"*Drug Testing in the Workplace – A Storm in a Pee-Cup*"[1]

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Introduction

1. Increasingly employers are introducing random drug testing using on-site testing devices. There are two primary testing modalities: testing a urine sample and testing a saliva (oral fluid) sample.

2. There is general agreement amongst unions, employees and employers that in industries that use heavy machinery it is appropriate, if not necessary, to implement a random drug-testing regime to identify workers who may create a risk to health and safety because of drug use. The dispute is not about whether to *have* a testing regime, but over *what modality* of testing to adopt.

3. Unions and employees usually prefer oral fluid testing. It is less personally intrusive to collect and it is less likely to pick up drug use outside of work. The latter is a particular concern if the policy provides that an initial positive result ('non-negative' in the language of the drug-testers) will result in the employee being stood down and can lead to disciplinary action including potentially the loss of employment (as occurred in the *ferry master* case discussed below).

4. Employers usually prefer urine testing. While it can fail to pick up very recent cannabis use, it is considered more likely to identify drug use and so more likely to identify those who might be impaired at work. Further, because it is more likely to identify drug use out of work it is considered more likely to deter employees from taking drugs that could affect them at work.

5. In many cases the employer can choose the modality of testing without being at risk of a tribunal finding that the method selected is not appropriate. Ordinarily an employer's direction to take a drug test pursuant to an established policy would be considered a reasonable direction, regardless of the modality.[2] However, where there is an enterprise agreement that provides the an industrial tribunal, such as the Fair Work Commission, with a power to arbitrate disputes arising in the workplace, the tribunal can determine whether a proposed policy that is in dispute

[1] This paper is based on a paper with the same title which the author, jointly with Ingmar Taylor SC, prepared and presented for the NSW Law Society on 19 March 2016. It has subsequently been updated in light of further case law.
[2] *Briggs v AWH Pty Ltd* [2013] FWCFB 3316 at [8].

is 'unjust or unreasonable'.[3] In the exercise of that power the tribunal has both upheld[4] and rejected[5] union applications to prefer on-site oral fluid testing over urine-based testing.

6. An important case on the issue is the Full Bench decision in *CFMEU v Port Kembla Coal Terminal Limited* [2015] FWCFB 4075. It considered a different approach, namely using *both* modalities on a random basis. The view the Commission took to that approach is discussed below.

Context of the dispute

7. The impetus to introduce drug testing arises from health and safety obligations. For instance, the *Work Health and Safety Act 2011* (NSW) imposes the following obligations:

   a. A primary duty of care on a person conducting a business or undertaking to ensure, so far as is reasonably practicable, the health and safety of workers[6];

   b. A duty on officers of a person conducting a business undertaking to exercise due diligence to ensure that the person complies with that duty[7]; and

   c. A duty on workers to, among other things, take reasonable care for their own health and safety and comply, so far as he or she is reasonably able, with any reasonable instruction or policy relating to health and safety at the workplace[8].

8. The need to introduce drug testing in some industries is almost self-evident, while in others it is arguably unnecessary. As Commissioner Cambridge said in *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWC 2384, (at [57]):

> " … it would seem to be largely unnecessary to implement a workplace drug testing regime in the case of a call centre. On the other hand, heavy and transport industries obviously require workplace drug testing."

9. It seems well established that health and safety obligations do not give rise to a need to adopt any *particular* method of drug testing.[9]

10. In the early days testing in a laboratory was utilised.[10] However, with improvements in technology, on-site oral fluid and urine tests have become more accurate and are now usually preferred. They give immediate results (albeit results that need to be confirmed in a laboratory

[3] The test of 'unjust or unreasonable' comes from *Australasian Federated Union of Locomotive Enginemen v State Rail Authority of NSW* (1984) 295 CAR 188 (usually referred to as the *XPT case*).
[4] *Endeavour Energy v CEPU* [2012] FWA 1809 (Upheld by Full Bench on appeal in [2012] FWAFB 4998; *MUA v DP World Brisbane* [2013] FWC 2394 (overturned on appeal [2014] FWCB 7889, but for reasons that were not related to whether urine testing was unjust or unreasonable).
[5] *CFMEU v HWE Mining Pty Ltd* [2011] FWA 8288; *Holcim (Australia) Pty Limited v Transport Workers' Union of New South Wales* [2010] NSWIRComm 1068*;* See too *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWC 2384 discussed in this paper.
[6] Section 19 of the *Work Health and Safety Act 2011* (NSW).
[7] Section 27 of the *Work Health and Safety Act 2011* (NSW).
[8] Section 28 of the *Work Health and Safety Act 2011* (NSW).
[9] *Endeavour Energy v CEPU and Ors* [2012] FWAFB 4998 at [53]-[57].
[10] *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch* (1998) 82 IR 162 was a case that involved urine testing by laboratory; *Shell Refining (Australia) Pty Ltd v CFMEU* [2008] AIRC 510 involved oral fluid testing by laboratory.

before being considered 'positive'), whereas a laboratory-only testing regime means it is a day or more before it is known that a sample was positive.

11. Some things are worth noting by way of background. At workplaces that use on-site testing the usual practice is to only send non-negative test samples to a laboratory for confirmatory testing. It is generally accepted that in a laboratory both oral fluid and urine provide a highly accurate result against the Australian Standard cut-off levels (with limited exceptions, as noted below). The comparative accuracy of the various on-site testing kits however is more contentious. This is an issue of some importance given that whenever an on-site test generates a 'false negative'[11] the sample is not sent for further testing and a worker is permitted to proceed to work.

12. By way of further background, the following matters are generally accepted to be true:

    a. Neither oral fluid nor urine testing devices are perfect (although some experts say urine testing has a lower incidence of 'false'[12] results);

    b. Both methods are susceptible to cheating, although the likelihood of someone being in a position to cheat effectively when a test is conducted at random and with no prior warning is relatively low;

    c. Australian Standards exist governing both methods; and there are laboratories accredited for the analysis of both oral fluid and urine samples;

    d. Systems are in place to verify the accuracy of on-site testing devices for both oral fluids and urine (although depending on the devices the accuracy of the verification processes are themselves capable of being compared; further the Australian Standard for oral fluid does not currently contain a standard method to verify oral fluid devices, which does not mean there are not accepted verification processes but does mean they cannot be said to be compliant with an Australian Standard[13]);

    e. Neither method tests directly for impairment; and

    f. Cannabis is the most widely used drug apart from alcohol and hence the comparative effectiveness of detection of Cannabis has tended to be the focus of proceedings.

13. Of perhaps greatest significance in that list is the well-accepted fact that *neither* modality tests for impairment. A person who tests positive to an alcohol breath-test at above a 0.05 can be accepted to be impaired at the time the test is taken to some degree. That is not the case in respect of the drug tests – the test reveals the presence of certain chemical compounds in quantities above designated cut-off levels exist in the fluid: that may mean the person is affected by the drug, but may not.

14. For example a non-negative urine sample occurs where cannabis metabolites are detected, but since that will arise in circumstances where the cannabis was smoked between a few hours and

[11] False negative is where a sample is identified as negative but the drug is present in the sample at the identified cut-off level. (It does not refer to the situation where a person tests negative at a time when they are impaired.)
[12] 'False' in this context meaning a result, whether positive or negative, that is shown when sent to a laboratory for confirmation to have generated an incorrect result.
[13] *Endeavour Energy* [2014] FWC 198.

3 days earlier it does not, of itself, indicate the person's capacity is impaired at the time of the test. Hence much of the case law examines which modality of testing is more likely to identify the risk of impairment, rather than impairment itself.

Nature of the Dispute

15. The ongoing dispute in industrial tribunals about the appropriate drug testing modality at the workplace is best summarised by the opening paragraphs of the decision of the Full Bench in *Briggs v AWH Pty Ltd* [2013] FWCFB 3316:

> [1] The issue of whether the most appropriate method of workplace drug testing is by the collection and analysis of a urine sample or a saliva sample has proved to be controversial. The controversy exists at two levels. Firstly, there has been a scientific debate as to which method best detects drug use of a nature that may affect workplace health and safety. At the core of this debate are the propositions that urine testing is the more accurate means of determining whether an employee has at some time consumed any one of a range of drugs of abuse, but that saliva testing is better at identifying likely present impairment from drug use (particularly cannabis use) because it only detects very recent use. The Full Bench in *Endeavour Energy v CEPU* described the competing scientific merits of urine and saliva testing in the following concise way:
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> > "... oral fluid testing is more focussed on acute impairment, whereas urine testing is more likely to uncover patterns of drug use which may lead to levels of impairment and safety concerns."
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> [2] Secondly, there has been controversy over which of two competing workplace interests (which might alternatively be characterised as workplace "rights" in the social and ethical if not the legal sense) should be given priority in the selection of the appropriate testing method. On the one hand, there is the interest of employees in not having their private behaviour subject to scrutiny by their employers. As a general proposition it is doubtless the case that employees are entitled to a private space in their lives into which the workplace may not intrude, although the boundaries of that space may sometimes be difficult to define. Urine testing challenges employee privacy, because it detects historic drug use, including drug use in purely private time, not just recent drug use during or immediately before working time as in the case of saliva testing.[14] On the other hand, there is the interest that employers and employees have in ensuring a safe working environment by the taking of all practicably available measures to detect and eliminate or manage risks to safety. Both employers and employees are throughout Australia subject to statutory duties concerning workplace safety, breach of which may result in criminal liability, and employees are exposed to the possibility of injury or death if workplace risks to safety are not identified and either removed or controlled. In this context it has been argued that the wider net cast by urine testing is more effective in protecting this interest in that it may catch any user of drugs of abuse who may represent a current or future risk to safety, and also acts as a more effective deterrent to drug use.
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> [3] Industrial tribunals have accepted at least since the 1998 decision of the Western Australian Industrial Relations Commission in *BHP Iron Ore Pty Ltd v Construction,*

[14] See *Endeavour Energy v CEPU* [2012] FWA 1809 at [41]: "... it [urine testing] also has the disadvantage that it may show a positive result even though it is several days since the person has smoked the substance. This means that a person may be found to have breached the policy even though their actions were taken in their own time and in no way affect their capacity to do their job safely."

Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australia, Western Australian Branch[15] that the implementation of a program of random and targeted drug testing is a reasonable and legitimate employer response to the risk to safety posed by employee drug use, even if that involves some interference with employee privacy. As the Full Bench put it in that case:[16]

> "...current standards and expectations of the community concerning health and safety in the workplace as evidenced by legislative prescriptions and judgements of courts and industrial tribunals are such that there will, of necessity, be some constraint on the civil liberties at times and, in particular, an intrusion into the privacy of employees."

[4] However, no consensus has developed in decisions of industrial tribunals as to what is the most appropriate method of testing. The testing program approved in the *BHP Iron Ore Case* involved urine testing, but scientific developments since that time, including the development of an Australian oral fluids testing standard (AS 4760), have made saliva testing a credible alternative. Thus in *Shell Refining (Australia) Pty Ltd v CFMEU*[17], Senior Deputy President Hamberger determined as follows in a dispute resolution process conducted under Division 3 of Part 13 of the *Workplace Relations Act 1996*:

> "I note that the Western Australian Industrial Relations Commission in Court Session in the BHP Iron Ore Case specifically found that a random testing programme using urine samples was justified on safety grounds – and indeed was both fair and reasonable. However that case was decided ten years ago. Since then oral fluid testing has become available and an Australian standard for oral fluid testing has been developed. The question now is whether it would be unjust or unreasonable for the company to implement a urine based random testing regime with its wide "window of detection", with all that implies for interfering with the private lives of employees, when a much more focussed method is available, where a positive test is far more likely to indicate actual impairment, and is far less likely to detect the use of drugs at a time that would have no consequential effect on the employee's performance at work. My conclusion is that the implementation of a urine based random drug testing regime in these circumstances would be unjust and unreasonable."

[5] A somewhat different conclusion was reached by the NSW Industrial Relations Commission (Connor C) in *Holcim (Australia) Pty Limited v Transport Workers' Union of New South Wales*[18]. Connor C determined that while saliva testing might in time become the more appropriate, convenient and accurate testing method, it had not yet developed to the point that it should displace the more established method of urine testing. In *CFMEU v HWE Mining Pty Limited*[19] Lawler VP agreed with the decision in *Shell* insofar as "laboratory testing of saliva is essentially as reliable as laboratory testing of urine in detecting relevant drugs", but found that in the case of on-site testing, which the employer in that case required to be undertaken, "the currently available on-site screening devices for saliva" were "materially less reliable" than for urine testing.

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[15] (1998) 82 IR 162.
[16] At 168.
[17] [2008] AIRC 510 at [121]-[122]; affirmed on appeal in [2009] AIRCFB 428.
[18] [2010] NSWIRComm 1068 at [112].
[19] [2011] FWA 8288 at [26]-[29].

> In *Endeavour Energy v CEPU*[20], Hamberger SDP concluded that introduction of a urine testing policy in that case would be unjust and unreasonable because an employee could breach the policy through private conduct which had no effect on work capacity, and because of the availability of saliva testing as an alternative. This decision was upheld on appeal as being "open and appropriate" in the circumstances of the case.[21] The Full Bench in that appeal said in addition:
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> > "The approaches and policies to be adopted by employers on drug and alcohol testing in the workplace will depend upon what is deemed appropriate according to their needs and the circumstances."

16. Ultimately the question as to what is an appropriate approach for a particular workplace will depend on a number of factors. These include, among others:

    a. The nature and requirements of the work which employees perform;

    b. The approaches adopted by other employers in the industry;

    c. The objectives of a particular drug and alcohol policy;

    d. The balance between determining possible impairment, and the private activities of the employee; and

    e. Protections for employees in the use of the tests, particularly in respect of privacy and confidentiality.

17. A critical consideration is the effectiveness of oral fluid and urine tests in detecting the presence of drugs at the levels prescribed by the applicable Australian Standards, being Australian Standard AS4760-2006 for oral fluid testing and Australian Standard AS/NZ 4308-2008 for urine testing.

18. The table below sets out the commonly understood positions, derived from decisions[22] that have drawn conclusions from various expert evidence. It is acknowledged that the authors are not experts and that the table below is their best understanding of what experts have said in recent cases. Further the simplified summary below fails to reveal some matters of detail that may be important in particular cases. Further the technology underpinning the on-site devices is continuing to evolve, and the effectiveness of the on-site devices appears to be improving (at least if one accepts the vendor's marketing materials).

[20] [2012] FWA 1809 at [41].
[21] [2012] FWAFB 4998 at [67].
[22] *Endeavour Energy v CEPU* [2012] FWA 1809; *MUA v DP World Brisbane* [2013] FWC 2394; *Holcim (Australia) Pty Limited v Transport Workers' Union of New South Wales* [2010] NSWIRComm 1068*; Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWC 2384.

Drug type	Oral Fluid on-site test		Urine on-site test	
	Detection of recent use	Detection of chronic/long-term use	Detection of recent use	Detection of chronic/long-term use
Cannabis	Detects immediately after use and for some hours thereafter.[23] Cannot detect ingested cannabis.	Will detect only if there has been recent usage. Cannot detect ingested cannabis.	Will not detect very recent use.[24] Will otherwise detect use from a few hours to some days following usage.	Will generally detect, including from a few hours to a number of weeks after usage.
Benzodiazepines	Most onsite devices cannot detect.	Most onsite devices cannot detect.	Will generally detect.	Will generally detect.
Opioids	Will generally detect.	Will generally detect.	Will generally detect.	Will generally detect.
Cocaine	Will generally detect.	Will generally detect.	Will generally detect.	Will generally detect.
Amphetamines	Will generally detect.	Will generally detect.	Will generally detect.	Will generally detect.

19. It is immediately apparent from the above table that on-site oral fluid testing is not currently effective in detecting benzodiazepines[25] nor ingested cannabis (eating cookies for example). Further it is unlikely to identify chronic users of cannabis unless they smoke it inside the window of detection for on-site oral fluid testing. On the other hand, it is good at identifying a person who has smoked cannabis in the hours immediately before the test was taken.

20. In contrast, urine is not good at detecting very recent cannabis use, when the effect of cannabis might be at its highest, but is effective at detecting benzodiazepines, ingested cannabis and more likely to identify chronic users of cannabis. The latter consideration is of some importance given expert evidence that chronic cannabis use can lead to ongoing impairment. On the other hand urine testing will also identify use of cannabis some 1-3 days earlier, which means you can get a positive test in circumstances where the worker is not impaired at the time of the test. The latter situation may give rise to disciplinary implications for a worker even though he or she was able to safely undertake work. The greater capacity to identify drug use

[23] Experts differ as to how many hours following smoking cannabis an on-site oral fluid device will detect cannabis use. It will depend on the effectiveness of the on-site oral fluid testing device, which does vary. Some are advertised as detecting use up to 10 hours after smoking. However it is generally accepted to have an acceptably high degree of true positive results for at least 1-2 hours following use, and some say for at least 1-4 hours.

[24] Immediately after smoking or ingesting cannabis a period must elapse before the metabolites are present in the urine in sufficient quantities to generate a non-negative result (summarised in different decisions to be between 0.5hr and 2hrs or up to 4hrs).

[25] Benzodiazepines can be detected in oral fluid in a laboratory.

in a person's private life also raises concerns about confidentiality and privacy, especially if it becomes known by other workers that the worker was suspended following a random drug test.

21. It is to be borne steadily in mind, however, when considering the comparative effectiveness of each type of testing regime, that while one object of any drug and alcohol policy is to detect usage, perhaps a more significant object is deterrence. Like random road-side alcohol testing, the most significant impact of testing is not the identification of a particular worker who is unfit for work, but its capacity to dissuade workers from attending work in circumstances where their capacity might be impaired by drugs. The greater the known capacity of the testing regime to identify drug use the greater the deterrent effect.

Case Study 1: *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch* (1998) 82 IR 162

22. This case did not itself involve a debate about the modality of testing to be utilised. The company sought to introduce a program of drug and alcohol testing, including utilising urine testing. The program had been developed in consultation with workers and was not opposed other than by one union based on a vote of members at particular sites.

23. The programme was focused on identifying risks of impairment and deterrence. The company acknowledged that the testing was not a test of impairment. Offending employees were not exposed to the risk of losing their employment unless they had had a third positive reading in a two-year period. On the first occasion of a positive test, an employee was liable to be sent home on paid special leave. On the second occasion within the same period, the employee was liable to be sent home on *unpaid* special leave. On the third occasion within the same period, the employment of the employee would be the subject of discussions. Otherwise, following the two-year period, any record of a positive reading was expunged. Employees who were identified through the process, or who self-identified, were given access to assistance in relation to an alcohol or drug dependency condition.

24. Steps were also taken to safeguard against intrusion into the privacy of an individual and to protect and maintain the confidentiality of records.

25. Ultimately, a Full Bench of the Industrial Commission held that the programme was reasonable and fair. In reaching this finding, the Full Bench noted that the programme contained a formal review mechanism which allowed for the adoption of changes to the programme as new and more efficient and effective methods of testing became available. In other words, the potential to use different testing methods was left open.

26. The tribunal relevantly made the following finding regarding the adoption of testing on a random basis:

> "… the random nature of the testing process is likely to be an effective deterrent, more especially because the Programme appears to have the support of a significant majority of the workforce."

Case Study 2: *Endeavour Energy v CEPU* [2012] FWA 1809 (Upheld by Full Bench on appeal in [2012] FWAFB 4998; (2012) 244 IR 57

27. In this case, Endeavour Energy sought to introduce a new drug and alcohol policy. A number of unions opposed some elements of the policy, including the use of urine testing rather than oral fluid testing. The case was heard as a private arbitration pursuant to the dispute resolution procedure contained within the enterprise agreement.

28. Under the policy, the employer proposed that, for a first offence, employees be stood down on pay and issued with a first and final warning and a recommendation to volunteer in a course of counselling and/or rehabilitation. All costs associated with assistance over and above any EAP service would be at the employees cost and in their time. On confirmation of the second breach within 12 months, the employee may be subject to further disciplinary action up to and including termination of employment. This was opposed by the union which sought a three step process, with an employee being issued with a show cause letter as to why their employment should not be terminated on a third offence within 12 month period.

29. The Commission found that:

    a. Oral fluid testing tests for recent consumption and is more likely to identify someone who is impaired;

    b. Oral fluid testing is a better indicator than urine testing of likely impairment as a result of smoking cannabis, which is the most widely used drug;

    c. Urine testing may be unable to identify someone who has smoked cannabis in the previous four hours – which is the timeframe most relevant for identifying impairment;

    d. Urine testing may show a positive result even where several days have passed since the person has smoked the substance; and

    e. The management of breaches, as proposed by the employer, was reasonable.

30. The Commission found that a person may be found to have breached Endeavour Energy's policy through urine test results even though their actions were taken in their own time and in no way affected their capacity to do the job. In particular, it stated as follows:

> [40] Neither method tests directly for impairment. However, a method which tests for recent consumption (only) is more likely to identify someone who is impaired. While some witnesses regard this as a weakness, it is precisely because it only detects for recent use that oral fluid testing is a better indicator of likely impairment as a result of smoking cannabis (the most widely used drug apart from alcohol) than a urine test. Indeed, urine testing may be unable to identify that someone has smoked cannabis in the previous four hours - precisely the time frame which is most relevant for identifying likely impairment.
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> [41] Not only is urine testing potentially less capable of identifying someone who is under the influence of cannabis, but it also has the disadvantage that it may show a positive result even though it is several days since the person has smoked the substance. This means that a person may be found to have breached the policy even though their actions were taken in their own time and in no way affect their capacity to do their job safely.

> In the circumstances where oral fluid testing - which does not have this disadvantage - is readily available, I find that the introduction of urine testing by the applicant would be unjust and unreasonable. Accordingly I find that the system of drug testing that should be used by the applicant for on-site drug testing should be that involving oral fluids. This should be done on the basis of AS4760 - 2006: the Australian Standard governing procedures for specimen collection and the detection and quantitation of drugs in oral fluid.

31. Accordingly, it found that saliva testing was to be preferred over urine testing and that the introduction of urine testing would be unjust and unreasonable.

32. Endeavour Energy appealed the decision to the Full Bench of Fair Work Australia (as it was then). However, the Full Bench determined that it was open and appropriate for Senior Deputy President Hamberger at first instance to conclude that oral fluid testing for drugs should be adopted as a part of the new drugs and alcohol policy. Accordingly, it dismissed the appeal.[26]

Case Study 3: *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWCFB 4075

33. This is a case which involved an appeal of a decision by Commissioner Cambridge in *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* [2015] FWC 2384.

34. The dispute in this matter concerned the implementation of a drug and alcohol policy at Port Kembla Coal Terminal.

35. This case is novel in that, rather than utilising either oral fluid testing or urine testing, the company sought to adopt an approach of randomly selecting the use of either urine testing or oral fluid testing on the day of testing. In other words, employees who were selected for drug testing could be required to submit to either urine testing or oral fluid testing depending upon which was selected. The union and employees were opposed to the utilisation of urine testing.

36. At first instance, Commissioner Cambridge determined that the proposed approach of PKCT was not unjust or unreasonable. In doing so, he stated:

> [33] In addition to avoiding what can be described as the identified scientific shortcomings of either sampling method, the random utilisation of both oral fluid and urine sampling provides a superior deterrent against drug use. There are various widely disseminated techniques which can be used to adulterate either an oral fluid or a urine sample. It is unquestionably more difficult to be equipped with adulteration materials and capacity if the method of sampling is unknown. The greater deterrent which is created by the utilisation of both sampling methods was acknowledged by the experts who gave evidence...
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> [34] … it would appear that the combination of both methods would in general terms provide; (a) long-term drug monitoring benefits, and (b) the identification of more immediate acute drug induced impairment, and (c) a superior deterrent against drug use.

[26] [2012] FWAFB 4998

37. On the issue of privacy, Commissioner Cambridge stated:

> [36] As a general proposition I think it is reasonable to accept that there would be a greater degree of self-consciousness, or discomfort or even embarrassment associated with providing a urine sample as compared with an oral fluid swab. I believe that it would be fair to say that most people would prefer not to have to provide a urine sample and would prefer to provide an oral fluid sample instead.
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> [37] However, any discomfort or even embarrassment that may be associated with providing a urine sample must be evaluated against important countervailing factors. Importantly, any discomfort or embarrassment about providing a urine sample would be of negligible consequence if such discomfort or embarrassment avoided death or debilitating injury suffered at work. The balance, in my view, would overwhelmingly favour the benefits of adoption of a superior drug detection and deterrent mechanism for the cost of the discomfort, inconvenience or embarrassment of having to provide a urine specimen.
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> [38] In addition, in recent years there has been widespread introduction of workplace drug testing regimes which involve urine sampling. Although urine sampling in the workplace could not be described as commonplace it has become increasingly more prevalent particularly in heavy and transport industry sectors. Consequently, there has been a steadily expanding exposure to urine sampling across the broader workforce.

38. Further, he stated:

> [50] Although I am unable to accept the validity of the privacy concerns advanced as opposition to urine sampling, it must be recognised that oral fluid sampling has considerable benefits over urine sampling particularly in respect to its enhanced capacity to identify immediate acute intoxication which may not be detected by urine sampling. Consequently, if presented with an "either or scenario" oral fluid sampling would probably represent, on balance, a preferable option to urine sampling.
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> [51] As previously mentioned, the circumstances of this case did not involve an "either or scenario." The employer has sought to, in effect, add urine sampling to its existing oral fluid sampling. Although there is an absence of any legitimate privacy concerns upon which to reject the addition of urine sampling, it is also necessary to briefly recognise the additional benefits that are derived from urine sampling.

39. On appeal, the Full Bench determined that Cambridge C made an error in positing a definite relationship between a positive test result and a physical impairment or intoxication. Having regard to the expert evidence of both parties the matter, the Commission found that there was no basis to assert that a positive urine test led to a "logical inference" that there must have been "*some impact on capacity to perform work related functions, irrespective of the time period that may have elapsed since the drug was taken*".

40. Having found error the Full Bench considered for itself the appropriate outcome. The Bench was satisfied that it would not be unjust or unreasonable for PKCT to implement its approach of utilising both urine testing and oral fluid testing on a random basis. In other words, the outcome was the same as at first instance although the reasoning process was somewhat different.

41. The Full Bench relied on a number of reasons. These reasons placed particular emphasis on the deterrent value of the dual-modality testing regime proposed by PKCT against a background of the high-risk nature of the work undertaken at the coal terminal.

42. Two of the further reasons suggest, however, that the result is one that may not be universally applied. First, reliance was placed on evidence that urine-testing was the standard approach in the industry; all other coal terminals utilise urine testing. Second, significant weight was placed on the fact that a non - negative test result would not necessarily lead to disciplinary action, but rather would be dealt with using a case management approach which would have regard to the circumstances of individual workers.

43. The following paragraphs of the decision of the Full Bench capture its reasoning:

> [66] … First, it needs to be emphasised that the policy concerns a random testing regime. Whichever method of drug testing is adopted, employees attending for work will often not be tested. This means that some employees might be impaired by drugs or alcohol and not be detected through testing. The real purpose of random testing is therefore to deter employees from attending work in an impaired state because of the risk that they might be detected.
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> [67] The appellant's own expert witness agreed that a system where workers would not know which type of drug testing method might be used would enhance the deterrent value of the testing. In particular, it would be significantly more difficult for a worker to take measures to avoid detection. An additional benefit is that there is scope to test for a wider range of drugs if both methods of testing were to be used. This also adds to the deterrent value.
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> [68] An additional purpose of random testing is to detect drug use by employees in order to enable PKCT to reduce and manage workplace risks associated with drug use. As we have already stated, neither test establishes functional impairment caused by drug use.
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> [69] PKCT has a statutory duty to ensure, so far as it is reasonably practicable, the safety of its employees and contractors who might be put at risk by work that is being carried out. An essential element of this duty involves the identification of potential hazards and elimination or minimisation of risks. It seems to us that PKCT's AOD Standard and its preferred drug testing regime is part of the method employed by PKCT to discharge this duty. Having regard to the high-risk nature of the work undertaken at the Port Kembla coal terminal by employees, the privacy concerns about urine testing must therefore give way to allow the implementation of a testing method which will enable PKCT to identify and manage workplace safety risks.
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> [70] We have also taken into account two other factors. One is Mr Calder's uncontested evidence is that most of the respondent's shareholder entities and other Australian coal export terminals use urine-based drug testing.
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> [71] Finally, we have given significant weight to the way in which PKCT has indicated it will use non-negative test results. In particular a case management approach will be adopted, which will have regard to the circumstances of individual workers. While acknowledging that in some circumstances a non-negative result could lead to disciplinary action, other outcomes could include rehabilitation, counselling, participation in the Employee Assistance Program, scheduled testing and the development of a return to work plan.

Case Study 4: *Harbour City Ferries Pty Ltd v Toms* [2014] FWCFB 6249

44. This decision involved an appeal of a first instance decision of the Fair Work Commission. It highlights some of the considerations that arise if there is a breach of a policy which is already in place.

45. A ferry master had agreed to fill a vacant shift in July 2013, despite having smoked marijuana 16 hours earlier to relieve pain in his shoulder. He was required to submit a urine sample after crashing his vessel into a wharf. He returned a positive test to marijuana. The employer had a zero-tolerance policy.

46. At first instance, Deputy President Lawrence found that the termination of a ferry master's employment was unfair. In particular, it was found that while the company had a valid reason to terminate the employment, other factors such as the lack of any evidence of impairment and poor future employment prospects rendered the dismissal unfair.

47. Deputy President Lawrence noted the following factors in finding that the dismissal was unfair:

    a. The Applicant had 17 years satisfactory service with the Respondent and its predecessor;

    b. The evidence was consistent with the employees' account that he had smoked one marijuana cigarette because of the pain in his shoulder;

    c. There was no evidence the Applicant was a drug user. He had been tested previously three times in his career and each test had been negative;

    d. There is no evidence that the positive drug test is proof of impairment;

    e. There is no evidence of a link between the drug test and the accident and there had been similar incidents with other ferries;

    f. The accident caused little damage; a post was tilted. There was no harm occasioned to passengers;

    g. The employee was not rostered to work on 25 July. He was attempting to help the Respondent by covering the shift;

    h. The employee reported the incident in an appropriate manner and within a reasonable time-frame;

    i. The employee was open and co-operative with the investigation and, when confronted with a positive drug test, admitted his fault;

    j. The dismissal had a serious impact on the employee. He had not found alternative work and his skills and qualifications would not translate easily to other employers and industries; and

k. There were a number of sanctions short of dismissal, contained in the discipline procedure which could have been implemented in response to the employee's breach of policy.

48. On appeal, Full Bench reversed the first instance decision and upheld the decision of the employer terminating the employment of the captain. It found that the mitigating factors relied upon by DP Lawrence had not addressed "*the core issue*" namely "*the serious misconduct which led to the dismissal*". That serious misconduct was the ferry master's "*deliberate disobedience*" of a significant policy by a senior employee. They held the ferry master's decision to accept a shift while aware of the likelihood of being in breach of the Policy provided not only a valid reason for the dismissal but, given that it was a knowing act, was so serious as to outweigh the mitigating factors that DP Lawrence had relied upon to find the dismissal to be harsh.

49. The reasoning of the Full Bench is revealed at [27]:

> [27] The fact is that Harbour City required its policy complied with without discussion or variation. As an employer charged with public safety it does not want to have a discussion following an accident as to whether or not the level of drug use of one of its captains was a factor. It does not want to listen to the uninformed in the broadcasting or other communications industry talk about drug tests establishing impairment. It does not need to have a discussion with any relevant insurer, litigant or passenger's legal representative about those issues. What it wants is obedience to the policy. Harbour City never wants to have to have the discussion.

50. The decision of the Full Bench was appealed to the Federal Court on the basis that it contained a jurisdictional error. The challenge was rejected on grounds that did not require the Court to consider the merits of the ferry master's application.[27]

Other cases involving 'zero tolerance' policies

51. The willingness of the Commission to uphold the employer's 'zero tolerance' policy in the *ferry master case* reflected the approach taken in an earlier decision *Dowling v Atwood Oceanics Pacific Limited* [2011] FWA 1934. In that case, the tribunal found that the termination of an assistant engineer's employment was not unfair in circumstances where the employee had returned a positive test result for alcohol contrary to a strict 'zero tolerance' policy.

52. In reaching its decision in *Dowling*, the Commission found:

> [71] Considering the Drug and Alcohol Policy on its terms I accept that the presence of drugs or alcohol in any detectable amount in an employee's body when reporting to work, while working or while on Atwood business will constitute a breach of the policy.
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> [72] The policy does not require that the employee be under the influence, in the ordinary meaning of those words, of for example alcohol for the employee to have breached the policy.

[27] *Christopher Toms v Harbour City Ferries Pty Limited and Fair Work Commission* [2015] FCAFC 35

[73] The policy is as the Respondent describes it a zero tolerance policy concerning any detectable amount of alcohol or drugs in an employee's body.

[74] As the Respondent argues this zero tolerance policy is not subject to arbitrary or subjective assessment. It is capable of consistent and uniform application. It is also easily understood by employees.

[75] I accept the Respondent's submission that the Respondents Drug and Alcohol Policy clearly provides that the Respondent can use urine testing to detect alcohol and that such testing of an employee can occur at any time during paid work and may be random testing without prior warning. Further I accept the policy provides that if a detectable amount of alcohol is found in an employee's body this will amount to a breach of the policy and such a breach can result in the termination of employment.

[76] Considering the nature of the industry in which the Respondent operates, including the types of hazards and the potentially extreme consequences of accidents and considering the regulatory impost on the Respondent and also the Applicants particular employment I find that this Drug and Alcohol Policy is reasonable in all the circumstances.

53. In *Hafer v Ensign Australia* [2016] FWC 990, Commissioner Platt considered competing drug tests in circumstances of a zero tolerance policy. The applicant had been employed for four years as a derrick hand on an off-shore oil rig in the Moomba gas fields. Like Mr Toms in the *ferry master case* he was called to work with short notice to replace another rostered crew member and was selected for a routine random drug test on his first morning. The on-site urine test returned a non-negative sample for methamphetamine and cannabis use, and the sample was confirmed as positive in a laboratory. He was stood down and returned to Adelaide where attended a different laboratory where he was tested a second time. The second test was negative, but also identified very low creatine levels in the urine which led that laboratory to suggest the sample may have been diluted (which can occur if a person drinks large amounts of water) and recommended retesting, which was not done.

54. Expert evidence was led by the company as to the reliability of the first test was accepted by the Commissioner. On that basis Mr Hafer was found to have breached the employer's 'zero tolerance' policy and his application was dismissed. As in the *ferry master case* that decision was made notwithstanding the absence of any evidence of impairment at the time that Mr Hafer attended work.

55. More recently, in *Shane Clayton v Coles Group Supply Chain Pty Ltd* [2016] FWC 4724, the tribunal found not to be unfair the decision of Coles to dismiss a worker who tested positive to cannabis but claimed to have consumed it outside what he believed to be the "window of detection". An on-site oral fluid test for the employee returned a non-negative result for cannabinoids. Following confirmatory testing by a laboratory, the employee's employment was terminated without notice on the basis of a breach of a policy described as being a "zero tolerance policy" – so that any level of (detectable) alcohol or illicit drugs would be a breach of the policy.

56. In finding that there was a valid reason for the dismissal, Commissioner Hampton stated:

> [90] I am satisfied that it was reasonable for Coles to have a D&A policy of the kind implemented here and that it was important that it be consistently applied. That is, given the nature of the workplace, the risks associated with employees potentially working under the influence of alcohol or illicit drugs, and the absence of an appropriate objective test for impairment, the policy's insistence upon not having any (detectable) drugs (or alcohol) in the system is reasonable and lawful.
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> [91] It is apparent that Mr Clayton was in breach of the policy given that he did attend for work in circumstances where a valid non-negative result for THC, subsequently confirmed by further testing, was found. Further, the importance of not being in breach of the D&A policy was well understood by him and a strict approach to the policy has been consistently applied by Coles. This is a matter directly concerning the health and welfare of employees at the Coles EPDC.

57. As to the tribunal's assessment of the fairness of the decision, he stated:

> [121] In determining matters in this jurisdiction, the Commission will not stand in the shoes of the employer and determine what the Commission would do if it was in that position. This also means that the employer's approach to apply the "zero tolerance policy" in a manner that may not account for any of the particular circumstances of the breach cannot limit the Commission's proper consideration of all of the statutory criteria as part of its own assessment of fairness.

Conclusion and final comments

58. When considering what type of testing regime to introduce, different considerations arise depending on whether or not a drug and alcohol policy is one that can be the subject of arbitration before an industrial tribunal. Once a policy is in place, different considerations again arise when assessing whether or not an employer's response and management of a breach is reasonable and/or constitutes a valid and fair decision to terminate an employee's employment.

59. Where the tribunal does not have a private arbitration power via an enterprise agreement or a statutory provision, it is open to an employer to introduce a drug and alcohol policy and give reasonable directions to employees to abide by that policy, using the modality of the employer's choice. That does not mean employers should not carefully consider the various benefits and detriments of different testing schemes and determine appropriate privacy and confidentiality regimes. There is a large body of expert evidence that random testing is much more effective if it is embraced by the workforce, which means that even in the absence of an arbitration power an employer would want to ensure its policy is reasonable and appropriate and fully explained to the workforce. It does mean, however, that an employer can proceed to utilise urine-based on-site testing if that is preferred.

60. Where the tribunal does have jurisdiction to arbitrate there is a real issue at the moment as to whether a policy that mandates on-site urine testing will be considered 'unjust and unreasonable'. In each case the question is whether on-site oral fluid testing is sufficiently effective and the alternative sufficiently intrusive into private lives to make it unreasonable for an employer to rely on urine testing. Different members at first instance have come to different views based on similar evidence. Appeal benches have to date been inclined to find no error in the first instance decisions, even though they have not been consistent in extolling one or other

view. That is because they apply the test that the decision was one that was open to the Member at first instance on the material before the tribunal.

61. The reasonableness or otherwise of any particular policy will be considered against the background of the proposed disciplinary action that will be taken where a positive sample is taken. The original *BHP Iron Ore* case had a policy that meant, in effect, that an employee would have to have three positive tests before dismissal, and there was a regime whereby employees were given confidential support after an initial positive test. The more punitive the potential outcome, the more likely that the tribunal will be concerned about urine testing, given its capacity to identify as 'positive' the presence of a drug taken in advance of the working day.

62. Although the debate has traditionally centred on the utilisation of either oral fluid testing or urine testing, the Full Bench decision in the *Port Kembla Coal* matter provides a third way that may come to be seen as more attractive than either of the alternatives. Utilising both modalities on a random basis appears to go some way to overcoming the different limitations of the respective testing modalities and correspondingly increase the deterrence factor in a manner that, at least in that case, was found to overcome the detriments of urine-testing alone.

63. Finally, as the *ferry master case* demonstrated, once a testing regime is in place the question of whether an employee can be fairly dismissed for a 'positive' sample is one that falls to be determined not on the basis of the modality of testing but rather by reference to the policy. If the policy is a 'zero-tolerance' policy then a knowing breach may well be sufficient to give rise to a fair dismissal regardless of whether the employee was in fact impaired while at work. That approach increases the importance of selecting the right testing regime at the outset.

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