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Committee Secretary
Parliamentary Joint Committee on
Law Enforcement

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Dear Committee Secretary

Re. Inquiry into crystal methamphetamine (Ice)

We refer to Ai Group's appearance at the Joint Committee hearing in Liverpool on Wednesday 29 July 2015.

Ai Group was asked the following question on notice:

> *"CHAIR: Can you take on notice whether you think there is any legislative change that the parliament needs to look at to ensure the employer has the ability to implement a form of drug testing that is beneficial not only to the company but also to all the other employees on the site as well."*

Ai Group has considered the question and proposes some legislative amendments to remove barriers to employers implementing drug and alcohol testing as a work health and safety measure in the workplace. The proposed amendments are outlined below.

1. An amendment to section 194 (Meaning of unlawful term) of the *Fair Work Act (2009)* (FW Act) to add an additional unlawful term in a new paragraph 194(i) as follows:

"(i) a term restricting drug and alcohol testing"

Enterprise agreements are subject to restrictions in the FW Act regarding the terms that can and cannot be included. In approving an enterprise agreement, the Fair Work Commission (FWC) must be satisfied that the agreement contains no unlawful terms (s.186(4)). Unlawful terms are exhaustively listed in s.194. Our proposed amendment would add an additional item to the list in s.194, being a term that restricts workplace drug and alcohol testing.

The direct effect of the amendment would be to prevent the FWC from approving an enterprise agreement if the agreement contained a term restricting workplace drug and alcohol testing.

The amendment would also assist in addressing union arguments that "No Extra Claims" clauses and other provisions of enterprise agreements prevent drug and alcohol testing. This issue was at the centre of the decisions of the FWC and Full Federal Court in the *Wagstaff Piling v CFMEU* case[1] which related to the implementation of drug and alcohol testing on the Tulla Sydney Alliance Project in Melbourne which involved the well-recognised hazards of heavy equipment and heavy vehicles being used in close proximity to workers, the use of cranes, working at heights on bridges, the use of explosive power tools and the use of hazardous chemicals, with the additional factor that the work was carried out within metres of a busy Ring Road used by many thousands of vehicles every day.

2. An amendment to Subdivision D of Division 3 of Part 2-3 of the FW Act (which deals with terms that must not be included in modern awards) to insert a new section 155A as follows:

"155A TERMS THAT DEAL WITH DRUG AND ALCOHOL TESTING

A modern award must not include terms dealing with drug and alcohol testing"

Like enterprise agreements, the FW Act limits what terms may be included in modern awards. Subdivision D, Division 3, Part 2-3 of the FW Act identifies terms that must not be included in modern awards. Examples of terms that currently must not be included in modern awards are terms about right of entry, discriminatory terms and long service leave.

Ai Group proposes that a new s.155A be added as set out above to ensure that modern awards do not provide any limitation or restriction on drug and alcohol testing.

3. A proposal similar to Draft Recommendation 5.2 in the Productivity Commission's draft report into the Workplace Relations Framework which provides that procedural errors by an employer would not result in reinstatement or compensation for a former employee if there is a valid substantive reason for the dismissal.

If an employee commits a serious breach of work health and safety requirements then the dismissal of such employee should not be overturned due to procedural deficiencies.

[1] *CFMEU v Wagstaff Piling Pty Ltd* [2012] FCAFC 87; *Wagstaff Piling Pty Ltd; Thiess Pty Ltd v CFMEU* [2011] FWAFB 6892; *Wagstaff Piling and Thiess v CFMEU* [2011] FWA 5221.

In conjunction with implementing the above recommendation, we propose that s.385 of the FW Act be amended to add the underlined wording below:

> ***"385*** *A person has been unfairly dismissed if the FWC is satisfied that:*
>
> ***(a)*** *The person has been dismissed; and*
>
> ***(b)*** *The dismissal was harsh, unjust, or unreasonable; and*
>
> ***(c)*** *The dismissal was not consistent with the Small Business Fair Dismissal Code; and*
>
> ***(d)*** *The dismissal was not a case of genuine redundancy; and*
>
> **(e)** *The dismissal was not a case of* ***serious misconduct."***

Serious misconduct is currently defined in Regulation 1.07 of the *Fair Work Regulation 2009.* The definition includes conduct that causes serious and imminent risk to the health or safety of a person, including "*the employee being intoxicated at work"*. The Regulation states that:

> *"an employee is taken to be intoxicated if the employee's faculties are, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee is unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform."*

We would be happy to provide any further information that the Committee may require about the above proposals.

Yours sincerely

Stephen Smith
Head of National Workplace Relations Policy