Alcohol and other drugs - legal issues in the new era

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Introduction

1 The management of alcohol and other drugs (**AODs**) as a health and safety issue affects all workplaces. Court decisions have recognised that there is a higher need to manage these issues in 'blue collar' industries where impairment can have a greater impact on health and safety.

2 Testing for AODs is mandatory for some industries and positions, such as in sections of the transport industry and for airline pilots. Insurance requirements may also demand testing for certain positions.

3 Within the Queensland mining industry:

(a) Part 6 (Fitness for work) *Coal Mining Safety and Health Regulation 2001* (Qld) contains provisions about a coal mine's safety and health management system for alcohol, as well as the requirements for the safety and health management system for personal fatigue and other physical and psychological impairment, and drugs; and

(b) Part 9 (Fitness) *Mining and Quarrying Safety and Health Regulation 2001* (Qld) contains provisions about assessing fitness for work for metalliferous mines.

4 A key part of the management of AODs is an effective testing regime. Implemented properly, a testing regime can provide evidence about breaches of accepted workplace standards, as well as acting as a deterrent to workers being impaired by AODs at work.

5 However, the legal position about where the boundaries lie for properly implementing a testing system for AODs is still developing.

6 To be fair, this is not due to any particular failure by regulators, but more as a result of the difficulties that arise when dealing with the use of AODs.

7 When considering the management of AODs in the workplace there is crossover between:

(a) social issues – individual privacy about drug usage and broader invasion of privacy concerns, including about conditions that may require the use of medications;

(b) legal requirements – workplace safety (which, broadly, requires those in the mining industry to ensure safety issues are managed to an acceptable level of risk) and anti-discrimination (which may make some policies for testing unlawful); and

(c) general workplace management – whereby employers want to ensure productivity and appropriately manage employee health issues, but without eroding trust and workplace morale.

8 While there are sensible health and safety and other considerations that motivate the need for managing AODs within the work environment, as well as legislative schemes that require these issues to be managed in the mining industry, there remain many 'new era' challenges.

9 These challenges arise not only from the issues listed above, but also the development and availability of new intoxicants, and the lengths to which workers will go in order to overcome testing systems.

10 Each of these 'new era' challenges will be considered in this paper.

Dependency as impairment

11 A significant legal complication when managing AODs in the workplace is that dependency (whether of a lawful or unlawful drug, such as in the case of alcoholism) can be considered a disability.

12 Issues arise here where there is less favourable treatment of a person that is related to a protected attribute and in a protected area under anti-discrimination laws. That is, to bring a successful discrimination claim, the claimant must demonstrate that some direct or indirect disadvantage has been, or will be, suffered by them as a result of an attribute protected by law and in an area protected by law.

13 For the purposes of this paper, the relevant area in which discrimination must not occur is in relation to a person's work.

14 It is not necessary for the protected attribute to be the only reason for the treatment. Under the *Disability Discrimination Act 1992* (Cth) (**DD Act**) the attribute be one of many reasons for the treatment and need not be the dominant or a substantial reason. Under the *Anti-Discrimination Act 1991* (Qld) (**QAD Act**) the protected attribute must be a 'substantial' reason for the treatment.

15 It is also sufficient if it can be shown that the discrimination is on the basis of:

(a) a characteristic that a person with the protected attribute generally has;

(b) a characteristic that is often imputed to a person with the protected attribute;

(c) a protected attribute that the claimant is presumed to have, or to have had at any time, by the person discriminating; or

(d) a protected attribute that the claimant had, even if the claimant did not have it at the time of the discrimination.

16 The relevant attribute protected under both the AD Act and DD Act when considering AODs policies is that of an 'impairment' or 'disability'.

17 The question of whether drug or alcohol dependency is a disability has been considered in numerous decisions.

Effect of case law decisions

18 The decisions in *Marsden v Coffs Harbour and District Ex-Servicemen & Women's Memorial Club Limited* [2000] FCA 1619 (applying the DD Act) and *Carr v Botany Bay Council & Anor* [2003]

NSWADT 209 (applying the *Anti-Discrimination Act 1977* (NSW) (**NSW Act**)) concluded that drug dependency is a 'disability' within the meaning of the relevant legislation.

19 As a consequence of the decision made on appeal in *Marsden*, the NSW Act was amended to allow discrimination on the grounds of disability in circumstances where the person's disability relates to their addiction to a prohibited drug.

20 A similar amendment was proposed to the DD Act but was never passed. The QAD Act has also not been amended in this regard.

21 The decision in *Rawcliffe v Northern Sydney Central Coast Area Health Service & Ors* [2007] FMCA 931 determined that discrimination on the basis of an impairment was capable of occurring where an employee was discriminated against in relation to the symptoms caused through the use of a legal drug (sleep deprivation and paranoia caused by epilepsy medication), as opposed to the mere fact of using the drug.

22 However, when dealing with symptoms of an impairment, the treatment of a person on the basis of symptoms will not always result in a successful claim of unlawful discrimination.

23 For example, in *Purvis v New South Wales (Department of Education and Training)* (2003) 202 ALR 133) a student had exhibited violent behaviour at school as a consequence of a condition attributable to brain damage suffered in infancy. The school's Principal and the NSW Department of Education determined that the student should be enrolled in a special school and should be excluded from the school he was attending. The High Court held that the exclusion of the student did not satisfy the requirements for making a successful discrimination claim on the basis that the educational authority would have treated a non-disabled student exhibiting the same behaviour in the same way.

24 It is important to be aware that, in Queensland, it is irrelevant for anti-discrimination purposes whether a drug dependency relates to an illegal drug. As noted earlier, in New South Wales there is an exemption in the NSW Act which does not make it unlawful to discriminate based on use of unlawful drugs. However, no similar provision exists in the AD Act or the DD Act.

25 Also, in both the *Marsden* appeal and in the *Carr* decision, it was determined that even where a person was receiving treatment for their drug dependency that alleviated the effects of that dependency (such as receiving methadone for the treatment of heroin addiction) the person still suffers from a disability for the purposes of the DD Act.

26 Although there is no decision in Queensland on the issue, the definition of 'impairment' in the QAD Act is also capable of supporting the view that drug dependency is an impairment that could support a valid claim of discrimination. In that regard, 'impairment' is defined widely in the QAD Act and includes all kinds of bodily and mental malfunctions, conditions, illnesses and disease, whether or not existing from birth, and includes impairments which presently exist and no longer exist.

27 It is therefore possible for a Queensland worker to bring a successful claim of discrimination based on a drug dependency provided they can further prove that they have been treated less favourably or unfavourably (for example by being dismissed or any unfavourable variation of contract terms) when compared to someone without their impairment, such that there is a causal connection between the impairment and their less favourable treatment.

What does this mean for managing AODs?

28 The above cases sit uncomfortably with the statutory obligations to ensure workplace health and safety is managed to achieve an acceptable level of risk.

29 Based on the above matters, Queensland employers may be found to unlawfully discriminate where:

(a) they take, or propose to take, disciplinary or other action against a worker with a drug dependency or alcoholism (such as by terminating their employment or changing contract terms);

(b) the action amounts to less favourable treatment; and

(c) the action is based on the dependency, or reasons that include the dependency.

30 In Queensland it is irrelevant that the drug concerned may be legal, such as alcohol, or illegal.

31 However, there are also exemptions to the anti-discrimination laws that may make such management achievable. The most relevant exemptions are where the discriminatory act can be shown to be where:

(a) the discrimination occurs as a result of the 'inherent requirements' (DD Act) or 'genuine occupational requirements' (QAD Act) of the role; and

(b) the supply of special services or facilities is needed for the worker to perform the inherent requirements of the role, in circumstances where providing such services or facilities would impose an 'unjustifiable hardship' on the employer.

32 The existence of an unjustifiable hardship is not generally easy to prove, particularly given that among the relevant factors considered are the employer's financial circumstances. Given the size of some employer budgets in the resources sector, proving an unjustifiable hardship when dealing with services or facilities that may be needed to support a worker with drug dependency or alcoholism may, in practice, be very difficult to establish.

33 An additional exemption is contained in section 108 QAD Act, which provides:

> '*a person may do an act that is reasonably necessary to protect the health and safety of people at a place of work*'

34 The DD Act does not have any similar defence as, while compliance with prescribed laws can be a defence, workplace health and safety legislation is not a 'prescribed law' for the purposes of section 47(2) DD Act.

35 As noted earlier, unlawful discrimination can occur based on imputed characteristics. Therefore, Queensland employers should be mindful that assumptions made about the functionality of a person with a drug dependency or alcoholism when determining their ability to perform their work can lead to unlawful discrimination occurring.

36 For example, if the defence of compliance with workplace health and safety legislation is sought to be relied upon, it may be difficult to show in practice that a worker who has been coping with a drug dependency over a long period of time without any demonstrable risk to the safety of others should suddenly be dismissed because of an assumed risk to safety.

37 In such circumstances a proper analysis of inherent requirements of the role and how those requirements are affected by AODs is likely to be critical.

38 Further, the exemptions differ under the QAD Act and the DD Act such that, for example, while health and safety concerns might be an exemption protecting Queensland employers from action under the QAD Act, it will not apply under the DD Act. However, in practice, the Australian Human Rights Commission will take into account the fact that employers must comply with laws and it can exercise discretion in the employer's favour when deciding whether to allow claims.

39 In all of the circumstances a 'best practice' approach to managing workers with drug dependency and alcoholism should be adopted to limit the prospect of discriminatory treatment occurring in the first place. A sensible application of the statutory provisions means that mining industry employers can meet their safety obligations by implementing AODs policies that are appropriately focused on rehabilitation rather than on disciplinary outcomes.

Best practice

40 In essence, the management of drug dependency and alcoholism to limit exposure to discrimination claims is in many respects the same as that for workers suffering any other illness or injury.

41 There is no process that will guarantee that a successful discrimination claim will be avoided, particularly in circumstances where decisions may need to be made in circumstances where there may be conflicting medical evidence.

42 However, AODs policies must to include appropriate consideration of anti-discrimination laws, including cross referencing anti-discrimination policies, and must ensure that health management plans used as part of the steps in AODs policies are appropriate for those suffering from long-term dependency issues.

43 Employers should also consider what level of support is to be offered workers with drug dependencies or alcoholism, bearing in mind the need to balance:

(a) the level of support that will be sufficient to deal with those with longstanding problems;

(b) the need to not discourage self-reporting; and

(c) operational needs.

Privacy concerns

44 One of the main arguments raised by those seeking to oppose the introduction of AODs policies, and especially testing regimes to be applied under those policies, is based on privacy concerns.

45 As a starting point, it is clear that AODs policies cannot be enforced where they would unlawfully intrude upon a person's privacy. Without being exhaustive, legally enforceable rights exist about:

(a) assault that would make it unlawful to force invasive testing for AODs;

(b) false imprisonment that would make it unlawful to force a person to stay in a testing room against their will;

(c) trespass to property that would make bag, vehicle or locker searches unlawful in the absence of consent; and

(d) collection of personal information under privacy laws.

46 Further issues arise in a 'privacy' context when considering the type of AODs testing to be conducted. When it comes to the justification for undertaking testing, the law has developed differing approaches to 'for cause' and 'random' testing.

Random testing policies

47 AODs testing 'for cause' is now widely accepted as being appropriate and acceptable. For example, if a worker is involved in a serious work health and safety incident, requiring the employee to undergo testing is permissible, and a refusal to be tested by the employee in those circumstances will likely be accepted as a failure to follow a lawful and reasonable direction. Arising out of the Blee Coronial Inquiry, a directive was issued pursuant to section 125 *Coal Mining Safety and Health Act 1999* (Qld) requiring that safety and health management systems for AODs must be reviewed to ensure that they are amended to include a provision that all persons directly involved in a fatal accident or serious bodily injury are to be drug and alcohol tested within the provision of the policies.

48 Policies about random testing are trickier. Such policies can be successfully introduced if there is a clear and obvious need to ensure workplace health and safety.

49 However, legal decisions make it clear that there must be a proper purpose behind the testing, that is that it can be shown that the AODs testing is for impairment and not past use, noting that there needs to be a connection to the employer's workplace concerns in order to justify the invasion of the employee's privacy.

50 In *Caltex Australia Limited v Australian Institute of Marine and Power Engineers, The-Sydney Branch; The Australian Workers' Union* [2009] FWA 424 a dispute arose between Caltex and the Australian Workers' Union about drug and alcohol testing and, in particular, whether Caltex could undertake random drug and alcohol testing. The dispute was brought before Fair Work Australia for determination.

51 In brief, Caltex had proposed to introduce random drug and alcohol testing at its refinery in line with a detailed policy. The random testing was to be restricted to persons working in safety critical sites and it was noted that the purpose of the testing was to ensure the health and safety of employees and provide a safe system of work.

52 The Union argued that random testing should not be permitted and that testing should only be undertaken where there was cause to test, or a reasonable suspicion of drug and alcohol abuse. The Union further argued that there was no evidence to support the introduction of random testing and that there had been no evidence of incidents resulting from drug and alcohol use at the refinery for some period.

53 Fair Work Australia had regard to:

(a) the absolute duty imposed on Caltex under the applicable work health and safety laws;

(b) the disincentive a drug and alcohol policy may have for abuse of drugs and alcohol in the workplace;

(c) the purpose of the policy in assisting to rehabilitate rather than penalise employees; and

(d) the safety critical nature of the refinery.

54 Fair Work Australia upheld the ability to introduce random drug and alcohol testing of employees at Caltex in light of the safety critical nature of the work being performed by the employees to be tested, but required that appropriate safeguards be maintained in conducting that random testing. The safeguards included:

(a) a process on the review on return of positive test results requiring a medical officer to inform the employee and liaise with them in relation to the results and treatment;

(b) a graduated disciplinary process starting with a formal warning and counselling where an employee has breached the drug and alcohol policy and progressing to a final warning and then dismissal, noting that the intention of the policy should be to rehabilitate rather than to discipline the employee; and

(c) that the policy not be unilaterally varied by Caltex in any manner.

55 In the *Caltex* decision Fair Work Australia did not consider that random testing for drugs and alcohol should become an automatic entitlement for employers, noting:

(a) random drug and alcohol testing can be justified where it can be shown as being necessary to ensure the business is fulfilling its work health and safety obligations;

(b) where the employer can demonstrate that the industry they operate in or the section of the workforce they are testing operate in a high risk environment, a specific risk assessment of the impact of drugs and alcohol in that environment may not be necessary before the introduction of random testing; and

(c) safeguards are necessary in AODs testing procedures.

56 More recently, in *CFMEU v Wagstaff Piling Pty Ltd* [2012] FCAFC 87, a Full Bench of the Federal Court of Australia allowed the introduction of random testing after finding that the union collective agreement in place, despite being silent on the issue, did not prevent the implementation of such testing. In making this finding, the Full Bench noted the statutory imperative for employers to ensure safety and found that a regime designed to ascertain whether AODs had been imbibed was a step towards protecting the safety of employees at the workplace and therefore may be seen as the employer attending to its own obligations.

Oral vs urine testing

57 The methods for testing for AODs - using oral or urine fluid test samples - remains controversial. Among the concerns is that urine test samples are not seen as showing 'impairment', but may instead show historical use during a worker's private time which would fall outside of legitimate employer concerns.

58 The decision in *Shell Refining (Australia) Pty Ltd, Clyde Refinery v CFMEU* [2008] AIRC 510 centred on a dispute about the testing method used for AODs.

59 Shell Refining attempted to conduct random drug and alcohol testing by way of urine samples. This was challenged by the CFMEU.

60 The CFMEU challenged the proposed random testing on the basis that oral fluid testing determined an actual impairment of the employee, but urine testing had the capacity to pry into the private lives of the employee and determine prior drug and alcohol use in a window much wider than that of oral fluid testing.

The Commissioner rejected the reasoning on the prior case of *BHP Iron Ore Pty Ltd v Construction Mining Energy Timber Yards, Sawmills and Woodworkers Union of Australia (WA Branch)* (1998) 82 IR 162 in which it was held that urine testing was an appropriate fair and reasonable means by which to test drug and alcohol impairment in the workplace and was justified on safety grounds. In doing so, the Commissioner noted that testing regimes had progressed since that case had been determined, and decided that urine based testing would be unjust and unreasonable given its ability to pry into the private lives of employees. However, this was qualified by two factors:

(a) no Australian laboratories had yet been accredited under the relevant standard for oral fluid testing; and

(b) there were particular drugs that Shell Refining wanted to test for, but the Australian Standard did not provide appropriate target concentration levels.

61 On the basis of these two qualifications, while the Commissioner held that oral fluid testing was the preferred drug and alcohol testing method as it was less invasive to the individual, until the two qualifications could be resolved it was appropriate for the company to continue its urine based testing regime. However, it should be noted that this decision only considered laboratory testing of samples and did not consider the effectiveness or desirability of on-site oral fluid testing.

62 More recently, in *Holcim (Australia) Pty Ltd v Transport Workers' Union of NSW* [2010] NSWIRComm 1068 urine testing was again found to be permissible.

63 Holcim developed a national policy of drug and alcohol testing that utilised urine tests rather than oral saliva testing. The policy was opposed by the Transport Workers' Union (**TWU**), who asserted that oral saliva testing was a more appropriate method. The parties attempted conciliation on numerous occasions and over many years, but were unable to come to an agreement on this issue.

64 In these proceedings, Holcim sought the variation of two contract determinations in order to incorporate its drug and alcohol testing regime and to accommodate random drug testing by way of urine sampling for the contract drivers of agitator vehicles.

65 The TWU did not object to the random testing of drivers for drugs and alcohol. However, the TWU opposed the Holcim drug and alcohol policy on the basis that it relied on urine sampling. The TWU argued that urine testing was more intrusive for employees and less convenient than oral testing with saliva swabs. Part of the argument was based on the time it took for urine testing, which would impact on the workers' driving time.

66 After analysing the evidence given by a toxicologist and a pharmacologist concerning the effect and testing of various drugs, the Commission held that the most appropriate and reliable method of drug and alcohol testing in the circumstances was through a regime of urine testing.

67 The Commission noted urine testing had:

(a) already been introduced for the entire Holcim workforce nationally and was consistent with the method adopted for State Rail projects;

(b) proper accreditation and sophistication, unlike oral testing which had not yet achieved equivalent accreditation; and

(c) been generally accepted throughout the industrial community for several years and only takes a limited amount of additional time for employees when compared with oral testing.

68 The Commission observed that, over time, oral testing may become the preferred alternative. However, on the evidence before the Commission, the policy of urine testing continued to be more appropriate in the circumstances.

69 Accordingly, Holcim and TWU were directed to engage in further discussions in order to extend the regime of urine testing to the Holcim contract drivers involved in driving agitator vehicles, and to address issues of delays associated with urine testing and any financial loss that contract drivers may incur as a result of the tests.

70 The debate about appropriate testing methods is continuing, and oral fluid testing may well have reached a point where it can overcome limitations that have resulted in urine testing being preferred.

71 The 2011 decision in Fair Work Australia of *CFMEU v HWE Mining Pty Limited* [2011] FWA 8288 concerned a dispute over random on-site screening testing to be conducted by way of urine samples. In particular, despite indications that saliva testing would be used if Australian Standard certification was received for that process, the company refused to do so, citing inadequacies with that standard (being AS4760). In practical terms, the dispute centred on employee privacy concerns. Based on the expert evidence, and on particular concessions made by the CFMEU's expert, Fair Work Australia accepted that the company's refusal to move to saliva testing for random on-site screening testing was reasonable, noting that urine testing was seen as more reliable and therefore more likely to allow the employer, who operated in the NSW coal mining industry, to discharge its statutory health and safety obligations. The materially higher incidence of false negatives with on site saliva testing and greater scope for defeating the existing on-site saliva screening tests were seen as particularly significant.

72 Earlier this year, in *Endeavour Energy v CEPU & Ors* [2012] FWA 1809, Fair Work Australia rejected the proposed introduction of urine testing. The predominant reason for the refusal focused on urine testing not proving impairment and therefore potentially leading to an employee breaching the policy, even though the employee took the illicit substances in their own time and in no way was affected in terms of their capacity to work safely. This decision was unsuccessfully appealed to a Full Bench of Fair Work Australia by Endeavour Energy – see *Endeavour Energy v CEPU & Ors* [2012] FWAFB 4998. Among the reasons for appeal was alleged inconsistency with the *HWE Mining* decision. However, the Full Bench noted that the circumstances of that case were different in that there was already a urine testing program in place and, since mid-2010 when that case was decided, there were improvements to on-site saliva testing.

Effect of these decisions

73 While it is common that there will be objections to urine testing based on privacy concerns, this does not guarantee that oral testing must be preferred.

74 Technological advancements and medical evidence will play a critical role in determining what will be appropriate, especially in the ongoing oral fluid versus urine debate, and remain in a state of constant development. For example, in *Holcim*, it was found that a properly implemented system of urine testing will act to minimise the number of chronic and habitual drug users in the industry. Importantly, there was acceptance based on the expert evidence that chronic use would justify testing, even based on urine, due to the potential for a 'hangover' effect that could be a concern for the employer. However, in the first *Endeavour Energy* decision, Fair Work Australia considered evidence that no AODs testing method could detect impairment due to 'hangover' effects.

Drafting of AODs policies

75 As a result of the challenges faced in implementation, it is imperative that any AODs policy is well constructed so that the requirements and procedures are clear and enforceable.

76 The preferred approach is to:

(a) set out the process in employment contract, contractually binding policy or collective agreement;

(b) ensure employee awareness through the provision of information and training; and

(c) ensure consistent application - those enforcing the AODs policy should be trained, including as to recognising signs that justify 'for cause' testing so as to limit challenges.

What an effective AODs policy looks like

77 Based on the case law guidance, an enforceable AODs policy will:

(a) be based on meeting statutory safety obligations;

(b) have a consistent approach to all workplaces, unless otherwise justified;

(c) respect privacy concerns;

(d) include safeguards for employee protection;

(e) ensure positive (or 'non-negative') results are verified by qualified tester;

(f) ensure any action taken based on positive result is appropriate – 'intoxication' at work will constitute serious misconduct under the *Fair Work Act 2009* (Cth);

(g) contain a dispute resolution mechanism; and

(h) focus on rehabilitation, noting that:

(i) employees who require time off for drug or alcohol issues must be able to access sick leave entitlements in the same was as other employees with an illness or injury; and

(ii) self declaration may be treated differently and it would be more likely to be treated as a rehabilitation issue rather than situation justifying discipline.

The role of standards

78 While standards are not strictly enforceable, AODs policies should apply Australian Standards, or equivalent or higher measures. By doing this, there will be a level of proof that AODs systems are appropriate and enforceable based on accepted standards.

79 Due to ongoing developments, there will always be a need to keep a watching brief on relevant standards, but current standards include:

(a) AS3547 - 1977 (Breath alcohol testing devices for personal use);

(b) AS4760 - 2006 (Procedures for specimen collection and the detection and quantitation of drugs in oral fluid);

(c) AS/NZS 4308 - 2008 (Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine).

New era substances

80 When developing or reviewing an AODs policy consider what intoxicants are relevant to the workplace – not necessarily just alcohol or the 'garden variety' drugs we are familiar with. For example, recent issues have been identified as a result of the emergence of:

(a) synthetic cannabis – such as products known as Kronic, Purple Haze, Kaos and Voodoo; and

(b) other substances (e.g. DMAA, a legally available stimulant said to be used by mine workers to stay alert, but which is set to be included on a schedule of prohibited substances by the Therapeutic Goods Administration).

81 It also needs to be recognised that there are limits on what testing can show. There therefore needs to be a system to manage substances that fall outside of testing capabilities, but which cause impairment. For example, licking cane toads can clearly impair a worker, but how do you test for it? As such, supervisors need to be able to effectively identify behaviours showing impairment and be able to appropriately act on it. Training in this is a matter that should be undertaken, noting the prominence of intoxicants that cannot be tested under existing systems. The better the training, the more likely that there can be credible evidence of impairment that can be relied upon to activate rehabilitation and, where warranted, disciplinary action.

82 Systems must also be implemented in order to ensure the integrity of testing and to limit the ability of workers to provide false samples or otherwise circumvent the testing method used, noting that the means of 'cheating' on tests are becoming more sophisticated. These methods include guidance readily available on internet forums about how to beat AODs testing, as well as the ability to buy 'kits' (such as synthetic urine) to provide false results.

Conclusion

83 So far as work health and safety is concerned, the need for vigilance remains paramount if employers in the mining industry are to meet their statutory obligations, especially as a result of challenges arising from:

(a) developments in technology;

(b) developments in standards;

(c) more sophisticated substances; and

(d) more sophisticated methods of cheating.

84 The developments in medical technologies and applicable standards also mean that resources industry employers should not assume that current policies are set in stone. Rather, in the new era, employers need to stay abreast of developments and adapt so that, so far as practicable, AODs policies (including testing requirements) are focused on properly dealing with impairment and do not unnecessarily intrude into an employee's privacy or otherwise become unenforceable or irrelevant.

85 As matters currently stand, there are no definitive answers about the limits on all aspects of the management of AODs in the workplace, but the cases at least provide helpful guidelines. An understanding of the legal requirements, and keeping up to date with legal and other developments, is the only way to ensure that effective and enforceable systems are maintained.

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