Fitness for Duty in the Mining Industry – A Legal Perspective

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Safety and health legislation applicable to the Queensland mining industry requires the development and application of fitness for work programs so that risks arising from hazards such as the improper use of drugs and alcohol, personal fatigue and other impairment are eliminated or controlled.

By reference to case law examples, this paper will identify how participants in the mining industry in Queensland and other States have approached fitness for work programs and draw out the relevant lessons for Queensland mine operators and contractors.

The paper will also consider fitness for work programs in comparable industries which may be helpful for the mining industry.

How have operators in the mining sector approached fitness for work?

Both the *Coal Mining Safety and Health Act 1999* (Qld) and the *Mining and Quarrying Safety and Health Regulation 19991* (Qld) and their associated Regulations require the periodic medical assessment of mine workers to determine their fitness and both effectively require fitness for work programs to be developed and implemented at Queensland mines. The *Coal Mining Safety and Health Regulation 2001* (Qld) also prescribes certain minimum "fitness provisions" that must be included in fitness for work programs and includes requirements for consultation and agreement with coal mine workers when developing particular aspects of the fitness provisions.

In addition to the obligations arising under the safety and health legislation above, employers in Queensland (including mine operators and their mining contractors) have a duty at common law to take reasonable care for the safety and health of their employees. Again, the implementation of a fitness for work program is an important means for ensuring compliance with this common law duty.

In response to the obligations above, fitness for work programs have been implemented at many Queensland mines. Programs which prohibit the taking of drugs or alcohol during work hours or before commencing work and include a system of drugs and alcohol testing to ensure compliance are complemented by programs to educate employees about risks arising from working under the influence of drugs and alcohol and to provide assistance to them. There is also an increasing awareness of the need to manage fatigue and other physical and psychological impairment issues including through, for example, managing shift and overtime arrangements in an appropriate way, providing on-site rest facilities, educating workers about sleep management, encouraging workers to take regular holidays and ensuring that medical facilities are available to assist workers with impairment issues in both a proactive and reactive sense.

Key legal issues in relation to fitness for work programs

1. **Legal foundation for fitness for work programs**

   As a threshold issue, employers need a legal foundation to introduce any fitness for work programs which require compliance by their employees.

   In the absence of any such legal foundation, the application of a fitness for work program may be unlawful. For example, blood testing of an employee for alcohol concentration without a right to do so or the employee's consent could involve an action for trespass to the person and battery under criminal law.

   Employers can generally provide this legal foundation by ensuring that contracts with employees and contractors entitle them to require participation in the fitness for work program. Employers can also include a right to require employees to participate in a program in an industrial instrument (eg.

workplace agreement). However, wherever the employer provides for this right, care needs to be taken to ensure that there is sufficient flexibility to continue to develop/vary/amend the fitness for work program as appropriate.

It is also important to ensure that any fitness for work program complies with the requirements of the safety and health legislation referred to above.

There is an issue as to the extent to which the minimum requirements of the *Coal Mining Safety and Health Regulation 2001* (Qld) could impact upon the introduction of fitness for work programs at Queensland mines. There are a number of relevant cases. For example, the issue was considered by the Full Bench of the Australian Industrial Relations Commission in *Macmahon Contractors Pty Ltd (Moura Project Certified Agreement 2005) v CFMEU* (Print 965459). In that case, the Full Bench considered that the obligation to implement a safety and health management system addressing prescribed issues, including the improper use of drugs, applied only to the Site Senior Executive at the mine. It did not apply to other persons at the mine and, consequently, Macmahon Contractors (a contractor at the relevant mine) was entitled to implement its own drug testing procedures and its employees were required to submit to drug testing in accordance with the terms of their contracts of employment. Other relevant cases include the decision of Justice Atkinson in *Edwards v North Goonyella Coal Mines Pty Ltd* [2005] QSC 242 and the decision of Commissioner Bacon in *CFMEU v North Goonyella Coal Mines Ltd* (Print PR943615).

2. Procedures and testing methods adopted under fitness for work programs

When introducing a fitness for work program, employers need to demonstrate that the application of the program will be fair and reasonable having regard to the employer's safety and health obligations in the context of the specific workplace.

Often employees and unions may not be opposed to the introduction of a fitness for work program in itself, but may challenge certain technical aspects of the program, such as the correlation between drug and alcohol cut-off limits adopted by the employer and impairment of work performance. Cut-off levels adopted by fitness for work programs therefore need to be reasonable and supported by reference to appropriate scientific research.

Blake Dawson Waldron recently represented Gladstone Power Station in a dispute against several trade unions where the unions argued that the blood alcohol cut off limit under the fitness for duty program should be 0.05%, rather than the company's proposal of 0.02%. The unions also argued that a fitness for work program to be implemented at the Gladstone Power Station should include a computerised impairment testing device, such as OSPAT, as an overall assessment tool for the testing of possible impairment. The company argued that its proposed fitness for work program, including a random drug and alcohol testing component, was comprehensive in nature and opposed the introduction of OSPAT or a similar computerised impairment testing system. The matter was heard under an alternative dispute resolution process by Australian Industrial Relations Commission (**Commission**).

In considering the two issues, the Commission stated that, in the circumstances of the Gladstone Power Station, the case for the introduction of a blood alcohol cut off limit of 0.02% for all persons on site was overwhelming. In particular, the Power Station was a workplace presenting high risk hazards and requiring complex task demands. In relation to the second issue, following a consideration of the evidence before the Commission, including lengthy expert evidence, the Commission expressed considerable doubts about whether OSPAT was capable of delivering what it claimed to do. The Commission also stated that, on the basis of the material before the Commission in the proceedings, there was no evidence that OSPAT was able to identify with a sufficient degree of accuracy when an individual was impaired for any reason.

Overall, the Commission considered the fitness for work program of the company to represent a comprehensive package of measures designed to address a range of fatigue related and drug and alcohol related problems, or potential problems, at the power station. Further, the program was developed over a lengthy period of time with extensive involvement of employees and external experts.

3. Ensuring that the employer complies with its own program

Employers need to be aware that once introduced, employers, as well as employees, will be held to the terms of a fitness for work program.

Employers who do not adhere strictly to the terms of their own program or do not follow its procedures may face difficulties later on in relying on any breach of the program as justification for disciplining an employee or for terminating an employee's employment.

In the case of *Transport Workers Union of Australia, Industrial Union of Workers, Western Australian Branch v BHP Iron Ore Ltd* [2002] WAIRC 06523 for example, an employee was tested for drugs in August 2000 after being involved in a near miss incident at work. His urine sample tested positive for cannabis. The employee was notified in writing that he had recorded his first positive test result. In accordance with the company's policy, the employee was randomly tested each subsequent month. He tested positive on two subsequent occasions in October and November 2000. Ultimately, his employment was terminated.

The employee was able to successfully challenge the termination of his employment before the Western Australian Industrial Relations Commission primarily on the basis that the second positive result was not a valid sample under the policy. The second positive test had contained a creatinine level of only 1.1 mmol/L, and pursuant to the policy should have been regarded as null and void, and another sample taken to be tested. Instead, this was treated as a valid result. The case shows the importance for companies to strictly abide by the standards adopted in the fitness for work programs they develop and apply.

4. Drawing a line between risk management and individual privacy

Fitness for work programs inevitably impact upon employees' privacy and participation by employees in work activities outside working hours. Drugs and alcohol for example, may be consumed by an employee for recreational purposes outside work hours, but still have an impact on an employee's work performance during working hours. While there is safety and health legislation in place which requires that a person must not carry out any work at a mine if the person is under the influence of alcohol and, in some cases, impaired by a drug, there is still the need for an employer to demonstrate that out of hours use of drugs or alcohol has a relevant connection to the employment in implementing a particular fitness for work program.

There have been cases where industrial tribunals have found that the termination of an employee's employment arising from the employee testing positive against drugs or alcohol limits was unfair because the taking of the substance had not occurred while the employee was at work. In these circumstances, employers would need to demonstrate that out of hours use of drugs or alcohol has a relevant connection to the employment. Policies need to make clear that what is prohibited is the *presence* of alcohol or drugs in an employee's system, regardless of whether or not the substance was consumed at work.

For example, in the case of *Debono v TransAdelaide* (1999) 46 AILR 4-158, a train driver was involved in a fatal incident which was not his fault. Nevertheless he was subsequently dismissed after his urine sample tested positive for marijuana. He advised TransAdelaide that he had ingested some marijuana after finishing work recently. The Commission reinstated the employee. The reason for this, in part, was that although it might be appropriate to dismiss a train driver who took drugs or whose work performance was impaired by drugs, it was *not* commonsense to extend such a prohibition to what essentially went towards 'lifestyle rather than conduct at work'. The Commission was not satisfied that the terms of the employer's drug policy had been clearly communicated to, and understood by, the employee. In these circumstances, the Commission found it was not valid to terminate employment as the employee was not aware that a positive marijuana reading would be deemed to reflect impairment.

Lessons for mining operations in managing fitness for work programs

Our experience and the reported cases show that fitness for work programs are more likely to be effective and less vulnerable to challenges before courts and industrial tribunals if they adopt the following elements:

1. **Consultation:** During the development and implementation of the program, there should be consultation with employees and their representatives about the program and an opportunity for them to have input where relevant. This establishes an overall fairness to the approach taken in the program and produces a greater likelihood of acceptance, cooperation, and compliance with the program, and a lower likelihood of future disputes. As noted above, consultation on certain aspects of the fitness for work programs developed at Queensland coal mines is required by the *Coal Mining Safety and Health Regulation 2001* (Qld).

2. **Clear communication:** The terms of the program (and any subsequent changes to it) should be clearly communicated to all employees, contractors and visitors so that they are aware of and understand their obligations. This would assist in justifying any subsequent disciplinary actions taken against anyone for breach of the terms of a program. The communication should be in writing and face to face, for example, in shift communication sessions tool box talks, one on one discussions and through occupational safety and health committee meetings.

3. **Use appropriate testing methods:** Employers should ensure that any testing procedures for drugs and alcohol adopted in a program are credible and reliable. Consider the use of external providers in the procedures as they are more likely to be seen as conducting their work at arms length from the employer.

4. **Setting appropriate cut off levels:** Any cut off limits for drugs and alcohol adopted in a program should not be arbitrary, but supported by adequate reasons and referable to relevant Australian Standards (such as AS/NZS 4308:2001 *Procedures for the collection, detection and quantification of drugs of abuse in urine*; AS/NZS 3547: 1997 *Breath alcohol testing devices for personal use*, AS/NZS 4760: 2006 *Procedures for specimen collection and the detection and quantification of drugs in oral fluids*) and expert research. Ideally, cut off limits should be set in light of the nature of the work to be performed and environment in which it is to be performed.

5. **Provide instruction and training:** Adequate instruction and training should be provided to those who have a role in administering and implementing the program, for example, supervisors and managers who have authority under the program to identify and deal with employees to be tested to establish fitness for duty.

6. **Consider privacy issues:** Employers should have systems in place which safeguard and keep confidential any results and information collected from testing so that employee concerns about privacy can be addressed and to meet requirements of privacy laws.

7. **Set out in clear terms a disciplinary process:** Employers should clearly set out what disciplinary process is to be used if and when an employee refuses to undergo testing in accordance with the program, and where an employee tests positive for drugs or alcohol under the program. Generally, this involves a staged disciplinary process where an employee tests positive on a first, second or third occasion. There should also be a rational objective and defendable basis for any decision to take some form of disciplinary action against an employee for non compliance with a policy. The policy should also cover what is to happen not only if an employee returns a positive result but also what is to happen if an employee refuses to undergo a test.

8. **Comply with own program:** Employers should ensure that they strictly comply with the terms and procedures of their own program. Condoning any employee behaviour in breach of program procedures over a period of time may well limit the ability of the employer to later discipline employees for breach of the policy. Employers should also ensure that their existing arrangements for shiftwork and overtime are consistent with the objectives of their fitness for work programs, having in mind other factors such as time travelling to and from work.

Other approaches taken by employers

It is of interest to note that some employers (from both mining and non-mining industries) are taking a broader view of managing fitness for work. Various employers have recognised that in order to ensure employees are in a healthy state physically, mentally, and emotionally, fitness for work programs may need to extend beyond simply enforcing drug or alcohol standards at work.

For example, in Western Australia, BHP Billiton has in place a comprehensive fitness for work program which includes advising and reminding workers of the importance of maintaining a healthy diet, and encouraging them to participate in sporting, recreational and other activities held at the mining facilities. The program has received some news coverage on the West Australian recently. Instead of going to the pub after work, employees are now encouraged to attend yoga classes or exercise classes structured around their shift timetables. There is a cash prize for any employee who loses the most weight. On site meals have also changed from food with high fat content to healthier choices. Family members of workers and local residents in Port Hedland and Newman have been encouraged to participate in fitness programs in order to keep workers motivated.

Also, Santos has in place a "Health & Wellbeing Standard" with an emphasis on health risk prevention strategies which encourage staff to self-manage fitness for work and to make informed choices about their lifestyles. The strategies consist of a package of health education and awareness programs, free health assessments, subsidised gym membership, confidential counselling advice, quit smoking campaigns, and the provision of healthy food options at the workplace.

As another example (and one involving a non-mining employer), Public Transport Safety Victoria (**PTSV**), the Victorian Public Transport Safety Regulator, introduced the "Learning Pathway Education and Training Program" for its workforce last year. The program represents an integrated approach to training and education and aims to give regulatory staff the knowledge, skills and attributes necessary for achieving successful safety results. It comprises of employer subsidised in-house training, graduate diplomas, or master's degree levels studies in safety science, human factors, or risk and safety management. The program was introduced in response to the recognition that staff of a safety regulator must have knowledge and qualifications in a range of essential safety related areas.

These examples show how employers can implement fitness for work programs which not only promote safety and health in the workplace, but at the same time also encourage staff to learn skills and adopt lifestyle changes that are beneficial to them not just at work, but in all areas of their lives.

What approach have the courts taken?

Generally, courts and industrial tribunals have supported the broad objective of ensuring safety and health at the workplace through the development and introduction of fitness for work programs. They know that employers have a general obligation at common law to take reasonable care for the safety and health of their employees, and also strict statutory obligations under safety and health legislation to ensure safety. They recognise that the introduction of a fitness for work program is one way to assist employers to comply with these legal obligations.

However, courts and industrial tribunals are also interested in ensuring that such programs have been developed and implemented in a fair and reasonable manner. They are keen to ensure that the program is implemented in a non-discriminatory way, and that employees and unions have been extensively consulted during the development of the program.

In the Queensland mining industry, it is also important to consider the operation of the *Coal Mining Safety and Health Act 1999* (Qld) and the *Mining and Quarrying Safety and Health Act 1999* (Qld) and their associated Regulations.