

Australian Manufacturing Workers Union (AMWU) Submission to the Inquiry into Workplace Drug testing in Victoria – February 2024

Introduction

The AMWU welcomes the opportunity to provide input into this significant workplace issue which centres around occupational health and safety and worker rights to privacy and respect.

The Victoria Branch of our union represents 18,993 members across 4,130 workplaces. Our membership is diverse in skill and age. Our industries include automotive manufacture and service, food, metal and print manufacturing and construction.

Workers within these industries are vulnerable. Young workers, aging workers, labour hire, unskilled and semi-skilled workers who work in dangerous work. This cohort of workers is overrepresented in workers who experience both serious traumatic injury and musculoskeletal disorders from the hazardous manual handling tasks they undertake as part of their normal duties.

The AMWU does not condone the use of illegal drugs or alcohol in the workplace.

There are, however, workers who go through difficult life periods and experience sickness and/or injuries and are prescribed medication or self-medicate to cope. In these circumstances the AMWU believes there is a community responsibility to help them. This includes fair and just regulation and workplace policies and procedures which enable support in the changing workplace environment.

RESPONSE TO THE TERMS OF REFERENCE

(1) The legislative and regulatory framework for workplace drug testing;

The transport industry excluded, there is no mandated drug and alcohol testing in Victoria. There is, however, a suite of Australian Standards dealing with the scientific guide to detecting drugs in oral fluids and urine.

The Victorian Occupational Health and Safety Act 2004, often used to implement quasi legal mandates, does not place an obligation on an employer to test for drug or alcohol testing.

Claiming the provision of a safe and healthy work environment, employer's endeavour to control the use of drugs and alcohol by having zero tolerance policies prohibiting any substance being present when tested. In many cases this includes prescribed drugs. There is no window for human needs and workers are frequently terminated. The irony of this is not lost -while employers enforce strict adherence the D&A policy the OHS Act applies a more generous test for employer compliance to controlling hazards – that of '*so far as reasonably practicable*'. The zero tolerance approach can be harsh and inflexible.

The AMWU is seeing an increase occurrence of workers being terminated. These workers are frequently in the category of injured workers, aging workers, or workers in high stress positions such as health and safety representatives. It is at this stage that other legislation such as Human Rights, Equal Employment laws, Industrial legislation such as the Fair Work Act and the Workplace Injury Rehabilitation and Compensation Act come into play.

Regrettably legal provisions in these laws such as - flexibility of work, discrimination against someone with a disability and the provision to make reasonable adjustments at work only go part way to assisting workers within

their employment. Victorian *Equal Opportunity Act 2010* and similar laws provide an exemption that allows an employer to discriminate against an employee on the basis of their disability if that discrimination is reasonably necessary to protect the health or safety of any person. Employers invariably argue this exemption and consequently are not held accountable for ensuring such things as reasonable adjustments.

The AMWU is committed to ensuring that workers are employed in safe and healthy workplaces. We do not approve of workers who, due to drug or alcohol consumption, place themselves or others at risk. However, the current business approach which focus on testing and discipline is not working and is actively working to discriminate against vulnerable groups.

Canada has taken the lead in this field. Having legalised medical cannabis in 1999. Arbitrators and courts in Canada have generally agreed that genuine efforts to address health and safety concerns can appropriately ground a demand for the testing of employees if there is a “*demonstrable justification on reasonable and probable grounds*”. The approach effectively requires a balance to be struck between the legitimate privacy and dignity rights of workers and the legal requirement to take all reasonable steps to ensure workers’ safety. The Court further observed that while the dangerousness of a workplace was clearly a relevant consideration, it had never been found to be an automatic justification for the imposition of testing. That random testing of workers in safety sensitive positions, in safety sensitive industries was justifiable in three limited circumstances:

- i) if there is a reasonable cause to believe that the employee was impaired while on duty;
- ii) following a workplace accident/ incident or near miss, whose cause was not attributable to mechanical or other non-human failure, and where there was the potential for significant harm to arise as a result of the accident or near miss; or
- iii) upon returning to work after treatment for substance abuse.

The AMWU supports the approach taken by Canada and is of the opinion that the law must provide a positive obligation on employers to make reasonable adjustments for workers with a disability. That they must be required to demonstrate that all necessary measures have been taken to prevent further injury and assist with RTW of injured workers.

Failure to disclose.

In addition to zero tolerance in D&A policies employers are requiring workers disclose all medications they are taking well prior to testing. There is a threat of dismissal if they fail to disclose this information.

Privacy is a cherished right, and privacy around ones mental and physical health is even more so. The AMWU is often called upon by members concerned by a demand to reveal the drugs they are taking. The negative stigma of needing prescription drugs to work plus the risk of termination is present. Workers must then make a decision regarding revealing the drugs being taken and risk termination or be detected and be terminated. Recently FWC upheld a sacking for failure to disclose they were taking medical cannabis(Sept 2022). AMWU experience is employers view workers who take prescription drugs as lacking and, regardless of capacity, not wanted in their workplaces.

Workers would feel more comfortable disclosing medication if they did not feel they would be treated poorly.

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

Medical Cannabis is emerging as a valuable drug for the treatment of chronic pain such as back pain, sleep disorders, anxiety and the side effects of chemotherapy. The international medical community and governments are

supporting its use. In Victoria the use of medical cannabis was approved for use in 2016. And while physicians are prescribing medical cannabis there remains a prejudice amongst workplace leaders - managers, to accept this a valid and useful treatment.

More recently we are seeing, and only in relation to medicinal cannabis, members who have been directed by the employer to stop following the prescribed treatment of their doctor (and take a different type of prescribed drug). This interference of a worker's medical treatment by an employer is of great concern for workers and the AMWU, particularly where an employer's logic is more based on stigma than scientific evidence.

Case Study 1

At the end of January 2024, the AMWU was contacted by a member who was stood down due to taking medical cannabis prescribed by his doctor. This was prescribed other prescription medication failed address his anxiety and depression.

Prior to Christmas 2023, when the worker was prescribed the medical cannabis, he advised the Company. The worker continued to work over the Christmas period, approximately 6 weeks, when production is high and many workers were on annual leave. It was only when other workers returned that he was suspended from work and told he must record a zero reading in a urine test before he can return to work.

The worker advised the AMWU that his anxiety was significantly less when taking the medication, enabling him to work more productively.

It is of great concern that a Company:

- Was happy to maintain his employment whilst they needed the labour over the Christmas period. Production.
- Is Influencing the medical practitioner recommended treatment of a worker by threatening his job. The worker needs the job so they are in a very precarious position.

Manufacturing and construction, most of our members, experience a high incidence of serious sprains & strains injuries. They are often off work for a period of time and frequently have a secondary illness of mental injury. They experience severe pain and often fear and anxiety at returning to work where the job is the same as when they were injured. Under the guidance of their treating doctor they are able to perform work – potentially in their original job but may also be with some restrictions. Yet, despite disability discrimination legislation, workers compensation and industrial legislation the employer can still test a worker and prohibit them from returning to work.

A study undertaken in Canada (Carnide -September 2023) concluded that workers use cannabis for their work-related injuries and illnesses, most commonly for pain, poor sleep and mental health. The taking of cannabis is both prescribed and non-prescribed.

Further the study identifies that physicians are hesitant to guide patients to medical cannabis as they have concerns with their knowledge about prescribing cannabis and the potential harm it may cause

There is a void of studies which inform the results of use of cannabis and their effect on recovery of an injured worker.

Other recent research has also found no major impact on workers' performance when cannabis was consumed the evening before work, but not prior to or at work, casting doubt on some traditional views about associated risks (Bernerth & Walker, 2020)

Some studies have also controversially found no increase in the rate of work-related injuries among workers who used cannabis (Zhang et al., 2020), in contrast to other workplace studies (Carnide et al., 2021; McEntee et al., 2020). Moreover, international research assessing whether more liberal recent laws surrounding recreational and medicinal cannabis have contributed to increased levels of use (Hall & Lynskey, 2016) and harms, such as road traffic accidents (Leyton, 2019), have generally failed to find definitive associations.

Worksafe Annual report 2023 reported an increase in physical injuries of 14%; whilst the increase of mental injury is a staggering 17% and is predicted to continue increasing. On page 23 the report states “*Work-related musculoskeletal disorders (MSDs) continue to be the most prevalent type of injury experienced in manufacturing*”. If prescribed medical cannabis is deemed a suitable treatment by a worker’s treating doctor and the doctor can also say there is not risk of them working then the employer should be required to offer suitable duties

In April 2022 there was a case in the NSW workers compensation courts which found the treatment (use of prescribed medical cannabis) was not reasonably necessary on the basis of cost. However, the state of our workplace injuries in relation to hazardous manual handling and associated psychological injury suggests that these should be included in the workers comp schedule.

It is the AMWU position that where a treating medical practitioner deems prescribed medical cannabis to be appropriate treatment then it must follow that:

- WorkSafe must approve medical cannabis as suitable treatment if a workers compensation claim is accepted.
- Employers must be required to return to work an injured worker who is prescribed medical cannabis, where their own treating doctor states they are able to perform the inherent requirements of the job.

Finally, the testing drugs is not equal. The half live of some drugs is significantly more than others eg marijuana. Consequently they will show up in testing – where as others do not show up. Further the tests do not reflect impairment or a workers capacity to perform their job.

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

Yes. This area must be improved.

Currently a worker is not extended due process nor natural justice where it comes to drug testing and the repercussions for testing positive.

Every worker has the right to be treated fairly and in accordance with the law. However, employers, through the use of policies, not applying an equal, fair and just approach. Their focus is on production.

Refer to Case study 1 as an example of an employers primary focus being production.

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

The AMWU supports the including of medication or medical treatment in Victorian anti-discrimination laws. Victorian law needs to go further requiring employers to document why / why not they cannot make the reasonable adjustments for a worker. Reasonable adjustments could include enabling them to perform their ordinary work – in line with the workers treating doctor, changing the workers schedule if work hours or identify a suitable job to enable them to work.

If a worker is suspected of under the influence of drugs – tested and sacked. This sacking is upheld if there is a policy making testing mandatory.

Anti-discriminating legislation and the Workplace rehabilitation legislation both refer to a requirement to make '*reasonable adjustments*' however employers in health and safety are claim that the adjustments are not reasonably practicable.

Case Study 2

An AMWU member has a history of intense pain and anger which he noted can trigger a loss of concentration and unacceptable workplace aggression. He was prescribed a series of different tablets however this resulted in memory loss and what described as weird behaviour. He started by self-medicating with cannabis. In 2016 his doctor prescribed medical cannabis.

Since that time, he has had 3 employers.

- The first one he chose to not disclose his medication as he felt there was workplace stigma around using cannabis as a medication and he was fearful he would be terminated.
- The second employer was undertaking a drug and alcohol test and he revealed to the testers his doctor's certificate that he was on prescribed medical cannabis. No disciplinary action was taken.
- The third employer required a pre-employment medical assessment and the doctor who undertook the test stated he failed and that the Company would be notified. The worker challenged the doctor, stating there was nothing illegal he was doing, however the information was passed on. The worker then had further discussions with the Company and again table the script. And a further letter to say the medication does not affect the ability to work or drive.

He is employed as a [REDACTED] and has licences including a forklift and elevated work platform, which he uses from time to time.

The worker commented that at no time does he feel 'high'. That he believes his work performance is better and he rarely takes a day of sick leave.

This is a positive case study. It demonstrates that employers do respect the treating doctor's advice.

The AMWU is of the opinion that if a medical practitioner prescribes medical cannabis and can also attest that a worker can perform the inherent requirement of the job then an employer must be required to accept this professional opinion and continue to employ the worker.

(5) any other relevant matters; and

Impairment

As mentioned previously drug testing in Victoria, regardless of whether the drugs are prescribed or recreational, is being used as the sole reason for termination of workers. The requirement on the employer to consider other factors in the work environment that contribute to impairment, outside testing for drugs and alcohol, is sadly lacking in occupational health and safety legislation.

There is no requirement to consider, or undertake a risk assessment on the cumulative, and sometimes synergistic, effect of hazards to which a worker may be exposed. Such as chemicals, heat/ cold, noise, fatigue - including long working hours and overtime; manual handling and the psychological hazards such as bullying stress, sexual harassment, and harassment.

Since 2009 the AMWU has recognised that both drugs and alcohol can result in impairment but equally so can exposure to other hazards in the workplace. For this reason, we have developed a Draft Impairment Agreement / policy for HSRs to commence discussions with employers. And whilst we have early success in 2011-2012 the easy option for an employer is to blame a worker and terminate them.

Impairment is key in any legislation, as is collaboration on guidance and procedures developed.

The Canadian centre for regulation of occupational health and safety, Canadian Centre for Occupational Health and Safety(CCOHS), has done

significant work in this area and defines impairment as “changes in an employee's attendance, performance, or behaviour”. [CCOHS: Impairment at Work - Policy and Recognition](#)

There needs to be an obligation on employers to investigate more thoroughly all contributing factors.

Case Study 3

IN 2021 AMWU was contacted by a HSR concerned for a member who had presented as if under the influence of drugs or alcohol. She also mentioned that the worker was a diabetic. The Company had assumed guilt and commenced the discipline procedure without any reasonable investigation.

A simple search found research that noted that people with diabetes may “appear intoxicated and slur their speech, get confused or have trouble walking.” Further they may be uncooperative, aggressive and may even smell of alcohol.

If there is a suspicion of impairment for any reason, then the employer must be required to undertake an investigation and risk assessment, considering all workplace hazard factors not just substance abuse.

Drug Testing.

The issue of drug testing has not been central to any of the terms of reference raised above yet is central to the whole enquiry.

AMWU experience is that testing has become a punitive measure used to target injured or ill workers and those who actively raise OHS hazards.

Further, testing is intrusive. It fails to deliver what is important to workers. – that of privacy, dignity, and choice. It fails to deliver what is important to employers – a workforce that trusts them and therefore will work for their benefit. Furthermore, there is no evidence in manufacturing that testing has reduced the incidence of use of D& A but merely encouraged workers to be more deceptive.

Employers need to include in their policies more tolerance and more attention to the Occupational Health and Safety Act – that is providing a safe workplace. This can be done through the application of an impairment approach and education

Support

Periodically and for a combination of reasons, including at work, workers may enter a dark period in their life where they become mentally ill and/or partake in substance abuse or gambling. In these circumstances workers need support. Many employers have access to an EAP (employee assistance program), some have mental health first aiders, as well as first aiders. These initiatives are positive, but some workers need further intervention.

The AMWU, along with other unions and with the backing of Odyssey House, is setting up a service known as The Crossing. This is where workers can receive treatment and rehabilitation as an inpatient for 28 days followed by outpatient & outreach services. This comprehensive service can bring workers back from despair to being productive employees.

In order to achieve successful rehabilitation and RTW (return to work) an employer needs to recognise a worker's need for help, work cooperatively with the worker's treating practitioner, be ready to assist with a graduated RTW, develop a good workplace culture and maintain the worker's employment and wage whilst off work.

(6) directs the Committee, in undertaking this inquiry, to limit its consideration to workplace drug testing and not consider the broader subject of roadside drug testing and reform of the Road Safety Act 1986

No reference to rail, truck etc bus – maintenance

RECOMMENDATIONS

The following recommendations can be achieved by legal and other support documentation:

1. Victorian anti-discrimination laws

The AMWU believes it would be a positive step forward *if 'medication and medical treatment'* were included in the above law.

2. Employers

It is the AMWU position that where a treating medical practitioner deems prescribed medical cannabis to be appropriate treatment then it must follow that:

- WorkSafe must approve medical cannabis as suitable treatment if a workers compensation claim is accepted.
- Employers must be required to return to work an injured worker who is prescribed medical cannabis, where their own treating doctor states they are able to perform the inherent requirements of the job.

Further employers must:

- be required to Demonstrate they have undertaken a full investigation of the circumstances for a positive test including a risk assessment of all hazard factors.
- Make reasonable adjustments to assist with the rehabilitation and RTW of workers.
- Implement education programs to inform workers of the testing requirement, impairment and support they can get from the Company

3. Impairment

There needs to be a focus on all factors that could contribute to a worker being impaired for work

Including how to identify the triggers to observe when someone is impaired and how to assess the impact or to look at the multiple affect of various factors
There needs to be an obligation on employers to investigate more thoroughly all contributing factors.

If there is a suspicion of impairment for any reason, then the employer must be required to undertake an investigation and risk assessment, considering all workplace hazard factors not just substance abuse.

4. Education

Increasing general awareness of medical cannabis and prescription drugs is essential in any campaign to enlighten parties. Such training would include: -

- An understanding of workplace health and safety statistics & the use of drugs and alcohol in the workplace.
- The importance of workers following the advice of their treating doctors' advice and prescribed medication.
- An employer making reasonable adjustments for workers to enable them to perform work when they have a need to take medication which may affect their capacity to perform their full duties.
- The benefits of medical cannabis and the research on the impact of cannabis and RTW implications
- Groups that need this training include – doctors/medical practitioners. Employers including human resource managers and supervisors, workers union representatives and elected HSRs.
- The duty of the employer under the Occupational Health and Safety Act 2004

There is a need for medical community to develop and distribute information on the benefits of medical cannabis and how a patient may respond.

5. Support

There needs to be a legislative process where workers who volunteer they are taking prescribed drugs will not be terminated until all avenues are exhausted to get the worker back to work. Any tests will be based on the treating doctors' advice based on the agreed outline of the job/ role duties undertaken by the worker.

In order to achieve successful rehabilitation and RTW (return to work) an employer need to recognise a worker's need for help, work cooperatively with the worker's treating practitioner, be ready to assist with a graduated RTW, develop a good workplace culture and maintain the workers employment and wage whilst off work.

6. Drug and Alcohol testing.

Protection of privacy – the treating doctor needs to be able to assess the impact of drugs on work giving consideration to the requirements of the job provided by the employer in consultation with the injured worker/ worker representative.

The AMWU believes that the Canadian approach to testing offers a more fair and just approach to testing.

7. Research

Further research needs to be done on the effectiveness of cannabis and the impact it can have on RTW

8. Workers Compensation

Medical Cannabis must be on the schedule medication for injures workers. It should not be up to the worker to fight to get financial reimbursement or have to outlay from their own pocket the funds.

Some key References

1. Carnide N, et al – “Cannabis use among workers with work-related injuries and illnesses: results from a cross-sectional study of workers ‘compensation claims in Ontario, Canada”. *BMJ Open* 2023.(July 2023)
2. OHS Alert – September 2023 “Employer rights and medical cannabis examined”
3. Ann Roche, Alice McEntee & Susan Kim (2023) If cannabis use is increasing among workers what are the implications for policy? A secondary analysis of a nationally representative Australian dataset, *Drugs: Education, Prevention and Policy*, 30:4, 383-393, DOI:10.1080/09687637.2022.2028729
4. OHS alert – Medical Cannabis: Injured worker overturns cost denial - *Couch v Electus Distributing Pty Ltd*[2023] NSWPICPD 8 (10 February 2023)