

**Queensland Mining Industry Health and Safety Conference  
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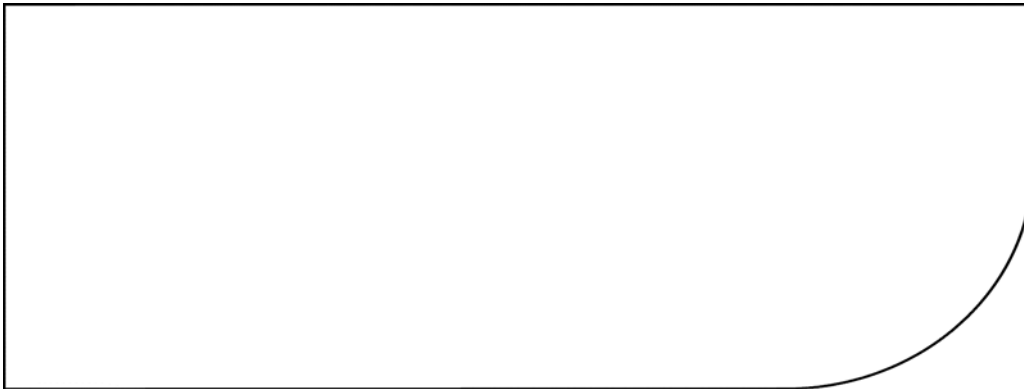


**Contractors' obligations with drug and alcohol policies**

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## Contractors' obligations with drug and alcohol policies

### 1 Introduction

- 1.1 Drug and alcohol policies, for obvious reasons, are commonplace in the Queensland mining industry. There are a number of important issues to be considered when developing, implementing and enforcing such policies. For contractors, the interrelationship between the Site Senior Executive's (**SSE**) responsibilities and those of contractor companies or other stakeholders will be of crucial importance. This paper will explore some of those issues.
- 1.2 The *Coal Mining Safety and Health Act 1999* (Qld) (**CMSHA**) and the *Mining and Quarrying Safety and Health Act 1999* (Qld) (**MQSHA**) require a Safety and Health Management System (**SHMS**) to be in place, incorporating risk management elements and practices to ensure the safety and health of persons who may be affected by operations. Whilst there is some variation between the two sets of Regulations, and neither specifically state that such a (general) policy is required, arguably, the CMSHA Reg and the MQSHA Reg require a Queensland mine site to develop, implement and maintain an Alcohol and Other Drug (**AOD**) policy.

#### Macro/micro - what are the main areas for a contractor to consider?

- 1.3 For contractors operating in the Queensland mining industry there will, broadly, be two main areas to consider in relation to drug and alcohol policies:
- 1.3.1 *The macro position* - What do the mine's own policies require? How does this fit with a contractor's policies? Do they conflict? Which one takes precedence? What are a contractor's statutory obligations? What are the SSE's obligations?
- 1.3.2 *The micro position* - How does a contractor enforce its own policy or the mine site's policy in relation to its own workers? How does the contractor deal with its own employees in the event of a breach? What are the risks?

#### What do the Regulations say?

- 1.4 There are slightly varying requirements set out in the Regulations made under each of the Acts in relation to fitness for work and drug and alcohol related obligations made under CMSHA and MQSHA, as summarised below:

Obligation	Coal Mining Safety and Health Regulation 2001 (CMSHA Reg)	Mining and Quarrying Safety and Health Regulation 2001 (MQSHA Reg)
Alcohol only - general obligations	Section 40 of the CMSHA Reg provides that a person must not carry out any work at a coal mine or enter a mine if they are under the influence of alcohol.	<i>Does not include a general obligation for alcohol only - includes combined alcohol and drug provision</i>

Obligation	Coal Mining Safety and Health Regulation 2001 (CMSHA Reg)	Mining and Quarrying Safety and Health Regulation 2001 (MQSHA Reg)
Alcohol and drugs together - general obligations	<i>Does not include a general obligation for both alcohol and drugs</i>	Section 84 of the MQSHA Regs provides that a person must not carry out operations at a mine, or enter an operating 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 duties at the mine.
Alcohol testing	<p>Section 41 of the CMSHA Regs provides that the safety and health management system must provide for controlling risks at the mine associated with the excessive consumption of alcohol and must include:</p> <ul style="list-style-type: none"> <li>• Voluntary self-testing;</li> <li>• Random testing before starting work;</li> <li>• Testing the person if someone else reasonably suspects the person is under the influence of alcohol.</li> </ul>	<i>Does not include a general provision for alcohol testing only</i>
Drugs only - general obligations	<p>Section 42 of the CMSHA requires that the SHMS must provide for controlling risks at a mine associated with personal fatigue, other physical or psychological impairment and the improper use of drugs.</p> <p>In developing the fitness provisions, the SSE must consult with a cross-section of workers and if those provisions allow for 'the assessment of workers' (testing) the criteria concerned must be agreed to by the majority of workers at the mine (section 42(7)).</p>	

Obligation	Coal Mining Safety and Health Regulation 2001 (CMSHA Reg)	Mining and Quarrying Safety and Health Regulation 2001 (MQSHA Reg)
Drug and alcohol - general testing	<i>Does not include a general provision for both alcohol and drug testing.</i>	<p>Section 85 requires the SSE to ensure that a worker does not carry out work unless the worker's fitness level has been decided under section 87 of the MQSHA Regs.</p> <p>Section 87 of the MQSHA Regs provides that the SSE must ensure that each worker at a mine is assessed to decide if their fitness level is adequate. This assessment must be carried out:</p> <ul style="list-style-type: none"> <li>• Before the worker begins work at the mine;</li> <li>• Whenever the worker's duties change;</li> <li>• Periodically, as necessary, in order to assess changes in the worker's fitness for work or the adequacy of the worker's fitness level for the work.</li> </ul>

## 2 Policy purpose and methods

### What is the purpose of an AOD Policy?

2.1 In relation to the development of the policy itself, the key issue will always be - what is the purpose of the policy and does it go about achieving that purpose by adopting reasonable, fair and indiscriminate methods? Is there a less intrusive way of achieving the same outcome? Are the tests accurate and do the results actually indicate impairment? There are also significant, and not just financial, costs involved. The impact on staff morale and on recruitment must be considered.

2.2 The UK Independent Inquiry on Drug Testing at Work, which reported in 2004, referred to five key dimensions for consideration:

- *The science* - How do tests work? What can they detect? How reliable are they?
- *The ethics* - How is the balance to be struck between safety and respecting individual rights?
- *The law* - What can and can't be done? What are the legal requirements and limits on employers?

- *The social dimension* - Is it the role of employers to address drug use at work?
- *The business case* - Is testing worth the investment? Does it reduce risk or could other methods be adopted?

2.3 It is difficult to argue that the consumption of alcohol and other drugs will not lead to an impairment of a worker's ability to carry out their work safely, despite the fact that there may not, at present, be empirical research directly establishing a workers' consumption of alcohol and/or other drugs to be the specific cause of impairment. While it may in some circumstances be an untested conclusion, until proven otherwise (perhaps in relation to the effect of consumption of particular substances on the ability to perform particular tasks) employers would not be wise to take the risk.

2.4 When implementing an AOD policy it is important that an employer also considers a worker's impairment possibly being caused by other things - such as fatigue, psychological stress, physical injury and the general workplace environment, for example. The purpose of the policy should be the eradication or reduction of the risk of workplace injuries and fatalities. It should not be simply to find out about a worker's personal life and habits. It is only where a worker's out-of-work life impacts (or potentially impacts) on an employer's business and its safety obligations that the employer should adopt an AOD policy.

2.5 The benefit of a well managed AOD policy is simple. It increases an individual worker's awareness of their own responsibilities and ultimately results in a safer workplace.

2.6 However, there a number of potentially negative consequences. Some of the issues that an employer should address when implementing (or maintaining) an AOD policy are:

- Consultation, developing and incorporating the policy and interaction with any certified agreement.
- Worker and union concerns.
- Methods of testing, standards and accuracy.
- Concerns about workers being bullied and harassed in relation to the AOD policy.
- Procedures relating to disciplinary action and dismissal.

### **Types of testing methods**

2.7 Broadly, there are four methods of testing:

- Saliva testing (oral fluid).
- Breath testing.
- Urine testing.
- Blood testing.

2.8 Testing can take place in various ways, for example:

- Pre-employment testing.
- Routine medicals.
- Self-testing.
- Random testing.
- 'For cause' testing.
- Post-accident testing.
- Return to duty testing.
- Follow-up testing.

### **Purpose and legal form of the policy**

2.9 An AOD policy should seek to promote understanding about the potential impact of alcohol and other drugs on safety in the workplace. It should encourage workers to take responsibility for their own actions and seek to offer assistance to those requesting it. Whilst disciplinary action including, perhaps, dismissal may be warranted in some circumstances, such action should not take place without some consideration having been given to the particular circumstances. Contractors should also consider the legal form of the policy. Is it part of a workplace agreement or a separate stand-alone policy? What is its legal effect? Does it impose legal obligations both on the employer and its employees? Can it be varied? What are the consequences of a breach?

### **Which methods of testing are approved by Australian Standards?**

2.10 Currently, the only Australian Standard relating to testing is the urine testing standard - AS4308/2001. However, Standards Australia currently have a draft for public comment dealing with testing using oral fluid entitled '*Procedures for the collection, detection and quantification of drugs in oral fluid Part 2: Collection, on-site initial testing, storage, handling and dispatch of oral fluid specimens*'. The closing date for comment was early March 2006. To date there is no relevant standard for breath testing even though it is considered to be a more reliable source.

## **3 Macro issues - the interrelationship between the SHMS and a Contractor's obligations**

### **The Macmahon testing dispute - a look at the macro issues**

3.1 Following the decision of the Full Bench of the Australian Industrial Relations Commission (**Commission**) in the *Macmahon Contractors Pty Ltd* dispute of November 2005 (C2005/4461) (**Macmahon dispute**), it appears that a contractor does not have the same type of obligations as the SSE in relation to the safety and health management plan. However, for contractors that operate in the mining industry, SSEs are likely to seek to ensure that all workers comply with the mine's plan, regardless of who their employer is. We deal with an unfair dismissal

application made against Macmahon by an employee dismissed in relation to Macmahon's drug and alcohol policy in more detail below (in which the issues are also related to the Macmahon dispute).

3.2 In the Macmahon dispute, the Full Bench considered an appeal brought by Macmahon Contractors against a determination made by Commissioner Bacon on 30 September 2005. In the matter before Commissioner Bacon, it was argued that because Macmahon's AOD policy was not developed in accordance with the CMSHA Regs, Macmahon was precluded from dismissing an employee for breach of its terms. It was argued that Macmahon was required to develop and apply its AOD Policy in accordance with the CMSHA Regs.

3.3 In the appeal, the Full Bench of the Commission found that the Commissioner erred and that having found that the application did not relate to a dispute about the agreement, the application should have been dismissed. The Full Bench found that:

*'Although it is not strictly necessary to do so we think it is appropriate to give some indication of our conclusions in relation to the merits of Macmahon's appeal. The Commissioner concluded that the effect of the particular provisions of the [CMSHA] and the [CMSHA Regs] was to invalidate the contractual obligations on employees of Macmahon to comply with the testing procedure. It is unnecessary to deal with the issue comprehensively. It is sufficient to note that we have **grave doubts** that s.37 of the [CMSHA], in conjunction with reg.42 of the [CMSH Reg] operates in the way the Commissioner held'.*

3.4 The Full bench went on to say that:

*'The obligation to develop a [SHMS] is cast on the [SSE]. A coal mine operator must ensure that the [SSE] develops and implements an SHMS. A contractor, like Macmahon, has an obligation to ensure that any applicable SHMS is complied with. However, such a contractor also has obligations falling on persons generally including the obligation in s.39(1)(c) of the CSMH Act [ie 'to take any other reasonable an necessary course of action to ensure anyone is not exposed to an acceptable level of risk'].*

3.5 So, in short, a contractor must ensure that its workers comply with the SHMS where appropriate and that if the SHMS does not have an AOD regime, it has its own procedures in place to properly manage potential risks arising from the effect of alcohol and other drugs. Contractors with a mobile and moveable workforce may need to develop AOD policies that can be applied both independently and together with those required by an SSE (depending on where its employees are required to work and the applicability of any overarching policy).

## 4 Micro issues - a contractor's own policies

### How should a contractor address concerns about workers being bullied and harassed in relation to the AOD policy?

4.1 Employers should apply a testing regime without discriminating against any particular employee or group of employees and its application should be managed fairly. Whilst consistency in application is essential, it is imperative that an employer carefully

considers each worker's particular circumstances should they refuse to take, or fail a test.

### **How should a contractor address disciplinary action and dismissal in relation to the policy?**

- 4.2 Contractors with AOD policies should ensure that they are developed fairly, their employees are made aware of them and the consequences of a breach and that a contractor itself properly complies with its own policy. This is illustrated by a related proceeding also against Macmahon Contractors.

#### **Macmahon - unfair dismissal claim**

- 4.3 In the recent case of *Shane Rolls v Macmahon Contractors Pty Ltd [2006] (U2005/246)*, the Commission ordered that a mine worker (and union delegate) should be reinstated after he was dismissed for refusing to take a drug and alcohol test. The Commission found that there was no 'investigation or review' by the Company in accordance with the requirements of the AOD policy itself.
- 4.4 The applicability of the AOD policy had been in dispute as discussed above. When the Full Bench of the Commission found that the AOD policy itself was not invalid, Macmahon sought to terminate the worker's employment because of his failure to comply with it. The Commission found that Macmahon's policy formed a term of the contract of employment, binding both Macmahon and the worker. However, the Commission made it clear that: *'non-conformity with a properly applied and reasonably constituted drug and alcohol policy, related as it is to the important issue of workplace safety, may lead to the termination of an employee's employment'*.
- 4.5 In short, whilst Macmahon's employees were required to comply, it was required to do precisely what it set out to do under the policy. Ultimately, Macmahon was exposed by its own policy by failing to conform with the policy's own requirements. The Commission found that:
- 'In order for the Respondent to rely upon breaches of the Macmahon Drug and Alcohol Procedures as a reason for terminating the Applicant's employment, it is incumbent upon the Respondent itself to give full and proper effect to those very procedures and to discharge its own obligations (under the DAP) by so doing. This failure caused the Commission to find, in the circumstances, that there was no valid reason for the termination of the Applicant's employment in the sense considered in Re: Selvachandran v Peterson Plastics Pty Ltd.'*
- 4.6 Senior Deputy President Richards found that Macmahon's policy fell within the scope of the employment and appeared to be reasonable both in its own terms and in the context of the work undertaken.
- 4.7 The Macmahon policy provided that employees who test positive a second time within a 12 month period would have their employment terminated.
- 4.8 On the face it, the worker had breached the policy on two occasions.
- 4.9 The first incident occurred in June 2005, when the worker apparently returned a positive urine sample after being tested. The worker was stood down and allowed to return after later returning a negative reading.



- 4.10 The second incident occurred two months later when the worker was randomly selected to undergo a test. However, because the worker was not working when the random testing was carried out on his shift, he was required to take the test before he returned, in accordance with the policy. He refused to do so, because he apparently understood his union had directed him not to participate in what is considered to be an unlawful arrangement. The worker was stood down again.
- 4.11 The question of the lawfulness of Macmahon's policy was referred to the Commission and, at first instance, Macmahon was required to reinstate the worker.
- 4.12 However, the single Commissioner's findings were overturned on appeal on jurisdictional grounds and the full Bench expressed their view that Macmahon's policy was a lawful scheme. Macmahon dismissed the worker the day after the Full Bench's decision.
- 4.13 In the application for unfair dismissal, the worker alleged that:
- The testing procedure was in breach of its own terms.
  - The employer selectively chose to apply its policy against the worker because he had previously challenged the policy in his role as union delegate.
- 4.14 The employee also relied on the case of *G Robin v Worley ABB (2001) (C2001/5564)*, in which a Full Bench of the Commission had found that the failure of an employer to comply with their own drug and alcohol policy rendered the termination harsh and unreasonable.
- 4.15 Ultimately, Macmahon lost the case because it was found that it failed to properly apply its own policy. The policy provided that '*Every positive test result or refusal will be investigated and reviewed*'. Macmahon, apparently, failed to do so, denying the worker a procedural opportunity that should have been given to him.
- 4.16 Whether or not other disciplinary action or dismissals taken as a result of a worker's adherence to an AOD policy will be justified will clearly depend on the circumstances of each case and the express requirements of the particular policy being applied.

#### **Other cases**

- 4.17 In *Edward Hall v Ulan Coal Mines Ltd (1997) (No. 20803 of 1997)*, the employer introduced its alcohol and other drugs policy five years after the employee's employment began. The employee suffered a number of personal problems and 'snapped' at work. When he returned, he entered into a 'Return to Work Program Agreement', setting out a number of procedures to be followed over the following five years, including random urine testing. The Agreement provided that in the event of a positive test, the situation would be considered by a Review Panel, before any disciplinary action was taken.
- 4.18 In 1997, after going to work the morning after a party the night before, the employee tested positive for cannabis. He was suspended on full pay and a Review Panel meeting was then arranged. A short while later, the employee was informed that his employment had been terminated because of his 'serious misconduct in returning a

positive drug test'. The employee sought reinstatement pursuant to section 170CE of the *Workplace Relations Act 1996 (Cth)* (the pre-reform Act).

- 4.19 The employee submitted that his use of cannabis was during non-work time and there was no evidence that his use of the substance affected him and that his conduct was not such to amount to a serious misconduct. Further, he submitted that the 'termination was not related to either the operational requirements of the [employer] or the [employee's] capacity to perform his work'.
- 4.20 Ultimately, the Commission found whilst the actions of the employee were sufficient to justify termination of employment, they did not justify summary dismissal leading to the decision that to the extent that the termination was on the basis of summary dismissal, the termination was harsh. Indeed, the Commission was influenced by the fact that the AOD policy itself did not provide that summary dismissal was a possibility. Reinstatement was not ordered and only limited entitlements (relating to those that would have been paid had notice been given) was awarded.
- 4.21 Our view is that times have changed and this argument would today hold even less weight in the Queensland mining industry. Safety in the mining industry today is a constant and imperative consideration, demonstrated both by the development of the general law and the very specific obligations set out in the Queensland mining safety legislation.
- 4.22 In another case, *Worden v Diamond Offshore General Company (1999) (No 80124 of 1999)*, the employee's application for unfair dismissal was also upheld. Again, the employee was dismissed for serious misconduct as a result of failing a drug and alcohol test. The Commission found that the dismissal was unfair. A similar order was made and remuneration was ordered to be paid for a two and half month period. Reinstatement was not ordered.
- 4.23 The Full Bench decision in *Robin v Worley ABB (2001) (C2001/5564)* also deals with similar matters. The Commission found that there were grounds for summary dismissal. However, the Full Bench found that whilst the AOD policy was incorporated into the employment contract, the employer had failed to properly comply with its terms, finding that the employer had '*acted inconsistently with its contractual obligations...*'.

#### **What other risks should contractors be aware of?**

- 4.24 In some cases, it may be the case that a worker's dependency on alcohol or other drugs is the manifestation of, or consequence of, a legally protected impairment or attribute. In Queensland, the *Anti Discrimination Act 1991 (Qld)* protects against discrimination on the basis of an 'impairment'. Whilst an AOD policy should be applied consistently across the board, ignoring a worker's particular medical circumstances could mean that an employer falls foul of the anti-discrimination laws. This can be a tricky area and one that one should be approached carefully.

## **5 Conclusion**

- 5.1 The testing of employees for drug and alcohol will always be a sensitive issue, straddling the boundaries between an employee's private life and legitimate work related concerns. Whilst testing will continue to be part of an SHMS, increased

dependency on AOD testing could lead to a weakened focus on other important areas. What about the effects of fatigue and general fitness on safety, for example? How is that managed?

5.2 Also, with ever increasing scientific capabilities, at what point will an employer owe its employees a specific duty to provide individually based medical risk assessments taking that take into account an employee's particular medical susceptibilities with his or her particular work environment? Many previously unknown hazards can now be more easily determined and particular risks linked to specific employees working in particular environments. What should happen if an employee requests their employer to carry out an individual medical risk assessment into their own circumstances if they themselves provide their own medical information or volunteer to be tested for that purpose? Will it be possible for an employer to limit the purpose of testing to workplace safety reasons or should testing also focus on an employee's individual health?

5.3 These are issues that will, no doubt in future, be thoroughly explored.

## Contact information

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