

Enforceable Voluntary Undertakings Policy



INDEPENDENT
TRANSPORT
SAFETY AND
RELIABILITY
REGULATOR

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1. Purpose

The NSW Independent Transport Safety and Reliability Regulator (ITSRR) has the principal objective of facilitating the safe operation of transport services in New South Wales. This is achieved through regulation of the rail industry in accordance with the *Rail Safety Act 2008* and supporting regulations, guidelines and policies, and promotion of safety as a fundamental objective in the delivery of transport services.

The Independent Transport Safety and Reliability Regulator (ITSRR) may accept written undertakings from persons who have, or may have, contravened the Act or the Regulations.

The purpose of this policy is to outline the ITSRR's:

- criteria for accepting an undertaking;
- criteria for considering a variation or withdrawal of an undertaking; and
- approach to enforcing an undertaking.

2. Scope

This policy applies to dutyholders under the Act, and to the ITSRR and its officers.

3. Definitions

Act means the *Rail Safety Act 2008* (NSW).

rail transport operator has the meaning given to it in the Act.

railway operations has the meaning given to it in the Act.

Regulations means the *Rail Safety (General) Regulation 2008* (NSW) and the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* (NSW).

undertaking means an enforceable voluntary undertaking given by a person and accepted by the ITSRR in accordance with section 140 of the Act.

4. Legislative framework

The ITSRR will adopt a graduated approach to compliance with, and enforcement of, the Act. The ITSRR does not use these actions sequentially and may choose to use a combination of these measures to facilitate compliance, beginning at the most appropriate point in the hierarchy:

- provision of practical, constructive information about legislative requirements, particularly in relation to risk and safety management systems;
- non-conformances;
- improvement notices;
- prohibition notices;

- directions to accredited operators to amend their safety management system;
- penalty notices;
- variation of accreditation or conditions or restriction on accreditation;
- enforceable voluntary undertakings;
- prosecution; and
- suspension or revocation of accreditation.

When choosing between litigation or an administrative solution, the ITSRR will take the approach which it considers likely to produce the best safety outcomes.

The importance of section 140 of the Act is that it greatly increases the effectiveness of an administrative resolution approach as undertakings are ultimately enforceable by the court.

Thus, accepting undertakings is one way the ITSRR can enforce railway safety compliance under the Act and promote rail safety outcomes. The circumstances under which such an undertaking may be accepted are outlined in this policy and in the *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*.

4.1 Undertakings

Section 140 of the Act covers giving and accepting of undertakings. The ITSRR may accept an undertaking given by a person related to an alleged or actual contravention by that person of the Act or the Regulations. The ITSRR cannot require a person to enter into an undertaking. Conversely, a person cannot compel ITSRR to accept an undertaking. The person may only withdraw or vary the conditions of that undertaking if the ITSRR agrees in writing.

The ITSRR does not have the power to demand or require an undertaking, but may raise it as an option, leaving it to the other party to decide whether to pursue it or not.

Staff of the ITSRR may canvass the possibility of an undertaking in the course of their consideration of a matter. In doing so, they may give advice which reflects the ITSRR's general attitude to the matter, without pre-empting its ultimate decision.

It is important to understand that rail safety officers are not empowered to accept undertakings. That is the responsibility of the Chief Executive on behalf of the ITSRR.

The consequence of accepting an undertaking is that neither the ITSRR nor a rail safety officer may bring proceedings against the person giving the undertaking in relation to a contravention, or alleged contravention, of the Act or Regulations by that person to which the undertaking relates while it is in force. This does not, however, prevent the ITSRR from bringing proceedings in respect of any subsequent contravention constituted by conduct that is the subject of the undertaking.

4.2 Enforcement by the ITSRR

Under section 141, if the ITSRR considers that a person has contravened an undertaking, it may seek enforcement of the undertaking. To do this, it may apply to a Local Court constituted by an Industrial Magistrate.

The Court may make orders about the person's compliance with the undertaking, or discretionary orders, if it is satisfied that the person has contravened an undertaking.

5. Policy statements

This section explains the ITSRR's policy on undertakings based on its powers and obligations under the Act.

5.1 Giving and accepting undertakings

The ITSRR has absolute discretion as to whether it will accept an undertaking as an alternative to other enforcement actions available under the Act.

In exercising its discretion, the ITSRR will consider its proposed regulatory action in the context of the Act and Regulations and the principles described in the *National Guideline for Compliance and Enforcement for Rail Safety* and whether such an action is the most appropriate option for the circumstances. The ITSRR may choose to accept an undertaking where, in its opinion, the public interest is better served by accepting an undertaking than proceeding with a prosecution.

The ITSRR may consider a number of factors when deciding whether accepting an undertaking is an appropriate regulatory outcome. These include, but are not limited to:

- the nature of the alleged breach in terms of:
 - its impact on third parties and the community at large;
 - the size of the business/es involved;
 - the history of complaints against the business/es and of complaints in the industry and any relevant previous court or similar proceedings;
- whether a person is likely to comply with the undertaking;
- whether a person is prepared to acknowledge that the ITSRR has reason to be concerned about the alleged breach;
- the regulatory impact of the undertaking compared to that of the other forms of enforcement remedy;
- the cost-effectiveness for all parties of pursuing an administrative resolution instead of court action; and
- the prospects for rapid resolution of the matter.

Every undertaking is tailored to the particular circumstances of the matter and will contain specific undertakings clearly setting out the person's obligations. The ITSRR's acceptance of an undertaking in a particular set of circumstances should not be regarded as a precedent.

An undertaking will not take effect until it is formally accepted by the Chief Executive of the ITSRR, or an authorised delegate of the Chief Executive.

The ITSRR may accept an undertaking if:

- the person has contravened or allegedly contravened the Act or Regulations;
- the person has applied to the ITSRR in writing;
- the application sets out in detail their proposed actions and the date/s by which they intend to comply with the undertaking (large programs of work may need specific project milestone dates for compliance); and
- the proposed actions are described clearly enough and in enough detail to enable the ITSRR, other agencies and the Local Court to review compliance.

In determining whether the public interest is better served by acceptance of an undertaking than by proceeding with a prosecution, the ITSRR may consider, among other things, whether:

- the actions proposed address the matters which have given rise to the perceived breach;
- actions are proposed to prevent a recurrence of the breach;
- the ITSRR considers that the acceptance of an undertaking is more likely than other enforcement actions to:
 - improve the safety related outcomes;
 - result in the development or strengthening of a railway safety compliance culture;
 - lower the risk of future breaches of the Act or the Regulations.

5.2 Form of undertakings

The following is a non-exhaustive list of the matters which the ITSRR will ordinarily require a person to specify in any undertaking. However, it is the responsibility of the person proposing specific undertakings to consider what material actions will prevent further contravention of the Act or Regulations. It is also their responsibility to consider whether any other actions are needed to rectify the consequences of any past contravention or alleged contravention.

The ITSRR will only accept an undertaking when the person proposes to:

- stop the particular conduct or alleged breach that concerns the ITSRR; and
- not recommence that conduct or alleged breach.

An undertaking must also set out how the person will:

- address the conduct or alleged breach;
- prevent that conduct or alleged breach from occurring again; and/or

- rectify the consequences of the conduct and/or the alleged breach.

In addition, an undertaking must set out:

- details of the proposed monitoring and reporting mechanisms (for example, internal control/compliance programs);
- the name of the contact officer who is responsible for monitoring and complying with the undertaking; and
- a proposed internal monitoring program.

5.3 Response by the ITSRR to applications to give undertakings

The ITSRR will acknowledge any offer of undertaking given by a person, or a request to vary or withdraw an existing undertaking within 21 days. The ITSRR will make a decision as soon as reasonably practicable and after considering:

- the nature of the contravention or alleged contravention giving rise to the offer of undertaking, the substance and complexity of the proposed undertaking itself and whether the public interest is better served by accepting an undertaking than proceeding with a prosecution;
- the nature of the person's proposed variation to any existing undertaking and the circumstances giving rise to the person's request for variation or withdrawal; and
- the surrounding circumstances in which the offer of undertaking, or variation proposal is made.

Before determining whether to accept an undertaking from a person, the ITSRR may:

- consult with the person and/or other agencies about any aspect of the proposed undertaking; and
- request that the person provide further information, including documents, about any matters which the ITSRR considers relevant.

5.4 Acceptance of undertakings and acceptance of variations to and withdrawals of undertakings by the ITSRR

The ITSRR will notify a person in writing if it accepts a person's undertaking (or a variation or withdrawal of an existing undertaking). The ITSRR should not be taken to have accepted any offer of undertaking or agreed to any request to vary or withdraw any undertaking unless the ITSRR issues its written notice of acceptance.

If the ITSRR consults with, or requests documents or information from, any person about an offer of undertaking or a request to vary or withdraw an undertaking this does not indicate that it has made a decision on that offer or request or that an undertaking, variation or withdrawal in some form will be accepted.

5.5 Rejection by the ITSRR of an offer of undertaking or request to vary or withdraw an undertaking by a person

The ITSRR will notify a person in writing if it rejects an undertaking or a request to vary or withdraw an existing undertaking.

5.6 Publication of undertakings

The ITSRR may publish details on its website if it accepts an undertaking or a request to vary or withdraw an existing undertaking.

The ITSRR may limit publication if it would not be in the public interest (eg if there are overriding considerations of confidentiality or of safety to persons or to property).

The ITSRR may also require the person giving the undertaking to let other railway operators know of that undertaking by publishing details in a place and within a timeframe to be specified in that undertaking.

5.7 Variation or withdrawal of undertakings by a person

Under section 140(2) of the Act a person may withdraw or vary undertakings with the written consent of the ITSRR. This allows negotiations for changes if undertakings are subsequently found to be too hard to comply with, not practical or where changes in circumstances occur.

An application by a person to vary or withdraw an undertaking must:

- be made in writing;
- set out the reasons for the application;
- detail any proposed variation including the date/s from which it will take effect (large programs of work may need specific project milestone dates for variation); and
- describe the proposed changes clearly enough and in enough detail to enable the ITSRR, other agencies and the Local Court to review compliance with the altered undertaking.

In reviewing an application to vary or withdraw an undertaking the ITSRR will consider whether:

- the terms of the undertaking need to change to reflect a substantial change in the underlying railway operations of the person who gave the undertaking that relates to the conduct or matter that is the subject of the undertaking, or some of the terms are no longer relevant; and
- the proposed changes are such that any risks to safety arising from the relevant railway operations are reduced 'so far as is reasonably practicable'.

5.8 Enforcement of undertakings by the ITSRR

If the ITSRR has reasonable grounds to believe that a person has contravened an undertaking, the ITSRR is entitled to seek orders from the Local Court for enforcement.

Where the ITSRR has reason to believe that a person has not complied with an undertaking, it will seek to resolve the matter by consultation.

If consultation does not bring about the result the ITSRR is seeking, it will apply to the court for appropriate orders including:

- a declaration that the person has breached the undertaking;
- an order that the person must comply with the undertaking;
- an order that the person take specified action to comply with the undertaking; or
- other orders as the court considers appropriate.

To determine whether to seek orders enforcing an undertaking, the ITSRR may take into account all relevant information and the following criteria:

- whether enforcement is in the public interest, determined by such factors as:
 - the seriousness of the alleged breach and whether its nature is of considerable public concern;
 - the impact of the enforcement action (ie reducing the likelihood that other persons will breach undertakings) or specific deterrence (ie reducing the likelihood that the person who has given the particular undertaking will commit a further breach of undertaking);
 - the availability and likely effectiveness of any alternatives to enforcement, including prosecution for the subsequent contravention of the Act; and
- whether the person has repeatedly breached safety duties; and
- whether there is sufficient evidence of the breach of the undertaking.

If the conduct involved in the breach of the undertaking itself constitutes a breach of the Act, then the ITSRR may bring proceedings for an offence in respect of that conduct.

6. Roles and responsibilities

6.1 Chief Executive Officer

The Chief Executive of the ITSRR has the authority to accept, vary or withdraw undertakings. The Chief Executive may delegate this authority to another senior officer of the ITSRR.

6.2 Divisional Executive Directors

Transport Safety Regulation Division is responsible for preparing advice and making recommendations to the Chief Executive.

Individual officers within the Division responsible for assessing applications for an undertaking must do so in a manner which ensures consistency, transparency, accountability and impartiality in decision-making.

All decisions, and the reasons for them, must be clearly documented and be supported by sufficient evidence to substantiate the alleged breach of the undertaking including for example:

- field notes;
- photographs; and
- diagrams.

7. Supporting documentation

- *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*

8. Approval/review/amendments history

Amendment/ Review No	Version No.	Amended by	Descripti on
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Approved
Carolyn Walsh
Chief Executive