

South Australia

**HARBORS AND NAVIGATION (BREATH ANALYSIS AND BLOOD
TEST) REGULATIONS 1997**

REGULATIONS UNDER THE HARBORS AND NAVIGATION ACT 1993

Harbors and Navigation (Breath Analysis and Blood Test) Regulations 1997

being

No. 234 of 1997: *Gaz.* 4 December 1997, p. 1533¹

as varied by

No. 33 of 2002: *Gaz.* 23 May 2002, p. 1974²

¹ Came into operation 7 December 1997: reg. 2.

² Came into operation 27 May 2002: reg. 2.

NOTE:

- *Asterisks indicate repeal or deletion of text.*
- *For the legislative history of the regulations see Appendix.*

SUMMARY OF PROVISIONS

1. Citation
2. Commencement
3. Interpretation
- 3A. Conduct of breath analysis
- 3B. Oral advice on refusal or failure to comply with alcotest or breath analysis direction
4. Oral advice and written notice on recording of positive breath analysis reading
5. Request for approved blood test kit
6. Procedures for voluntary blood test
7. Prescribed period—section 74(10a)(b) of Act
8. Exemption of certain medical practitioners from s. 74 of Act

SCHEDULE 1AA

Prescribed Oral Advice (Section 71(4)(b))

SCHEDULE 1

Prescribed oral advice and written notice (section 73(4)(a), reg. 4)

SCHEDULE 2

Form of request (section 73(4)(b), reg. 5)

APPENDIX

LEGISLATIVE HISTORY

Citation

1. These regulations may be cited as the *Harbors and Navigation (Breath Analysis and Blood Test) Regulations 1997*.

Commencement

2. These regulations will come into operation on 7 December 1997.

Interpretation

3. In these regulations—

"the Act" means the *Harbors and Navigation Act 1993*.

Conduct of breath analysis

3A. (1) Pursuant to section 71(3a) 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 two 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 one litre of breath; and
- (c) there must be an interval of not less than two 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 two 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 two 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 two 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

4.

- (ii) the person may be required to provide two 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 two 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 *Harbors and Navigation Act 1993* and 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).

Oral advice on refusal or failure to comply with alcotest or breath analysis direction

3B. The prescribed oral advice for the purposes of section 71(4)(b) is set out in Schedule 1AA.

Oral advice and written notice on recording of positive breath analysis reading

4. (1) The oral advice required to be given for the purposes of section 73(4)(a) of the Act must be as set out in Part A of schedule 1.

(2) The written notice required to be delivered for the purposes of section 73(4)(a) of the Act must be as set out in Part B of schedule 1.

Request for approved blood test kit

5. (1) For the purposes of section 73(4)(b) of the Act, a request for an approved blood test kit must be made in accordance with the following provisions:

- (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 form in the form set out in schedule 2 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.

Procedures for voluntary blood test

6. (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 73(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 73(4)(b) 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 two 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 two 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 (Breath Analysis and Blood Test) Regulations 1994* (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 one 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 member of the police force 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;

6.

- (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 *Harbors and Navigation Act 1993* or the corresponding provision of that Act.

Prescribed period—section 74(10a)(b) of Act

7. For the purposes of section 74(10a)(b) of the Act, the prescribed period for which a container containing a sample of a person's blood must be kept available for collection by or on behalf of that person is the same as that prescribed in regulation 7 of the *Road Traffic (Breath Analysis and Blood Test) Regulations 1994*.

7.

Exemption of certain medical practitioners from s. 74 of Act

8. Medical practitioners who, in the circumstances referred to in section 74(1) or (4) of the Act, attend or certify or report the death of a person admitted to (or dead on arrival at) a hospital are exempt from section 74(1) and (4) if the hospital concerned is not a hospital specified in regulation 5 of the *Road Traffic (Section 471 Hospitals) Regulations 1992*.

8.

SCHEDULE 1AA

Prescribed Oral Advice (Section 71(4)(b))

HARBORS AND NAVIGATION ACT 1993

**ORAL ADVICE ON REFUSAL OR FAILURE TO COMPLY WITH ALCOTEST OR
BREATH ANALYSIS DIRECTION: SECTION 71(4)(b)**

It is a criminal offence to refuse or fail to provide a breath sample without good cause. The penalty for this offence is a fine.

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 an authorised person will help you to have the sample taken at Government expense.

SCHEDULE 1

*Prescribed oral advice and written notice
(section 73(4)(a), reg. 4)*

PART A

**ORAL ADVICE FOR THE PURPOSES OF SECTION 73(4)(a) OF HARBORS AND
NAVIGATION ACT 1993**

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* (operating or crewing a vessel under the influence of liquor), it will be presumed that the breathalyser accurately indicated your blood alcohol level at the time of the reading and for the preceding two hours. However, the *Harbors and Navigation Act* 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 a 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 two 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 State Forensic Science 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 B
WRITTEN NOTICE FOR THE PURPOSES OF SECTION 73(4)(a) OF HARBORS
AND NAVIGATION ACT 1993

OPERATION OF HARBORS AND NAVIGATION ACT 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 70(3) 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* (operating or crewing a vessel under the influence of liquor), 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), (2a)*).

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

- if you have a sample of your blood taken and analysed *as described below*

AND

- 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 [*or 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 two containers and seal the containers. One 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 State Forensic Science 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

Form of request (section 73(4)(b), reg. 5)

**HARBORS AND NAVIGATION ACT 1993
REQUEST FORM FOR THE PURPOSES OF SECTION 73(4)(b)**

..... of
(Name)

.....
(Address)

submitted to a breath analysis at
(Address or description)

at am/pm on the day of 19.....

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:

13.

APPENDIX

LEGISLATIVE HISTORY

Regulations 3A and 3B:
Schedule 1AA:

inserted by 33, 2002, reg. 3
inserted by 33, 2002, reg. 4