



National Rail Safety Regulations (Amendments)
Exposure Draft
September 2012



National Transport Commission

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National Rail Safety Regulations (Amendments) Exposure Draft

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Report outline

Title:	Rail Safety National Regulations (Amendments)
Type of report:	Exposure Draft
Purpose:	For public exposure
Abstract:	<p>This document describes a number of amendments to the draft Rail Safety National Regulations. A previous version, along with the Act which they accompany, was approved by the Standing Council on Transport and Infrastructure in November 2011. However, a number of matters remained to be addressed. The proposed amendments, as described in this exposure draft, address some of those.</p> <p>Enacting in law policy decisions previously made by Ministers or addressing mechanical elements of the Rail Safety National Law, these amendments have been assessed as having only a minor impact. Comment by stakeholders on them is now sought.</p>
Submission details:	<p>Submissions will be accepted until close of business on Friday, 5 October 2012 online at www.ntc.gov.au or by mail to:</p> <p>Chief Executive Officer National Transport Commission L15/628 Bourke Street MELBOURNE VIC 3000</p>
Key milestones:	The consolidated Rail Safety National Regulations are to be submitted for voting at a meeting of the Standing Council on Transport and Infrastructure, to be held in November 2012.
Key words:	Rail Safety National Law, Rail Safety National Regulations
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How to make a submission to the NTC

Who can make a submission?

Any individual or organisation can make a submission to the NTC.

Please note that as these Regulations implement policies already approved by the Ministerial Council the NTC will only consider submissions about the drafting and operation of the law expressed in the National Regulations, and not the policy decisions being implemented in the National Regulations.

How to submit

To make an online submission please visit the NTC homepage (www.ntc.gov.au) and select 'Make a submission to the NTC' from the News & Publication menu.

Alternatively, you can mail your comments to: Chief Executive Officer, National Transport Commission, Level 15/628 Bourke Street, MELBOURNE VIC 3000.

Where possible, you should provide evidence, such as data and documentation, to support your views.

Publication of submissions

Unless submissions clearly request otherwise, all submissions will be published online. Submissions that contain defamatory or offensive content will not be published. The *Freedom of Information Act 1982 (Cwlth)* applies to the NTC.

Foreword

The National Transport Commission (NTC) is an independent organisation established under the National Transport Commission Act 2003 (Commonwealth) and an Inter-Governmental Agreement for Regulatory and Operational Reform in Road, Rail and Intermodal Transport. NTC is responsible for developing nationally consistent reforms in road, rail and intermodal transport and for evaluating, monitoring, reviewing and maintaining those reforms.

In May 2009, the Australian Transport Council (ATC) recommended the establishment of a Single National Rail Safety Regulator, that decision being endorsed by the Council of Australian Governments in December 2009. NTC was tasked with developing Rail Safety National Law (the National Law), based on the Model Rail Safety Bill (2007) and Model Regulations (the Model Law) developed by the NTC and approved by the Australian Transport Council (ATC) in 2006.

Following previous initiatives to develop more nationally consistent arrangements, the reform represents an historic moment and unique opportunity to achieve a truly national system of rail safety regulation. It comes at a time when rail transport has been increasingly identified as a key means of servicing the growing nation-wide demand for safer, more productive and environmentally friendly transport services and infrastructure.

On 4 November 2011, the Standing Council on Transport and Infrastructure (SCOTI, formerly ATC) approved the National Law and accompanying regulatory impact statement, which assessed the cost impacts and benefits of the transition from Model Law to the National Law. SCOTI also noted an exposure draft of the Rail Safety National Regulations (the National Regulations).

The proposed additions/amendments to those draft National Regulations, as described in this explanatory document, now represent a fully functional body of rail safety law sufficient to underpin commencement of the Single National Rail Safety Law and Regulator in January 2013.

I acknowledge the efforts of NTC staff and the contributions of the National Rail Safety Regulator Project Office, Commonwealth, state and territory government policy makers, rail safety regulators and industry and union representatives.

Public comment was previously sought on regulations to be made under the National Law, as part of the regulatory impact statements on the National Rail Safety Law (Act and Regulations) in 2011 and on options for the further regulation of outer limits of work and rest for rail safety workers in 2012. This exposure draft of the National Rail Safety Regulations implements the policy decisions taken by ATC and SCOTI as part of the aforementioned, earlier processes of consultation and policy development.



Greg Martin PSM

Chairman

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1. Introduction

With national transport policy identified as a competition reform priority under the National Partnership Agreement to Deliver a Seamless National Economy¹, the Council of Australian Governments (COAG) agreed at their meeting on 7 December 2009 to establish a Single National Rail Safety Law and Regulator (the National Law and Regulator). Both were to be hosted in South Australia, with the Model Bill used as the basis for developing the South Australian-hosted National Law. The latter was then to be applied (referenced) by laws of each participating state and territory².

An Intergovernmental Agreement on Rail Safety Regulation and Investigation Reform³ was signed by all First Ministers at the COAG meeting of 19 August 2011. The agreement included matters for the objectives, scope, functions, structure, governance arrangements, roles and responsibilities of the Regulator.

Developed by the NTC and Project Office of the Rail Safety National Regulator (the Project Office), the Standing Council on Transport and Infrastructure (SCOTI) approved a body of National Law on 4 November 2011. SCOTI also noted an exposure draft of the Rail Safety National Regulations (the National Regulations).

The latter addressed some of the more detailed matters for how the National Law will operate, including:

- Processes for a rail transport operator to apply for or to vary their accreditation.
- Arrangements for the registering of private siding infrastructure managers.
- Prescribed requirements for an operator's safety management system, security and emergency management plans, rail network rules, rail-to-road interface agreements and the disclosure of train safety recordings.
- Requirements for rail safety worker health and fitness, drug and alcohol, and fatigue risk management programs, and records of rail safety worker competence.
- Processes for operators applying to be exempted from elements of the National Law.
- Infringement penalties.
- Arrangements for how certain Commonwealth Acts apply to the National Law.
- Prescribed information to be supplied by operators to the Regulator.
- Provision (but at that stage, no detail) for fees payable to the Regulator.

This exposure draft of the National Regulations includes several minor additional and amended provisions to those included in the previous (broader) exposure draft (which accompanied the National Law and regulatory impact statement). Those are as follows:

1. Additional fatigue risk management and drug and alcohol management provisions have been included in the National Regulations to implement the SCOTI decision of 18 May 2012 that the National Regulations preserve these NSW-specific requirements for rail transport operations in NSW.
2. Minor amendments have been made to the regulation of notifiable occurrences, to provide that oral reports of Category A notifiable occurrences are to be made to the Australian Transport Safety Bureau (the ATSB) and not the Regulator. The power of the Regulator to extend the time for reporting notifiable occurrences has also been removed as it is inconsistent with the *Transport Safety Investigation Act 2003 (Cth)* which imposes the same obligations to report as the National Regulations.
3. Provisions that modify the application of the South Australian oversight provisions which apply to the Regulator. These modifications reflect the fact that the South Australian oversight provisions need to operate nationally and not just in South Australia.

¹ Available at http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/seamless_national_economy_np.rtf

² All except the Australian Capital Territory, in which no railways exist.

³ Available at http://www.coag.gov.au/coag_meeting_outcomes/2011-08-19/docs/Rail_IGA-19August2011.pdf.

4. Including the fixed fees for activities such as accrediting rail transport operators and registering private sidings. These fixed fees, which differ from the annual charges, were approved by SCOTI in May 2012.
5. Clarification of which South Australian laws apply as laws of each state and territory, instead of corresponding laws in the latter. These laws apply for the purpose of providing oversight of the Regulator. Also clarification of which government entity is responsible for administering those (South Australian) laws, i.e. the South Australian or corresponding government entity in a given state or territory.

This exposure draft of the National Regulations also includes drafting notes on planned, further amendments to the National Regulations. These are:

1. In Regulation 7, details of Victorian tourist and heritage operators to be exempted from the National Law (and will instead be regulated by Victorian law);
2. The annual charges for accredited rail transport operators.

Amendment 1 in the list above will be included in the version of the National Regulations to be submitted to SCOTI for voting in November 2012. Amendment 2 will be the subject of separate amending regulations, planned to be submitted to SCOTI for approval in 2013.

2. Proposed amendments

Each of the proposed amendments to the draft National Regulations is discussed in this section.

These resolutions mean that the National Law and Regulator remain on schedule to commence as planned in January 2013.

2.1 Regulation 7 - Exempt Railways

2.1.1 Background

Regulation 7 (Railways to which Law does or does not apply) provides for prescribed railways to be explicitly included or excluded from the National Law (as otherwise defined in section 7 of the National Law - Railways to which this Law does not apply). The purpose of this regulation is to allow for:

- Clarity over the inclusion or exclusion from the National Law of specific railways for which an interpretation of the same against the scope of the National Law may be unclear or subjective.
- To explicitly include or exclude a given railway from the National Law, which may otherwise be clearly interpreted as falling outside or within it, respectively.

In May 2012, SCOTI determined that the National Law not apply to prescribed Victorian tourist and heritage rail transport operators, to be nominated by the Victorian government.

2.1.2 Objective

To prescribe, under the National Regulations, a list of (additional) railways to which relevant governments have determined shall be excluded from it.

2.1.3 Proposal

A list of railways to be excluded is still being developed by the Victorian government. It is anticipated that it would be prepared by late September 2012. It is proposed that those (to be) exempted railways be included in the final version of the Regulations, to be submitted for voting by SCOTI in November 2012.

Also, the Queensland government has resolved to no longer propose that the railway operating within the Dreamworld amusement park be explicitly included within the scope of the National Law (i.e. that it be excluded, by deletion of previous regulation 2(b)).

2.1.4 Consultation

Consultation over which railways will be exempted is a matter for and currently being undertaken between the Victorian government and relevant (Victorian) railways. A detailed assessment (including records of consultation) of the impacts of the National Law and Regulator on railways, including specifically those in the tourist and heritage sector, was included in the 2011 regulatory impact statement for the National Law⁴.

2.1.5 Impact

The nominated rail transport operators would be subjected to, instead of the National Law, applicable Victorian rail safety law and its administration by the Victorian government. The precise impacts of the proposal are impracticable to assess at this time, with any high degree of accuracy. However, the proposal would support the SCOTI decision on the matter.

The removal of the Dreamworld amusement park railway from the scope of the National Law would have no impact. While it would be anticipated for there to be some reduced compliance burden, relative to the previous proposal (for the railway to be included), the latter was a draft proposal, the costs for which had not yet been incurred.

⁴ Available at <http://www.ntc.gov.au/viewpage.aspx?documentid=1925>.

2.2 Accreditation fees

2.2.1 Background

A railway subject to the National Law may only operate if accredited by the Regulator and under the conditions of that accreditation.

Under the outgoing state and territory rail safety regulatory regimes, accreditation fees were set and charged by individual states and territories. On commencement of the National Law and Regulator, those will cease. Replacement fees now need to be set under the National Law (Regulations).

2.2.2 Objective

To establish, under the National Law, a nationally uniform regime for charging accreditation fees to rail transport operators.

2.2.3 Proposal

It is proposed to set fees under these regulations for specific transactions (as described in Table 1). The first column refers to the section of the National Law under which the relevant application may be made. The fees themselves are included in Schedule 3 of the National Regulations.

An annual accreditation fee will also continue to be charged, however this has yet to be set, pending the provision and assessment of further information. The mechanism for setting these fees has been approved by Ministers. Each fee would be charged to a rail transport operator on receipt of the applicable type of application.

Section	Description	Fee
64(2)(d)	Application for accreditation	\$10,000
68(3)(c)	Application for variation of accreditation	\$1,000
71(2)	Application for variation of conditions/restrictions of accreditation	\$1,000
84(2)(b)	Application for registration	\$1,000
87(3)(c)	Application for variation of registration	\$250
90(2)	Application for variation of conditions/restrictions of registration	\$250
205(2)(d)	Application for exemption	\$1,000
208(3)(c)	Application for variation of an exemption	\$100
211(2)	Application for variation of conditions and restrictions of exemption	\$100
	Annual accreditation fee	TBC

Table 1. Proposed fees for specific transactions only.

These fees have been developed based on estimates of regulatory effort, i.e. the cost to the Regulator of providing the associated service to rail transport operators.

2.2.4 Consultation

These fixed fees were developed by the Project Office of the Rail Safety National Regulator and the NTC. They were endorsed by SCOTI in May 2012.

While the fee figures themselves were developed post public consultation on the broader costs of implementing the Regulator (as assessed in the regulatory impact statement approved by SCOTI in November 2011), it is considered that they reflect/are consistent with those costs.

2.2.5 Impact

Under outgoing arrangements (state and territory-based rail safety laws and regulation), corresponding fees are charged at rates which vary from state-to-state. In some cases, the fees proposed here would constitute a fee increase for non-interstate operators. The NTC believes this to be the result of some states and territories historically administering rail safety regulation regimes at a net "loss". Rail transport operators operating in more than one jurisdiction will still benefit from being liable for a single fee only.

At a societal level, the NTC considers these proposed fees to have no impact, beyond those costs and benefits previously assessed as part of (i.e. embodied within) the 2009 and 2011 regulatory impact statements⁵ for the National Law and Regulator. Those broader regulatory proposals were approved by COAG and SCOTI. The proposed fees are merely mechanisms by which (part of) those costs and benefits would be incurred by rail transport operators.

A comparison of the fees proposed for the National Regulations with those in existing state and territory rail safety laws reveals that many of the proposed national fees are for relatively minor sums of money, i.e. \$100-\$250. Some others are for higher sums, particularly an application for accreditation (proposed to be \$10,000). Currently only applications for accreditation (for which existing fees range between \$1,000 and \$10,000), applications for variation of accreditation in Tasmania (\$1000) and applications for registration of a RIM for Private Siding in Victoria (\$611) attract a fee.

The fee for applications for accreditation is the only one which represents a significant increase above what is due under existing regulatory regimes, in some states and territories. It should be noted that this fee is only due upon an initial application for accreditation; it will never be incurred by an existing railway transport operator. As new railways appear only infrequently and the broader costs for which would make this fee minor in comparison, it is assessed as having only a negligible impact.

The other proposed fees would also be incurred infrequently. These applications are not for matters incurred in the day-to-day operations of a railway. They would typically arise only when significant changes were proposed to a railway's operations.

Sections 77 and 96 of the National Law delegate authority for the Regulator, using his discretion, to waive the full amount or part of these fees. While the National Law imposes no obligation on the Regulator to exercise that authority, it allows him to account for factors such as (potentially) affordability, which may arise due to the wide range of operating budgets between rail transport operators.

The NTC understands that at least some state and territory governments intend to, in fulfilling their community service obligations, (continue) subsidis(ing) the costs of certain railways, such as those in the tourist and heritage sector. SCOTI has approved a set of discounted fees for tourist and heritage rail transport operators, those being:

- \$1,000 for application for accreditation.
- \$500 for variation to accreditation.

Those fees have been excluded from the National Regulations, due to the impracticability of defining tourist and heritage operators. Instead, it is intended that such a determination will be left to the Regulator; i.e. the discounted fees will be given effect through the Regulator's power to waive fees.

In summary, the NTC has assessed these proposed fees as having, at most, only a minor impact on rail transport operators' costs. In combination with the authority of the Regulator to waive all or part of the fees, it is also noted that supplementary arrangements, particularly the ongoing practice of governments subsidising some railways, would further reduce or eliminate that minor cost impact.

⁵ The 2009 regulatory impact statement is available at <http://www.ntc.gov.au/viewpage.aspx?documentid=1927>, and the 2011 statement at <http://www.ntc.gov.au/viewpage.aspx?documentid=1925>.

2.3 Category A and B notifiable occurrences

2.3.1 Background

The 2012 COAG Intergovernmental Agreement on Rail Safety Regulation and Investigation reforms designated the Australian Transport Safety Bureau (ATSB) as the National Rail Safety Investigator.

The ATSB now has an overarching authority to investigate the national rail safety “system”. This includes determining the contributing factors in an accident or incident and encouraging safety action in relation to the safety management performance and practices of industry members and governments, including the National Law and Regulator. The ATSB’s *Transport Safety Investigation Act 2003* states that it is not the function of the ATSB to apportion blame or determine liability in its investigations.

The Regulator may also separately undertake a compliance investigation. A compliance investigation has a common objective with the ATSB of identifying opportunities for improving rail safety management. However, a major distinction is the ATSB’s independence from the system as a whole allowing it to take a broader systemic approach. The Regulator is responsible for identifying and taking appropriate measures to reduce incidences of non-compliance with the National Law; i.e. where appropriate, by taking enforcement action.

For the national investigator and the regulator to be able to perform their separate but related investigation functions, it is important that they have timely and effective access to mandatory reports by rail transport operators of relevant safety incidents. Section 121 (Notification of certain occurrences) of the National Law imposes such a duty on rail transport operators to notify the “.. *Regulator or another authority specified by the Regulator..*” of a prescribed type of incident/occurrence.

2.3.2 Proposal

To support the respective investigatory needs of both the Regulator and ATSB, it is proposed that ATSB shall receive mandatory reports from rail industry members of safety incidents (notifiable occurrences) of a nature which may warrant immediate investigation. The draft National Regulations currently prescribe two categories of notifiable occurrences: categories A (of which the regulator must be notified immediately) and B (of which the regulator must be notified within 72 hours).

The previous exposure draft of the National Regulations (in regulation 40 – now regulation 57 of the National Regulations) provided that oral reports of Category A notifiable occurrences be provided to the Regulator. In line with the decision to expand the role of the ATSB in investigating rail safety incidents, the regulation has been amended to provide that the oral report must be given to the ATSB if required to do so under the *Transport Safety Investigation Act 2003 (Cth)* and must be given to the Regulator if the Commonwealth Act does not require a report to the ATSB.

The new regulations being made under the *Transport Safety Investigation Act 2003 (Cth)*⁶ will require all category A occurrences (as defined under the National Regulations) to be notified to the ATSB. This will ensure a single point of contact for reporting category A offences.

Another amendment is that the previous exposure draft of the National Regulations allowed for the Regulator to extend the allowable time for a rail transport operator to report a notifiable occurrence. Since the obligations to report both Category A and Category B notifiable occurrences are in both the *Transport Safety Investigation Act 2003 (Cth)* and the National Regulations, and the Commonwealth legislation prevails over the National Regulations in the event of an inconsistency, it is proposed that the power of the Regulator to extend the allowable time be removed since it will be ineffective in the absence of a corresponding power to extend in the Commonwealth legislation.

Some stakeholders have advised that they consider the current list of Category A incidents to be too broad. This is on the basis that some of the Category A incidents, if reported, would not require

⁶ The exposure draft for these is available from the ATSB website at <http://www.atsb.gov.au/rail/exposure-draft-of-rail-occurrence-reporting-regulations.aspx>.

an immediate response from either the ATSB or the NRSR. While no changes are proposed at this time, a review is being conducted on whether that may be appropriate.

2.3.3 Consultation

At this stage, consultation has been restricted to between government bodies only.

2.3.4 Impact

The amendments materially impact only on the mechanics of government (i.e. allocation of responsibilities for receiving mandatory notifications of accidents and incidents between the Regulator and ATSB). These are not considered to constitute regulatory impacts.

The removal of a power for the Regulator to grant time extensions to the reporting of Category A incidents has also been assessed as having no regulatory impact.

2.4 Outer limits of work and rest in NSW only

2.4.1 Background

In November 2011, SCOTI approved a Rail Safety National Law and endorsed an accompanying body of Rail Safety National Regulations. Those Regulations excluded any provisions addressing outer limits of rail safety work or rest. Such limits are currently prescribed only in the New South Wales rail safety law, as a means of supporting the management of safety risks arising from rail worker fatigue.

In approving the Act, SCOTI directed that policy for outer limits be resolved, prior to the National Law commencing. In a submission to SCOTI in May 2012, supported by a regulatory impact statement⁷, the NTC proposed that prescription of outer limits of rail safety work and rest was not necessary in the National Law to ensure rail safety.

SCOTI approved that proposal, but also directed that the National Regulations be amended to allow NSW to retain their current prescribed train driver hours limits, as applied in the New South Wales rail safety law⁸.

SCOTI further directed that the Regulator undertake a review of the fatigue provisions within three years from their commencement.

2.4.2 Proposal

In accordance with the May 2012 SCOTI outcome, it is proposed to amend the (draft) National Regulations (as endorsed by SCOTI in November 2011), to include provisions to the same effect as those in the current New South Wales rail safety law for application in that state only. These provisions can be found in regulation 29(4) and Schedule 2 of the National Regulations.

It is intended that the limits of work and rest would apply only to prescribed types of rail safety work which take place in New South Wales. In other words, for work which occurs across state borders, the entire duration of that work would count towards the drivers shift length for fatigue management purposes. However, an operator would only be in breach of the Regulations when a shift limit is exceeded within New South Wales. Operators who consider that they can ensure safe hours of work outside the Schedule 2 limits may apply for an exemption from the Regulator. Operators who are already exempt from Schedule 2 under current New South Wales law will continue to be exempt under the National Rail Safety Law.⁹

⁷ Available at <http://www.ntc.gov.au/viewpage.aspx?documentid=1925>.

⁸ These NSW requirements are mainly found in section 20 and Schedule 2 of the *Rail Safety Act 2008 (NSW)*.

⁹ Such exemptions are planned to continue applying for up to 24 months after commencement of the National Law and Regulator, or when the exemption was scheduled to lapse (whichever comes first), after which the operator may re-apply to the Regulator for a new exemption.

2.4.3 Impact

The proposal would implement the May 2012 SCOTI-directed policy outcome which, by maintaining the New South Wales arrangements, effectively maintains the status quo (under collective state and territory rail safety laws). Therefore, there is no impact of the proposal.

2.5 Drug and alcohol amendments

2.5.1 Background

The National Law requires rail transport operators to develop and implement a drug and alcohol management program, including a rail safety worker testing regime. However, operators are not required to report individual results of such tests to the Regulator.

New South Wales rail safety law provides for a different arrangement, in which rail transport operators must ensure that:

- A minimum of 25 per cent of rail safety workers (those being workers for the purposes of the operator's railway) are tested each year, in accordance with prescribed testing standards and procedures.
- Rail safety workers involved in a prescribed incident (i.e. one with serious risk of injury) are similarly tested within three hours of the incident.
- Positive test results (those indicating a potential offense) must be reported to the (New South Wales) rail safety regulator.

In May 2012, SCOTI directed that the National Law be amended to preserve the New South Wales requirements, in that state only.

2.5.2 Proposal

To implement the May 2012 SCOTI decision, as described above, by including regulation 28(2) to 28(4) and 28(7) in the National Regulations.

2.5.3 Impact

The proposal would implement the May 2012 SCOTI-directed policy outcome which, by maintaining the arrangements which already apply in New South Wales under its state rail safety law, effectively maintains the status quo (under collective state and territory rail safety laws). Therefore, there is no impact of the proposal.

2.6 Oversight law amendments

2.6.1 Background

Section 263 of the National Law provides that certain South Australian legislation applies as a law of each participating jurisdiction for the purpose of the Law. These Acts are:

1. *Freedom of Information Act 1991 (SA)*
2. *Ombudsman Act 1972 (SA)*
3. *Public Finance and Audit Act 1987 (SA); and*
4. *State Records Act 1997.*

These Acts are oversight laws which ensure that the Regulator is subject to oversight from the public and agencies such as the Ombudsman and the Auditor-General. The South Australian oversight laws apply to the Office of the National Rail Safety Regulator to ensure national consistency.

2.6.2 Proposal

Regulations 35 to 55 of the National Regulations set out modifications to the South Australian oversight laws as they apply as a law of a jurisdiction subject to the National Law.

Important provisions confer jurisdiction on the South Australian Ombudsman, the South Australian Auditor-General and the District and Supreme Courts of South Australia to exercise functions, hear

and determine appeals respectively. These provisions also clarify whether references to government entities in the oversight laws are to be references to each jurisdiction's version of the entity or to South Australian version.

2.6.3 Impact

The amendments materially impact only on the mechanics of government and clarify how the existing policy to use the South Australian oversight laws as required by the National Law will be implemented when the South Australian oversight laws are applied in other jurisdictions.

3. Next steps

After reviewing all comments received on these proposed amendments, the NTC will submit the draft National Regulations, encompassing any necessary, further changes arising from feedback received, to SCOTI for voting in November 2012.

Having previously been approved by SCOTI (in November 2011), the (National Law) Act was passed by the South Australian Parliament on 1 May 2012. The National Regulations may be made by the Governor of South Australia, on the unanimous recommendation of the Ministerial Council (as prescribed in section 264 of the draft National Law).

Once made under South Australian law, the remaining states and territories will then implement applying legislation that will reference the South Australian rail safety legislation (National Law) as their own legislation. Commencement is expected to take place in January 2013.