

# FAIR WORK TESTS NEGATIVE FOR RESOURCE INDUSTRY HEALTH & SAFETY

National resource industry employer group the Australian Mines and Metals Association (AMMA) is calling for greater employer control over drug and alcohol testing procedures following a series of Fair Work Commission rulings that undermine management decision-making, writes AMMA senior policy adviser **Lisa Matthews**.

**E**mployers have again been constrained in their ability to manage workplace health and safety in the critical area of workplace drug and alcohol testing at the behest of the federal industrial tribunal.

Following a dispute being raised by the Maritime Union of Australia (MUA), stevedoring company DP World has had its managerial rights diminished after the Fair Work Commission (FWC) ruled that using urine-based testing to follow up a positive oral fluid (saliva) drug test was an 'unjust and unreasonable' incursion into employees' privacy.

This decision has no doubt caused great operational disruptions and is unsurprisingly being appealed by the employer, set to be heard in mid-June.

This case joins the growing number of FWC decisions that have transformed drug and alcohol testing from a critical safety measure into a contentious tug-of-war between employer obligations and union industrial agendas, with the FWC offering little consistency in its interpretation of the complex issues in this area and even less support for management discretion.

In 2011, the FWC told HWE Mining 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 drugs and alcohol.

In 2012, Endeavour Energy was ordered to use saliva testing only because the FWC deemed urine-based testing to be 'unjust and unreasonable' given that, in its view, saliva testing was equally accurate. The company's subsequent appeals of the decision were also rejected.

In 2013, the FWC supported an employer's decision to dismiss a worker who refused to undertake an onsite urine test, finding it was not unreasonable to require employees to submit to onsite urine testing.

And in 2014, we saw the FWC order DP World not to use urine testing at the Union's request, despite questions existing over the FWC's jurisdiction to make such an order.

While the above decisions were based on the specific circumstances of each case, they make the regulatory framework around drug and alcohol testing increasingly fraught and difficult to navigate. Even the fact that the National Association of Testing Authorities (NATA) withdrew its accreditation for all onsite saliva testing devices late last year has not deterred the FWC from continuing to constrain employers' ability to use urine testing as an alternative.

The FWC has intruded to an unprecedented degree in management decision-making, but has also left employers without a clear and consistent precedent to follow.

These interpretative inconsistencies must be rectified and the narrowing rights of employers to protect their workplaces from illicit substance abuse must be reversed.

Union campaigns have sought to shield the recreational drug use of their members as immaterial to employees' vocational responsibilities. But it must be remembered that in safety critical industries such as the resource industry, workplace hazards are constant ranging from hot molten metal right through to heavy machinery and explosives. Any drug-based impairment on these sites, including any "hangover" effects from previous drug use, can result in serious injury or death.

Drug and alcohol testing, including urine testing, has been a feature of resource sector employment for more than three decades and is a practice not merely accepted across the mining, oil and gas industries, but widely supported by employees, despite union campaigns to the contrary.

Random urine testing occurs routinely across most international resource project sites and a lesser standard should not be imposed on Australian workplaces.

Our industrial relations system allowing the FWC to rule on how drug and alcohol testing is carried out undermines managerial prerogative and contributes to a progressively more complicated and uncertain regulatory framework. As the national resource employer group, AMMA has consistently reinforced the view that resource employers should be able to meet their obligations to provide a safe and healthy workplace for all in a way that is most effective for their enterprise. In many cases, that will include urine testing for drugs and alcohol.

But as confusion for employers grows with each new decision the FWC hands down, the need for an independent appeals body becomes more urgent. Such a body would make binding and sensible decisions in this area informed by private sector experience in running a business which would be hoped to alleviate the inconsistency around FWC decisions to date.

The Federal Government is currently considering the establishment of such an independent appeals body and this is a measure that has AMMA's full and ongoing support.

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