

Managing Compliance Through Inspections Policy



INDEPENDENT
TRANSPORT
SAFETY AND
RELIABILITY
REGULATOR

Contents

1. PURPOSE..... 3

2. SCOPE..... 3

3. DEFINITIONS 3

4. LEGISLATIVE FRAMEWORK 4

5. POLICY STATEMENT/S 4

5.1 Goals of carrying out inspections 4

5.2 Circumstances under which the ITSRR carries out inspections..... 5

5.3 How the ITSRR carries out inspections 5

5.4 Possible actions from inspections 5

5.5 Circumstances in which regulatory actions are appropriate 6

6. ROLES AND RESPONSIBILITIES 6

7. SUPPORTING DOCUMENTATION 6

8. APPROVAL/REVIEW/AMENDMENTS HISTORY..... 7

ATTACHMENT A POSSIBLE REGULATORY ACTIONS ARISING FROM INSPECTIONS 8

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 purpose of this policy is to outline the ITSRR's approach to conducting inspections into compliance under the Act and the circumstances in which ITSRR might apply specific regulatory actions arising from findings.

2. Scope

This policy applies to the conduct of inspections as a means of determining compliance with or breaches of rail safety legislation by duty holders. This policy also covers the possible regulatory actions that may be taken to address findings from compliance inspections.

The circumstances in which it might be appropriate for the ITSRR to use one or more of these regulatory actions are described in Attachment A.

This policy is applicable to rail safety officers and to rail transport operators and other persons conducting railway operations.

This policy is one of a series of operational policies supporting the *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*. Other policies include:

- *Managing Compliance Through Advice, Education and Training;*
- *Managing Compliance Through Audits;* and
- *Managing Compliance Through Investigations.*

3. Definitions

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

inspection means an inspection of the railway operations of a rail transport operator or any other person.

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

rail safety officer has the meaning given to it in the Act.

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

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

4. Legislative framework

The Act sets out the legal requirements for rail transport operators, other persons conducting railway operations and other persons including:

- a duty to ensure safety;
- establishing and reviewing safety management systems;
- applying for and complying with accreditation and any conditions or restrictions of that accreditation, except in specific circumstances such as an exemption under s60 (private sidings);

To facilitate the safe operation of transport services in NSW the *Transport Administration Act 1988* confers on the ITSRR the function, among others, of conducting investigations for compliance purposes under the *Rail Safety Act 2008*.

Part 5 of the *Rail Safety Act 2008* confers on rail safety officers a wide range of powers to be exercised for "compliance and investigative purposes" which includes inspection. Part 5 also imposes obligations on rail safety officers in relation to the exercise of those powers. Part 5 details:

- powers of entry including powers of entry for purposes related to an inspection;
- general enforcement powers of rail safety officers;
- search warrants;
- powers to support seizure;
- dealings with seized items;
- directions; and
- other relevant matters.

5. Policy statement/s

5.1 Goals of carrying out inspections

The ITSRR aims to support the improvement of rail safety outcomes by working with rail transport operators. In this context, the ITSRR has the objectives of:

- educating the rail community, and taking action to improve rail operators' motivation and capacity to pro-actively manage safety and establish a continually improving safety culture;
- taking appropriate compliance and enforcement action to ensure persons undertaking railway operations meet their obligations to comply with the rail safety legislation; and
- protecting the rail community and the public from those persons who cannot, or will not, operate in accordance with mandatory safety obligations.

Accordingly, the ITSRR carries out inspections to satisfy those objectives. Inspections are a means of monitoring compliance and of taking action to promote compliance when necessary.

5.2 Circumstances under which the ITSRR carries out inspections

Inspections are used by the ITSRR to:

- respond to a particular safety issue;
- verify compliance with legislation and the operator's safety management system;
- follow up on findings in relation to non-conformances from ITSRR audit reports;
- follow up recommendations of independent investigation reports; and
- to determine/validate the need for investigation.

5.3 How the ITSRR carries out inspections

Rail safety officers conduct inspections in accordance with Part 5 of the Act. Part 5 of the Act details actions that may be employed by rail safety officers in carrying out inspections, including:

- powers of entry;
- actions after entry;
- seizing and dealing with seized items;
- using assistants, electronic and other equipment and documents;
- securing a site;
- use of search warrants;
- temporary closure of railway crossings;
- restoring infrastructure following action taken;
- use of force;
- conditions and restrictions on powers; and
- giving 'directions to give reasonable assistance' to:
 - a rail transport operator;
 - a person carrying out railway operations; or
 - a rail safety worker.

5.4 Possible actions arising from inspections

Possible non-regulatory actions arising from inspections include the provision of information, counselling or advice to assist the person to understand and meet their legislative obligations.

Possible regulatory actions arising from inspections by the ITSRR are:

- issuing an improvement notice, and/or prohibition notice;
- directing an accredited operator to amend its safety management system;
- issuing a penalty notice.

Further information on regulatory actions is provided at Attachment A.

5.5 Circumstances in which regulatory actions are appropriate

The ITSRR may pursue regulatory actions if it considers that action to be necessary or desirable based on the knowledge gained during an inspection where it determines that a non-compliance with obligations imposed by the Act, the Regulations and other instruments made under that Act and Regulations has occurred, is occurring or there is a threat or material risk to safety.

Non-compliance in this context may involve contravention of the Act or the Regulations, but it may also involve a breach of a condition or restriction attached to an accreditation, or non-compliance with the operator's safety management system.

Different inspection outcomes may lead to different regulatory actions. Attachment A details the circumstances under which each regulatory action may be applied by the ITSRR, noting that the ITSRR reserves the right to apply whatever regulatory action it considers appropriate for the circumstances.

6. Roles and responsibilities

Rail safety officers

The role of rail safety officers includes:

- determining the need for inspection including gathering information to identify safety issues or potential non-compliances;
- conducting inspections to assess compliance with rail safety duties and obligations;
- determining whether the outcome of inspection indicates the need to conduct an investigation;
- determining if regulatory action is warranted as an outcome of inspection findings; and
- compelling rail transport operators to undertake remedial action to rectify safety breaches through the use of statutory instruments such as improvement or prohibition notices.

7. Supporting documentation

- *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*
- *NSW Appendix to National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*
- *Policy – Compliance and Prosecution*
- *Policy – Managing Compliance through Advice, Education and Training*
- *Policy – Managing Compliance through Audits*
- *Policy – Managing Compliance through Investigations*
- *Policy – Enforceable Voluntary Undertakings*
- *Policy – Suspending or Revoking Accreditation*

8. Approval/review/amendments history

Amendment/ Review No	Date	Version No.	Amended by	Description
-------------------------	------	-------------	------------	-------------

Approved
Carolyn Walsh
Chief Executive

Attachment A Possible Regulatory Actions Arising From Inspections

Issuing an Improvement Notice Part 6 Division 1 of the Act

- An improvement notice may require a person to remedy the contravention or likely contravention and undertake remedial safety work. The notice may adopt by reference the requirements of any industry or other code of practice or standard. The improvement notice is complied with when the systemic deficiencies have been remedied.
- The improvement notice may state the date by which compliance must be achieved. This date must be at least 7 days after the notice was written.
- A person who, without reasonable excuse, fails to comply with a requirement imposed by an improvement notice is guilty of an offence.
- Improvement notices are subject to the right of review.

A rail safety officer may serve an improvement notice on a person if the officer believes on reasonable grounds that the person:

- is contravening a provision of a rail safety law, or
- has contravened a provision of a rail safety law and it is likely that the contravention will continue or be repeated, or
- is carrying out or has carried out railway operations that threaten safety, or
- is a roads authority responsible for a road or work that is part of a rail or road crossing that threatens the safety of railway operations.

Improvement notices may be appropriate in circumstances where a breach is not minor in nature, considering the following:

- the safety consequences of the breach, and in particular, the likelihood of a notifiable occurrence taking place
- if a notifiable occurrence might occur as a result of the breach, whether that occurrence would be likely to be a serious one
- whether the breach might trigger other, more serious breaches, or encourage others to fail to comply
- whether the breach is systemic or an isolated occurrence
- whether the rail transport operator has other measures or procedures in place which would help prevent adverse consequences flowing from the specific breach
- the history of the rail transport operator's performance in respect of the breach – that is, whether the rail transport operator has had several similar breaches
- whether the breach is one which is not open to interpretation (eg failure to report notifiable occurrences)
- whether the breach is the result of a knowing disregard for safety
- whether the breach is the result of a disregard of the relevant safety management system.

The ITSRR or a rail safety officer may issue both an improvement notice and a prohibition notice in relation to an observed breach. The prohibition achieves cessation of the activity constituting the immediate risk to safety, that is occurring at the specific place and time witnessed by the rail safety regulator, and for which evidence has been collected. The improvement notice addresses the systemic failures or deficiencies that allowed the breach to occur and that may have relevance to similar activities conducted at other locations and times.

Managing Compliance Through Inspections Policy

Issuing a Prohibition Notice Part 6 Division 2 of the Act

- Prohibition notices are a tool to achieve compliance with existing legislation. They are not a means of imposing new obligations on a person or the rail industry as a whole. That is the province of Acts and Regulations issued by Parliament and Government. A prohibition notice is a tool that is used to achieve short term, localised action in relation to a specific activity at a specific locality and its associated risks.
- A prohibition notice may be issued as an oral direction before the service of a written notice.
- Due to the immediate risk to safety, non-compliance with a prohibition notice without reasonable excuse is a serious breach of safety legislation and will lead to prosecution.
- However, an operator can lawfully fail to comply if a 'reasonable excuse' exists. What constitutes a 'reasonable excuse' may vary depending on the facts. Mere inconvenience to the operator is not sufficient. But if a prohibition was issued directing the operator to immediately cease operating a particular class of rolling stock, but this would mean effectively abandoning rolling stock on the main line and creating risk to another operator, then there would be a reasonable excuse to continue operating that rolling stock in order to stable it at the nearest siding or yard.
- The rail safety officer issuing the notice must follow up to determine whether the breach has been corrected. Evidence collected to support a decision to prosecute for non-compliance after a prohibition notice has been issued must be of sufficient standard to be presented to court.
- A prohibition notice is complied with as soon as the activity giving rise to the risk ceases. However the activity must not be resumed until a rail safety officer has certified in writing that the matters that give or will give rise to the risk have been remedied. There is no compliance date specified.
- Prohibition notices are subject to the right of review.

A prohibition notice may be issued when a rail safety officer believes on reasonable grounds that an activity is occurring or may occur in relation to railway operations or premises that involves an immediate risk to safety. If the authorised officer is of this opinion, it is his or her decision as to whether a prohibition notice is required.

Prohibition notices require the cessation of the relevant activity until the rail safety officer has certified in writing that the matters that give or will give rise to the risk have been remedied.

The decision to issue a prohibition notice is reached after objectively considering and assessing all the relevant facts and issues, including the consequences of not issuing a notice. Evidence must be available to substantiate an opinion of immediate threat to safety, not only that a breach has occurred. This process of consideration will generally be conducted in consultation with the rail safety officer's manager, and where the consequences to the operator's service delivery are significant, with:

- the Director, Rail Safety Regulation and
- the Executive Director, Transport Safety Regulation.

The ITSRR or a rail safety officer may issue both an improvement notice and a prohibition notice in relation to an observed breach. The prohibition achieves cessation of the activity constituting the immediate risk to safety, that is occurring at the specific place and time witnessed by the rail safety regulator, and for which evidence has been collected. The improvement notice addresses the systemic failures or deficiencies that allowed the breach to occur and that may have relevance to similar activities conducted at other locations and times.

Managing Compliance Through Inspections Policy

Directing an accredited operator to amend its safety management system s24 of the Act

- ITSRR's approach to the regulation of safety is based on risk management principles. Operators are required to develop and maintain a safety management system and to pro-actively identify, assess and control safety risks in relation to rail operations. Operators are further expected to continually improve their safety management system and safety culture.
- Under s24 of the Act, the ITSRR may direct a rail transport operator, by notice in writing, to amend the operator's safety management system within a specified period not less than 28 days. Such a direction must state the reasons why the ITSRR considers the amendment necessary. There is a penalty for non-compliance without a reasonable excuse.
- The ITSRR may use this power as a first step ahead of more serious regulatory action open to it under the Act and to ensure that the safety management system complies with the relevant requirements, risk management principles, and procedures prescribed by the regulations

Schedule 1 of the Regulations specifies the content of a safety management system. A direction to an accredited operator to amend its safety management system may be appropriate where:

- the ITSRR considers that an accredited operator's safety management system falls short of the regulatory requirements;
- the systems and processes comprising the safety management system have contributed to a minor occurrence or non-conformance but the shortfall does not warrant more serious regulatory action; or
- systemic or regular issues have occurred across industry and the ITSRR has decided to direct all operators to amend their safety management systems to prevent further occurrences.