

Prosecution Policy



INDEPENDENT
TRANSPORT
SAFETY AND
RELIABILITY
REGULATOR

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1 Introduction

1.1 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 prosecution under the *Rail Safety Act 2008* (NSW) for rail transport operators, rail safety workers, the rail safety officers of the ITSRR and other rail industry participants.

1.2 Scope

This Policy applies to the ITSRR and rail safety officers.

This document is not a legal document and does not limit the discretion of the ITSRR to take any compliance or enforcement action it deems appropriate under the *Rail Safety Act 2008* (NSW).

1.3 Definitions

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

ITSRR has the meaning given to it in the Act.

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

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

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

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), the Rail Safety (Drug and Alcohol Testing) Regulation 2008 and the Rail Safety (Offences) Regulation 2008.

1.4 Other relevant policies

This Policy should be read in conjunction with:

- *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety and NSW Appendix to National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*

- *ITSRR Policy on Managing Compliance Through Advice, Education and Training*
- *ITSRR Policy on Managing Compliance Through Audit*
- *ITSRR Policy on Managing Compliance Through Inspections*
- *ITSRR Policy on Managing Compliance Through Investigations*
- *ITSRR Policy on Enforceable Voluntary Undertakings*
- *ITSRR Policy on Suspending or Revoking Accreditation*

2 Legislative requirements

The ITSRR and rail industry participants have a shared objective to make railway operations safe. While the ITSRR works co-operatively with the rail industry to help achieve safe railway operations, rail transport operators, other rail industry participants and rail safety workers have the primary responsibility for rail safety.

2.1 Objects of the Rail Safety Act 2008

The objects of the Act are to:

- Provide for improvement in the safe carrying out of railway operations;
- Provide for the management of safety risks associated with railway operations;
- Make special provision for the control of particular safety risks arising from railway operations; and
- Promote public confidence in the safety of transport of persons or freight by rail.

2.2 Role of the ITSRR

The ITSRR is a statutory corporation constituted pursuant to section 42B of the *Transport Administration Act 1988*. The ITSRR exercises various powers and authorities and has duties under the legislative framework for rail safety in NSW.

The legislative framework includes the following enactments:

- *Rail Safety Act 2008* and the regulations and compliance codes and guidelines made under the Act; and
- *Transport Administration Act 1988*.

The functions of the ITSRR include:

- to review and evaluate any matter related to the safe operation of transport services and the functions of transport authorities in relation to the safe operation of transport services; and

- to accredit rail transport operators under the Act and to investigate, or arrange investigations, for compliance purposes under that Act; and
- to investigate and report on accidents and incidents involving transport services; and
- to provide, or facilitate the provision of, advice, education and training in relation to rail safety.

The ITSRR is required to exercise its functions with the objective of promoting safety and reliability of transport services.

The ITSRR exercises its function consistently with its role in both accrediting rail transport operators and regulating persons carrying out railway operations.

The ITSRR is committed to approaching its compliance, enforcement and prosecution activities in accordance with the principles of accountability, consistency, transparency, impartiality and proportionality which are discussed in the *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*.

2.3 The role of the rail safety officer

Rail safety officers are appointed by the ITSRR under Part 8 of the Act to exercise certain functions under the Act to assist with the compliance activities of the ITSRR.

Rail safety officers' powers under the *Rail Safety Act 2008* include:

- Investigation powers including powers of entry for compliance and investigative purposes which include audit, inspection and investigation.
- Enforcement powers including powers to:
 - search a place, and any rail infrastructure, rolling stock, motor vehicle or other thing at the place
 - take, retain and make copies of documents
 - use and operate equipment to access information or examine things
 - secure a site to protect evidence that might be relevant for compliance and investigative purposes or ensuring safety
 - seize things and issue embargo notices.
- Powers to issue directions, including powers to:
 - issue directions to give information or documents
 - obtain information, documents and evidence.

- Powers to issue improvement, prohibition and penalty notices.
- Powers to direct rail safety workers to undergo drug and alcohol testing.

Rail safety officers carry out their functions under the Act consistently with the ITSRR's objectives and the roles and principles of accountability, consistency, transparency, impartiality and proportionality which are outlined in the *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*.

2.4 Compliance options

The ITSRR has a range of compliance options available for use:

- Facilitated compliance (or non-regulatory action), including:
 - advice, education and training in relation to rail safety;
 - audit reports and non-conformances;
- Statutory compliance (or regulatory action) including:
 - Improvement notices;
 - Prohibition notices;
 - Directions to amend a safety management system;
 - Penalty notices;
 - Enforceable voluntary undertakings;
 - Variation of accreditation or conditions or restrictions on the accreditation;
 - Prosecution;
 - Suspension or revocation of accreditation.

The use of these compliance tools is discussed in the *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety* and the NSW Appendix to the National Rail Safety Guideline.

The ITSRR's rail safety officers are directly involved with compliance activities on railway premises. Compliance activities may be undertaken:

- as part of an audit;
- as part of a compliance inspection; or
- as part of a compliance investigation.

Audits are generally undertaken as part of a planned audit program. Inspections and investigations may be undertaken in a range of contexts including but not limited to:

- as part of a targeted intervention program in response to identified risks, particular aspects of the safety management system, or non-compliant rail transport operators; or
- in response to an incident, or complaint regarding rail safety management compliance or other possible breach of the legislation.

The ITSRR has discretion to determine the appropriate method of achieving compliance with rail safety legislation. Compliance and enforcement decision making is structured and involves consideration of the factors outlined in this Policy and in the *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*, the NSW Appendix to the National Rail Safety Guideline and the supporting local policies.

Figure 1 below reflects the increasing severity of the compliance options available to the ITSRR but is not intended to imply a staged response for compliance. The ITSRR will choose one or more of the compliance options based on the individual circumstances of the compliance issue involved. Nothing in this Policy should be interpreted as requiring the ITSRR to implement a facilitated compliance approach before any statutory compliance actions may be taken.

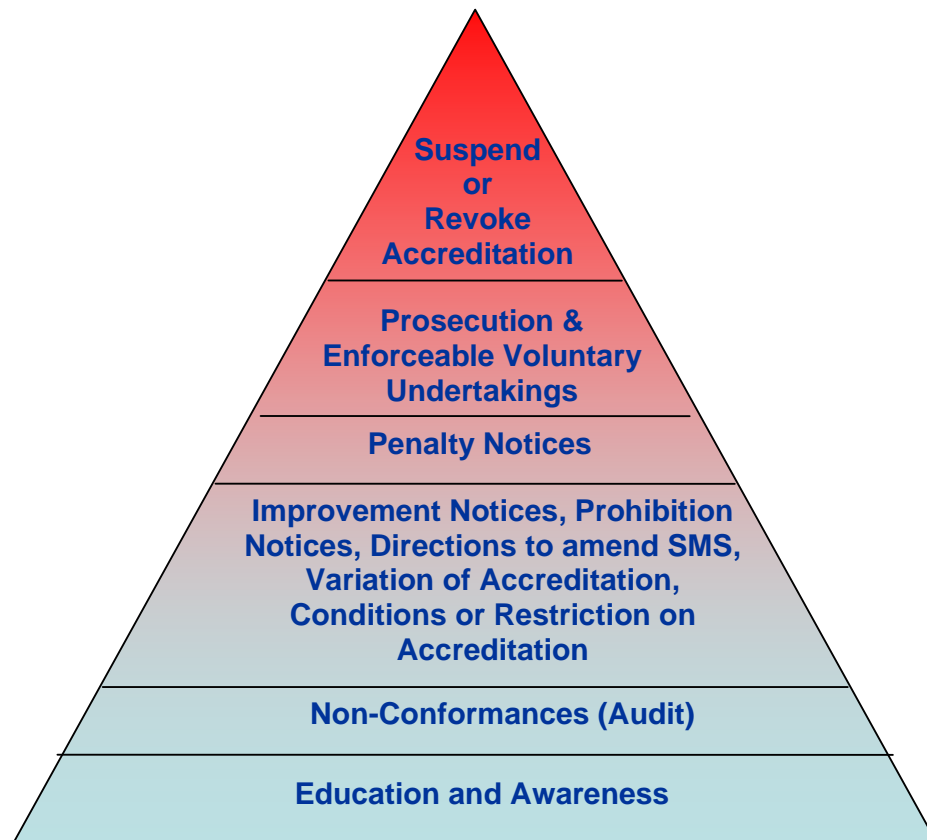


Figure 1 – Compliance Pyramid

2.5 General rail safety duties

The primary focus of rail safety legislation is the safety of railway operations.

The rail industry is a hazardous industry that affects public safety. Accordingly the Act imposes general safety duties on rail transport operators and others who are in a position to influence safety outcomes in the rail industry.

The general duties under the Act are set out in sections 8, 9 and 10.

Section 8 requires rail transport operators and other persons who carry out railway operations to ensure, so far as is reasonably practicable, the safety of the railway operations.

The duty imposed by section 8 does not apply to a person who carries out railway operations as a rail safety worker or an employee.

Section 9(1) imposes a duty on any person who designs, commissions, manufactures, supplies, installs or erects any thing that the person knows, or ought reasonably to know, is to be used as, or in connection with rail infrastructure or rolling stock. These persons must:

- Ensure, so far as is reasonably practicable, that the thing is safe if it is used for a purpose for which it was designed, commissioned, manufactured, supplied installed or erected; and
- Carry out, or arrange the carrying out, of such testing and examination of the thing as may be necessary for compliance with this section; and
- Take such action as is necessary to ensure, so far as is reasonably practicable, that there will be adequate information available about the use for which the thing has been designed, commissioned, manufactured, supplied, installed or erected, and the result of any testing or examination and the conditions necessary to ensure so far as reasonably possible that the thing is safe when used for a purpose for which it was designed, commissioned, manufactured, supplied, installed or erected.

Section 9(2) imposes a duty on a person who decommissions any rail infrastructure or rolling stock to ensure, so far as is reasonably practicable, that the decommission is carried out safely and to carry out or arrange the carrying out of such testing and examination as may be necessary for compliance with this duty.

The duties in section 9 do not apply if the person who supplies the thing carries on the business of financing the acquisition of the thing by customers, and has in the course of that business, acquired an interest in the thing solely for the purpose of financing its acquisition by a customer from a third person or its provision to a customer by a third person and has not taken possession of the thing, or has taken possession of it solely for

the purpose of passing possession to that customer. In such a case the safety duties of a supplier fall on the third person.

Duties are also placed on rail safety workers. Under section 10(1) a rail safety worker must, when carrying out rail safety work:

- take reasonable care for his or her own safety; and
- take reasonable care for the health and safety of others who may be affected by the rail safety workers acts or omissions; and
- cooperate with the rail transport operator with respect to any action taken by the rail transport operator to comply with a requirement imposed by or under this Act or the regulations.

Rail safety workers are also expressly prohibited from:

- intentionally or recklessly interfering with or misusing anything provided to them by the rail transport operator in the interest of safety or under the legislation (s10(2)); and
- wilfully or recklessly placing the safety of another person on or in the immediate vicinity of rail infrastructure at risk (s10(3)).

In determining whether a rail safety worker failed to take reasonable care the Act requires that regard must be had to what the rail safety worker knew about the relevant circumstances.

It should be noted that section 11 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.

Further information on the general rail safety duties is provided by the *National Rail Safety Guideline for the Meaning of Duty to Ensure Safety So Far As Is Reasonably Practicable* and the *NSW Appendix to the National Rail Safety Guideline for the Meaning of Duty to Ensure Safety So Far As Is Reasonably Practicable*.

2.6 Accreditation of rail transport operators

In addition to the general safety duties that are imposed on all parties involved in the management and delivery of rail infrastructure and operations, the Rail Safety Act prohibits the carrying out of railway operations unless the person is either accredited or exempt from the requirement to be accredited under the Act, or is carrying out the railway operations for or on behalf of a rail transport operator who is accredited or exempt in respect of the railway operations.

Accreditation may only be granted to an applicant who demonstrates that they are a rail infrastructure manager or rolling stock operator, or both, in relation to the railway operations for which accreditation is sought.

A rail infrastructure manager is the person who has effective management and control of the rail infrastructure of a railway, whether or not the person

owns the rail infrastructure, or has a statutory or contractual right to use the rail infrastructure or to control, or provide, access to it.

A rolling stock operator is the person who has effective management and control of the operation or movement of rolling stock on rail infrastructure for a particular railway. A person is not a rolling stock operator if they merely drive the rolling stock or control the network or the network signals.

The purpose of accreditation is to attest that the rail transport operator has demonstrated to the ITSRR that they have the competence and capacity to manage risks to safety that are associated with the accredited railway operations.

Accreditation does not certify that the accredited person is compliant with the general safety duty.

Further information about accreditation under rail safety legislation is provided in the *National Rail Safety Guideline for Accreditation of Rail Transport Operators*.

2.7 Drug and alcohol obligations

The *Rail Safety Act 2008* requires rail transport operators to have a drug and alcohol management program for rail safety workers who carry out, or are about to carry out, rail safety work in connection with railway operations for which the operator is required to be accredited,

The drug and alcohol management program is to include any matters required to be included by the regulations, including requirements with respect to:

- protocols for fair procedures, and
- education and assistance of rail safety workers.

The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* also makes provision for random, targeted/reasonable cause and post-incident drug and alcohol testing of rail safety workers engaged in rail safety work.

Since 1 July 2004, accredited operators have been required to notify the ITSRR of the results of any positive drug and alcohol tests and refusals to undergo testing. The ITSRR also undertakes a limited program of random testing to supplement operator testing programs and provide a further deterrent to drug and alcohol use before or during the undertaking of rail safety work.

Offences

The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* establishes a range of offences including:

- the carrying out of rail safety work with the prescribed concentration of alcohol in breath or blood (i.e., 0.02%) (clause 12);

- the carrying out of rail safety work while under the influence of alcohol or any other drug (clause 13);
- refusing to undergo a drug and alcohol test (clause 27);
- interfering with the results of a test (clause 29); and
- interfering or tampering with drug or alcohol test blood or urine samples (clause 31).

Note that under clause 15(4) of the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*, the results of any breath or urine test undertaken pre-sign-on (that is, before a rail safety worker commences work) or the results of any subsequent breath analysis or urine analysis relating to those tests undertaken pre-sign-on, are not admissible in any proceedings under this Regulation.

2.8 Limits of rail safety regulation

Rail safety legislation operates within the overarching umbrella of Occupational Health and Safety (OHS) legislation. The relationship between OHS and rail safety legislation is established in section 175 of the Act. Section 175(1) provides that if a provision of the OHS legislation applies to railway operations, that provision continues to apply, and must be observed, in addition to rail safety legislation.

Section 175(2) provides that if a provision of the Act or rail safety regulations is inconsistent with a provision of the OHS legislation, the provision of the OHS legislation prevails to the extent of any inconsistency.

Section 175(3) of the Act provides that compliance with rail safety legislation is not in itself a defence in any proceedings for an offence against the OHS legislation.

There is a degree of overlap between rail safety, OHS and dangerous goods legislation. Section 175(4) of the Act provides that if an act or omission constitutes an offence under two or more of these pieces of legislation the offender is not liable to be punished twice for the offence.

The ITSRR maintains agreements with WorkCover NSW and the NSW Department of Environment, Climate Change and Water to aid in coordinating the activities of each agency in respect to rail safety, OHS and dangerous goods regulatory matters.

3 Prosecution Policy

3.1 General safety duties and accreditation

The general safety duty on rail transport operators and other persons who carry out railway operations makes it explicit that it is their responsibility to ensure the safety of their railway operations, so far as is reasonably

practicable. Compliance with the safety duty obliges the duty holder to take a proactive approach to managing safety risks. The general safety duties are discussed in more detail in section 2.5 above.

The Act also requires rail transport operators to be accredited before undertaking railway operations or exempt from the requirement to be accredited under the Act¹. Accreditation requirements for rail transport operators are discussed in more detail in section 2.6 above.

The purpose of accreditation of a rail transport operator for railway operations is to attest that the rail transport operator has demonstrated to the ITSRR the competence and capacity to manage safety risks associated with railway operations.

The ongoing safety of railway operations is dependent on the ongoing vigilance of the rail transport operator in implementing, monitoring, reviewing and revising their safety management systems and developing and maintaining a positive safety culture.

The general safety duty provides an overarching obligation on rail transport operators to do everything reasonably practicable to ensure that their safety management systems are effective on an ongoing basis.

It should be noted that the Rail Safety Act and associated regulations establish a range of offences, in addition to the general duties and accreditation offences, imposing significant penalties for non-compliance.

3.2 The decision to prosecute

Prosecution for an offence under rail safety legislation is one of several enforcement options available to the ITSRR.

Prosecution is a discretionary action. Not every breach of the laws passed by Parliament is automatically prosecuted. The dominant factor in the exercise of the discretion to prosecute or not to prosecute is the public interest.

Prosecution action serves to both punish the offender and deter future offenders. Prosecution in appropriate circumstances may reinforce community expectations that failure to comply with legislative responsibilities will be enforced through the courts.

In exercising its discretion to prosecute breaches, the ITSRR is required to take into account all facts and circumstances surrounding the particular breach. What might constitute the basis of commencing prosecution action in one matter may not form the basis in another matter because each breach under the Act will be considered and assessed by the ITSRR in light of each of the individual circumstances surrounding the breach.

¹ The Act provides exemptions from the requirement to be accredited in some circumstances and also allows for exemptions to be granted by the regulations.

The principles operating at law require prosecutions only to be brought if it is in the public interest. The question of whether or not the public interest requires that a matter be prosecuted is resolved by determining:

1. whether or not the admissible evidence available is capable of establishing each element of the offence (*the prima facie case test*);
2. whether or not it can be said that there is no reasonable prospect of conviction, with regard to the following:
 - i. the availability, competence and credibility of witnesses and the admissibility of such evidence;
 - ii. the reliability of the evidence of each witness and any conflicts in the evidence of eye witnesses;
 - iii. the reliability of any admissions, if any, made by defendants; and
 - iv. any other factors which could affect the likelihood or otherwise of a conviction; and if not
3. whether or not discretionary factors nevertheless dictate that the matter should not proceed in the public interest.

In considering the public interest and community expectations, the following factors will be taken into account:

- the seriousness and circumstances of the alleged offence (for example the nature of the breach, reasonable practicability to ensure safety, where a death has occurred, when there has been a serious injury or when there has been a risk of fatality or serious injury as a result of the alleged offence);
- the prevalence of the alleged offence and the impact of prosecution-related action on general deterrence (ie reducing the likelihood that other duty holders will commit similar offences) or specific deterrence (ie 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 enforcement options, for example enforceable voluntary undertakings;
- compliance history (ie whether the party allegedly in breach has repeatedly breached safety duties);
- co-operation during an investigation;
- attempts by the offender to remedy the alleged offence and make the railway operations safe;
- the proportionality of prosecution action;
- the degree of culpability of the party allegedly in breach;

- the age, physical health, mental health or special disability of the alleged offender, witness or victim;
- the alleged offender's antecedents and background, including culture and language ability;
- the enforcement action taken in relation to any other party under the Act in relation to the same alleged offence;
- any mitigating or aggravating factors;
- length of time since the alleged offence;
- whether the prosecution action would be perceived as counter-productive or bringing the law into disrepute;
- whether or not any resulting conviction would necessarily be regarded as unsafe and unsatisfactory;
- special circumstances that would prevent a fair trial from being conducted;
- whether or not the alleged offence is of considerable general public concern;
- the necessity to maintain public confidence in such basic institutions as the Parliament and the courts;
- the likely length and expense of a trial; and
- the prospects of success for prosecution action.

The applicability of and weight to be given to these and other factors will vary widely and depend on the particular circumstances of each case.

Applying these principles, a prosecution for a breach of the general duty would not be viable if there is sufficient evidence that the rail transport operator had done all that was reasonably practicable to ensure safety. It is recognised that the resources available for prosecuting are finite and should not be expended pursuing inappropriate cases.

Irrelevant factors

A decision whether or not to proceed must not be influenced by:

- the race, religion, sex, national origin, social affiliation or political associations, activities or beliefs of the alleged offender or any other person involved (unless they have special significance to the commission of the particular offence or should otherwise be taken into account objectively);
- personal feelings of the prosecutor concerning the offence, the alleged offender or a victim;
- possible political advantage or disadvantage to the government or any political party, group or individual;

- the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution or otherwise involved in its conduct; or
- possible media or community reaction to the decision.

3.3 Offences by corporations – liability of directors and managers

Under the Act, if a corporation contravenes any provision of the Act then each director of the corporation and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the person satisfies the court that:

- he or she was not in a position to influence the conduct of the corporation in relation to the contravention; or
- being in such a position they took reasonable precautions and exercised due diligence to prevent the contravention.

Compliance with the Act requires duty holders to take a proactive approach to the management of safety.

The “deemed liability” provisions of the Act are designed to ensure directors and managers are not shielded from responsibility for safety breaches by the corporate legal structure. It is not the intent of the provisions to capture middle managers who have limited ability to influence the conduct of the corporation in relation to the contravention.

The ITSRR recognises the criticality of appropriate safety governance by those in leadership positions of the rail transport operator. In considering what action is appropriate in relation to “deemed liability” the ITSRR considers the breaches in the context of any acts or omissions in safety governance and internal control by the directors and managers.

3.4 Offences by volunteers

The deemed liability provisions do not permit the prosecution of volunteers who are officers of a corporation for anything done or not done by him or her as a volunteer. A volunteer means a person who is acting in a voluntary basis irrespective of whether the person receives out-of-pocket expenses (s136 (6) and (8) of the Act).

The corporation for whom the volunteer was acting is still liable whether or not its officers are volunteers.

3.5 Public authorities

The legislation administered by the ITSRR binds the Crown and Government authorities. The law applies with equal force to both the private and public sectors.

The circumstance in which public authorities should be prosecuted for breaches of rail safety legislation is a specific instance of determining whether prosecution is in the public interest. There are two competing public interests in relation to prosecution of public authorities. These are:

- the public has an interest in Government authorities abiding by the law; and
- it is the tax payer that bears the cost of any prosecution of public authorities. Such expenditure needs to be justified as being in the public interest.

In prosecuting Government authorities, the current Premier's Memorandum No M97-26: "Guidelines for litigation involving or between Government departments and authorities" applies to the parties to proceedings.

3.6 Offences by rail safety workers

Where a rail safety worker commits an offence, a related offence may be committed by a rail transport operator or other person carrying out railway operations (such as a contractor). In these circumstances, it will rarely be appropriate to commence a prosecution against the rail safety worker, unless it appears that the rail transport operator, or other person carrying out railway operations, has done all that was reasonably practicable to ensure the safety of the railway operations in relation to the offences it may have committed and otherwise complied with its legislative obligations.

In the event that ITSRR finds it inappropriate to prosecute a rail safety worker it may nevertheless take other compliance and enforcement action in accordance with the *National Rail Safety Guideline for Compliance and Enforcement for Rail Safety*, the NSW Appendix to the National Rail Safety Guideline and the supporting local policies.

3.7 Who may prosecute

Legal proceedings for offences under the Act may only be taken by the ITSRR or by a person authorised by the ITSRR for the purpose, either generally or in any particular case.

Proceedings for an offence cannot be instituted in the Industrial Court of NSW without the written consent of the ITSRR or of an officer of the ITSRR authorised for this purpose.

No proceedings can be initiated under the Act against the crown or a statutory body representing the crown, without the written consent of the Minister.

3.8 Mode of trial

Prosecutions for offences under the *Rail Safety Act 2008* or the regulations are conducted summarily before either the Local Court or the Industrial

Court of New South Wales. ITSRR will decide in which Court the prosecution should be heard on the basis of the nature of the alleged offence.

4 References

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

National Rail Safety Guideline for the Meaning of Duty to Ensure Safety So Far As Is Reasonably Practicable

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

National Rail Safety Guideline for Accreditation of Rail Transport Operators

Policy - Managing Compliance Through Advice, Education and Training

Policy - Managing Compliance through Audits

Policy - Managing Compliance through Inspections

Policy - Managing Compliance through Investigations

Policy – Enforceable Voluntary Undertakings

Policy – Suspending or Revoking Accreditation