



ICRC

Independent Competition and Regulatory Commission

UTILITY REPORTING OF MATERIAL BREACHES AND NON-COMPLIANCE

The Independent Competition and Regulatory Commission (the Commission) was established by the *Independent Competition and Regulatory Commission Act 1997* (ICRC Act) to determine prices for regulated industries, advise government about industry matters, advise on access to infrastructure, and determine access disputes. The Commission also has responsibilities under the ICRC Act for determining competitive neutrality complaints and providing advice about other government-regulated activities.

The Commission has responsibilities under the *Utilities Act 2000* for a range of matters relating to the provision of utility services including utility licensing, standard customer contracts, and industry codes.

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1 Background

The licences of all utilities licensed under the *Utilities Act 2000* contain the following obligations:

- to notify the Commission of any material breaches (clause 7.2), and
- to provide a statement to the Commission of any non-compliance (clause 7.3).

In addition, the Commission's standing instructions to utilities in relation to matters to be contained in their annual reports prepared under subsection 25(2)(d) of the Utilities Act require statements on clause 7.2 breaches and on compliance generally.

2 Aim of guidance material

This guidance note sets out the Commission's position on what would constitute utility compliance under the terms of clauses 7.2 and 7.3. The aim is to:

- provide greater certainty for utilities and avoid a situation in which a utility may be held to be in breach of its licence through confusion as to the Commission's requirements
- ensure that the Commission receives timely and meaningful reporting of matters most directly relevant to its statutory responsibilities
- avoid onerous and unnecessary demands on utilities.

3 Reporting requirements under clause 7.2

Clause 7.2 states that "[i]f the Licensee becomes aware of a material breach of this licence and any Law or such other code of practice, directions and guidelines applicable to the Licensee and to any of the other services to be rendered by the Licensee that it is required to comply with under clause 6.2, the Licensee must notify ICRC of the breach as soon as practicable."

3.1 What is a material breach for the purposes of clause 7.2?

It is a decision for the utility whether an incident constitutes a material breach. The following is provided to assist utilities in making such a decision. Reporting under clause 7.2 is intended for serious matters. In cases of doubt, however, utilities may choose to handle "borderline" cases under this heading.

Consistent with the Commission's Compliance Audit Framework,¹ a breach would be potentially "material" if the consequences of the breach, in terms of the impact on customers, was high. Relevant impacts to be considered in coming to an overall assessment would include:

- cost to customers or the public
- danger to public health or safety
- damage to property

¹ ICRC Report 14 of 2005

- loss or reduction of essential services
- environmental damage
- adverse public reaction arising from failure to meet community expectations.

The following may also be relevant to assessing whether a report should be made:

- the significance of the breach to the provision of services under the licence
- whether the breach is a systemic problem
- the extent of the breach including the number of customers affected
- the costs involved
- the likely community interest in the matter
- whether the same matter has been identified in previous reports.

3.2 Timeframe for the report

If the matter is serious enough to raise in the context of the clause 7.2 requirement, the breach should be brought to the Commission's attention by the working day after the utility becomes aware of it, and no later than five working days afterwards.

3.3 Matters to be covered in the report

The matters covered in the report should be tailored to the considerations that brought the utility to the conclusion that the breach was material. It would normally:

- state that it is a report under clause 7.2 of the licence
- list the considerations that led the utility to the conclusion that the breach was material
- cover the matters listed for clause 7.3 (the circumstances of, and reasons for the non-compliance, consequences of the non-compliance—including any penalties imposed, and measures that the Licensee will put in place to rectify that non-compliance)
- be kept short (the Commission will, if required, seek additional detail)
- comment on whether the incident has been reported to other regulators.

The fact that the incident has been reported to other regulators does not remove the obligation for reporting.

A summary of all clause 7.2 reports are to be included in utility annual reports to the Commission.

4 Reporting requirements under clause 7.3

Clause 7.3 states that “[i]f the Licensee has not complied with any of its obligations under clause 6.2, the Licensee must identify those obligations and provide a brief statement to ICRC that explains the circumstances of, and reasons for the non-compliance, consequences of the non-compliance (including any penalties imposed) and outlines measures that the Licensee will put in place to rectify that non-compliance.”

4.1 How should non-compliance be brought to the Commission's attention?

It is a decision for the utility whether an incident constitutes non-compliance and, having assessed that the non-compliance does not fall under the clause 7.2 reporting requirement, to assess whether the incident is relatively minor or otherwise.

The considerations for the purposes of determining materiality under clause 7.2 may also be relevant in determining the seriousness of the non-compliance.

4.2 Timeframe for the report

Non-compliance that is assessed as relatively minor or trivial can be held for reporting in the context of utility annual reports.

If, in the opinion of the utility, the non-compliance, even relatively minor or trivial points to an inadequacy in the utilities regulatory framework (e.g. a requirement that is open to frequent non-compliance because of poor definition), the utility is encouraged to provide early advice to the Commission.

In cases of doubt, a brief report to the Commission remains appropriate. The Commission will seek further information as required.

4.3 Matters to be covered in the report

Where a utility provides a report to the Commission under clause 7.3 outside the annual report, it should:

- state that it is a report under clause 7.3 of the licence
- list the considerations that led the utility to the conclusion that the non-compliance, while not a material breach, warranted reporting
- cover the matters listed in the licence requirement set out in clause 7.3 (the circumstances of, and reasons for the non-compliance, consequences of the non-compliance (including any penalties imposed) and measures that the Licensee will put in place to rectify that non-compliance)
- comment on whether the incident has been reported to other regulators.

The fact that the incident has been reported to other regulators does not remove the obligation for reporting.

The Commission will also seek a summary of all clause 7.3 reports in utility annual reports.

Appendix: Standard licence clauses 6.2, 7.2 and 7.3

Clause 6.2 (referred to in Clause 7.2):

"Without limiting the generality of clause 6.1 [licensee to comply with all laws], ... the Licensee must comply with: (1) any requirement of the Act; (2) relevant Industry Codes including the performance standards (if any) prescribed under those codes; (3) relevant Technical Codes including the performance standards (if any) prescribed under those codes; (4) any direction given to the Licensee by ICRC or the Chief Executive under the Act; and (5) any applicable ring fencing requirements."

Clause 7.2:

"If the Licensee becomes aware of a material breach of this licence and any Law or such other code of practice, directions and guidelines applicable to the Licensee and to any of the other services to be rendered by the Licensee that it is required to comply with under clause 6.2, the Licensee must notify ICRC of the breach as soon as practicable."

Clause 7.3:

"If the Licensee has not complied with any of its obligations under clause 6.2, the Licensee must identify those obligations and provide a brief statement to ICRC that explains the circumstances of, and reasons for the non-compliance, consequences of the non-compliance (including any penalties imposed) and outlines measures that the Licensee will put in place to rectify that non-compliance."