

Ai GROUP SUBMISSION

Legal and Social Issues
Committee

**Inquiry into workplace drug
testing in Victoria**

8 December 2023

Ai
GROUP

Inquiry into workplace drug testing in Victoria

The Australian Industry Group (**Ai Group**) welcomes the opportunity make a submission to the Victorian Government's Inquiry into workplace drug testing in Victoria (**Inquiry**).

Ai Group considers it reasonable and appropriate for the Victorian Government to investigate the legislative and regulatory framework for workplace drug testing, including the treatment of prescription medicinal cannabis.

Our members report the increasing use of prescription medicinal cannabis by employees. As is the case with all drugs (prescription or not), our members' primary concern is whether that drug use creates risks of impairment. Workplace drug testing is a measure of this and, at this point of time, in the absence of any alternative, is the only objective measurement they can rely on.

We set out further detail below.

Why is workplace drug testing conducted?

Workplace participants each have duties under occupational health and safety legislation (**OHS laws**), including employers and workers.

Obligations under OHS laws for workers and employers

Under OHS laws, an **employer** must, so far as is reasonably practicable, ensure the health and safety of workers and others in the workplace. This includes ensuring workers are not exposed to hazards and risks which may impact workplace safety - for example, the use of drugs or alcohol which may result in impairment at work.

Workers also have obligations to take reasonable care for their own health and safety and not adversely affect the safety of others by using drugs or alcohol which carry risks of impairment in the workplace.

Managing the use of medicinal cannabis as a workplace hazard

If a worker is under the influence of drugs or alcohol this may be an injury hazard to themselves, their colleagues or other people in the workplace.

Under OHS laws employers must take all reasonable steps to ensure drugs or alcohol do not impact workplace safety. Workers must comply with their employer's measures to manage drugs and alcohol to eliminate the risks of injury or harm to themselves and others in the workplace.

As discussed below, prescription medicinal cannabis carries an acknowledged risk of impairment especially if it contains delta-9-tetrahydrocannabinol (**THC**). This fact does not change because the product is medically prescribed.

The risk of injury or harm to the worker or others due to a worker's consumption of prescription medicinal cannabis containing THC is greater if the worker conducts safety critical tasks. For example, if the worker:

- operates machinery;
- drives in the course of work;
- needs concentration or motor coordination to carry out their job;
- uses hazardous substances;
- performs duties as part of a team; and/or
- works in an occupation where the impairment may jeopardise the safety and health of others, e.g., drivers, pilots, medical professionals.

Implementing measures to eliminate risk

Under OHS laws, employers **must** implement control measures to reduce or eliminate risks of injury or harm to persons in the workplace due to impairment associated with the use of prescription medicinal cannabis (as they do for other drugs).

Where there is a risk of injury or harm, employers will as a minimum have a drug and alcohol policy. In the case of prescribed medicinal cannabis, if THC-related impairment is more than a negligible risk, the policy may regulate permitted levels (which may be zero). This policy may be supported by workplace drug testing, which could be voluntary self-testing, random testing, triggered by reasonable belief and/or testing after a workplace health and safety incident.

It is relevant that laws operating across jurisdictions in Australia acknowledge THC as a hazard creating risks of impairment. For example, the Rail Safety National Law prohibits rail safety workers from doing rail safety work while there is any presence of alcohol or a 'prescribed drug' in their system - mandatory workplace testing supports this¹. Similar prohibitions apply in commercial road transport, the railways, civil aviation and marine transport. It is also significant that it is currently illegal for people to drive or control a vehicle in Australia if they have THC in their system (noting the proposed trial on this issue in Victoria - discussed below).

It is also important to understand that workplace drug testing is the only option as there is no available alternative recognised impairment test. A confirmation from a prescriber that a worker "*would most likely not be impaired*" six to eight hours after using the medication would not be sufficient to establish the risk was negligible in high-risk circumstances².

This is not just a discussion for employers. Workplace drug testing supports workers in meeting their

¹ [ONRSR Fact Sheet - Drug and alcohol: Requirements for Rail Transport Operators - July 2019 \(nsw.gov.au\)](#)

² *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331 in paras 36 and 44.

own legal obligations under WHS laws to keep not only themselves but also everyone else safe.

As one of our members succinctly put it:

"For our workplace, we operate with a culture of safety for all workers and our workers have a right to be safe whether working alone or with a colleague".

It is also important to understand that under OHS laws, organisations must consult with workers in the development of a drug and alcohol policy and implementation of a workplace drug testing regime. Some of our members have reported that their consultation processes identified that their workers supported drug testing.

For example, as one of our members said:

" We introduced the policy over a period of 18 months consultation and collaboration with our workers due to the high-risk nature of our workplace".

Ultimately, it is a question of safety. It is not discrimination.

Legislative and regulatory framework for workplace drug testing

In this submission we focus on the key legislation and regulations which are most relevant for conducting workplace drug testing, including:

- overarching duties of organisations and workers under OHS laws and industry specific legislation (discussed above);
- the right to direct an employee to undertake workplace drug testing and unfair dismissal remedies;
- anti-discrimination laws;
- privacy issues as they relate to the collection, use, disclosure, security and storage of information;
- road safety legislation;
- common laws obligations - e.g., negligence.

Lawful and reasonable directions - unfair dismissal laws

An employer may decide to dismiss or discipline an employee if they fail to comply with a drug and alcohol policy and/or have a result from a workplace drug test which contravenes the policy.

If an employer dismisses the employee, the employee may apply to the Fair Work Commission (**FWC**) (or equivalent court or tribunal) for an unfair dismissal remedy: Pt 3-2, *Fair Work Act 2009* (Cth) (**FW Act**).

The dismissal will be unfair (and unlawful) if it was harsh, unjust or unreasonable. When considering whether a dismissal is unfair, the FWC considers three criteria:

- **was there a valid reason** - this may relate to person's capacity (i.e., ability to do their job) or their conduct (e.g., the failure to comply with a lawful and reasonable direction)
- **was the employee given procedural fairness** - was the person given an opportunity to respond to allegations about their conduct or capacity and did the employer genuinely consider their responses (i.e., 'natural justice')
- **are there any other relevant matters** - e.g., proportionality, mitigating circumstances, contrition and remorse, disciplinary record and the employee's circumstances which may include age, economic situation and difficulty in finding new employment.

If a person fails to comply with a drug and alcohol policy through a breach of a workplace drug test (or the failure to take that test), this will usually be a valid reason if that policy and/or testing regime can be established as being lawful and reasonable. A drug and alcohol policy supported by workplace drug testing is likely to be lawful and reasonable if it is necessary to ensure the safety and welfare of people in the workplace. In relation to workplace drug testing, a positive test result may, of itself and particularly in a safety critical role, also be a valid reason for dismissal.

When assessing if there was procedural fairness, the FWC will consider various matters, including:

- **the employee's role in relation to safety** - e.g., if associated impairment relates to a safety critical role, such as where workers operate or drive heavy equipment or vehicles, handle heavy loads, work at heights or do tasks where errors may have significant health and safety ramifications for the worker or others in the workplace like a medical professional, or pilot, bus driver etc.) - then this will likely support a dismissal;
- **the employer's approach to enforcing the drug and alcohol policy** - e.g., was it consistently applied?
- whether employees were **trained** in and **understand** the drug and alcohol policy;
- whether the drug and alcohol policy addresses *real* risks of impairment - e.g., where workers undertake **safety critical tasks**, this will be viewed favourably³.

A failure to disclose the use of a drug in breach of a drug and alcohol policy may be a valid and lawful reason to dismiss an employee⁴.

Anti-discrimination

Anti-discrimination laws protect workers (and job applicants) who have a 'disability.'

³ *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033.

⁴ *Haigh v Platinum Blasting Services Pty Ltd* [2023] FWC 2465

Commonwealth, State and Territory jurisdictions have legislation addressing this in similar terms.

The *Equal Opportunity Act 2010* (Vic) (**EO Act**) provides that an employer cannot treat an employee, contractor or job applicant less favourably because they have a disability (i.e., direct discrimination). Employers also cannot impose an unreasonable requirement, condition or practice with which the person cannot comply, as compared to another person who does not have the relevant disability (i.e., indirect discrimination). The *Disability Discrimination Act 1992* (Cth) (**DD Act**) provides similarly.

In the case of *indirect* discrimination, employers must make **reasonable adjustments** so a disabled worker can comply with an employer's requirement, condition or practice. However, an adjustment may not be reasonable if it is very costly or will disrupt the workplace - this depends on the employer's circumstances. If the adjustment is unreasonable or, if the worker could not perform the genuine and reasonable requirements of the job even if a reasonable adjustment was made, the employer may lawfully decide to not make the adjustment. Importantly also, discrimination is lawful if it addresses a real risk to someone's health, safety or property. This means an employer does not need to make adjustments if they would diminish their general safety standards under a drug and alcohol policy developed in accordance with an organisational risk assessment.

The FW Act also protects employees from unlawful adverse action in employment where it is because of a 'physical or mental disability': section 351. This protection is different to that provided by anti-discrimination legislation. However, if the discrimination is lawful under the DD Act or EO Act, it will not contravene s.351.

Under the EO Act, a "disability" includes:

- the total or partial loss of a body part or a body function (such as mobility, sight or hearing)
- disfigurement
- mental health disorders
- learning difficulties.

A disability for these purposes includes a past disability and one that may exist in the future, a disability which is temporary or permanent and includes any related behaviour or effect that might be a symptom of the disability.

A person with a disability may be prescribed medication (e.g., medicinal cannabis), including by a general practitioner or nurse to treat the disability or its symptoms. This is treated as part of the disability and if they are discriminated against because they take the prescribed medication, the EO Act (and DD Act) will apply.

In these circumstances, if a drug and alcohol policy and workplace drug testing regime prohibits or limits a person from using the prescribed medication it will be a requirement, condition or practice with which the worker is unable to comply - especially if there is no acceptable alternative medication. In accordance with the EO Act, the employer then needs to consider whether allowing the worker to take the prescribed medication would be a 'reasonable adjustment'. However, as noted above, if the prescribed medication impairs the worker so they cannot safely perform the genuine and reasonable requirements of their job the discrimination which prohibits the medication will be lawful.

The key 'discrimination' questions for an employer who has a worker using medicinal cannabis is:

- does the use of the prescribed medication **impair** the worker in the workplace; and
- if it does (or if there is a risk that it does), can they **safely** do the genuine and reasonable requirements of their job if the employer makes a reasonable adjustment allowing them to continue using the medicinal cannabis.

The impairment assessment is crucial to this analysis. However, if a job involves tasks of a safety critical nature, it is difficult to see how permitting the ongoing usage of prescribed medicinal cannabis, could ever be a reasonable adjustment.

Privacy laws

The interrelationship of privacy and workplace relations laws creates an additional layer of complexity and difficulty for larger employers.

The *Privacy Act 1988* (Cth) (**Privacy Act**) regulates Australian Government agencies and organisations with an annual turnover of more than \$3 million. Covered organisations must comply the Australian Privacy Principles (**APPs**) when collecting, using, storing or disclosing personal information.

Relevantly, an employer covered by the Privacy Act has a responsibility to comply with the APPs when it collects workplace drug testing information from a person to hold in a record.

While employers have the benefit of the employee records exemption to the APPs, the exemption does not operate at the point of collection⁵. Also, the exemption does not extend to contractor workplace drug testing records. This means employers must comply with the APPs as far as they relate to collecting workplace drug test results of any worker (employee or contractor). Relevantly, the Australian Government is currently considering removing the employee records exemption and if it does this will further exacerbate the complexity⁶.

⁵ *Knight v One Key Resources (Mining) Pty Ltd t/as One Key Resources* [2020] FWC 3324 and *Jeremy Lee v Superior Wood Pty Ltd* [2019] FWCFB 2946 and *Construction, Forestry, Maritime, Mining and Energy Union v BHP Coal Pty Ltd t/a BHP Billiton Mitsubishi* [2022] FWC 81

⁶ [Government response to the Privacy Act Review Report | Attorney-General's Department \(ag.gov.au\)](#)

As a workplace drug test result is 'sensitive information' APP 3 applies. APP 3 stipulates this information may only be collected with the employee's (or contractor's) consent and where collecting those results is reasonably necessary to the employer's functions or activities.

Under APP 3, consent may be genuine even if the employee is under threat of discipline or dismissal if the workplace drug test requirement is lawful and reasonable. However, employers must also give employees adequate information and consult, amongst other actions.

The collection will be reasonably necessary if an employer is able to demonstrate that drug-related impairment would create safety risks to the employee or others in the workplace and that the test result is an indicator of this risk.

Employers must keep information about prescription medicine confidential and secure.

Road safety legislation

Currently in Victoria, under the *Road Safety Act 1986 (Vic)* (**Road Safety Act**), drivers cannot drive or be in charge of a vehicle if they have THC in their system. This is also the case elsewhere in Australia.

A Bill was introduced into the Legislative Council by Mr David Ettershank on 8 February 2023: Road Safety Amendment (Medicinal Cannabis) Bill 2023. The Bill proposes to amend offences in s.49(1) of the Road Safety Act so that they would not apply to a person whose blood or oral fluid contains THC. This is qualified by the requirement that the product consumed is medicinal cannabis under a prescription or other authority. However, if a person is impaired by medical cannabis, it would remain an offence. This Bill has stalled.

Relevantly on 17 October 2023, the Transport Legislation Amendment Bill 2023 was introduced into the Legislative Assembly by Hon Melissa Horne. The Bill passed the Legislative Assembly on 2 November 2023 and is likely to pass the Legislative Council shortly. Amongst other changes, this Bill inserts a new section 99C which provides that the Minister can designate a road safety research trial to determine whether it is safe for someone to drive or be in charge of a vehicle after consuming a drug, a combination of drugs, or a drug or combination of drugs and alcohol and to inform the development of alternative methods to assess impairment. The road safety research may take place on a closed-circuit track and be limited to certain times. The trial would permit medicinal cannabis users to demonstrate the impact the drug has on their driving ability.

The Queensland Department of Transport and Main Roads is also conducting a review of the rules prohibiting a person from driving with THC in their system which is expected to report in 2024.

Common law obligations and duty of care

An employer has a duty at common to law to take reasonable care for the health and safety of its employees. If they fail to do so they may be negligent and will have liability for injury or harm.

This duty is triggered by knowledge. This means if the employer knows an employee is using a drug such as medicinal cannabis to treat a medical condition it may increase the risk of liability for the employer if the employee's impairment causes injury or harm to person or property in the course of their duties.

Medicinal cannabis

Where does it come from?

Medicinal cannabis comes from the cannabis plant or from synthetically made substances which have similar effects to cannabinoids which are found in cannabis plants.

The cannabis plant contains different ingredients, including THC and cannabidiol (**CBD**). Medicinal cannabis products are diverse and have different ratios of THC and/or CBD, as well as other cannabinoids, terpenes or flavonoids which may also be present.

Since 2016, medicinal cannabis has been available to patients under medical supervision. Medicinal cannabis can be cultivated, produced and manufactured for medical purposes, but growers must have a licence and comply with strict rules. Otherwise, growing cannabis and its recreational use remains mostly illegal in Australia. In the ACT Adults may grow up to two cannabis plants per person with a maximum of four per household, can possess up to 50 grams of dried cannabis or up to 150 grams of fresh cannabis and use cannabis in their home⁷.

Rapidly escalating use

Data captured by the TGA in the first 5 years following implementation of a medicinal cannabis prescribing regulatory framework in Australia displays rapidly escalating numbers of approvals to use unregistered medicinal cannabis products, particularly since January 2020⁸. This escalation in use is consistent with what members have told us.

THC and CBD risks

Associate Professor Jonathon C Arnold,⁹ evaluated the safety profile of medicinal cannabis products and says: "*it is important to consider the relative THC and CBD content, as CBD generally*

⁷ [Home - Cannabis \(act.gov.au\)](https://www.act.gov.au/home)

⁸ Medicinal Cannabis Prescribing in Australia: An Analysis of Trends Over the First Five Years - PMC (nih.gov)

⁹ "[A primer on medicinal cannabis safety and potential adverse effects](#)", Australian Journal of General Practice, Vol. 50, Issue 6, June 2021.

has fewer safety concerns than THC". These are the key THC risks¹⁰:

- may impair cognitive and memory function;
- may cause intoxication depending on the dose and the patient's sensitivity, including euphoria, sedation and enhanced sensory perception;
- have been associated with anxiety, panic, disorientation;
- may impair driving performance;
- commonly has a side effect of dizziness;
- may have mild-to-moderate addictive liability (i.e., THC is classified as a drug of dependence); and
- rarely, may provoke a transient psychosis and increase the risk of developing schizophrenia - and for this reason, "doctors should not prescribe medicinal cannabis with THC content to patients who have a personal or family history of schizophrenia or psychotic disorders."

Associate Professor Jonathan C Arnold acknowledges:

"doctors are cautious about prescribing cannabis. While serious adverse events are rare, there are legitimate concerns around driving, cognitive impairment and drug dependence with products containing THC. Cannabidiol-only products pose fewer risks¹¹".

However, despite the safer profile of Cannabidiol-only products, TGA cautions as follows:

"Like all prescription medicines, medicinal cannabis products can have side effects. The extent of effects of these can vary with the type of medicinal cannabis product and between individuals. In general, the side effects of CBD-rich products are less than those for high-THC products, but because the required doses for CBD can be quite high in conditions such as paediatric epilepsies, a proportion of patients encounter side-effects with these CBD doses.

The known side-effects from medicinal cannabis treatment (both CBD and THC) include fatigue and sedation, vertigo, nausea and vomiting, fever, decreased or increased appetite, dry mouth, and diarrhoea.

THC (and products high in THC) have been associated with convulsions, feeling high or feeling dissatisfied, depression, confusion, hallucinations, paranoid delusions, psychosis, and cognitive distortion (having thoughts that are not true)."

The TGA also provides these general cautions about the use of medicinal cannabis substances

¹⁰ "A primer on medicinal cannabis safety and potential adverse effects", Australian Journal of General Practice, Vol. 50, Issue 6, June 2021.

¹¹ Prescribing medicinal cannabis - PMC (nih.gov)

our members' concerns around impairment in the workplace ¹²:

- *"Patients should not drive or operate machinery while being treated with medicinal cannabis. In addition, measurable concentrations of THC (tetrahydrocannabinol – the main psychoactive substance in cannabis) can be detected in urine many days after the last dose. It may take up to five days for 80 to 90 per cent of the dose to be excreted. Drug-driving is a criminal offence, and patients should discuss the implications for safe and legal driving with their doctor.*
- *Medicinal cannabis is not appropriate for:*
 - *people with an active or previous psychotic or active mood or anxiety disorder*
 - *women who are pregnant, planning to become pregnant or breastfeeding*
 - *people with unstable cardiovascular disease.*
- *Patients with neurological conditions may be more likely to experience negative effects from medicinal cannabis.*
- *There is no information available on the most effective or safe dose for various conditions and symptoms. For this reason, starting doses should be low and increased over time until patients respond positively or the negative effects outweigh the perceived benefits. Low start doses are particularly important for people with memory and thinking difficulties, liver and kidney disease, and weakness and wasting of the body due to severe chronic illness. Low start doses are also important for young people and the elderly.*
- *Doctors should:*
 - *carefully assess elderly and particularly sensitive patients*
 - *regularly monitor interactions between medicinal cannabis and other treatments*
 - *assess liver function when deciding to continue or stop treatment.*
- *Although there may be some evidence to suggest a benefit from medicinal cannabis treatment for one condition or symptom, this does not mean it will have benefits for other conditions, even with the same product and the same dose.*
- *There is very limited evidence to show how medicinal cannabis reacts with other approved medications."*

Comcare raised similar concerns in its recent publication - Workplace Research Monthly October 2023¹³ where it featured an article examining the use of medicinal cannabis and how adverse side

¹² [Guidance for the use of medicinal cannabis in Australia: Patient information | Therapeutic Goods Administration \(TGA\)](#)

¹³ [workplace-research-monthly-oct23.pdf \(comcare.gov.au\)](#) - page 12

effects may impact the performance of workers and workplace health and safety.¹⁴ Relevantly, the authors concluded:

"Adverse events associated with the use of medicinal cannabis could increase workplace risks, including decreased alertness and reaction times, increased absenteeism, reduced ability to safely drive or operate machinery and an increased probability of falling. Focused research into the risk to workers and workplaces from the use of medical cannabis and related human performance impairment is urgently warranted."

Lack of regulation on the medicinal cannabis product

Unfortunately, there is currently little rigour in the regulation of medicinal cannabis products.

Few medicinal cannabis products are TGA approved and registered - currently only two.

Instead, most medicinal cannabis products are unapproved and unregistered. It is these unapproved and unregistered products which are mostly used by workers. A person prescribing these products generally requires approval under the Therapeutic Goods Administration (TGA) Special Access Scheme-B or Authorised Prescriber Scheme.

Most States and Territories have additional approval and permission requirements for the prescription of these unregistered medicinal cannabis products.

The TGA provides a list of unapproved medicinal cannabis products which were supplied via the Special Access Scheme and Authorised Prescriber Scheme during 1 January to 30 June 2023, based on mandatory sponsor six monthly reporting data submitted to the TGA. It does not include medical cannabis products not supplied through these schemes or outside the reporting period. A sponsor is the person or company in Australia who provides a medicinal cannabis product to the treating medical practitioner or pharmacist. Where the medicinal cannabis product is sourced overseas, the importer may also be the sponsor.

These unregistered medicinal cannabis products are categorised by reference to how much THC and/or CBD is in the product. This is vital information to assess safety risks. The five categories are:

- Category 1: CBD medicinal cannabis product (CBD ≥ 98%)
- Category 2: CBD dominant medicinal cannabis product (CBD ≥ 60% and < 98%)
- Category 3: Balanced medicinal cannabis product (CBD <60% and ≥ 40%)
- Category 4: THC dominant medicinal cannabis product (THC 60% - 98%)
- Category 5: THC medicinal cannabis product (THC >98%)

¹⁴ O'Neill, V., Karanikas, N, Murphy, P, Medicinal Cannabis and Implications for Workplace Health and Safety: Scoping Revi Systematic Reviews, Workplace Health and Safety, Vol. 71, Issue 9, 19 April 2023 - <https://doi.org/10.1177/21650799231157086>

However, there is a significant problem with this as the categorisation of products **is made by the sponsor in accordance with the stated content of the active ingredients specified on the product label**. This makes the product list unreliable for all concerned. Indeed, the TGA itself clearly places little weight on the accuracy of this information given its disclaimer:

"Product information has been self-declared by sponsors and the TGA cannot guarantee and assumes no legal liability or responsibility for the accuracy, currency, completeness or interpretation of the information. It is an offence to provide false or misleading information to a government agency. The TGA will be conducting routine compliance assessments as part of ongoing compliance audits."

This means, despite the best efforts of pharmacists and prescribers to match the product content to the TGA approval, users (and employers) cannot be confident that product's stated content is what they get. This is an entirely unacceptable situation for **both** employers and employees given that presence of THC is the established primary cause of impairment (see discussion below). It gives false confidence for prescribers, users and employers, who may wrongly assume if the product is listed that its contents have been checked by the TGA as being accurate.

It also means that a worker may inadvertently place themselves and others in the workplace at significant risks of injury or harm where they use a THC-based product without knowing.

In the absence of certainty about the ingredients in medicinal cannabis - workplace drug testing for THC is the only option. Alternatively, the TGA should be required to register all products.

Workplace drug testing and impairment

As discussed above, the use of drugs and alcohol in the workplace are hazards which may impair a worker. This creates a risk to the worker's safety and that of others in the workplace. Employers and employees have non-delegable duties to eliminate this risk.

Workplace drug testing ensures compliance by checking for traces of the drugs regulated under the policy. It tests for traces of THC because THC is recognised as the main psychoactive component and the primary driver of impairment.

Increasingly, there is debate about whether a positive result for THC indicates cannabis impairment or whether it simply indicates a person is cannabinoid positive. This is because unlike alcohol and other drugs, traces of THC may be present for some time after use. For example, Victorian Roads (VicRoads) reports windows of detection for urine testing as being up to 7 days for a casual user or up to 30 days for a heavy user and, for saliva testing, the window of detection is up to 24 hours¹⁵. However, in the absence of a reliable alternative measurement of impairment, there is no other option.

¹⁵ [Drug testing: VicRoads](#)

As reported by Comcare¹⁶, the authors in a recent article state:

"Despite acknowledgment of the potential adverse effects of cannabis, research into the potential AEs has not yet matured (Arnold, 2021), and there seems to be a dearth of long-term high-quality studies to confidently clarify patient safety aspects (MacCallum et al., 2018). Moreover, there is no globally accepted definition of impairment associated with medicinal cannabis and no agreement on how to measure its occurrence (Eadie et al., 2021). **Yet, being cognizant of the adverse effects of medical cannabis and the probable impact on human functioning is critical for workplaces.**"
[emphasis added]¹⁷

Establishing impairment without an objective test is highly subjective and dependent on a physician's skill. Practitioners would at a minimum need to provide employers with an opinion based on comprehensive and ongoing review, including by considering these types of questions:

- What condition is the medicinal cannabis treating?
- What is the product and what are its active ingredients?
- How will the person administer the product?
- To what extent is the manufacturer regulated and what testing is done to ensure it contains only the listed ingredients?
- What is the dosage, how often is it taken and for how long will the treatment continue?
- What time of the day is it taken?
- How long has the patient been taking the prescribed dose?
- What are the risks of the worker being impaired?
- Has the patient had any impairment which is relevant?
- Are there any other circumstances relevant to the individual which may increase the risks of impairment?
- What other prescription or other drugs is the person using?
- How does the product affect the worker's ability to perform their work safely and what tasks may be affected by the impairment?
- Is there a period which needs to pass after a dose for the worker to no longer be impaired?

¹⁶ [workplace-research-monthly-oct23.pdf \(comcare.gov.au\)](#) - page 12

¹⁷ [Medicinal Cannabis and Implications for Workplace Health and Safety: Scoping Review of Systematic Reviews - Veronica O'Neill, Nektarios Karanikas, Adem Sav, Patricia Murphy, 2023 \(sagepub.com\)](#)

- Is there anything a worker should be doing to address impairment and how is this monitored?
- Is the patient using more than one medicinal cannabis product - what additional impact does this have?
- Is the patient engaged in ongoing education about their product?
- Is the patient being monitored on a regular basis and how is this taking place?
- And finally, is the patient able to perform the genuine and reasonable requirements of their job (i.e., often referred to as 'inherent requirements')

Prescribers rarely take this approach and expressions like "likely not be impaired" are common even in the context of safety critical work. This is clearly wholly inadequate.

Adding to this difficulty is that the risk of impairment is variable depending on the characteristics of the particular worker:

"In general, AEs can differ for each patient due to their age, underlying health conditions, gender, weight, patient compliance, interaction with other medication, food or vitamins, and overall health (FDA, 2018). Therefore, while there is a considerable range of AEs that can arise from taking medicinal cannabis, how to manage and accommodate these safely, especially during work activities, can be a challenging proposition for both the employer and the worker."¹⁸

Our members' concerns (and that of the broader work health and safety, medical and scientific communities) are exemplified in a recent Federal Court interlocutory matter¹⁹. In *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331, a dismissed worker applied to the Federal Court for an order to reinstate and return him to full time paid duties while his disability discrimination complaint was being heard by the Australian Human Rights Commission (**AHRC**). Mr Millar takes prescribed medicinal cannabis for the treatment of symptoms of Crohn's disease at night before going to sleep and at least 8 hours before commencing work. His employer, FQM Australian Nickel Pty Ltd (**FQM**) runs a mining site where safety is paramount. Mr Millar's work involved several safety critical tasks, including the manual handling of heavy loads, driving vehicles, operating forklifts, working at heights on elevated platforms and working with large pipes containing pressurised high temperature slurry where an error could cause injury or harm. FQM dismissed Mr Millar for reasons which included his failure to comply with workplace drug testing for THC and its drug and alcohol policy.

FQM communicated these concerns to the Court, many of which are shared by our members:

"... (4) the fact that medication is medically prescribed does not change the potential impact it has

¹⁸ [Medicinal Cannabis and Implications for Workplace Health and Safety: Scoping Review of Systematic Reviews - Veronica O'Neill, Nektarios Karanikas, Adem Sav, Patricia Murphy, 2023 \(sagepub.com\)](#)

¹⁹ *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331

on impairment of an employee's capacity to perform their role safely;

(5) an independent medical examination found that if Mr Millar continues to take medicalised marijuana and THC daily as prescribed, there is a real risk that Mr Millar will present to work to perform his role, which includes safety critical work, in an impaired state;

(6) there is a long-standing practice in the mining industry regarding the use of and testing for a wide range of drugs of impairment, regardless of whether or not those drugs are prescribed by a medical practitioner;

...

(8) Mr Millar did not provide any evidence to FQM from his treating specialist to support his use of medicalised marijuana and THC as a way to manage his disability, despite being provided with ample opportunity and time to do so and FQM requesting this information; and

(9) Mr Millar failed to acknowledge or understand that if FQM allowed him to continue working in a safety critical role at the mine site while he takes medicalised marijuana and THC daily, his drug use would create a serious safety risk not only for himself, but also other workers; and

(10) Mr Miller elected not to consider whether there were alternative management or treatment options for his disability that did not involve taking a drug of impairment daily and would ensure that he was not impaired or limited in performing his role despite FQM supporting him and providing him with opportunity and ample time to do so."

Significantly, while the Federal Court accepted Mr Millar should be reinstated on full-pay pending the outcome of the AHRC, it did not support his return to work. The Court acknowledged there were legitimate concerns to be addressed as part of the AHRC conciliation. Judge Colvin said:

(1) a considerable time had elapsed during which Mr Millar had been given an opportunity to obtain material to support the use of his medication;

(2) the only material obtained by him was a general statement to the effect that six to eight hours after taking the medication he 'would most likely not be impaired';

(3) on the available evidence, if Mr Millar is impaired at work, then there is a real safety risk to him and other employees;

(4) on the available evidence, it could not be said that the risk was negligible;

(5) a precautionary approach should be adopted in relation to matters of safety;

(6) there was no material to support the ability of a person to self-report whether they were impaired; and

(7) there was no evidence as to the rate at which the active effect of the amounts of THC in the medication being taken by Mr Millar might be expected to dissipate.

Consistent with this, the legitimacy of workplace drug testing for cannabis metabolites continues

to be accepted by the Fair Work Commission as being fair and reasonable in a safety critical environment to manage risks of impairment²⁰:

"Testing for use rather than impairment is a blunt instrument however, as the authorities say, may nonetheless be fair and reasonable if there is not an effective way to test for impairment ...

If there is a risk that a worker might attend the workplace impaired by drugs, and there is a difficulty identifying and proving that impairment, then testing for usage rather than impairment is likely to be fair and reasonable. If a worker fails a test, and the possibility or risk that the worker was impaired when they took the test cannot be eliminated, it is prima facie fair and reasonable that the employer takes strong action including dismissal."

Our members also have these following very serious concerns:

- prescribers are often not the worker's usual doctor - this makes it difficult to rely on the necessity or appropriateness of the prescribed medicinal cannabis product:

For example, a supplier says on their website (not unlawfully): "*If your current prescribing doctor is not willing to prescribe medical cannabis, [name] can either help you find a doctor who prescribes medicinal cannabis near you, or if this is not an option then telehealth appointments are available.*" [emphasis added]

- the stated active ingredients in medicinal cannabis products may not be correct and, medicinal cannabis products stated to be free of THC, do in fact contain THC:

A member said: "*A worker got a prescription for THC-free medicinal cannabis products - he did this because he wanted to be able to drive and to ensure safety. But when tested, he was found to be THC-positive. This means the stated ingredients were not accurate and he was unwittingly driving illegally as he had THC in his system and of course was also in breach of our policy and potentially impaired at work*".

- workers may be using medicinal cannabis and recreational cannabis at the same time or failing to use it as prescribed - this can have serious consequences:

A member said: "*currently we can clearly define a negative or a non-negative drug test. If a worker has a prescription for medical cannabis, how are we to know if that worker is only taking the prescribed dosage and not partaking recreationally?*"

- in the absence of an alternative test for impairment, the only option is workplace drug testing given that getting it wrong may be a serious safety risk (including injury or death) and this is unacceptable and a breach of duties under OHS laws;

²⁰ *Reece Goodsell v Sydney Trains* [2023] FWC 3209 at paras [104] and [105] citing with approval: *Harbour City Ferries v Toms* [2014] FWCFB 6249, *Sharp v BCS Infrastructure* [2015] FWCFB 1033 and *Sydney Trains v Hilder* [2020] FWCFB 1373

- prescribers may have conflicts of interest if the prescriber (or the organisation they work for) has financial interests in the supply or production of medicinal cannabis and/or are overly influenced by material which asserts the safety and efficacy of medicinal cannabis products - this should be closely examined:

A member said: "From what I have heard about medicinal cannabis, it reminds me about the problems with opioids in the United States where there was a lack of effective regulation and oversight by the Food and Drug Administration and there were conflicts of interest between opioid manufacturers and some physicians, researchers and policy makers."

A member said: "One worker managed to get prescribed medicinal cannabis with an entirely on-line process with a nurse and then after this was able to join a subscription base on which medicinal cannabis products would be provided on an ongoing basis".

A member said: "I also have concerns about addiction risks and do not believe this is being dealt with properly by prescribers or being taken seriously by workers".

On this basis, workplace drug testing is the only objective measurement which can cut through the conflicts of interest and lack of effective regulation and oversight by the TGA and which enables employers to ensure their workplace is safe from impairment related to THC.

We respectfully ask the Inquiry to acknowledge workplace drug testing keeps workers and others safe in the workplace in the absence of an acceptable alternative impairment test. Additionally, we assert the current basis for workplace drug testing is not for discriminatory reasons and the same analysis applies to any drug.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

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