is intended to be delivered but recommend that it be left for CPs determine how best the message is conveyed rather than requiring the CP to state in a notice that “it is important for him / her to be proactive in checking the accuracy of the CRI that CRBs hold” which may be perceived by the customer as patronising rather than educational and further put at risk the relationship with the CP.</p>
17.3(d)		<p>Typo: Reference should be to “consumer” credit and be bold.</p>
17.4 CP to CP disclosure process		<p>We support a compliance outcome that provides certainty to facilitate information exchanges from one CP (the disclosing CP) to another (the receiving CP) which are contingent on an individual’s specific consent (for a borrower applying for credit – this can be in writing if the application has been made in writing, or orally if made by phone). We note Parliament’s intention in this regard:</p> <p>Clause 21J Permitted CP disclosures between credit providers (at page 169): <i>“The consent of the individual (whether in writing or not) must be given to the credit provider who is to disclose the information or to the credit provider who will be the recipient of the information. It is not necessary for the consent to be given to both credit providers. Circumstances where the disclosing credit provider would be given the consent may include where the consent is not in writing. This would enable the disclosing credit provider to confirm that the individual has provided express consent to the disclosure for the particular purpose”.</i></p> <p>However, we submit that to ensure value, the form of the statement should not be dictated. This would therefore allow CPs to adopt a form which suits their business model. For example, the process should be able to occur verbally with relevant file notes to substantiate the process in the event of dispute. We note that an obligation to note the file has been statutorily imposed for both the disclosing CP and the collecting CP (under s. 21G(6)).</p> <p>In this regard we note Parliament’s intention (at pages 169 + 166-167 of the Explanatory Memorandum) in relation to the attributes of the note required to be made and the inclusion of Clause 23.1(a).</p> <p><u>AFC Recommends:</u> Revision to facilitate exchanges without imposing a particular form.</p> <p><i>As evidence of an individual’s express consent to the disclosure by a CP of CEI to another CP....the disclosing entity is able to rely on a statement by the recipient that: etc</i></p> <p>We also note Parliament’s intention that CP to CP permitted CEI disclosure does not see the CP falling within the definition of a credit reporting business: Explanatory Memorandum at page 124 - Clause 6P Meaning of credit reporting business <i>Subclause (1) provides that a ‘credit reporting business’ is a business or undertaking that involves</i></p>

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
		<p><i>collecting, holding, using or disclosing personal information about individuals for the purpose of, or for purposes including the purpose of, providing an entity with information about the credit worthiness of an individual.</i></p> <p><i>....Division 3 sets out 'permitted CP disclosures' under which a credit provider is permitted to disclose credit eligibility information, including, for example, to other credit providers with the consent of the individual (see subclause 21J(1)). A credit provider that makes a 'permitted CP disclosure' would not, as a result of making that specific permitted disclosure, fall within the general definition set out in subclause (1).</i></p> <p><u>AFC Recommends:</u> We recommend in line with Parliament's intention and in the interests of compliance certainty that the CR Code include a provision that reiterates that a CP making a permitted CP disclosure would not as a result of that specific permitted disclosure, fall within the general definition of a credit reporting business (in s. 6P).</p>
18. Protection for Victims of Fraud		
18 Explanation	Explanation	We suggest that the guidance in the Explanation appear as a provision of the CR Code to provide a legal basis to support the process noted which would allow the CP to obtain the individual's consent as part of an application process to enable a CRB to be permitted to disclose credit eligibility information to the CP for managing debt or debt collection purposes.
18.1 CRB Notation Requirement		<p>We suggest that the words of the Act be used in the interests of compliance certainty. Therefore suggest "individual reasonably believes that" with "individual believes on reasonable grounds that."</p> <p>We also question why a notation obligation is proposed to be imposed on a CRB (in Clause 18.1(a)). The action required under s. 20K is effectively a freeze on use / disclosure by the CRB unless the individual consents or there is a legal requirement / authorisation. Clause 18.2 provides the manner or notification ability for the CRB to let CPs (and we suggest others) know the reason for the non-disclosure. A further notification obligation seems redundant and we suggest should be omitted.</p>
18.2 CRB process for notifying requesting entities of Ban		We query whether Clause 18.2 should also take into account requests from mortgage insurers and trade insurers (in addition to CPs) during a ban period for disclosure of credit reporting information relating to the individual.
18 General Comment		We suggest that the CR Code be used to facilitate an outcome that protects the privacy of the individual who have been the victim of fraud (including identity fraud) while ensuring value of the credit reporting process is

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
		<p>retained.</p> <p>At present, there is no ability for an individual to request cessation of a ban (eg should they find their credit cards). The ban would therefore remain for 30 days despite the individual no longer being concerned that he / she may be a potential fraud victim. We recommend that the CR Code be used to facilitate the individual being able to request cessation of the ban period in these circumstances.</p> <p>Further, under s. 20Y a CRB is obliged to destroy credit reporting information it holds about an individual, the information relates to consumer credit provided by a CP to the individual (or a person purporting to be the individual) and the CRB is satisfied that the individual has been the victim of fraud and the consumer credit was provided as a result of that fraud.</p> <p>The obligation to destroy is imposed and must be complied with before the CRB is required to notify the individual and the CP that it has been destroyed. The notification obligation is also imposed on a CRB for other recipients of the information also following destruction.</p> <p>A CRB is left with compliance challenge of having to notify the individual, the CP and other recipients when records containing relevant contact details have had to be destroyed. We note the relevance of the definition of “destroy” at 1.2(g) in this regard and suggest clarification that the definition is relevant for the purposes of the obligations in s. 20Y may be useful.</p> <p>As a matter of interpretation we also understand that the intention is that the CRB is obliged to destroy only that component of the credit reporting information relating to the individual that has been tainted by the fraud. Confirmation through an additional paragraph in Clause 18 would provide compliance comfort for CRBs in this regard.</p> <p>We also note that Parliament has indicated that the retention periods (and consequently destruction obligations) for credit information that is identification information and publicly available information do not apply. We suggest that the Code be used as a means of continuing this approach in relation to these data sets in other cases where information s. 20Y obligations to destroy have been triggered. This will assist the CRB to legitimately retain a footprint in its database for audit and other purposes.</p>
19. Use by a CRB of CRI to facilitate a CP’s DM		<p>We recommend amendment of this heading. The pre-screening process is not intended to facilitate direct marketing but to support a process of responsible lending to assist CP ensure customers who represent an adverse credit risk are not sent direct marketing credit offers. We think continuation of the Act’s terminology is the best means of ensuring the heading sets the appropriate context for the Clause.</p> <p><u>AFC Recommends:</u></p> <p>Amendment of the heading to:</p> <p><i>19. Use and disclosure by a CRB of credit reporting information</i></p>

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
19.1 Marketing		<p>We question the need for inclusion of Clause 19.1 in the context of s. 20E(6) which clearly limits the use or disclosure of credit reporting information by CRB for the purposes of direct marketing.</p> <p>However, similar to Clause 17.1, we understand that Clause 19.1 reflects the outcome of discussions involving some industry participants. What was clear from these discussions, as we understand, was that this clause is not intended to intrude on the "use" by a CRB of positive data to internally develop credit risk / eligibility tools for credit assessment purposes. We also note the Parliament's clear intention in this regard (Explanatory Memorandum at page 106) in relation to the definition of CRB derived information s. 6(1): <i>"In addition, to be CRB derived information it must have some bearing on the individual's 'credit worthiness', and be used (or has been used, or could be used) to establish the individual's eligibility for consumer credit."</i></p> <p><i>To derive information from other information (the source information) is to obtain or deduce other personal information from the source information. It is secondary information in that it is not possible for a credit reporting body to produce CRB derived information without first having the source information about the individual (in this case, the source information is credit information) to form the basis for the derivation process. Generally, it is understood that CRB derived information will include a credit rating or score that has a bearing on the individual's credit worthiness by indicating the body's analysis of the individual's eligibility for consumer credit. A body is not limited to using only credit information to derive for CRB derived information, but may also use other information together with credit information to derive CRB derived information about the individual (such as, for example, the body's risk analysis that takes into account other economic or commercial factors)".</i></p> <p>We recommend that this be clearly confirmed if Clause 19.1 is to be retained.</p> <p>Accepting that a permitted use of credit reporting information by a CRB does not include a use for the purpose of direct marketing (as provided under s. 20E(6)) we understand that there was a potential question about whether the wording of the section prevented the CRB from using it for the purpose of developing tools for a direct marketing purpose for use by another entity or not.</p> <p>The inclusion of Clause 19.1 is intended to confirm that s. 20E(6) did capture this, as this outcome appeared to align with the Government's policy of limiting the use of CRI by the CRB for direct marketing purposes. As this appears to reflect the current position (CRBs do not have access to positive data from CPs for developing direct marketing tools, including upsell or cross sell strategies) the outcome is understood to be status quo.</p> <p>To ensure Clause 19.1 does not intrude on the Government supported pre-screening assessment process for direct marketing, a further sentence should be included in 19.1 to confirm that the position under the pre-screening assessment amendments (in particular s. 20G + s. 20H) and s. 20E use / disclosure permissions otherwise remains unchanged by Clause 19.1.</p>

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
		<p>We therefore suggest that if Clause 19.1 is retained, that there is a clear statement that it is not intended to intrude on the permission given in s. 20G + s. 20H.</p> <p>AFC Recommends: Given the potential for misunderstanding, we recommend that Clause 19.1 clearly indicate:</p> <ul style="list-style-type: none"> <input type="checkbox"/> firstly that Clause 19.1 does not prohibit a CRB from using credit reporting information for the development or refinement of credit risk / eligibility tool design purposes; and <input type="checkbox"/> secondly, the provisions of s. 20G + s. 20H are not impacted by Clause 19.1.
19.2 Eligibility Criteria	a CP must not nominate eligibility requirements that are based specifically on attributes or behaviours that indicate the individual is, or may in the future be, unable to meet repayments under their existing credit.	<p>We suggest that this Clause needs revision on the basis that while the concept used in s. 20G is “eligibility requirements” the actual criteria are better categorised as “ineligibility requirements” (eg a requirement like a default listing which would carve them out of receipt of direct marketing credit offers). As a consequence, the eligibility requirements are likely to be what the current wording of Clause 19.2 would prevent to be used (ie requirements, like default listings, that are based specifically on the individual being unable to meet repayments).</p> <p>As noted in the Explanatory Memorandum:</p> <p>Clause 20G Use or disclosure of credit reporting information for the purposes of direct marketing (at page 138), “...<i>Pre-screening is a direct marketing process by which direct marketing credit offers are screened against limited categories of credit information about those individuals to <u>remove</u> individuals from the direct marketing credit offer, based on criteria established by the credit provider making the offer, before the offers are sent.The CP making the offer establishes the eligibility requirements for the direct marketing credit offer and provides a list of individuals about whom the pre-screening assessment will be made; the CP undertakes the pre-screening assessment and determines whether the individual is eligible consistent with those criteria,...</i>”</p> <p>And further (at page 139) : “<i>As stated above, subclause (3) modifies paragraph (2)(d). When setting criteria, the credit provider can only nominate criteria that remove individuals from the direct marketing credit offer</i>”.</p> <p>AFC Recommends: We recommend revising Clause 19.2 to achieve the Government’s intention using wording similar to the NZ Credit Reporting Privacy Code 2004, as follows: <i>For the purpose of s. 20G(3), the eligibility requirements nominated by the CP must have the purpose of excluding individuals who represent an adverse credit risk and would be ineligible to receive the direct marketing.</i></p>
19.3 Opt-Out Request –		At present s. 20G does not provide a process for an individual to withdraw their opt-out.

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
Withdrawal		<p>Part IIIA does not prevent a CP from sending direct marketing credit offers to a customer without utilising the pre-screening process and where the process of offer does not involve the handling by the CP of credit eligibility information of the individual. If CEI were involved we understand that Clause 17.1 would be relevant and may operate to prohibit the use of the information to the extent that the CEI component was originally obtained from a CRB to assess a consumer credit application (We note our comments in relation to Clause 17). If the CP is not handling CEI to send the marketing material to the customer, for CPs that are APP regulated entities, APP 7 would be relevant. While this requires the CP to follow a particular process to give the individual the opportunity to opt-out of further marketing it does not prevent the initial contact. We also acknowledge that in practice, for NCC-regulated credit that there are further qualifications around whether an individual is likely to receive direct marketing credit offers (particular for credit card limit invitations). Also that the credit provider will need to have a process that ensures the offer is subject to the NCCP responsible lending assessment prior to acceptance. However, taking these further compliance obligations into account, in theory the outcome may be that the individual (eg who has a default listed) may receive direct marketing credit material sent directly from the CP when had they not opted out and the CP used the pre-screening process they would have been ineligible and not have received the offer.</p> <p><u>AFC Recommends:</u> The right of the individual to opt-out should be regarded as dynamic not a one-off process. Therefore, provision should be included in the CR Code to facilitate an individual being able to opt-in to the pre-screening process for direct marketing credit offers (eg by requesting the CRB withdraw his / her opt-out).</p>
19.4 Confidential Opt-Out Register		<p>We submit that s. 20G does not contain any requirement in relation to how a CRB manages the process of ensuring an individual that has opted-out of pre-screening is not included in that process going forward. We further submit that this a process best left for the CRB to determine how to appropriately manage. A requirement to keep a register of individuals who exercise their right to opt-out appears a privacy intrusive process – given it is effectively requiring the creation of a central repository of personal information of individuals; an outcome which appears at odds with Parliament's objectives in enacting the amendments.</p> <p><u>AFC Recommends:</u> Omission of Clause 19.4. A CRB should be allowed to determine the best means of managing the opt-out process in a way which balances both privacy rights and business imperatives.</p>
19.5 Recipients – Pre Screening Assessments		<p>As noted in the Explanatory Memorandum (at page 140), the results of a screening process = pre-screening assessment.</p> <p>Clause 20H Use or disclosure of pre-screening assessments <i>Information flows in the pre-screening process are essentially one-way – the credit provider is not given the results of the pre-screening process (referred to as the 'pre-screening assessment' in the Bill) and so cannot determine which individuals may have been excluded from the direct marketing credit offer as a result of the assessment. This is to ensure that credit providers are not able to target direct marketing to those people who they know have been excluded from their direct marketing offer. The purpose of pre-screening is purely to</i></p>

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		<p><i>provide a process to remove individuals from direct marketing offers, not to allow credit providers to target identified individuals with direct marketing offers.</i></p> <p>Therefore s. 20H appears to relate to the screened or washed list of individuals only. A pre-screening assessment does not contain information of an individual that has been removed through the screening process. We therefore suggest that Clause 19.5 (a) (b) may not be required, as the CRB is permitted only to disclose the pre-screening assessment (ie the results of the pre-screening) for the purposes of the direct marketing by, or on behalf of, the CP to a third party (eg mailing house).</p> <p>In relation to Clause 19.5(b) we also note that in line with our earlier comments – the concept of “eligibility requirement” and the Parliament’s intention that the process be used to remove individuals who represent an adverse risk is likely to mean negative criteria is used to screen. As a consequence, an individual with a default listing may have met the CP’s “eligibility requirements” and therefore should not be on the list of individuals whose details are passed to the mailing house for offers to be sent. The concept of “failed” to meet the CP requirements in Clause 19.5(b) may not therefore be appropriate. If Clause 19.5(b) were to be retained – alternate concepts like: “<i>but were excluded as a result of the assessment</i>” might reflect the situation better.</p> <p>Not clear why Clause 19.5(c) has been included. We understand that the prohibition during a ban period on use or disclosure of credit reporting information about an individual held by a CRB (s. 20K) applies to the CRB. The CRB is likely to have to have a compliance process that ensures part of the pre-screening assessment process initially carves out the credit reporting information of these individuals and then carves out those that have opted out of the process (under s. 20G(5)). Those remaining are then screened before the results, “the pre-screening assessment” is given to the third party recipient for it to mail out direct marketing credit offers on behalf of the CP. Therefore there should be no avenue for the third party recipient to ever have information relating to individuals who have been excluded on the basis of the s. 20K ban or because they exercised their s. 20G(5) opt-out right.</p> <p><u>AFC Recommends:</u> We therefore suggest Clause 19.5 be omitted.</p>
20. Access		
20.1		We suggest the term “access seeker” (as defined in s. 6L) be used in this Clause.
20.2		<p>We suggest that reference to the “provision of the individual’s credit reporting information” should be “access to” that information. For example, <i>“....the CRB must not charge a fee for giving access to the information if”</i></p> <p>Typo: Reference to “credit” should be qualified by “consumer”</p>
20.4(a)		We suggest the obligation on the CRB is to provider the access seeker with access to the information rather

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
		<p>than the information. Therefore, the introductory sentence to Clause 20.4 and Clause 20.4(a) should have the additional word “access” included. For example:</p> <p>Clause 20.4 “Where access to credit reporting information is <i>to be</i> provided to an access seeker free of charge....</p> <p>Clause 20.4(a) the CRB must provide the access seeker with “access <i>to</i>”:</p>
20.4(b) & 20.5 Means of Access – Procedural Matters		<p>We submit that in line with APP 12, in particular 12.5, and the expectations of Parliament in the Explanatory Memorandum (eg at pages 148 + 178) these provisions should provide detail around the “manner” in which the individual may request access or an alternative “manner” that meets the needs of the individual, if the CRB or CP is not reasonable and practicable to give access in the manner requested rather than mandating an obligation on the CRB or CP to provide explanations and summaries. For example, the CRB or CP could invite the individual (or other access seeker) to view the information and have its contents explained by a suitably qualified person, if appropriate. Or the individual could be given an accurate summary of the information.</p> <p>There should also be the ability for a CP to refer the individual to a CRB for more current credit reporting information than the CP may hold at the time of request for access (similar to the process the Commissioner has given guidance on in the current Code at Note 76).</p>
21. Correction		
		<p>The CR Code could be used as the means of clarifying what is a correction request from what is a complaint. This distinction is critical to then determining the process that the request should be dealt with by all parties involved. We also suggest that further detail should be considered as guidance on this issue. We submit that guidance on the interplay between s. 23A, s. 23C, s. 20S/s.21U in particular would be beneficial to all.</p> <p>We also note the interaction of APP 13 (eg in s. 21U) in relation to the obligations imposed on a CP where the credit information is identification information and suggest that this nuanced compliance obligation should be reflected in the CR Code.</p>
21.1 Credit Provider – Deemed CPs (Agents of CP or otherwise)		<p><u>AFC Recommends:</u></p> <p>We recommend that in line with the approach in Clause 21.1 that where the recipient of a correction request participates in the credit reporting system and is defined as a CP because of a deeming provision (eg s. 6H – Agents of a CP – processing applications for credit) that the recipient also be given the opportunity to within 30 days inform the individual of the contact details of the CP principal and refer the matter to the CP principal for resolution.</p>

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21.3 Process when extension required.		<p>We recommend re-drafting of this Clause to remove the obligation for the CP or CRB to advise the individual of the ability to complain to an EDRS until the decision to refuse to correct has been taken (eg s. 21W(2)). As drafted this notice is being given at a time when the CP is working to resolve the correction request but has identified that further time is required and consequently is inviting the individual to consent to an extension of the 30 day resolution period to facilitate it. Given, we assume, that the EDRS is not able to consider a complaint in relation to the handling of a correction request until after the IDR of the CP has been utilised, we see no value in the process as drafted and recommend paragraph (c) is omitted to avoid customer confusion.</p> <p>We also note that the provision is drafted so that access to the Commissioner to complain is only available to an individual where the CP is not a member of a EDRS. The law does not include this limitation. We submit that the impression that an individual would be left with is that it does not have a right to complain to a CP where the CP is a member of an EDRS. We submit that this is not accurate.</p> <p><u>AFC Recommends:</u> Omission of Clause 21.3 para (c)</p>
21.6		<p>We suggest Clause 21.6 may need revision to separately deal with the obligations that the CRB or CP needs to comply with depending on whether it decides to correct the information or decides not to do so.</p> <p>We also suggest that references to credit eligibility information or credit reporting information should be tied to information about the individual. For example, <i>"...(a) include all credit reporting information or credit eligibility information (as applicable) held by the CRB or CP (as applicable) relating to the individual, so that</i></p>
22. Complaints		
22.1		<p>We query how for CPs that are Australian Credit Licensees (and therefore required to comply with ASIC's RG 165 in relation to complaints handling), Clause 22.1 interfaces with the timeframes set down in Part IIIA for complaint handling. If the intention of Clause 22.1 is to facilitate a CP ACL complying with the RG 165 timeframes for a final response to a complaint (though we note the s. 26N limitations in this regard), that the other operative provisions in Clause 22 should reflect this.</p> <p>We also submit that the IDR requirements are too prescriptive for small commercial credit providers and a less prescriptive approach should be provided as an alternate or a qualification that the compliance obligation is scaleable.</p> <p><u>AFC Recommends:</u> Clarification to the extent that there is inconsistency in complaint handling timeframes between Clause 22, Part IIIA and ASIC's RG 165.</p>

CODE PROVISION	RELEVANT EXTRACTS	AFC FEEDBACK
		A less prescriptive approach to IDR compliance framework to recognise the broad gamut of entities that are captured as “credit providers”, particular small commercial financiers.
22.3 CRB mandatory EDRS membership		<p>There is no statutory basis for the imposition of this obligation. The Parliament had every opportunity of statutorily imposing this obligation on a CRB but chose not to do so. Without a process of RIS as a pre-cursor to what is effectively a decision to impose additional regulation and cost on CRB we question the basis for the provision. It remains open to the CRB to voluntarily join an EDRS as a customer relations exercise.</p> <p><u>AFC Recommends:</u> We recommend its omission and that the decision remains a business one for a CRB.</p>
23. Record Keeping		
23.1 Record of destruction of CRI etc		<p>We understand that the obligations to keep a record in relation to particular events or circumstances listed in Clause 23.1 does not impose an obligation to “create” a new record but to retain information adequate to be able to produce evidence in the event of a dispute. However, we recommend that this be clarified in relation to the record keeping obligations. This would also be useful in relation to the requirements to make written notes so that it is acknowledged that a means of extracting and producing electronically relevant aggregated data for the attributes relevant to the requirements for a written note would be compliant for the purposes of the Act. An obligation to create a note for the specific purpose is not required.</p> <p>While the list of circumstances detailed in Clause 23.1 appear prescriptive, we understand that they are generally reflective of a statutory obligation (eg for a CRB under s. 20E(5) to make a written note of disclosure. We query whether “keep a record” and “make a written note” are synonymous? If not, we suggest terminology that reflect the Act’s requirements should be preferred. We also suggest that, while noting that for some matters, Parliament has given a clear indication of its expectation in relation to the level of detail that would be expected to be included – eg at page 166 for CP uses & disclosures of credit eligibility information under s. 21G) where possible that it be left to the CRBs / CPs and other regulated entities how to structure compliance including in relation to record-keeping.</p>
24. Credit Reporting System Integrity		
24.3(c) + 24.5 Independent Auditors		We recommend omission in these paragraphs of a reference to an industry funded organisation on the basis that it pre-empts what remains a decision for industry broadly the compliance / monitoring / governance model together with the rules outlining industry participation in the system.

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24.9 Mandatory breach reporting to individual		<p><u>AFC Recommends:</u> Omission of Clause 24.9.</p> <p>We understand the Government is considering options for regulation in relation to mandatory breach reporting and any inclusion in the CR Code of compliance on this matter is premature and recommend that this Clause be deleted and revisited, as required, at a later point taking any additional legislative or other developments into account.</p>
25 Information Commissioner's Role		
25.2		<p>We acknowledge that the CR Code may provide for the reporting to the Commissioner about complaints.</p> <p>However, we also note that Parliament did not mandate the inclusion of this. As noted in the Explanatory Memorandum, at page 208 - 209:</p> <p>Clause 26N What is a CR code <i>Subclause (3) states the matters that the CR code may deal with. The purpose of this provision is to provide an indicative list of matters that may be included in the CR code, but the CR code is not required to include any of these matters.</i></p> <p><i>"...The CR code developer may also wish to include provisions dealing with the reporting of credit reporting complaints to the Commissioner, either as statistics, case notes, or in some other form."</i></p> <p>We understand that the Commissioner has indicated a preference for the CR Code to contain details of credit reporting complaints data reporting. We also note the focus of the current Code on the matter of significant sensitivity – namely SCI listing annual reporting (current Code 1.18).</p> <p>In this context, we are concerned that what is proposed is the draft CR Code at Clause 25.2 is far too prescriptive.</p> <p>The compliance / complaints reporting for CRBs / CPs in relation to their management of credit reporting data in which they have a commercial interest to ensure data accuracy should not be subject to reporting obligations to other regulators charged with ensuring compliance motivated by broad public interest concerns including money-laundering (eg Austrac) or public revenue abuse (eg ATO). We therefore suggest a less onerous, less intrusive reporting process be considered, particularly given whether a legal obligation will be included that will mandate breach reporting remains a matter for policy consideration by the Government.</p>

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		We also submit that as the law does not take effect until 12 March 2014, the reporting period should not begin until that date to minimise an outcome that would effectively impose a reporting obligation that acts retrospective from the date of approval of the CR Code.

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AFC COMMENTS: COVERING PAPER – DRAFT CR CODE (April 2013)

Stakeholders are asked to address in their submissions whether they consider that the proposed governance structure in the draft CR Code is sufficient bearing in mind OAIC's draft Guidelines.

AFC Response:

We understand that the questions posed in the Covering Paper arose in the context of draft Guidelines released by the OAIC for comment. The AFC responded to that draft and we submit that the points raised are valid to the questions raised in the paper. A copy of relevant extracts from the AFC submission follows:

Extracts from AFC Submission to OAIC Draft Guidelines on Code Development

We understand that Part IIIB will replace the current Act's provisions dealing with NPP Codes and the Credit Reporting Code of Conduct with a new framework dealing with codes of practice under the APPs (APP Codes) and a code of practice about credit reporting (called a CR Code). As noted in the background of the information-handling practices of our Members, both Code processes are potentially relevant to the AFC.

To date, our Members have not seen need to use the code powers available in the current Act to modify, via a NPP Code, the statutory parameters of the general information handling principles contained in the Act. Looking forwards, our Members are in the process of determining what changes to current practices will be required to ensure compliance with the amended Act from its 12 March 2014 commencement. Based on feedback to date, we do not anticipate a need for the new APP Code provisions to be utilised by our Members, at least in the short term.

In contrast, the compliance processes of our Members are heavily contingent on the current Credit Reporting Code of Conduct. It's replacement, the CR Code, will be equally critical to ensuring continued operation following commencement of the Amendment Act provisions relating to credit reporting.

For this reason, while noting the relevance of the components of the draft Guidelines relating to APP Codes, our consideration of the draft has been largely driven by Member priority and has focussed on the guidelines to the extent that they are relevant to the CR Code.

Our consideration has also taken into account the somewhat unique position that the CR Code has in the reformed statutory framework. Unlike an APP Code where the driver for its making will tend to be an industry or component of an industry sector looking to operationalise components of the Act to meet their particular situation (ie codes voluntarily developed by organisations), the CR Code is required to complete the statutory framework of the amended Part IIIA.

If the CR Code was largely conceptually and operationally the same as an APP Code, one might query the need for Part IIIB to separately provide a process for each. Rather, Part IIIB could have detailed a single framework for privacy codes, and that framework then be utilised either in the context of consideration of the APPs or Part IIIA credit reporting. The fact that the legislature determined it appropriate to separately deal with an APP code from the CR Code is a clear indicator of Parliament's policy position that they are different. Further, the

inclusion of the CR Code process in Part IIIB appears to have its genesis in the Government's response to the ALRC Report 108: FYI Privacy Law & Practice. The ALRC favoured a structure that saw credit reporting modernised in reformed privacy laws with credit reporting regulated:

- ☐ under high level principles in an Act, and
- ☐ more specific or different obligations for credit reporting information imposed on credit providers and credit reporting agencies prescribed under regulations.

In line with industry submissions, the ALRC also recognised there would be value for industry, to develop operational rules to assist compliance with the regulatory framework (eg reciprocity rules and promotion of data quality through rules relating to consistency and accuracy) and therefore recommended development of a credit reporting code, in consultation with other relevant stakeholders including consumer/privacy advocates and the Commissioner. The ALRC left open the question of the code's precise legal status and governance structure, suggesting these were matters for industry to resolve. Further, the ALRC did not regard this code as essential to the regulatory framework at commencement. Importantly, their view was that the regulations alone should be capable of providing adequate privacy protection for credit reporting in the absence of any code.

The proposed design of the reformed provisions was altered in the Government's response to the ALRC recommendations. While supporting a three component structure, the Government did not accept the framework proposed by the ALRC. Instead, the Government preferred that regulation of credit reporting:

- ☐ should continue to be primarily under a Privacy Act with provision for specific regulation where necessary. In effect, to the extent possible general information handling principles should apply to information, including credit reporting information.
- ☐ Where it was necessary for different or more specific protections to apply to this category of information, this would be dealt with primarily under targeted provisions within the Act.
- ☐ Importantly, the Government also supported development of a code as a flexible means of ensuring operational procedures consistent and compliant with the Act.

The Government saw the code operating in line with a proposed binding code power for the APPs but as a separate concept to them. The CR Code was to set out how credit providers and credit reporting agencies were to practically apply the credit reporting provisions without seeking to over-ride or apply lesser standards than outlined in the Act. Further, while there would be provision for development of the CR Code by the industry, final approval would be required by the Commissioner to ensure that the code appropriately balances the needs of industry to have efficient and effective credit reporting with the privacy needs of individuals. The CR Code was to be binding, and breach would be deemed to be breach of the Act.

Of note, the Government also acknowledged that industry may wish to outline matters in the code which are outside the jurisdiction of the Privacy Act and that these could be included though may need consideration and oversight through relevant approvals processes, including the ACCC.

The Guidelines for developing the CR Code appear to have been drafted with this context.

However the separation of the development process and statutory basis of the CR Code and the APP Code appears to have been lost.

Should there have been provision in the guidelines for a CR Code to be developed based on a model outlined by the Government (ie including provisions within the jurisdiction of the Privacy Act and provisions outside its jurisdiction), then the guidelines made need to have been drafted taking into account matters like consideration of resource requirements for Code development – including resources allocated to establishing an appropriate code administrator to oversee the operation of the code and financing the development and ongoing administration of the code in relation to regularly reporting on, and independent reviews, of the code. Given the position that appears in the draft indicates a view which would mean there is limited opportunity for a CR Code to be developed to cover other than matters in the Privacy Act, we find difficulty understanding the reason for their apparent application to a CR Code developer.

Under the Privacy Act, as amended, you or others appointed as Commissioner, are the statutorily appointed administrator of the registered CR Code and through appropriate review powers (eg through inclusion of an appropriate provision with the registered CR Code) will have the ability to ensure currency in the CR Code's operation. The review appropriately provides the opportunity for stakeholder (including industry) input.

Further, in other areas like complaint handling, which might necessitate resource allocation and review considerations if included in a code, in contrast to an APP Code, the inclusion in Part IIIA of the amended Act of a complaint handling process together with a mandatory obligation on a credit provider to be a member of a Commissioner-approved external dispute resolution scheme in order to get access to the credit reporting information imposes a different paradigm for an organisation subject to the CR Code than an APP Code which may contain its own EDR process and administrator for complaints handling.

For these reasons, we submit that it is not appropriate for the Guidelines to try to deal with the development and registration of a CR Code under the same type of framework that would apply to an APP Code. We further submit that a code administrator process separate from the Commissioner (eg in relation to monitoring or governance is not needed appears at odds with Parliament's intention. To the extent that the current draft Guidelines seek to impose considerations that are not relevant to development of a CR Code given its unique role with the amended Privacy Act, we submit the guidelines should be revised.

Conclusion & recommendation

In conclusion, the AFC recommends that, in line with the Government's and the Parliament's clear intention to provide separately for a process to support a binding APP code and a process for a CR Code, the draft Guidelines for Part IIIB Privacy Codes be revised to consist of two parts: one confined to APP Code development and the other with the CR Code development. We submit that this would achieve the underlying policy intention of Part IIIB and reflect the form which it has followed, would minimise the potential for confusion, and on the basis of what has been outlined above, avoid an unintended outcome that may arise through the inclusion of suggestions that monitoring and reporting compliance with the code beyond the statutorily appointed regulator, the Commissioner, is required to be taken into account by CR Code developers.

With that background, we provide the following responses:

1. Is the proposed governance structure sufficiently robust to enable stakeholders to have confidence in the credit reporting system? Does it sufficiently deal with conflicts of interest?

We submit that all participants in the credit reporting system, individual and industry alike, have a shared interest in ensuring appropriate information handling of personal information relevant to that process. Consequently there is no conflict. All participants have either an individual or commercial interest in ensuring appropriate collection, use, disclosure, security and destruction of the regulated data. We also submit that appropriate protections are provided at various points in the process to enable concerns in relation to inappropriate handling to be adequately dealt with either between the relevant parties or through the involvement of third party (eg the Commissioner; EDRS). As a consequence, we submit that the proposed governance structure is sufficiently robust.

2. Is there a sufficiently compelling case for an additional level of governance – a code administrative body – overseeing credit providers and credit reporting bodies and reporting through to the Commissioner? Would the costs justify the benefits?

No. We reiterate the general comments provided above to support this position.

3. Given that Part IIIA of the Privacy Act entrusts credit reporting bodies with signing up credit providers to agreements and with auditing credit providers compliance with their agreements, would it be workable to have a code administrator with responsibility for auditing or investigating serious or repeated interferences with privacy or systemic issues?

No need. For reasons given earlier, appropriate administrator of the registered CR Code is the AIC / Privacy Commissioner. The statutory basis for its existence includes the obligations for the inclusion of prescribed terms in subscriber agreements between CRBs and CPs. The Code as currently drafted proposes a mechanism for regular independent audit of the CRBs as a separate requirement under the Act for the CRB to monitor through independent audits the CP compliance. Coupled with the overarching monitoring and enforcement role that the Commissioner has together with the access for an individual to free EDR Schemes to resolve complaints we believe there is adequate governance and quality assurance structures in place.

4. If a Code administrator body were to be established, how should this be constituted (bearing in mind the OAIC's draft Guidelines that state the body needs to be representative of those bound by the Code)? What should the body's responsibilities be? How should the body be funded and how should it operate?

Not required. There is no need for the establishment of a Code Administrator nor a role for one in relation to the registered CR Code. The AIC / Privacy Commissioner remains the appropriate and relevant administrator as the Parliament's delegated representative. Additional administration structures are likely to add cost to the industry which is likely to be borne by customers of consumer credit. In the absence of an identified need or justification for the creation of such a structure with the attendant costs, further consideration of this proposal should not be pursued.

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