

Operational Guidance

Imposing sanctions under the 2020
General Insurance Code of Practice



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GENERAL INSURANCE
Code Governance Committee

Purpose of this document

1. This document sets out the use of the sanction provisions of the 2020 General Insurance Code of Practice (the Code) and includes:
 - a. the nature and purpose of the Code Governance Committee (CGC),
 - b. how the CGC selects matters for formal investigation,
 - c. the circumstances in which a Code subscriber will be in breach, or a Significant Breach, of the Code,
 - d. the nature and scope of the CGC's sanctions powers,
 - e. the circumstances in which the CGC may impose a sanction or sanctions on a Code subscriber, and
 - f. the CGC's obligations when exercising its sanctions powers.

The CGC's approach to sanctions powers

2. In line with the Code and the CGC's Charter, the Operational Guidance is principles-based to ensure that the Code can be applied across a range of circumstances.

The CGC and its purpose

3. The CGC is an independent body established under the Constitution of Code Governance Committee Association Inc. (paragraph 165).¹

4. The CGC's functions, powers and responsibilities are set out in the 2020 General Insurance Code of Practice (Code) and Schedule 1 – The Code Governance Committee Charter (CGC Charter).

5. The purpose of the CGC is to independently administer, monitor and enforce the Code. The functions, powers and responsibilities of the CGC are set out in:

- a. Part 13 'Enforcement, sanctions and compliance' of the Code (paragraphs 165 to 176),
- b. Part 14 'Promoting, reviewing and improving the Code' (paragraphs 189 and 190), and
- c. the CGC Charter.

6. These functions, powers and responsibilities include that the CGC will:

- a. provide stewardship of the Code by helping the general insurance industry understand and comply with the Code;
- b. identify areas for improvement of insurance practices;
- c. liaise with the Insurance Council of Australia (ICA) on matters relevant to the Code;
- d. provide quarterly reports to the Board of the ICA, in which it may make recommendations including about Code improvements, Code-related issues and matters of importance as a response to the CGC's monitoring and enforcement;
- e. publish an annual public report containing aggregate industry data and consolidated analysis on Code compliance; and
- f. monitor and enforce Code subscribers' compliance with the Code through a range of mechanisms including the power to impose sanctions.

¹.Unless otherwise stated, all references to 'paragraph' means a paragraph of the Code; and all references to 'Part' means a Part of the Code.

How the CGC selects matters for formal investigation

7. Potential breaches of the Code are brought to the Committee's attention in several ways, including:

- a. reports of alleged breaches of the Code from members of the public
- b. referrals of potential breaches of the Code from the Australian Financial Complaints Authority (AFCA)
- c. referrals of potential breaches of the Code from consumer organisations
- d. voluntary reports of possible significant breaches of the Code from Code subscribers, and
- e. through the CGC's monitoring work.

8. In addition, Code subscribers are required to report to the CGC:

- a. any identified Significant Breach of the Code, and
- b. annually on an aggregated basis – all breaches of the Code they have self-identified.

9. The CGC carefully considers how to respond to potential breaches of the Code, but it does not undertake a formal investigation of every matter that comes to its attention. This approach extends to the aggregated breach data that Code subscribers report annually.

10. The specific factors the CGC considers will vary according to the circumstances of the case. The CGC's priorities will necessarily evolve and change over time and that influences its monitoring and enforcement focus. Broadly, however, the CGC considers the following five issues in deciding whether to investigate and take enforcement action:

- a. Seriousness of the alleged or actual misconduct and particularly the extent of consumer harm or loss
- b. Whether the alleged or actual misconduct is widespread or a growing trend
- c. Whether a sanction will send an effective deterrent message
- d. Issues specific to the case
- e. Whether issuing a guidance note or releasing a report will be more effective than formal investigation.

Non-compliance with the Code

11. A Code subscriber will be held accountable for a breach of the Code.

12. The CGC may impose sanctions on a Code subscriber if it has breached its obligations under the Code as set out in Part 13 'Enforcement, sanctions and compliance' (paragraph 16).

When will a Code subscriber be in breach of the Code?

13. A Code subscriber will be in breach of the Code if its Employees, Distributors or Service Suppliers do not comply with the Code when they are acting on its behalf (paragraph 17).

14. Although a Code subscriber's Distributors and Service Suppliers are not subscribers to the Code, they are accountable to the Code subscriber for complying with the relevant standards in the Code (paragraph 17).

15. The Code does not provide a Code subscriber with an option of demonstrating that it has taken reasonable steps to support its Distributor or Service Supplier to comply with the relevant Code obligations.

16. The question is whether, on the facts of the matter before the CGC, a Code subscriber has breached the Code, because its Distributor or Service Supplier did not comply with the relevant Code obligations when acting on its behalf.

17. This means that if a Distributor or Service Supplier has failed to comply with the relevant Code obligations, their actions or conduct may expose the Code subscriber to sanctions under the Code.

18. A Code subscriber will also be in breach of the Code if another person that it has authorised to receive and handle Complaints about its products and services on its behalf, breaches Part 11 'Complaints' (paragraphs 158 and 159).

When will a Code subscriber be in Significant Breach of the Code?

19. Part 16 'Definitions' sets out that a 'Significant Breach' is a breach that is determined to be significant by reference to:

- a. the number and frequency of similar previous breaches;
- b. the impact of the breach, or likely breach, on the Code subscriber's ability to provide its services;
- c. the extent to which the breach, or likely breach, indicates that the Code subscriber's arrangements to ensure compliance with the Code are inadequate;
- d. the actual, or potential, financial loss caused by the breach; and
- e. the duration of the breach.

20. The CGC may determine that a Code subscriber's breach of the Code is a Significant Breach by reference to the applicable criteria above (paragraph 169(a)).

21. If a Code subscriber identifies a Significant Breach of the Code, then it must report it to the CGC within 10 Business Days (paragraph 181).

22. The CGC has published a guidance note for Code subscribers to assist them to meet their Significant Breach obligations: [Guidance Note No. 2 Significant breach obligations](#).

CGC's power and discretion to impose sanctions under the Code

23. The CGC is an independent body and has a range of responsibilities, including a responsibility to enforce compliance with the Code through a range of measures that include the imposition of sanctions.

24. Code subscribers have voluntarily agreed to be bound by the Code and the decisions and sanctions of the CGC, in respect of conduct within the scope of the Code.

25. Under the Code, the CGC may impose one or more sanctions on a Code subscriber for a breach of the Code or for a Significant Breach of the Code (paragraphs 170 and 174).

26. Before the CGC considers whether a breach or Significant Breach warrants a sanction, the CGC:

- a. will complete an investigation of a breach allegation, including considering whether there was a breach or Significant Breach, in accordance with the CGC's responsibilities and usual investigation procedures and timelines, or
- b. will investigate following the receipt of a Code subscriber's report that it has significantly breached the Code, and
- c. will have regard to how serious the conduct or actions were.

27. The fact that a Code subscriber has identified and reported a breach or Significant Breach to the CGC, is not of itself a factor that mitigates against the imposition of sanctions by the CGC.

28. If a Code subscriber has identified and reported a breach or Significant Breach to the CGC, it is a circumstance that the CGC may consider and weigh, against the factors outlined in paragraph 170 (considerations when determining any sanctions to be imposed), having regard to the purpose of sanctions, and the individual circumstances that underlie the matter, including the degree of consumer harm.

29. The CGC cannot outsource its power to impose a sanction in relation to a breach or a Significant Breach (clause 1.6(b), CGC Charter).

30. If the CGC intends to impose a sanction or sanctions on a Code subscriber for a breach of the Code or a Significant Breach of the Code, the CGC must give the Code subscriber the opportunity to provide a response before it does so. The Code subscriber must respond within 10 Business Days (paragraph 171).

31. After the CGC has considered a Code subscriber's response, the CGC must give the Code subscriber its final decision in writing, including its reasons as to why it has exercised its discretion to impose sanctions (paragraph 172).

32. The CGC's decisions and sanctions are binding on Code subscribers (paragraph 178).

33. If a Code subscriber is of the view that the CGC has not acted in accordance with the Code or the CGC Charter, the Code subscriber may complain to the CGC in accordance with clause 8 of the CGC Charter.

Power to impose sanctions for a breach of the Code

34. In considering whether to impose a sanction or sanctions on a Code subscriber for a breach of the Code, the CGC will consider:

- a. the appropriateness of the sanction;
- b. if a Code subscriber has not acted on — or has taken too long to act on — a request from the Committee to remedy a breach;
- c. if a Code subscriber has breached an undertaking it gave to the Committee;
- d. if a Code subscriber has not taken adequate steps to prevent a Significant Breach from reoccurring; and
- e. if a Code subscriber has not acted with the utmost good faith. (Paragraph 170).

35. Under paragraph 170(a) the CGC will consider which of the sanctions specified in paragraph 173 and/or paragraph 174 would appropriately address the relevant conduct. This includes whether the CGC should impose multiple sanctions.

36. The CGC intends to publish case studies of de-identified breach decisions to illustrate how the CGC may determine which sanctions are appropriate and why.

37. The CGC considers all matters on the basis of their individual circumstances, and case studies of breach decisions are not intended to anticipate all possible issues that might come before the CGC or how the CGC might respond.

38. The CGC aims to be consistent in its decision-making taking into consideration the particular facts, context and circumstances of each case.

Types of sanctions that the CGC may impose

39. There are six types of sanctions that the CGC may impose on a Code subscriber as follows:

- a. three types of sanctions may be applied to a breach of the Code or a Significant Breach of the Code (paragraph 173), and
- b. three additional types of sanctions may also be applied for a Significant Breach of the Code (paragraph 174).

40. For a breach of the Code or a Significant Breach of the Code, the CGC may require a Code subscriber to do any one or more of the following:

- a. take particular rectification steps within a set timeframe;
- b. audit its compliance with the Code at its own cost; or
- c. advertise to correct something that the CGC decides needs correcting. (Paragraph 173)

41. If the CGC imposes a sanction requiring a Code subscriber to audit its compliance with the Code, the CGC will work with the Code subscriber to identify an appropriate party to perform the audit.

42. For a Significant Breach of the Code, the CGC may also require a Code subscriber to do any one or more of the following:

- a. compensate an individual for any direct financial loss, or damage, it caused them arising from a Significant Breach;
- b. publish the fact that it has committed a Significant Breach of the Code; or
- c. pay a community benefit payment for a Significant Breach up to a maximum of \$100,000. The CGC must ensure that the size of a community benefit payment is in proportion to a Code subscriber's gross written premium and number of customers. (Paragraph 174)

43. When the CGC imposes a sanction of publication on a Code subscriber for a Significant Breach, the CGC has discretion to set the manner and the duration for which the publication will be made available by the Code subscriber (paragraph 174(b); clause 7.1, CGC Charter).

When compensation or a community benefit payment is payable as a sanction

44. When the CGC requires a Code subscriber to pay compensation or a community benefit payment as a sanction for a Significant Breach, it must take into account:

- a. any compensation awarded to an affected individual by the Australian Financial Complaints Authority (AFCA) or an enforcement agency; and
- b. any impending or ongoing investigation by the Australian Securities and Investments Commission (ASIC). (Paragraph 175)

Sanction to pay compensation to an affected individual – considerations regarding compensation already paid

45. When requiring a Code subscriber to pay compensation to an affected individual in respect of a Significant Breach under paragraph 174(a), paragraph 175 stipulates that the CGC must take into account any compensation awarded by AFCA or an enforcement agency.

46. The CGC may also consider any compensation that the Code subscriber has already paid to an affected individual that was not awarded by AFCA or an enforcement agency.

47. The CGC will consider whether the amount of compensation already paid by the Code subscriber is appropriate in all the circumstances.

48. If the CGC is satisfied that the compensation already paid is appropriate in the circumstances of the matter, the CGC may determine that it is not necessary to impose a sanction requiring payment of compensation.

49. In contrast, the CGC may impose a sanction to pay compensation to an affected individual who has not yet been appropriately compensated.

50. If the CGC is satisfied that the compensation paid by the Code subscriber to an affected individual was inadequate, the CGC may impose a requirement to pay the shortfall in compensation including interest.

Sanction requiring payment of compensation – Code subscriber to determine amount of compensation and interest payable

51. If the CGC imposes a sanction requiring the payment of compensation, it will be a matter for the relevant Code subscriber to propose the manner of calculation and quantum of compensation payable to an affected individual, including any applicable interest, having regard to the nature and extent of their financial loss.

52. As an outcome of the sanction, the CGC will expect (and will inform) the Code subscriber to develop a remediation plan. The CGC will require the Code subscriber's remediation plan to include the amount of compensation payable (including applicable interest), how that was calculated and a timeline for doing so, and to submit it to the CGC for approval.

Sanction requiring a community benefit payment – considerations regarding compensation already paid

53. When the CGC requires a Code subscriber to make a community benefit payment under paragraph 174(c) in respect of a Significant Breach, paragraph 175 requires the CGC to take into account any compensation that the Code subscriber has already paid to an affected individual that was awarded by AFCA or an enforcement agency.

54. The community benefit payment does not provide compensation to affected individuals. There may be circumstances where even though affected individuals have been appropriately compensated for direct financial loss or damage by a Code subscriber, the CGC may also impose on the Code subscriber a requirement to make a community benefit payment.

Sanction requiring a community benefit payment – calculating the amount to be paid

55. The sanction requiring a Code subscriber to make a community benefit payment applies to the Code subscriber's organisation as a whole, rather than to individual business lines.

56. As a result, when the CGC requires a Code subscriber to make a community benefit payment, the CGC will request the Code subscriber to provide the CGC with details of its gross written premium and the number of customers to enable the CGC to calculate the applicable payment.

CGC required to take into account any impending or ongoing investigation by ASIC

57. The CGC must take into account any impending or ongoing investigation by ASIC when requiring a Code subscriber to pay compensation or a community benefit payment.

58. The considerations outlined in paragraph 175 of the Code are subject to the availability of information that ASIC has made public about impending, ongoing or closed investigations.

59. The CGC will make reasonable enquiries to consider information that ASIC has made public about impending, ongoing or closed investigations.

60. The CGC is not required to defer its decision-making on whether a Code subscriber must pay compensation or make a community benefit payment.

Publication of CGC decisions of sanctions imposed on Code subscribers

61. The CGC may publish de-identified decisions of sanctions imposed on Code subscribers for breaches of the Code including sanctions for Significant Breaches, to increase Code subscribers' and the public's awareness of the Code and the CGC's functions, powers and responsibilities (clause 7.2(a), CGC Charter).

62. When publishing such decisions, the CGC will de-identify confidential information, and any other information which could be used to identify complainants or Code subscribers, within the decisions (clause 7.2(b), CGC Charter).

63. The CGC may decide not to publish a decision where the protection of confidential information cannot be effectively achieved by any de-identification process (clause 7.2(b), CGC Charter).

64. The requirement to de-identify a decision does not apply when the CGC has imposed the sanction of requiring a Code subscriber to publish the fact it has committed a Significant Breach of the Code (paragraph 174(b); clause 7.2(c), CGC Charter).

65. In all cases where a decision is published, the CGC will de-identify 'confidential information' in accordance with the CGC's confidentiality and privacy obligations under the CGC Charter (clause 11.2). 'Confidential information' extends to confidential information and materials of a consumer or small business, including that which discloses or relates to a matter to which an obligation of confidence applies under a privacy law.

ABOUT THE GENERAL INSURANCE CODE GOVERNANCE COMMITTEE (CGC)

The General Insurance Code of Practice is a voluntary industry code that promotes high standards of service and better customer relationships in the general insurance industry. The CGC is the independent body responsible for monitoring and enforcing Code Subscribers' compliance with Code standards.

OPERATIONAL GUIDANCE DOCUMENTS

The CGC developed this Operational Guidance document in accordance with clause 10.1 of the CGC Charter, to support the CGC's use of the sanction provisions of the 2020 General Insurance Code of Practice. Operational Guidance documents are subject to change and reflect the CGC's views at the date of publication.

