

Appendix to *National Rail Safety Guideline for Meaning of Duty to Ensure Safety So Far As Is Reasonably Practicable*: NSW



INDEPENDENT
TRANSPORT
SAFETY AND
RELIABILITY
REGULATOR

<p>Purpose</p>	<p>This Appendix details the way in which the ITSRR implements the <i>National Rail Safety Guideline for Meaning of Duty to Ensure Safety So Far As Is Reasonably Practicable</i> and explains differences between the <i>Rail Safety Act 2008</i> (the NSW Act) and the National Model Legislation in respect of general rail safety duties.</p>
<p>Scope</p>	<p>The ITSRR implements the <i>National Rail Safety Guideline for Meaning of Duty to Ensure Safety So Far As Is Reasonably Practicable</i> consistently with the NSW Act.</p>
<p>Risk management and justified decision making processes described in National Guideline</p>	<p>Section 2 of the <i>National Rail Safety Guideline for Meaning of Duty to Ensure Safety So Far As Is Reasonably Practicable</i> describes risk management and justified decision making processes. These processes assist rail transport operators in managing and minimising their compliance risk. However, they do not provide a guarantee of compliance with the general rail safety duties.</p> <p>It should be noted that rail transport operators are required by the National Model Regulations and the NSW <i>Rail Safety (General) Regulation 2008</i> to include a risk ranking in the risk register. Such rankings are useful in the process of managing risks. However, it must be recognised that failure to treat one risk because resources were directed to a higher priority risk does not necessarily mean that a rail transport operator has done all that is reasonably practicable to ensure safety.</p>
<p>Differences between the NSW Act and the National Model Legislation.</p>	
<p>General Rail Safety Duties in NSW Act</p>	<p>The general rail safety duties of the NSW Act are drafted consistently with the National Model Legislation. However, section 11 of the NSW Act places the onus on the defendant to prove, on the balance of probabilities, that it was not reasonably practicable to do more than was in fact done to satisfy the duty.</p> <p>There is a significant body of case law developed by the New South Wales Industrial Court under the <i>Occupational, Health and Safety Act 2000</i> ('OHS Act'), including as to the meaning of 'so far as is reasonably practicable' (SFAIRP), which is relevant in considering the scope of the general rail safety duties in NSW. To the extent it is applicable, this case law takes precedence over the National Guideline.</p>

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	<p>The relevant principles relating to SFAIRP under the OHS Act include the following:</p> <ul style="list-style-type: none"> • Establishing the SFAIRP defence requires a balancing of the nature, likelihood and gravity of the risk to safety occasioning the offence with the costs, difficulty and trouble necessary to avert the risk. • At one end of the scale, it could not be reasonably practicable to take precautions against a danger which could not have been known to be in existence. • At the other end of the scale are cases where there are known or obvious risks to safety. In these cases the assessment of the reasonable practicability of steps to address the risk requires a balancing of the quantum of the risk with the sacrifice (in money, time and trouble) in adopting the measures necessary to avert the risk. • Where there is a known risk which entails the potential for serious injury to persons in the workplace, the defendant will generally have to demonstrate that the costs, difficulty or trouble occasioned by the measures significantly outweigh the risk. <p>See <i>WorkCover Authority of New South Wales (Inspector Byer) v Cleary Bros (Bombo) Pty Ltd</i> (2001) 110 IR 182</p>
<p>Occupational Health and Safety Act 2000</p>	<p>The OHS Act will, in many instances, apply to a rail transport operator as well as the NSW Act. It prevails over the NSW Act to the extent of any inconsistency.</p> <p>It should be noted that under the OHS Act, decisions of the NSW Industrial Court (and its predecessors) establish (among other things):</p> <ul style="list-style-type: none"> • The duty to ensure the health, safety and welfare is absolute. • The duty is both preventative and remedial in nature and is not necessarily satisfied by carrying out what ought be done by a reasonable or prudent person in the circumstances. • The duty also includes risks which are not reasonably foreseeable - although not necessarily risks which are merely speculative or unduly remote.

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	<ul style="list-style-type: none">• The duty is to be pro-active rather than re-active. Employers must 'exercise abundant caution, maintain constant vigilance and take all practicable precautions to ensure safety in the workplace'. <p>See <i>Workcover Authority of New South Wales (Inspector Keelty) v Crown in the Right of New South Wales (Police Service of New South Wales) (No 2)</i> [2001] NSWIRComm 90 at 20; <i>South Sydney Junior Rugby League Club Ltd v WorkCover Authority of NSW (Inspector Bestre)</i> (2005) 142 IR 373 at 383; <i>Workcover Authority of New South Wales (Inspector Farrell) v Schrader</i> [2002] NSWIRComm 25.</p>
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