

# Drugs and Alcohol in the Workplace

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## SUMMARY

*Given the likely prevalence of drugs and alcohol in the workplace, it is the writer's view, however controversial that may be, that the statutory and legal obligations on employers, directors and those concerned in the management of corporations to provide a "safe" working environment virtually compel the introduction of a policy or program designed to ensure that employees do not attend work whilst under the influence of drugs or alcohol.*

*Although there is no single solution for the detection of drugs and alcohol, or for the response once they are detected, this paper seeks to canvass in a practical way some of the main issues and obstacles employers may encounter upon the formulation, introduction or implementation of such a policy. The writer also puts forward a compelling case for incorporating regular and random testing for alcohol and drugs within a policy or program.*

## NEED FOR ACTION

Alcohol and drugs of abuse are widely used in the Australian community. In relation to drugs, surveys indicate that cannabis is the most widely used illicit drug, with about one in three adults having used it in 1993.<sup>1</sup> The prevalence of cannabis use is higher among men than women, and decreases with age, with a sharp decrease over the age of 40 years.<sup>2</sup> There is also a variation in cannabis prevalence rates across States and Territories in Australia. Recent studies showed that cannabis use was highest in the Northern Territory.<sup>3</sup>

### *Impairment*

It now seems beyond argument that alcohol and drugs such as cannabis, opium, cocaine, amphetamine(s) and benzodiazepines (sedative-related drugs such as Valium) create intoxicating effects which adversely affect

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<sup>1</sup> Donnelly and Hall, *Patterns of Cannabis Use in Australia*, National Drug Strategy, Monograph Series No 27 (1994), p 9.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, pp 12-13.

skills required to perform work safely. Both psychomotor and a range of cognitive functions are impaired.<sup>4</sup> Persons so impaired are thus much more likely than those not impaired to act in an unsafe way or to take unjustifiable risks.<sup>5</sup> In the mining and petroleum industries where a large range of duties are performed which may readily be described as “safety sensitive”, not only in the use of large pieces of equipment but in the performance of a number of tasks requiring acute and accurate judgment or skill, there is, thus, no room for drugs which impair the safe performance of work.

### *Duties*

The obligations on employers in respect of the safety of employees and others who come onto a work site are onerous. Legislative provisions dealing with the obligations of employers and employees in respect of safety are numerous,<sup>6</sup> far-reaching<sup>7</sup> and impose heavy penalties for breach. The obligations also extend to contractors and their personnel.

In addition, the legislative provisions in a number of jurisdictions shift the onus onto the employer to prove either that it was not reasonably practicable to comply with the statutory obligations contained in a particular Act or Regulations, the breach of which constituted the offence, or that the commission of the offence was due to causes over which the person had no control and against the happening of which it was impracticable to make provision.<sup>8</sup> One should also not lose sight of the fact that these statutory provisions impose on directors of corporations, and on persons “concerned in the management”, obligations similar to those of the corporation unless such persons satisfy the court that they were not in a position to influence

<sup>4</sup> Hall, Solwy and Lemon, *The Health and Psychological Consequences of Cannabis Use*, National Drug Strategy, Monograph Series No 25 (1995).

<sup>5</sup> In the first report of the Victorian Road Safety Committee upon the *Inquiry into the Effects of Drugs (Other Than Alcohol) On Road Safety in Victoria* (1995) there appears, inter alia, the following conclusions:

- The most common drug (other than alcohol) detected in drivers killed in Australian accidents are in decreasing prevalence — cannabis, stimulants, opiates and the minor tranquillisers.
- All of these drugs have the capability to impair driving skills, particularly when misused.
- For comparison, alcohol use is still the major drug factor contributing to crashes on Australian and overseas roads. Approximately 30% of dead drivers have over 0.05% blood alcohol concentration.

<sup>6</sup> See, eg, *Occupational Health and Safety Welfare Act* 1983 (NSW); *Workplace Health and Safety Act* 1996 (Qld); *Occupational Health and Safety Act* 1985 (Vic); *Mineral Resources Development Act* 1990 (Vic); *Mineral Resources (Health and Safety) Regulations* 1991 (Vic); *Petroleum (Submerged Lands) Act* (Cth) 1967 and mirror legislation in various States; *Occupational Health and Safety (Maritime Industry) Act* 1993 (Cth); *Mines Safety and Inspection Act* 1994 (WA); *Occupational Health, Safety and Welfare Act* 1986 (SA); *Workplace Health and Safety Act* 1995 (Tas); *Work Health Act* 1986 (NT).

<sup>7</sup> In some jurisdictions it has been held that the obligations give rise to a duty in “absolute terms”: see, eg, *Shannon v Comalco Aluminium Ltd* (1986) 19 IR 358.

<sup>8</sup> See, eg, *Occupational Health and Safety Welfare Act* 1983 (NSW), s 53; cf *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 in which the High Court considered the provisions of the *Occupational Health and Safety Act* 1985 (Vic) and held that the relevant section imposed on the prosecutor the onus of proving practicability.

such persons satisfy the court that they were not in a position to influence the conduct of the corporation in relation to its contravention of the relevant provisions, or they, being in such a position, used all due diligence to prevent the contravention by the corporation.<sup>9</sup>

The penalties that a court may impose are now significant, ranging from heavy fines to, in some jurisdictions, more serious penalties.<sup>10</sup>

It is now trite that at common law the relationship between employer and employee gives rise to a promise to take reasonable care to provide a reasonably safe system of work and reasonably competent staff in all of the circumstances of the case so as not to expose employees to an unnecessary risk. A breach of this duty may, of course, give rise to claims in damages against a corporation and possibly also against persons in authority in the corporation, damages being at large.<sup>11</sup>

It may be difficult for an employer to discharge these onerous statutory and common law obligations without taking some steps or implementing some policy or program designed to ensure that employees do not cause themselves or others risk of injury (and that may be all that is required to constitute an offence) or actual injury because they are under the influence (impaired) or adversely affected by drugs or alcohol.

## OPTIONS

### *Employment contracts*

Through contracts of employment and company policies an employer may be able to stipulate that use, possession or being under the influence of drugs or alcohol at the workplace is unacceptable and will constitute misconduct of a kind which might give rise to dismissal.<sup>12</sup>

But if the employer were to do nothing more, a question will always remain whether it will be able to discharge its obligations in the case of a prosecution for breach of safety laws which, more often than not, may follow an accident or even fatality, or following upon a claim in damages.

Depending, of course, on the particular circumstances of the employer and the incident, I venture to suggest that even with these kinds of contractual terms in place an employer or its directors or managers cannot sit by and assume, with confidence, that without a vigorous policy to eradicate the use or abuse of drugs and alcohol in a workplace their positions are secure.

<sup>9</sup> See, eg. *Occupational Health and Safety Welfare Act 1983 (NSW)*; *Mines Safety and Inspection Act 1994 (WA)*, s 99.

<sup>10</sup> See, eg. *Occupational Health, Safety and Welfare Act 1986 (SA)*, s 59, creating a minor indictable offence (for aggravated cases) carrying a term of imprisonment for a period not exceeding five years.

<sup>11</sup> Usually there would be some form of insurance to minimise the impact of such claims on the employer and individuals.

<sup>12</sup> Bear in mind that some workplaces in areas such as mining towns are immediately adjacent to living quarters and/or "recreational" areas where alcohol may be served.

### ***Personal observation as a means of detection***

Another option is to ensure that supervisors are vigilant and observant and utilise the rights which, in some jurisdictions, arise from statutory provisions entitling the employer to direct employees to leave the mine site where the supervisor is of the opinion that the person is "adversely affected" by intoxicating liquor or drugs.<sup>13</sup>

My understanding is that personal observation as a means of detecting whether persons are under the influence of alcohol and drugs is notoriously unreliable, even when the observations are being carried out by trained observers. Moreover, the affects of alcohol or, more particularly, certain drugs may be masked and, for example with chronic users of (say) cannabis, the observer may not have an "unimpaired standard" to go by. Such users may, I believe, also be able to behave "normally" when confronted or challenged. Other drugs may have a "performance-enhancing" effect.<sup>14</sup> Nonetheless, the person may be affected and may end up taking much greater risks or putting her or his own or other persons' safety at risk.<sup>15</sup>

### ***Performance testing***

There are, I believe, available on the market various computers and computer software programs which are designed to enable persons to carry out what might be said to be simple exercises in order to determine fitness for work. In essence, these are "critical tracking tasks" testing, amongst other things, eye-hand co-ordination. I suggest that the following factors be considered before such a system is introduced or used:

1. What are the costs of setting up the system and maintaining it?
2. What does a positive test result prove or indicate? It may not be possible to know the cause of the positive result.
3. Does a negative test result actually mean the person is *not* impaired? A person affected by drugs, for example, may be able to perform the simple task on the test but still not be able to perform more complex tasks at the work site.
4. Do employees set their own "benchmark", upon which subsequent tests will be based, on a reliable basis? For example, if chronic and acute users sit tests to "benchmark" later tests, it is unlikely that later tests will produce a meaningful result.
5. Will the issue of unlawful discrimination arise? If the test shows up features peculiarly related to whether the employee is male or female, how will the employer deal with that situation?

<sup>13</sup> See, eg, *Mines Regulation Act 1946* (WA), reg 4.7.

<sup>14</sup> The understanding I have set out in this paragraph is derived from discussions I have had in the course of preparing a matter for trial with the assistance of Professor M Christie, Associate Professor of Pharmacology at the University of Sydney.

<sup>15</sup> The absence of reliance by road and traffic authorities on a personal observation method to detect whether a person is adversely affected by drugs may be an indication of how inherently unreliable the method is.

6. Can a test of, for instance, 20 seconds duration (which I understand at least one manufacturer suggests is the time for a test) reliably show anything?<sup>16</sup>

One employer in the mining industry has indicated to me disappointment in this type of testing system, which was used for a time in the mining industry's operations. The mining industry came to the conclusion that the system was not suitable for detecting impairment from, or the presence of, drugs and alcohol or their recent use. It appears to me that this form of testing is still in its infancy or developmental stage and, until technology is much more advanced, is not a viable option in dealing with the prevalence of drugs and alcohol.

### *Specific testing for drugs and alcohol*

Employers in the mining and petroleum industries no doubt already have various forms of rules or policies discouraging the use, or being under the influence, of drugs and alcohol whilst employees are at work.

If an employer decides upon the introduction of a drug and alcohol policy, the policy should achieve a number of results and objectives. These would, or should, in my view, include the following:

- (a) an awareness of the adverse effects of the use of alcohol and drugs;
- (b) the encouragement of employees to obtain professional help for drug or alcohol dependency, use or abuse;
- (c) a deterrent effect;
- (d) some form of disincentive or detriment for employees who are at work whilst impaired, or are likely to be impaired, by reason of the use of alcohol or drugs;
- (e) the means of detecting actual impairment or recent use, from which can be drawn certain inferences as to the likely impairment of the user so as to ensure people in this situation are not at work.

The next step would be to address the following issues which I raise for consideration, although I do not, of course, profess to be a pharmacologist.<sup>17</sup>

#### *What type of testing will be used?*

"Breathalyser equipment" is, as I understand, now fairly sophisticated and well developed so as to effectively and accurately measure the level of breath alcohol from persons participating in such a test.

<sup>16</sup> See, eg. clinical studies reported by Kelly, Foltin, Emurian and Fischman, "Performance-based Testing for Drugs of Abuse: Dose and Time Profiles of Marijuana, Amphetamines, Alcohol and Diayepam" (1993) 17 *Journal of Analytical Toxicology* 264 where tests are more detailed and their duration much greater.

<sup>17</sup> These matters are therefore set out, in some cases, in summary form without all the technical details which may accompany a scientific analysis of the issues.

The reasonably direct relationship or correlation between the levels of breath alcohol and intoxication or impairment (as is the case in blood alcohol concentrations) means that an employer, for example, can be satisfied that the person tested is impaired if alcohol is detected. Therefore, it is probably not necessary to consider other forms of testing methods for detecting alcohol impairment.

The position is by no means as straightforward in respect of drugs; either prescription drugs or illegal drugs. As the most commonly used of the non-prescription drugs in our community is probably cannabis, I will pay more regard to testing for intoxication or impairment resulting from ingestion of that drug.

### *Blood tests*

Readily available tests of body fluids essentially seek to detect the presence or levels of metabolites (cannabinoids) in samples tested. Expert opinion suggests that the detection in blood of metabolites produced from cannabis provides a reasonably reliable basis for concluding that the person was intoxicated and impaired by the drug at the time of testing.<sup>18</sup> However, unless persons voluntarily submit to giving a blood sample for testing, this form of testing may be difficult to enforce. To require an employee or other person to involuntarily submit to such a test may constitute assault and be actionable.<sup>19</sup>

### *Urine tests*

Urinary tests for cannabis and cannabinoids appear to be an alternative form of testing. The use of such tests seems to produce much controversy and, it appears to me, a breeding ground for oversimplified or even inaccurate statements in some quarters. I do not wish to cite particular articles or papers which might fall into that category since it will detract from my aim of highlighting matters to be considered in formulating a policy in the industries with which we are concerned. Suffice to say that statements which suggest that there is no benefit or no proven benefit of having such tests, or that a "positive" urine test for cannabis proves "nothing", should be treated with great caution.<sup>20</sup>

Urine tests do, however, have their shortcomings. The direct correlation which exists between the presence of blood or breath alcohol and intoxication or impairment is not available. Therefore, a positive test of urine revealing the presence of cannabinoids in the sample does not necessarily mean that the person tested was in fact impaired at the time of testing. However, the absence of such direct correlation does not negate the value of such tests.

<sup>18</sup> Hall, Solwy and Lemon, *op cit* n 4, p 35.

<sup>19</sup> See, eg, *J v MCC; W v W* [1972] AC 24.

<sup>20</sup> My view, based on scientific materials and opinion I have read, is that such statements are wrong and should be rejected.

It is true that the metabolites from cannabis may be present in urine for some time after the intoxicating and impairing effects of the drug have worn off. However, in general, "the greater the level of cannabinoid metabolites in urine, the greater the possibility of recent use, but it is impossible to be precise about how 'recent' use has been".<sup>21</sup> You should not be misled by unqualified statements that metabolites may be present in urine for lengthy periods of time. The significance of such statements depends on the sensitivity and the quantities or levels which may be found well after use by such tests. Testing used on a work site should, of course, not be designed to detect every trace of the drug or its metabolites.

With scientific information now available, an employer knows, or ought to know, that use of the drug would have produced intoxicating effects or impairment at some point in time. Since the employer is unable to determine from a urine test just how recent that use was, is it not reasonable for it to conclude that it is unsafe for a person who has tested positively to remain on the work site until such time as a negative test result is returned?

Moreover, the employer who has obtained a positive test result probably has no means of determining whether the person returning such a result may be a casual user or a chronic, heavy user of the drug. If the latter, that person is, by definition, someone who is regularly consuming the drug and is more than likely to be intoxicated or impaired at some time during working hours.<sup>22</sup> In my view, such a person clearly *should not be at work*. In addition, the testing may produce the avenue for the person to be assisted by a rehabilitation program combined with an overall testing program.

Does this not make the use of urinary tests to detect recent or very recent use of the drug imperative? And is the employer not entitled to have the employee or person returning a positive test leave the work site? In my view it does.

### ***Practice for collection and handling of samples***

It is obviously necessary to have in place a proper procedure for the collection and adequate identification of a sample for testing on-site or at a laboratory. Attention should be given to the manner of collection, the integrity and identity of a collected specimen, transportation to the relevant laboratory, storage and "chain-of custody".

There has been developed an Australian Standard AS4308-1995 entitled "Recommended Practice for the Collection, Detection and Quantification of Drugs of Abuse in Urine". As part of the Standard, a urine drug screening collection protocol was developed, which provides a useful guideline to overcome some potential objections to the whole concept of urine testing particularly as it relates to the invasion of privacy and/or supervision when a specimen for testing is produced.

<sup>21</sup> Hall, Solwy and Lemon, *op cit* n 4, p 35.

<sup>22</sup> Once again I have been influenced in drawing these conclusions by discussions I had with Professor M Christie. The views and the manner in which I have expressed them are not necessarily his views.

### ***Confidentiality***

One of the issues employers may confront in introducing a policy is that of confidentiality of the results. This concern may relate not only to the issue of confidentiality in disclosing information which might prove or assist in proving the commission of a criminal offence, but also to potential disclosure of particular lawful medication being used by the persons concerned. Fundamentally, every effort should be made to ensure confidentiality. Persons who have acquired this confidential information (the employer and/or a laboratory) will, of course, not be entitled to refuse to produce the relevant information under compulsion of law (for example, by way of subpoena) by the appropriate authorities.

It may also be harder to encourage in the work force acceptance of a program which does not provide safeguards for confidentiality of information. Any rehabilitation program which may be available may also be affected if such utilisation is not confidential.

### ***Test cut-off levels***

This is potentially a contentious issue in any testing program for alcohol and drugs. In relation to alcohol, a decision may be made, for example, to set the cut-off level at 0.05 per cent, that being the level used in a number of jurisdictions by traffic authorities. It is important to stress that this is an arbitrary figure. It does not mean that persons who return a test result of, for instance, 0.03 per cent, are not in fact impaired at the time of testing and ought to be permitted to perform work which is in any way safety-sensitive. This may turn out to be a difficult issue for employers if they are challenged in respect of an alleged breach of duty under relevant safety legislation. On the other hand, a policy becomes less acceptable if every trace of alcohol results in some form of disciplinary action or detriment to employees. What I am advocating is that those who formulate a policy ought to bring their minds to bear on this matter to decide on whether a workplace will be entirely alcohol-free; that is, whether very low cut-off levels are to be used or whether a degree of tolerance will be permitted.

Part of this consideration will then raise some potential difficulty in relation to "false positives" and "false negatives" produced from testing. As I understand this issue, it appears more likely that the lower the cut-off level, the more likely it is that persons who are in fact not intoxicated may return a "positive" test, whereas a false negative will mean, usually at a higher cut-off level, that persons who may in fact be impaired to a degree are not "caught in the net".

In relation to "drugs of abuse" there is a similar imperative, namely to decide what test cut-off levels will be used. The Australian Standard referred to above states that a range of options for preliminary testing is presented "but gas chromatography/mass spectrometry (GC/MS) is the only approved confirmatory test technology at present. The cut-off levels listed for both the preliminary test and confirmatory test are those industry-accepted levels."



The Standard further provides that:

“drugs and their metabolites in urine are detected and identified by two independent methods. The initial test (sometimes known as the screening test), is designed to tentatively identify the presence of drugs from those classes of drugs listed (in the Standard). Furthermore, it eliminates samples not containing the specified drugs or those containing drugs below the designated reporting levels. The confirmatory test is designed to confirm the identity and quantitate the individual drug from the class presumptively detected by the initial tests.”<sup>23</sup>

The Australian Standard then sets out test cut-off levels for initial testing and also for follow-up testing by use of the GC/MS method, the latter being much more sophisticated and able to detect the relevant cannabinoids more accurately.<sup>24</sup>

In certain circumstances it may be necessary to decide or negotiate with employees or their representatives the appropriate levels at which testing cut-off levels will be set.

### *Frequency of testing and selection*

It will become necessary to decide when employees or persons coming on-site are to be tested. In some cases in relation to employees it may be most convenient to do that immediately prior to the start of shift. This might not go far enough since there have been incidents of which I have become aware where it was obvious that during the course of a shift employees smoked cannabis (and of course must have become intoxicated whilst at work). Another consideration is that if testing takes place during a shift or immediately following a break the persons being tested will be much more readily identifiable.

Random testing, by means of a predetermined random selection process (perhaps a computer selection or drawing numbered balls out of jar) whereby all employees or persons who come on-site are equally subject to being tested on any work day without suspicion of use, should also be considered. Such a system will remove the potential for arguing that drug testing could be used as a means of victimisation. It also ought to have a deterrent effect.

It may be possible to draw on experience from the introduction of random breath testing on the roads to highlight the potential benefits of random testing. In proceedings of the 1992 Autumn School of Studies on Alcohol and Drugs,<sup>25</sup> the following was stated with respect to an earlier nationwide review of the effectiveness of such testing:

“In September 1988 Professor Ross Homel, then of the School of Behavioural Sciences, Macquarie University, released his report on a

<sup>23</sup> AS4308-1995, preface and cl 1.4.

<sup>24</sup> For example, the initial test cut-off level provided for in the Standard for cannabis metabolites is 50 ng/ml and for the confirmatory GC/MS it is 15 ng/ml.

<sup>25</sup> Maloney, “Random Breath Testing: A Prevention-based Initiative”, paper delivered at St Vincent’s Hospital, Melbourne, 20-22 May 1992.

nationwide study of random breath testing (RBT). He concluded that RBT was highly effective in reducing the incidence of alcohol affected driving. He concluded, however, that it reduced the level of alcohol affected driving through 'prevention' based interaction as opposed to 'detection' methods. He further concluded that the key points to address in achieving the maximum effect from RBT were as follows:

It was essential to be:

- highly visible
- vigorously enforced to ensure credibility
- sustained on a long-term basis
- well publicised.

Further analysis indicated that the true objective of RBT was that 'in order to reduce the incidence of alcohol affected driving it is necessary to create a general community belief that any such driving will most likely bring about their apprehension'."

The American experience appears to be similar. Studies suggest that "employers have found that random drug testing is a deterrent to both frequent and occasional use of illicit drugs" and "random workplace testing acts as a powerful prevention strategy to counteract illicit drug use because it does not involve an easily evaded scheduled test".<sup>26</sup>

In America, there have been a number of studies to assess the effectiveness of drug and alcohol testing programs. One such study critically evaluated the use by the Utah Power and Light Company of a substance abuse management program over a period of time.<sup>27</sup>

In the study it is stated:

"[D]rug testing was proven to be an effective deterrent to substance abuse in the occupational setting by the Navy's response to the 1981 jet crash on the flight deck of the aircraft carrier Nimitz ... Justification for widespread testing in the civilian work force has been prompted by the military's success, the desire to maintain a safe working environment and the competitive need for [United States] industries to eliminate the wasteful costs associated with drug and alcohol use."<sup>28</sup>

One of the conclusions drawn by the authors of that study was the following:

"Vehicle accident and medical injury accident data were used to draw inferences about the deterrent effect and efficiency of testing. There has been a continuing decrease in the number of vehicle accidents and mean number of vehicle accidents per month over the last two years.

<sup>26</sup> DuPont, Griffin, Siskin, Shriakis and Catze, "Random Drug Tests at Work: The Profitability of Identifying Frequent and Infrequent Users of Illicit Drugs" (1995) 14(3) *Journal of Addictive Diseases* 1 at 2.

<sup>27</sup> Crouch et al, "A Critical Evaluation of the Utah Power and Light Company's Substance Abuse Management Program: Absenteeism, Accidents and Costs" in Gust and Walsh (eds), *Drugs in the Workplace: Research and Evaluation Data*, NIDA Research Monograph No 91 (1989).

<sup>28</sup> *Ibid*, p 171.

[A] statistical evaluation comparing 1985 to 1986 and 1987 shows that statistically a change has occurred in the number and frequency of vehicle accidents at [Utah Power and Light Company]. The detected drug users in [one group] were five times more likely to have an on-the-job accident than in another [non-affected group]. Vehicle accident frequencies demonstrated a decreasing trend following the onset of drug testing.”<sup>29</sup>

In addition to random testing, it may be necessary or desirable to also have “for cause” testing in the event of any incident or accident. In other words, every person involved in an incident or accident is required to submit to a test.

Pre-employment testing is also used in certain jurisdictions, apparently to some good effect.<sup>30</sup> In an American study of the United States Postal Service, a conclusion was reached, in summary, that the authors of the study found “the positive pre-employment drug screening for marijuana or cocaine [is] predictive of a number of adverse employment outcomes”, namely, elevated relative risks for turnover, accidents, discipline and absence.<sup>31</sup>

### *Who should be tested?*

If the underlying rationale for testing relates to safety it is essential that all persons attending a site, whether “staff”, “wages employees”, contractors or visitors, be subjected to the same scrutiny and testing.<sup>32</sup>

This issue, and testing generally, highlights some concern for the apparent invasion of privacy associated with such a program. The Privacy Committee of New South Wales, for example, produced a report studying the privacy issues associated with workplace drug testing.<sup>33</sup> The Committee made the following observations in relation to issues of safety:

“There is no doubt that people who are using drugs may, in some occupations and in some circumstances, constitute an extreme safety risk to themselves and to others.

Many drugs can have an adverse effect on physical and mental functions required for the proper performance of hazardous activities. The use of some drugs can result in, for example, impaired co-ordination and reaction time and impaired judgment.

In particular the effects of alcohol on the performance of psychomotor tasks is well established and are the reason for the laws

<sup>29</sup> *Ibid*, pp 190-191.

<sup>30</sup> *Ibid*, p 171.

<sup>31</sup> Ryan et al, “The Effectiveness of Pre-employment Drug Screening in the Prediction of Employment Outcome” (1992) 34 JOM 1057

<sup>32</sup> A contractual requirement that contractors comply with such a program may be relevant to the discharge of the principal’s statutory duties: see, eg, *R v Associated Otel Co Ltd* [1996] 4 All ER 846 (HL).

<sup>33</sup> Privacy Committee of NSW, *Drug Testing in the Workplace*, No 64 (October 1992), concluded that workplace drug testing is privacy invasive in terms of both physical privacy and information privacy (data protection) interests. The Committee is established by the *Privacy Committee Act 1975* (NSW).

against driving motor vehicles with more than a prescribed concentration of alcohol in the bloodstream.”<sup>34</sup>

“Many jobs can pose a safety risk if the people involved are impaired by drugs. However, with the exception of alcohol, breath and blood testing, it seems that drug testing is severely limited in its ability to show that a person is impaired to the extent that safety is at risk.

Urine drug testing, in particular, is of limited usefulness in this regard. This form of testing can do little to alleviate safety concerns unless it is deemed that any detectable level of certain substances is unacceptable.<sup>35</sup>

The Privacy Committee concludes that workplace safety is a concern of such importance that, in limited circumstances, drug testing for safety reasons may be justified.”<sup>36</sup>

For the reasons I have expressed above, these comments, in my view, understate the value of urine testing. It is the most readily available and least invasive form of testing employers can use. If a person tests positive it provides evidence from which a number of legitimate inferences can be drawn, one of which is that it cannot be ruled out that at the time of testing the person was in fact impaired by use of the drug!

The Privacy Committee further proceeded in its report, for reasons which I do not find acceptable, to conclude that:

“random workplace testing breaches data protection principles. It is intrusive, unfair and unjustified. Random drug testing overturns the presumption of innocence and creates a suspect of anybody who is asked to be tested ... The Privacy Committee has concluded that the introduction of random drug testing in the workplace is not justifiable. Drug testing should be limited to situations where there is reasonable cause to believe a person is impaired by drugs.”<sup>37</sup>

It is indeed strange to suggest that urine testing is of “limited usefulness” and does “little to alleviate safety concerns” but, at the same time, to accept that method of testing for reasonable cause. In any event, employers in New South Wales will have to pay particular regard to these views expressed by the Privacy Committee.

Issues of privacy and potential violations of Fourth Amendment Constitutional Rights in America have obviously come before the courts there on a number of occasions, many of the cases concerning the introduction of urine testing for drugs and alcohol by government agencies. For example, in *Blustein v Skinner*<sup>38</sup> the United States Court of Appeal upheld the introduction of *random* unannounced drug testing of airline personnel. It was held that the interest in securing safe airline travel for the public overcame the violation of privacy interests of employees in being subjected to urine testing.

<sup>34</sup> Privacy Committee of NSW, *ibid*, p 29.

<sup>35</sup> Which, in my view, is not inappropriate. Any person who feels aggrieved by such a situation may wish to voluntarily provide a blood sample.

<sup>36</sup> Privacy Committee of NSW, *op cit* n 33, p 30.

<sup>37</sup> *Ibid*, pp 31-32.

<sup>38</sup> 908 F 2d 451 (9th Cir 1990).

The testing program proposed by the Federal Aviation Administration did not require any level of individualised suspicion or the occurrence of any “suspicion-triggering” event. In considering whether privacy concerns should outweigh safety concerns, the court held that the use of random testing was only a relevant factor to consider, particularly in circumstances where the employer reasonably concluded (on the basis of more evidence available to it supporting the efficacy of random testing programs than of non-random programs) “that random testing without advance notice will prove to be a greater deterrent than testing with advance notice”.<sup>39</sup>

### *Consequences for employees*

It is very important to decide, in advance, what action will be taken against employees who do test positive in relation to any of the tests. In my view, it is appropriate to require employees who do so to leave the site forthwith. Where follow-up tests are required (such as the GC/MS tests for cannabis), the employee should be required to remain off-site until there has been verification of the initial on-site tests. Questions then arise as to whether an employee is entitled to be paid whilst off-site and when that employee or person would be entitled to return to site.

It may be desirable to ensure that employees or persons who test positive do not return to site until a negative test is returned. It may also be necessary to deduct pay from employees who have tested positive until such time as a negative test is returned. If this course is not followed and no sanction at all is applied the policy may not have the requisite deterrent effect.

Moreover, a decision will have to be made whether other disciplinary action will be taken; for example, if the employee engages in this form of conduct on more than one occasion. Warnings may be given and ultimately dismissal may be justified.<sup>40</sup>

Provisions will also have to be made for the situation where employees or persons refuse to undertake the tests. One option may be to refuse access to the site without pay until such time as the employee does submit to a test and tests positive. Disciplinary action might also be justified.

### *Implementation of a policy*

It is obviously desirable to ensure that when employees are first engaged their contracts of employment stipulate that they agree to abide by the company’s drug and alcohol policy and agree to submit to nominated tests to give effect to such policy. It is also desirable for those persons to

<sup>39</sup> Ibid at 457; see also other cases cited there, upholding random drug testing in America.

<sup>40</sup> For a discussion on unfair dismissal because of drug and alcohol use and other issues concerning drug policies see: Sash, “Drugs in the Mining Industry — Legal Issues”, paper delivered to the Western Australian Branch of AMPLA, State Conference 1997, Perth.

acknowledge the consequences of non-compliance with the policy or returning a positive test result for any tests which are conducted from time to time.

For existing employees, the issue arises of how a newly developed policy is to be introduced. Existing contracts of employment may stipulate that the employee will abide by all the company's policies and procedures including those relating to safety. Depending upon the wording of such contracts the employer may be entitled, pursuant to those contractual terms, to implement its policy.

In the absence of any such contractual provisions the question will arise whether an employer is entitled, without more, to implement a policy containing the type of provisions I have referred to in the earlier part of this paper. In my view, it is at least arguable that the statutory and perhaps the common law obligations imposed on employers in relation to safety entitle them, without the consent of the employees, to insist on compliance with a drug and alcohol testing program which has as its foundation a concern for safety. This view, however, may be seen to be controversial and this step should not be undertaken without proper advice specific to your own situation being obtained.

The basis for arguing that consent or contractual agreement is not necessarily required arises from provisions in some jurisdictions to the effect that an employee's duty to co-operate with employers extends to enabling the employer to fulfil its statutory obligations under the relevant Acts referred to above.<sup>41</sup>

It is also possible to insert the requisite provision acknowledging the agreement of employees to submit to testing, and the policy as a whole, through either certified agreements, Australian Workplace Agreements or workplace agreements as and when they are negotiated and concluded. I am not aware of any Industrial Tribunal actually arbitrating on the terms of a policy that may be introduced.<sup>42</sup> There are, however, a number of instances where certified industrial agreements have included a form of policy which appears to be favoured by the union covering the particular work.<sup>43</sup>

### ***Rehabilitation and education***

In some instances employers wish to make available to their employees the assistance of a rehabilitation program. The terms upon which this is to take place — time off work, confidentiality, et cetera — should be considered.

<sup>41</sup> See, eg, *Petroleum (Submerged Lands) Act 1967* (Cth), s 9; *Occupational Health and Safety Welfare Act 1983* (NSW), s 19; *Mines Safety and Inspection Act 1994* (WA), s 10(3).

<sup>42</sup> Whether the Australian Industrial Relations Commission will be entitled to do so as an "allowable award matter" under the *Workplace Relations Act 1996* (Cth) remains to be seen.

<sup>43</sup> See, eg, the "BTG Drug and Alcohol Program" referred to in "Jasmat Steel Fabrication Industrial Agreement No AG 165 of 1996" (1996) 76 WAIG 2626. See also *Key v Cargill Foods* (unreported, Industrial Relations Court of Australia, Tomlinson JR, 6 September 1996).

It may also be advisable to provide some materials to employees about drugs and alcohol, their adverse and dependency-forming affects and how to obtain help for problems associated with their use.<sup>44</sup>

### *Other obstacles*

Many employers in the mining and petroleum industries will, no doubt, be engaging a variety of contractors. It will be essential to ensure that the contractual relations between parties stipulate that the principal contractor is entitled to enforce its drug and alcohol testing policy in respect of all persons on-site, including those brought on at the invitation of the contractor.

Many employee organisations may also resist the introduction of a policy or some of its terms. It may, therefore, be necessary to engage in consultation with those organisations in the development of such a program in order to obtain agreement as to levels of testing, manner of testing and so on.

## CONCLUSION

Each individual employer's position and interests may be different and, of course, different legislative provisions apply in different States and Territories. However, the duties generally applicable are such that you should not ignore the issue of drugs and alcohol in the workplace and should be prepared to answer the case that you used all due diligence to prevent the contravention of the relevant statutory safety obligations of the corporation of which you are an officer or manager.

<sup>44</sup> See, eg, the summary by Hall, Solwy and Lemon, *op cit* n 4, p 16, of the acute and chronic effects of cannabis including anxiety, panic and paranoia, cognitive and psychomotor impairment, increased risk of experiencing psychotic symptoms, respiratory diseases, development of a cannabis dependence syndrome, etc.