



Australian Federation of Employers and Industries (AFEI)

Parliamentary Joint Committee on Law Enforcement

Inquiry into Crystal Methamphetamine

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AFEI

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The Australian Federation of Employers and Industries (AFEI), formed in 1903, is one of the oldest and most respected independent business advisory organisations in Australia. AFEI has been a peak council for employers in NSW and has consistently represented employers in matters of industrial regulation since its inception.

With members of all sizes and across most industries and affiliated industry associations, our main role is to represent, advise and assist employers in all areas of workplace management, industrial relations and human resources.

We are a leading employer party in the formulation of employer policy at the state and national level and in the conduct of major test cases. We have been a major employer representative in the award modernisation process under the Fair Work Act.

AFEI provides advice and information on employment law and workplace regulation, human resources management, occupational health and safety and workers compensation.

AFEI is a key participant in developing employer policy at national and state (NSW) levels and is actively involved in all major workplace relations issues affecting Australian businesses.

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1. The Parliamentary Joint Committee on Law Enforcement Inquiry into Crystal Methamphetamine (**Inquiry**) is examining the criminal activities, practices and methods involved in the importation, manufacture, distribution and use of methamphetamine and its chemical precursors, including crystal methamphetamine (**Ice**) and its impact on Australian society. The Committee is to do so by paying particular attention to:
 - a. the role of Commonwealth law enforcement agencies in responding to the importation, manufacture, distribution and use of methamphetamine and its chemical precursors;
 - b. the adequacy of Commonwealth law enforcement resources for the detection, investigation and prosecution of criminal activities involving the importation, manufacture, distribution and use of methamphetamine and its chemical precursors;
 - c. the effectiveness of collaborative arrangements for Commonwealth law enforcement agencies with their regional and international counterparts to minimise the impact of methamphetamine on Australian society;
 - d. the involvement of organised crime including international organised crime and outlaw motorcycle gangs in methamphetamine related criminal activities;
 - e. the nature, prevalence and culture of methamphetamine use in Australia, including in indigenous, regional and non-English speaking communities;
 - f. strategies to reduce the high demand for methamphetamines in Australia; and
 - g. other related issues.

2. AFEI is pleased to contribute to the Inquiry to offer the perspective of Australian employers. In addition, we are thankful for the opportunity to respond to the unrealistic and unwarranted calls by some that Australian workplaces (i.e. Australian employers) ought to be regarded as pivotal settings for addressing Ice use.

Ice use in Australian Workplaces—an employer perspective

3. Employers face significant challenges when it comes to Ice and other methamphetamine use by their employees. The significant challenges are not confined to those arising from the intoxicating effects of drug use whilst an employee is at work. Ice use, even during an employee's private time, can give rise to a broad array of employment relations and/or business capacity issues, such as heightened work health and safety risk, including violence, reduced productivity, absenteeism and unacceptable service quality – just to name a few.
4. When these challenges arise our members contact us for advice on their options. From this experience we have learned many things.
5. We know from experience that some employers have assisted employees in need of help while caught up in Ice and other drug use. But there are limits. Work health safety, other workplace obligations and liabilities, impact on co workers, customers and clients, past experience and future prospects shape these limits.
6. Our experience tells us that for many Australian employers the capacity to accommodate options for affected employees is beyond reach.
7. Given the work health safety risks and other impacts on business, increasingly employers are implementing zero tolerance schemes for detected usage, irrespective of where the actual usage occurs. Given what we know of the notorious effects of Ice usage and the related illegality/criminality, it is little wonder many employers are adopting or are investigating the adoption of this approach.
8. Testing for Ice usage, via multiple test methods (including urine and saliva), is a valuable tool as a deterrent to Ice usage, to promote a healthy work culture and to bring to account those who are willing to risk their employment and the safety of themselves and others by engaging in Ice usage.
9. The right to test for Ice and other drug and alcohol must be protected. Not all employers will have the need to test for alcohol and drug usage and nor should there be any compunction to do so. However employers must have the freedom to test for usage before and during employment on grounds determined by them. This right should not be fettered by defensive assertions about the invasiveness of urine testing or the fact it can detect past usage. Drug usage is illegal. Its effects in the workplace can be significant. The detection of illicit drugs such as Ice is evidence of illegal behaviour and heightened work health safety risks for employers and workers.

10. Employers who consider these to be risk factors in their operations or possess evidence of Ice and other drug usage should not have to operate in an industrial relations system in which they are unreasonably constrained in the decisions they may make in the wake of a positive test for Ice, an admission of Ice usage or where other behaviour depicts Ice usage.
11. The Fair Work Commission must adopt realistic positions when determining matters such as unfair dismissal claims or enterprise agreement disputes which follow decisions by employers to dismiss or otherwise sanction employees for drug and alcohol usage. Employers cannot be left in a “lose either way” situation wherein they are legally obliged to ensure the safety of employees, and for the success and survival of the business or organisation they must protect its reputation, quality standards and employee morale, all of which can be seriously jeopardised by drug and alcohol usage. Yet they are often hamstrung in their response due the unreasonable standards imposed on them by tribunals and courts. Where an employer decides a zero tolerance drug and alcohol policy (which incorporates a testing regime) is needed in their operations, this decision may be subject to the Fair Work Commission’s review and reversal where it decides that such a standard and testing regime is unfair.

The debate around testing

12. Employers face significant challenges in being able to manage drug and alcohol workplace risks. One significant challenge arises from the unreasonable positions taken in relation to drug and alcohol testing. Drug and alcohol testing has been viewed by unions and others as imposing an invasive and unjust obligation on employees. In the Fair Work Commission, individual members and full benches have been concerned to guard against what they regard as inappropriate and unacceptable intrusion by the employer into the private affairs of its employees. This view has given way to a default position in cases where the onus is on employers to demonstrate the need for testing measures.
13. Despite having at all times the obligation to meet the requirements of work health and safety legislation, to minimise harm to all those who are affected by these activities and despite the illegality of drug usage, employer instigated testing for the presence of drugs and alcohol may be subject to review by the Fair Work Commission which can arbitrate on what safety measures it will permit in the circumstances. Employers must usually demonstrate that they:
 - operate in a high risk or “safety critical” environment (e.g. mining, transport, use of heavy machinery);¹
 - have a properly constructed zero tolerance drug and alcohol policy and procedure which is understood and signed off by workers, in which they have been trained and kept up to date as to its requirements, which is applied

¹ *Toms v Harbour City Ferries Pty Limited* [2015] FCAFC 35; *Sharp v BCS Infrastructure Support Pty Limited* [2015] FWCFB 1033; *Cunningham v Downer EDI Mining* [2015] FWC 318

consistently, and which the courts consider to be appropriate in the circumstances;²

- comply with procedural fairness requirements of the *Fair Work Act 2009* (Cth).³

14. Not only is the reasonableness of the need for drug testing an issue in proceedings before the Fair Work Commission, so too is the purpose and method of the testing. Employers have confronted a series of inconsistent decisions on drug testing in the Fair Work Commission which have focussed on the need to demonstrate impairment,⁴ or ruled on the efficacy of one testing method over another.⁵ Employers have had to counter arguments about what should be tested and the merits of impairment and usage.

15. In relation to the debate about the purpose of testing, the pendulum has swung away from drug testing as a measure to monitor compliance with workplace policies to testing for impairment. Indeed, where there are clear policies set by an employer, taking a reasonable course having regard to their work health safety responsibilities, about the existence of drugs/alcohol in an employee's system or about acceptable (and thus unacceptable) concentrations of them, it is difficult to fathom why the question of impairment is relevant. Impairment is, without question, a subjective issue. The existence of or concentration of alcohol or drugs in an employee's system, by contrast, is reliably ascertainable.

16. Road rules now recognise the dangers of drivers affected by drugs and impose penalties for driving with the presence of Ice (and other drugs) in oral fluid, blood or urine including fines and disqualification from driving. Since random breath testing was introduced there has been a dramatic improvement in fatal crashes involving alcohol.⁶ General deterrence for drink driving, operationalised through random breath testing (RBT), has been extremely effective to date in Australia. This has been based on the principles of ubiquity (highly overt operations), uncertainty (e.g. anywhere, anytime), and the perception of meaningful penalties.⁷ This approach is now applied in roadside drug testing operations. From January 2010 to September 2013 there were about 3,900 drivers convicted of drug driving offences on NSW roads.⁸

17. In both roadside alcohol and drug testing the legislation leapfrogged over the impairment debate. It affirmed that a subjective assessment based on 'walking the line' or slurred speech tests were no longer acceptable in the pursuit of road safety. It

² *DP World Brisbane v MUA* [2014] FWCFB 7889; *Cannon v Poultry Harvesting Pty Ltd* [2015] FWC 3126

³ *Stephen Keenan v Leighton Boral Amey NSW Pty Ltd (U2015/2778)*; *Cannon v Poultry Harvesting Pty Ltd* [2015] FWC 3126 ; *O'Hanlon v Alinta Energy Flinders Operating Services Pty Ltd T/A Alinta Energy* [2015] FWC 1029 *James Charles Debono v. TransAdelaide*; *Worden v. Diamond Offshore General Company*; *Stephen Vaughan v Anglo Coal (Drayton Management) Pty Ltd* [2013] FWC 10101

⁴ *Endeavour Energy (No. 2)* [2014] FWC 198 *MUA v DP World Brisbane Pty Ltd & Ors* [2014] FWC 198

⁵ *Endeavour Energy v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia and Others* [2012] FWA 1809; *Cannon v Poultry Harvesting Pty Ltd* [2015] FWC 3126

⁶ Since the introduction of RBT in NSW crashes involving alcohol have dropped from about 40 per cent of all fatalities to the 2012 level of 15 per cent. Police conduct about 5 million breath tests each year in NSW. Transport NSW Centre for Road Safety

⁷ P Rowden et al *Roadside Drug Testing in NSW* Australasian Road Safety Research, Policing and Education Conference 2011 Perth

⁸ Transport NSW Drug Driving Fact Sheet

was recognised that road safety was more important than user rights notwithstanding that many drivers may still function above 'point 05' or while under the influence of drugs. However the more stringent limits for heavy vehicle drivers or learner drivers suggested that just functioning was not a tolerable risk position and indirectly it confirmed the efficacy of point 05 for motor cars. Prescribed alcohol limit laws are a proxy for driving impairment, with zero tolerance for the presence of drugs.

18. Employers, having a broad ranging work health and safety duty, apart from other risk factors, must be free to determine their policy parameters and testing regimes. Otherwise the Fair Work Commission becomes, de facto, the arbiter of whether employees can be required to contractually comply with the law and whether employers will be permitted to implement particular testing regimes.
19. As for the best method of drug testing, the correct position is that clearly a range of testing options should be available. The prevailing view in the Fair Work Commission that saliva testing is preferable to urine testing is unfounded and based on a combination of scientific views about the reliability of one testing method over the other and ostensible privacy concerns that look more like strategic road blocks to the exposure of illegal/contractual breaches.
20. In our submission, the position adopted by the Fair Work Commission in relation to drug testing in *CFMEU v Port Kembla Coal Terminal Limited* is the correct one. There it was noted that:

*There are a range of important benefits that are derived from the random operation of both oral fluid and urine sampling. The use of both methods overcomes the scientific and technological deficiencies that each method cannot avoid if one method is used in isolation. Further, the use of both methods provides significantly enhanced deterrent properties. Against these significant attributes the alleged privacy intrusions are matters of little realistic consequence.*⁹

21. Although we agree with the above assessment, we also observe that other aspects of the above decision highlight the apparent urge for Fair Work Commission members to think in terms of saliva testing as the "better" method of testing and impairment being the true measure of consequence. For example, the Commissioner noted:

*Although I am unable to accept the validity of the privacy concerns advanced as opposition to urine sampling, it must be recognised that oral fluid sampling has considerable benefits over urine sampling particularly in respect to its enhanced capacity to identify immediate acute intoxication which may not be detected by urine sampling. Consequently, if presented with an "either or scenario" oral fluid sampling would probably represent, on balance, a preferable option to urine sampling.*¹⁰

⁹ *Construction, Forestry, Mining and Energy Union v Port Kembla Coal Terminal Limited* (C2014/1370)[68]

¹⁰ *Ibid* [50]

22. In the workplace drug user ‘rights’ have a protected status. Employer attempts to tighten safety through drug testing run a distant second. Yet employers are liable for every safety failure. Trade union opposition to drug testing — not just for Ice — is spurred by their knowledge that drug taking is widespread. So they oppose testing and substitute observation, guesswork and uncertainty while relying on privacy concerns and level of impairment measures to defeat testing and sanctions in the workplace. Regulator guidance material also reflects a negative view of testing in the workplace. NSW WorkCover’s *Guide to Developing a Workplace Alcohol and Other Drugs Policy* unhelpfully takes the superficial and political line that drug testing has a “number of significant limitations” and that a positive test for alcohol and other drugs “*is not in itself evidence of impairment of ability to perform or intoxication*”. The bulk of the guide is concerned with employer provision of information, education, training, counselling and support and a detailed four step disciplinary procedure involving professional counselling through an employer provided EAP. All this would be of little assistance to an employer who in the event of a safety incident involving a drug affected worker attempted to rely on the defence that the worker did not appear to be impaired and thus remained at work.
23. With the growing sophistication of detection devices and mounting evidence of drug usage at work, a more recent thrust is that work itself is the cause of drug use and that it is the employer’s responsibility to educate, support and rehabilitate drug users.

Construing the workplace as a pivotal setting to address methamphetamine use

24. In its submission to this inquiry, the National Centre for Education and Training on Addiction (NCETA), suggested that “*the workplace is a pivotal setting to address methamphetamine use and related harms*”. NCETA also said: “*The workplace offers a unique opportunity for early intervention and prevention strategies.*”¹¹ NCETA also claims a causal link between work and drug use.
25. At the heart of these claims is the familiar refrain that employers should assume responsibility for an employee’s drug taking, treatment and rehabilitation. This assumes a certainty that work conditions cause drug dependency and that the work situation can and should be altered in such a manner that the drug problem will disappear. This proposition has all the hallmarks for a broad array of industrial relations issues to be raised – hours, pay, work location, supervision, control over work load and so on.
26. Submissions of the kind by NCETA represent another example of a group aiming to foist responsibility for resolving a societal problem onto employers. A similar recent example of this can be seen in the current trade union claims in the Fair Work

¹¹ National Centre for Education and Training on Addition Flinders University. Submission 27 pages 13-14.

Commission for the assumption of obligations by employers and increased worker entitlements for family and domestic violence.¹²

27. AFEI rejects the proposition that Australian workplaces should be forced to assume these responsibilities. Government should not entertain policy responses that promote further moving the workplace onto the public health agenda, thus providing a justification for more intervention and regulation in the workplace. While some workplaces may voluntarily try such strategies and initiatives to combat employee drug taking, they should not be foisted upon employers generally or on employers targeted as having “at risk” workplaces. Training, education and awareness programs, the engagement of alcohol and drug problem service providers and employee assistance programs are not available cost free nor is their efficacy certain. Somebody has to pay – and if the proposition of NCETA is accepted, it will be the employer with resultant increases in labour costs, attendant regulation and further lost productivity and competitiveness.
28. There is no evidence that the workplace is even as successful in rehabilitating drug users as other settings. In reality most workplaces, however well-intentioned and compassionate, will be unable to accommodate problem employees. What action is taken will always depend on the individual and business circumstances and cannot be “prescribed” into a particular course of action which is to apply universally or even in workplaces targeted because they allegedly have work characteristics asserted to be conducive to drug use. Academics, unions and fellow travellers may conveniently argue that work is the source of drug and other social problems but that view does not make it so and does not make workplaces “*an ideal intervention setting*”¹³ to run prevention and treatment programs. Again it is an attempt to manufacture a defence for drug users and make it more difficult for employers to run their business and respond effectively to work health safety and other risks.

¹² Fair Work Commission 4 Yearly Review of Modern Awards (Review) Matter Nos.: AM2015/1 and AM2015/2 Family and Domestic Violence and Family Friendly Work Arrangements clauses Australian Council of Trade Unions

¹³ K Pidd *Methamphetamine use in the workplace: Options for prevention and treatment* NCETA National Methamphetamine Symposium: Making Research Work in Practice May 2015; *The Workplace as an AOD Related Harm Prevention and Intervention Setting* NCETA Research Focus July 2014.