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Introduction

Many of you will know someone who has been caught drink-driving. Maybe you have had to blow in the bag yourself at some stage?

In New Zealand drink-driving is properly known as EBA being “excess breath or blood alcohol”. It means the same thing - you are over the legal limit for driving, will be charged, will have to appear in court and will lose your licence.

The following pages are a general guide to the breath testing procedures and some related areas of transport law. We offer some practical advice about what you should and should not do if you find yourself pulled over at a checkpoint. We tell you about police powers and the sorts of penalties the Courts impose.

While we believe the advice is both accurate and up to date, we cannot possibly cover every scenario or specific case in this guide. There are many exceptions with most areas of law, and particularly in the case of transport law.

Summary of breath test procedure

Passive breath test

A preliminary test commonly known as the “sniffer” is often used by police at random check points. The sniffer is a breath alcohol sensing device, which a police officer will hold near your mouth and ask you to say something, for instance your name and address and where you have been. The sniffer ascertains whether there is any alcohol on your breath. A passive breath test identifies the drivers who have not been drinking and who are then free to go.

Evidential breath test

If the passive breath test shows you have more than 250 micrograms of alcohol per litre of breath, or you refuse to undergo one, you will be required to go to the nearest police station, or to a “booze bus” (police vehicles that contain evidential breath test machines), for an evidential breath test.

You are at this point being “detained” by the police (different to being arrested, although if you do not cooperate you may be arrested) and your rights under the New Zealand Bill of Rights Act are triggered. In particular, you have the right to consult a lawyer without delay and in private. We suggest that you take up this right should you ever find yourself in this situation. The police will provide you with a telephone and a list of lawyers and telephone numbers. It does not cost you anything to phone a lawyer and don’t be concerned about waking your lawyer in the middle of the night, lawyers on these lists are used to these calls, it is part of the job. It is important that you get the advice you need.

The evidential breath test machine is an electronic device which measures conclusively the alcohol in your breath. The machine requires a minimum of two breaths and produces two numerical readings (being micrograms of alcohol per litre of breath), the lower of which is your result. If your reading is over 250 micrograms per litre of breath you are over the legal limit.

If the evidential breath test reading is 250 micrograms or less the test is considered negative and you will then be free to go. It is possible however that the police may still consider you incapable of driving and forbid you to do so for a period of time (normally 12 hours). In these circumstances you must comply with the officer’s direction. Even though you are under the legal limit it is an offence to fail to comply with an officer’s direction forbidding driving.
Drivers who commit an offence between 251 – 400 micrograms of alcohol per litre of breath will have no option to elect an evidential blood test and will face an infringement fee of $200 and 50 demerit points. If you fail an evidential breath test over 400 micrograms of alcohol per litre of breath, you will face criminal charges.

There is a zero tolerance policy for drivers under the age of 20. Any alcohol on your breath will result in prosecution.

**Blood Test**

If you refuse, cannot complete an evidential breath test, or if police do not have an evidential breath test machine available, you will be required to have a blood specimen taken.

The blood specimen must be taken by a medical practitioner or a medical officer. You cannot refuse a blood test, even if you have a fear of needles, or have what you think is some other “reasonable” excuse. Refusing to permit blood to be taken is also a qualifying offence for indefinite disqualification. Most drivers who undergo a blood test will be liable to pay the blood test costs, regardless of the result of the test. Blood test costs include a blood test fee of $109.25 and associated medical expenses.

For an adult, “the limit” is 50 milligrams per 100 millilitres of blood. A blood test result of 51 – 80 milligrams of alcohol per 100 millilitres of blood will incur an infringement fee of up to $700 and 50 demerit points. This cost may vary depending on the circumstances leading to your blood test. A blood test result of more than 80 micrograms of alcohol per 100 millilitres of blood will result in criminal charges.

Again, there is a zero tolerance policy for drivers under 20.

It is possible to be just over the limit on a breath test, yet under the limit on a subsequent blood test. Factors such as how long you stopped drinking will have an effect on the test result. In those circumstances (which we stress are highly unusual) you are given the benefit of the lesser reading and would not be charged.

**Cooperation**

We recommend you cooperate with police if you are required to go through breath testing procedures. Being difficult, smart or refusing to comply is very likely to make matters worse and may well result in you being charged for an evidential breath test. It is an offence to refuse to accompany the officer and you would then be arrested.

It is not an offence to refuse an evidential breath test once at the station or booze bus, but as already stated, it is an offence to refuse a blood test.

If you are convicted of refusing to undergo an evidential blood test, you can face a fine of up to $4,500, a licence disqualification of at least 6 months, and a prison sentence of up to three months for a first or second offence. Higher penalties apply for third or subsequent offences. These penalties also apply if you elect to undergo an evidential blood test knowing that for medical or physical reasons blood cannot be drawn. The driver will have to rebut the presumption that they have refused the evidential blood test by taking advantage of their likely inability to provide a blood sample.

At the end of the day you cannot avoid the consequences or get out of it by refusing to take the tests. If the refusals are continued, eventually they lead to a requirement for a blood test from which there is no escape.

If you do not cooperate, you can make matters worse, and be charged with all sorts of further offences. For instance, driving off from a check point and not stopping for the police car chasing you may see you being charged with dangerous driving and failing to stop. People have been charged with obstruction, obscene
language, assault on police and similar offences for their abusive/aggressive behaviour whilst going through breath test procedures. Obviously that sort of behaviour does not impress a Judge and only stiffens the resulting sentence. On the other hand, confirmation from the police that you were cooperative throughout the procedure goes in your favour.

Penalty

The following is a general guide only as to the sorts of penalties Courts are currently imposing for EBA offences.

If you commit an offence between 251-400 micrograms of alcohol per litre of breath you will face an infringement fee of $200 and will receive 50 demerit points. If you accumulate 100 or more demerit points from driving offences within two years, you will receive a three month driver licence suspension.

Firstly, there is mandatory disqualification for a minimum of six months for adults. For drivers under 20, where the limit is zero, the disqualification is three months minimum. A driver under 20 years of age can be charged as an adult if their breath/blood alcohol level is above the adult limit. When this occurs they are then subject to the same minimum period of disqualification as an adult, being six months.

Roadside licence suspension for 28 days now comes into force for drivers who are found to have a breath alcohol level above 650 micrograms of alcohol per litre of breath or a blood alcohol level above 130 milligrams per 100 millilitres of blood. This suspension is in addition to any Court imposed penalty.

For a first offence a Judge is likely to leave the disqualification at six months (i.e. the minimum they can impose) provided your reading was not too high and there were no other aggravating features. For instance, if you were charged with careless or dangerous driving, obstruction or assault from the same incident then in those circumstances the disqualification imposed would almost certainly be longer.

Certain combinations of offences also trigger what the Court terms “indefinite disqualification”, this being disqualification for a minimum of one year. We have already talked about two of those offences - failing to accompany an enforcement officer and refusing to permit a blood specimen to be taken. This provision also applies when you have two EBA convictions within five years and one of them was a very high reading - more than 1,000 on a breath test or more than 200 on a blood test (i.e. two and a half times the legal limit).

Apart from the mandatory disqualification, there will also be a fine or other penalties imposed. For EBA offences the maximum fine is $4,500.00. A basic rule of thumb for first offences is that the Judge will transfer your evidential breath test reading into dollars, for example, if your reading was 550 micrograms you could expect a fine of $550.00 or thereabouts plus court costs which are imposed in every case. This could be less if you are able to pay the fine in full on the day of sentencing.

For a second offence, Judges usually impose community work. A third offence, particularly within a short space of time (i.e. less than five years), will very likely result in imprisonment.

For a first or second offence the maximum term of imprisonment is three months but for a third (or worse) offence the maximum fine is $6,000.00 and the maximum term of imprisonment is two years. Minimum disqualification is one year and requires anyone under this to re-sit and pass the practical driving test before they can drive again.

“Three strikes and you’re out” scheme

The Act has been amended to provide tougher penalties for repeat offenders.
For the first offence there are the current Court imposed penalties. For a second offence there is an immediate roadside licence suspension for 28 days for drivers who have had one previous drink driving conviction in the past four years, their breath or blood alcohol level is irrelevant. This is in addition to Court imposed penalties.

For a third or subsequent offence committed by a driver who has two previous drink driving convictions in the past four years (in addition to any Court imposed penalties) there is an immediate vehicle impoundment for 28 days. The driver will also face an immediate suspension of licence for 28 days.

It is legally impossible to obtain name suppression in a drink driving case.

Confiscation

For many years the Court has had a discretionary power to confiscate the motor vehicles of offenders convicted of EBA offences.

Confiscation is now mandatory on a second driving offence, where the second offence (be it EBA, refusing to supply a blood specimen, driving while disqualified, dangerous driving or one of the other listed offences) is committed within four years of the first, unless confiscation will result in extreme hardship to the offender or other persons, e.g. family.

Where a vehicle is confiscated, the offender loses the actual car and it is sold. The net sale proceeds are returned to the offender but the sale price is inevitably lower with a forced sale and the costs of sale and any outstanding money owed to the Ministry of Justice are also deducted from the sale proceeds.

Powers of police - your rights and obligations

Have you ever been required by police to go through breath test procedures? Have you wondered what your rights and obligations are if a police officer pulls you over? The following are some useful things to know and remember:

- Firstly, you have to stop when signalled to pull over by a police officer or when being followed by a vehicle displaying flashing blue or blue and red lights or sounding a siren.
- If asked, you must give your name, address and date of birth.
- If asked, you must identify the owner of the vehicle you are driving.
- You have to carry your drivers’ licence with you. It must be produced without delay for inspection if a police officer asks to see it.
- You can be prohibited from driving for a certain period and required to surrender your car keys where an officer believes on reasonable grounds that you are for the time being “incapable of having proper control of your vehicle”. As stated earlier this can occur even when a breath test has confirmed that you are under the legal limit.
- When you are given the right to telephone a lawyer, (which arises when the police require you to accompany them for purposes of an evidential breath test or blood test), do it. Ring your lawyer and check with them your rights and obligations.

You need to be aware of your rights and obligations, but it is in your best interests to cooperate with the police.

If you are charged and told to appear in Court, consult us. We can advise you about the process, and will check that the correct testing procedures were followed. We will appear with you in Court and speak on your behalf to the Judge ensuring that all relevant and/or special circumstances are put forward.
Duties in case of an accident

Ever been a driver involved in an accident or wondered what your legal obligations as a driver in an accident are?

- Stop your car and get out and look to see if anyone is injured or requires assistance. Failing to stop is an offence and so is failing to ascertain injury or render all practicable assistance to an injured person. These offences carry a mandatory penalty of one year disqualification in addition to other penalties imposed (e.g. a fine, community work, term of imprisonment).
- If a person is injured in an accident, including any passengers in the vehicle, the driver must report the accident to the police as soon as reasonably practicable, and in any case not later than 24 hours after the time of the accident, unless the driver is incapable of doing so by reason of injuries sustained in the accident.
- If no one is injured but there is damage to property (e.g. another vehicle, a fence, road sign or power pole) you must notify the owner of that property within 48 hours of the accident or if the owner is not readily contactable or identifiable report the accident to the police within 60 hours.

Limited licences

A limited licence enables someone who is disqualified from driving to drive for a specified purpose, usually work purposes. Not everyone can apply for a limited licence, the Land Transport Act 1998 sets out the requirements.

In order to obtain a limited licence you need to show that if you do not obtain a limited licence you will suffer either “extreme undue hardship” and/or someone else will suffer “undue hardship.” Mere inconvenience is not itself enough.

You also need to show that you are not a risk to public safety as this is a noted ground on which an application can be refused. If you do have previous drinking convictions we can assess your situation and advise you on your chances of obtaining a limited licence.

If you are convicted of some offences, including excess breath blood alcohol, there is a mandatory 28 day stand down period from the date of conviction before you can apply for a limited licence. We would prepare your application in that period and have it ready to be heard at the end of that time.

For other disqualifications, such as excess demerit points or careless driving, there is no stand down period and you can apply immediately. We are happy to discuss with you whether you will be eligible for a limited licence and the likely terms and conditions of that. We would prepare the actual application, liaise with police and appear for you in Court.

Demerit points disqualification

With every speeding ticket you incur “demerit points” (except in the case of speed camera tickets).

The number of demerit points incurred depends on the extent of your speeding as set out below.

<table>
<thead>
<tr>
<th>Speeding Offence</th>
<th>Demerit Points</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exceeding limit by up to 10 km/h</td>
<td>10</td>
</tr>
<tr>
<td>Exceeding limit by 11-20 km/h</td>
<td>20</td>
</tr>
<tr>
<td>Exceeding limit by 21-30 km/h</td>
<td>35</td>
</tr>
<tr>
<td>Exceeding limit by 31-35 km/h</td>
<td>40</td>
</tr>
</tbody>
</table>
Exceeding limit by more than 36 km/h 50

Other tickets also attract demerit points - for instance passing on a no passing line, failing to observe give way rules, using a mobile phone while driving, failing to stop at a stop sign or following another vehicle too closely. Similarly, minor traffic offences attract demerit points, e.g. careless driving.

Where you accumulate 100 or more demerit points in any two year period your drivers’ licence is suspended for three months. In other words you are disqualified and are unable to drive any vehicle for three months. Breaching this suspension is punishable by the same penalties as driving while disqualified.

You are however eligible to apply for a limited licence immediately. The normal one month stand-down period that applies to disqualifications for drink-driving offences does not apply to demerit points disqualifications. We can prepare and arrange to have your limited licence ready to kick in as soon as your licence is formally suspended.

**Speeding fines**

Speeding fines start at $30 for speeds less than 10km/h over the limit and increase progressively to $630 for speeds up to 50km/h over the limit. As well as having to pay a fine, you will also incur demerit points. The maximum fine for exceeding a speed limit is $1000.

Exceeding the permanent posted speed limit by more than 40 km/hr will result in your drivers’ licence being suspended immediately for 28 days and often in a Court prosecution, for driving at dangerous speed where a further disqualification and a hefty fine are likely.

**How can we help you**

Govett Quilliam is Taranaki’s largest law firm. We have the people, the experience and the resources to assist you, whatever your case may be.

We have prepared this guide as a guideline to traffic offences and breath testing procedures. If you require further information, or have any questions about this guide please contact us.

Our specialists with experience in traffic offences and breath testing procedures is:

**Andrew Laurenson**

Partner

DDI: (06) 768-3711  
Andrew.Laurenson@gqlaw.co.nz
Please call our office if you would like further information on any guides prepared by our firm. Copies are also available on our website.

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- Employment
- Enduring Powers of Attorney
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- Flexible Working Arrangements

- Franchising
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- Wills and Estate Administration

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