

**FITNESS FOR DUTY IN THE AUSTRALIAN
MINING INDUSTRY:**

**EMERGING LEGAL AND INDUSTRIAL
ISSUES**

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Introduction

Fitness for duty (FFD) or work is emerging as a key occupational health and safety (OHS) issue in the Australian mining industry. It has not been a term extensively or consistently used in Australian industry or the legal system – for example, CCH’s OHS manual does not contain a single reference to fitness for duty or work – but different versions of fitness for duty policies have been proliferating throughout mining sites and beginning to appear as a “stand alone” term in state mining OHS regulations in recent years. In general terms, it appears that fitness for duty is perceived to relate to the physical and psychological capacity of an individual employee to safely and competently perform their job – although the operational and regulatory definitions vary. Significantly, fitness for duty will be explicitly legally defined for the first time when new regulations in Queensland and New South Wales come into effect during 2001.

FFD is therefore clearly an issue that is gathering momentum and given the potential scope of the issue – at least as it will apply in the Queensland legislation – it requires much closer scrutiny. This is an exploratory paper which attempts to identify and explore some of the emerging legal and industrial practices in relation to fitness for duty and the implications for employment rights and responsibilities, managerial practices and OHS. We understand that many of the issues raised will be speculative rather than substantive, awaiting some stronger operational and legal precedent in the area.

1.0 What is Fitness for Duty?

1.1 An evolving definition

Fitness for duty (FFD) is not yet a clearly defined or consistent operational or legal term. It appears to be an evolving one driven by a combination of practice in the field and emerging legislation at a state level. At a site level there are quite different understandings, and even in the emerging legislation there is no single accepted definition or scope. At present FFD appears to be the sum of its constituent parts – depending on how narrowly or broadly this is interpreted. Some of the perspectives are outlined below and obviously there will be some overlap between them:

- The ‘traditional’ view whereby FFD refers quite narrowly to physical fitness for work. This usually involves employees being required to undertake generic physical fitness examinations upon recruitment and thereafter at intervals
- The “impairment” view where physical fitness is expanded to include impairment assumed to exist as a result of the presence of drugs and alcohol. In this case FFD is managed primarily by management undertaking drug and alcohol testing and more closely targeting physical fitness to the extent of undertaking ‘functional’ physical assessments which are tied to the specific requirements the job (rather than generic medicals). Requirements to control the presence or effect of drugs and alcohol already exists in NSW, WA, Queensland mining OHS legislation and in employment law (for example, being intoxicated is ground for summary dismissal).

- The “broad but individual responsibility” view which uses FFD as an umbrella term to encompass a broader range of issues relating to the individual’s physical and psychological fitness (including drug and alcohol impairment, fatigue, physical fitness, health, emotional well-being including stress). This view, however, tends to locate the principal responsibility with the individual to assume responsibility their fitness for duty (such as ensuring adequate rest and recuperation between shifts, controlling the use of drugs and alcohol, lifestyle management).
- The “broad but shared responsibility” view which has a similar broad scope to the one above but locates the responsibility for FFD as a shared one between workplace management and the individual for an employee’s fitness for work. This broader shared view is one that is implicitly contained within the Queensland mining legislation.

Given that these different perspective are not – at present - being operationally or legally applied in a consistent way across state jurisdictions it is difficult to put forward one definition of fitness for duty at the present time. The Queensland statutes, positively requiring employers to control risks at the workplace associated with a diverse range of sources of physical and psychological impairment, contain a much broader perspective on FFD than other state jurisdictions. Although the Queensland legislation may be the catalyst for interested parties to lobby other state governments to introduce similar regulations, at this stage the legal requirements upon employers in other states in relation to FFD are considerably narrower. The definition of FFD is therefore evolving and varies across jurisdictions which can make it difficult to assess.

Perhaps one of the reasons why there is not at present a consistent definition may be due to what Stone (1995: 109) noted in his study of the US police force;

“the fitness for duty evaluation lies somewhere at the intersection between risk management, labour law, and internal discipline.” In other words, FFD straddles what employees do in their personal and private lives, at work and the implications this has for safety. Conflicts and uncertainties about the appropriate relationship between these sectors often lead to the ambiguities surrounding the various responsibilities for ensuring FFD.

1.2 An evolving legislative framework

In Australia, FFD is currently implicitly regulated at common law, the *Occupational Health and Safety Act* under the general duty of care responsibilities of an employer to ensure that employees are not a risk to themselves or other at the workplace, and to ensure safe systems of work.

Although Queensland coal regulations have mandated random alcohol testing since 1993, the draft Queensland regulations are the first effort to explicitly define FFD.

Part 6 – Fitness For Work in the current working draft of the *QLD Coal Mining Safety and Health Regulation 2001* states:

41. (1) A mine’s safety and health management system must provide for controlling risks at the mine associated with the following –

- (a) the excessive consumption of alcohol;
- (b) the improper use of drugs.

S42. (1) of the same draft regulations also state:

42. (1) A mine’s safety and health management system must provide for controlling risks at the

mine associated with the following –

- (c) personal fatigue;
- (d) other physical or psychological impairment.

Example of other physical or psychological impairment –

An impairment caused by stress or illness

Supporting this regulation will be a guidance note on outlining the risks associated with shiftwork. With this last expression, nominating ‘impairment caused by stress or illness’ as an ‘example of other physical or psychological impairment’, the Queensland Coal Mining regulations contain arguably the widest possible ambit of impairment.

The draft of the Queensland *Mining and Quarrying Safety and Health Regulation 2001* specifically nominates drug and alcohol consumption (Part 9, S84. (1)) and ‘personal fatigue caused by excessive work hours or insufficient rest periods’ (Part 9, S89) as factors which have to be incorporated into safety and health management systems but otherwise relies upon a more general requirement for managing fitness for duty:

Assessing workers to decide fitness level

87. (1) The site senior executive must ensure –

- (a) each worker at the mine is assessed to decide if the worker’s fitness level is adequate to enable the worker to carry out work at the mine without creating an unacceptable level of risk

Part 9, S87 stipulates that an assessment, such as a medical examination, must be carried out before the commencement of employment, upon changes in duties or

'periodically, as necessary' to satisfy the requirements of S87. (1).

Fitness for duty issues are also covered, implicitly, by part 2 in both regulations which set out general requirements for safety and health management. Both coal and mining and quarrying regulations require mine management to ensure a process of hazard identification, risk analysis and management systems to control risks associated with any hazards are operative.

Both sets of legislation also stipulate the responsibility of employees to maintain their own fitness levels for work, in particular stating that persons should not enter sites under the influence of alcohol and drugs, procedures must be established to allow voluntary self-testing and emphasising the use of employee assistance programs to manage alcohol and drug-related fitness problems. Both sets of legislation view fitness for duty as an issue where employers and employees have mutual obligations but ultimate responsibility lies with the site's senior executive.

In NSW FFD has not yet emerged in the NSW Mines Inspection General Rule covering the metalliferous and extractive mining industries or in the NSW coal regulations (although these are under review at the time of writing). There are similar guidelines being drawn up to accompany these regulations that will attempt to further define what FFD means and what fatigue management will require. In NSW:

Division 2 Fitness for work in the *NSW Mines Inspection General Rule 2000* states:

The general manager of a mine must prepare a procedure that makes appropriate provision to deal with the fitness for work of persons working

at the mine, including provisions relating to persons at the mine who are affected by fatigue, alcohol or drugs.

NSW regulations focus on drugs, alcohol & fatigue whereas the Queensland Coal regulations encompass all forms of physical and psychological impairments.

In Western Australia, the *Mines Safety and Inspection Act 1994* sets objectives to promote and improve occupational safety and health standards. The Act sets out broad duties and is supported by more detailed requirements in the Mines Safety and Inspection Regulations. A range of guidance material, including codes of practice and guidelines, further supports the legislation. In 2001, a Guideline for Fatigue Management was released by MOSHAB setting out suggestions for managing fatigue within the mining industry.

There is a myriad of potential legal and industrial issues raised by the emerging definitions of FFD. For example:

- How will the various employer and employee responsibilities for fitness for duty be worked out? Who determines where these responsibilities lie?
- Under a regime which positively requires employers to control risks at the workplace associated with FFD, does an employer have to try to control the lifestyle of their employees to ensure they remain FFD in order to discharge their duties under new legislation?
- What are the legal, ethical and privacy issues involved with the new statutory requirements and management systems on FFD?
- Can employees refuse to be tested for drugs and alcohol? For psychological fitness? For impairment?

The legal framework on FFD appears to still be in its formative stages and

evolving rapidly. In the area of employee privacy, there is a patchwork of federal and state laws, none of which addresses the issues of the intersection of employee privacy and workplace safety. The boundaries between private life and the legitimate concerns – and legal liabilities - of an employer remain unclear. Consequently there are no simple, fixed answers as yet to many of the questions surrounding fitness for duty.

The approach undertaken in the rest of the paper is to look at the current legal state of play relating to the four categories of FFD as outlined by the Queensland draft regulations (which has the most comprehensive approach to date). We will in turn examine issues associated with: drugs/alcohol, fatigue, psychological and other physical impairment – before considering some of the broader issues which affect all FFD more generally.

2. Drugs & Alcohol

2.1 Legislative Provisions

Attempts to control of presence of drugs and alcohol through testing are becoming widespread across the mining industry. Whilst the legislation does not specify testing as a control measure, many sites have chosen testing as the primary control measure. The NSW and Queensland mining regulations define impairment in relation to drugs and alcohol in similar terms. In Queensland, site management has to control the risks associated with the '*excessive consumption of alcohol and improper use of drugs*' and under section 82 (1) it is illegal for any person to enter or perform duties in an operating part of a mine:

If the person is under the influence of alcohol, or is impaired by a drug, to the extent the alcohol or drug impairs, or could impair, the person's ability to safely ability to safely

carry out the person's duties at the mine.

No consumption of alcohol on-site is allowed except in accommodation buildings and recreation areas.

Under the NSW regulations, site management must establish procedures which include:

31 (2) (a) strategies to protect persons working at the mine from the harmful impacts of alcohol and drugs while they are at the mine, and

(b) controls on the presence and use of alcohol and drugs at the mine during working hours, and

No-one can take alcohol into a mine except with the authority of the general manager [s32 (1) & (2)], general managers are authorised to test anyone they have 'reasonable grounds' for believing is 'under the influence of alcohol' [s32 (4) and:

Before attending for work at a mine, a person must not drink alcohol or use a drug so as to cause the person to present a hazard to himself or herself or any other person at the mine [s32 (4)].

WA's *Mine Safety Inspection Act 1995* states that no-one can possess or consume intoxicating liquor or drugs on-site or "be in or on any mine while the person is adversely affected by intoxicating liquor or drugs" (s4.7.1).

Do employers have to test their employees for drugs and alcohol to meet their statutory requirements? Whilst one perspective asserts that the new statutory requirements effectively leave sites with little option other than to test, it needs to be emphasised that none of the statutes specifically require testing. Many sites (especially in the quarrying industry) do not test at all, others test only for

alcohol whilst many other sites test for both drugs and alcohol. All of these options are potentially legally defensible, including random testing for alcohol but not for drugs, so long as other appropriate initiatives are taken to maintain vigilance against risks to health and safety. Plainly, doing nothing is not enough but the various health and safety regulations in different state jurisdictions are not prescriptive.

The Queensland regulations do however specify some other preventative and remedial measures:

42. (2) The system must provide for the following about alcohol consumption for persons at the mine –

- (a) an education program;
- (b) an employee assistance program;
- (c) the following assessments to decide a person's fitness for work –
 - (i) voluntary self-testing
 - (ii) random testing before starting work;
 - (iii) testing the person if someone else reasonable suspects the person is under the influence of alcohol

(3) The system must provide for the following about drug consumption or ingestion for persons at the mine –

- (a) an education program;
- (b) an employee assistance program;
- (c) an obligation of a person to notify the sites senior executive for the mine of the current use of medication that could impair the person's ability to carry out the person's duties at the mine;
- (d) an obligation of the site senior executive to keep a record of a notice given to the site senior executive under paragraph (c).

The testing method, what they test for and how to manage testing process are left for determination at site level.

Similarly, none of the statutes specify the cut-off levels for either alcohol or drugs, but use the notion of “impairment” as a guide. Although the NSW regulations make reference to the use of a ‘recognised test to determine the extent, if any, to which the person is under the influence of alcohol or a drug’ [s32 (5)], neither the NSW nor Queensland regulations stipulate precisely what level of alcohol or drug consumption is ‘excessive’ or ‘improper’: the question of how to establish a linkage between the presence of alcohol and drugs and impairment is left to the parties to determine at site level.

2.2 Alcohol testing – what is the appropriate cut-off level?

Alcohol testing appears to be more widely used throughout the coal mining and metals industry, and far less common in the quarrying sector. The most common form of testing is alcohol breath testing. Alcohol breath testing equipment is covered by Australian standard AS3547-1997, “Breath alcohol testing devices for personal use”. These devices measure the alcohol content of an appropriate sample of expired air. There are a range of testing devices available and in terms of road driving standards, the cut-off levels vary from state to state. Some states have a cut-off reading of 0.00% - 0.02% for commercial drivers (Tasmania, Queensland, NT, Victoria) whereas in other states the cut-off limit is 0.02% for commercial drivers and 0.05% for non-commercial drivers. Alcohol cut-off limits across the mining industry appear to vary. Our research has found levels ranging from 0.00% to 0.05% used in different sites.

However, there are question-marks over the accuracy of testing devices at the level of 0.00% and therefore its legal defensibility. Although there is no legal reason why an employer should not adopt 0.00% as the blood alcohol level for particular categories of employees, in practice it would not be difficult to imagine

litigation around the fairness or accuracy of such an absolute level. These issues would usually arise after an event which attracted employer disciplinary action - most likely dismissal. The employee affected could challenge the fairness of the dismissal and call into question the accuracy of the testing equipment and raise issues about the reliability of the testing equipment. One could imagine a case where an employee returned a .01% result and was the subject of severe disciplinary action. The employee would, it is suggested, have a respectable basis to suggest that the sanction of dismissal in such circumstances was draconian – especially given that 0.02% is the level typically used for commercial drivers of especially heavy vehicles. The criticism of the employers approach would be fortified if the employee was able to draw upon expert evidence to call into question the integrity of the testing measurement equipment.

2.3 Drug testing: Urine testing vs saliva testing and the issue of impairment

Drug testing is less widespread than alcohol testing but becoming more popular in the coal and metals sector; it is rare in the quarrying sector. Drug tests attempt to detect the presence of the drug and/or its metabolites in a biological fluid or tissue following human drug use. Drug testing does not measure impairment – rather it measures the exposure to the drug. Drugs and metabolites may be detected for days or weeks after exposure, at which time they have no influence on work performance.

The most popular testing method for drug testing appears to be **urine testing**. Australian Standard 4308, 'Recommended practice for the collection, detection and quantification of drugs of abuse in urine', sets out guidelines for laboratory technicians including threshold quantities of the parent compound, breakdown products or a combination of the two as indicative of the presence of a substance. It is a two-stage process whereby a screening test is performed and then a

confirmatory test is performed where positive findings of a substance occur. AS4308 covers the confirmatory testing process.

Various criticisms have been leveled at the accuracy of urine testing. Firstly, there is the possibility of 'false positives' e.g. 'cross-reactivity' can occur when elements of legal medication lead to positive tests for illegal substances – amphetamines, for instance, are in over-the-counter cold medications (Rothstein 1987: 691). It should be noted that the Queensland regulations require employees to notify the senior site executive of any 'current use of medication that could impair the person's ability to carry out the person's duties at the mine' (QMC 2000: s42 (3)c) and questionnaires are administered during the screening test process to establish possible causes of positive results. Nevertheless, this does not entirely eliminate the possibility of problems arising from employees who register positive and inadvertently forget (or claim to have forgotten) to notify management about medication. Secondly, there is a multitude of designer drugs, hallucinogens or prescription medicines which could lead to impairment but which are not tested (Perry 1998: 42). Thirdly, US studies reveal cases of 'false negatives' i.e. cases of persons impaired who return a negative reading. It takes between three to five hours for the presence of metabolites to be detectable. Therefore, urine testing would not detect the substance if consumed immediately prior to work – the point at which impairment is arguably greatest. There is also the possibility of 'adulteration' to cover or dilute the presence of a substance in urine by the addition of foreign substances and medications (Dr Lewis, AIRC 2000: PN411).

The most fundamental weakness of urine testing though is that it measures the *presence* of a substance but cannot determine whether the subject is suffering *impairment*. The acute effects of most drugs are relatively brief. For instance, Dr

Hamilton (Toxicology Unit, Pacific Laboratories)¹ says in relation to THC (the active metabolite in cannabis), 'impairment . . . lasts between two and four hours, i.e. less than the working day because THC is approximately 99 per cent protein' (AIRC 2000: PN586).² Urine testing will detect the presence of a substance long after the impairment effects have ceased:

A fundamental problem with drug tests is their inability to detect drug use in time to prevent it from causing harm. Testing can only distinguish between someone who has used or been exposed to a drug and someone who has not; it cannot tell when the former took the drug, how much was taken, how frequently this person has taken this drug, or the effect of the drug on the user. By the time an employee's test result has been interpreted, as positive, any drug-impaired behaviour would already have taken its toll. On the other hand, the metabolites in a person's urine that produce a positive test result do not necessarily mean the person cannot work, as any effects of the drug could have long worn off by the time the test was administered. As explained by Orentlicher, 'a test that was positive for drug use may be falsely positive for drug impairment' Because there is considerable evidence that drug testing can have a potentially negative impact on employees' attitudes and behaviours, and that it cannot detect impaired performance, its useful as a management tool is arguable (Comer 2000: 61).

There are numerous variables which mediate the impact of a drug upon an individual such as " . . . type of drug, dose, time lapse from administration, duration of effect and use, and interactions with other drugs . . . age, weight, sex, general health state, emotional state, and drug tolerance" (Rothstein 1987: 688). As Dr Lewis (AIRC 2000: PN652), a supporter of urine testing, notes: "The role of testing is designed to identify drugs. The role of the laboratory is not to determine impairment."

¹ Pacific Laboratories is part of the NSW Health Services. It is the NSW reference centre for clinical drugs of abuse and provides a medical legal testing drug service to the community (AIRC 2000: PN 381).

² Long-term chronic users of drugs such as cannabis may suffer lasting forms of impairment to their central nervous system and cognitive functioning.

Consequently, industrial activity has occurred against drug testing on the grounds that it constitutes an intrusion of personal privacy. This issue was specifically considered in the BHP *Pilbara* case. The unions had raised concerns with BHP that occasional or casual marijuana smokers might fall foul of the testing regime. They could well see their employment at risk where, for example, they had taken marijuana at a party on the weekend. Although there would be no question in these circumstances that the employee was in any way, shape or form impaired, a drug test the following week would almost certainly produce a positive result. BHP endeavoured to address this by doubling the amount of marijuana metabolites necessary to record a positive result as compared with that required under the Australian standard. BHP's expert pharmacologist said that there was a greater likelihood that a level of 100 nanogram's per millilitre would be an indicator of likely impairment - although it could not be stated with confidence that there would be impairment even at this level. There is no explanation in the Australian Standard of the decision to set the level of marijuana metabolites at 50mu. This position may be dramatically contrasted with that of the .05 standard for alcohol. Scientific evidence suggests that there is a very close and real correlation between impairment and that level of alcohol in the system. This of course is not the case with marijuana and other drugs.

The major alternative presented by critics of urine testing is saliva testing. The advantages of saliva testing include the less invasive nature of the testing, and that it detects the presence of substances over a much shorter time-frame therefore dramatically increasing the likelihood of detecting impairment. As far as employers are concerned, it is less likely to create resentment amongst the workforce and is likely to be cheaper as many of the costs of collection which are associated with random urine sampling would simply not be present.

However, there is no presently no Australian standard for saliva testing – although it should be noted that there are draft US standards - and some toxicologists question its sensitivity or reliability (Dr Lewis, AIRC 2000: PN469). As saliva testing is a very recent development, it remains to be seen whether such testing will pass the tests of litigation which will surely arise if employees are disciplined in consequence of a positive drug test when a saliva sample is taken. The presence or absence of a published Australian Standard does not necessarily rob the method of testing of legitimacy so long as reasonable steps and precautions are taken. Standards Australia is not a government body. Consequently, an Australian Standard has no legal status in the sense that it is not required to be followed by law. Surprisingly, there has been very little discussion of the issue of the legal status of the Australian Standards. In *Wright v Edgell Birdseye, A Division of Petersville, Wright J Supreme Court of Tasmania*, [7 Nov 1994 No 535 of 1992] said:

38. It has been my experience in the past that from time to time, counsel for an injured plaintiff has sought to rely upon Standards Association publications as constituting some kind of standard, design or operational criteria, non-compliance with constitutes prima facie evidence of negligence. This is not necessarily so. Frequently such publications provide valuable guidance within an industry and, on many occasions, engineering or other experts will acknowledge the publication as being an appropriate and recognised authority within a particular field. Such is not always the case however and disputes between experts as to the status and acceptability of published standards is by no means unknown. Without expert endorsement or agreement between counsel an SAA Australian Standard Publication will not normally be admissible in evidence and will certainly not constitute an unassailable basis for a finding of negligence.

Industrial tribunals are not usually bound by the laws of evidence and so are permitted to take a more pragmatic view as to the weight attributed to documents such as those issued by Standards Australia. It would be fair to say

that the Standard represents an expert consensus which gives their adoption legitimacy in any proceedings before industrial tribunals but they are not unassailable. In the case of saliva testing, then, it would arguably be necessary to satisfy the employees that there is a legitimate basis for the testing and it will be necessary to ensure that technical issues associated with the regime - issues such as chain of custody - are rigorous and properly addressed. Notwithstanding the absence of an Australian standard, and the reservations of some experts as to their reliability, some mining sites are now adopting saliva testing because of the greater chance that positive readings indicate impairment (see Australian Safety 2000).

2.3 The Right to Refuse? Employee Rights and Drug and Alcohol Testing

Under the Queensland and NSW statutes, it appears it would be a legitimate exercise for an employer to introduce a testing regime, notwithstanding the opposition or misgivings of the workforce, so long as a process of consultation has occurred with its workforce, but recent rulings by the AIRC have placed more stringent requirements upon employers in the event of a dispute over the introduction of drug and alcohol testing.

Queensland and NSW draft regulations require employers to consult with the workforce - or representatives of the workforce, whether they be union delegates or other health and safety representatives - over the design and implementation of drug and alcohol testing procedures. The NSW regulations state:

31 (4) The procedure is to be prepared by a process of consultation between the general manager of and the persons working at the mine.

. . .

(5) (b) regularly review the procedure through a process of consultation with those persons

The Queensland regulations stipulate:

42 (7) The site senior executive must consult with a cross-section of workers at the mine in developing the part of the safety and health management system that provides for the things mentioned in subsections (2) to (5) (the 'fitness provisions').

So long as consultation is undertaken though, there is no requirement that consensus be reached. The legal duty to consult does *not* correspond with a legal obligation to reach consensus. So long as genuine efforts are made to consult with the workforce and proper and appropriate consideration is given to any suggestions - even if at the end of the day those suggestions are rejected - the requirement to consult will have been satisfied.

However, recent rulings by the AIRC appear to be giving legal backing to the refusal of employees to take a drug test *in the absence* of an agreement or consent. For example, South Blackwater Coal Ltd introduced blind drug and alcohol testing. However CFMEU employees refused to participate on the grounds that the company should be adopting a broader approach which focussed on detecting impairment. When the company tried to proceed, three employees refused to participate and were stood down. The company then applied for an order to stop the industrial action which subsequently occurred, on the grounds the written agreement stipulated that management could unilaterally develop and implement safety policies, subject to any dispute being worked out in accordance with dispute settlement provisions. The AIRC ruled that such a dispute existed: therefore the company was precluded from implementing the policy, all industrial action should cease but an employee's refusal to participate in drug and alcohol testing itself was not 'industrial action'. Freehill's (2000) interpretation of the dispute's consequences were as follows:

The ability to implement drug testing will depend on the consent of employees or an

environment where the relevant enterprise agreement does not limit the employer's ability to implement the testing . . . The implementation of testing will be easier if contracts of employment expressly permit this to occur.

In another dispute between the CFMEU and the United Collieries Pty Ltd over the implementation of drug and alcohol testing, the AIRC (2000: PN706) recommended the policy be "implemented on the basis of a 12 month trial period . . . collectively, under the auspices of the Occupational Health and Safety Committee . . . with a view to amending the policy so as to address any reasonable concerns of the workforce, and so as to implement methods which may be determined to be a more effective way of implementing the policy beyond the 12 month period." Again, the Commissioner insisted on the right of the workforce to have input before the introduction of drug and alcohol testing.

Following that process, so long as the employer gives reasonable notice of the introduction of the programme it will have satisfied its legal requirements. It will be in a strong position legally to insist that employees comply with the testing requirements. An individual employee's refusal to submit to a random test on the grounds that the employee did not give his or her express individual consent to the proposal, could be plausibly met by the employer pointing to adequate notice having been given of the proposal, the employee consultation involved, and the legal obligations which the employer was seeking to satisfy. That said, there is still no clear and unequivocal legal answer to the employee's contention that they were not obliged to comply because of the lack of consent.

It would be likely, however, that the employer would be able to dismiss the employee on notice, or by the payment of wages in lieu of notice, in the event that the employee failed to comply because the requirement to submit to the testing regime would be regarded as a variation to the terms and conditions of the employees contract of employment. So long as reasonable

notice was given of that variation and the employee did not treat the variation as a repudiation of the employee's contract of employment, the more likely the legal conclusion will be that the employee has acquiesced. Additionally, NSW, Queensland and WA regulations empower management to submit any employee to a test where they have 'reasonable grounds' for believing the person is 'under the influence of alcohol'.

So far as the position of contractors goes, it would usually be the case that the principal would have a contract with the contracting company which includes a term which obliges the contractor to place all of its employees on the drug testing regime. Thus the contract could empower the principal contractor to exclude from the site any contractor's employees who fail a drug test or who refuse to comply with the drug testing regime. If any dispute arose the contractor's employee would have a dispute – not with the principal – but with his or her own employer. It would be necessary to ascertain what the employee's terms and conditions of employment contained. So far as the principal is concerned, its powers would include exclusion from the site and one would expect this would be exercised.

So far as self-employed persons or subcontractors go, they would be required as a term of the contract to agree to submit to the drug testing regime. In the absence of such agreement there would be no contractual term effecting or obliging an independent contractor in this circumstance to submit. Strictly speaking the contractor could simply ignore the requirement and insist on his or her contract being honoured. In practice, however, it might be expected that the threat of exclusion from future work and the imbalance in the bargaining power between the independent contractor and the principal would be such that all persuasive force would be brought to bear to see to it that the independent contractor fell into line with the policy.

2.4. Positive Test Results: Legal and HR Considerations

There are no hard and fast legal rules as far as what constitutes due process and fairness in the event of one or a number of positive drugs tests from an individual. There is no firm guidelines regarding the manner in which any drug testing scheme deals with the consequences of a positive test. An express contractual provision could stipulate that an employee shall be sent home without pay in the event of a positive result. The more likely position would be that the employee would be sent home on pay because a suspension without pay would inevitably lead to arguments about the fairness of the arrangement. For example, the suspension could arguably even amount to a dismissal if it were for an extended period. The drug testing policies which have attracted notice appear to permit an employee to be sent home *with* pay unless and until the employee can present again and pass a test. Typically this would occur the next day. So far as the re-allocation of an employee to lesser duties for the day is concerned there is no reason why this could not be a part of any such regime. However, those lesser duties would need to be duties which were well away from safety sensitive work and would have to be within the scope of the duties which could ordinarily be expected of that employee. This again would depend on the terms of the contract and/or any agreement which applies to the employees. For employees who test positive more than once, there are again no firm legal requirements as to how employers should respond. There is no obligation upon any employer to take any counselling and rehabilitation initiatives of any particular kind. If an employee is dismissed as a result of a positive drug test, any unfair dismissal case will necessarily consider the fairness of the overall testing regime including whether or not it gives an employee an opportunity for either rehabilitation or for a 'second' chance. In this connection it would be likely that the dismissed employee, (perhaps through his or her union), would call in

aid experience of other schemes to assist any assessment of the fairness of any particular drug testing schemes.

The question of how a company can and should deal with a positive test is potentially complicated by a recent decision of the Federal Court on drug dependency. In *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd* (2000), Justice Catherine Branson found drug dependency *could* constitute a disability under the *Disability Discrimination Act 1992*. The Federal Court judge found the Human Rights and Equal Opportunity Commission (HREOC) had erred in validating the decision of an RSL club to expel an 'opioid-dependent' man on the grounds that drinking would exacerbate his condition. 'The tentative view of the Inquiry Commissioner that the applicant's opioid dependency could not constitute a disability within the meaning of the DDA cannot, in the circumstances, be upheld' (*Marsden v HREOC*). Although it is not yet certain that this will become established precedent, potentially the effect of the Federal Court decision will be that the non-selection, dismissal or any other lesser treatment of individuals on the grounds of drug-dependency by employers may be a breach of the *Disability Discrimination Act 1992 Cth*. The Federal Court decision opens up legal uncertainties about the capacity of management to enforce sanctions against individuals who register multiple positive tests and are drug or alcohol dependent.

Can employees use ignorance as a defence? In *Kay v Cargill Foods Australia* (1996), for example, an employee dismissed for repeat violations of the company's drug and alcohol policy tried to use the fact that he had trouble reading and writing and management's failure to read out the policy as a defence. Although the Industrial Relations Court of Australia (2000) upheld the dismissal, it did so on the grounds that it was satisfied the employee was aware

of the policy, implying there are grounds for appeal if an employee can provide doubt about whether the policy was known and understood. Under the NSW *DMR Mines Inspection Rule 2000*, procedures for counter-acting drug, alcohol and fatigue impairment have to be introduced through a consultative process and clearly communicated to the workforce:

31 (4) The procedure is to be prepared by a process of consultation between the general manager of and the persons working at the mine.

(5) The general manager must:

- (a) communicate the procedure, or a summary of the procedure to the persons working at the mine, and
- (b) regularly review the procedure through a process of consultation with those persons

The Queensland draft regulations also state:

S42 (7) The site senior executive must consult with a cross-section of workers at the mine in developing the part of the safety and health management system that provides for the things mentioned in subsections (2) to (5) (the 'fitness provisions').

The new regulations are clearly designed to pre-empt such cases but nonetheless it is not hard to imagine scenarios where there could be misunderstandings; for instance between managers and employees with poor language/literacy skills – most obviously NESB workers – or temporary workers such as individuals who are contractors are hired through labour-hire companies. In the event of a dispute, it would presumably be incumbent upon the management to prove they had taken adequate steps to communicate its policy and consult with the workforce to ensure it is understood.

In any case, it is clear that testing needs to be sensitively, transparently and consistently handled to avoid negative industrial consequences and employee

relations outcomes. One of the industry unions is concerned that FFD might be used by companies to weed out people considered undesirable for industrial reasons. The potential for drug and alcohol testing to adversely affect employee is also clear.

2.5 What is the Appropriate Role in OHS Management Systems for Drug and Alcohol Testing?

Drug and Alcohol testing can play an important part in OHS management but some fear too much emphasis is being placed on testing. There may be an erroneous assumption that merely testing for the presence of drugs and alcohol is synonymous to eliminating problems with drugs and alcohol. In the US, Rothstein (1987: 708) noted:

If there is one general criticism that can be leveled at managers . . . it is that they have too eagerly embraced drug testing as the solution to the problem of workplace drug abuse. Before drug testing is implemented there must be a detailed and thoughtful consideration of whether there is a workplace drug abuse problem, whether drug testing is essential to combat the problem, whether the benefits of drug testing outweigh the costs to employers and employees, and whether drug testing can be undertaken in a way that will ensure accuracy, fairness and privacy. While some people have recommended unrestricted drug testing or no drug testing at all, there is a growing consensus . . . that limited drug testing is permissible. For example, the American Medical Association's council on scientific matters recommended: 'that the AMA take the position that urine drug and alcohol testing of employees should be limited to: (a) pre-employment examinations of those persons whose jobs affect the health and safety of others, (b) situations in which there is reasonable suspicion that an employee's job performance is impaired by drug and alcohol use, and (c) monitoring as part of a comprehensive program of treatment and rehabilitation of alcohol and drug abuse or dependence.

Additionally, as we have argued, drug testing in particular does not resolve the issue of *impairment* that can be caused by other drugs not detected by drug

testing, by fatigue, stress and ill-health. Similar concerns are voiced by other US experts, who find that the majority of test positives are for non-drug & alcohol related impairment. In a dispute between the CFMEU and the United Colliery Pty Ltd over the introduction of drug and alcohol testing, site management admitted under cross-examination they had not conducted any investigation into causes of accidents and there was only one known instance of drugs or alcohol being a factor in an accident. Trevor Sharp (2000), a member of the Building Trades Group which has actively promoted programs to address safety problems arising from alcohol and drug abuse in the construction industry, comments:

While some organisations actively promote testing, there has been little or no documented evidence of its efficiency in regard to reducing accidents, lost time or industrial disputes . . . The method is costly, can undermine and divert resources away from other strategies, invades employee privacy, and demands that the employee demonstrate innocence of drug use, not impairment

As Comer (1995: 5) also concludes, there is no 'strong evidence' drug testing enhances safety and productivity and the decision to implement drug testing 'sometimes stemmed more from sociopolitical or symbolic than rational practical factors'. At the very least, testing needs to be targeted and incorporated into a holistic program of OHS management.

2.6 Generic impairment testing

A recent development in the area of impairment testing has been the emergence of "generic" impairment testing devices which purport to screen for impairment without identifying the cause(s) of the impairment. The methods used range from testing fine motor skills and hand-eye co-ordination to pupil dilation assessment. At the time of writing we are not aware of any formal validation of these devices within a workplace setting, but despite this they are currently

being used at a number of sites across the coal and metals industry. These devices measure an individual's performance or some other faculty against their own previous baseline performance or measure. One example is the critical tracking test where employees have to use a controller to keep a moving object centred on a computer screen. Yet other performance-based tests require employees to undergo psychomotor tests of hand-eye coordination, divided attention tasks (e.g. testing ability to share time between tasks) and cognitive tests (testing judgement, mathematical reasoning, short-term memory etc.) (Allen, Silverman & Itkonen). These devices are often supported at a workplace level because they seem to offer a way out of the 'can of worms' of trying to determine which employees are under the influence of drugs (especially cannabis) or who are fatigued or on some other way impaired. It is thus seen as a way of not targeting the individual but rather identifying impairment, regardless of the cause. This is seen as particularly attractive with respect to the detection of cannabis where many employees feel victimised for they consider to be their right to use "recreational' drugs.

However, many questions hang over the use of these devices. The absence of properly validated studies on the applicability of their use within a workplace setting is a serious problem and it remains to be seen whether they will withstand further academic and scientific scrutiny. Already, their accuracy has been questioned on a number of grounds. Firstly, although some tests which measure 'involuntary' reactions (e.g. pupil diameter) cannot be cheated, there is controversy as to whether an individual could deliberately under-perform in the performances during the baseline trials. Supporters argue it would be difficult to consistently under-perform but sceptics are not entirely convinced. Secondly, impaired individuals may still be able to perform at very high levels for the short period required by performance tests but not maintain the longer concentration or be able to perform non-routine tasks. Individuals may adapt and become

capable of passing a performance test even when impaired. Thirdly, there does not appear to be any baseline indication of what the impairment means for particular kinds of tasks; in other words, there does not at this point appear to be any *functional matching* of the level of impairment with the particular requirements of the job. On the basis of archival data, interviews with managers and employee questionnaires, Comer concluded:

The results suggest that fitness-for-duty testing loses something in the translation from theory to practice. These tests emerge valid and reliable in laboratory investigations; yet current test-takers and managers of former test-takers assert that fit individuals fail while obviously impaired individuals pass, and employees claim they can pass or fail their performance tests at will These results are personally disappointing to me. Although I . . . still advocate fitness-for-duty testing in theory, I am not convinced that Factor 1000 or Delta-WP is accomplishing what its clients expect.

Comer's assessment was based on an earlier generation of impairment testing devices but in the absence of independent validation, similar question-marks hang over the next generation of devices.

Finally, there is also the issue of the appropriate use of the results of the tests and the confidentiality of the results. Would the result be used to determine fitness of work, or would they be used as a basis for further testing (such as drug and alcohol testing)? Would they be used to assess performance, promotion, suitability for a role? Could impairment testing regimes, for instance, be used to justify the building of particular rosters if the results of the impairment testing show that employees were not impaired? Could they be used in the event of an accident or dispute to show that adequate consideration was given to the effects upon the workforce, at least so far as fatigue is concerned, by the building of a roster?

Consequently, unfair dismissal proceedings could provide an opportunity to challenge the validity of the tests which resulted in the employee being disciplined. Impairment testing of this kind would not be an ultimate answer to an individual incident where there was other evidence that showed that the employee was, or should have been, regarded as being unfit for duty. However, as part of the armoury of general precautions that might reasonably be put in place by a prudent employer it would be – all other things being equal – usually be regarded by a court or tribunal as constituting a reasonable and prudent step for an employer to implement to conform with the its legal obligations. Nevertheless, the uncertainties about their accuracy and the absence of third-party validation increases the possibility of a successful legal challenge.

3. Physical Impairment

3.1 Legislative Provisions

NSW and WA legislation requires mines to perform regular 'health surveillance' whilst the draft Queensland regulations require a fitness examination which includes a physical as part of the FFD provisions. Under the Queensland regulations:

- workers must perform 'self-assessments' whether they are fit to work 'without creating an unacceptable level of risk' including the effects of heat stress and fatigue (Part 9, division 1, 84);
- the site senior executive must ensure all workers are assessed by medical examination before they first commence work, whenever their duties change, 'periodically, as necessary' for the adequacy and any changes in their fitness for work (Part 9, division 1, 85);

Workers should be required to perform self-assessments and be trained to recognise signs of fatigue and lack of fitness for work it would be surprising and if any employer relied on self-assessments alone. Many employees, keen to maintain their income levels and avoid being singled out by an employer as a complainer, would work extended hours. Employees in this situation would often deny that they suffered the effects of fatigue. This psychological dimension would need to be acknowledged in any self-assessment regime. The training of employees in self-assessment should emphasise to them that they will not be singled out or victimised in the event that they self-assess as being unfit for duty. It would certainly not be enough however, for an employer simply to rely on the fact that employees were instructed to self-assess to avoid its liability. Self-assessment should only be one minor part of the overall techniques and requirements designed to minimise risks to health and safety.

The NSW *Mines Inspection General Rule 2000* states with respect to 'health surveillance':

33 Provision of health surveillance

- (1) The general manager of a mine must make provision for regular surveillance of the health of people working at the mine, including:
 - (a) The periodic provision of medical examinations for each person working at the mine who is exposed or likely to be exposed to occupational health hazards at the mine (including hazards due to air pollution, noise and vibration), and
- (2) In addition to routine health surveillance required under subclause (1), the general manager of a mine must, if required by the Chief Inspector in writing to do so, arrange for any or all of the following medical examinations (or such of them as are specified in the request):
 - (a) the medical examination of persons who propose to work at the mine to establish their level of health before commencing work,
 - (b) the medical examination of persons

- who work at the mine to establish whether working at the mine is affecting their health,
- (c) the medical examination of persons ceasing to work at the mine to establish their level of health at that time

A recent development with respect to the assessment of physical fitness has been the emergence of more targeted “functional assessments” of employees rather than standard or generic medicals. Battigelli expresses the logic of functional fitness assessment well:

The whole process of determining fitness is a series of measurements and, as such, is an exercise in relativity . . . the extent of fitness or impairment must be gauged in terms of the demand of a task to be performed, specified in type, intensity, duration, and schedule.

Physical fitness assessments are only meaningful if the definition of fitness for duty is determined by the job requirements.

This appears to be an increasingly common trend throughout the coal industry. The use of these assessments – often undertaken by the Joint Coal Board is to ascertain the functional fitness of an employee for a particular task or set of tasks. Whilst this is generally undertaken as part of a return to work program, there is a stated desire to widen their utilisation. Legally, there is no doubt that employers under various legislative regimes have a duty to see that employees are regularly medically assessed for fitness for duty. It may well be that medical assessments are required *regardless* of the fact that there are no obvious signs presented by the employee at work which would indicate there are any cause for concern. The idea of regular medical assessments is to expose underlying conditions that if left dormant, might result in a more serious state of affairs that would lead to the compromise of the employee’s fitness for duty.

Concerns have been raised about the legality of screening out employees before they injure themselves on the basis of failing a functional assessment (where the failure may be due to a pre-existing injury they obtained as a result of the job in the first place). More general screening of employees raises controversial privacy and human rights issues. If an employer, for example, were to adopt a screening regime to exclude say, smokers or persons suffering from mild obesity or those prone to other ailments, this would arguably over-reach what was reasonably necessary for the employer to comply with its legal obligations. Additionally, the growth in functional assessments appears to be in response to the aging of the workforce in the coal industry and the reluctance to 'carry" workers with pre-existing injuries. In other words, there appears to be a desire to use functional assessments to 'screen out" employees who carry an injury risk before they actually have an injury. If there were particular functional assessments where classes of persons were more likely to fail as a group this may well give rise to claims of age discrimination (where state law so provided) or sex discrimination because of the propensity of that particular class or group to suffer a greater incidence of failure of the particular function or fitness assessment. If an employee is terminated on these grounds, the employee would almost certainly have a sound case to take before an industrial tribunal for wrongful or unfair dismissal.

The circumstances of medical screening would need to be carefully considered if medical screening were to go beyond what was ordinarily understood to be its role in the workplace. An employee may have a legitimate basis to challenge the additional aspects of the medical assessment. However, if the employee simply refused to submit to the medical assessment when that was a requirement of his or her continuing employment as a practical matter, the employer would be able to dismiss the employee for insubordination. If, however, an employee

submitted to the medical assessment without prejudice and 'under protest', they may be able to subsequently utilise the grievance or disputes provisions in the relevant award or agreement or other instrument to bring to the employer's attention the objectionable features of the proposal.

4. Fatigue

Fatigue management is emerging as a key issues across the mining industry in a number of jurisdictions. Part of the reason for this is the emergence of compressed, extended and at times intensive work schedules across parts of the industry in recent years (Heiler, Pickersgill and Briggs, 2000). As a result various jurisdictions have responded by including requirements to more actively manage fatigue and have developed guidelines or guidance notes to accompany them.

For example, the Queensland Coal regulations stipulate that the employers' must take the following measures in relation to fatigue:

32. (4) The system must provide for the following about personal fatigue for persons at the mine –
- (a) an education program;
 - (b) an employee assistance program;
 - (c) the maximum number of hours for a working shift;
 - (d) the number and length of rest breaks in a working shift;
 - (e) the maximum number of hours to be worked in a week or roster cycle.

The *NSW Mines Inspection General Rule 2000* stipulates companies must introduce:

31 (2) (a) strategies in regard to working arrangements to reduce the effect of fatigue of persons at work at the mine.

Guidelines are currently being drawn up to accompany the NSW regulations but as yet nothing exists for the coal industry in NSW except that which implicitly exists under the general duty of care provisions.

In Western Australia guidelines have been developed that contain strategies for more effectively managing fatigue.

As mentioned, whilst there are various guidelines and guidance notes that accompany these state regulations, they do not provide guidance or recommendations about a number of the specific issues (such as the maximum hours for a working shift, or the number of rest breaks or maximum number of hours in a week or roster cycle). These are issues left up to the site to determine. Instead, a risk management approach is advocated as the preferred approach to the management of the roster and any associated risks. However, the utilisation of a risk management approach to shiftwork and fatigue is underdeveloped to this point and the control measures yet to be fully developed or tested (Heiler, 2000). So, whilst “fatigue” has been nominated by Queensland, NSW and WA legislators as an issue which mining sites must address, regulators have stopped short of any guide on what actually constitutes ‘fatigue’ or prescriptive regulations on counter-measures.

It may well be that if technology is reliable and relatively inexpensive, then an expectation will grow that employees will be tested at the end of a shift as well as at the commencement of the shift. It may be valuable if assessment is undertaken at the end of a shift before the commencement of a period of overtime or if an additional shift is to be worked. This will very much depend

on the circumstances of individual cases and also upon the reliability of testing equipment as the science of testing evolves.

It should also be noted, finally, that employers cannot use provisions in any industrial instrument which permit particular rostering arrangements - whether it be an award, a certified agreement or an AWA – to discharge their duties in relation to the management of risks associated with fatigue. The primary obligation of the employer under the occupational health and safety laws is not displaced by the existence of an industrial agreement even if the industrial agreement is a federally registered certified agreement. The ordinary rules regarding the precedence of federal law do not usually apply in this context. Whereas the certified agreement deals with the broad terms and conditions of employment, quite separate and distinct obligations fall upon the employer as a consequence of State based occupational health and safety laws. In these circumstances the employer is quite easily able, at one and the same time, to follow the provisions of the federal certified agreement and observe its duties and obligations under State law. That being so, there is no clash of federal and state law and no issue of federal law supplanting state law in this area.

5. Psychological Fitness

The testing of an employee's psychological FFD is at this stage not widespread in the mining industry although psychometric and personality testing of staff and management upon recruitment and for promotion appears to be more common. Some sites do now make use of an organisational psychologist and offer counselling services in the event of personal problems and this is often made available to employees and families.

Although there seems to be an awareness that FFD might encompass

psychological impairment, few FFD evaluations currently included psychological testing although some sites engage in aptitude/personality testing in the recruitment of employees, especially at “greenfield” sites and sites where there is targeted selection and a desire to change the culture of the workforce.

To the extent that sites get involved in psychological assessment (other than for recruitment and selection), it is likely to be on an ad-hoc basis. These situations can arise as a consequence of an accident, incident, leave taken as a result of mental or psychological illness, or subjective observations that someone is ‘acting strangely’. A common approach to psychological impairment in Queensland is to educate workers and supervisors to recognise abnormal behaviour and then encourage individuals to seek advice and counselling. But industry sources interviewed for this project do agree there are emerging problems related to restructuring of industry, increased job insecurity, accidents/work environment and isolation/separation from family that appear to be creating problems with the emotional well-being of employees throughout the industry.

5.1 Legislative Provisions

Queensland is the only jurisdiction that has specifically addressed psychological impairment as part of FFD. Stress is mentioned as an example of a form of psychological impairment included in the Queensland draft amendments:

S42 (1) A coal mine’s safety and health management system must provide for controlling risks at the mine associated with the following –

(d) other physical or psychological impairment.

Example of ‘other physical or psychological impairment’ –

An impairment caused by stress or illness.

- ...
- (5) The system must provide for protocols for other physical and psychological impairment for persons at the mine

Like fatigue, with statutory backing, stress (or depression, anxiety) may to be an issue that finds its way into the industrial arena and, like fatigue, there is no testing device to set a standard for defining or assessing 'stress'. The assessment of psychological impairment is therefore likely to be the subject of much deliberation and disputation, as has already been the case where these cases have found their way into the courts. An example of the potential legal and industrial issues that can arise as a result of attempts to define or assess psychological illness, or delineate where the various responsibilities lie, is demonstrated well in the following case.

5.2 Example: The Cumnock Case

A recent case involving the dismissal of a coal miner (*M.S.Kennedy Vs Cumnock*) with a history of depressive illness may implications for the assessment and management of psychological impairment and FFD generally. A longwall miner, employed by Cumnock No. 1 Colliery Pty Ltd for a period of 4 years, developed a depressive illness and was unfit for duties for 16 months. The miner was given a medical clearance to return to work by his own doctor and a specialist nominated by the Joint Coal Board on the proviso that he continue taking his medication, continue with regular reviews by his treating specialist and report any emotional or mental problems to his supervisor. Unhappy with this outcome, the mine manager at Cumnock commissioned a private consulting firm to provide further assessment. Following the assessment by the private consulting firm, the miner's employment was terminated on the grounds that management believed it could not exert adequate control over the employee to

ensure he met these conditions. The company argued that it could not properly discharge its duty of care under the *Occupational Health and Safety Act, 1983 (NSW)*. It was argued that the mine could not 'eliminate, control or minimise' the risk of the employee not taking his medication and regular testing was too expensive (estimated to be a cost of approximately \$25, 000 per annum). Nor could management order the employee to attend reviews with the specialist, an issue considered significant in this case, since the employee had a history of not reporting problems/incidents to his supervisor. Therefore, the company argued that the employee posed an 'unacceptable risk' to the business, the safety of other employees and the employee himself. Commissioner Larkin endorsed the position of Cumnock, agreeing that in the light of the nature of the industry, the work performed by a longwall miner and the circumstances relating to the management of the employee's illness, there was an unreasonable risk.

The Full Bench overturned Commissioner Larkin's decision on appeal. The Full Bench ruled the assumptions underlying Commissioner Larkin's ruling and the termination of employment about the risks attached to Mr Kennedy's return were excessive and would apply to employees with other forms of episodic illnesses:

the Commissioner made a finding that there was a valid reason for the termination of Mr Kennedy's employment. Integral to that finding was a conclusion . . . the conditions could not be effectively managed and that therefore Mr Kennedy's return would constitute an unacceptable risk to health and safety at the mine. The Commissioner's conclusion is based on a number of assumptions about the illness from which Mr Kennedy was recovering. The most important assumption is that if Mr Kennedy failed to observe the treatment regime his mental state could deteriorate undetected to a stage where he might be likely to cause injury before medical intervention occurred. The assumption is contrary to the opinions of the treating psychiatrist and the chief medical officer of the Joint Coal Board who . . . must be taken to have regarded the observance of the conditions as posing no obstacle to Mr Kennedy's return . . . The requirement to take medication regularly, and perhaps to seek regular medical attention as well, is one

borne by many citizens in regular employment. Insulin-dependent diabetics and epileptics are familiar examples of people in this category. The scope for an employer to supervise the taking of medication in those cases is obviously quite limited. The risks of injury to such employees and to their co-workers if medication is not taken may be supposed to be considerable. It would be unusual to suggest that employees with such illnesses should be excluded from the workforce as a matter of principle because of the difficulty an employer must necessarily have in monitoring compliance with the relevant regime of treatment.

The Cumnock case highlights the complexities involved in determining the balance between an employer's duty to discharge their legal responsibilities and the right of employees with various forms of episodic illnesses to work. So at what point can an employer exclude an employee on the grounds they are unable to perform the 'inherent requirements' of a job?

What are the inherent requirements of a job?

In December 1999, a majority-decision of the High Court upheld the Australian army's decision to sack a HIV-positive soldier by reference to the 'inherent requirements' of the job. In *X v The Commonwealth*, the High Court determined:

the "inherent requirements" of a "particular employment" are not confined to the physical ability or skill of the employee to perform the 'characteristic' task or skill of the employment. In most employment situations, the inherent requirements of the employment will also require the employee to be able to work in a way that does not pose a risk to the health or safety of fellow employees. Whether something is an 'inherent requirement' of a particular employment for the purposes of the Act depends on whether it was an 'essential element' of the particular employment. However, the inherent requirements of employment embrace much more than the physical ability to carry out the physical tasks encompassed by the particular employment. Thus implied in every contract of employment are obligations of fidelity and good faith on the part of the employee. Furthermore, it is an implied warranty of every contract of employment that the employee possesses and will exercise reasonable care and skill in carrying out the employment. These obligations and warranties are inherent requirements of every employment. If for any reason – **mental, physical or emotional** – the employee is unable to carry them out, an otherwise unlawful discrimination may be protected by the provisions of s15 (4). Similarly, carrying out the employment without endangering the safety of other employees is an inherent requirement of any employment.

The High Court rejected any interpretation of the *Disability Discrimination Act 1992 (Cth)* which restricted 'the inherent requirements' of a job to physical abilities, and expanded it to include any 'mental' or 'emotional' impairment which threatens the safety of other employees.

For the purposes of determining whether or not the disability prevented the employee from carrying out the 'inherent requirements' of the particular employment, the High Court listed 5 relevant factors in *X v The Commonwealth* (p8-9):

1. By reason of some essential feature or defining characteristic of the particular employment, does the disability pose a real risk to the safety or health of other persons or the preservation of the property of the employer? In determining whether there is relevantly a real risk, the Commission will have to consider:

- (a) the degree of the risk;
- (b) the consequences of the risk being realised;
- (c) the employer's legal obligations to co-employees and others, whether arising from a common law duty of care, occupational health and safety statutes, or other aspects of the employment regulatory regime;
- (d) the function which the employee performs as part of the employer's undertaking;
- (e) the organisation of the employer's undertaking.

2. If the answer to question 1 is no, then the disability does not prevent the employee carrying out any inherent requirement of the particular employment. If the answer to question 1 is yes, however, it will be necessary to determine under s 15(4)(b) whether the employee could carry out the work safely with the assistance of 'services or facilities' which the employer could provide without unjustifiable hardship.

Commissioner Larkin used the same logic to uphold the dismissal of the longwall miner in the Cumnock case. S170CK of the *Workplace Relations Act* states 'temporary absence of work due to illness or injury' is not a valid ground for dismissal – except where the illness or injury relates to the 'inherent requirements' of the job. Discrimination on the basis of personal characteristics

is prohibited – again except in cases where that characteristic prevents the employee from performing an ‘inherent requirement’ of a ‘particular employment’. The effect of these rulings is most obviously to include psychological and emotional fitness for duty as an ‘inherent requirement’ of employment but as the following cases illustrate, a case-by-case approach is evolving whereby the courts assess whether the employer’s attitude is a reasonable and fair one in the circumstances having regard to the particular difficulties faced by the employees concerned.

5.3 Other Legal Developments

At the time, the above decision was viewed as creating a major avenue out of the requirements of anti-discrimination legislation for employers. One commentator noted that:

The over-arching lesson for employers from this case is: if you lose a discrim (sic) case, and have the money and can stand the public spotlight and possible opprobrium, appeal. Courts are more likely to take a narrower definition of anti-discrim (sic) legislation than specialist EEO bodies (NIS 1999)

This certainly was the fear of the dissenting judgement from Justice Kirby who argued the broadening of the inherent requirements definition would allow the provisions to be ‘readily circumvented’ and ‘permit an employer . . . to walk straight out of the Act’.

However, another subsequent case (*Dawes v State of Victoria*) has somewhat qualified the expanding ambit of inherent requirements. The Victorian police service used a vision colour deficiency test on the grounds that persons with difficulties represent a potential safety problem to the public, fellow officers or themselves. However, the Victorian police service was found to have discriminated by using a colour deficiency test which did not differentiate between persons who had difficulties seeing particular colours and those with

difficulties distinguishing between shades of colour. The VIC CAT ruled the Service must put an employee through 'real life tests' noting medical evidence about the inadequacies of current tests to encompass other non-colour related cues in the field. It also ruled there was no evidence the costs of implementing new tests would be 'excessive':

If employers thought the High Court's ruling in the case relating to the HIV-positive army cadet broadened their ability to reject job applicants on safety grounds without tripping up over EEO legislation, this decision pulls the rug from under their feet. It reaffirms that employers cannot afford to base their safety and medical tests on assumptions or stereotypes about people's abilities. They must base decisions on the abilities of individual candidates; the limitations this may pose in relation to their ability to perform the particular requirements of their work or level of danger it may result in; and how reasonable, possible and expensive it is for the employer to accommodate the individual (NIS 2000).

The *Davies v State of Victoria* decision adds to the legal uncertainty surrounding fitness for duty issues: it affirms that employers must adopt a case-by-case approach to testing the fitness-for-duty of an employee based on the 'inherent requirements' of the 'particular employment'. In the event of legal challenge, the role of expert evidence as to the particular circumstances is crucial.

5.4 Assessing Psychological Fitness: Issues of Procedural Fairness

Aside from the implications for unfair dismissals and discrimination law, there must be concerns about the fairness of the procedures such as those used in the Cumnock case to assess the employee's psychological fitness for work. In particular, the company's decision to hire a private consultant to re-assess the employee, after the employee's own specialist and a specialist appointed by the Joint Coal Board found him fit to return to work. **Does this mean companies are free to 'shop around' until they find a suitable psychiatric assessment? At what point is the evidence of a psychiatrist admissible or non-admissible? There have to be question-marks over the independence of a consultant hired by companies in such situations or, indeed, of in-house psychologists employed to _____ perform _____ evaluations.** Psychology is a particularly inexact

science, as Dr Patricia Maffeo (1990: 297) - an occupational psychologist with experience in the public, private and university sectors - comments:

As a practical matter, psychologists are designated to make decisions regarding psychological fitness in employment settings, and must do so even though the scientific underpinnings for the decisions are less than ideal. Psychologists have access to the accumulated wisdom of the profession, even if some of it is unvalidated The dilemma facing the psychologist is to provide a good clinical decision in the face of incomplete data, which does not jeopardise the prospective employee's civil rights . . . if the decision is challenged, psychologists have an ethical obligation to disclose the limitations of the data on which their decisions were based.

Currently, there are very few standards or guidelines available if a site decides to implement testing for psychological fitness. Although there are a variety of standardised personality-aptitude tests available (e.g. Myer-Briggs), there is no approved or recognised standard testing procedures for psychological fitness. The person designing and administering the test merely needs to be a registered psychologist. There is a regulatory vacuum on the role of occupational psychologists whose role may increase in importance as psychological impairment becomes a FFD issue.

6.0 Privacy Issues: Legal and Ethical Considerations in the Collection, Storage and Use of Fitness For Duty Information

There are also privacy issues which need to be considered in the collection, storage and use of information from FFD evaluations. This applies to information about an individuals' physical fitness, the results of impairment tests and psychological assessments.

As far as testing is concerned, the testing procedure in the case of urine testing is

generally agreed to be 'highly invasive' on a personal level. Additionally, if drug and alcohol testing uncovers 'presence' rather than 'impairment', are companies are effectively becoming 'social police'. One response might be that as drugs are illegal, companies have a right to test but as one US commentator, Rothstein (1987: 710), notes:

. . . it is clear that employers are not concerned about illegality per se. If they were concerned simply about lawbreaking, measures other than drug testing are likely to be much more effective in detecting wrongdoing. For example, an employee (and management) federal income tax return screening every April 15th would undoubtedly be quite revealing. Of course, it is the province of the Internal Revenue Service and not the employer to detect tax irregularities. Similarly, it is the responsibility of law enforcement agencies and not employers to prevent illegal drug use.

It is not the province of employers to be testing employees for activities undertaken in off-work time which do not impinge upon their work performance: if company testing is for presence, not impairment, there is a legitimate case that the company is violating the privacy and civil rights of its employees. Generally speaking, it will only be where there is a very direct and tangible impact on an employee's FFD that an employer would have any legitimate business in querying and regulating an employee's out of hours conduct.

There are significant ethical and legal issues relating to storage and use of results of the kinds of tests and assessment we have outlined in the paper. Information collected by fitness-for-duty evaluations can be highly sensitive (and contentious) information which individuals may understandably wish to keep confidential for personal and work-related reasons. Currently, procedures for maintaining the confidentiality of information collected about employees and testing results are too lax and we are not aware that the industry understands the

confidentiality requirements associated with this kind of information. For example, researchers involved in this scoping were offered individual test results upon request. Whilst there is substantial rhetoric associated with confidentiality of these results, practice appears to be lagging behind.

Only in the new Queensland regulations is the issue of confidentiality directly addressed:

43. The site senior executive must ensure information and records about a person's fitness for work obtained under section 42 are –
- (a) used only for deciding the person's fitness for work at the mine; and
 - (b) are destroyed –
 - (i) for an employee of a regular contractor – 18 months after the employee ceases to work at the mine; or
 - (ii) for an employee of the coal mine operator – when the employee ceases to be employed by the operator

Interestingly, the Queensland regulations therefore cover the use of information by management and provision for *destruction once employment has ceased* but are silent on the disclosure of fitness for duty information whilst the individual is still an employee of the organisation.

The privacy commissioner has a set of guidelines for the collection, maintenance and release of personal information by private sector organisations. The guidelines were passed as the *Privacy Amendment (Private Sector) Act 2000* in December 2000. Some of the key provisions include:

- a requirement for organisations to set out written policies for the handling of personal information and to make that policy and the details about what type of personal information is held available on request by the individual;

- the right of individuals to be have changed misinformation;
- the disclosure of personal information can only proceed following the express consent of individuals (with some qualifications such as the suspicion of criminal activity).

Notably, the new legislation incorporates 'special provisions for sensitive and health information' (Privacy Commissioner 2000). The national privacy principles remain voluntary for the collection of the personal information from employee by employers who were specifically exempted from the provisions of the legislation.

6.0 The Ambiguous Position of Contractors

Typically, contractors present unusual and special challenges to the effective operation of FFD regulations and policies. This includes all of the issues covered in this paper with respect to physical fitness, fatigue, drugs and alcohol and psychological fitness.

The first challenge is simply one of logistics. If FFD policies are developed and designed as part of the OHS management system to encompass more than core employees, regular or random testing of persons who work intermittently at a mining site is likely to be more difficult, timely and costly. The second challenge is the legal status of contractors in relation to testing. How can persons who work at a mine site but are the employees of a contractor - or even more challenging - self-employed contractors, be brought within the ambit of FFD policies? The draft Queensland regulations, which variously apply to *any person* on-site, working in an operational part of the mining site, appear to give site

management the legal right to incorporate self-employed contractors and contractor employees. However, the legal situation in other jurisdictions is highly ambiguous.

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