

MEDIA RELEASE

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Latest drug test ruling pushes the case for a FWC appeal bench

THE ability for employers to manage the risk of drug and alcohol impairment in the workplace has been made even more uncertain by the Fair Work Commission (FWC) which last Friday (17/1/2014) banned an energy employer from using its preferred urine-based testing method.

The FWC's inconsistent approach in recent drug and alcohol testing cases, particularly on whether employers were justified in using onsite urine testing, has resource industry employer group AMMA (Australian Mines and Metals Association) calling for clarification and certainty.

"The Commission's approach to matters involving drug and alcohol testing methods has been all over the place," says AMMA executive director, policy, Scott Barklamb.

"Despite the absolute importance of ensuring nobody on-site is at risk due to drug or alcohol impairment, mining and energy employers still have no clear and consistent precedent to follow.

"Three recent cases highlight the uncertainties around employers' ability to implement whichever drug and alcohol testing method they deem most appropriate. While each of the three cases rests on its own circumstances, the FWC's findings are inconsistent and confusing to say the least:

- "In 2011, HWE Mining was told it could vary its policy to include onsite urine testing as well as saliva testing in order to keep its workplaces safe and free of drug and alcohol impairment.
- "In 2012, Endeavour Energy was ordered to use saliva testing only because the FWC deemed urine-based testing to be 'unjust and unreasonable'. The employer's subsequent appeals of this decision have been rejected.
- "In 2013, the FWC supported the actions of an employer who dismissed an employee who refused to undertake an onsite urine drug test, finding it was not unreasonable to require employees to submit to onsite urine testing.

"Endeavour Energy has sought to exercise its managerial prerogative to use onsite urine testing due to problems with saliva testing including inaccuracy, an unacceptable turnaround time for conclusive lab results, and the uncertain status of national accreditation for onsite saliva testing.

"By rejecting Endeavour's latest challenge to the decision that prevented it from introducing urine testing, the FWC is sending mixed messages to the business community on how to properly fulfil legal obligations to provide a safe workplace."

In a private submission to the Minister for Employment, AMMA recommended a new expert bench be established to independently hear appeals of contentious FWC decisions.

AMMA's submission cited several examples of inconsistent approaches by commission members on important employment issues, with drug and alcohol testing procedures topping the list.

"The three recent cases in this area all represent different takes on legal precedent established as far back as 1984 in the XPT case, when it was confirmed that employers should be able to manage important workplace relations issues as they saw fit," Mr Barklamb says.

"A new and judicially superior appeals body could resolve such inconsistencies, not only for the parties directly concerned, but for future employers, employees and organisations who at the moment are understandably confused as to which precedent applies."

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