

Drugs and alcohol management and testing standards in Australian workplaces: avoiding that “morning-after” feeling

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Drugs and alcohol at the workplace: testing issues and after hours conduct
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1. Introduction

1.1 The role and perception of drugs in society

Human societies have been using and experimenting with drugs for thousands of years. Hallucinogenic seeds were found in burial caves in South America over 11 000 years ago, cannabis, the “sacred weed” was an integral part of many Hindu rituals. Drug “epidemics” are also well documented, the gin alleys of London, the Opium addiction in China, the banning of alcohol in the United States between the wars. Australia itself has historically been active in drug use. It was one of the heaviest importers of heroin before it was made illegal, and cigarettes laced with were cannabis were once sold legally over the counter. In the 1920s and 1930s many Australian became addicted to heroin and morphine and by 1931 Australian were consuming more than 3kg of heroin per million inhabitants – more in total than the US, Canada or Germany; by 1951 Australia had the highest consumption of heroin in the world (Lewis, 2002: 183). Australian women and their addiction to “BEX” was well known, while tobacco and alcohol - both legal drugs - currently account for the greatest costs in terms of human lives and economic costs compared to all other illicit drugs put together.

Moreover, our acceptance of drugs is also highly cultural in nature. In the West, alcohol is considered a recreational drug, an integral part of social discourse and activities for over 80% of Australia. It is promoted and widely advertised. However, in many Islamic societies it is banned. One society’s drug of choice is considered inappropriate in others.

Our perception of the harm related to drugs is also often highly emotive rather than directly correlated to the level of harm associated with the drug. This is understandable if people have had direct experience of the tragedies and violence associated with alcohol addiction within families, the pain of heroin addiction of a son or daughter. However, in terms of human and social costs, legal drugs account for the greatest costs in society. Another addiction – gambling – is again promoted, government receive significant financial windfalls from this particular addiction - yet is a cause of family, societal and workplace problems. We accept morphine as a legal and effective pain killer, yet an almost identical derivative – heroin, is illegal and considered one of the greatest scourges of society.

The point is that drug use and the debates that swirl around the issues of both legal and illegal drugs, appears to be neither consistent nor always well-informed. Moreover, drug use appears to be an integral part of this society. The challenge from a workplace health and safety perspective is to keep drug and alcohol use in its place (eliminate it from the workplace); encourage people to manage their use responsibly (put in places appropriate rules and guidelines); educate about the consequences of impaired performance (assess the risk) and manage it as we would any other hazards (put in place appropriate controls). The law has established that drugs are **not** to be managed at the workplace as a “moral” issue. Employers are not expected to control behaviour outside of work as though they were the police, but, rather to manage the risks associated with its inappropriate use that impacts on people’s health and safety.

This is proving to be easier said than done.

2. Drugs and alcohol: an overview of the costs

2.1 Putting drug and alcohol use into perspective

Whilst the costs of drug abuse and misuse are obviously high among those who use drugs inappropriately at work, it is instructive to put the patterns of drug use into perspective. It is important to do so in order to take the first step in a risk assessment process which would be to ask: what is the likelihood that drug misuse and abuse is a problem at your workplace?

Legal drugs are overwhelmingly and not surprisingly, the most common drugs of use in Australia. The Australian Institute of Health and Welfare survey into household drug use is now a benchmark for tracking usage patterns among the population as whole.

The 2001 survey found that **alcohol** is the most common drug of use, with 82.4% of the population reporting having used once in the previous 12 months. The pattern of usage is also regular, especially among older users. Next most common drug of use is **tobacco** at 23.2%.

Other drug use – especially illicit drug use - appears to be at much lower levels and is heavily concentrated among younger age groups, with use often situational and infrequent. Interestingly, there were statistically significant declines reported for some illicit drugs between 1998 and 2001. For example, among some of the drugs commonly tested for at the workplace, the following trends were detected:

Drug	1998	2001
	%	%
Alcohol	80.7	82.4
Marijuana	17.9	12.9
Amphetamines	3.7	3.4
Tranquilisers	3.0	1.1
Ecstasy	2.4	2.9
Cocaine	1.4	1.4
Heroin	0.8	0.2
Any illicit drug	14.2	14.7

Source: AIHW 2002: Used once in the last 12 months

As noted, with respect to some of these drugs, usage is concentrated among younger people (such as marijuana and ecstasy). For example, among males aged 14-29 the proportion reporting recent use of marijuana (ie last 12 months) was 26.6% and 35% respectively compared to 12.9% overall. Usage patterns fall away significantly among persons over the age of 40. Similarly, amphetamine use appears to be heavily concentrated among users aged 20 -29 (14.1% compared to 4.2% for all users). Similar trends are apparent for ecstasy use.

In addition, it is important to recognise that many of the users of the heavier illicit drugs such as heroin, cocaine and amphetamines are also poly-drug users, meaning that heavy

drug users are also multiple drug users depending on supply and cost. These users are often habitual users with serious drug problems.

If we examine the location of use, we also see that the vast majority of users of illicit drugs use drugs in social settings (such as at parties and friends houses), with a very small percentage reporting they actually use drugs at work. Not surprisingly, drugs such as ecstasy are used at parties and licensed premises. Heroin use, on the other hand, is more likely to be used in the person's own house or a friend's house. Similar trends were reported for marijuana usage. Whilst the usage of drugs does not necessarily discount a continuing impact at the workplace, it does highlight that drug testing at work is unlikely to pick up recent use.

Thus whilst the costs of drugs and alcohol are significant among those who misuse, it is important to consider – when making decisions about workplace testing in particular – the patterns of usage among the population against the profile of your own workplace and the nature of the work they undertake.

2.2 The costs of drugs misuse and abuse

There is little question that misuse and abuse of drugs and alcohol represents a significant health and safety hazard both at and outside of work. This is largely associated with unsafe behaviours at work, impaired physical and cognitive performance associated with the use of depressants such as alcohol and opiates, and increased risk taking behaviour associated with some of the stimulants such as cocaine.

The 2002 National Drug Strategy Household Survey (AIHW, 2002) estimates the following unsafe behaviours associated with alcohol and drugs. Of those people who reported using either drugs or alcohol in the previous 12 months:

- 12.8% of all respondents reported driving a motor vehicle whilst under the influence of alcohol; males were more likely at 18%
- 3.9% reported driving a motor vehicle under the influence of other drugs
- 4.3% of all respondent reporting going to work under the influence of alcohol
- 2.3% reported going to work under the influence of drugs

In 1997 the Australian Institute of Health and Welfare estimated that over 22 000 deaths and more than quarter of a million hospital episodes were drug-related (AIHW, 1999). Drugs were estimated to be a direct factor in one in five of all deaths. This was made up of:

- 18 200 tobacco
- 3 700 alcohol
- 800 illicit drugs

Tobacco accounts for around 80% of all drug and alcohol related deaths, while alcohol was response for around 16%. In addition, it is estimated that at any one time, over 16 000 Australians are receiving treatment for drug and alcohol problems. This underestimates problems associated violence, aggression, crime, accidents, dysfunctional relationships, inability to work and debt that can be caused by the misuse and illegal nature of some drugs.

Recent figures are difficult to obtain and recent estimates of the costs associated with illicit drug use in particular are rare (ABS 2001) but the following provides some indication of the extent of the problem:

Whilst illicit drug use is small in comparison to the misuse of alcohol, the costs are still significant, much of which is associated with enforcement. The ABS¹, drawing on available research estimated, that in 1992 the tangible and intangible costs of illicit drug use were estimated to be \$1, 683.6 million. Of this:

- \$758m resulted from lost productivity, both paid and unpaid
- \$450m was spent on law enforcement
- \$42.7 was spent on health care including medical services, nursing homes and hospital bed days

Other research revealed that:

- In 1981 44% of drivers that were killed on the roads had a BAC above 0.05% (Roads and Transport Authority)
- In 1997 this had been reduced to 28% (largely due to RBT) (RTA)
- A NOSHC study of workplace deaths in 1982-1984 reported that 16% had a BAC above zero at the time of autopsy
- NHMRC study concluded that 11– 15% of traumatic, non-fatal work injuries were associated with alcohol intoxication.

Indeed, the International Labour organisation considers workplace drug and alcohol abuse to be a serious problem at the workplace². They recently estimated that:

- Absenteeism is two to three times higher for drug and alcohol users than for other employees
- Employees with chemical dependency problems may claims three times as many sickness benefits and five time as many workers compensation claims
- In many workplaces 20-25% of accidents at work involve intoxicated people injuring themselves and or others.

¹ ABS 2001 Illicit drug use: Sources of Australian Data

² <http://www.ilo.org/public/english/protection/safework/cis/>

3. A framework for managing drugs and alcohol as an impairment issue within a risk management framework

3.1 Drugs and alcohol are among a range of factors that can cause impairment

As outlined above, drugs and alcohol misuse are potentially sources of human physical and cognitive impairment. As such, they constitute a potential workplace hazard that should be managed in the same way as any other hazard. Impairment caused by drugs and alcohol is similar in impact to human physical, cognitive and psychosocial impairment associated with activities that employees engage out of work, bring with them to the workplace or are derived from conditions at the workplace itself. As such they have **both** a work and non-work dimension that have to be taken into account. The aim is to avoid managing any of these issues in a moralistic manner, but to try to eliminate and manage the impairment risks.

It is important, when considering implementation of a drug and alcohol program on the basis of impairment, that impairment can be associated with a range of factors including:

- Fatigue
- Drug and alcohol misuse
- Psychological (stress anxiety)
- Physical (injury or functional fitness)
- Workplace environmental factors (heat, dust, noise, chemicals etc)
- Design of the work

Indeed, the effects of fatigue on physical and cognitive performance are similar to those caused by alcohol as is now well established in the scientific literature. It could be rightly asked whether companies who are concerned about the risks of drug and alcohol performance have considered risks associated with other factors such as fatigue.

Indeed, challenges to drug and alcohol testing programs are often made by trade unions on the grounds that impairment and fitness for duty more generally should be the focus of management, rather than singling out drugs and alcohol as a separate issue.

Drug tests cannot draw conclusions about likely impairment (especially with respect to cannabis), but only recency of use (whatever the standard of accuracy). It is therefore the case that workplace testing is not undertaken for the purposes of ascertaining impairment, but rather for the purposes of detection.

3.2 Drugs and alcohol at work: a reassessment

3.2.1 Changes in accepted behaviour

The days when long boozy lunches or a couple of beers before starting morning shift was implicitly accepted as part of the culture of the workforce or joked about with a wink and a nod are gone. The main control for these kinds of breaches when they

became apparent was often summary dismissal if the boss or co-workers considered it enough of a problem. However, acceptance of this behaviour and approaches to the management of the problem has profoundly changed.

3.2.2 Better understanding of the hazard

Employers and employees are now aware that drugs and alcohol can impair human physical and cognitive performance. This kind of impairment has no place at work and represent a serious safety hazard to the users and those around them. There is also a growing understanding that there is likely to be performance, productivity and efficiency losses associated with drug and alcohol misuse. There is also now an understanding that employees can be impaired by drugs or alcohol, even if they may not visibly appear to be impaired, or even if they do not test positive as having drugs or alcohol in their system. This makes the problem more difficult to assess and to manage.

3.2.3 Different approaches to management

The current interest in ensuring that employees do not use drugs or alcohol at work and are not impaired when they arrive at work, is leading to a proliferation of differing approaches to its management. In particular, the spread of workplace testing in Australia - whilst nowhere near the levels in the United States – is raising new and as yet unresolved problems associated with standards, accuracy of testing, fair and effective procedures that protect employers and employees alike.

In particular, the self-regulatory approach to testing methods and analysis in Australia raises questions about the extent to which employee rights are being properly protected and employer liability not exposed.

The complexity of issues associated with a company's decision to undertake an effective drug and alcohol program cannot be underestimated. There are legal, industrial relations, scientific and technical, ethical and management issues to consider. The costs of getting such a approach wrong can see companies embroiled in costly and bitter industrial disputation and, inevitably costly legal disputes. How can this be avoided?

3.2.4 Principles of a drug and alcohol management policy

Before considering in more detail some of the issues associated with testing, it is useful to outline some principles that could arguably guide a drug and alcohol policy at the workplace:

The aims of a good drug and alcohol policy should be to:

- Promote understanding and awareness of the impact of drugs and alcohol on safety, health and performance in a way that changes behaviour associated with drug use
- Discourage employees from inappropriately using drugs and alcohol in a way that compromises safety and performance at work
- Encourage and support individuals to take responsibility for managing their alcohol and drug problems by making provision for counselling and rehabilitation services
- Identify individuals who may be a risk and implement immediate and longer term appropriate controls

- If testing is assessed as necessary, ensure that this is introduced in a consultative, equitable and transparent manner
- If testing is used, ensure that the methods and protocol conform to the highest possible Australian standards
- Avoid linking punitive measures to positive tests results alone.

To recap, the real challenge is to devise management strategies that meet the tests of:

- Fairness, transparency and flexibility
- Quality and representative consultation
- Accuracy, validity and consistency of any assessment method used
- Compliance with existing recognized standards and protocols
- Utmost confidence in the integrity of processes used for assessing impaired individuals
- Appropriate and balanced responses to the management impaired individuals
- Consequences of breaches that are proportionate to the problem and connected to the performance of the job (rather than the results of isolated tests).

It is true that these are complex issues that benefit from professional expertise. However, policies developed unilaterally and imposed without adequate (genuine and representative) consultation will quite rightly generate employee resentment and even industrial conflict. Indeed, the major reason why it is so important to get drug and alcohol management right is that the consequences of getting it wrong can be profound for all stakeholders.

3.2.5 Can drugs and alcohol be managed within a risk assessment framework?

The management of drugs and alcohol can be located within risk management framework that combines a range of integrated strategies suited to the level of risk at a particular workplace. The main feature of this approach is that testing becomes merely one potential (not compulsory) risk assessment tool rather than the main focus of the entire approach. Such an approach may include the following:

1. Hazard identification

- Information; education
- Consultation and provision for continuous feedback
- Provision of additional information for individuals who request it
- Provisions of support for those with problems
- Procedures for the management of over the counter and prescription drugs

2. Risk assessment

- Self assessment (education, awareness and provision for self –testing)
- Peer assessment by co-workers and management
- Opportunities for self management through self-testing of alcohol and drugs
- Random
- “For cause” testing

3. Development of controls

- Prohibition of drugs and alcohol on the designated site
- Education and awareness
- Encouragement of self assessment and management
- Testing
- Counselling and rehabilitation
- Positive test result compliance procedures

4. Monitoring and assessment

- Support for and utilisation of the policies and procedures
- Adherence to the policies and procedures
- Number of positive tests
- Evidence of improved productivity
- No safety incidents associated with drug and alcohol impairment.

4. Some current problems with drug and alcohol testing and management in Australia

4.1 Increased testing in Australian workplaces

Workplace testing of drugs and alcohol appears to be on the rise in Australia, increasing especially over the last five years or so. However, few reliable figures exist and the most recent survey in Australia appears to be the one undertaken 1991 by the National Drug and Alcohol Research Centre. This indicated little drug and alcohol testing and a strong reliance on employee assistance programs. Certainly there appears to have been an increase in workplace testing since then, particularly in certain industries such as mining and transport.

In the mining industry in NSW for example, where reliable figures do exist, the number of tests have increased significantly increased from 391 in 1997 to over 2000 in 2002 (Coal services Australia, 2002). At the same time, positive results for direct employees have remained stable at between 4 and 6% of all tests undertaken, while for contractors test results have fluctuated from between 6 and around 19%. In terms of drugs detected, in 2002 opiates accounted for the majority (42.6%) followed by cannabis at 33.3%. Positive alcohol tests were quite small at 3.7% of total tests, indicating quicker clearance rates for alcohol than for other drugs (Coal Services Health 2002).

This increase in workplace testing appears to be driven by a range of factors including:

- increased awareness of the impairment effects of a range of substances and factors such as drugs, alcohol, fatigue, heat, stress and anxiety and physical impairment;
- increased awareness of the general duty of care provisions in OHS legislation to ensure that employees do not pose a hazards to themselves or others
- employer obligation to control to presence and effects of drugs and alcohol (specified in some mining industry legislation);
- increased fear of litigation in the event of an accident or incident
- increased availability and reliability of on-site testing technologies
- reasonably aggressive marketing of testing by some overseas commercial testing companies.

Whether companies elect to test or not, there are a range of issues and problems associated with current approaches to drug and alcohol management and testing, only some of which we highlight here (see Lewis, 2002 for an excellent review of some of the issues).

4.2 Issues associated with drug and alcohol testing

It is now increasingly accepted that decisions about whether to adopt testing as a strategy should be very carefully considered and based on:

- The level of risk at your workplace
- Whether there are viable alternatives to testing (such as education, awareness and support)

- The existence of jobs that are so safety sensitive that that may justify the use of testing as a deterrent among other initiatives
- The accuracy and reliability of the testing methods.

It needs to be emphasised that testing itself is **not** a complete solution to the problem of drugs, alcohol and impairment, but rather merely one method for ascertaining the level risk and acting as a deterrent (an imperfect one) where other methods fail. However, as we outline below, there are a range of problems with testing.

4.2.1 Testing methods and approaches

A range of testing methods and approaches are currently being used in Australia, including alcohol breath testing, urine testing and more recently, saliva testing. Whilst other forms of testing exist, including hair and sweat, they are in their infancy and not considered suitable for the workplace.

The main drugs of interest at the workplace include: alcohol, cannabis, opiates (heroin, morphine and similar drugs) and amphetamines. Sometimes other drugs are screened for as well including cocaine benzodiazepines (Joyce, 2002).

Workplaces appear to be using on-site screening tests for both alcohol (breath testing) and drugs (urine testing) and laboratories for confirmatory testing (urine) for drugs. There has been a small increase in the use of saliva tests.

Workplaces are also testing in different ways. These can include:

- Pre-employment testing
- Self-testing
- Random testing
- “For cause” or on suspicion testing
- Post accident testing
- Return to duty testing
- Follow-up testing

4.2.2 Current issues associated with testing

a) The costs of testing vs the costs of not testing? Do we really know?

There are major claims made about the benefits of testing for drugs and alcohol at the workplace. Claims are made about improved productivity, decreased absenteeism and workplace accidents, reduction in liability and so on.

However, there is in fact little validated empirical evidence to support these claims. In Australia, for instance, there is little hard evidence about the extent of testing, much less evidence about the costs and benefits of testing. It may well be that testing is a cost effective approach but at present the reality is that there is little hard evidence to support it. The American Civil Liberties Union, for example, argues that “junk science” has fuelled drug testing and that unsubstantiated claims are made about the benefits in order to seal the technology and the services that support it. On the other hand, the US Transit Authority claims that there are clear cost benefits of testing. However, these claims are

based on assumptions about the level of drug use and the likely impairment effects caused by drugs and alcohol. There are currently no controlled, peer-reviewed or validated assessments of the benefits of testing in an Australian context that this author is aware of. At present there are assertions and common sense but untested claims.

b) The thorny issues of presence vs impairment

There is little question that one of the main reasons why drug testing is opposed by employees and civil libertarians is that testing for drugs in particular is not assessing impaired performance but rather indicates the **presence** of drug metabolites in the system. Depending on the testing method used, levels of a particular drug can be identified, and estimates made of the recency of use, but there is currently **no way** of determining or establishing impairment or even **when** the person was likely to be impaired³ This is especially the case with marijuana because the drug metabolites can be detected in urine long after use of the drug. Moreover, depending on the level of regular use, metabolites can be picked up for weeks after use. As a result it is considered almost impossible to ascertain the likely impairment effect of drugs. As best, detection of a drug is taken as a proxy for inappropriate drug use and possible impairment. For this reason, saliva testing is considered a viable option, since it has a smaller window of detection. However, there are currently no Australian standards for saliva testing in Australia.

Breath testing is more reliable, and evidence of an established link between the BAC and impairment is now accepted. There are of course individual differences (sex, height, weight, pattern of use) but by and large at least there is an accepted science evidence of the link.

c) Accuracy

As is now well documented, though perhaps poorly understood, is that there are limitations with all of the testing methods used. In a recent article by Professor David Joyce, Clinical Director Western Australian Centre for Pathology and Medical Research, he argued that the overwhelmingly concern that should drive the choice of a testing methodology is accuracy. He states that accuracy is important because all methods are error-prone and different testing and analysis methods have different error-rates.

Joyce explains that there are “false negatives”: and “false positives” and both create problems for employees and management alike.

False positives (usually but not always the result of onsite screening tests) are a problems because employee have to be stood down until a confirmatory test can be undertaken and this can cause stress and stigma until a confirmatory test is returned.

³ Some countries have adopted policy which takes account of this. The Canadian Human Rights Commission Policy for example, states that drug testing (especially random testing) is not acceptable because it does not assess the effect of drug use on performance. It argues that if impairment is a concern in the workplace, whether from stress, anxiety, fatigue or substance abuse, an employer should focus on ways of identifying potential safety risks and remedying them, rather than taking a punitive approach to the issue. For both alcohol and drug testing, employers must demonstrate that it can pass the “reasonable necessity” test.

Even more damaging is a laboratory false positive, the results of which are hard to challenge and can result in dismissal of an employee and expensive litigation (see P.F Worden and Diamond Offshore General Company U No 80124 of 199) 1255/99 D print S0242). This issue highlights the importance of using laboratories that conform to the highest possible standards.

False negatives are also problematic because they can allow a potentially impaired person to remain on site

Subjective reading of on-site tests: on-site urine test have to be read and interpreted by operators. There are currently no requirements that operators are trained to do so (as the police are) and so this can increase the rate of false readings.

Are there ways to ensure that employees and employers alike are protected from the outcomes of inaccurate testing?

d) Standards that will ensure the integrity of testing method and analysis of results

Unfortunately, standards and protocols associated with drug testing are not currently mandated in Australia. Compliance is voluntary. This creates problems with all of the different testing methods.

- **Issues with the use of on-site screening tests**

First, there are currently no standards governing procedures or quality controls for on-site drug testing in Australia. Whilst most of the devices are manufactured overseas and many have FDA (US) approval, these standards do not have any formal status in Australia there is no mandated requirement that they do so. These devices perform at differing levels of sensitivity, accuracy reliability. Breath testing is more reliable as most companies use devices used by state policing authorities and they have high levels of reliability and accuracy.

However, drug testing devices are different and companies need to very sure that results obtained on site are only ever used as a screen, never the final evidence of drug use. Indeed, laboratory based urine testing that conforms to Australian standards is currently the only recognised standard in place. This means that irrespective of whether saliva or urine testing is used as a workplace screening method, confirmatory laboratory testing using a urine sample is strongly recommended. It is not currently mandated. The legal status of a reliance on on-site screening tests is unclear and yet to be tested in court.

- **Standards for laboratory testing**

The only recognised standard that currently exists for the collection and analysis of human fluid samples for toxicological purposes in a laboratory setting is called AS4308: 2001 governing urine testing. However, while this standard is recommended and laboratories may state they *conform* to this standard, compliance is voluntary.

Moreover, whilst there is a system of laboratory accreditation by NATA (National Association of Testing Authorities), accreditation by NATA does **not** automatically mean that laboratories are accredited to comply with the Australian Standard. For this laboratories need accreditation to class 10.61.16: Drugs for Toxicological purposes. It

seems that there are only a handful of laboratories (around 4 or 5 out of 160+) that are currently accredited to this higher standard in Australia⁴. This standard is important since it guarantees the technical quality and integrity of the testing process and confirms to internationally recognised detection levels for drugs. Whilst laboratories may be conforming to the Australian Standard, without NATA accreditation to this higher class it is impossible for employers and employees to know with certainty the quality and reliability of their work

- **Testing methods**

Testing methods are not without their respective problems and this makes the protocols associated with their use and quality of analysis imperative. For example, saliva testing is becoming a more viable option, supported because it has a shorter window of detection for cannabis. However, at present there are no standards for its use as a screening test and confirmation testing should be undertaken using a urine sample in the event of a positive test. This means that urine tests should really be used in the event of a positive saliva test in order to undertake a confirmatory test that confirms to Australian Standards. Several devices are now on the market that at least recently received FDA approval. However, cut-off levels between saliva tests and urine tests are not directly comparable. Urine testing is recognised as more reliable, but there are no standards for its use as an on-site screening device and, as mentioned, confirmatory analysis should be undertaken at laboratories conforming with AS4308. In addition, some drugs take several hours to be absorbed into urine, so its use as detection of drugs immediate after use can be limited.

f) A need for mandated standards?

The limitations associated with all testing methods and the lack of guarantee that testing devices and methods conform to the highest possible standards should be worrying for employees and employers alike. It means that employers need to be very cautious about relying on testing (especially site screen tests) as the primary control method. IT also raises serious questions about using test results in a punitive way or as a disciplinary tool. Employees and their representatives need to be much more rigorous in demanding that testing is of the highest quality in order to ensure fair outcomes for employees. Regulators may need to reassess their current self-regulatory approach to drug and alcohol workplace management and testing.

Despite the very serious and punitive consequences for employees of delivering a positive test result, regulators in Australia have been slow to mandate procedures and processes that will ensure - among other things:

- the accuracy and integrity of the results
- the comparability of cut-off levels
- the fairness of the process
- protection against inappropriate disciplinary action by employers.

Both employees and employers alike need to be sure that the testing of samples for drug is undertaken at the highest possible standards and they need to be better informed about what to look for.

⁴ Advice from Dr John Lewis, Northern Sydney Area Health.

5. Lack of consistency in approach to drug and alcohol management

Perusal of a range of drug and alcohol policies across a range of industries highlights the vast discrepancy in approach, consistency, quality, consultative methods, detail and testing methods among just a few. Whilst a degree of flexibility is required to ensure that the level of risk within any particular workplace can be responded to appropriately, this does not appear to be the key explanation for the differences we in approaches.

The differences in approach can be illustrated by examining two examples codified in enterprise agreements, one in the construction industry, one in the mining industry. Both industries have safety sensitive employees -- employees in positions where the consequences of impaired employees are serious. Thus the need to ensure that impaired employees are managed and risks controlled is high.

Example 1: Mining agreement NSW EBA Drugs and alcohol

The parties agree that as part of the safety and security procedures of the site that:

- a) no alcohol is permitted on the mine site at any time, alcohol may be permitted with the express approval of the Mine manager
- b) no narcotic drugs, cannabis or illicit drugs are permitted on the site at any time;
- c) employees that present themselves at work under the influence of either alcohol or narcotic drugs, cannabis or illicit drugs will be refused the right to work
- d) employees found to be working under the influence of alcohol, narcotic drugs, cannabis or illicit drugs will be subject to summary dismissal
- e) employees thought to be under the influence of alcohol or narcotic drugs cannabis or illicit drugs will be required to submit to a breathalyser examination in the case of alcohol, or an appropriate medical test in the case of narcotic drugs, cannabis or illicit drugs.

The requirement to submit to such a test will be at the direction of the mine manager.

The failure to submit to such a test could result in summary dismissal.

- f) All employees as a term of their employment will be bound by the employers' policies and procedures on drugs and alcohol in this workplace.

Example 2: Construction agreement: Queensland EBA

Principle

People dangerously affected by alcohol and/or drugs are a safety hazard to themselves and all other persons in the workplace

Policy

- a) A person who is dangerously affected by drugs or alcohol will not be allowed to work until that person can work in a safe manner

- b) The decision on a person's ability to work in a safe manner will be made by the safety committee or, on projects with no safety committee, by a body of at least equal numbers of employees/employer representatives
- c) There will be no payment of lost time to a person deemed unable to work in a safe manner
- d) If this happens three times the worker shall be given a written warning and made aware of the availability of treatment/counselling. If the worker refuses help he/she may be dismissed the next time he/she is deemed unable to work in a safe manner
- e) For the purposes of disciplinary action a warning shall be effective for a period of 12 months from the date of issue

- f) A worker having problems with alcohol and other drugs
 - Won't be sacked if he/she is willing to get help
 - Must undertake and continue with recommended treatment to maintain the protection of this program
 - Will be entitled to sick leave or leave without pay while attending this program.

These two examples highlight just how different the approaches to drug and alcohol management can be, even where the risk of impairment is likely to be similar. More seriously still, the two examples show the vast differences in procedural fairness and consultation codified in policy. The construction agreement, for example, focuses strongly on consultation and ensuring opportunities for rehabilitation; the mining agreement is highly managerial and discretionary and – arguably - as a stand alone document would be highly unlikely to pass tests of procedural fairness and due process if challenged.

However, unless challenged, there are currently few avenues for ensuring that drug and alcohol policies meet the above tests, as well as tests of fairness, transparency, consistency and rigour. Given that there is an increasing tendency to include often very punitive consequences of positive tests or evidence of impairment (such as dismissal), it seems that there is a need to ensure that there greater consistency in approach. Whilst informal guidelines and guidance notes exist, there is no current requirement to confirm to them or vary them unless challenged by employees or unions.

Standards in the United States

Drug and alcohol testing expanded rapidly throughout both public and private American workplaces throughout the 1980s. Increased recognition of the impairment effects of both drugs and alcohol combined with increased availability of testing technology drove the rapid expansion of workplace testing programs. Legislation has been passed by both federal and states government covering a range of issues associated with substance abuse and its management at the workplace.

Many federal workplaces are now mandated by law to have programs that address alcohol misuse and drugs abuse in the workplace.⁵ Government industries including

⁵ See the US Divisions of Workplace programs:
<http://www.drugfreeworkplace.gov/FedPrograms/FedPrograms.htm>

transportation, nuclear power and defence all have mandated requirements that their workplaces are “drug-free” as well as programs that require drug testing as a conditions of employment for employees in “safety sensitive” or other sensitive jobs. Federal legislation which mandates testing also includes requirements for drug and alcohol misuse prevention programs, and detailed procedures for urine and breath testing under the National Laboratory Certification Program.

Many state governments in the US have also passed legislation that affects workplace drug testing. Some of these statutes restrict testing circumstances, require that specific procedures be followed, limit employee sanctions for violation or allow for private lawsuits against employers, laboratories and medical facilities that violate the law.

An overview of some examples of state laws and regulations governing drug and alcohol highlight the gaps that currently exist in Australian legislation.⁶ As seen from the examples below, some states provide for testing, other limit it, other make requirements for testing procedures. The wide variety of approaches is encapsulated in the following examples:

- **California** prohibits any drug test not performed in certified laboratory or by a licensed physician; employer with 25 or more employees must accommodate employees who wish to participate in a substance abuse program; employers must make a reasonable effort to safeguard employee privacy
- A **San Francisco** ordinance prohibits drug testing under most circumstances including random, periodic, and post accident testing. Pre-employment, reasonable suspicion and rehabilitation testing are permitted where specific requirements are met
- In **Maryland** state law does not place any restriction on the types of testing that may be conducted, but does require that specific technical procedures be followed with regard to drug testing. All testing must be conducted at laboratories certified by the Maryland Department of Health and Mental Hygiene. Hair testing is permitted for pre-employment testing only.
- **Texas** focuses on drug test falsification where state law provides that it is illegal to manufacture, deliver, own or use a substance or device designed to falsify drug test results
- In **Virginia**, State law requires that all public bodies include in every contract over \$10 000 the following provisions:
 - The contractor must provide a drug free workplace for the contractors employees;
 - S/he must post a statement explaining the drug free workplace policy and the consequences of policy violation
 - S/he must state in all solicitations or advertisements for employees that the contractor maintains a drug-free workplace

⁶ See the Us Department of labor SAID site:
<http://www.notes.dol.gov/said/nsf/2744923ab65da61>(Check this)

- She must include the drug-free workplace clauses from the Act in every sub-contract or purchase order over \$10 000 so that the provisions are binding on the sub-contactor or vendor.

Whilst many of these standards and protocols apply to testing, they apply more generally to items such as the provision of assistance programs and privacy. Unions and civil liberty groups in the United States, for example have lobbied to ensure that where testing is mandated, that there are rights associated with:⁷

- Advance notice of program implementation
- Detailed appeal provisions
- Guarantee that testing is conducted at certified laboratories and at forensically significant cut-off levels
- Medical review officer
- Privacy provisions
- Access to substance abuse treatment through employee assistance programs

Finally, and by way of illustration of how complex and involved the issue of drug testing is, the Federal Transit Authority suggest the following as checklist for those contemplating introducing a drug and alcohol testing program

- What gets tested (the substances which will be tested)
- Testing methods, how testing is to be conducted and by whom
- Training of operators if on-site testing is to be undertaken
- Provision for self-testing is available
- Scope of testing and categories of employees who will be tested (eg everyone, those in safety sensitive positions, contractors, visitors etc)
- Documentation of how the employer determined who would get tested (to ensure procedural fairness and adequate notice)
- Conditions under which employees agree to be tested
- Testing circumstances (eg pre-employment, random etc)
- Description of the testing procedures
- Criteria for post-accident testing
- Criteria for reasonable suspicion testing
- Return to duty and follow-up testing
- Procedures used to test for drugs
- Procedures in place to protect the employees and the integrity of the drug testing process/breath testing
- Description of the employees rights to access records and the protection of those records
- Procedures in place to ensure the validity and reliability of the test results
- Chain of custody procedures
- Conditions and ramifications of refusal to take a drug or alcohol test
- Description of the consequences of an indicative and then confirmed drug test (*immediate response and subsequent response to an indicative and then confirmed test) This may include immediate removal from the site

⁷ See the US Divisions of Workplace programs:
<http://www.drugfree workplace.gov/FedPrograms/FedPrograms.htm>

- Timeframe governing the policy
- Methods of intervening if an alcohol problem is suspected
- Elements a drug rehabilitation and support program
- Avenues for appeal
- Management of prescribed drugs

The need to ensure that these issues are addressed exist in Australia as well. As yet, we appear to be in the early stages of ensuring that all industries and workplaces have drug and alcohol policies that address all of these issues. It is clear that some workplaces are tackling drug and alcohol management in a progressive and consistent way, others are way behind.

Conclusions

Drug and alcohol testing is on the rise in Australia and the interest in it is increasing. However, the use of various technologies appears to have outstripped legal protections for employees and employers alike. There is a need to ensure that the testing that is undertaken – whether on site or in the laboratory - conforms and can be proven to conform to the highest possible standard of accuracy and reliability; there needs to be a more transparent system for knowing that laboratories are properly accredited.

Moreover, drug and alcohol policies need to ensure that employee rights are protected, that processes and procedures are fair and transparent and are developed in a way that is both representative and consultative. The consequences of not doing could well leave us with a massive morning after feeling.

References

Lewis, J. (2002) “Working to recognised standards: a prerequisite for drug testing in Australia” **Therapeutic Drug Monitoring** Vol 24 No 1 pp182 -186