



PROSECUTION POLICY

RAIL SAFETY (DRUG AND ALCOHOL TESTING) REGULATION 2008

Introduction

The *Rail Safety Act 2008* requires rail transport operators 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 drug and alcohol management program is to include any matters required to be included by the regulations, including requirements with respect to:

- protocols for fair procedures, and
- education and assistance of rail safety workers.

The Rail Safety (Drug and Alcohol Testing) Regulation 2008 also makes provision for random, targeted/reasonable cause and post-incident drug and alcohol testing of rail safety workers engaged in rail safety work.

Since 1 July 2004, accredited operators have been required to notify the ITSRR of the results of any positive drug and alcohol tests and refusals to undergo testing.

The ITSRR also undertakes a limited program of random testing to supplement operator testing programs and provide a further deterrent to drug and alcohol use before or during the undertaking of rail safety work.

Offences

The *Rail Safety (Drug and Alcohol Testing) Regulation 2008* establishes a range of offences including:

- the carrying out of rail safety work with the prescribed concentration of alcohol in breath or blood (i.e., 0.02%) (clause 12);
- the carrying out of rail safety work while under the influence of alcohol or any other drug (clause 13);
- refusing to undergo a drug and alcohol test (clause 27);

- interfering with the results of a test (clause 29); and
- interfering or tampering with drug or alcohol test blood or urine samples (clause 31).

Note that under clause 15(4) of the *Rail Safety (Drug and Alcohol Testing) Regulation 2008*, the results of any breath or urine test undertaken pre-sign-on (that is, before a rail safety worker carries out rail safety work) or the results of any subsequent breath analysis or urine analysis relating to those tests undertaken pre-sign-on, are not admissible in any proceedings under this Regulation or Prosecution Policy.

Authority to Prosecute

Prosecutions under the *Rail Safety Act 2008* may only be initiated by the ITSRR, or by persons authorised by the ITSRR to initiate such prosecutions.

To ensure the fair and consistent application of this Prosecution Policy, the ITSRR will retain the sole right to initiate prosecutions of drug and alcohol offences.

Decision to Prosecute

Minimising the risks to safety in the public interest is the paramount consideration when determining whether or not to initiate a prosecution. That is, the ITSRR must determine whether the public interest in encouraging the widespread implementation of random testing programs, the self-reporting of drug and alcohol problems and the provision of assistance to staff that have a drug and alcohol problem, outweighs the public interest in deterring the prohibited behaviour.

This question of whether or not the public interest necessitates that the matter be prosecuted is determined by the ITSRR considering the following:

1. Whether or not there is sufficient evidence to establish a prima facie case

A prime facie case is established if there is admissible evidence available to prove every element of the alleged offence.

2. Whether or not there is a reasonable prospect of securing a conviction

The ITSRR should evaluate the evidence with regard to the following matters, including:

- i. the availability, competence and credibility of witnesses and the admissibility of such evidence; and
- ii. the reliability of the evidence of each witness and any conflicts in the evidence of eye witnesses; and
- iii. the reliability of any admissions, if any, made by defendants; and

- iv. any other factors which could affect the likelihood or otherwise of a conviction.

This list is not exhaustive and the matters to consider will vary depending on the circumstances of each case.

3. *Whether or not any discretionary factors dictate that the matter should not proceed to a prosecution*

While the factors to be taken into account vary from case to case, they may include the following:

- i. the seriousness of the alleged offence and/or whether the offence is of a technical nature only;
 - for example, a rail safety worker who fails or refuses a test after being involved in a safety incident or after being suspected of being under the influence of drugs or alcohol while undertaking rail safety work is a serious offence;
- ii. any mitigating or aggravating circumstances;
- iii. the degree of culpability of the alleged offender in relation to the offence;
 - for example, the results of drug and alcohol tests, including the type and levels of drugs detected or the level of breath or blood alcohol; and/or
 - the likelihood and severity of risks to safety that may have arisen due to drugs and alcohol, in view of the individual's duties and existing risk control measures;
- iv. the age, physical health, mental health or special infirmity of the alleged offender, witness or victim;
- v. the availability and efficacy of any alternatives to prosecution;
 - for example, any disciplinary action taken by the employer, or if the rail safety worker is participating in an employer-sponsored drug and alcohol rehabilitation or counselling program and their level of compliance with the program;
- vi. the prevalence of the alleged offence and the need for deterrence, both personal (for example, if the rail safety worker has any prior convictions for drug and alcohol offences, or previous positive test results or refusal of testing), and general prevalence of the alleged offence;
- vii. the length of time since the alleged offence occurred and the likely length and expense of a trial;

- viii. whether the prosecution would be perceived as counter-productive, i.e. as bringing the law into disrepute; and
- ix. whether the consequences of any resulting conviction would be unduly harsh or oppressive.

The applicability of and weight to be given to these factors and any other relevant factors will depend on the particular circumstances of each case.

It is recognised that the resources available to the ITSRR for prosecuting are finite and should not be expended on pursuing inappropriate cases.

Irrelevant factors

The decision by the ITSRR on whether or not to prosecute must clearly not be influenced by:

- i. the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- ii. personal feelings concerning the offence, the alleged offender or the victim;
- iii. possible political advantage or disadvantage to the Government or any political group or party;
- iv. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision; or
- v. possible media or community reaction to the decision.

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