

INQUIRY INTO WORKPLACE DRUG TESTING IN VICTORIA

Organisation: Mining and Energy Union

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MINING & ENERGY UNION

Victorian Parliament Legislative Committee: investigation into the legislative and regulatory framework for workplace drug testing

Submissions of the Mining and Energy Union

Introduction

The Mining and Energy Union (hereafter **MEU**) is the principal trade union representing mineworkers. We also have significant membership in power stations, coal ports and amongst locomotive drivers in the Pilbara. In total, we have over 21,000 members working in the mining and energy industries across Australia.

In Victoria the MEU coverage applies to employees in:

1. Mining or exploration;
2. Power generation, co-generation, transmission and distribution;
3. Oil, gas, coal, shale;
4. Nuclear; and
5. Chemical production.

The purpose of these submission is to respond to the terms of reference agreed to by the Victorian Parliament Legislative Council - Legal and Social Issues Committee (**Committee**) investigating the legislative and regulatory framework for workplace drug testing including the treatment of prescription medical cannabis. Our response will deal with the workplace policies that provide for workplace drug testing and case examples of how the current application of policies in workplaces where the MEU has membership unfairly affects employees who are prescribed medical cannabis.

Terms of Reference

(1) the legislative and regulatory framework for workplace drug testing.

The legislative and regulatory framework for workplace drug testing is largely regulated by Work Health and Safety (WHS) legislation and regulations, and the Australian Standards that include:

- Victorian Occupational Health and Safety Act 2004 (OHS Act).
 - Victorian Occupational Health & Safety Regulations 2017 (OHS Regs).
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- Australian Standard for specimen collection and detection and quantitation of drugs in oral fluid AS 4760-2019 (AS 4760-2019).
- Australian Standard for breath alcohol testing devices AS 3547-2019.

Under the OHS Act there is a general duty imposed on an employer to as far as reasonably practicable eliminate risks to health and safety.¹ That duty requires an employer to as far as reasonably practicable provide and maintain for employees of the employer a working environment that is safe and without risks to health.² The reference to 'Employees' includes an independent contractor engaged by an employer and any employees of the independent contractor.³ Arising from the obligation for an employer to provide a working environment that is safe and without risks to health employers create and apply policies and procedures to train and manage employees to meet these obligations. Relevantly, employers develop policies and procedures to minimise health risks associated with alcohol and other drugs in the workplace.

In industries where MEU members are employed employers have developed Workplace Alcohol and Other Drug policies and procedures. Most of these policies include terms that deal with procedures when an employee is taking prescribed medications and over the counter medications. The policies include procedures for alcohol and other drug testing that are commonly either a saliva swab sample or urine sample. Workplace policies may have a combination of saliva and urine testing where following a positive test to a saliva sample the employee is required to provide a secondary urine sample.

Some workplaces may have enterprise agreements approved by the Fair Work Commission (**FWC**) that incorporate workplace alcohol and drug policies and procedures as a term of the agreement. It is not uncommon for enterprise agreements to include terms in a dispute procedure that are broad enough to apply to disputes concerning drug and alcohol policies under the *Fair Work Act 2009*.

(2) the treatment of prescription medicinal cannabis as compared to other prescription medications, that workplace drug testing framework

It is the MEU's direct experience that the treatment of prescription medicinal cannabis as compared to other prescription medications, under workplace policies and drug testing framework is outdated and misconceived.

Usually, the employee has complied with the employer's policy requiring the employee to declare they are taking prescribed medication, provide medical evidence from a treating medical practitioner or specialist specifying the medication prescribed stating the medication is prescribed to treat a medical condition, and that the employee has been assessed by the medical practitioner as not being

¹ Section 20 (1), *Occupational Health and Safety Act 2004*.

² Section 21(1), *Occupational Health and Safety Act 2004*.

³ Section 21(3), *Occupational Health and Safety Act 2004*

impaired to perform their role while taking the prescribed medication. In cases where more information was required the employee has complied with the request.

It is important at this stage of the MEU submission to highlight a misconception that the MEU has experienced concerning medically prescribed cannabis that contains various levels of THC and Cannabidiol (CBD). CBD is a non-intoxicating cannabinoid currently widely prescribed in Australia in the treatment of pain, anxiety, epilepsy and other conditions.^{4 5} In Australia, the TGA conducted a review of the safety of CBD and concluded that it had a good safety and tolerability profile.⁶ The MEU's experience with an employee who was medically prescribed CBD Oil with low doses of CBD who was deemed unfit for work is that the assessor engaged by the employer had little or no experience in assessing employees who took CBD. It is difficult to understand the reasons why employers do not permit the use of CBD in this circumstance and the employee appears to be prejudiced by the employer's lack of understanding on this subject.

We provide the following case examples:

a. Employee A:

Employee A was employed at an open cut mine primarily to operate heavy and light vehicles at the mine. The employee was prescribed medical cannabis to treat several medical conditions. The Employees roster consisted of a combination of day shift and night shifts.

Previously, the employee was prescribed other medications by their treating medical practitioner to treat a number of medical conditions. The employee reported to the treating medical practitioner that they benefitted most from prescribed medical cannabis. The medical cannabis was prescribed by the employee's medical practitioner with restrictions on dosage and a minimum timeframe between taking the prescribed medical cannabis and commencing work. From the commencement of taking the prescribed medical cannabis the employee complied with the employer's workplace alcohol and other drug policies. This included declaring they were taking medically prescribed cannabis, providing evidence from their treating medical practitioner stating the medical cannabis was prescribed to treat a medical condition, the restrictions on taking the prescribed medical cannabis, and the employee would not be impaired for work if they took the prescribed medication as advised by their treating medical practitioner.

⁴ Arnold, J.C., Nation, T., and McGregor, I.S. (2020). Prescribing medicinal cannabis. *Aust Prescr* 43, 152-159. 10.18773/austprescr.2020.052.

⁵ Henderson, L.A., Kotsirilos, V., Cairns, E.A., Ramachandran, A., Peck, C.C., and McGregor, I.S. (2021). Medicinal cannabis in the treatment of chronic pain. *Aust J Gen Pract* 50, 724-732. 10.31128/AJGP-04-21-5939

⁶ TGA (2020). Review on the safety of low dose cannabidiol.

The employer's response was that the employee was not fit to perform their role and they were not permitted to attend work. The employer stood the employee down off pay directing the employee to take annual leave or long service leave until the employee could demonstrate they were no longer taking medically prescribed cannabis. When no leave was available the employee was required to take leave without pay.

At the direction of the employer the employee commenced a process to cease taking medically prescribed cannabis and was prescribed other medication to treat their medical condition. Prior to returning to work the employee was required to undergo several urine tests to provide results stating that they were below the acceptable level of THC as stipulated by the employer's policy. During this process the employee exhausted all annual leave and long service leave entitlements and was forced to take leave without pay. The process caused the employee to suffer from anxiety and exacerbated their medical condition.

b. Employee B:

The background facts are largely similar to Employee A.

Employee B was employed at an open cut mine to operate machinery and declared as required by the employer's policies they were taking prescribed medical cannabis. The employee provided medical evidence of the types of prescription and medical condition. However, during the process Employee B was subjected to a more rigorous fitness for work assessment than other employees who were taking prescribed medicines. The employer referred Employee B to an external medical assessment that required Employee B to provide more detailed evidence from the treating medical practitioner regarding Employee B's medical condition and treatment.

Again, during the process Employee B was stood down from work off pay and was directed to take annual leave and long service leave. Ultimately, Employee B exhausted all annual leave and long service leave entitlements and was stood down off pay for an extended period. In this case example Employee B experienced more challenges in finding alternative prescription medication to treat their medical condition. This resulted in Employee B being off work for an extended period on leave without pay while they trialled different prescribed medications causing the employee to suffer significant financial loss and negative health impacts.

c. Employee C:

Employee C was a fly in fly out worker at an open cut mine primarily employed to operate heavy and light vehicles at the mine. Their duties included performing work in blasting. The employee had long standing medical conditions that were being treated with several prescription medications that the employer was aware of via declarations of Employee C. After taking several prescribed medications, Employee C was prescribed CBD Oil that greatly benefitted the employee's treatment.

Employee C declared they were being prescribed CBD Oil and was immediately stood down from work and directed to take leave. They were required to undertake an on-site urine test. The test result was negative to THC. Employee C was referred to a medical practitioner engaged by the employer for a fitness for work assessment. During the process Employee C provided medical evidence from their treating doctor that certified Employee C was fit for work while taking CBD. Despite this the medical practitioner's advice was that Employee C was not fit for work while they were taking CBD Oil due to a risk of impairment. The advice recommended that Employee C be prescribed alternative medication.

At their own cost Employee C consulted with their treating medical practitioner and specialists to trial alternate medication. While trialling alternate medications Employee C described suffering from severe side effects that were detrimental to their medical condition.

After using a significant accrual of leave Employee C was able to return to work after being prescribed alternate medication. Prior to returning to work Employee C was required to undertake a urine test and provide a negative sample to THC.

In each case example the employer either directly or indirectly stated that if the employee continued to take medically prescribed cannabis their employment was at risk. These statements caused the employees undue concern regarding their ongoing employment and detrimentally affected their existing medical conditions. All of the employees have reported that they benefit most from medically prescribed cannabis or CBD. However, after being without pay for an extended period and having concerns that they may be dismissed from their employment the employees are reluctantly taking less beneficial medication.

(3) whether the framework for occupational health and safety and workplace drug testing may be improved to benefit medicinal cannabis patients, ensuring due process and natural justice in workplace settings, balanced against risks to occupational health and safety.

It is apparent from the case examples above employer reactions to employee's who have been prescribed medicinal cannabis has been to stand the employee down from work stating they are unfit to perform their role and require the employee to take leave or when that is exhausted leave

without pay. The employer commonly refers an employee to an external provider for an assessment to determine if the employee is fit for work. To demonstrate they are fit to return to work the employee is required to undertake a saliva or urine test (in nearly all cases urine sample tests) and return a negative result to THC. In contrast when the same employee or other employees have declared they are taking other prescribed medications, and provided medical evidence as they did for medically prescribed cannabis from their treating medical practitioner the employee has had no issues in being permitted to perform work. This is plainly unfair treatment of employees who take medically prescribed cannabis or CBD.

Further, based on the reports from consultants in the above case examples and other matters concerning medically prescribed cannabis the consultants have varying standards of qualifications and expertise in assessing an employee who is taking prescribed medical cannabis. The consultants often lack medical qualifications to properly assess whether the employee is fit to perform work when taking medically prescribed cannabis or CBD.

The application of workplace alcohol and other drugs policies in circumstances where employers treat employees who are prescribed medical cannabis and CBD differently to employees who are prescribed other prescribed medications is unjust. An employee who is prescribed medical cannabis by a treating medical practitioner to treat a medical condition should be treated in the workplace in the same way as an employee who declares they are taking other (non cannabis) medically prescribed medications.

4) whether current workplace drug testing laws and procedures are discriminatory in nature and could be addressed by the addition of a further protected attribute such as ‘medication or medical treatment’, in Victoria’s anti-discrimination laws

The *Disability Discrimination Act 1992 (Cth)* states it is unlawful for an employer or a person acting or purporting to act on behalf of an employer to discriminate against a person on the ground of the other person’s disability. The definition of disability includes a disorder, illness or disease that affects a person’s thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour. In the MEU’s submission, it is arguable that this definition would include anxiety and insomnia which are regularly effectively treated with medically prescribed cannabis or CBD.

In Victoria, it is against the law for someone to discriminate against a person because of certain protected characteristics. These include a disability (which also includes discrimination based on having an assistance aid supporting a person with disability – this includes equipment like a wheelchair or cane, an assistance dog or a person providing assistance or services to them). The definition of disability is similar in wording to the Commonwealth Act.

The MEU submits that an employee who seeks to take medically prescribed cannabis or CBD is a reasonable adjustment under the *Disability Discrimination Act 1992 (Ch)* and Victorian disability discrimination laws. The MEU supports the addition of a protected attribute for medication or medical treatment in disability discrimination legislation. Such an amendment would make it clear that a disability includes treatment for a medical condition and that discrimination against a person taking medication or medical treatment would be unlawful.

Mining and Energy Union

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