



New South Wales

# Rail Safety (Adoption of National Law) Amendment (Drug Testing of Oral Fluid Samples) Regulation 2015

under the

Rail Safety (Adoption of National Law) Act 2012

His Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Rail Safety (Adoption of National Law) Act 2012*.

DUNCAN GAY, MLC

On behalf of the Minister for Transport and Infrastructure

## Explanatory note

Under the *Rail Safety National Law (NSW)* the National Rail Safety Regulator may appoint persons as authorised persons. Those persons, along with police officers, may require oral fluid analysis of rail safety workers in certain circumstances. When New South Wales police officers deal with oral fluid samples, they do so in the same way as they do when enforcing New South Wales road transport legislation, which differs from the way that the National Rail Safety Regulator operates.

The objects of this Regulation are as follows:

- (a) to make provision for the taking and transportation of oral fluids that are to be tested by the National Rail Safety Regulator by including aspects of procedures for specimen collecting for drug testing that are used by that body (by requiring an oral fluid sample taken by or handed to an authorised person who is not a police officer to be collected, transported and stored in accordance with a specified Australian Standard),
- (b) to facilitate the testing of oral fluids by the National Rail Safety Regulator by requiring samples to be analysed in accordance with a specified Australian Standard and by including a laboratory, an oral fluid testing device and oral fluid analysing instruments used by that body in the list of laboratories, devices and instruments approved for drug testing,
- (c) to provide that evidence may be given of or in relation to the presence of a drug or a concentration of a drug if the court is satisfied that the analysis was not arranged in contravention of the *Rail Safety (Adoption of National Law) Regulation 2012* (to achieve consistency with similar provisions in other legislation about drug testing of motor vehicle drivers),
- (d) to omit an incorrect reference to a testing device in a definition about oral fluid analysis, which is in fact carried out by analysing instruments.

This Regulation is made under the *Rail Safety (Adoption of National Law) Act 2012*, including sections 8 (Regulations relating to alcohol and drug testing) and 10 (the general regulation-making power).

## **Rail Safety (Adoption of National Law) Amendment (Drug Testing of Oral Fluid Samples) Regulation 2015**

under the

Rail Safety (Adoption of National Law) Act 2012

### **1 Name of Regulation**

This Regulation is the *Rail Safety (Adoption of National Law) Amendment (Drug Testing of Oral Fluid Samples) Regulation 2015*.

### **2 Commencement**

This Regulation commences on the day on which it is published on the NSW legislation website.

## Schedule 1 Amendment of Rail Safety (Adoption of National Law) Regulation 2012

### [1] Clause 3 Definitions

Omit the definitions of *approved laboratory*, *approved oral fluid analysing instrument* and *approved oral fluid testing device* from clause 3 (1).

Insert instead:

*approved laboratory* means:

- (a) in relation to blood—the laboratory at the NSW Forensic & Analytical Science Service at Lidcombe, New South Wales, and
- (b) in relation to urine samples—a laboratory that has been accredited by the National Association of Testing Authorities, Australia for the purposes of AS/NZS 4308:2008, and
- (c) in relation to oral fluid samples—the laboratory at:
  - (i) the NSW Forensic & Analytical Science Service at Lidcombe, New South Wales, or
  - (ii) Racing Analytical Services Ltd at Flemington, Victoria.

*approved oral fluid analysing instrument* means:

- (a) an approved oral fluid analysing instrument within the meaning of Schedule 3 to the *Road Transport Act 2013*, or
- (b) the device known as Thermo TSQ Quantum Ultra, or
- (c) the device known as Thermo TSQ Quantum Access, or
- (d) the device known as Thermo TSQ Orbitrap Discovery, or
- (e) the device known as AB Sciex QTrap 5500.

*approved oral fluid testing device* means:

- (a) an approved oral fluid testing device within the meaning of Schedule 3 to the *Road Transport Act 2013*, or
- (b) the device known as Medvet Oral7.

*AS 4760—2006* means Australian Standard AS 4760—2006, *Procedures for specimen collection and the detection and quantitation of drugs in oral fluid*.

### [2] Clause 3 (1), definition of “oral fluid analysis”

Omit “testing device”. Insert instead “analysing instrument”.

### [3] Clause 13 Samples taken at hospitals from rail safety workers involved in accidents in carrying out rail safety work

Omit clause 13 (6). Insert instead:

- (6) Nothing in clause 29 enables evidence to be given of or in relation to the presence of a drug, or the presence of a particular concentration of a drug, in the blood or urine of a person charged with an offence under section 128 of the *Rail Safety National Law (NSW)* (as determined by an analysis of a sample obtained under this clause) unless the court is satisfied that the analysis was not arranged in contravention of this Regulation.

**[4] Clause 17**

Omit the clause. Insert instead:

**17 Taking and dealing with oral fluid samples**

- (1) A police officer who is provided with a sample of a rail safety worker's oral fluid under this Regulation or the *Rail Safety National Law (NSW)* must:
  - (a) place the sample into a container, and
  - (b) fasten and seal the container, and
  - (c) mark or label the container for future identification, and
  - (d) give to the person from whom the sample is taken a certificate relating to the sample that contains sufficient information to enable the sample to be identified as a sample of that person's oral fluid, and
  - (e) immediately place the sample in a security box of a type approved by the Commissioner of Police and lock the box.
- (2) An authorised person (other than a police officer) who is provided with a sample of a rail safety worker's oral fluid under this Regulation or the *Rail Safety National Law (NSW)* must:
  - (a) collect the sample in accordance with section 2 of AS 4760—2006, and
  - (b) give the person from whom the sample is taken a certificate relating to the sample that contains sufficient information to enable the sample to be identified as a sample of that person's oral fluid.
- (3) The police officer or other authorised person may carry out an oral fluid test on a portion of the sample before dealing with the remaining portion of the sample under subclause (1) or (2). In such a case, a reference in this clause and clause 29 to the sample that is submitted to an approved laboratory is taken to be a reference to the remaining portion of that sample.
- (4) A sample of a rail safety worker's oral fluid provided under this Regulation or the *Rail Safety National Law (NSW)*:
  - (a) in any case—must, as soon as practicable after being provided, be submitted to an approved laboratory for analysis by an analyst to determine the concentration of drugs in the oral fluid, and
  - (b) in the case of a sample provided to a police officer—must be kept in the security box until it is submitted to an approved laboratory, and
  - (c) in the case of a sample provided to an authorised person who is not a police officer—must be transported in accordance with section 2 of AS 4760—2006.
- (5) A person from whom a sample is taken may, within 6 months after the taking of the sample, apply to the laboratory at which the sample is being, or was, analysed for a portion of the sample to be sent for analysis, at the person's own expense, to a medical practitioner or laboratory nominated by the person.
- (6) A medical practitioner, authorised person or other sample taker of another jurisdiction who, under the Rail Safety National Law of that jurisdiction, takes a sample of oral fluid in consequence of an occurrence in this jurisdiction may arrange for a portion of the sample to be submitted for an analysis by an analyst to determine the concentration of drugs in the oral fluid.

**[5] Clause 52**

Insert after clause 51:

**52 Evidence relating to certain samples**

Clause 13 (6), as substituted by the *Rail Safety (Adoption of National Law) Amendment (Drug Testing of Oral Fluid Samples) Regulation 2015*, applies to evidence given after the commencement of that regulation regardless of whether the evidence was determined by an analysis that occurred before or after that commencement.