

Ai GROUP SUBMISSION

Inquiry into Crystal
Methamphetamine (Ice)

**Parliamentary Joint Committee on
Law Enforcement**

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GROUP

Ai Group Submission to Inquiry into Crystal Methamphetamine (Ice)

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

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1. Executive summary

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Law Enforcement's inquiry into crystal methamphetamine (Ice).

Ai Group Members have a direct interest in the Inquiry due to the significant impact the drug Ice has in Australian workplaces.

The distribution, supply and usage of Ice, directly affects Australian employers by creating significant work health and safety risks, damaging working relationships, draining labour productivity and reducing workforce participation.

The Australian Crime Commission's (ACC) report on the increase in frequency of Ice use and its purity¹ paints a bleak picture for the community and Australian workplaces. This combined with greater ease of access, including in regional areas, places Australian workplaces at risk.

A key requirement for employers seeking to manage safety risks arising from persons attending work affected by Ice is the ability to conduct workplace drug and alcohol testing.

Enabling easier access to workplace drug and alcohol testing is consistent with broader Government initiatives to reduce demand for methamphetamines in Australia.

Since the release of the ACC report, it has been anecdotally reported that "ice was the drug of choice for miners"² and a former paramedic based in Tasmania disclosed that she worked under the influence of Ice for 5 years and had never been drug tested at work.³

These stories are of great concern to employers and for these reasons Ai Group recommends:

- Recognising that drug and alcohol testing at the workplace is a key action employers can take to protect the safety of employees and the community.
- Work health and safety campaigns aimed at educating the community about the risks created by methamphetamine use in operating machinery and vehicles.
- Law enforcement agencies provide liaison services and dedicated hotlines for employers and employees impacted by Ice, including for those in regional and remote locations.
- Education resources be developed to assist employers to deal with the impacts of Ice in their workplaces, including providing details of external support services for affected employees to complement existing employee assistance programs (EAPs) provided by many employers;

¹ The Australian Methylamphetamine Market – The National Picture, Australian Crime Commission, Commonwealth of Australia 2015, p.17

² "Ice drug of choice for miners", The Age, 24 April 2015,

³ "Former Tasmanian paramedic says she worked and drove ambulance whilst high on ice", ABC News, 4 April 2015,

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2. Effects of Ice in workplaces

Generally, persons in paid employment use illicit drugs more frequently than those not in paid employment.⁴ Amphetamine use in particular is almost twice as common among those in the paid workforce as those not in paid work.⁵ This is in contrast to other drugs such as heroin and opiates where more users are not in the paid workforce.

As such, employers are directly affected by the usage of amphetamines, such as Ice, given its higher prevalence amongst employees than the unemployed.

On an industry level, the National Centre for Education and Training on Addiction (NCETA) report that amphetamine usage by employees is higher than the total workforce average (4.0%) in the industries of hospitality, transport, construction, agriculture, retail and manufacturing.⁶ This is more than double the rate of usage that was estimated by the Australian Institute of Health and Welfare (AIHW) for the entire population aged 14 years and over, at around 2% in 2010 and in 2013. Within this group of methamphetamine users, the AIHW found that Ice usage is increasing while powders usage (e.g. cocaine) is decreasing. The AIHW further found that correlated with this increasing Ice usage, more methamphetamine users were taking the drugs daily or weekly, up from 12.4% of these users in 2010 to 25.3% in 2013.⁷

NCETA further reports that the weekly use of methamphetamine among employed respondents who reported using methamphetamine in the last 12 months was particularly high in manufacturing at 17%. While monthly use was highest in the mining sector (38%) and agriculture sector (33%).⁸

In addition to usage, NCETA reports that 2.5% of the workforce reported going to work under the influence of illicit drugs.⁹ Tradespeople (3.9%) and unskilled workers (3.7%) had the highest prevalence of going to work under the influence of illicit drugs compared to professionals (1.3%) and managers (1.6%).

⁴ Bywood, P., Pidd, K., Roche, A., (2006), *Illicit Drugs in the Australian Workforce: Prevalence and Patterns of Use*, NCETA, Fact Sheet 5.

⁵ Roche, A.M., Pidd, K., Bywood, P., & Freeman, T. (2008). Methamphetamine use among Australian workers and its implications for prevention. *Drug and Alcohol Review* 27(3), 334-341

⁶ Pidd, K., Shtangey, V., Roche, A., (2008) *Drug Use in the Australian Workforce: Prevalence, patterns & implications*, NCETA, Table 5.2

⁷ AIHW 2015, *National Drug Strategy Household Survey 2013, Illicit use of drugs, key findings*.
<http://www.aihw.gov.au/alcohol-and-other-drugs/ndshs/2013/illicit-drug-use/>

⁸ Ibid, Table 5.6

⁹ Bywood, P., Pidd, K., Roche, A., (2006), *Illicit Drugs in the Australian Workforce: Prevalence and Patterns of Use*, NCETA, Fact Sheet 5

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It was further reported that employees who had attended work under the influence of drugs was highest in hospitality (7.7%) and construction (4.2%).¹⁰

Methamphetamine usage was more prevalent amongst male workers (4.8%) than female workers (3.0%) and was more prevalent for workers aged between 18 – 29 years of age.

Businesses are clearly adversely affected by employees taking illicit drugs like methamphetamines. Employers in the construction, manufacturing and transport industries are particularly affected given both the higher than average use of Ice by employees in these industries and the industry prevalence of heavy machinery and vehicle operation.

Some Ai Group Members have advised of common characteristics of the employees they have had to manage who were affected by the drug Ice. They:

- Had a period of stable employment;
- Had no prior history of disciplinary action or poor performance at work;
- Were more likely to work in regional offices or regional or remote worksites;
- Tested positive for very high levels of methylamphetamine, well above detection cut-off rates of 150ug/L.

In addition, some Ai Group Members have reported that Ice-affected employees can initially show no unusual behaviour but their behaviour can subsequently become aggressive and irrational as the Ice usage continues.

Employers consistently report that it is often impossible to determine whether an employee is under the influence of Ice without formal drug and alcohol testing.

3. Work health and safety

Australian employers operate under rigorous work health and safety laws that impose statutory duties on employers and individuals to provide a safe workplace.

Employers and individuals face high financial penalties if they breach work health and safety laws.

In discharging their statutory obligations, employers (or persons conducting a business or undertaking (PCBU))¹¹ must ensure the health and safety of workers as far as reasonably practicable. A worker is not just an employee of the PCBU, but can be (amongst other things) a customer, visitor, volunteer or contractor.¹²

¹⁰ Pidd, K., Shtangey, V., Roche, A., (2008) Drug Use in the Australian Workforce: Prevalence, patterns & implications, NCETA, Table 7.3

¹¹ See s.5 WHS Act 2011 (Cth); s.5 WHS Act 2011 (NSW)

¹² See s.7 WHS Act 2011 (Cth); s.7 WHS Act 2011 (NSW)

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The definition of a 'workplace' in work, health and safety legislation is also broad. The *Work, Health & Safety Act 2011 (Cth)* defines workplace as:

"**workplace**" is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

"**place**" includes:

- (a) a vehicle, vessel, aircraft or other mobile structure, and
- (b) any waters and any installation on land, on the bed of any waters or floating on any waters."

Accordingly, businesses which engage workers outside the confines of an established worksite, such as driving vehicles on public roads, performing work on client sites, or permitting employees to work from home, are still liable to ensure the safety of workers in those non-standard work environments. That liability cannot be transferred or delegated to another person or entity.¹³

Employer work health and safety duties therefore extend deep into the broader community. Community issues and behaviours, such as the reported prevalence of methamphetamines, including Ice, are of strong importance to business. The intersection of community drug use and workplaces is a safety issue that businesses must manage. There can be critical safety risks and hazards if they are not managed.

A key action to eliminate the safety risks associated with drug use by workers is for the employer to implement workplace drug and alcohol testing.

Workplace drug and alcohol testing detects drug levels in persons at a workplace and enables employers to ensure workplace safety by removing persons affected by drugs from the workplace. In some instances, the employment of employees who have tested positive for illicit drugs (such as Ice), may be terminated, or the employees may face other disciplinary action.

When workplace drug and alcohol testing can lead to disciplinary action or termination of employment it deters employees from using illicit drugs (such as Ice) and consequently weakens demand amongst the working population.

Workplace drug and alcohol testing can take different forms. Some employers conduct random testing, others test "for cause" where an incident or suspicion arises. Some employers adopt urine testing, and others apply oral testing. The choice of testing regime is highly dependent on the specific safety risks present in particular workplaces if an employee attends work under the influence of alcohol or drugs. The choice of testing regime can also be dependent on the availability of on-site testing facilities and the workplace dynamics between employers, employees and unions.

¹³ s.14 WHS Act 2011 (Cth); s.14 WHS Act 2011 (NSW)

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Opposition from unions to workplace drug and alcohol testing has inhibited many employers in managing work health and safety risks.

While the relevance of drug and alcohol testing to managing safety risks has generally been recognised by industrial tribunals for some time, many disputes have arisen with unions over types of testing regimes, or indeed whether testing is necessary.

In *Shell Refining (Australia) Pty Ltd, Clyde Refinery v CFMEU* [2008] AIRC 510, the Construction, Forestry, Mining and Energy Union (CFMEU) challenged the employer's right to introduce random drug and alcohol testing for employees and contractors. In his decision Senior Deputy President Hamberger acknowledged the employer's right to eliminate the health and safety risks created by employees who were under the influence of drugs and alcohol at work: (emphasis added)

"[117] Neither party in this dispute sought to argue that random testing for drugs (or alcohol) was unjust or unreasonable. However both parties also recognise that random testing is an intrusion on the privacy of the individual which can only be justified on health and safety grounds. The employer has a legitimate right (and indeed obligation) to try and eliminate the risk that employees might come to work impaired by drugs or alcohol such that they could pose a risk to health or safety. Beyond that the employer has no right to dictate what drugs or alcohol its employees take in their own time. Indeed, it would be unjust and unreasonable to do so."

The Senior Deputy President also accepted that it was reasonable for the employer to expect its contractors to comply with the worksite's drug and alcohol policy:

"[129] Finally, I turn to the issue of contractors. I note that the D&A Policy already provides that contractors must demonstrate that they have their own consistent policies. Shell has indicated that this principle is being implemented progressively. This is not unreasonable. However, it would seem appropriate to put some time line around this process. Shell should be able to advise the union within six months of the date of this decision that all contractors have adopted consistent D&A Policies. If there are any who have not done so they should be identified and a sound reason given for their failure to comply with the target date."

In a different case (*Caltex Australia Limited v Australian Institute of Marine and Power Engineers*, [2009] FWA 424), Senior Deputy President Hamberger said: (emphasis added)

"[93] Thus Caltex has an absolute obligation to obviate any risk – even one not “reasonably foreseeable” – to the health and safety of its employees at the Kurnell Refinery. The fact that there has not been an accident or injury in the past is no defence. The employer is not liable for risks that are “merely speculative or unduly remote”; however, I am satisfied that the possibility of an accident at Kurnell due to an employee being impaired by alcohol or drugs would not fall into this category. In this regard, there was no serious challenge to the evidence of Dr McCartney that there is an ongoing problem with drug and alcohol abuse in Australia, and that there is an association between alcohol and drug abuse and workplace accidents. Indeed the need to take action to prevent accidents due to alcohol and drug related problems is central to the ILO code of practice tendered as Exhibit AWU2. Moreover, Kurnell is not just any workplace. Given the hazardous nature of the materials stored there the consequences of an accident could be disastrous."

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Further, in *Holcim (Australia) Pty Limited v. Transport Workers' Union of New South Wales* [2010] NSWIRComm 1068, the Transport Workers Union (TWU) challenged aspects of the employer's drug and alcohol testing program. In that case, the Industrial Relations Commission of NSW held that drug and alcohol testing is now widely accepted across the industrial landscape and in fact the norm in the transport industry in NSW: (emphasis added)

"99. It is now difficult to argue questions of unfairness for drug testing some twelve years after the decision in the BHP Iron Ore Case in the light of the many programmes for testing that have been introduced across various industries in this country and internationally - include those relying on urine testing - and the TWU does not argue it in this hearing. It simply supports what it believes is the less intrusive option - oral testing.

100. I believe that the issue of random drug testing has certainly now been resolved throughout the industrial community generally, and the transport industry in particular. As I noted earlier in this decision, for instance, in the Mutual Responsibility for Road Safety Case the Full Bench indicated (at p.75) that a drug and alcohol policy for the transport industry should specifically allow for random testing. And as Mr Miles asserted, and as I see the position, it is now no more than a legitimate prerogative of Holcim management to implement such a drug and alcohol policy.

101. Any questions concerning the privacy of the individual employee (or, in this case, contract driver) or fairness, whilst obviously still important, must be considered in the context of the wider issue of occupational health and safety and, in the case of the drivers of any heavy vehicles, the interests of the general community which, of course, also uses public roads. Those safety concerns remain paramount, in my opinion. Whilst the genuine concerns raised by the TWU on behalf of its member contract drivers in this hearing should be borne in mind, my task essentially remains to determine the most appropriate and reliable method to adopt - an evaluation based entirely on the scientific information available and provided to me."

In an earlier decision (*BHP Iron Ore Limited v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia, Western Australian Branch* (1998) 82 IR 162), the Full Bench of the Western Australian Industrial Relations Commission in Court Session made the following conclusion about a drug and alcohol testing program: (emphasis added)

"In our view, the Programme cannot be said to be either unreasonable, harsh or unfair. On the contrary, we consider it to be both fair and reasonable. In recording this conclusion, it is important to emphasise that the Commission has been concerned only to review a particular programme for drug testing in the context of the industry in which the Company is engaged."

The more recent decision of *Cunningham v Downer EDI Mining Pty Limited* [2012] FWC 318 concerned a driver of a 580 tonne dump truck at the employer's open-cut coal mine presenting for work under the influence of Ice. On submitting to random drug testing procedures implemented by the employer, the employee produced a positive result for methamphetamine, four times above the detection cut off level.

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The employer terminated the employee's employment for breach of a cardinal safety rule prohibiting the attendance at work under the influence of a non-approved drug. The employee contested her dismissal and through her union, the CFMEU, she filed an unfair dismissal claim in the Fair Work Commission.

The Fair Work Commission upheld the employer's decision to dismiss the employee and recognised that *"Workplace drug and alcohol testing regimes are mechanisms which improve safety for workers. Individuals who attend a workplace like the Mine under the influence of drugs or alcohol endanger the lives of other workers."*¹⁴

The Commission also criticised the CFMEU for running a case that was based on notions of impairment, irrespective of the quantities of methamphetamines consumed by the employee. Their proposition was described by the Commission as deeming acceptable, *"a person driving a 580 tonne truck whilst having methylamphetamine in their body at a level 4 times the reportable cut-off rate."*¹⁵

On 26 March 2015, the CFMEU announced its approach to "best practice" drug and alcohol testing that applies a "one size fits all" program for employers regardless of the employer's operations and specific workplace safety risks.¹⁶

The CFMEU policy announcement is purportedly linked to workplace safety and was in response to the reported Ice epidemic in the community. However, the policy objectives prioritise the rights of drug-affected employees ahead of workplace safety.

Further the policy objectives focus on worker impairment rather than objective, medical drug and alcohol testing procedures underpinned by Australian Standards. Specifically it is proposed that worker impairment is determined by observations made by members of an employer's safety committee. This is equivalent to seeking to replace breathalyzer testing of car drivers with a subjective check-up by a committee of police officers or other car drivers, in order to determine if a car driver is over the 0.05 blood alcohol limit and should not drive their car.

Employer decisions based on drug and alcohol testing results can affect the safety of people, operational processes (including project deadlines), use of contractors, productivity and the employment of individuals. It is therefore important that employers are able to rely on testing procedures that are accurate, independent and deliver on-site results. Observation-driven impairment assessment is an unreliable, subjective and unsafe substitute for reliance upon objective scientific testing.

Further, the CFMEU policy also applies to *all* employees, labour hire and contractors without random selection and with no relationship to high-risk occupations relevant to the work performed. This is another sign that workplace safety is not a core objective.

¹⁴ [2015] FWC 318 at [45]

¹⁵ *Ibid* at [54]

¹⁶ <http://www.cfmeu.asn.au/news/cfmeu-proposal-for-new-impairment-policy-includes-drug-and-alcohol-testing>

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The CFMEU impairment policy should be rejected. It is far from 'best practice.' By making it more difficult for employers to conduct drug and alcohol testing regimes relevant to their workplaces and more difficult for employers to remove drug-affected employees from the workplace, the CFMEU's impairment policy runs counter to public policy initiatives to deter the demand and usage of Ice in the community.

Indeed, it was this impairment argument that was rejected and criticised by the Fair Work Commission in *Cunningham v Downer EDI* referred to above because of its inherent acceptance that the employee could still operate a 580 tonne dump truck while having 4 times the cut-off limit of Ice in her system.

Employers carry the statutory duty and liability to ensure the safety of workers and therefore it is the employer who must have the right to implement an appropriate testing regime to manage the safety of its workforce.

Ai Group Members who have workplace drug and alcohol testing regimes in place, do so to manage work health and safety risks created by drug affected employees, and to ensure the safety of their workforce. Ai Group Members have consistently reported that:

- Established random drug and alcohol testing is a deterrent to employee usage of illegal drugs, including methamphetamines; and
- Were it not for random workplace drug and alcohol testing, detection of employees affected by Ice would often not have been made.

Consequently Ai Group recommends that there be broader recognition of the role workplace drug and alcohol testing can play in minimising the incidence and frequency of Ice usage in the community.

In addition, Ai Group recommends that workplace safety regulators conduct awareness campaigns to highlight the dangers of employees operating heavy machinery and vehicles while under the influence of Ice.

4. Loss of productivity - absenteeism

The impact of ice in workplaces does not end with workplace safety. There is a high cost in lost productivity.

Higher levels of absenteeism caused by illicit drug use and time spent by employers in managing the employment of employees affected by Ice (or affected by the Ice usage of their families) eat away at business productivity and staff morale.

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On occupational levels, NCETA found that the highest drug-related absenteeism was found in skilled agricultural and horticultural workers (3.2%), science, building and engineering professionals (3.0%) and other labourers and related workers (3.0%). On an industry level, the highest drug related absenteeism rates were reported in retail (1.8%) and hospitality (1.7%).¹⁷

The increase in usage and purity of the drug, combined with greater access to it, stretches the resources of employers and co-workers to cover Ice-related absences.

The cost and disruption to employers in having to manage staff absences by internally back-filling functions or sourcing external labour elsewhere detracts from the operations and objectives of the business. The morale and output of employees and supervisors also suffer when they are required to cover for unexpected absences caused by illegal drug use.

5. Loss of productivity – damaged work relationships

The decisions of the Fair Work Commission in *Lewis v CQ Group Australia Pty Ltd*¹⁸ and *Brown v CQ Group Australia Pty Ltd*¹⁹ demonstrate the impact of Ice on employee behaviour at work. These cases concerned the behaviour of three road train supervisors in coercing a subordinate employee to withdraw cash on the employer's credit card for purchasing the drug Ice. The employer operated at a mine site. The subordinate employee alleged that he, his wife and family were physically threatened if he did not comply.

On becoming aware, the employer investigated the allegations and dismissed the three employees. Two of the employees filed unfair dismissal claims. The subordinate employee chose not to attend the hearing for fear of reprisals in giving evidence against his dismissed supervisors. As a result, the Commission concluded that it did not have sufficient evidence to establish that the employer had dismissed the employees for a valid reason as required under s.387 of the *Fair Work Act 2009 (Cth)*. The dismissed employees were each awarded compensation.

Ai Group Members report that unlike other substances such as cannabis or alcohol, the impact of Ice in the workplace is extremely difficult to manage and predict. Employers report that the erratic, volatile and irrational behaviour that can result from prolonged Ice usage often makes any constructive dialogue with the employee near impossible. As a result, employers are placed in difficult positions in resolving matters of safety at the workplace and providing, where appropriate, support for the affected employee.

In some cases, employers have had no option but to terminate the employee's employment or have seen the employee abandon his or her employment.

¹⁷ P. Bywood, K. Pidd, A. Roche, *Illicit Drugs in the Australian Workforce: Prevalence and Patterns of Use*, Information & Data Sheet 5, NCETA, reporting on 2004 National Drug Strategy Household Survey

¹⁸ [2014] FWC 8466

¹⁹ [2014] FWC 8594

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The threatening and abusive behaviours that some employers have reported from Ice-affected employees also create safety risks for co-workers, managers and customers and damage productive working relationships.

These drug-affected behaviours are all the more dangerous and threatening when they occur in regional or remote work sites where there are generally fewer community services to provide help.

In this area, employers need support. Education resources should be developed to assist employers to deal with the impacts of Ice in their workplaces, including providing details of external support services for affected employees to complement existing employee assistance programs (EAPs) provided by many employers.

In addition, Ai Group recommends that law enforcement authorities provide workplace liaison services and dedicated hotlines for employers and employees impacted by Ice, including for those in regional and remote locations.



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