



What are the relevant legislative provisions relating to drug and alcohol management in NSW?

Rail Safety National Law (NSW) No 82a (RSNL)

- > Section 52(2)(c) – rail transport operators’ duty to ensure that rail safety workers do not carry out rail safety work, and are not on duty, while impaired by alcohol or a drug
- > Section 115 – requirement for operators to have a drug and alcohol management program (DAMP) as part of their safety management system (SMS)
- > Sections 123 to 129A – drug and alcohol testing by the Regulator

Rail Safety National Law National Regulations 2012 (the National Regulations)

- > Clause 28 – DAMP requirements

Note that clauses 28(2), (3) and (4) relate specifically to drug and alcohol testing requirements in NSW, such as the requirement for random testing of 25% of rail safety workers (which does not apply to heritage railways), the requirement for post-incident testing after a prescribed incident, and additional reporting requirements.

- > Clause 56(1)(a)(i) – operators to provide the Regulator with a monthly return
- > Clause 57(1)(b)(xxi) and (xxia) – reporting of drug and alcohol notifiable occurrences

Rail Safety (Adoption of National Law) Regulation 2012

- > Clauses 4 to 30 – include further details on drug and alcohol testing in NSW

Is it a requirement to conduct random breath or urine testing of rail safety workers?

Yes. NSW operators that are not heritage operators are required to conduct random breath or urine testing of not less than 25% of their rail

safety workers each year – see (National Regulation 28(2)(a)(i)).

Can NSW operators undertake saliva testing in addition to urine testing?

Yes. NSW operators may conduct oral fluid testing, but this will not form part of the 25% of random testing required by National Regulation 28(2)(a)(i).

Is it a requirement to conduct post-incident testing of rail safety workers?

Yes. If a rail safety worker is involved, or is reasonably suspected of having been involved, in a prescribed incident, the operator must, unless there is a reasonable excuse not to, require the worker to undergo drug and alcohol testing within three hours immediately after the incident (– see National Regulation 28(2)(a)(ii)).

What are the prescribed incidents for post-incident testing?

Prescribed incident means any of the following that occur on railway premises:

- (a) a collision between rolling stock
- (b) a collision between rolling stock and a person
- (c) a collision between rolling stock and a road vehicle or plant equipment
- (d) the derailment of rolling stock
- (e) a breach of the rail infrastructure manager’s network rules
- (f) any other incident that the Regulator may, by notice in writing to a rail transport operator, declare to be a type of prescribed incident in respect of the operator’s railway operations

See clause 28(7) of the National Regulations.

What are the rail safety drug and alcohol offences under the RSNL?

- > Section 52(2)(c) – a rail transport operator must ensure, so far as is reasonably practicable, that rail safety workers do not carry out rail safety work, and are not on duty, while impaired by alcohol or a drug – penalties

are detailed in sections 58, 59 and 60 of RSNL.

- > Section 115 – failure of a rail transport operator to prepare and implement a DAMP that complies with the prescribed requirements relating to drug and alcohol management programs (maximum penalty in the case of an individual - \$50,000, in the case of a body corporate - \$500,000)
- > Section 125(3) – failure of a person to return an identity card to the Regulator if that person ceases to be an authorised person (maximum penalty - \$5,000)
- > Section 126(3) – failure to comply with a direction given by an authorised person for the purpose of requiring the worker to submit to a preliminary breath test or breath analysis (maximum penalty - \$10,000).
- > Section 127(3) – failure to comply with a direction given by an authorised person for the purpose of requiring the worker to submit to a drug screening test, urine screening test, oral fluid analysis or blood test (or any combination of these) (maximum penalty - \$10,000)
- > Section 128(1)(a) - carrying out rail safety work with the prescribed concentration of alcohol in breath or blood, which is any concentration (maximum penalty - \$10,000)
- > Section 128(1)(b) – carrying out rail safety work while a prescribed drug is present in oral fluid or blood (maximum penalty - \$10,000)

Section 128(5) defines prescribed drug as:

- delta-9-tetrahydrocannabinol;
 - Methylamphetamine (Methamphetamine)
 - 3,4-Methylenedioxymethylamphetamine (MDMA)
- > Section 128(1)(c) – carrying out rail safety work while under the influence of alcohol or a drug (maximum penalty - \$10,000)

There are additional NSW drug and alcohol offences under the *Rail Safety (Adoption of National Law) Regulation 2012*:

- > Clause 21(1) – worker refuses or fails to submit to an assessment of sobriety (maximum penalty - 10 penalty units*)
- > Clause 21(2) – worker fails to provide a sample of his or her own blood, oral fluid or urine when requested to do so (maximum penalty – 10 penalty units*)
- > Clause 22 – worker does anything, or causes anything to be done, to introduce, or alter the concentration of, alcohol or any drug in the worker’s or another worker’s breath, blood, oral fluid or urine before the worker or another worker submits to a breath analysis or provides a sample of blood, oral fluid or urine (maximum penalty – 25 penalty units* or imprisonment for 9 months, or both)
- > Clause 23(1) – an authorised sample taker refuses or fails to take a blood sample (or does not comply with the requirements of clause 16 with respect to blood samples) (maximum penalty – 10 penalty units*)
- > Clause 23(3) – any person does not comply with the requirements of clauses 16, 17 or 18 with respect to taking a blood, oral fluid or urine sample from a rail safety worker (maximum penalty – 10 penalty units*)
- > Clause 23(4) – a person must not hinder or obstruct an authorised sample taker or other person in attempting to take a sample of blood or urine of any other person (maximum penalty – 20 penalty units*)
- > Clause 23(5) – a person must not hinder or obstruct an authorised person in attempting to take an oral fluid sample from or administering an oral fluid drug screening test on another person (maximum penalty – 20 penalty units*)
- > Clause 23(6) – a person must not hinder or obstruct an authorised person in attempting to administer a urine screening test for any other person (maximum penalty – 20 penalty units*)
- > Clause 24 – a person must not interfere or tamper with or destroy a sample of a person’s blood, oral fluid or urine except for in certain circumstances (maximum penalty – 20 penalty units*)

* In NSW, One penalty unit is equivalent to \$110.

What is the prescribed concentration of alcohol in breath or blood?

The prescribed concentration of alcohol is any concentration of alcohol in breath or blood - see *section 128(5) of the Rail Safety National Law (NSW) and clause 5 of the Rail Safety (Adoption of National Law) Regulation 2012.*

What are the drug limits for urine testing?

The drug limits for urine testing are specified in AS/NZS 4308:2008, *Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine.*

Can any person conduct drug and alcohol testing under the RSNL?

No. Drug and alcohol testing must be carried out by an authorised person, appointed under the RSNL – see section 124(1).

What is the process for the appointment of authorised persons?

The process is described in the fact sheet *Appointment of authorised persons to conduct drug and alcohol testing in NSW* on the ONRSR website.

Do authorised persons need to have an identity card?

Yes. The National Rail Safety Regulator is required to give each authorised person an identity card that states the person's name and appointment as an authorised person.

An authorised person must produce their identity card for inspection if requested to do so by a person they have asked to submit to a test – see section 125 of the RSNL.

When may an authorised person require a rail safety worker to submit to a drug or alcohol test?

An authorised person may at any time require a rail safety worker to submit to a preliminary breath test or breath analysis (or both), or a drug screening test, urine screening test, oral fluid analysis or blood test (or any combination of these) if the worker:

- (a) is about to carry out rail safety work; or
- (b) is carrying out rail safety work; or
- (c) is attempting to carry out rail safety work; or
- (d) is still on railway premises after carrying out rail safety work; or
- (e) without limiting a preceding paragraph – is involved in a prescribed notifiable occurrence
- (e1) without limiting a preceding paragraph – is involved in an accident or irregular incident while carrying out rail safety work.

See sections 126 and 127 of the RSNL.

What does “about to carry out rail safety work” mean?

A rail safety worker is considered to be “about to carry out rail safety work” if the worker:

- has left home or a temporary residence for work (being rail safety work); and
- has not commenced work after having so left home or the temporary residence.

See section 129A(1) of the RSNL.

Can test results be used for an offence where the rail safety worker had not commenced work?

No. The results of any breath test, breath analysis, drug screening test, oral fluid analysis or blood or urine test conducted on a rail safety worker who was about to carry out rail safety work are not admissible in any proceedings for an offence under section 128 of the RSNL – see clause 6 of the *Rail Safety (Adoption of National Law) Regulation 2012.*

This provision is designed to draw a distinction between a worker who has not signed on for duty, and a worker who is carrying out rail safety work,

or is attempting to carry out rail safety work after signing on for duty.

This distinction does not apply to the failure to undergo testing, or to tampering with samples. These offences, if committed by a worker who is about to carry out rail safety work, are admissible in any proceedings for an offence under section 128 of the RSNL.

What drug and alcohol testing incidents require notification to ONRSR?

There is a requirement for all accredited rail transport operators to notify the ONRSR as a Category B notifiable occurrence of the failure of a rail safety worker to submit to a test, or where the test result suggests the worker was in breach of the operator's DAMP (see clauses 57(1)(b)(xxi) and (xxia) of the National Regulations).

NSW operators are also required to provide additional details, on the approved form in the event of the following incidents:

- > positive alcohol breath tests, breath analysis or blood analysis (where breath or blood analysis confirms the presence of **any** alcohol)
- > positive drug tests (where urine or blood analysis confirms the presence of a drug other than alcohol) including:
 - illicit drugs; and
 - prescribed or over-the-counter medication; (the approved form has space for operators to describe if (a) the rail safety worker advised they were taking medication prior to the test and (b) if the results were consistent with the medication declared);
- > Failure to undergo tests:
 - where workers have been unable to provide a urine or blood sample, or fail to undergo a breath test or undergo a breath analysis;
- > Tampered tests, where there has been interference with blood or urine samples taken, or interference to alter the concentration of alcohol or any other drug in a rail safety

worker's breath, blood or urine before submitting to a breath analysis or providing a blood or urine sample.

For example, the test results may show an abnormal result, such as:

- > low creatinine levels, which may indicate dilution in some individuals;
- > abnormal temperature readings; and
- > synthetic urine samples.

These requirements are specified in clause 28(2)(b) of the National Regulations.

NOTE: A positive breath test indicating the presence of the prescribed concentration of alcohol must still be reported to the ONRSR under clauses 28(2)(b)(iv) and 57(1)(b)(xxia) of the National Regulations, even if a subsequent breath test or analysis falls below the cut-off.

The approved forms are available on the ONRSR website at www.onrsr.com.au

Notifications should be emailed to occurrences@onrsr.com.au.

Other than drug and alcohol testing incidents, what other D&A reporting to the ONRSR is required?

Rail transport operators must include the number of drug and alcohol tests they conduct (including any oral fluid tests) in their monthly returns to the ONRSR (see clause 56(1)(a)(i) of the National Regulations), including:

- the type of tests conducted
- the class of rail safety work undertaken
- positive results
- refusals
- the number of employees (including volunteers) engaged in rail safety work, as at the last working day of the month

The approved forms are available on the ONRSR website at www.onrsr.com.au

Monthly returns should be emailed to occurrences@onrsr.com.au.

What are the notification requirements for heritage operators?

All rail transport operators, including heritage operators, are required to provide a monthly return on the number of drug and alcohol tests conducted by the rail transport operator (see clause 56(1)(a)(i) – National Regulations) as outlined above.