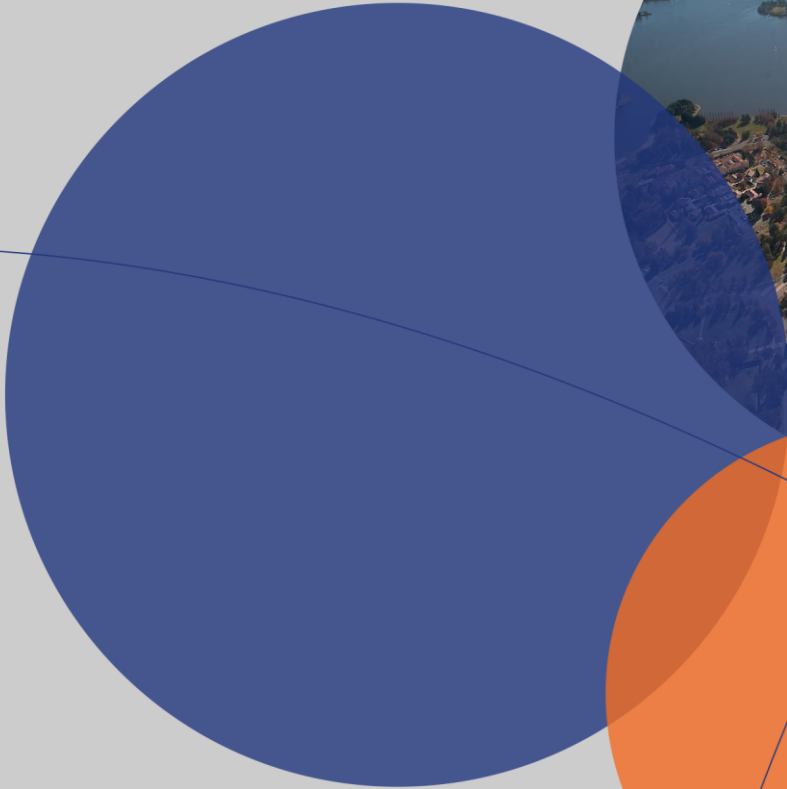




ICRC
independent competition and regulatory commission

Material Breach Guideline

June 2021



The Independent Competition and Regulatory Commission is a Territory Authority established under the *Independent Competition and Regulatory Commission Act 1997* (the ICRC Act). We are constituted under the ICRC Act by one or more standing commissioners and any associated commissioners appointed for particular purposes. Commissioners are statutory appointments. Joe Dimasi is the current Senior Commissioner who constitutes the Commission and takes direct responsibility for delivery of the outcomes of the Commission.

We have responsibility for a broad range of regulatory and utility administrative matters. We are responsible under the ICRC Act for regulating and advising government about pricing and other matters for monopoly, near-monopoly and ministerially declared regulated industries, and providing advice on competitive neutrality complaints and government-regulated activities. We also have responsibility for arbitrating infrastructure access disputes under the ICRC Act

We are responsible for managing the utility licence framework in the ACT, established under the *Utilities Act 2000* (Utilities Act). We are responsible for the licensing determination process, monitoring licensees' compliance with their legislative and licence obligations and determination of utility industry codes.

Our objectives are set out in section 7 and 19L of the ICRC Act and section 3 of the Utilities Act. In discharging our objectives and functions, we provide independent robust analysis and advice.

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Correspondence or other inquiries may be directed to the Commission at the following address:

Independent Competition and Regulatory Commission
PO Box 161
Civic Square ACT 2608

We may be contacted at the above address, or by telephone on (02) 6205 0799. Our website is at www.icrc.act.gov.au and our email address is icrc@act.gov.au

1. Background

The *Utilities Act 2000* (ACT) provides that a person, including a company, must not provide a utility service except in accordance with a licence. The commission issues and regulates licenced utilities in the ACT.

Current licences issued to utilities are on our website at: <https://www.icrc.act.gov.au/utilities-licensing/current-licences>.

Each licence provides that there are two categories of licence breaches: breaches that are 'material' and any other breach that is not found to be 'material'.

A utility must tell us of any 'material breaches' and give us a written statement. The utilities are also required to note material breaches in their annual reports to us.

This guidance note:

- describes what is a material breach
- explains how to report a material breach
- will help utilities give us timely and meaningful reports of material breaches
- helps avoid unnecessary reporting by clarifying our expectations of what utilities should report to us.

Making a report to us does not remove a utility's reporting obligations to the Technical Regulator and other organisations, and vice versa.

2. Reporting requirements for material breaches

Clause 8.2 of each utility licence states that:

The Licensee must notify the ICRC if it becomes aware of a material breach of this licence, or any Law, Industry Code, Technical Code or direction that Licensee is required to comply with under clause 6.2 as soon as practicable and in accordance with any reporting guidelines published by the ICRC from time to time.

2.1. What is a material breach?

We are responsible for making the final decision on whether a breach is a ‘material breach’ of the licence. We have developed this guideline to help the licensed utilities identify when a material breach has occurred. Where there is a material breach, a timely notification from the utility is critical. This helps to reduce the adverse consequences of the breach by allowing us to work with the utility to ensure appropriate actions are taken to rectify the breach as soon as possible and the utility takes any actions needed to avoid a recurrence of the breach.

In deciding whether a breach is ‘material’, the utility should consider the consequences of the breach for the safety of workers and the public, the supply of services, the environment, property, and the community generally. At a high level, reporting under clause 8.2 is intended for matters that:

- have serious consequences, and/or
- have a high impact on customers.

Table 1 sets out some factors that the utilities may wish to consider in assessing whether a breach is material.¹

In ‘borderline’ cases, utilities may wish to take a conservative approach and may call the commission’s Senior Director Legal to discuss whether a report needs to be made.

¹ An example used in this document is not exhaustive and may extend, but does not limit, the meaning of the part that it relates to.

Table 1 Factors to consider in assessing whether a breach is material

Consideration	Impact or consequence of breach
Loss or reduction of essential services	<ul style="list-style-type: none"> - Where the non-compliance impacts on a customer(s) such that it causes major or severe inconvenience or financial loss due to disruption of supply For example: a significant number of customers which will not receive a satisfactory level of service due to the breach - Interruption of supply affecting critical infrastructure or cessation of core/critical service essential to business continuity.
Licensee’s financial viability	<ul style="list-style-type: none"> - Any significant reduction in financial capacity which may compromise the licensee’s ability to continue to supply the services covered by the licence
Major change in licensee’s operations	<ul style="list-style-type: none"> - Any significant operational change which may negatively affect the licensee’s ability to supply the services covered by the licence or significantly reduce reliability, safety or quality of the services
Danger to public health or safety	<ul style="list-style-type: none"> - Where the non-compliance results in a moderate, major or severe safety consequence or public health issue - Extensive injuries, impairment or extended period of recovery and medical intervention - Widespread illness attributable to drinking water contamination or sewerage exposure [for water utilities only]
Adverse public reaction arising from failure to meet community expectations	<ul style="list-style-type: none"> - Where the non-compliance has the potential to cause major or severe reputation damage to the utility and damage public confidence in the supply of the utility service - Major dissatisfaction across multiple stakeholder groups and/or adverse local media attention across multiple media channels
Cost to customers or to the public	<ul style="list-style-type: none"> - Where the non-compliance impact causes significant cost to consumers or the public, for example,
Legal/compliance	<ul style="list-style-type: none"> - A breach of law in which major consequences such as litigation, fines, external audit regimes are likely to occur
Damage to property	<ul style="list-style-type: none"> - Where the non-compliance impacts on customers or public such that the property damage results in any other defined high impact

Environmental damage	<ul style="list-style-type: none"> - Major adverse impacts on environment, threatened species or habitat, and/or damage to large area of native vegetation - Damage to heritage asset
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2.2. Timeframe for reporting a material breach

If the utility believes that a licence breach may fall within the description of a material breach, the utility should notify the commission’s Chief Executive Officer within 24 hours of first becoming aware of the breach. If the utility determines that a material breach has occurred, it should also provide a written report of the breach to the commission no later than 5 working days after becoming aware of the breach.

If the utility is unsure whether the licence breach should be classified as a material breach, it should contact the Chief Executive Officer by telephone for initial guidance.

2.3. 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 8.2 of the licence
- explain why the utility considers the breach is a material breach and list any factors it considered in reaching this view
- give details of the circumstances of, and reasons for the non-compliance, and the actual and/or potential consequences of the non-compliance— and
- explain what actions the licensee has taken to rectify the non-compliance, any further actions it plans to take to rectify the non-compliance and to prevent a recurrence of the non-compliance, and any actions it has taken or plans to take to address the consequences of the non-compliance
- give details on whether the incident has been reported to other regulators.

A summary of all clause 8.2 reports must be included in the utility’s annual report to us for the year in which the breach occurred.

2.4. Follow-up report

When a utility has submitted a ‘material breach’ report as described in section 2.3, the utility should give us a subsequent report as necessary after all planned actions have been completed.

The follow-up report should include:

- an update on what actions have been taken to resolve the non-compliance
- an update on what actions still need to be taken, if applicable
- an update on any plans made to prevent the non-compliance from occurring again
- an update on the consequences of the non-compliance, including actions taken by other regulators.

3. Reporting requirements for non-material breaches

Clause 8.3 of each utility licence states that:

(1) If the Licensee has not complied with any of its obligations under clause 6.2, the Licensee must identify those obligations and provide a statement to the ICRC that explains the:

(a) circumstances of, and reasons for the non-compliance,

(b) consequences of the non-compliance (including any penalties imposed), and

(c) outlines measures that the Licensee will, or has, put in place to rectify the non-compliance.

(2) The non-compliance statement must be provided in accordance with any reporting guidelines published by the ICRC from time to time, and in the absence of any such guideline, it must be included with the annual compliance report outlined in clause 8.4.

3.1. Timeframe for the report

Utilities must report non-material breaches in their annual utility annual licence report to us.

However, if in the opinion of the utility, the non-compliance, even if it is relatively minor, points to an inadequacy in the management of its compliance with its licence obligations, the utility is encouraged to contact us to give us early advice on the problem and how the utility plans to correct it. This is particularly the case where the inadequacies in the utility's compliance processes have created a systemic issue that has caused multiple non-material breaches to occur.



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