

Issues Paper:

Updating the 1996 *Credit Reporting Code of Conduct*

March 2012

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A. Foreword

This document has been developed by the *Australasian Retail Credit Association* ("**ARCA**") and endorsed for release by the Code Industry Council – a roundtable of key industry stakeholders (and credit reporting agencies) related to credit reporting.

The introduction of more comprehensive credit reporting will bring significant benefits to the Australian community, including more informed lending decisions which have the potential to drive positive economic activity.

Improved data sharing is critical to the efficient operating of credit markets, resulting in improved products and rates for consumers.

B. Purpose

The purpose of this Issues Paper is to summarise the views of members of the Code Industry Council ("**CIC**"). Specifically, this Paper sets out the CIC's positions on what should be considered for inclusion or amendment in the development of the edited *Credit Reporting Code of Conduct*.

C. Scope

The Australian Government's reform of the *Privacy Act*, and in particular Part 3A related to credit reporting, provides an unprecedented opportunity to review the framework for the sharing and use of credit reporting information. In accordance with the Government's response, the current *Credit Reporting Code of Conduct* will be updated to guide the activities of industry and consumers in credit reporting-related matters. This Code will be drafted by industry and approved by the Privacy Commissioner.

The updated Code of Conduct is a critical aspect of the implementation of credit reporting reforms that will allow for the introduction of more comprehensive credit reporting in Australia as well as improve the existing credit reporting practices. An updated Code will assist consumers by ensuring greater transparency in the risk assessment process and will allow more accurate information to be shared amongst Credit Providers and Credit Reporting Agencies. Further, the Code will support improvements in the complaints processes, and industry participants will benefit from a Code that provides clear and effective advice on key operational matters.

To ensure the Code balances the needs of all those involved in and impacted by credit reporting, an Independent Reviewer has been appointed to ensure impartial approach to Code development.

The Independent Code Reviewer is expected to:

- review and make recommendations on the Code development process;

- review the positions for inclusion in the Code contained within this Paper;
- meet with stakeholders to facilitate their review and feedback on this Paper; and
- ensure the final Code proposal meets the needs of all stakeholders as much as this is possible.

D. Background

There has been an extensive review process for Australia's current *Privacy Act*. In October 2006, the Australian Law Reform Commission (ALRC) released *Issues Paper 31*, a general review of privacy issues. ALRC *Issues Paper 32 'Review of Privacy – Credit Reporting Provisions'* was released in December 2006 and focused on a range of options to reform Australia's regulatory arrangements for credit reporting - from minor changes to the current law through to major structural proposals concerning the location and nature of credit reporting regulation. In each context, the Issues Paper asked whether information privacy is protected adequately in the credit reporting system.

In 2008, the ALRC tabled *For Your Information* (ALRC Report 108). ALRC Report 108 was the product of a comprehensive 28 month inquiry into the effectiveness of the *Privacy Act* and related laws.

The Australian Government will respond to ALRC Report 108 in two phases. The first stage response addresses 197 of the 295 recommendations in the ALRC's report.

Of those 197 recommendations:

- the Government has accepted 141, either in full or in principle;
- 34 are accepted with qualification;
- 20 are not accepted; and
- 2 recommendations are noted.

The remaining 98 recommendations of the ALRC will be considered in stage two of the Government's response.

The introduction of more comprehensive credit reporting forms part of the Government's first stage response, alongside the introduction of the proposed Australian Privacy Principles, and provisions about strengthening the Privacy Commissioner's powers.

For additional information on the Australian Government's reforms to privacy, visit <http://www.dpmc.gov.au/privacy/reforms.cfm>.

E. Structure of this Paper

The contents of this Paper have been separated into the following sections for ease of reading.

Part 1

The industry positions in the context of those aspects addressed in the relevant ALRC recommendations, the Australian Government's response to those recommendations, and the Exposure Draft provisions on the credit reporting of the new *Privacy Act*.

Part 2

Additional components ARCA has proposed for inclusion in a revised Credit Reporting Code of Conduct to deliver an improved and holistic approach to credit reporting.

Part 1: The Australian Law Reform Commission recommendations, and industry responses to those recommendations.

1.1 The creation of an updated Credit Reporting Code of Conduct

1.1.1 ALRC Recommendation 48–1

Part 3AA of the *Privacy Act* should be amended to specify that a privacy code:

- (a) approved under Part 3AA operates in addition to the model Unified Privacy Principles (UPPs) and does not replace those principles; and
- (b) may provide guidance or standards on how any one or more of the model UPPs should be applied, or are to be complied with, by the organisations bound by the code, as long as such guidance or standards contain obligations that, overall, are at least the equivalent of all the obligations set out in those principles.

1.1.2 Government Response: Accept in principle

The Government agrees that the Privacy Principles should be the base standard for privacy protection and that codes should be developed to provide guidance about how some or all of the principles apply in certain contexts.

The Government notes that it was not the ALRC's intention in paragraph (a) that the protections in the code cannot expand upon or enhance the protections in the Privacy Principles. This means that in some instances a code may 'replace' concepts in the principles to the extent the code adds to the requirements by providing for a more specific or higher standard of privacy protection. For example an organisation would be able to narrow the application of the 'use and disclosure' principle so that personal information could only be used for a primary purpose or the concept of 'reasonable' access in the 'access and correction' principle could be replaced with a prescribed fee for access.

The code power will therefore allow organisations to offer protections in excess of those offered by the privacy principle but only to the extent that these protections do not derogate from the principles.

Binding codes

In addition to recommendation 48-1, the Privacy Commissioner should be given the power to request the development of a privacy code by a defined group of organisations/agencies where the Commissioner considers that the public interest would be served by the development of such a code. The defined group of organisations/agencies would be either an industry sector or a group of organisations/agencies who engage in a prescribed practice (such as using certain tools or technologies). The code would be developed by the organisations/agencies in line with recommendation 48-1 and would be approved by the Commissioner subject to the requirements of Part 3AA. The code would be mandatory for all those organisations/agencies as defined in the code.

Where an adequate code is not developed or approved, the Privacy Commissioner would be empowered to develop and impose a privacy code that mandatorily applies to a defined group of organisations/agencies. This power would be subject to a requirement to undertake consultation with relevant stakeholders similar to that currently required for

Public Interest Determinations.

This would result in a three tiered model for code development: codes voluntarily developed by organisations; mandatory codes developed at the request of the Privacy Commissioner; and where such a request is not complied with, a mandatory code developed by the Privacy Commissioner.

This model is based on Part 6 of the *Telecommunications Act 1997* (Cth) and the mandatory codes will have the same application as recommended in recommendation 48-1 and as currently applies in Part 3AA of the *Privacy Act*. The codes would be distinguished from the telecommunications model in that they would not create standards which would attempt to derogate from the Privacy Principles but would provide more specific standards for sector groups or for specific practices. These codes may go beyond the application of the Privacy Principles to the extent that they do not derogate from the principles.

A breach of a binding code would be an interference with privacy under section 13A of the *Privacy Act* and would be subject to the usual enforcement mechanisms available for an interference with privacy.

1.1.3 ARCA Position

ARCA proposes that the current Credit Reporting Code of Conduct is updated to account for the reforms to credit reporting.

ARCA further proposes to develop a data standard to support the Code which would address the data standards required to deliver credit reporting.

This data standard would be for all users of credit reporting, it may include some differences for selected industries but in such instances it would be consistent within each industry sector.

1.1.4 Implications of the Exposure Draft provisions on the ARCA position

Part 3AAA of the current *Privacy Act* provides the powers for the regulator to create a Credit Reporting Code of Conduct. Though there are numerous references to a Credit Reporting Code of Conduct, there is neither a definition of one or provision for the drafting by industry of one in the Exposure Draft provisions.

ARCA expects that the Exposure Draft provisions relating to the powers of the regulator will ensure this issue is addressed.

1.1.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.2 Scope of the Credit Reporting Code of Conduct

1.2.1 ALRC Recommendation 54–9

Credit Reporting Agencies and Credit Providers, in consultation with consumer groups and regulators, including the Office of the Privacy Commissioner, should develop a credit

reporting Code providing detailed guidance within the framework provided by the *Privacy Act* and the new *Privacy (Credit Reporting Information) Regulations*. The credit reporting code should deal with a range of operational matters relevant to compliance.

1.2.2 Government Response: Accept with amendment

The Government agrees that both industry and advocates require flexibility to ensure that operational procedures consistent and compliant with the *Privacy Act*. Matters identified by the ALRC to be placed in the credit reporting code would be more suitably placed in an industry-developed code rather than the *Privacy Act*.

The Government notes that it is necessary to have a clear and transparent code of practice, which is agreed to across the credit reporting industry, about how the credit reporting provisions and related issues will operate in practice. The code will ensure consistency across the industry in relation to matters such as access to information, data accuracy and complaint handling.

The Government considers that an industry code should be developed subject to satisfactory consultation requirements between the credit reporting industry, advocates and the Privacy Commissioner. The *Privacy Act* will broadly outline the matters to be addressed in the code (including those recommended by the ALRC). It is also intended that the code will replace the current Credit Reporting Code of Conduct developed by the Privacy Commissioner, and will address the matters outlined in that Code of Conduct to the extent they do not overlap with requirements in the redrafted *Privacy Act*.

The code will operate in line with the proposed binding code power as outlined in recommendation 48-1. The code will operate in addition to the credit reporting provisions and should not seek to override or apply lesser standards than are outlined in the *Privacy Act*. Instead the code would set out how Credit Reporting Agencies and Credit Providers can practically apply the credit reporting provisions.

The *Privacy Act* will require that any code that is developed is to be approved by the Privacy Commissioner. The Government acknowledges that the credit reporting industry will be the main driver behind the code. However, final approval of the code by the Privacy Commissioner will ensure that the code appropriately balances the needs of industry to have efficient and effective credit reporting with the privacy needs of individuals.

Any organisation or agency (including Credit Providers and Credit Reporting Agencies) that wants to participate in the credit reporting system will be required to be a member of this binding code. This will ensure consistency across the sector.

A breach of the code will be deemed to be a breach of the *Privacy Act* to the extent that the code provision is interpreting the application of a credit reporting provision in the Act.

The Government notes that industry may wish to outline matters in the code which are outside the jurisdiction of the *Privacy Act* and that these matters could be addressed through the relevant approval processes as required by the Australian Competition and Consumer Commission.

The Government will consult further with industry and advocates in drafting the appropriate provisions to establish the power to make a binding industry code in the *Privacy Act*.

1.2.3 ARCA Position

ARCA proposes that the Code will cover those areas specifically mentioned in the Government's response to the ALRC's recommendations. Additionally, the Code will address operational issues to practically enable the allowed types of information within the bounds of the *Privacy Act*, related regulations and other laws as applicable.

Key aspects to be addressed that are beyond those mentioned in the recommendations and Government response include, but are not limited to:

- The establishment of a single data standard comprising policies, processes, and procedures required to implement the utilisation of consumer information relating to credit reporting in a consistent manner.
- Requirements for 'reciprocity' – rules that broadly require the supply of data commensurate to the level of data returned, subject to the restrictions imposed by law.
- Mechanisms to further facilitate compliance with the Code.

1.2.4 Implications of the Exposure Draft provisions on the ARCA position

Though there are numerous references to a Credit Reporting Code of Conduct in the Exposure Draft provisions related to credit reporting, there is neither a definition of one or provision for the drafting by industry of one in the Exposure Draft provisions. Further there is no defined scope for the Code – it is not clear whether the Code must only deal with elements referenced in the Act and the regulations, or additional matters can also be included.

ARCA assumes that the Code will be able to address areas other than those referred to in the Act and regulations, so long as it does not contradict them.

1.2.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.3 Four additional data sets – those allowed for all Credit Providers

1.3.1 ALRC Recommendation 55–1

The new *Privacy (Credit Reporting Information) Regulations* should permit credit reporting information to include the following categories of personal information, in addition to those currently permitted in credit information files under the *Privacy Act*:

- a) the type of each credit account opened (for example, mortgage, personal loan, credit card, mobile phone, utility);
- b) the date on which each credit account was opened;
- c) the current limit of each open credit account; and
- d) the date on which each credit account was closed.

1.3.2 Government Response: Accept

The Government supports the introduction of comprehensive credit reporting, in line with the ALRC's recommendations, subject to sufficient privacy protections being put in place. The Government considers that the introduction of the five 'positive' data sets proposed by the ALRC in recommendations 55-1 and 55-2 will provide Credit Providers with an enhanced tool to establish an individual's credit worthiness. Greater access to the five data sets as

proposed by the ALRC will allow more robust assessment of credit risk, which in turn could lead to lower credit default rates. On balance, comprehensive credit reporting is also likely to improve competition in the credit market, which will result in benefits to both individuals and the credit industry.

The Government understands the strong privacy and consumer credit concerns that arise with the introduction of a comprehensive credit reporting regime. The Government notes that the ALRC has based a number of recommendations for enhanced protection and dispute resolution for credit reporting information on the introduction of comprehensive credit reporting. The Government supports the introduction of effective privacy protections to ensure that the five data sets will be handled appropriately by Credit Providers and Credit Reporting Agencies.

The Government notes that, in line with the ALRC's views, the four data sets outlined in this recommendation will be made available without being subject to responsible lending obligations. The Government considers that the enhanced notification, data quality and dispute resolution requirements will provide sufficient protections to prevent the misuse of this information.

The Government notes that the binding industry code (outlined in recommendation 54-9) will also be an important mechanism to ensure consistency in how the four data sets are listed with Credit Reporting Agencies. The Government will require the credit reporting industry to develop standards around how it lists the types of credit accounts as well as when a credit account is deemed to be closed. For example, in relation to account closure, confusion exists for individuals around whether some credit products are closed after final payment or whether these are ongoing lines of credit (such as interest free accounts). The Government encourages industry to provide clear information to customers about when a credit account will be deemed to be closed.

The Government proposes that the listing of the four data sets with Credit Reporting Agencies will be permitted to occur in relation to existing accounts open at the time that amendments to the *Privacy Act* take effect. The Government does not consider there is justification for the argument that listing this type of information should only occur with respect to new accounts opened after the commencement of the amendments.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.3.3 Additional information regarding the Government reform agenda

ARCA met with representatives of the Department of Prime Minister and Cabinet on 16 April 2010. The Department provided their initial views on additional information which may be useful to understanding the reform agenda.

Scope and operation of the five positive data sets

a. Type of account opened

Issue – Should listed information about type of account be limited to only listing information about purpose of the account (for example. a mortgage or personal loan) or should further information be included to distinguish account types?

Outcome

Account type is limited to:

a) Industry type – credit, telephone, utility, and so on

- b) Name of credit provider – currently required by s 18E(1)(b)(v)
- c) Product type – loan type or purpose such as mortgage, credit card, mobile phone account, [type of] account
- d) Attributes of credit product – Key elements that describe the nature of the particular product type which are limited to:
 - Principle and interest or interest only
 - Fixed (e.g. home or personal loan) or revolving or continuing credit (e.g. credit card, overdraft)
 - Secured or unsecured

b. Date on which account opened

Issue - Whether the date should be when the credit is offered (at which point the credit provider is required to make provision for the credit) or when it is actually drawn down.

Outcome

There was general agreement from stakeholders that the point at which an account would be deemed open for the purposes of credit reporting information should be based on the date that an individual has entered a contract to obtain credit.

c. Current limit of each open account

Issue – Information is required to be reasonably accurate and up to date. Credit with scheduled payments over time (such as mortgage credit) will mean the current limit of the account will decrease, changing the individual's credit exposure. The issue is whether, and how, this change in the credit limit should be captured.

Outcome

There was no agreement between consumer advocates and the credit industry on the need for capturing the current limit of this type of credit. Credit Providers consider that, depending on the credit type, the current limit should reflect the actual amount of credit available to the individual and Credit Providers should be responsible for regularly updating the available credit limit.

d. Date on which each credit account was closed

Issue – Whether an account is deemed closed when credit is no longer available and the individual has no further commitments to make payments (i.e. where the individual no longer has access to credit but is still required to make payments). Also discussion around when consumers may consider credit accounts to be closed when no more payments are due, even though the credit account has not been formally closed by the credit provider.

Outcome

It was agreed by stakeholders that it was necessary to clearly specify the meaning of a

closed account. There was general agreement that the date a credit account is closed would be the date from which no further credit is available to be obtained by the individual or provided by the credit provider but there was disagreement about whether it should extend to the individual also having no further commitments under the credit contract. This raised issues around whether this data set is trying to deal with the credit exposure of the individual or their liability under a contract.

1.3.4 ARCA Position

ARCA proposes that a single data standard be created comprising policies, processes, and procedures required to implement the utilisation of consumer information relating to credit reporting.

The single data standard would apply to all users of credit reporting – Credit Providers as well as Credit Reporting Agencies. Further, the single standard will ensure uniformity regardless of whether the information is the ‘negative’ type information or any of the five new data sets. . The single data standard will enable specific industry sectors to establish exceptional rules on the basis that all entities within that sector conform to the exception.

Compliance with a single data standard would be required by all users of credit reporting, so as to ensure consistency and transparency – enabling businesses to operate effectively whilst supporting competition and delivering clarity to consumers in relation to precisely how information related to credit reporting is being managed.

The single data standard is vital to ensuring consistency and transparency for both consumers and those who utilise information relating to credit reporting, regardless of who supplied the information or who disclosed the information.

1.3.5 Implications of the Exposure Draft provisions on the ARCA position

Section 105 of the Exposure Draft provisions seems to empower and require CRAs to develop practices, procedures and systems, as well as policies that relate to the utilisation of credit reporting information that the Credit Reporting Agency collects to ensure it meets the standard of accurate, up to date, complete and relevant. It would seem reasonable that a data standard would be required to meet those obligations.

This obligation, in combination with the fact that there is no dominant purpose test for being classified as a CRA, could be interpreted as meaning that all involved in credit reporting must do this, and if that were the case, then doing so as a standard would be the only practical means – alternatively all parties involved could have their own standards which would make the industry highly ineffective and would likely make things highly confusing for consumers.

1.3.6 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.4 Fifth additional data set – restricted to licensed Credit Providers only

1.4.1 ALRC Recommendation 55–2

Subject to Recommendation 55–3, the new *Privacy (Credit Reporting Information) Regulations* should also permit credit reporting information to include an individual's repayment performance history, comprised of information indicating:

- a) whether, over the prior two years, the individual was meeting his or her repayment obligations as at each point of the relevant repayment cycle for a credit account; and, if not,
- b) the number of repayment cycles the individual was in arrears.

1.4.2 Government Response: Accept

The Government notes there is significant debate over the possible effect that the inclusion of repayment history in credit reporting information could have on the provision of credit to consumers.

On balance, the ALRC found that the listing of repayment history would provide Credit Providers with an independent and easily obtainable source of information about an individual's willingness to repay and would also clearly demonstrate when individuals are under credit stress. The Government agrees with the ALRC's view that the predictive value of this extra data set will lead to more informed lending practices, which in turn will result in greater efficiency and effectiveness in consumer credit lending. The Government considers that the benefits this data set will provide to the Australian credit market, and in turn to individuals and Credit Providers, outweighs the possible adverse privacy effects.

The Government agrees to the introduction of the fifth data set of repayment history subject to the protections that the ALRC has outlined in recommendations 55-3 to 55-5. These protections will be supplemented by additional privacy protections, including in relation to data quality, which will be implemented across the credit reporting scheme.

The Government notes that, in line with recommendation 54-8, the effect of implementing recommendation 55-2 will be reviewed in due course. The review will determine whether further privacy protections are necessary to ensure that all the new comprehensive credit reporting data sets are being collected, used and disclosed appropriately.

Collection and use of repayment history information will be subject to the proposed commencement of the responsible lending obligations in the National Consumer Credit Protection Bill 2009 (see recommendation 55-3 below). However, the Government notes that some credit reporting stakeholders suggest that at the commencement of the repayment history amendments to the *Privacy Act*, Credit Reporting Agencies should be able to list at least the previous 12 months' repayment history. Advocates have suggested that repayment history information should only be listed prospectively from the date these provisions commence.

The Government proposes that, in order to allow viable repayment history to be assessed from the commencement of the repayment history provisions, the period from when repayment history may be reported will commence six months after the release of this Government response. This will mean all credit consumers will be on notice that six months from the date of release of the Government's response, any repayment history on credit accounts may become available at a later date (ie when the repayment history provision commences) to a Credit Reporting Agency and any other Credit Providers from which the

individual may seek credit.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.4.3 ARCA Position

ARCA recognises that credit reporting can and does have important implications on the provision of credit to consumers.

The addition of the fifth data set is a vital element of information in being able to more accurately determine the level of risk involved in providing credit – risk to the lender, but also risk to the consumer.

ARCA proposes that the single data standard will also apply to the fifth new data set.

1.4.4 Implications of the Exposure Draft provisions on the ARCA position

Section 187 of the Exposure Draft provisions defines repayment history, and Sections 108 (4), 110 (2) (a), and 132 (5) govern the disclosure by a CRA of the fifth data set (repayment information); preclude the use of repayment information for direct marketing; and disclosure by a Credit Provider of the fifth data set.

It would seem that the key aspect topics are covered, but as listed in more detail in later sections, the Exposure Draft provisions phrasing and structure of these controls is problematic.

1.4.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.5 Fifth data set linked to responsible lending obligations

1.5.1 ALRC Recommendation 55–3

The Australian Government should implement Recommendation 55–2 only after it is satisfied that there is an adequate framework imposing responsible lending obligations in Commonwealth, state and territory legislation.

1.5.2 Government Response: Accept

The Government acknowledges that the inclusion of repayment history in credit reporting information could assist in achieving more responsible lending of consumer credit.

However, without a positive obligation to lend responsibly, the provision of repayment history data could mean that Credit Providers also take adverse credit risks based only on this information. It is therefore necessary that the inclusion of repayment history in credit reporting information should occur alongside appropriate responsible lending obligations.

In introducing the National Consumer Credit Protection Reform Package into Parliament, the Government has made a significant commitment to establishing enhanced protection for the provision of consumer credit. As part of these reforms, the Government is requiring all licensees under the reforms to comply with a set of responsible lending conduct requirements. These obligations will require licensees to ensure that they do not provide or suggest unsuitable credit to a consumer.

The Government is satisfied that the responsible lending conduct requirements in the Reform Package will provide a suitable framework to ensure that Credit Providers appropriately use information about an individual's repayment history (as outlined in recommendation 55-2).

As the responsible lending obligations will only be applicable to licensees subject to the National Consumer Credit Protection Bill 2009, the Government proposes that repayment history information should only be handled by Credit Providers subject to the obligations in that Bill.

The Government notes that the responsible lending obligations will not commence until January 2011 and therefore commencement of provisions about the use and disclosure of repayment history information will be subject to this same commencement date. The Government will consult with stakeholders on whether the 'plus four' data sets (ie the data sets outlined in recommendation 55-1) should be shared prior to the commencement of repayment history (noting that use and disclosure of these data sets will not be dependent on the commencement of the responsible lending obligations).

1.5.3 ARCA Position

ARCA's view is that all five of the new data sets should be made available to all involved in credit reporting, with the Data Standard to be constructed to manage the restrictions on the utilisation of the fifth data set in a practical and effective manner.

Nevertheless, ARCA acknowledges that neither the ALRC recommendation nor the Government response will support this position, and therefore the Code update will assume that the fifth data set will only be available to Credit Providers subject to responsible lending obligations, namely NCCP-licensed Credit Providers.

1.5.4 Implications of the Exposure Draft provisions on the ARCA position

Section 180 of the Exposure Draft provisions defines 'licensee' as having the meaning given by the *National Consumer Credit Protection Act*. This, in conjunction with the controls outlined in Sections 108 (4), 110 (2) (a), and 132 (5) that govern the disclosure by a CRA of the fifth data set, prohibits the use of repayment information for direct marketing.

It would seem that the Government have incorporated reference to the responsible lending obligations as they intended.

1.5.5 Insurance Council of Australia Position

We strongly support the ARCA position outlined at 1.5.3 which states that the new data set should be made available to all involved in credit reporting. Whilst we note the response from the Government limits access to this data set to credit providers subject to responsible lending obligations, this requirement will limit a LMI provider's access to repayment history information.

1.5.6 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.6 Fifth additional data set – procedures for reporting repayment history

1.6.1 ALRC Recommendation 55–4

The credit reporting code should set out procedures for reporting repayment performance history, within the parameters prescribed by the new *Privacy (Credit Reporting Information) Regulations*.

1.6.2 Government Response: Accept in principle

The *Privacy Act* will set out that only minimal information in relation to an individual's repayment history, in accordance with recommendation 55-2, should be collected by Credit Reporting Agencies and disclosed to Credit Providers. This information will not include information about account balances or specific repayment amounts.

The Government understands that the ALRC's intention in recommendation 55-2 was that a repayment would only be listed as 'missed' where the next repayment cycle had commenced and the previous payment had still not been made. The repayment cycle would be dependent on the timeframes set out in the credit contract. However, the Government notes that it may also be understood that a 'missed' payment would be deemed to occur prior to the next repayment cycle but within a defined period.

The Government notes that it should be clearly set out in the *Privacy Act* when a 'missed repayment' will be deemed to occur. The Government will seek further views from stakeholders about the preferred approach. If the latter approach is preferable, the Government proposes that the details of 'missed' payment timeframes should be set out in regulations.

The Government also considers that, given the significance that will be attributed to how repayment history is listed and the accompanying notices provided with this listing (see recommendation 56-11), these matters should be set out in regulations to the *Privacy Act*, rather than in the binding industry code. The Government proposes that the *Privacy Act* will set out the broad requirements applicable to listing repayment history in accordance with recommendation 55-2. Regulations would then outline issues about how and in what form the information will be listed, timing for missed payments and the notice requirements for repayment history. Regulations would also address other matters such as whether overdue payments which are re-negotiated for further scheduled payments should be listed and if so, how they should be listed.

The Government notes that the binding industry code will still play a part in determining other operational matters around repayment history that are not included in regulations, such as at what intervals a credit provider will list information with a Credit Reporting Agency.

1.6.3 Additional information regarding the reform agenda

ARCA met with representatives of the Department of Prime Minister and Cabinet on 16 April 2010. The Department provided their initial views on additional information which may be useful to understanding the reform agenda.

Repayment history

Issue – How the listing of repayment history should be standardised.

Outcome

There was general agreement that the listing of repayment history should be standardised to a monthly cycle, irrespective of the actual repayment cycle for an individual.

The effect of a monthly listing cycle is that an individual's actual repayment cycle will still be related to their credit contract and a missed payment will occur where payment is not made by the contractual due date of payment. However, the representation of repayment history will relate to whether repayment obligations have been met on a monthly basis in arrears.

Industry stated that grace periods are part of industry practice, although actual grace periods vary across the different types of credit products. It was noted that defining a grace period would simply move the problem of being 'one day late' and effectively give consumers flexibility beyond their contractual repayment requirements.

There was no agreement on the 'flagging' of schemes of arrangement and/or hardship applications. Industry supports some indication of these arrangements.

1.6.4 ARCA Position

ARCA proposes that the single data standard will also cover the fifth new data set.

The single data standard will include detailed operational specification of all data elements, as well as the aspects required to manage the restrictions on their utilisation - including those specific to the fifth data set - in a practical and effective manner.

The data standard will be drafted within the confines of the new *Privacy Act* and accompanying regulations.

The development of the data standard has been underway for more than two years, evolving in light of the ALRC's recommendations, the Government's response, and ARCA's discussions and engagement with the Government.

This work has included the development of a data standards framework comprised of:

- policies;
- field definitions; and
- technical specifications

Effective credit reporting requires such highly detailed and technically complex specifications to develop the computer programming required, so that credit reporting works as intended.

Due to the volume of information being utilised (even in a 'negative only' environment), there is no single individual that works out whether an item should or should not be listed. And even if there were, that would introduce a high degree of inconsistency. The only practical means of utilising large volumes of data in a way that reflects sufficient context to enable it to effectively represent the circumstances of the consumer, is to develop a sufficient level of detail.

There are instances when an item of information in isolation can reflect two very different realities, and ARCA seeks to include aspects in the Code and data standard to minimise the data elements needed to reflect the customer's unique circumstances without expanding the nature of the data being utilised.

To do this will require within the fifth data set provision for information that make clear situations of 'temporary hardship' which may involved arrangements between Credit Providers and consumers such as payment moratoriums, or debt restructures. This is

necessary to be able to distinguish between very different situations.

For example – consider these two scenarios:

- A) Someone who represents a low credit risk, but who has suffered a temporary setback such as the victims of the floods or cyclones in Queensland and Victoria. They may well 'miss a few successive payments' whilst they focus their efforts on getting their immediate situation sorted. As was the case in many instances, financial institutions made arrangements with these customers to allow them to sort out their immediate situation first and then get back on top of their financial situation – by providing them with relief under hardship provisions.

Note: The systems that Credit Providers use (by in large) continue to count delinquency in the background – as payments are not being made. The marking of the account as 'under hardship' does not change this, but does change the way such situations are treated relative to collection actions.

- B) Someone who as the same level of debt as customer A but who via their own financial management is at a point where they are missing payments.

If there were only those elements currently specified in Section 187 of the Exposure Draft provisions available, both credit reports would look the same.

When customer A is back on their feet, and they seek to apply for credit, it could be difficult for them to do so without a substantial amount of effort – due to the highly automated nature of consumer lending.

By allowing sufficient provision of 'context' information such a situation can be effectively made clear via credit reporting, thus enabling the consumer to get on their activities without further hassle.

As well, customer B will not wrongly be granted credit that they are unlikely to be able to effectively manage.

ARCA proposes to make provision for the data necessary to distinguish such situations without having to introduce unnecessary complexity, by making provision for a very limited number of general treatments given to customers rather than trying to capture specific detail about what could be a near limitless set of circumstances that might give rise to these general treatments.

The single data standard will include all of the data elements as well as the aspects required to manage the restrictions on the utilisation of the fifth data set in a practical and effective manner.

1.6.5 Implications of the Exposure Draft provisions on the ARCA position

Section 187 of the Exposure Draft provisions defines repayment history. It stipulates that regulations may be used to address two specific aspects in more detail.

Sections 108 (4), govern the disclosure by a CRA of the fifth data set (repayment information), 110 (2) (a), controls the preclusion of repayment information for direct marketing, and 132 (5) covers disclosure by a credit provider of the fifth data set.

Section 187 is unworkable for very similar reasons that make the default listing requirements of the current *Privacy Act* and Code problematic, they prescribe an approach that seems like

what should happen, but at a more detailed level is very different from the way that accounts are actually managed.

In contrast to the very brief Exposure Draft provisions, the data standard as drafted (which deal with only the technical loading of data), will extend to well over 100 pages on their own. Whilst the data standard will deal with all of the data sets to be utilised, it is expected that in excess of 15 pages (or approximately 600+ lines) will be devoted to this data set alone, to ensure that it reflects the nature of how accounts are actually conducted by consumers, whilst not seeking to expand upon the clear boundaries laid out in the ALRC's recommendation and the Government's response.

In relation to the basic aspect of reporting repayment history as simply whether or not payments are made:

Section 187 of the Exposure Draft provisions provides for what seems to be only three items of data in relation to repayment history, namely:

1. presumably a 'flag' as to whether or not a consumer has met their obligation to make a payment
2. The date on which that payment was due.
3. If the payment was not made when due, then the date it was made.

Section 187 also indicates that the regulations may expand on this further – but limits the scope of that to only what constitutes 'meeting the obligation of the payment – which is assumed to be to create a uniform tolerance threshold; and whether or not a payment is a monthly payment', which is presumed to be some means of standardising the treatment of payments that are due on alternative frequencies (e.g. fortnightly or weekly).

Perhaps unintentionally, but the Exposure Draft provisions appear to be overly prescriptive, and would require highly complex parallel calculation of delinquency – one for credit reporting and the other for how the account is actually run by the institution and communicated to the consumer via their statements.

This is problematic, but would seem to be able to be addressed by making the language slightly more general, yet still sufficiently restrictive so that credit reporting could not use the 'flexibility' to introduce other topics of information into credit reporting.

In relation to providing for a small degree of context around the commercial arrangements that the credit provider and the consumer may have to enable differentiation of circumstances – such as natural disasters:

Section 187 of the Exposure Draft provisions does not seem to provide for this aspect, but it is unclear whether that was intentional or an oversight.

On the assumption that there is an interest in being able to distinguish on a credit report situations where Credit Providers and consumers were able to come to alternative arrangements (such as are suggested in Section 184 relative to situations once a default has been lodged) ARCA recommends that similar provisions be made in relation to the reporting of repayment history where circumstances have resulted in an arrangement between the consumer and the credit provider to vary the terms of the contract.

1.6.6 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback

in relation to an alternative.

1.7 Data retention periods

1.7.1 ALRC Recommendation 55–5

The new Privacy (*Credit Reporting Information*) Regulations should provide for the deletion of the information referred to in Recommendation 55–1 two years after the date on which a credit account is closed.

1.7.2 Government Response: Accept

In line with the overarching aim of credit reporting regulation to ensure that information is only maintained by Credit Reporting Agencies and used by Credit Providers for as long as the information remains relevant to assessing an individual's credit worthiness, the Government considers that this retention period is appropriate.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.7.3 ARCA Position

ARCA proposes that the data standard will detail operational matters relating to data retention.

The data standard will address data retention through policies, processes, and procedures necessary to give effect to these retention requirements in a practical and effective manner.

Those elements of information required to give effect to the retention periods (such as dates of certain events) will need to be included in the data standard, and allowed for under either the *Privacy Act* or regulations.

1.7.4 Implications of the Exposure Draft provisions on the ARCA position

Sections 124 and 125 of the Exposure Draft provisions specify the retention periods for various types of information.

These sections are inconsistent in how they envisage the treatment of the data, specifically with respect of the retention timeframes related to defaults.

In the Exposure Draft provisions related to credit reporting, as a general principle the start date is the date that something happened; for example from the time the account was closed – not the date the account was 'reported' as closed. Similarly the starting point for items related to bankruptcy or court judgements, is the day they occur, not the date they are initially loaded on to the credit bureau reports.

For defaults to be consistent, the starting data would be the date that the default criteria were initially met, and not the date when the credit provider initially reported it or when the credit bureau actually loaded it into their system.

If the starting point is not linked to the event to which it relates, but rather when those that share information do so, then the length of time a default would be on a credit report could

vary substantially, based on the practices of the reporting institution rather than the credit conduct of the consumer.

This is both unfair to the consumer and problematic for the users of the data – as the underlying meaning of a field would be compromised.

For example:

Customer falls “x” number of months behind in their payments at two different Credit Providers.

Assume that both notify the customer of their intention to list a default, as required, and all other criteria and obligations are all met;

- Credit Provider A – chooses to report a default as soon as they are allowed. Five years later this default will be removed from the credit report.
- Credit Provider B – chooses to report 6 months later (which under the current Exposure Draft provisions would be allowed as there is no requirement to report ‘when’ the criteria is met, only to not report a default *until* it is met (or any time thereafter so long as no further criteria – such as the debt being barred from collection has not yet occurred))

Here two identical defaults would be treated differently. Credit Provider B’s default would remain on the customer’s credit report six months past the time that the other was deleted due simply to the delay in reporting the event.

For payment information (as defined in the Exposure Draft provisions related to credit reporting) to also be consistent, it would be the date that the payment was actually made, not the date that the information about the payment was collected by the credit reporting business. The consequences of using the collection date are similar.

Section 125 in the Exposure Draft provisions is highly prescriptive, and as a result may have intentionally created the need for changes to or development of other laws to support this level of detail as well as changes to the disclosure practices of the insolvency trustee and the courts that deal with insolvency.

For example:

Section 125 requires knowledge of whether item of personal insolvency information is related to specific sections of the *Bankruptcy Act*. At present this aspect of detail is not currently made available to CRAs as part of a personal insolvency record. It is unknown whether this information can be disclosed under existing bankruptcy laws or other laws which govern such information. At a minimum, changes would be required for this information to be made available to CRAs for them to discharge their obligations under the Exposure Draft provisions requirements.

Unless the necessary data required to execute the prescribed retention period requirements can be made available in a timely and practical manner, these requirements would seem unreasonably prescriptive.

1.7.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.8 Criteria for serious credit infringement

1.8.1 ALRC Recommendation 56–7

The Office of the Privacy Commissioner should develop and publish guidance on the criteria that need to be satisfied before a serious credit infringement may be listed, including:

- a) how to interpret ‘serious’ (for example, in terms of the individual’s conduct, and the period and amount of overdue payments);
- b) how to establish whether reasonable steps to contact the individual have been taken;
- c) whether a serious credit infringement should be listed where there is a dispute between the parties that is subject to dispute resolution; and
- d) the obligations on Credit Providers and individuals in proving or disproving that a serious credit infringement has occurred.

1.8.2 Government Response: Accept in principle

The Government considers that it would be preferable given the level of concern over the application of a ‘serious credit infringement’ listing, that the elements outlined above be required by the *Privacy Act* to be addressed in the binding industry code. This will allow for the guidance to be binding on all those parties subject to the code and would provide a greater opportunity for industry, privacy and consumer advocates, and the Privacy Commissioner to work together to develop appropriate standards for the listing of serious credit infringements.

The Government notes that the Credit Reporting Code of Conduct as issued by the Privacy Commissioner provides guidance on the definition of ‘serious credit infringement’ and provides a useful model on how this could be addressed in the binding industry code.

1.8.3 ARCA Position

ARCA proposes that the single data standard will include specification of the minimum requirements that must be met prior to listing a serious credit infringement as these form part of what defines this item.

Draft specifications include the prescription of actions that Credit Providers must take as well as the outcomes or consequences of those efforts to ensure that prior to listing a serious credit infringement, reasonable attempts have been made to contact the consumer.

1.8.4 Implications of the Exposure Draft provisions on the ARCA position

The Exposure Draft provisions definition of serious credit infringement includes a requirement prior to a credit provider listing this information with the CRA to determine intent (as far as can be deduced from conduct) as well as to have taken certain steps to contact the individual which have been unsuccessful.

The proposed means of determining intent is to apply a set of objective rules given attempts to contact and their results. Assuming there is agreement that the rules are reasonable; the

intent aspect will have been addressed.

However, it is entirely possible for someone to seek to avoid their obligations and still be contactable. It is not uncommon for someone when contacted as part of collections activities to simply refuse to pay, or to provide false information.

The Exposure Draft provisions as written require that the credit provider must not have been able to contact the consumer to be able to list the serious credit infringement.

This is expected to be an unintended consequence of the drafting.

1.8.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.9 Treatment of information about those under 18 years of age

1.9.1 ALRC Recommendation 56–9

The new *Privacy (Credit Reporting Information) Regulations* should prohibit the collection of credit reporting information about individuals who the Credit Provider or Credit Reporting Agency knows, or reasonably should know, to be under the age of 18.

1.9.2 Government Response: Accept

The Government acknowledges that there should be appropriate protections around the provision of credit to individuals under the age of 18 and that this protection should also be afforded in relation to credit reporting.

The Government is satisfied that on balance the enhanced protections that individuals under the age of 18 will receive in prohibiting the listing of their information with Credit Reporting Agencies overrides the limited concerns raised that this may affect their ability to gain credit.

The Government would encourage guidance on when a Credit Provider or Credit Reporting Agency would know or should reasonably know an individual's age as part of the binding industry code.

The effect of this prohibition will be that credit reporting information can only be recorded from the date when an individual turns 18. However where repayment history is recorded once the individual turns 18, information about when the account was opened (if it occurred before the individual turned 18) would be permitted to be recorded.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.9.3 ARCA Position

ARCA proposes that the data standard will include specification of the requirements that must be met prior to provision or utilisation of data related to credit reporting.

These provisions will include a prohibition on data relating to those who are reasonably known to be under 18, and minimum standards in relation to determining that the individual being reported on is at least 18 years of age.

1.9.4 Implications of the Exposure Draft provisions on the ARCA position

Sections 106 (4) (c) and (6) of the Exposure Draft provisions deal with the collection and Section 132 (2) and (4) the disclosure by a CRA of information relating to those under the age of 18. These provisions seem to be consistent with their intention of protection those under age, and appear to be practical in terms of their ability to be implemented.

1.9.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.10 Notification requirements prior to data collection

1.10.1 ALRC Recommendation 56–10

The new *Privacy (Credit Reporting Information) Regulations* should provide, in addition to the other provisions of the 'Notification' principle, that at or before the time personal information to be disclosed to a Credit Reporting Agency is collected about an individual, a credit provider must take such steps as are reasonable, if any, to ensure that the individual is aware of the:

- a) identity and contact details of the Credit Reporting Agency;
- b) rights of access to, and correction of, credit reporting information provided by the regulations; and
- c) actual or types of organisations, agencies, entities or persons to whom the Credit Reporting Agency usually discloses credit reporting information.

1.10.2 Government Response: Accept

The Government agrees that more specific 'notification' requirements should be placed on Credit Providers to provide notice to individuals about not only the Credit Providers own information handling practices but also about specific practices of a Credit Reporting Agency. The Government considers it is appropriate that this notification should occur at or before the time of the collection of the personal information to be disclosed to the Credit Reporting Agency (ie at the time of applying for credit) rather than at any other time.

These 'notification' requirements will ensure that individuals are fully aware of how their information will be utilised in the credit reporting system. Notice of Credit Reporting Agencies' practices is important given that individuals will most often not receive this information directly from Credit Reporting Agencies.

The Government considers that these further notification requirements are reasonable and should not place an overly burdensome obligation on Credit Providers.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.10.3 ARCA Position

ARCA proposes that the Code provide guidance relating to notification requirements prior to data collection by Credit Providers.

Since the utilisation of data is predicated on the ability to rely on the notifications provided by the original party that collected the data, this guidance will help to ensure consumers get clear and consistent information about:

- identity and contact details of the CRAs; and
- rights of access to, and correction of, credit reporting information.

1.10.4 Implications of the Exposure Draft provisions on the ARCA position

Section 131 of the Exposure Draft provisions specifies the notification requirements relative to the collection of personal information (which is generally any information that can be linked back to the person).

The requirements in the Exposure Draft provisions related to credit reporting are less than were specified in the ALRC's recommendation and the Government's response.

Dropped are the requirements to make clear:

- (b) rights of access to, and correction of, credit reporting information provided by the regulations; and
- (c) actual or types of organisations, agencies, entities or persons to whom the Credit Reporting Agency usually discloses credit reporting information.

Item (b) becomes a requirement when dealing with requests for correction or complaints. This would seem to be a more practical placement.

It would seem possible that dropping this requirement from notification at the time of collections was an oversight. It would not seem to be onerous, so it may be useful to include this information in notification at time of collection as part of the Code of Conduct.

Item (c) which is also no longer included would seem more problematic, as it would be very difficult for a credit provider to know this information, in particular as it relates to the future.

1.10.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.11 Notification requirements prior to listing of missed payments

1.11.1 ALRC Recommendation 56–11

The new *Privacy (Credit Reporting Information) Regulations* should provide that a credit provider, before disclosing overdue payment information to a Credit Reporting Agency, must have taken reasonable steps to ensure that the individual concerned is aware of the intention to report the information. Overdue payment information, for these purposes, means the information currently referred to in s 18E(b)(1)(vi) of the *Privacy Act*.

1.11.2 Government Response: Accept with amendment

The Government understands that there is confusion about when an individual should be notified that a default payment will be listed in their credit reporting information, and that often individuals are unaware that a default has been listed until they attempt to apply for new credit. Given the negative impacts that default listings have on an individual's credit worthiness, it is important that they be made aware that this information will be provided by a credit provider to a Credit Reporting Agency.

The Government notes that the ALRC's proposed 'reasonable steps' test is intended to align with industry best practice that notification should occur just prior to a default being listed. This test does not attempt to dictate at what stage notice should be given as this would be dependent on the practices of each credit provider and any other notice obligations they are required to comply with in relation to consumer credit (for example, in relation to a default notice under the National Consumer Credit Protection Bill 2009). However, it is expected that any notice would be sufficiently connected in time to when the default is intended to be listed.

The Government also proposes, subject to further consultation with stakeholders, that this notification obligation would apply to Credit Providers who propose to list repayment history information which details 'missed' payments. The Government notes that the listing of 'missed' payments as part of repayment history will have a similar effect to default listings and so there should be appropriate notification to individuals that this information will be listed.

It is understood that generally Credit Providers will provide notification in overdue payment reminders that a default may be listed with a Credit Reporting Agency where the payment remains overdue. In line with this approach, it is likely that any requirement to also notify about the potential listing of a 'missed' payment would not be overly burdensome for Credit Providers. It would be appropriate that procedural requirements around the notification of 'missed payments' would be outlined in greater detail in proposed regulations as set out in recommendation 55-4.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.11.3 Additional information regarding the reform agenda

ARCA met with representatives of the Department of Prime Minister and Cabinet on 16 April 2010. The Department provided their initial views on additional information which may be useful to understanding the reform agenda.

Notification for repayment history

Issue – How notification processes for repayment history should operate.

Outcome

There was agreement on the requirement for general notification of obligations around listing of payments in arrears and that regular reminder notification of the effects of missing a payment could occur (for example, as part of regular account statements where these are used for the particular form of credit).

However, there was no agreement on the need for specific notice requirements that individuals be notified directly prior or around a missed payment being listed. While industry recognises that notice may be possible through new technologies, such as SMS alerts, there was no general industry support for specific notice after each missed payment as this would result in a significant regulatory burden.

1.11.4 ARCA Position

ARCA proposes that the single data standard will include specification of the criteria to be used in determining via a consistent means that a payment has been missed.

The data standard will include, as part of the definition of a missed payment, the notification and other requirements that must be met prior to listing a missed payment.

ARCA also supports inclusion within the Code minimum requirements with regard to general notification and specific notification by Credit Providers and CRAs.

ARCA supports consistency in notifications, and acknowledges that during the credit lifecycle, individual consumer circumstances may warrant that default notification be delayed or withheld and such practices are recorded within the Credit Provider policy and procedures.

For Credit Providers

Proposed general notification minimum:

There is no practical way to know in advance who will and won't miss a payment. In the specific instance of moving from 'current' (no payments missing) to one payment missing, prior specific notification would be impractical as generally over 90% of consumers make their payments, and to be required to specifically warn each consumer every month in case they do not would be excessive.

Nevertheless, notice on a regular basis of the consequences of missing a payment is reasonable.

ARCA supports regularly incorporating a warning about the consequences of missing a payment within communication regarding other matters – such as a regular account statement. This approach would be effective for customers that are already familiar with

receiving information in this manner, and practical in terms of the cost burden on Credit Providers.

Proposed specific notification minimum:

Prior to listing with a Credit Reporting Agency an instance of missed payment more severe than a single missed payment, specific and proximate notice is reasonable to be provided. As it is not possible to become two payments in arrears without having first been one payment in arrears, there is a more practical means of providing notice prior to listing this further missed payment being listed (assuming a standardised monthly payment counting method).

One means of doing so (though not the only one) that ARCA supports would be inclusion of notice with the communication indicating that the initial payment had been missed (which may be by an account statement).

For Credit Reporting Agencies

Given the nature of their relationship with consumers – which does not involve any regular communication, the following is proposed:

Proposed general notification minimum:

Regularly make prominent in their public communications and in educational materials (including on their website) the potential consequences of missing a payment or payments – including what will be recorded on an individual's credit report when this occurs.

There should be no requirement to specifically advise a consumer in advance of having a missed payment recorded, however, as part of the text of the contents of a credit report a warning about the consequences to a person's credit report, including what will be recorded on a person's credit report when this occurs, would be included.

1.11.5 Implications of the Exposure Draft provisions on the ARCA position Notification prior to listing a Default

Section 132 (2) (e) (i) and (ii) of the Exposure Draft provisions describes the need to notify a consumer "in writing" and for a "reasonable period to have passed" prior to listing a default.

As an account would need to be more than 60 days in arrears prior to listing the default (under current Exposure Draft provisions), the requirement seems to be reasonable they be informed in advance.

Whilst the requirement is a "reasonable period to have passed" prior to listing a default, there is no requirement for 'proximity' to that notice. It therefore remains unclear as to whether a single, blanket notification is sufficient.

It may be worth making provision in the Code for some aspect of proximity as a means of enhancing the customer's awareness of the implications of potentially reaching the default threshold.

As widely common practice would be to write to consumers at some point prior to their reaching 60 days delinquency, it would seem reasonably practical to implement notification within say within the 60 days prior.

Notification prior to listing "repayment information"

Section 132 (2) (d) (iii) of the Exposure Draft provisions leaves the door open for regulations

to stipulate notification requirements as flagged in the government's response to the ALRC Report 108 recommendations.

At issue is the impracticality of notice in advance of an account moving from current to past due (one payment behind). Given the consequences if a lag between reporting to a CRA, and the CRA being able to disclose this information were introduced, finding an alternative is necessary.

The suggestion above for inclusion in the Code is the most appropriate response, and would be far less problematic.

1.11.6 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.12 Pre-screening

1.12.1 Recommendation 57–3

The new *Privacy (Credit Reporting Information) Regulations* should prohibit the use or disclosure of credit reporting information for the purposes of direct marketing, including the pre-screening of direct marketing lists.

1.12.2 Response: Accept in part

The Government agrees that, even in light of its response to recommendation 57-2, it is important to make clear that credit reporting information should not be used or disclosed in any circumstances for the purposes of direct marketing. This will ensure that the permitted uses and disclosures of credit reporting information are interpreted in line with this prohibition.

The Government acknowledges the ALRC's views on the use or disclosure of credit reporting information for the purpose of pre-screening direct marketing lists. However, the Government considers that, on balance, the use or disclosure of credit reporting information for the purposes of pre-screening should be expressly permitted, but only for the purpose of excluding adverse credit risks from marketing lists. Pre-screening would be subject to specific requirements including the following:

- i. only negative credit reporting information can be used or disclosed for the purpose of pre-screening direct marketing lists;
- ii. individuals must be given specific notice at the time of collection of their personal information that it may be used for pre-screening;
- iii. individuals must be given the opportunity to opt-out of having their credit reporting information used for pre-screening;
- iv. individuals removed from direct marketing lists by pre-screening cannot be specifically identified for other direct marketing;
- v. Credit Providers, Credit Reporting Agencies, mailing houses, or any other organisation involved in pre-screening must maintain auditable evidence to verify compliance with the pre-screening restrictions;
- vi. Credit Reporting Agencies must maintain evidence that is available to individuals

which records the actual use, if any, of their credit reporting information for the purposes of pre-screening;

- vii. pre-screening must only be available to Credit Providers as defined under Part 3A of the Act and who are subject to the National Consumer Credit Protection Bill 2009; and
- viii. any organisations involved in pre-screening must be subject to the general requirements of the *Privacy Act*, if they are not already so covered.

The Government recognises the importance of any organisation involved in pre-screening (including mailing houses) maintaining adequate evidence to demonstrate compliance with the pre-screening requirements. The Government considers that this evidence must be made available for auditing by the Office of the Privacy Commissioner as required. The Government encourages the Office to provide guidance to organisations involved in pre-screening on compliance with this requirement.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.12.3 ARCA Position

ARCA's view is that pre-screening should be made available to all organisations that access credit reporting information. While understanding the desire to very tightly control the practice of pre-screening, it is ARCA's view that limiting this activity to only 'negative information' will result in consumers who are at risk of being overcommitted not being excluded from marketing offers.

Nevertheless, ARCA will proceed on the assumption that this proposal will not be accepted at this time. Should the Government's view change, the Code could be easily adapted.

Pre-screening is a 'one way' process that sees a Credit Provider send to a CRA a list from which high risk customers will be removed prior to solicitation using only data that is permitted. The process does not disclose back to the Credit Provider any information about individual customers who were removed from or remain on the list.

ARCA proposes that the ability to 'opt out' of pre-screening should be undertaken in such a way as to ensure that those who choose to 'opt out' of having their data used for pre-screening are automatically removed from marketing lists - in effect opting out of direct marketing that utilises pre-screening. This is necessary to prevent the unintended consequence of people with 'poor' credit histories attempting to use the 'opt out' as a way of staying on a marketing list, which would seem highly counterproductive in the context of responsible lending.

1.12.4 Implications of the Exposure Draft provisions on the ARCA position

Section 111 and 112 of the Exposure Draft provisions cover the topic of pre-screening and the destruction of pre-screening determination information.

Notwithstanding the comments about the 'opt out' issue, the balance of the pre-screening provisions seem able to be implemented in a practical way.

1.12.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback

in relation to an alternative.

Further, ARCA seeks specific feedback on the approach to be followed in relation to 'Opt Out'.

1.13 Consumer ability to preclude disclosure of their credit report

1.13.1 ALRC Recommendation 57–5

The new *Privacy (Credit Reporting Information) Regulations* should provide individuals with a right to prohibit for a specified period the disclosure by a Credit Reporting Agency of credit reporting information about them without their express authorisation.

1.13.2 Government Response: Accept

The Government strongly agrees that there should be measures in place to allow individuals to highlight to potential Credit Providers in their credit reporting information that they are a victim of fraud, including identity theft. These measures could assist in preventing credit reporting information from being used to perpetuate fraud.

The Government agrees that the *Privacy Act* should allow individuals, who have a reasonable belief that they are or are about to be victims of fraud, to request that a Credit Reporting Agency restrict access to their credit reporting information. Where Credit Providers seek access to credit reporting information that has been restricted, Credit Reporting Agencies would be required to advise the credit provider that they are unable to release information due to the individual's concerns about fraud. An individual would be able to consent to their credit reporting information being released where it is for legitimate purposes.

The Government agrees with the ALRC's proposal that, where a credit provider provides credit during the period that access is restricted and it is shown that the credit was provided for illegitimate purposes, the credit provider would be prohibited from listing a default or serious credit infringement that occurs as a result of that provision of credit.

The onset of fraud, particularly identity theft, often requires immediate action and the Government notes that it may be difficult for individuals to demonstrate to Credit Reporting Agencies their reasonable belief that fraud has or is likely to occur. The Government therefore proposes that the Credit Reporting Agency should restrict access to the individual's credit reporting information immediately at the individual's request and that the access restriction should remain in place for a period of 14 days. In order to extend the restriction beyond this initial period, an individual would be required to demonstrate to the Credit Reporting Agency that they have a reasonable belief that fraud has or is likely to occur. This would not necessarily require court-based evidence, but could include a statutory declaration by the individual or advice from the individual's financial institution.

The extension of the access restriction beyond this initial period would be subject to reasonable periods as determined within the binding industry code. The code should also set out other procedural requirements about notifying the individual of the effect of restricting access, the initial period in which access will be restricted, subsequent notifications that an access restriction period is ending, and how a credit provider should be informed of why the access restriction is in place.

1.13.3 ARCA Position

ARCA supports the concept behind the ALRC recommendation and the Government's subsequent response in relation to the protection of the individual and their credit reporting

information in the instances of fraud.

ARCA proposes an efficient and practicable way of protecting the individual and their credit reporting information from fraudulent use.

ARCA proposes the introduction of a fraud flag onto an individual's credit file. This would allow an individual to indicate that they have been the victim of suspected or confirmed identity theft.

Such an approach:

- does not require complex administration on an ongoing basis;
- does not affect provision of data updates by Credit Providers to the CRAs; and
- puts any credit provider assessing an application on notice that there is fraudulent or suspected fraudulent activity, thereby requiring them to undertake a greater level of due diligence in their verification processes.

Should it later be deemed that the credit provider did not perform sufficient due diligence there are already remedies in place, such as the consequences for licensed Credit Providers under the NCCP responsible lending obligations.

1.13.4 Implications of the Exposure Draft provisions on the ARCA position

Section 113 of the Exposure Draft provisions precludes the use of disclosure of credit reporting information and prescribes the processes involved in establishing and maintaining a ban on a person's credit reporting information.

The process prescribed for "freezing" a consumer's credit reporting information - to prevent use or disclosure by a CRA requires complex processes to establish this feature. Further, freezing of the individual's credit reporting information requires the consumer to demonstrate to the Credit Reporting Agency that they have a reasonable belief that fraud has or is likely to occur.

Additionally Section 134 of the Exposure Draft provisions is highly impractical requiring complex notification processes and maintenance activities to achieve consumer protection, when a far less complex approach can deliver this outcome.

Specifically, Section 134 seems to require a credit provider to maintain continual awareness of the status of their customers' credit reports (whether it not it is frozen) to enable them to prevent providing further data about that customer to the CRAs. This would require the creation of an ongoing exchange between each CRA and the Credit Providers that are associated with every credit file that is frozen. A further complexity is introduced by the fact that many Credit Providers are expected to provide data to multiple CRAs.

1.13.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

Further, ARCA seeks specific feedback on the approach to be followed in relation to a 'fraud flag'. With respect to dealing with fraud or potential fraud, should the Code include processes that utilise the typical the flow of information CRAs and Credit Providers, but place a higher requirement of due diligence on Credit Providers as an alternative to the complex arrangements for both consumers and industry required under the current wording of S 134?

1.14 Exchange of “banker’s opinion” data directly between Credit Providers

1.14.1 ALRC Recommendation 57–6

There should be no equivalent in the new *Privacy (Credit Reporting Information) Regulations* of s 18N of the *Privacy Act*, which limits the disclosure by Credit Providers of personal information in ‘reports’ related to credit worthiness. The use and disclosure limitations should apply only to ‘credit reporting information’ as defined for the purposes of the new regulations.

1.14.2 Government Response: Not accept

Credit Providers should continue to be restricted from disclosing ‘credit worthiness’ information in accordance with the protections in section 18N of the *Privacy Act*. This is particularly important in relation to information which is similar to that maintained by Credit Reporting Agencies or which directly relates to an individual’s existing credit account. The Government considers that there should be consistency around how this information is disclosed and assurances for individuals that it will not be disclosed in an inappropriate way. For example, the Government considers that information that relates to an individual’s repayment history or credit account limit or balance should only be disclosed by a credit provider to another credit provider where an individual specifically consents to this disclosure.

The Government acknowledges that the current definition of a report about an individual’s ‘credit worthiness’ is too broad and covers information that would be adequately protected by the general ‘use and disclosure’ privacy principle. The definition will therefore be revised to only apply to information that is similar to information maintained by a Credit Reporting Agency (in accordance with recommendation 56-1) or information that is about an individual’s credit accounts. It is not intended to cover information about an individual’s income or employment details.

1.14.3 ARCA Position

ARCA proposes developing within the Code standard procedures for the capture and management of direct data sharing between Credit Providers including record keeping as necessary to meet the obligations related to this process. It is ARCA’s view that for licensed Credit Providers, this capability is vital in some circumstances to confirm debts required to meet NCCP responsible lending obligations.

1.14.4 Implications of the Exposure Draft provisions on the ARCA position

Section 137 of the Exposure Draft provisions specifies the requirements relating to the disclosures between Credit Providers.

The express consent requirement seems to be similar to the requirements under Section 18N (1) (b) of the current *Privacy Act* - *“the individual concerned has specifically agreed to the disclosure”*. Though the exchange of information between CRAs and Credit Providers only requires notification, there seems to be a higher standard if the exchange is undertaken directly between Credit Providers.

What was unclear under the current *Privacy Act* remains unclear under the Exposure Draft provisions related to credit reporting, namely whether or not the specific purpose aspect limits which other Credit Providers can be contacted by the credit provider who has been given expressed consent.

If there is a limitation of only contacting those institutions that the consumer designates they

have credit with, then it could be problematic trying to identify instances of ‘under-disclosure’ – which has been shown to be rather common and disproportionately so for those who are more likely to face credit difficulty in the future.

Some clarity of this situation is sought.

1.14.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.15 Treatment of adverse contractual variations

1.15.1 ALRC Recommendation 58–2

The new *Privacy (Credit Reporting Information) Regulations* should provide that where the individual has entered into a new arrangement with a credit provider to repay an existing debt—such as by entering into a scheme of arrangement with the credit provider—an overdue payment under the new arrangement may be listed and remain part of the individual's credit reporting information for the full five-year period permissible under the regulations.

1.15.2 Government Response: Accept

The Government considers it is appropriate that, where a default or serious credit infringement has been listed in an individual's credit reporting information and the individual enters a new scheme of arrangement relating to that listing, any future default under that arrangement may be listed separately. This will provide evidence that an individual continues to be under credit stress and put Credit Providers on notice.

This will apply to schemes of arrangement as currently defined in the Office of the Privacy Commissioner's guidance to the Credit Reporting Code of Conduct and will only apply to schemes that are as a result of a previous default or serious credit infringement listing.

The Government notes that the listing of a default that occurs under a new scheme of arrangement will be subject to the same requirements that apply to the listing of defaults more generally. For example, the same notification requirements would apply as outlined in recommendation 56-11.

It is also intended to make clear in the *Privacy Act* that notes about schemes of arrangements can be included in credit reporting information (in line with the provisions in the Credit Reporting Code of Conduct).

The Government has indicated that it will also be considering the application of schemes of arrangement in relation to the listing of repayment history when making regulations to clarify the application of that data set (see recommendation 55-4).

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.15.3 ARCA Position

ARCA proposes developing within the Code, standard procedures for dealing with instances where a Credit Provider has entered into a contract variation arising from adverse situations. Further, the single data standard will include the necessary provision of data elements

required to enable consistent capture and utilisation of this information.

It is ARCA's view that similar provisions should be included to deal with situations where the terms and conditions of accounts have been changed, but which have not yet met the criteria for or have yet been actually listed as a default.

This is vital to being able to portray accurate and up to date information about a credit exposure, and provide better protection to a debtor in a scheme of arrangement and reduce the likelihood of further borrowing.

Catering for new arrangements related to 'pre-default' situations would involve specific details in relation to how missed payment counters must be coded to make clear that the account is under such an arrangement and whether that arrangement is being maintained, has been concluded successfully, or has been broken.

ARCA further proposes requiring those engaged in credit reporting to make publicly available clear and simple communications about how these (and all other) aspects reflecting customer account conduct will be treated in credit reports.

This information will be available prior to the implementation and will be featured ongoing as part of a deliberate consumer education obligation.

1.15.4 Implications of the Exposure Draft provisions on the ARCA position

Section 184 of the Exposure Draft provisions defines the *Meaning of new arrangement information*. This definition is specifically linked to only previously defaulted credit. Section 124 Table Items 6 and 7 specify unique retention periods for this type of information.

The provision relating to the treatment of 'new arrangements' seem to be able to be implemented in a practical manner.

As mentioned in relation to ALRC Recommendation 55-4, the absence at this point of similar provisions for the treatment of 'arrangements' relative to pre-defaulted credit is problematic.

1.15.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.16 Data consistency and data quality

1.16.1 ALRC Recommendation 58–3

The credit reporting 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:

- a) the timeliness of the reporting of credit reporting information;

- b) the calculation of overdue payments for credit reporting purposes;
- c) obligations to prevent the multiple listing of the same debt;
- d) the updating of credit reporting information; and
- e) the linking of credit reporting information relating to individuals who may or may not be the same individual.

1.16.2 Government Response: Accept

The Government understands that 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.

The Government agrees that operational issues in relation to ensuring data quality should be addressed by industry, in consultation with consumer and privacy groups and the Privacy Commissioner, in the binding industry code.

1.16.3 ARCA Position

ARCA proposes a Code that details the operational aspects of the new *Privacy Act* with respect to credit reporting.

ARCA further proposes to develop a data standard to be referenced by the Code to deal with those aspects of a data standard that are required to deliver practical credit reporting that is complete, accurate, up-to-date and relevant.

The Code will address operational issues needed to enable practical utilisation of the allowed types of information within the bounds of the *Privacy Act*, related regulations and other laws as applicable.

Key aspects to be addressed that are beyond those mentioned in the recommendations and Government response include, but are not limited to:

- The establishment of a single data standard comprising policies, processes, and procedures required to implement the utilisation of consumer information relating to credit reporting.
- Requirements for 'reciprocity' – rules that broadly require the supply of data commensurate to the level of data returned – subject to the restrictions imposed by law.
- Mechanisms to further facilitate compliance with the operational detail – a key aspect of delivering practical credit reporting that is complete, accurate and up-to-date and relevant.

These aspects are fundamental to deliver substantive reforms to credit reporting in a practical and effective way.

Further, ARCA proposes to make these documents publically available to promote such a fact and to proactively promote consumer education relating to credit reporting. This education will include both the use of credit reporting information in credit decisions so that consumers are aware of how their data is being treated, and the consequences of their conduct in relation to credit applications and accounts.

Finally, ARCA propose including in the Code, mechanisms to further facilitate compliance with these requirements via practical and effective means.

1.16.4 Implications of the Exposure Draft provisions on the ARCA position

The ALRC recommendations and the Government response to the recommendations indicate a preference for leaving operational detail to be dealt with under the updated Code. However, the Exposure Draft provisions contain some operational details. This detail in a number of cases whilst seemingly similar to actual industry practice is not precisely industry practice.

Once such example is the treatment of repayment information.

The detail in Section 187 (a), (b), and (c) prescribes in detail the exact elements of information that can be utilised with regard to whether or not payments have been made as required or missed. However, to meet these requirements would require extensive simulation of actual practice to be run in parallel to actual practice to generate the items of information allowed as some of these items are not data elements already in the programming of the actual systems used to manage credit accounts.

Whilst it seems simple to suggest that if a payment is made late you can record the data, this fails to recognise that amounts paid are not always equal to a specific payment required to meet the obligations of the account.

The systems that keep track of what payments are required and whether or not they are met are complex. They also deal with reversals of payments, credits, the consequences of dishonoured payments, and other information that is used to manage the account.

To require development of what might appear to be a 'simplified' set of data elements would result in Credit Providers and CRAs operating two separate systems. Such a situation would most likely only serve to confuse matters as an accounts statement would say one thing, and the credit report would say another.

By being less prescriptive, but still being 'restrictive' about the scope of the data that can be utilised, this issue can be resolved. The critical aspect here is that whatever information is allowed to be reported to CRAs and disclosed to Credit Providers should reflect what is communicated to the consumer in the normal course of consumer and credit provider interactions (including the provision of account statements or the answering of queries about accounts).

1.16.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.17 Compliance, data security and data accuracy

1.17.1 ALRC Recommendation 58–4

The new *Privacy (Credit Reporting Information) Regulations* should provide that Credit Reporting Agencies must:

- a) enter into agreements with Credit Providers that contain obligations to ensure the quality and security of credit reporting information;
- b) establish and maintain controls to ensure that only credit reporting information that is accurate, complete and up-to-date is used or disclosed;

- c) monitor data quality and audit compliance with the agreements and controls; and
- d) identify and investigate possible breaches of the agreements and controls.

1.17.2 Government Response: Accept

It is important for both Credit Reporting Agencies and Credit Providers to take proactive steps to establish practices which maintain the data quality and security of credit reporting information. Given that Credit Reporting Agencies play a key role in managing credit reporting information it is appropriate that they be charged with the responsibility to develop appropriate agreements.

The Government expects that the agreements established by Credit Reporting Agencies and Credit Providers will expand upon the procedures which are outlined in relation to 'accuracy of information' in the current Credit Reporting Code of Conduct. The Government notes that these aspects of the Code of Conduct should be included in the binding industry code, where necessary.

The Government notes that this recommendation will supplement Credit Providers' and Credit Reporting Agencies' compliance with the general Privacy Principles in relation to 'data quality' and 'data security'. These principles overlap with paragraphs 18G(a) and (b) of the *Privacy Act* and these paragraphs will not need to be repeated in the revised credit reporting provisions. However, the *Privacy Act* will continue to require separately that Credit Providers and Credit Reporting Agencies take reasonable steps in accordance with paragraph 18G(c) to prevent unauthorised use or disclosure of credit reporting information where provided to a third party.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.17.3 ARCA Position

ARCA recognises the need for a comprehensive means of oversight to ensure an effective credit reporting system.

It is ARCA's view that in addition to contractual obligations placed on Credit Providers by CRAs there must be further effective independent oversight.

It is necessary to have an in-depth understanding of credit reporting to deliver sustainable and effective compliance frameworks.

1.17.4 Implications of the Exposure Draft provisions on the ARCA position

Section 116 for CRAs and Section 143 for Credit Providers of the Exposure Draft provisions, deals with the quality of information in credit reporting.

Section 116 specifies an obligation on CRAs to stipulate in their contracts with Credit Providers obligations to ensure, with regard to data quality, that independent audits are undertaken and to identify and deal with breaches of those contracts.

Section 118 in a similar way details the requirements relative to data security.

This seems to be an outsourcing of oversight to a large degree to the CRAs and establishes formally a conflict of interest situation.

As CRAs are paid by Credit Providers it would require them to try to regulate the activities of their own customers.

Whilst it is appropriate to have such requirements within the contracts, that mechanism of oversight alone is not sufficient.

1.17.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.18 Consumer access to information in relation to credit reporting

1.18.1 ALRC Recommendation 59–1

The new *Privacy (Credit Reporting Information) Regulations* should provide individuals with a right to obtain access to credit reporting information based on the provisions currently set out in s 18H of the *Privacy Act*.

1.18.2 Government Response: Accept

This is in line with the approach that the credit reporting provisions in the *Privacy Act* should only set out those requirements that are different or more specific to the general Privacy Principles. The access rights set out in section 18H should be replicated in amendments to the Act, as it is not appropriate for the exceptions in the general ‘access and correction’ principle to apply to credit reporting information.

The correction rights in the general ‘access and correction’ principle closely align with the current requirements in section 18J. Therefore it will be appropriate that Credit Reporting Agencies and Credit Providers are only subject to the general correction requirements in the ‘access and correction’ principle.

The Government notes that currently the Credit Reporting Code of Conduct sets out more detailed requirements in terms of when Credit Reporting Agencies and Credit Providers should provide access to, and correct, credit reporting information. These matters should continue to be outlined as necessary in the binding industry code. The *Privacy Act* will require that the code set out matters in relation to when and how access and correction should be provided for and the timeliness of the transactions.

Note: In line with the Government’s response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.18.3 ARCA Position

ARCA supports the Government’s position that the mandatory, binding Code should identify the requirements for credit reporting agencies and credit providers in relation to when and how access to, and correction of, credit reporting information should occur.

ARCA Members support the principle that the Code should provide a clear and consistent approach that will enable consumers to access their personal credit reporting information, and where required correct their credit information.

ARCA Members support the principle that the Code require that consumers are informed of the procedures for accessing and correcting personal credit information in a manner that is

clear and written in “plain English”, is concise and easily understood and provides an effective means of accessing and correcting personal credit information.

1.18.4 Implications of the Exposure Draft provisions on the ARCA position

Sections 119 and 146 of the Exposure Draft provisions deal with access. Section 119 (3) stipulates that the agency must respond within 10 days. It is not clear whether this is 10 calendar or 10 business days?

With respect to timeframes in the Exposure Draft provisions, the same issue is present. Clarity is required as to whether the Exposure Draft provisions when stipulating timeframes mean calendar or business days.

The other aspects of the Exposure Draft provisions in these sections seem to be reasonably likely to be practical to implement.

1.18.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.19 Consumer access to their credit report

1.19.1 ALRC Recommendation 59–2

The new *Privacy (Credit Reporting Information) Regulations* should provide that Credit Reporting Agencies must provide individuals, on request, with one free copy of their credit reporting information annually.

1.19.2 Government Response: Accept in principle

It is important to ensure that individuals have a statutory right to receive, on request and within a reasonable timeframe, a free copy of their credit reporting information from a Credit Reporting Agency. The Government understands that currently individuals have the ability to gain a free copy of their credit reporting information and that this practice should be mandated.

The Government considers that the binding industry code should set out the appropriate timeframes in which free copies should be provided to individuals. This will allow industry to determine in consultation with privacy and consumer advocates what is deemed a reasonable timeframe based on factors such as the urgency of a request (for example, where a dispute arises) along with the costs associated in providing a free copy. The Government notes that it may be appropriate to set out different timeframes for accessing a free copy based on the reason for the access request and whether it is reasonable that individuals will always receive a free copy in certain circumstances. These are all matters which it would be appropriate for the credit reporting industry to determine.

The binding industry code should also set out the form in which access should be given. The Government strongly encourages Credit Reporting Agencies to take reasonable steps to provide access to credit reporting information, including free copies, electronically.

Note: In line with the Government’s response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.19.3 ARCA Position

ARCA proposes developing, within the Code, standard procedures for dealing with provision of a free credit report under those conditions where that is required. Such procedures will also include the form in which the report will be provided.

ARCA expects that provision of a free credit report will be required at the request of the consumers (subject to some reasonableness of frequency threshold).

1.19.4 Implications of the Exposure Draft provisions on the ARCA position

Sections 119 (5) and (6) of the Exposure Draft provisions deal with the provision of a 'free' credit report.

These sections seem to be reasonably likely to be practical to implement.

1.19.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.20 Notification in the event of a declined credit application

1.20.1 ALRC Recommendation 59–4

The new *Privacy (Credit Reporting Information) Regulations* should provide that, where a credit provider refuses an application for credit based wholly or partly on credit reporting information, it must notify an individual of that fact. These notification requirements should be based on the provisions currently set out in s 18M of the *Privacy Act*.

1.20.2 Government Response: Accept

The notification requirement in section 18M of the *Privacy Act* plays an important role in developing transparency around the operation of the credit reporting system. Its continued application will ensure that individuals are aware of all the relevant issues to assist them in understanding how they can access their credit reporting information and which elements of the information may have led to the refusal of credit.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.20.3 ARCA Position

ARCA realises that effectively dealing with consumers who have been declined credit is a vital element in the overall success of credit reporting.

ARCA proposes developing within the Code standard procedures for request of a free credit report when credit has been declined as a result of information obtained from a Credit Reporting Agency.

ARCA proposes that information about how the process relative to querying an application being declined for credit based on information from a credit report and how to engage that process, should be made readily available and in plain-English for consumers.

Further, ARCA proposes developing guidelines for inclusion in the Code of the type of information to be included in decline letters with a view toward making the communication

more consistent and clear in relation to how to initiate a query if a consumer has a concern that the information in their credit report might be incorrect.

1.20.4 Implications of the Exposure Draft provisions on the ARCA position

Section 142 of the Exposure Draft provisions deals with what information needs to be disclosed if information from a CRA was wholly or partially the basis for declining credit.

The requirements listed are very similar to the current *Privacy Act* requirements, but also allow for further specification via the Code.

It therefore seems as though the ARCA approach could be implemented practically via inclusion of the further specifications under the Code.

1.20.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.21 Complaints management - general

1.21.1 ALRC Recommendation 59–5

The new *Privacy (Credit Reporting Information) Regulations* should provide that:

- a) Credit Reporting Agencies and Credit Providers must establish procedures to deal with a request by an individual for resolution of a credit reporting complaint in a fair, efficient and timely manner;
- b) a Credit Reporting Agency should refer to a credit provider for resolution complaints about the content of credit reporting information provided to the agency by that credit provider; and
- c) where a Credit Reporting Agency or credit provider establishes that it is unable to resolve a complaint, it must inform the individual concerned that it is unable to resolve the complaint and that the individual may complain to an external dispute resolution scheme or to the Privacy Commissioner.

1.21.2 Government Response: Accept in part

Given that an individual is likely to deal with a number of organisations when trying to resolve a dispute about credit reporting information, the Government strongly agrees there should be clear requirements about who should take responsibility to attempt to resolve the dispute.

In this recommendation the ALRC has reversed the obligation for resolving disputes and placed the onus on the relevant credit provider who is likely to have sufficient access to information in order to deal with the dispute. However, the Government is concerned that this approach could still result in an individual having to take several steps before ownership of the dispute settles with the credit provider. This would occur particularly where the individual relies on details from a notice provided under recommendation 59-4 to contact the

Credit Reporting Agency at first instance.

The Government considers that a more balanced approach is that the obligation for attempting to resolve the dispute should lie with whichever party the individual first makes a complaint (whether it be the credit provider to which the listing relates or the Credit Reporting Agency). This will place a clear onus on the first contacted party to take measures to resolve the dispute and will ensure that the individual themselves is not required to go back and forth between the parties.

Either party would then be required to take the necessary steps to attempt to resolve the complaint, including liaising with and obtaining information from the other relevant body (ie the Credit Reporting Agency would be required to consult with the credit provider and would need to take reasonable steps to obtain information to resolve the dispute). Either party could act as the intermediary for the individual to assist them, to the extent possible, to resolve the dispute. The party would then need to advise all other relevant parties, including the individual, of the outcome of the investigation and the further steps the individual could take through either external dispute resolution (see recommendation 59-7) or by making a complaint to the Privacy Commissioner if they are not satisfied with the outcome.

The Government notes that where a Credit Reporting Agency or credit provider determines that corrections need to be made to the individual's credit reporting information, they should take steps to advise the other party, along with other relevant Credit Reporting Agencies who may have listed the information, of the corrections. This will be in accordance with the general 'access and correction' principle.

The *Privacy Act* will outline these overarching requirements. However, this approach to dispute resolution will only work effectively where there are robust procedures established between Credit Providers and Credit Reporting Agencies to deal with initial complaints they receive. The Government considers that the binding industry code should play an important part in formalising these procedures across the industry. The code would set out matters such as when a 'dispute' has been raised by an individual, the timeliness in responding to the individual, providing information about the party responsible for considering the dispute, procedures for establishing appropriate contact officers in Credit Reporting Agencies and Credit Providers, and information sharing procedures.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.21.3 ARCA Position

ARCA realises that effectively dealing with consumer complaints is – as the public face of credit reporting – central to the overall success of credit reporting.

ARCA proposes requiring both Credit Providers and CRAs to develop processes to holistically deal with consumer concerns in relation to the contents of their credit report – from gaining access, to requesting investigation or correction of data, to dealing with complaints about their data or their treatment in relation to the processes relating to credit reporting.

Work is already underway to review the end to end process from capturing issues (requests for correction, or complaints) to investigation, and to correction (if required).

These processes will be developed in such a way as to meet the following clarification in the Government's response to the ALRC recommendations:

"The Government considers that a more balanced approach is that the obligation for attempting to resolve the dispute should lie with whichever party the individual first makes a complaint (whether it be the Credit Provider to which the listing relates or the Credit

Reporting Agency).“

To assist the consumer to get to the appropriate party who will ‘own’ responsibility for overseeing the complaint investigation and resulting corrective action and notification (if an error is confirmed), ARCA is working to develop the type of information to be included in decline letters – to make clear, in the event a consumer is declined credit related to information on their credit report, how to obtain their credit report, and if they believe there is an issue with the accuracy of that information, who to contact about it. These processes will also include specific timeframe requirements for response to the consumer.

With regard to notification of correction:

While not all industries are bound by NCCP responsible lending obligations which see a credit assessment as valid for only 90 days, it is suggested that the automatic timeframe for notification of incorrect information be set at 90 days, with notification being applied at the consumer’s request.

1.21.4 Implications of the Exposure Draft provisions on the ARCA position

Sections 121 and 149 of the Exposure Draft provisions deal with requests for correction.

There are several areas of concern about the practicality and commercial sensitivity of the way in which the Exposure Draft provisions related to credit reporting seems to require these matters be handled.

Notification:

The Exposure Draft provisions seem to suggest that the first party contact must undertake (presumably themselves) to notify ‘everyone’ who has received the incorrect information.

Here too, what seems to be a simple requirement under the Exposure Draft provisions becomes complex because of the degree of prescription of how an operational process must work rather than the outcome that it must deliver. Discussions with External Dispute Resolution schemes suggest that industry should help refer the customer to the CRA or credit provider that can assist to resolve the matter.

There is no time provision for how far back in history the disclosure of incorrect information was. Letting a recipient know that they received incorrect information when it is no longer relevant to the decision for which it was gathered would seem to be an unintended consequence of the current Exposure Draft provisions.

1.21.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.22 Complaints management – specific to refusal of credit

1.22.1 ALRC Recommendation 59–6

The new *Privacy (Credit Reporting Information) Regulations* should provide that the information to be given, if an individual's application for credit is refused based wholly or partly on credit reporting information, should include the avenues of complaint available to the individual if he or she has a complaint about the content of his or her credit reporting information.

1.22.2 Government Response: Accept

The Government agrees that in addition to the requirements in recommendation 59-4, the individual should also be provided with short form advice on the mechanisms available if they have a complaint about their credit reporting information. This would include noting that either the relevant credit provider or Credit Reporting Agency should be contacted at first instance prior to making a complaint to the Privacy Commissioner.

The Government notes that it would be appropriate for the binding industry code to outline what type of information should be provided to the individual.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.22.3 ARCA Position

ARCA proposes that complaints relating to being declined for credit be treated via a documented process that handles this type, as well as other types, of complaints.

ARCA proposes that advice on the complaints process, both from an internal and external perspective, should be made readily available and in plain-English for consumers and should also be provided to customers at the specified contact points throughout their contact with a Credit Provider or CRA in the course of raising and resolving a complaint.

ARCA is working to develop guidance regarding the type of information to be included in decline letters, for Credit Providers to refer to.

ARCA proposes that the type of information to be provided to consumers include:

- Relevant internal dispute resolution process information
- Relevant external dispute resolution process information
- Timeframes that the CRA or Credit Provider must respond within
- **And as an optional inclusion**, non-sensitive commercial information that relates to the application being declined, and steps the consumer could take to improve their credit record in future

It is expected that the process will be consistent in dealing with a complaint whether or not its origin was the result of a declined credit application or some other issue – unless there are specific obligations imposed to do otherwise.

1.22.4 Implications of the Exposure Draft provisions on the ARCA position

Section 142 (2) (c) (ii) of the Exposure Draft provisions seems to adequately provide for the inclusion of information about how to request a correction to the information on a credit report or how to complain about refusal of access, refusal to correct, or other matters (as outlined in Division 5 – Complaints).

1.22.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

1.23 Timeframe for resolving requests for correction, and the burden of proof

1.23.1 ALRC Recommendation 59–8

The new *Privacy (Credit Reporting Information) Regulations* should provide that, within 30 days, evidence to substantiate disputed credit reporting information must be provided to the individual, or the matter referred to an external dispute resolution scheme recognised by the Privacy Commissioner. If these requirements are not met, the Credit Reporting Agency must delete or correct the information on the request of the individual concerned.

1.23.2 Government Response: Accept

This recommendation will ensure that the onus of proving the accuracy or appropriateness of a listing in an individual's credit reporting information lies with Credit Providers and Credit Reporting Agencies. It is also likely to assist in encouraging the credit reporting industry to resolve disputes as quickly and efficiently as possible.

The Government understands that mechanisms will need to be put in place to determine at what point in time a complaint will be deemed to have been made and the appropriate notice that should be provided to the individual about the dispute process. In line with recommendation 59-5, these matters should be addressed as part of the binding industry code. The Government will consider other matters, such as the interaction of this recommendation with frivolous or vexatious complaints, as part of making this amendment to the *Privacy Act*.

The Government notes the concern that even where subject to an external dispute resolution (EDR) process, the disputed listing could continue to remain in the individual's credit reporting information. To ensure there is sufficient transparency around the fact that the listing is in dispute, it will be a requirement that where a dispute is referred to an EDR scheme, a note to this effect is associated with the disputed listing.

Note: In line with the Government's response to recommendation 54-1, this recommendation will be implemented in the *Privacy Act*, not regulations.

1.23.4 ARCA Position

ARCA will develop processes and procedures for complaint handling that will include

- the timeframe for resolution, and
- help to ensure that timing requirements are consistently met.

ARCA proposes timeframe alignment with existing regulatory and the Code requirements (E.G. ASIC's RG165 for licenced Credit Providers). Where an institution is not captured by another specific regulation or Code, then a timeframe of 30 days would apply.

ARCA also proposes to 'flag' a credit report that is under investigation, so that Credit Providers are on notice that such information may not be correct. This can then be appropriately taken into account by Credit Providers in making their credit decisions.

ARCA proposes including in the Code mechanisms to facilitate compliance with these processes via practical, transparent and effective means.

ARCA further proposes that there are processes to prevent abuse of the complaints process in an attempt to get factually accurate information removed.

While details of such processes are still being considered, the intention will be to strike a very fair balance to ensure that the opportunity for legitimate complaints is not impeded, whilst abuse is prevented. This is necessary to enable the system to be used with confidence that the data it contains does in fact represent the facts of the matter as being correct from the source and not being subject to manipulation.

ARCA proposes that both of the following options be available if evidence is not provided within the required timeframe:

1. The Credit Provider to which the listing relates or the Credit Reporting Agency may choose to make the changes necessary to address the consumer's issue – for example to remove or update the data in question; or
2. To notify the consumer that more time (to a maximum of an additional 45 days) is needed to finalise the matter, and to provide a justification as to why. Additionally, the notification must include clear mention that at any point during those 45 days the consumer may raise the issue as a complaint with the relevant EDR, and how to do that.

1.23.4 Implications of the Exposure Draft provisions on the ARCA position

The Exposure Draft provisions related to credit reporting do not seem to deal with directly or make specific provision for in either regulation or the Code, what the outcome should be if a request for correction is not acted upon within the timeframe allotted.

Both the ALRC's recommendations and the Government's response both indicate the need for this, yet the Exposure Draft provisions have not addressed the matter other than to enable an 'out of time' result to a request for correction to be raised as a complaint or taken to an EDR.

It remains ARCA's position that there should be a clear mechanism for ensuring resolution within a reasonable time, and preferably without the need to involve the customer further or other regulatory agencies.

Potentially this could be dealt with under the Code.

1.23.5 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

Part 2: Additional components proposed by ARCA for inclusion in the new Credit Reporting Code of Conduct

2.1 Three pillars of data quality

ARCA proposes that the issue of Data Quality be addressed in a holistic fashion via a three pillar approach consisting of:

- 1) a single data standard,
- 2) the requirement of reciprocity, and
- 3) an effective and adequately resourced means of independent oversight.

These three aspects are explained in more detail below.

2.2 Definition of a data standard

ARCA proposes that the data standard include the policies, processes, and procedures as well as the technical specifications required to operationalise the requirements of the Act, regulations and Code.

The Act, regulation and Code govern what can, must or can't be done in the credit reporting environment, while the data standard defines only how these requirements are to be achieved.

2.2.1 Implications of the Exposure Draft provisions on the ARCA position

Whilst the Exposure Draft provisions related to credit reporting make reference to the existence of a Credit Reporting Code of Conduct, they do not specify nor suggest a limitation on the scope of the Code. It would seem that if the Code does not contradict either the *Privacy Act* or regulations, then its contents could include the elements suggested.

As is suggested above, the data standard is proposed to be referenced by the Code, and therefore form part of the regulatory environment for credit reporting, but not to be part of the Code itself.

2.2.2 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

2.3 A single data standard

ARCA proposes that the Code reference the data standard, and that the data standard carry the same 'weight of law' as the Code. Compliance with both instruments would be mandatory, however the data standard, due to its technical nature will be required to be consistent with the Act, regulations and the Code, but not be deemed to be part of the Code for the purposes of requiring regulator approval.

To balance the desire to not hamper innovation, with the need for effective oversight and compliance, ARCA proposes making public and fully transparent the data standard prior to enactment. A proposal of a suitable timeframe for advance public notice of a change to the data standard will be finalised – consistent with the planning, development and implementation lead times required to make changes to such an instrument.

As the data standard must comply with the Act, regulations and Code, if it were deemed that any changes to the data standard were in contravention to these elements, the Privacy Commissioner would be able to identify that prior to implementation and address that issue.

This structure is necessary to enable practical operation and evolution of systems and technology protocols that must already operate within the constraints imposed by the Act, regulations or the Code.

In no way will the data standard be able to 'extend' the breadth of data sets which may be utilised under the Act, regulations, or Code, though the specific fields and their technical specification within the confines of those data sets will be able to be updated and amended as needed, without regulator approval.

For Example 1:

Current drafting of the data standard include XML schemas and specifications regarding the variety of technical environments to be supported. It is likely as technology advances that over time changes to these elements will be required – something as simple as an update in the version of XML that is being used would need to be reflected in the data standard, but would likely be of no interest from a privacy perspective and thus of no interest to the Privacy Commissioner. It should also be noted that non XML delivery of credit reporting information will also be facilitated to prevent exclusionary access to credit reporting.

For Example 2:

Industry may develop a new type of credit product that existing fields used to exchange information as allowed under the data set of 'account type', may not be able to be classified adequately. Rather than 'force fit' an incorrect classification – which would impact on data accuracy – the data standard would be modified to create the necessary new values to enable accurate classification.

If the data standard, referenced in an edited Code, is not exempt from Privacy Commissioner approval, then the regulator will need to develop both the expertise and maintain the level of resources required to effectively maintain operational procedures and instructions required to avoid becoming a constraint on innovation of all activities that relate in any way to comprehensive credit reporting.

2.3.1 Implications of the Exposure Draft provisions on the ARCA position

Section 105 (4) of the Exposure Draft provisions requires each CRA to implement practices, procedures and systems to ensure compliance with the Division of the Act that deals with CRAs and with the Code of Conduct. In particular subsections (a) and (b) require policies to be developed that govern what information is collected and how it is held.

It would therefore seem that if the Code specifies a requirement for a 'single data standard' then all CRAs would have to construct one and all Credit Providers would then have to follow it.

Further, Section 105 (5) requires that the CRAs make the policy (publicly) available.

2.3.2 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

Further, ARCA seeks specific feedback on the proposed approach to be followed in relation to the data standard, whereby this instrument would not be subject to direct Privacy Commissioner approval prior to amendment.

Are there issues with an approach to enable the development and ongoing evolution of the data standard as proposed above?

If so, what are these concerns?

If there are concerns, what alternative is there to addressing the issues mentioned relative to requiring Privacy Commissioner prior approval?

2.4 Tiered structure for credit reporting

As participation in credit reporting is not mandated, both licensed Credit Providers and other users of credit reporting can choose to share less data than they are legally allowed.

To cater for this choice, whilst balancing the need for consistency, ARCA proposes limiting the choice via the creation of three tiers of credit reporting participation:

- Full Comprehensive – includes Negative plus all five of the additional datasets;
- Partial Comprehensive – includes Negative plus four of the five additional datasets (excluding Repayment History); and
- Negative – those elements that are allowed under the Act; and excludes all five of the additional datasets

Whilst it is ARCA's view that Full Comprehensive should be made available to all Credit Providers, ARCA has proposed a three tier structure on the assumption that this would not be met with Government approval at this time. Should the Government's view change the structure could be easily adapted.

Such a structure is needed to operationalise the differences between the breadth of information that institutions chose to utilise within the boundaries of the Act, regulations and the Code.

For example, licensed Credit Providers under the NCCP are able to utilise both what has been previously referred to as 'negative data', but also all five of the new data sets including repayment history.

Other users of credit reporting (those who are not licensed) are only able to utilise 'negative data' and just four of the five new data sets; they are not permitted to utilise the fifth new data set, repayment history.

A credit provider who is covered by the Code must nominate their chosen level for credit reporting information within the following categories:

- i. Full Comprehensive Credit Reporting
- ii. Partial Comprehensive Credit Reporting
- iii. Negative Credit Reporting

Additionally, there is a link between the practical ability to lend more responsibly (which for licensed Credit Providers is now an obligation under NCCP) and the breadth of data available for decision making.

2.4.1 Implications of the Exposure Draft provisions on the ARCA position

The Exposure Draft provisions related to credit reporting do contain, via a number of sections, a distinction between what licensed Credit Providers and other Credit Providers can do – specifically this related to the fifth data set, repayment information. The Exposure Draft provisions do not make suggestions about further segmentation of data utilisation, but as credit reporting is not compulsory, and the Exposure Draft provisions do not appear to restrict the contents of the Code (other than it must not contradict the Act or corresponding regulations) then it would seem that a three tiered approach could be developed within the Code.

2.4.2 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

2.5 Code definitions re: tiered participation

2.5.1 Code Party

A Code party is an organisation bound by the Credit Reporting Code of Conduct, by virtue of sharing Credit Reporting Information as defined in the Act.

2.5.2 Full Comprehensive Credit Reporting Information

For the purposes of this Code, Comprehensive Credit Reporting Information is provision of repayment history, account opened, account closed, credit limit, account type and negative reporting as defined by the Act.

2.5.3 Full Comprehensive Credit Reporting Party

A Full Comprehensive Credit Reporting party is a Credit Provider who has agreed to the exchange of Credit Reporting Information as defined by the Code, under the principle of reciprocity, where the legal notifications as required by law have been obtained.

2.5.4 Partial Credit Reporting Information

Partial Credit Reporting is the provision of account opened, account closed, credit limit, account type and negative reporting as defined by the Act, under the principle of reciprocity.

2.5.5 Partial Credit Reporting Party

A Partial Credit Reporting party is a Credit Provider who is ineligible to provide or receive Repayment History as defined in the Act, and has agreed to the exchange of Partial Credit Reporting Information, under the principle of reciprocity, where the legal notifications as required by law have been obtained.

2.5.6 Negative Credit Reporting Information

Negative Credit Reporting Information is defined as credit reporting information that indicates an inability or unwillingness to comply with the terms and conditions of the credit contract which includes, but is not limited to the following:

- Default;
- Bankruptcy (voluntary and involuntary);
- Schemes of Arrangements; and
- Serious credit infringements.

2.5.7 Negative Credit Reporting Party

A Negative Credit Reporting party is defined as a Credit Provider who has agreed to the exchange of Negative Credit Reporting Information, under the principle of reciprocity, where the legal notifications as required by law have been obtained.

2.5.8 Data Standard

The data standard means the data standard which details the acceptable format to be used by Credit Providers and CRAs to exchange Credit Reporting Information.

2.5.9 Implications of the Exposure Draft provisions on the ARCA position

The Exposure Draft provisions related to credit reporting do not appear to restrict the contents of the Code (other than it must not contradict the Act or corresponding regulations) so then it would seem that creating the additional defined terms needed to support a three tiered approach could be developed within the Code.

2.5.10 Request for Confirmation or Feedback

ARCA seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

2.6 Principle of reciprocity

Reciprocity is the foundation for ensuring accurate, up to date, complete and relevant credit reporting information. ARCA strongly believes that credit reporting information must be shared on the principle that Credit Providers must contribute all of their chosen level of data (negative, full or partial comprehensive) to receive all data at *the same level* in return.

Reciprocity is required to incentivize users of credit reporting to provide their data to build the most holistic picture of a consumer's credit profile possible – a necessity to enable more responsible lending decisions to be made by all users of credit reporting.

ARCA proposes the requirement for the principle of reciprocity. Credit Reporting Information will be shared on the principle that Credit Providers who contribute all of their chosen level of credit reporting information on all of their portfolios will receive all of their chosen level of credit reporting information in return.

To be clear, if a credit provider has only a 'limited' product range – for example only issues credit cards – and they supply data in accordance with the data standard for a particular tier – they will receive back in credit reporting data across all products at that same tier level.

2.6.1 Implications of the Exposure Draft provisions on the ARCA position

The Exposure Draft provisions related to credit reporting do not appear to restrict the contents of the Code (other than it must not contradict the Act or corresponding regulations) so then it would seem that creating a policy of reciprocity could be developed within the Code.

2.6.2 Insurance Council of Australia Position

The principle of reciprocity, as currently outlined in ARCA's Position, is of significant concern to lenders mortgage insurers (LMIs). The Paper notes that the principle of reciprocity is designed to incentivise users of credit reporting to provide their data. Whilst lenders mortgage insurers require access to credit reporting information, they are extremely limited in terms of information they are able to contribute. LMI is a business to business insurance product and LMIs have no direct contact with the consumer in either the establishment or the ongoing management of the credit contract. LMIs therefore have no 'new' data to contribute, except in the unlikely event that the consumer defaults on their mortgage. However, LMIs must have access to full comprehensive reporting as it is fundamental to their business, which supports the 'first line' credit providers. The principle of reciprocity, as currently outlined in the Issues Paper, would remove this access. If a policy of reciprocity is to be created in the Credit Reporting Code of Conduct, we submit that lenders mortgage insurers should be exempted from this requirement.

2.6.3 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

2.7 Refinement of default definition criteria

More severe than a simple occasional missed payment, defaults are an indication of more serious credit difficulty.

There is a need to separate when the data about a default is actually sent from when the criteria of default have been met.

For default information to be most helpful in enabling a Credit Provider to assist consumers it needs to be a consistent measure. To achieve this there needs to be consistent criteria for what constitutes a credit reporting 'default'.

The Exposure Draft provisions allows for this to be as early as 60 days delinquent, but allows for the default to be listed at 'any time' thereafter so long as the remaining obligations under the Act are met (for example, such as collections action has been taken). Such an open-ended definition will result in 'defaults' having a variety of meanings – 180 or more days.

Historically, as a consequence of the same general approach to default listing under the *Privacy Act*, Credit Providers treat 'defaults' very conservatively - since a default could mean that the customer is 180 days behind (7 cumulative monthly payments) or even more, even though it could be substantially less. Further, as there is no current mandate to list at any point, Credit Providers could be completely unaware of someone experiencing sufficient financial difficulty.

Within the boundaries of the Act, ARCA proposes two key elements to improve the current situation:

1. A strict definition of default, so that the meaning of a default is consistent and relates to a specific level of delinquency – i.e. to the point at which the criteria for default is met (not before or after) *assuming that all of the other requirements under the Act have been met.*
2. A requirement to list defaults when they occur – in effect requiring they be reported so that other Credit Providers are on notice that the consumer is in financial difficulty, so that fact can be taken into account when making credit decisions.

The above would seem entirely consistent with the spirit of the responsible lending obligations of licensed Credit Providers.

If necessary for technical reasons, and to enable consistency with regulatory requirements on some industries (for example, utility providers), the single data standard could cater for different timings for the listing of defaults by industry product set. All definitions would comply with the broader requirements of the Act and Regulations.

If there were different set thresholds in the data standard, it is still proposed that there be a requirement for consistency within each industry product set.

If a default is reported to the CRA late, it should still reflect when the default criteria as defined by the Credit Provider was initially met.

2.7.1 Implications of the Exposure Draft provisions on the ARCA position

Section 182 of the Exposure Draft provisions defines specifically the meaning of 'default information'. The definition, though not the same as the ARCA position, may not preclude the refinement of the provisions to reflect the ARCA position.

The ARCA position is more specific and largely based on developing operational consistency. If the Exposure Draft provisions in fact do not restrict the contents of the Code (other than ensuring that it must not contradict the Act or corresponding regulations) then it would seem that creating a policy to further refine the definition of Default (such as from an operational consistency perspective) could be developed within the Code and possibly via the data standard.

2.7.2 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

2.8 Code compliance

ARCA strongly believes that independent oversight is a critical element of ensuring compliance with the Code. It is imperative that organisations commit to data quality in credit reporting and that data quality not be solely a function of the commercial agreements between Credit Providers and Credit Reporting Agencies.

ARCA proposes the following key principles to ensure compliance with the Code:

1. A single regulator, namely the Office of the Australian Information Commissioner, responsible for ensuring compliance with aspects of the Code including those issues not expressly enabled through the Act;
2. A commitment by Credit Providers and CRAs to comply with the Code, including a commitment to regular reporting of compliance with the Code; and
3. A commitment by industry to provide expert resources to support the regulator with aspects of Code compliance if required.

2.8.1 Implications of the Exposure Draft provisions on the ARCA position

The Exposure Draft provisions do not seem to make clear who will have accountability for oversight of the new *Privacy Act*, regulations or the Code. Further, it does not seem to provide any detail about how that responsibility will be undertaken.

Unlike other aspects where there seems the potential to deal with items not specifically dealt within the Act via the Code, it is expected that in the Privacy Commissioner powers section of the *Privacy Act* (which are yet to be released), that these issues will be addressed.

2.8.2 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

2.9 Treatment of sold debts

ARCA proposes that the requirements of the Code continue to apply to debts that are sold to third party organisations (e.g. via contract between Credit Providers and the third party organisation).

2.9.1 Implications of the Exposure Draft provisions on the ARCA position

If the Exposure Draft provisions do not restrict the contents of the Code (other than ensuring that it must not contradict the Act or corresponding regulations) then it would seem that creating a policy to further refine practices involving the sale of debts would sit within the Code.

2.9.2 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.

2.10 Evolution of the updated Credit Reporting Code of Conduct

ARCA proposes that the Code be amended from time to time to ensure it accurately reflects best practice, without inhibiting innovation by industry.

ARCA proposes that amendments to the Code would be developed in consultation with Credit Providers and Credit Reporting Agencies, government, and other industry and consumer stakeholders who may have an interest in the Code.

Within three years after publication of the Code, and once every five years thereafter, industry will commission and publish an independent review on the operation and effectiveness of the Code. The review may include an analysis of changes in industry practice, privacy regulation, credit regulation and best practice. The review may recommend amendments to the Code.

The review must be conducted by an impartial, independent third party, with expertise in best practice Code based-regulation.

ARCA will fund the Code review process in conjunction with other relevant industry partners.

Amendments to the Code will be authorised by the Privacy Commissioner and will become binding. Provision will need to be made for implementation timeframes as part of proposed amendments.

2.10.1 Implications of the Exposure Draft provisions on the ARCA position

The Exposure Draft provisions do not seem to make provision for either a review of the Code or its ongoing maintenance and evolution. The ALRC recommendation 54-8 was to have a review of the changes to the *Privacy Act* section dealing with credit reporting within five years of commencement. The Government's response provided 'agreement in principle' to this timeframe

It is expected that in the Privacy Commissioner powers section of the *Privacy Act* that is yet to be released will address this issue in further detail.

2.10.2 Request for Confirmation or Feedback

Industry seeks confirmation of the position relative to the updating of the Code, or feedback in relation to an alternative.