

South Australia

## **Rail Safety National Law (South Australia) (Drug and Alcohol Testing) Regulations 2012**

under the *Rail Safety National Law (South Australia) Act 2012*

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## **1—Short title**

These regulations may be cited as the *Rail Safety National Law (South Australia) (Drug and Alcohol Testing) Regulations 2012*.

## **2—Commencement**

These regulations will come into operation on the day on which Part 4 of the *Rail Safety National Law (South Australia) Act 2012* comes into operation.

## **3—Interpretation**

In these regulations—

*Act* means the *Rail Safety National Law (South Australia) Act 2012*.

## **4—Conduct of preliminary breath test or breath analysis**

- (1) For the purposes of section 12 of the Act, if a rail safety worker submits to testing by means of a preliminary breath test or breath analysis (or both), the testing must be conducted in the following manner:
  - (a) the worker 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 rail safety worker 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 rail safety worker—
    - (i) that sample, or, if that sample was the second sample provided, both samples, must be disregarded; and
    - (ii) the worker 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 rail safety worker 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 rail safety worker 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 rail safety worker 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 worker in accordance with this regulation, that indicates the lower concentration of alcohol in the worker's breath (not taking into account any samples that, in accordance with this regulation, are to be disregarded).

#### **5—Oral advice on refusal or failure to comply with requirement or direction of authorised person**

- (1) A rail safety worker who refuses or fails to comply with a reasonable direction of an authorised person in relation to a requirement to submit to a preliminary breath test or breath analysis must be given the oral advice set out in Schedule 1 Part 1 of these regulations as to the operation of section 12(4) and (6) of the Act.
- (2) A rail safety worker who refuses or fails to comply with a reasonable direction of an authorised person in relation to a requirement to submit to a drug screening test or oral fluid analysis must be given the oral advice set out in Schedule 1 Part 2 clause 2 of these regulations as to the operation of section 13(5) and (7) of the Act.
- (3) A rail safety worker who refuses or fails to comply with a requirement or reasonable direction of an authorised person relating to a blood test required in connection with drug testing must be given the oral advice set out in Schedule 1 Part 2 clause 3 of these regulations as to the operation of section 13(5) and (8)(a) of the Act.
- (4) A rail safety worker who refuses or fails to comply with a requirement or reasonable direction of an authorised person relating to a blood test required in connection with alcohol testing must be given the oral advice set out in Schedule 1 Part 2 clause 4 of these regulations as to the operation of section 13(5) and (8)(b) of the Act.

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

For the purposes of sections 17(e)(ii) and 18(e)(ii) 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.

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

For the purposes of section 18(f)(iv) 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.

## 8—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 section 20(2) of the Act:
  - (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 20(5)(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 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 Forensic Science SA;
  - (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 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 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 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 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 Regulator;
  - (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) A reference in a certificate completed for the purposes of subregulation (1)(f) to the *Road Traffic Act 1961* or the *Rail Safety Act 2007*, or a provision of either those Acts, will be taken to be a reference to the *Rail Safety National Law (South Australia) Act 2012* or the corresponding provision of that Act.

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

- (1) The oral advice required to be given for the purposes of section 20(5)(a) of the Act must be as set out in Schedule 1 Part 3 of these regulations.
- (2) The written notice required to be delivered for the purposes of section 20(5)(a) of the Act must be as set out in Schedule 1 Part 4 of these regulations.

### **Note—**

See also Schedule 2 clause 2.

## 10—Request for approved blood test kit

- (1) For the purposes of section 20(5)(b) of the Act, 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.

## 11—Destruction of oral fluid and blood samples

The Commissioner of Police must ensure that the sample of oral fluid or blood (and any other forensic material taken incidentally during a drug screening test, oral fluid analysis or blood test) is destroyed—

- (i) if 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; or
- (ii) 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—Oral advice and written notices

### Part 1—Oral advice on refusal or failure to comply with preliminary breath test or breath analysis direction: section 12 of Act

#### 1—Oral advice on refusal or failure to comply with preliminary breath test or breath analysis direction: section 12 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.

If you have some physical or medical condition that prevents you from providing a breath sample, you may immediately ask for a sample of your blood to be taken instead by a medical practitioner.

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.

## **Part 2—Oral advice on refusal or failure to comply with drug screening test, oral fluid analysis or blood test direction: section 13 of Act**

### **2—Oral advice on refusal or failure to comply with drug screening test or oral fluid analysis direction: section 13 of 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.

If you have some physical or medical condition that prevents you from providing a sample of oral fluid, you may ask for a sample of your blood to be taken instead or 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.

### **3—Oral advice on refusal or failure to comply with blood test direction in connection with drug testing: section 13 of 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.

If you have some physical or medical condition that prevents you from providing a sample of blood, you may 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.

### **4—Oral advice on refusal or failure to comply with blood test direction in connection with alcohol testing: section 13 of 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.

If you have some physical or medical condition that prevents you from providing a sample of blood, you may 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.

## **Part 3—Prescribed oral advice for purposes of section 20(5)(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 128(1) of the Rail Safety National Law, which is set out in the Schedule to the *Rail Safety National Law (South Australia) Act 2012*.

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 National Law (South Australia) Act 2012* 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].

One 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 4—Prescribed written notice for purposes of section 20(5)(a) of Act**

### **Operation of *Rail Safety National Law (South Australia) Act 2012* in relation to results of breath analysis**

#### **1 Offence**

A rail safety worker commits an offence against section 128(1) of the Rail Safety National Law (see the Schedule to the *Rail Safety National Law (South Australia) Act 2012*) 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 section 128(5) of the Rail Safety National Law (see the Schedule to the *Rail Safety National Law (South Australia) Act 2012*); 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 (section 20(1) of the *Rail Safety National Law (South Australia) Act 2012*).

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 20(2) of the *Rail Safety National Law (South Australia) Act 2012*).

#### **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.

## **Schedule 2—Revocation and transitional provisions**

### **1—Revocation**

The following regulations are revoked:

- (a) *Rail Safety (General) Regulations 2008*; and

(b) *Rail Safety (Alcohol and Drug Testing) Regulations 2008*.

## **2—Transitional provisions**

- (1) Despite regulation 9(2), a written notice required to be delivered for the purposes of section 20(5)(a) of the Act may, during the period of 6 months after the commencement of this subclause, be given in the form prescribed for the purposes of Schedule 2 clause 15(5)(a) of the repealed Act by the revoked regulations as in force immediately before their revocation (rather than in the form as set out in Schedule 1 Part 4 of these regulations).
- (2) A reference to the repealed Act, the revoked regulations, or a particular provision of the repealed Act or the revoked regulations in the notice prescribed by the revoked regulations referred to in subclause (1), is to be read as a reference to the Act, these regulations or the corresponding provision of the Act, the Rail Safety National Law or these regulations, as the case requires.

### **Notes—**

- (1) A reference to Schedule 2 clause 15(5)(a) of the *Rail Safety Act 2007* is to be read as a reference to section 20(5)(a) of the *Rail Safety National Law (South Australia) Act 2012*.
  - (2) A reference to section 71(4) of the *Rail Safety Act 2007* is to be read as a reference to section 128(1) of the Rail Safety National Law.
  - (3) A reference to regulation 4 of the *Rail Safety (Alcohol and Drug Testing) Regulations 2008* is to be read as a reference to section 128(5) of the Rail Safety National Law.
  - (4) A reference to clause 15(1) of Schedule 2 of the *Rail Safety Act 2007* is to be read as a reference to section 20(1) of the *Rail Safety National Law (South Australia) Act 2012*.
  - (5) A reference to clause 15(2) of Schedule 2 of the *Rail Safety Act 2007* is to be read as a reference to section 20(2) of the *Rail Safety National Law (South Australia) Act 2012*.
- (3) Despite regulation 10(1)(b), a request form required to be completed for the purposes of section 20(5)(b) of the Act may, during the period of 6 months after the commencement of this subclause, be given in the form approved for the purposes of regulation 17(1)(b) of the revoked regulations as in force immediately before their revocation.
  - (4) A reference to the repealed Act or the revoked regulations or a particular provision of the repealed Act or the revoked regulations in the request form referred to in subclause (3) is to be read as a reference to the Act, these regulations or the corresponding provision of the Act or these regulations.

### **Notes—**

- (1) A reference to clause 15(5)(b) of Schedule 2 of the *Rail Safety Act 2007* is to be read as a reference to section 20(5)(b) of the *Rail Safety National Law (South Australia) Act 2012*.
- (2) A reference to regulation 17 of the *Rail Safety (Alcohol and Drug Testing) Regulations 2008* is to be read as a reference to regulation 10 of these regulations.

- (5) If a statement in writing is required to be delivered for the purposes of section 20(4) of the Act, for the period of 6 months after the commencement of this subclause, it will be sufficient for those purposes if the statement is delivered in the form used for the purposes of Schedule 2 clause 15(4) of the repealed Act, as in force immediately before its repeal (and a reference to a provision of the repealed Act in such a notice is to be read as a reference to the corresponding provision of the Act).
- (6) In this clause—
- repealed Act* means the *Rail Safety Act 2007*;
- revoked regulations* means the *Rail Safety (Alcohol and Drug Testing) Regulations 2008*.

**Note—**

As required by section 10AA(2) of the *Subordinate Legislation Act 1978*, the Minister has certified that, in the Minister's opinion, it is necessary or appropriate that these regulations come into operation as set out in these regulations.

**Made by the Governor**

with the advice and consent of the Executive Council  
on 13 December 2012

No 256 of 2012

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