

# Rail Safety (Drug and Alcohol Testing) Regulation 2008

[2008-609]



New South Wales

## Status Information

### Currency of version

Historical version for 19 December 2008 to 30 June 2011 (accessed 18 July 2024 at 5:46)

Legislation on this site is usually updated within 3 working days after a change to the legislation.

### Provisions in force

The provisions displayed in this version of the legislation have all commenced.

### Notes—

- **Does not include amendments by**  
*Health Services Amendment (Local Health Districts and Boards) Act 2011 No 4* (not commenced)

### Authorisation

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File last modified 16 May 2011

# Rail Safety (Drug and Alcohol Testing) Regulation 2008



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# Rail Safety (Drug and Alcohol Testing) Regulation 2008



New South Wales

Her Excellency the Governor, with the advice of the Executive Council, has made the following Regulation under the *Rail Safety Act 2008*.

DAVID CAMPBELL, M.P., Minister for Transport

## Part 1 Preliminary

### 1 Name of Regulation

This Regulation is the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*.

### 2 Commencement

This Regulation commences on 1 January 2009.

### 3 Definitions

(1) In this Regulation:

**analyst** means a person employed by the owner or operator of an approved laboratory as an analyst.

**approved laboratory** means:

(a) in relation to blood samples—the laboratory at Lidcombe of the Division of Analytical Laboratories, Institute of Clinical Pathology and Medical Research, Western Sydney Area Health Service, 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.

**AS/NZS 4308:2008** means Australian/New Zealand Standard AS/NZS 4308:2008 *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*.

**breath analysing instrument** and **breath analysis** have the same meanings as they have in the *Road Transport (Safety and Traffic Management) Act 1999*.

**breath test** means a test for the purpose of indicating the concentration of alcohol in a person's breath or blood, carried out on that person's breath by means of a device, not being a breath analysing instrument, of a type that complies with the requirements of AS 3547—1997, *Breath alcohol testing devices for personal use*, or of a type approved by the Governor by order published in the Gazette for the purposes of the *Road Transport (Safety and Traffic Management) Act 1999*.

**drug** means:

- (a) alcohol, or
- (b) any other substance that is a drug within the meaning of the *Road Transport (Safety and Traffic Management) Act 1999*.

**heritage railway** means a railway operation principally involving the restoration, preservation or operation of vintage trains.

**hospital** means a public hospital or a private health facility, and includes any premises, institution or establishment that is a hospital for the purposes of section 19 of the *Road Transport (Safety and Traffic Management) Act 1999* or that is prescribed by the regulations.

**on-site drug screening device** means a device which determines the presence or absence of drugs in urine using an immunoassay technique that meets the screening test cut-off levels listed in Table 1 of AS/NZS 4308:2008.

**prescribed concentration of alcohol** means a concentration of 0.02 grammes or more of alcohol in 210 litres of breath or 100 millilitres of blood.

**prescribed incident** means any of the following that occur on railway premises:

- (a) a collision between trains,
- (b) a collision between a train and a person,
- (c) a collision between a train and a road vehicle or plant equipment,
- (d) the derailment of a train,
- (e) a breach of the rail infrastructure owner's safeworking rules,
- (f) any other incident that the ITSRR may, by notice in writing to a rail transport operator, declare to be a type of prescribed incident in respect of the operator's railway operations.

**sample**, in relation to urine, includes, if the sample is divided into portions, a portion

of the sample.

**testing officer** means:

- (a) a person authorised for the time being under clause 4 as a testing officer, or
- (b) a rail safety officer.

**the Act** means the *Rail Safety Act 2008*.

- (2) A reference in this Regulation to a police officer authorised by the Commissioner of Police to operate breath analysing instruments is a reference to a police officer so authorised under the *Road Transport (Safety and Traffic Management) Act 1999*.
- (3) For the purposes of this Regulation, a thing is to be regarded as having been done by a medical practitioner or analyst if it is done by a person acting under the supervision or direction of the medical practitioner or analyst.
- (4) For the purposes of this Regulation, a power to require a person to provide a sample of blood or urine includes a power to require a person to provide samples of any one or more of blood or urine.
- (5) Notes included in the text of this Regulation do not form part of this Regulation.

#### **4 Authorisation of testing officers**

- (1) The ITSRR may, by notice in writing, authorise any person to be a testing officer for the purposes of exercising functions under this Regulation.
- (2) A rail transport operator may, by notice in writing, authorise any person to be a testing officer for the purposes of exercising functions under this Regulation.
- (3) The rail transport operator or the ITSRR may authorise as a testing officer:
  - (a) a person by name, or
  - (b) the holder from time to time of an office by reference to the title of the office concerned.
- (4) The authority of a testing officer authorised under this clause is limited:
  - (a) by any conditions or other limitations specified in the relevant notice of authorisation, and
  - (b) in the case of a testing officer authorised by a rail transport operator—to the railway specified in the accreditation of the operator.
- (5) The rail transport operator must furnish a testing officer authorised by the operator with a certificate of authorisation as a testing officer.

- (6) The ITSRR must furnish a testing officer authorised by the ITSRR with a certificate of authorisation as a testing officer.
- (7) A testing officer must, if requested to do so, produce the certificate of authorisation to any person required by the officer to submit to a breath test or to do any other thing under this Regulation.
- (8) If a person is authorised as a testing officer by virtue of being the holder of an office, evidence that the testing officer holds the office concerned has the same effect as the production of a certificate of authorisation as a testing officer.
- (9) The ITSRR may, by notice in writing to a rail transport operator, revoke the authorisation of a person authorised as a testing officer by the operator.
- (10) The ITSRR may, by notice in writing, revoke the authorisation of a person authorised as a testing officer by the ITSRR.
- (11) A rail transport operator may, by notice in writing, revoke the authorisation of a person authorised as a testing officer by the operator.

## **Part 2 Drug and alcohol management programs**

### **5 Matters to be included in drug and alcohol management programs**

The drug and alcohol management program of a rail transport operator must include the following:

- (a) guidelines and provision for training for managers and supervisors as to how to deal with rail safety workers whose work is or may be affected by the use of alcohol or other drugs,
- (b) confidentiality requirements and protocols for personal information obtained from rail safety workers during counselling, treatment or rehabilitation,
- (c) measures in accordance with clause 7,
- (d) a drug and alcohol policy in accordance with clause 8,
- (e) without limiting paragraph (f) or clause 9, an emphasis, in relation to rail safety workers, on drug and alcohol education and rehabilitation,
- (f) matters relating to rail safety workers in accordance with clause 9,
- (g) testing procedures in accordance with clause 10,
- (h) testing officer authorisation and training procedures in accordance with clauses 4 and 11.

## **6 Risk management principles to be applied**

In preparing a drug and alcohol management program, a rail transport operator must:

- (a) identify and assess any risks to the safety of the operator's railway operations that have arisen or may arise from the use of alcohol or other drugs by rail safety workers, and
- (b) specify the controls that are to be used by the operator to manage those risks to safety, and
- (c) include procedures for monitoring, reviewing and revising the adequacy of those controls.

## **7 Obligations of rail transport operators relating to use of alcohol or other drugs**

The drug and alcohol management program of a rail transport operator must provide for the following measures to be taken by or on behalf of the operator:

- (a) the prohibition or restriction of the availability of alcohol and other drugs to persons carrying out rail safety work,
- (b) the establishment of rules relating to the use of alcohol and other drugs by rail safety workers,
- (c) the identification of rail safety workers who have alcohol or other drug related problems and, where appropriate, the referral of those workers for assessment, treatment and rehabilitation,
- (d) the use of appropriate personnel management practices, employment practices, working conditions and work arrangements to reduce any other alcohol or other drug related problems in the carrying out of railway operations,
- (e) the provision of leave, if appropriate in the circumstances, to rail safety workers for the purpose of rehabilitation and treatment programs,
- (f) the provision of information to rail safety workers about the rules relating to the use of alcohol or other drugs by rail safety workers and the risks to safety of railway operations and to personal health that may arise from the use of alcohol or other drugs by rail safety workers.

## **8 Drug and alcohol policy**

The drug and alcohol policy of a rail transport operator must include:

- (a) the objectives of the rail transport operator in relation to the management of alcohol and other drugs, and related issues, in connection with the safety of each of the operator's railway operations, and



- (b) without limiting paragraph (a), the following objectives:
  - (i) the establishment of measures to achieve a workplace culture that supports fitness for work,
  - (ii) the reduction of risks to safety, absenteeism and other effects in the workplace of the consumption or use of alcohol and other drugs, and
- (c) the manner in which the objectives are to be achieved.

## **9 Matters relating to rail safety workers**

- (1) The drug and alcohol management program of a rail transport operator is to set out the obligations of rail safety workers with respect to the management of alcohol and other drug use and is to set out the actions, including disciplinary sanctions, that may be taken by the rail transport operator if there is a breach of those obligations.
- (2) Without limiting subclause (1), the program is to provide for the following:
  - (a) a requirement that a rail safety worker notify the rail transport operator or a nominated person if the worker is aware that the safety of rail safety work may be affected because the worker, or another worker, is affected by alcohol or any other drug (including a drug prescribed for the worker for medical or therapeutic purposes),
  - (b) the provision of education and rehabilitation measures for rail safety workers (not limited to workers who identify themselves to the operator as someone who may need those measures), including provision for information to be provided about referral to counselling, treatment and rehabilitation services (where appropriate),
  - (c) the provision of information to rail safety workers about their responsibilities, in relation to alcohol and other drug use, under the Act and this Regulation, as well as their responsibilities under the program,
  - (d) the provision of information to rail safety workers about the problems arising from the consumption or use of alcohol or other drugs and the disciplinary sanctions and other penalties applicable to workers whose work is affected by the consumption or use of alcohol or other drugs,
  - (e) appeals against disciplinary sanctions relating to the use of alcohol or other drugs,
  - (f) grievance mechanisms for dealing with complaints about the application of sanctions or the implementation of the drug and alcohol management program,
  - (g) protocols for fair procedures relating to the operation of the drug and alcohol management program and testing under this Regulation, including (but not limited to) the following matters:

- (i) provision for privacy of individuals required to produce samples for urine testing,
  - (ii) provision for sufficient time for producing urine samples,
  - (iii) a requirement that testing, as far as practicable, take place during working hours,
  - (iv) a requirement that adequate toilet or bathroom facilities be available for persons required to produce samples for urine testing,
  - (v) a requirement that the same processes apply to all rail safety workers, having regard to any applicable medical, cultural or religious constraints,
- (h) without limiting paragraph (g), protocols for fair procedures, education and assistance to rail safety workers who test positive for a prescribed medication, taken in accordance with instructions, for an identified medical condition and who have previously notified that they are taking the medication.

## **10 Testing procedures**

- (1) The drug and alcohol management program of a rail transport operator must provide for testing on a random basis in accordance with Part 4, using risk management principles to select rail safety workers, of not less than 25% of the operator's rail safety workers in each year.
- (2) The drug and alcohol management program of a rail transport operator must provide for the testing of the operator's rail safety workers in accordance with Part 4 and clause 28.
- (3) Without limiting subclause (2) or Part 4, the drug and alcohol management program of a rail transport operator must require the testing of a rail safety worker if the operator has reasonable cause to believe that the worker is under the influence of alcohol or any other drug.
- (4) Subclause (1) does not apply to a rail transport operator engaged only in railway operations relating to the operation of a heritage railway.

## **11 Testing officers**

- (1) This clause applies to testing officers authorised by a rail transport operator.
- (2) The drug and alcohol management program of a rail transport operator must set out:
  - (a) training requirements for testing officers that are approved by the ITSRR for the purposes of this clause, and
  - (b) requirements for qualifications of persons who provide the training that are approved by the ITSRR for the purposes of this clause.

- (3) The drug and alcohol management program of a rail transport operator must provide for the updating and revision of training requirements for testing officers.
- (4) As soon as practicable after any training is completed, a rail transport operator must give a testing officer a written training statement, signed by the person who conducted the training, setting out the following matters:
  - (a) the type and content of the training completed by the testing officer,
  - (b) the dates on which training was provided,
  - (c) the name of the person who conducted the training.
- (5) A rail transport operator must keep the following records of persons authorised by the operator as testing officers:
  - (a) the names of the testing officers or of offices the holders of which are designated as testing officers,
  - (b) the responsibilities of each such testing officer under the drug and alcohol management program,
  - (c) copies of any statements issued under subclause (4).

Maximum penalty (subclauses (4) and (5)): 20 penalty units.

### **Part 3 Offences relating to alcohol or other drugs**

#### **12 Offence—carrying out rail safety work with prescribed concentration of alcohol in breath or blood**

A rail safety worker who carries out rail safety work while the prescribed concentration of alcohol is present in the worker's breath or blood is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 6 months, or both.

#### **13 Offence—carrying out rail safety work while under influence of alcohol or other drug**

- (1) A rail safety worker who carries out rail safety work while under the influence of alcohol or any other drug is guilty of an offence.

Maximum penalty: 10 penalty units or imprisonment for 6 months, or both.

- (2) If a person is charged with an offence under this clause:

- (a) the document commencing proceedings may allege the person was under the influence of more than one drug and is not liable to be dismissed on the ground of uncertainty or duplicity if each of those drugs is described in the document, and
- (b) the offence is proved if the court is satisfied beyond reasonable doubt that the

defendant was under the influence of:

- (i) a drug described in the document commencing proceedings, or
- (ii) a combination of drugs any one or more of which was or were described in the document.

#### **14 Double jeopardy**

- (1) A rail safety worker is not liable to be convicted of both:
  - (a) an offence under clause 12 of carrying out rail safety work while the prescribed concentration of alcohol is present in the worker's breath or blood, and
  - (b) an offence under clause 13 of carrying out that rail safety work while under the influence of alcohol or any other drug.
- (2) A rail safety worker is not liable to be convicted of both:
  - (a) an offence under clause 13 of carrying out rail safety work while under the influence of alcohol or any other drug, and
  - (b) an offence under clause 27 of refusing or failing to submit to a breath analysis or to provide a sample of blood or urine in connection with the carrying out of that rail safety work.

### **Part 4 Testing for alcohol or other drugs**

#### **15 Random and targeted testing of rail safety workers**

- (1) A testing officer may require any rail safety worker who the officer has reasonable cause to believe is on duty for the purpose of carrying out rail safety work, or who the officer has reasonable cause to believe is about to carry out rail safety work:
  - (a) to undergo a breath test in accordance with the directions of the officer, or
  - (b) to provide a sample of the worker's urine for the purpose of testing for the presence of drugs,or both.
- (2) The selection of a rail safety worker for testing may be conducted on a random or targeted basis.
- (3) A rail safety worker may be:
  - (a) breath tested or required to undergo breath analysis whether or not there is any suspicion that the worker has recently consumed alcohol, or
  - (b) required to provide a urine sample whether or not there is any suspicion that the

worker has recently taken drugs.

- (4) In the case of a rail safety worker who was about to carry out rail safety work, the result of any such breath test (or of any subsequent breath or other analysis) or the result of any such testing or analysis performed on a sample of the worker's urine may be used for the purposes of any disciplinary proceedings against the worker, but is not admissible in any proceedings for an offence under this Regulation.
- (5) For the purposes of this clause, a rail safety worker is to be regarded as being about to carry out rail safety work if the worker:
  - (a) has left home or a temporary residence for work (being rail safety work), and
  - (b) has not commenced work after having so left home or the temporary residence.

#### **16 Testing of rail safety workers in specified situations**

- (1) A testing officer or a police officer who has reasonable cause to believe that a rail safety worker has been involved in an accident or irregular incident while carrying out rail safety work may require the worker:
  - (a) to undergo a breath test in accordance with the directions of the officer, or
  - (b) to provide a sample of the worker's urine for the purpose of testing for the presence of drugs,or both.
- (2) Nothing in this clause limits clause 15.

#### **17 Assessment of sobriety if breath testing device not available**

- (1) If:
  - (a) a testing officer or a police officer is entitled under this Regulation to require a rail safety worker to undergo a breath test, and
  - (b) the device required to carry out the breath test is not readily available,the officer may require the worker to submit to an assessment of the worker's sobriety in accordance with the directions of the officer.
- (2) A requirement that a rail safety worker submit to such an assessment is not open to challenge in any proceedings on the basis that the device was readily available.

#### **18 Breath analysis of rail safety workers following breath testing**

- (1) If:
  - (a) it appears to a testing officer or a police officer as a result of a breath test or

assessment under this Regulation that the prescribed concentration of alcohol may be present in a rail safety worker's breath or blood, or

- (b) a rail safety worker who is required by a testing officer or a police officer to undergo a breath test or to submit to an assessment under this Regulation refuses or fails to do so in accordance with the directions of the officer,

the officer may require the worker to submit to a breath analysis in accordance with the directions of the officer.

- (2) If a police officer is entitled to require a rail safety worker to submit to a breath analysis, the officer may:
  - (a) arrest the worker without a warrant, and
  - (b) take the worker with such force as may be necessary to a police station or such other place as the officer considers desirable and there detain the worker for the purposes of the breath analysis.
- (3) If a testing officer is entitled to require a rail safety worker to submit to a breath analysis, the officer may direct the worker to attend the nearest police station, or such other place as the officer may reasonably require, and there submit to a breath analysis.
- (4) A breath analysis must be carried out by:
  - (a) a testing officer, or
  - (b) a police officer authorised by the Commissioner of Police to operate breath analysing instruments,at or near a police station or such other place as the officer considers desirable.
- (5) As soon as practicable after a rail safety worker has submitted to a breath analysis the testing officer or police officer operating the breath analysing instrument must deliver to the worker a statement in writing signed by the officer specifying:
  - (a) the concentration of alcohol determined by the analysis to be present in the worker's breath or blood and expressed in grammes of alcohol in 210 litres of breath or 100 millilitres of blood, and
  - (b) the day on which and time of the day at which the breath analysis was completed.
- (6) A rail safety worker who is required to submit to a breath analysis may request the testing officer or police officer making the requisition to arrange for the taking (in the presence of a testing officer or a police officer) of a sample of the worker's blood for analysis, at the worker's own expense, by:
  - (a) a medical practitioner nominated by the worker, or

(b) a medical practitioner nominated by the officer at the worker's request.

(7) The making of any such request or the taking of a sample of a rail safety worker's blood does not relieve the worker from the obligation imposed on the worker to submit to a breath analysis in accordance with this clause.

**19 Blood or urine samples taken at hospitals from rail safety workers involved in accidents in carrying out rail safety work**

(1) If a rail safety worker attends or is admitted to a hospital for examination or treatment because the worker has been involved in an accident while carrying out rail safety work, a testing officer or police officer may require the worker to provide as soon as practicable a sample of the worker's blood or urine in accordance with the directions of a medical practitioner who attends the worker at the hospital.

(2) If there is no medical practitioner present to attend the person at the hospital, the blood or urine sample is to be taken by a registered nurse who is accredited by a hospital as competent to perform the sampling procedures.

(3) Any such medical practitioner or nurse must take the sample if informed by the testing officer or police officer that the sample is required to be taken by the practitioner or nurse under this Regulation.

(4) A requirement under subclause (1) need not be made directly to the rail safety worker concerned but may be made through a medical practitioner or any such nurse who attends the worker at the hospital.

**20 Additional circumstances when blood or urine samples may be taken**

(1) A testing officer may require a rail safety worker to provide a sample of the worker's blood or urine if:

(a) the officer is entitled under this Regulation to require the worker to submit to a breath analysis, and

(b) a breath analysing instrument is not readily available.

(2) A testing officer who has a reasonable belief that, by the way in which a rail safety worker was acting, the worker might be under the influence of a drug, may require the worker to provide a sample of the worker's blood or urine if:

(a) the worker has undergone a breath test in accordance with this Regulation, and

(b) the result of the test does not permit the worker to be required to submit to a breath analysis, and

(c) the officer has required the worker to submit to a sobriety assessment and:

(i) the worker refuses to submit to the assessment, or

- (ii) after the assessment is made, the officer has a reasonable belief that the worker is under the influence of a drug.

**Note—**

Under clause 15, a rail safety worker may be required at any time to provide a urine sample.

- (3) A requirement that a rail safety worker provide a sample is not open to challenge in any proceedings on the basis that a breath analysing instrument was readily available.

## **21 Taking of blood or urine samples**

- (1) This clause applies if a testing officer or a police officer is entitled under this Regulation to require a rail safety worker to provide a sample of the worker's blood or urine.
- (2) The officer may require the rail safety worker to provide the sample of urine in accordance with the directions of the officer.
- (3) The officer may require the rail safety worker to provide the sample of blood at a hospital in accordance with the directions of a medical practitioner who attends the worker.
- (4) If there is no medical practitioner present to attend the rail safety worker at the hospital, the blood sample is to be taken by a registered nurse who is accredited by a hospital as competent to perform the sampling procedures.
- (5) Any such medical practitioner or nurse must take a sample of blood if informed by the testing officer or police officer that the sample is required to be taken by the practitioner or nurse under this Regulation.
- (6) If a police officer is entitled to require a rail safety worker to provide a sample of blood, the officer may:
  - (a) arrest the worker without a warrant, and
  - (b) take the worker with such force as may be necessary to a hospital and there detain the worker for the purpose of obtaining the sample.
- (7) If a testing officer is entitled to require a rail safety worker to provide a sample of blood, the officer may direct the worker to attend the nearest hospital for the purpose of obtaining the sample.

## **22 Restrictions on requiring breath test, assessment, breath analysis or sample**

A testing officer or a police officer must not require a rail safety worker to undergo a breath test, submit to an assessment or a breath analysis or provide a sample of blood or urine:



- (a) if the worker has been admitted to a hospital for medical treatment, unless the medical practitioner who attends the worker at the hospital (or, if no medical practitioner is present to attend the person, a registered nurse who is accredited by a hospital as competent to perform the sampling procedures) has been notified of the intention to make the requisition and the medical practitioner or nurse does not object on the ground that compliance would be prejudicial to the proper care or treatment of the worker, or
- (b) if it appears to the officer that it would (because of injuries sustained by the worker) be dangerous to the worker's medical condition if the worker complied with the requisition, or
- (c) at any time after the expiration of 3 hours from the time the worker carried out the rail safety work (or was due to commence the rail safety work) to which the requisition relates, or
- (d) in the case of a person other than a worker who has been involved in an accident or irregular incident while carrying out rail safety work, after the worker has ceased to be on duty on a particular day, or
- (e) at the worker's home.

### **23 Action to be taken with respect to blood samples**

- (1) A medical practitioner, nurse or other person by whom a sample of a rail safety worker's blood is taken under this Regulation 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 blood, and
  - (e) as soon as reasonably practicable after the sample is taken, hand the sample to the testing officer or police officer who was present at the time the sample was taken.
- (2) The testing officer or police officer to whom a sample of blood is handed under subclause (1) must:
  - (a) immediately on being handed the sample, place the sample in a security box of a type approved by the Commissioner of Police and lock the box, and
  - (b) as soon as reasonably practicable thereafter, arrange for the sample to be

submitted to an approved laboratory for analysis by an analyst to determine the concentration of alcohol (and, where required, of other drugs) in the blood.

- (3) The person from whom the sample was taken may, within 12 months after the taking of the sample, apply to the laboratory referred to in subclause (2) for a portion of the sample to be sent, for analysis at that person's own expense, to a medical practitioner or laboratory nominated by that person.

#### **24 Action to be taken with respect to urine samples**

- (1) If a testing officer or police officer requires a rail safety worker to provide a sample of urine, the sample must be collected in accordance with section 2 of AS/NZS 4308:2008.
- (2) The testing officer or police officer who required the worker to provide a sample must arrange for the sample to be submitted for screening testing.
- (3) Screening testing may be carried out:
  - (a) at the place where the sample was taken, using an on-site drug screening device, or
  - (b) by an analyst at an approved laboratory, in accordance with section 4 of AS/NZS 4308:2008.
- (4) A sample that is submitted for screening testing or confirmatory testing at an approved laboratory is to be transported in accordance with section 2 of AS/NZS 4308:2008.
- (5) If screening testing of the sample indicates that the urine contains a drug or drugs:
  - (a) in the case of a screening test conducted in accordance with subclause (3)
    - (a)—the testing officer or police officer who required the worker to provide the sample must arrange for the sample to be submitted to an analyst at an approved laboratory for confirmatory testing in accordance with clause 25, or
    - (b) in the case of a screening test conducted in accordance with subclause (3)
      - (b)—the analyst or another analyst at an approved laboratory is to conduct confirmatory testing in accordance with clause 25.
- (6) If confirmatory testing determines that a urine sample contains a drug or drugs, the person from whom the sample was taken may, within 3 months after the taking of the sample, apply to the laboratory at which the sample is being kept for a portion of the sample to be sent for analysis, at the person's own expense, to an approved laboratory nominated by the person.
- (7) Samples are to be stored in accordance with section 3 of AS/NZS 4308:2008.

## **25 Analysis of samples**

- (1) An analyst to whom a sample of blood is submitted for analysis under clause 23 may carry out an analysis of the sample, or of a portion of the sample, to determine the concentration of alcohol in the blood or to determine whether the blood contains alcohol or another drug or drugs, as the case requires.
- (2) An analyst to whom a sample of urine is submitted for analysis under clause 24 may carry out confirmatory testing on the sample, or a portion of the sample, to determine whether the urine contains a drug or drugs. The confirmatory testing must be carried out, and a report provided, in accordance with section 5 of AS/NZS 4308:2008.
- (3) Confirmatory testing under subclause (2) may be carried out only if screening testing determines that the urine contains a drug or drugs.
- (4) Without limiting subclause (2), the ITSRR may, generally or in a particular case or class of cases, direct that an analysis is to be carried out in order to determine whether there is present in a sample a drug specified in Schedule 1 to the *Drug Misuse and Trafficking Act 1985*.

## **26 Medical practitioners, nurses and testing officers—protection from liability**

- (1) No civil or criminal liability is incurred by a medical practitioner or nurse (nor by any person acting under the supervision or direction of the medical practitioner or nurse) in respect of anything properly and necessarily done by the practitioner or nurse in the course of taking a sample of blood or urine from a person if the practitioner or nurse:
  - (a) believed on reasonable grounds that the practitioner or nurse was required under this Regulation to take the sample of blood or urine from the person, or
  - (b) was informed by a testing officer or a police officer that the person was a person from whom the practitioner or nurse was required under this Regulation to take the sample of blood or urine.
- (2) No civil or criminal liability is incurred by a testing officer in respect of anything properly and necessarily done by the officer in the course of administering a breath test or breath analysis, conducting an assessment of sobriety or taking a sample of urine in the exercise of the functions of a testing officer under this Regulation.

## **Part 5 Offences relating to testing for alcohol or other drugs**

### **27 Refusal to be tested**

- (1) Any rail safety worker who, when required under this Regulation to do so, refuses or fails:
  - (a) to undergo a breath test, or

(b) to submit to an assessment,

in accordance with this Regulation is guilty of an offence.

Maximum penalty: 10 penalty units.

(2) Any rail safety worker who, when required under this Regulation to do so, refuses or fails:

(a) to submit to a breath analysis, or

(b) to provide a sample of his or her own blood or urine,

in accordance with this Regulation is guilty of an offence.

Maximum penalty: 25 penalty units or imprisonment for 9 months, or both.

(3) It is a defence to a prosecution for an offence under this clause if the defendant satisfies the court that the defendant was unable on medical grounds to comply with the requirement concerned.

## **28 Failure to conduct test**

A rail transport operator must not, without reasonable excuse, fail to ensure that a rail safety worker is required:

(a) to undergo a breath test and, if it appears to the testing officer as a result of the breath test that the prescribed concentration of alcohol may be present in the worker's breath or blood, a breath analysis, or

(b) to provide a sample of blood or urine,

or both, within 3 hours immediately after the worker is involved, or is reasonably suspected of being involved, in a prescribed incident while carrying out rail safety work.

Maximum penalty: 250 penalty units.

## **29 Interfering with results of test**

(1) A rail safety worker who does anything to introduce, or alter the concentration of, alcohol or any other drug in the worker's breath, blood or urine before submitting to a breath analysis or providing a sample of blood or urine under this Regulation is guilty of an offence if the worker does so for the purpose of preventing or restricting the use of the results of the analysis in any proceedings against the worker.

Maximum penalty: 25 penalty units or imprisonment for 9 months, or both.

(2) A rail safety worker who does anything, or causes anything to be done, to introduce, or alter the concentration of, alcohol or any other drug in a rail safety worker's breath, blood or urine before the worker submits to a breath analysis or provides a sample of

blood or urine under this Regulation is guilty of an offence if the worker does so for the purpose of preventing or restricting the use of the results of the analysis in any proceedings against the worker.

Maximum penalty: 25 penalty units or imprisonment for 9 months, or both.

### **30 Taking of samples**

(1) Any medical practitioner or nurse who, when required under this Regulation to take a sample of blood or urine from a rail safety worker:

- (a) refuses or fails to take the sample, or
- (b) does not comply with the requirements of clause 23 or 24 with respect to any sample taken,

is guilty of an offence.

Maximum penalty: 10 penalty units.

(2) It is a defence to a prosecution for an offence under subclause (1) if the medical practitioner or nurse satisfies the court that:

- (a) the practitioner or nurse believed on reasonable grounds that the taking of the sample from the rail safety worker would be prejudicial to the proper care and treatment of the worker, or
- (b) the practitioner or nurse was, because of the behaviour of the rail safety worker, unable to take the sample, or
- (c) there was other reasonable cause for the practitioner or nurse not to take the sample.

(3) Any person who, when taking a sample of blood or urine from a rail safety worker, does not comply with the requirements of clause 23 or 24 with respect to any sample taken is guilty of an offence.

Maximum penalty: 10 penalty units.

(4) A person who hinders or obstructs a medical practitioner, nurse or other person in attempting to take a sample of the blood or urine of any other person under this Regulation is guilty of an offence.

Maximum penalty: 20 penalty units.

### **31 Interfering or tampering with, or destroying, samples**

A person must not interfere or tamper with a sample of a person's blood or urine provided or taken under this Regulation, or destroy such a sample unless the sample is destroyed:

- (a) by or at the direction of an analyst in the course of or on completion of analysis, or
- (b) in the case of a sample handed to a person on behalf of a rail safety worker, by or at the direction of the person, or
- (c) in the case of a blood sample, after the expiration of 12 months commencing on the day on which the sample was taken, or
- (d) in the case of a urine sample, after the expiration of 3 months commencing on the day on which the sample was taken.

Maximum penalty: 20 penalty units.

## **Part 6 Certificate evidence in proceedings**

### **32 Certificate evidence of concentration of alcohol in breath or blood determined by breath analysis**

- (1) In proceedings for an offence under clause 12, evidence may be given of the concentration of alcohol present in the breath or blood of the person charged, as determined by a breath analysing instrument operated by:
  - (a) a testing officer, or
  - (b) a police officer authorised by the Commissioner of Police to operate breath analysing instruments.
- (2) The concentration of alcohol so determined is taken to be the concentration of alcohol in the breath or blood of the person at the time the person carried out the rail safety work to which the breath analysis relates if the breath analysis was made within 3 hours after that time, unless the defendant proves that the concentration of alcohol in the defendant's breath or blood at that time was less than 0.02 grammes of alcohol in 210 litres of breath or 100 millilitres of blood.
- (3) In proceedings for an offence under clause 12, a certificate purporting to be signed by a testing officer or a police officer and certifying that:
  - (a) the officer is duly authorised as a testing officer or (as the case requires) the police officer is authorised by the Commissioner of Police to operate breath analysing instruments, and
  - (b) the person named in the certificate submitted to a breath analysis, and
  - (c) the apparatus used by the officer to make the breath analysis was a breath analysing instrument within the meaning of the *Road Transport (Safety and Traffic Management) Act 1999*, and
  - (d) the analysis was made on the day and completed at the time stated in the

certificate, and

- (e) a concentration of alcohol (determined by that breath analysing instrument and expressed in grammes of alcohol in 210 litres of breath or 100 millilitres of blood) was present in the breath or blood of that person on the day and at the time stated in the certificate, and
- (f) a statement in writing required by clause 18 (5) was delivered in accordance with that subclause,

is prima facie evidence of the particulars certified in and by the certificate.

- (4) In proceedings for an offence under clause 12, a certificate purporting to be signed by the Commissioner of Police that the police officer named in the certificate is authorised by the Commissioner of Police to operate breath analysing instruments is prima facie evidence of the particulars certified in and by the certificate.
- (5) In any proceedings for an offence under clause 12, evidence of the condition of a breath analysing instrument or the manner in which it was operated is not to be required unless evidence that the instrument was not in proper condition or was not properly operated has been adduced.

### **33 Certificate evidence of concentration of alcohol in blood determined by analysis of blood sample**

- (1) In proceedings for an offence under clause 12, evidence may be given of the concentration of alcohol present in the blood of the person charged, as determined by an analysis under this Regulation of a sample of the person's blood.
- (2) The concentration of alcohol so determined is taken to be the concentration of alcohol in the blood of the person charged at the time the person carried out the rail safety work to which the analysed sample of blood relates, if that sample of blood was taken within 3 hours after that time, unless the defendant proves that the concentration of alcohol in the defendant's blood at that time was less than 0.02 grammes of alcohol in 100 millilitres of the blood.
- (3) In proceedings for an offence under clause 12, a certificate purporting to be signed by a medical practitioner or nurse and certifying any one or more of the following matters:
  - (a) that the practitioner or nurse was a medical practitioner or nurse who attended a specified person at a hospital,
  - (b) that the practitioner or nurse took a sample of the person's blood in accordance with this Regulation on the day and at the time stated in the certificate,
  - (c) that the practitioner or nurse dealt with the sample in accordance with clause 23,

- (d) that the practitioner or nurse used equipment of a specified description in so taking and dealing with the sample,
  - (e) that the container was sealed, and marked or labelled, in a specified manner,
- is prima facie evidence of the particulars certified in and by the certificate.
- (4) In proceedings for an offence under clause 12, a certificate purporting to be signed by a testing officer or a police officer and certifying any one or more of the following matters:
- (a) that the officer received a sample of a specified person's blood taken in accordance with this Regulation,
  - (b) that the officer arranged for the sample to be submitted for analysis by an analyst to determine the concentration of alcohol in the blood,
  - (c) that the container was sealed, and marked or labelled, in a specified manner,
- is prima facie evidence of the particulars certified in and by the certificate.
- (5) In proceedings for an offence under clause 12, a certificate purporting to be signed by an analyst and certifying any one or more of the following matters:
- (a) that the analyst received, on a specified day, a sample of a specified person's blood in a container submitted for analysis under this Regulation,
  - (b) that the container, as received by the analyst, was sealed, and marked or labelled, in a specified manner,
  - (c) that, on receipt by the analyst of the container, the seal was unbroken,
  - (d) that the analyst carried out an analysis of the sample to determine the concentration of alcohol in the sample,
  - (e) that the concentration of alcohol determined pursuant to the analysis and expressed in grammes of alcohol in 100 millilitres of blood was present in that sample,
  - (f) that the analyst was, at the time of the analysis, employed by the owner or operator of an approved laboratory as an analyst,
- is prima facie evidence of the matters set out in subclause (6).
- (6) A certificate under subclause (5) is prima facie evidence:
- (a) of the particulars certified in and by the certificate, and
  - (b) that the sample was a sample of the blood of that specified person, and



- (c) that the sample had not been tampered with before it was received by the analyst.

### **34 Certificate evidence of presence of drugs**

- (1) In proceedings for an offence under clause 13:

- (a) evidence may be given of:

- (i) the presence of a drug, or
- (ii) the presence of a particular concentration of a drug,

in the blood or urine of the person charged, as determined pursuant to an analysis under this Regulation of a sample of the person's blood or urine, and

- (b) the drug the presence of which is so determined or the particular concentration of the drug the presence of which is so determined, as the case may be, is taken to have been present in the blood or urine of that person at the time the person carried out the rail safety work to which the analysed sample relates,

if the sample was taken within 3 hours after that time, unless the defendant proves the absence of the drug, or the presence of the drug in a different concentration, at that time.

- (2) In proceedings for an offence under clause 13, a certificate purporting to be signed by a medical practitioner or nurse and certifying any one or more of the following matters:

- (a) that the practitioner or nurse was a medical practitioner or nurse who attended a specified person at a hospital,
- (b) that the practitioner or nurse took a sample of the person's blood or urine in accordance with this Regulation on the day and at the time stated in the certificate,
- (c) that the practitioner or nurse dealt with the sample in accordance with clause 23 or 24,

is prima facie evidence of the particulars certified in and by the certificate.

- (3) In proceedings for an offence under clause 13, a certificate purporting to be signed by a person and certifying any one or more of the following matters:

- (a) that the person took a sample of a person's urine in accordance with this Regulation on the day and at the time stated in the certificate,
- (b) that the person dealt with the sample in accordance with clause 23 or 24,

is prima facie evidence of the particulars certified in and by the certificate.

- (4) In proceedings for an offence under clause 13, a certificate purporting to be signed by a testing officer or a police officer and certifying any one or more of the following matters:
- (a) that the officer received a sample of a specified person's blood or urine taken in accordance with this Regulation,
  - (b) that the officer arranged for the sample to be submitted for analysis (or testing and analysis) by an analyst to determine whether any drug was present in the sample,
  - (c) that the container was sealed, and marked or labelled, in a specified manner,
- is prima facie evidence of the particulars certified in and by the certificate.
- (5) In proceedings for an offence under clause 13, a certificate purporting to be signed by an analyst and certifying any one or more of the following matters:
- (a) that the analyst received, on a specified day, a sample of a specified person's blood or urine in a container submitted for analysis (or testing and analysis) under this Regulation,
  - (b) that the container, as received by the analyst, was sealed, and marked or labelled, in a specified manner,
  - (c) that, on receipt by the analyst of the container, the seal was unbroken,
  - (d) that the analyst carried out an analysis of the sample to determine whether any drug was present in the sample,
  - (e) that a specified drug ascertained pursuant to the analysis was present in that sample and, if so certified, was present in that sample in a specified concentration,
  - (f) that the analyst was, at the time of the analysis, employed by the owner or operator of an approved laboratory as an analyst,
- is prima facie evidence of the matters set out in subclause (6).
- (6) A certificate under subclause (5) is prima facie evidence:
- (a) of the particulars certified in and by the certificate, and
  - (b) that the sample was a sample of the blood or urine of that specified person, and
  - (c) that the sample had not been tampered with before it was received by the analyst.
- (7) Nothing in this clause enables evidence to be given of or in relation to:

- (a) the presence of a drug other than alcohol, or
  - (b) the presence of a particular concentration of a drug other than alcohol,
- in the blood or urine of a person charged with an offence under clause 13, as determined by an analysis of a sample obtained under clause 19.

### **35 Certificate evidence of authorisation of testing officer**

In proceedings for an offence under this Regulation, a certificate purporting to be signed by the ITSRR and certifying that the officer named in the certificate is a testing officer is prima facie evidence of the particulars certified in and by the certificate.

## **Part 7 Miscellaneous**

### **36 Notification of drug and alcohol testing**

- (1) A rail transport operator is to notify the ITSRR, in a form approved by the ITSRR, of the following:
  - (a) any analysis of blood confirming the presence of a drug (other than alcohol) in the blood of a rail safety worker,
  - (b) any analysis of blood confirming that the prescribed concentration of alcohol is present in the rail safety worker's blood,
  - (c) any analysis of urine confirming the presence of a drug in the urine of a rail safety worker,
  - (d) any breath test indicating that the prescribed concentration of alcohol is present in the rail safety worker's breath or blood,
  - (e) any breath analysis confirming that the prescribed concentration of alcohol is present in the rail safety worker's breath or blood,
  - (f) any rail safety worker who, when required to do so under this Regulation, fails to undergo a breath test, undergo a breath analysis, or provide a sample of blood or urine,
  - (g) any incident or suspected incident involving the interference or tampering with, or the destruction of, a sample of a person's blood or urine provided or taken under this Regulation in contravention of this Regulation,
  - (h) any incident or suspected incident involving something being done in contravention of this Regulation to introduce, or alter the concentration of, alcohol or any other drug in a rail safety worker's breath, blood or urine before the worker submitted to a breath analysis or provided a sample of blood or urine under this Regulation.

**Note—**

Clause 3 of this Regulation provides that drug includes alcohol.

- (2) A rail transport operator is to provide the ITSRR with statistical reports relating to the conduct of alcohol and other drug testing at such times as are requested by the ITSRR, in the form provided by the ITSRR for that purpose.

**37 Savings and transitional provisions**

- (1) The *Rail Safety (Drug and Alcohol Testing) Regulation 2003* (the **old Regulation**), as in force immediately before the commencement of this Regulation, continues to apply in respect of any sample of urine or blood collected before that commencement.
- (2) A laboratory is taken to be an approved laboratory for the purposes of this Regulation if it was an approved laboratory under the old Regulation immediately before the commencement of this Regulation because it was accredited for the purposes of the Australian/New Zealand Standard AS/NZS 4308:2001, *Procedures for the collection, detection and quantitation of drugs of abuse in urine*.
- (3) A laboratory that is taken to be an approved laboratory under subclause (2) is taken to comply with any provision of this Regulation that requires compliance with AS/NZS 4308:2008 if the laboratory complies with the corresponding provision of the standard referred to in that subclause.
- (4) Subclauses (2) and (3) cease to have effect on the third anniversary of the commencement of this Regulation.