

TRANSCRIPT

LEGISLATIVE COUNCIL LEGAL AND SOCIAL ISSUES COMMITTEE

Inquiry into Workplace Drug Testing in Victoria

Melbourne – Wednesday 22 May 2024

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Sarah Mansfield

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WITNESSES

Tracey Browne, Manager, Work Health and Safety and Workers Compensation Policy and Membership Services, and

Scott Barklamb, Principal Adviser, Workplace Relations Policy, Australian Industry Group; and

Georgia Holmes, Policy and Communications Adviser (*via videoconference*), and

Jordon Carlisle, Manager, Workplace Relations (*via videoconference*), Master Electricians Australia.

The CHAIR: Welcome back to the Inquiry into Workplace Drug Testing in Victoria. Joining us for this session we have got the Australian Industry Group and also we have Master Electricians Australia. We have Scott Barklamb and Tracey Browne, and also on Zoom we have Georgia Holmes and Jordon Carlisle. Thank you for making the time and turning up on Zoom and turning up to give your submissions today. Before I continue I would just like to read you some information regarding the evidence you are providing us today.

All evidence taken is protected by parliamentary privilege as provided by the *Constitution Act 1975* and further subject to the provisions of the Legislative Council standing orders. Therefore any information you provide during this hearing is protected by law. You are protected against any actions for what you say during this hearing, but if you go elsewhere and repeat the same things, those comments may not be protected by this privilege. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

All evidence is being recorded. You will be provided a proof version of the transcript following the hearing. Transcripts will ultimately be made public and posted on the committee's website.

For the Hansard record, I will ask you to state your full name and the organisation that you are representing today, please.

Tracey BROWNE: Tracey Browne, Manager, Work Health and Safety and Workers Compensation Policy and Membership Services, with the Australian Industry Group.

The CHAIR: Welcome, Tracey.

Scott BARKLAMB: Scott Barklamb, also with the Australian Industry Group.

The CHAIR: Thanks, Scott. Would you like to introduce yourselves, please, Georgia and Jordon?

Georgia HOLMES: Sure. I am Georgia Holmes, Policy and Communications Adviser, Master Electricians.

Jordon CARLISLE: Jordon Carlisle, Workplace Relations Manager, Master Electricians Australia.

The CHAIR: Okay. Thank you very much. I will quickly just introduce the committee to you. I am Trung Luu, Chair. My Deputy Chair is Mr Ryan Batchelor. Ms Rachel Payne, Mr David Ettershank, Dr Sarah Mansfield and also we have got Dr Renee Heath online as well. Mr Lee Tarlamis may be joining us as well, online, later on.

I know you have made submissions, but I will open it up for you to make a short, quick statement before we continue and open it to the committee for questioning. Tracey.

Tracey BROWNE: Thank you. The primary concern for employers when we are looking at drug and alcohol testing is around ensuring that the health and safety of people in the workplace, or who may be affected by work done in the workplace, is protected. Our work health and safety regulatory regime requires employers to take action on known risks, and THC, which is found in some medicinal cannabis, is recognised as creating a risk of impairment. Most medium to large employers have policies in place around drug and alcohol use and presence in the workplace, and a subset of these employees include workplace drug and alcohol testing as part of their policy implementation, but not all.

Testing generally occurs in high-risk environments and is used as an indicator that a person may be impaired. This enables employers to initiate investigations to identify what further action may need to be taken. We would always expect drug and alcohol testing to be undertaken as part of a workable policy that has been developed in consultation with workers and is fairly and consistently administered. In the absence of reliable tools to assess impairment, testing is an option available to employers who need to manage such risks to manage their health and safety duties. As Justice Colvin of the Federal Court has indicated in the Millar case cited on page 15 of our submission, cannabis-based impairment does create real safety risks which are not negligible, and it is important that a precautionary approach is adopted.

The laws around workplace testing are well litigated and refined, and the committee can have confidence that the application of testing appropriately balances considerations for employers and employees. It is critically important for the safety of workers and the wider community that employers be able to manage all drug-based safety risks and that they are supported to do so. This responsibility should not be made harder, or employers options to meet duties narrowed, in any community committed to minimising the risk of serious work health and safety incidents. The considerations before the committee should be approached on the same basis that employers approach this issue in workplaces – driven by workplace safety and ensuring employers can take practical steps to ensure impairment does not create risks of serious injury or death. We therefore ask the committee to conclude that workplace drug testing is a legitimate tool that can be used in appropriate circumstances to keep workers and others safe in Victorian workplaces and that testing remains not only fair and reasonable but in many workplaces an essential tool to identify situations in which further action is required to ensure the safety of workers and others who may be impacted. Thank you.

The CHAIR: Thank you, Tracey. Scott, do you want to add to that?

Scott BARKLAMB: Nothing to add, Chair.

The CHAIR: Georgia or Jordon, do you want to make an opening statement before we open to questions from the committee?

Jordon CARLISLE: Yes. Thank you, Chair and committee, for the invitation to today's session. At Master Electricians we look after electrical contractors and their employees. They work in a high-risk environment – your homes, your roofs, our stores, mining and construction sites – so it is an important area. Impairment and capacity – I agree with our friends at AIG – are the key issues that we want to be mindful of here. The legislative framework needs to be able to support employers doing exactly that – determining whether a worker may or may not be impaired. It is not simply down to drugs and alcohol, it is about impairment from any medication, drug, alcohol or otherwise that might create an unsafe workplace. That obligation to provide a safe workplace is, as has been described, unwavering, and it is important that it outweighs the risks to the worker or the concern that a worker might have about medical information becoming available to the employer. Their own safety and the safety both of the workers around them and the general public is paramount, in our view.

The chief risk we are seeing, as has also been identified, is that THC is in some forms of medical cannabis. There is a CBD version and THC versions, as I understand it, and what is unknown to the employer when testing is the impairment element. It has to be taken that, if there is THC, as in other circumstances, the employer is viewing that person as being not in a fit state for a high-risk workplace. We also have concerns around the ability for a worker to fulfill the inherent requirements of their role. If they are precluded from driving as a result of taking medical cannabis or another medication or drug or alcohol, they would not be able to fulfil their requirements for most employers in most roles. It is a difficult balancing area, we appreciate, because there are rights of general protections around discrimination and not being treated less favourably, but ultimately the matter comes down to the worker's ability to have the capacity to work safely in their environment. That is, in our view, the chief concern for the employer. Thank you.

The CHAIR: Thank you, Jordon. Georgia, do you want to add anything at all or are you happy for us to go to questions?

Georgia HOLMES: No, I am happy for questions now. Thank you.

The CHAIR: Okay. Thank you both for your quick opening statements. I will quickly open the questions. I know both groups here are talking about high risk. I think you are just speaking on that area of high-risk environments. Talking to the Australian Industry Group, part of your recommendation is that workplace testing

is part of the overall scheme in relation to providing WorkSafe support as employers. Touching on that, in relation to drug testing, where do you see prescribed medications? That is, all medications prescribed whether opioids or whatever it would be, including prescribed cannabis for treatment – that is, not illicit use. Should that be supported with employees utilising it?

Tracey BROWNE: We provide sample drug and alcohol policy outlines for our members. In those we do cover drugs, alcohol, prescribed medication and non-prescribed medication – so the over-the-counter – with an expectation that workers will advise employers in circumstances where the medication that they are taking may cause an impairment. I think in the issue of medicinal cannabis, we have the road rules, which say you cannot have THC in your body and drive, so I think it is reasonable for employers to also say if the road rules say you cannot drive with THC and we have got people doing high-risk work then that is an issue.

One of the things that we have received feedback from our members on is circumstances where workers believe that they are taking a CBD medicinal cannabis and then have had THC identified when there was drug and alcohol testing – well, drug testing. So the concern there is, because it is not as regulated as far as what the contents of the medicinal cannabis actually contains, it is actually the testing that gives both the employer and employee that certainty about whether they do or do not have THC in their medicinal cannabis.

The CHAIR: Thank you. Jordon, any comments?

Jordon CARLISLE: Not at this stage. I think we largely agree with AIG's position there, thanks.

The CHAIR: Just going to your answer. You mentioned the road rules – you cannot drive if what you have taken has THC in it. If the road rules were to change – I think the government is introducing some sort of pilot program maybe – and down the track the road rules allowed you to drive after using medicinal cannabis at a certain level of THC, would you support going along with the road rules as well, or you would not because it is a high-risk environment you are talking about?

Tracey BROWNE: That would obviously be something that would need to be considered at the time. We are definitely keen to see the outcome of the trial that is just commencing in Victoria. I think at the moment it is that reverse. If the road rules say you cannot drive and we have got a high-risk industry then that is problematic. If that changes, then we would need to look at, 'Is there high-risk work which is so significantly risky that even though it is permitted to have THC while driving, in this industry we think it is still a problem?'

Scott BARKLAMB: I might briefly add just quickly, we are cognisant of your term of reference 6 limiting the relevance of the driving parallel developments, but what we took from the Premier's announcement – I think it was yesterday – were the unknowns. So why are we doing a trial through Swinburne? It is because there is so much we do not know about impairment and impacts on driving. That compels our members similarly in workplaces to a degree of caution in managing risk. So just in terms of situational awareness of where we are at, there is something we can take out of this driving trial, which is caution in concluding we can change current approaches.

The CHAIR: Any comment at all, Jordon or Georgia?

Jordon CARLISLE: Yes, I do think that it is the impairment question. While road rules would certainly alleviate one avenue of, 'If you cannot drive, particularly as an electrical contractor or electrician, then that might impact on your ability or capacity to be employed.' That is one problem we have taken out of the mix, but there is the question of impairment. As I understand it as a layperson, it is extremely difficult and there is, as I understand it, no test to confirm the level of impairment or whether there is impairment and how that is affected on an individual basis.

Employers are in the gun if there is an injury, and so the employer is going to take a cautionary approach in high-risk environments to ensure that there is not a worker who is impaired. I think that when they have THC in their system the science does not say, 'Well this person should be okay to go, good to go,' that leaves the employer to make the decision, 'Well, you're not fit for work.'

The CHAIR: Okay. Thank you so much for that. I just have one question before I pass on to the panel. We have so far mentioned about prescribed medications and talked about the impairment. What is your position in

relation to testing in the workplace and it is not prescribed, it is illicit drugs? Is it zero tolerance in relation to a risky work environment from both parties?

Tracey BROWNE: Certainly the advice that we give to members is that a non-negative test is a starting point for further discussion. There may be some workplaces where they have a zero tolerance, but that is not something that we would suggest would be a good starting point. In some industries there is legislation which has a zero-tolerance approach, but it is about having that conversation of: how did this occur, what is the issue, what is your level of impairment and what can we do to address that? But it is complicated with cannabis being both legal and illicit.

The CHAIR: Jordon.

Jordon CARLISLE: Yes. I would jump in as well to say there are two aspects of zero tolerance. One of them is very easy – zero tolerance to working while impaired. It is nothing to do with your employment at this stage. This is just a question of if you test positive or it is not a negative test, then again that high bar or the cautionary bar is taken that you are not fit for work at this time. If the employee has then breached an employer's policy around working while impaired or, you know, those sorts of things around drug and alcohol, that is a separate question, I think, as AIG have indicated there. That is where you might go down an investigatory path before considering a disciplinary path as to whether or not those are strikes against the employee, so to speak, or whether a warning or further action is warranted. It could even end up being serious misconduct, and I think that is where the complication lies. But I think it is a very simple thing to say if you are testing positive for something here or it is not a negative test, that you are not fit for work. But your employment question, that is a separate one we will take up at another time because you are afforded due process and natural justice here. But we need to keep you safe first.

The CHAIR: Okay. Thank you. Thanks for your answer to that. To clarify the question, zero means zero for working at that location at that time but not for employment. Thank you.

Jordon CARLISLE: Sure.

The CHAIR: David, do you want to continue? Ryan?

Ryan BATCHELOR: Thanks, Chair. A lot of the obligations here are arising out of workplace health and safety and occupational health and safety legislation about duties to create a safe workplace. One of the questions that is arising in the course of this inquiry is: is that framework providing us with sufficient regulatory certainty with respect to how workplace drug testing is administered, or should there be some further sources of regulation about the circumstances under where workplace drug testing can and should occur? I am wondering if you have a view on that.

Tracey BROWNE: I think for general workplaces, we have a general duty to provide a workplace, so far as is reasonably practicable, that is healthy and safe. We do not have any specific regulations around whether we should or should not do drug and alcohol testing. We certainly have an expectation that we will make sure that people are fit for work when they work. I do not see a way that any form of regulation could be written in a way that could cover all of the potential circumstances of every Victorian workplace.

Scott BARKLAMB: Can I just briefly highlight a couple of protections that are there, though? You do have technical standards for testing in Australia, which I think you may have investigated when the testing people were here yesterday, but also the proof and veracity through the unfair dismissal system. In examining the fairness of the substance of dismissals, we have extensive passages of case law, and we cite some of those in our submission, which go to the veracity of the testing methodology as reasons for dismissal and its application. I want to perhaps stress that this is not just an open field. There are existing checks and balances and processes on fairness that go to your terms of reference.

Ryan BATCHELOR: Do you think there is sufficient guidance and certainty for employers at the moment from organisations such as WorkSafe about when it is appropriate to undertake workplace drug testing and the manner and mechanisms in which it is deployed and the protections and practices that should be put in place once it is undertaken?

Tracey BROWNE: The WorkSafe guidance is very much around how you put in place the policy and how you consult on whether drug and alcohol testing is appropriate. I do not see that they have got the technical expertise to actually advise on when drug and alcohol testing should be undertaken, how it should be done and how it should be interpreted. We do not provide that advice either. We provide advice on the structure and leave it to the employers to get the technical advice around what will be achieved by drug and alcohol testing, but predominately drug testing, from the experts, because I think it is an area that is regularly evolving and by the time we got up to speed on what was appropriate it would probably have changed.

Ryan BATCHELOR: Do you as an organisation take or collect any data or do any survey work or have you undertaken any research about the number of workplace safety incidents that are related to workplace drug use, including medicinal cannabis?

Tracey BROWNE: No. We are contacted by employers when they have a particular issue that they need help dealing with, but they are done on a case-by-case basis. We know how many inquiries we get but we do not know whether that is about an incident. We do not keep that level of information statistically.

Ryan BATCHELOR: Just quickly, how many of those would relate to the use of medicinal cannabis and how many would relate to other prescription-based medications, including opioids?

Tracey BROWNE: I spoke to our workplace advice line recently. There are a lot of inquiries about medicinal cannabis, because employers are trying to get their head around how they deal with it, particularly, and we gave some examples in our submission, when a result indicates that a person must be taking more than what was prescribed already, or it is THC when the person thought it was only a CBD drug. But in relation to specific incidents, we do not have the data.

Ryan BATCHELOR: Thanks, Chair.

The CHAIR: Rachel.

Rachel PAYNE: Thank you, Chair, and thank you to everyone for presenting for us today. I just wanted to review – in your submission you talk about keeping workplaces safe from the impairment related to THC, yet all testing that is done in workplace settings is just testing for presence not for impairment. My question is: given that you are a big organisation of 60,000 businesses employing over 1 million staff, have you looked at any options for impairment testing for your members? Have you looked at other jurisdictions and how they measure impairment in the workplace, or looked at emerging technologies? One example I could give would be the Druid application that is used in the United States and Canada, I believe. It is an app on your phone which looks at your cognitive ability, your hand-eye coordination, your rapid eye movement and so forth. Is there any movement from the industry in this space?

Tracey BROWNE: It is not an area that we have stepped into directly. Once again, that whole technology space is evolving quite quickly. From an employer perspective at the moment with the status that we have got for THC for driving, I think employers would be reluctant to try and apply something different to what the police have been applying, but certainly I can see that is something that employers need to become more aware of.

Rachel PAYNE: But you acknowledge that on a roadside drug test they do not test for other impairing medications.

Tracey BROWNE: No.

Rachel PAYNE: Okay. We heard from some of the technical workplace testing providers yesterday that the swab tests detect cannabis in the system for 24 hours. We had police saying that roadside drug testing can test for up to three to four days. We had toxicologists say that after 4 hours your impairment level is mild, .04 level, for example, and after 8 hours you have no impairing effect. There is no consistency here. Is that something on which you are providing advice to the businesses you are representing and giving them that guidance?

Tracey BROWNE: We do not provide advice on testing processes and testing outcomes; we are not the experts in that. We would say to our members, 'You need to rely on the experts for that information,' but certainly conflicting information does not help employers.

Scott BARKLAMB: I would probably add – and I hope I do not get a punch under the table for this – that for employers in high-risk scenarios they are, quite properly, very cautious in managing risks. When separating impairment from presence, which is the premise of your question, in a situation of uncertainty or contest or ambiguity or even contingency on the individual employee – by size, weight, age, sex, whatever – employers are going to be cautious, because you are talking about high-risk environments of serious injury or fatality to the employees themselves, their peers, the public et cetera. Overwhelmingly those duties of care or those OH&S statutory duties that we owe are the motivating circumstance.

Rachel PAYNE: And you are working with what is available now, I do get that. I guess, just for Jordon: you mentioned the capacity to work safely and said the reasoning behind drug testing is that capacity to work safely. What we know from the data on why people are prescribed medicinal cannabis is that predominately it is for pain management and for insomnia, for example. If someone is not actually taking their medication, wouldn't they be at more risk of not having capacity to work safely?

Jordon CARLISLE: They may well do, yes. And to your other question, I think it would be very helpful to get some greater clarity from the science about what impairment might look like and how we might measure that. I agree, if that is a question. Yes, let us do that.

To the point of: do other things mean people are not fit for work? Yes, they do – fatigue. We have policies around what fitness for work looks like and where unfitness for work can come from. That could come from people taking Endone, other medications and the like. We are talking today about medical cannabis because that is what we are talking about, but it could come from somewhere else, absolutely. Have kids and stay up all night with them – that will get you impaired.

Rachel PAYNE: Thank you. My time is up, but thank you for your responses.

The CHAIR: Dr Mansfield.

Sarah MANSFIELD: Thank you. Thank you for appearing today. I think this has come up multiple times, and we heard it from the people who appeared before you this morning – about the inconsistency across different bits of legislation, regulations and workplace policies. In your view, would it be helpful to have some more clarity in terms of legislation and any accompanying regulations around workplace drug and alcohol testing? Would it be a helpful thing for industry to have that guidance?

Tracey BROWNE: I think the challenge with regulation is it is extremely hard to write regulation that is going to be relevant to every workplace and every situation. I think if there was to be anything, guidance would be helpful. But I think, particularly in an environment where testing regimes are changing and the use of particular drugs are changing, it takes a long time to amend a regulation, whereas it is much quicker to amend guidance material.

Jordon CARLISLE: I would jump in there as well to say I agree that it is difficult to say, 'This is what it should look like.' There is already support for and an acceptance that workplace drug testing is necessary, or workplace testing is necessary, but it does not hurt if regulations and guidance material and the like further strengthen that and to say what the avenues are and what it might look like and what the ultimate goal is here, to put that down. I do not want to pick the COVID scab, but in reference to that particular time, I had a lot of employers and their workers having difficulty around the question of 'You're not entitled to this information'. Well, I do not want to have to pull out the Qantas Airways decision every time an employer asks a lawful and reasonable question about whether an employer can ask about someone's capacity and what that looks like. It is about having support in regulation and legislation that says, 'If the employer can reasonably give business grounds as to why it needs to ask the question operationally, that should constitute a lawful and reasonable direction – and here it is; we wrote it down here too.'

Sarah MANSFIELD: Where would you like to see that guidance coming from?

Tracey BROWNE: I think that is really difficult. If we are really getting into the detail of the type of testing and how you use it and how you interpret it, I do not think it is something that the regulator – so WorkSafe – have got the expertise to do. I think it probably needs to come from some technical base around what you are actually finding out with that testing and what is the best way to use it, but then it has to have around it the guidance that covers both the health and safety imperative of having people who are fit to work and all of the

other bits and pieces in the workplace relations space. I think it makes it really difficult to get one set of guidance that is going to encompass everything and be owned by a regulatory authority – for example, WorkSafe does not have a remit to give workplace relations advice – so where that is involved, that then becomes difficult as well.

Sarah MANSFIELD: Okay. You said you are getting a lot of inquiries around medicinal cannabis because there is some uncertainty around that. What do you do then with those inquiries? How do you approach that?

Tracey BROWNE: We work through them as best we can with the employer. Usually, if it is prescribed medicinal cannabis, you need to get advice from the doctor about what the person's capacity and restrictions are and use that information for the basis of making decisions about what the person can and cannot do in the workplace.

Sarah MANSFIELD: Okay. Thanks.

The CHAIR: Thank you, Doctor. David.

David ETTERS HANK: Thank you. Thank you, all of you, for your work and for attending today. In your submission you said that the current basis for workplace drug testing does not discriminate against particular drugs. To start off, as a first principle, would we agree that in fact there should be consistency of testing for all drugs?

Tracey BROWNE: Do you want to?

Scott BARKLAMB: Apologies if I have missed that in the submission. With any drug being tested for, the test should have veracity, so it should be picking up what it is seeking to pick up at a certain level of confidence to provide the employer with empirical information as to whether the policy has been met or not met in regard to fitness for work. I apologise if I was a little confused by your question.

David ETTERS HANK: Let us just stop on that point there, then. If it is about fitness for work, is it your position that testing for cannabis, or THC specifically, actually provides such a benchmark, because we have heard a lot of expert witnesses that have said it certainly does not?

Scott BARKLAMB: A lot of safety is about managing uncertain or not entirely knowable situations as knowably as possible and about reducing risks of illness, injury and the like. At the moment testing provides the best available information on which employers can manage what is potentially quite a serious area of risk where there may be impairment.

David ETTERS HANK: So would you accept that in the case of, say, for example, trace elements of THC, which Ms Payne referred to before, that in a cheek swab can be detected a week later? How does that fit with what you have just said?

Scott BARKLAMB: Well, it depends. My colleague Ms Browne went through scenarios in which you may have, in simplified terms, a zero tolerance to presence type approach in a workplace, and we are not saying that is not merited, but a lot of the time a positive test –

David ETTERS HANK: Are you saying that it is merited?

Scott BARKLAMB: Well, it may well be merited in particular workplaces, but in a lot of situations that merits then a discussion about why someone may have presented a positive test and an explanation and discussion. It might prompt retraining. It might prompt a warning. It might prompt reference to an employee assistance program. There are all sorts of scenarios in a particular workplace that may follow that type of scenario. But where someone talked about a cheek swab and indicated they had been using medicinal cannabis some time ago, that would go to the materiality of the employer's ability to act on that information. I mentioned before that the unfair dismissal system takes into account the fairness of an employer's actions and responses, so that adds a further control or check on – perhaps just to use a word, and it was not the way you framed it – a capricious or unfair type of approach. There are checks on those.

David ETTERSHANK: You referenced the road rules I think before as a ‘substantiator’ for a zero-tolerance position. I mean, the government clearly is walking back from that through the trial. I guess I am a little bit confused about the consistency of it.

Let us move on, I guess, to a related question. You talk about a high-risk industry and that obviously you do need to look at the context. Where would the committee find a definition of what is a high-risk industry?

Tracey BROWNE: I do not think you are going to find anything that says, ‘These are high-risk industries.’ Generally, it is recognised that construction is high risk and also rail transport, road transport and mining. Then when you move into areas such as manufacturing, it depends. So some parts of manufacturing will have very high-risk activities; in some manufacturing sites you might have two or three people undertaking a very high-risk activity and others not. But really what you are looking at when you are considering drug and alcohol policies is: what are the chances that there will be a serious injury or a fatality if the person does the wrong thing in these circumstances?

David ETTERSHANK: So then if I was to try and wrap this all up – I am cognisant of time, Chair – basically you are saying that a zero-tolerance approach can be applied legitimately to all drugs that could impair and that it is up to employers to define themselves as high risk. That is sort of your catchment, really, is it? Because it is a pretty big net.

Tracey BROWNE: I think it depends on what you mean by zero tolerance, and I think Jordon was talking about before –

David ETTERSHANK: You were talking about zero tolerance in the context of road testing.

Tracey BROWNE: Zero tolerance in the workplace is: we do not want you undertaking these high-risk tasks if you have a non-negative test. That is different to the concept of zero tolerance, which is normally interpreted as ‘One strike and you’re out.’ I am not talking that. I am talking from the perspective of: ‘We don’t tolerate that level of drug; now we’re going to deal with what the circumstances are around that. What are we investigating? How do we respond to it? Do we move you to another part of the workplace?’

Jordon CARLISLE: Can I jump in and say, and sort of to these questions that have been asked: why are we testing for this? These testing ideas – it is an orange light on a panel if we were to consider it that way. It is not ‘Well, that person can’t operate, they’re gone’ – that sort of thing. It is a flag for a further conversation. So we test certain things to determine whether or not we need to investigate. This is about visual inspection, if you like, of a site – is there stuff in the way? If there are hazards there we need to address them; we do not go, ‘Well, there’s a hazard here, so we’re going to stop entirely.’ It is a trigger for further action, and what that action might be is going to be on a case-by-case basis.

To your point of ‘Are we going to cast the net that wide?’, yes, in the simplest terms we kind of have to, but as has been pointed out by AIG, there is a huge amount of checks and balances against an employer. They are in a vortex of perpetual hell, frankly, about what they have to manage because they have got unfair dismissal laws – we have only spoken about those; we have not even touched general protection provisions and how broadly that net is, not to mention discrimination law. So someone who pops up or pings up with a positive test for THC and they get caught in this impairment loop of ‘Are you impaired or aren’t you impaired?’ has quite a few bites at the proverbial cherry to be able to get their case heard as to why an employer should or should not take particular action in relation to their level of impairment, whether that is a cheek swab or whatever test they ultimately do through an app. It is a question of due process and natural justice, not whether or not the employer should put their hand up and say, ‘Hey, friend, are you okay today?’ Is that not also what we have got an obligation to do? That is really why we look at THC in the way it is, because it is an orange light that says you may need to do something here. It is not green, but it ain’t red. It is orange: we need to ask a question.

David ETTERSHANK: So are you saying the *Disability Act* does actually apply? Is that the position of employers?

Jordon CARLISLE: Well, discrimination law – if I have got an impairment, and it has been identified that I could be taking it for insomnia or a mental health condition or pain management, those all represent impairments, and discrimination law would be my friend, so to speak, if I felt that I was being treated less favourably because of my impairment.

David ETTERSHANK: And that is AIG's view?

Scott BARKLAMB: We go to this in our written submission. I was just going to try and find the correct bit to refer you to. It is from page 5 onwards, and it runs through in some detail the extent to which medical conditions and their treatment are disabilities under the Act as it is but also addresses the extent to which there could be reasonable accommodations or to which our other duties to protect health and safety in the workplace may override the discrimination for the antidiscrimination purposes. So we hope we have captured the current situation there for you and commend it to you.

David ETTERSHANK: Thank you.

The CHAIR: Thank you, David. Renee, would you like to ask some questions?

Renee HEATH: Thank you. Thank you, guys, so much for your submission and also for your presentations. I found it very interesting. I think that we have heard definitely from different perspectives, and it seems that some people are saying, 'Hey, you can't discriminate against me because I am on this drug.' But how do you balance not discriminating against one employee, for instance, with health and safety and the responsibility you have to provide that to others?

Tracey BROWNE: That is the challenge that employers are dealing with on a regular basis, not just in relation to drug testing but in relation to a range of things. The health and safety laws place very high obligations on employers and very high potential penalties. The highest possible penalty under our Victorian work health and safety laws is workplace manslaughter, which for an officer can be 25 years jail, so there has been a lot of effort put into making sure employers understand the importance of doing everything that they need to to manage work health and safety in the workplace. And so that is also something that is on employers' minds when they are making that decision. If we are not sure and there is uncertainty and the road rules are saying THC is a problem, as an employer I am not going to say it is okay, because if there is a serious injury or a fatality, particularly if there is a fatality, my business will be investigated, as an officer I will be investigated and I might be facing up to 25 years jail if I was negligent.

Renee HEATH: Wow.

Scott BARKLAMB: One thing that struck us, I will just briefly add, is that one of the changes is – and I will see whether my colleague agrees with this – increasingly employees are aware of their role with their peers in the safety of the workplace and not meeting the employer's duty but ensuring everybody is safe at work. And one thing that has come to our attention which you might want to consider is whether peers and coworkers may raise concerns when they become aware of colleagues being treated with medicinal cannabis and potential impairment. So we foresee that as an area where we think a lot of questions could come to employers or concerns might be raised.

Jordon CARLISLE: I was just going to highlight that, from our membership base, predominantly AIG have lots of big employers. Our membership base – they are literally the people coming around to your home and fixing it up. They might have three to five employees. That is 95 per cent of our employers, our members. So when it comes to answering that question: with extreme difficulty. How do they balance it? In many respects they are expected by legislation to be, you know, a safety expert, an employment expert and now a medical expert in terms of determining the level of impairment that somebody is going to have. They do not know. They do not know where there is impairment what that means. The questions I get about medical cannabis are 'Well, what do I do next?' And yes, it is a complicated one where particularly small businesses, which represent a lot of our employers, do not know what they need to do next. And it is only through representation in organisations like AIG and ours that they get a little bit of clearer guidance, but you are threading a needle through the eye in the dark sometimes. It is very, very difficult, and striking that balance is near impossible because of issues like vicarious liability around those sorts of penalties and the like.

Renee HEATH: Yes. That is very interesting. There are a few interesting thoughts that I jotted down yesterday with some of the prior witnesses, and I just wanted to know if you agree. One of the statements somebody said was that drug testing is a way to punish employees. Yes or no: do you believe that is true?

Tracey BROWNE: No. Definitely not.

Jordon CARLISLE: No.

Renee HEATH: And the other one was that drug testing – they do not think it is anything other than a way to kick workers out. Would you think that is true or false?

Tracey BROWNE: No. I would think that is false. Employers do not like having to terminate people's employment.

Jordon CARLISLE: No.

Renee HEATH: Yes, and you need good employees, right? I thought that was very interesting what you said – it is a way of helping people; it is a flag for a further conversation. I do not think that it seems like drug testing – it is like, the minute something shows up, you support those people through to find what they can do safely and ways to support them and find other things that are going on in their life. Are these the things that drug testing can lead to –

Jordon CARLISLE: Absolutely.

Renee HEATH: probably as a flag for a further conversation? I think it was you, Jordon?

Jordon CARLISLE: Yes. I commonly use an expression with my employer, if they raise a question like that: 'What do I do next?' It is a big, fat 'Depends' – it is a huge 'Depends'. You have got to look at all of those sorts of things. Is it from an impairment? Is the person struggling with a condition of another type, maybe some addiction? There is no singular path which is one plus drug equals termination – not at all. It is a huge melting pot. I think for the panel the questions are around what we can do for guidance and how we can further support employers in being able to make lawful and reasonable decisions, with the protections for workers that are already in place, because there are a lot of them. These are questions. It is not about getting employees out; it is about making sure there is a safe workplace, and that is paramount. And yes, they do not want to lose good workers; they want to support them. Many of the small employers I have spoken to are often calling at their wits' end. They are calling 18 months down the track sometimes after they have been trying to coach and help and manage a worker who has been struggling with something that might include drug use. It is a tough road.

Renee HEATH: Yes. I think drug use, or addiction in general, is often a place people do not want to be, and they require a lot of love and support. I just do not think you can separate the two things. Just because you are drug testing does not mean that you are not there to support and really help that person get the best out of their career. I am just seeing if I have got any other things I have jotted down. I think that is it. Thank you so much.

The CHAIR: Thank you, Dr Heath. Committee, any last-minute –

David ETTERS HANK: Can I just ask: would it be useful to employers – and particularly I am thinking of smaller employers that do not have HR departments and whatever else – if there was actually something like, for example, model drug policy that could be included in, for example, EBAs? Would that be seen as useful?

Tracey BROWNE: Well, that is what we provide for our members.

David ETTERS HANK: I do not want to put you out of work.

Tracey BROWNE: But there are a lot of employers who are not members of industry associations. We provide that because we believe it is very helpful to give them a starting point. I think the challenge for a lot of smaller employers – it is not going to be something you put into an enterprise agreement. They do not have them, being small. We would also advise against them being part of an enterprise agreement in larger employers; it should be a standalone policy, because that way it can be amended when it needs to be. But yes, guidance around what a policy might look like but also then how to do it – because the risk of a draft policy is people just put their company name on it and say, 'We've now got a policy.' If they have not consulted, if they have not made sure it is something that is fit for purpose for their business, actually giving them a template policy could put them in a worse situation than not having anything.

David ETTERS HANK: Because – if I may, Chair – the current WorkSafe guide is sort of the inverse, isn't it, because it is actually all about process but not about content.

Tracey BROWNE: Yes, it is about process, and they are probably reluctant to do a draft policy for that reason.

David ETTERS HANK: Sure. But you need both, don't you, particularly with smaller employers?

Tracey BROWNE: Yes, but I think if you are providing a draft policy, you also need to have the context about how you are going to use it.

David ETTERS HANK: Sure.

Scott BARKLAMB: And you have got to understand it, live it, implement it, communicate it et cetera as well, once it is there.

David ETTERS HANK: I think that is beyond the role of Parliament, but I take your point.

Scott BARKLAMB: But that is actually critical to the sorts of wellness outcomes, performance outcomes and safety outcomes as well.

The CHAIR: Thank you. Thank you, David. Thank you so much for your submission in relation to the perspective of employers and their responsibility for OH&S and liability, which employers do care about in looking after workers in relation to not just during but after workplace testing as well. We much appreciate your evidence given today, and it is something we will definitely take into consideration in delivering our recommendations down the track. Thank you, Jordon, Georgia, Scott and Tracey, for coming in.

Witnesses withdrew.