

Managing Compliance Through Investigations



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

2. Scope

This policy applies to the conduct of investigations 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 those investigations.

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.

The policy is applicable to the ITSRR and its officers, and to rail transport operators and persons carrying out railway operations in NSW.

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:

- *ITSRR Policy on Managing Compliance Through Advice, Education and Training;*
- *ITSRR Policy on Managing Compliance Through Audits;* and
- *ITSRR Policy on Managing Compliance Through Inspections.*

3. Definitions

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

Chief Investigator means the Chief Investigator of the Office of Transport Safety Investigations.

compliance and investigative purposes include purposes related to:

- ascertaining whether a rail safety law has been or is being complied with, including whether an offence has been committed against a rail safety law;
- ascertaining whether the terms of, or a condition or restriction of, an accreditation has been or is being complied with;
- an audit, inspection, investigation, rail safety inquiry or other inquiry under the Act.

notifiable occurrence has the meaning given to it in the Act.

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 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 a wide range of powers on rail safety officers to be exercised for "compliance and investigative purposes". Part 5 also imposes obligations on rail safety officers in relation to the exercise of those powers. Part 5 details:

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

5. Policy statements

5.1 Goals of carrying out investigations

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.

5.2 Circumstances under which the ITSRR carries out investigations

In accordance with both Part 5 of the Act and the *National Guideline for Compliance and Enforcement for Rail Safety*, and as part of the overall strategic objective of improving rail safety outcomes, the ITSRR exercises its powers of entry, seizure and general enforcement for compliance and investigative purposes.

It does this in a range of circumstances involving, but not limited to:

- possible non-compliance with rail safety law;
- the results of an audit, inspection or inquiry;
- a notifiable occurrence;
- trends in safety breaches or other reports of behaviour related to rail safety
- a request from the Minister for Transport.

5.3 How the ITSRR carries out investigations

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

- powers of entry;
- actions before and 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;
- 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 investigations

Possible non-regulatory actions arising from investigations by the ITSRR under Part 5 of the Act include the provision of information, counselling or advice to assist the person to understand and meet their legislative obligations.

Possible regulatory actions arising from investigations by the ITSRR under Part 5 are:

- issuing an improvement notice, and/or prohibition notice;
- directing an accredited operator to amend its safety management system;
- issuing a penalty notice;
- enforceable voluntary undertakings;
- variation of accreditation or conditions or restrictions on accreditation;
- prosecution; and/or
- suspension or revocation of accreditation.

5.5 Circumstances in which regulatory actions are appropriate

The ITSRR may pursue regulatory actions as a result of investigations carried out under Part 5 of the Act, if 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.

Different investigation outcomes may lead to different regulatory actions. Attachment A details the circumstances under which 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.

5.6 Other investigations into railway accidents and incidents

Separate to the ITSRR, investigations may also be conducted under Part 4 of the Act, which provides for the following investigations and inquiries:

- s65: investigations, at the request of the Chief Investigator, by rail transport operators of notifiable occurrences, or other railway accidents or incidents that may endanger the safety of railway operations, or other matters prescribed by regulations;
- s67: investigations by the Chief Investigator of railway accidents or incidents that may affect the safe carrying out of railway operations; and
- s67: at the request of the Minister, investigations by the Chief Investigator of, and reports to the Minister on, railway accidents or incidents that may affect the safe carrying out of railway operations or the personal security of any rail safety worker or member of the public using the railway.

This policy does not cover Part 4 of the Act except to note that:

- the ITSRR receives investigation reports prepared by a rail transport operator following a s65 investigation; and

- information that the ITSRR obtains in a report on a s65 investigation cannot be used in evidence in any criminal or civil proceedings against the rail transport operator that provided the report, unless the Court decides that such use is in the public interest in the particular circumstances.

6. Roles and responsibilities

Rail safety officers

The role of rail safety officers includes:

- conducting investigations as required, including those arising from issues identified through safety audits or compliance inspections; 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*
- Policy – Compliance and Prosecution*
- Policy – Managing Compliance through Advice, Education and Training*
- Policy – Managing Compliance through Audits*
- Policy – Managing Compliance through Inspections*
- Policy – Enforceable Voluntary Undertakings*
- Policy – Suspending and 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 Investigations

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.

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.

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- 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.

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

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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.

Enforceable Voluntary Undertakings Part 7 Division 3 of the Act

- The ITSRR may accept written undertakings from a person in connection with a matter relating to a contravention or alleged contravention of the Act or Regulations. Having accepted such an undertaking the ITSRR cannot then take prosecution action against the person over the matter to which the undertaking relates. If the ITSRR considers that the person has failed to do what they undertook to do, the rail safety regulator may apply to the court to have the undertaking enforced.
- Further information is provided in the *Enforceable Voluntary Undertakings Policy*.

Enforceable Voluntary Undertakings may be appropriate where :

- the actions proposed to be undertaken address the matters which have given rise to the perceived breach - they must include firm future actions to prevent a recurrence of the breach;
- the actions proposed to be undertaken can be (and have been) described with sufficient clarity and specificity to enable compliance with the undertaking to be established – the description of deliverables must be precise and detailed;
- the compliance date can be specified - large programs of work may need specific project milestone dates for compliance; and
- the public interest would be better served by acceptance of a voluntary undertaking than proceeding with prosecution.

Prosecution Part 7 division 2 of the Act

- Proceedings for an offence against the Act or the Regulations
- The Act provides for offences to be dealt with summarily before the Local court and the Industrial Court of NSW.
- In any matter where an investigation reveals admissible, reliable and substantial evidence of a contravention of the type referred to in this table, the matter will be referred to Corporate Counsel for prosecution.
- Note: Prosecution proceedings may only be taken within two years from the date of an alleged offence.

Prosecution may be appropriate where:

- the contravention involves a breach of the Act; and
- the contravention is serious or demonstrates a deliberate or reckless disregard for safety; or
- the contravention is part of a pattern of similar contraventions by the same individual or organisation; or
- the contravention involves a breach of the Act; or
- the offender has failed to notify the ITSRR of a notifiable occurrence under the Act that falls within the requirements for immediate notification; or
- the contravention endangers or endangered the safety of persons other than the person committing the contravention (for example the contravention led to an accident or incident), or.
- the offender encouraged others to breach the safety rules; or
- the extent of harm cannot immediately be assessed, (therefore making a penalty notice inappropriate)
- there is sufficient evidence to support a reasonable prospect of conviction;
- where it is in the public interest, determined by such factors as:
 - the seriousness of the alleged offence and whether its nature is of considerable public concern;
 - the impact of prosecution-related action on general deterrence (i.e. reducing the likelihood that

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other duty holders will commit similar offences) or specific deterrence (i.e. reducing the likelihood that the duty holder will commit a further breach of rail safety laws);

- the availability and likely effectiveness of any alternatives to prosecution, such as one of the other regulatory options noted above; and
- whether the operator has repeatedly breached safety duties.

The maximum penalty that a Local Court can impose is 500 penalty units or imprisonment for 12 months or both. The Industrial Court is limited only by the maximum penalty prescribed by the legislation for the particular offence. The maximum penalty available for each type of breach under the Act will therefore be a consideration of ITSRR in determining the court in which proceedings will be instigated by the ITSRR. The ITSRR may not instigate proceedings in the lower court where this would in effect limit the discretion of the court to determine the appropriate penalty under the law. In addition to the above, the ITSRR may consider:

- the objective seriousness of the offence, having regard to the factual circumstances of the case
 - the legal and factual complexity involved
 - the need for special and general deterrence
 - other relevant matters
- as a determination is made as to the most appropriate jurisdiction in which to instigate proceedings.

Variation of Accreditation s53 of the Act

At any time the ITSRR may:

- attach any conditions or restrictions to a person's accreditation after it has been granted, or
- amend or remove any conditions or restrictions on the accreditation, or
- otherwise vary the accreditation.

ITSRR may vary an accreditation where the accredited person:

- no longer has the competence and capacity to manage the risks to safety associated with the railway operations for which it is accredited or is no longer able to comply with the conditions or restrictions of accreditation;
- is not managing rail infrastructure or operating rolling stock and has not done so for the preceding 12 months; or
- contravenes the Act or the Regulations.

In making a decision whether or not to take such action, the ITSRR may consider:

- the railway operator's history of compliance
- whether railway operations are/are not conducted to an adequate standard of safety and the safety management system complies with the legislation
- whether the accredited operator is temporarily or permanently unable or unwilling to undertake any relevant remedial action necessary to satisfy the requirements for accreditation.

The ITSRR must give the operator written notice of a decision to take such action with reasons. The operator has the right to make written representations about the intended action within 28 days.

Variation of Conditions or Restrictions on Accreditation s58 of the Act

Conditions and restrictions of accreditation may be used to articulate the railway operations to which accreditation relates and any limits to the accredited person's demonstrated competence and capacity. They are not a means of imposing new obligations on an accredited person or the rail industry as a whole.

In making a decision whether or not to vary or impose conditions or restrictions on an accreditation, the rail safety regulator may consider:

- the railway operator's history of compliance
- whether railway operations are/are not conducted to an adequate standard of safety and the safety management system complies with the model legislation
- whether the accredited operator is temporarily or permanently unable or unwilling to undertake any relevant remedial action necessary to satisfy the requirements for accreditation.

The ITSRR is required to give the operator written notice of a decision to take such action, and to provide reasons. The operator has the right to make written representations about the intended

action within 14 days.

Suspension or Revocation of Accreditation Part 3 Division 4 of Act

- The purpose of accreditation is to attest that the accredited person has the competence and capacity to manage the risks to safety associated with the railway operation for which they are accredited. Revocation or suspension of part of an accreditation is achieved by the ITSRR initiating a variation of the accreditation and/or the conditions or restrictions on the accreditation or by imposing new conditions or restrictions on the accreditation.
- The ITSRR must advise a rail transport operator of the intention to suspend accreditation and accept representations before this takes place in accordance with s53(3) of the Act.
- The ITSRR has the power to immediately suspend an accreditation, (or part of an accreditation) if it considers that there is, or would be, an immediate and serious risk to safety unless the accreditation is suspended immediately
- Under the Act, the ITSRR may immediately suspend a person's accreditation for a period not exceeding 6 weeks.
- Decisions to suspend, or cancel an accreditation can only be made by the Chief Executive Officer of ITSRR, following an extensive process of internal review and advice.
- The ITSRR acknowledges that the suspension of an accreditation may have serious consequences for the rail transport operator and may also have serious adverse 'flow on' effects for employees, the public, dependent businesses and so on. The ITSRR acknowledges the role that the rail industry performs in the community and the need to balance continued provision of rail services against the need to protect the safety of the public and the railway system.
- Further information is provided in the *Suspending or Revoking Accreditation Policy*.

The ITSRR may **suspend or revoke** an accreditation (or part of an accreditation) where the accredited person:

- no longer has the competence and capacity to manage the risks to safety associated with the railway operations for which it is accredited or is no longer able to comply with the conditions or restrictions of accreditation;
- is not managing rail infrastructure or operating rolling stock and has not done so for the preceding 12 months; or
- contravenes the Act or the Regulations.

In making a decision whether or not to take such action, the ITSRR may consider:

- the railway operator's history of compliance;
- whether railway operations are/are not conducted to an adequate standard of safety and the safety management system complies with the Act; and
- whether the accredited operator is temporarily or permanently unable or unwilling to undertake any relevant remedial action necessary to satisfy the requirements for accreditation.