

South Australia

# **Harbors and Navigation (Alcohol and Drug Testing) Regulations 2009**

under the *Harbors and Navigation Act 1993*

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## Legislative history

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### **1—Short title**

These regulations may be cited as the *Harbors and Navigation (Alcohol and Drug Testing) Regulations 2009*.

### **2—Commencement**

These regulations will come into operation on 1 February 2010.

### 3—Interpretation

In these regulations—

*Act* means the *Harbors and Navigation Act 1993*;

*approved courier* means a person approved by the Commissioner of Police under the *Road Traffic Act 1961* as a courier for the purposes of Schedule 1 of that Act.

### 4—Prescribed class of offences

For the purposes of paragraph (a) of the definition of *prescribed circumstances* in section 4(1) of the Act, each of the following is an offence of a prescribed class:

- (a) an offence against section 69, 69A, 70 or 85 of the Act;
- (b) an offence against regulation 11(1), 167, 168, 171, 173, 179, 180, 181 or 198 of the *Harbors and Navigation Regulations 2009*;
- (c) an offence against—
  - (i) section 84 of the Act; or
  - (ii) regulation 165(2) or 166(2) of the *Harbors and Navigation Regulations 2009*,

committed by a master or an operator of a vessel.

### 5—Conduct of breath analysis

- (1) Pursuant to section 71(7) of the Act, if a person submits to a breath analysis, the breath analysis must be conducted in the following manner:
  - (a) the person must provide 2 separate samples of breath for analysis;
  - (b) each sample must be provided in accordance with the directions of the operator of the breath analysing instrument and must consist of not less than 1 litre of breath;
  - (c) there must be an interval of not less than 2 minutes and not more than 10 minutes between the provision of the samples.
- (2) Despite subregulation (1)—
  - (a) if, on analysing a sample of breath, the breath analysing instrument indicates an error in the analysis of the sample—
    - (i) that sample, or, if that sample was the second sample provided, both samples, must be disregarded; and
    - (ii) the person may be required to provide 2 further samples of breath for analysis using a different instrument (and such samples must be provided in accordance with subregulation (1)(b) and (c)); or
  - (b) if, on analysing a sample of breath, the breath analysing instrument indicates the presence of alcohol in the mouth of the person—
    - (i) that sample, or, if that sample was the second sample provided, both samples, must be disregarded; and

- (ii) the person may be required to provide 2 further samples of breath for analysis (and such samples must be provided in accordance with subregulation (1)(b) and (c)); or
  - (c) if, on analysing 2 samples of breath, the breath analysing instrument indicates that the reading obtained on analysis of the second sample was more than 15% higher or lower than the reading obtained on analysis of the first sample—
    - (i) those samples must be disregarded; and
    - (ii) the person may be required to provide 2 further samples of breath for analysis (and such samples must be provided in accordance with subregulation (1)(b) and (c)); or
  - (d) if, for any reason, a second sample of breath is not provided within 10 minutes of the provision of the first sample—
    - (i) the first sample is to be disregarded; and
    - (ii) the person may be required to provide 2 further samples of breath for analysis (and such samples must be provided in accordance with subregulation (1)(b) and (c)).
- (3) If a person submits to a breath analysis, the result of the breath analysis will, for the purposes of Part 10 Division 4 of the Act and for the purposes of any other Act, be taken to be the reading produced by the breath analysing instrument, on analysis of the samples of breath provided by the person in accordance with this regulation, that indicates the lower concentration of alcohol in the person's breath (not taking into account any samples that, in accordance with this regulation, are to be disregarded).

#### **6—Oral advice on refusal or failure to comply with alcotest or breath analysis direction**

For the purposes of section 71(9)(b) of the Act, the prescribed oral advice is set out in Schedule 1 clause 1.

#### **7—Oral advice on refusal or failure to comply with drug screening test, oral fluid analysis or blood test direction**

For the purposes of section 72(11)(b) of the Act, the prescribed oral advice is set out in Schedule 1 clause 2.

#### **8—Oral advice and written notice on recording of positive breath analysis reading**

- (1) For the purposes of section 73(6)(a) of the Act, the prescribed oral advice is set out in Schedule 1 clause 3.
- (2) For the purposes of section 73(6)(a) of the Act, the prescribed written notice is set out in Schedule 1 clause 4.

## 9—Procedures for voluntary blood test

For the purposes of section 73(2)(a) of the Act, a sample of a person's blood must be taken and dealt with as follows:

- (a) the person must cause the sample to be taken by a medical practitioner of the person's choice and must deliver the blood test kit supplied to the person under section 73(6)(b) of the Act to the medical practitioner for use for that purpose;
- (b) the medical practitioner by whom the sample of the person's blood is taken must place the sample, in approximately equal proportions, in 2 containers (being the containers provided as part of the blood test kit);
- (c) each container must contain a sufficient quantity of blood to enable an accurate evaluation to be made of any concentration of alcohol present in the blood and the sample of blood taken by the medical practitioner must be such as to furnish 2 such quantities of blood;
- (d) the medical practitioner must seal each container by application of the adhesive seal (bearing an identifying number) provided as part of the blood test kit;
- (e) it is the duty of the medical practitioner to take such measures as are reasonably practicable in the circumstances to ensure that the blood is not adulterated and does not deteriorate so as to prevent a proper assessment of the concentration of alcohol present in the blood of the person from whom the sample was taken;
- (f) the medical practitioner must then complete a certificate in the form set out in Schedule 2 by inserting the particulars required by the form;
- (g) the certificate must be signed by the medical practitioner certifying as to the matters set out in the form;
- (h) the certificate must also bear the signature of the person from whom the blood sample was taken, attested to by the signature of the medical practitioner;
- (i) the original of the signed certificate must then be delivered to the person from whom the blood sample was taken together with 1 of the sealed containers containing part of the blood sample;
- (j) a copy of the signed certificate must be delivered by the medical practitioner together with the other sealed container containing part of the blood sample to a police officer or an approved courier;
- (k) a police officer to whom a copy of the signed certificate and the other sealed container is delivered under paragraph (j) must deliver the copy and container to Forensic Science SA or to an approved courier;
- (l) an approved courier to whom a copy of the signed certificate and the other sealed container is delivered under this regulation must deliver the copy and container to Forensic Science SA;
- (m) the blood sample container and copy of the certificate referred to in paragraph (j) must not be delivered into the possession of the person from whom the sample was taken;

- (n) on receipt of the blood sample container and certificate at Forensic Science SA, the blood in the container must be analysed as soon as reasonably practicable by or under the supervision of an analyst to determine the concentration of alcohol present in the blood expressed in grams in 100ml of blood;
- (o) the analyst must then complete and sign a certificate certifying as to the following matters:
  - (i) the date of receipt at Forensic Science SA of the blood sample container and the certificate accompanying the blood sample container;
  - (ii) the identifying number appearing on the adhesive seal used to seal the blood sample container;
  - (iii) the name and professional qualifications of the analyst;
  - (iv) the concentration of alcohol found to be present in the blood expressed in grams in 100ml of blood;
  - (v) any factors relating to the blood sample or the analysis that might, in the opinion of the analyst, adversely affect the accuracy or validity of the analysis;
  - (vi) any other information relating to the blood sample or analysis or both that the analyst thinks fit to include;
- (p) the analyst's certificate must be sent by post to the person from whom the blood sample was taken at the address shown as the person's address on the certificate accompanying the blood sample container;
- (q) a copy of the analyst's certificate must be sent to or retained on behalf of the Minister;
- (r) a copy of the analyst's certificate must also be sent to the Commissioner of Police;
- (s) the person from whom the blood sample was taken may cause the sample of blood as contained in the blood sample container delivered to that person to be analysed to determine the concentration of alcohol present in the blood.

## 10—Request for approved blood test kit

- (1) For the purposes of section 73(6)(b) of the Act, a request for an approved blood test kit must be made in accordance with the following:
  - (a) the request must be made either orally or in writing to the person operating the breath analysing instrument (the *operator*);
  - (b) on such a request having been made by the person, the operator or any other authorised person present at the scene must complete a written request form in the form set out in Schedule 3 by inserting the particulars required by the form;
  - (c) the person making the request must then sign the request form in the presence of the operator or other authorised person and the person's signature must be attested to by the signature of the operator or other authorised person;

- (d) the original of the signed request form may be retained by the person making the request;
  - (e) a copy of the signed request form must be delivered to the operator or other authorised person.
- (2) The copy of the request form delivered to the operator or other authorised person must be delivered to the Minister or retained on the Minister's behalf for 12 months from the day on which the request form was signed by the person making the request.

### **11—Prescribed period for keeping blood samples and oral fluid samples**

For the purposes of clauses 2(e)(ii) and 7(e)(ii) of Schedule 1A of the Act, the period prescribed for which a container containing a sample of a person's blood or oral fluid (as the case may be) must be kept available for collection by or on behalf of that person is 12 months from the day on which the sample was taken from the person.

### **12—Information to be included on analyst's certificate**

For the purposes of clause 7(f)(iv) of Schedule 1A of the Act, the required information in relation to any prescribed drug found to be present in the sample is information identifying the drug or drugs.

## **Schedule 1—Prescribed oral advice and written notice**

[regulations 6 to 8]

### **1—Oral advice on refusal or failure to comply with alcotest or breath analysis direction—section 71(9)(b) of Act**

It is a criminal offence to refuse or fail to provide a breath sample without good cause and you could be fined as a consequence.

It is a defence if you have some physical or medical condition that prevents you from providing a breath sample, but only if you ask for a sample of your blood to be taken instead or can show that your condition also prevents the taking of blood.

If you want a blood sample taken because of your condition, you should ask for that and the authorised person will help you to have the sample taken at Government expense.

### **2—Oral advice on refusal or failure to comply with drug screening test, oral fluid analysis or blood test direction—section 72(11)(b) of Act**

It is a criminal offence to refuse or fail to provide a sample of oral fluid or blood without good cause and you could be fined as a consequence.

It is a defence if you have some physical or medical condition that prevents you from providing a sample of oral fluid or blood [whichever is applicable], but only if you ask for a sample of your blood or oral fluid [whichever is applicable] to be taken instead.

If you want a sample of blood or oral fluid [whichever is applicable] taken because of your condition, you should ask for that and the authorised person will help you to have the sample taken at Government expense.

### **3—Oral advice on recording of positive breath analysis reading—section 73(6)(a) of Act**

The breathalyser reading just taken shows that you had a prohibited level of alcohol in your blood.

Therefore, it appears that you have committed an offence against section 70(2) of the *Harbors and Navigation Act 1993*.

In any court proceedings for that offence, or for an offence against section 70(1) of the *Harbors and Navigation Act 1993*, it will be presumed that the breathalyser accurately indicated your blood alcohol level at the time of the reading and for the preceding 2 hours. However, the *Harbors and Navigation Act 1993* allows for contrary evidence based on the results of a blood test.

If you want to have such a blood test you will have to make your own arrangements and follow certain procedures, using a special blood test kit. This blood test kit will be supplied to you on your signing a written request.

If you obtain a blood test kit and want to have your blood tested, you should take the kit promptly to a hospital or medical practitioner in order to have a sample of your blood taken.

You must not consume any more alcohol before having a sample of your blood taken and must not open the blood test kit before delivering it to a medical practitioner.

Under the blood test procedure, the sample of blood is divided and sealed in 2 containers. You will have to sign a form that will be given to you by the medical practitioner.

1 of the sealed containers will be given to you and you may make your own arrangements to have the blood in that container analysed.

In any event, the blood in the other container will be analysed by Forensic Science SA and you will be given written notice of the results of the analysis.

Further information as to these matters is contained in the written notice which will be delivered to you shortly.

### **4—Written notice on recording of positive breath analysis reading—section 73(6)(a) of Act**

#### **Operation of *Harbors and Navigation Act 1993* in relation to results of breath analysis**

##### **1—Offence**

A person commits an offence against section 70(2) of the *Harbors and Navigation Act 1993* if the person—

- (a) operates a vessel; or
- (b) is a member of the crew of a vessel who is (or ought to be) engaged in duties affecting the safe navigation, operation or use of the vessel,

while there is present in his or her blood the prescribed concentration of alcohol (as defined in section 4 of the Act).

## **2—Breath analysis**

Your breath has just been analysed by means of a breath analysing instrument which indicated that the prescribed concentration of alcohol was present in your blood.

Accordingly, it appears that you have committed the offence described above.

## **3—Legal effect of breath analysis result**

In proceedings for the offence described above or an offence against section 70(1) of the *Harbors and Navigation Act 1993*, the result of the breath analysis will be presumed to accurately record the concentration of alcohol in your blood at the time of the analysis and throughout the preceding 2 hours (section 73(1), (3)).

In any proceedings against you for such an offence, you will be able to challenge the accuracy of the breath analysis reading—

- (a) if you have a sample of your blood taken and analysed as described below; AND
- (b) if the result of analysis of the blood sample shows that the breath analysing instrument gave an exaggerated reading of the concentration of alcohol present in your blood (section 73(2)).

## **Procedures for optional blood test**

- 1 You may have a sample of your blood taken and analysed if you wish.
- 2 For that purpose, you must request the breath analysis operator to supply you with an approved blood test kit (you must sign a written request form for the kit and should retain a copy of the signed request form).
- 3 You should then proceed promptly to a hospital or a medical practitioner of your choice and request that a sample of your blood be taken (using the blood test kit).
- 4 Do not consume any further alcohol before the sample is taken.
- 5 Do not open the blood test kit.
- 6 The medical practitioner taking the sample of your blood will divide it and place it into 2 containers and seal the containers. 1 container will be delivered to you—do not break the seal on this container.
- 7 Sign the form presented to you by the medical practitioner—the original of the form will be given to you which you should retain.
- 8 You may, if you wish, have the blood sample (in the container delivered to you) analysed at a laboratory to determine the concentration of alcohol present in the blood.

- 9        The other blood sample container will, in any event, be sent to Forensic Science SA where the blood will be analysed. The results of this analysis will be sent to you at your address (as indicated on the form presented to you by the medical practitioner who took the blood sample).

## Schedule 2—Form of certificate

[Section 73(2) and regulation 9]

*Harbors and Navigation Act 1993*

### Blood Test For Alcohol (Medical Practitioner's Certificate)

**A. CERTIFICATE BY MEDICAL PRACTITIONER**  
*Pursuant to section 73 of the Harbors and Navigation Act 1993*

I, \_\_\_\_\_ a medical practitioner, certify that at \_\_\_\_\_ at \_\_\_\_\_ am/pm on the \_\_\_\_\_ day  
Place (*Name of Hospital/Surgery/Medical Institution*)  
of \_\_\_\_\_ 20\_\_\_\_, I took a sample of blood from:

**PATIENT'S NAME & ADDRESS** *Please print clearly for mailing*

_____ _____ _____ Postcode
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I placed the sample of blood, in approximately equal proportions, in 2 containers (being the containers provided as part of the blood test kit that was delivered to me by the patient) and secured the caps. I then sealed each container by application of the adhesive seal (bearing the identifying number specified below) provided as part of the blood test kit. I delivered 1 of the sealed containers containing part of the blood sample by giving the container to the patient. I witnessed the patient's signature.

IDENTIFYING NUMBER BARCODE
-------------------------------

\_\_\_\_\_  
*Signature of medical practitioner*

**B. PATIENT'S CONTAINER**

**PATIENT TO SIGN ON RECEIPT OF SAMPLE:**  
I acknowledge receipt of 1 sealed container containing part of the blood sample:

\_\_\_\_\_  
*Signature of patient*

**C. POLICE CONTAINER**  
Please indicate by an "x" in the appropriate box:

I delivered 1 of the sealed containers containing part of the blood sample to a police officer or an approved courier by:

Placing the container in a secured blood box:                      Box number:  
 Giving the container to \*a police officer/an approved courier

\_\_\_\_\_  
*Signature of medical practitioner*

*\*delete as required*

### Note—

This form may be combined with a form required for the purposes of section 47K(1a) of the *Road Traffic Act 1961* and Schedule 2 clause 15(2) of the *Rail Safety Act 2007* and regulations under those Acts.

### Schedule 3—Form of request

[Section 73(6)(b) and regulation 10]

*Harbors and Navigation Act 1993*

#### Request form for the purposes of section 73(6)(b)

..... of .....  
(Name)

.....  
(Address)

submitted to a breath analysis at.....  
(Address or description)

at .....am/pm on the.....day of .....20 .....

I (the person named above) now request that I be supplied with an approved blood test kit.

Signature:..... In the presence of: .....  
(Person making request) (Name of Authorised Person)

Signature of witnessing Authorised Person:.....

### Schedule 4—Revocation of *Harbors and Navigation (Breath Analysis and Blood Test) Regulations 1997*

The *Harbors and Navigation (Breath Analysis and Blood Test) Regulations 1997* are revoked.

## Legislative history

### Notes

- For further information relating to the Act and subordinate legislation made under the Act see the Index of South Australian Statutes or [www.legislation.sa.gov.au](http://www.legislation.sa.gov.au).

### Principal regulations

Year	No	Reference	Commencement
2009	290	<i>Gazette 10.12.2009 p6213</i>	1.2.2010: r 2