DECISION

Fair Work Act 2009
s.603 - Application to vary or revoke a FWC decision

Endeavour Energy
(C2013/1559)

SENIOR DEPUTY PRESIDENT
HAMBERGER

SYDNEY, 15 JANUARY 2014

Revoke or vary a decision.

Revoke or vary a decision; on-site drug testing.

[1] On 1 October 2013, Endeavour Energy (Endeavour, the applicant) applied to the Fair Work Commission, pursuant to section 603 of the *Fair Work Act (2009)* (the Act), seeking a variation to a decision by Fair Work Australia (FWA) made on 26 March 2012: [2012] FWA 1809 (the original decision).

[2] The original decision was made in settlement of a dispute between Endeavour and the respondent unions: the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), the Australian Municipal, Administrative, Clerical and Services Union (ASU) and the Association of Professional Engineers, Scientists and Managers, Australia (APESMA). The dispute had been referred to FWA under the terms of the dispute settlement procedure in the *Endeavour Enterprise Agreement 2010*, in accordance with section 739 of the Act.

[3] The original decision was an exercise of the tribunal's power of private arbitration. The dispute referred to FWA concerned the introduction of an alcohol and other drugs policy by the applicant. A number of issues concerning the proposed policy were in dispute between the applicant and the respondent unions, including the type of drug testing to be used. As part of the settlement of the dispute FWA determined that drug testing should be conducted using oral fluid - as proposed by the unions - rather than urine - as proposed by the applicant. FWA stated that the testing should be done in accordance with the procedures contained in the relevant Australian standard, namely AS 4760-2006: 'Procedures for specimen collection and the detection and quantitation of drugs in oral fluid'.

[4] The original decision was the subject of an appeal by Endeavour to a Full Bench of FWA. The Full Bench found that the original decision had not been attended by appealable error and dismissed the appeal.[i]

[5] The current application, to vary the original decision, was heard on 2 and 18 December 2013. Endeavour was represented by B Hodgkinson, SC and the respondent unions by Mr I Taylor, SC. Evidence was provided on behalf of Endeavour by:

- Mr Mark Greenhill (Group Advocate, Industrial Relations for Endeavour, Ausgrid and Essential Energy);
- Mr David Neville (General Manager, Health Safety and Environment, Endeavour);
- Mr Steve Korkoneas (National Operations and Technical Manager, Medvet - the applicant's supplier of drug and alcohol testing services);
- Ms Nicole Peacocke (solicitor, K&L Gates); and
- Dr John Vine (Scientific Consultant).

[6] Evidence was presented on behalf of the unions by:

- Dr Michael Robertson (Senior Consultant, Independent Forensic Consulting);
- Mr Brad Currey (Organiser, CEPU); and
- Mr Justin Page (Organiser, CEPU).

[7] In its application, Endeavour asked for the original decision to be varied by replacing the reference to oral fluid testing on the basis of AS 4760-2006 with urine based drug testing in accordance with AS 4308-2008, 'Procedures for specimen collection and the detection and quantitation of drugs of abuse in urine.

[8] Section 603 of the Act empowers the Fair Work Commission to vary or revoke a decision made under the Act (with certain exceptions), either on its own motion or on application by a person affected by the decision. There are no legislative criteria prescribing when or how this power should be exercised. However, as the applicant acknowledged during the proceedings, it is a power that is rarely exercised and in many respects is exceptional because it is contrary to the principle regarding the finality of decisions[ii].

[9] Applications to vary or revoke a decision should not be used to re-litigate the original case. It would generally be unacceptable, for instance, to allow a party, after a case has been decided against it, to raise a new argument which, deliberately or by inadvertence, it failed to put during the original hearing when it had the opportunity to do so.[iii] In this case, the applicant submitted that since the original decision was made, there has been a change in circumstances such that the applicant can no longer comply with the original decision. I agree that if there has been such a change this could constitute a reasonable basis for a variation of the original decision.

The original decision and associated proceedings

[10] In the original proceedings before FWA, the unions did not oppose the introduction of a system of workplace drug testing of employees. However the parties disagreed on the method to be used to test for drugs. Endeavour proposed the use of on-site urine testing for drugs, while the unions preferred oral fluid testing. Both parties were legally represented during the proceedings and presented expert evidence to the tribunal.

[11] Dr Vine gave evidence in the original proceedings on behalf of Endeavour. Part of his evidence was to the following effect (as summarised in the initial decision):

> 'Perhaps the factor most attractive to prospective users of oral fluid testing is the claimed effectiveness of the on-site testing devices. On the face of it this offers companies wishing to carry out testing a quick, relatively inoffensive, effective and

> reasonably reliable means of determining whether an employee has used a drug recently and who may therefore not be fit for work.
>
> On-site test devices for urine testing are also available and have been used for many years for this purpose. However, the implementation of AS/NZS 4308:2008 has provided a procedure for the validation of these devices. It is now a NATA requirement for accreditation of on-site testing that a validated device is used. If a non-validated device is used the testing report cannot claim compliance with the standard.
>
> In contrast, however, no such provision for the validation of on-site testing devices is present in the oral fluid testing standard AS 4760-2006. Without such validation, NATA has to date not accredited any person or organisation for the provision of on-site oral fluid testing.
>
> If the validation methodology currently applied to on-site urine testing devices is applied to on-site oral fluid testing devices then it is almost certain that all of them will fail to provide acceptable performance. RASL has actually evaluated several of these devices on this basis and this was the case. So currently, there is no fit-for-purpose on-site oral fluid screening device available.'[iv] (references deleted)

[12] Dr Robertson also gave evidence during the original proceedings. Dr Robertson commented on Dr Vine's evidence:

> 'Dr. Vine states that 'there is no provision in the standard for the validation of such devices in the same way that urine on-site test devices are validated', it is unclear what is meant by this statement given the standard gives no apparent direction regarding the validation of on-site testing devices;
>
> Whilst it is a requirement that urine testing devices be verified by an accredited laboratory prior to use, oral fluid devices may be verified on-site by use of quality controls to ensure they are working appropriately;'[v]

[13] Evidence was also given in the original proceedings by Dr D Allen, Managing Director, Drug & Alcohol Solutions Australia. Amongst the evidence he gave was that if a collection agency is complying with AS 4760 the on-site devices are checked for accuracy by a negative and a positive control every 25 devices.[vi]

[14] In its submissions in the original proceedings, Endeavour referred to the fact that oral fluid devices were not required by AS 4760 to be validated, and also noted that no organisation had to date been accredited to AS 4760 for on-site oral fluid testing.

[15] Having summarised the evidence presented during the proceedings, the original decision drew the following conclusions about the use of urine compared to oral fluids for on-site drug testing.

> '**38]** Both methods are susceptible to cheating. For example, cleaning one's mouth thoroughly after smoking cannabis would minimise the risk of being caught by an oral fluids test. Urine can also be adulterated. There is some evidence that saliva/oral fluid screening is less susceptible to specimen adulteration or substitution compared to urinalysis. In practice however, the likelihood of someone being in a position to cheat

effectively when a test is conducted at random and with no prior warning is in my opinion relatively low.

[39] Australian standards exist governing both methods; and there are laboratories accredited for the analysis of both oral fluid and urine samples. Systems are in place to verify on-site testing devices for both oral fluids and urine.

[40] Neither method tests directly for impairment. However, a method which tests for recent consumption (only) is more likely to identify someone who is impaired. While some witnesses regard this as a weakness, it is precisely because it only detects for recent use that oral fluid testing is a better indicator of likely impairment as a result of smoking cannabis (the most widely used drug apart from alcohol) than a urine test. Indeed, urine testing may be unable to identify that someone has smoked cannabis in the previous four hours - precisely the time frame which is most relevant for identifying likely impairment.

[41] Not only is urine testing potentially less capable of identifying someone who is under the influence of cannabis, but it also has the disadvantage that it may show a positive result even though it is several days since the person has smoked the substance. This means that a person may be found to have breached the policy even though their actions were taken in their own time and in no way affect their capacity to do their job safely. In the circumstances where oral fluid testing - which does not have this disadvantage - is readily available, I find that the introduction of urine testing by the applicant would be unjust and unreasonable. Accordingly I find that the system of drug testing that should be used by the applicant for on-site drug testing should be that involving oral fluids. This should be done on the basis of AS 4760-2006: the Australian Standard governing procedures for specimen collection and the detection and quantitation of drugs in oral fluid.'[vii] (references deleted)

AS 4760-2006: Procedures for specimen collection and the detection and quantitation of drugs in oral fluid

[16] The preface to AS-4760:2006 indicates that the objective of the standard is to 'provide requirements and guidance on the mechanisms of incorporation of drugs in oral fluid, factors that might affect drug concentration, applicability of oral fluid for drug testing and general issues related to drug detection on-site and in the laboratory. Also to ensure that the preliminary (if not already conducted on-site) and confirmatory laboratory procedures meet the needs for the detection and quantitation of drugs in oral fluid.'

[17] The first section of the standard is a general introduction and includes a series of definitions. It notes that oral fluid drug testing technology is evolving rapidly and there is yet to be an accepted 'cut-off' concentration for target drugs. Target concentrations in the standard refer to the threshold concentrations of drugs in undiluted oral fluid that should be achieved wherever possible since these represent concentrations attained some hours following common use of the listed drug. 'Initial testing - also known as a screening test - is defined as 'a valid method used to exclude the presence of the drug or class of drugs.' On-site initial testing is to be done using 'immunoassay' devices. The standard recognises that this form of testing can never definitively identify a drug. In all cases, technicians operating immunoassay devices are required by the standard to have successfully completed a course of

instruction in compliance with the standard for on-site testing and received a statement of attainment in accordance with the Australian Quality Training Framework.

[18] Section 2 of the standard deals with the collection, storage, handling and dispatch of oral fluid to the laboratory. It also refers to on-site initial testing, though the section indicates that this is described in more detail in Section 3. It states that 'It is important that whatever on-site oral fluid testing device is used, it is fit for the intended purpose of detecting drug use.' It recommends that selection of a suitable on-site device and establishment of the initial testing procedure be carried out in consultation with the accredited laboratory performing the confirmatory testing and all relevant parties. The collecting agency is required to monitor the performance of the on-site testing device. 'Collecting agency' is defined in Section 1 as 'An accredited organisation to assume professional, organisational, educational and administrative responsibility for collection, initial testing if applicable, storage and dispatch of the oral fluid specimen.'

[19] Section 2 states that 'appropriately trained individuals (collector or technician as defined in section 1) are required to assume professional, organisational, educational and administrative responsibility for all of the following: collection, initial testing, storage, and dispatch of the oral fluid specimen.' The section then goes on to deal with issues such as privacy, security, consent forms and chain-of-custody, the integrity and identity of the collected specimen, and transportation to the laboratory. It includes the following:

> 'If initial on-site testing is performed (refer to Section 3) the collector shall ensure that in the event of any unconfirmed result(s), there is a suitable separate specimen to enable confirmatory laboratory testing to be performed. This includes the provision of a separate referee's specimen at the point of collection.'

[20] Section 3 is headed "On-site initial testing". It states that 'on-site initial testing shall be performed by a technician (as defined in Clause 1.3.38) from an appropriately accredited collecting agency.' The section deals with the procedure to be used for on-site initial testing, the report to be issued to the requesting authority, the dispatch of a suitable specimen to an appropriately accredited laboratory for confirmatory testing, and record-keeping. This section provides that the collecting agency is to ensure that appropriate quality control procedures are implemented to monitor performance. It states that 'Each day, immediately prior to the testing of the specimens, a minimum of one positive and one negative quality control shall be run for each lot number used. Positive and negative controls shall be used alternately.' It then provides further details of how the quality-control testing should take place. The section also includes the following:

> 'Where a suitable proficiency testing program exists, the collecting agency shall participate. Otherwise, a minimum of 1 and thereafter 1 out of every 20 subsequent donor specimens that produced a negative result shall be forwarded to an appropriately accredited laboratory for analysis, for quality-control purposes.'

[21] Sections 4 and 5 deal with laboratory initial testing and confirmatory testing procedures respectively.

[22] 14 facilities have been accredited under Section 2 of the standard. Five facilities have been accredited under Section 4, and 10 under Section 5. No organisation has ever been accredited under Section 3.[viii]

Events since the original decision

[23] In early 2013 Endeavour told its employees that staff training on alcohol and drugs testing would be taking place from May 2013, with testing to commence six weeks after training.[ix] The on-site testing was to be conducted by Medvet.[x] Endeavour was aware that Medvet was not accredited under Section 3 of AS 4760-2006 (though it was accredited under Section 2) but was seeking this accreditation. However, the evidence from the relevant Endeavour staff is that the timetable for implementation was not conditional on Medvet obtaining Section 3 accreditation.[xi] In other words, implementation was planned to take place whether or not Medvet had obtained Section 3 accreditation.[xii] For various logistical reasons, it was decided to delay the commencement of the training until June/July 2013. While the training did eventually commence, it was then suspended on 25 September 2013.[xiii]

[24] In July 2013 the National Association of Testing Authorities, Australia (NATA)[xiv] issued a note that in the light of a number of significant technical issues it was not in a position to consider accrediting entities for testing in accordance with AS 4760-2006, Section 3 (On-Site Initial Testing). The technical issues identified by NATA were summarised as follows:

> '• There are no clearly defined cut-offs concentrations for devices published in AS 4760-2006 as there are for urine devices in AS/NZS 4308:2008;
> • Target values are only described as "nominated" target values and are very wide. The lowest concentration can be anything from the value described in Table 5.1 of AS 4760-2006 to a value above those described in Table 3.1;
> • There is no definitive criteria for what constitutes "fit for purpose" as described in AS 4760-2006;
> • There are no acceptance criteria for what constitutes a methodology or acceptance criteria for verification of devices as published in Appendix B of AS/NZS 4308:2008;
> • There is no recognised expert technical group available for consultation for oral fluid drug testing e.g. the AACB Toxicology Working Party for urine toxicology;
> • Due to the lack of a recognised technical expert group there has been inconsistency in the review of data collected at NATA assessments;
> • The expertise of NATA technical assessors has been challenged in relation to this testing due to a lack of an expert technical group;
> • There is concern as to the stability of some drug classes during the testing process, especially THC, which is com pounded by the allowance of "nominated" targets;
> • The allowance of a target screening concentrations at a level at or above the confirmatory concentration may impact on the ability of confirmatory laboratories to reproduce a non--and negative screening result due to loss of drug during transport and handling.'[xv]

[25] The notice emphasised that the decision did not affect the provision of accreditation under Section 2 (collection, storage, handling and dispatch), Section 4 (laboratory initial testing) or Section 5 (confirmatory testing procedures) of AS 4769-2006. Mr Korkoneas forwarded a copy of the NATA note to Endeavour on 23 July 2013.[xvi]

[26] On 6 August 2013, Mr Korkoneas sent an email to Endeavour which included the following: 'Onsite oral fluid testing is no longer recognised as a valid testing method. If EE

still want to perform oral fluid all samples need to be sent to the laboratory or perform onsite testing that does not meet the standard.'[xvii]

[27] On 14 August 2013, Mr Korkoneas sent a further email to Endeavour telling them that:

> '...NATA no longer recognizes Section 3 Onsite Oral Fluid testing under AS 4760-2006, until all points have been rectified to the satisfaction of NATA. The main point is that the onsite devices, have no verification criteria set as per the urine Standard ie +25% of the cut-off & -30% of the cut-off. As discussed on many occasions there are no NATA accredited organisations to perform onsite oral fluid drug testing in Australia. The only fully accredited process is to collect the oral fluid sample under Section 2 of the AS 4760-2006 Standard and then sent directly to the laboratory for screening under Section 4 of the AS 4760-2006 Standard. Is this practical for EE? The results can take up to 3 days.'[xviii]

[28] On 25 September 2013, Mr Gerard Phillips, Partner K+L Gates, wrote to the CEPU (with copies to the other respondent unions). The letter included the following:

> 'We have recently become aware of the fact that the National Association of Testing Authorities of Australia (NATA) is no longer and will not be in the future accrediting facilities to perform on-site initial drug testing of oral fluid pursuant to s.3 of the Australian Standard 4760-2006.
>
> As you are aware, the present drugs and alcohol policy requires that oral fluid testing methodology be utilised and that that testing methodology is to be carried out in accordance with s.3 of AS 4760-2006. Such a requirement is now impossible to comply with. There are, as a result of the NATA decision, no testing agencies who are accredited to test oral fluid samples in accordance with the Australian Standard. This amounts to a significant change in circumstances than that which existed at the time when the drug and alcohol policy was the subject of a dispute and "decisions" by Fair Work Australia (as it then was).
>
> The decisions in relation to the earlier dispute were made pursuant to the dispute settling procedure contained in the 2010 Enterprise Agreement and not pursuant to the terms of the 2012 Enterprise Agreement. We consider ourselves therefore to be in a position to alter the policy given the changed circumstances referred to above.
>
> The policy will be re-drafted such that the methodology to be used for testing will be on-site urine testing methodology. The new policy will be available to the parties on or before the end of October 2013 with the aim of undertaking training and implementation by the year's end. Employees will be notified of the change prior to the date when the new policy comes into operation.
>
> If the union parties to the Enterprise Agreement are of the view that the decision made by Senior Deputy President Hamberger on 26 March 2012 as upheld by the Appeal decision of Fair Work Australia given on 14 August 2012 continues in operation and is a "decision" made under the *Fair Work Act 2009*, then we are instructed to file an Application under s.603 of the *Fair Work Act 2009* to have that decision revoked as necessary and varied as necessary. This Application will be made based upon the fact

that having regard to the changed circumstances identified above, it is impossible for Endeavour Energy to comply with that decision.'[xix]

[29] The applicant's Acting Chief Executive Officer, Mr Bruce Rowley, circulated an Employee Update to all Endeavour staff which included the following:

'In July, the National Association of Testing Authorities (NATA) announced it would no longer accredit testing agencies for on-site oral swab testing. This means that we are not able to implement our drug testing program in line with the original Fair Work decision because the circumstances have changed.

Today we informed our unions that because there is no accredited oral swab testing program available, we will be using on-site urine testing. We expect our unions may seek legal advice on their position.'[xx]

[30] On 8 October 2013, Mr Vince Graham, Chief Executive Officer, Networks NSW, wrote to be Chief Operating Officers of Essential Energy and Ausgrid. His message included the following:

'As you know, in late July 2013, the National Association of Testing Authorities Australia (NATA) issued a notice regarding accreditation of on-site saliva testing devices for drug use under section 3 of AS 4760 of 2006.

The notice states that NATA will not proceed with the accreditation of on-site saliva testing and as at the date of that notice, no collection agency in Australia had achieved accreditation.

On the basis of this, it is not possible to have confidence in the reliability of on-site oral testing devices. Essential Energy has already experienced a false-positive test. The list of reasons NATA has set out in their letter open up the risks of both false positive and false negative results. Any disciplinary action taken by management in response to positive test results could be difficult to defend given NATA's accreditation concerns.

I am therefore proposing that you now suspend drug testing that utilises on-site oral fluid testing and advise our unions of the suspension.'[xxi]

[31] Mr Greenhill gave evidence that as a result of the NATA decision, Ausgrid and Essential Energy had decided to suspend all oral fluid drug testing until further notice. He added:

'I have had discussions with the Chief Operating Officers of both Ausgrid and Essential Energy who are of the view that appropriate drug and alcohol testing is an important aspect of work health and safety management particularly in the electricity industry. As a consequence of NATA's position regarding accreditation, the validity and consistency of results from all testing can no longer be relied upon. The importance of maintaining consistent and reliable results requires the testing process to be an accredited one consistent with the requisite Australian Standard.'[xxii]

[32] On 9 December 2013, Standards Australia convened a workshop to discuss matters related to the application of and issues associated with AS 4760:2006. According to a summary of the workshop produced by Standards Australia, a number of suggestions were made by the experts present of ways the standard could be improved. There was a view expressed by many of the participants that the standard should be revised as quickly as possible.[xxiii]

[33] NATA gave a presentation to the Standards Australia workshop. In his written presentation to the workshop, the NATA representative[xxiv] said that should the technical issues identified by NATA be resolved, NATA would reconsider providing accreditation for Section 3 of AS 4760-2006. He also stated that NATA's decision regarding accreditation under Section 2 of the standard

> '... does not imply that
>
> - 'the performance of Oral Fluid devices is suspect,
> - employers should not use Oral Fluid as part of their testing regime,
> - urine is the preferred option, or
> - the technical competence of testing agencies should be questioned.'[xxv] (emphasis in original)

Consideration

[34] Neither oral fluid nor urine testing is infallible. Where on-site tests are conducted - whether using oral fluid or urine - confirmatory tests need to be conducted by an appropriate laboratory before any firm conclusions can be drawn about the presence of a drug. However nothing has happened since the original decision and the subsequent appeal in 2012 to indicate that on-site oral fluid testing devices are unreliable. Particularly given NATA's specific disavowal to the contrary, it would be wrong to infer from NATA's recent decision to suspend accreditation under Section 3 of AS 4760-2006 that 'the performance of Oral Fluid devices is suspect, employers should not use Oral Fluid as part of their testing regime' or that 'urine is the preferred option'. Mr Graham's letter of 8 October 2013 strongly suggests that these erroneous conclusions were the reason why Endeavour stopped its implementation of oral fluid testing.

[35] It was understood by the tribunal and the parties at the time of the original proceedings and the subsequent appeal that no facility had been accredited under Section 3 of AS 4760-2006. In its submissions in the original proceedings, Endeavour linked the failure by NATA to have accredited anyone under Section 3 to the lack of any validation process of onsite oral fluid testing devices in AS 4760.[xxvi] The issue of the validation of devices was dealt with in the original decision. At paragraph 39 of that decision, it was noted that systems were in place to verify on-site testing devices for both oral fluids and urine. Dr Vine's concerns regarding verification of on-site oral fluid testing devices and the consequent lack of accreditation under Section 3 of AS 4760 were noted and in effect rejected, having regard to other evidence that satisfactory systems were in place to ensure effective quality control of devices. The issues raised by Dr Vine in his evidence during these proceedings largely echo the concerns he expressed during the original proceedings.

[36] Mr Korkoneas gave evidence that Medvet uses an on-site oral fluid device to detect drugs - Medvet Oral 7 - that in his view, as a qualified toxicologist, meets the requirement of

the standard - even though the standard is silent on how one deems a device fit for purpose.[xxvii] He also confirmed that Medvet Oral 7 had been independently validated by a NATA accredited laboratory confirming the device complies with the manufacturer's cut off levels.[xxviii] He gave evidence that he has a high degree of confidence about the number of false positive results (because non-negative results are sent to a laboratory for confirmation). As for false negatives, Medvet participates in a quality control program (as permitted by the standard) which indicates around 95 per cent accuracy.[xxix]

[37] A number of reasons were given in the original decision to prefer oral fluid over urine testing. The NATA notification with regard to accreditation in no way undermines those reasons. There is simply no basis to vary the original decision that testing for drugs by the applicant should use oral fluid.

[38] While I am satisfied that no change should be made to the use of oral fluid, the issue has been raised whether the applicant can comply with the requirement that oral fluid testing be conducted in accordance with AS 4760-2006.

[39] I note that the applicant did not submit during the initial proceedings that compliance with AS 4760-2006 would be impossible in the absence of accreditation under Section 3 of the Standard.

[40] It is not at issue that oral fluid testing can be done in such a way that is fully compliant with the standard. Oral fluid samples can be taken at the workplace, sent to a laboratory for screening under Section 4 and then confirmed under Section 5. The perceived disadvantage with this approach is that can take up to three days before the result is obtained.[xxx] There appears to be a clear preference by the applicant that testing be conducted on-site, with a preliminary (if unconfirmed) result available at the time the sample is taken on-site. The argument now put by the applicant is that on-site testing using oral fluid cannot be conducted in accordance with the standard in the absence of a facility that is accredited under Section 3.

[41] There was a conflict in the expert evidence as to whether it is currently possible to comply with the standard using on-site oral fluid testing in the absence of accreditation under Section 3.

[42] Dr Vine's evidence was that:

> 'As all of the technical requirements for on-site testing are contained in Section 3 and these are not described in Section 2, in my opinion, it follows that on-site testing should require specific accreditation to Section 3 of the Standard.
>
> As defined in Section 1(1.3.10) a "Collecting Agency" is "an accredited organisation" which assumes responsibility, "for collection, initial testing if applicable, storage and despatch" of the specimens. This appears to require that initial testing (on-site testing) should be carried out by an accredited organisation....
>
> ...the specific practical, technical and regulatory requirements for on-site testing are all contained in Section 3 and it is impossible to carry out testing in compliance with the Standard without reference to this section. Therefore, an organisation accredited only for compliance with Section 2 cannot, in my view, claim to be accredited for on-site testing which requires compliance with and accreditation to Section 3.'[xxxi]

[43] Dr Robertson gave evidence that:

> 'AS 4760-2006 does not appear to specifically require on-site oral fluid testing to be conducted by an organisation that is accredited under section 3 of AS 4760-2006. Whilst the intentions of Standards Australia is somewhat unclear, when compared to equivalent standard for urine AS/NZS 4308:2008, there does not appear to be any specific requirement for accreditation under section 3 only that the collection facility be appropriately accredited i.e. accredited as a collection facility (Section2). This would appear to imply that any collection agency, if accredited under Section 2 i.e. appropriately accredited, could perform initial testing and comply with AS 4760-2006.'[xxxii]

[44] Nowhere in the standard is it explicitly stated that on-site testing must be conducted by an agency with accreditation under Section 3. Instead Clause 3.1 states that on-site initial testing shall be performed by a technician from 'an appropriately accredited collection agency.' 'Collecting agency' is defined an 'accredited organisation' that assumes professional, organizational, educational and administrative responsibility for collection, initial testing if applicable, storage and dispatch of the oral fluid specimen. Clause 2.2 specifies that responsibility for the collection, initial testing, storage, and dispatch of the oral fluid specimen must be assumed by 'appropriately trained individuals'. These are 'collectors' or 'technicians' as defined in Clauses 1.3.13 and 1.3.38. Collectors are there defined as a person who has successfully completed a course of instruction in compliance with the standard for specimen collection, storage, handling and dispatch and received a certificate of attainment in accordance with the Australian Quality Training Framework (AQTF). A technician is defined as a person who conducts on-site testing. They must have successfully completed a course of instruction in compliance with the standard for on-site testing and received a statement of attainment in accordance with the AQTF.

[45] The reference in the standard to collecting agencies as 'appropriately accredited' could be read as implying that such agencies - if they are to conduct on-site initial testing - should be accredited under that section of the standard that primarily deals with such testing - that is Section 3. However even if this reading of the standard is correct, does that justify varying the original decision - and if so, how?

[46] I have already found that nothing that has happened since the original decision undermines the conclusions made in that decision regarding the appropriateness of using oral fluids rather than urine to detect recent drug use. Therefore testing should continue to use oral fluid.

[47] AS 4760-2006 continues to provide a helpful guide concerning the appropriate procedures to be used when it comes to the collection, storage, handling, and dispatch of oral fluid to the laboratory. It also provides guidance on how to conduct on-site and laboratory initial testing as well as confirmatory testing procedures. The current absence of accreditation under Section 3 does not affect the desirability of using the standard as the guide to be used in conducting oral fluid testing. It is possible that the lack of accreditation under Section 3 might mean that strict compliance with the standard is not possible, if it is desired to conduct initial on-site testing (though the issue does not arise if screening is conducted in a laboratory under Section 4).

[48] The most appropriate course in the circumstances would be a simple variation to the decision so that it provides that drug testing should be done on the basis of AS 4760-2006 as far as is practicable. Any on-site testing is to be conducted by a technician as defined in Clause 1.3.38 of that Standard engaged by a collecting agency accredited under Section 2 of that Standard using an appropriate on-site testing device as determined by the applicant's service provider in consultation with the accredited laboratory that will be performing the confirmatory testing.

[49] Given recent events it is possible that AS 4760-2006 will be varied or replaced in the not too distant future. If this occurs, the parties should consult in relation to the implications for drug testing at Endeavour Energy.

SENIOR DEPUTY PRESIDENT

Appearances:

B Hodgkinson, SC for the applicant
I Taylor, SC for the respondents

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[i] *Endeavour Energy v CEPU and Others* [2012] FWAFB 4998

[ii] Outline of Submissions for the Applicant, paragraph 10

[iii] *Metwally v University of Wollongong* [1985] HCA 28 at [7]

[iv] [2012] FWA 1809 at [18]

[v] Exhibit U4 in original proceedings

[vi] [2012] FWA 1809 at [25]

[vii] *Endeavour v CEPU and Others* [2012] FWA 1809

[viii] Exhibit U6, page 15

[ix] Exhibit E3, attachment I

[x] PN592

[xi] PN613-4

[xii] PN669, 1000

[xiii] Exhibit E3, paragraphs 24- 25, 31-33 and 37

[xiv] NATA is Australia's key organisation for the accreditation of inspection bodies, testing and measurement laboratories and proficiency testing scheme providers.

[xv] Exhibit E4, annexure A

[xvi] Exhibit U3, tab 3, PN642

[xvii] Exhibit U3, tab 4

[xviii] Exhibit E3, attachment O

[xix] Exhibit U9, attachment BC5

[xx] Exhibit U9, attachment BC4

[xxi] Exhibit U2, tab 8

[xxii] Exhibit E1, paragraph 3

[xxiii] Exhibit U7

[xxiv] Mr Andrew Griffin , who also authored the NATA notice, PN1386

[xxv] Exhibit U6

[xxvi] Endeavour's submissions dated 24 January 2012

[xxvii] PN1010

[xxviii] PN1027-8

[xxix] PN1063-1068

[xxx] PN837

[xxxi] Exhibit E7, paragraph 2

[xxxii] Exhibit U8