

Rail Safety National Law (Queensland) Regulation 2017

Explanatory notes for SL 2017 No. 75

made under the

Rail Safety National Law (Queensland) Act 2017

General Outline

Short title

Rail Safety National Law (Queensland) Regulation 2017

Authorising law

Section 270 of the *Local Government Act 2009*

Section 63 of the *Rail Safety National Law (Queensland) Act 2017*

Section 38 of the *Transport Planning and Coordination Act 1994*

Section 276 of the *Work Health and Safety Act 2011*

Policy objectives and the reasons for them

On 28 February 2017, the Queensland Parliament enacted the *Rail Safety National Law (Queensland) Act 2017*. The primary purpose of the Act is to repeal the *Transport (Rail Safety) Act 2010* and apply the Rail Safety National Law as a law of Queensland.

The policy objective of the *Rail Safety National Law (Queensland) Regulation 2017* (the local regulation) is to prescribe detail to support the Office of the National Rail Safety Regulator's (the ONRSR) drug and alcohol testing program, prescribe the method for calculating the rail safety investigation fee, prescribe detail around payment of the fee, and make minor consequential amendments.

Drug and alcohol testing provisions

The Rail Safety National Law includes offences for a rail safety worker to carry out, or attempt to carry out, rail safety work while there is alcohol present in their blood, while a prescribed drug is present in their oral fluid or blood or while they are so much under the influence of alcohol or a drug as to be incapable of effectively discharging a function or duty of a rail safety worker.

While the offences are contained in the Rail Safety National Law, the Rail Safety National Law provides that jurisdictions will prescribe the manner in which the ONRSR drug and alcohol testing program will be conducted. As a result, detailed drug and alcohol testing processes are included in the *Rail Safety National Law (Queensland) Act 2017* and further detail is to be prescribed by the local regulation.

Retaining funding for rail safety investigations

Prior to 1 July 2017, the annual rail safety accreditation fees paid by rail transport operators and collected by the Department of Transport and Main Roads (TMR) under the *Transport (Rail Safety) Act 2010*, covered both the cost of undertaking regulatory functions and no-blame rail safety investigation functions.

Under the Rail Safety National Law, the ONRSR will collect the cost of undertaking regulatory functions only. The ONRSR will not collect fees to cover the cost of the Australian Transport Safety Bureau (ATSB) undertaking no-blame rail safety investigations.

To continue to fund the ATSB undertaking no-blame rail safety investigations in Queensland, from 1 July 2017 the *Rail Safety National Law (Queensland) Act 2017* includes a power to prescribe a rail safety investigation fee. TMR will continue to administer this adjusted fee, and will collect only the annual amount required to fund no-blame investigations in Queensland.

Consequential Amendments

Due to the repeal of the *Transport (Rail Safety) Act 2010*, consequential amendments to regulations that currently include references to that Act are also included in the local regulation.

Achievement of policy objectives

Drug and alcohol testing provisions

The drug and alcohol testing provisions contained in the *Rail Safety National Law (Queensland) Act 2017* closely follow the existing drug and alcohol roadside testing procedures contained in the *Transport Operations (Road Use Management) Act 1995*.

Likewise, the drug and alcohol testing provisions in the local regulation closely mirror the existing provisions contained in the *Transport Operations (Road Use Management) Act 1995* and the *Traffic Regulation 1962*.

Retaining funding for rail safety investigations

The formula developed to calculate the prescribed rail safety investigation fee, as contained in the local regulation, was developed in line with the principles that operators most likely to be subject to a no-blame rail safety investigation by the ATSB pay fees relative to the size of their operation, and that the total fee amount collected is only used to fund the cost of the ATSB. The funding amount will be indexed by national CPI annually.

Consequential Amendments

The local regulation makes consequential amendments to the following regulations to update references to the *Rail Safety National Law (Queensland) Act 2017*:

- *Local Government Regulation 2012*;
- *Transport Planning and Coordination Regulation 2005*; and
- *Work Health and Safety Regulation 2011*.

Consistency with policy objectives of authorising law

The local regulation is consistent with the policy objectives of the *Rail Safety National Law (Queensland) Act 2017*.

Inconsistency with policy objectives of other legislation

The local regulation does not create any inconsistencies with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

The local regulation is the only effective means of achieving the policy objectives.

Benefits and costs of implementation

Prior to the commencement of the *Rail Safety National Law (Queensland) Act 2017*, the cost of rail safety regulation and no-blame safety investigations was fully cost-recovered by fees paid by Queensland rail transport operators.

Rail transport operators will continue to fund the cost of rail safety regulation by payment of annual accreditation fees to the ONRSR. Prescribed accredited operators (those travelling more than 1.5 million kilometres annually in Queensland) will fund the cost of no-blame safety investigations by payment of the annual rail safety investigation fee. Any rail operator subject to the rail safety investigation fee will not pay more in regulation and accreditation fees than they did prior to transition to the national regulator and investigator.

Therefore, implementation of the local regulation is not expected to result in any ongoing additional costs to rail transport operators or to the Queensland Government.

Consistency with fundamental legislative principles

The local regulation is consistent with fundamental legislative principles, as set out in section 4 of the *Legislative Standards Act 1992*.

Consultation

Stakeholders were extensively consulted in relation to the development of the *Rail Safety National Law (Queensland) Act 2017*, including in relation to the rail safety investigation fee.

On 19 and 20 April 2016, TMR, in conjunction with the ONRSR, conducted forums for rail transport operators, unions and rail representative bodies to discuss how the rail safety reforms will be applied in Queensland, the cost recovery methodology and how the transition to the National Rail Safety Regulator might impact their operations. This included detailed consultation on the proposed rail safety investigation fee.

TMR has continued to keep stakeholders up to date during the transition process. ONRSR and the ATSB will also engage with all relevant stakeholders throughout the transition process.

In accordance with *The Queensland Government Guide to Better Regulation*, the Office of Best Practice Regulation, Queensland Productivity Commission, was not consulted in relation to the local regulation. TMR applied a self-assessable exclusion from undertaking further regulatory impact analysis (Category A—Regulatory proposals that make consequential amendments).

Notes on Provisions

Part 1 Preliminary

1 Short title

Clause 1 provides that, when made, the short title of the regulation is the Rail Safety National Law (Queensland) Regulation 2017.

2 Commencement

Clause 2 provides for the regulation to commence at the end of 30 June 2017, to coincide with the commencement of the *Rail Safety National Law (Queensland) Act 2017*.

3 Definitions

Clause 3 specifies that schedule 1 of the regulation defines particular words used in the local regulation.

Part 2 Drug and alcohol testing

4 Analyst's laboratory—Act, s 15

Clause 4 prescribes the laboratories that can carry out a saliva analysis or laboratory test, for the purpose of the definition of analyst in section 15 of the *Rail Safety National Law (Queensland) Act 2017*.

The prescribed laboratory for a laboratory test is Forensic and Scientific Services, Health Support Queensland, Department of Health.

The prescribed laboratory for a saliva analysis is Racing Analytical Services Limited in Victoria.

5 Preliminary breath test—Act, s 15

Clause 5 approves the device to undertake the preliminary breath test for the purpose of the definition of preliminary breath test in section 15 of the *Rail Safety National Law (Queensland) Act 2017*.

An approved device is a device that complies with AS 3547-1997, Breath alcohol testing device for personal use.

6 Preliminary saliva test—Act, s 15

Clause 6 approves the device to undertake the preliminary saliva test for the purpose of the definition of preliminary saliva test in section 15 of the *Rail Safety National Law (Queensland) Act 2017*.

The approved device is the Medvet Oral7.

7 Laboratory test—Act, s 15

Clause 7 approves the laboratory test to analyse a specimen of saliva, for the purposes of the definition of saliva analysis in section 15 of the *Rail Safety National Law (Queensland) Act 2017*.

The approved laboratory test is a laboratory test that uses mass spectrometry to identify the presence of a prescribed drug.

8 Requirements for providing specimen of breath or saliva for analysis—Act, s 34

Clause 8 prescribes how a specimen of breath for analysis must be provided for the purposes of section 34 of the *Rail Safety National Law (Queensland) Act 2017*.

A rail safety worker, when directed to give a specimen of breath for analysis by an authorised person, must:

- place their mouth over the mouthpiece of the breath analysing instrument when and in the manner directed by the instrument operator, and
- blow directly and continuously through the mouthpiece until told to stop by the instrument operator.

Clause 8 also prescribes how a specimen of saliva for analysis must be provided for the purposes of section 34 of the *Rail Safety National Law (Queensland) Act 2017*.

A rail safety worker, when directed to give a specimen of saliva for analysis by an authorised person, must:

- place a collection unit or allow a collection unit to be placed into or adjacent to their mouth, when and in the manner directed by the instrument operator, and
- provide the specimen until told to stop by the instrument operator.

The collection unit, for collecting the saliva specimen for analysis, is any of the following:

- saliva collection swab from a Cozart DDS805 2-panel methamphetamine/THC test kit
- saliva collection swab from a Cozart DDS805AP test kit
- a Draeger DCH 5000 attached to a Draeger DrugTest 5000 STK, or
- an UltraSal-2.

9 Blood specimens

Clause 9 provides how a health care professional must take a specimen of blood for a laboratory test and sign a specimen certificate stating particular information, including the identifying number the health care professional placed on the specimen tube containing the specimen of blood.

A copy of the specimen certificate must be given to an analyst with the specimen of blood to which the certificate relates. The copy of the specimen certificate is sufficient authority for the analyst to be able to issue an analyst's certificate for the specimen under section 46 of the *Rail Safety National Law (Queensland) Act 2017*.

The specimen certificate is evidence of particular matters.

10 Dealing with blood specimens

Clause 10 provides that a duplicate specimen of blood must be dealt with by the health care professional in the same way as the specimen of blood for the laboratory test was dealt with.

Section 33 of the *Rail Safety National Law (Queensland) Act 2017* allows a rail safety worker to request a duplicate specimen of blood.

11 Delivery of specimen to laboratory—Act, s 38

Clause 11 prescribes, for the purposes of section 38 of the *Rail Safety National Law (Queensland) Act 2017*, the way a specimen of saliva or blood must be delivered to the laboratory of an analyst. A specimen of saliva or blood must be delivered to the laboratory of an analyst in accordance with the International Air Transport Association Dangerous Goods Regulations, except when it is delivered personally.

12 Authority for analyst to issue certificate of an analysis for specimen of saliva

Clause 12 sets out that a copy of a certificate prepared under section 41(2) of the *Rail Safety National Law (Queensland) Act 2017* is sufficient authority for the analyst to be able to issue an analyst's certificate under section 46 of the *Rail Safety National Law (Queensland) Act 2017*.

The certificate prepared under section 41(2) of the Act states matters such as the name of the rail safety worker who was required to submit to saliva analysis, the name of the authorised person who made the requirement, and the date, place and time the requirement was made. A copy of this certificate is to accompany the specimen of saliva to be given to the analyst.

13 Evidence—authorised persons

Clause 13 provides that evidence by an authorised person that they used a device for carrying out a preliminary breath test or preliminary saliva test, is sufficient evidence, unless the contrary is proved, that the device was approved by regulation for the purposes of the test.

14 Evidence—breath analysing instruments

Clause 14 establishes that a standard alcohol solution is a solution, prepared by an analyst or an approved supplier, of ethyl alcohol and distilled water suitable for use with an approved breath analysing instrument.

A certificate signed by the analyst or the approved supplier that states that the analyst or approved supplier prepared the solution of ethyl alcohol and distilled water, that the solution is suitable for use with an approved breath analysing instrument and the solution is in a sealed, numbered container is evidence (unless the contrary is proved) that the solution in the numbered container is a standard alcohol solution.

15 Evidence—authority to operate breath analysing instrument

Clause 15 provides that a police officer is not required to produce the certificate of authority that they are authorised to operate a breath analysing instrument in a proceeding under the *Rail Safety National Law (Queensland) Act 2017*.

However, if a person intends to dispute that the police officer was authorised to use the breath analysing instrument, the person must give the police commissioner written notice of the dispute 14 days before the day fixed for the hearing.

16 Evidence-certificate about breath, saliva and blood specimens

Clause 16 outlines that if an authorised person, health care professional or instrument operator is required to make a certificate relating to a specimen of breath, saliva or blood, and they certify that they have given all necessary directions, and have given a copy of a certificate to the required persons, the certificate is conclusive evidence of all matters in the certificate unless the contrary is proved.

17 Evidence-certificates

Clause 17 applies section 52(2) of the *Rail Safety National Law (Queensland) Act 2017* to all certificates that are signed by a health care professional, an analyst or an approved supplier. Therefore, these certificates are evidence, until the contrary is proved, of all matters stated in the certificate and that the signature on the certificate is the signature of the person who made the certificate.

18 Failure to comply with provisions

Clause 18 establishes that it is presumed that any failure to comply with any sections under the regulation did not affect the result of the analysis or test, unless it is proved otherwise.

Part 3 Rail safety investigation fee

19 Accredited persons for rail safety investigation fee—Act, s 59

Clause 19 provides that a prescribed accredited person, for the purposes of section 59 of the *Rail Safety National Law (Queensland) Act 2017*, is an accredited person who is a rolling stock operator with effective control and management of the operation or movement of trains that travel, in total, more than 1.5 million kilometres within Queensland in the previous calendar year.

Train, for the purposes of this part, is defined in schedule 1, as a train that transports passengers or freight (or both), but does not include a light rail vehicle or tram.

The previous calendar year, for the purposes of this part, is also defined in schedule 1, as the calendar year most recently ended before the start of the financial year in question. As an example of how to work out the previous calendar year: the previous calendar year for the 2017-18 financial year is the 2016 calendar year.

As an example of how this would apply: For the 2017-18 financial year, a prescribed accredited person is a rolling stock operator with passenger and/or freight trains that travel over 1.5 million kilometres within Queensland in the 2016 calendar year.

20 Period for rail safety investigation fee—Act, s 59

Clause 20 prescribes the period for which the rail safety investigation fee is payable for the purposes of section 59(1) of the *Rail Safety National Law (Queensland) Act 2017*. The prescribed period is a financial year.

21 Rail safety investigation fee—Act, s 59

Clause 21 prescribes the rail safety investigation fee, for the purposes of section 59(1) of the Rail Safety National Law (Queensland) Act 2017.

The Rail Safety Investigation Fee is calculated using the following formula: $A/B \times C$, where:

A is the total amount being collected for the prescribed period (i.e. for the financial year in question). The amount for the 2017-18 financial year is \$750,000.

For subsequent years, the amount for A is the rate calculated under section 21(2) and (3) of the regulation. The amount for A, consistent with this part, will be provided with the invoice given under section 23 of the regulation.

B is the total number of kilometres travelled within Queensland by the trains of all prescribed accredited persons in the previous calendar year. This number will be provided with the invoice given under section 23 of the regulation.

C is the total number of kilometres travelled within Queensland by the trains of the prescribed accredited person for the previous calendar year.

22 Date for payment of rail safety investigation fee—Act, s 59

Clause 22 prescribes the date on or before which the rail safety investigation fee must be paid, for the purposes of section 59(2) of the Rail Safety National Law (Queensland) Act 2017. The prescribed date is 31 August in the prescribed period (i.e. 31 August in the financial year as outlined in clause 20 above).

For example, the prescribed date for the payment of the rail safety investigation fee for the 2017-18 financial year is 31 August 2017.

23 Invoice for rail safety investigation fee

Clause 23 specifies that by 31 July of the prescribed period, the chief executive must give a prescribed accredited person an invoice for the rail safety investigation fee.

If the chief executive becomes aware that the invoice was incorrect, the chief executive must notify the prescribed accredited person within 30 days of becoming aware of the error.

The rail safety investigation fee payable by the prescribed accredited person in the following financial year will be adjusted by taking into account the corrected amount.

24 Information to be given to chief executive—Act, s 60

Clause 24 provides that, for the purposes of section 60(1) of the Rail Safety National Law (Queensland) Act 2017, the chief executive can require an accredited person to give the chief executive information about the number of kilometres travelled within Queensland by trains of the accredited person in the previous calendar year.

The accredited person must give the required information in writing, within the period stated by the chief executive. The period stated by the chief executive must be at least 28 days.

Part 4 Consequential amendments

25 Consequential amendments

Clause 25 provides that schedule 2 amends the regulations it mentions.

Schedule 1 Dictionary

Schedule 1 defines a number of terms relevant to the regulation.

The terms *analysis*, *analyst*, *analyst's certificate*, *authorised person*, *breath analysing instrument*, and *health care professional* are defined by reference to section 15 of the *Rail Safety National Law (Queensland) Act 2017*.

The term *instrument operator* for a specimen of breath is also defined by reference to section 15 of the *Rail Safety National Law (Queensland) Act 2017*. The term *instrument operator* for a specimen of saliva means the person operating the collection unit under section 8(2) of the regulation.

The term *police commissioner* means the commissioner of the police service.

The term *previous calendar year*, for a financial year, means the calendar year most recently ended before the start of the financial year.

The term *train* is defined for the purposes of part 3 of the regulation (calculating the rail safety investigation fee) as a train that carries passengers and/or freight but does not include a light rail vehicle or tram.

Schedule 2 Consequential amendments

Schedule 2 makes consequential amendments to the following regulations to update references to the *Rail Safety National Law (Queensland) Act 2017*:

- *Local Government Regulation 2012*
- *Transport Planning and Coordination Regulation 2005*, and
- *Work Health and Safety Regulation 2011*.