

# Policy

## Compliance and Enforcement

---

**Document reference number:** A394542

Version No.	Approved by	Publication date	Review date
1.0	Chief Executive	4 December 2014	December 2015
2.1	Chief Executive	April 2016	December 2017

### **Policy changes to version 2.1**

- > Implementation of new ONRSR template
- > Minor word edits – no material changes

### **Copyright information**

© Office of the National Rail Safety Regulator 2016

This material may be reproduced in whole or in part, provided the meaning is unchanged and the source is acknowledged.

Level 1, 75 Hindmarsh Square, ADELAIDE SA 5000

PO Box 3461, Rundle Mall, ADELAIDE SA 5000

Phone: 08 8406 1500

Fax: 08 8406 1501

E: [contact@onrsr.com.au](mailto:contact@onrsr.com.au)

W: [www.onrsr.com.au](http://www.onrsr.com.au)

## Table of contents

<b>1. Purpose</b>	<b>5</b>
<b>2. Scope</b>	<b>5</b>
<b>3. Definitions</b>	<b>6</b>
<b>4. Legislative Framework</b>	<b>6</b>
<b>5. Purpose of Compliance and Enforcement (s134)</b>	<b>6</b>
<b>6. Compliance and Enforcement Approach</b>	<b>7</b>
6.1 Independent and impartial	7
6.2 Risk based	7
6.3 Educational	7
6.4 Proportionate	8
6.5 Transparent, fair and accountable	8
6.6 Consistent	8
<b>7. Monitoring Compliance</b>	<b>8</b>
7.1 Compliance audits (s133)	9
7.2 Compliance inspections	9
7.3 Operational investigations	9
7.4 Compliance investigations	10
7.5 Request for information	11
<b>8. Compliance Tools</b>	<b>11</b>
8.1 Provision of education and advice	12
8.2 Non-Conformance Report	12
8.3 Improvement Notice (s175 to s178)	13
8.4 Prohibition Notice (s179 to s181)	13
8.5 Infringement Notice (s233 to s242)	13
8.6 Non-disturbance Notice (s182 to s 185)	14

8.7	Variation of conditions or restrictions to accreditation or registration (Divisions 4 and 5 of Part 3).....	14
8.8	Direct Amendment to a Safety Management System (s104) .....	15
8.9	Enforceable Voluntary Undertakings (s251 to s257) .....	15
8.10	Cancellation or suspension of accreditation or registration (Divisions 4 and 5 of Part 3) 16	
8.11	Immediate suspension (Divisions 4 and 5 of Part 3).....	16
<b>9.</b>	<b>Prosecution .....</b>	<b>16</b>
9.1	Prosecution in the public interest .....	17
9.2	Prosecution of individuals .....	18
9.3	Drug and alcohol testing .....	18
<b>10.</b>	<b>The Role of the Rail Safety Officer .....</b>	<b>19</b>
	<b>APPENDIX 1: Summary of Compliance tools and actions .....</b>	<b>20</b>

## 1. Purpose

The Office of the National Rail Safety Regulator (ONRSR) has been established under the Rail Safety National Law (RSNL) to administer a national system of rail safety regulation including the effective management of rail safety risks through a national scheme for accreditation of rail transport operators in relation to rail operations.

Under the RSNL, a person must not carry out any railway operations unless the person is an accredited rail transport operator or undertakes railway operations for or on behalf of an accredited rail transport operator or is specifically excluded or exempt from the RSNL, including through registration.

The ONRSR has the principal objective of facilitating the safe operation of rail transport services across Australia. This is achieved through regulation of the rail industry in accordance with the RSNL and Regulations, publication and application of guidelines and policies; and through the promotion of safety as a fundamental objective in the delivery of rail transport services.

The RSNL is based on the principle of shared responsibility for safety on all parties, including rail transport operators, rail safety workers, other persons and duty holders involved in the rail industry and the public.

Specific safety duties are imposed on parties in the rail industry who have control over rail activities, including the primary duty imposed on rail transport operators to ensure the safety of their railway operations so far as is reasonably practicable.

The purpose of this policy is to:

- > articulate how the application of the compliance and enforcement measures set out in the RSNL will be applied by the ONRSR
- > facilitate a consistent approach to compliance and enforcement measures throughout Australia
- > provide an appropriate level of transparency to regulated parties in regard to the application by the ONRSR of compliance and enforcement measures

## 2. Scope

This policy describes the principles the ONRSR will follow when applying the compliance and enforcement provisions available in the RSNL. It applies to rail safety officers appointed under the RSNL in all ONRSR jurisdictions.

This policy does not apply to investigations undertaken by the Australian Transport Safety Bureau (ATSB). The ATSB is an independent Commonwealth Government statutory agency that is governed by a Commission and is entirely separate from transport regulators, policy makers and service providers. The ATSB performs its functions in accordance with the provisions of the *Transport Safety Investigation Act 2003* and associated Regulations

### 3. Definitions

Definitions provided by the RSNL and the National Regulations apply within this policy.

**RSNL** – means the *Rail Safety National Law* which has been enacted as a Schedule to the *Rail Safety National Law (South Australia) Act 2012 (SA)* as it applies in each state and territory. In Western Australia, 'RSNL' means the Rail Safety National Law which has been enacted as mirror legislation in the *Rail Safety National Law (WA) Act 2015*.

**National Regulations** – means the *Rail Safety National Law National Regulations 2012*; or the *Rail Safety National Law (WA) Regulations 2015* in Western Australia.

*Where terms are not defined within the legislation or regulations the Macquarie Dictionary definition applies.*

*Use of the word 'should' indicates a recommendation of the ONRSR. However, the rail transport operator is free to follow a different course of action provided it complies with the legislation. Use of the word 'must' indicates a legal requirement where compliance is necessary.*

### 4. Legislative Framework

The RSNL was enacted as a Schedule to the application law of South Australia, as the host jurisdiction, with enabling legislation passed by each State and Territory. This Law establishes the ONRSR (and Regulator) and the responsibilities and obligations of all persons undertaking work that affects or could affect rail safety in Australia. The relevant provisions in the RSNL pertaining to compliance and enforcement are found in Parts 3, 4 and 5 of the law.

### 5. Purpose of Compliance and Enforcement (s134)

The functions and objectives of the ONRSR are specified in s13 of the RSNL. Enforcement of the RSNL will be undertaken for the purpose of:

- > protecting public safety
- > promoting improvement in rail safety
- > removing incentive for any unfair commercial advantage that might be derived from contravening the rail safety requirements under this Law
- > influencing the attitude and behaviour of persons whose actions may have adverse impacts on rail safety
- > securing compliance with this Law through effective and appropriate compliance and enforcement measures

Rail safety officers are officers of the ONRSR who have a range of provisions at their disposal in seeking to secure compliance with the law and to enable a proportionate response to be applied when carrying out audits, inspections and investigations and dealing with criminal offences.

This policy provides some context as to the types of situations when different enforcement measures may be deemed appropriate by the ONRSR, within the framework of the RSNL.

Sometimes the law is prescriptive – spelling out in detail what must be done. Sometimes it is goal setting – setting out what must be achieved, but not how it must be done.

Advice on how to achieve the goals may be set out in Approved Codes of Practice (ACOPs). These give practical advice on compliance and have a special legal status. If a person is prosecuted for a breach of the RSNL and did not follow the relevant provisions of an ACOP, then the onus is on them to show that they complied with the law in another way.

Following this guidance is not compulsory, but doing so will often be considered as being a mitigating defence in any proceedings.

Neither ACOPs nor guidance material necessarily fit every case. In considering compliance with the law, rail safety officers will consider whether the law is prescriptive or goal setting and take relevant ACOPs and other relevant guidance into account, using reasoned judgment about the extent of the risks and the controls applied to appropriately manage them.

The ONRSR will acknowledge the requirements of the RSNL for a rail transport operator to develop and implement a safety management system (that includes procedures and processes for the review, audit and correction of their own system), by giving rail transport operators the opportunity to take improvement action in accordance with their own system in most cases. However the circumstances and merits of each case will be assessed in determining the appropriate level of enforcement.

## 6. Compliance and Enforcement Approach

The fundamental way in which the ONRSR delivers its compliance and enforcement functions is guided by its overall *Regulatory Approach*. The application of this to compliance and enforcement is described under the following ONRSR key principles:

- > independent and impartial
- > risk based
- > educational
- > proportionate
- > transparent, fair and accountable
- > consistent

### 6.1 Independent and impartial

Decisions made by the ONRSR and its officers will be impartial with any potential conflict of interest that might influence a decision being disclosed prior to the decision being made.

### 6.2 Risk based

The ONRSR will take a risk based approach to all aspects of its work and will focus actions and activities primarily at rail transport operators whose activities give rise to the most serious risks. The onus is on the rail transport operator who is best placed to manage their risks and comply with the law, where the hazards are least well controlled, or where ongoing compliance with the law needs to be verified. The action will be focused on the responsible rail transport operator best placed to control it.

Any enforcement action will be directed against the rail transport operator responsible for a breach. This may be employers in relation to workers or others exposed to risks; the self-employed; directors, managers and other similar company officers; owners of premises; contracting entities; suppliers of equipment; designers or clients of projects; or employees themselves. Where several rail transport operators have responsibilities in respect of an incident or breach of compliance, each may be subject to enforcement action by the ONRSR, as required.

### 6.3 Educational

The ONRSR through its normal regulatory interactions undertaken by rail safety officers will actively look to use an educational approach with individual rail transport operators as an option for securing compliance and improving safety.

## 6.4 Proportionate

The ONRSR and its officers, in making decisions when administering the RSNL, will make decisions proportionate to the identified risk to safety, the seriousness of any perceived breach, and/or the level of non-compliance with legislative requirements.

The ONRSR will determine the seriousness of the matter by considering a number of factors, including:

- > the actual or potential harm caused to employees and third parties, including passengers and other railway users, and to the public interest
- > the degree to which the requirements of the law have not been met
- > the culpability of the offender, including whether the rail transport operator has acted negligently, recklessly, knowingly or intentionally
- > the history of compliance and incidents involving the party

## 6.5 Transparent, fair and accountable

Rail safety officers will at all times be conscious of their role and accountability for promoting the highest practicable safety standards.

The ONRSR will act in the best interest of the public.

The ONRSR and its officers will fully document and clearly communicate to those persons involved the reasons for decisions taken when administering the RSNL.

Transparency means helping rail transport operators to understand what is expected of them and what they should expect from the ONRSR.

## 6.6 Consistent

While like situations will be treated in a like manner, the circumstances of each situation will be taken into account and each will be considered on its own merits.

Decisions and actions by the ONRSR will be fair and comparable situations will have comparable outcomes.

Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar outcomes.

## 7. Monitoring Compliance

In monitoring compliance the ONRSR undertakes the following:

- > compliance audits
- > compliance inspections
- > operational investigations
- > compliance investigations
- > requests for information

The ONRSR also maintains oversight of compliance with change requirements consistent with the *Regulatory response to the management of change policy*.



## 7.1 Compliance audits (s133)

A compliance audit involves a formal review of all or part of a rail transport operator's safety management system and risk management, including supporting systems, programs or workplace practices.

The purpose of a compliance audit is to determine compliance with legislative requirements.

Compliance audits will be undertaken as part of the planned ONRSR work program, but may also be undertaken in response to circumstances arising at other times. For more information refer to the *Rail safety audit policy*.

## 7.2 Compliance inspections

A compliance inspection is an on-site examination of a rail transport operator's workplace management and control of rail safety hazards and risks. Typically an inspection would involve observations of railway operations, confirming compliance with the rail transport operator's standards and procedures and examination of records.

An inspection may be conducted as:

- > An unplanned or unscheduled walk around the site
- > A formal, planned inspection
- > Compliance inspections may be conducted in a range of circumstances, such as:
  - > in response to a notifiable occurrence
  - > in response to a notification of change or a variation to accreditation
  - > to supplement a compliance audit to confirm application of systems in practice
  - > after an observation made, or information received, by the ONRSR
  - > after a report based on safety concerns is received from a member of the public or a person in the rail industry

A compliance inspection may also be part of the ONRSR's ongoing activities which target specific areas for risk management and prevention. Such areas may be identified through other incidents or trends, or may be specific to the rail transport operator.

## 7.3 Operational investigations

An operational investigation is the ONRSR term for the initial investigation of a notifiable occurrence. The rail safety officer conducting the investigation will seek to establish the basic facts surrounding the incident, which will inform the ONRSR decision on whether to require the rail transport operator to investigate the incident (s122 of the RSNL) and/or the ONRSR to undertake a compliance investigation. The ONRSR will not normally investigate an incident that is being investigated by the rail transport operator under s122 of the RSNL.

For incidents of a serious nature (or in cases of repeated incidents) a rail safety officer will attend the site of the occurrence. The rail safety officer may ask the rail transport operator to demonstrate "show cause" as to its ability to safely continue carrying out railway operations. In satisfying this, the rail safety officer will consider whether the rail transport operator has:

- > demonstrated an understanding of the factors that led to the incident
- > identified actions that have been taken to give confidence that such an incident will not be repeated

It is important to note that this "show cause" process is not intended in any way to prejudice investigations being undertaken by the rail transport operator or the ONRSR. The aim is to

ensure that any immediate safety concerns have been considered and addressed at the time rather than waiting for the conclusion of any investigative process.

In cases where the rail safety officer is not satisfied that the rail transport operator has demonstrated appropriate “show cause”, and believes there is an immediate risk to safety, then a prohibition notice may be issued to prevent any further carrying out of the activity that led to the incident.

It is acknowledged that any actions implemented in this immediate context can only be made on the information available at the time. As an investigation by the rail transport operator and/or the ONRSR develops over time it is accepted that information may come to light that renders the immediate actions taken obsolete or inappropriate. In such cases the ONRSR expects the rail transport operators to amend its actions so as to reflect the new information and inform the ONRSR appropriately, and consistent with any notices issued.

## **7.4 Compliance investigations**

The ONRSR may conduct a compliance investigation into a suspected breach of the RSNL.

A compliance investigation may be conducted in a range of circumstances which include, but are not limited in response to:

- > a notifiable occurrence
- > an adverse finding from an audit
- > outcomes identified from a compliance inspection
- > outcomes identified from an operational investigation
- > confidential or other intelligence reports
- > a written direction from a responsible Minister for a participating jurisdiction on a rail safety matter relating to that jurisdiction

The ONRSR will investigate in order to determine:

- > whether there has been a breach of the RSNL
- > whether appropriate action has been taken, or needs to be taken, to prevent a recurrence of an incident and / or to secure compliance with the law
- > lessons to be learnt and whether there is a requirement to influence the law and industry guidance
- > what response is appropriate to a breach of the law, if a breach is identified

To maintain a proportionate response, the ONRSR will devote available resources for investigation to the more serious incidents or those with the potential to be serious. It is neither possible nor necessary for its statutory purposes to investigate all potential issues of possible non-compliance with the law. In selecting which complaints or reports of incidents or injury to investigate, and in deciding the level of resources to be used, ONRSR will take account of the following factors:

- > the severity and scale of potential or actual harm
- > the seriousness of any potential or actual breach of the law
- > knowledge of the rail transport operator’s past performance in terms of compliance with the law
- > ONRSR’s enforcement priorities
- > the likelihood of the investigation leading to successful enforcement action against a rail transport operator or a meaningful improvement in their behavior
- > the wider relevance of the event, including serious public concern

## 7.5 Request for information

To support monitoring and safety improvement activities, rail safety officers may request information from rail transport operators. Depending on the circumstances the request may range from a phone call seeking clarification of a simple and/or minor matter through to formal written communications using relevant sections of the RSNL.

## 8. Compliance Tools

The range of compliance and enforcement tools available to the ONRSR can be shown as a pyramid of options with the most punitive tools (and those with the most immediate effect) at the top.

'Education and advice' are considered the first step in the compliance and enforcement pyramid. The pyramid reflects the increasing severity of the options available to the ONRSR but it is not intended to imply a sequential response for compliance. It signifies that the ONRSR must consider the full range of compliance and enforcement options available in relation to each situation and take a balanced approach, proportionate to the circumstances and risk at the time.

Picture 1: Compliance and enforcement pyramid



In determining the appropriate compliance tool or enforcement mechanism the ONRSR will consider the immediate risk, as well as:

- > the compliance tools at its disposal
- > the likely effectiveness of each tool
- > the speed of resolution
- > rail transport operator's history of compliance and incidents
- > any other factors relevant to the specific case

Findings from an audit, inspection or investigation activity will be considered individually and collectively so that the most appropriate option (or combination of options) for the circumstance is applied. Where appropriate, the ONRSR will liaise with the rail transport operator when considering the compliance and enforcement option so as to afford the rail transport operator an opportunity to remedy the matter. However, the ONRSR shall, if appropriate, use stronger

enforcement options dependent upon the nature of the breach, the risk to safety and/or the gravity of the circumstances.

To ensure consistency, transparency, accountability and impartiality in decision making, all decisions and the reasoning for each decision shall be clearly documented. Each decision to take enforcement action is to be supported by evidence that is sufficient to substantiate the actions taken.

Decisions to take enforcement action are subject to a review process, as outlined in the *ONRSR Review of decisions policy*.

## **8.1 Provision of education and advice**

The ONRSR will, where appropriate and practicable, work with rail transport operators by providing education and advice as the primary method of helping duty holders to improve the safety of railway operations.

There is no legal obligation for an operator to comply with informal or general advice given by the ONRSR or its officers. Advice is only given to facilitate compliance with the law and may be specific to a rail transport operator (as an 'observation') or given more broadly to industry (for example, through safety bulletins).

Advice may be given verbally or in writing. This advice is given in good faith and based on the considered view of the ONRSR and its officers. Typically in the course of a compliance audit or inspection, rail safety officers will note opportunities for improvement (referred to as 'observations'). Any observations will be provided in writing to the rail transport operator as informal advice, with a supporting explanation. This advice will not require a formal response from the rail transport operator but will be recorded by the ONRSR for consideration in future compliance activities.

Provision of advice may be appropriate in circumstances where there is a lack of awareness about, or misinterpretation of the RSNL or conditions of accreditation, the circumstances are minor in nature, and the rail transport operator demonstrates a willingness to take measures to make improvements and ensure compliance.

## **8.2 Non-Conformance Report**

If in the course of an audit, inspection or investigation where the rail safety officer has found the rail transport operator to be in breach of the RSNL, the issuing of a Non-Conformance Report (NCR) may be appropriate where:

- > the breach does not present an immediate threat to safety or is considered to be relatively minor; and
- > the rail safety officer is satisfied that the rail transport operator has demonstrated a willingness and capability to address the breach within its safety management system procedures.

An NCR will detail the identified breaches, termed 'non-conformances'. In response to any non-conformances arising, the rail transport operator will be requested to provide the ONRSR with written advice of the corrective actions it will take and the expected timeframes. Further, it is expected that the rail transport operator will record and address any non-conformances through its' own audit / review / corrective action processes, as part of its safety management system.

If a rail transport operator fails to provide advice of intended corrective actions, and/or to adequately address a non-conformance within the agreed timeframe the ONRSR may escalate the matter.

### **8.3 Improvement Notice (s175 to s178)**

Improvement notices may be issued by a rail safety officer where they reasonably believe that a rail transport operator is contravening or has contravened a provision of the RSNL, or is carrying out or has carried out railway operations that threaten safety. In determining whether to issue an improvement notice, the rail safety officer will take into consideration the current risks and the safety history of the rail transport operator involved.

If the direction to be given by the rail safety officer in the improvement notice is likely to result in significant costs for the rail transport operator, a cost benefit analysis may be required in accordance with the *ONRSR Application of cost benefit analysis requirement policy*.

The issuing of an improvement notice is a reviewable decision under s215 of the RSNL.

### **8.4 Prohibition Notice (s179 to s181)**

A rail safety officer may issue a prohibition notice when they believe on reasonable grounds that there is an immediate risk to safety. A prohibition notice requires the immediate cessation of the relevant activity until the matters that give rise to the risk to safety are remedied. This notice is a tool to achieve immediate action in relation to a specific risk or activity. A prohibition notice may be issued verbally but must be confirmed by written notice as soon as practicable.

The decision for a rail safety officer to issue a prohibition notice shall be reached after objectively considering and assessing all the relevant facts and issues, including any actions being undertaken by the operator.

The issuing of a prohibition notice is a reviewable decision under s215 of the RSNL.

### **8.5 Infringement Notice (s233 to s242)**

The ONRSR has the power under the RSNL to issue an infringement notice in circumstances where a rail transport operator or an individual has breached the RSNL, and for that particular breach an infringement penalty provision is contained in the RSNL. Infringement penalty provisions are listed in s233 of the RSNL. An infringement notice is not subject to right of review, nor is the ONRSR required to conduct or cause to be conducted a cost benefit analysis. An infringement notice must be issued within 12 months from ONRSR forming the view that a breach has occurred.

The issuing of an infringement notice is viewed as a serious consequence for non-conformance with the RSNL. Prior to issuing an infringement notice the ONRSR will take into consideration:

- > the level of the breach
- > the seriousness of any harm or injury that may have resulted from the breach
- > the adequacy of the prescribed penalty in relation to the severity of the breach
- > whether the breach is a one-off situation that can be remedied easily
- > the issue of an infringement notice is likely to be a practical and a viable deterrent
- > level of evidence to substantiate the breach
- > the time lapse between the offence and the issue of the infringement notice

The ONRSR can, at any time before the deadline for payment of the infringement notice, withdraw the infringement notice by serving a withdrawal notice on the rail transport operator or individual.

The person who is the subject of an infringement notice has the right to refuse to pay the infringement fine, however if the infringement notice is not paid the ONRSR will pursue alternative debt recovery options.

## **8.6 Non-disturbance Notice (s182 to s 185)**

The power to issue a non-disturbance notice is available to rail safety officers. Any rail safety officer may choose to issue a non-disturbance notice when it is imperative to the work being undertaken by the ONRSR that evidence is preserved. An example could be where the ONRSR elects to conduct a compliance investigation following an incident and requires the rail transport operator to ensure the preservation of evidence associated with the incident.

The ONRSR acknowledges a non-disturbance notice does not prevent any action being taken:

- > to assist an injured person or to remove a deceased person
- > to make the site safe or prevent a further incident
- > by police

A non-disturbance notice must be complied with unless the person to whom the notice has been issued can provide a “reasonable excuse” for non-compliance. The ONRSR may accept a reasonable excuse based on evidence that compliance with the notice may introduce other risks to safety.

The ONRSR cannot accept non-compliance due to reasons of inconvenience or cost alone.

The non-disturbance notice will prevent the site from being disturbed for a period of no more than 7 days however, if required further non-disturbance notices may be issued for periods not exceeding 7 days at a time.

The issuing of a Non Disturbance notice is a reviewable decision under s215 of the RSNL.

## **8.7 Variation of conditions or restrictions to accreditation or registration (Divisions 4 and 5 of Part 3)**

ONRSR initiated variation of an accreditation, or the variation or imposition of conditions or restrictions on an accreditation or registration may be appropriate in circumstances where the rail safety officer has formed an opinion that the rail transport operator does not have the competence and capacity to undertake railway operations to the extent allowed by its current notice of accreditation or registration.

In considering a decision to impose or vary conditions or restrictions on accreditation or registration for the purposes of enforcing compliance, the ONRSR will consider:

- > the rail transport operator’s history of compliance whether railway operations are or are not conducted to an adequate standard of safety and the safety management system complies with the RSNL
- > whether the rail transport operator is temporarily or permanently unable or unwilling to undertake any relevant remedial action necessary to satisfy the requirements for accreditation or registration

Prior to varying, revoking or imposing a new condition or restriction, the ONRSR shall provide the rail transport operator with an opportunity to discuss the proposed changes and the avenue for review. The ONRSR must also consider whether a cost benefit analysis is required, in accordance with the *ONRSR Application of cost benefit analysis requirement policy*.

## 8.8 Direct Amendment to a Safety Management System (s104)

The ONRSR may direct a rail transport operator to amend its safety management system (SMS) in a specified manner if the ONRSR considers that the SMS or a particular part of the SMS is deficient. Prior to issuing a direction to amend a SMS, the ONRSR will provide the rail transport operator an opportunity to discuss the proposed amendment.

Where the ONRSR decides to formally direct the rail transport operator to amend its SMS in a specified manner, the ONRSR shall give the rail transport operator a period of not less than 28 days in which to undertake the change.

If the intended direction to amend the SMS is likely to result in significant costs to the rail transport operator a cost benefit analysis may be required in accordance with the *ONRSR Application of cost benefit analysis requirement policy*.

The issuing of a direction to amend a SMS is a reviewable decision under s215 of the RSNL.

## 8.9 Enforceable Voluntary Undertakings (s251 to s257)

An enforceable voluntary undertaking (EVU) is a formal written undertaking by a person to address a contravention or alleged contravention of the RSNL. It is voluntary and up to the rail transport operator to propose, however if accepted by the ONRSR, it becomes a legally binding agreement that the ONRSR may enforce in court.

An EVU represents a high level commitment from the rail transport operator and for this reason will only be accepted from the Accountable Person as nominated through their accreditation or registration, generally to correct serious matters that may otherwise be prosecuted. It must demonstrate to the ONRSR that the safety outcome of the EVU will be greater than other enforcement options.

An EVU may be accepted by the Regulator where it meets the following criteria:

- > it is not for a contravention, or alleged contravention, of a Category 1 offence (as defined in s58 of the RSNL)
- > the public interest would be better served by acceptance of a voluntary undertaking rather than proceeding with prosecution or cancellation or suspension
- > the person is likely to comply with the undertaking, taking into account the
- > organisation's record of compliance and upholding of previous commitments
- > it will have at least the same regulatory impact and is more cost-effective than the alternative enforcement option, including consideration of the cost and effort of monitoring compliance with the undertaking
- > 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
- > a compliance date is specified - large programs of work may need specific project milestone dates for compliance
- > it is in the preferred ONRSR format

Consistent with these criteria, in most cases the ONRSR will only accept an EVU in cases where prosecution or suspension is being considered. However it is at the discretion of the Regulator to determine when a rail safety undertaking is appropriate.

Only the Regulator or an authorised delegate may accept, vary or withdraw a rail safety undertaking. A written decision and the reasons for that decision will be provided to the proponent as soon as is reasonably practicable.

### **8.10 Cancellation or suspension of accreditation or registration (Divisions 4 and 5 of Part 3)**

The ONRSR will consider cancellation or suspension of an accreditation or registration where the accredited rail transport operator or registered person:

- > no longer satisfies the requirements for accreditation or registration
- > is not complying with the conditions or restrictions of the accreditation or registration
- > has not conducted the railway operations or managed the private siding/s for which the accreditation or registration was granted for at least the preceding 12 months or contravenes the law

Before arriving at the decision to cancel or suspend, the ONRSR will consider all other tools available and be satisfied that the risk to safety is such that cancellation or suspension is the most appropriate option to ensure safety. The ONRSR will advise the accredited or registered person in writing of the intention to cancel or suspend the accreditation or registration. The ONRSR must give at least 28 days for the accredited person to show why the decision should not be made.

However, immediate suspension is available to the ONRSR and this will be activated by the ONRSR in when there is an immediate and serious risk to safety unless the accreditation or registration is suspended immediately.

Cancellation or suspension of accreditation or registration is a reviewable decision under s215 of the RSNL.

### **8.11 Immediate suspension (Divisions 4 and 5 of Part 3)**

The ONRSR has the power to immediately suspend an accreditation or registration, if the ONRSR considers there is, or would be, an immediate and serious risk to safety unless the accreditation or registration is suspended immediately.

The RSNL provides for a period of suspension not exceeding 6 weeks, however the ONRSR may, by written notice, extend that period further for up to 6 weeks.

Immediate suspension of an accreditation is similar to cancellation and suspension and is an action of last resort and will not be taken unless ONRSR considers that there is no other effective means of intervention available to prevent a serious risk to safety.

An immediate suspension is usually focusing on a broader area of operations, where a prohibition notice focuses on a specific type of operation.

## **9. Prosecution**

The ONRSR will use discretion in making any decision regarding a potential prosecution.

Prosecution will only be pursued where the ONRSR has collected sufficient evidence to provide a realistic prospect of conviction and has decided, in accordance with this policy that it is in the public interest to prosecute. The ONRSR will have regard to the following matters when deciding whether to prosecute:

- > a person is reckless as to the risk to an individual of death or serious injury or illness



- > the gravity of an alleged safety offence, taken together with the seriousness of any actual or potential harm warrants it
- > there has been a failure to adhere to statutory obligations which has resulted in a significant financial benefit or competitive advantage to the offending rail transport operator
- > there have been repeated breaches of a similar nature which give rise to significant risk, or persistent and significant poor compliance in related areas
- > work has been carried out without, or in serious non-compliance with, a legal authorisation, order or certificate
- > there has been a failure to comply with an improvement or prohibition notice or there has been a repetition of a previous breach
- > false information has been supplied wilfully, or there has been an intent to deceive, in relation to a matter which gives rise to significant risk
- > a rail safety officer has been intentionally obstructed by the rail transport operator in a way that prevents them from carrying out their lawful duties

Where rail safety officers are assaulted or threatened, the ONRSR will seek police assistance, with a view to seeking the prosecution of offenders.

Any decision to prosecute will be kept under continuous review, over the course of the prosecution. Where the circumstances are serious enough to warrant it and the evidence to support a case is available, the ONRSR may prosecute without seeking recourse to alternative sanctions.

## 9.1 Prosecution in the public interest

The principles of the RSNL require prosecutions only be brought if it is in the public interest. In determining whether or not the public interest requires that a matter be prosecuted the ONRSR may consider the following:

- > whether the admissible evidence available is capable of establishing each element of the offence (the prima facie case test)
- > whether there is a reasonable prospect of conviction, with regard to the following:
  - availability, competence and credibility of witnesses and the admissibility of such evidence
  - the reliability of the evidence of each witness and any conflicts in the evidence of eye witnesses
  - the reliability of any admissions, if any, made by defendants
  - other factors which could affect the likelihood or otherwise of a conviction
  - whether discretionary factors dictate that the matter should not proceed in the public interest

In considering the public interest and community expectations, the following factors will also 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 (i.e. reducing the likelihood that 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 enforcement options, for example enforceable voluntary undertakings
- > compliance history (i.e. 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 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 RSNL 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
- > 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.

## **9.2 Prosecution of individuals**

The ONRSR may pursue a prosecution against an individual (as opposed to a body corporate) when appropriate to do so in accordance with this policy. Where an investigation reveals that an offence was committed by an individual, or that the offence was attributable to neglect on their part, the ONRSR may take action against them.

The ONRSR encourages reporting of safety concerns via appropriate channels. The ONRSR advises that where an individual has fulfilled their duty to report a safety concern, this fact will be a material consideration, in the individual's favour, in terms of deciding whether to prosecute the individual or not.

## **9.3 Drug and alcohol testing**

Under the RSNL the ONRSR has the power to appoint authorised persons who can require a rail safety worker to undertake a test for the presence of a prescribed drug or alcohol. An authorised person may require the following:

- > preliminary breath test

- > breath analysis
- > drug screening test
- > oral fluid analysis
- > blood test

The RSNL details penalties for rail safety workers under the influence of drugs or alcohol. There are also penalties for rail safety workers who do not comply with directions given by an authorised person for the purpose of requiring the worker to submit to testing.

The Regulator may pursue an individual in accordance with this policy if a positive test for a prescribed drug or alcohol is recorded. The ONRSR's policy for administration of the program is described in the ONRSR *Drug and alcohol policy*.

## 10. The Role of the Rail Safety Officer

Rail safety officers are appointed under the RSNL and have the necessary powers required to fulfil their duties under the RSNL. In the exercise of their powers under the RSNL, rail safety officers shall comply with the ONRSR internal policies and processes.

The role of a rail safety officer generally includes, but is not limited to, the following:

- > providing practical, constructive information to duty holders about legislative requirements, particularly in relation to risk management and safety management systems
- > conducting audits, inspections and investigations to assess compliance with rail safety duties and obligations
- > compelling rail transport operators to undertake remedial action to rectify safety breaches through the use of enforcement measures such as infringement, improvement or prohibition notices

In order to carry out their duties rail safety officers are given wide powers of entry, enquiry and investigation under the RSNL. These powers include being able 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

There are also powers to issue directions, including powers to:

- > issue directions to give information or documents
- > obtain information, documents and evidence

Rail safety officers carry out their functions under the RSNL consistently with the ONRSR objectives and key principles.

## APPENDIX 1: Summary of Compliance tools and actions

It is important that rail transport operators have clear expectations as to what outcomes may follow on from compliance monitoring activities and in particular, what response is required from them when various compliance tools are applied.

Below is a summary of the most common tools and outcomes.

Outcome	Description	Further action required
No Adverse Findings	The rail safety officer has not identified any issue of concern.	No further action required by the rail transport operator.
Observation	The rail safety officer sees an opportunity for improvement in the systems and processes of the rail transport operator and provides advice to this effect.	Observations will be made in writing. The ONRSR will not seek a specific action in regard to such advice but rail safety officers may review how the advice has been considered and implemented during future compliance audits and inspections.
Non-Conformance Report (NCR)	The rail safety officer has found the rail transport operator to be in breach of the RSNL but has confidence that the rail transport operator is capable of managing the breach through its own corrective action processes and that the matter does not present a risk to safety that requires more immediate response.	The ONRSR will communicate the NCR in writing and request a written corrective action response from the rail transport operator. Rail transport operator expected to comply with rectifying identified non-conformances.
Improvement Notice	The rail safety officer has found the rail transport operator to be in breach of the RSNL – and the matter is deemed inappropriate for an NCR.	Findings are communicated in an Improvement Notice. Further action from the rail transport operator to comply with the notice is required.
Prohibition Notice	The rail safety officer believes there is an immediate threat to safety.	Compliance with Prohibition Notice required.