



INDEPENDENT
TRANSPORT
SAFETY AND
RELIABILITY
REGULATOR

RAIL SAFETY ACT 2008 (NSW) COMPARISON WITH RAIL SAFETY ACT 2002 (NSW)

This table provides a comparison of the *Rail Safety Act 2008 (NSW)* (**the 2008 Act**) with the *Rail Safety Act 2002 (NSW)* (**the 2002 Act**). Column 1 sets out the provisions of the 2008 Act. Column 2 sets out any comparable provisions that were contained in the 2002 Act. Column 3 provides comments on the comparison of the provisions, identifying any significant changes to legal requirements.

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
Part 1: Preliminary	Part 1: Preliminary	
1 Name of Act	1 Name of Act	As per name of Act in each case
2 Commencement	2 Commencement	Act changed to reflect year of commencement
3 Objects	3 Objects	Objects in 2008 Act expanded as per National Model Legislation
4 Interpretation	4 Interpretation	
“accreditation”	“accreditation”	Amended to reflect structure of 2008 Act
“accredited person”	“accredited person”	Definition added to reflect National Model Legislation
“approved”	“approved”	No material change

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
"assessor"	"assessor"	Definition preserved with changes to reflect numbering of 2008 Act (c.f comments for section 71 of the 2008 Act)
"Australian rail safety law"		Definition added to reflect National Model Legislation
"Australian Rail Safety Regulator"		Definition added to reflect National Model Legislation
"Board of Inquiry"	"Board of Inquiry"	Definition preserved with changes to reflect numbering of 2008 Act (c.f comments for section 69 of the 2008 Act)
"Chief Investigator"	"Chief Investigator"	No material change
"commercial benefits order"		Definition added to reflect National Model Legislation
"compliance code"		Definition added to reflect National Model Legislation
"corresponding law"		Definition added to reflect National Model Legislation
"corresponding rail safety law"		Definition added to reflect National Model Legislation
"corresponding Rail Safety Regulator"		Definition added to reflect National Model Legislation. Definition in 2008 NSW Act simplifies the expression of the equivalent definition in the National Model Legislation but does not materially alter its content.
"embargo notice"		Definition added to reflect National Model Legislation
"employee"		Definition added to reflect National Model Legislation
"employer"		Definition added to reflect National Model Legislation
"exercise"	"exercise"	No material change

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
“function”	“function”	No material change
“guidelines”		Definition added to reflect National Model Legislation (c.f. section 167 of 2008 Act whereby ITSRR can approve Guidelines under the Act)
“improvement notice”	“improvement notice”	Definition in 2002 Act preserved with changes to reflect numbering of 2008 Act (c.f comments for section 51 of the <i>RS Act 2002</i>)
“ITSRR”	“ITSRR”	No material change
“jurisdiction”		New definition added to reflect National Model Legislation
“motor vehicle”		Definition inserted into 2008 Act referencing definition in the <i>Road Transport (Safety and Traffic Management) Act 1999</i>
“notifiable occurrence”	“notifiable occurrence”	New definition inserted into 2008 Act to reflect National Model Legislation
“occupational health and safety legislation”		Definition added to reflect National Model Legislation and to make it clear that the term “occupational health and safety legislation” also includes relevant coal mining legislation
“previous offender”	“previous offender”	No material change
“private siding”	“private siding”	Definition has changed to reflect National Model Legislation which legislatively excludes certain sidings from the definition of “private sidings”
“prohibition notice”	“prohibition notice”	No material change

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
“public place”		Definition added to reflect National Model Legislation. Expressed so as to conform with applicable NSW drafting conventions
“rail infrastructure”		Definition added to reflect National Model Legislation
“rail infrastructure manager”		Definition added to reflect National Model Legislation
“rail safety inquiry”	“rail safety inquiry”	Definition preserved with changes to reflect numbering of 2008 Act (c.f comments for section 69 of the 2008 Act)
“rail safety law”		Definition added to reflect National Model Legislation
“rail safety officer”		Definition added to reflect National Model Legislation
“rail safety work”	“rail safety work”	Definition in 2002 Act now dealt with in section 7 of the 2008 Act (see below)
“rail safety worker”		Definition added to reflect National Model Legislation
“rail transport operator”		Definition added to reflect National Model Legislation
“railway”	“railway”	Definition amended to reflect National Model Legislation, but content remains broadly the same
“railway operations”		Definition added to reflect National Model Legislation
“railway premises”		Definition added to reflect National Model Legislation
“railway tracks and associated track structures”		Definition added to reflect National Model Legislation
“rolling stock”	“rolling stock”	Definition amended to reflect National Model Legislation, but content broadly similar to existing definition
“rolling stock operator”		Definition added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
“running line”	“running line”	No material change
“safety”		Definition added to reflect National Model Legislation.
“safety management plan”		Definition added to reflect National Model Legislation
“safety management system”		Definition preserved with changes to reflect numbering of 2008 Act (c.f comments for sections 12 and 24 of the 2008 Act)
“security management plan”		Definition added to reflect National Model Legislation
“siding”	“siding”	Definition preserved, except for omission from 2008 Act of reference to “stabling”. Stabling of trains is no longer a feature of a siding
“supervisory intervention order”		Definition added to reflect National Model Legislation
“train”	“train”	Definition amended to reflect National Model Legislation
“train safety recording”		Definition inserted, with reference to section 75 of the 2008 Act
5 Railways to which this Act does not apply	6 Railways to which this Act does not apply	In addition to a railway in an underground mine and an aerial cable operated system, section 5 of the 2008 Act also excludes from the operation of that Act slipways, railways used only to guide cranes and those prescribed by the regulations Section 5 of the 2008 Act does not provide that the Act does not apply to a railway operated at an amusement park the operator of which holds a certificate of exemption as did section 6(2)(b) of the 2008 Act. Such a railway will only be automatically excluded if it operates on a gauge less than 600mm or is otherwise exempted from the Act by a regulation.
6 The concept of ensuring safety		New section added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
7 Rail safety work		New section added to reflect National Model Legislation
Part 2: General Rail Safety		
<i>Division 1: Duties to ensure public safety of railway operations</i>		
8 Duties of rail transport operators and other persons carrying out railway operations		New section added to reflect National Model Legislation. Note that these duties extend to contractors and other persons carrying out railway operations. Penalty notices can be issued for certain breaches under section 8(1). Also note that, section 11 of the NSW 2008 Act makes it clear that the onus is on the defendant to prove that it was not reasonably practicable to have done more to comply with the duty.
9 Duties of designers, manufacturers, suppliers, etc		New section added to reflect National Model Legislation. Note that section 11 of the NSW 2008 Act makes it clear that the onus is on the defendant to prove that it was not reasonably practicable to have done more to comply with the duty
10 Duties of rail safety workers		New section added to reflect National Model Legislation. There is a note included which stipulates that the duties and other requirements of the Act and Regulations do not preclude the operation of the occupational health and safety legislation: per s 175 of the 2008 Act.
11 Onus of proving limits of what is reasonably practicable under this Division		New section added to clarify that, in proceedings for breach of the general duties provisions in Division 1, the onus is on the defendant to prove that it was not "reasonably practicable" to have done more to comply with the duty The section is based on section 40 of the <i>Health and Safety at Work etc Act 1974</i> of the United Kingdom

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
<i>Division 2: Application of Occupational Health and Safety Legislation</i>		
<i>Division 2: Safety management of railway operations</i>		
12 Safety management system	48A Safety management systems	<p>Broad changes that mandate with a greater degree of particularity what the SMS must do and contain. In this regard, section 12(2)(f) provides that the following are all part of the SMS:</p> <ul style="list-style-type: none"> • Security management plan • Emergency management plan • Health and fitness management program • Drug and alcohol management program • Fatigue management program. <p>Also, under the 2008 Act rail transport operators will be required to consult with certain persons before establishing or reviewing an SMS: see section 12(3), which requires that</p>
13 Implementation of and compliance with safety management system	<p>48A Safety management systems</p> <p>14 Safety management systems and competency to safely carry out rail operations</p>	<p>The 2008 Act incorporates the requirements of the 2002 Act that an accredited person have an SMS in place and ensure that their railway operations comply with that SMS.</p> <p>Section 13 of the 2008 Act requires a rail transport operator to implement and comply with their SMS. It also provides a defence of "reasonable excuse" in relation to the failure to comply with the SMS.</p>
14 Review of safety management system		New section added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
15 Safety performance reports	48B Annual safety report	<p>Content of reports required by 2008 Act is broadly similar to existing requirements, although the 2008 Act also requires that any deficiencies or irregularities in a rail transport operator's railway operations that may be relevant to the safety of the railway must be commented on.</p> <p>Reporting period under 2008 Act will be a calendar year or such other period as ITSRR agrees with the rail transport operator. The safety performance report can be submitted either 6 months after the end of the reporting period or such other period as may be agreed between ITSRR and the rail transport operator.</p>
16 Security management plan	13 Passenger security	The section in the 2008 Act contains a greater degree of particularity than the equivalent section in the 2002 Act. The new section also expressly requires the implementation of the plan if a security incident occurs.
17 Emergency management plan	13 Passenger security	New section added to reflect National Model Legislation, however, the passenger security and policy plans required under the 2002 Act are likely to have covered similar issues, such as procedures for dealing with emergencies and responses to emergency situations: see clause 49C of the <i>Rail Safety (General) Regulation 2003</i> .
18 Health and fitness management program	41 Health and fitness of railway employees	<p>Under the 2008 Act, the general duties provisions specifically require rail transport operators to ensure that each rail safety worker who is to perform rail safety work in relation to the operator's railway operations is of sufficient good health and fitness to carry out that work safely.</p> <p>As elsewhere in the Bill, the key change is in the regulatory emphasis, which has, in the 2008 Act, moved from regulation based on accreditation (as per the 2002 Act) to regulation based on general duties.</p> <p>Note also that duties of a rail transport operator under section 7 of the 2008 Act extend to contractors and other persons carrying out railway operations.</p>

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
19 Drug and alcohol management program	42 Railway employees – alcohol or other drugs (except 42(1)(b))	<p>No material change</p> <p>Failure to ensure rail safety workers are free from D & A impairment whilst carrying out rail safety work will be a breach of a rail transport operator's general duties under the 2008 Act, rather than a breach of accreditation conditions as in the current 2002 Act.</p> <p>Note also that duties of a rail transport operator under section 8 of the 2008 Act extend to contractors and other persons carrying out railway operations</p>
20 Fatigue management	43 Fatigue management	Schedule 2 to existing Act retained.
21 Competence of rail safety workers	38 Certificates of competency	The 2008 Act requires a rail transport operator to ensure, so far as is reasonably practicable, the competency of workers to carry out rail safety work. It does not retain the requirement for rail safety workers to be "fit and proper" persons, as was required under the 2002 Act

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
	39 Register of certificates	<p>The 2008 does not require the issue of Certificates of Competency, but rather that the rail safety workers hold some form of identification allowing competency and training to be checked: per section 22 below.</p> <p>Please note that in Schedule 3 of the Act (Savings, Transitional and Other provisions) provides that:</p> <ul style="list-style-type: none"> • A continuing operator is not required to assess the competence of rail safety workers under s 21(2) of this Act if the workers are the subject of certificates of competency issued under s 36 of the 2002 Act • a certificate of competency in force under section 36 of the 2002 Act is taken to be a sufficient form of identification under for the purposes of section 22 of the Act <p>Section 21(5) requires records of the competency to be maintained for rail safety workers carrying out rail safety work “in connection with railway operations for which the accredited person is accredited.”</p>
22 Identification for rail safety workers	36 Employees to be issued with certificates of competency	<p>Certificates of Competency will not be issued under the 2008 Act, although a transition period will apply.</p> <p>The duty in the 2008 Act for rail transport operators is to ensure that their rail safety workers are competent, as in section 21 above.</p> <p>The duty to issue identification cards from which a rail safety worker’s competence can be elicited is in section 22. Section 22(1) of the 2008 Act requires all rail transport operators to ensure that each of their rail safety workers has an identification card that enables the type of competence and training of that worker to be checked by a rail safety officer.</p> <p>There is no equivalent provision to sections 36(3) to 36(5) of the 2002 Act in the 2008 Act because ITSRR will no longer be issuing third-party CoC authorisations once that Act has commenced and the transitional period expires</p>

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
	<p>37 Employee must hold a certificate of competence</p> <p>37A Production of certificate of competency</p> <p>40 Training of railway employees engaged in railway safety work</p>	<p>Section 21 (particularly 21(2)) contains the criteria against which competency must be assessed</p> <p>Whilst there is no exact equivalent in the 2008 Act to section 36(7) of the 2002 Act, section 22(1) of the 2008 Act makes it an offence for rail transport operators to fail to ensure the competency of their rail safety workers</p> <p>Please note that in Schedule 3 of the Act (Savings, Transitional and Other provisions) provides that:</p> <ul style="list-style-type: none"> • A continuing operator is not required to assess the competence of rail safety workers under s 21(2) of this Act if the workers are the subject of certificates of competency issued under s 36 of the 2002 Act • a certificate of competency in force under section 36 of the 2002 Act is taken to be a sufficient form of identification under for the purposes of section 22 of the Act <p>The 2008 Act does not have an equivalent to s 37 for the reasons outlined above</p> <p>The 2008 Act refers to identification cards in keeping with the new regime of issuing those cards rather than CoCs: see section 22(2). The penalty for failure to produce an ID card is 5 x the current penalty for failing to produce a CoC.</p> <p>Under the 2008 Act, s 22 provides that a rail transport operator ensure that rail safety workers have sufficient identification to enable their training to be checked by a rail safety officer. In addition, a failure by a rail transport operator to ensure that all rail safety workers carrying out rail safety work in relation to their railway operations are appropriately trained is a breach of the general duty to ensure the safety of those operations.</p>

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
23 Other persons to comply with safety management system		New section added to reflect National Model Legislation
24 ITSRR may direct amendment of safety management system	48A(3) Safety management systems	Existing power to direct amendment of SMS retained in 2008 Act, although a statement of reasons explaining the necessity of the amendment must now accompany any such direction. ITSRR must allow not less than 28 days for the making of any amendments instigated at its direction
Division 3 Interface Co-ordination		
25 Interpretation		New provision adopted to reflect NML Bill No 2 NB. In NSW, public road does not include a Crown road
26 Interface co-ordination – rail transport operators	12 Safety interface agreements	Significant changes in Division 3 Part 2 of the 2008 Act to reflect adoption of NML Amendment Bill No 2. “Safety interface agreements” are called “interface agreements” in the 2008 Act. There are ongoing obligations for managing interfaces imposed upon rail transport operators and roads authorities. Importantly, new obligations are imposed on rail infrastructure managers and roads authorities to jointly manage risks arising from rail or road crossings, such as level crossings, road over rail bridges and rail over road bridges
27 Interface co-ordination – rail infrastructure manager – public roads		New provision adopted to reflect NML Bill No 2
28 Interface co-ordination – rail infrastructure manager – roads other than public roads		New provision adopted to reflect NML Bill No 2

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
29 Interface co-ordination – obligations of roads authorities		New provision adopted to reflect NML Bill No 2
30 Assessment of Risks		New provision adopted to reflect NML Bill No 2
31 Scope of interface agreements		New provision adopted to reflect NML Bill No 2
32 Interface Agreements may be directed as made		New provision adopted to reflect NML Bill No 2
33 Register of Interface agreements		New provision adopted to reflect NML Bill No 2
Part 3: Accreditation of rail transport operators		
<i>Division 1: Requirement for accreditation</i>		
34 Purpose of accreditation	9 Purpose of accreditation	Changes to reflect National Model Legislation requirements. 2008 Act section simplifies the existing 2002 Act section
35 Accreditation required for railway operations	8 Operators of railways to be accredited	Existing section adapted to reflect National Model Legislation. Significant changes, including changes to exclude contractors from requirement to be accredited
36 Purpose for which accreditation may be granted		New section added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
37 Accreditation offences	8 Operators of railways to be accredited 91 Offences involving accreditation, certification and authorisation 92 Failure to maintain safety systems, devices or appliances	Substance of requirements in 2002 Act provision is unchanged in 2008 Act, particularly with the inclusion of the general duties as outlined above
<i>Division 2: Applications for accreditation</i>		
38 Application for accreditation	10 Applicant to give information 15 Applicant to describe, and identify ownership of, infrastructure 16 Rolling stock to be identified	The 2008 Act requires more specific information to accompany applications for accreditation. The regulations prescribe further requirements in relation to the information to be included
39 What applicant for accreditation must demonstrate	14(2) Safety management systems and capacity to safely carry out railway operations	Substance of requirements in 2002 Act provision is unchanged in 2008 Act equivalent
40 ITSRR may direct applicants to co-ordinate and co-operate in applications		New section added to reflect National Model Legislation
41 Co-ordination between ITSRR and other Rail Safety Regulators	22 Exemption of interstate railway operations	Section 41(5) of the 2008 Act replicates section 22(2) of the existing 2002 Act. The 2008 Act provision requires ITSRR to co-ordinate with other jurisdictions in respect of applications for accreditation by entities that are already accredited, or are seeking accreditation, in other states.
42 Determination of application	18 Grant of accreditation	Section in 2008 Act contains changes to the existing 2002 Act provision, including the imposition in the 2008 Act of a new time limit in which ITSRR must determine applications for accreditation. The time limit appointed is normally 6 months from the date upon which all necessary information is received by ITSRR
43 Prescribed conditions and restrictions	18(3) Grant of accreditation	No material change

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
44 Accreditation cannot be transferred or assigned		New section added to reflect National Model Legislation
45 Sale or transfer of railway operations by accredited person	24 Sale or transfer of railway by accredited person	2002 Act requirements are incorporated in the 2008 Act equivalents. However, section 45 of the 2008 Act includes a new definition of “ <i>railway operations</i> ” for the purpose of the section to make it clear that the provision applies to a sale or transfer of a part of the railway operations for which the person is accredited
<i>Division 3: Accreditation fees and inspection of documents</i>		
46 Annual accreditation fees	44 Annual accreditation fees	Obligation to pay annual fees is retained in 2008 Act, however under that Act the amount of fees to be paid will be prescribed in the Regulation rather than published in the Gazette. Fee regime to be further developed
47 Differential accreditation fees	45(2) Fixing of annual accreditation fees	Broadly similar provisions. The power in 2002 Act to fix different differential accreditation fees retained is in 2008 Act. However, under the 2008 Act any differential fees will be prescribed
48 Payment of annual fees	46 Payment of annual fees	No material change
49 Late payment fees	48 Minimum and late payment fees	Amount imposed by 2008 Act for late payment of fees will be prescribed in the Regulation
50 Waiver of fees	48 Minimum and late payment fees	Current power in the 2002 Act to waive fees is retained in the 2008 Act
51 Keeping and making available documents for public inspection		New section added to reflect National Model Legislation. Note that the section in 2008 Act includes a reference to the operator’s “principal office” or “principal place of business” to facilitate administration of section by ITSRR’s officers.

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
<i>Division 4: Surrender, revocation and variation of accreditation</i>		
52 Suspension of Accreditation	28 Suspension or cancellation of accreditation	No material change, the 2008 Act makes it clear that an accredited person can surrender their accreditation in accordance with the regulations
53 Suspension or revocation of accreditation	28 Suspension or cancellation of accreditation	No material change
54 Immediate suspension of accreditation	29 Suspension of accreditation in emergency	No material change
55 Application for variation of accreditation	27 Requests by Accredited Persons for variation or surrender of accreditations	No material change Note, however, that the scope of accreditations will be broader to reflect the focus on regulating by the enforcement of general duties. That is, the revised accreditation notice will provide for broader approvals (where appropriate) to reflect the regulatory movement away from governance based on terms of specific operators' accreditations and towards ensuring compliance with general statutory duties. The intended consequence is that fewer variations will need to be made and the variation provisions in the 2008 Act will not need to be invoked as frequently as the variation provisions contained in the 2002 Act
56 Determination of application for variation	27 Requests by Accredited Persons for variation or surrender of accreditations	No material change See comments above
57 Variation of conditions and restrictions	27 Requests by Accredited Persons for variation or surrender of accreditations	New section added to reflect National Model Legislation, but it substantially reflects the 2002 requirements. See above comments

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
58 ITSRR may make changes to conditions or restrictions	25 Variation of accreditations 29 Suspension of accreditation in emergency 32 Notice of proposed action 33 Representations to ITSRR 34 Determination by ITSRR	No material change Note, however, that the scope of accreditations will be broader to reflect the focus on regulating by the enforcement of general duties. That is, the revised accreditation notice will provide for broader approvals (where appropriate) to reflect the regulatory movement away from governance based on terms of specific operators' accreditations and towards ensuring compliance with general statutory duties. The intended consequence is that fewer variations will need to be made and the variation provisions in the 2008 Act will not need to be invoked as frequently as the variation provisions contained in the 2002 Act
59 Prescribed conditions and restrictions	117(2)(u) Regulations	No material change
<i>Division 5: Private sidings</i>		
60 Exemption from accreditation	23 Exemption of operators of private sidings 21 Exemptions from accreditation and accreditation requirements	The exemption in section 60 of the 2008 Act differs from the equivalent provision in the 2002 Act. Relevantly, the class of persons who may be exempted under the 2008 Act are the "rail infrastructure managers" of private sidings, rather than their owners. Importantly, section 60 makes it clear that exemption from accreditation does apply to railway operators involving the operation or movement of rolling stock Section 174(3) of the 2008 Act provides that the Regulations may exempt or provide for the exemption, either absolutely or subject to conditions, any person, class of persons, siding, railway, part of a railway or railway operation from all or any of the provisions of the Act or regulations Please note that any existing exemptions given under section 21 of the 2002 Act continue for the period specified in the exemption, as appropriate: <i>Schedule 3 – Savings, Transitional and other provisions</i>

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
Part 4: Safety reports and investigations		
<i>Division 1: Safety reports</i>		
61 Rail transport operators to provide information	63 Provision of information relating to safety to ITSRR	Broadly similar provisions, although the section in the 2008 Act specifically permits ITSRR to require the production of financial information: see section 56(1)(b).
62 Industry safety reports	62 Industry safety reports	Broadly similar provisions, although requirements as to what such reports must contain have been particularised in subsection (2) of the 2008 Act
63 Notifiable Occurrences	64 Accredited persons must report notifiable occurrences	Broadly similar to 2002 Act requirements for notification of occurrences
64 Confidential reporting of safety information by railway employees	65A Confidential reporting of safety information by railway employees	No material change, aside from the inclusion of a drafting note to reference s 210 of the Industrial Relations Act which makes it an offence to victimise an employee
<i>Division 2: Investigations of accidents and incidents</i>		
65 Investigation into railway accidents and incidents by railway operators	66 Investigations into railway accidents and incidents by railway operators	No material change
66 Information may not be used in certain proceedings	66A Information may not be used in certain proceedings	No material change, the 2008 Act clarifies the role of the court in ordering release of certain information
67 Investigations by Chief Investigator	67 Investigations by Chief Investigator	No material change
68 Chief Investigator and transport safety investigator's functions	67A Chief Investigator and transport safety investigator's functions	No material change
69 Rail safety inquiries	67B Rail safety inquiries	No material change
70 Chief Investigator may request rail safety inquiry	67C Chief Investigator may request rail safety inquiry	Section 70 of the 2008 Act contains additional subsections (3) and (4) to clarify the requirements in relation to a Minister seeking to table a notice and reasons

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
71 Assessors	67D Assessors	No material change
72 Witnesses and evidence at rail safety inquiries	67E Witnesses and evidence at rail safety inquiries	No material change
73 Report on rail safety inquiry	67F Report on rail safety inquiry	No material change
74 Tabling of reports	68 Tabling of reports	No material change
<i>Division 3: Disclosure of train safety records</i>		
75 Definitions	61 Definitions	No material change
76 Disclosure of train safety record to Commonwealth or Commonwealth authority	71 Disclosure of train safety record to Commonwealth or Commonwealth authority	No material change
77 Disclosure of train safety records (other than train safety recordings) to a court or person	72 Disclosure of train safety records (other than train safety recordings) to a court or person	No material change
78 Disclosure of train safety recordings	73 Disclosure of train safety recordings	No material change, aside from a clarification of when train safety recordings can be disclosed in the case of investigations relating to any criminal proceedings
79 Evidence of train safety recordings in criminal proceedings	74 Evidence of train safety recordings in criminal proceedings	No material change, reference to "railway employee" in 2002 Act changed to "rail safety worker" in 2008 Act
80 Evidence of train safety recordings in civil proceedings	75 Evidence of train safety recordings in civil proceedings	No material change, reference to "railway employee" in 2002 Act changed to "rail safety worker" in 2008 Act
81 Examination by a court of train safety recording	76 Examination by a court of train safety recording	No material change, reference to "railway employee" in 2002 Act changed to "rail safety worker" in 2008 Act
82 Compliance with subpoenas and other directions	77 Compliance with subpoenas and other directions	No material change, reference to "authorised officer" in 2002 Act changed to "rail safety officer" in 2008 Act
83 Admissibility of other evidence and liability	78 Admissibility of other evidence and liability	No material change, reference to "railway employee" in 2002 Act changed to "rail safety worker" in 2008 Act

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
<i>Division 4: Audit by ITSRR</i>		
84 Audit of railway operations of rail transport operators	49 Safety inspections 50 Regulations	<p>The 2008 Act provides that ITSRR “may” audit rail transport operators (including contractors). The term “audit” replaces the concept of inspection.</p> <p>Current regulation-making power in respect of how audits will be carried out has been retained in section 84(4), whilst current regulation-making powers relating to inspection reports have been omitted</p> <p>Under the 2008 Act, ITSRR will have increased flexibility as to what is targeted by any audit program devised to audit railway operations.</p> <p>The timeframes in section 49 have not been retained. ITSRR must provide not less than 24 hours notice before auditing the railway operator’s railway operations</p>
Part 5: Investigation powers		
<i>Division 1: Powers of entry</i>		
85 Power to enter places	79 Power of entry	The provision in the 2008 Act expands the range of places that ITSRR’s officers may enter
86 Limitation on entry powers – places used for residential purposes	88 Premises used for residential purposes	No material change
87 Notice of entry	82 Notice of entry	No material change; operation of existing section 82 clarified in section 87 of the 2008 Act
<i>Division 2: General enforcement powers of rail safety officers</i>		

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
88 General powers after entering a place	80 Inspections and investigations	The provision in the 2008 Act does not limit ITSRR's officers' powers to being exercisable only on railway premises, but rather enables those powers to be exercised in any place which officers are permitted to enter. Powers of officers in 2008 Act expanded to facilitate administration of that Act.
89 Powers of rail safety officers in relation to relevant documents	81 Functions of authorised officers in relation to relevant documents	No material change, section 89(4) clarifies that the intention of the section is not to limit section 88.
90 Use of assistants and equipment		New section added to reflect National Model Legislation.
91 Use of electronic equipment		New section added to reflect National Model Legislation.
92 Use of equipment to examine or process things		New section added to reflect National Model Legislation.
93 Securing a site		New section added to reflect National Model Legislation.
<i>Division 3: Search warrants</i>		
94 Search warrants	90 Search warrants	No material change. Terminology has changed with the use of "rail safety officer" and "authorised officer" on 2008 Act instead of "authorised officer" and "authorised justice" in 2002 Act. Note reference to "certification" in 2002 Act removed
<i>Division 4: Powers to support seizure</i>		
95 Directions relating to seizure		New section added to reflect National Model Legislation.
96 Receipt for seized things		New section added to reflect National Model Legislation
97 Access to seized thing		New section added to reflect National Model Legislation
98 Embargo notices		New section added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
<i>Division 5: Dealings with seized items</i>		
99 Return of seized things		New section added to reflect National Model Legislation
100 Forfeiture of sample or thing		New section added to reflect National Model Legislation The provision in the 2008 Act has been drafted in accordance with applicable New South Wales drafting conventions
101 Dealing with forfeited sample or thing		New section added to reflect National Model Legislation Note that subsection (3) of the equivalent National Model Legislation provision has been inserted into the 2008 Act as a separate section for consistency with existing NSW legislation
102 Application of Law Enforcement (Powers and Responsibilities) Act 2002		New section added to reflect National Model Legislation and to reflect NSW statutory position on dealings with forfeited property
<i>Division 6: Directions</i>		
103 Rail safety officers may direct certain persons to give assistance		New section added to reflect National Model Legislation. Expressed so as to conform with applicable NSW drafting conventions
104 Power to direct name and address be given		New section added to reflect National Model Legislation. Expressed so as to conform with applicable NSW drafting conventions
105 Failure to give name or address	96 Offenders to state name and address	No substantial change to equivalent provision, however the section in the 2008 Act that empowers officers to direct that a person provide a name and address has been particularised as to when such a direction can be made and what warnings must be given with such direction: see section 104

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
106 Power to obtain information, documents and evidence	63 Provision of information relating to safety to ITSRR	<p>Section added to reflect National Model Legislation, however, the 2002 Act requirement on accredited persons to provide information related to rail safety is incorporated and extended in 2008 Act</p> <p>Under the 2008 Act a rail safety officer may obtain information, documents or evidence in relation to a possible contravention of a rail safety law or for the purposes of an audit, investigation, rail safety inquiry or other inquiry, where they have reasonable grounds for believing a person is capable of doing so.</p>
107 Failure to comply with notice	63 Provision of information relating to safety to ITSRR	As above
<i>Division 7: Miscellaneous</i>		
108 Directions may be given under more than one provision		<p>New section added to reflect National Model Legislation. Expressed so as to conform with applicable NSW drafting conventions</p>
109 Temporary closure of railway crossings	52 Closure of level-crossings or other structures	<p>Broad changes, including that under the 2008 Act, only authorised persons can close a railway crossing.</p> <p>A "railway crossing" means a level crossing, bridge or another structure used to cross over or under a railway.</p> <p>"Authorised persons" are people who hold specific authorisations issued by ITSRR.</p> <p>The power to close a crossing, bridge, etc ... under the 2008 Act is not predicated on the issue of an improvement notice and the power can only be exercised if the authorised person is satisfied that closure is necessary because of an immediate threat to safety</p>
110 Restoring rail infrastructure and rolling stock etc to original condition after action taken		New section added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
111 Use of force	83 Use of force	No material change; section in 2008 Act applies not only to ITSRR's officers but also their assistants.
Part 6: Improvement and prohibition notices		
<i>Division 1: Improvement notices</i>		
112 Improvement notices	51 Improvement notices	<p>Existing power to require that any remedial actions be undertaken in fewer than 7 days has been omitted from 2008 Act.</p> <p>Grounds for issuing improvement notices are largely unchanged, however the power to issue a notice for failure to carry out railway operations in compliance with an applicable safety interface agreement has been omitted (this is covered by other provisions).</p> <p>The 2008 Act also specifies more particularly what an improvement notice must state</p> <p>Note that improvement notices can be issued on a roads authority to facilitate the implementation of the new Division 3 of Part 2 (road/rail interfaces) and to protect safety at level crossings</p>
113 Contravention of improvement notice	53 Failure to comply with improvement notice	No material change to offence provision.
114 Withdrawal or amendment of improvement notices	59 Withdrawal of notices	<p>the 2008 Act clarifies that Notices can be amended</p> <p>Notices of amendment must include reasons as to why the notice is being amended, as well as review information and a statement of which provision is being invoked</p>
115 Proceedings for offences not affected by improvement notices	60 Proceedings for offences not affected by notices	No material change
116 ITSRR to arrange for rail safety work required by improvement notice to be carried out		New section added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
<i>Division 2: Prohibition notices</i>		
117 Prohibition notice	54 Prohibition notices	No material change
118 Contravention of prohibition notice	54(3) Prohibition notices	No material change
119 Oral direction before prohibition notice served		New section added to reflect National Model Legislation.
120 Withdrawal or amendment of prohibition notice	59 Withdrawal of notices	Notices of amendment must include reasons as to why the notice is being amended, as well as review information and a statement of which provision is being invoked
121 Proceedings for offences not affected by prohibition notices	60 Proceedings for offences not affected by prohibition notices	No material change
<i>Division 3: General provisions relating to notices</i>		
122 Review of notices by ITSRR	56 Review of notices by ITSRR	Broadly similar, although notice recipients will have 28 days to apply for an internal review under the 2008 Act, as opposed to the 7 day deadline that is currently in place In addition ITSRR must deal with the application for review within 28 days of receipt
123 Appeal to Industrial Magistrate following review	58 Appeal to Administrative Decisions Tribunal	Applications for review of notices following ITSRR's internal review must, under the 2008 Act, be made to the Industrial Magistrate rather than the Administrative Decisions Tribunal
124 Application to Industrial Magistrate for stay of prohibition notice	57 Application to Administrative Decisions Tribunal for stay of prohibition notice	Applications for stays of prohibition notices must now be made to the Industrial Magistrate rather than the Administrative Decisions Tribunal
125 Revocation or withdrawal or notice does not prevent issue of another notice	59 Withdrawal of notices	Notices of amendment must include reasons as to why the notice is being amended, as well as review information and a statement of which provision is being invoked

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
Part 7: Offences, penalties and other sanctions		
<i>Division 1: Offences</i>		
126 Obstructing or hindering rail safety officers	97 Obstruction	Broadly similar. The provision in the 2008 Act introduces an element of intention into the offence and provides an extra offence for concealment of records and things. In the 2008 Act, the offence of failing to render assistance when directed to do so by a rail safety officer has been decoupled from the general obstruction offence. The failure to assist offence is located in section 103
127 Offence to impersonate rail safety officer	99 Offence of impersonating an authorised officer	No material change
128 Offences involving accreditation	91 Offences involving accreditation, certification and authorisation	No material change, apart from the removal of references to certification
129 Notice to be given of certain matters		New section added to reflect National Model Legislation
130 Tampering with railway equipment	93 Tampering with railway equipment	No material change; definition of "emergency or safety equipment" introduced to clarify operation of offence
131 Railway offences	95 Railway offences	Regulation-making powers in 2008 Act adapted to support existing Regulations plus further offences arising as a result of adopting the National Model Legislation. A separate offences regulation will contain these offences.
<i>Division 2: Proceedings for offences</i>		

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
132 Proceedings for offences	103 Proceedings for offences	<p>The provisions in the 2008 Act:</p> <ul style="list-style-type: none"> • provides that proceedings for an offence can be dealt with summarily before the Local Court or Industrial Court of NSW; • ensures that provisions of the Industrial Relations Act will apply to appeals; • provides that the onus is on the defendant in proceedings to prove that a person has reasonable excuse. •
133 Period within which proceedings for offences may be commenced	103(3) Proceedings for offences	<p>General 2 year period for commencement of proceedings retained, but with clarifications:</p> <ul style="list-style-type: none"> • this does not apply to offences under the regulations; • proceedings can be commenced after the completion of a relevant inquiry such as an OTSI investigation or coronial inquest. <p>In this regard, proceedings for offences against regulation must be commenced within one year (in accordance with regular criminal procedure).</p>
134 Authority to take proceedings	104 Authority to take proceedings	No material change
135 Multiple contraventions of general duties under Part 2		New section added to reflect National Model Legislation
136 Offences by corporations	101 Offences by corporations	<p>The 2008 Act adopts a provision equivalent to the comparable NML provision</p> <p>The 'deemed liability' provisions are designed to ensure managers and directors are not shielded from responsibility for safety breaches by the corporate legal structure.</p>

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
		<p>Under these provisions, contraventions of the legislation by a corporation would be deemed to have been committed by its directors and managers unless they were not in a position to influence the conduct of the corporation in relation to its contravention, or used all due diligence to prevent the contravention by the corporation. However, an officer of a corporation who is a volunteer is not liable to be prosecuted, pursuant to these provisions, for anything done or not done by him or her as a volunteer.</p> <p>In addition, if an employee contravenes a provision of the Act or the regulations, whether by act or omission, their employer is taken to have contravened the same provision.</p>
137 Continuing offences		<p>New section added to reflect National Model Legislation.</p> <p>Section in 2008 Act expressed to conform with applicable NSW drafting conventions</p>
138 Proceedings against the Crown and government agencies		<p>New section added to apply sections 119–121, 122 and 123 of the Occupational Health and Safety Act 2000, dealing with offences involving a Crown entity and successors of government agencies</p>
139 Penalty notices	105 Penalty notices for certain offences	No material change
<i>Division 3: Enforceable voluntary undertakings</i>		
140 ITSRR may accept undertakings		New section added to reflect National Model Legislation
141 Enforcement of undertakings		<p>New section added to reflect National Model Legislation</p> <p>Section in 2008 Act expressed so as to conform with applicable NSW drafting conventions</p>
<i>Division 4: Court-based sanctions</i>		

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
142 Commercial benefits order		New section added to reflect National Model Legislation
143 Supervisory intervention order		New section added to reflect National Model Legislation
144 Contravention of supervisory intervention order		New section added to reflect National Model Legislation
145 Exclusion orders		New section added to reflect National Model Legislation and existing relevant NSW legislation
146 Contravention of exclusion order		New section added to reflect National Model Legislation
Part 8: Administration		
147 Delegation by Minister	112 Delegation by Minister	No material change
148 Appointment of rail safety officers	111 Appointment of authorised officers	No material change
149 Reciprocal powers of rail safety officers		New section added to reflect National Model Legislation
150 Identification cards for rail safety officers		New section added to reflect National Model Legislation
151 Rail safety officer must not exercise functions without identification card		New section added to reflect National Model Legislation
152 Display and production of identification card	87 Authority to enter railway premises	Whilst the 2002 Act refers to officers having and producing authorities, the 2008 Act refers to rail safety officers having and producing identification cards. Under the 2008 Act, no power or function can be exercised by an officer unless ITSRR has issued an identification card to them
153 Return of identification cards	87 Authority to enter railway premises	Section added to reflect National Model Legislation, see above comments
154 ITSRR may exercise functions of rail safety officers	87 Authority to enter railway premises	Section added to reflect National Model Legislation, see above comments

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
Part 9: Miscellaneous		
155 Act to bind Crown	7 Act binds Crown	No material change
156 Exchange of information	109 Exchange of information	No material change
157 Reviewable decisions	20A Application to Administrative Decisions Tribunal for review of decision of ITSRR	Section 157 in the 2008 Act is the equivalent of section 20A in the 2002 Act. Note expanded range of decisions now able to be appealed.
158 Review by the ITSRR and ADT		Section added to reflect National Model Legislation and to clarify the requirement for an internal review of a decision by ITSRR, consistent with the <i>Administrative Decisions Tribunal Act 1997</i> (NSW). Drafted to ensure conformity with existing NSW legislation. Note that timeframes for reviewing prohibition and improvement notices have been dealt with elsewhere in 2008 Bill. ITSRR anticipates that the 2008 Act will make it clear that operators must seek an internal review of certain accreditation decisions before they can appeal to the ADT
159 Protection from incrimination	89 Protection from incrimination	The 2008 Act specifies the appropriate time for warnings to be given to persons subject to certain requirements made under that Act. Further, the 2008 Act extends the operation of the incrimination protection over further information obtained as a result of information arising from a requirement made under that Act
160 Records and evidence from records	107 Records and evidence from records	Broadly similar but now requires the keeping of Improvement and Prohibition Notices

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
161 Certificate evidence	107(2) Records and evidence from records	The 2008 Act clarifies that a statement in a certificate issued by ITSRR or corresponding Rail Safety Regulator, officer or police officer as to a matter in records kept or accessed by ITSRR is admissible.
162 Disclosure of Information		New section added to reflect National Model Legislation
163 Civil liability not affected by Part 2		New section added to reflect National Model Legislation
164 Exclusion of personal liability	113 Exclusion of personal liability	No material change
165 Exclusion of liability of the State	114 Exclusion of liability of the State	No material change
166 Immunity for reporting unfit rail safety worker		New section added to reflect National Model Legislation
167 Approval of compliance codes and guidelines	116A Guidelines	Guidelines under the 2008 Act will not be mandatory ITSRR can make an order approving Guidelines under the Act. However, the Minister still has power to order approval of Compliance Code given legal effect of compliance
168 Use of Compliance Code		New section added to reflect National Model Legislation, but redrafted to better reflect the legal intent and for consistency with O H&S Act, making it clear that a person's failure at a material time to comply with a compliance code can be used as evidence in proceedings for an offence against this Act
169 Effect of compliance code		New section added to reflect National Model Legislation, but redrafted to better reflect the legal intent and for consistency with O H&S Act
170 Recovery of certain costs	85 Records of cost of entry and inspection	2008 Act section clarifies that ITSRR may recover costs of some audits other than those specified in section 84 of the 2008 Act
171 Recovery of amounts due	106 Recovery of amounts due	No material change
172 Contracting out prohibited		New section added to reflect National Model Legislation

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
173 Service of documents	116 Service of documents	The provision in the 2008 Act allows for service on appointed places of business for corporations.
174 Regulations	117 Regulations	Regulation-making powers in 2008 Act adapted to support existing 2002 Regulations plus further offences arising as a result of adopting the National Model Legislation
175 Application of OH&S Act		New section added to reflect National Model Legislation, redrafted to better clarify relationship between OH&S Act and Rail Safety Act The relationship s defined not as one set of laws prevailing over the other, but in terms of the rail safety scheme not precluding or affecting the operation of the OH&S law. Where compliance with both is not possible the OH&S law
175(4) Application of OH&S Act	102 Double jeopardy	No material change
176 Repeal	118 Repeal	Adapted for repeal of the 2002 Act
177 Savings, transitional and other provisions	119 Savings and transitional provisions	Adapted as appropriate for 2008 Act
178 Amendment of other Acts		Mechanical provision
179 Review of Act	121 Review of Act	No material change
<u>Schedule 1: Rail safety workers – alcohol or other drugs</u>	<u>Schedule 1: Railway employees – alcohol or other drugs</u>	No material change
<u>Schedule 2: Fatigue management</u>	<u>Schedule 2: Fatigue management</u>	Schedule 2 of 2008 Act consolidates requirements previously dealt with as conditions of accreditation. The legal effect of consolidated Schedule 2 remains unchanged from the 2002 Act, however, Schedule 2 now clarifies that the requirements are minimum standards

<u>Rail Safety Act 2008 (NSW)</u>	<u>Rail Safety Act 2002 (NSW)</u>	<u>Comments</u>
<u>Schedule 3: Savings, transitional and other provisions</u>	<u>Schedule 5: Savings and transitional provisions</u>	As appropriate for 2008 Act, includes full requirements for all savings and transitional requirements dealing with existing and continuing accreditations, safety managements systems, sidings, competency of rail safety workers. Provisions include 3 year transition period for road authorities to comply with Division 3 of Part 2
<u>Schedule 4: Amendment of other Acts</u>		As appropriate for 2008 Act