

# Operational Guidance

Paragraph 176 of the 2020 General  
Insurance Code of Practice

Reporting Significant Breaches or  
serious misconduct to the Australian  
Securities and Investments  
Commission

**October 2022**



**GENERAL INSURANCE**  
Code Governance Committee

# Operational Guidance on Paragraph 176 of the 2020 General Insurance Code of Practice – Reporting Significant Breaches or serious misconduct to the Australian Securities and Investments Commission

## Purpose of this document

1. This document sets out Operational Guidance to support the Code Governance Committee (CGC) in meeting its responsibility to report Significant Breaches or serious misconduct of the 2020 General Insurance Code of Practice (the Code) to the Australian Securities and Investments Commission (ASIC) in accordance with paragraph 176 of the Code.
2. This document includes:
  - a. the nature and purpose of the CGC;
  - b. the CGC’s approach to reporting to ASIC;
  - c. what Significant Breaches or serious misconduct are;
  - d. whether the CGC must report all Significant Breaches or serious misconduct to ASIC;
  - e. how the CGC is made aware of Significant Breaches or serious misconduct of the Code;
  - f. whether the CGC names Code Subscribers in reports to ASIC; and
  - g. the timeframe in which the CGC reports Significant Breaches or serious misconduct to ASIC.

## About the CGC

3. The CGC is an independent body established under the Constitution of Code Governance Committee Association Inc. (paragraph 165)<sup>1</sup>.
4. The CGC’s functions, powers and responsibilities are set out in the [2020 General Insurance Code of Practice](#) (the Code) and [Schedule 1 – The CGC Charter](#) (CGC Charter).
5. The purpose of the CGC is to independently administer, monitor and enforce the Code.

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<sup>1</sup> Unless otherwise stated, a reference to ‘paragraph’ or a reference to ‘Part’ means a paragraph or a Part of the 2020 General Insurance Code of Practice (the Code).

6. The functions, powers and responsibilities of the CGC are set out in:
  - a. Part 13 'Enforcement, sanctions and compliance' (paragraphs 165 to 176),
  - b. Part 14 'Promoting, reviewing and improving the Code' (paragraphs 189 and 190), and
  - c. the CGC Charter.
7. These functions, powers and responsibilities include that the CGC will, amongst other things, report Significant Breaches and serious misconduct to ASIC.
8. The Code Compliance and Monitoring Team at the Australian Financial Complaints Authority (AFCA) acts as Code Administrator for the CGC, with responsibility for monitoring Code compliance on the Committee's behalf. A reference to the CGC or Committee here also includes reference to the Code Compliance and Monitoring Team at AFCA, acting under appropriate delegation from the CGC in accordance with the CGC Charter.

### **CGC's responsibility to report to ASIC**

9. Paragraph 176 sets out the CGC's reporting responsibilities:

*The CGC will report Significant Breaches or serious misconduct to the Australian Securities and Investments Commission.*

10. Clause 6.2 of the CGC Charter reflects the CGC's reporting responsibilities under paragraph 176, and provides as follows:

#### **Reporting to ASIC**

*The CGC will report Significant Breaches or serious misconduct to ASIC in accordance with the Code.*

11. This requirement to report Significant Breaches and serious misconduct to ASIC came into effect on 1 July 2021.
12. Paragraph 176 contains two separate reporting responsibilities:
  - a. That the CGC will report Significant Breaches to ASIC; and
  - b. That the CGC will report serious misconduct to ASIC.

### **CGC's approach to reporting to ASIC**

13. In line with the Code and the CGC Charter, the following Operational Guidance is principles-based, to ensure that the CGC can meet its responsibility to report Significant Breaches or serious misconduct to ASIC, across a range of circumstances.

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

## What is a Significant Breach or serious misconduct?

### **What is a Significant Breach?**

15. The Code defines 'Significant Breach' in *Part 16: Definitions* as:  
**Significant Breach** means 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 our ability to provide our services;
  - c. the extent to which the breach, or likely breach, indicated that our 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.
16. In its *Significant Breach Guidance Note*<sup>2</sup>, the CGC sets out its expectations of how it interprets a Significant Breach. The CGC expects Code Subscribers to assess a breach of the Code against each of the five criteria to determine whether or not it should be classified as a Significant Breach. However, a breach does not need to meet all five criteria to be significant. A breach will be a significant breach if it meets only one of the criteria. A significant breach does not need to impact multiple consumers. If a breach meets only one of the criteria but impacts even a single consumer, it will still be considered a significant breach.
17. The Guidance Note also provides guidance to Code Subscribers on assessing whether a breach is significant and reporting Significant Breach matters to the CGC. The Code Subscriber has the onus on identifying and reporting a Significant Breach to the CGC.

### **What is serious misconduct?**

18. The term 'serious misconduct' is not defined in either the Code or the CGC Charter.

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<sup>2</sup> [CGC Guidance Note No 2 Significant Breach Obligations, General Insurance Code of Practice.](#)

19. It is not possible to provide an exhaustive definition of the factors the CGC may regard as being 'serious misconduct. We have provided some examples at paragraphs 25 and 26 below, of conduct the CGC could consider to be 'serious misconduct' as guidance. The CGC retains discretion to refer all matters it reasonably believes may constitute serious misconduct to ASIC. The CGC expects de-identified any case studies it may publish in future, as outlined in paragraph 54, will help clarify what constitutes serious misconduct.
20. The CGC normally takes a range of factors into consideration when deciding whether serious misconduct has occurred or may have occurred.
21. The CGC will consider each matter on its own facts and carry out any required investigation in accordance with its responsibilities under the Code and the CGC Charter.
22. In assessing seriousness of misconduct, the CGC aligns with *ASIC Information Sheet 151, ASIC's Approach to Enforcement*. ASIC Information Sheet 151 contains guidance on the factors ASIC may consider in deciding which remedy to pursue.<sup>3</sup> These include the nature and seriousness of the suspected misconduct.
23. 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.
24. If the identified serious misconduct suggests ongoing harm or a continuing risk of consumer losses, the CGC expects to report to ASIC as soon as practicable. It would not be necessary for the CGC to wait until the relevant Code Subscriber had remediated the serious misconduct before reporting to ASIC.

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<sup>3</sup> ASIC Information Sheet 151 lists the following examples as factors ASIC may consider in deciding which remedy to pursue when assessing the nature and seriousness of the suspected misconduct:

- Whether there is evidence that the contravention involved dishonestly or was intentional, reckless or negligent
- The amount of any benefit and detriment caused as a result of the contravention
- The impact of the misconduct on the market, including potential loss of public confidence
- The amount of any loss caused to investors and consumers
- Whether the conduct is continuing
- Whether the misconduct indicates systemic compliance failures
- Whether the subject has a poor compliance record (e.g. the subject has previously engaged in the misconduct).

### ***Examples of conduct that could be ‘serious misconduct’***

25. The CGC considers ‘serious misconduct’ may include the following conduct:

- a. Fraudulent conduct
- b. Negligent conduct
- c. Grossly inefficient conduct
- d. Reckless conduct
- e. Wilful or flagrant breaches of laws relevant to the breach or misconduct in question; or
- f. Wilful or flagrant breaches of the Code.

26. Cases of serious misconduct under the Code may arise from, but are not limited to, the following circumstances:

- a. A breach of an insurer’s duty of utmost good faith owed to an insurer or third-party beneficiary under a contract of insurance (section 13, Insurance Contracts Act 1984).<sup>4</sup>
- b. A breach or Significant Breach of the Code that has attracted a sanction or sanctions.
- c. A breach of paragraph 21, which requires a Code Subscriber, its Distributors and its Service Suppliers to be honest, efficient, fair, transparent and timely in its dealings with consumers covered by the Code – in particular, the elements of honesty and fairness.
- d. Conduct that the CGC considers to be serious misconduct that is not a breach of the Code. For example:
  - i) A breach of the financial services law that is not a breach of the Code; and
  - ii) Conduct that is of concern but is not captured by the Code.

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<sup>4</sup> [Section 13, Insurance Contracts Act 1984 \(Cth\)](#) ASIC may bring civil proceedings against an insurer who fails to comply with its duty of utmost good faith. An insurer who has breached its duty is liable to civil penalty of up to 5000 penalty units.

27. While serious misconduct is more likely to involve matters that are persistent or systemic in nature, there may be one-off instances that are so serious that the CGC considers them to be serious misconduct and reports these to ASIC.
28. Whether a matter before the CGC amounts to serious misconduct is likely to turn on its facts. As a result, it is not possible for the CGC to provide an exhaustive list of examples about what might constitute serious misconduct.
29. The CGC considers that misconduct will be serious, and therefore reportable to ASIC, if:
  - a. The CGC has sufficient facts or information to have an objectively reasonable belief that it is serious; and
  - b. The CGC in good faith forms the view that serious misconduct may have occurred.
30. A reasonable belief will be formed if a reasonable person would expect the CGC to report the matter to ASIC.

## **Operating Procedure for reporting Significant Breaches to ASIC**

### ***Whether the CGC must report all Significant Breaches to ASIC***

31. The words 'will report' in paragraph 176 mean that the CGC must report all Significant Breaches to ASIC, after the CGC has had an opportunity to consider them. The mandatory obligation on the CGC to report all Significant Breaches to ASIC is irrespective of whether the Code Subscriber has or has not also reported the matter to ASIC.
32. The CGC must report all confirmed Significant Breaches to ASIC. These Significant Breaches will have been either self-reported by the Code Subscriber or determined by the CGC to be a Significant Breach. The CGC's determination that a Code breach is a Significant Breach is final and binding.
33. The CGC is not obliged to report Significant Breaches allegations made by members of the public or consumer advocates, or possible Significant Breaches reported by Code Subscribers, to ASIC.
34. 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.
35. Further information about the processes undertaken by the CGC when alleged or possible breaches of the Code are brought to its attention are outlined further

in the CGC's *Significant Breach Guidance Note and Operational Guidance on Imposing Sanctions under the 2020 General Insurance Code of Practice*.<sup>5</sup>

36. When a Code Subscriber reports a new Significant Breach to the CGC, they are expected to notify the CGC about whether it has also reported the Significant Breach to ASIC, and whether the Code Subscriber is aware if the matter is the subject of a past or current related ASIC investigation.
37. Where a Code Subscriber notifies the CGC that it has also reported a Significant Breach to ASIC, the CGC will aim to communicate this to ASIC.

#### ***Whether the CGC must report all serious misconduct to ASIC***

38. Similar to Significant Breaches, the words 'will report' in paragraph 176 means the CGC must also report all findings of serious misconduct to ASIC.
39. Unlike Significant Breaches, the CGC does not have jurisdiction to investigate serious misconduct unless it also is a breach or Significant Breach of the Code. Where the CGC investigates serious misconduct because it is also either a breach or Significant Breach of the Code, that investigation process will allow the Code Subscriber an opportunity to respond to the CGC.

#### ***Timeframe for reporting Significant Breaches or serious misconduct to ASIC***

40. The Code and the CGC Charter do not specify a timeframe in which the CGC must report a Significant Breach or serious misconduct to ASIC.
41. 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.
42. The CGC does not need to wait for a Code Subscriber to remediate a Significant Breach or serious misconduct before it makes a report to ASIC.

#### ***Giving the Code Subscriber the proposed ASIC report of a Significant Breach before reporting to ASIC***

43. Before the CGC reports a Significant Breach to ASIC, the CGC will give the Code Subscriber an opportunity to view the proposed report it will make to ASIC. The CGC does so out of courtesy and for transparency. This is not an opportunity for the Code Subscriber to review the merits of the CGC's acceptance or determination of a Significant Breach, but an opportunity for the

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<sup>5</sup> <https://insurancecode.org.au/app/uploads/2021/12/FINAL-CGC-Operational-Guidance-on-Sanctions-16.12.21.pdf>



Code Subscriber to provide any final comments about the factual accuracy of the report.

44. 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. 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.

***Giving the Code Subscriber the proposed ASIC report of serious misconduct before reporting to ASIC***

45. Before the CGC reports serious misconduct to ASIC, the CGC will give the Code Subscriber an opportunity to view the proposed report it will make to ASIC. The CGC does so out of courtesy and transparency. This is not an opportunity for the Code Subscriber to review the merits of the CGC's decision to report the serious misconduct, but an opportunity for the Code Subscriber to provide any final comments about the factual accuracy of the proposed report.
46. Except in urgent cases, such as where there is serious ongoing consumer harm or a continuing risk of consumer loss, the CGC will provide the Code Subscriber with a period of at least five (5) business days within which to inform the CGC of any factual inaccuracies. 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.

***Giving the Code Subscriber a copy of the final report made to ASIC***

47. The CGC will notify a Code Subscriber of the lodgement of the Significant Breach or serious misconduct report it makes to ASIC and will aim to provide the Code Subscriber with a copy of the final report it makes.

***Identifying the Code Subscriber in reports to ASIC***

48. The CGC will report Significant Breaches and serious misconduct to ASIC on an identified basis in accordance with Clause 11.2(c)(i) and (iv) of the CGC Charter. This means that the CGC will identify the Code Subscriber when reporting Significant Breaches and serious misconduct to ASIC.
49. The CGC will report Significant Breaches and serious misconduct in accordance with clause 11.2(c)(i) – (iii) of the CGC Charter.<sup>6</sup>

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<sup>6</sup> **11.2 Confidentiality of information**

The CGC may disclose any confidential information:

50. Except where the individual or individuals have given express written consent, the CGC expects reports of Significant Breaches and serious misconduct to ASIC will de-identity details of 'confidential information' that relate to an individual or individuals, 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.
51. The CGC will notify the Code Subscriber when it will be reporting a Significant Breach or serious misconduct to ASIC and that it will be on an identified basis.

### ***Reporting to ASIC***

52. The CGC will consider any responses it receives from the Code Subscriber as referred to in paragraphs 43 and 45, before providing a report to ASIC.
53. The report to ASIC will include relevant details of the Significant Breach or serious misconduct.

### ***Publication of serious misconduct Case Studies***

54. The CGC intends to publish case studies of serious misconduct based on its reports of such matters to ASIC.
55. The CGC expects any case studies it publishes to be on its website or other suitable platform for publication.
56. The CGC considers all matters based on their individual circumstances. Case studies of serious misconduct are not intended to anticipate all possible issues that might come before the CGC or how the CGC might respond.
57. In all cases where a case study is published, 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

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- (i) within the CGC or to any other person to whom disclosure is reasonably required for the purpose of the CGC exercising its functions, powers and responsibilities, under the Code and the Charter;
  - (ii) to any person to whom disclosure of confidential information is required by law;
  - (iii) in response to a request for that confidential information from ASIC or another enforcement agency, the EDR Scheme or the Service Provider;
  - (iv) under corresponding obligations of confidence as imposed by this clause 11 to a person retained to provide advice in accordance with clause 4.1(b), to ASIC or another engagement agency, the EDR Scheme, the Service Provider, or another person, where the CGC determines that such disclosure is reasonably necessary for the purpose of investigating, determining or imposing a sanction on a Code Subscriber in accordance with the Code; or
  - (v) with the prior written consent of the Code Subscriber.

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.

58. The CGC normally gives a Code subscriber the opportunity to conduct a factual accuracy check and provide comments to the CGC on the proposed case study prior to publication.

## DISCLAIMER

Examples and case studies used in this Guidance are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

## 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.

## CONTACT THE CODE GOVERNANCE COMMITTEE

If you have any queries about this report, please contact the CGC through its secretariat at: [info@codecompliance.org.au](mailto:info@codecompliance.org.au).



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