

# Rail Safety (Adoption of National Law) Regulation 2012

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New South Wales

## Status Information

### Currency of version

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### Provisions in force

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

### Notes—

- **Does not include amendments by**  
[Transport Administration Amendment \(Independent Transport Safety Regulator\) Act 2017 No 4](#) (not commenced)

### Authorisation

This version of the legislation is compiled and maintained in a database of legislation by the Parliamentary Counsel's Office and published on the NSW legislation website, and is certified as the form of that legislation that is correct under section 45C of the [Interpretation Act 1987](#).

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# Rail Safety (Adoption of National Law) Regulation 2012



New South Wales

## Contents

<b>Part 1 Preliminary</b> .....	5
1 Name of Regulation .....	5
2 Commencement .....	5
3 Definitions .....	5
<b>Part 2 Drug and alcohol testing</b> .....	7
<b>Division 1 Provisions relating to drug and alcohol offences</b> .....	7
4 No duplicity where more than one drug alleged .....	7
5 Measurement of alcohol concentrations .....	8
6 Test results may not be used for offence where worker had not commenced work .....	9
<b>Division 2 Testing for alcohol or other drugs</b> .....	9
7 Random and targeted testing of rail safety workers .....	9
8 Restrictions on requiring breath test, sobriety assessment, breath analysis or sample .....	9
9 Supervisee may perform functions of authorised sample taker or authorised person .....	9
10 Assessment of sobriety if breath testing device not available .....	9
11 Breath analysis of rail safety workers following breath testing .....	10
12 Oral fluid analysis following drug screening test or request .....	11
13 Samples taken at hospitals from rail safety workers involved in accidents in carrying out rail safety work .....	12
14 Additional circumstances when blood or urine samples may be taken .....	12

15 Taking of blood samples or urine .....	13
16 Action to be taken with respect to blood samples .....	14
17 Taking and dealing with oral fluid samples .....	15
18 Action to be taken with respect to urine samples.....	16
19 Analysis of samples .....	17
20 Authorised sample takers and authorised persons—protection from liability .....	17
<b>Division 3 Offences relating to testing for alcohol or other drugs .....</b>	<b>18</b>
21 Additional offences relating to testing .....	18
22 Interfering with results of test .....	18
23 Taking of samples .....	18
24 Interfering or tampering with, or destroying, samples .....	19
<b>Division 4 Admission of evidence in proceedings .....</b>	<b>20</b>
25 Evidence of concentration of alcohol in breath or blood determined by breath analysis .....	20
26 Evidence of presence of drugs in proceedings for offence of having drug in blood or oral fluid.....	20
27 Evidence of presence of drugs in proceedings for offence of being under influence of alcohol or drug .....	21
<b>Division 5 Certificate evidence.....</b>	<b>21</b>
28 Certificate evidence about breath analysing instruments .....	21
29 Certificate evidence about the taking and analysis of samples.....	22
30 Certificate evidence may specify minimum concentrations .....	25
<b>Part 3 Train communications systems .....</b>	<b>25</b>
31 Train communications systems.....	25
32 Exemptions.....	26
<b>Part 4 Savings and transitional provisions .....</b>	<b>26</b>
33 Definitions .....	26
34 Data Loggers Compliance Code.....	26
35 Rail safety officers and testing officers.....	27
36 Accreditation of continuing operators.....	27
37 Existing applications for accreditation.....	27
38 Persons newly required to be accredited .....	28
39 Existing exemptions continued.....	28

40 Registration of private sidings .....	28
41 Reviews and appeals .....	29
42 Interface agreements .....	29
43 Rail safety workers .....	29
44 Improvement and prohibition notices and other compliance and enforcement matters .....	29
45 Inquiries and investigations.....	30
46 Proceedings for offences .....	30
47 Fees .....	30
48 Drug and alcohol provisions .....	31
49 Information sharing agreements .....	31
50 Application of certain amendments relating to certificate evidence by analysts and sample takers .....	31
51 Use of existing evidence certificate forms by analysts.....	31
52 Evidence relating to certain samples.....	32

# Rail Safety (Adoption of National Law) Regulation 2012



New South Wales

## Part 1 Preliminary

### 1 Name of Regulation

This Regulation is the *Rail Safety (Adoption of National Law) Regulation 2012*.

### 2 Commencement

This Regulation commences on 20 January 2013 and is required to be published on the NSW legislation website.

### 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—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*.

**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*.

**authorised sample taker** has the same meaning as in Schedule 3 to the [Road Transport Act 2013](#).

**breath analysing instrument** has the same meaning as in the [Road Transport Act 2013](#).

**breath analysis** has the same meaning as in Schedule 3 to the [Road Transport Act 2013](#).

**drug screening test** means a test carried out by an approved oral fluid testing device for the purpose of ascertaining whether any drugs are present in a person's oral fluid.

**hospital** means any of the following:

- (a) a public hospital within the meaning of the [Health Services Act 1997](#) controlled by a local health district or the Crown,
- (b) a statutory health corporation or affiliated health organisation within the meaning of the [Health Services Act 1997](#),
- (c) a private health facility within the meaning of the [Private Health Facilities Act 2007](#).

**ITSR** means the Independent Transport Safety Regulator constituted under the

*Transport Administration Act 1988.*

**on-site urine screening device** means a device that 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.

**oral fluid analysis** means a test carried out by an approved oral fluid analysing instrument for the purpose of ascertaining, by analysis of a person's oral fluid, the presence of drugs in that person's oral fluid.

**preliminary 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 Act 2013*.

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

**the Act** means the *Rail Safety (Adoption of National Law) Act 2012*.

- (2) A reference in this Regulation to a police officer authorised by the Commissioner of Police to carry out a breath analysis is a reference to a police officer so authorised under the *Road Transport Act 2013*.
- (3) For the purposes of this Regulation, a power to require a person to provide a sample of blood, oral fluid or urine includes a power to require a person to provide samples of any one or more of blood, oral fluid or urine.
- (4) Notes included in this Regulation do not form part of this Regulation.

## **Part 2 Drug and alcohol testing**

### **Division 1 Provisions relating to drug and alcohol offences**

#### **4 No duplicity where more than one drug alleged**

- (1) If a person is charged with an offence under section 128 (1) (b) of the *Rail Safety National Law (NSW)*:
  - (a) the document commencing proceedings may allege that more than one drug was present in the blood or oral fluid of the person and the proceedings are 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 there was present in the blood or oral fluid of the defendant:

- (i) a prescribed drug described in the document commencing proceedings, or
  - (ii) a combination of prescribed drugs any one or more of which was or were described in the document.
- (2) If a person is charged with an offence under section 128 (1) (c) of the *Rail Safety National Law (NSW)*:
  - (a) the document commencing proceedings may allege that the person was under the influence of more than one drug and the proceedings are 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 so much 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,as to be incapable of effectively discharging a function or duty of a rail safety worker.
- (3) In subclause (2), **drug** includes alcohol.

## 5 Measurement of alcohol concentrations

- (1) For the purposes of the *Rail Safety National Law (NSW)* and this Part, the concentration of alcohol present in a person's breath or blood may be expressed as follows:
  - (a) in the case of a sample of breath that is measured by a breath analysing instrument or other breath testing device that provides a reading or result by reference to alcohol present in the breath—the amount of alcohol in grams in 210 litres of breath,
  - (b) in the case of a sample of breath that is measured by a breath analysing instrument or other breath testing device that provides a reading or result by reference to alcohol present in the blood—the amount of alcohol in grams in 100 millilitres of blood,
  - (c) in the case of a sample of blood—the amount of alcohol in grams in 100 millilitres of blood.
- (2) An amount of alcohol in grams present in breath when measured by reference to 210 litres of breath is, for the purposes of the *Rail Safety National Law (NSW)* and this Part, taken to be equivalent to the same amount of alcohol in grams present in blood when



measured by reference to 100 millilitres of blood.

**6 Test results may not be used for offence where worker had not commenced work**

The results of any breath test, breath analysis, drug screening test, oral fluid analysis or blood or urine test conducted on a rail safety worker who was about to carry out work are not admissible in any proceedings for an offence under section 128 of the *Rail Safety National Law (NSW)*.

**Division 2 Testing for alcohol or other drugs**

**7 Random and targeted testing of rail safety workers**

The selection of a rail safety worker for testing for the presence of a drug or alcohol under the *Rail Safety National Law (NSW)* or this Part may be conducted on a random or targeted basis.

**8 Restrictions on requiring breath test, sobriety assessment, breath analysis or sample**

An authorised person must not require a rail safety worker to undergo a breath test, submit to an assessment of the worker's sobriety or a breath analysis or drug screening test or provide a sample of blood, oral fluid or urine:

- (a) if it appears to the authorised person 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
- (b) 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
- (c) 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 person has ceased to be on duty on a particular day, or
- (d) at the worker's home.

**9 Supervisee may perform functions of authorised sample taker or authorised person**

- (1) Any duty of an authorised sample taker or an authorised person under this Part may be performed by a person acting at the direction or under the supervision of the authorised sample taker or an authorised person.
- (2) A duty performed by any such person is taken to have been performed by the authorised sample taker or authorised person.

**10 Assessment of sobriety if breath testing device not available**

- (1) If:

- (a) an authorised person is entitled under the *Rail Safety National Law (NSW)* and 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 authorised person may require the worker to submit to an assessment of the worker's sobriety in accordance with the directions of the authorised person.
- (2) A requirement that a rail safety worker submit to such an assessment is not open to challenge in any proceedings merely on the basis that the device was readily available.

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

- (1) An authorised person may require a rail safety worker to submit to a breath analysis in accordance with the directions of the authorised person only if:
- (a) it appears to the authorised person, as a result of a preliminary breath test or an assessment of sobriety 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 an authorised person to undergo a preliminary breath test, or to submit to an assessment of sobriety under this Regulation, refuses or fails to do so in accordance with the directions of the authorised person.
- (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 an authorised person (other than a police officer) is entitled to require a rail safety worker to submit to a breath analysis, the authorised person may direct the worker to attend the nearest police station, or such other place as the authorised person may require, and there submit to a breath analysis.
- (4) A breath analysis must be carried out by:
- (a) an authorised person (other than a police officer), or
  - (b) a police officer authorised by the Commissioner of Police to carry out a breath analysis,
- at or near a police station or such other place as the authorised person or police officer considers desirable.

- (5) As soon as practicable after a rail safety worker has submitted to a breath analysis the authorised person or police officer operating the breath analysing instrument must deliver to the worker a statement in writing signed by the authorised person or police officer specifying:
  - (a) the concentration of alcohol determined by the analysis to be present in the worker's breath or blood and expressed in grams 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 authorised person or police officer making the requisition to arrange for the taking by an authorised sample taker (in the presence of an authorised person or a police officer) of a sample of the worker's blood for analysis, at the worker's own expense.
- (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.

## **12 Oral fluid analysis following drug screening test or request**

- (1) An authorised person may require a rail safety worker to provide an oral fluid sample in accordance with the directions of the authorised person for the purposes of an oral fluid analysis if:
  - (a) it appears to the authorised person from one or more drug screening tests carried out by the authorised person under the *Rail Safety National Law (NSW)* that the device by which the test was carried out indicates that there may be one or more drugs present in the person's oral fluid, or
  - (b) the person refused to submit to a drug screening test required under that Law or fails to submit to that test in accordance with the directions of the authorised person.
- (2) An authorised person may require a person to provide a blood sample in accordance with the directions of an authorised sample taker if the person:
  - (a) has attempted to provide an oral fluid sample as directed under this clause, but
  - (b) has been unable to comply with that direction (for example, because no oral fluid was able to be produced).
- (3) If a police officer is entitled to require a rail safety worker to provide an oral fluid sample for an oral fluid 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 providing the oral fluid sample for the oral fluid analysis.

(4) If an authorised person (other than a police officer) is entitled to require a rail safety worker to provide an oral fluid sample for an oral fluid analysis, the authorised person may direct the worker to attend the nearest police station, or such other place as the authorised person may require, and there provide an oral fluid sample for an oral fluid analysis.

### **13 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, an authorised person 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) A rail safety worker is not required to provide a sample of blood or urine 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) 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.

(3) 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.

(4) Any such medical practitioner or nurse must take the sample if informed by the authorised person that the sample is required to be taken by the practitioner or nurse under this Regulation.

(5) 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.

(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.

### **14 Additional circumstances when blood or urine samples may be taken**

(1) An authorised person may require a rail safety worker to provide a sample of the

worker's blood or urine if:

- (a) the authorised person is entitled under the *Rail Safety National Law (NSW)* and this Regulation to require the worker to submit to a breath analysis, and
  - (b) a breath analysing instrument is not readily available.
- (2) An authorised person 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 alcohol or a drug, may require the worker to provide a sample of the worker's blood or urine if:
- (a) the worker has undergone a preliminary 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 authorised person has required the worker to submit to an assessment of sobriety and:
    - (i) the worker refuses to submit to the assessment, or
    - (ii) after the assessment is made, the authorised person has a reasonable belief that the worker is under the influence of alcohol or a drug.
- (3) A requirement that a rail safety worker provide a sample is not open to challenge in any proceedings merely on the basis that a breath analysing instrument was readily available.

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

- (1) This clause applies if an authorised person is entitled under the *Rail Safety National Law (NSW)* or this Regulation to require a rail safety worker to provide a sample of the worker's blood or urine.
- (2) The authorised person may require the worker to provide the sample of urine in accordance with the directions of the authorised person.
- (3) The authorised person may require the rail safety worker to provide the sample of blood at a hospital in accordance with the directions of an authorised sample taker.
- (4) (Repealed)
- (5) An authorised sample taker must take a sample of blood if informed by the authorised person that the sample is required to be taken under the *Rail Safety National Law (NSW)* and 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 an authorised person is entitled to require a rail safety worker to provide a sample of blood, the authorised person may direct the worker to attend the nearest hospital for the purpose of obtaining the sample.

**16 Action to be taken with respect to blood samples**

- (1) An authorised sample taker 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 authorised person who was present at the time the sample was taken.
- (2) The authorised person 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 or drugs in the blood.
- (3) The blood sample must be kept in the security box until it is submitted to an approved laboratory for analysis.
- (4) 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.
- (5) A medical practitioner, registered nurse or other sample taker of another jurisdiction who, under the Rail Safety National Law of that jurisdiction, takes a sample of blood 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 alcohol or drugs in the blood.

### **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.

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

- (1) If an authorised person 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 authorised person who required the worker to provide a sample must arrange for the sample to be submitted for urine screening testing.
- (3) Urine screening testing may be carried out:
  - (a) at the place where the sample was taken, using an on-site urine 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 urine 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 urine screening testing of the sample indicates that the urine contains a drug or drugs:
  - (a) in the case of a urine screening test conducted in accordance with subclause (3) (a)—the authorised person 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 19, or
  - (b) in the case of a urine 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 19.
- (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.

## **19 Analysis of samples**

- (1) An analyst to whom a sample of blood is submitted for analysis under this Division 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 oral fluid is submitted for analysis under this Division may carry out an analysis of the sample, or of a portion of the sample, to determine whether the oral fluid contains a drug or drugs.
- (3) An analyst to whom a sample of urine is submitted for analysis under this Division 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.
- (4) Confirmatory testing under subclause (3) may be carried out only if urine screening testing determines that the urine contains a drug or drugs.
- (5) An analysis under this clause may be carried out, and any act, matter or thing in connection with the analysis (including the receipt of the sample to be analysed and the breaking of any seal securing the sample) may be done, by a person acting at the direction or under the supervision of an analyst, and in that event is taken to have been carried out or done by the analyst.
- (6) Without limiting any other provision of this clause, the Regulator 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*.

## **20 Authorised sample takers and authorised persons—protection from liability**

- (1) No civil or criminal liability is incurred by an authorised sample taker (or by any person acting at the direction or under the supervision of the authorised sample taker) in respect of anything properly and necessarily done by the authorised sample taker in the course of taking a sample of blood or urine from a person if the authorised sample taker:
  - (a) believed on reasonable grounds that the authorised sample taker was required under this Regulation to take the sample of blood or urine from the person, or
  - (b) was informed by an authorised person that the person was a person from whom the authorised sample taker was required under this Regulation to take the sample of blood or urine.

- (2) No civil or criminal liability is incurred by an authorised person in respect of anything properly and necessarily done by the authorised person in the course of administering a breath test or breath analysis, conducting an assessment of sobriety, administering a drug screening test or a urine screening test or taking a sample of oral fluid or urine in the exercise of the functions of an authorised person under the *Rail Safety National Law (NSW)* or this Regulation.

### **Division 3 Offences relating to testing for alcohol or other drugs**

#### **21 Additional offences relating to testing**

- (1) Any rail safety worker who, when required under this Regulation to do so, refuses or fails to submit to an assessment of sobriety in accordance with this Regulation is guilty of an offence.

Maximum penalty: 10 penalty units.

- (2) A rail safety worker who, when required under the *Rail Safety National Law (NSW)* or this Regulation to provide a sample of blood, oral fluid or urine, fails to provide a sample of his or her own blood, oral fluid or urine, is guilty of an offence.

Maximum penalty: 10 penalty units.

- (3) It is a defence to a prosecution for an offence under subclause (1) if the defendant satisfies the court that the defendant was unable on medical grounds to comply with the requirement concerned.

#### **22 Interfering with results of test**

A rail safety worker who does anything, or causes anything to be done, to introduce, or alter the concentration of, alcohol or any drug in the worker's or another worker's breath, blood, oral fluid or urine before the worker or another worker submits to a breath analysis or provides a sample of blood, oral fluid or urine under the *Rail Safety National Law (NSW)* or 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 or other worker.

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

#### **23 Taking of samples**

- (1) An authorised sample taker who, when required under the *Rail Safety National Law (NSW)* or this Regulation to take a sample of blood from a rail safety worker:
- (a) refuses or fails to take the sample, or
  - (b) does not comply with the requirements of clause 16 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 authorised sample taker satisfies the court that:
- (a) the authorised sample taker 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 authorised sample taker was, because of the behaviour of the rail safety worker, unable to take the sample, or
  - (c) there was other reasonable cause for the authorised sample taker not to take the sample.
- (3) Any person who, when taking a sample of blood, oral fluid or urine from a rail safety worker under the *Rail Safety National Law (NSW)* or this Regulation, does not comply with the requirements of clause 16, 17 or 18 with respect to any sample taken is guilty of an offence.

Maximum penalty: 10 penalty units.

- (4) A person must not hinder or obstruct an authorised sample taker or other person in attempting to take a sample of the blood or urine of any other person under the *Rail Safety National Law (NSW)* or this Regulation.

Maximum penalty: 20 penalty units.

- (5) A person must not hinder or obstruct an authorised person in attempting to take an oral fluid sample from, or administering a drug screening test on, another person under the *Rail Safety National Law (NSW)* or this Regulation.

Maximum penalty: 20 penalty units.

- (6) A person must not hinder or obstruct an authorised person in attempting to administer a urine screening test for any other person under this Regulation.

Maximum penalty: 20 penalty units.

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

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

- (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 an oral fluid sample—after the expiration of 6 months commencing on the day on which the sample was taken, or
- (e) 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.

## **Division 4 Admission of evidence in proceedings**

### **25 Evidence of concentration of alcohol in breath or blood determined by breath analysis**

- (1) This clause applies to any proceedings for an offence against section 128 (1) (a) of the *Rail Safety National Law (NSW)*.
- (2) Evidence may be given in proceedings to which this clause applies 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) an authorised person (other than a police officer), or
  - (b) a police officer authorised by the Commissioner of Police to carry out a breath analysis.
- (3) Evidence may be given in proceedings to which this clause applies of the concentration of alcohol present in the blood of the person charged, as determined by an analysis of the person's blood under this Part.
- (4) The concentration of alcohol determined by a breath analysing device or by analysis of the person's blood 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 or blood sample relates if:
  - (a) in the case of evidence concerning breath analysis—the breath analysis was made within 3 hours after that time, or
  - (b) in the case of evidence concerning a blood sample—the sample of blood was taken within 3 hours after that time.

### **26 Evidence of presence of drugs in proceedings for offence of having drug in blood or oral fluid**

- (1) This clause applies to any proceedings for an offence against section 128 (1) (b) of the *Rail Safety National Law (NSW)*.

- (2) In proceedings to which this clause applies:
  - (a) evidence may be given of the presence of a prescribed drug in the blood or oral fluid of the person charged, as determined by an analysis of the person's blood or oral fluid under this Part, and
  - (b) the prescribed drug the presence of which is so determined is taken to be so present at the time the person carried out the rail safety work to which the sample relates if the sample was taken within 3 hours after that time, unless the defendant proves the absence of the prescribed drug at the time the person carried out the rail safety work.

## **27 Evidence of presence of drugs in proceedings for offence of being under influence of alcohol or drug**

- (1) This clause applies to proceedings for an offence against section 128 (1) (c) of the *Rail Safety National Law (NSW)*.
- (2) In proceedings to which this clause applies:
  - (a) evidence may be given of the presence of a drug, or the presence of a particular concentration of a drug, in the blood, oral fluid or urine of the person charged, as determined by an analysis of the person's blood, oral fluid or urine under this Part, 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, oral fluid or urine of that person at the time the person carried out the rail safety work to which the 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 the time the person carried out the rail safety work.
- (3) In this clause, **drug** includes alcohol.

## **Division 5 Certificate evidence**

### **28 Certificate evidence about breath analysing instruments**

- (1) This clause applies to proceedings for an offence against section 128 (1) (a) or (c) of the *Rail Safety National Law (NSW)*.
- (2) A certificate purporting to be signed by an authorised person and certifying any one or more of the following matters is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by the certificate:
  - (a) the authorised person is duly authorised as an authorised person or, if the authorised person is a police officer, the police officer is authorised by the

Commissioner of Police to carry out a breath analysis,

- (b) the person named in the certificate submitted to a breath analysis,
  - (c) the apparatus used by the authorised person to make the breath analysis was a breath analysing instrument within the meaning of the *Road Transport Act 2013*,
  - (d) the analysis was made on the day and completed at the time stated in the certificate,
  - (e) a concentration of alcohol (determined by that breath analysing instrument and expressed in grams 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,
  - (f) a statement in writing required by clause 11 (5) was delivered in accordance with that subclause.
- (3) In proceedings for an offence against section 128 (1) (a) or (c) of the *Rail Safety National Law (NSW)*, 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 carry out a breath analysis is prima facie evidence of the particulars certified in and by the certificate.
- (4) In any proceedings for an offence against section 128 (1) (a) or (c) of the *Rail Safety National Law (NSW)*, 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.

## **29 Certificate evidence about the taking and analysis of samples**

- (1) This clause applies to proceedings for an offence against section 128 (1) (a), (b) or (c) of the *Rail Safety National Law (NSW)*.
- (2) A certificate purporting to be signed by an authorised sample taker and certifying any one or more of the following matters is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by the certificate:
- (a) that the certifier was an authorised sample taker who attended a specified person at a hospital,
  - (b) that the certifier took a sample of the person's blood or urine in accordance with the *Rail Safety National Law (NSW)* and this Regulation on the day and at the time stated in the certificate,
  - (c) that the certifier dealt with the sample in accordance with clause 16 or 18,

- (d) that the certifier 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.
- (3) A certificate purporting to be signed by an authorised person and certifying any one or more of the following matters is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by the certificate:
- (a) that the authorised person took a sample of the oral fluid or urine of the person named in the certificate in accordance with the *Rail Safety National Law (NSW)* and 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 17 or 18.
- (4) A certificate purporting to be signed by an authorised person and certifying any one or more of the following matters is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by the certificate:
- (a) that the authorised person received a sample of a specified person's blood, oral fluid or urine taken in accordance with this Regulation and submitted to an approved laboratory for analysis (or testing and analysis),
  - (b) that the authorised person arranged for the sample to be submitted for analysis (or testing and analysis) by an analyst to determine the concentration of alcohol in the sample or the presence or concentration of a drug in the sample (as the case requires),
  - (c) that the container was sealed, and marked or labelled, in a specified manner.
- (5) A certificate purporting to be signed by an analyst and certifying any one or more of the following matters is admissible in proceedings to which this clause applies:
- (a) that a sample of a specified person's blood, oral fluid or urine was received, on a specified day, in a container submitted for analysis (or testing and analysis) under this Regulation,
  - (b) that the container, as received, was sealed, and marked or labelled, in a specified manner,
  - (c) that, on receipt of the container, the seal was unbroken,
  - (d) in the case of an analysis of a blood sample carried out to determine the concentration of alcohol in the blood of the specified person:
    - (i) that an analysis of the sample was carried out to determine the concentration of alcohol in the sample, and
    - (ii) that the concentration of alcohol determined pursuant to the analysis and

expressed in grams of alcohol in 100 millilitres of blood was present in that sample,

(e) in the case of an analysis of a blood or urine sample carried out to determine the presence or concentration of a prescribed drug or other drug in the blood or urine of the specified person:

(i) that an analysis of the sample was carried out to determine whether any prescribed drug or other drug (as the case requires) was present in the sample, and

(ii) that a specified prescribed drug or other drug (as the case requires) ascertained pursuant to the analysis was present in that sample in a specified concentration,

(f) in the case of an oral fluid analysis carried out on the oral fluid of the specified person:

(i) that an oral fluid analysis of the sample was carried out to determine the presence of any prescribed drugs and other drugs in the sample, and

(ii) that a specified prescribed drug or other drug was determined pursuant to the oral fluid analysis to be present in that sample,

(g) that the analyst was, at the time of the analysis, employed by the owner or operator of an approved laboratory as an analyst.

(6) A certificate referred to in 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, oral fluid or urine of that specified person, and

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

(7) A certificate purporting to be signed by an interstate sample taker or interstate analyst in accordance with a law of another jurisdiction that substantially corresponds to the relevant provisions of this Regulation concerning sample taking or analysis is admissible in proceedings to which this clause applies and is prima facie evidence of the particulars certified in and by this certificate.

(8) In this clause:

**interstate analyst** means a person (however described) who analyses, or who supervised or directed the analysis of, a blood, urine or oral fluid sample in another jurisdiction.

**interstate sample taker** means a person (however described) who takes, or who



supervised or directed the taking of, a blood, urine or oral fluid sample in another jurisdiction.

### **30 Certificate evidence may specify minimum concentrations**

- (1) This clause applies to a certificate under this Division if:
  - (a) evidence is given by the certificate in proceedings in which evidence is permitted to be given of the results of an analysis undertaken for the purposes of the *Rail Safety National Law (NSW)* or this Regulation of a sample of a person's blood, oral fluid or urine, and
  - (b) the certificate is to the effect that alcohol or a specified drug was found by the analysis to be present in the sample in a concentration not less than a specified concentration.
- (2) A certificate to which this clause applies is to be treated as though it stated that the concentration of alcohol or of the other drug concerned was determined by the analysis to be present in the specified minimum concentration.
- (3) Evidence given by a certificate to which this clause applies is not open to challenge on the basis that the analysis, merely because it purports to determine a concentration in terms of a minimum, does not meet the requirements of the *Rail Safety National Law (NSW)* or this Regulation.

## **Part 3 Train communications systems**

### **31 Train communications systems**

- (1) A rolling stock operator must ensure that each train for which the person is responsible is, at all times when the train is on the NSW rail network, fitted with a radio communications system that complies with this clause and a back up means of communication to be used if the radio communications system fails.

Maximum penalty: 100 penalty units.

- (2) A rail infrastructure manager must ensure that a rolling stock operator of rolling stock operated on any part of the NSW rail network vested in or owned, managed or controlled by the rail infrastructure manager complies with subclause (1).

Maximum penalty: 100 penalty units.

- (3) A radio communications system for a train must:
  - (a) enable the driver of the train to verbally communicate with any network control officer responsible for the area in which the train is operating, and
  - (b) be working at all times when the train is being operated, and

- (c) be capable of receiving and transmitting emergency calls, and
  - (d) be fitted with an emergency button that enables an emergency call from the train to be given priority over all other calls and that enables direct communication between the train and the network control officer responsible for the area in which the train is operating, and
  - (e) be capable of transmitting an emergency communication in a form that will allow any network control officer responsible for the area in which the train is operating to transmit the communication to other trains in that area.
- (4) A rail transport operator is taken to comply with subclause (2) if the radio communications system fails but the back up means of communication is operational.
- (5) In this clause:

**NSW rail network** means the railway lines vested in or owned by or managed or controlled by a rail infrastructure owner, within the meaning of the [Transport Administration Act 1988](#), (including passing loops and turnouts from those lines and loops and associated rail infrastructure facilities that are so vested or owned or managed or controlled).

## 32 Exemptions

- (1) The Regulator may, by notice in writing to one or more rail transport operators, exempt from the operation of this Part a particular train or class of trains.
- (2) A notice under this clause takes effect from the day specified in the notice, or if no day is specified, from the day it is given to the rail transport operator concerned.

## Part 4 Savings and transitional provisions

### 33 Definitions

In this Part:

**continuing operator**—see clause 36.

**Data Loggers Compliance Code** means the Code of that name approved by the Minister under section 167 of the former Act, as in force immediately before the commencement of this Regulation.

**the former Act** means the [Rail Safety Act 2008](#).

### 34 Data Loggers Compliance Code

- (1) The Data Loggers Compliance Code continues to have effect and section 167 of the former Act continues to apply in respect of that Code.

- (2) Sections 168 and 169 of the former Act continue to apply to the Code as if a reference in section 168 to an offence were a reference to an offence against the *Rail Safety National Law (NSW)*, the national regulations under that Law, the *Rail Safety (Adoption of National Law) Act 2012* or regulations under the Act.

### **35 Rail safety officers and testing officers**

- (1) A person who was a rail safety officer under the former Act immediately before the commencement of this Regulation is taken to be a rail safety officer for the same purposes under the *Rail Safety National Law (NSW)* for a period of 6 months after that commencement.
- (2) A person who was a testing officer under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* immediately before the commencement of this Regulation is taken to be an authorised person for the same purposes under the *Rail Safety National Law (NSW)* for a period of 6 months after that commencement.
- (3) An appointment continued under this clause may be revoked under the *Rail Safety National Law (NSW)* before the end of the period specified under this clause.
- (4) An identity card issued to an officer referred to in subclause (1) or (2) for the purposes of the former Act or former Regulation may be used as an identity card for the purposes of the *Rail Safety National Law (NSW)* for the period referred to in those subclauses.

### **36 Accreditation of continuing operators**

- (1) A rail transport operator (a **continuing operator**) who, immediately before the commencement of this Regulation, held an accreditation under the former Act is taken, on that commencement, to hold an accreditation under the *Rail Safety National Law (NSW)*.
- (2) The accreditation of the continuing operator is subject to the same terms and conditions as in force immediately before that commencement, until it is varied, surrendered, suspended or cancelled under that Law.
- (3) An accreditation that, immediately before that commencement, was suspended under the former Act is taken to have been suspended under that Law on the same terms.

### **37 Existing applications for accreditation**

An application for an accreditation or surrender or variation of an accreditation under the former Act that was not determined immediately before the commencement of this Regulation is taken to be an application for accreditation or surrender or variation of an accreditation made under the *Rail Safety National Law (NSW)* and that Law applies accordingly.

### **38 Persons newly required to be accredited**

- (1) This clause applies to a rail transport operator who is required to be accredited under the *Rail Safety National Law (NSW)* for railway operations carried out by the person immediately before the commencement of that Law and for which accreditation was not required under the former Act immediately before that commencement.
- (2) A rail transport operator, or any person who carries out those railway operations, or causes or permits those operations to be carried out, for or on behalf of the operator, is not required to be accredited under that Law for those operations or to comply with Division 6 of Part 3 of that Law in relation to those operations.
- (3) Despite subclause (2), the Regulator may, by notice in writing to the rail transport operator or person, require the operator or person to comply with any of the provisions of Division 6 of Part 3 of that Law in relation to the operations concerned.
- (4) This clause ceases to have effect on the third anniversary of the commencement of this Regulation.

### **39 Existing exemptions continued**

- (1) An exemption under regulations made under the former Act, and in force immediately before the repeal of that Act, continues in force for the period specified in the exemption.
- (2) This clause only applies to the extent that a requirement of the former Act that is the subject of any such exemption continues to apply to or in respect of the person concerned under the *Rail Safety National Law (NSW)* or this Regulation.
- (3) This clause ceases to have effect, in the case of an exemption from accreditation, on the third anniversary of the commencement of this Regulation and, in any other case, on the second anniversary of the commencement of this Regulation.

### **40 Registration of private sidings**

- (1) A rail infrastructure manager of a private siding that, immediately before the commencement of this Regulation, was registered under section 60 of the former Act is taken, on that commencement, to be registered under the *Rail Safety National Law (NSW)* in respect of the private siding.
- (2) The registration is subject to the same conditions and restrictions as in force immediately before that commencement, until it is varied, surrendered, suspended or cancelled under that Law.
- (3) A rail infrastructure manager of a private siding that, immediately before the commencement of this Regulation, was not required to be registered under the former Act but is required to be registered under that Law is not required to be so registered

until the third anniversary of the commencement of this Regulation.

#### **41 Reviews and appeals**

- (1) If an application for accreditation or variation of an accreditation, or registration of a siding, was refused before the commencement of this Regulation and the period within which an application for a review of that decision could be made under the former Act has not expired, the applicant may, before the expiry of that period, apply for a review of the decision under the *Rail Safety National Law (NSW)*.
- (2) An application for a review made under the former Act, and not determined before the commencement of this Regulation, may be determined, and any decision on that review given effect to, as if the application were made under that Law.

#### **42 Interface agreements**

- (1) An interface agreement in force immediately before the commencement of this Regulation continues in force and is taken to have been entered into for the purposes of Subdivision 2 of Division 6 of Part 3 of the *Rail Safety National Law (NSW)*.
- (2) A register kept by a rail transport operator or roads authority under section 33 of the former Act immediately before the commencement of this Regulation is taken to be a register for the purposes of section 111 of the *Rail Safety National Law (NSW)*.

#### **43 Rail safety workers**

A form of identification issued under section 22 of the former Act is taken to be a form of identification issued under section 118 of the *Rail Safety National Law (NSW)*.

#### **44 Improvement and prohibition notices and other compliance and enforcement matters**

- (1) An improvement notice in force under section 112 of the former Act immediately before the commencement of this Regulation continues in force and is taken to have been issued under Division 1 of Part 5 of the *Rail Safety National Law (NSW)*.
- (2) A prohibition notice in force under section 117 of the former Act immediately before the commencement of this Regulation continues in force and is taken to have been issued under Division 2 of Part 5 of the *Rail Safety National Law (NSW)*.
- (3) A direction or requirement by a rail safety officer in force immediately before the commencement of this Regulation continues to have effect as if it were a direction given or a requirement made under the *Rail Safety National Law (NSW)* or the *Passenger Transport Act 1990*, as the case requires, but only to the extent that such a direction is able to be given under that Law or Act.
- (4) An enforceable voluntary undertaking in force under Division 3 of Part 7 of the former Act immediately before the commencement of this Regulation is taken to be an enforceable voluntary undertaking in force under Division 6 of Part 10 of the *Rail*

*Safety National Law (NSW).*

- (5) A supervisory intervention order in force under section 143 of the former Act immediately before the commencement of this Regulation is taken to be a supervisory intervention order in force under section 231 of the *Rail Safety National Law (NSW)* and, for that purpose, any function of the ITSR under that order is to be exercised by the Regulator instead.
- (6) An exclusion order in force under section 145 of the former Act immediately before the commencement of this Regulation is taken to be an exclusion order in force under section 232 of the *Rail Safety National Law (NSW)*.

#### **45 Inquiries and investigations**

- (1) A report of a notifiable occurrence under section 63 of the former Act made before the commencement of this Regulation has effect as if it were a report made under Division 8 of Part 3 of the *Rail Safety National Law (NSW)*.
- (2) An investigation of a notifiable occurrence required to be undertaken by a rail transport operator under section 65 of the former Act immediately before the commencement of this Regulation is to continue as if it were an investigation required to be undertaken under Division 8 of Part 3 of the *Rail Safety National Law (NSW)*.
- (3) A notifiable occurrence that occurred before the commencement of this Regulation may be the subject of an inquiry or investigation under that Law or the *Passenger Transport Act 1990* (as amended by the Act).
- (4) The former Act continues to apply to an investigation by the Chief Investigator under section 67 of the former Act, and to a rail safety inquiry under section 69 or 70 of the former Act, and to anything done or required to be done under the former Act in connection with any such investigation or inquiry.

#### **46 Proceedings for offences**

Proceedings for an offence against the former Act (or the regulations made under that Act) alleged to have been committed before the repeal of that Act are to be dealt with after the repeal of that Act as if that Act (and the regulations made under that Act) had not been repealed.

#### **47 Fees**

- (1) The repeal of the former Act does not affect the liability of any person for a fee payable under that Act or the regulations under that Act.
- (2) No further fee is payable by a continuing operator or a rail infrastructure manager in respect of a period of accreditation or registration of a siding if a fee has been paid by the continuing operator or for the registered siding under the former Act in respect of

that period.

#### **48 Drug and alcohol provisions**

- (1) The provisions of the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* continue to apply in respect of any act done or omitted to be done for the purposes of that Regulation.
- (2) A reference in a certificate under Division 5 of Part 2 of this Regulation issued on or after the commencement of this Regulation to a provision of a former Act or a former Regulation is taken to be a reference to the corresponding provision of the *Rail Safety National Law (NSW)* or this Regulation.
- (3) In this clause:

**former Act** includes the *Rail Safety Act 2002*.

**former Regulation** means the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* or the *Rail Safety (Drug and Alcohol Testing) Regulation 2003*.

#### **49 Information sharing agreements**

An agreement entered into by the ITSR with a government agency or public authority for the purposes of obtaining or disclosing information in connection with the ITSR's functions under the former Act extends to the obtaining or disclosing of information in connection with any functions exercised by the ITSR in connection with the *Rail Safety National Law (NSW)*.

#### **50 Application of certain amendments relating to certificate evidence by analysts and sample takers**

- (1) In this clause and clause 51:

**amending Regulation** means the *Rail Safety (Adoption of National Law) Amendment (Drug and Alcohol Testing) Regulation 2014*.

- (2) The amendments made to clause 29 (5) and (6) by the amending Regulation apply to a certificate in relation to a sample regardless of whether the sample was received by or on behalf of the analyst before or after the commencement of the amending Regulation.
- (3) Clause 29 (7) and (8), as amended and substituted by the amending Regulation, apply in relation to a certificate regardless of whether the sample to which the certificate relates was taken before or after the commencement of the amending Regulation.

#### **51 Use of existing evidence certificate forms by analysts**

- (1) A form of evidence certificate that was prepared in accordance with former clause 29 (5) before the relevant day so that it could be used under that clause when

completed:

- (a) is taken to be, and is to be construed as, a form of evidence certificate prepared in accordance with new clause 29 (5), and
- (b) may, during the transitional period, be completed in accordance with and used under that clause.

(2) In this clause:

**former clause 29 (5)** means clause 29 (5) as in force immediately before the relevant day.

**new clause 29 (5)** means clause 29 (5) as amended by the amending Regulation (within the meaning of clause 50).

**relevant day** means 1 February 2015 (being the day on which the amending Regulation commences).

**transitional period** means the period of 12 months commencing on the relevant day.

## 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.