

Employment Alert

To pee or not to pee? Drug testing is the question again

WHAT YOU NEED TO KNOW

- The National Association of Testing Authorities, Australia recently announced that it is withdrawing the provision of accreditation for on-site drug testing of oral fluid.
- In 2012, the Fair Work Commission determined in *Endeavour Energy v CEPU & Ors* that, among other things, a proposed drug and alcohol procedure should provide for saliva testing (rather than urine testing). At the time, a key reason for the Commission's decision was the availability of on-site oral fluid testing devices which provided a quick, less offensive, effective and reasonably reliable method of determining whether an employee had recently used a drug.

WHAT YOU NEED TO DO

- Employers should consider the drug testing regime which applies at their workplace and whether NATA's decision has any impact on that regime.
- If on-site oral fluid drug testing is conducted, employers should consider:
 - how reliable the method used is?
 - if the agreement, procedure or policy setting out the testing method prescribes that testing must be conducted by a NATA accredited testing agency?
- If it becomes necessary to amend existing procedures or implement new procedures, employers should carefully consider factors such as consultation, existing work health and safety obligations, and employment and industrial relations related risks.
- Employers may want to obtain expert evidence to support proposed changes to procedures. This could assist to respond to any challenge to the implementation of a new or changed procedure.

The National Association of Testing Authorities, Australia (**NATA**) recently announced that it is withdrawing the provision of accreditation for on-site drug testing of oral fluid. This means that employers who use this method of drug testing on-site may need to reconsider their approach to drug testing.

NATA's decision is likely to feature as a relevant factor in future decisions of the Commission relating to drug testing procedures in the workplace.

Decision of NATA

NATA is the authority responsible for the accreditation of laboratories, inspection bodies, calibration services, producers of certified reference materials and proficiency testing scheme providers throughout Australia.

In July 2013, NATA announced that due to "significant technical issues", it would withdraw the provision of

accreditation for on-site initial drug testing of oral fluid under the Australian Standard 4760:2006.

NATA identified the following issues with oral fluid testing which it was unable to resolve:

- a lack of clearly defined cut-off concentrations for devices;
- target values are only described as "nominated" target values and are very wide;
- there is no definitive criteria for what constitutes "fit for purpose" as described in AS 4760:2006;
- there is no recognised expert technical group available for consultation for oral fluid drug testing which has led to inconsistency in the review of data and challenging of the expertise of NATA technical assessors;

- there is concern about the stability of some drug classes during the testing process, especially THC (the active component of cannabis); and
- there are issues with the ability of laboratories to reproduce a non-negative screening result due to loss of drug during transport and handling.

It is important to note that NATA's decision relates to on-site drug testing of oral fluid and not laboratory testing.

Endeavour Energy v CEPU & Ors [2012] FWA 1809

Prior to NATA's decision, this case was one of the few cases in which the Commission had ruled against urine testing and in favour of oral fluid testing.

This case concerned the proposed introduction of a new drug and alcohol testing policy. One of the key issues was whether urine testing or saliva swab testing should be used.

After considering expert and other evidence about both testing methodologies, Senior Deputy President Hamberger determined that the use of urine testing was unjust and unreasonable when oral fluid testing was readily available.

The Commission noted that urine and oral fluid testing were similar in that they were both governed by Australian Standards, had laboratories accredited for the analysis of samples, had systems in place to verify on-site testing and neither directly tested for impairment.

However, Hamberger SDP relied on a number of factors to prefer oral fluid testing. In particular, Hamberger SDP considered that:

- oral fluid testing was a better indicator of likely impairment as a result of smoking cannabis;
- urine testing may be unable to identify that someone had smoked cannabis in the previous four hours; and
- urine testing unfairly scrutinised the private behaviour of individuals. In particular, it may show a positive result where an individual had smoked cannabis several days prior to the test. This may give rise to a breach of policy and possible termination of employment in circumstances where the individual's actions were taken in their own time and did not affect their capacity to do their job safely.

Hamberger SDP's decision was subsequently upheld by a Full Bench of the Commission. The Full Bench found

that it was open for Hamberger SDP to find in favour of oral fluid testing in light of all the factors which were considered, including the availability of effective on-site oral fluid testing devices which provided a quick, less offensive, effective and reasonably reliable means of determining whether an employee had recently used a drug.

Implications for employers

The issue of whether the more appropriate method of workplace drug testing is by collecting and analysing a urine sample or a saliva sample continues to be a controversial area.

While there have been a number of seminal decisions of industrial tribunals relating to the most appropriate drug testing methodology, there is still no consensus as to what is the most appropriate method of testing.

It will be interesting to monitor whether NATA's decision and the concerns which it has raised relating to on-site oral fluid testing will influence the debate about the most appropriate method of testing.

In the meantime, it is important that employers consider the drug testing regime which applies at their workplace and whether NATA's decision has any impact on that regime. For example, if on-site oral fluid drug testing is used:

- how reliable is the method used?
- does the agreement, procedure or policy setting out the testing method prescribe that testing must be conducted by a NATA accredited testing agency?

If it becomes necessary to amend existing procedures or implement new procedures, employers should carefully consider factors such as consultation, existing work health and safety obligations, and employment and industrial relations related risks.

Employers should also consider obtaining expert evidence to support proposed changes to procedures.

These steps will be important if an employer needs to respond to any challenge to the implementation of a new or changed procedure.

MAKING THE CASE: Insights from Geoff Giudice

The significance of NATA's decision arises at two points in time; when implementing a drug testing procedure, and when seeking to enforce that procedure.

One of the considerations which the Full Bench had regard to when it upheld Endeavour Energy's implementation of on-site saliva testing was that "The evidence in the present case was to the effect that there have been significant improvements in the reliability of current on-site oral fluid testing devices." NATA's announcement tends to undermine this conclusion because of the doubts it raises about the reliability of on-site saliva testing.

For the same reason, it may be difficult to withstand a challenge to any enforcement of a procedure based on on-site saliva testing, such as a decision to stand down an employee pending an off-site laboratory test. Further, it is clear that the NATA statement has the potential to impact on the efficacy of on-site testing procedures overall.

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