

Guidance Note 1

Classification, Reporting and Remediation of Non-Compliance with the Insurance Brokers Code of Practice

September 2015

The Insurance Brokers Code Compliance Committee (IBCCC) is an independent code compliance monitoring body established under section 3 of the Insurance Brokers Code Compliance Charter.

The IBCCC oversees the compliance of subscribing insurance brokers with their obligations under the Insurance Brokers Code of Practice (the Code) by:

- a. monitoring compliance with the Code
- b. investigating Code breach allegations, and
- c. monitoring any aspects of the Code that are referred by the National Insurance Brokers Association (NIBA).

This Guidance Note has three purposes, namely to indicate the IBCCC's likely approach to:

- a. the classification, recording and reporting of non-compliance with the Code in the discharge of its functions
- b. its enforcement and sanctions powers and how they apply to different levels of non-compliance, including
- c. the public naming of a Code subscriber.

Guidance Notes are subject to change by the IBCCC and this document reflects the IBCCC's views as at the date of its publication.

It is important to understand that the IBCCC considers all matters on the basis of their individual circumstances and this document is not intended to anticipate all possible issues that might come before the IBCCC.

Any reference to "insurance broker" in this Guidance Note means an insurance broker which subscribes to the Code. Any reference to the "Code" is a reference to the 2014 version of the Code, unless otherwise stated. Any reference to a "consumer" or "client" means an individual or small business that is either a client or potential client of an insurance broker.

For more information about the IBCCC, please visit the website: (<http://www.fos.org.au/about-us/codes-of-practice/#id=insurance-brokers>).

Overview of IBCCC Classification of Non-compliance and its Enforcement and Sanctions Framework

IBCCC Classifications of Non-compliance		IBCCC Enforcement and Sanctions Framework ¹
BREACH	<p>A breach is a failure to comply with the obligations of the Code in relation to the provision of an insurance broking service.</p> <p>The IBCCC may become aware of breaches or make a Determination that an insurance broker has not complied with the Code, as a result of:</p> <ul style="list-style-type: none"> • an insurance broker self-reporting breaches in the Annual Compliance Statement • an investigation into an allegation that an insurance broker has breach the Code • an investigation into a referral from the National Insurance Brokers Association (NIBA) • a referral from another forum hearing an allegation and that forum making a Determination that a Code subscribing insurance broker has not complied with the Code (eg FOS), or • through another monitoring process such as an Own Motion Inquiry (which may lead to a IBCCC investigation or self-reported non-compliance). 	Guidance on good industry practice
		Negotiation and Resolution
SIGNIFICANT BREACH / SYSTEMIC BREACH	<p>A significant breach is a breach of the Code's obligations that is determined on a case-by-case basis, by reference to matters such as the:</p> <ul style="list-style-type: none"> • number of clients affected or likely to be affected • extent of any client detriment • adequacy of arrangements to ensure compliance with the Code • duration of the breach • number and duration of similar breaches • rectification and other costs incurred or to be undertaken • impact of the insurance broker's ability to provide services, and 	Remediation and Corrective Actions
	<p>A systemic breach is non-compliance that has implications beyond the immediate actions and parties affected by the non-compliance with the Code.</p> <p>Systemic breaches are those which have or are likely to affect more than one person. It is likely to involve a process, policy or technological issues within the insurance broker's operations.</p> <p>A systemic breach is a lower threshold than a serious breach, and may, or not, be significant.</p>	Determination and Remediation
		Undertakings

¹ NIBA Insurance Brokers Code of Practice Procedures clause 6.1

	<ul style="list-style-type: none"> extent to which the breach indicates the insurance broker’s arrangements for compliance with the Code are inadequate. <p>Consideration given to ASIC “Regulatory Guide 78 – Breach Reporting by AFS Licensees, the Australian Standard AS 3806 2006-Compliance Programs” and Section 912D of the Corporations Act 2001.</p> <p>Code subscribing insurance brokers are required to report significant breaches separately in the Annual Compliance Statement.</p> <p>The IBCCC will give consideration to the criteria above when making a Determination on whether there is breach of the Code.</p>		<p>Warnings</p>
<p>SERIOUS BREACH</p>	<p>A serious breach is non-compliance with the Code which is considered to be fraudulent, grossly negligent or wilful. It may also include instances where an insurance broker has not rectified the issue(s) which led to the breach, or wilfully ignores or fails to act on an IBCCC Determination or Undertaking related to a previously self-reported significant and/or systemic breach.</p> <p>A serious breach is the highest threshold of breach (and will always be significant).</p>	<p>Public Naming</p>	

Introduction

1. The IBCCC's Charter² sets out its powers and functions.
2. One of the IBCCC's function is to monitor compliance of insurance brokers with the Code through a number of methods, including lodgement of an Annual Compliance Statement by insurance brokers that reports on their compliance with the Code during the previous 12 months.
3. Independent monitoring by the IBCCC is important to ensure that non-compliance with the Code is identified, reported and remedied. Robust compliance monitoring arrangements are essential to maintain public confidence that insurance brokers comply with, and are seen to comply with, the Code's obligations.
4. Another function is to investigate and determine whether a breach of the Code has occurred.
5. The IBCCC must report annually on the outcomes of its activities and functions including the level of compliance with the Code, the underlying cause of non-compliance, any compliance measures implemented by relevant insurance brokers and any systemic breaches or other trends.
6. The IBCCC is also empowered to name an insurance broker on the IBCCC's website, in its annual report, or both, in connection with a breach of the Code, where an insurance broker has been guilty of serious, significant or systemic non-compliance.
7. To facilitate the effective, efficient and transparent discharge of all of these functions, this Guidance Note outlines the IBCCC's likely approach to the classification, recording and reporting of non-compliance (breaches) with the Code's obligations and the subsequent approach that the IBCCC may take to ensure remediation of non-compliant activity or sanction against the relevant insurance broker.

Classification of Code breach activity

8. When undertaking its functions to monitor or investigate compliance with the Code, the IBCCC may become aware of breach activity or make a Determination that an insurance broker has not complied with its Code obligations.
9. Non-compliance with the Code is classified by the IBCCC, as follows:
 - 9.1. a breach (non-compliance with a Code obligation)
 - 9.2. a significant breach
 - 9.3. a systemic breach, or
 - 9.4. a serious breach of the Code.
10. Appendix 1 outlines these classifications in more detail and the IBCCC's likely approach when enforcing the Code against Code subscribers.
11. The classifications are not mutually exclusive. Some overlap in classification may occur. For example, a significant breach of the Code may have resulted from systemic non-compliance with Code obligations.

² The IBCCC's Charter can be found at https://www.niba.com.au/resource/NIBA_CCC_Deed_300614.pdf

Breaches

12. A breach of the Code is described as a failure to comply with the obligations of the Code in the provision of an insurance broking service.
13. The IBCCC expects that insurance brokers will acknowledge any Code breach in their internal Code breach register as well as their Annual Compliance Statement and undertake any remediation that is appropriate to correct non-compliance.

Significant breaches

14. When making a decision about non-compliance with the Code, the IBCCC will also consider whether a breach is significant and/or serious or systemic in nature.
15. When assessing the significance of a Code breach, the IBCCC will be guided by ASIC “Regulatory Guide 78 – Breach Reporting by AFS Licensees, the Australian Standard “AS 3806 2006 - Compliance Programs” and Section 912D of the Corporations Act 2001 (Cth).
16. A significant breach of the Code’s obligations therefore will be determined on a case-by-case basis, by reference to matters such as the:
 - 16.1. number of clients affected or likely to be affected
 - 16.2. extent of any client detriment
 - 16.3. adequacy of arrangements to ensure compliance with the Code
 - 16.4. duration of the breach
 - 16.5. number and duration of similar breaches
 - 16.6. rectification and other costs incurred or to be incurred
 - 16.7. impact of the breach on the insurance broker’s ability to provide services, and
 - 16.8. extent to which the breach indicates the insurance broker’s arrangements for compliance with the Code are inadequate.
17. To assist insurance brokers in their Code breach assessment processes, some examples of significant breaches that have been reported to the IBCCC in the past include:
 - 17.1. incorrect disclosures in a Product Disclosure Statement
 - 17.2. inaccurate advertising of product and interest rate details
 - 17.3. procedures that do not comply with general law and statute
 - 17.4. multiple errors affecting a class or classes of clients, for example charging of incorrect insurance premiums or failure to act on cancellation instructions.
 - 17.5. non-disclosure of conflict of interest, for example underwriting agency and premium funding arrangements and payment of commission/brokerage, and
 - 17.6. failure to adequately train representatives in the obligations under the Code
18. When the IBCCC becomes aware of, or identifies a significant breach of the Code, it may:
 - 18.1. seek further information from the insurance broker about how the issue has or will be remedied to prevent recurrence
 - 18.2. engage in a monitoring program to ensure that actual or proposed remedial action has been completed, and

- 18.3. seek confirmation from the insurance broker that the Code breach has been acknowledged in their internal Code breach register as well as their Annual Compliance Statement.
19. The IBCCC may conclude a compliance investigation by Determination. In doing so the IBCCC must first issue a Notice of Determination in accordance with NIBA Insurance Brokers Code of Practice Procedures clause 5.31 that includes, if applicable, a brief description of any finding the IBCCC intends to make that the insurance broker is responsible for significant, serious or systemic non-compliance with the Code.
20. The IBCCC may publish details of any significant breaches of the Code in its Annual Report and on its website. These publications will be on a de-identified basis, unless the conduct is also determined to be serious or systemic and the insurance broker is to be named in accordance with paragraphs 57 – 70 of this Guidance Note.

Systemic breaches

21. A systemic breach is classified by the IBCCC as non-compliance with the Code that has implications beyond the immediate actions and parties affected. This is consistent with the definition of *systemic issue* in the Terms of Reference of the Financial Ombudsman Service Australia (FOS).
22. Systemic breaches are those which have, or are likely to affect, more than one person. It may also involve a process, policy or technological issue affecting the insurance broker's operations.
23. The IBCCC believes that systemic non-compliance is likely to be a lower threshold than a serious breach of the Code. The same conduct may or may not constitute a significant breach of the Code, using the criteria set out in paragraph 14 above.
24. To determine whether a Code breach is systemic, the IBCCC may request access from an insurance broker to complaints data, product details and internal processes and procedures documentation.
25. Insurance brokers should self-report systemic breaches of the Code to the IBCCC. If they do so, they should provide details of what occurred, the impact of the breach including the number of consumers affected and detriment caused and the remedial action that has been, or will be, taken to correct the non-compliance and prevent recurrence.
26. The IBCCC may conclude a compliance investigation by Determination. In doing so the IBCCC must first issue a Notice of Determination in accordance with NIBA Insurance Brokers Code of Practice Procedures clause 5.31 that includes, if applicable, a brief description of any finding the IBCCC intends to make that the insurance broker is responsible for significant, serious or systemic non-compliance with the Code.
27. Where the IBCCC makes a Determination that a Code breach is systemic, in addition to recording a Code breach against the insurance broker, the IBCCC may request additional information about the remediation program the insurance broker will or has undertaken to correct the non-compliance and prevent recurrence and monitor the completion of that program.

28. The IBCCC must report on systemic breaches in its Annual Report on a de-identified basis, unless the Committee has determined to name the insurance broker under its sanction powers.
29. The IBCCC may initiate an Own Motion Inquiry into the issues associated with a systemic breach across all insurance brokers, where it believes there may be a risk of broader industry non-compliance.

Serious breaches

30. A serious breach of the Code is classified by the IBCCC as non-compliance that is considered to be fraudulent, grossly negligent or involves wilful breaches of the insurance broker's Code obligations. It may also include instances where an insurance broker has not remedied the conduct or errors that led to the breach, or wilfully ignores or fails to act on an IBCCC Determination or undertaking³ related to a previously self-reported significant and/or systemic breach.
31. This description is consistent with the definition of *serious misconduct* used in the FOS Terms of Reference.
32. A serious breach of the Code is considered by the IBCCC to be the highest threshold of breach and will always be significant in nature.
33. Where a breach is classified as serious, the IBCCC is likely to increase its level of engagement with the insurance broker to understand what occurred and why, and how the insurance broker plans to respond and rectify the non-compliance.
34. The IBCCC may conclude a compliance investigation by Determination. In doing so the IBCCC must first issue a Notice of Determination in accordance with NIBA Insurance Brokers Code of Practice Procedures clause 5.31 that includes, if applicable, a brief description of any finding the IBCCC intends to make that the insurance broker is responsible for significant, serious or systemic non-compliance with the Code.
35. In accordance with NIBA Insurance Brokers Code of Practice Procedures clause 5.34, the IBCCC must consider the public naming of an insurance broker, where the insurance broker has been, amongst other things, guilty of serious or systemic non-compliance.

Arrangements for recording and reporting Code breaches

36. The IBCCC expects insurance brokers to:
 - 36.1. have a clear and well understood process for identifying, recording, reporting and rectifying non-compliance with the Code
 - 36.2. ensure that arrangements are in place to prevent a recurrence of breach activity, and
 - 36.3. have appropriately trained personnel within each operational area to identify and report when and where breaches have occurred.

³ In the absence of a formal definition in the Code or NIBA Insurance Brokers Code of Practice Procedures, the term "undertaking" is given its ordinary meaning by the IBCCC and means a formal pledge or promise to do (or not do) something.

37. Breach incidents may typically arise across all of the insurance broker's operational areas and systems in addition to direct dealings with clients (including branches, collections activities and call centres).
38. When recording breach activity, multiple breaches of the Code may be recorded as follows:
- 38.1. a single incident that results in breaches of the same type (for example a system error that resulted in breaches of the Code's disclosure provisions and has impacted a number of clients) may be counted as one breach or significant breach of the relevant Code clause, and
 - 38.2. where more than one of the Code's standards has been breached (for example a client's insurance broker account details are disclosed to a third party and their complaint about this is not dealt with in accordance with internal dispute resolution time frames) both breaches of the Code should be recorded.
39. Once an insurance broker has identified non-compliant conduct with the Code's standards, it should assess whether that breach has resulted in a failure to act fairly and reasonably in a consistent and ethical manner in the provision of services to its clients and/or to comply with all relevant laws relating to insurance broking services.

When must Code breaches be reported to the IBCCC

40. As part of its monitoring role, the IBCCC requires each insurance broker to lodge (in a form acceptable to the IBCCC) an Annual Compliance Statement with the IBCCC on its compliance with the Code during the previous reporting year. This Statement forms a key part of the IBCCC's program to monitor insurance brokers' compliance with the Code.
41. The number of breaches of the Code to be reported should include information from all sources (including the insurance broker, the IBCCC, FOS and other forums) and be recorded against the relevant clause of the Code.
42. Insurance brokers are required to report significant breaches separately in the Annual Compliance Statement.
43. The IBCCC accepts that insurance brokers have systems and procedures to identify and report significant breaches of their legal obligations. The recording and reporting of significant Code breaches to the IBCCC therefore may be made according to the criteria the insurance broker already applies to determine breach significance (or similar terminology) for its own reporting, both internally and to other regulators (see paragraphs 12 -18 of this Guidance Note).
44. When completing the significant breach table within the Annual Compliance Statement, the following information should be provided:

Incident Details	The version of the Code which applies; clause breached; date detected; product category; channel; client type; location; role/ position of identifier; nature/ characteristics; and manner discovered.
Underlying Causes	Matters involved; system/process issues; and personnel issues.

Breach Magnitude	Systemic significance; number of clients affected (actual/ potential/ direct/ indirect); location of clients affected (actual/ potential/ direct/ indirect); duration/ dates over which breach occurred; payments to clients; other rectification costs incurred; and non-financial impacts.
Remedial action	Actions with dates; preventative/ corrective; short/ long-term; temporary/ permanent; and past/ present/ future.

45. Where a breach of the law has been reported to, or identified by, the Australian Securities and Investment Commission (ASIC) or another regulator, the incident also results in a breach of the Code and must be reported to the IBCCC when it occurs or in the Code Breach Summary in the Annual Compliance Statement of the relevant period.
46. This is the same for breaches of the Code that are determined by another forum, namely any court, tribunal, arbitrator, mediator, FOS, or statutory ombudsman in any jurisdiction.
47. The IBCCC may also invite an insurance broker during a reporting year to acknowledge that a breach of the Code has been found by another forum or regulator and/or indicate to the IBCCC whether the breach will be self-reported in the Annual Compliance Statement.
48. If an insurance broker self-reports an individual breach outside the Annual Compliance Statement program, the IBCCC will acknowledge the report and may request further information if needed.
49. In some cases the IBCCC may not need to take any further action if the reported breach has been rectified to the IBCCC's satisfaction.
50. The IBCCC may also contact the insurance broker to discuss improvements made or proposed to code compliance processes and procedures to prevent recurrence, if it is not satisfied that this has occurred.
51. A failure by an insurance broker to report breaches of the Code to the IBCCC may of itself, in certain circumstances, be a breach of the Code.
52. The IBCCC acknowledges that insurance brokers may wish to annually self-report unique breaches separately to the IBCCC, without linking to a corresponding breach of the Code's standards. Provision is made for this type of annual reporting in the Annual Compliance Statement.

Publication of Code breach activity

53. The effective notification by insurance brokers of Code related breaches allows the IBCCC to report on and make recommendations regarding emerging areas of risk and the continuous improvement of industry standards.
54. The IBCCC will also add this data to internal risk models for ongoing monitoring of trends in Code compliance.

Possible enforcement action

55. Appendix 1 to this Guidance Note outlines some of the potential actions available to the IBCCC in its dealings with the insurance brokers to address and resolve non-compliance with the Code.

56. These actions may be broadly categorised as:

- 56.1. Guidance on good industry practice
- 56.2. Negotiation and resolution
- 56.3. Remediation and Corrective actions
- 56.4. Determination
- 56.5. Undertakings
- 56.6. Warnings, and
- 56.7. Public naming

57. These actions are not mutually exclusive and may be used in combination.

58. The level of engagement an insurance broker can expect from the IBCCC and the application of the IBCCC's enforcement and sanctions powers once Code breach activity has been identified, will be commensurate with the level of non-compliance the IBCCC considers that the insurance broker has engaged in.

Public Naming of an insurance broker

59. The IBCCC is accountable to its stakeholder groups for the transparency of its Code monitoring and enforcement actions.

60. Transparency, through public disclosure of sanctions imposed in certain circumstances, is considered by the IBCCC to be an important factor to ensure that the insurance brokers are held, and are seen to be held, accountable for their compliance with Code obligations. ASIC Regulatory Guide 183⁴ for example, points out that community confidence in the effectiveness of industry codes is largely reliant on the perception that a Code is seen to be enforced against non-compliant subscribers.

61. The most serious sanction that the IBCCC may impose is the public naming of an insurance broker.

62. Clause 6.1 (h) of the NIBA Insurance Brokers Code of Practice Procedures states that the IBCCC may publish details of any non-compliance by a Code Member, including their name and the name of the Company they represent, where it can be shown that the insurance broker has:

- 62.1. been guilty of serious or systemic non-compliance
- 62.2. ignored the IBCCC's request to remedy a breach or failed to do so within a reasonable time
- 62.3. breached an undertaking given to the IBCCC, or
- 62.4. not taken steps to prevent a breach reoccurring after having been warned that the insurance broker might be named.

63. Clause 7.5 (d) of the NIBA Insurance Brokers Code of Practice Procedures states that the IBCCC may also name an insurance broker in its next Annual Report.

64. The IBCCC recognises that the objective in imposing a public naming sanction can be different in each case. For example, a naming power may be used to reprimand an insurance broker that has failed to comply with a request by IBCCC to correct a breach of the Code and/ or to act as a general deterrent to others to avoid engaging in non-compliant conduct.

⁴ Australian Securities and Investments Commission, 2013, *Regulatory Guide 183: Approval of financial services sector codes of conduct*, p. 9

65. The IBCCC accepts that the publication of an insurance broker's name for non-compliance with Code obligations may have significant consequences.
66. In considering whether or not to publically name an insurance broker in a particular matter, the IBCCC will balance the public interest in publishing the non-compliant activity against the rights of the company that is to be the subject of the sanction.
67. The IBCCC may also take into account a number of factors when deciding whether to publish or not, including:
 - 67.1. any limitations outlined in the NIBA Insurance Brokers Code of Practice Procedures and section 9.3 of the Charter
 - 67.2. the need to safeguard confidential or sensitive information
 - 67.3. privacy legislation and guidelines
 - 67.4. the need to apply procedural fairness and consider fairness in all the circumstances
 - 67.5. the risk of harm or detriment that may be caused to any of the parties, and
 - 67.6. compliance with any court orders not to disclose information in certain circumstances.
68. In applying these criteria, the IBCCC will consider the public naming power in the context of what is reasonable in all of the circumstances of each case, having regard to legal principles relevant to the decision-making process, applicable Code provisions and any IBCCC guidance as to code requirements.
69. If the IBCCC forms the view that it should consider imposing a public naming sanction, the IBCCC will:
 - 69.1. notify the insurance broker and the insurance broker CEO of the proposal, prior to a final decision being made
 - 69.2. provide a brief description of the finding the IBCCC intends to make and the reasons for why it reasonably suspects that the insurance broker is responsible for serious or systemic non-compliance with the Code
 - 69.3. advise the insurance broker of the opportunity to be heard on the proposed sanction and make submissions within 28 days of the date of the notice as to why the sanction should not be imposed, and
 - 69.4. include a statement that the proposed sanction will become effective after 28 days from the date of the Notice should no submissions be received.
70. At the expiry of the 28 day notice period:
 - 70.1. if the insurance broker has not responded, the sanction will be adopted, or
 - 70.2. if the insurance broker has responded, the IBCCC will consider the submissions made, prior to making its final decision.
71. The IBCCC may also consult with the FOS Chief Ombudsman and National Insurance Brokers Association (NIBA), as parties to the Code's governance arrangements, about its proposal to impose a naming sanction against a particular insurance broker prior to publication occurring.
72. Once the IBCCC decides that a public naming sanction is to be imposed the IBCCC will notify the CEO of the insurance broker of its decision and:

72.1. prepare a publication notice which includes:

- 72.1.1. the name of the insurance broker
- 72.1.2. the date of the IBCCC's decision
- 72.1.3. the Code obligations that have been breached
- 72.1.4. the relevant clause 6.1 (h) of the NIBA Insurance Brokers Code of Practice Procedures to which the IBCCC's decision relates, and
- 72.1.5. a short statement of the IBCCC's reasons for the decision to impose the public naming sanction

72.2. provide a copy of the Notice to the insurance broker and NIBA

72.3. provide a copy of the Notice to the FOS Chief Ombudsman, and

72.4. include the notice in the IBCCC's next Annual Report and/ or on its website.