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Examining the legal implications of being fit for work

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Introduction

- Snapshot of issues
- Many dimensions and components
- Not all perspectives explored fully
- Designed to identify issues emerging

1A

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Identifying the concept

- Industrial revolution and child labour testing
- Emergence of workers compensation laws
- Social and industrial expectations

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Fitness for work

“Sufficiently fit to resume or engage in the relevant employment”
(Petrolo v John Lysaght)



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Current motivators for implementing fitness for work



- Economic incentives
- Regulatory requirements
- Surveillance of diseases
- Genuine interest in employee's welfare

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Other influences impacting on fitness for work

- The right to work
- Economic needs of the worker and/or family
- Social needs of the worker
- Other industrial and political influences



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Four aspects of fitness for work

- Pre-employment screening
- Arising out of and in the course of employment
- Assessment as a consequence of accident or injury
- Random health testing



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Other methods of classification

- Preplacement
- Periodic
- Sickness absence
- Retirement
- Statutory examination
- Superannuation and pensions

(Source: Australian Faculty of Occupational Medicine, Guidelines for Health Assessment for Work)

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Requiring employees to undergo testing

- Express contractual right
- Implied contractual right
 - *Blackadder v Ramsey*
- Major developing issue
 - *Lewis v Mobil Oil*
- Importance of process



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Implications in mining

- Uniqueness of industry
- Critical need to ensure appropriate testing
- Specialisations within testing becoming focus of debate

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Discrimination

- The general principle
 - Unlawful for an employer to discriminate in determining who should be offered employment, deny an employee access to promotion, transfer and training, dismiss an employee, or subject them to any other detriment on the basis of disability

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When is discrimination permitted?

- Inherent/genuine occupational requirements
- WH&S defence (Qld)
- Issues of reasonable accommodation and adjustment

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Termination

- Remedies under State and Federal termination laws
 - What is harsh, unjust, unreasonable or unlawful?
- Right of employee for a second opinion
 - Consultation
 - Doctor of choice
- Process obligations
- Reinstatement and risk of exacerbation

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Emerging issues

- Integrity of methodologies
 - FCE's
 - Simulators
- Proper consideration of facts
- Objectivity in assessment



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Roles and rights of parties

- Communication and consultation
- Education/health management
- Role of agents



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Confidentiality and privacy

- Rights and responsibilities
- Need to know
- Implications of privacy laws
- Breach of confidentiality – a new tort for Australia?



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Conclusion

- Aware of respective rights of the parties
- Processes and specialisation intensifying debate
- Need to be objective and fair



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