

EXPLANATORY STATEMENT

Select Legislative Instrument No. 249, 2015

Issued by the authority of the Minister for Justice

Australian Federal Police Act 1979

*Australian Federal Police Amendment (Workplace Drug Testing and Other Measures)
Regulation 2015*

The *Australian Federal Police Act 1979* (the Act) establishes the Australian Federal Police (AFP) and prescribes the constitution, functions and powers of the AFP.

Section 70 of the *Australian Federal Police Act 1979* (the Act) provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for securing the discipline and good government of the Australian Federal Police (AFP), or for otherwise carrying out or giving effect to the Act.

Section 40P of the Act provides that regulations may be made for the purposes of sections 40LA, 40M and 40N of the Act (dealing with alcohol and drug testing for AFP employees). Section 40J of the Act provides that regulations may be made relating to the conditions an AFP employee must comply with while suspended.

Testing AFP employees and special members for alcohol and drug use is a vital part of detecting and deterring illicit drug use and maintaining the integrity of the AFP. The *Australian Federal Police Regulations 1979* (the Principal Regulations) detail the uniform methods and procedures for implementing and administering the AFP's alcohol and prohibited drug testing regime. The Principal Regulations also set out record keeping and security requirements relating to the AFP's drug testing regime to ensure that the rights and privacy of individual employees and special members are safeguarded.

The AFP conducted a review of its workplace drug testing regime, as set out in the Principal Regulations, and identified several issues with the current framework. In particular, the AFP identified that its current regime may not align with contemporary best practice in all instances. Failure to bring the AFP regulations into line with contemporary best practice may result in the AFP being unable to test AFP employees and special members for illicit drug use in certain circumstances.

The *Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015* (the Regulations) ensure that the AFP's workplace drug testing regime aligns with contemporary sample collection and testing procedures. The Regulations reflect best practice, taking into account scientific advancements in drug testing. The Regulations also clarify that AFP employees are only entitled to be paid base remuneration, and may be directed to undertake drug and alcohol testing, while suspended from duty.

The AFP, National Archives of Australia and the Australian Information Commissioner were consulted on the Regulations.

Details of the Regulations are set out in the Attachment.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations commence on the day after they are registered.

Authority: section 70 of the *Australian Federal Police Act 1979*

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Human rights implications

The *Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015* (the Regulations) engages the following rights:

- the right to privacy, and
- the right to work and rights in work.

The right to privacy

The Regulations engage the right to privacy as they change the period of time for which the AFP may retain body samples indicating the presence of drugs and/or alcohol and the records of any positive or negative test. They also enable the AFP to disclose information from prohibited drug or alcohol tests to government agencies in certain circumstances (for example, to inform another agency's employment decisions).

This is reasonable in the circumstances and proportionate to the aims of the Regulations.

Extending the time for which the AFP may retain body samples and records of positive tests is necessary to allow the completion of long term investigations and prosecutions, which may span over several years. This benefits both the AFP (to enable it to follow through investigations, employment decisions and prosecutions relating to prohibited drug tests) and employees and special members (who may need samples or records of tests to dispute a test result).

Extending the time that negative test results could be retained is necessary to enhance the administration of the AFP's drug testing program. It would also benefit employees and special members, but allowing the AFP to collect a history of negative test results to show a drug or alcohol-free pattern.

Enabling the AFP to share information from drug or alcohol tests with other government agencies in certain circumstances is necessary to ensure that an individual's prohibited drug taking history (and potential associated relationship with organised crime) may be considered

by any agency considering employing that individual. This is critical to mitigate integrity and security risks, particularly given the breadth of government agencies that are involved in combating contemporary crime. It would also help promote broader public sector resilience to the ‘insider threat’ associated with prohibited drug use by employees of government agencies.

In these circumstances, the Regulations create permissible limitations on the right to privacy.

The right to work

The Regulations engage the right to work and rights in work as they clarify the conditions of suspension for AFP employees and special members. This is reasonable in the circumstances and proportionate to the aims of the Regulations.

In particular, the Regulations clarify that AFP employees are not entitled to certain elements of remuneration (relating to additional work hours or work patterns) while suspended from duty. This is appropriate, as suspended employees are not performing any duties for the AFP and financial entitlements related to additional working hours and patterns should not be payable.

The Regulations also clarify the AFP’s power to direct an employee who is suspended from duty to undergo a prohibited drug test. This is necessary to ensure that an AFP employee maintains expected professional standards while he or she is suspended.

In these circumstances, the Regulations create permissible limitations on the right to privacy.

Conclusion

The measures in the Regulations are compatible with the human rights and freedoms recognised or declared in the international instruments listed in the definition of human rights in section 3 of *the Human Rights (Parliamentary Scrutiny) Act 2011*. To the extent that these measures may limit those rights and freedoms, such limitations are reasonable, necessary and proportionate.

ATTACHMENT

Details of the *Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015*

Regulation 1 – Name

This regulation provides that the title of the Regulations is the *Australian Federal Police Amendment (Workplace Drug Testing and Other Measures) Regulation 2015* (Regulations).

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on the day after they are registered.

Regulation 3 – Authority

This regulation provides that the Regulations are made under the *Australian Federal Police Act 1979* (AFP Act). Section 70 of the AFP Act provides that the Governor-General may make regulations prescribing all matters required or permitted by the Act to be prescribed for securing the discipline and good government of the AFP. Section 40P of the Act provides that regulations may be made for the purposes of sections 40LA, 40M and 40N of the Act (which relate to drug and alcohol testing of AFP employees and special members). Section 40J of the Act provides that regulations may be made dealing with the suspension of employees.

Regulation 4 – Schedules

This regulation provides that Schedule 1 to the Regulations amends the *Australian Federal Police Regulations 1979* (Principal Regulations).

Schedule 1 Amendments

Item 1 – Regulation 2

This item repeals the definition of ‘accredited pathology laboratory’. The amendment made by item 2 replaces the definition with a definition of ‘authorised laboratory’.

Item 2 – Regulation 2

This item inserts new definitions for ‘authorised laboratory’, ‘government agency’, ‘head’ of a government agency and ‘integrity agency’ into regulation 2.

1. The term ‘authorised laboratory’ is defined to mean a facility accredited by the National Association of Testing Authorities, Australia (NATA), or a facility covered by a determination in force under regulation 13QA. The analysis of body samples for forensic purposes (e.g. testing hair for the presence of prohibited drugs) is not performed by laboratories that have been approved by the Minister under section 23DN of the *Health Insurance Act 1973*, as the current definition of ‘accredited pathology laboratory’ requires. Such laboratories are instead accredited by NATA. This amendment is intended to reflect current accreditation standards.

2. The term ‘government agency’ is defined to include a Department of the Commonwealth or of a State or Territory, or a body established for a public purpose by or under a Commonwealth, State or Territory law. This definition is intended to capture all government agencies, including Commonwealth law enforcement agencies such as the Australian Crime Commission, Australian Transaction Reports and Analysis Centre, the Australian Commission for Law Enforcement Integrity and CrimTrac. The new definition allows the AFP to disclose certain information to government agencies in limited circumstances, as detailed in new subregulation 13L(2).
3. The term ‘head’ of a government agency is defined to include the Secretary of a Commonwealth Department, the person holding the principal office of a Commonwealth agency established for a public purpose, or the person holding the principal office of a State or Territory agency. Similar to the new definition of ‘government agency’, this new definition allows the AFP to disclose information to the head of a government agency, or the person performing the duties of the head of the agency, in limited circumstances, as detailed in new subregulation 13L(2).
4. The term ‘integrity agency’ is defined to include:
 - (a) the New South Wales Crime Commission;
 - (b) the Independent Commission Against Corruption of New South Wales;
 - (c) the Police Integrity Commission of New South Wales;
 - (d) the Independent Broad-based Anti-corruption Commission of Victoria;
 - (e) the Crime and Corruption Commission of Queensland;
 - (f) the Corruption and Crime Commission of Western Australia;
 - (g) the Independent Commissioner Against Corruption of South Australia;
 - (h) the Integrity Commission of Tasmania.

This definition links to new subregulation 13L(2), which allows the AFP to disclose certain information to defined integrity agencies in limited circumstances. The Australian Commission for Law Enforcement Integrity is not included in this list, as it falls within the new definition of ‘government agency’.

Item 3 – Subregulation 5(1)

This item removes the words ‘an AFP appointee’ from subregulation 5(1) and replaces them with ‘an AFP employee’. This reflects the terminology used in the provisions of the AFP Act which enable the making of regulations (section 40M, 40N and 40P).

Item 4 – Paragraphs 5(1)(a) and (b)

This item removes the word ‘appointee’ and replaces it with ‘employee’. This is consequential to the amendments made by item 3.

Item 5 – Subregulation 5(2)

This item removes the word ‘appointee’ and replaces it with ‘employee’. This is consequential to the amendments made by item 3.

Item 6 – Paragraphs 5(2)(a) and (b)

This item removes the word ‘appointee’ and replaces it with ‘employee’. This is consequential to the amendments made by item 3.

Item 7 – Subregulation 5(3)

This item repeals current subregulation 5(3) and replaces it with a statement that specifies what remuneration an AFP employee is entitled to receive while suspended from duty. This amendment clarifies that, while suspended from duty, an AFP employee is not entitled to composite or other allowances that are usually payable to AFP employees while on duty or while available for duty.

This is appropriate as suspended employees are not performing any duties for the AFP and financial entitlements related to working hours and arrangements should not be payable.

Item 8 – Paragraphs 5(5)(a) to (c)

This item removes the word ‘appointee’ and replaces it with ‘employee’. This is consequential to the amendments made by item 3.

Item 9 – Regulation 5A

This item inserts a new regulation 5A into the Principal Regulations.

New subregulation 5A(1) specifically allows an authorised person to issue a direction to an AFP employee who is suspended from duty to undergo an alcohol screening test, a breath test or provide a body sample for a prohibited drug test. This amendment is necessary to clarify the AFP’s power to direct an employee who is suspended from duty to undergo a prohibited drug test which will provide greater assurance that an AFP employee will maintain expected professional standards while he or she is suspended.

New subregulation 5A(2) makes it compulsory for an AFP employees to comply with a direction given under new subregulation 5A(1).

New subregulation 5A(3) enables an AFP employee who has undergone a breath test and returned a positive result to provide a sample of his or her blood. This is a normal safeguard on breath tests to verify the integrity and accuracy of results.

Item 10 – Subregulation 13F(1)

This item inserts a reference to new subregulation 5A(1) into subregulation 13F(1). This ensures that the AFP Commissioner can authorise a person to provide a direction to an AFP employee who is suspended from duty to undergo a drug or alcohol test, for the purposes of new subregulation 5A(1).

Item 11 - Subregulation 13F(4)

This item inserts a reference to new subregulation 5A(1) into subregulation 13F(4). This is consequential to the amendments made by items 9 and 10 and ensures that a person

authorised by the Commissioner to provide a direction under new subregulation 5A(1) must provide evidence of their authorisation to an AFP employee or special member, when requested to do so.

Item 12 - Subregulation 13H(1)

This item replaces references to sections 40M and 40N in subregulation 13F(1) with references to new subregulation 5A(1) and subsections 40M(1) and 40N(1), (2) or (4). This is consequential to the amendments made by Item 9 and ensures that tests carried out under any of those provisions continue to be conducted in a respectful manner and in circumstances affording reasonable privacy to the AFP employee or special member directed to undergo the test.

Item 13 - Subregulation 13H(4)

This item repeals current subregulation 13H(4) and replaces it with a new subregulation to allow a person collecting a hair sample for the purpose of a prohibited drug test to remove the hair using the least painful technique known and available, collect only as much hair as is reasonably necessary for the analysis of a sample, and collect the sample from any part of the body except the genital or anal area, or the buttocks.

Current subregulation 13H(4) provides that a person collects a hair sample by cutting a strand of hair or removing a strand of hair by its root. This does not reflect the analytical laboratory practice, as a single strand of hair is not sufficient to enable a prohibited drug test to be conducted. Contemporary best practice in hair testing for prohibited drugs requires larger samples. The amendment clarifies the methodology and reflects best practice, as well as providing safeguards for respectful collection of the hair.

Item 14 – Regulation 13K

This item repeals current regulation 13K and substitutes it with a new regulation 13K which governs the security and destruction of body samples.

Currently, regulation 13K provides that all body samples relating to positive drug or alcohol tests must be destroyed no later than two years after they were collected. All other records relating to positive tests must be destroyed as soon as practicable after the AFP employee or special member ceases to be an AFP employee or special member.

The AFP has advised that this is inadequate and it has had investigations spanning beyond two years where the destruction of body samples has weakened the evidence available. New subregulation 13K amends current requirements to increase the length of time a positive test is retained, and enable the AFP to destroy negative results as soon as practicable.

New subregulation 13K(1) provides that the regulation only applies to body samples provided by an AFP employee or special member for the purpose of a prohibited drug test conducted for the purposes of subregulation 5A(1), subsections 40M(1) or 40N(1), (2) or (4) of the Act.

New subregulation 13K(2) ensures that any body sample provided by an employee must be kept in a secure location until such time as it is destroyed in accordance with the regulation.

This ensures the security of body samples and provides protections for AFP employees' privacy.

New subregulation 13K(3) provides that a body sample must be destroyed:

- (a) if the body sample indicates the presence of alcohol or prohibited drugs—no later than three years after the day the test was conducted; or
- (b) in any other case—no later than 28 days after the day the test was conducted.

The increase in the period of time the AFP may retain a body sample indicating a positive result, from two years to three years, is important to allow the evidence of a positive test to be retained until an investigation is complete, providing protection for ongoing investigations that may rely on the retention of positive body samples and that span over a long period of time. Specifically requiring the AFP to destroy body samples indicating a negative result within 28 days ensures all other body samples are destroyed within a reasonable period of time, consistent with current requirements.

New subregulation 13K(4) provides further protection for long term investigations by allowing the Commissioner to determine if a sample needs to be retained for longer than the three year period. The Commissioner may determine that a body sample be retained for the purpose of:

- (a) determining whether the AFP employee or special member has committed an offence or failed to comply with AFP professional standards; or
- (b) assessing the continuing suitability of, as the case requires:
 - (i) the AFP employee for employment as an AFP employee; or
 - (ii) the special member for appointment as a special member; or
- (c) use in any of the following:
 - (i) proceedings in relation to a decision of the Commissioner to terminate the employment of the AFP employee or the appointment of the special member;
 - (ii) proceedings under the *Safety, Rehabilitation and Compensation Act 1988*;
 - (iii) proceedings in tort against the Commonwealth that are instituted by the AFP employee or special member.

This allows any ongoing investigations or legal proceedings to remain on foot for both the AFP (in investigating and taking action in relation to tests) and its employees and special members (should an employee or special member challenge a decision under the Act). It also ensures that the AFP upholds community standards and expectations, particularly around finalising cases and ensuring the maintenance of AFP integrity.

New subregulation 13K(5) provides that, if the Commissioner determines the body sample should be retained for a longer period, the sample must be destroyed at the end of the longer

period. This ensures that the AFP does not have to retain body samples indefinitely, and is consistent with the AFP's obligations under the *Privacy Act 1988*.

New subregulation 13K(6) provides that regulation 13K does not apply to an unanalysed body sample. Unanalysed samples may be destroyed within six months. Unanalysed samples are kept as a safeguard so that employees and special members can take the sample to be analysed by another laboratory, if they do not agree with the result of an analysed sample. If an employee does not collect the unanalysed sample within six months after being informed of the results of the analysis, new subregulation 13K(6) enables the AFP to destroy the sample. This ensures that employees and special members have a reasonable amount of time to collect the sample, while ensuring that AFP does not have to store unanalysed samples indefinitely.

Regulation 13KA

This item inserts a new regulation 13KA into the Principal Regulations to govern the security and destruction of records of body samples from alcohol and prohibited drug tests.

Currently, regulation 13K in the Principal Regulations provides that records of positive tests must be destroyed as soon as practicable after the AFP employee or special member ceases to be an AFP employee or special member. Information from records may only be retained if it is used for compiling a statistical database and it does not include any identifying information. Records of negative tests must be destroyed within 28 days.

The AFP has advised that the current regulation 13K could impede the investigative process. For example, where an appointee resigns from the AFP the records of any positive drug or alcohol tests must be destroyed. It is appropriate where an investigation has commenced that relevant records can be retained to inform that process.

New subregulation 13KA enables the AFP to retain records of positive test results indefinitely. It also provides that the AFP can continue to retain records of a negative test for the period of time that a person is an AFP appointee. This supports the amendments to regulation 13K above, to provide further protection for ongoing investigations.

New subregulation 13KA(1) provides that regulation 13KA only applies to records of alcohol screening tests, a breath test, a blood test or a prohibited drug test conducted for the purposes of subregulation 5A(1) or subsection 40M(1) or 40N(1), (2) or (4) of the Act. This removes any doubt as to the basis for the proposed new subregulation under the Act.

This regulation uses the terminology 'AFP appointees', as one of the enabling provisions in the AFP Act (subsection 40LA(1)) applies to AFP appointees. While the other enabling provisions of the AFP Act (sections 40M and 40N) only apply to AFP employees and special members, it is not necessary to adopt this terminology in addition to 'AFP appointee' because the definition of AFP appointee in section 4 of the Act includes AFP employees and special members.

New subregulation 13KA(2) provides that the record created from the tests referred to in new subregulation 13KA(1) must be kept in a secure location until such time as it is destroyed in accordance with the regulation. This ensures the security of records and appropriate

protections for AFP appointees' privacy. The AFP will also continue to comply with the Privacy Act in the way it handles and secures this information.

New subregulations 13KA(3) and (4) will:

- a) allow the AFP to securely retain all drug testing records with a negative result for the period of an AFP appointee's employment, and
- b) provide that that record must be destroyed as soon as possible after the AFP appointee ceases to be an AFP appointee.

New subregulation 13KA(3) increases the period for which the AFP may retain a record of a negative test from 28 days to such a time as when the appointee ceases to be an AFP appointee. Extending the time that negative test results can be retained under new subregulation 13KA(3) is intended to enhance the administration of the AFP's drug testing program. It will allow the AFP to collect a history of negative test results to show a drug or alcohol-free pattern. The actual body samples indicating a negative result will still be destroyed within the current 28 day period under new paragraph 13K(3)(b).

New subregulation 13KA(4) will ensure that personal information collected from the record is destroyed as soon as possible after it is no longer required by the AFP, consistent with the Privacy Act.

New subregulation 13KA(5) allows the AFP to securely retain all alcohol and drug testing records that indicate a positive result indefinitely. This will help the AFP in determining employment or re-employment suitability. The samples indicating a positive result will be destroyed three years after the test was conducted, or longer as determined by the Commissioner, as outlined in new subregulation 13K.

It is necessary for the AFP to retain records of positive tests indefinitely, as current record keeping restrictions for positive tests (two years) do not reflect the AFP's operational need to retain this information, including the need to keep the AFP's corruption resilience strong. Enabling the AFP to retain identifiable positive test results indefinitely is particularly important to help protect the integrity of the public sector generally. In combination with the amendments made by item 18 below (relating to the disclosure of information to government agencies), this amendment ensures that the AFP can share an individual's positive test record with any future agency considering employing the individual, so that that agency may consider an individual's prohibited drug-taking history (and associated relationship with organised crime) in order to mitigate integrity and security risks.

New subregulation 13KA(6) provides that a record of a positive test can be destroyed if the Commissioner determines, in writing, that it should be destroyed. This enables the Commissioner to destroy records if he or she determines it is appropriate to do so. This will ensure that the AFP does not have to keep records of positive tests past a useful date.

Item 15 – Regulation 13L

This item inserts a new subregulation (1) into regulation 13L to clarify that a person subject to the secrecy requirements in section 60A of the Act may disclose information revealed by a

test conducted for the purpose of subsection 40LA(1), 40M(1) or 40N(1), (2) or (4) only if the circumstances outlined in current subregulations 13L(a)-(h) are met.

This item does not change the intention of current regulation 13L, but inserts specific reference to subsection 40LA(1), 40M(1) and 40N(1), (2) and (4) to clarify that the regulation refers to information obtained through a test under those provisions.

Item 16 – Paragraph 13L(g)

This item replaces references to ‘AFP employee’s or special member’s’ in paragraph 13L(g) with ‘AFP appointee’s’. This amendment is consequential to the amendment made by item 15.

Item 17 – Paragraph 13L(h)

This item replaces references to ‘AFP employee or special member’ in paragraph 13L(h) with ‘AFP appointee’. This amendment is consequential to the amendment made by item 15.

Item 18 – Regulation 13L(2)

This item inserts a new subregulation (2) into regulation 13L. New subregulation 13L(2) allows the AFP Commissioner to disclose information revealed by an alcohol or prohibited drug test to the head of a Commonwealth government agency, the head of a police force of a state or territory, the head of a state or territory integrity agency or the head of another state or territory government agency if he or she considers it appropriate to do so for certain purposes. These purposes are:

- conducting a security or character clearance of a person who is, or was, an AFP employee
- determining whether a person who is, or was, an AFP employee has committed an offence or failed to comply with professional standards
- assessing employment suitability for a person who was, or is, an AFP employee, and
- intelligence gathering in relation to criminal activity.

Currently, the AFP is unable to disclose information revealed by an alcohol or prohibited drug test for these purposes. For example, if an AFP employee had been terminated or resigned in circumstances linked to a positive drug test and subsequently applied for a job with another law enforcement agency, the AFP could only disclose that the person had been terminated or otherwise ceased their employment, not the reason behind this. This means that government agencies may be vulnerable to employing former AFP employees or special members who have not previously met the AFP’s prohibited alcohol and drug testing standards.

By enabling the AFP to disclose information from alcohol and drug tests to other government, law enforcement and integrity agencies, new subregulation 13L(2) ensures that an individual’s prohibited drug taking history or alcohol consumption (and potential associated relationship with organised crime) may be considered by any agency considering employing that individual. This is critical to mitigate integrity and security risks, particularly

given the breadth of government agencies that are involved in combating contemporary crime. It also helps promote broader Commonwealth resilience to the ‘insider threat’ associated with prohibited drug use within government agencies.

Appropriate protections for privacy and security of an individual’s information are provided in the note, which reinforces the offence in section 60A of the AFP Act of disclosing information to another person other than for the purposes of the Act or the regulations.

Item 19 – Regulation 13Q

This item replaces reference to ‘accredited pathology laboratory’ in regulation 13Q with ‘authorised laboratory’. This amendment is consequential to the amendments made by item 2.

Item 20 – Regulation 13Q

This item repeals the definition of an unanalysed sample. The Regulations will now rely on the natural meaning of ‘unanalysed sample’, that is, a sample that has not been analysed.

Item 21 – Regulation 13QA, 13QB and 13QC

This item inserts new regulations 13QA, 13QB and 13QC into the Principal Regulations.

New regulation 13QA allows the AFP Commissioner to determine that a suitable facility, other than a NATA accredited facility, is an authorised laboratory for the purpose of the Regulations. New subregulation 13QA(2) provides that the Commissioner must provide the facility with a certificate as evidence of its status as an authorised laboratory and that an AFP employee or special member may request to see the certificate if they are directed to undertake a test at the facility.

This provides the AFP with the flexibility to engage offshore and other suitable testing laboratories that may not have NATA accreditation. This is important to allow the AFP to conduct drug testing on employees and special members deployed overseas and ensure that the Principal Regulations remain current as technology, accreditation standards and the AFP’s prohibited drug and alcohol testing programs evolve over time.

New regulation 13QB enables the Commissioner to approve a facility, other than a facility accredited by NATA, to collect body samples other than blood. New subregulation 13QB(2) provides that the Commissioner must provide the facility with a certificate stating it is approved to collect samples and that an AFP employee or special member may request to see the certificate if they are directed to undertake a test at the facility. This amendment allows a facility approved by the Commissioner to collect the samples required for testing, even if that facility does not have NATA accreditation. It is intended to support new regulation 13QA.

New regulation 13QC enables the Commissioner to approve a training course in collecting body samples other than blood. This enables AFP testing procedures to remain current if a new course is developed or collection technology advances, without requiring further amendment to the Regulations.

Item 22 - Subregulation 13R(1)

This item is a consequential amendment which updates the numbering in the Principal Regulations.

Item 23 – Subregulation 13R(1)

This item adds a new paragraph (d) to subregulation 13R(1). New paragraph 13R(1)(d) provides that an authorised person taking a sample for a blood test or prohibited drug test must arrange for both sealed containers to be sent to an authorised laboratory.

This amendment is consequential to the amendment made by item 24.

Item 24 – Subregulation 13R(2)

This item repeals subregulation 13R(2), which currently requires that an authorised person must either i) arrange for both sealed containers containing a body sample to be sent to an authorised laboratory, where satisfied that an employee or special member is incapable of understanding the procedures that have been applied to him or her, or ii) give one sealed container to the AFP employee or special member and arrange for the other to be sent to an authorised laboratory.

Contemporary best practice requires both sealed containers containing a body sample collected for the purposes of a blood test or prohibited drug test to be sent to an authorised laboratory. The current provision requiring one sample to be given to an AFP employee or special member except in certain circumstances is inconsistent with best practice. This item repeals that requirement and moves to subregulation 13R(1) the requirement to arrange for both of the samples to be provided to an authorised laboratory (see item 23).

Item 25 – Subregulation 13S(1)

This item replaces the reference to ‘accredited pathology laboratory’ in subregulation 13S(1) with ‘authorised laboratory’. This amendment is consequential to the amendments made by item 2.

Item 26 – Subregulation 13S(3)

This item removes the words ‘If 2 containers were submitted to the accredited pathology laboratory under paragraph 13R(2)(a)’, and is consequential to the made by item 23.

Item 27 – Subregulation 13T(1)

This item repeals the current subregulation 13T(1) and replaces it with a new subregulation setting out a simplified process for issuing certificates after a body sample has been analysed.

Currently, subregulation 13T(1) requires an analyst to provide a certificate to both the AFP employee or special member who was the subject of the test, and the authorised person who directed the person to undergo the test. The AFP has advised that analysts are unable to comply with the requirement to provide a certificate to the test subject as the analyst is not given the name of the AFP employee or special member who provided the sample. Instead, for privacy reasons and reflecting contemporary drug testing practices, the analyst is provided with a unique identifying number. The amendments made by this item address this issue.

In particular, under new subregulation 13T(1), the analyst will now have to provide an authorised person with a certificate as soon as practicable after analysis is completed. This authorised person does not need to be the person who directed the employee to undergo the test, ensuring that the analyst can still comply with this requirement if an authorised person goes on leave or ceases to be an AFP appointee.

Item 28 – Paragraph 13T(2)(a)

This item repeals current paragraph 13T(2)(a) and substitutes it with a paragraph which requires the analyst certificate issued under subregulation 13T(1) to state the unique identification number of the sample, instead of the full name of the AFP employee or special member.

Currently, the analyst cannot comply with paragraph 13T(2)(a) as he or she is not informed of the AFP employee's or special member's identity – the analyst is only given the unique identification number of the sample. These amendments ensure analysts can comply with the requirements set out in the legislation, while maintaining appropriate privacy protection for AFP employees and special members.

This also supports the amendments to 13T(1) proposed by item 27.

Item 29 – Paragraphs 13T(2)(c) and (d)

This item replaces reference to 'accredited pathology laboratory' in paragraphs 13T(2)(c) and (d) with 'authorised laboratory'. This amendment is consequential to the amendments made by item 2.

Item 30 – Subregulation 13T(3)

This item repeals current subregulation 13T(3) and replaces it with a new subregulation (3). This amendment inserts a new procedure for providing an AFP employee or special member with the analyst certificate issued under regulation 13T.

The current procedure requires the analyst to provide the AFP employee or special member with the analyst certificate at the same time as it is provided to the authorised person. The amendments transfer responsibility for informing the AFP employee or special member of the results of their test to an authorised person. It also allows an authorised person to provide the test subject with a certificate indicating a positive test after a process of review by an AFP Medical Review Officer. This is important to limit any undue stress on the testing subject during the period between returning a positive result and that result being reviewed and confirmed by the Medical Review Officer in accordance with the AFP's standard procedures.

The item also replicates items from the current subregulation 13T(3) to allow unanalysed samples to be destroyed after six months and to allow the AFP employee or special member to seek independent testing if they wish.

Item 31 – Subregulation 13U(1)

This item removes the words 'If 2 containers were submitted to the accredited pathology laboratory under paragraph 13R(2)(a)', and is consequential to the amendments made by item 23.

Item 32 – Regulation 13V

Regulation 13V sets out the standard that the AFP must comply with in relation to collecting and analysing urine samples for the purposes of a prohibited drug test. This item updates that standard to refer to *Australian/New Zealand Standard AS/NZS 4308 – 2008*, ‘Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine.’

Currently, regulation 13V refers to Australian standard AS/NZ 4308-2001, which has since been superseded by AS/NZ 4308:2008.

Item 33 – Part 7

This item inserts a new Part 7, which sets out the application and transitional provisions for these amending Regulations.

Regulation 36 defines certain terms for the purposes of the application and transitional provisions.

Regulation 37 outlines the application of the amendments and when they are to apply. The majority of the amendments in Schedule 1 (Items 2, 3, 4, 5, 6, 8, 14, 15, 18, 22, 23, 24, 26, 27, 28, 30 and 31) apply from the commencement date, so tests conducted on or after this date are subject to the new requirements.

Subregulation 5(3) and regulation 5A apply to AFP employees who are suspended on or after the commencement day, whether or not the suspension began before that day. This is important as suspension does not abrogate an employee’s or special member’s obligations to comply with all AFP Values and the AFP Code of Conduct.

Regulation 38 provides that Part 7 of these amending Regulations is repealed on 1 July 2016. For the avoidance of doubt, only the application and transitional provisions as set out in Part 7 are repealed on this date. The substantive amendments made by this regulation remain in force.

Items 34, 35, 36 and 37– Schedule 1A

These items insert a number of amendments to the tables in Schedule 1A.

All of these amendments specify further persons who are authorised to conduct tests and operate equipment for breath tests, blood tests and prohibited drug tests. These people include:

- people who have completed a training course in collecting body samples other than blood approved under regulation 13QC (item 34)
- any other person who is qualified to take blood samples (item 35), or
- an employee of a facility approved under regulation 13QB to collect body samples other than blood (items 36 and 37).

The proposed approach in items 34, 35, 36 and 37 for authorising other trained persons to take body samples currently applies in relation to prohibited drug tests using urine samples. This enables the testing of samples to keep up with advances in technology and contemporary testing practice.