



# INDEPENDENT TRANSPORT SAFETY AND RELIABILITY REGULATOR

## DISCUSSION PAPER

### PROPOSED AMENDMENT OF THE *RAIL SAFETY (DRUG AND ALCOHOL TESTING) REGULATION 2008*

MAY 2009

#### 1. PURPOSE OF THIS DISCUSSION PAPER

- (1) The primary purpose of this discussion paper is to examine proposals to amend the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* (the Regulation) to:
- (i) provide for oral fluid (saliva) testing to detect the presence of certain drugs; and
  - (ii) introduce offences for the presence of certain drugs.
- (2) In addition, the discussion paper examines a proposal to require on-site urine drug screening to comply with AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*.

#### 2. INTRODUCTION

The NSW Government has a strong commitment to effective drug and alcohol testing programs across the transport sector.

The regulatory framework for drug and alcohol testing in the NSW rail industry is comprised of:

- the *Rail Safety Act 2008*
- the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*
- the Independent Transport Safety and Reliability Regulator (ITSRR) Drug and Alcohol Prosecution Policy; and
- rail transport operators' drug and alcohol management programs.

The *Rail Safety Act 2008* and supporting regulations, including the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*, came into effect on 1 January 2009. The 2008 Regulation does not introduce any new requirements, but retains the provisions from the previous 2003 Regulation, and incorporates the mandatory requirements from the previous *Guidelines relating to Drug & Alcohol Programs* into the Regulation.

This discussion paper examines proposals to amend the Regulation to:

- provide for oral fluid testing to detect the presence of certain drugs;
- introduce offences for the presence of certain drugs; and
- require on-site urine drug screening to comply with AS/NZS 4308:2008.

The discussion paper does not cover:

- breath alcohol testing or breath analysis; or
- drug and alcohol testing for transport (bus and ferry) safety employees, which is covered by the *Passenger Transport (Drug and Alcohol Testing) Regulation 2004*.

It is not proposed to change the existing blood testing arrangements under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*, or the provision for urine or blood testing at a hospital after an accident.

Background information is provided in the following attachments:

**Attachment A:**

Drug Testing under the NSW *Rail Safety (Drug and Alcohol Testing) Regulation 2008*

**Attachment B:**

Drug Driving Offences in NSW

**Attachment C:**

Civil Aviation Safety Authority (CASA) Testing Program

**HOW TO COMMENT ON THE PROPOSALS**

ITSRR is seeking comments on the proposals from rail transport operators, testing providers, industry associations, unions and relevant Government agencies.

Submissions should be marked “Attention: Consultation – Discussion Paper on the Proposed Amendment of the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*” and can be submitted by:

- post - Independent Transport Safety and Reliability Regulator, PO Box A2633, Sydney South, NSW 1235;
- fax – (02) 8263 7200; or
- email – [contact@transportregulator.nsw.gov.au](mailto:contact@transportregulator.nsw.gov.au)

Please note that submissions may be made public, subject to the provisions of the *Freedom of Information Act 1989*. ITSRR will consider any requests for submissions to be treated on a confidential basis, subject to the provisions of the Act.

ITSRR will initiate discussions on the proposals with organisations that have previously raised these issues with ITSRR. Other organisations interested in discussing these proposals with ITSRR are invited to contact ITSRR at [contact@transportregulator.nsw.gov.au](mailto:contact@transportregulator.nsw.gov.au) to arrange a meeting.

### **3. PROPOSAL TO PROVIDE FOR ORAL FLUID TESTING TO DETECT THE PRESENCE OF CERTAIN DRUGS**

#### **3.1 Background**

Under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*, random and targeted testing for the purpose of testing for the presence of drugs may be undertaken by urine testing. Post-incident testing may be undertaken by urine testing, or urine or blood testing at a hospital.

During consultation in 2007 on the draft *Rail Safety (Drug and Alcohol Testing) Regulation 2007* to support the *Rail Safety Bill 2007*, support was expressed for oral fluid testing in preference to urine testing, as it is a less personally intrusive form of testing than urine testing and provides a convenient and rapid way to screen for drugs.

It is relevant to note that:

- Police random roadside drug testing using oral fluid testing is now in force in all states and in the Northern Territory (where it is primarily limited to truck drivers), commencing in NSW in January 2007.
- Queensland Rail conducts random oral fluid testing of its rail safety workers.
- In September 2008, CASA implemented a national random drug and alcohol testing program for the aviation industry, using oral fluid testing to detect a range of drugs. Random testing commenced in May 2009.

#### **3.2 Evaluation of Blood, Urine and Oral Fluid Testing**

The table below summarises the advantages and disadvantages of blood, urine and oral fluid testing to detect the presence of certain drugs:

<b>Type of Testing</b>	<b>Procedure</b>	<b>Advantages</b>	<b>Disadvantages</b>
<b>Blood</b>	<p>The <i>Rail Safety (Drug and Alcohol Testing) Regulation 2008</i> requires blood samples to be:</p> <ul style="list-style-type: none"> <li>• taken at a hospital by a medical practitioner or registered nurse</li> <li>• placed into a container which is fastened and sealed, and marked or labelled for future identification</li> <li>• placed in a security box of a type approved by the Commissioner of Police and submitted to the Division of Analytical Laboratories (DAL), Institute of Clinical Pathology and Medical Research, Western Sydney Area Health Service, for analysis by an analyst to determine the concentration of alcohol or other drugs in the blood.</li> </ul>	<ul style="list-style-type: none"> <li>• can detect if there is a substance in the blood which may affect brain functions</li> </ul>	<ul style="list-style-type: none"> <li>• intrusive form of testing</li> <li>• samples must be taken under the <i>Rail Safety (Drug and Alcohol Testing) Regulation 2008</i> at a hospital by a medical practitioner or registered nurse</li> </ul>
<b>Urine</b>	<ul style="list-style-type: none"> <li>• The <i>Rail Safety (Drug and Alcohol Testing) Regulation 2008</i></li> </ul>	<ul style="list-style-type: none"> <li>• reliable form of testing that can provide a</li> </ul>	<ul style="list-style-type: none"> <li>• does not indicate impairment</li> </ul>

Type of Testing	Procedure	Advantages	Disadvantages
	<p>requires urine testing of rail safety workers to be conducted in accordance with AS/NZS 4308:2008, <i>Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine</i>. NB. The Regulation provides for a laboratory that is accredited by the National Association of Testing Authorities, Australia (NATA) for the purposes of AS/NZS 4308:2001, <i>Procedures for the collection, detection and quantitation of drugs of abuse in urine</i>, to be taken to be an approved laboratory which complies with the 2008 Standard until 1 January 2012.</p> <ul style="list-style-type: none"> <li>• Private toilet facilities must be provided.</li> <li>• The urine sample is usually taken by a collecting agency which may either use an on-site drug screening device to conduct the initial screening test, or send the urine sample to an approved laboratory (accredited by NATA for the purposes of AS/NZS 4308) for screening testing.</li> <li>• Confirmatory testing must be conducted by an analyst at an approved laboratory if the screening test indicates the presence of a drug or drugs in the urine sample.</li> <li>• Classes of drugs tested for under the Standard are amphetamine type substances (eg ice, speed, ecstasy), benzodiazepines (eg sleeping tablets or muscle relaxants), cannabis (eg marijuana, hash), cocaine and opiates (eg heroin, codeine).</li> </ul>	<p>recent history of the use of drugs that remain in the system for some time (days to weeks)</p> <ul style="list-style-type: none"> <li>• longer window of detection may indicate if a person is a regular user, eg. cannabis may be detected in heavy users for several months after their last use</li> <li>• NB Detection periods vary, depending on a range of factors including the dose of the drug used and the individual's metabolism</li> </ul>	<ul style="list-style-type: none"> <li>• cannot detect exposure to a drug until some time after use</li> <li>• intrusive form of testing</li> <li>• Private toilet facilities must be provided</li> </ul>
<b>Oral Fluid</b>	<ul style="list-style-type: none"> <li>• AS 4760-2006, <i>Procedures for specimen collection and the detection and quantitation of drugs in oral fluid</i> was introduced in 2006.</li> <li>• Oral fluid can be obtained by 'spitting' or by absorption onto an absorbent material or through employing a device that stimulates production of oral fluids.</li> <li>• The Standard allows for initial on-site testing, or the conduct of initial testing in an accredited laboratory.</li> </ul>	<ul style="list-style-type: none"> <li>• provides rapid detection (within hours) of recent drug use, eg. cannabis can be detected an hour after use</li> <li>• NB Detection periods vary, depending on a range of factors including the dose of the drug used and the individual's metabolism</li> <li>• reliable confirmatory test - AS 4760-2006</li> </ul>	<ul style="list-style-type: none"> <li>• does not indicate impairment or long term drug use</li> <li>• does not test for benzodiazepines (eg. sleeping tablets or muscle relaxants), which can be detected by urine testing</li> <li>• oral fluid screening testing is not as reliable as urine screening testing (NB AS 4760 requires</li> </ul>

Type of Testing	Procedure	Advantages	Disadvantages
	<ul style="list-style-type: none"> <li>Confirmatory testing must be performed in an accredited laboratory, in the event of an unconfirmed initial test result. (ie The test result was not negative and requires confirmatory testing to unequivocally determine the presence or absence of a drug.)</li> <li>Classes of drugs tested for under the Standard are amphetamine-type stimulants, cannabis, cocaine and opiates, but not benzodiazepines.</li> </ul>	<ul style="list-style-type: none"> <li>requires laboratory confirmatory testing of unconfirmed initial test results</li> <li>less intrusive than urine or blood testing</li> <li>can be easily observed (so the possibility of adulteration or substitution is reduced)</li> <li>convenient - easier to collect than urine or blood samples, as collection does not require specialist medical or paramedical experience (as for blood collection) or special collection facilities (as for urine collection)</li> </ul>	<ul style="list-style-type: none"> <li>laboratory confirmatory testing of unconfirmed initial test results)</li> <li>the volume of oral fluid is invariably low and this will often restrict the number of tests that can be conducted without the need for repeat collection</li> </ul>

It is not cost-effective for independent (commercial) laboratories to analyse blood samples to detect the presence of drugs. This is generally only undertaken by forensic laboratories (eg. for analysis of samples taken after road or rail accidents).

The costs for urine and oral fluid testing vary according to such things as the volume of screening/confirmatory tests to be performed, location and whether the testing provider charges for labour and the supply of a mobile clinic (required for urine testing if toilet facilities are not available). Costs are therefore determined on the basis of the commercial arrangement negotiated between the rail transport operator and testing provider. An indication of the range of prices that may be charged is provided below:

*Urine Testing*

- On-site screening may involve labour costs in the range of \$110-\$150 an hour per collector, or around \$295 an hour if two collectors and a mobile clinic are required; plus \$40 per sample for the testing device.
- Laboratory confirmatory testing (if required) may cost in the range of \$75-\$100 per sample.

*Oral Fluid Testing*

- On-site screening may involve labour costs in the range of \$110-\$150 an hour per collector, plus \$50-\$85 per sample for the testing device.
- Laboratory confirmatory testing (if required) may cost in the range of \$150-\$250 per sample.

### 3.3 Options

The following options may be considered in relation to the proposal to provide for oral fluid testing to detect the presence of certain drugs:

**(1) Status Quo – Urine Testing for Random, Targeted or Post-incident Testing**

- Under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*, random, targeted and post-incident testing for the purpose of testing for the presence of drugs may be undertaken by urine testing.
- Existing blood testing arrangements would continue to apply, together with the provision for urine or blood testing at a hospital after an accident.

**(2) Only Oral Fluid Testing for Random, Targeted or Post-incident Testing**

- Provide for random, targeted and post-incident testing to be conducted by oral fluid testing.
- Existing blood testing arrangements would continue to apply, together with the provision for urine or blood testing at a hospital after an accident.

**(3) Optional Oral Fluid Testing for Random, Targeted or Post-incident Testing**

- Provide for random, targeted or post-incident testing to be conducted by either urine or oral fluid testing.
- Existing blood testing arrangements would continue to apply, together with the provision for urine or blood testing at a hospital after an accident.

**(4) Optional Oral Fluid Testing for Random Testing**

- Provide for random testing to be conducted by either urine or oral fluid testing, and retain urine testing for targeted testing and post-incident testing.
- Existing blood testing arrangements would continue to apply, together with the provision for urine or blood testing at a hospital after an accident.

Retaining the status quo of urine testing would ensure that there is a uniform approach to the drug testing procedures used throughout the rail industry, but would exclude the rail industry from using a new form of technology that has several important advantages including convenience and a less intrusive testing method.

The introduction of oral fluid testing would align drug testing programs in the NSW rail industry with the road and aviation testing regimes:

- The police use oral fluid for random roadside drug testing because it is much easier than collecting a blood or urine sample.
- The CASA random testing regime is using oral fluid testing as it correlates with recent use and is more likely to detect the presence of the active substance in the sample from recent use. Organisations that are required to conduct testing under the CASA regulations can use either oral fluid or urine testing for pre-employment, random, reasonable suspicion or post-accident testing.

Oral fluid testing conducted under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* would be required to meet the standards of accuracy specified by the Australian Standard. However, there may be a concern with moving solely to oral fluid testing for drug detection, primarily because it does not identify long term drug use.

A key element of the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* is that drug and alcohol management programs are to have an emphasis, in relation to rail safety workers, on drug and alcohol education and rehabilitation. Moving away from urine testing could therefore be seen as a diminution of the testing regime.

This concern could be addressed by augmenting, rather than replacing, urine testing with oral fluid testing ie retaining urine testing in certain circumstances (eg targeted testing and post-incident testing) and providing for the option of oral fluid testing in certain circumstances (eg. random testing).

**Do you have any comments on these options?**

- (1) **Status Quo – Urine Testing for Random, Targeted or Post-incident Testing**
- (2) **Only Oral Fluid Testing for Random, Targeted or Post-incident Testing**
- (3) **Optional Oral Fluid Testing for Random, Targeted or Post-incident Testing**
- (4) **Optional Oral Fluid Testing for Random Testing**

**4. PROPOSAL TO INTRODUCE OFFENCES FOR THE PRESENCE OF CERTAIN DRUGS**

**4.1 Background**

The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* makes it an offence for a rail safety worker to carry out rail safety work while **under the influence** of alcohol or any other drug, but does not prescribe offences for a worker having a drug or drugs present in their body.

Rail transport operators are required to notify ITSRR of “positive” drug and alcohol test results. In relation to drugs other than alcohol, positive tests are:

- any analysis of blood confirming the presence of a drug (other than alcohol) in the blood of a rail safety worker, or
- any analysis of urine confirming the presence of a drug in the urine of a rail safety worker.

To date, ITSRR has prosecuted three rail safety workers for alcohol offences, but none for drug offences, despite the fact that the overall detection rate – the percentage of total tests that yielded a positive result – is higher for drugs than for alcohol.

In 2007-08, the detection rates were 1.6% for drugs and 0.2% for alcohol. As in previous years, cannabis was the most common drug associated with positive tests.

The drug driving offences under the NSW *Road Transport (Safety and Traffic Management) Act 1999* (“*the Road Safety Act*”) include:

- driving a motor vehicle with the **presence** of cannabis, speed or ecstasy in oral fluid, blood or urine;
- driving with the **presence** of cocaine or morphine (heroin) in blood or urine (unless the morphine was taken for medicinal purposes); and
- driving **under the influence** of alcohol or any other drug, where police have the power to take a driver to a hospital to obtain a blood and urine sample if:
  - the manner of driving suggests that the driver is impaired by drugs;
  - the driver is involved in a fatal crash.

It is relevant to note that CASA’s random testing program aims to determine whether or not a person has drugs **present** above a permitted level in oral fluid.

The offences of the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* were originally modelled on those of the *Road Safety Act*. However, the offences of the *Road Safety Act* now exceed those of the *Rail Safety Regulation*, following the introduction of presence as an offence under the *Road Safety Act*.

This has created an inconsistency in the offences that may be applied to rail safety workers or transport (bus and ferry) safety employees who drive a motor vehicle in the course of carrying out their safety work, such as bus drivers, and those who do not drive a motor vehicle in the course of carrying out their safety work, such as train drivers.

During consultation in 2007 on the draft *Rail Safety (Drug and Alcohol Testing) Regulation 2007* to support the *Rail Safety Bill 2007*, support was expressed for introducing offences for the presence of certain drugs, consistent with the offence for carrying out rail safety work with the prescribed concentration of alcohol in blood or breath.

One of the reasons for this is that it is difficult to prove the offence of being under the influence of drugs, compared to the offence of presence. In this regard, AS 4760-2006, *Procedures for specimen collection and the detection and quantitation of drugs in oral fluid* states that it is not appropriate to relate the presence of drugs in oral fluid to impairment, but rather, to recent use. AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* states that AS/NZS 4308 has no relevance to the issue of impairment.

## 4.2 Evaluation of Rail/ Road/Aviation Drug Offences

The table below summarises the advantages and disadvantages of the rail, road and aviation drug testing regimes:

Testing Regime	Description	Advantages	Disadvantages
<b>Rail</b>	<p>It is an offence under the <i>Rail Safety (Drug and Alcohol Testing) Regulation 2008</i> for a rail safety worker to carry out rail safety work while under the influence of alcohol or any other drug.</p> <p>Drug testing is usually conducted by urine testing, in accordance with AS/NZS 4308:2008, <i>Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine</i> (to detect the presence of opiates, amphetamine type substances, cannabis, cocaine and benzodiazepines).</p> <p>NB The Regulation provides for a laboratory that is accredited by the National Association of Testing Authorities, Australia (NATA) for the purposes of AS/NZS 4308:2001, <i>Procedures for the collection, detection and quantitation of drugs of abuse in urine</i>, to be taken to be an approved laboratory which complies with the 2008 Standard until 1 January 2012.</p>	<ul style="list-style-type: none"> <li>The offence of under the influence is available to cover those incidents where it can be proven that a rail safety worker was under the influence of a drug.</li> </ul>	<ul style="list-style-type: none"> <li>It is difficult to prove the offence of under the influence.</li> <li>Even if a worker repeatedly tests positive for the presence of drugs, prosecution action cannot be taken unless it can be proven that the worker was under the influence of drugs at the time of the tests.</li> </ul>
<b>Road</b>	<p>Drug driving offences under the <i>Road Transport (Safety and Traffic Management) Act 1999</i> include:</p> <ul style="list-style-type: none"> <li>driving with the presence of cannabis, speed or ecstasy in oral fluid, blood or urine</li> <li>driving under the influence of drugs, where police have the power to take a driver</li> </ul>	<ul style="list-style-type: none"> <li>Presence is prescribed in the legislation and is not subjective.</li> <li>The offence of under the influence is available to cover those incidents where under the influence can be</li> </ul>	<ul style="list-style-type: none"> <li>Oral fluid screening testing is not as reliable as urine screening testing (NSW Police undertake roadside confirmatory testing and laboratory confirmatory testing of positive test</li> </ul>

Testing Regime	Description	Advantages	Disadvantages
	<p>to a hospital to obtain a blood and urine sample if:</p> <ul style="list-style-type: none"> <li>- the manner of driving suggests that the driver is impaired by drugs;</li> <li>- the driver is involved in a fatal crash</li> </ul> <ul style="list-style-type: none"> <li>• driving with the presence of cocaine or morphine (heroin) in blood or urine.</li> </ul> <p>NSW Police undertake testing in accordance with the requirements of the <i>Road Transport (Safety and Traffic Management) Act 1999</i>.</p>	proven.	results).
<b>Aviation</b>	<p>It is an offence under the <i>Civil Aviation Safety Regulations 1998</i> for people to perform, or be available to perform, safety-sensitive aviation activities while being over the permitted level for drugs.</p> <p>Oral fluid samples will be tested in accordance with AS 4760-2006, <i>Procedures for specimen collection and the detection and quantitation of drugs in oral fluid</i> (to detect the presence of opiates, amphetamine-type stimulants, cannabis and cocaine).</p>	<ul style="list-style-type: none"> <li>• Presence is prescribed in the legislation and is not subjective.</li> <li>• The CASA testing regime is using oral fluid instead of urine for drug testing as it is more likely to detect the presence of the active substance in the sample from recent use.</li> </ul>	<ul style="list-style-type: none"> <li>• Oral fluid screening testing is not as reliable as urine screening testing [AS 4760-2006 requires laboratory confirmatory testing of unconfirmed (positive) initial test results].</li> </ul>

### 4.3 Options

The following options may be considered in relation to the proposal to introduce offences for the presence of certain drugs:

#### (1) Status Quo – Under the Influence

- The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* makes it an offence for a rail safety worker to carry out rail safety work while **under the influence** of alcohol or any other drug, but does not prescribe offences for a worker having a drug or drugs present in their body.

#### (2) Introduce Presence as an Offence in addition to Under the Influence

- Introduce offences that mirror the road safety offences in NSW for the presence of certain drugs, eg. cannabis, speed or ecstasy in oral fluid, blood or urine, and cocaine or morphine in blood or urine (in addition to the current offence of under the influence).

Retaining the status quo would perpetuate the inconsistency between the *Road Safety Act* and *Rail Safety Act* offences, although the drugs most commonly detected by both the police and rail transport operator testing programs are cannabis and amphetamine-type substances such as ice, speed or ecstasy.

The Regulation could be amended so that presence of cannabis, speed or ecstasy in oral fluid, blood or urine, and cocaine or morphine in blood or urine, could be made an offence in addition to the offence of under the influence, which should be retained to cover those incidents where it can be proven that a worker was under the influence of a drug. This would again align the road safety and rail safety legislation in NSW.

**Do you have any comments on these options?**

- (1) **Status Quo – Under the Influence**
- (2) **Introduce Presence as an Offence in addition to Under the Influence**

**5. PROPOSAL TO REQUIRE ON-SITE URINE DRUG SCREENING TO COMPLY WITH THE REQUIREMENTS OF AS/NZS 4308:2008**

**5.1 Background**

AS/NZS 4308:2001, *procedures for the collection, detection and quantitation of drugs of abuse in urine* was recently revised. The new AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* was published on 19 March 2008 and supersedes AS/NZS 4308:2001.

The revision provides additional requirements for collection procedures, laboratory screening procedures and quantitative laboratory confirmatory procedures. It also introduces the option of on-site urine drug screening.

After collection of the specimen, the Standard allows for either screening at the collecting site or at a laboratory using the cut-off levels as specified in the Standard.

The requirements for on-site screening include the implementation of procedures such as:

- quality controls;
- proficiency testing of collecting agencies (to ensure they can operate at a level of proficiency in accordance with the Standard);
- verification of testing devices (to ensure the devices are fit-for-purpose in accordance with the Standard);
- competency based training for collectors; and
- accreditation of collecting agencies.

The new on-site screening procedures are primarily requirements to be met by the collecting agencies. These procedures ensure that on-site screening is conducted to the same standard as laboratory screening and provide confidence in the quality of the results obtained.

## **5.2 Current Position**

The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* requires urine testing of rail safety workers to be conducted in accordance with AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*.

Rail transport operators should ensure that collecting agencies are compliant with the Standard in regard to the collection of urine samples and their transportation to an approved laboratory.

In relation to urine samples, the Regulation provides that an approved laboratory is a laboratory that has been accredited by the National Association of Testing Authorities, Australia (NATA) for the purposes of AS/NZS 4308:2008. However, the Regulation also provides for a laboratory that is accredited by NATA for the purposes of AS/NZS 4308:2001, *Procedures for the collection, detection and quantitation of drugs of abuse in urine*, to be taken to be an approved laboratory which complies with the 2008 Standard until 1 January 2012.

The Regulation does not require on-site urine drug screening to comply with AS/NZS 4308:2008. The Regulation provides for on-site drug screening devices to be used, providing they determine the presence or absence of drugs in urine using an immunoassay technique that meets the screening test cut-off levels listed in Table 1 of AS/NZS 4308:2008. (These are the same cut-off levels that were in Table 1 of AS/NZS 4308:2001.)

## **5.3 Comment**

On-site screening at the collecting site is optional under the revised Standard, but has been included since this procedure has become an established screening technique in a number of industries.

It is understood that on-site urine drug screening is becoming an increasingly common screening technique in the rail industry, because it provides immediate results (within minutes). Rail transport operators make a commercial decision as to the costs and benefits of using an on-site drug screening service.

Comments are being sought on the proposal to require on-site urine drug screening conducted under the Regulation to comply with AS/NZS 4308, to assess the impact of this proposal on the rail industry.

<p><b>Do you have any comments on the proposal to require on-site urine drug screening conducted under the Regulation to comply with AS/NZS 4308:2008?</b></p>
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**DRUG TESTING UNDER THE NSW RAIL SAFETY (DRUG AND ALCOHOL TESTING) REGULATION 2008**

**Background**

- The *Rail Safety Act 2008* requires a rail transport operator to have a drug and alcohol management program for rail safety workers who carry out, or are about to carry out, rail safety work in connection with railway operations for which the operator is required to be accredited.
- The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* requires an accredited rail transport operator to conduct drug and alcohol testing as part of its drug and alcohol management program and this may involve random testing, targeted or reasonable cause testing, or post-incident testing of rail safety workers who carry out rail safety work.
- The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* makes it an offence for a rail safety worker to carry out rail safety work while under the influence of alcohol or any other drug, but does not prescribe offences for a worker having a drug or drugs present in their body.
- It is also an offence to refuse or fail to be tested, to interfere with test results, or to interfere or tamper with or destroy blood or urine samples.
- Drug testing under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* is usually conducted by urine testing. In this regard, a testing officer may require a rail safety worker who is carrying out, or is about to carry out, rail safety work to provide a urine sample for the purpose of random or targeted testing for the presence of drugs.
- A testing officer or police officer may require a rail safety worker who has been involved in an accident or irregular incident while carrying out rail safety work to provide a urine sample for the purpose of testing for the presence of drugs, or to provide a blood or urine sample if the worker attends or is admitted to a hospital after being involved in an accident while carrying out rail safety work.
- Additional circumstances when blood or urine samples may be taken include the following:
  - A testing officer may require a rail safety worker to provide a sample of blood or urine if the testing officer requires the worker to submit to a breath analysis and the breath analysing instrument is not readily available.
  - A testing officer may require a rail safety worker to provide a sample of blood or urine if the testing officer believes the worker might be under the influence of a drug and the worker has undergone a breath test, the result of which does not permit the worker to submit to a breath analysis and the worker either refuses to submit to a sobriety assessment or, after the assessment, the testing officer believes that the worker is under the influence of a drug.

- Rail transport operators are required to notify ITSRR of “positive” drug and alcohol test results. In relation to drugs other than alcohol, positive tests are:
  - any analysis of blood confirming the presence of a drug (other than alcohol) in the blood of a rail safety worker, or
  - any analysis of urine confirming the presence of a drug in the urine of a rail safety worker.
- In circumstances where there is a positive test result, but the rail safety worker did not appear to be under the influence of a drug at the time of the test, the operator should take action in accordance with its drug and alcohol management program, which may include such things as counselling, rehabilitation or disciplinary action.
- If a rail safety worker appears to be impaired by drugs, they should be removed from rail safety work and tested.

## **Testing Procedures**

### *Blood Testing*

- The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* requires that blood samples must be taken from rail safety workers at a hospital by a medical practitioner or registered nurse.
- The sample must then be placed into a container which is fastened and sealed, and marked or labelled for future identification, then placed in a security box of a type approved by the Commissioner of Police and submitted to the laboratory at Lidcombe of the Division of Analytical Laboratories (DAL), Institute of Clinical Pathology and Medical Research, Western Sydney Area Health Service for analysis by an analyst to determine the concentration of alcohol or other drugs in the blood.
- Rail safety workers have up to 12 months after the sample was taken to apply to DAL for a portion of the sample to be sent for analysis, at their own expense, to a medical practitioner or laboratory nominated by them.

### *Urine Testing*

- The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* requires urine testing of rail safety workers to be conducted in accordance with AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*.
- The urine sample is usually taken by a collecting agency which may either use an on-site drug screening device to conduct the initial screening test, or send the urine sample to an approved laboratory for screening testing by an analyst. It may take a couple of days for the laboratory results to be obtained.

- An approved laboratory under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* is a laboratory that has been accredited by the National Association of Testing Authorities, Australia (NATA) for the purposes of AS/NZS 4308:2008. The Regulation also provides for a laboratory that is accredited by NATA for the purposes of AS/NZS 4308:2001, *Procedures for the collection, detection and quantitation of drugs of abuse in urine*, to be taken to be an approved laboratory which complies with the 2008 Standard until 1 January 2012.
- Private toilet facilities must be provided for workers being tested.
- Confirmatory testing must be conducted by an analyst at an approved laboratory if the screening test indicates that the urine contains a drug or drugs.
- If confirmatory testing determines that a urine sample contains a drug or drugs, the rail safety worker has up to 3 months after the taking of the sample to apply to the laboratory at which the sample is being kept for a portion of the sample to be sent for analysis, at their own expense, to an approved laboratory nominated by them.
- Drug limits are set according to AS/NZS 4308:2008. A drug is deemed to be detected in a screening test if its concentration is at or above the screening test cut-off levels listed in Table 1 of AS/NZS 4308:2008. A drug is deemed to be detected in a confirmatory test if its concentration is at or above the confirmatory test cut-off concentrations listed in Table 2 of AS/NZS 4308:2008.
- Classes of drugs tested for are amphetamine type substances (eg ice, speed, ecstasy), benzodiazepines (eg sleeping tablets or muscle relaxants), cannabis (eg marijuana, hash), cocaine and opiates (eg heroin, codeine).

### **ITSRR Drug and Alcohol Prosecution Policy**

At the time of the initial screening test, the testing officer should keep a written record of their observations of the worker's behaviour, in the event that they are required to provide ITSRR with a written statement to support prosecution action.

The operator should also document the action it has taken in accordance with its drug and alcohol management program, eg. removal from rail safety work, counselling, return to rail safety work following a negative test result and clearance from a counsellor, and monitoring for a set period.

ITSRR may initiate prosecution for offences under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* in accordance with the ITSRR Drug and Alcohol Prosecution Policy, which is available on ITSRR's website at [www.transportregulator.nsw.gov.au](http://www.transportregulator.nsw.gov.au). Factors taken into consideration by ITSRR when deciding to prosecute a rail safety worker under the *Rail Safety (Drug and Alcohol Testing) Regulation 2008* are:

- whether there is sufficient evidence;
- test result levels;
- potential safety consequences;

- the adequacy of the rail transport operator's drug and alcohol management program; and
- the rail safety worker's compliance with their rehabilitation program.

**DRUG DRIVING OFFENCES IN NSW \***

**Roadside Drug Testing**

Under the NSW *Road Transport (Safety and Traffic Management) Act 1999*, it is an offence to drive with the presence of active THC (cannabis), methylamphetamine (speed/ice) or methylenedioxymethylamphetamine (MDMA or ecstasy) in oral fluid, blood or urine. These three drugs were chosen because they are known to be among the most prevalent illicit drugs used by drivers.

Police have powers to carry out roadside drug testing on any driver, rider or supervising licence holder in NSW to detect the presence of cannabis, speed or ecstasy. The police collect oral fluid from drivers at the roadside because it is much easier than collecting a blood or urine sample:

- Police first conduct a preliminary oral fluid test through the window of the driver's vehicle. The driver is required to lick the test pad of a device. A result is known in about five minutes. If the test result is negative, the driver is able to drive away.
- If the test result is positive, the driver will have to provide a second oral fluid sample in the police support vehicle. This second sample is tested using a different oral fluid screening device. This second test should take about 20 minutes.
- If the presence of one or more of these three drugs is confirmed by a roadside confirmatory test, the driver will be prohibited from driving for 24 hours by police, and the remaining portion of the oral fluid sample from this test will be sent to the laboratory at Lidcombe of the Division of Analytical Laboratories, Institute of Clinical Pathology and Medical Research, Western Sydney Area Health Service, for confirmatory analysis.
- If the presence of one or more of these three drugs is confirmed by the laboratory, the driver will receive a Court Attendance Notice with the charge of driving with the presence of an illicit drug.

The penalty for a first offence is a maximum \$1,100 fine and three (minimum) to six months (maximum) licence disqualification.

The penalty for a second or subsequent offence is a maximum \$2,200 fine and licence disqualification for a minimum of six months up to an unlimited period.

If a person is unable to provide a sample of their oral fluid, they will be taken by the police to a hospital to provide a blood sample.

It is also an offence to:

- refuse to provide an oral fluid sample, or refuse or fail to submit to providing a blood sample when unable to provide an oral fluid sample;
- wilfully introduce or alter the amount of a drug in oral fluid or blood after being required to provide an oral fluid or blood sample.

## **Driving under the influence of drugs**

Police have the power to take a driver to a hospital to obtain a blood and urine sample if:

- the manner of driving suggests that the driver is impaired by drugs;
- the driver is involved in a fatal crash.

The sample will be analysed for any drug, including some prescription medicines known to impair driving.

Blood and urine samples are sent to the laboratory at Lidcombe of the Division of Analytical Laboratories, Institute of Clinical Pathology and Medical Research, Western Sydney Area Health Service, for confirmatory analysis.

The penalty for a first offence is a maximum \$2,200 fine, a maximum gaol term of 9 months and six months (minimum) to unlimited (maximum) licence disqualification.

The penalty for a second or subsequent offence is a maximum \$3,300 fine, a maximum gaol term of 12 months and licence disqualification for a minimum of 12 months up to an unlimited period.

It is also an offence to refuse to submit to the taking of a blood or urine sample after involvement in a fatal crash, or wilfully introduce or alter the amount of a drug in blood or urine after involvement in a fatal crash.

## **Driving with the presence of cocaine or morphine (heroin)**

There is also an offence of driving with the presence of cocaine or morphine (heroin) in blood or urine (unless the morphine was taken for medicinal purposes).

Blood and urine samples are sent to the laboratory at Lidcombe of the Division of Analytical Laboratories, Institute of Clinical Pathology and Medical Research, Western Sydney Area Health Service, for confirmatory analysis.

The penalty for a first offence is a maximum \$1,100 fine and three (minimum) to six months (maximum) licence disqualification.

The penalty for a second or subsequent offence is a maximum \$2,200 fine and licence disqualification for a minimum of six months up to an unlimited period.

\* Source: NSW Roads and Traffic Authority (2009), RTA website, viewed 6 March 2009 <<http://www.rta.nsw.gov.au/>>

**CIVIL AVIATION SAFETY AUTHORITY (CASA) TESTING PROGRAM\*\***

**Background**

New regulations amending the *Civil Aviation Safety Regulations 1998* (made under the *Civil Aviation Act 1988*) came into force on 23 September 2008:

- enabling CASA to require certain aviation industry organisations, such as airlines and maintenance companies, to have in place a drug and alcohol management plan (DAMP); and
- requiring CASA to conduct additional random alcohol and drug testing to audit these programs.

The regulations cover all who engage in safety-sensitive aviation activities (SSAA), including pilots, engineers, cabin crew, flight instructors, re-fuelers, dispatchers, load controllers, baggage handlers, air traffic controllers and CASA staff that perform duties airside.

**DAMP Testing Program**

DAMPs cover pre-employment testing, reasonable suspicion testing and post-accident testing, as well as education, training and rehabilitation.

Random testing is not mandated in the DAMP requirements, but this will not prohibit DAMP organisations from undertaking such testing under their own internal policy.

DAMP organisations may use either oral fluid or urine testing, so long as it meets the relevant Australian Standard:

- AS 4760-2006, *Procedures for specimen collection and the detection and quantitation of drugs in oral fluid* (for the detection of opiates, amphetamine-type stimulants, cannabis and cocaine); or
- AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine* (for the detection of opiates, amphetamine-type stimulants, cannabis, cocaine and benzodiazepines).

**CASA Random Testing Program**

Under the CASA random testing program, which commenced in May 2009, it is an offence for people to perform, or be available to perform, safety-sensitive aviation activities while being over the permitted level for drugs or alcohol.

For drugs other than alcohol, CASA will be testing oral fluid samples for the presence of opiates, cannabis, amphetamine-type stimulants and cocaine.

For these testable drugs, the permitted level is a concentration of the testable drug that is less than the confirmatory target concentration for that drug specified in Table 5.1 of AS 4760-2006.

CASA will be following the testing process prescribed in its legislation, based on the Australian Standard 4760. An oral fluid sample will be taken and an on-site screening test will be conducted. If there is an indication of the presence of any of the testable drugs on the screening test, the donor may be asked to provide further samples, or the donor's sample will be split, and the samples sent to a NATA accredited laboratory, or a forensic equivalent, for confirmation of both the presence and the permitted level of the testable drug. All confirmatory tests conducted by the laboratory will be reported to the Medical Review Officer within CASA for verification.

The CASA testing regime is using oral fluid instead of urine for drug testing as it is more likely to detect the presence of the active substance in the sample from recent use, whereas urine testing provides information about a larger window of detection, providing a recent history of use.

While the aim of the CASA program is preventative, not punitive, the regulations provide for a suitable enforcement regime to deal with personnel whose tests return confirmed readings over the permitted levels for drugs or alcohol.

Criminal proceedings are possible if an SSAA employee returns a confirmatory positive test result when undergoing CASA testing. However, there are no offences against individuals under DAMP testing, which is unlikely to be conducted to the same evidential standards as required by the CASA testing.

\*\* Source: Civil Aviation Safety Authority (2009), CASA website, viewed 6 March 2009 <<http://aod.casa.gov.au/aod/>>

## KEY SOURCES

AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine*

AS 4760-2006, *Procedures for specimen collection and the detection and quantitation of drugs in oral fluid*

Civil Aviation Safety Authority (2009), CASA website, viewed 6 March 2009  
<<http://aod.casa.gov.au/aod/>>

NSW Independent Transport Safety and Reliability Regulator Drug and Alcohol Prosecution Policy

*NSW Rail Safety Act 2008*

*NSW Rail Safety (Drug and Alcohol Testing) Regulation 2008*

NSW Roads and Traffic Authority (2009), RTA website, viewed 6 March 2009  
<<http://www.rta.nsw.gov.au/>>