

South Australia

# Rail Safety (Alcohol and Drug Testing) Regulations 2008

under the *Rail Safety Act 2007*

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Legislative history

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## **1—Short title**

These regulations may be cited as the *Rail Safety (Alcohol and Drug Testing) Regulations 2008*.

## **2—Commencement**

These regulations will come into operation on the day on which the *Rail Safety Act 2007* comes into operation.

## **3—Interpretation**

In these regulations, unless the contrary intention appears—

*Act* means the *Rail Safety Act 2007*.

## **4—Prescribed concentration of alcohol**

For the purposes of the definition of **prescribed concentration of alcohol** in section 4 of the Act (Interpretation), the prescribed concentration is a concentration of .02 grams or more of alcohol in 100 millilitres of blood.

## **5—Prescribed drugs**

For the purposes of the definition of **prescribed drug** in section 4 of the Act (Interpretation), each of the following substances are declared to be a prescribed drug:

- (a) delta-9-tetrahydrocannabinol;
- (b) methylamphetamine;
- (c) 3, 4-methylenedioxymethamphetamine (MDMA).

## **6—Procedures relating to urine tests**

For the purposes of clause 3(2) of Schedule 2 of the Act, the following procedures and requirements in accordance with which a urine test must be conducted under the Act are prescribed:

- (a) a medical practitioner by whom a sample of urine is taken under the Act must
  - (i) place the sample of urine in approximately equal proportions, in 2 separate containers marked with an identification number distinguishing the sample from other samples of urine and seal the containers; and
  - (ii) give to the person from whom the sample was taken a notice in writing—

- (A) advising that the sample has been taken under the relevant provision of the Act; and
  - (B) advising that a container containing part of the sample and marked with the identification number specified in the notice will be available for collection by or on behalf of the person at a specified place; and
- (iii) complete and sign a certificate containing the information required under paragraph (d); and
  - (iv) make the containers and the certificate available to an authorised person;
- (b) each container must contain a sufficient quantity of urine to enable an analysis to be made of the presence of a drug in the urine;
  - (c) it is the duty of the medical practitioner by whom the sample is taken to take such measures as are reasonably practicable in the circumstances to ensure that the urine is not adulterated and does not deteriorate so as to prevent a proper analysis of the presence of a drug in the urine;
  - (d) the certificate referred to in paragraph (a) must state—
    - (i) the identification number of the sample marked on the containers referred to in that paragraph; and
    - (ii) the name and address of the person from whom the sample was taken; and
    - (iii) the name of the medical practitioner by whom the sample was taken; and
    - (iv) the date, time and place at which the sample was taken; and
    - (v) that the medical practitioner gave the notice referred to in that paragraph to the person from whom the sample was taken;
  - (e) 1 of the containers containing the sample must—
    - (i) as soon as reasonably practicable be taken by an authorised person to the place specified in the notice given to the person under paragraph (a); and
    - (ii) be kept available at that place for collection by or on behalf of the person for the period of 12 months from the day on which the sample was taken;
  - (f) after analysis of the sample in a container made available to an authorised person in accordance with paragraph (a), the analyst who performed or supervised the analysis must sign a certificate containing the following information:
    - (i) the identification number of the sample marked on the container;
    - (ii) the name and professional qualifications of the analyst;
    - (iii) the date the sample was received in the laboratory in which the analysis was performed;
    - (iv) the prescribed drug or other drug found to be present in the sample;

- (v) any factors relating to the 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 sample or analysis that the analyst thinks fit to include;
- (g) on completion of an analysis of a sample, the certificate of the medical practitioner by whom the sample was taken and the certificate of the analyst who performed or supervised the analysis must be sent to the rail transport operator and copies of the certificates must be sent—
- (i) to the medical practitioner by whom the sample was taken; and
  - (ii) to the person from whom the sample was taken or, if the person is dead, a relative or personal representative of the deceased;
- (h) if the whereabouts of the person from whom the sample is taken, or the identity or whereabouts of a relative or personal representative of the deceased (as the case may be), is unknown, there is no obligation to comply with paragraph (g)(ii) but copies of the certificates must, on application made within 3 years after the completion of the analysis, be furnished to any person to whom they should, but for this paragraph, have been sent.

## 7—Conduct of breath analysis

- (1) Pursuant to clause 4(6) of Schedule 2 of the Act, where 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; and
  - (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; and
  - (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) Where a person submits to a breath analysis, the result of the breath analysis will, for the purposes of the 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).

## **8—In-house testing by rail transport operator**

- (1) For the purposes of a blood test conducted as a result of a requirement of an authorised person appointed under clause 2(1)(d) of Schedule 2 of the Act, the certificate of the medical practitioner who took the blood sample and the certificate of the analyst who performed or supervised the analysis of the sample, referred to in clause 10(g) of Schedule 2 of the Act must be sent—
  - (a) to the relevant rail transport operator; and
  - (b) to the medical practitioner by whom the sample was taken; and
  - (c) to the person from whom the sample was taken or, if the person is dead, a relative or personal representative of the deceased,

but need not be sent to the Regulator or Commissioner of Police.
- (2) For the purposes of an oral fluid analysis conducted as a result of a requirement of an authorised person appointed under clause 2(1)(d) of Schedule 2 of the Act, the certificate of the analyst who performed or supervised the analysis of the sample referred to in clause 11(g) of Schedule 2 of the Act must be sent—
  - (a) to the relevant rail transport operator; and
  - (b) to the person from whom the sample was taken or, if the person is dead, a relative or personal representative of the deceased,

but need not be sent to the Regulator or Commissioner of Police.
- (3) Clause 15 of Schedule 2 of the Act does not apply to testing conducted as a result of a requirement of an authorised person appointed under clause 2(1)(d) of Schedule 2 of the Act.

- (4) An alcotest, breath analysis, drug screening test, oral fluid analysis, blood test or urine test conducted under clause 4 or clause 5 of Schedule 2 of the Act where that testing is required by an authorised person appointed under clause (1)(d) of that Schedule is at the expense of the relevant rail transport operator.
- (5) In this clause, the **relevant rail transport operator** is the operator of the railway operations in respect of which the rail safety worker undergoing testing—
  - (a) was about to carry out rail safety work; or
  - (b) was carrying out rail safety work; or
  - (c) was attempting to carry out rail safety work; or
  - (d) had carried out rail safety work; or
  - (e) was involved in a prescribed occurrence.

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

- (1) In the case of an authorised person appointed under clause 2(1)(d) of Schedule 2 of the Act, the prescribed oral advice for the purposes of clause 4(8)(b) of Schedule 2 of the Act is set out in Schedule 1 clause 1 of these regulations.
- (2) In the case of any other authorised person, the prescribed oral advice for the purposes of clause 4(8)(b) of Schedule 2 of the Act is set out in Schedule 1 clause 2 of these regulations.

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

The prescribed oral advice for the purposes of clause 5(8)(b)(ii)(A) of Schedule 2 of the Act is set out in Schedule 2 clause 1 of these regulations.

## **11—Oral advice on refusal or failure to comply with blood test direction in connection with drug testing**

The prescribed oral advice for the purposes of clause 5(8)(b)(ii)(B) of Schedule 2 of the Act is set out in Schedule 2 clause 2 of these regulations.

## **12—Oral advice on refusal or failure to comply with blood test direction in connection with alcohol testing**

The prescribed oral advice for the purposes of clause 5(8)(b)(ii)(C) of Schedule 2 of the Act is set out in Schedule 2 clause 3 of these regulations.

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

For the purposes of clauses 10(e)(ii) and 11(e)(ii) of Schedule 2 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.

## 14—Information to be included on analyst's certificate

For the purposes of clause 11(f)(iv) of Schedule 2 of the Act, the required information in relation to any prescribed drug or other drug found to be present in the sample is information identifying the drug or drugs.

## 15—Procedures for voluntary blood test

- (1) The following are the prescribed procedures in accordance with which a sample of a person's blood must be taken and dealt with for the purposes of clause 15(2) of Schedule 2 of the Act (Evidence):
  - (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 clause 15(5)(b) of Schedule 2 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 3 of the *Road Traffic (Miscellaneous) Regulations 1999* (being a form provided as part of the blood test kit) 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 who must, in turn, deliver that copy of the certificate and the blood sample container to State Forensic Science;

- (k) 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;
  - (l) on receipt of the blood sample container and certificate at State Forensic Science, 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 100 millilitres of blood;
  - (m) the analyst must then complete and sign a certificate certifying as to the following matters:
    - (i) the date of receipt at State Forensic Science 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 100 millilitres 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;
  - (n) 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;
  - (o) a copy of the analyst's certificate must be sent to or retained on behalf of the Minister;
  - (p) a copy of the analyst's certificate must also be sent to the Commissioner of Police;
  - (q) 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.
- (2) References in a certificate completed for the purposes of subregulation (1)(f) to the *Road Traffic Act 1961* or a provision of that Act are to be taken to be references to the *Rail Safety Act 2007* or the corresponding provision of that Act.

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

- (1) The oral advice required to be given for the purposes of clause 15(5)(a) of Schedule 2 of the Act (Evidence) must be as set out in Schedule 3 Part 1 of these regulations.
- (2) The written notice required to be delivered for the purposes of clause 15(5)(a) of Schedule 2 of the Act (Evidence) must be as set out in Schedule 3 Part 2 of these regulations.

## **17—Request for approved blood test kit**

- (1) For the purposes of clause 15(5)(b) of Schedule 2 of the Act (Evidence), a request for an approved blood test kit must be made in accordance with the following:
  - (a) the request may, in the first instance, be made orally 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 in the form approved by the Regulator;
  - (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 Regulator or retained on the Regulator's behalf for 12 months from the day on which the request form was signed by the person making the request.

## **18—Destruction of oral fluid, blood or urine samples**

A rail transport operator who employs a rail safety worker from whom a sample of oral fluid, blood or urine is taken under the Act (or in the case of a sample required by a police officer, the Commissioner of Police), must ensure that the sample of oral fluid, blood or urine (and any other forensic material taken incidentally during a drug screening test, oral fluid analysis, blood test or urine test) is destroyed—

- (a) if disciplinary proceedings or proceedings for an offence against the Act based on evidence of the results of analysis of the sample are not commenced within the period allowed (and if both disciplinary proceedings and proceedings for an offence may be instituted, the period allowed refers to the later of the 2); or
- (b) if such proceedings are commenced within the period allowed—when the proceedings (including any proceedings on review or appeal) are finally determined or discontinued.

## **Schedule 1—Prescribed oral advice in relation to alcotest or breath analysis**

### **1—Oral advice by an authorised person appointed under clause 2(1)(d) of Schedule 2 of the Act, on refusal or failure to comply with alcotest or breath analysis direction: clause 4(8)(b) of Schedule 2 of the 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 the rail transport operator's expense.

**2—Oral advice by any other authorised person, on refusal or failure to comply with alcotest or breath analysis direction: clause 4(8)(b) of Schedule 2 of the 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.

**Schedule 2—Prescribed oral advice in relation to drug screening test, oral fluid analysis, blood test or urine test**

**1—Oral advice on refusal or failure to comply with drug screening test or oral fluid analysis direction: clause 5(8)(b)(ii)(A) of Schedule 2 of the Act**

It is a criminal offence to refuse or fail to provide a sample of oral fluid 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, 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 sample of blood taken because of your condition, you should ask for that and the authorised person will help you to have the sample taken.

**2—Oral advice on refusal or failure to comply with blood test direction in connection with drug testing: clause 5(8)(b)(ii)(B) of Schedule 2 of the Act**

It is a criminal offence to refuse or fail to provide a sample of blood in connection with drug testing 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 blood, but only if you ask for a sample of your oral fluid to be taken instead.

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

### **3—Oral advice on refusal or failure to comply with blood test direction in connection with alcohol testing: clause 5(8)(b)(ii)(C) of Schedule 2 of the Act**

It is a criminal offence to refuse or fail to provide a sample of blood in connection with alcohol testing 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 blood, but only if you ask for a sample of your breath to be taken instead.

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

## **Schedule 3—Prescribed oral advice and written notice**

### **Part 1—Prescribed oral advice for purposes of clause 15(5)(a) of Schedule 2 of *Rail Safety Act 2007***

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 71(4) of the Act.

In any court proceedings for that offence, 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 *Rail Safety Act 2007* 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.

[\*Alternatively, you may have the sample taken by a registered nurse.]

You must not consume any more alcohol before having the sample of your blood taken and must not open the blood test kit before delivering it to a medical practitioner [\*or registered nurse].

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 [\*or registered nurse].

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.

\*Advice as to the alternative of a registered nurse is to be given only if the breath analysis was conducted outside Metropolitan Adelaide.

## **Part 2—Prescribed written notice for the purposes of clause 15(5)(a) of Schedule 2 of the *Rail Safety Act 2007***

### **Operation of *Rail Safety Act 2007* in relation to results of breath analysis**

#### **1 Offence**

A rail safety worker commits an offence against section 71(4) of the *Rail Safety Act 2007* if the worker carries out, or attempts to carry out, rail safety work while—

- (a) there is present in his or her blood the prescribed concentration of alcohol (as defined in regulation 4 of the *Rail Safety (Alcohol and Drug Testing) Regulations 2008*); or
- (b) so much under the influence of alcohol as to be incapable of effectively discharging a function or duty of a rail safety worker.

#### **2 Breath analysis**

Your breath has just been analysed by the 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, 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 (clause 15(1) of Schedule 2 of the *Rail Safety Act 2007*).

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 (clause 15(2) of Schedule 2 of the *Rail Safety Act 2007*).

#### **4 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 [\*or a registered nurse] 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 [\*or registered nurse] 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 [\*or registered nurse]—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 [\*or registered nurse] who took the blood sample).

\*The alternative of a registered nurse applies only if the breath analysis was conducted outside Metropolitan Adelaide.

## 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   |
|------|-----|--------------------------------|----------------|
| 2008 | 267 | <i>Gazette 25.9.2008 p4629</i> | 29.9.2008: r 2 |