

6 October 2022

To All Mandated Stakeholders

### **Release of Operational Guidance on reporting Significant Breaches and serious misconduct to the Australian Securities and Investment Commission (ASIC)**

The Code Governance Committee (CGC or Committee) has published [Operational Guidance](#) - Reporting Significant Breaches or serious misconduct to ASIC ('Operational Guidance') in accordance with paragraph 176 of the 2020 General Insurance Code of Practice (2020 Code). This requirement to report Significant Breaches and serious misconduct to ASIC came into effect on 1 July 2021.

The Operational Guidance is principles-based and sets out how the CGC expects to meet its responsibility to report Significant Breaches or serious misconduct to ASIC, across a range of circumstances.

The CGC consulted on a draft of the Operational Note between 26 October 2021 and 26 November 2021. The Committee received six submissions from consumer organisations, ASIC, a Code subscriber, and the Insurance Council of Australia (ICA).

The Committee has reviewed the merits of all stakeholder feedback and sought to balance any concerns raised by industry and those raised by consumers organisations, in finalising the Operational Guidance. The draft Operational Guidance was issued as two documents – one in relation to serious misconduct and the other in relation to Significant Breaches. There was a consensus amongst stakeholders that it would be preferable for the documents to be combined into one, to remove repetition and produce a shorter document. The Committee has accepted this feedback.

Improvements have been made to the Operational Guidance in response to stakeholder feedback. The key changes are highlighted below.

- i) The Operational Guidance includes timeframes for reporting by the CGC to ASIC. The CGC expects to report to ASIC quarterly and on an ad hoc basis for urgent matters, such as where there is urgent ongoing consumer detriment.
- ii) The Operational Guidance clarifies that the CGC will report to ASIC:

- a. confirmed Significant Breaches. These Significant Breaches will have been either self-reported by the Code Subscriber or determined by the CGC to be a Significant Breach.
  - b. serious misconduct about which the CGC has formed an objectively reasonable belief that it is serious, and if the CGC in good faith has formed a view that serious misconduct may have occurred. The CGC will align its approach with *ASIC Information Sheet 151, ASIC's Approach to Enforcement* in assessing serious misconduct. Where the CGC is uncertain whether to refer a matter to ASIC as serious misconduct, it may consult with ASIC in deciding whether it should be reported to ASIC.
- iii) The CGC will report Significant Breaches and serious misconduct in accordance with clause 11.2(c)(i) – (iii) of the CGC Charter.
  - iv) A Code Subscriber will be provided with an opportunity to view a report that the CGC will make to ASIC about a Significant Breach or a serious misconduct involving the Subscriber. This is an opportunity for the Code Subscriber to provide any final comments about the factual accuracy of the proposed report and is not an opportunity for the Code Subscriber to review the merits of the CGC's decision to report the Significant Breach or serious misconduct to ASIC.
  - v) There is no obligation for the CGC to report allegations of significant breaches received from consumers or their advocates, or possible Significant Breaches reported by Code Subscribers. As part of the process of assessing alleged or possible Significant Breaches, the CGC gives a Code Subscriber an opportunity to respond to any allegations of a Code breach as it is required to under paragraph 169 of the Code.
  - vi) Except in urgent cases, such as where there is serious ongoing consumer harm or a continuing risk of consumer loss, the CGC considers it reasonable to provide the Code Subscriber with a period of five (5) business days within which to inform the CGC of any factual inaccuracies in relation to a proposed Significant Breach report. For serious misconduct, this period will be at least five (5) business days.

The Committee has made this distinction because the CGC may not have the power to conduct a detailed investigation about a serious misconduct unless it is also a Significant Breach of the Code. The CGC will review any response it receives from the Code Subscriber and make any revisions it considers necessary before providing the proposed report to ASIC.

- vii) The CGC intends to publish case studies of serious misconduct based on its reports of such matters to ASIC. The CGC will de-identity the Code Subscriber and details of 'confidential information' relating to a Code Subscriber, an individual or individuals, in accordance with the CGC's confidentiality and privacy obligations under the CGC Charter (clause 11.2). The CGC expects the de-identified case studies it may publish in future will help clarify what constitutes serious misconduct.

The Committee thanks all stakeholders who have made submissions for their input during the consultation process.

Yours sincerely,

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**On behalf of General Insurance Code Governance Committee**