

# What Happens if I Refuse a Breath Test?

Random breath testing (RBT) met with a great deal of criticism before it was first introduced, as many people saw it as an unjustified intrusion into privacy and individual freedom.

Critics of RBTs argued that police should not be allowed to pull people over and subjecting them to a test without having a solid reason to do so.

But most of us now accept that being pulled over for an RBT is part-and-parcel of driving, and that the scheme has contributed significantly to reducing road fatalities.

If you've made the mistake of drinking and driving, you might wonder if it's worth refusing a breath test or failing to exhale hard enough.

Well the short answer is: it is never a good idea because the penalties are severe – the same as high range drink driving.

## **Power to perform a breath test**

[Schedule 3, clause 16 of the Road Transport Act 2013](#) gives police the power to require a person to submit to a breath test or analysis, or a sobriety assessment.

However, police are not permitted breath test you if:

- You have been admitted to hospital for medical treatment, unless your medical practitioner is notified and does not object;
- The authorised sample taker believes that to do so would be dangerous to the person's health;
- The police officer believes that because of the injuries sustained, it would be dangerous to the persons medical condition;

- It has been over two hours after you were driving; or
- You are on your own residential property.

In other situations, police have a wide discretion when it comes to conducting breath tests.

### **What is the difference between a breath test and a breath analysis?**

There are two types of breath tests that police can perform.

The first is often called a “roadside breath test” – which, as the name suggests, usually occurs at the roadside after you have been pulled over or involved in an accident.

Roadside breath tests give an indication of your blood alcohol concentration (BAC), and give police a basis to arrest you for the purpose of a breath analysis if you blow a prescribed reading. However, the reading from the roadside breath test is not permissible in court to prove a certain BAC.

The second type of breath test is called a “breath analysis”. It is carried out after you have blown a positive roadside breath test, or refused or failed to submit to a breath test. It usually occurs at the police station or in a ‘booze bus’.

The results of a breath analysis can be used in court.

### **What are the penalties for refusing?**

[Refusing a breath test](#) comes with a maximum penalty of \$1,100.

The penalties are more severe if you refuse a breath analysis.

For a first offence, the penalty for refusing a breath analysis is a fine of \$3,300 and/or imprisonment for up to 18 months. There is also an ‘automatic’ 3 year licence disqualification. This can be reduced to a minimum of 12 months if there are good reasons to do so.

If it is your second or more major traffic offence in 5 years,

the penalty jumps to a \$5,500 fine and/or 2 years imprisonment. The automatic disqualification period increases to 5 years. This can be reduced to 2 years if you can convince the magistrate that there are good reasons to do so.

If you are guilty, the only way to avoid a criminal conviction against your name, and also avoid a licence disqualification, is to persuade the magistrate to grant you what's known as a '[section 10 dismissal](#) or [conditional release order](#)'; which means guilty but no criminal record.

### **What if I drive after I have been suspended or disqualified?**

Driving whilst suspended is when you drive after police have issued you with a suspension notice or after you have been suspended by the RMS.

For a first major traffic offence within 5 years, the automatic period of disqualification is 12 months.

If it is your second or subsequent major traffic offence, the period increases to 2 years.

Driving whilst disqualified is when you drive after a court has disqualified you from driving, or during a 'habitual offender disqualification period'.

If you are caught [driving whilst disqualified in NSW](#), the courts also have the option to send you to prison; but prison is considered to be as a last resort.

### **What is a 'habitual offender declaration'?**

If it's your third or more major traffic offence within a 5 year period, the RMS can declare you a 'habitual traffic offender' and add an extra 5 year disqualification on top of what the court imposed.

### **What should I do if I am charged by police?**

If you have been charged with refusing to submit to a breath test or analysis, or driving whilst suspended or disqualified, your best bet is to seek legal advice immediately.

An experienced traffic lawyer will be able to advise you about your options and the best way forward.

In certain circumstances, they may be able to have the charges withdrawn or thrown out of court or, if you wish to plead guilty, help you to avoid a criminal conviction and a licence disqualification by pushing for a 'non conviction order'.