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Inquiry into Workplace Drug Testing in Victoria

Maintaining a ‘risk-based’ focus in high-risk industries.

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Master Electricians Australia (MEA) is the trade association representing electrical contractors recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. You can visit our website at www.masterelectricians.com.au

The electrical industry is a high-risk work environment requiring workers to be unimpaired whilst on a worksite. Consequently, our inquiry response is targeted towards the risk of medicinal cannabis (MC) in high-risk trade industries and the dangers of impairment when conducting work.

With the rise of MC, Victoria (and the Commonwealth) is entering an unknown legal era regarding workplace drug and alcohol (D&A) use/suspension/termination. MC is an unfamiliar field scientifically where short and long-term impairments are unknown and testing to measure MC impairment is currently unattainable. MC is particularly worrisome for high-risk industries with zero-tolerance policies which are designed to prevent fatalities that are reasonably and objectively expected from any level of impairment. Such industries include mining, electrical and transport sectors.

It is essential the Victorian Government does not prioritise altering the perceived negative connotation associated with cannabis over and above worksite health and safety. MC users are treated equally to other prescribed medication users and to give any greater rights would implement discriminatory D&A practices amongst work sites. Furthermore, Government is at a pivotal point given other drugs (MDMA, Psilocybin and Ketamine) are being considered for prescribed treatment. These drugs are intentionally tested for at high-risk worksites due to significant impairment risks which can jeopardise the health and safety of employees and wider public and we argue that many prescribed medications also come with risks of impairment. With the potential for MDMA, Psilocybin and Ketamine to also become prescribed medications it is fundamental that Victorian Government establishes a legal framework which balances safety, discrimination and fairness without eroding either.

With the intentional legislative framework leaving workplace D&A policies to control worksite tolerance and testing rules, MEA advocate for Government to explicitly legislate for lawful discrimination where an employee is terminated as a result of their prescribed medication preventing them from fulfilling their core contractual employment functions.

Inquiry Topics

The legislative and regulatory framework for workplace drug testing

Neither Victorian nor Federal laws specifically prohibit drugs and alcohol on site or in an employees' system during work hours. At most, (in Victoria) such laws exist under the *Occupational Health and Safety Act 2004* (OHS Act). In particular, s 21 legislates –

> *(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.*[1]

Additionally, the OHS Act imposes obligations on employees, whereby s 25(1) dictates "while at work an employee must –

> *(a) take reasonable care for his or her own health and safety; and*

[1] Work Health and Safety Act 2004 [VIC], s 21(1).

(b) take reasonable care for the health and safety of persons who may be affected by the employee's acts or omissions at a workplace;[2]

Section 25(1) obligates employees to avoid being impaired "as a result of alcohol or other drugs, affected in a way that may put themselves or others at risk."[3] In the absence of direct legislative framework, it is the employers' burden to implement D&A policies regarding tolerance levels and testing regimes reflective of the safety risks associated with the job role. The absence of legislative governance for workplace impairment is clearly in recognition that safe levels of "… 'impairment' and making 'reasonable adjustments' vary from workplace to workplace depending on workplace D&A policies and the circumstances of the particular workplace"[4] based on a risk assessment of hazards.

MEA believe the overall current regulatory framework is sufficient for workplace D&A policies which rightfully allows employers to assess impairment risk in light of subjective risks as opposed to a blanket legislative framework. However, MEA argues this broad employer discretion generates exposure towards unwarranted level of risk for discriminatory lawsuits to which we argue Government should explicitly legislate for lawful discrimination in preventing an employee to work when they are unfit for work (or if their fitness cannot be determined empirically) due to their medical prescription.

The treatment of prescription MC as compared to other prescription medications, under that workplace drug testing framework -and- whether the framework for occupational health and safety and workplace drug testing may be improved to benefit MC patients, ensuring due process and natural justice in workplace settings, balanced against risks to occupational health and safety.

Medicinal Cannabis in the Legislative Framework

Despite MC being a relatively new concept, treatment of MC in the workplace is non-discriminatory when compared to treatment of other prescribed medication (if the employer can establish a link to inherent requirements). "If an employee is taking medical cannabis that is prescribed by their medical practitioner, employers must deal with these employees in the same way as employees taking other prescribed medication"[5]. Drug testing is common practice in high-risk worksites. Under D&A policies, employees are usually required to disclose if they are taking any medication (such as sleeping tablets and high-blood pressure pills etc); even though these are not detected in in D&A tests, they still pose impairment risks where supervisors will often disallow that employee to operate heavy machinery or conduct high-risk work. Alternatively, some prescription medication, like tramadol, are opioids and would test positive in a D&A test which will inhibit employees from conducting risky operations such as working from heights or conducting electrical work. We then pose the question – why should MC be treated any differently from the rest of prescription medication? Currently, employers' risk 'unfair dismissal' and 'discriminatory' lawsuits if they terminate employment for MC purposes without attempting to make reasonable adjustments to the role; as is the case with any prescription medication[6] when reasonable adjustments are limited in high-risk industries where impairment is considered.

We raise caution the MC inquiry is at risk of lobbying MC to have extra employee protections. We have not seen this form of attention given to other such prescribed medications, and as such, are concerned treatment towards employees using other forms of prescribed medication

[2] *Ibid*, s 25(1)(a)-(b).
[3] '*Guide for developing a workplace alcohol and other drugs policy*', WorkSafe Victoria <https://www.worksafe.vic.gov.au/guide-developing-workplace-alcohol-and-other-drugs-policy>
[4] '*Medicinal Cannabis – Workers' Rights and Employer Obliations*', We are Union OHS Reps [October 2023] https://www.ohsrep.org.au/medical_cannabis_worker_s_rights_and_employer_obligations.
[5] '*Medical cannabis in the kplace – risks and challenges for employers*', Cooper Grace Ward [14 June 2023] https://cgw.com.au/publications/medical-cannabis-in-the-workplace-risks-and-challenges-for-employers/.
[6] (n2) & (n7).

will essentially become worse off. Employers may already be required to "accommodate the injury or illness, including the effects of [prescribed MC]"[7]. "The rights of an employee using medical cannabis at the workplace depend on the drug and alcohol policy of said workplace. However, employers cannot dismiss employees [merely because they] hold a legal prescription for medical cannabis"[8].

In *Sheldon Haigh v Platinum Services Pty Ltd*, the Fair Work Commission (FWC) upheld the defendant company's decision to terminate an employee who used MC despite him only using it during his rostered-days-off, leaving a 32-hour buffer of no-use before returning to work and returning a negative D&A test. The FWC held the termination was reasonable given the company's policy stated employees must disclose any substances being utilised that may cause impairment; something the plaintiff did not do. The only reason the decision was upheld was the plaintiff's "failure to comply with the Drug and Alcohol Policy"[9]. The company policy stated 'may impair', 'of any potential impairment' and 'could impair' where it was held these are "words that indicate the possibility of impairment rather than a measurable assessment of impairment"[10]. This outcome was despite an earlier case, *Sydney Trains v Gary Hilder* which overturned the company's decision for unfair dismissal when an employee tested positive for [11] THC after recreationally consuming cannabis the previous night. However, many of the reasons for the FWC's decision came down to the company's D&A policy.[12] These cases highlight the significance that workplace D&A policies have in determining the outcome of MC users; FWC issues have ultimately relied on wording, understanding and accessibility of company D&A policies; not zero tolerance specifically – the risk assessment of impairing medications, to date, has rightfully been left to the employers' judgement and should continue to remain so for MC.

Misuse and Measurement

MEA supports the below extract from HWL Ebsworth Lawyers, which summarises key issues with differentiating MC from illicit use through worksite testing -

> *"… there is no reliable evidence yet about the impairing effects of the available forms of medicinal cannabis. This means that there is no evidence available to employers which establishes the length of time the impairing effects of medical cannabis may last and whether employees can perform work safely or make good decisions with medicinal cannabis in their system.*
>
> *…*
>
> *In addition, there is no objective test for impairment which can easily be administered at a worksite. Employers have routinely relied on testing for the presence of impairing drugs, including cannabis. As cannabis is metabolised differently from other drugs of impairment, an employee can return a positive test result for the presence of Tetrahydrocannabinol (THC) and/or cannabidiol (CBD) long after the drug was taken.*
>
> *…*

[7] '*Cannabis and the workplace*', Fair Work Legal Adice < Cannabis and the workplace - Fair Work Legal Advice>.
[8] Rashid. W., '*Medical cannabis at the workplace: An employer's viewpoint*' andatech [27 September 2023] <Medical cannabis at the workplace: An employer's viewpoint – Andatech>
[9] *Sheldon Haigh v Platinum Blasting Services Pty Ltd* [2023] FWC 2465 7, [41].
[10] (n10), 8, [47].

[12] Gavin. T., McLennan. E., '*Employee reinstated despite breaching 'zero tolerance' drug policy*', Allens Linklaters [17 February 2020] <Employee reinstated despite breaching 'zero tolerance' drug policy (allens.com.au)>.

> *Another challenge is that because medicinal cannabis is not regulated there is no standard dose given to patients. The amount of medicinal cannabis an employee ingests could be inconsistent from the amount recommended by their doctor, which may result in impairment. It is also not possible for a drug test to differentiate between medicinal cannabis and illicit cannabis."*[13]

How does an employer of a zero-tolerance worksite determine if a positive THC test is that of an illicit or medicinal use? In *Eather v Whitehaven Coal Limited T/A Narrabri coal Operations*, an employee was dismissed from his mining-site job for positive levels of THC. Scientific research was referred to where it was stated "it is extremely unlikely that a person who smoked two joints and tested 65 µg/L five days later and tested again 22 days later at 18 µg/L, was a one-off user …. It can take as long as 4 hours for THCCOOH to appear in the urine at concentrations sufficient to trigger an immunoassay (at 50ng/mL) following smoking."[14]

What is to stop an employee from obtaining medicinal prescription while continuing to heavily use illicit cannabis recreationally? It would appear existing testing measurements essentially provide opportunity for employees to abuse medicinal prescriptions as a free pass to working while recreationally using cannabis, significantly raising work health and safety risk to other employees and bystanders.

Effects

"A major issue with acute dosing of medicinal cannabis products that contain THC is intoxication. A typical intoxicating dose of THC in a person who has never used cannabis previously is approximately 10 mg, although caution is warranted as some patients may be more sensitive"[15].

Lists of side-effects from THC cannabis include:[16]

- Euphoria
- Enhanced sensory perceptions
- Disorientation
- Impaired attention
- Short-term memory defect
- Driving performance (particularly dangerous for the electrical industry (and other such industries) which require contractors to drive between worksites with company vehicles.
- Transient psychosis
- Altered perception of time and space[17]
- Loss of co-ordination.[18]

Given cannabis can impair users differently depending on their personal circumstances, it is unsafe to allow MC's presence within employee's systems whilst performing dangerous works. Where the employee is a chronic user of MC, it will be difficult to determine whether positive THC levels are from prescription or recreational use. Alternatively, where the employee consumes THC for the first time through a medical prescription it is unknown whether that employee will have adverse reactions to the drugs. Regardless, there is too much uncertainty to justifiably give any greater working rights to MC users in high-risk worksites –

[13] (n2).
[14] '*Cannabis and the workplace*', Fair Work Legal Adice < Cannabis and the workplace - Fair Work Legal Advice>.
[15] Arnold. J, "*A primer on medical cannabis safety and potential adverse effects*' Australian Journal of General Practice 50, no. 6 (2021); < RACGP - A primer on medicinal cannabis safety and potential adverse effects>.
[16] *Ibid.*
[17] '*SHORT-TERM EFFECTS'*, Simcoe Muskoka District Health Unit < https://www.simcoemuskokahealth.org/Topics/Drugs/Cannabis/how-marijuana-effects-health/Short-term-effects#cb738a25-6d96-4524-ab2f-9da02d3c834d>
[18] (n15).

> *"THC is a psychoactive substance that has shown to impair cognitive and motor function, increasing your risk of being involved in a motor vehicle crash. Impairments that will affect your driving include your ability to anticipate hazards and unexpected situations, your decision making and your ability to respond quickly … (e.g. reaction time). These impairing effects are exacerbated when combined with alcohol and certain other prescription medication. Patients should not drive or operate machinery while being treated with medicinal cannabis products containing THC."*[19]

Driving

Whilst we appreciate this inquiry specifically excludes roadside drug testing, it is necessary to raise the matter. It is currently illegal to drive with any THC levels (we note this is currently under inquiry by the Victorian Government); for many industries this is may not be an employment issue, but rather a criminal matter. For many industries and workplaces, driving is a core function of employees' roles, for example –

- electricians – they must be able to drive between worksites in company vehicles carrying necessary tools and equipment.
- linesmen – they must be able to drive EWPs on the road /drive work Utes alongside the rail.
- Taxi drivers – they must be able to drive passengers.

For many jobs, it is not a matter of adjusting the role where reasonable; it is simply illegal for the employee to fulfil their core functions.

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 medicinal treatment', in Victoria's anti-discrimination laws.

Cannabis

High-risk industries intentionally have zero-tolerance to drugs (including some prescription medication such as tramadol) and alcohol. Many over-the-counter and prescribed medications come with warnings to not drive or operate heavy machinery as they create high-risk to health and safety.

Australia has constituted the Westminster rule of law which dictates that everyone is to be treated equally under the law. We argue that giving greater working rights/more lenient working rights to employees using MC compared to those using other prescribed medication would be directly at odds with the rule of law. Those using prescribed medication such as tramadol, who may feel unimpaired with its consumption, would be strictly prohibited from working at heights or completing electrical work while those using MC with similar side-effects are allowed to continue working (if this inquiry were to favour such an outcome). This is particularly discriminatory for long-term prescription medication users who are likely to have their employment terminated from being incapable of completing their contractual core roles, while those using MC would be able to continue under the same circumstance.

MEA believe any further legislative protection of MC users will become discriminatory against other prescribed medication users and therefore advise against further legislative/regulatory functions.

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[19] *'Medicinal Cannabis and Driving'*, Vic Roads < https://www.vicroads.vic.gov.au/safety-and-road-rules/driver-safety/drugs-and-alcohol/medicinal-cannabis-and-driving#:~:text=Penalties%20for%20drug%2Ddriving%20include,prescription%20medication%2C%20including%20medicinal%20cannabis.>.

Testing

Any argument that testing regimes are invasive with the risk of becoming discriminatory if medical data other than drug results were to be acted upon is redundant as employees are protected by medical confidentiality. Employers are only to be advised if there is a positive drug test; they are not entitled to know any other medical information derived from the drug testing. It therefore stands that testing regimes are not discriminatory. If an employee is suspended or terminated for positive D&A results, it is in light of health and safety procedures; the public interest outweighs the employment outcome.

Arbitrary Workplace Policies

Arguably, drug testing laws are arbitrary and therefore discriminatory in the fact that D&A policies are tailored by individual employers, not necessarily industries. For example, one electrical contractor may give extra lenience towards MC employees if they believe the risk to be low compared to another electrical contractor who assesses the risk to be significantly higher with D&A policies that lead to easier employment termination. It this sense, D&A laws are discriminatory where some employees within an industry are being fired for something other employees within the same industry are not. There is a case to be made that Government could consider implementing tighter industry-specific regulations (as has been done with the mining industry) regarding D&A policies. This will better ensure greater consistency within industries avoiding potential discrimination.

Lawful Discrimination

Treatment towards the individual medicating employees is discriminatory towards their disability in which medication has been prescribed to treat. With a focus on the dangers of impairment (and the inability to measure impairment in some instances), we advocate Government amend the OHS Act to provide framework for employers to prohibit employees working while medicated so it becomes lawful discrimination. This will ensure employees continue to focus on work health and safety as opposed to making decisions in fair or employment lawsuits. Justification for such government intervention can be found in the public interest test where safety of employees and bystanders outweighs employment capacity of an individual employee. With the continuously changing medical landscape of what is becoming prescription combined with the inability to test impairment of MC, it is vital Government take a ‘not fit for work’ approach towards prescribed medication in that any detected levels render an employee unfit for work in high-risk work environments.

Conclusion

Through FWC precedent and limited statutory regulation, it is evident that workplace D&A framework is heavily reliant on workplace D&A policies. However, we raise concern this leaves a legislative gap exposing employers to unreasonably bear the brunt of discrimination and unfair dismissal claims. Legislation should explicitly provide for lawful discrimination where an employer determines an employee is unfit for work due to any prescribed medication. With the evolving medical landscape, Government must preserve employers' rights to determine whether an employee is fit for work based on operational risks; the public interest test supports such Government intervention.

Compared to other prescribed medications, the effects of patients taking medicinal cannabis are being treated fairly and without discrimination in the workplace; as there are already protections available under the General Protections provisions of the Fair Work Act. Cogent reasons have not been advanced to provide a basis for treating medical cannabis differently to other medications in high risk workplaces. Current laws provide ample employee protections through unfair dismissal, General Protections and discrimination claims. Based on very recent but limited case history, it would appear employers' D&A policies play a vital role in determining the legal outcome of contested employee terminations, a framework which MEA supports. The Fair Work Commission has tested these on each occasion to determine the operational imperative of the business and whether that standard constitutes reasonable management action taken in a reasonable way.

Given the emerging importance D&A policies are evidently going to have regarding MC, we suggest there is potential scope for ancillary industry regulations which supplement the *OHS Act* regarding tolerance and testing policies be introduced. We have highlighted existing D&A discriminatory risk may exist where, for example, one electrical contractor is more lenient on MC compared to another electrical contractor whose workplace policies may ultimately result in an employees' termination. *Sheldon* was upheld merely because the D&A policy stated "may be impairing" whereas if another mining company had the same material facts except the policy wording instead stated "will cause impairment", the FWC may have overturned the plaintiff's termination. However, we caution that such regulations should not inhibit the *OHS Act's* intentional flexibility for employer discretion as this is crucial in assessing subjective circumstances for each employee and/or worksite.

It is vital the Victorian Government prioritises work health and safety over untested and fresh MC usage. If it is considered that there is a risk of impairment through recreational use of cannabis, and the current testing regimes cannot establish fitness for work, when used as a medicinal treatment, the Victorian Government should not lower the duty of care to provide a safe workplace.

We sincerely hope the future of our high-risk industries remain risk-based as opposed to harm-based as any fatality arising from impairment is one too many fatalities.