



DRUGS AND ALCOHOL IN THE WORKPLACE

The impact of drugs and alcohol on workplace safety, performance, relations and productivity is increasingly becoming an issue for Australian employers. There needs to be greater public and industry awareness of some of the key issues in this area and ACCI is currently undertaking policy work to identify potential solutions.

Drug and alcohol use are major public health issues for Australia. Misuse of drugs and alcohol has significant cost implications for the community. Many of these impacts are well understood. For individuals and their families, it is a burden on relationships and finances. It puts pressure on an already stretched health system, as Australian governments allocate resources for treatment and deal with the health consequences of misuse. Drug and alcohol use also imposes costs in other areas of government, such as policing of illegal activities and the consequences of drug or alcohol related crime.

Drug and alcohol use also affects the workplace and many of these effects are less well understood. It adversely affects workforce participation – something our nation cannot afford with an already ageing population. It impinges on employee performance. Conduct within a workplace setting carries with it risks for safety, workplace relations and productivity. Misuse of drugs and alcohol are associated with a range of negative human resource and productivity effects such as absenteeism, turnover, decreased output/performance and lower levels of job satisfaction.

Drug and alcohol misuse also imposes costs on employers as a trigger for other forms of liability and litigation including sexual harassment and termination of employment claims.

Until now, the problem of excessive drug or alcohol consumption on our roads has been well known, but the problem of alcohol and drug impacts on the workplace have not been widely understood.

For employers, this is both a workplace safety and a productivity matter. For the community, it is largely a health matter.

DIRECT AND INDIRECT COSTS

While there are a variety of measures of the cost of drug and alcohol use to businesses, all estimates identify the cost of drug and alcohol use as very significant.

In direct terms, it often manifests itself in absenteeism as well as reduced productivity, damage to workplace and customer relationships and in some cases damage to job security and careers.

In December 2006 the *Medical Journal of Australia* published a report by the National Centre for Education and Training on Addiction at Flinders University. That report dealt with the issue of excessive alcohol consumption and its impact on the workplace. The report found that:

- the extent and cost of alcohol related absenteeism is far greater than previously reported;
- absenteeism and productivity loss by low risk and infrequent drinkers has been understated;
- 2.5 million work days were directly lost due to absenteeism arising from alcohol consumption in 2001 and indirectly 7.5 million days; and
- direct impacts on the economy were \$437 million per year and indirect impacts were \$1.2 billion.

To provide a fuller and even more concerning picture, the issue of drugs on the workplace need to be included.

A Monash University study has estimated that combined drug and alcohol use costs at least \$13.7 billion in direct and indirect costs to the Australian economy.

Drugs and alcohol are estimated to be a factor in 25 per cent of workplace accidents and 10 per cent of workplace deaths.

INDIVIDUAL RESPONSIBILITIES

Identifying the nature of the problem, and its causes, provides some basis for developing solutions.

Just as the case with reckless consumption of drugs and alcohol affecting community safety on our roads, there is no one answer. Fundamentally though, as with road safety, solutions start with individual responsibility and can be supported by collective community action in the form of education, enforcement and rehabilitation.

Employees are responsible for their own health and their productivity. Employers have a right to expect employees to present for work in a state that is safe and productive, and to clamp down on misuse of sick leave.

Employers should make workplace policy clear and remove safety risks where foreseeable and practical.

EMPLOYER DUTIES

While many employers would prefer not to interfere in an issue which is often seen as being the preserve of the private lives of employees, there are statutory obligations on employers that require some level of active management of drug and alcohol issues.

Increasingly, governments are imposing direct statutory obligations on employers in particular industries to undertake drug and alcohol testing or otherwise ensure that no employees perform work whilst under the influence of drugs and alcohol. Requirements such as these have been introduced or are soon to be introduced in the rail transport, mining and aviation industries.

In a broader sense, the general duties of employers under State/Territory occupational health and safety (OHS) laws to provide for safe workplaces extend to ensuring that employees who operate plant or equipment or perform work are not impaired by drugs or alcohol.

Beyond these statutory duties imposed by OHS laws, there is another set of concerns that motivates employer management of this issue.

The first level is what might be termed liability management. Employers are becoming increasingly aware that allowing alcohol to be consumed in a work setting often leads to other behaviour which exposes employers

to risk of litigation, such as sexual or racial harassment claims, or civil actions where employees have sued employers after injuring themselves driving home from work functions.

Employer liability here is connected to court decisions which have established that an employer has liability for work functions in a similar manner to their liability for conduct and activity that takes place in other work settings. For example, a staff Christmas party is considered to be part of 'work' and employer liability is assigned accordingly.

MANAGING RISKS

Given these impacts, there is a productivity and human resource imperative for the management of drug and alcohol use. This is particularly the case in industries where impairment carries with it significant health and safety risks (e.g. mining and transport). In those industries, there is a need for industry to have the capacity to formulate and implement policies that are appropriate to the high risk nature of work being performed. Zero tolerance policies and testing are examples of this.

In all cases, employers should be encouraged to act with sensitivity and in a proportionate manner based on genuine business criteria.

As highlighted in the ACCI OHS Policy Blueprint *Modern Workplace: Safer Workplace*, published in 2005, additional challenges are presented for small and medium employers when addressing these issues.

The regulatory environment within which employers operate is determined by the interaction of various sources of liability and legal constraint on the capacity of employers to manage. The ACCI *Modern Workplace: Safer Workplace* blueprint points to major deficiencies in both the quality and quantity of safety regulation, including contradictory obligations, obligations that impose unworkable or impossible duties and obligations enforced in an unbalanced manner.

What is required, is an overarching, rational approach to regulation which does not impose an obligation in one area of law and then undermine the capacity of employers to meet that obligation by imposing contradictory obligations drawn from other areas of law.

Employers designing and implementing drug and alcohol policies need to be aware of legislation in other areas and how that impacts on what options are available to them.

PRIVACY REGULATION

There is both federal and state privacy legislation that needs to be considered in the development of a drugs and alcohol policy. This regulates how personal information is collected and stored and its dissemination to third parties. Employers in particular need to be aware of the stricter standards that apply to information classified as health information which is particularly relevant in the context of drug and alcohol policies. Furthermore, employers in NSW should have particular regard to the *Workplace Surveillance Act 2005* (NSW) and ensure that any mechanisms or policies introduced are not in breach of their requirements under this Act. This Act places significant restrictions on the capacity of an employer to engage in either overt or covert surveillance.

Addressing policy tensions between privacy law and occupational health and safety obligations is a challenge for employers, trade unions and governments. For example, at the high water mark of this tension is the question of what constraints, if any, should the law impose on an employer that seeks to undertake drug and alcohol testing of employees. This is also an aspect of policy tension that arises in other contexts such as the debate about genetic testing.

Reconciling tensions such as these is not easy for policy makers. For employers, practical application of these principles can be very difficult, affecting not simply the rights of an individual employee, but also the rights of other employees and customers, and in some cases workplace relations and trade union relationships.

DISMISSAL LEGISLATION

There is a range of discrimination-based law in Australia that regulates the termination of employment. Applying drug and alcohol policy in a way that does not give rise to termination litigation is not an easy task. For example, some courts and tribunals chastise employers for not applying a policy in a consistent manner, yet other courts and tribunals (and sometimes even members within the same courts or tribunals) chastise employers for not being flexible enough in giving the individual circumstances of employees sufficient attention when applying policy in cases of termination or demotion.

Some lawyers and litigants even argue that an employee's addiction is a disability, giving rise to employer obligations under discrimination or workers' compensation laws.

While the exemption under WorkChoices from unfair dismissal laws for incorporated businesses with fewer than 100 staff has improved the regulatory environment

in this regard, unlawful dismissal laws still apply to all employers. Larger businesses and non-incorporated employers in some states also remain subject to unfair dismissal laws. In the past, employers have developed and then implemented drug and alcohol policies only to find that employees dismissed under these policies have been able to successfully take an action for unfair dismissal. In particular, courts and tribunals have taken a very dim view of zero tolerance policies, even when developed for very sound policy and health and safety reasons. This makes it very difficult for employers to have confidence that a drug and alcohol policy will minimise their risk of litigation.

ANTI-DISCRIMINATION LAWS

All employers remain subject to anti-discrimination laws. These can provide an alternative remedy where businesses are now exempt from unfair dismissal laws. A distinct concern has been court decisions which have determined that an addiction to drugs or alcohol may constitute a 'disability' and persons with addiction and therefore subject to the normal set of protections as people with disabilities in our community.

While the NSW Government has taken action to clarify that addiction is not a disability for the purposes of NSW anti-discrimination legislation, action has not been taken in other states. Similar action has been proposed by the Federal Government but has not been pursued in this parliament. It needs to be. If a view is taken by the courts that drug or alcohol addiction is a disability, this will significantly constrain the capacity of employers to implement effective policies on drugs and alcohol.

MANAGING RISK

It needs to be acknowledged that employers cannot operate as de facto social workers or public health professionals. There need to be reasonable limits around the role that employers should be expected to play in managing drugs and alcohol. While employers can play a role in seeking to ensure that workplaces are kept as safe as practicable and that employees do not perform work while impaired, more resource-intensive strategies involving the identification and treatment of addiction must remain the responsibility of individuals, governments and public health agencies.

Employer responses to drug and alcohol abuse will always be guided and informed by information they receive from public health authorities, OHS regulators, employer organisations and the media. Particularly in the face of new issues in drug and alcohol abuse (e.g. the rise of usage of new forms of drugs with a different profile of safety risks to other drugs) it is critically important that

employers receive the educational support they need if they are going to adequately fulfill their obligations under OHS laws. To date it is questionable that this has been achieved, at least in terms of a nationally coordinated strategy.

EMPLOYER RESPONSES

Employers can respond to drug and alcohol misuse on a variety of levels – the first being to develop an awareness of the potential effects of drug and alcohol use on their workplaces, and in particular potential risks to health and safety.

Some businesses will respond to drug and alcohol issues in an incidental or reactive manner – that is, an issue relating to a particular individual will be dealt with in the manner the employer thinks is best.

Many businesses have however put in place more systematic responses to the issue, particularly in certain industries and in larger companies. Components of these systematic responses include the development of formal, written policies on drug and alcohol use, procedures to monitor or manage drug and alcohol use in the workplace and an infrastructure for dealing with issues as and when they emerge.

NATIONAL INDUSTRY POLICY

Given the emerging nature of the issue, employer bodies have been undertaking work on the issue at a national level. In June 2006 ACCI presented a paper to the National Centre for Education and Training on Addiction which concluded that employers need new tools to develop specific capacities to manage the problem – employers are lay people and not health professionals, and often have little or no past exposure to alcohol or drug misuse or addiction.

In November 2006 ACCI convened a meeting of occupational health and safety experts from employer organisations to work on national policy guidance for employers on drug and alcohol usage in the workplace. This type of industry consultation is a key element in implementing the ACCI *Modern Workplace: Safer Workplace* blueprint.

Employer organisations, through the leadership position of ACCI on the tripartite Australian Safety and Compensation Council, also have the opportunity to engage in national discussion and strategy on these issues with senior representatives of all governments and the trade union movement.

ROLE OF TRADE UNIONS

Many trade union officials and organisers have considerable experience in dealing with the workplace interaction of drug and alcohol usage and policy implementation. Employers, particularly those in unionized businesses, should consider consulting with trade unions on these issues, with a view to assisting in the development and implementation of policy. Often, these issues have broader workplace relations impact that concern unions operating in a workplace. Equally, employers cannot and should not abrogate their responsibility for managing these issues should trade union consultation not be effective or appropriate.

INDUSTRY STRATEGIES

There is no single strategy or policy that is appropriate for businesses dealing with drug and alcohol misuse. Rather, policies should be developed following an analysis of the nature of business operations, an identification of potential risks and a consideration of what is likely to work given the culture of the business. What is likely to be effective for a large manufacturing business might not be appropriate for a small retail business.

A recent ACCI survey of 549 union and non union agreements shows that almost 25 per cent specifically address the drug and alcohol issue. They adopt a variety of innovative approaches, including:

- provision of leave to attend rehabilitation;
- the implementation of employee assistance programmes;
- disciplinary, counseling and testing protocols; and
- zero tolerance policies in industries where employee or public safety is at risk.

In the unionized sector where collective bargaining prevails, that percentage is higher. An analysis of federal collective agreements registered in December 2005 showed that 37.8 per cent addressed drug and alcohol use and 1.8 per cent referred to an employee assistance programme. Agreements addressing drug and alcohol use appear relatively common in building and construction, mining, manufacturing and transport industries.

Other policies and approaches in certified agreements include:

- the imposition of behavioural standards or

requirements (for example, that an employee attend work in a fit and presentable state and not under the influence of drugs and alcohol);

- including drug or alcohol use in the categories of behaviour which will constitute serious misconduct justifying immediate dismissal;
- a commitment to introduce a drug or alcohol policy in the workplace, and the process for doing so;
- guidelines for drug and alcohol testing in the workplace; and
- disciplinary measures for misuse of drugs or alcohol.

NEXT STEPS

There is no magic formula or one-size-fits-all solution to the problem of drugs and alcohol in workplaces. While a relatively high proportion of larger businesses have implemented strategies to manage drug and alcohol misuse, it is not an issue in all businesses and there should be no presumption that all businesses need to develop highly formalised responses.

There are however a number of approaches that can be recommended to policy makers, which will assist the better management of drug and alcohol misuse:

Recommendation 1: Allow Businesses to Develop Policies that Suit Them.

Policymakers should provide information and support for employers but should also recognise that effective management of drug and alcohol issues requires varied and individualised responses in workplaces.

Recommendation 2: Create a Regulatory Environment that Allows Businesses to Manage Drug and Alcohol Issues.

Businesses are under obligations to manage drug and alcohol issues, either through direct statutory obligations or more broadly through their duties under OHS law to maintain a safe workplace. Simultaneously, other areas of legal regulation restrict the capacity of employers to meet those duties and effectively deal with drug and alcohol issues. Policymakers should ensure that double jeopardy is removed and that employers have the management tools necessary to effectively deal with these issues.

Recommendation 3: Build Linkages and Provide Information to Employers on Drug and Alcohol Issues.

Employers are laypeople often relying on the information they receive from other sources on what the effects of drug and alcohol abuse may be and how to deal with these. In some jurisdictions, there have been initiatives

which have sought to provide information and support to employers on drug and alcohol issues. These initiatives should be broadened and intensified. In particular, as patterns of drug and alcohol use change, and as new forms of drug abuse emerge, employers will need support to understand the signs of potential abuse, effects and proper management of the issue from a health and safety perspective.

Recommendation 4: Accept Proper Limits to the Role of Employers.

Ultimately, drug and alcohol misuse is a community problem. It is the responsibility of individuals to act in a responsible manner, and of governments to address the broader health and community-based solutions. Employers seek to conduct safe, viable commercial operations. They are not social workers, or health institutions. Obligations should not be placed on employers that are excessive, unreasonable or impractical. There needs to be a clear understanding of where employer responsibility ends and the responsibilities of individuals and governments begin.

CONCLUSION

The challenge of addressing and managing drug and alcohol impacts on the workplace is an emerging issue that has been faced by some employers, but not all. Many aspects of this challenge have broader community impacts and affect a wide array of relationships. Where possible, thought should be given to the management of issues before they arise is wise. For small and medium sized employers there are special difficulties in meeting this challenge, amongst a myriad of others.

Employers could benefit from an improved regulatory environment and additional information about the effects of drug and alcohol on individuals and the health and safety risks this can pose for their businesses.

Individual responsibility, supported by collective action and common sense, provides the basis for balanced and workable solutions.

This article is adapted from a presentation made by ACCI's Manager of Occupational Health, Safety and Compensation, Christopher Harris, to the National Centre for Education and Training on Addiction in 2006. The Modern Workplace: Safer Workplace blueprint referred to in this article is available on the ACCI web site at www.acci.asn.au.