

2011

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**ROAD TRANSPORT (ALCOHOL AND DRUGS) AMENDMENT
REGULATION 2011 (No 1)**

SUBORDINATE LAW SL2011-11

EXPLANATORY STATEMENT

Presented by
Mr Jon Stanhope
Minister for Transport

OVERVIEW

This Regulation is made under section 51 of the *Road Transport (Alcohol and Drugs) Act 1977* (the Act).

Its main purpose is to amend the *Road Transport (Alcohol and Drugs) Regulation 2000* to make provision for the use of certain drug testing equipment for the purpose of Part 2 of the Act. It also amends provisions in the Regulation dealing with the content of statements under section 13E (6) of the Act (which are statements about an oral fluid analysis by an analysis instrument) so that the Regulation reflects the contents of statements that will be electronically produced by the drug analysis instrument that has been selected for use in oral fluid drug testing in the ACT.

The Regulation also makes minor amendments to Schedule 1, which deals with contents of statements for section 12 (5) of the Act. These minor amendments will ensure that the contents of these statements better align with the contents of the register of authorised operators that must be kept under section 5A of the Act (this section was inserted by amendments to the Act last year) and the details that are currently recorded on ACT, interstate and foreign driver licences.

The amendments in themselves are not expected to affect human rights, in that they do not create new obligations, create offences, impose penalties or significantly alter any existing entitlements or rights. The amendments are nevertheless part of a scheme for drug testing motorists that does materially affect several human rights. The Explanatory Statement for the *Road Transport (Alcohol and Drugs) Legislation Amendment Act 2010* discusses the human rights implications of roadside drug testing schemes and the justification for the introduction of such a scheme in the ACT as a reasonable limitation of rights for the purpose of section 28 of the *Human Rights Act 2004*. Interested readers are referred to that Explanatory Statement, which is available on the Legislation Register at <http://www.legislation.act.gov.au/default.asp>.

Notes on Clauses

Clause 1 Name of Regulation

This is a formal provision that sets out the name of the Regulation.

Clause 2 Commencement

This is a formal provision that provides for the commencement of the Regulation.

It provides for specified clauses to commence on the day after notification (these are clauses 3 and 4) with clauses 5 to 9 inclusive to commence either on that day, or on the commencement of section 22 of the *Road Transport (Alcohol and Drugs) Legislation Amendment Act 2011*, whichever is the later¹. The purpose of this split commencement provision is to arrange for the changes relating to contents of printouts from breath analysis devices and oral fluid analysis devices to commence at the same time as section 22 of the proposed *Road Transport (Alcohol and Drugs) Legislation Amendment Act 2011* (the proposed Act). That section inserts an example into section 13E (6) of the Act to make it clear that a statement under that provision

¹ Clauses 1 and 2 commence automatically on notification under section 75 (1) of the *Legislation Act 2001*.

may be in the form of a printout from an analysis instrument. The Bill for the *Road Transport (Alcohol and Drugs) Legislation Amendment Act 2011* was presented on 31 March 2011. As it is not known when the Bill will be debated or commence, clause 2 (3) of this Regulation disapplies section 79 of the *Legislation Act 2001*. Without clause 2 (3), section 79 would have the effect of commencing clauses 5 to 9 automatically after 6 months, if they had not already commenced by then.

Clause 3 Legislation amended

This clause explains that the Regulation amends the *Road Transport (Alcohol and Drugs) Regulation 2000*.

Clause 4 New sections 3A and 3B

This clause inserts two new sections into the Regulation. These are sections 3A and 3B.

New section 3A prescribes a drug screening device, the Securetec DrugWipe TWIN – also known as the DrugWipe II TWIN, for section 7B of the Act. This device is manufactured overseas and imported into Australia. As different batches of the same device may be packaged by the manufacturer with either name, both variations of the name have been prescribed to avoid confusion. Victoria has also chosen to prescribe both name variants. The device is currently used by several Australian police forces including Victoria, New South Wales, South Australia and Queensland.

New section 3B prescribes an oral fluid analysis instrument. That instrument is the Cozart DDS. It is currently used by police for roadside oral fluid testing in several other Australian jurisdictions including Western Australia, Queensland and South Australia. An earlier version of that instrument, called the Cozart Rapiscan, is used in Victoria and NSW. That instrument is no longer available for purchase.

Clause 5 Section 5

This clause replaces existing section 5, which deals with the contents of a statement under section 13E (6), with a new section 5. The new section 5 provides that the particulars set out in Schedule 2 must be included in the statement. As explained previously, this amendment is section 22 of the proposed Act, which would make it clear that a printout from the analysis instrument may be used as the statement for section 13E (6). Giving the person an automatically generated printout by way of a statement has the advantage minimizing the time required by police to generate a statement for section 13E (6) and therefore reducing the time the tested person is with the police for drug testing. The matters that are set out in Schedule 2 reflect the contents of the printout generated by the Cozart instrument.

There are several matters that are currently prescribed by section 5 that will not be recorded on the printout. These matters are generic information about the drug testing processes under the Act, including information about how samples are sealed and divided and where they are being stored. As this information will be the same for all tested people, the police will instead give the tested people a standard information sheet that contains these matters, together with the printout that contains the person's specific details and results. Using a pre-printed information sheet rather than a

customised statement for each client that sets out these matters will reduce processing times and enable tested persons to leave police custody more quickly.

Clause 6 Schedule 1, item 1

This amendment is a drafting amendment, to change “sample number of the test” to “test number”. The revised language makes it clearer that it is the number of the test conducted by the device, and not the number of the sample(s) provided by the person, to which this item refers.

Clause 7 Schedule 1, items 3 and 4

This clause omits the word ‘full’ from item 3 and item 4 of Schedule 1.

The requirement to include the tested person’s full name is amended because it appears that ACT, interstate and foreign driver licences and the databases from which driver licence information is derived (which are the primary source of information used by police to identify a driver who is taken into custody for drug testing) do not always contain the person’s full legal name and therefore it may not be possible for police to insert the person’s full name. For example, some driver licences may record an initial in place of a middle name and/or some middle names may be omitted entirely, especially if the driver has several middle names. As many people do not routinely carry their birth certificates, marriage certificates or other primary identification documents that record their full legal name, police may not have ready access to the necessary documentation to confirm the person’s full name where this is not stated on the person’s driver licence.

The opportunity has been taken to amend the requirement to include the full name of the police officer who has custody of the person, to accommodate situations where the officer’s full name exceeds the space available on the printout. The printouts are in the form of a docket and are narrower than an ordinary A4 page. It should be noted that the amended item still contains a requirement to include the police officer’s name so that the relevant officer can be identified, so at a minimum the officer’s first and last name and middle initial(s) must be recorded.

Clause 8 Schedule 1, item 5

This clause replaces the requirement to provide the authorised operator’s full name and rank, with a requirement to provide the authorised operator’s service number and signature. This amendment aligns with changes made to the Act last year that provided for the establishment of a register of authorised operators, which must include the service number of persons who are authorised to operate breath or oral fluid analysis instruments. The register can be accessed publicly from the ACT Policing website at <http://www.police.act.gov.au/roads-and-traffic/drink-driving/register-of-authorised-operators.aspx>.

The publicly accessible part of the Register does not contain either the name or rank of approved operators but it does contain the service number. This amendment will make it much easier for a person who has undergone breath analysis to check the

register to determine whether the person who conducted the analysis was authorised to do so.

Clause 9 New schedule 2

This clause sets out the particulars to be included in the statement for section 13E (6) of the Act. As explained in the clause notes for clause 5, these matters reflect the contents of the printout generated by the Cozart DDS oral fluid analysis instrument. This printout is also in the form of a narrow docket.

Items 1 to 6 set out the particulars to be included in the statement. They include matters such as the instrument type and serial number, the test number, personal details of the test subject, the unique identifying number for the oral fluid sample, the service number and signature of the authorised operator, the date and time of the analysis and the results. These particulars do not fully mirror the particulars required by Schedule 1 for breath analysis statements partly because the printout from the oral fluid analysis instrument is not the same as the printout from the breath analysis instrument, partly because oral fluid samples are collected and stored in a different way than breath samples (the latter simply dissipate into the atmosphere when the test is complete).

For the reasons explained in the notes for clause 7 (that is, to accommodate situations where there are incomplete driver licence records), there is a requirement to record the person's name but no obligation to record the full name. For the reasons explained in the notes for clause 8 (consistency with contents of register of authorised operators), the signature and service number of the authorised operator must also be recorded.

In relation to the test results, it should be noted that the Cozart DDS printout does not differentiate in the 'results' area between methamphetamine and MDMA. Either of these substances, if detected by the analysis, will show as a positive for "XTC". Laboratory analysis is required to determine which of these two drugs was present in the sample (noting that in some cases of polydrug use, both drugs may be present).