

Review of Privacy (Credit Reporting) Code 2014 (V1.2)

Report

8 December 2017



8 December 2017

Timothy Pilgrim PSM
Australian Information Commissioner
Australian Privacy Commissioner
Level 3, 175 Pitt Street
SYDNEY NSW 2000

Dear Mr. Pilgrim,

Review of the Privacy (Credit Reporting) Code 2014 (V 1.2)

We are pleased to report the findings of our recent review of the *Privacy (Credit Reporting) Code 2014* (Cth) (version 1.2) (the **Code**). The regulation of credit reporting is an important enabler of a fair and efficient financial system and it has been a privilege to undertake our review. Our report is provided subject to the terms set out on the final page of this report.

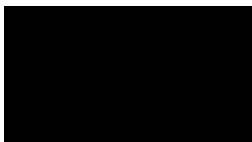
We have had the opportunity to engage with a range of interested stakeholders and this report has benefited from the perspectives that they have shared with us. Our terms of reference were targeted at the operation of the Code and its relationship with the *Privacy Act 1988* (Cth) and we have therefore confined our recommendations to this field of review.

During the course of our engagement with stakeholders we received a range of valuable insights on credit reporting policy and other credit related matters falling outside of our terms of reference. We have recorded these in our report for your future consideration.

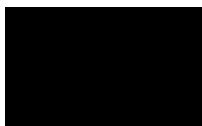
The Code was introduced in anticipation of widespread adoption of comprehensive credit reporting (**CCR**) by credit providers. This adoption has yet to occur, which is an important limitation on our review. In view of the recent announcement by the Commonwealth Treasurer that legislation will be passed mandating adoption of CCR in 2018, we think that a supplementary review of the operation of the Code should be undertaken sometime after that point, in order fully to test the operation of the Code in the CCR environment.

Finally, we gratefully acknowledge the assistance of officials from your office and the support they have provided to us in the conduct of this review.

Yours sincerely,



Tony O'Malley
Partner



Jeremy Thorpe
Partner



Sarah Hofman
Partner

PricewaterhouseCoopers, ABN 52 780 433 757

*One International Towers Sydney, Watermans Quay, Barangaroo NSW 2000,
GPO BOX 2650 Sydney NSW 2001*

T: +61 2 8266 0000, F: +61 2 8266 9999, www.pwc.com.au

Liability limited by a scheme approved under Professional Standards Legislation.

Contents

1	Executive summary	1
1.1	Background	1
1.2	Summary of recommendations	1
2	Background	4
2.1	Overview	4
2.2	Development of the Code	4
3	The Review process	5
3.1	Scope of Review	5
3.2	Consultation process	5
3.3	Evaluation process	6
3.4	Recommendations	6
4	Analysis and recommendations	8
4.1	Overarching issues	8
4.2	Arrangement of specific issues	10
4.3	Notice requirements	12
4.4	Repayment history information	16
4.5	Credit reports	21
4.6	Credit information	25
4.7	Defaults	31
4.8	Correction of information by individuals	35
4.9	Governance, monitoring and enforcement	38
4.10	Dealing with fraud	43
4.11	Other matters	46
	Appendix A Glossary of defined terms	51
	Appendix B Targeted consultation participants	52

1 *Executive summary*

1.1 *Background*

PwC was engaged by the Office of the Australian Information Commissioner (**OAIC**) to undertake an independent review of the operation of the Code. The Code was approved by the Australian Information Commissioner (the **Commissioner**) in 2014 for the purposes of Part IIIA of the *Privacy Act 1988* (Cth) (the **Act**) and its periodic review is a requirement of paragraph 24.3 of the Code.

The terms of reference set by the OAIC required us to consider:

- issues arising with regard to the interaction between the Code and the Act
- significant issues or concerns about the practical operation of the Code
- requirements (if any) which have not been complied with in practice.

The terms of reference are targeted at the operation of the Code and its relationship with the Act. Broader policy considerations or issues that would require changes to the Act do not fall within the scope of this review. Stakeholders have provided a range of valuable insights which fall outside of the terms of reference and for which we have not made any recommendation, although we have recorded many of these insights in the report for future consideration.

1.2 *Summary of recommendations*

We summarise our recommendations here. We note that recommendations have not been provided for those issues canvassed in this report that are outside our terms of reference or for which it is otherwise not appropriate to provide a recommendation.

Recommendations

Recommendation 1 – *Review of the Code following introduction of mandatory CCR*

A review of the Code should be undertaken following the second anniversary of the commencement of mandatory CCR, to ensure that issues which arise as a result of the increased volume of information in the credit reporting system are captured and addressed.

[Refer section 4.1]

Recommendation 2 – *Enhancement of monitoring and enforcement activity*

Consideration should be given to enhancing the visibility of monitoring and enforcement activity of the Code, having regard to the regulatory architecture and resources available to the OAIC.

[Refer section 4.1]

Recommendation 3 – *Enhancement of education and awareness*

Consideration should be given to the enhancement of consumer and industry education and awareness with respect to certain credit reporting concepts in general and some specific mechanisms in particular, including:

- the relationship between section 6Q and section 21D notices
- the acceleration of debts process and related section 6Q notification requirements

Recommendations

- access to, and information contained in, free credit reports
- the listing of Court judgements unrelated to the provision of credit
- consumer rights to deal with incorrect or aggressive marketing
- steps that are ‘reasonable’ for purposes of securing credit reporting information
- the availability and operation of the correction of information mechanism
- consumer rights with respect to complaints handling and escalation processes
- the notification obligations imposed on credit providers (CP).

[Refer section 4.1]

Recommendation 4 – Timing of issuance of section 21D notice

Paragraph 9.3(f)(i) of the Code should be amended to conform to the language of section 21D(3) of the Act, in order to avoid ambiguity in the timing for disclosure of default information by a CP to a credit reporting body (CRB) following the issue of a section 21D notice.

[Refer Issue #1a in section 4.3]

Recommendation 5 – Method of delivery of section 21D notice

Paragraph 9.3(d) of the Code should be amended to permit, but not prescribe, delivery of a section 21D notice to an individual’s ‘last known address at the time of despatch’ by electronic means. Consideration should be given to any formal consent requirements that may need to be adhered to as part of this process.

[Refer Issue #1b in section 4.3]

Recommendation 6 – Divergence in amounts specified in section 6Q and section 21D notices

Paragraph 9.3 of the Code should be amended to include a requirement for CPs to specify in a section 21D notice the component parts of the due amount, enabling reconciliation with the prior section 6Q notice.

[Refer Issue #2 in section 4.3]

Recommendation 7 – Application of ‘grace period’ for RHI disclosure

Paragraph 8.2(c)(ii) of the Code should be amended to specify that the first RHI code (‘1’) applies where the age of the oldest outstanding payment is ‘15 – 29 days overdue’ in order to ensure consistency in the application of the 14 day grace period.

[Refer Issue #33 in section 4.4]

Recommendation 8 – Information requests for an unknown amount of credit

Paragraph 7.1 of the Code with respect to information requests for an unknown amount of credit should be retained in the Code to cover those situations where it could be applicable, even if uncommon in practice. The Code should remain flexible to deal with a range of different credit arrangements, having regard to the different types of CPs to which the Code applies.

[Refer Issue #28 in section 4.6]

Recommendations

Recommendation 9 – *Scope of prohibition for developing a ‘tool’ to facilitate a CP’s direct marketing*

Paragraph 18.1 of the Code should be amended to include a reference to ‘services’ in addition to ‘tool’ in order to remove any uncertainty as to whether the prohibition on CRBs to develop tools for provision to CPs to enable direct marketing activities extends to ‘services’ provided by CRBs.

[Refer Issue #17 in section 4.11]

2 Background

2.1 Overview

Information about a person's credit history is amongst the most sensitive information that can be held, influencing the price and availability of credit. Credit information is also a key enabler of efficient and sustainable lending in our economy. The consumer credit reporting system seeks to balance the interests of individuals in protecting their personal information, with the need to ensure that there is sufficient personal information available for a credit provider to determine an individual's eligibility for credit.

The credit reporting system is regulated by Part IIIA of the Act, as supplemented by the *Privacy Regulation 2013* (Cth) (the **Regulation**) and the Code. The Code is a legislative instrument and compliance with the Code is mandatory.

2.2 Development of the Code

The regulation of credit reporting information in Part IIIA of the Act has been a feature of the Act since 1990, accompanied by a code of conduct (the predecessor to the Code). The current version of Part IIIA came into force on 12 March 2014, following a significant review of privacy regulation by the Australian Law Reform Commission (**ALRC**), culminating in Report 108 – *For Your Information* (**ALRC Report**).

The Code was developed in accordance with section 26N of the Act, led by the Australian Retail Credit Association (**ARCA**) and registered by the Commissioner in 2014.

These reforms were enacted, in part, to facilitate the introduction of CCR. To date, the Code has largely not operated in the intended CCR environment, but still exists to give operational effect to the principles found in Part IIIA of the Act, in particular:

- how to comply with provisions of Part IIIA of the Act
- matters required or permitted to be provided for under Part IIIA of the Act
- any additional requirements in excess of those contained in Part IIIA of the Act (but which must not be inconsistent with the Act)
- the entities to which the Code applies (or a means of identifying them), including all CRBs, specified CPs and other entities
- how complaints must be dealt with and reported.

Since the Code's initial development there have been two variations, namely creation of:

- version 1.1 on 3 April 2014, which amended the grace period in paragraph 8.1(b) from 5 to 14 days
- version 1.2 on 24 April 2014, which incorporated amendments to effect the repeal of the previous (or previous versions) of the Code.

The amendments were minor in nature and did not affect the obligations or rights of individuals or organisations.

3 *The Review process*

3.1 *Scope of Review*

We have been appointed to undertake a review of the Code (**Review**) in order to fulfil the requirement in paragraph 24.3 of the Code, which mandates that an independent review occur within three years of the commencement of the Code.

The terms of reference for the Review required that we consider:

- issues arising with regard to the interaction between the Code and the Act
- significant issues or concerns about the practical operation of the Code
- requirements (if any) which have not been complied with in practice.

In adhering to the terms of reference we have necessarily had to avoid expressing views on a range of topical policy issues relating to credit reporting that have been raised with us. We have, however, recorded many of these insights in this report for future reference.

3.2 *Consultation process*

The terms of reference called for insights gained from the operation of the Code and so we sought the views of interested stakeholders through a structured consultation process.

Issues paper

To facilitate participation by a wide a range of stakeholders, we produced an issues paper which was published on the OAIC website on 20 September 2017 (**Issues Paper**) which was designed to provide basic information and description of potential issues to inspire consideration by stakeholders. The Issues Paper did not define the ambit of possible issues for consideration.

The Issues Paper was developed through:

- review of relevant literature which addresses the Code, prepared by law reform organisations, the Productivity Commission, industry stakeholders and credit industry representative bodies
- targeted pre-consultation with select industry and consumer representative stakeholders.

Analysis was undertaken to identify themes and conversion of views around issues, to ensure that the matters raised in the Issues Paper would facilitate meaningful consultation.

Public consultation

The publication of the Issues Paper was accompanied by a general invitation for members of the public to provide written submissions to inform the Review.

We received 16 submissions in total, each of which has been published on the OAIC website to the extent not requested to remain confidential.

Targeted consultation

In addition to the public consultation, we sought the views of specific stakeholders in a series of roundtable meetings and interviews. Stakeholders were identified in consultation with officials from the OAIC and spanned consumer, industry and regulatory bodies. As a matter of practicality we focused on engaging peak organisations who were able to bring the views of their members, rather than invite the members directly.

A list of targeted consultation participants is included in Appendix B. Officials from the OAIC also attended targeted consultation sessions to provide subject matter expertise and assist in uncovering insights.

A summary of the issues discussed during each consultation roundtable has been published on the OAIC website. Some participants elected to also provide written submissions and these have been published as part of the public consultation process to the extent not requested to remain confidential.

3.3 Evaluation process

We have aimed to apply a rigorous methodology to evaluating the insights gained from the consultation, along with our own views:

- identify the issues raised, which included the issues identified in the Issues Paper
- group the issues into a number of key themes, enabling a more holistic understanding of issues which are often inter-related
- gather the various perspectives obtained in respect of each issue to enable us to properly understand the nuance of the particular issue
- assess whether the issue fell within the specific terms of reference
- for issues falling within the terms of reference, consider an appropriate response, having regard to the attendant costs and benefits and completeness of information
- where we have been able to form a view, we have stated a recommendation
- for issues in relation to which further consultation and analysis would need to be undertaken in order to form a view, we have not stated a recommendation
- we have also recorded many of the issues which fell outside of the formal terms of reference, to provide insight for future reform.

3.4 Recommendations

Where issues fall within our terms of reference and it is appropriate, we have made a recommendation as to how the issue may be addressed. As noted above, there are a number of issues in relation to which we have not been able to form a view without further consultation and technical analysis, in which case we have not stated any recommendation.

A number of amendments to the Code are proposed to address specific technical points. The drafting of proposed amendments would need to be undertaken with care and properly socialised with relevant stakeholders before they are adopted.

Amendment to the Code is made in accordance with the process outlined in section 26T of the Act, allowing the Commissioner to make a variation either on his own initiative or on application by an entity bound by the Code or a body or association representing one or more of these entities. Following approval of a variation, the Commissioner must remove the

preceding version of the Code from the Codes Register, and register the Code (as varied) by including it on the Codes Register.

We have identified a number of issues where a response would require amendment of the Act rather than the Code or, based on the consultation feedback, it is considered that regulatory or behavioural change is not appropriate. These matters have nevertheless been included in this report for reference and, where required, consideration of whether amendment to the Act could be pursued is noted. In these cases it would be open to the OAIC to consider referring such matters to the Attorney General's department which has primary responsibility for investigating policy changes and, following further analysis of the true cost of implementing changes, pursuing amendments to the Act.

4 Analysis and recommendations

4.1 Overarching issues

The Code traverses a range of issues identified both in the Issues Paper and the public and targeted and consultation process and we have arranged this report around a number of key themes, described further in section 4.2 below. However, before addressing each of these key themes and their respective issues, we have sought to touch on a few overarching and recurring issues up front, recognising their relative importance and impact to the operation of the Code and the effectiveness of the credit reporting system as a whole.

Review of the Code following introduction of mandatory CCR

As highlighted above, it is reiterated that the Code has largely not yet operated in the CCR environment in which it was intended. However, on 2 November 2017 the Commonwealth Treasurer announced that legislation will be introduced to implement a mandatory CCR regime with effect from 1 July 2018. It is intended that the four major banks (which account for approximately 80 percent of the volume of lending to households) will be the first CPs subject to mandatory CCR, with 50 percent of their credit data required to be ready for reporting by the commencement date, increasing to 100 percent later in the year. It is envisaged that the move to mandatory CCR will substantially increase the volume of transactions and information reported as part of the credit reporting system.

Whilst consultation for this Review was undertaken prior to this announcement, the level of interest and stakeholder engagement with this issue was notable. It was submitted that the increased volume of information will naturally bring to light further issues and more detailed insights about the operation of the Code in practice. Accordingly, it will be important to proactively review the operation of the Code once this contextual change has come about, particularly engaging with those stakeholders that might be less familiar with the operation of the Code and the relative impact CCR will have on the credit reporting system as a whole. The level of stakeholder engagement on this topic was demonstrative of a community-wide cooperative desire to ensure that the system regulation operates effectively for all stakeholders once the move to CCR has occurred.

Recommendation 1

A review of the Code should be undertaken following the second anniversary of the commencement of mandatory CCR, to ensure that issues which arise as a result of the increased volume of information in the credit reporting system are captured and addressed.

Enhancement of monitoring and enforcement activity

A number of issues were raised which reveal a perception that regulatory enforcement action could be enhanced in respect of some provisions of the Code. It may be that this is only a perception which could be addressed by more visible monitoring and enforcement activity, or activity to improve confidence amongst consumers in particular.

The OAIC has a regulatory action policy which informs its approach to monitoring and enforcement. Changes to the approach in this area is obviously not a straight-forward matter and there are resourcing and regulatory policy issues that would need to be considered in this regard.

Recommendation 2

Consideration should be given to enhancing the visibility of monitoring and enforcement activity of the Code, having regard to the regulatory architecture and resources available to the OAIC.

Enhancement of education and awareness

It was evident that there are different levels of understanding of the technical operation of the Code, as presently drafted, across different stakeholder groups. A number of issues canvassed in this report may reflect a lack of awareness of the functioning of the Code and specific mechanisms arising under it.

There are a number of education and awareness initiatives that are already in existence, including, for example, guidance material published by the OAIC and the CreditSmart website developed by ARCA in conjunction with consumer representatives. There may be an opportunity to enhance the depth and awareness of these materials, ideally in a single co-ordinated manner.

Recommendation 3

Consideration should be given to the enhancement of consumer and industry education and awareness with respect to certain credit reporting concepts in general and some specific mechanisms in particular, including:

- the relationship between section 6Q and section 21D notices
- the acceleration of debts process and related section 6Q notification requirements
- access to, and information contained in, free credit reports
- the listing of Court judgements unrelated to the provision of credit
- consumer rights to deal with incorrect or aggressive marketing
- steps that are 'reasonable' for purposes of securing credit reporting information
- the availability and operation of the correction of information mechanism
- consumer rights with respect to complaints handling and escalation processes
- the notification obligations imposed on CPs.

4.2 Arrangement of specific issues

Through our consultation and research processes we identified over 50 issues for consideration. In reviewing these issues it became clear that there were inter-relationships between issues and we have grouped those issues into the key themes outlined in the table below to enable a holistic understanding and for ease of reference.

Some issues span multiple categories, however they have been addressed in the category most relevant to the Review. Many of the issues considered were stated in the Issues Paper and for convenience we have retained the numbering of those issues, with additional issues raised in the public and targeted consultation process added and numbered subsequently.

<i>Key theme</i>	<i>Issues</i>
1. Notice requirements	- Issue #1a – Timing of issuance of section 21D notices - Issue #1b – Method of delivery of section 21D notices - Issue #2 – Divergence in amounts specified in section 6Q and section 21D notices - Issue #4 – Notification of accelerated debts on section 6Q notice - Issue #30 – Notice of transfer of debt to relevant CRB
2. Repayment history information	- Issue #5 – Definition and recording of RHI - Issue #9 – Timely disclosure of RHI to consumers - Issue #29 – Inconsistency between the definition of ‘month’ and practices of CPs - Issue #32 – Frequency of data submissions by CPs - Issue #33 – Application of ‘grace period’ for RHI disclosure
3. Credit reports	- Issue #6 – Inclusion of credit scores on free credit reports - Issue #7 – Access to free credit reports - Issue #8 – Marketing to consumers who have requested a free credit report - Issue #23 – Disclosure of information regarding access to credit reports
4. Credit information	- Issue #14a – Reporting of Courts judgements unrelated to creditworthiness - Issue #14b – Reporting of writs and summons as credit information - Issue #15 – Determining the ‘maximum amount of credit available’ - Issue #16 – Determining ‘the day credit is terminated or otherwise ceases to be in force’ - Issue #28 – Information requests for an unknown amount of credit - Issue #34 – Security of credit reporting information - Issue #35 – Minimum amount for default information
5. Defaults	- Issue #10 and # 20 – Listing of defaults by CRBs - Issue #13 – Mandatory reporting of default information - Issue #19 – Listing of statute-barred debts

<i>Key theme</i>	<i>Issues</i>
6. Correction of information by individuals	• Issue #18 – Correction of information mechanism • Issue #36 – Timing for escalation of complaints to EDR scheme
7. Governance, monitoring and enforcement	• Issue #11 – Identifying breaches of the requirement for CPs to provide refusal notices • Issue #12 – Independent governance of the Code • Issue #22 – Insufficient range of sanctions available to CRBs • Issue #26 – Meaning of ‘prominently’ when advertising the right for individual to access a free credit report • Issue #27 – CRBs keeping credit information accurate, up to date, complete and relevant • Issue #37 – Inconsistent approach to audit requirements of CRBs
8. Dealing with fraud	• Issue #21 – Notification where allegations of fraud • Issue #38 – Length of ban period
9. Other matters	• Issue #17 – Scope of prohibition for developing a ‘tool’ to facilitate a CP’s direct marketing • Issue #24 – General drafting of the Code • Issue #39 – Provision of original documents in compliance investigations • Issue #40 – General consumer education • Issue #41 – CRBs acting as a debt collector

4.3 Notice requirements

Part IIIA of the Act imposes a number of notice obligations on CPs and CRBs. The Code provides detail around practical aspects such as timing, delivery and compliance in the issuance of such notices. Several issues were raised in relation to the operational aspects of issuing notices under sections 21D and 6Q of the Act regarding default information.

Issue #1a – Timing of issuance of section 21D notices

[Code: para 9.3(f), Act: s 21D(3)]

A. Identification of issue

A potential misalignment between the provisions of the Act and the Code has been identified with respect to the timing for disclosure of default information about an individual by a CP to a CRB, following the issuance of notice by the CP to the individual of its intention to make such disclosure (referred to as a ‘section 21D notice’).

Specifically, section 21D(3)(d) of the Act states that a CP may only disclose default information to a CRB after ‘*at least 14 days have passed since the giving of the notice*’, while paragraph 9.3(f) of the Code states that such disclosure cannot occur ‘*earlier than 14 days after the date on which the section 21D(3) notice is issued by the credit provider to the individual*’.

The difference in expression in the Act and the Code on this point could arguably lead to inconsistency and uncertainty as to the correct approach in practice.

B. Summary of consultation views

There were indications from the consultation that CPs commonly include a ‘buffer’ period between the expiry of the 14th day and the making of a disclosure to a CRB and so the observed misalignment is not problematical in practice. Notwithstanding this, there appeared to be a consensus that the drafting of paragraph 9.3(f) of the Code should conform precisely to the language of section 21D(3)(d) of the Act to avoid chance for ambiguity.

C. Evaluation

There is an intrinsic benefit to avoiding conflict between provisions of the Code and the Act. A cost in updating systems may arise for those CPs who do not include a ‘buffer’ period in their process of disclosing default information to CRBs. It is not clear to us whether this is a significant proportion of CPs, however transitional arrangements may be able to be implemented to address any disproportionately onerous impact on certain CPs.

Recommendation 4

Paragraph 9.3(f)(i) of the Code should be amended to conform to the language of section 21D(3) of the Act, in order to avoid ambiguity in the timing for disclosure of default information by a CP to a CRB following the issue of a section 21D notice.

Issue #1b – Method of delivery of section 21D notices

[Code: para 9.3(d), Act: s 21D(3)]

A. Identification of issue

Related to Issue 1a is the issue of where to deliver section 21D notices. Paragraph 9.3(d) of the Code requires the section 21D notice to be sent to the individual’s ‘*last known address at the time of despatch*’. The OAIC has provided guidance in *Privacy Fact Sheet 35* indicating

that the requirement may be satisfied by sending an electronic notice to an email address, provided due consideration is given to the manner in which the CP usually communicates with the consumer, whereas both the Act and the Code are silent on the use of electronic communication.

B. Summary of consultation views

There was a divergence of view as to the appropriateness of delivery of statutory notices by electronic means. It appears that some CPs may have adopted the practice of delivering notices electronically and some have observed that section 11 of the *Electronic Transactions Act 1999* (Cth) (**ETA**) permits this. Concerns have, however, been raised about privacy issues, reliability of delivery and the interaction with other statutory provisions, such as section 88 of the National Credit Code (**NCC**). Clarifying whether electronic delivery of statutory notices is available to CPs and in what circumstances would be welcomed.

C. Evaluation

The divergent views of stakeholders can be resolved by amendment to the Code that formally permits, rather than prescribes, use of electronic delivery of notices. This would formalise the existing OAIC guidance and be consistent with section 11 of the ETA. Reference to a technology neutral term, such as ‘electronic communication’, might provide additional flexibility for CPs to utilise any future means by which they might usually communicate with customers.

It is expected that the costs of any change would be able to be managed by CPs; many already use electronic communication in accordance with the OAIC guidance and, in any event, the suggested change does not impose a mandatory obligation on CPs to use electronic forms of communication, providing flexibility in relation to implementation.

Recommendation 5

Paragraph 9.3(d) of the Code should be amended to permit, but not prescribe, delivery of a section 21D notice to an individual’s ‘last known address at the time of despatch’ by electronic means. Consideration should be given to any formal consent requirements that may need to be adhered to as part of this process.

Issue #2 – Divergence in amounts specified in section 6Q and section 21D notices

[Code: para 9.3, Act: s 6Q, s 21D]

A. Identification of issue

A CP is obliged to provide notice to a consumer of overdue payments under section 6Q of the Act (referred to as a ‘section 6Q notice’) prior to issuing a section 21D notice and subsequently disclosing default information to a CRB.

The amounts specified in a section 6Q notice and a section 21D notice are not necessarily the same, notwithstanding the fact that they relate to the same principal debt, potentially creating confusion for consumers. Paragraph 9.3 of the Code distinguishes between the notices, permitting a CP to add interest, fees and deduction for part-payment to the amount specified in the section 21D notice.

B. Summary of consultation views

It was recognised that the divergence in amounts specified in section 6Q and section 21D notices may be confusing to consumers if not properly explained, with a number of complaints having been made to the OAIC on this issue, although there is a sound reason for the divergence given that the notices speak at different points in time.

It has been suggested that information be included in the section 21D notice in an accessible form which allows consumers to reconcile the amount specified in that notice with the earlier section 6Q notice, to enable them to understand the divergence in amounts.

C. Evaluation

The inclusion of information in an accessible form in a section 21D notice which enables reconciliation with amounts specified in the earlier section 6Q notice would enhance consumer understanding and avoid subsequent complaints and disputation.

The information required to provide the proposed reconciliation is already held by CPs, so the cost of implementing this change would be that associated with the re-formatting of section 21D notices to specify the component parts of the due amount. An interim approach may be to include a standard information sheet with delivery of section 6Q notices, which identifies the factors that may lead to divergence in the amounts specified in a later section 21D notice.

Recommendation 6

Paragraph 9.3 of the Code should be amended to include a requirement for CPs to specify in a section 21D notice the component parts of the due amount, enabling reconciliation with the prior section 6Q notice.

Issue #4 – Notification of accelerated debts on section 6Q notice

[Code: para 9.3, Act: s 6Q]

A. Identification of issue

There is some uncertainty as to whether a CP may include ‘foreshadowed’ accelerated debts in the amount specified in a section 6Q notice or whether a separate section 6Q notice must be issued once the debt is, in fact, accelerated.

B. Summary of consultation views

It was generally accepted that an accelerated amount will only become due and payable after expiry of the acceleration period (being 30 days, plus allowance for postage, from issue of a notice under section 88 of the NCC which includes an acceleration clause required by section 93 of the NCC), and only once it becomes due and payable can it become an ‘overdue payment’ for purposes of a section 6Q notice.

There is an opportunity to clarify the proper interpretation of section 6Q of the Act with respect to accelerated debts, either by amendment to the Code or provision of guidance to the market.

C. Evaluation

The operation of section 6Q of the Act is clear that foreshadowed accelerated debts cannot be included on a section 6Q notice until they constitute an ‘overdue payment’, which technically cannot occur until they are, in fact, due. The issue appears to be one of awareness and understanding of the acceleration process amongst CPs which could best be addressed through enhanced guidance and education on the acceleration of debts generally and the section 6Q notification requirements in particular, rather than amendment to the Code.

Issue #30 – Notice of transfer of debt to relevant CRB

[Code: para 13, Act: s 6K]

A. Identification of issue

It has been suggested that the notification requirements for CPs transferring debts, set out in paragraph 13 of the Code, could be simplified to improve efficiency and compliance.

Paragraph 13 of the Code obliges both the acquiring CP and the original CP to notify a relevant CRB of the transfer of the debt. The provision was introduced to overcome consumer confusion regarding the identity of relevant CPs following transfer of a debt, which is not always reflected in a credit report. It has been observed that paragraph 13, in particular the requirement to satisfy the first three sub-sections of paragraph 13.1 before disclosure of the transfer event is required to be made, is complex and potentially leads to non-compliance in practice.

B. Summary of consultation views

There is some apparent uncertainty in practice as to whether the obligation to inform a relevant CRB of the transfer of a debt is imposed jointly on each of the original and acquiring CP, and whether this only applies where the requirements in subparagraphs 13.1(a) – (c) are satisfied. A market practice of assignment deeds imposing an obligation on the acquiring CP to notify a relevant CRB of a transfer of a debt was noted. It was also noted that there may be inconsistency with obligations imposed by the Australian Credit Reporting Data Standard (ACRDS) requirements as the potential cause of the confusion in practice.

A proposed change to the Code to address this confusion was amendment to paragraph 13.1 to require ‘either’ of the original CP or the acquirer to ensure disclosure of the transfer event is made to the CRB, rather than ‘both’. This was submitted to align with the market practice of assignment deeds imposing the notification obligation on one party, typically the acquirer.

C. Evaluation

While there was general consensus that paragraph 13.1 of the Code could benefit from simplification, which would provide clarity for CPs and assignees and therefore greater compliance with the notification requirements, it was unclear whether the current drafting has caused systemic non-compliance in practice.

Nevertheless, it is expected that the cost of implementing the suggested change would be minimal, as it would effectively remove the notification obligation from one party, and in any event, would better align with current market practice. However, removing the obligation on both parties to notify the CRB will place greater emphasis on the contractual arrangements between the original CP and acquirer to allocate this responsibility.

Consideration could be given to amending paragraph 13.1 of the Code to require ‘either’ of the original CP and the acquiring CP, rather than ‘both’, to notify a CRB of the transfer event in order to improve understanding and compliance by CPs, and therefore address the risk of non-compliance in practice, with the requirement of original CPs and acquiring CPs to notify CRBs of a debt transfer event. Further consultation may be needed to investigate the implementation of such a change and evaluate the resulting emphasis placed on contractual agreements between original CPs and acquiring CPs and any unintended consequences that might arise.

4.4 Repayment history information

The regulation of repayment history information (RHI) will become an increasingly important feature of credit reporting regulation with the introduction of CCR. The expression is defined in section 6V(1) of the Act to mean, relevantly:

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

Further guidance is provided in paragraph 8.1 of the Code, specifically, that consumer credit is overdue if there was at least one overdue payment in relation to which a grace period of 14 days or more has expired, on the last day of the month to which the RHI relates. The grace period was extended from five days to its current 14 days under the first variation of the Code.

In view of the fact that there is limited experience in the operation of CCR we think there is need for circumspection in considering issues relating to RHI; this may be an area for detailed consideration in a subsequent review of the Code.

Policy issues relating to financial hardship and use of hardship flags is beyond the scope of this review, as noted in the Issues Paper. We have, however, sought to test whether any non-hardship related RHI reporting issues should be considered as part of this Review.

Issue #5 – Definition and recording of RHI

[Code: para 8, Act: s 6V]

A. Identification of issue

There has been concern expressed about the recording of RHI in circumstances where a CP and consumer have agreed to a variation to the terms of a credit contract, for instance an extension of term to assist a consumer experiencing financial hardship.

B. Summary of consultation views

Recognising the limitations of the scope of our Review, we set out in this part a summary of the feedback received on this issue. We understand that the concept of RHI is being considered more broadly in other forums, including in particular with reference to hardship and the use of hardship flags.

A number of stakeholders indicated that there is a technical issue in respect of the distinction between whether a payment arrangement is an ‘indulgence’ or a ‘variation’ to a contract for credit, both triggering different outcomes for the consumer in terms of how RHI is reported. At a high level, we heard from submissions that there are circumstances in which a CP may:

- allow a debtor an ‘indulgence’ in extending the time for making a particular repayment or repayments, in the case of shorter-term financial hardship (for example, in the case of illness, relationship breakdown or transfer of employment). In these circumstances, CPs generally do not consider that there has been a variation to the terms upon which credit was provided; and if the debtor’s failure to repay the loan becomes ongoing, they may wish to commence recording RHI in line with the original terms of credit
- consent to a variation of the terms upon which credit is provided. In this case, any recording of RHI must be made in accordance with the new varied terms.

It is recognised that the delineation between an ‘indulgence’ and a ‘variation’ can be blurry in some cases, particularly where an ‘indulgence’ is allowed for an extended period of time, and that this can cause disputes between CPs and debtors. In a letter from the OAIC to ARCA dated 10 March 2017, the Commissioner provided his views on the application of section 6V of the Act with respect to temporary payment arrangements. The Commissioner, based on advice from counsel, indicated a view that an assessment of whether a debt is ‘due and payable’ for purposes of RHI for temporary payment arrangements (where there has been no formal variation) should have regard to the nature of the arrangement and, particularly, whether the CP can maintain enforcement action against the individual for default of the original contract despite compliance with the temporary arrangement, bringing into view technical legal concepts such as equitable estoppel.

While some views canvassed in the consultation process challenged this interpretation, it was generally considered that further clarity is required with respect to the distinction between an ‘indulgence’ and a ‘variation’. Recognising the limited consideration of this nuance in practice, particularly evidenced by the limited number of complaints with respect to RHI raised to date, it is expected that this issue would be better addressed alongside the broader consideration of RHI following operation in a CCR environment.

Issue #9 – Timely disclosure of RHI to consumers

A. Identification of issue

There is presently no obligation for CPs to notify consumers when they report RHI to CRBs. It has been suggested that the imposition of such an obligation, possibly via periodic account statements, would improve consumer awareness and management of their credit and enhance accuracy of data held by CRBs by encouraging greater consumer oversight of data.

B. Summary of consultation views

There was a strong divergence of views on this issue. The above-mentioned benefits proposed by those supportive of the change were thought to be outweighed by significant costs that would be borne by CPs in implementing the change, as well as concerns about the practicality of implementation (for instance, monthly reporting of RHI vs quarterly or bi-annual statement cycles and accounting for the 14 day grace period applicable only for RHI reporting), by those who do not support the change.

C. Evaluation

A number of practical issues have been raised, including significant operational costs, which would impede the introduction of timely notification of RHI reporting to consumers. We do not have sufficient information to reach a definitive view on the extent of consumer benefit or indeed the true cost of implementing the proposed change, including any alternative approaches which may involve CRBs directly. However, based on the consultation feedback it is reasonably expected that the costs of imposing any such RHI notification obligation on CPs, particularly by requiring alignment with existing periodic account statement practices, would significantly outweigh the benefits and are unlikely to be justifiable.

In any event, the implementation of any such obligation would require introduction via the Act and so falls outside of the ambit of this Review. It may be an issue for consideration in the context of broader legislative reform, at which time a more detailed weighing of costs and benefits could be undertaken.

Issue #29 – Definition of ‘month’ for purposes of reporting RHI

[Code: para 1.2(i)]

A. Identification of issue

In the context of reporting RHI, concern has been raised as to the alignment of the definition of ‘month’ under the Code to the reporting practices of CPs. Specifically, the term ‘month’ is defined in the Code by reference to the meaning given in section 2G(1) of the *Acts Interpretation Act 1901* (Cth) (**AIA**), which makes no adjustment to the start or end days for non-business days. However, it is submitted that CPs often align their internal processing dates to either a due date, cycle date or month-end date and, in either case, may adjust such date where it falls on a non-business day. In this respect, it is possible that some CPs might be unable to match their internal ‘month’ reporting timeframes with the Code’s ‘month’ requirements, resulting in technical non-compliance with the Code.

B. Summary of consultation views

The consultation feedback on this issue was limited. There was a proposal that the definition of ‘month’ under the Code be amended to provide clarity on how to deal with situations where the month end-date falls on a non-business day and provide flexibility for CPs to decide which date to use, thereby allowing them align their RHI reporting with their internal processes.

It was also observed that the AIA already has a mechanism for dealing with non-business days. Specifically, section 36(2) of the AIA notes that ‘*if an Act requires or allows a thing to be done, and the last day for doing the thing is a Saturday, a Sunday or a holiday, then the thing may be done on the next day that is not a Saturday, a Sunday or a holiday*’. Based on the consultation feedback it is unclear whether CPs have regard to this adjustment mechanism in practice, whether the general interpretation of the Code definition of ‘month’ is strictly limited to the wording of section 2G(1) of the AIA or whether the adjustment mechanism is not applicable to the Code definition of ‘month’ by virtue of its requirement for ‘a thing to be done’ potentially not extending to calculation of a reporting timeframe.

C. Evaluation

Given the minor technical nature of the issue, any change to the Code to clarify the definition of ‘month’ is unlikely to require significant implementation costs for CPs and, in any event, will bring the Code in line with existing internal processes.

While the suggested amendment to the Code definition of ‘month’ appears appropriate and uncontroversial, consideration should be given to the potential application of the mechanism for dealing with non-business days in section 36(2) of the AIA. We do not have sufficient information to reach a view on whether this mechanism is applicable and appropriate in practice. To the extent this mechanism is applicable and provides the necessary adjustment for non-business days then amendment to the Code would not be required.

Consideration could be given to amendment of paragraph 1.2(i) of the Code to deal with non-business days and provide flexibility to CPs to adjust as required. Further consultation with CPs may be needed to assess the practical impact of the apparent inconsistency between the definition of ‘month’ and practices of CPs and the applicability and appropriateness of the existing adjustment mechanism under section 36(2) of the AIA.

Issue #32 – Frequency of data submissions by CPs

[Code: para 8.2, Act: 6V(2)]

A. Identification of issue and summary of consultation views

Paragraph 8.2(a) of the Code states that where a CP discloses RHI about consumer credit provided to an individual, it must take reasonable steps to ensure that it does not disclose RHI about that credit more frequently than once each month.

A small number of stakeholders raised concerns that, for smaller CPs, this period is inconsistent with the commercial reality in which they operate. Smaller CPs often have debt cycles of weeks or fortnights, rather than months, and paragraph 8 of the Code does not contemplate or provide for this. They are therefore required to calculate a monthly RHI value which covers more than one of the debtor's repayment periods. Accordingly, it was submitted that paragraph 8.2 of the Code be amended to allow more frequent reporting of RHI – for example, weekly or fortnightly – where the repayment cycle is a shorter period than monthly.

B. Evaluation

While the consultation feedback was limited to the operation of paragraph 8.2(a) of the Code, it is noted that section 6V(2) of the Act enables the Code and other regulation to provide guidance on whether or not a payment is a monthly payment and whether or not an individual has met their obligation to meet a monthly payment. The Explanatory Memorandum to the *Privacy Amendment (Enhancing Privacy Protections) Bill 2012* (Cth) (**Explanatory Memorandum**), at pages 129 and 130, indicates an expectation that the Code will provide further guidance on the elements of RHI, including guidance on how RHI that is subject to other periods of repayment (e.g. weekly or fortnightly) will be listed on a monthly basis.

Consideration could be given to the expansion of paragraph 8.2(a) of the Code to provide guidance on whether or not a payment is a monthly payment for purposes of section 6V(2)(b) of the Act in order to deal with how RHI that is subject to other periods of repayment will be listed on a monthly basis. Given the limited consultation feedback on this issue, further consultation may be needed to better understand and assess the impact of such a change, particularly on consumers.

Issue #33 – Application of 'grace period' for RHI disclosure

[Code: para 8.2(c)]

A. Identification of issue

Concern was raised as to the application of paragraph 8.2(c)(ii) of the Code with respect to the calculation, and subsequent disclosure, of RHI information to CRBs, and in particular the impact of the grace period when calculating the first RHI period.

B. Summary of consultation views

There was general appreciation of the need for clarity in the manner in which the grace period is accounted for when calculating and reporting the RHI periods by those stakeholders who commented on this issue.

We received submissions proposing two interpretations of the way in which the grace period can be accounted for under paragraph 8.2(c)(ii) of the Code:

- first RHI period only commences after expiration of the 14-day grace period
- first RHI period commences on day 1, however CPs are prohibited from disclosing RHI to CRBs until after the expiration of the grace period on day 15.

It was generally accepted that the second interpretation outlined above was the intended interpretation of paragraph 8.2(c)(ii). To address any uncertainty, it was proposed that paragraph 8.2(c)(ii) be amended to require the first RHI code ('1') to be applicable where the age of the oldest outstanding payment is '15 to 29 days overdue', indicating that the first RHI period commences on day 1 but CPs are prohibited from disclosing RHI to CRBs for the first 14 days by virtue of the grace period.

C. Evaluation

Implementation costs of the proposed change will only arise for those CPs that presently do not account for the grace period in the favoured manner above. It is expected that any costs to update systems will be relatively minor, but will result in clarification of the interpretation of the grace period timeframe, reducing the risk of technical non-compliance with the Code for CPs and providing greater clarity and consistency for consumers in respect of their RHI that is reported.

Recommendation 7

Paragraph 8.2(c)(ii) of the Code should be amended to specify that the first RHI code ('1') applies where the age of the oldest outstanding payment is '15 – 29 days overdue' in order to ensure consistency in the application of the 14 day grace period.

4.5 Credit reports

A number of issues have been raised in respect of the practical operation of a number of provisions of the Code dealing with content of and access to credit reports.

It is clear that there is a balance to be struck between the need for consumers to have effective oversight over their credit information and the legitimate commercial interests of CRBs providing credit reporting services. This balancing of interests is a common theme in considering the issues raised in relation to credit reporting.

Issue #6 – Inclusion of credit scores on free credit reports

[Code: para 19.4(a), Act: s 20R(1), s 6(1)]

A. Identification of issue

A CRB is required to provide access to all credit reporting information about an individual that it holds upon request of the individual under section 20R(1) of the Act. When a CRB is required to provide access to credit reporting information under the Act, paragraph 19.4(a) of the Code requires that the CRB provide access to both ‘credit information’ and current ‘CRB derived information’ about the individual that is available.

It was raised that parliamentary intention of the meaning of ‘*CRB derived information*’, as defined under section 6(1) of the Act, finds expression in the Explanatory Memorandum, which indicates at page 147 that this information includes ‘*for example, any credit scoring analysis about the individual*’.

The Commissioner made a determination in December 2016 (the **Determination**) which drew attention to the requirement for CRB’s to ‘hold’ the credit reporting information about an individual under section 20R(1) of the Act and explored the definition of ‘holds’ under section 6(1) of the Act in the context of credit scores that are automatically generated by CRBs. The Commissioner concluded that where a credit score is not in existence at the time of the access request, this does constitute credit reporting information and is therefore not required to be provided to the access seeker, highlighting that a CRB is only required to disclose credit score information to consumers in free credit reports where this is already ‘held’ by the CRB and not in the case where it must take the additional step of generating the information.

Several stakeholders consider that the issue was not satisfactorily dealt with by the Determination.

B. Summary of consultation views

It was generally considered that a deviation from the Commissioner’s interpretation of section 20R(1) of the Act in the context of credit scoring information and imposition of a specific obligation on CRBs to provide credit scores with free credit reports would require amendment to the Act and would represent a significant policy shift, in both respects rendering the issue outside the scope of this Review. In view of the significant engagement by stakeholders on this issue we think it appropriate to set out some of the perspectives received in order to inform future decision-making.

A number of arguments were presented challenging the interpretation in the Determination and arguing forcefully that CRBs should provide credit scores in free credit reports. It was observed that one CRB does in fact include credit scores on their free credit reports provided to consumers, suggesting that it is operationally and commercially possible. It was similarly noted that some CRBs do not include credit scores on their free credit reports but do include credit scores on paid reports, suggesting again that it would be operationally possible to generate one for a free credit report. Finally, it was observed that the relevant text of the

Explanatory Memorandum clearly evidences Parliament's intention for 'CRB derived information' to include credit scoring information.

A number of arguments were also presented in support of the interpretation in the Determination. It was suggested that inclusion of credit scores on free credit reports might lead to greater consumer confusion and uncertainty, recognising that there is no benchmark or comparative scale applicable to all credit scores and that each CRB has its own calculation methodology, making it difficult for consumers to effectively understand, reconcile and compare the credit scores that would be widely available. It was also noted that credit scores are only one reference point considered by CPs when making lending decisions, and in fact it is the information listed on the credit report that is arguably more important to consider when making its decision. Finally, it was observed that changes to mandate provision of credit scores on free reports would harm the legitimate business interests of CRBs who are all commercial enterprises, rather than public bodies.

In light of the generally divergent views and underlying policy rationale, it is considered that further consultation is required to better evaluate the desire and corresponding hesitation to disclose credit scores on free credit reports.

Issue #7 – Access to free credit reports

[Code: para 19.4, Act: s 20R]

A. Identification of issue

Concern was raised that some consumers may have difficulty in accessing the free credit report that they are entitled to under section 20R of the Act, including those who do not have regular access to the internet or those who do not use email.

B. Summary of consultation views

There was general consensus that the Commissioner addressed this issue in his Determination. It was suggested that since the issuance of the Determination, CRBs have adopted a practice of facilitating access to free credit reports by phone, mail and internet. However, it was also suggested that consumers continue to face difficulty accessing their free credit reports, potentially resulting from a lack of awareness of the services now made available by CRBs following the Determination.

C. Evaluation

The Commissioner's Determination appears to provide a firm basis for consumers to request access to free credit reports in ways other than by internet and provides direction to CRBs to facilitate alternative access. As such, it seems that changes to the Code are not necessary.

There is obviously concern that consumers do not widely understand the ambit of their right of access to free credit reports and the manner in which this can be accessed and there is an opportunity to raise awareness of this. Consideration could be given to the enhancement of consumer education and awareness in relation to the ability and manner in which free credit reports can be accessed.

Issue #8 – Marketing to consumers who have requested a free credit report

[Code: para 19, Act: s 20R]

A. Identification of issue

Concern has been expressed about communications between CRBs and consumers and the possibility of consumers being provided with inaccurate information or subject to aggressive marketing by some CRBs.

B. Summary of consultation views

Concern has been expressed about instances where consumers requesting access to a free credit report have received incorrect information, including suggestions that consumers are required to pay for credit reports or that requesting a free credit report will negatively impact their creditworthiness. It has also been suggested that consumers may have been unintentionally consenting to receiving direct marketing from CRBs without their knowledge due to confusion in the mechanism used to seek consumer consent to receiving direct marketing from CRBs.

A number of stakeholders observed that avenues for redress exist to deal with inaccurate or aggressive marketing through the prohibition on misleading and deceptive conduct in section 18 of the Australian Consumer Law enshrined in Schedule 2 of the *Competition and Consumer Act 2010* (Cth). In addition, consultation feedback consistently indicated that the Australia Privacy Principles (APPs) would also apply to the conduct of CRBs in respect of the kinds of personal information they would use when marketing to consumers, being personal information other than credit reporting information, CP derived information or pre-screening assessments (in which case the APP carve out for CRBs under section 20A(2) of the Act would not apply). In particular, it was submitted that APP 7 would generally apply to regulate the direct marketing conduct of CRBs in this context.

Caution was advised in proposing amendments to the Code which may impinge upon the established regulatory regimes under the APPs or Australian Consumer Law.

C. Evaluation

Consumers have specific avenues of redress available under the Act and the Australian Consumer Law when subject to misleading or aggressive marketing. Empirical evidence of consumers being subject to this kind of behaviour by CRBs suggests that there may be an opportunity to improve the understanding of CRB contact staff, including review of training, call centre scripts and marketing plans to ensure continued compliance with the existing law.

A concerted focus by the OAIC and ACCC on monitoring complaints made in respect of the marketing practices of CRBs may be an appropriate step to assess whether systemic problems exist which require greater regulatory enforcement or amendments to the Code; this latter step would require careful thought to avoid duplication or conflict with the existing regulatory regime. Steps could also be taken to raise the awareness of consumers to their rights under existing regulatory provisions to deal with circumstances of incorrect or aggressive marketing.

Issue #23 – Disclosure of information regarding access to credit reports

[Act: s 6N(d)]

A. Identification of issue

Concern was raised as to the format and disclosure of the audit trail which identifies when CPs and debt collectors have accessed an individual's credit report.

B. Summary of consultation views

It was suggested that there is a lack of clarity around the nature and implications of the audit trail listed on credit reports, particularly regarding the reasons for why CPs and debt collectors have accessed the report, whether the audit trail is visible by other bodies and whether the history and frequency of access as depicted in the audit trail factors into an individual's credit assessment and determination of their credit score. The lack of clarity appears to be exacerbated by a lack of consistency in the listing of access details.

It was recognised that there may be a lack of clarity on the face of the credit report why legitimate access requests had been made and a concern as to whether this information constitutes credit information and might impact future credit assessments.

It was suggested that standardising the format of access entries and the inclusion of a short description of the reason for access in the credit report received from CRBs, including a flag when information is shared with a CP or debt collector, may enhance transparency and assist in providing necessary context for consumers to better interpret the audit trail. The provision of reasoning each time a credit file has been accessed may also address concerns about access for purposes unrelated to the provision of credit, which is a concern that was also raised.

It was also proposed to improve consumer education and awareness of the nature and purpose of the audit trail to enhance understanding of the legitimate reasons for access to a credit report by a CP or debt collector and how it is used in the credit assessment process.

Another alternative submitted was that CRBs could categorise audit trail access requests that are 'accessible' (i.e. those that CPs can access under the Act) and those that are 'non-accessible' (i.e. those that are disclosed only to the individual and are not accessible by the CP). This would enable consumers to focus on those entries in the audit trail which may be considered by future CPs and avoid distraction of access entries of a more administrative nature.

C. Evaluation

Imposing a requirement for CPs and debt collectors to specify a reason each time a credit report is accessed would provide more information to consumers. It is expected that significant operational changes would be required across CPs, debt collectors and CRBs to implement this and it is not clear whether it would improve consumer understanding of the audit trail.

The proposal to require CRBs to flag those access requests on the audit trail which will be disclosed to future CPs and debt collectors may limit the area of concern and, in conjunction with standardisation of audit entry format and an accompanying explanation as to the types of requests falling into each category, may provide sufficient level of clarity to consumers.

Consideration could be given to amending the Code to include a requirement for CRBs to adopt a standard format for audit trail disclosure of information about access to credit reports, including a flag for those access requests which are 'accessible' by CPs and a standard explanation of the types of request that fall within each category. Further consultation may be needed to assess the implementation costs of any such requirement on CRBs and CPs. As an interim measure, enhanced guidance could be provided to consumers on the nature, purpose and accessibility of the audit trail disclosure of information regarding access to their credit reports.

4.6 Credit information

A number of issues were raised in relation to the proper interpretation of the expression ‘credit information’ and related definitions, under the Act and how this information is handled in the credit reporting system. These concepts go to the heart of the regulatory regime under the Code and any changes would require careful analysis to assess the impacts and identify unintended consequences.

Issue #14a – Reporting of Court judgements unrelated to creditworthiness

[Code: para 11.1(c), Act: s 6N]

A. Identification of issue

Concern has been raised about the listing of Court judgements which do not relate to the credit worthiness of an individual, potentially due to difficulty in interpreting paragraph 11.1(c) of the Code and the requirement for publicly available information about an individual to satisfy the requirements of section 6N(k) of the Act.

B. Summary of consultation views

It has been suggested that there is empirical evidence of judgements of the Court which do not bear upon a person’s credit worthiness being collected by and reported to CRBs and listed on credit reports of individuals. It was also observed that there was an inconsistency of practice across the numerous court bureaucracies throughout Australia.

A number of stakeholders observed that the Act already has mechanisms in place to ensure the Court information listed is not unrestricted in terms of relevance, noting that:

- ‘publicly available information about the individual’ collected under section 6N(k) of the Act must relate to the individual’s credit worthiness (as required by section 6N(k)(i))
- ‘court proceedings information about the individual’ collected under section 6N(i) of the Act is qualified by the definition of ‘court proceedings information’ under section 6(1) of the Act, requiring in subsection (b) that such information ‘*relate to any credit that has been provided to, or applied for by, the individual*’.

C. Evaluation

There appears to be a clear restriction in the Act preventing CRBs from listing Court judgements which do not relate to an individual’s credit worthiness or the provision of credit. While it is acknowledged that the OAIC does take measures to address the incorrect listing of judgements, as evidenced by its determination in respect of *KB and Veda Advantage Information Services and Solutions Ltd* [2016] AlCmr 81 dated 25 November 2016, it is considered that enhanced monitoring and enforcement activity with respect to the restriction on listing Court judgements unrelated to an individual’s creditworthiness or the provision of credit could appropriately address any concerns of non-compliance in future. Enhanced guidance could also be provided to Court registries throughout Australia to improve awareness of the obligations amongst officials and improve co-ordination in developing consistent approaches to provision of information to CRBs to avoid inadvertent listing of unrelated Court information by CRBs.

Issue #14b – Reporting of writs and summons as credit information

[Code: para 11.1(c), Act: s 6N]

A. Identification of issue

Related to issue 14a, significant concern was expressed about CRBs listing originating proceedings (i.e. writs and summons) in addition to Court ‘judgements’.

B. Summary of consultation views

It was observed that the term ‘court proceedings information’ should be limited to judgements of an Australian Court and not originating process or other documentation. This view was supported by the Explanatory Memorandum which states at page 105 in respect of the definition of ‘court proceedings information’ under subsection 6(1) of the Act that *‘the definition expressly refers only to judgements, not any other form of, or stages in, court proceedings. This means that, for example, an originating summons cannot be included in an individual’s credit information as court proceedings information because it is not a judgement (even though it is part of the proceedings of the court)’*.

Concern was raised that in practice some CRBs have listed writs and summons by virtue of them being considered ‘publicly available information’ and potentially satisfying the definition of credit information under section 6N(k) of the Act.

It was acknowledged that writs and summons could technically fall within the ambit of section 6N(k) of the Act where it relates to an individual’s activities in Australia, relates to an individual’s credit worthiness and is not Court proceedings information (which it is arguably not given it is not a judgement) or information that is entered or recorded on the National Personal Insolvency Index. We understand that this interpretation was recently confirmed by the OAIC in correspondence in response to a complaint raised on the subject. While not a formal determination, the OAIC expressed a view that listing of a writ on an individual’s credit file might not necessarily point to a breach of the Act, however noted that this will depend on the circumstances of a particular listing and could not be generalised across all writs, noting particularly that consideration is required of whether listing the writ may be considered inaccurate, incomplete or out of date (referencing a CRB’s obligation under section 20N(1) of the Act).

Nevertheless, there was consistent feedback and a general recognition across a range of stakeholders that the listing of originating proceedings is inappropriate and it would be helpful for this to be clarified.

C. Evaluation

Given the Act does not specifically prohibit the listing of writs and summons, and the OAIC’s recent indication that such listing might not technically breach the Act, it is considered that the imposition of any specific restriction on the listing of writs and summons would represent an effective policy shift and would need to be implemented by changes to the Act. Nevertheless, given the consultation feedback indicated consistent support for a prohibition on the ability for CRBs to list writs and summons and the continued complaints lodged with the OAIC in this respect, it is considered that there is value in further consideration and resolution of this issue.

Issue #15 – Determining the ‘maximum amount of credit available’

[Code: para 6.2(b), Act: s 6(1) definition of ‘consumer credit liability information’]

A. Identification of issue

Concern has been raised as to the potential for overlap between the six categories of credit set out in paragraph 6.2(b) of the Code for the purpose of determining how the ‘maximum amount of credit available’ is calculated. The consequence is that different credit limits may be imposed on a consumer, depending upon how the credit contract is categorised.

B. Summary of consultation views

Views on this issue were limited, however there was a recognition that there should not be overlap between the categories listed in paragraph 6.2(b) of the Code and the original intention was that credit contracts would be categorised into only one of the six distinct categories.

It was submitted that the ability for CPs to ‘choose’ how to categorise a particular type of credit which could arguably fit within more than one category under paragraph 6.2(b) might result in the same type of consumer credit having a different ‘maximum amount of credit available’ and therefore might appear differently on a credit report, which might influence future lending decisions. It was suggested that sub-paragraphs 6.2(b)(v) and (vi) of the Code could be removed to avoid situations of potential overlap with other sub-paragraphs.

C. Evaluation

Ensuring consistent categorisation of credit contracts in determining the maximum amount of credit available is a worthwhile objective. It is important that any changes to paragraph 6.2(b) of the Code to achieve this have regard to the possibility of unintended consequences. In respect of the proposal to remove sub-paragraphs 6.2(b)(v) and (vi) of the Code there may be a need to re-assess credit limits for contracts which have already been determined in accordance with sub-paragraphs 6.2(b)(v) and (vi). There may also be specialist CPs who are particularly impacted by removal of sub-paragraphs 6.2(b)(v) and (vi) to the extent their types of credit fall only within one of these categories and there is no overlap with others.

Consideration could be given to amendment of the Code to avoid possible overlap between categories in paragraph 6.2(b) of the Code with respect to the manner in which CPs determine the ‘maximum amount of credit available’. Further consultation may be needed to assess the extent of any overlap and the most appropriate resolution to ensure no unintended consequences, particularly for specialised CPs.

Issue #16 – Determining ‘the day credit is terminated or otherwise ceases to be in force’

[Code: para 6.2(c)(ii), Act: s 6(1) definition of ‘consumer credit liability information’]

A. Identification of issue

Under section 6(1) of the Act, information included in the definition ‘consumer credit liability information’ includes ‘the day on which the consumer credit is terminated or otherwise ceases to be in force’. The Code provides interpretation of the meaning of the expression ‘otherwise cease to be in force’ in paragraph 6.2(c)(ii) of the Code, stating that it is the day that the credit is ‘no longer available to the individual under the terms of the contract, arrangement or understanding and the CP has irrevocably determined that the credit cannot be reinstated on those terms’, notwithstanding that the credit has not been terminated.

Concern has been raised that the terms of paragraph 6.2(c)(ii) of the Code may have the effect that closure of a credit contract could be disclosed to CRBs in advance of the finalisation of the individual's liability and termination of the contract, potentially resulting in an inaccurate disclosure of the consumer's indebtedness.

B. Summary of consultation views

It was acknowledged that to the extent outstanding payment obligations of consumers are not reflected on a credit report due to the operation of paragraph 6.2(c)(ii) of the Code allowing accounts to be marked as 'closed', this practice should be addressed and corrected via the Code. It was submitted that all amounts owing should be clearly reported until they are finally paid to ensure CPs have an accurate representation of a consumer's ongoing payment obligations in order to make responsible lending decisions. To address this practice, it was suggested that the definition in paragraph 6.2(c) of the Code be amended to remove the concept of the day credit 'otherwise ceases to be in force' (i.e. sub-paragraph 6.2(c)(ii)) and restrict the definition to only refer to the day that the credit contract, arrangement or understanding is terminated.

The consultation submissions highlighted that the proposed limitation of paragraph 6.2(c) might require consequential review of the ongoing RHI disclosure obligations, particularly where there is no ongoing monthly payment due and payable for purposes of section 6V of the Act but the account has not formally been terminated. It was considered that further consultation with industry would be required as to the manner in which RHI could be reported in these situations, noting one approach could be to simply disclose the account type and with a zero limit.

C. Evaluation

It is acknowledged that removing the second limb of paragraph 6.2(c) of the Code might appropriately address the practical issue of reflecting an account as closed notwithstanding payment obligations are still outstanding, resulting in greater clarity over a consumer's payment obligations and better enabling CPs to meet their responsible lending obligations. However, it is expected that the second limb of paragraph 6.2(c) of the Code might have initially been included in the Code to address a particular situation which was not expressed during the consultation process.

Accordingly, while paragraph 6.2(c) of the Code could be amended to address any inaccurate representation of a consumer's ongoing payment obligations caused by the definition of 'otherwise ceases to be in force' under paragraph 6.2(c)(ii) of the Code, the manner in which the Code is amended would require further investigation to ensure any unintended consequences are addressed. Alternatives to removing the second limb of paragraph 6.2(c), such as including a new mechanism for accounting for inactive but not yet terminated accounts, could also be investigated.

Issue #28 – Information requests for an unknown amount of credit

[Code: para 7.1]

A. Identification of issue

Paragraph 7.1 of the Code applies in situations where an application for consumer credit is for an unknown amount or an amount incapable of being specified. The Issues Paper canvassed a potential issue in that it is unlikely that consumers would seek credit for an unknown amount, resulting in a technical redundancy of this paragraph of the Code.

B. Summary of consultation views

The consultation feedback indicated that there was a lack of understanding as to the situations in which a customer would apply for credit for a unknown amount, leading to

concern as to whether such a practice might be irresponsible and potentially breach a CPs responsible lending requirements.

While some stakeholders shared this view, there was some concern raised as to the initial rationale for including such a provision and whether any change to remove this provision might lead to unintended consequences where that particular situation (even if rare) might be required.

Throughout the consultation process it became clear that certain types of credit can in fact be for an unknown amount or amount incapable of being specified, particularly including telecommunication contracts where the amount of credit required for certain post-paid services (e.g. mobile phone and internet services) will be determined based on the consumer's use of the services and associated spend, rendering it incapable of being specified at the time the contract is entered into.

C. Evaluation

Given the consultation process identified certain situations where paragraph 7.1 of the Code could be applicable, it is considered that any amendment to the Code to remove this provision would be negligent to these situations. As an underlying comment, it is accepted that the Code should remain flexibility to deal with a range of different credit arrangements, particularly given the number of different industries affected by its application.

Recommendation 8

Paragraph 7.1 of the Code with respect to information requests for an unknown amount of credit should be retained in the Code to cover those situations where it could be applicable, even if uncommon in practice. The Code should remain flexible to deal with a range of different credit arrangements, having regard to the different types of CPs to which the Code applies.

Issue #34 – Security of credit reporting information

[Code: para 15.1]

A. Identification of issue

Concern has been raised as to the security of credit reporting information held by Australian CRBs following a data breach involving a CRB in another jurisdiction.

B. Summary of consultation feedback

A number of consultation submissions touched on this issue and advocated the merits of imposing a higher degree of security standards for data held and transferred between CPs and CRBs. It was suggested that the obligation of CRBs and CPs under paragraph 15.1 of the Code to maintain reasonable practices, procedures and systems to ensure the security of credit reporting information, should be strengthened by specification of objective standards of what CRBs and CPs should have regard to in determining what is 'reasonable'.

It was submitted that imposing such benchmark standards would provide clarity on the obligations to secure credit reporting information and therefore assurance to consumers that their information would not be significantly impacted by a large-scale data breach. It was also observed that CRBs and CPs would benefit from a more objective standard, to which they could readily demonstrate compliance, limiting the prospect of sanction and reputational damage in the event of a data breach event.

It was noted that the OAIC currently publishes its *Guide to Securing Personal Information*, which sets out the factors it considers when making an assessment of whether 'reasonable steps' have been taken to secure information. It was also noted that some relevant industry

standards exist, notably APRA's *Prudential Practice Guide CPG 235 - Managing Data Risk* and relevant ISO standards such as ISO / IEC 27001 *Information Security Management*, which may be relevant in an assessment of whether 'reasonable steps' have been taken.

C. Evaluation

The efficacy of the credit reporting system depends upon consumer confidence in the security of their personal data. The reported data breach in another jurisdiction is of concern, however it should be noted that no submission was made indicating significant data breaches in respect of credit reporting information in Australia, so it is not clear whether there is a present deficiency in data security.

The current approach in paragraph 15.1 of the Code provides flexibility to CRBs and CPs to tailor their security arrangements to their specific circumstances and likely threats faced. In the face of overseas data breaches, prescribing benchmark standards may improve consumer confidence, although it would necessarily reduce flexibility for CRBs and CPs and may result in added costs if current approaches are deemed insufficient. The extent of such costs would only be known once standards were developed.

In recognition of community concerns, the OAIC could focus its monitoring activities in this area to better understand the adequacy of current approaches taken by CRBs and CPs towards data security and assess whether the 'reasonable' standard in paragraph 15.1 of the Code needs to be supplemented with more detailed criteria. In the interim, to maintain public confidence in light of concerns in this area internationally, consideration could be given to development of further guidance in this area to assist CRBs and CPs in compliance with their data security obligations, which could be provided in conjunction with information on the new Notifiable Data Breaches scheme to be introduced in February 2018.

Issue #35 – Minimum amount for default information

[Act: s 6Q(1)(d)]

A. Identification of issue

A concern has been raised about the low \$150 threshold above which an overdue debt may constitute default information for the purposes of section 6Q(1)(d) of the Act with a proposal that the threshold be raised by changes to the Act or Regulation.

B. Summary of consultation views

While consultation of this issue was limited, the view was put that a \$150 threshold for overdue amounts is not appropriate, particularly where an overdue telecommunications or utility bill, commonly exceeding \$150 for a household, could be listed as default information on an individual's credit report. As a comparison, it was noted that the Australian Energy Regulator's minimum overdue amount in order to trigger disconnection of a NSW household's electricity is currently set at \$300, intending to protect consumers from adverse consequences that might otherwise arise due to failure to pay a single quarterly invoice.

It was noted that many CPs (particularly telecommunication and utility providers) apply their own internal thresholds or tend to list only accumulated debts, and in practice will typically not list the debt until the account is closed given other avenues are available to collect the debt (e.g. the threat of disconnection). Given the threshold is prescribed under section 6Q(1)(d) of the Act, resolution of this issue is beyond the scope of this Review, however it is considered that further consultation should be undertaken across the broader range of stakeholders to investigate and assess the costs and benefits of any increase to this threshold amount.

4.7 Defaults

Several matters were raised in the Issues Paper and throughout the consultation process relating to the listing of defaults by CRBs. The issues raised canvassed several elements, including what defaults are listed, when they are listed, and for how long. It was apparent in the feedback that there is a need to balance the sometimes-competing interests of ensuring there is accurate information available to enable CPs to make responsible lending decisions, with the need for fairness to individuals that participate in the system.

Issues #10 and #20 – Listing of defaults by CRBs

[Code: para 9.3, Act: s 20W]

A. Identification of issue

Concerns have been raised about instances where consumers have had the same default information listed by different CRBs at different times, leading to inconsistencies with respect to timing of the default listing and consequently expiry of the retention period applicable to the default listing.

It was canvassed that this inconsistency is caused by section 20W of the Act, which calculates the retention period for default information as *‘the period of 5 years that starts on the day on which the credit reporting body collects the information’*. Where default information is provided to or collected by different CRBs on different dates, the retention period of that default information will naturally be different for each CRB.

B. Summary of consultation views

Generally strong and consistent views were expressed during the consultation process that section 20W of the Act should be amended to provide a consistent date which triggers the commencement of the retention period. The most widely supported suggestion for change was that the retention period should commence on the date of the default.

A number of submissions also expressed concern about the re-listing of a default following assignment of a debt to an acquiring CP, with the result that the debt effectively remains listed for more than five years. A number of submissions questioned the need for change, observing that paragraph 9.3(f)(ii) of the Code, which requires a CP to list a default within three months of issuing a section 21D notice, was introduced to address this particular issue.

A related issue was raised in a submission which proposed a sliding scale for retention in proportion to the size of the debt in the belief that CPs tend not to take into account the size of the debt in making lending decisions.

In any event, given the date on which defaults are listed finds genesis in section 20W of the Act, it was noted that any change required to address the inconsistency in the listing of defaults by CRBs would require an amendment to the Act, and is therefore beyond the scope of this Review.

Issue #13 – Mandatory reporting of default information

[Code: para 9.1]

A. Identification of issue

Concern has been raised about the ability for CRBs to continue listing default information in credit reports even after a debt has been, or is in the process of being, resolved by either:

- a CP entering into a binding settlement agreement with a consumer with respect to the debt (which may include a provision that the default listing be removed)

- a CP entering into legitimate settlement negotiations with the consumer in respect of the debt, and/or
- a recommendation or determination having been made by an EDR scheme in respect of the debt.

While technically correct, the continued listing of defaults in these circumstances was questioned in terms of underlying fairness to individuals who have taken appropriate steps to address their outstanding debts.

B. Summary of consultation views

A divergence of views was apparent in the feedback received.

Industry representatives were largely of the view that the credit reporting system (as reflected in Part IIIA of the Act and supporting regulations) relies on accurate, up to date, complete information being held on individuals' credit files. Removal of defaults which have been settled – that is, otherwise accurate credit information – undermines the fundamental principles of the credit reporting system as CPs rely on accurate historical credit information being held in the system to make responsible lending decisions.

The submissions also recognised that once CCR is introduced, there will be a greater range of information through which a consumer that has previously defaulted can demonstrate his or her financial recovery; and so the impact of a particular default listing (where the individual has achieved financial recovery) is likely to be less.

Consumer representatives raised concerns that it is disadvantageous to consumers if default information which is the subject of a settlement is not removed; and favoured an amendment to paragraph 9.1 of the Code to incorporate a prohibition on CPs disclosing default information where the circumstances set out above are satisfied. In their view, this default information is settled and therefore no longer reflective of the individual's creditworthiness. Concern was also expressed that consumers may be less inclined to enter into negotiated settlements where default information continues to be listed following resolution of a matter.

A related concern was raised as to whether defaults which have been settled should be marked as 'settled' or 'paid' on the individual's credit report, however it was submitted that paragraph 10.1(b) of the Code provides sufficient clarity that the amount should be disclosed as 'paid'.

C. Evaluation

While consumer concerns are recognised with respect to the continued listing of default information that might have been sufficiently dealt with by settlement outcomes or direction by an EDR scheme, the reporting of this factually accurate information is considered to be a fundamental principle that underpins the efficacy of the credit reporting system as a whole.

While the Code appears clear on the requirement to mark settled debts as 'paid', alternative methods to differentiate the manner in which default information that has been dealt with by settlement outcomes or in accordance with recommendations or determinations by an EDR scheme is listed in credit reports could be considered further, recognising that the suggestion to entirely remove such default information may detract from the reporting of accurate credit information. Further consultation may be needed to formulate and better assess the costs and benefits of any proposed approach. In any event, it is acknowledged that the introduction of CCR is likely to reduce the weight attributed to individual defaults and any proposal for change should be considered with this in mind.

Issue #19 – Listing of statute-barred debts

[Code: para 22; Act: s 6Q, s 20W]

A. Identification of issue

Related to Issues #10 and #20, concerns were raised that there have been some instances of delay in the time at which CPs have listed defaults after they arise – sometimes even years after they arise. The retention period for default information is *‘the period of 5 years that starts on the day on which the credit reporting body collects the information’*.

Contrasting this retention period with the generally six year statutory limitation period for the collection of simple contractual debts applied in most jurisdictions, which generally runs from the latter of the date on which the debt arose, the date of last payment or the date the debt is last acknowledged in writing, a delay of more than a year in the listing of default information might result in defaults continuing to be listed after they have been statute-barred.

While the cause of delays in the listing of default information is considered by Issues #10 and #20, a separate concern was raised about who has the onus to correct (that is, to investigate and remove) a statute-barred debt from a credit report. Presently, there is a perception that the onus is on the individual to demonstrate that the debt is, in fact, statute-barred (which in some cases can require the individual to demonstrate that they have not acknowledged the debt in writing). Feedback was sought as to whether this approach should remain.

B. Summary of consultation views

The feedback acknowledged the difficulty in assigning which party should have the onus to correct a statute-barred debt contained on an individual’s credit reports.

A number of submissions indicated that CPs and CRBs are better placed to have responsibility for correction of a statute-barred debt, as they are responsible for the initial listing of the default and maintenance of credit reports. Individuals, on the other hand, would only become aware of the listing if they request their credit report and, in any event, it was submitted that individuals may not be aware of the concept of debts becoming ‘statute-barred’. Further, it was considered that if the statute-barred period is challenged by a CP alleging that the individual acknowledged the debt in writing, the onus is on the individual to demonstrate that such acknowledgement did not occur (a fact that could more easily be proven by the CP, for example by producing a copy of the acknowledgement).

A number of options to transfer the responsibility for addressing statute-barred debts was submitted, including:

- imposing a penalty where a default is listed 5 days or more after it becomes statute-barred, to incentivise removal
- requiring CBRs to include as part of a default listing the expected statute-barring date, and to remove the listing at the expected statute-barring date listed (to incentivise update of the information where relevant).

Conversely, several submissions supported no change on the basis that this issue is resolved by the correction mechanism contained in paragraph 20.6 of the Code. This allows individuals to request correction to the relevant CP or CRB, who must within 30 days either correct the listing or provide notice as to why they are rejecting the request for correction. In their view, placing the onus on CPs or CRBs would impose an undue burden to proactively check and update default listings; and might create an undue risk of ‘gamesmanship’ whereby an assertion is sufficient to remove the listing without consequence for incorrect or misleading information.

C. Evaluation

While not raised in the consultation process, it is noted that the Commissioner, via letter dated 6 May 2016, reminded CRBs of the positive quality and correction obligations imposed on them under sections 20N and 20S of the Act respectively, requiring them to take reasonable steps to ensure the accuracy of the information they collect and hold. The Commissioner referred specifically to situations where CPs are barred from recovering debts due to a statute of limitations, highlighting that this information would cease to be 'default information' and 'credit information' for purposes of section 6Q and 6N of the Act respectively, and therefore could not continue to be used or disclosed by a CRB under paragraph 5.1(a) of the Code. The Commissioner acknowledged that determining whether a default listing is statute-barred may not always be straight-forward, and highlighted the availability of the correction mechanism under paragraph 20.6 of the Code where individuals identify any inaccurate listings.

Recognising that mechanisms are currently in place to address the listing of statute-barred debts, it is considered that any non-compliance by CRBs with their positive obligations could be addressed by enhanced monitoring and enforcement activity. While the suggestion to shift the onus to correct statute-barred listings to CPs might have the benefit of addressing any problems faced by individuals in relying on the correction of information mechanism, including in relation to awareness and evidencing the statute-barring, further consultation may be needed to better understand and evaluate the costs and benefits associated with such a change.

4.8 Correction of information by individuals

The Issues Paper invited comment on the operation of the correction of information mechanism set out in paragraph 20 of the Code. The consultation feedback raised a variety of views, issues and ideas in relation to correction of information and we set out our analysis of this in this part.

Issue #18 – Correction of information mechanism

[Code: para 20]

A. Identification of issue

It has been suggested that the mechanisms for correction of information in paragraph 20 of the Code can be improved in a number of respects, including:

- clarification of the obligations imposed by the corrections mechanism
- revising expected timing for responses to improve compliance
- timeframes for CRBs to effect corrections after notification by a CP or the OAIC
- comprehensiveness of the process undertaken by CRBs to correct the information when notified.

B. Summary of consultation views

The feedback indicated a divergence of views between industry and consumer representatives regarding the appropriateness and effective operation of the correction of information mechanism.

In general, industry representatives expressed satisfaction with the current mechanism to correct information errors and noted that:

- three-yearly reports by CRBs demonstrate that correction and complaint mechanisms are working, and the average number of days for correction of information is within the timeframe prescribed by the Code
- CRBs are heavily reliant on consultation with third parties to verify corrections, and where there are delays by third parties which are beyond the control of the CRB, this can cause delay in the correction of information process. Whilst such delays are not ideal, they are often caused by the need to ensure the quality and correctness of the resolution.

Consumer representatives indicated the view that the correction of information mechanism is inefficient and ineffective in practice. Challenges identified include that:

- paragraph 20 of the Code is difficult for consumers to read and understand
- given responsibility for making a correction is held by both CPs and CRBs, both have a tendency to ‘push back’ against a request for correction of information by a consumer. In particular, this is partly due to CRBs charging a fee for correction which CPs are often unwilling to incur
- CPs and CRBs have 30 days to correct the information listed, however in many cases this timeframe is not commercially reasonable (for example, where the individual is seeking approval for a new line of credit in order to purchase a house or vehicle).

Debt acquirers also provided an interesting perspective on the operation of the correction mechanism and were generally supportive of change. Given a debt acquirer is deemed to be a new CP for purposes of the Act and Code, they effectively also acquire the responsibility to correct information upon request of the debtor and would have to incur any applicable amendment fee. However, as the acquirer is not the primary CP, they often have no oversight over the incorrect information and may not have the broader information required to action the correction. It was submitted that consumers are often caught in the middle in these circumstances.

C. Evaluation

A number of suggestions for change were presented as part of consultation, each of which may need further consideration to better understand and evaluate the specific costs and benefits of pursuing the change:

- **Review of correction timeframe:** It was suggested that the 30 day response time for correction of information requests be reviewed. This may be appropriate in circumstances where a CRB does not need to consult with third parties and would result in timelier resolution of requests for consumers. However, given the frequency with which CRBs need to consult with third parties in order to achieve a correct outcome, a lesser timeframe is likely to be impractical.
- **Separating obligations of CPs and CRBs:** It was suggested that obligations of CPs and CRBs under paragraph 20.3 of the Code be separated, to ensure that the necessary communications do, in fact, occur. This represents a fundamental change to the operation of the Code and would require further consultation to confirm its practicality.
- **Including identification information in paragraph 20.9 notices:** It was suggested that paragraph 20.9 of the Code should be amended to require the notice provided to CRBs, CPs and other affected information recipients to incorporate sufficient identification information about the debtor so that the notified party can record the correction. This should facilitate swifter resolution of correction requests, however further understanding of consumer views would be required prior to actioning this change.
- **Imposing responsibility for correction on the original CP:** It was suggested that the original CP, rather than any subsequent acquiring CP following transfer of a debt, should continue to hold responsibility for correction of information even after transfer event. This would resolve difficulties experienced by acquiring CPs not having the information required to address the correction request, however would cause original CPs to continue incurring costs to correct. Further consultation is recommended to better assess the costs and benefits of this suggestion.
- **Requiring better IDR procedures for CRBs:** This suggestion would result in greater resolution of complaints and reduce consumer complaints made to EDR schemes and the OAIC, however would impose additional costs on CRBs in the development and implementation of new IDR procedures. There is also a risk that CRBs might not implement consistent procedures. This suggestion would require a policy change and could not be operationalised via the Code.

Issue #36 – Timing for escalation of complaints to EDR scheme

A. Identification of issue

Related to Issue #18 regarding the correction of information mechanism in general, concern was expressed that the process and timing for escalation of disputes between a consumer and CRB is not clear, and in particular, there is no mandated timeframe in which a dispute must be escalated to an EDR scheme.

B. Summary of consultation views

While feedback on this issue was limited, it was submitted that consumers were often not aware that they could escalate disputes to an EDR scheme or the OAIC, suggesting that a more prescriptive complaints handling process might be appropriate.

It was noted that paragraph 21.4 of the Code requires that where the CRB or CP forms the view that it will not be able to resolve a complaint within the 30 day period required by Part IIIA, it must advise the complainant that they may complain to the EDR scheme of which the CRB or CP is a member (and provide contact details for that scheme) or, where relevant, the Commissioner.

The Act also requires that this advice be provided to an individual where a CRB does not make a correction requested by the individual and refuses to provide access to personal information upon request of the individual.

C. Evaluation

Implementation of a formalised dispute resolution scheme will incur costs to regulators and CRBs to establish and operate, which are unlikely to be justifiable to the extent sufficient mechanisms currently exist. It is considered that the Code and the Act have existing mechanisms in place to ensure that consumers are made aware of their right to escalate a complaint to an EDR scheme should they choose to do so. Accordingly, if these requirements are not being adhered to, then this is a matter of non-compliance which could be appropriately addressed by enhanced monitoring and enforcement activity rather than amendment to the Code.

Given the feedback indicates that consumers are generally not aware of their right to escalate disputes to an EDR scheme, enhanced consumer education and awareness could also be considered to ensure that information about consumers' rights in disputes is readily available.

4.9 Governance, monitoring and enforcement

As highlighted above, the consultation process yielded a variety of feedback in relation to governance, monitoring and enforcement of the Code. It was apparent that operation of the Code in practice might benefit from greater visibility of proactive monitoring and enforcement activities in a number of specific areas.

Issue #11 – Identifying breaches of the requirement for CPs to provide refusal notices

[Code: para 16.3; Act: s 21P]

A. Identification of issue

Concerns were raised about non-compliance by CPs with paragraph 16.3 of the Code, which requires a CP to provide timely written notice to a consumer where the CP has refused the consumer's application for credit on the basis of credit reporting information provided by a CRB in the preceding 90 days.

B. Summary of consultation views

It was generally accepted that paragraph 16.3 of the Code imposes a clear notification obligation on CPs. While no systemic problem was identified, it appears that instances of non-compliance do occur on a case-by-case basis. It was acknowledged that, absent consumer complaints that a refusal notice was not provided, it is a challenging provision to enforce.

Several submissions highlighted an inconsistency between:

- section 21P(2) of the Act, which requires a refusal notice be provided only if a credit decision is based in whole or part on credit reporting information
- paragraph 16.3 of the Code, which requires a refusal notice be provided in all circumstances where credit reporting information is obtained in the previous 90 days, even if the information was not a factor in the refusal of credit.

C. Evaluation

Given no systemic non-compliance with paragraph 16.3 of the Code was identified, it is considered that a change to the Code is not necessary. In light of submissions suggesting non-compliance does exist, it is considered that enhanced monitoring and, if necessary, enforcement activity could appropriately address this issue. In addition, enhanced consumer education to raise awareness of the requirement for CPs to provide refusal notices under paragraph 16.3 of the Code could assist with the identification of non-compliance in practice.

Issue #12 – Independent governance of the Code

A. Identification of issue

At the time the Code was developed it was suggested that an independent administrative body be established to oversee the operation of the Code and investigate complaints, in line with established practice in the regulation of other industry codes. This suggestion was not implemented in view of concerns that it may duplicate the role of the OAIC.

Under the Act, the OAIC has a range of powers, including the power to conduct assessments, undertake voluntary investigations, make inquiries, accept enforceable undertakings, make determinations, seek injunctions and apply to a Court for civil penalties, which allow it to undertake a broad range of regulatory activities in respect of the Code. Consideration was given to whether the current administration of the Code is sufficient, and whether a renewed focus should be placed on the requirement for an independent Code administrative body.

B. Summary of consultation views

This issue received a wide range of feedback, with generally divergent views between industry and consumer representatives.

Industry representatives were of the view that the OAIC is an efficient regulator; actively addressing systemic issues and regularly engaging with all Code stakeholders. Consistent with feedback canvassed during development of the Code, concerns were raised at the concept of an independent administrative body, particularly in terms of duplication of the OAIC's role and cost to industry in funding the body.

An alternate view was expressed and acknowledged that whilst the OAIC does take a role in enforcement and guidance in respect of the Code, monitoring compliance with the Code requires a different perspective and set of activities. It was expressed that proactive monitoring is required for efficient enforcement of the Code and it was considered that this is an area for improvement. It was suggested that the Code would be best monitored by an independent governance committee (with a strong referral relationship to the OAIC, for enforcement purposes) which could undertake proactive inquiries into particular compliance areas.

Specific concerns were also raised in respect of the OAIC's current complaints handling timeframes, which are submitted to be often longer than the 30 day period applicable to CRBs and CPs under section 23B(5) of the Act, which indicates industry standard. While this timeframe is not applicable to the OAIC, which has separate complaints mechanisms under section 36 of the Act and Part V of the Act in general, there is a general perception that the misalignment between OAIC practice and industry timeframes results in uncommercial outcomes for consumers. The submissions called for improvement in this respect.

C. Evaluation

The key benefits of having an independent governance body are that it allows for increased, proactive monitoring and enforcement activity without impacting on the resources or activities currently being undertaken. However, it is apparent that there are significant costs associated with establishing and operating an independent governance body, which would likely be funded by industry, and a strong risk of duplicating the OAIC's enforcement role.

As monitoring and enforcement are closely linked, as a preliminary step it is expected that this issue could be appropriately addressed by the OAIC internally reviewing its regulatory activities in respect of the Code, and considering options for increasing its proactive monitoring and enforcement activities having regard to its available resources or ability to seek further funding if required.

Issue #22 – Range of sanctions available to CRBs

[Code: para 23.9]

A. Identification of issue

Where CPs breach their contractual obligations to CRBs, paragraph 23.9 of the Code empowers CRBs to 'take such action as is reasonable in the circumstances, which may include termination of the agreement'.

It has been observed that the only specified sanction, being termination of the agreement, is a heavy handed sanction that is unlikely to be used by CRBs in practice and that a range of possible sanctions should be specified to enable appropriate sanctions to be applied depending on the nature of the breach.

B. Summary of consultation views

The feedback indicated general consensus that paragraph 23.9 of the Code is permissive rather than prescriptive and does not limit the sanctions that are available to CRBs. Rather, paragraph 23.9 is framed to specifically include the most heavy-handed of sanctions, being termination of the agreement between the CRB and a CP, enabling CRBs to determine an appropriate sanction without limitation.

Areas for improvement were suggested around the clarity of CRBs' obligation to report and/or investigate CPs, and the transparency of CRB enforcement activities (noting, however, that enforcement activities form part of CRBs' three-yearly reporting requirements).

C. Evaluation

It is considered that specifying sanctions in the Code might detract from CRB's underlying monitoring and audit obligations by shifting their focus to the assessment of the appropriateness of sanctions rather than proactively resolving issues. In addition, further specifying sanctions, even by way of example, creates a risk that CRBs might only select from these prescribed sanctions and thereby effectively limit the range of sanctions which might otherwise be available to them.

However, it is acknowledged that specifying sanctions may increase their use by CRBs and provide greater clarity around CRBs' obligations to report and/or investigate CPs. In addition, specification is likely to allow for benchmarking the use of particular sanctions such that their use is more consistent across CRBs.

Enhanced monitoring of the use of sanctions by CRBs against CPs that have breached their contractual agreements could be undertaken to identify and evaluate any deficiency with the use of sanctions in practice prior to considering any change to the Code to address this, recognising the general satisfaction of CRBs with the flexibility afforded by the current regime.

Issue #26 – Meaning of 'prominently' when advertising the right for individual to access a free credit report

[Code: para 19.3]

A. Identification of issue

The Code requires that CRBs must 'prominently state' that individuals have a right under Part IIIA of the Act to obtain their credit reporting information free of charge in certain circumstances.

The Commissioner's recent Determination considered the meaning of 'prominently' stating this information in the context of a web page. In the Determination, the Commissioner considered that 'prominently' takes its ordinary natural meaning to be '*easily seen*', '*very noticeable*' and that this requirement was not met by the relevant CRB in the particular circumstances.

B. Summary of consultation views

There was general consensus that this issue had been appropriately addressed by the Determination and does not require further clarification in the Code.

Consumer representatives indicated that further regulatory guidance on how to comply might be useful, however in reality the issue would be best addressed by enhanced monitoring and enforcement action.

C. Evaluation

It is clear that most industry participants feel that the Determination has provided sufficient guidance on the requirement for CRBs to ‘prominently’ display the right for an individual to obtain a free credit report under paragraph 19.3 of the Code. Going forward, it is considered that enhanced monitoring and enforcement of compliance with this requirement could appropriately address any concerns of non-compliance in future, rather than pursuing any amendment to the Code.

Issue #27 – CRBs keeping credit information accurate, up to date, complete and relevant

[Code: paras 5.3 and 5.4]

A. Identification of issue

CRBs are required under the Code to keep credit information accurate, up to date and complete. Though conducted prior to the implementation of Part IIIA of the Act and the Code, the 2013 OAIC report on its Community Attitudes to Privacy survey notably indicated that 30 percent of credit reports sought by consumers from CRBs contained errors. Of these, 57 percent were successfully able to arrange for correction of the information and 39 percent did not seek correction.

B. Summary of consultation views

The feedback received indicates that this is not a systemic issue, and that guidance has been provided in the Commissioner’s Determination.

Whilst it is not a systemic issue, consumer representatives raised concerns that inaccuracies are only identified where consumers proactively check their credit report, and that additional transparency and monitoring would better ensure CRBs are achieving compliance.

C. Evaluation

As no systemic issue was identified, the feedback was generally of the view that no change to the Code was required. Enhanced monitoring and enforcement activity could be undertaken to address any future instances of non-compliance by CPs and CRBs with respect to the requirement for CRBs to keep credit information accurate, up to date, complete and relevant under paragraphs 5.3 and 5.4 of the Code.

Issue #37 – Inconsistent approach to audit requirements of CRBs

[Code: para 23.1]

A. Identification of issue

The feedback raised concern about the inconsistent approaches taken to satisfy the audit requirements of CRBs under sections 20N and 20Q of the Act and paragraph 23.1 of the Code. These sections impose obligations as to the quality and security of credit reporting information, and require CRBs to procure that regular audits are conducted by an independent person to determine whether these obligations are being complied with. The OAIC requires that such audit reports be provided to the OAIC annually, but it is noted that little guidance is provided as to the extent and form of the audit reports.

B. Summary of consultation views

Feedback on this issue was limited. However, the feedback was generally consistent and indicated that there is a need for agreement on a standard for auditing. The lack of guidance means that there is no consistent approach which auditors can take and the outcomes can be highly variable.

C. Evaluation

The submissions indicated that legislative change would likely be necessary to ensure compliance, but acknowledged that this can be costly and timely. Given the cost and time factors, an alternative suggestion was proposed that this issue could be addressed outside the Code, by way of specific OAIC or industry guidance.

It was indicated that almost all parties involved would benefit from the consistency:

- CRBs and auditors will have a standard process to follow in order to comply with the audit requirement
- the OAIC will have comparable reports to assist in regulatory activities
- customers of CRBs (i.e. CPs) will benefit from the ability to share the audit reports, so as to avoid inconsistent outcomes and unnecessary costs where they engage with multiple CRBs.

Consideration could be given to amendment of paragraph 23.1 of the Code to require greater consistency in the audit requirements of CRBs. Further consultation may be needed to better assess the costs and benefits of such amendment and consider whether alternative solutions, such as enhanced OAIC or industry guidance, might be more appropriate in the circumstances.

4.10 Dealing with fraud

Some feedback from the consultation process indicated that the underlying focus of the Code appears to be geared towards the collection and commercialisation of credit reporting information, rather than the protection of consumers. It was suggested that the obligations placed on consumers are somewhat onerous in certain circumstances and might better be handled if the procedural burden was shifted to CPs or CBRs, particularly given they are naturally equipped with greater resources and have greater oversight over information in the credit reporting system in comparison to consumers. Examples of such circumstances include the obligation on individuals to seek correction of their information and also to impose a ban period in situations of fraud.

Given the prevalence and continuously evolving methods of data hacking, fraud and identity theft, the manner in which the Code deals with situations of fraud will become increasingly important over time. The issues identified in the Issues Paper and consultation process dealing with fraud are therefore understandably geared towards greater consumer protection, seeking to ensure the Code has appropriate mechanisms in place to quickly, efficiently and effectively deal with situations of fraud.

Issue #21 – Notification where allegations of fraud

[Code: para 17, Act: s 20K]

A. Identification of issue

The Act presently provides some protection for individuals who have been a victim of fraud by enabling them to request a CRB to commence a 'ban period'. While the Code imposes some obligations on CRBs in context of the ban period, it has been suggested that CRBs, being the central hub of credit information, could play a greater role in streamlining the process for individuals who have been a victim of fraud. Specifically, it has been suggested that consumers might benefit from CRBs proactively notifying all affected CPs where an individual has been involved in an allegation of fraud, rather than allowing the individual to reactively deal with investigations from CPs directly.

B. Summary of consultation views

While the consultation process yielded generally divergent views as to the imposition of additional obligations on CRBs and CPs to better deal with situations of fraud, there was a consistent underlying appreciation for this issue as a serious concern and one that requires detailed consideration, particularly in light of the ever-increasing risks of fraud and identity theft.

In response to the specific suggestion made in the Issues Paper, for an obligation to be imposed on CRBs to proactively notify all affected CPs where there has been an allegation of fraud, the feedback indicated that this suggestion would not be supported for a number of reasons. Firstly, as it would be technically difficult for a CRB to determine which CPs might constitute an 'affected CP', it would be impractical for CRBs to implement. Secondly, it was submitted that imposing such a requirement might result in adverse outcomes for consumers where all applicable CPs are notified of an allegation of fraud and take action, thereby limiting an individual's access to potentially unaffected credit accounts and also placing an undue burden on the individual to re-instate each account. Finally, it was submitted that CRBs have limited information to investigate and validate allegations of fraud, and in any event are restricted by the operation of section 20K of the Act in terms of what they are permitted to do after a ban period has been established.

While there was some resistance to the suggestion outlined in the Issues Paper, it was submitted that the current mechanism for dealing with allegations of fraud, requiring individuals to request a ban period with CRBs, is presently deficient in that it has limited application to assist consumers that have existing credit accounts that are impacted by

fraudulent activity. It was therefore suggested whether additional responsibilities might better be imposed on CPs to assist consumers in cases of fraud. It was considered that given the information available to CPs and their sophisticated systems, CPs might be better placed to investigate allegations of fraud in a consistent and more efficient manner and better advise consumers as to the best course of action.

It was further suggested whether an obligation could be imposed on CRBs to at least notify other CRBs where there has been an allegation of fraud, removing the need for the affected consumer to approach each CRB individually. There was some discussion as to whether this obligation should be imposed via the Code or whether it should be left to the CRBs to develop such a process as an industry standard of practice. It was additionally suggested whether a third party organisation might be able to act as an intermediary between the consumer and the CRBs, and potentially the affected CPs as well, to streamline the process and minimise the responsibility placed on affected consumers to proactively take action themselves.

C. Evaluation

While a number of suggestions were presented and no consistent view favoured, it was apparent that the consultation feedback indicated that the mechanism dealing with fraud could be bolstered and some of the default responsibility placed on affected consumers could be shared by other parties.

Given CRBs and CPs are fundamentally better placed to investigate, address and alleviate situations of fraud, shifting part of the obligation on consumers onto CRBs and CPs is conceptually supported. However, given the varying degree of suggestions presented, a workable solution would need to be formulated and the costs and benefits of such a solution properly investigated.

While any change to the current ban period process under section 20K of the Act is likely to require amendment to the Act, the level of engagement on this issue and seriousness of the impact of fraud in a credit reporting context emphasises the need for further consultation on this issue. Consideration could be given to the appropriateness of the current ban period process for dealing with allegations of fraud and whether obligations could be imposed on CRBs and CPs to relieve some of the burden placed on consumers. Further consultation may be needed to better assess the costs and benefits of any such obligation and formulate a workable solution.

Issue #38 – Length of the ban period in situations of fraud

[Act: s 20K(3)]

A. Identification of issue

In context of dealing with situations of fraud, the consultation process raised an inquiry into the nature and origination of the length of the ban period, set at 21 days (unless extended) under section 20K(3) of the Act.

B. Summary of consultation views

While the issue was not raised as a fundamental concern, and in any event was acknowledged as an issue under the Act rather than the Code, the rationale behind why the ban period was set as an initial 21 day period was questioned. Particularly in comparison with other jurisdictions, such as in the majority of states in the United States, where their equivalent of a ban period continues to remain in place until voluntarily asked to be removed by the consumer, it was suggested that the 21 day ban period appears arbitrary and is not easily referable to an underlying time period.

It was further suggested that the ban period process as a concept might also be deficient in certain circumstances, including for example where the affected individual does not yet have a credit file. It was suggested this might typically be the case for individuals under 25, who

have not yet engaged in credit activity and therefore do not yet have a credit file. It was submitted that a ban period can only be imposed where the CRB holds credit reporting information about an individual, therefore if the individual does not have any credit reporting information then a ban period cannot be imposed, resulting in no protection being afforded to the individual in a credit context.

C. Evaluation

As the nature of the ban period was merely questioned in the consultation process and not suggested to be technically deficient in practice, there was no apparent suggestion for change. While any change to the current ban period would require amendment to the Act, consideration could be given to the appropriateness of the current ban period and the nature and rationale for its length, particularly in comparison to other jurisdictions.

4.11 Other matters

There were a number of other issues raised throughout the consultation process which do not easily fall within the themes set out above. We set out below our consideration of these bespoke issues.

Issue #17 – Scope of prohibition for developing a ‘tool’ to facilitate a CP’s direct marketing

[Code: para 18.1, Act: 20G]

A. Identification of issue

CRBs are restricted from using credit reporting information held about individuals for the purposes of direct marketing. However, they are allowed to use certain credit information to undertake pre-screening activities on behalf of CPs to assess whether or not the individual is eligible to receive direct marketing.

In order to address concerns that pre-screening undertaken by CRBs could be used to facilitate the use of credit reporting information for direct marketing by CPs, paragraph 18.1 of the Code prohibits CRBs from ‘developing a tool’ for provision to CPs to enable direct marketing activities. It has been submitted that given the Code makes specific reference to ‘tools’, there is a degree of ambiguity as to whether this extends to the provision of services by CRBs or is strictly limited to tools produced by CRBs.

B. Summary of consultation views

Industry and consumer representative views were aligned on the importance of strengthening consumer protection in respect of direct marketing. The feedback indicated that, while the prohibition in paragraph 18.1 of the Code has yet to be tested in a CCR environment, it was intended upon implementation of the Code that the provision extend to both ‘tools’ and ‘services’; and support for this technical clarification was generally supported.

It was noted that prohibitions on direct marketing are contained in Part IIIA of the Act, and that paragraph 18.1 exists in addition to these provisions.

C. Evaluation

The key benefits of clarifying paragraph 18.1 of the Code to include ‘services’ are that it will expressly confirm the intended application of the provision and address the technical gap (and the potential for its exploitation) which currently exists with respect to the potential for CRBs to provide ‘services’ which are not a ‘tool’ for the purposes of direct marketing. This reduces confusion for customers and industry participants alike as to the extent of application of this provision. Comparatively, the cost to make this change is expected to be minimal as it is acknowledged that most CRBs are not currently providing such ‘services’.

Recommendation 9

Paragraph 18.1 of the Code should be amended to include a reference to ‘services’ in addition to ‘tool’ in order to remove any uncertainty as to whether the prohibition on CRBs to develop tools for provision to CPs to enable direct marketing activities extends to ‘services’ provided by CRBs.

Issue #24 – General drafting of the Code

A. Identification of issue

It has been noted that the format and readability of the Code may render it difficult to digest, potentially leading to deficiencies in its operation in practice and non-compliance with specific requirements.

B. Summary of consultation views

The feedback yielded consistent comments that the Code is difficult to read and understand (particularly for, but not limited to, consumers), but no specific drafting points were raised that cause practical issues in the operation of the Code, or non-compliance with the Code in practice. More specifically, several submissions noted that there is repetition or cross-references between the Act and the Code which are difficult and cumbersome to read and understand.

However, a number of submissions acknowledged that there is a level of technicality and legal certainty needed in the Code, which whilst important may also impact on readability.

C. Evaluation

The comments relating to readability of the Code are noted and, in principle, the need to improve readability is recognised. However, as a number of provisions have not been tested in the context of CCR, it is suggested that a holistic drafting review of the structure and language of the Code be delayed until CCR has been implemented and the Code is reviewed in this context. This will allow operational changes required under CCR to be prepared at the same time as any other drafting changes, and avoid duplication of effort.

Issue #39 – Provision of original documents in compliance investigations

A. Identification of issue

A number of submissions raised concerns that, in evidencing the provision of certain notice or correspondence to consumers as part of investigations, many CPs do not provide copies of the original documents sent to the consumer. Rather, they provide a copy of the template form or correspondence which was sent and a computer record indicating the date of sending.

B. Summary of consultation views

The feedback received indicated two schools of thought on this issue:

- As a general rule (and particularly under rules of evidence), an original document must be provided to evidence the authenticity of a procedure. It was submitted that failure to do so is not appropriate or acceptable in the case of disputes.
- That provision of template documents is a longstanding practice of many CPs, who would incur significant costs and experience storage constraints if they were to store copies of originals of all correspondence and notices sent to individuals. Provision of a template document and rigorous records on the sending of documents should be sufficient to evidence their provision in dispute scenarios.

C. Evaluation

Requiring original documents in dispute scenarios would support implementation of best practice dispute resolution in CRBs / CPs, EDR schemes and other non-litigious dispute resolution mechanisms. In addition, it is likely to reduce the need for consumers to escalate

matters to EDR schemes or the OAIC where blank template documents or incomplete information is provided.

However, the cost implications for industry in complying with the need to store and produce original documents to consumers is likely to be significant. Whilst it is clearly best practice, it is not yet clear that the benefits of requiring production of original documents as part of investigations would outweigh these costs.

Consideration could be given to imposing a requirement on CPs to provide original documents as part of compliance investigations. Further consultation may be needed to investigate the prevalence and impact of this issue in practice and better assess the costs and benefits of requiring original records to be retained and provided as part of investigations.

Issue #40 – General consumer education

[Act: s 28]

A. Identification of issue

A number of issues considered throughout this Review indicate a need for further consumer education in relation to credit reporting.

B. Summary of consultation views

There are a number of existing sources of consumer education available, including via the ‘Individuals’ tab on the OAIC website. Other materials are also available or could be used to further publicise existing materials – for example, via ARCA’s CreditSmart website or ASIC’s MoneySmart website.

The need to improve and extend upon both content and accessibility of consumer education sources has been clear throughout this Review and in this Report.

Paragraph 4 of the Code sets out a number of matters, in addition to those matters set out in section 21C(a) of the Act, which must be disclosed by a CP to an individual whose information it is likely to disclose to a CRB. It was suggested that to support disclosure to individuals, the Code should require CPs to develop and provide to individuals at the time of collection of personal information, a ‘Key Fact Sheet’ which provide a clear, concise and relevant statement about credit reporting including the amount of debt, repayment amounts, fees and charges. The purpose is to improve transparency to and understanding of consumers.

C. Evaluation

A focus on the effective and comprehensive education and raising of awareness of consumers with respect to the credit reporting system as a whole and specific matters, for example those raised in this Report, could help address a number of the issues raised in this Review. Consideration could be given to enhancing education and awareness of consumers, CPs and CRBs of the rights and obligations imposed by the Code, including better practice guidance where appropriate.

A co-ordinated effort between the OAIC, other regulators, ARCA and selected representative industry and consumer bodies would ensure any consumer education and awareness initiatives have regard to the right issues and target the right audience. CPs and CRBs would also play a pivotal role in formulating and communicating these initiatives.

Issue #41 – CRBs acting as a debt collector

A. Identification of issue and summary of consultation views

It was raised in feedback that, whilst relatively infrequent, some CRBs operate as both a CRB and a debt collector. In these circumstances the CRB is both the entity responsible for making and recording a default listing for the debt. In particular, concern was raised about combined communications from a CRB when acting in these two capacities – for example, if the CRB provides both a credit report and a default notice in the same communication, it is likely to cause confusion as to whether the particular default is listed.

It was suggested that some regulation may be required to address this conflict, to either:

- prohibit CRBs from acting as debt collectors
- impose some form of conflict management mechanism where a CRB also acts as a debt collector, or
- at minimum, prohibit sending joint communications when acting in more than one capacity.

As this is effectively a policy issue, regulation of the ability and manner in which CRBs also act in the capacity as debt collector is beyond the scope of this Review but is nevertheless an important issue that should be considered further.

Appendices

Appendix A Glossary of defined terms	51
Appendix B Targeted consultation participants	52

Appendix A Glossary of defined terms

Term	Definition
ACCC	Australian Competition and Consumer Commission
ACRDS	Australian Credit Reporting Data Standard
Act	<i>Privacy Act 1988</i> (Cth)
AIA	<i>Acts Interpretation Act 1901</i> (Cth)
ALRC	Australian Law Reform Commission
ALRC Report	Report 108 – <i>For Your Information</i> published by the ALRC
APPs	Australian Privacy Principles
ARCA	Australian Retail Credit Association
ASIC	Australian Securities and Investments Commission
Australian Consumer Law	The Australian Consumer Law per Schedule 2 of the <i>Competition and Consumer Act 2010</i> (Cth)
CCR	Comprehensive credit reporting
Code	<i>Privacy (Credit Reporting) Code 2014</i> (Cth) v1.2
Commissioner	The Australian Privacy Commissioner and Australian Information Commissioner
CP	Credit provider
CRB	Credit reporting body
Determination	The decision and reasons for decision of Australian Privacy Commissioner, Timothy Pilgrim, with respect to <i>Financial Rights Legal Centre Inc. & Others and Veda Advantage Information Services and Solutions Ltd</i> [2016] AICmr 88 dated 9 December 2016
EDR	External dispute resolution
ETA	<i>Electronic Transactions Act 1999</i> (Cth)
Explanatory Memorandum	The explanatory memorandum to the <i>Privacy Amendment (Enhancing Privacy Protections) Bill 2012</i> (Cth)
IDR	Internal dispute resolution
Issues Paper	Issues paper prepared by PwC and published on the OAIC website on 20 September 2017
OAIC	Office of the Australian Information Commissioner
Part IIIA	Part IIIA of the Act
PwC	PricewaterhouseCoopers
Regulation	<i>Privacy Regulation 2013</i> (Cth)
Review	PwC's independent review of the Code in accordance with paragraph 24.3 of the Code
RHI	Repayment history information

Appendix B Targeted consultation participants

<i>Targeted consultation participants</i>
Australian Bankers' Association
Australian Collectors & Debt Buyers Association
Australian Communications Consumer Action Network
Australian Finance Industry Association
Australian Retail Credit Association
Communications Alliance
Compuscan
Consumer Action Law Centre
Data Governance Australia
Dunn & Bradstreet
Energy & Water Ombudsman NSW
Energy & Water Ombudsman Victoria
Equifax (formerly Veda)
Financial Ombudsman Service
Financial Rights Legal Centre
ID Care
Insurance Council of Australia
Legal Aid Queensland
Mortgage & Financial Association of Australia
National Credit Providers Association
We Fix Credit

This report has been prepared by PricewaterhouseCoopers Australia ('PwC') at the request of the Office of the Australian Information Commissioner ('OAIC').

PwC has based this report on information, statements, statistics and commentary (together, the 'Information') received or obtained, on the basis that such Information is accurate and, where it is represented, complete. PwC and its respective agents, directors, officers, contractors and employees make no express or implied representation or warranty as to the accuracy, reliability or completeness of the Information.

PwC may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement the Information.

This report is for the sole use of the OAIC. PwC makes no representation as to the adequacy or appropriateness of this report for use by any other person. PwC assumes no responsibility to any other person in relation to this report. This report is for general information purposes only, and should not be used as a substitute for consultation with professional advisers.

Liability limited by a scheme approved under Professional Standards Legislation.

© 2017 PricewaterhouseCoopers. All rights reserved.

PwC refers to the Australian member firm, and may sometimes refer to the PwC network.

Each member firm is a separate legal entity. Please see www.pwc.com/structure for further details.

This content is for general information purposes only, and should not be used as a substitute for consultation with professional advisors.

At PwC Australia our purpose is to build trust in society and solve important problems. We're a network of firms in 157 countries with more than 208,000 people who are committed to delivering quality in assurance, tax and advisory services. Find out more and tell us what matters to you by visiting us at www.pwc.com.au

Liability limited by a scheme approved under Professional Standards Legislation