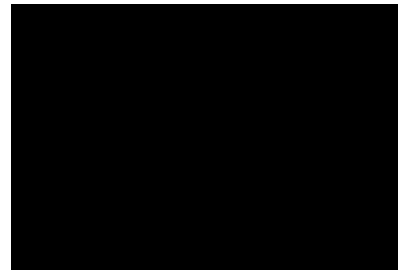




Montu Group Pty Ltd



Legislative Council Legal and Social Issues Committee

Parliament House
Spring Street
East Melbourne Victoria 3002

Sent via Parliament House website

Submission to the Inquiry into Workplace Drug Testing in Victoria

Dear Committee Members,

Montu Group Pty Ltd (Montu) thanks the Legal and Social Issues Committee for the opportunity to provide a submission to this Inquiry into medicinal cannabis and workplace drug testing in Victoria.

Executive Summary

- Where there is a specific safety sensitive issue, Montu supports the current legal requirements for workplace strategies to protect employees in safety-critical workplaces such as roles in the mining, transport and aviation industries.
- Montu is of the view that both the scope and methodology of current testing practices are at best out-dated, and at worst, discriminatory. The regimens in place currently give little to no discretion for workers who have been prescribed medicinal cannabis and who are not cognitively impaired by their medication.
- Anecdotally, there are some workers who, while they work in sectors where workplace testing is common, are asked to submit to testing, even when they are not in safety-critical roles. Such universal approaches by employers are not appropriate.
- Montu would like to see arrangements where only safety-critical roles are subject to testing, but that testing covers any prescription medicine which might adversely affect cognition, and then further test workers for cognitive impairment, if necessary.

- Montu highlights the need for best practice principles for workplace drug testing which have due process and natural justice at their core to be developed and implemented.
- Montu recommends that the Committee seek advice from the Victorian Equal Opportunity and Human Rights Commissioner for their view on how to best protect medicinal cannabis patients who are workers in safety critical roles through the anti-discrimination legislative framework.

About Montu

- Founded in 2019, Montu is the largest medicinal cannabis company in Australia, with operations in both the Asia-Pacific and European regions. Last month, Montu was named the country's fastest-growing tech company by Deloitte for an impressive two consecutive years. Montu has also recently been included in LinkedIn's prestigious Top Five start-ups list. Beyond these important industry recognitions, Montu's mission has always been to facilitate greater access and affordability of medicinal cannabis for patients who can potentially benefit from its therapeutic properties. In everything we do, Montu is guided by two simple principles: an evidence-based belief in the life-changing potential of medical cannabis – and a drive to ensure it's reaching those who need it most.

Introduction

- We note that this Inquiry encompasses an examination of the existing legislative framework, the differential treatment of prescription medicinal cannabis in comparison to other medications, and potential improvements to the occupational health and safety and workplace drug testing framework, considering the welfare of medicinal cannabis patients. Additionally, the Committee is tasked with investigating the possible discriminatory nature of current workplace drug testing laws, considering the addition of a protected attribute in Victoria's anti-discrimination laws. We note that the inquiry is open to exploring any other relevant matters that may arise during its course, but is strictly directed to limit its considerations to workplace drug testing, excluding the broader subject of roadside drug testing and the reform of the *Road Safety Act 1986*.
- Montu believes that this examination of existing workplace drug testing laws in Victoria by the Committee is of importance for medicinal cannabis patients, in part because of the intersection of legal, medical, and social aspects of how patients who have been legally prescribed medicinal cannabis are perceived in the workplace. The legislative and regulatory framework for workplace drug testing has consequences for employees, employers, and broader societal attitudes towards the use of medicinal cannabis as a bona fide therapeutic treatment modality. The inquiry will address critical issues such as the equitable treatment of medicinal cannabis in comparison to other prescription medications, seeking to ensure the protection of the rights of medicinal

cannabis patients within workplace settings. Additionally, the assessment of potential discriminatory elements in current laws and the proposal for an additional protected attribute reflects the Committee's commitment to upholding principles of fairness and justice. By scrutinising and potentially improving the existing framework, the Committee plays an important role in striking a balance between safeguarding occupational health and safety, respecting individual rights, and fostering a legal environment that reflects evolving societal perspectives on medicinal cannabis as a legitimate treatment option for Victorian workers.

Legislative and Regulatory Framework for Workplace Drug Testing

- The prevalence of workplace drug testing in Victorian workplaces is driven mostly by employer concerns regarding risks to workplace safety and productivity, with particular focus on safety-critical roles. Indeed, the *Occupational Health and Safety Act 2004 (Vic)* (the OHS Act) requires employers, so far as is reasonably practicable, to provide and maintain a safe and healthy work environment for their employees.
- While concerns about workplace safety by employers are entirely valid, and indeed legally mandated in certain sectors, it is somewhat difficult to access impartial information assessing the effectiveness of testing in mitigating such risks. Currently available information is largely disseminated by manufacturers of drug testing devices or service providers, which for some, may raise concerns about potential selectivity and the possibility of information being presented in a manner that may exaggerate the efficacy of drug testing. Additionally, there is somewhat of an absence of information delineating 'best practice' in workplace drug testing programs and procedures.
- Montu will outline here what we believe to be the appropriate principles for a best practice workplace drug testing framework. It is our view that the need for the Committee to determine what constitutes best practice is crucial, as programs and procedures adhering to best practices are more likely to garner acceptance and endorsement from employees. And they are therefore more likely to ensure due process and natural justice in workplace settings while balancing occupational health and safety risks.
- The OHS Act and regulations do not mandate, require or prohibit testing, but some workplaces may require testing as part of their alcohol and other drugs management plan or industrial agreements. Some industries are covered by specific legislation that regulates the use of alcohol and other drugs in the workplace. For example, the OHS regulations require mine operators to introduce strategies to protect persons at the mine from risks to their health and safety associated with consumption of alcohol or other drugs by any person. Public safety legislation in the transport industry restricts the use of alcohol and other drugs in the workplace.

- It should be noted that Regulation 409 of the Victorian OHS Regulations - where the requirement for mine operators to develop these strategies is set out, refers to persons *adversely affected* by drugs i.e. their judgement or capacity is impaired. Regulation 409 does not oblige mine operators to disallow workers from entering a mine simply because they have a particular substance present in their system. This Regulation also allows workers who have had the substance legally prescribed and determined by their doctor to be able to do so, to use those substances at the mine.
- Montu is not proposing that these legal requirements for workplace strategies to protect employees in safety-critical workplaces change. However, we do consider that the standards which have been developed to screen workers for various substances (including prescribed cannabis) are somewhat outdated in both the scope of substances tested, as well as the approach of testing for mere presence (rather than impairment), for all tested substances other than alcohol.

Treatment of Medicinal Cannabis in Workplace Drug Testing

- A summary of the way workplaces test for cannabis is provided here, to bring to light the concerns that Montu has with a system that only tests to detect the presence of cannabis, rather than some other form of testing that might actually reveal whether a person is cognitively impaired. WorkSafe recommends, should employers wish to conduct alcohol and drug testing, that testing is conducted in accordance with Australian Standard AS 4760:2019, Procedures for Specimen Collection and the Detection and Quantitation of Drugs in oral fluid and AS/NZ 4308:2008 - Procedures for Specimen Collection and Quantitation of Drugs of Abuse in Urine. These standards test for alcohol, amphetamine-like substances, benzodiazepines, cannabinoids (via testing for presence of tetrahydrocannabinol or THC), cocaine and its metabolites, and opioids.
- The standards test for a blood alcohol level of 0.05g/100mL or greater, and there is a significant body of evidence pointing to the fact that blood alcohol levels at or above this range will indicate impairment of an individual's cognitive function. In practice, this allows workers to engage in the use of alcohol outside of work, without impacting their ability to attend to their duties during work hours. The same is not true for any other substance under this testing regimen, including prescribed cannabis. These tests will detect any amount of THC at a concentration of 15 ng/mL for urine and 50 micrograms/ Lg for saliva. To state it plainly, current workplace tests for substances other than alcohol have no objective criteria by which to determine cognitive impairment.

There is a difference between the presence of a substance and whether that substance causes cognitive impairment.

- It is important to be clear about the difference between the presence of a substance and whether that substance causes cognitive impairment. In general, whether a substance impairs an individual's ability to safely perform a task depends on a range of individual factors such as age, gender, and body weight. It also depends on environmental factors such as the type of task and the environmental conditions in situ (such as extreme temperature, dirt, noise, poor visibility etc). It is Montu's view that the mere presence of medicinal cannabis is not a fair measure of whether an individual can safely perform a task and therefore an evidence base for determining a level, above which an individual is likely to be cognitively impaired, should be developed.
- There is some published evidence to support the position that neurocognitive performance is not necessarily impaired in medicinal cannabis patients, particularly in patients being treated for chronic conditions. This evidence furthers the argument that merely testing for the presence of cannabinoids in blood or urine is not a reasonable indicator of whether an individual is able to work in a safety-critical role. Arkell et al recently published an open-label trial where patients with various health conditions attended a single laboratory session in which they self-administered a standard dose of prescribed medicinal cannabis as per the labelling instructions (Arkell, T.R., Manning, B., Downey, L.A. et al. A Semi-Naturalistic, Open-Label Trial Examining the Effect of Prescribed Medical Cannabis on Neurocognitive Performance. *CNS Drugs* 37, 981–992 (2023)).
- Trial participants were assessed for cognitive performance via a standard research tool (the Cambridge Neuropsychological Test Automated Battery or CANTAB and the Druid app) immediately before a dose of medicinal cannabis and then at one, two and four hours after. Participants' performance improved over time on the CANTAB test and all other changes in cognitive performance measures over time were non significant. These findings suggest that prescribed medicinal cannabis may have minimal acute impact on cognition of patients with chronic conditions, but given the small number of participants in this trial (n=40), larger controlled trials might be needed. Beyond that, the findings also demonstrate that a scientifically robust methodology to test an individual's level of cognitive performance does exist, and could inform new workplace testing models which could test for impairment, not just presence.

Best Practice, Ensuring Due Process and Natural Justice

- There are different types of drug testing programs which take place across workplaces. These can be summarised into four: pre-employment screening, where testing involves screening job applicants as part of the application process, random testing, where a predetermined proportion of the total workforce is screened (usually without notice), for cause testing (where there is physical or other evidence of drug use) and post accident testing where screens are done after accidents or near misses. It is Montu's view that all of the sub

groups of programs described above may be justifiable, but only when executed within a framework which ensures due process and natural justice, and then only for workers in safety critical roles. It is not defensible for a company which has some of its workforce in safety-critical roles to apply universal requirements for testing across its entire workforce. Nor is it just for a company to screen workers simply as a means to surveil its staff i.e. when there is no identified risk being addressed, only as a control measure, or from a position that staff should adhere to certain social behaviours.

- To connect this real issue to real life experience from our patients, we have a patient who works in construction, is around fifty years old, and has chronic pain and associated anxiety and insomnia. He was open with his employer about his medicinal cannabis treatment, who was satisfied with a treatment letter from his doctor which simply outlined his medications. He then reported to a work site as a subcontractor, informed the site of his medications, was disallowed from the site, and subsequently stood down as a subcontractor. His employer then requested an updated treatment letter from the doctor which explicitly stated that there was no risk of impairment with his medications. The doctor was unable to provide this explicit assurance and instead indicated in writing that, if used as prescribed, it is unlikely to cause impairment but that it was ultimately up to the workplace to determine risks and mitigations beyond that.
- This example speaks strongly to the varied interpretations of risk in workplaces and the need for evidence-based metrics with which to assess impairment. By comparison, we have another patient who is around 40 years old and works in fly-in, fly-out construction. He is being treated for anxiety with associated insomnia. His workplace conducts both urine and saliva testing. In contrast to the other patient, this patient's employer was satisfied with a treatment letter outlining his prescriptions and indications for treatment. He had no further issues, despite working in a safety-critical role. Putting these two examples together clearly illustrates the imperative for best practice screening principles, so that workers across industries are not only treated fairly, but with a consistent approach.
- The National Centre for Education and Training on Addiction (NCETA) at Flinders University undertook a critical review of relevant literature on the extent and nature of alcohol or drug related risk to workplace safety. It examined the effectiveness of workplace drug testing in improving safety and identified best practice testing programs and implementation processes. (Pidd, K, Roche, AM. (2011). Workplace drug testing: Evidence and issues. National Centre for Education and Training on Addiction (NCETA), Flinders University, Adelaide). While the review was done some time ago - 2011, its methodology on how it arrived at a set of principles for a best practice workplace drug testing program is sound. Montu would recommend that the Committee consider the findings of this review, but particularly take into account the principles it sets down as best practice, as Montu supports these as a basis for future testing programs in Victoria. The principles NCETA arrived at are:

- The program must be justified as a mechanism to address an identified risk.
- It must adopt procedures that are applied in a procedurally fair manner.
- It must result in counselling, treatment and rehabilitation, rather than punitive outcomes.
- It must target safety-sensitive, rather than non safety-sensitive work roles.
- It must allow for employee input into the development and implementation of the program.
- It must allow for a right of appeal.
- It must adequately disseminate associated policy and procedures.
- It must incorporate appropriate education and training.

And to these principles, we would also add:

- Should a worker test positive for a substance which is screened for, a further test for cognitive impairment should be carried out.
- As per OHS regulations, the program must allow workers who have had any substance legally prescribed and determined by their doctor to be able to do so, to continue to use them while at work.

Addressing Discrimination in Workplace Drug Testing Laws

A more just approach is for comprehensive screening of all prescription medicines which may impact cognition, with the testing framework to include a separate cognitive impairment test.

- Seeking to improve workplace safety by eliminating or minimising risks associated with substances that cause cognitive impairment is a noble aim. However, it is not reasonable or consistent to test for some legally prescribed medicines which may cause cognitive impairment, but not test for other legally prescribed medicines which are known to cause impairment. Consistency of approach is a necessary part of ensuring that the processes a workplace implements to keep employees safe are not discriminatory.
- On this issue, there are a significant number of prescription medicines which may impair an individual's cognitive ability. Austin Health has done a number of literature reviews for the Victorian Department of Health which look at which prescription medicines cause the most harm, and is a good resource for the Committee to consider in the context of cognitive impairment (*Evidence to inform the inclusion of Schedule 4 prescription medications on a real-time prescription monitoring system* D Liew, E Joules, J Booth, K Garrett, A Frauman, Dept Clin Pharmacology & Therapeutics and Pharmacy Dept, Austin Health 2017). Novel antipsychotic agents such as quetiapine and risperidone cause significant cognitive impairment. Z-drugs (such as zopiclone and zolpidem),

used to treat insomnia, can cause daytime sedation. Clonidine, originally used as an anti-hypertensive but more recently also used for opioid and alcohol dependence, can cause significant cognitive impairment. Gabapentinoids, including pregabalin and gabapentin, used in the treatment of chronic pain, can significantly impair a patient's cognition. Some anti-depressants, most first generation antihistamines, and even some non steroidal anti inflammatories can cause either sedation or cognitive impairment or both.

- While the above list is by no means exhaustive, it does point to a very significant issue with the current testing regimen: that some legally prescribed medicines are treated differently to others. To have a system where some medicines are screened for while others, which may cause far greater cognitive impairment, are not screened for, can well be described as discriminatory. A more just way would be to have more comprehensive screening of all prescription medicines which may impact cognition, with the testing framework to include a separate cognitive impairment test, as described earlier.
- The Terms of Reference make specific mention of considering a new protected attribute under Victoria's anti discrimination legal framework, potentially around medication or medical treatment. Section 6 of the *Equal Opportunity Act 2010 (Vic)* sets out the 'attributes' on the basis of which discrimination is prohibited in the areas of activity in Part 4 of the Act. There are presently 21 separate protected attributes under this legal framework. While Montu does believe that equal opportunity legislation is an area that the Committee should consider for the purposes of this Inquiry, there may be unintended consequences to adding 'medication or medical treatment' to the list of attributes. It also may be that an existing attribute, such as disability, may already offer the necessary protections under law. Montu would recommend that the Committee specifically engage Commissioner Ro Allen (the Victorian Equal Opportunity and Human Rights Commissioner) and seek their advice on this question.
- Finally, a quick summary of the matters raised in this submission. While Montu supports the current legal requirements for workplace strategies to protect employees in safety-critical workplaces, we are of the view that currently both the scope of substances included in workplace screening and the approach of testing for mere presence, rather than impairment, are discriminatory and need to be updated. This means expanding scope of testing to other prescription medicines which impact cognition and developing separate tests which measure cognitive impairment. We have also put forward what a best practice workplace screening model would include, with due process and natural justice at its core. We also recommend engaging the Victorian Equal Opportunity and Human Rights Commissioner on how best to protect medicinal cannabis patients under the equal opportunity legislative framework.
- Montu would again like to thank the Committee for bringing attention to the very important issue of how medicinal cannabis is dealt with in workplace drug

testing arrangements. This is a significant issue for many of our patients, and the Committee's work here focuses on important principles of fairness and justice. We trust that the matters we have raised in this submission will assist the Committee in its consideration of this issue and we are happy to attend a public hearing, should the Committee deem that appropriate.

Submitted by:

Montu Pty Ltd



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8 December 2023