

ONRSR Policy

Exemptions from the Rail Safety National Law



Document control	
Objective Document ID:	A388614
Version number:	3.0
Approved by:	Chief Executive
Date approved:	June 2017

Policy changes to 3.0

- > Inclusion of the ability to surrender an exemption, following legislative change

Office of the National Rail Safety Regulator

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

W: www.onrsr.com.au

 www.twitter.com/ONRSRAustralia

Copyright information

© Office of the National Rail Safety Regulator 2017. This material may be reproduced in whole or in part, provided the meaning is unchanged and the source is acknowledged

Table of contents

1	Purpose	2
2	Scope.....	2
3	Definitions	2
4	Legislative framework.....	3
4.1	Railways to which this Law does not apply.....	3
4.2	Exemptions relating to rail infrastructure managers of certain private sidings.....	3
4.3	Ministerial exemptions.....	3
4.4	Exemptions granted by the Regulator.....	3
5	When exemption may be considered by the Regulator	4
6	Scope of exemptions granted by the Regulator	5
7	Assessment of applications.....	5
8	Ensuring ongoing compliance.....	6
9	Surrender of exemption.....	6

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, rail transport operators must ensure, so far as is reasonably practicable, the safety of their railway operations and must demonstrate the management of risks through a documented safety management system.

The risk management process and the safety management system must conform to various, more specific, requirements as detailed in the RSNL. While the general co-regulatory approach of the RSNL provides latitude in determining what measures are appropriate for a given operational circumstance, the RSNL may impose requirements on a limited number of rail transport operators that may not be 'reasonably practicable', where the burden of complying with the requirement may outweigh the safety benefit that could be realised.

Additionally, rail transport operators may seek alternative means of compliance for a given requirement. In these circumstances, rail transport operators may seek an exemption from the relevant requirement (or requirements) of the RSNL.

The purpose of this document is to outline the ways by which a rail transport operator may be considered for an exemption from all or part of the RSNL. In particular, this document will focus on those exemptions that may be issued at the discretion of ONRSR, and will articulate how ONRSR will exercise its power to exempt.

2 Scope

This policy has relevance for ONRSR's determination of applications, submitted by rail transport operators, for exemption from the requirements of the RSNL. The policy is intended to guide regulatory officers in their assessment and interpretation of the discretionary aspects of the RSNL.

The document is intended to be read in conjunction with the legislation and other relevant ONRSR policies. The policy itself imposes no legal duty and where actions or requirements are described as mandatory these reflect requirements in the RSNL or National Regulations. It is not intended to replace the legislation, or to limit or expand the scope of the legislation. In the event of an inconsistency between this policy and the legislation, the legislation will prevail.

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

There are various mechanisms in the legislation by which rail transport operators may be excluded from all requirements of the RSNL or be exempt from part of the RSNL. While this document will focus on those exemptions that may be conferred by ONRSR upon application by a rail transport operator, for clarity, the following parts outline all options available through the RSNL.

4.1 Railways to which this Law does not apply

Section 7 of the RSNL prescribes various railways that are 'excluded' from the application of the RSNL, with s7(1)(g) allowing, through regulation, for other classes of railway or specified named railways to also be excluded and s7(3) allowing for railways otherwise excluded to have the RSNL apply.

Those railways prescribed under s7 are wholly excluded from the legislation, meaning that no provisions of the RSNL apply and ONRSR oversight is therefore not required. This is different to 'exemptions', where some requirements of the RSNL would generally still be applicable and ONRSR oversight is still necessary.

4.2 Exemptions relating to rail infrastructure managers of certain private sidings

See Subdivision 1 of Division 5 of Part 3 of the RSNL.

Due to the lower levels of risk presented by the majority of private sidings, a rail infrastructure manager of a private siding (as defined in the RSNL) is provided with an exemption from accreditation and is not required to comply with certain aspects of the RSNL, such as prescribed requirements for a safety management system.

In place of accreditation, under s83 of the RSNL, rail infrastructure managers of certain private sidings must be registered and comply with certain prescribed requirements for managing risks.

Further guidance on registration is in the ONRSR Private Siding Registration Policy.

4.3 Ministerial exemptions

See Division 1 of Part 6 of the RSNL.

The relevant state or territory Minister may, by Gazette, grant exemptions from all or part of the RSNL for rail operations carried out in the relevant jurisdiction, which may be subject to conditions. Such exemptions may be granted for a maximum period of 3 months (after which full compliance with the law would be required or separate exemption sought), and thus would generally be sought under pressing, urgent or one-off circumstances.

Unless a Ministerial exemption is granted from all provisions of the RSNL, ONRSR will have regulatory oversight of these railway operations.

Rail transport operators seeking such an exemption would be required to seek the approval of the relevant Minister. The Minister must consult with ONRSR in making a determination. The ONRSR will provide advice to the Minister in accordance with this policy when requested.

4.4 Exemptions granted by the Regulator

See Division 2 of Part 6 of the RSNL

The RSNL contains the power for the Regulator to confer longer term exemptions from designated provisions of the legislation, being all or part of the following areas of the RSNL:

Accreditation (Division 4 of Part 3 of the RSNL)

Registration of rail infrastructure managers of private sidings (Division 5 of Part 3 of the RSNL)

The following elements of a safety management system (Subdivision 3 of Division 6 of Part 3 of the RSNL):

- security management plan (s112 of the RSNL)
- emergency management plan (s113 of the RSNL)
- health and fitness management program (s114 of the RSNL)
- drug and alcohol management program (s115 of the RSNL)
- fatigue risk management program (s116 of the RSNL).

A formal application process exists for individual rail transport operators to seek an exemption or variation of an exemption. The application process and what the applicant must demonstrate is described in detail under Division 2 of Part 6 of the RSNL and Part 6 of the National Regulations.

The granting of an exemption may be subject to conditions or restrictions and includes the authority for ONRSR to vary, cancel or suspend it. Decisions on exemption applications made by ONRSR are reviewable (see ONRSR's Review of Decisions policy).

5 When exemption may be considered by the Regulator

The RSNL establishes a process by which rail transport operators assess the risks associated with their railway operations and then establish a safety management system to manage them. It provides flexibility that supports operators in aligning their risk management with the scope, nature and risk profile of their operations.

Therefore, exemptions will not be needed frequently, as the requirements of the RSNL generally accommodates a level of scalability (i.e. can be applied to both large and small rail transport operators). The scalable nature of the RSNL should allow most rail transport operators to find a means of compliance with the legislation.

It is considered preferable for rail transport operators to develop a means of achieving compliance with the RSNL rather than to apply for an exemption from the requirements of the RSNL. While the primary responsibility for developing a compliant safety management system lies with rail transport operators, who are responsible for managing the risks to safety, ONRSR will work with and support rail transport operators to find a means to comply with the RSNL in full.

However, it is acknowledged that certain provisions of the RSNL contain more detail, which serve to formalise the manner by which the risk management process of a rail transport operator needs to be presented in the safety management system and, in some cases, may reduce the degree of flexibility for operators in determining how safety shall be managed.

Whilst most requirements in the RSNL are scalable, certain areas of the legislation may place a disproportionate burden on some rail transport operators, imposing requirements that are not 'reasonably practicable' when considering the risks presented by the particular operations. This may be the case where a rail transport operator presents risks to safety that may be sufficiently low that complying with the more prescriptive areas of the RSNL is demonstrated to impose compliance costs without resultant safety benefits. This would most likely only apply to small scale rail transport operators.

It may also be the case that the risks presented by a particular operation are more efficiently managed through means other than those prescribed in the RSNL. In these cases, rail transport operators may present alternative means of compliance and be considered for exemption from the relevant provision, subject to a condition requiring the alternative means be complied with.

In summary, while ONRSR is provided with the power to exempt, it is unlikely to exercise this power frequently and will not do so unless it is demonstrated by the rail transport operator that safety would not be compromised.

There are two circumstances in which ONRSR will consider an application for exemption from a designated provision of the RSNL:

- > Where the rail transport operator presents sufficiently low risk that complying in full with the requirements of the RSNL imposes an excessive burden without a resultant safety benefit.
- > A rail transport operator can demonstrate an alternative means of complying with a duty under the law other than that which may be prescribed in the RSNL.

By reducing the degree of regulation for some railways commensurate to their level of risk, exemptions should not reduce the level of rail safety, but rather streamline regulatory arrangements and reduce unnecessary or excessive compliance burdens.

6 Scope of exemptions granted by the Regulator

In the limited circumstances described above, ONRSR may grant exemption from the designated provisions of the RSNL, as mentioned in part 4.4 of this document. Importantly, however, ONRSR cannot exempt rail transport operators from the general rail safety duties (Division 3 of Part 3 of the RSNL).

As such, while ONRSR may exempt a rail transport operator from complying with a designated provision of the RSNL, the rail transport operator must continue to comply with the overarching duty to ensure safety so far as is reasonably practicable, as well as other duties that may be applicable. For example, while a rail transport operator may have successfully sought an exemption from the requirement to prepare and implement a drug and alcohol management program in accordance with all of the prescribed requirements of regulation 28 of the National Regulations, the rail transport operator must continue to ensure that rail safety workers do not carry out rail safety work, and are not on duty, while impaired by alcohol or a drug (s52(2)(c) of the RSNL).

Additionally, it is unlikely that a rail transport operator could demonstrate that complying with a full management program requirement of the RSNL (as required by s112-116) is disproportionately burdensome. An exemption will most likely not be granted in an 'outright' manner (that is, where the risk to safety for a given area could be demonstrated to be negligible), rather it is more likely that only a reduced degree of risk would be demonstrated, that would still need to be managed in some form. For example, rather than an exemption being granted from the full requirement to prepare and implement a drug and alcohol management program (s115 of the RSNL), it is more likely that only a prescribed requirement may be considered for exemption, for example, the requirement for drug and alcohol testing (r28(1)(d) of the National Regulations).

In granting an exemption, ONRSR has the ability to require an alternative means of compliance based on the risk profile of a particular operator. ONRSR will require this through conditions on the exemption granted. Additionally, ONRSR may impose restrictions.

7 Assessment of applications

ONRSR will assess applications for exemption on a case-by-case basis, taking into consideration the scope and nature of the rail transport operator's railway operations and the particular circumstances in question. ONRSR must be satisfied that the rail transport operator has the competence and capacity to manage risks to safety in respect of which the exemption is sought, and be satisfied that the granting of the exemption does not compromise safety - Refer to the ONRSR Competence and Capacity Guideline.

The granting of an exemption does not obviate the need for rail transport operators to comply with other aspects of the RSNL. In determining the application (in accordance with s207 or 209 of the RSNL), ONRSR will ensure that the extent of the exemption granted is clear and that rail transport operators do not neglect any other associated requirements of the RSNL.

If an exemption is considered, ONRSR will also consider imposing conditions and restrictions and ONRSR may also require the rail transport operator to comply with an alternative means of compliance based on the risk profile of that particular operator.

8 Ensuring ongoing compliance

ONRSR will ensure ongoing compliance with an exemption granted, through normal compliance and enforcement activities, such as inspections and audits. ONRSR may make changes to conditions or restrictions placed on an exemption and, if at any time ONRSR is no longer of the opinion that the rail transport operator satisfies the requirements for the exemption, ONRSR may cancel or suspend the exemption. In considering any compliance or enforcement action, ONRSR will have regard to the *ONRSR Compliance and enforcement policy*.

9 Surrender of exemption

A rail transport operator may surrender their exemption by notifying ONRSR in writing prior to the date of surrender (refer to s213A of the RSNL¹). It is preferable that the applicant gives ONRSR at least 28 days' notice of intention to surrender. The rail transport operators must provide full details of the proposed arrangements in relation to the surrender.

While ONRSR will not unreasonably withhold acceptance of the surrender, ONRSR must be satisfied that the proposed arrangements in regard to the surrender do not present a safety risk to other rail transport operators or the public.

Decisions on applications for surrender of exemption by the Regulator are reviewable (see ONRSR's Review of Decisions policy).

¹ As of 1 July 2017 this provision does not apply in Western Australia