

Ai GROUP SUBMISSION

Portfolio Committee No. 1 –
Premier and Finance

**Inquiry into the impact of
the regulatory framework
for cannabis in
New South Wales**

MAY 2024

Ai
GROUP

Inquiry into the impact of the regulatory framework for cannabis in New South Wales

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Government's Inquiry into the impact of the regulatory framework for cannabis in New South Wales (**Inquiry**).

Ai Group is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains. We make this submission to the Inquiry on behalf of our members.

We consider it reasonable and appropriate for the New South Wales Government to investigate the impact of the regulatory framework for cannabis in New South Wales

Cannabis has been a workplace hazard for many years. However, our members have been increasingly telling us that they are having significant difficulties in managing workers' use of prescribed medicinal cannabis, which can co-exist and indeed be indistinguishable from the unlawful use of cannabis. As is the case with all drugs (prescription or not), our members' primary concern is whether drug use creates risks of impairment. At law, our members must take steps to reduce or eliminate risks of injury or harm to persons in the workplace due to impairment associated with the use of cannabis (as they do for other drugs). This is of particular concern where the work-related activities are safety critical.

We set out below our submission which we have confined to the impact of the current regulatory framework for cannabis as it relates to employment and the difficulties faced by our members.

What is the legislative and regulatory framework for cannabis in relation to employment in New South Wales?

Relevant legislative and regulatory framework

The key legislation for cannabis as it relates to the workplace in New South Wales includes the following:

- the overarching duties of organisations, officers and workers under work health and safety laws and industry specific legislation;

- the right to direct an employee to undertake workplace drug testing for cannabis use and the interaction with unfair dismissal remedies;
- anti-discrimination laws;
- privacy issues as they relate to the collection, use, disclosure, security and storage of information;
- road safety legislation;
- common law obligations - e.g., negligence.

Work health and safety laws – cannabis use as an impairment risk

Obligations under WHS laws for workers and employers – drug use

Workplace participants each have duties under work health and safety legislation, including employers and workers. In NSW, the relevant legislation is the *Work Health and Safety Act 2011 (NSW)* and related regulations and Codes of Practice (**WHS laws**).

Under WHS laws, an **employer** (i.e., as a person conducting a business or undertaking – PCBU) must, so far as is reasonably practicable, ensure the health and safety of workers and others in the workplace. This includes ensuring workers are not exposed to hazards and risks which may impact workplace safety - for example, the use of drugs or alcohol which may result in impairment at work. Officers specifically have duties to exercise due diligence in relation to ensuring the employee complies with these reasonably practicable steps.

Workers are also obliged to take reasonable care for their own health and safety and not adversely affect the safety of others, including by using drugs or alcohol which carry risks of impairment in the workplace.

These WHS duties are non-delegable and can lead to criminal prosecution, including the imposition of significant penalties and, in extreme cases, terms of imprisonment.

Cannabis as a workplace hazard

If a worker is under the influence of drugs or alcohol this may be a WHS hazard to themselves, their colleagues, or other people in the workplace.

As discussed below, the use of cannabis carries an acknowledged risk of impairment including because it contains delta-9-tetrahydrocannabinol (**THC**). The same applies to medicinal cannabis regardless of whether it is prescribed.

The risk of injury or harm to the worker or others due to a worker's consumption of cannabis, including prescription medicinal cannabis, containing THC is greater if the worker conducts safety critical tasks. For example, if the worker:

- operates machinery;
- drives in the course of work;
- needs concentration or motor coordination to carry out their job;
- uses hazardous substances;
- performs duties as part of a team; and/or
- works in an occupation where the impairment may jeopardise the safety and health of others, e.g., drivers, pilots, medical professionals.

Employers must implement control measures

Under WHS laws, employers **must** implement control measures to eliminate or minimise risks of injury or harm to persons in the workplace due to impairment associated with the use of cannabis, including prescription medicinal cannabis (as they do for other drugs).

Where a risk of injury or harm is identified from drug or alcohol use, employers will usually have a drug and alcohol policy. The policy may regulate permitted levels of THC, which may be zero. A policy may be supported by workplace drug testing, which could be voluntary self-testing, random testing, triggered by reasonable belief and/or testing after a workplace health and safety incident.

It is relevant that laws operating across jurisdictions in Australia acknowledge THC as a hazard creating risks of impairment. For example, the Rail Safety National Law prohibits rail safety workers from doing rail safety work while there is any presence of alcohol or a 'prescribed drug' in their system - mandatory workplace testing supports this¹. Similar prohibitions apply in commercial road transport, the railways, civil aviation and marine transport.

It is also significant that it is currently illegal for people to drive or control a vehicle in Australia if they have THC in their system. The only exception is Tasmania if it is prescribed medicinal cannabis, and the person can show they are not impaired and are fit to drive. As set out below, New South Wales is currently considering a similar change to its road safety legislation.

¹ [ONRSR Fact Sheet - Drug and alcohol: Requirements for Rail Transport Operators - July 2019 \(nsw.gov.au\)](https://www.nsw.gov.au/transport-and-infrastructure/road-safety/road-safety-legislation)

Our members understand the need to deal with cannabis as a workplace hazard. As one of our members succinctly put it:

"For our workplace, we operate with a culture of safety for all workers and our workers have a right to be safe whether working alone or with a colleague".

It is also important to understand that under WHS laws, when implementing control measures (e.g., policy or workplace drug testing) organisations must consult with workers. Some members told us their consultation processes identified that their workers supported drug testing, including for cannabis. For example, as one of our members said:

"We introduced the policy over a period of 18 months consultation and collaboration with our workers due to the high-risk nature of our workplace".

Can the use of cannabis ever be compatible with safety critical duties?

Ai Group's position is that the use of cannabis is not compatible with safety critical duties, including when the cannabis use is medically prescribed.

We refer the Committee also to the submission Ai Group made to the Legislative Council Legal and Social Issues Committee - Inquiry into workplace drug testing in Victoria² (**Victorian Inquiry**) which canvases issues which we believe are also relevant to this Inquiry.

We also note the following extracts from the submission made by the Australasian Medical Review Officers Association to the Victorian Inquiry which is also consistent with our position:

Submission - Australasian Medical Review Officers Association – 5 February 2024³:

"AMROA's position on the use of medical [i.e., medicinal] cannabis is that THC (the main psycho-active component) is incompatible with safety sensitive duties."

"THC is impairing, there is little doubt on that point. The question that inevitably arises as to whether a "safe" level of medical cannabis can be found that would be acceptable. As stated above, urine and oral fluid testing do not assist as they are not directly related to impairment. However, serum levels of THC do correlate well with impairment. Extensive research has even developed standards, see [the AMROA] appendix (a) for details, below which it is possible that a person may not be impaired. But trying to administer medicinal cannabis to keep below these levels is fraught with problems because there is still too much uncertainty with differing body sizes, ages, metabolisms, compliance with prescriptions, dosages, frequency of use and methods of ingestion. "

² <https://www.parliament.vic.gov.au/workplacedrugtestinginquiry>

³ https://www.parliament.vic.gov.au/496510/contentassets/bf490e0f43e84731a356a3190edcb2cf/submission-documents/028.-amroa_redacted.pdf

“... Medicinal cannabis almost always contains some THC, and this in our view is not compatible with safety sensitive work”.

“... Some argue that taking only CBD [cannabidiol] medication would be safe. However as pointed out in appendix (b) most medication classified as “CBD” is not pure and contains traces of (up to 2%) THC, which can reach significant levels as CBD medication is often given in much larger doses. CBD is also known to inhibit the metabolism of THC perhaps leading to higher serum levels.”

“... Many organisations currently have policies in place that prohibit safety sensitive employees from having any THC in their system at all. This is the highest standard and would prohibit medicinal cannabis. Some argue that safety sensitive work could be graded with some positions seen to be of a lower risk, thus allowed a less restrictive standard. We disagree, any safety sensitive work, whether it be flying a plane or driving a van should be held to the highest standard of protection.”

“... The current legislation and drug testing policies does potentially discriminate against those taking medicinal cannabis as described above in TOR (1). However, it is well established and accepted in our society that discrimination may be reasonable when safety is involved. It is discriminatory to prevent a truck driver with unstable epilepsy from driving, or a bus driver taking regular sedating medication. But our society accepts that discrimination in order to have safe driving.”

“... Also, when considering discrimination, one must look at what penalty a person may suffer from the administrative actions associated with the policy. If they are to lose their livelihood then that is a serious penalty. But if they had to change their medicinal cannabis for alternative medication, or cease medication altogether to keep their job, that could be a lesser penalty. AMROA would draw attention at this point to the fact that there is still a paucity of high-quality medical evidence to support the efficacy of medical cannabis in all but a few indications. We would refer you to the recent Institute for Safety Compensation Recovery Research report carried out by WorkSafe Victoria and Monash university in 2022 which reaches a similar conclusion although stating more research is needed.”

“...In relation to the suggestion of adding a protected attribute such as “medication or medical treatment” to the anti-discrimination legislation: We cannot endorse this for the reasons stated above. This would effectively allow people to work in safety critical positions while under the influence of THC which again, in our view is not feasible.”

Dismissals for breaching a drug and alcohol policy – unfair dismissal laws

Once an employer implements a control measure such as a drug and alcohol policy to manage the risks of impairment-related injuries, it must deal with non-compliance. For example, an employer may decide to dismiss or discipline an employee if they fail to comply with a drug and alcohol policy and/or have a result from a workplace drug test which contravenes the policy.

If an employer dismisses the employee, the employee may apply to the Fair Work Commission (**FWC**) (or equivalent court or tribunal) for an unfair dismissal remedy under the Fair Work Act 2009 (Cth) (**FW Act**) – Pt 3-2.

The dismissal will be unfair (and unlawful) if the FWC finds it was harsh, unjust or unreasonable. In these circumstances an order may be made to reinstate the employee (possibly with backpay) or an order may be made requiring the employer to pay monetary compensation.

When considering whether a dismissal is unfair, the FWC considers three criteria:

- **was there a valid reason** - this may relate to person's capacity (i.e., ability to do their job) or their conduct (e.g., the failure to comply with a lawful and reasonable direction)
- **was the employee given procedural fairness** - was the person given an opportunity to respond to allegations about their conduct or capacity and did the employer genuinely consider their responses (i.e., 'natural justice')
- **are there any other relevant matters** - e.g., proportionality, mitigating circumstances, contrition and remorse, disciplinary record and the employee's circumstances which may include age, economic situation and difficulty in finding new employment.

If a person fails to comply with a drug and alcohol policy through a breach of a workplace drug test (or the failure to take that test), this will usually be a valid reason if that policy and/or testing regime can be established as being **lawful and reasonable**. A drug and alcohol policy supported by workplace drug testing is likely to be lawful and reasonable if it is necessary to ensure the safety and welfare of the employee and other people in the workplace. In relation to workplace drug testing, a positive test result may, of itself and particularly in a safety critical role, also be a valid reason for dismissal.

When assessing if there was procedural fairness, the FWC will consider various matters, including:

- **the employee's role in relation to safety** - e.g., a dismissal is likely to be lawful if the associated impairment relates to a safety critical role, such as where workers operate or drive heavy equipment or vehicles, handle heavy loads, work at heights or do tasks where errors may have significant health and safety ramifications for the worker or others in the workplace like a medical professional, or pilot, bus driver etc.;
- **the employer's approach to enforcing the drug and alcohol policy** - e.g., was it consistently applied?
- whether employees were **trained** in, and **understand**, the drug and alcohol policy;
- whether the drug and alcohol policy deals with *real* risks of impairment - e.g., where workers undertake **safety critical tasks**, this will be viewed favourably⁴.

⁴ *Sharp v BCS Infrastructure Support Pty Ltd* [2015] FWCFB 1033.

A failure to disclose the use of a drug in breach of a drug and alcohol policy may be a valid and lawful reason to dismiss an employee⁵.

Anti-discrimination laws

Anti-discrimination laws protect workers (and job applicants) who have a 'disability.' Commonwealth, State and Territory jurisdictions have legislation addressing this in similar terms.

The *Anti-Discrimination Act 1977 (NSW) (ADA Act)* provides that an employer cannot treat an employee, contractor or job applicant less favourably because they have a disability (i.e., direct discrimination). Employers cannot impose an unreasonable requirement, condition or practice with which the person cannot comply, as compared to another person who does not have the relevant disability (i.e., indirect discrimination).

The *Disability Discrimination Act 1992 (Cth) (DD Act)* provides similarly.

Is the use of cannabis a disability?

Under the ADA Act, a "*disability*" includes:

- total or partial loss of a person's bodily or mental functions or of a part of a person's body, or
- the presence in a person's body of organisms causing or capable of causing disease or illness, or
- the malfunction, malformation or disfigurement of a part of a person's body, or
- a disorder or malfunction that results in a person learning differently from a person without the disorder or malfunction, or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behaviour.

A person may be *prescribed* medication (e.g., medicinal cannabis) to treat their disability or its symptoms, including by a general practitioner or nurse. In these circumstances, the use of prescribed medicinal cannabis is treated as part of the disability. If the worker is discriminated against because they take the prescribed medication, the ADA Act (and DD Act) may mean this discrimination is unlawful.

⁵ *Haigh v Platinum Blasting Services Pty Ltd* [2023] FWC 2465

Is it discrimination to prohibit or limit the use of medicinal cannabis?

A drug and alcohol policy and/or workplace drug testing regime which prohibits or limits a person from using prescribed medicinal cannabis, may be a requirement, condition or practice with which the worker is unable to comply because of their disability - especially if there is no acceptable alternative medication. This may be unlawful discrimination.

However, the ADA allows an employer to lawfully impose a discriminatory requirement, condition or practice in certain circumstances, including where it is '*reasonable in the circumstances of the case.*' In the context of drug use, reasonable circumstances may include where there is a risk that drug-related impairment will prevent the worker from performing the genuine and reasonable requirements of their job and/or it creates risks to their or another person's health, safety or property in the workplace.

Specifically, it is likely to be reasonable in the circumstances (and lawful) to prohibit the use of prescribed medicinal cannabis if its use would diminish an employer's general safety standards under a drug and alcohol policy developed in accordance with an organisational risk assessment under WHS laws.

The impairment assessment is crucial to this analysis. However, if a job involves tasks of a safety critical nature, it is difficult to see how permitting the ongoing use of prescribed medicinal cannabis could ever be reasonable in the circumstances, given the acknowledged risks to health and safety to workers and others. We note our comments above in this regard – see [here](#).

The FW Act also protects employees from unlawful adverse action in employment where it is because of a 'physical or mental disability': section 351. This protection is different to that provided by anti-discrimination legislation. However, if the discrimination is lawful under the DD Act or ADA Act, it will not contravene s.351.

Privacy laws

The interrelationship of privacy and workplace relations laws creates an additional layer of complexity and difficulty for larger employers. The *Privacy Act 1988* (Cth) (**Privacy Act**) regulates Australian Government agencies and organisations with an annual turnover of more than \$3 million. This application may be further extended to all employers if the Australian Government removes the small business exemption, as envisaged in its response to the [Privacy Act Review Report](#).⁶ Covered organisations must comply with the Australian Privacy Principles (**APPs**) when collecting, using, storing or disclosing personal information. Relevantly, an employer covered by the Privacy Act has a responsibility to comply with the APPs when it collects health information to be kept in a record, including information about prescription medication, medical disability and workplace drug testing information.

⁶ <https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report>

While employers currently have the benefit of the employee records exemption to the APPs, the exemption does not operate at the point of collection⁷. Also, the exemption does not extend to contractor records.

This means employers must comply with the APPs as far as they relate to collecting health information, including workplace drug test results, of any worker (employee or contractor).

The Committee should also be aware that the Australian Government is considering removing the employee records exemption as part of its response to the Privacy Act Review Report. If it does this will further exacerbate the complexity because it will mean that employers will need to comply with all the APPs and not just those that apply at the point of collection⁸.

Information such as a workplace drug test result is 'sensitive information,' which means APP 3 applies. APP 3 stipulates sensitive information may only be collected with the employee's (or contractor's) genuine consent and where collecting those results is reasonably necessary to the employer's functions or activities.

Under APP 3, **consent** may be genuine even if the employee is under threat of discipline or dismissal if the workplace drug test requirement is lawful and reasonable. However, employers must also give employees adequate information and consult, amongst other actions.

The collection will be **reasonably necessary** if an employer is able to demonstrate that drug-related impairment would create safety risks to the employee or others in the workplace and that the test result is an indicator of this risk.

Employers must keep information about prescription medicine confidential and secure.

Road safety legislation

Under the *Road Transport Act 2013* (NSW), if a person has THC in their oral fluid, blood or urine it is a strict liability offence to:

- drive a motor vehicle, or
- occupy the driving seat of a motor vehicle and attempt to put the motor vehicle in motion, or
- if the person is the holder of an applicable driver licence —occupy the seat in a motor vehicle next to a learner driver who is driving the vehicle⁹.

⁷ *Knight v One Key Resources (Mining) Pty Ltd t/as One Key Resources* [2020] FWC 3324 and *Jeremy Lee v Superior Wood Pty Ltd* [2019] FWCFB 2946 and *Construction, Forestry, Maritime, Mining and Energy Union v BHP Coal Pty Ltd t/a BHP Billiton Mitsubishi* [2022] FWC 81

⁸ Government response to the Privacy Act Review Report | Attorney-General's Department (ag.gov.au)

⁹ Section 111 of the Road Safety Act 2013 (NSW)

On 9 May 2023, a private members bill was introduced to the NSW Legislative Council: Road Transport Amendment (Medicinal Cannabis) Bill 2023.

The Bill proposes inserting section 111(1A) into the *Road Transport Act 2013* to provide a defence for the offence of driving with the presence of a prescribed illicit drug in a person's oral fluid, blood or urine, THC. In his second reading speech, the Hon. Jeremy Buckingham MLC, advised that the Bill would place New South Wales in line with Tasmania, which legislated a defence for medicinal cannabis to driving offences in 2020. He further noted that the United Kingdom, New Zealand, Norway, Germany and Ireland also provide a defence for medicinal cannabis patients who test positive to THC, if they are not impaired and are using the drug as directed by a medical practitioner. The defence only arises if the defendant can prove the only drug present in their oral fluid, blood or urine was THC and that the THC was obtained and administered in accordance with the *Poisons and Therapeutic Goods Act 1966* or a corresponding Act of another State or Territory.

The Legislative Review Committee examined the Bill and concluded on 22 August 2023 that the Bill did not unduly trespass on personal rights and liabilities as the limited circumstances in which the defence applies mirrors the defence available to morphine users.

The Bill has not progressed beyond the Legislative Council at the point of writing this submission.

As the law currently stands, we note some of our members have expressed their concern with employees who may be driving to and from work unlawfully, due to the presence of THC in their oral fluid, blood or urine. This means employees using cannabis (whether prescribed or not) are also unable to lawfully drive vehicles as part of their job.

Common law obligations and duty of care

An employer has a duty at common to law to take reasonable care for the health and safety of its employees. If they fail to do so they may be negligent and will have liability for injury or harm, in addition to any workers' compensation entitlements that may arise.

This means if the employer knows an employee is using a drug such as medicinal cannabis to treat a medical condition it may create a duty for the employer to act, or increase the risk of liability for the employer if the employee's impairment causes injury or harm to person or property in the course of their duties.

Medicinal cannabis

Rapidly escalating use

Data captured by the TGA in the first 5 years following implementation of a medicinal cannabis prescribing regulatory framework in Australia displays rapidly escalating numbers of approvals to use of unregistered medicinal cannabis products, particularly since January 2020¹⁰.

This escalation in use is consistent with what members have told us and has led to significant difficulties.

Where does it come from?

Medicinal cannabis comes from the cannabis plant or from synthetically made substances which have similar effects to cannabinoids which are found in cannabis plants.

The cannabis plant contains different ingredients, including THC and cannabidiol (**CBD**). Medicinal cannabis products are diverse and have different ratios of THC and/or CBD, as well as other cannabinoids, terpenes or flavonoids which may also be present.

Since 2016, medicinal cannabis has been available to patients under medical supervision. Medicinal cannabis can be cultivated, produced and manufactured for medical purposes, but growers must have a licence and comply with strict rules. Otherwise, growing cannabis and its recreational use remains mostly illegal in Australia. In the ACT Adults may: grow up to two cannabis plants per person, with a maximum of four per household; can possess up to 50 grams of dried cannabis or up to 150 grams of fresh cannabis; and use cannabis in their home¹¹.

THC and CBD risks

Associate Professor Jonathon C Arnold,¹² recently evaluated the safety profile of medicinal cannabis products and says: "*it is important to consider the relative THC and CBD content, as CBD generally has fewer safety concerns than THC*". These are the key THC risks¹³:

- it may impair cognitive and memory function;
- it may cause intoxication depending on the dose and the patient's sensitivity, including euphoria, sedation and enhanced sensory perception;
- it may have been associated with anxiety, panic, disorientation;

¹⁰ Medicinal Cannabis Prescribing in Australia: An Analysis of Trends Over the First Five Years - PMC (nih.gov)

¹¹ [Home - Cannabis \(act.gov.au\)](https://www.act.gov.au/home-cannabis)

¹² "[A primer on medicinal cannabis safety and potential adverse effects](#)", Australian Journal of General Practice, Vol. 50, Issue 6, June 2021.

¹³ "[A primer on medicinal cannabis safety and potential adverse effects](#)", Australian Journal of General Practice, Vol. 50, Issue 6, June 2021.

- it may impair driving performance;
- it commonly has a side effect of dizziness;
- it may have a mild-to-moderate addictive quality (i.e., THC is classified as a drug of dependence); and
- rarely, it may provoke a transient psychosis and increase the risk of developing schizophrenia - and for this reason, "*doctors should not prescribe medicinal cannabis with THC content to patients who have a personal or family history of schizophrenia or psychotic disorders.*"

Associate Professor Jonathan C Arnold also acknowledges:

"doctors are cautious about prescribing cannabis. While serious adverse events are rare, there are legitimate concerns around driving, cognitive impairment and drug dependence with products containing THC. Cannabidiol-only products pose fewer risks¹⁴".

However, despite the safer profile of Cannabidiol-only products, TGA cautions as follows:

"Like all prescription medicines, medicinal cannabis products can have side effects. The extent of effects of these can vary with the type of medicinal cannabis product and between individuals. In general, the side effects of CBD-rich products are less than those for high-THC products, but because the required doses for CBD can be quite high in conditions such as paediatric epilepsies, a proportion of patients encounter side-effects with these CBD doses.

The known side-effects from medicinal cannabis treatment (both CBD and THC) include fatigue and sedation, vertigo, nausea and vomiting, fever, decreased or increased appetite, dry mouth, and diarrhoea.

THC (and products high in THC) have been associated with convulsions, feeling high or feeling dissatisfied, depression, confusion, hallucinations, paranoid delusions, psychosis, and cognitive distortion (having thoughts that are not true)."

The TGA also provides these general cautions about the use of medicinal cannabis, which substantiates our members' concerns around impairment in the workplace ¹⁵:

- *"Patients should not drive or operate machinery while being treated with medicinal cannabis. In addition, measurable concentrations of THC (tetrahydrocannabinol – the main psychoactive substance in cannabis) can be detected in urine many days after the last dose. It may take up to five days for 80 to 90 per cent of the dose to be excreted. Drug-driving is a criminal offence, and patients should discuss the implications for safe and legal driving with their doctor.*

¹⁴ [Prescribing medicinal cannabis - PMC \(nih.gov\)](#)

¹⁵ [Guidance for the use of medicinal cannabis in Australia: Patient information | Therapeutic Goods Administration \(TGA\)](#)

- *Medicinal cannabis is not appropriate for:*
 - *people with an active or previous psychotic or active mood or anxiety disorder;*
 - *women who are pregnant, planning to become pregnant or breastfeeding;*
 - *people with unstable cardiovascular disease.*
- *Patients with neurological conditions may be more likely to experience negative effects from medicinal cannabis.*
- *There is no information available on the most effective or safe dose for various conditions and symptoms. For this reason, starting doses should be low and increased over time until patients respond positively, or the negative effects outweigh the perceived benefits. Low start doses are particularly important for people with memory and thinking difficulties, liver and kidney disease, and weakness and wasting of the body due to severe chronic illness. Low start doses are also important for young people and the elderly.*
- *Doctors should:*
 - *carefully assess elderly and particularly sensitive patients;*
 - *regularly monitor interactions between medicinal cannabis and other treatments;*
 - *assess liver function when deciding to continue or stop treatment.*
- *Although there may be some evidence to suggest a benefit from medicinal cannabis treatment for one condition or symptom, this does not mean it will have benefits for other conditions, even with the same product and the same dose.*
- *There is very limited evidence to show how medicinal cannabis reacts with other approved medications."*

Comcare raised similar concerns in its recent publication - Workplace Research Monthly October 2023¹⁶ where it featured an article examining the use of medicinal cannabis and how adverse side effects may impact the performance of workers and workplace health and safety.¹⁷ Relevantly, the authors concluded:

"Adverse events associated with the use of medicinal cannabis could increase workplace risks, including decreased alertness and reaction times, increased absenteeism, reduced ability to safely drive or operate machinery and an increased probability of falling. Focused research into the risk to workers and workplaces from the use of medical cannabis and related human performance impairment is urgently warranted."

¹⁶ [workplace-research-monthly-oct23.pdf \(comcare.gov.au\)](https://www.comcare.gov.au/workplace-research-monthly-oct23.pdf) - page 12

¹⁷ O'Neill, V., Karanikas, N, Murphy, P, Medicinal Cannabis and Implications for Workplace Health and Safety: Scoping Revi Systematic Reviews, Workplace Health and Safety, Vol. 71, Issue 9, 19 April 2023 - <https://doi.org/10.1177/21650799231157086>

We also refer the Committee to the extracts set out above from the submission made by the Australasian Medical Review Officers Association to the Victorian Inquiry which outlines significant impairment risks with cannabis use, including medicinal cannabis use (Submission - Australasian Medical Review Officers Association – 5 February 2024).

Lack of regulation on the medicinal cannabis product

Unfortunately, there is currently little rigour in the regulation of medicinal cannabis products.

Few medicinal cannabis products are TGA approved and registered - currently only two.

Instead, most medicinal cannabis products are unapproved and unregistered. It is these unapproved and unregistered products which are mostly used by workers. A person prescribing these products generally requires approval under the Therapeutic Goods Administration (TGA) Special Access Scheme-B or Authorised Prescriber Scheme.

Most States and Territories have additional approval and permission requirements for the prescription of these unregistered medicinal cannabis products.

The TGA provides a list of unapproved medicinal cannabis products which were supplied via the Special Access Scheme and Authorised Prescriber Scheme during 1 January to 30 June 2023, based on mandatory sponsor six monthly reporting data submitted to the TGA. It does not include medicinal cannabis products not supplied through these schemes or outside the reporting period. A sponsor is the person or company in Australia who provides a medicinal cannabis product to the treating medical practitioner or pharmacist. Where the medicinal cannabis product is sourced overseas, the importer may also be the sponsor.

These unregistered medicinal cannabis products are categorised by reference to how much THC and/or CBD is in the product. This is vital information to assess safety risks. The five categories are:

- Category 1: CBD medicinal cannabis product (CBD ≥ 98%)
- Category 2: CBD dominant medicinal cannabis product (CBD ≥ 60% and < 98%)
- Category 3: Balanced medicinal cannabis product (CBD <60% and ≥ 40%)
- Category 4: THC dominant medicinal cannabis product (THC 60% - 98%)
- Category 5: THC medicinal cannabis product (THC >98%)

However, there is a significant problem with this as the categorisation of products **is made by the sponsor in accordance with the stated content of the active ingredients specified on the product label**. This makes the product list unreliable for all concerned.

Indeed, the TGA itself clearly places little weight on the accuracy of this information given its disclaimer:

"Product information has been self-declared by sponsors and the TGA cannot guarantee and assumes no legal liability or responsibility for the accuracy, currency, completeness or interpretation of the information. It is an offence to provide false or misleading information to a government agency. The TGA will be conducting routine compliance assessments as part of ongoing compliance audits."

This means, despite the best efforts of pharmacists and prescribers to match the product content to the TGA approval, users (and employers) cannot be confident that a product's stated content is what they get. This is an entirely unacceptable situation for **both** employers and employees given that presence of THC is the established primary cause of impairment (see discussion below). It gives false confidence for prescribers, users and employers, who may wrongly assume that, if the product is listed, its contents have been checked by the TGA as being accurate.

It also means that a worker may inadvertently place themselves and others in the workplace at significant risks of injury or harm where they use a THC-based product without knowing.

In the absence of certainty about the ingredients in medicinal cannabis, workplace drug testing for THC is the only option. Alternatively, the TGA should be required to register all products.

Workplace drug testing and impairment

As discussed above, the use of drugs and alcohol in the workplace are hazards which may impair a worker. This creates a risk to the worker's safety and that of others in the workplace. Employers, their officers and their employees each have non-delegable duties to eliminate this risk so far as is reasonably practicable.

In combination with a drug and alcohol policy, a workplace drug testing regime is commonly used by employers to ensure compliance. A testing regime checks for traces of the drugs regulated under the policy. It tests for traces of THC because THC is recognised as the main psychoactive component and the primary driver of impairment.

Increasingly, there is debate about whether a positive result for THC indicates cannabis impairment or whether it simply indicates a person is cannabinoid positive. This is because unlike alcohol and some other drugs, traces of THC may be present for some time after use.

We refer again to Submission - [Australasian Medical Review Officers Association](#) – 5 February 2024 and note the extract below in relation to ‘impairment’ and test results:

“THC is impairing, there is little doubt on that point. The question that inevitably arises as to whether a “safe” level of medical cannabis can be found that would be acceptable. As stated above, urine and oral fluid testing do not assist as they are not directly related to impairment. However, serum levels of THC do correlate well with impairment. Extensive research has even developed standards, see [AMROA] appendix (a) for details, below which it is possible that a person may not be impaired. But trying to administer medicinal cannabis to keep below these levels is fraught with problems because there is still too much uncertainty with differing body sizes, ages, metabolisms, compliance with prescriptions, dosages, frequency of use and methods of ingestion.”

In any event, establishing impairment without an objective test is highly subjective and dependent on a health practitioner’s skill. Treating health practitioners must base their assessment on a comprehensive and ongoing review, including by considering these types of questions:

- What condition is the medicinal cannabis treating?
- What is the product and what are its active ingredients?
- How will the person administer the product?
- To what extent is the manufacturer regulated and what testing is done to ensure it contains only the listed ingredients?
- What is the dosage, how often is it taken and for how long will the treatment continue?
- What time of the day is it taken?
- How long has the patient been taking the prescribed dose?
- What are the risks of the worker being impaired?
- Has the patient had any impairment which is relevant?
- Are there any other circumstances relevant to the individual which may increase the risks of impairment?
- What other prescription or other drugs is the person using?
- How does the product affect the worker's ability to perform their work safely and what tasks may be affected by the impairment?
- Is there a period which needs to pass after a dose for the worker to no longer be impaired?

- Is there anything a worker should be doing to address impairment and how is this monitored?
- Is the patient using more than one medicinal cannabis product - what additional impact does this have?
- Is the patient also using non-prescribed cannabis?
- Is the patient engaged in ongoing education about their product?
- Is the patient being monitored on a regular basis and how is this taking place?
- And finally, is the patient able to perform the genuine and reasonable requirements of their job (i.e., often referred to as 'inherent requirements')

We understand from our members that prescribers rarely take this approach and expressions such as "likely not to be impaired" are common even in the context of safety critical work. This is clearly wholly inadequate.

Adding to this difficulty is that the risk of impairment is variable depending on the characteristics of the particular worker:

"In general, AEs [adverse events] can differ for each patient due to their age, underlying health conditions, gender, weight, patient compliance, interaction with other medication, food or vitamins, and overall health (FDA, 2018). Therefore, while there is a considerable range of AEs that can arise from taking medicinal cannabis, how to manage and accommodate these safely, especially during work activities, can be a challenging proposition for both the employer and the worker."¹⁸

Our members' concerns about cannabis use and impairment (and that of the broader work health and safety, medical and scientific communities) are well exemplified in a recent Federal Court interlocutory matter¹⁹. In *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331, a dismissed worker applied to the Federal Court for an order to reinstate and return him to full time paid duties while his disability discrimination complaint was being heard by the Australian Human Rights Commission (**AHRC**). Mr Millar takes prescribed medicinal cannabis for the treatment of symptoms of Crohn's disease at night before going to sleep and at least 8 hours before commencing work. His employer, FQM Australian Nickel Pty Ltd (**FQM**) runs a mining site where safety is paramount. Mr Millar's work involved several safety critical tasks, including the manual handling of heavy loads, driving vehicles, operating forklifts, working at heights on elevated platforms and working with large pipes containing pressurised high temperature slurry where an error could cause injury or harm. FQM dismissed Mr Millar for reasons which included his failure to comply with workplace drug testing for THC and its drug and alcohol policy.

¹⁸ [Medicinal Cannabis and Implications for Workplace Health and Safety: Scoping Review of Systematic Reviews - Veronica O'Neill, Nektarios Karanikas, Adem Sav, Patricia Murphy, 2023 \(sagepub.com\)](#)

¹⁹ *Millar v FQM Australia Nickel Pty Ltd* [2022] FCA 1331

FQM communicated these concerns to the Court, many of which are shared by our members:

"...

(4) the fact that medication is medically prescribed does not change the potential impact it has on impairment of an employee's capacity to perform their role safely;

(5) an independent medical examination found that if Mr Millar continues to take medicalised marijuana and THC daily as prescribed, there is a real risk that Mr Millar will present to work to perform his role, which includes safety critical work, in an impaired state;

(6) there is a long-standing practice in the mining industry regarding the use of and testing for a wide range of drugs of impairment, regardless of whether or not those drugs are prescribed by a medical practitioner;

...

(8) Mr Millar did not provide any evidence to FQM from his treating specialist to support his use of medicalised marijuana and THC as a way to manage his disability, despite being provided with ample opportunity and time to do so and FQM requesting this information; and

(9) Mr Millar failed to acknowledge or understand that if FQM allowed him to continue working in a safety critical role at the mine site while he takes medicalised marijuana and THC daily, his drug use would create a serious safety risk not only for himself, but also other workers; and

(10) Mr Miller elected not to consider whether there were alternative management or treatment options for his disability that did not involve taking a drug of impairment daily and would ensure that he was not impaired or limited in performing his role despite FQM supporting him and providing him with opportunity and ample time to do so."

Significantly, while the Federal Court accepted Mr Millar should be reinstated on full-pay pending the outcome of the AHRC, it did not support his return to work. The Court acknowledged there were legitimate concerns to be addressed as part of the AHRC conciliation. Judge Colvin said:

(1) a considerable time had elapsed during which Mr Millar had been given an opportunity to obtain material to support the use of his medication;

(2) the only material obtained by him was a general statement to the effect that six to eight hours after taking the medication he 'would most likely not be impaired';

(3) on the available evidence, if Mr Millar is impaired at work, then there is a real safety risk to him and other employees;

(4) on the available evidence, it could not be said that the risk was negligible;

(5) a precautionary approach should be adopted in relation to matters of safety;

(6) there was no material to support the ability of a person to self-report whether they were impaired; and

(7) *there was no evidence as to the rate at which the active effect of the amounts of THC in the medication being taken by Mr Millar might be expected to dissipate.*

Consistent with this, the legitimacy of workplace drug testing for cannabis metabolites continues to be accepted by the Fair Work Commission as being fair and reasonable in a safety critical environment to manage risks of impairment²⁰:

"Testing for use rather than impairment is a blunt instrument however, as the authorities say, may nonetheless be fair and reasonable if there is not an effective way to test for impairment ...

If there is a risk that a worker might attend the workplace impaired by drugs, and there is a difficulty identifying and proving that impairment, then testing for usage rather than impairment is likely to be fair and reasonable. If a worker fails a test, and the possibility or risk that the worker was impaired when they took the test cannot be eliminated, it is prima facie fair and reasonable that the employer takes strong action including dismissal."

Our members also have these following very serious concerns:

- prescribers are often not the worker's usual doctor - this makes it difficult to rely on the necessity or appropriateness of the prescribed medicinal cannabis product:

For example, a supplier says on their website (not unlawfully): "***If your current prescribing doctor is not willing to prescribe medical cannabis, [name] can either help you find a doctor who prescribes medicinal cannabis near you, or if this is not an option then telehealth appointments are available.***" [emphasis added]

- the stated active ingredients in medicinal cannabis products may not be correct and, medicinal cannabis products stated to be free of THC, do in fact contain THC:

A member said: "*A worker got a prescription for THC-free medicinal cannabis products; he did this because he wanted to be able to drive and to ensure safety. But when tested, he was found to be THC-positive. This means the stated ingredients were not accurate and he was unwittingly driving illegally as he had THC in his system and of course was also in breach of our policy and potentially impaired at work*".

- workers may be using medicinal cannabis and recreational cannabis at the same time or failing to use it as prescribed - this can have serious consequences:

A member said: "*currently we can clearly define a negative or a non-negative drug test. If a worker has a prescription for medicinal cannabis, how are we to know if that worker is only taking the prescribed dosage and not partaking recreationally?*"

²⁰ *Reece Goodsell v Sydney Trains* [2023] FWC 3209 at paras [104] and [105] citing with approval: *Harbour City Ferries v Toms* [2014] FWCFB 6249, *Sharp v BCS Infrastructure* [2015] FWCFB 1033 and *Sydney Trains v Hilder* [2020] FWCFB 1373

- in the absence of an alternative test for impairment, the only option is workplace drug testing given that getting it wrong may be a serious safety risk (including injury or death) and this is unacceptable and a breach of duties under WHS laws;
- prescribers may have conflicts of interest if the prescriber (or the organisation they work for) has financial interests in the supply or production of medicinal cannabis and/or are overly influenced by material which asserts the safety and efficacy of medicinal cannabis products - this should be closely examined:

A member said: "From what I have heard about medicinal cannabis, it reminds me about the problems with opioids in the United States where there was a lack of effective regulation and oversight by the Food and Drug Administration and there were conflicts of interest between opioid manufacturers and some physicians, researchers and policy makers."

A member said: "One worker managed to get prescribed medicinal cannabis with an entirely on-line process with a nurse and then after this was able to join a subscription base on which medicinal cannabis products would be provided on an ongoing basis".

A member said: "I also have concerns about addiction risks and do not believe this is being dealt with properly by prescribers or being taken seriously by workers".

We respectfully ask the Inquiry to acknowledge the serious concerns employers have dealing with cannabis use in the workplace and, in particular, the use of medicinal cannabis.

We also reiterate that cannabis use, whether lawfully prescribed for medical purposes or not, creates risks of injury or harm to persons in the workplace due to impairment associated with its use. Cannabis use is not compatible with safety sensitive work. Our members must be supported in meeting their obligations under WHS laws to ensure the health and safety of all workers and other persons in the workplace.

ABOUT THE AUSTRALIAN INDUSTRY GROUP

The Australian Industry Group (Ai Group®) is a peak national employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for 150 years. Ai Group and partner organisations represent the interests of more than 60,000 businesses employing more than 1 million staff. Our membership includes businesses of all sizes, from large international companies operating in Australia and iconic Australian brands to family-run SMEs. Our members operate across a wide cross-section of the Australian economy and are linked to the broader economy through national and international supply chains.

Our vision is for thriving industries and a prosperous community. We offer our membership strong advocacy and an effective voice at all levels of government underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the resources and the expertise to meet the changing needs of our membership. Our deep experience of industrial relations and workplace law positions Ai Group as Australia's leading industrial advocate.

We listen and support our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We provide solution-driven advice to address business opportunities and risks.

OFFICE ADDRESSES

NEW SOUTH WALES

Sydney
51 Walker Street
North Sydney NSW 2060

Western Sydney
Level 2, 100 George Street
Parramatta NSW 2150

Albury Wodonga
560 David Street
Albury NSW 2640

Hunter
Suite 1, "Nautilus"
265 Wharf Road
Newcastle NSW 2300

VICTORIA

Melbourne
Level 2 / 441 St Kilda Road
Melbourne VIC 3004

Bendigo
87 Wil Street
Bendigo VIC 3550

QUEENSLAND

Brisbane
202 Boundary Street Spring Hill
QLD 4000

ACT

Canberra
Ground Floor,
42 Macquarie Street
Barton ACT 2600

SOUTH AUSTRALIA

Adelaide
Level 1 / 45 Greenhill Road
Wayville SA 5034

WESTERN AUSTRALIA

South Perth
Suite 6, Level 3 South Shore Centre 85
South Perth Esplanade
South Perth WA 6151

www.aigroup.com.au