UNDERWRITING AGENCIES COUNCIL

1 Contractual enforceability

1.1 Proposed changes in the revised draft General Insurance Code of Practice (Code)

As it stands, the current Code is a largely self-regulatory instrument. The Underwriting Agencies Council (**UAC**) understands that the Insurance Council of Australia (**ICA**) proposes to introduce the contractual enforceability of the Code by enacting the following changes in the revised Code:

(a) subscribers to the revised Code will be required to expressly incorporate all relevant paragraphs in sections 1 to 9 in insurance contracts that are subject to the revised Code.

(b) where provisions of the Code are incorporated into insurance contracts, insureds will have legal rights to enforce those provisions as part of the contract (including the ability to bring a claim in court for breach of contract).

The Code will also include a series of qualifications that moderate the operation of incorporated terms:

(a) where there is any inconsistency between the Code and the policy wording, the policy terms will prevail (the revised Code para 23(a)).

(b) the incorporation of the Code in an insurance policy does not form a condition or warranty (the revised Code para 23(b)).

(c) if subscribers fail to comply with the Code, they will not be held liable:

(i) for breaches of timeframes for the period that an extraordinary event[1] declaration is in place; or

(ii) to the extent the failure was affected by some other event that was outside the Code subscriber's control, not reasonably foreseeable, or occurred without the fault or negligence of the Code subscriber (the Code para 23(c)).

1.2 UAC views

Whilst UAC supports the ICA's objective of making the Code contractually enforceable and enhancing consumer confidence, in light of the revised Code being the first iteration that is proposed to be contractually enforceable, UAC suggests that the ICA consider limiting the contractual enforceability provisions to only those obligations that are clear, certain and objectively measurable in the Code and would be considered to be significant breaches if not complied with by Code subscribers (as opposed to minor breaches only).

Contractual incorporation of the Code provisions (sections 1 – 9 based on the current proposal by the ICA) into insurance contracts which are subject to the Code raises some concerns for UAC, including the following, which are expanded further below:

[1] The Code defines "extraordinary events" as an event that is so significant in size or magnitude in its impact to customers, supply chains, or insurers' operations, or one that coincides with multiple other events that the Board of the Insurance Council of Australia declares it to be extraordinary.

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(a) increased likelihood for Code subscribers (including UAC members) to be exposed to vexatious or frivolous litigation arising from minor or technical breaches of the Code obligations incorporated into the insurance contracts; and

(b) the likely inflationary effect of the change (i.e., increased costs for Code subscribers arising from the increased compliance burden, ultimately resulting in increased premiums for policyholders at a time where affordability of insurance is a critical issue for the Australian insurance market).

Increased exposure to vexatious or frivolous litigation

In the revised Code's current proposed form, UAC submits that the contractual enforceability proposals will likely increase exposure to vexatious or frivolous litigation for Code subscribers (including for UAC members) in respect of technical or minor Code breaches, as they are not delineated from more substantive Code breaches (e.g. those which would constitute a significant breach of the Code).

In particular, paragraph 22 of the Code provides that *"If we breach those paragraphs [Section 1 to Section 9 of the Code which apply to your policy], you will have legal rights to enforce those paragraphs as part of it, unless the exceptions at paragraph 23 apply"*.

Although paragraph 26 provides that *"Where third-parties, including a Third-Party Beneficiary, are covered by this Code, they are not party to a policy with us, and do not have legal rights to contractually enforce the Code. These third-parties can complain to us or the Code Governance Committee, which can enforce our obligation to them"*, UAC also has some concerns that, to the extent sections 1 to 9 extend to third parties, for example service suppliers, repairers, builders, investigators and external experts, there may be increased risk of exposure for Code subscribers where acts or omission of third parties have occurred outside of the Code subscribers' control, remit or knowledge and for which they would not ordinarily be held responsible.

In circumstances where the revised Code does not distinguish between minor and significant breaches, and does not clearly identify the consequences of such breaches, there is increased risk of vexatious or frivolous litigation against Code subscribers, including from class actions where claimants may seek to allege systemic breach of Code obligations across large numbers of policies even where there is little or no actual consumer loss. Such class actions are typically funded by litigation funders (most of which are offshore), which effectively results in a redistribution of premiums from consumers over time to overseas litigation funders.

The adverse impact of the increased risk of class actions against insurers has already been experienced recently in the Australian insurance market in various classesand segments, with first the increase of premiums and then the subsequent withdrawal of capacity in the Australian insurance market as a result of such increased risks. UAC is concerned that the contractual enforceability of sections 1 – 9 of the revised Code (without delineation between provisions that would constitute minor or significant breaches giving rise to the contractual enforceability remedies) will result in the same withdrawal of capacity from the Australian insurance market by Code subscribers across a broader range of lines of business.

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Inflationary effect

UAC submits that the contractual enforceability as it is currently proposed in the Code could potentially have an inflationary effect on claims handling, dispute resolution costs, and premiums. In the current economic environment where inflation is rife and there are known affordability issues in the Australian insurance market, UAC submits that adding further obligations on Code subscribers through the introduction of contractual enforceability for sections 1 – 9 of the revised Code will inevitably result in a higher cost of managing claims and compliance which will be passed onto the customer. If premiums keep increasing, UAC believes that this will result in further underinsurance (increasing vulnerability) in Australian society. Rapidly evolving technology may also exacerbate these effects and gives rise to an increased risk of vexatious claims that are generated by claimants with the assistance of artificial intelligence (which is often inaccurate and generates voluminous materials) or other technology on the basis of minor breaches of the Code.

1.3 **UAC recommendation**

In light of the concerns outlined above, UAC proposes some suggestions for limiting the wide scope of the proposed contractual enforceability of the Code (currently proposed to extend to all of sections 1 to 9 of the Code). For example, UAC proposes establishing contractual enforceability for only certain aspects of the Code that are clear, certain and objectively measurable in the Code and would be considered to be significant breaches if not complied with by Code subscribers (as opposed to minor breaches only).

*Adopt a similar approach to ASIC Regulatory Guide RG 271: Internal dispute resolution (**RG 271**)*

In UAC's view, given the concerns raised above regarding the lack of delineation between minor and significant/substantive breaches of the Code and the interaction with the contractual enforceability regime, a possible approach that the ICA could adopt is to identify relevant provisions or sections of the revised Code that would be contractually enforceable or not, similar to the approach adopted by the Australian Securities and Investment Commission's (**ASIC**) with the introduction of the revised RG 271 in September 2021 in relation to internal dispute resolution (**IDR**) requirements for Australian Financial Services (**AFS**) licensees with retail clients, to meet ASIC's standards and requirements.

For example, the types of enforceable provisions in RG 271 include the requirement for IDR processes to be resourced so that it operates fairly, effectively and efficiently and the financial firm must regularly review whether the IDR process is adequately resourced (see RG 271.142). In contrast, ASIC notes at RG 271.9 that the parts of the guide which have not been highlighted are guidance to help financial firms to comply with their legal obligations such as RG 271.16 which provides as follows:

> *"To develop and maintain a positive complaint management culture, financial firms should have a robust IDR process, including all procedures, documents, policies, resources, governance and arrangements in place to manage complaints."*

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In summary, in light of the concerns outlined above, UAC proposes reducing the number of provisions of the Code that are enforceable (adopting an approach akin to RG 271 in highlighting only certain provisions as being enforceable).

In summary, UAC does not agree with the wide net of the Code's proposed contractual enforceability which, it considers, will have an inflationary effect on the businesses operated by Code subscribers by increasing the compliance burden and ultimately driving an increase in the overall cost of insurance products for policyholders.

2 Vulnerability

2.1 Proposed changes in the revised draft Code

UAC understands that the ICA proposes to introduce contractually enforceable and new definitions of "Vulnerability" and "Extra Care" under the revised Code. These definitions will be accompanied by corresponding enforceable obligations requiring Code subscribers to consider a range of factors when assessing whether a customer is experiencing vulnerability, including:

(a) health conditions;

(b) life events, such as relationship breakdown, family or domestic violence, or bereavement;

(c) resilience factors, such as caregiving responsibilities, financial hardship or poverty; and

(d) limited capability, including low levels of literacy, numeracy or financial understanding.

UAC further understands that the proposed revised Code will require subscribers to take reasonable steps to identify customers who may require "Extra Care" and to respond appropriately by providing information about, and access to, suitable support measures and assistance. These obligations are intended to ensure that vulnerable customers receive appropriate protection and support throughout their interactions with Code subscribers.

UAC recognises that the ICA proposes to issue non-binding vulnerability guidance (**Guidance**) alongside the revised Code to assist Code subscribers in meeting the proposed vulnerability and extra care obligations. UAC further notes that the revised Code expressly references this non-binding guidance at paragraph 141, which requires Code subscribers to develop and maintain systems, processes and procedures in accordance with the guidance. While the Guidance is described as non-binding, the proposed drafting appears to give it practical significance in informing how Code subscribers are expected to operationalise and demonstrate compliance with their vulnerability obligations.

UAC supports the objective of improving outcomes for customers experiencing vulnerability and does not oppose Code subscribers taking appropriate steps to identify and assist such customers. However, UAC has concerns regarding the proposal to make the new customer vulnerability obligations contractually enforceable under the revised Code.

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2.2 UAC views

UAC submits that the identification of vulnerability with a customer involves an inherently subjective assessment that is often difficult for Code subscribers to identify in practice. While certain indicators of vulnerability may be apparent, many of the factors contemplated by the revised draft Code's definition (such as mental health conditions, financial stress, caregiving burdens, or the impact of significant life events) may not be disclosed to the Code subscriber and may not be otherwise observable during ordinary customer interactions. In these circumstances, UAC does not consider that it is reasonable to expose Code subscribers to contractual liability for failing to identify matters of which they were not, and could not reasonably have been, aware in relation to the vulnerability of the customer.

The implementation of the ICA's proposed definitions and obligations will require substantial operational changes by Code subscribers. Code subscribers will need time to review and update existing policies, procedures, systems, training materials and customer engagement frameworks to ensure consistent application of the enforceable customer vulnerability obligations. Making these provisions immediately enforceable from the effective date of the new Code may create uncertainty and inconsistency across the industry while Code subscribers work to embed the new requirements into their operations.

UAC is also concerned that the proposed obligations may give rise to increased costs across the industry. To manage enforcement risk, Code subscribers are likely to implement additional compliance controls and more extensive documentation requirements. These measures may require increased investment in staff training, customer interaction systems, call recording and transcription capabilities, quality assurance processes and record-keeping frameworks. These additional costs may ultimately result in an inflationary outcome, contributing to higher premiums for policyholders.

UAC also notes that Code subscribers and their representatives are not medical professionals with psychological training. The revised draft Code may require front-line staff to make complex judgments regarding a customer's circumstances and level of vulnerability, particularly where indicators are subtle or ambiguous. For example, many mental health conditions are not readily apparent during routine interactions, and different individuals may exhibit very different behaviours despite experiencing similar circumstances. In UAC's view, imposing contractually enforceable obligations in circumstances involving such subjective assessments is disproportionate to the expertise reasonably expected of Code subscribers and their staff.

In addition, there is a risk that contractual enforceability of such customer vulnerability provisions may encourage retrospective assessments of Code subscriber conduct by the policyholder/claimant as an avenue to attempt to achieve a different outcome with the Code subscriber if an unfavourable outcome has been reached, based on information that only becomes apparent after the relevant interaction has occurred with the policyholder (e.g. a declined claim under a claims handling process governed by the relevant insurance contract and supplemented by other provisions in the Code, where the claimant pursues the Code subscriber for failing to identify their vulnerability at the beginning of the claims process where this was not apparent at that time).

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UAC's view is that a Code subscriber's conduct should be assessed with reference to the information that was reasonably available to it at the time. It would be unfair and impractical for Code subscribers to face allegations that they failed to identify vulnerability based on circumstances or diagnoses that were not disclosed and could not reasonably have been known at the relevant time.

UAC further considers that contractual enforceability may increase the incidence of opportunistic or fraudulent vulnerability claims. Given the subjective nature of many vulnerability indicators, the absence of clear boundaries regarding when obligations are triggered may create uncertainty and increase the potential for disagreement regarding whether vulnerability existed and whether additional assistance should have been provided.

2.3 UAC recommendation

UAC recommends that the ICA reconsider the inclusion of the customer vulnerability obligations within the contractually enforceable provisions of the proposed Code. Given the inherently subjective nature of vulnerability assessments, and the practical difficulties which Code subscribers face in identifying vulnerability where circumstances are not disclosed or readily apparent, UAC considers that certain vulnerability-related obligations may be better suited to be situated within the ICA's non-binding vulnerability Guidance, at least during an initial implementation period.

Given the introduction of new concepts and definitions regarding the identification and support of customers experiencing vulnerability under the revised Code, a principles-based guidance framework would provide Code subscribers with an opportunity to develop consistent processes, build operational capability and assess how the requirements function in practice. This phased approach would facilitate more effective implementation of obligations for Code subscribers and reduce the risk of inconsistent application.

However, if the ICA elects to proceed with contractual enforceability of the customer vulnerability provisions, UAC recommends that the Code provides clear, objective and operationally workable criteria regarding when vulnerability obligations are triggered and the steps Code subscribers are expected to take to comply. This would promote consistency across the industry, reduce the risk of retrospective assessments based on information unavailable at the relevant time, and provide Code subscribers with greater certainty regarding their obligations.

3 Breach Reporting

3.1 Proposed changes in the revised draft Code

UAC supports the proposed amendment to align the Code breach reporting timeframe with the statutory reporting timeframe under the *Corporations Act 2001* (Cth) (the **Corporations Act**). The current position, which requires Code breach reports to be submitted within 10 business days, diverges from the legislative regime, under which reportable situations must generally be reported to ASIC within 30 calendar days after the AFS licensee first knows, or is reckless with respect to whether, there are reasonable grounds to believe a reportable situation has arisen. Aligning the Code reporting timeframe to 30 calendar days will promote consistency

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and enable Code subscribers to undertake a more thorough assessment before reporting.

3.2 UAC views

Notwithstanding UAC's support for the alignment of the breach reporting timeframes, UAC considers there remains a lack of consistency between the various breach reporting regimes that apply to Code subscribers. As noted in UAC's Code Review Submission, UAC believes that efficiency and effectiveness of the Code could be improved through ensuring that definitions are equivalent among the various parties with respect to significant breaches and coordination between different parties would enable more efficiency, such as in respect of the breach reporting mechanisms for different regulators and oversight bodies in the industry.

Code subscribers (particularly insurers) may be required to assess and report the same conduct under multiple legal and regulatory frameworks, including:

(a) the reportable situations regime for AFS licensees under Chapter 7 of the Corporations Act;

(b) the Code;

(c) the Australian Financial Complaints Authority's (**AFCA**) systemic issues framework as per their Operational Guidelines; and

(d) the breach reporting regime for Australian Prudential Regulation Authority (**APRA**)-authorised insurers under section 38AA of the *Insurance Act 1973* (Cth).

The table below compares the differing definitions of a "significant breach" or "systemic issue" under the Corporations Act, the revised draft Code, and AFCA's Operational Guidelines, highlighting areas of overlap and duplication that may result in Code subscribers (who are also UAC members) having to report the same issue to multiple regulators.

Regime	Definition
Corporations Act	**Deemed significance test** Under s912D(4) of the Corporations Act, certain breaches of core obligations are taken to be significant ('**deemed significant breaches**'). Deemed significant breaches include: 1) breaches that constitute the commission of an offence and the commission of the offence is punishable on conviction for: a) Three months or more if the offence involves dishonesty; or b) 12 months or more in any other case;

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Regime	Definition
	2) breaches of a civil penalty provision (other than a civil penalty provision that is excluded under the regulations)[2]; 3) breaches that contravene s 1041H(1) Corporations Act or s 12DA(1) *Australian Securities and Investments Commission Act 2001* (Cth) (***misleading or deceptive conduct provisions***); 4) breaches that result, or are likely to result, in material loss or damage to: a) a person or persons to whom the AFS licensee or a representative of the licensee provides a financial product or a financial service as a wholesale or retail client. For a managed investment scheme or superannuation entity – a member or members of the scheme or entity. **<u>Second significance test</u>** The breach may be 'significant' under the second significance test in s 912D(5) of the Corporations Act which requires consideration of the following factors: 1) the number or frequency of similar breaches; 2) the impact of the breach on the financial services licensee's ability to provide financial services covered by the license; 3) the extent to which the breach indicates that the financial services licensee's arrangements to ensure compliance with those obligations are inadequate; or 4) any other matter prescribed by regulations made for the purposes of this paragraph.
The revised draft Code	The definitions section of the revised draft Code notes that a "Significant Breach" means a breach that is determined to be significant by having regard to all of the following factors, considered holistically and in combination: (a) the number and frequency of similar previous breaches; (b) the impact of the breach, or likely breach, on our[3] ability to provide our services;

[2] Note: Certain contraventions of core obligations for AFS licensees, including the civil penalty provisions, are no longer considered to be significant by virtue of s 6 of *ASIC Instrument 2024/620* and s 3 of *ASIC Instrument 2025/289*. E.g., a breach of a civil penalty provision relating to misleading or deceptive conduct that affects only one person (or one group of persons) and the contravention has not resulted in (and is unlikely to result in) any financial loss / damage to the person(s).

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Regime	Definition
	(c) the extent to which the breach, or likely breach, indicates 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. A breach will only be considered significant where, after considering all of these factors together, it is determined that the breach is significant in the context of the Code subscriber's overall compliance with the Code.
AFCA's Operational Guidelines	A.17 of AFCA's Operational Guidelines notes that a "systemic issue" is 'an issue that is likely to have an effect on consumers or Small Businesses in addition to any Complainant.' A.17 of the Operational Guidelines further elaborates on the definition of "systemic issue" by detailing that it is 'one that has been raised in a complaint or several complaints, or is otherwise identified by information obtained by, or provided to, [AFCA] that is likely to affect a class of persons beyond any person who lodged a complaint or raised a concern.' Several complaints of the same type or a single complaint may raise a systemic issue, provided that the effect of the issue may clearly extend beyond a single Complainant.

The definitions of a "significant" breach under the Corporations Act and the revised draft Code share a number of common features. Both frameworks require consideration of factors such as the number and frequency of similar breaches, the impact of the breach on the AFS licensee / Code subscriber's ability to provide services, and whether the breach indicates deficiencies in their compliance arrangements, with all of the factors to be taken into account when determining the significance of the breach. However, the Corporations Act adopts a broader approach by also capturing a range of "deemed significant" breaches (under section 912D(4) of the Corporations Act), including certain civil penalty contraventions, misleading or deceptive conduct, and breaches resulting in material loss or damage, irrespective of whether they satisfy the qualitative significance factors.

AFCA's systemic issues framework operates separately again, focusing not on the significance of a breach itself, but on the systemic nature of an issue (i.e., whether the issue is likely to affect a broader class of consumers or small businesses beyond the individual complainant). While there is clear overlap between these regimes, the differing thresholds and concepts create the potential for a single incident to trigger multiple reporting obligations across the CGC for the current and revised Code, ASIC, and AFCA, for UAC members who are subject to all of these regimes.

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These overlapping obligations impose considerable administrative burden without necessarily improving regulatory outcomes. In practice, Code subscribers expend substantial resources preparing multiple reports addressing the same underlying conduct for different regulators / stakeholders.

3.3 UAC recommendation

UAC therefore submits that consideration should be given to the revised Code containing a deeming provision under which a breach report submitted by a Code subscriber to another regulator such as ASIC, AFCA or APRA (as appropriate) is deemed to satisfy the equivalent Code breach reporting requirement, if the report contains the information reasonably required by the CGC under the revised Code. If such a deeming provision is introduced, there should be a mechanism by which the Code subscriber can confirm to the relevant regulator or oversight body that it intends to provide a breach report to another regulator in respect of the same conduct, before the deeming provision / single-reporting mechanism is engaged. UAC also considers that the Code subscriber should be notified where the regulator receiving the initial breach report intends to share that information with the CGC or another relevant regulatory or oversight body under such deeming provision, ensuring transparency and clarity regarding the reporting pathway.

This type of deeming mechanism is consistent with the existing deeming provision in section 912DAA(5) of the Corporations Act which recognises that where an AFS licensee is an APRA-regulated body (e.g. an insurer) and has given a report to APRA that contains all of the information that is required in a breach report in relation to the reportable situation for the purposes of the Corporations Act, such a report is taken to have been lodged with ASIC. This means that APRA-regulated bodies which are also AFS licensees benefit from a single breach reporting mechanism to the regulators, where the relevant breach arises from the same conduct or circumstances and involves an entity that is dually regulated by both APRA and ASIC. This type of deeming provision in the revised Code could assist with reducing unnecessary duplication of breach reporting by Code subscribers that are also regulated by other regulators such as ASIC, particularly in circumstances where:

(a) the definitions of “significant” breach under the Corporations Act (s912D(5)) and the revised draft Code both require similar consideration of those overlapping factors by both AFS licensees and Code subscribers; and

(b) the CGC already recognises in its CGC Guidance Note 2 (Significant breach obligations – 2025) that its view is that compliance issues arising from a breach report made by Code subscribers to ASIC or an AFCA determination that a matter represents a definite systemic issue, serious contravention or other serious breach, would likely also amount to a significant breach of the Code and would therefore by reportable to the CGC.

UAC further submits that breach reporting obligations should be accompanied by corresponding accountability measures for the CGC to respond within a certain prescribed timeframe to breach reports made by Code subscribers. Code subscribers are required to investigate, assess and report potential breaches within prescribed timeframes, yet there are no equivalent prescribed timeframes for the CGC to acknowledge receipt, provide status updates, communicate next steps or indicate expected timeframes for assessment. This can leave Code subscribers

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uncertain as to the progress or outcome of matters that have been reported. UAC considers that oversight bodies such as the CGC receiving breach reports should be subject to comparable service standards and response timeframes to those imposed on regulated entities.

Ultimately, the focus of any breach reporting framework should be whether the underlying issue has been identified and appropriately remediated. A reporting framework that prioritises remediation and regulatory efficiency will better promote consumer outcomes than one that requires Code subscribers to submit multiple reports to multiple bodies regarding the same conduct, particularly given that Code subscribers currently have no certainty as to progress or outcome of matters that have been reported to regulators or oversight bodies. UAC therefore encourages the ICA to pursue greater alignment between the Code and existing legislative and regulatory reporting frameworks, while reducing duplication and ensuring a proportionate compliance burden for Code subscribers.

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