



Fair Work
Australia

DECISION

Fair Work Act 2009

s.240 - Application to deal with a bargaining dispute

Caltex Australia Limited

v

Australian Institute of Marine and Power Engineers, The-Sydney Branch;

The Australian Workers' Union

(B2009/10326)

Oil and gas industry

SENIOR DEPUTY PRESIDENT HAMBERGER

SYDNEY, 19 OCTOBER 2009

Random drug and alcohol testing; whether justified; the need for appropriate safeguards.

The dispute

[1] This matter concerns an application by Caltex Refineries (NSW) Pty Ltd and Caltex Lubricating Oil Refinery Pty Ltd (Caltex, the applicant) for Fair Work Australia (FWA) to deal with a bargaining dispute pursuant to s.240 of the *Fair Work Act 2009* (the Act).

[2] S.240 of the Act states

“(1) A bargaining representative for a proposed enterprise agreement may apply to FWA for FWA to deal with a dispute about the agreement if the bargaining representatives for the agreement are unable to resolve the dispute.

(2) If the proposed enterprise agreement is:

(a) a single-enterprise agreement; or

(b) a multi-enterprise agreement in relation to which a low-paid authorisation is in operation;

the application may be made by one bargaining representative, whether or not the other bargaining representatives for the agreement have agreed to the making of the application.

(3) If subsection (2) does not apply, a bargaining representative may only make the application if all of the bargaining representatives for the agreement have agreed to the making of the application.

- (4) If the bargaining representatives have agreed that FWA may arbitrate (however described) the dispute, FWA may do so.”

[3] The dispute relates to a proposed enterprise agreement between the applicant and the Australian Workers Union (AWU) that would cover employees located at the applicant’s Kurnell refinery in New South Wales. The employees are engaged as Refinery Technicians in the refining of crude oil to produce petrol, diesel, jet fuel, fuel oils, LPG, propane, butane, bitumen, lubricants, lubricating oil base stocks, waxes, process oils, and sulphur.

[4] Caltex and the AWU are parties to a certified agreement known as the *Caltex Kurnell/AWU Manufacturing Agreement 2006* (the 2006 agreement) which was certified on 3 March 2006 and has a nominal expiry date of 31 January 2009.

[5] In November 2008 Caltex and the AWU commenced meeting in order to negotiate a new collective agreement. A large number of formal meetings have been held between negotiators from the AWU and Caltex. On 7 July 2009 Caltex made a final offer to the AWU, This was rejected by the AWU on 10 July 2009.

[6] Caltex subsequently made the application currently under consideration on 15 July 2009.

[7] A conciliation conference presided over by FWA was held on 28 July 2009. In addition to Caltex and AWU, the conference was attended by a representative of the Australian Institute of Marine and Power Engineers (AIMPE), which also has members employed as Refinery Technicians at Kurnell and has its own certified agreement with Caltex. It has been accepted that the dispute also encompasses AIMPEE. Following the conference I sent the following letter to the AWU, AIMPE and Caltex:

“The parties have reached agreement at today’s conference on the following:

There will be a four week period during which there will be meetings to identify areas of agreement and disagreement on the issue of drug and alcohol policy.

Meetings will then take place on three days per week during this period. The AWU will have two delegates present and AIMPE will have one. Full time union officials will have an open invitation to attend the meetings.

There will be a report back to FWA after two weeks, and a further report back at the end of the four week period, at which the parties will identify areas of agreement and disagreement.

Any areas of disagreement will be subject to arbitration by FWA. Both parties are committed to accepting the outcome of this arbitration.

The enterprise agreement will be finalised on the basis of the previous understandings reached.

The drafting of the agreement, to bring it into line with the FW Act, will be completed as soon as possible and submitted to a vote of the refinery technicians at Kurnell in accordance with the requirements of the Act.

The enterprise agreement will include a commitment to implement a drug and alcohol policy as determined by this process. In addition, the enterprise agreement will include a commitment to implement a Fitness for Work Policy during the term of the agreement.”

[8] ‘Report back’ conferences at FWA were subsequently held on 11 and 25 August 2009. The parties drafted a document entitled ‘Summary of Positions in respect of Drug & Alcohol issues’. This document, which summarised the areas of disagreement between Caltex on the one hand, and the AWU and AIMPE (the unions) on the other, was then referred to FWA for arbitration. A copy of the document is attached to this decision as Appendix A.

[9] Hearings were conducted on 1, 2 and 3 September 2009. Caltex was represented by Mr Darren Perry, a partner with Freehills. The AWU was represented by Mr Arthur Moses SC, and AIMPE by Mr Joseph Fallone.

The evidence

[10] The following were called to give evidence on behalf of Caltex:

- Mr John McNally (Acting Operational Excellence Champion, Refining);
- Mr Brett Chatterton (Drug and Alcohol Policy – Project Manager);
- Mr Fiore Zulli (Engineering Projects Manager and Acting Reliability Manager);
- Mr James Mitchell (Human Resources Manager, Kurnell Refinery);
- Dr Robert McCartney (Medical Director, Prime Health Queensland).

[11] The following were called to give evidence on behalf of the unions:

- Mr Peter Wilkinson (Caltex Group Manager for Operational Excellence and Risk);
- Dr Yossi Berger (National Occupational Health and Safety Officer, AWU);
- Mr Graeme Grace (Refinery Technician, Kurnell Refinery); and
- Mr Gary Wicks (Refinery Technician and Sites Coordinator, Kurnell Refinery).

[12] Central to the issues in dispute is the Caltex Drug and Alcohol Policy together with the related Drug and Alcohol Procedures (collectively the D&A Policy). The most contested aspect of the policy is the inclusion of random testing for drugs and alcohol (as opposed to testing only on a ‘for cause’ basis).

[13] Mr Wilkinson described the initial impetus for the policy thus:

“I think there was a feeling that in the context of what was happening in the oil and gas industry. In 2005 there has been a significant disaster in BP. Our customers were often asking how we handled this issue. Our contractors had queried whether or not we were going to have a drug and alcohol policy and more locally we saw other companies in a similar line of business introducing these sorts of policies and I think that we felt in the leadership level, and directors also felt that we probably weren’t meeting our duties

under OHS legislation or common law duties if we didn't have this sort of process in place.”[PN1749]

[14] Mr Wilkinson expanded on this during cross examination. In particular, he referred to the fact that a director of the company had inquired about the issue as he sat on other boards that had introduced random testing, that the Civil Aviation Safety Authority (CASA) had introduced testing, and the introduction of random testing at Shell, a major competitor of Caltex. He added:

“I think the view was that what was reasonable for Caltex to do to meet its duties of care had changed over the years and it was now implicitly required of us.”[PN1855-1859]

[15] Mr Chatterton's evidence [Exhibit C5, paragraph 6] is that a decision was taken in May 2008 by the Compliance and Risk Committee of Caltex (CRC) to develop and implement a group wide alcohol policy. The policy was to include certain key features. These were contained in an attachment to Exhibit C5, and included the following:

- Caltex to develop in 2008 a Group wide Drug and Alcohol (D+A) policy as one part of a Fitness for Work Framework (FFW).
- The Caltex D+A policy should use consistent principles across the Group unless there are justifiable reasons for any variation.
- Allow for departments to implement the D+A policy at different time.
- The Caltex D+A policy should contain random testing as a deterrent to D+A use by all employees and workers on all Caltex sites. Executive positions should also be subject to random D+A testing
- The Caltex D+A policy should include “for cause” (i.e. reasonable suspicion) and post incident testing, in addition to random testing.
- Caltex should use saliva testing for drugs and breath-analysers when testing for alcohol
- The consequences for returning a positive D+A test should be dealt with under the Caltex Counselling and Discipline Policy. Employees who self report D+A problems will have access to D+A counselling and rehabilitation with some company funding
- All employees who will be subject to D+A testing will receive appropriate education/awareness sessions on D+A from external contractors with appropriate medical expertise.”

[16] A Task Force was established to assist with the development and implementation of a drug and alcohol policy [Exhibit C5, paragraph 10]. A draft policy was approved by the CRC in October 2008. [Exhibit C5, paragraph 13]

[17] Mr Chatterton stated, during cross examination, that he was not aware of any risk assessment being undertaken in relation to whether random drug testing was appropriate. The Task Force did however recommend that a risk assessment be conducted to determine which sites were safety critical. [PN628-639] He indicated during re-examination that sites where large quantities of flammable materials did not require a risk assessment. However when it came to other parts of the business, such as Head Office or service stations, then a risk assessment was required because it was marginal whether there would be any benefits in performing random drug and alcohol tests in those sites.

[18] Caltex is now in the process of implementing the D&A Policy across the organisation. According to Mr Mitchell's statement [Exhibit C8] implementation has already occurred throughout Caltex's aviation operations. At the time of the hearing it was being rolled out at all Caltex distribution terminals with 'go live' dates having commenced in mid August 2009 and continuing. It is the company's intention that the policy will be implemented at the Kurnell and Lytton refineries this year. (Mr Mitchell indicated during cross examination a 'target date' of 19 November 2009. [PN947])

[19] A copy of the policy was annexed to Mr Chatterton's statement. The D&A policy document itself is only two pages. The policy document is headed 'draft' but as Mr Chatterton said at paragraph 12 of his statement "*the documents are labelled as drafts not because they are unfinished, but because of the ongoing employee consultation process. The Draft Policy will remain marked 'draft' until the implementation group wide has been completed.*"

[20] He added during cross examination:

"It's a draft policy and the reason it's a draft policy is that it will remain a draft policy until every employee who is impacted by it has had an opportunity to be part of that process, till the consultation process is complete.

It may change? --- It may change, yes." [PN542-543]

[21] The policy document states:

"The company is committed to providing safe workplaces and systems by eliminating or, when this is not possible, minimising conditions and work practices that may lead to personal injury. The use of illegal drugs and misuse of legal drugs, alcohol or other substances can seriously threaten safety, health and the environment.

Our policy on drugs and alcohol has been established to eliminate this safety threat. From time to time the company may vary its D&A Policy or procedures in order to improve achievement of this objective.

The Drug and Alcohol Policy operates at Caltex and its subsidiaries. The policy (as varied from time to time) applies to Employees, Contractors, people performing work for or on behalf of Caltex, those providing services to or for Caltex and visitors to Caltex sites (collectively, "Individuals").

Individuals must not:

- possess, sell, distribute or take illegal drugs; or
- be affected by alcohol or drugs to the extent that there is a risk to their safety or the safety of others; or
- If tested for alcohol or drugs, return a “Positive” test result, as specified in the Drug and Alcohol Procedures.

These obligations apply to individuals:

- during Working Hours;
- at Work-Based social events;
- when Individuals perform services or work for or on behalf of Caltex (including driving);
- when Individuals visit Caltex sites and premises; or
- at any time an Individual drives a company-owned vehicle.

No Individual will be allowed to enter or remain on a site or perform work when Caltex forms the view that a person’s behaviour may create a risk to safety.

Violation of this policy by an Employee may result in counselling and disciplinary action, up to and including termination of employment. Any other person violating this policy may be removed from Company premises, and in the case of a Contractor, their contract may be terminated. Further, local law enforcement agencies may be advised of suspected violations of the law.

Caltex will endeavour to create a safe working environment by:

- taking a zero tolerance approach to the use, possession, sale or distribution of illegal drugs or improper use of legal drugs;
- continuing to provide an EAP service which may be accessed by employees to help overcome any drug and alcohol related problems that could impair safety at work;
- implementing testing for drugs and alcohol at Caltex workplaces to minimise the safety risk posed by the use of these substances;
- appropriately managing people who breach this policy with a view to ensuring workplace safety.

Individuals are required to:

- read the D&A Policy and Procedures (as varied from time to time) and attend training as required;

- ensure that they are not affected by drugs or alcohol in breach of the D&A Policy and Procedures;
- raise any concerns about their possible drug or alcohol impairment with their manager;
- raise concerns about another person's possible drug or alcohol impairment with that person and/or their manager;
- notifying a relevant manager of any situation where the D&A Policy has been breached; and
- undergoing drug and alcohol testing as required by Caltex or regulatory bodies.

The D&A Policy should be read in conjunction with the company's Drug and Alcohol Procedures."

[22] The D&A Procedures state that individuals must not exceed the lower of either a blood alcohol content (BAC) reading of less than 0.05% or 0.02% when driving a heavy vehicle or refuelling an aircraft. They also state that:

"Regardless of drug and alcohol testing, where a Manager forms the view that a person's behaviour may create a risk to safety, the person will be asked to cease duties."

[23] The D&A Procedures contain a table with "target concentrations" for a range of drugs, indicating that 'a "Positive" test result is a confirmatory drug test result which registers a reading equal or above' these levels. They also state:

"Where an individual requires prescription or other legal medication for health purposes, they must obtain advice from a medical practitioner or pharmacist to establish whether such medication will impair their fitness for work. Where medication creates a risk of a breach of this policy then Individuals should discuss this issue with their manager or HR representative before commencing work so that appropriate steps can be taken to ensure that no safety risk occurs. If an Individual has complied with this process and registers a Positive result for a substance which is consistent with the individual's disclosure, then they will not breach this policy."

[24] The D&A Procedures state that individuals may be required to undergo testing for drugs or alcohol in the following circumstances:

- where it is required by law or by a regulatory authority;
- where an accident occurs or nearly occurs and the company determines it reasonable to establish whether alcohol or drugs may have been a contributing factor;
- at any time the company decides that for safety purposes a random testing program should be implemented;

- where there is a reasonable suspicion that a person has drugs and/or alcohol in their system equal to or exceeding 'defined cut off levels;
- where an individual seeks to return to work having previously registered a positive test result, or informed the company that they had a drug or alcohol problem.

[25] The D&A Procedures state that a schedule for random testing will be determined by Caltex based upon its assessment of risk to health and safety and the following may be required to participate in random testing:

- employees working at or attending safety critical sites;
- designated contractors; and
- members of the Caltex Leadership Team, irrespective of their location.

[26] The D&A Procedures state that drug and alcohol testing will be conducted by suitably trained personnel, engaged specifically for the purpose. Alcohol testing will be conducted using a breathalyser complying with Australian Standard no. 3547:1977. Drug testing will be conducted using a saliva sample, with an oral fluid analysis in accordance with AS 4760:2006.

[27] The D&A Procedures state that if an employee tests positive for alcohol they will be directed to cease work, and may be provided with transportation from the site. If an employee's initial test for drugs is positive, a further sample will be sent to the authorised laboratory for a confirmatory test. Following consultation with the Medical Review Officer, the employee will either be allowed to continue working while waiting for the confirmatory test result or will be directed to cease duties (on pay). A refusal to undergo an alcohol or drug test, or an attempt to falsify a test result, will be treated as a serious breach of the policy.

[28] The D&A Procedures state that in the event of an employee breaching the policy, Caltex's Counselling and Disciplinary Policy and Procedures will be applied, which might result in dismissal. Where an employee advises their manager or an HR representative that they are adversely affected by drugs or alcohol this could be treated as an important mitigating factor.

[29] The D&A procedures also state that counselling and support for employees regarding any use or misuse of drugs or alcohol is available through the Employee Assistance Program with the costs met by the employer (within certain limits).

[30] The D&A Procedures indicate that Caltex will engage a Medical Review Officer (MRO) for the purposes of assisting with the implementation of the D&A Policy. The MRO is to be a qualified, registered medical practitioner who has specialist knowledge of the medical and health effects of drugs and alcohol. The MRO is to be responsible for assessing the results of drug and alcohol tests and consulting with and advising the relevant managers in relation to the results.

[31] The D&A Procedures state that the company will comply with applicable privacy laws in respect of information collected under the D&A Policy. Test results may be released to the MRO and Caltex personnel “*as may be necessary*”. Positive test results may be retained for up to seven years. The D&A Procedures also state:

“The company may release an individual’s test results to other parties in circumstances where:

- (a) drug or alcohol test results become subject to dispute;
- (b) the application of the D&A Policy or any actions taken in respect of the D&A Policy become the subject of a dispute; or
- (c) it is required to do so by law.”

[32] Mr Chatterton in Exhibit C5 outlined the implementation process for the D&A Policy and Procedures. This involves four phases, and occurs on a business unit by business unit basis. Phase 1 is essentially a planning phase. Phase 2 relates to consultation with employees. It involves tool box discussions with small groups of employees where the policy is introduced and employees are provided with a pack of documents. As well as the policy documents a ‘Frequently Asked Questions’ document and a ‘Feedback Form and email address for providing feedback’ is included. The covering letter to employees states that

“We value your feedback and would like to know if you have any concerns or questions regarding the introduction of the Drug and Alcohol Policy. If you do have concerns and are not satisfied with the outcomes or objectives of the policy, we want you to tell us, so that we have an opportunity to respond to your concerns.”

[33] Mr Chatterton’s evidence was that the employee feedback process had led to minor amendments being made to the policy. For example, he indicated that a proposal that two managers be required to agree that a ‘for cause’ test is justified before an employee can be required to undertake such testing was scheduled for discussion and might be incorporated into the policy. [Exhibit C5, paragraph 22]

[34] Phase 3 is the education and training phase of the process where employees are required to attend a training session delivered by Medvet Laboratories (who have been engaged by Caltex to provide testing services) and a company representative. The training covers the effects of drugs and alcohol on workplace performance, the testing procedures and the D&A Policy and Procedures. Phase 4 is actual implementation. According to Mr Chatterton, a gap of around two weeks is usually allowed between the final two phases to give an opportunity for anyone with drug or alcohol issues “*to commence corrective behaviours*”.

[35] According to Mr Chatterton

“The Task Force formed the view that random testing was an important feature because it provides real deterrence to Individuals who may compromise safety at Caltex work sites as a result of their alcohol and drugs use. It also demonstrates to Caltex managers and supervisors that an effective process is available and must be used to manage

employees who are not fit for work due to drug and alcohol issues.”[Exhibit C5, paragraph 46]

[36] Mr Chatterton said that it had been decided to restrict random testing to Safety Critical Sites and members of the Caltex Leadership Team and their direct reports because this would “*allow maximum focus in the areas of greatest risk within the business.*” [Exhibit C5, paragraph 49]

[37] It is not contested that the Kurnell refinery has a unique set of safety and environmental risks and is classified as a ‘Major Hazard Facility’ under the *Occupational Health and Safety Regulations* in New South Wales (NSW). According to Mr McNally, it is appropriate to designate the whole refinery site as ‘safety critical’ [Exhibit C4, paragraph 34]. His evidence was that certain activities, such as driving a truck or performing maintenance, when performed in a refinery, involve increased risk. For example, if a truck were to run off the road in a refinery it could run into pipes containing hydrocarbons. This could lead to a serious fire, and possibly an explosion causing multiple fatalities. Mr Chatterton noted that oil refineries store extremely large quantities of flammable materials.

[38] Mr Chatterton’s evidence was that it had been decided to test the Caltex Leadership Team on the basis that the members are required, on a regular basis, to make important decisions which have the potential to have significant safety and financial impacts. [Exhibit C5, paragraph 55]

[39] Mr Chatterton outlined the process he anticipated would occur in selecting individuals for random testing at the Kurnell refinery:

“There are groups of workers at the Kurnell refinery who will be subject to random testing:

- 5 shifts of Refinery Technicians of approximately 50 employees each;
- approximately 300 day workers, including refinery technicians, reliability (maintenance), engineering; laboratory workers, clerical and administrative staff, etc.;
- 3 shifts of 3 chemists in the refinery laboratory; and
- Approximately 400 contractors, mostly on day work.

Caltex will provide Medvet with a list of all employees/contractors for each of the groups above. This list will be used by Medvet to identify which of the individuals will be selected for testing on the particular testing occasion. The random means by which Medvet will select the Individuals for testing has yet to be determined.”[Exhibit C5, paragraphs 83-84]

[40] Mr Chatterton indicated that the number of random tests would result in around 50% of all Individuals at each Safety Critical Site being tested in any one year. The number of persons tested from each category of individuals on site would be proportionate to the number

of Individuals in that category. [Exhibit C5, paragraphs 85-86] Because of the greater risks associated with shutdowns, random testing would be increased at such times.

[41] During cross examination, Mr McNally indicated that he was not aware of Caltex finding any drugs or alcohol, or of any employee being impaired by drugs or alcohol, at the Kurnell site since 2005 [PN298-302]. He also indicated that Caltex had not completed a formal risk assessment in relation to the issue of the use of drugs and alcohol at the site [PN304]. He suggested during re-examination that such an assessment was unnecessary as information on whether drugs and alcohol impair people's ability to do things was fairly widespread and well known [PN386].

[42] Mr Mitchell advised, during his cross examination that he was unaware of any occupational health and safety incidents involving drugs or alcohol at the Kurnell site since 2005. [PN1161]

[43] According to Mr Chatterton's oral evidence, he was aware of two drug and alcohol related issues in relation to Caltex truck drivers. One was where there was a tanker truck accident and the subsequent investigation revealed an open bottle of Bourbon in the cab. The other incident was of a contract truck driver who was carrying fuel on behalf of Caltex who was stopped at a mine site and failed a drug test [PN407]. He also said he had been told by a colleague around 18 months to two years ago of an incident at the Kurnell refinery where empty beer bottles had been found on the site. He indicated during cross examination that nothing happened as a result of this incident, nor did he know where the bottles came from [PN517-518]. He also referred to a complaint from a resident that someone was smoking a 'bong' in his car and then drove towards the refinery [PN519]. However he was unaware of when the incident took place [PN526], or whether the person in question worked for Caltex [PN 524].

[44] Mr Wicks gave the following evidence:

“At Kurnell there has not been a recorded incident relating to drug and alcohol since late 2005. To the best of my knowledge, based on 37 years experience at Caltex Kurnell and my knowledge of the incident database which records potential, as well as actual incidents and accidents, there are only two drug and alcohol related incidents in the entire 37-year period.”

[45] Mr Zulli gave evidence concerning work that was undertaken between 2003 and 2006 by a 'Fitness for Work' Project Team. [Exhibit C7] Mr Zulli nominated himself to be a member of the project team. Mr Zulli at the time was Environment, Health, Safety and Risk Manager for the Lytton refinery. He described his role on the project team as “*effectively a management representative for Refining*” [Exhibit C7, paragraph 9]. The project team included staff from a cross section of the Caltex organization in Australia and was led by Mr Gavin Tory (National Manager, Lubricants and Special Products.) The role of the project team was, in Mr Zulli's words “*to develop a 'Fitness for Work' Program (FFW Program) and associated policies and processes which supported the FFW Program for the whole of CAL*”. [Exhibit C5, paragraph 11]

[46] The project team did not have the power to make any decisions. Instead it made recommendations to the 'Decision Review Board' composed of Caltex Leadership Team

Members. Indeed, the DRB itself only made recommendations to the actual decision maker – the ‘Decision Executive’ who was Mr Eion Turnbull (General Manager for Refining). It was his decision whether “*to stop, recycle hold or proceed*” at the ‘gates’ to the various decision making phases contained in the company’s internal decision making process (known as ‘CPDEP’ – the ‘Chevron Project Development and Execution Process’.) [Exhibit C5, paragraphs 15-26]

[47] The project team developed a Draft Fitness for Work Policy. However this policy never went beyond Phase 3 of the CPDEP process (‘the development of preferred alternatives’) and was not approved by Caltex management. [Exhibit C5, paragraph 29] Indeed, according to Mr Zulli, the draft policy was never even presented to the DRB. As the Decision Executive had not approved the policy, it could not proceed to Phase 4 of the CPDEP process – ‘execution’. [Exhibit C5, paragraphs 60-62]

[48] Exhibit C5 included as an attachment a document (consisting of a series of slides) headed ‘Fitness for Work, Phase 2 Decision Support Pack, DRB August 23, 2004 Revised Final Pack’. The document appears to be a presentation to the DRB to authorize moving on to ‘Phase 3’. The document indicated that the project team had utilised extensive research and consultation to generate recommended alternatives for a Fitness for Work program “*to improve the wellbeing of our employees, whilst contributing to the achievement of a safe, incident free working environment.*” It went on “*Areas of focus have been drugs, alcohol, fatigue and stress, across all company employees, permanent contractors and visitors to Caltex premises. Recommended alternatives cover documented policies and procedures to educate, manage & raise awareness of the above factors, coupled with cause-based testing regimes for drugs and alcohol.*”

[49] The document noted that “*In October 2003 the DRB agreed that the FFW project should move into Phase 2. The DRB gave permission for a series of broadly based focus groups across management and staff. Ten focus groups were conducted, covering approximately 60 employees during March/April 2004. Outputs of the focus groups, coupled with literature reviews and detailed team analysis have led to a suite of recommended alternatives.*”

[50] The document summarized the findings of the focus groups. Fatigue was found to be a significant issue for employees in all the identified areas of the business. Likewise, work related stress was found to be prevalent across all areas of the business. In relation to drugs and alcohol, the document stated:

“Overall finding that misuse of drugs and alcohol not considered a major issue within Caltex, albeit one that still requires education and management.”

[51] Having regard to these findings, and an analysis of existing policies within the Australian business environment, the project team recommended the development of an education and awareness program. In relation to random testing for illicit drugs the document commented:

“Little perceived problem as outlined by the focus group findings and incident statistics reviewed, hence random testing incurs a potentially high cost with little return. Random testing is potentially discriminatory, can be an invasion of privacy and civil

liberties and has proven difficult to implement in several recent cases. There is some risk of misuse by management. There are concerns regarding the validation of test results versus the time lag. Technology should not supplant fair and humane management.”

[52] Similar comments were made regarding random breath testing for alcohol. Both in relation to drugs and alcohol, the document said the policy should require testing only when there is ‘due cause’.

[53] A working draft of a Fitness for Work Policy dated 11 October 2005 was attached to Exhibit C5 that is broadly consistent with the recommendations from the project team.

[54] Mr Zulli’s evidence is that he raised on a number of occasions during project team discussions the issue of further investigating random drug and alcohol testing; however he was the only member of the team to support this approach [Exhibit C5 paragraph 51, PN916]

[55] The evidence of Mr Wicks is that the failure of Caltex to implement the policy was due to a change in senior Caltex management. [Exhibit AWU7, paragraph 25] He continued:

“AWU Refinery Technicians wrote to the new Refineries General Manager, Brian Waywell and drew his attention to the policy. Mr Waywell was advised of workforce and Union support for the policy. To the best of my knowledge and belief Caltex management did not explain the reason for the failure to implement this important policy, other than a reply some months later that it was being looked at by the then Caltex leadership team.”[Exhibit AWU7, paragraph 26]

[56] Mr Wilkinson’s evidence is that when Caltex commenced work on developing the current D&A policy in 2007 they looked back at the Fitness for Work Policy “*and looked what was in it and looked what is now occurring in other companies and we decided consciously that we’d start again.*” [PN1752]

[57] Mr Wilkinson said that Caltex had not performed any risk assessments in relation to drug and alcohol use at Kurnell, but “*I know we looked at those people who we considered performed safety critical activities across the company, and that included Kurnell...*” [PN1755] He agreed that there had been no consideration of the proportion of occupational health and safety incidents at Kurnell that might have involved drugs and alcohol. [PN1758] He denied [PN1785] that it was fair to say that that no risk assessment had been done in relation to Caltex because they had examined a whole host of options and exposures (for example in the papers considered by the Caltex Compliance and Risk Committee in 2008 [Exhibit AWU4]).

[58] Mr Mitchell stated that “*Caltex has in place a number of initiatives to assist its employees who have drug and alcohol related problems*” [Exhibit C8, paragraph 57] he referred in particular to the company’s return to work policy and its Employee Assistance Program.

[59] Mr Mitchell said that the return to work policy is not limited to assisting employees who are injured at work in returning to their employment. He stated that “*Caltex fully intends to treat employees who are unable to work for a period of time due to alcohol or drug related*

issues as being covered by the policy, and to assist them to return to work in appropriate cases.” [Exhibit C8, paragraph 59] A copy of the current return to work standard was attached to Mr Mitchell’s statement. Under the heading scope it stated:

“This standard can also be applied to employees with non work related injuries and illnesses if deemed appropriate by all parties.”

[60] A copy of a document outlining the Employee Assistance Program was also attached to Mr Mitchell’s statement. The service provider, Davidson Trahaire Corpsych (DTC), is described as composed of “*specialist counsellors and corporate psychologists who have been providing EAP, trauma and general counselling services for many Australian companies for more than 10 years.*”

[61] According to the document, DTC counsellors use a short-term, solution focussed counselling model. The counselling aims to help clarify key issues, discuss options for change and develop appropriate strategies and action plans. Drug and alcohol issues are specifically listed as the sorts of matters counsellors can deal with. If an individual requires long term counselling, the counsellor will refer them to a specialist service. The service provided is confidential (employees contact it directly) and managers can only be provided with information with the employee’s consent. Caltex will not be told an employee has accessed the service. Caltex will pay for up to six sessions.

[62] Mr Mitchell noted that the D&A Policy contemplates that it may be necessary for employees who fail a drug test to be subjected to counselling and disciplinary action. This would be addressed through the Counselling & Discipline Procedures of Caltex, a copy of which was attached to his statement [Exhibit C8, paragraph 62].

[63] The Counselling and Discipline Procedures contain five steps: informal counselling (for minor matters); formal counselling (where the matter is significant, or is a repeat of a previous incident, or there has been previous informal counselling); written warning (for cases involving serious issues/incidents); final written warning (for ‘*certain cases of serious matters*’ or where a written warning is active); and termination of employment. The procedures state

“In cases of serious or wilful misconduct, or other serious workplace behaviour matters, or where an employee has an “active” Final Written Warning and engages in further inappropriate workplace behaviour or unacceptable performance, the final step is to terminate the employment of the employee.”

[64] The procedure states that “ ‘serious misconduct’ may include, but is not limited to...-*Impairment by alcohol or drugs at work*”.

[65] The procedures have a separate heading: ‘Alternative Disciplinary Measures (exceptional circumstances only)’. Under this heading the procedures state:

“In mitigating circumstances surrounding serious misconduct, disciplinary action other than dismissal may be considered. Potentially a Final Written Warning may be considered appropriate, together with another form of appropriate disciplinary action such as:

- Leave without pay for an appropriate period (where allowed by the applicable industrial instrument)
- Reclassification of employment status
- Removal of internet usage privileges
- Relocation to another site or section of the business.”

[66] I asked Mr Mitchell what step in the Counselling and Disciplinary Procedures would apply to some one who had tested positive for cannabis in a random drug test. He responded that in his view *‘it would commence at step 2’*. When asked, he explained that this would be because *“it’s a clear breach of a company policy, it would be seen as serious and it would be put on the record as being serious”*. If an employee came back with a second positive test after a period of time, step three would then be applicable, though he also said *“it’s very difficult to be prescriptive without knowing the precise circumstances”*. When pressed he said *“Well, if it was a straightforward case of somebody without any mitigating circumstances to be taken into account. The second warning would be, sorry, the second offence would be step 3, a written warning”*.

“Right, and then what would happen next if they were found a third time?---Then a final warning and then the possibility of termination...you would go through the steps, formal counselling, written warning, final warning and then termination.”

[67] When asked whether the company would treat someone coming to work under the influence of drugs or alcohol as serious misconduct, and therefore liable for termination, Mr Mitchell responded:

“No, but if somebody was, if there was an incident on site for example where somebody was found to be heavily under the influence of alcohol, or where somebody was found taking alcohol or drugs on site and that caused an incident, that might, you know, cause a review of the step that we initiated.”

[68] Mr Moses then drew Mr Mitchell’s attention to the definition of serious misconduct in the Counselling and Disciplinary Procedures as including ‘impairment by alcohol or drugs at work’. Mr Mitchell agreed that this meant that Caltex could exercise its unfettered discretion to terminate an employee, though termination in such circumstances was not mandatory. [PN1059-1083]

[69] During re-examination, Mr Mitchell indicated that during his 21 years at the refinery only around three or four refinery technicians had been dismissed, and to his knowledge all those employees had had prior warnings.

[70] Dr Robert McCartney was called as an expert witness by Caltex. Dr McCartney is Medical Director of Prime Health Queensland. He is on the Policy & Advocacy Committee of the Australasian Faculty of Occupational and Environmental Medicine, and is the President-elect of the Australian and New Zealand Society of Occupational Medicine.

[71] Attached to Dr McCartney's statement [Exhibit C9] was a report setting out his opinion in relation to those issues in contention between the parties that he considers are within his area of expertise. In this report he stated that:

“There is intuitive, anecdotal, inferential and empirical support for the association between drug use and accidents....

If we accept that there is significant use and abuse of impairing substances in the community and this creates a significant and foreseeable workplace health and safety risk, then this risk must be managed.

This is particularly important in safety critical workplaces...

The risk management program should always include good policy development, drug education and an employee assistance program. In safety and quality critical environments, the risk management should include a testing program...It should be implemented in a fair, transparent and inclusive way...

The intuition that drug testing might prevent accidents involves an implicit causal chain: drug use impairs psychomotor functioning, which in turn enhances accident risk. Drug testing is designed to detect drug use, the earliest link in the chain, and hopefully to deter or prevent it.

In very high risk industries, sites and occupations I recommend a random/unannounced program. This is particularly important in safety critical workplaces where, even if the determined effect is fairly marginal in some occupations single mistake could have disastrous consequences in terms of injury and death...

This is now standard risk management practice in a wide range of industries.

It is also enshrined in standards for various types of higher risk occupations such as rail workers, aviation workers, and commercial vehicle operators....

...All industry sectors will have individuals at risk...There is no reason to think that this cohort of workers [at Kurnell] will not have the similar levels of drug and alcohol use/problems...

Cause-based testing is appropriate for fitness for duty assessment but not as a preventative or screening program. In higher safety-risk situations, it is unacceptable (morally and under any reasonable OHS risk management strategies) to wait for an accident or injury before one implements risk management....

It is my experience that a worker with a positive sample will benefit greatly from appropriate counselling, retraining and assistance. This will alter the outcome for the individuals as well as the organization.”

[72] Dr McCartney was asked by Mr Perry to explain in his experience what the role of a medical review officer was in circumstances where there was a positive test. His response was:

“I can certainly tell your Honour what I do in such circumstances, as – as a medical review officer and a consultant occupational physician. The first thing I do is have a discussion with the individual, either face to face or through telemedical services, to get to the bottom of the possible reasons for the positive test. I’ll usually only get involved when it’s a confirmed positive, although sometimes at the screening test. Confirmed means there’s no doubt that there’s a positive test for whatever the substance is it’s positive. It’s been confirmed by GCMS. I then do what I call validate the test, which is look for reasons as to why that test might not be valid, and that there can be there are sometimes legitimate medical reasons why someone might be positive for a certain substance. Or there might be innocent reasons, less commonly, but maybe. I talk to the individual and work out if there are such reasons. I get to the bottom of why is it positive, and in some circumstances it’s positive, the individual took that substance, and that’s the majority of situations, of course. I then have a chat with them about under what circumstances they took it, how frequently they take the substance, particularly if it’s a substance that I’ve got concern will create a health – and in particular an occupational health and safety risk. I’ll then have a long chat with them about the implications of their use. By and large most individuals I talk to it’s either a recreational or an occasional use, but I have a long chat with them about that that’s not always as – safe as they might think. I talk about the consequences for their own health and for workplace health and safety. I talk about the consequences with regards to individual policies and procedures, so in this case I – if it was – if I was called upon, and I’d talk about this policy and procedure, and then talk to them about possible – what we could do to assist. In – the only ones I get involved with are where organisations have set up good policies and procedures, where they allow and support and resource for appropriate treatment and rehabilitation if required. By and large there’s not a lot required, because as I say, it’s usually a rare or occasional recreational use, but occasionally there is a significant intervention required. Once I determine the validation of the test, the scope of what’s going to be required to help this individual, I then write an initial report to the employer or the company, and that identifies the individual and explains that there’s been a breach of the workplace health and safety policy or the drug and alcohol policy. I don’t identify what it was positive for. I just explain that there has been a breach and that therefore there is the potential that they’re unable to safely carry out the essential inherent requirements of that particular job, particularly if it’s safety or quality critical. I recommend that they avoid safety or quality critical work for a period of time, and then I – I then follow them up, usually at about seven days, depending on the story or the situation, sometimes a few days, and we do a repeat test. If the repeat test is negative, if the individual doesn’t require any further ongoing assessment or management, such as referral to an appropriate counsellor or what have you, I’ll then recommend to the employer through a letter, again saying this individual is now fit to return to safety and quality critical work, and he’s safe to do so. I often make recommendations of follow up though, and it might be that I recommend that I have another chat with them in six weeks or eight weeks. It might be that I recommend that they have a series of unannounced tests over the next six weeks, and that’s particularly of concern if someone, for example, tells me that they smoke pot every – every two or three days, and they’ve been doing it for ages; it just helps them get to sleep some nights. I have real concerns about that individual perhaps relapsing into such behaviour and so with that person I might recommend that we do an unannounced test or two in the next six weeks, and perhaps one more in the

next six months. If they turn up negative then I'll write a final report that says this individual is now fit to carry out all the essential requirements of the safety and quality critical work and can go on the normal regime as per the policy and procedure. Very rarely do I have to do more than that. There is the occasional weird case and I've got one going at the moment, where we have a young fellow who's got...significant problems, and he is not going back to work in a hurry, and we have him actually as an in-patient at the moment. So occasionally – and I must stress this is very rare – occasionally we – we have to do a whole bunch more.” [PN1238]

[73] Dr McCartney then indicated that he had been asked to be Caltex's medical review officer, which he clarified during cross examination occurred *'about six to nine months ago'*. [PN1275] He subsequently agreed that he had been appointed to the position on 15 April 2009. [PN1323] During cross examination he agreed that he would not be the medical advisor for drug and alcohol program that did not include some form of education and an opportunity to provide appropriate treatment or rehabilitation strategies. [PN1461]

[74] During his re-examination, Dr McCartney said that it was difficult to identify drug and alcohol risks in a workplace in a formal way, by for example surveying the work force. Moreover such surveys are unlikely to be accurate as there is evidence that people do not answer such surveys honestly. Random testing of a whole work force to identify the level of drug and alcohol usage and then correlate that with accidents would be theoretically possible, but would not receive approval from an ethics committee. He said *"By and large when it comes to human factors such as that you have to take into consideration more the nature of what would occur should an individual [be] impaired or affected...."* [PN1685]

[75] Dr McCartney said that in conducting a risk assessment, even if the likelihood of something occurring was low, if the consequences were severe, then that would make it a high risk and it would need to be managed. Oil refining was a high risk industry – not because there are a lot of accidents caused by drugs or alcohol but because *"if something does go wrong the consequences can be very, very severe"* [PN1688]

[76] Dr Yossi Berger was called as an expert witness by the AWU. Dr Berger has been the AWU's Occupational Health and Safety Officer since 1990. He is a registered psychologist and has extensive experience in occupational health and safety. He is not an expert on drugs or alcohol [PN2241].

[77] In his written statement [Exhibit AWU5], Dr Berger discussed the concept of 'risk assessment'. He quoted Professor Quinlan in the Beaconsfield inquiry where he described risk assessment:

"At its most basic, the process of risk assessment seeks to assess the magnitude and likelihood of an incident or exposure in the workplace in order to form a basis for deciding the urgency and resources that should be devoted to particular problems...The dimensions for assessing risk revolve around trying to assess, on the one hand, the magnitude (seriousness and consequences) of being exposed to the hazard and, on the other hand, the likelihood (or frequency) of exposure. Thus, for example a hazard which is rarely encountered and entails minimal costs may be assessed as a minimal risk requiring limited intervention whereas a hazard exposure

that is relatively infrequent but has very serious consequences (causing serious injury or death) would require a significant response.”

[78] Dr Berger made the point that ‘fitness for work’ can be affected by fatigue resulting from difficult rosters and long shifts and poor rest breaks (which can generate endogenous drugs such as adrenaline, noradrenaline, dopamine and cortisol), as well as the various exogenous drugs that the company wishes to test for.

[79] Dr Berger’s evidence was that:

“Random drug testing of workers has a low likelihood of identifying drug usage but a high likelihood of generating resentment amongst workers to the detriment of OHS standards. However it’s done at present it will be perceived by workers as a form of implicit blame.

Every worker will be cast as a ‘drug cheat’ of sorts...

...but will it end up controlling the risks associated with drug taking? At this stage I have not been given any evidence that such risks do exist at the workplace, or that they have undergone a proper risk assessment process. In itself, if that’s true, it would suggest to me poor management of OHS. I would strongly recommend against such blind random testing for drugs.”

[80] During his cross examination, Dr Berger conceded that, having regard to the high level of drug and alcohol use and abuse in the community it is foreseeable that one or some workers attend for work under the impairment of drugs and alcohol. [PN2199] However he expressed concern that generating resentment in the work force *“in itself will be a greater risk as I see it than what is being proposed to be fixed.”* [PN2248]

[81] At paragraph 48 of his written statement [Exhibit AWU7] Mr Wicks gave evidence concerning current drug and alcohol policies at oil refineries around Australia, based on telephone enquiries he had made on 26 and 27 August 2009 with workforce representatives at those sites. This was as follows:

“BP Bulwer (QLD)

- There is no current D&A policy. There is no drug testing, whether random or “for cause”.
- There is a relatively old generic policy which provides that there be no drugs or alcohol on site (common at all sites).
- The company tests for D&A on a pre-employment basis only (common in many industries). Contractors are tested before a maintenance shut-down.

BP Kwinana (WA)

- A one-year trial involving random testing has just concluded. No details of names or positions of persons tested were retained.

- Management and Site Unions have agreed after a one-year trial period to postpone any decision on whether to proceed with a confirmed and agreed position or abandon a FFW project altogether, pending the Kurnell determination.
- The Union, on receipt of final statistics and following the trial carefully, found major issues in relation to privacy and problem-solving regarding the logistics of conducting tests.

Caltex Lytton (QLD)

- The on site AWU delegates have had no official notification that D&A is being contemplated by management for their refinery. The workforce have not been advised by Caltex management that Kurnell is subject to a consent arbitration, despite Managers being briefed by Ms Irwin of Caltex regarding the company's D&A proposals.

Exxon Esso Longford (VIC)

- There is no random D&A testing.
- Any testing is "for cause" based.
- Excellent education materials and Employee Assistance Programme are in place.

Exxon Mobil Altona (VIC)

- Only five job positions (two award and three non-award) are randomly subject to testing, that is the Operations Team Leader, the Wharf Team Leaders and the Refinery Manager, Operations Manager and OH&S Manager. This constitutes a potential of 25 employees out of 320.
- The remaining 295 employees are only tested on a "for cause" basis.
- The Senior Delegate (who is a Team Leader) was tested four times within four work cycles (i.e. a total period of 44 days). He considered he was obviously "targeted" and, as a result, phoned the Australian Manager, Human Resources and made a complaint about harassment and intimidation. He has not been tested for a year since.

Shell Sites (Clyde, NSW and Geelong, Victoria)

No action has been taken by the company to implement the D&A Policy for employees.

Some testing of contract fitters not directly employed by Shell has been undertaken by the contracting company."

[82] Caltex tendered a bundle of documents [Exhibit C15] which contained material about drug and alcohol policies from a range of organisations. These indicated that random testing for alcohol and drugs is carried out by RailCorp (NSW), Xstrata, Sydney Ferries and BHP Billiton.

Consideration

[83] I first need to deal with the proper test to be applied in making my decision. Mr Perry referred to the XPT Case

“It seems to us that the proper test to be applied and which has been applied for many years by the Commission is for the Commission to examine all the facts and not interfere with the right of an employer to manage his own business unless he is seeking from the employees something which is unjust or unreasonable.”¹

[84] Mr Perry submitted that the test that should be applied in this case is this: are any of the positions contended for by Caltex in the Summary of Positions Document (to be found at Appendix A) unjust or unreasonable?

[85] In resolving the dispute before me I am exercising a statutory power, and as such I must have regard to the Act under which I am performing my functions. Section 577 of the Act stipulates inter alia that

“FWA must perform its functions and exercise its powers in a manner that:

- (a) is fair and just; and...
- (d) promotes harmonious and cooperative workplace relations.”

[86] Section 578 of the Act states that in performing its functions under a part of the Act, FWA must take into account:

- “(a) the objects of this Act, and any objects of the part of this Act; and
- (b) equity, good conscience and the merits of the matter; and
- (c) the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.”

[87] The object of the Act (set out in s.3) includes the following:

“The object of this Act is to provide a balanced framework for cooperative and productive workplace relations that promote national economic prosperity and social inclusion for all Australians by:

¹ *Australian Federated Union of Locomotive Enginemen and State Rail Authority of New South Wales* (1984) 295 CAR 191

(a) providing workplace relations laws that are fair to working Australians, are flexible for businesses, promote productivity and economic growth for Australia's future economic prosperity and take into account Australia's international labour obligations..."

[88] In making this decision I have had regard to all these goals.

[89] As Mr Perry submitted: "*the primary point of dispute between the parties is whether there should be a component of random drug and alcohol testing at the Kurnell Refinery*".

[90] Mr Perry rightly pointed to the onerous duties imposed on Caltex by the New South Wales *Occupational Health and Safety Act 2000*.

[91] Section 8 of that Act sets out the duties of employers:

“(1) Employees.

An employer must ensure the health, safety and welfare at work of all the employees of the employer.

That duty extends (without limitation) to the following:

(a) ensuring that any premises controlled by the employer where the employees work (and the means of access to or exit from the premises) are safe and without risks to health,

(b) ensuring that any plant or substance provided for use by the employees at work is safe and without risks to health when properly used,

(c) ensuring that systems of work and the working environment of the employees are safe and without risks to health,

(d) providing such information, instruction, training and supervision as may be necessary to ensure the employees' health and safety at work,

(e) providing adequate facilities for the welfare of the employees at work.

(2) Others at workplace.

An employer must ensure that people (other than the employees of the employer) are not exposed to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work."

[92] The duty imposed on the employer is properly characterised as '*absolute*'. In *Drake*² a Full Bench of the NSW Industrial Relations Commission (in considering the equivalent

² *Drake Personnel Ltd t/as Drake Industrial v WorkCover Authority (NSW)* (1999) NSW IRComm 90 452

provision to s.8 in the previous Act) rejected the notion that an employer could only be held liable for risks that were “*reasonably foreseeable*”.

“...the submission focuses on the foreseeability of the alleged risk to safety. The authorities cited above establish that in order to demonstrate a breach of s15(1) the prosecutor is required to prove the existence of a failure on the part of the employer which is causally connected with the risk to safety. There can be no failure on the part of the employer in not taking steps to preclude a risk which was impossible to anticipate.... However, the appellant goes further and submits that no breach of s15(1) is committed where the employer does not know of the hazard and could not reasonably know about it.

The concept of "reasonable foreseeability" is not, in our view, apt to be applied in relation to the duties owed under the OH&S Act. The duties imposed by the Act are not merely duties to act as a reasonable or prudent person would in the same circumstances... Under s15(1) the obligation of the employer is "to ensure" the health, safety and welfare of employees at work. There is no warrant for limiting the detriments to safety contemplated by that provision, to those which are reasonably foreseeable. Whilst employers are not liable for risks to safety which are merely speculative or unduly remote, the terms of s15(1) specify that the obligation under that section is a strict or absolute liability to ensure that employees are not exposed to risks to health or safety. It is inappropriate to seek to substitute a different test for that specified in s15(1).

Secondly, the arguments advanced on behalf of the appellant in this respect erroneously concentrate upon the foreseeability of the particular circumstances of the accident in question. The general duties created by the OH&S Act are directed at obviating "risks" to the health, safety and welfare of persons in the workplace...The occurrence of an accident and the sustaining of injuries by an employee will certainly represent relevant evidence of the existence of a risk to the health and safety of employees and the seriousness of that risk. However, it is not the accident itself which constitutes the offence, but rather the failure of the employer to ensure that its employees are not exposed to risks while at work.”

[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.

[94] Mr Moses made much of the applicant’s alleged failure to conduct a risk assessment in relation to its drugs and alcohol policy. Whether there was or was not a formal risk

assessment is not however the issue. As both Dr Berger and Dr McCartney explained, central to the notion of risk assessment is that one looks at both the likelihood of something happening and the consequences if it were to happen. There is no convincing evidence of a significant problem of drug or alcohol abuse at the Kurnell Refinery. However – even though unlikely – the consequences of an accident at Kurnell due to an employee being impaired due to alcohol or drugs could be devastating. Adopting ‘risk management’ logic this is a possibility that needs to be taken very seriously.

[95] This does not automatically mean that random testing for drugs and alcohol is justified. However, it is hard to forswear the logic that a properly run program of random tests would have a deterrent effect. Dr McCartney’s evidence to this effect was not seriously challenged. The experience with the random breath testing of motorists supports this conclusion.

[96] Mr Moses submitted that I should have regard to the Canadian case law on the issue of random testing. He drew my attention in particular to the Imperial Oil case³. In that decision the board of arbitration upheld the company’s policy in relation to ‘for cause’ and post-incident drug testing provisions. It also upheld the policy’s random drug testing measures where such testing formed part of a continuing contract of employment and the rehabilitation of an employee clearly identified as having a problem of alcohol or drug use. However it rejected the policy’s provisions providing for general random testing of employees. The board’s decision summarised the Canadian jurisprudence on the issue of alcohol and drug testing:

“As set out above, a key feature of the jurisprudence in the area of alcohol or drug testing in Canada is that arbitrators have overwhelmingly rejected mandatory, random and unannounced drug testing for all employees in a safety sensitive workplace as being an implied right of management under the terms of a collective agreement. Arbitrators have concluded that to subject employees to an alcohol or drug test when there is no reasonable cause to do so, or in the absence of an accident or near miss and outside of the context of a rehabilitation plan for an employee with an acknowledged problem is an unjustified affront to the dignity and privacy of employees which falls beyond the balancing of any legitimate employer interest, including deterrence and the enforcement of safe practices.”⁴

[97] While no evidence was led on this point, it is apparent from the decision just cited that other countries have not necessarily taken the same approach as Canada. The board’s decision drew attention to the overall legal context in which the Canadian jurisprudence had developed. In particular, it was noted that neither the Parliament of Canada, nor any of the provincial legislatures, “*as contrasted with developments in other countries*” had legislated to grant to employers the statutory or regulatory authority to conduct alcohol or drug testing. In fact Australia could be regarded as one of those “*other countries*”. In sharp contrast to Canada, the public authorities in Australia have in a number of industries actually mandated random drug and alcohol testing. For example, reference was made during the case to a NSW Government agency, the Independent Safety and Reliability Regulator (ITSRR) which requires rail operators to conduct random alcohol and drug tests on 25 per cent of employees

³ *Imperial Oil Ltd and Communications, Energy & Paperworkers Union of Canada, Local 900* (2006) OLAA 721

⁴ *Ibid*, paragraph 101

each year. [Exhibit C15] A regulation, the *Passenger Transport (Drug and Alcohol Testing) Regulation 2004* made under the *Passenger Transport Act 1990*, empowers ITSRR to authorise officers to require any transport safety employee to undergo a random drug or alcohol test. At the Commonwealth level, in 2008 regulations were approved by the Executive Council and came into force requiring random alcohol and drug testing of workers in the Australian aviation industry. Thus both State and federal governments in Australia have taken the view that random testing for drugs and alcohol can be appropriate for workers involved in safety critical work. In this broader policy context, and given the uncontested evidence in the current proceedings concerning the potentially hazardous nature of work at the Kurnell Refinery, together with the heavy obligation imposed on Caltex by New South Wales occupational health and safety legislation, I find that the introduction of random drug and alcohol testing at the refinery is justifiable.

[98] However, it also needs to be recognised that the introduction of any form of drug and alcohol testing, in the words of the ILO code of practice on the management of alcohol and drug related issues in the workplace, [Exhibit AWU2] “*involves moral, ethical and legal issues of fundamental importance*”. This is particularly so when the testing is random, rather than ‘for cause’. There must be appropriate safeguards in place. I note that many of the concerns expressed by the AWU and AIMPE summarised at Appendix A, and reflected in particular in the evidence of Mr Grace, [Exhibit AWU6] relate to the way in which random testing will work – as much as the principle itself. These include, for example, concerns about an inappropriate emphasis on discipline rather than rehabilitation, the potential for victimisation and targeting of certain groups and individuals, a lack of privacy, and scope for an appeals mechanism. I share the unions’ concerns that the safeguards that currently exist in the D&A Policy are inadequate.

[99] I draw from the evidence of Dr Berger the proposition that the introduction of a particular occupational health and safety policy – even if well intentioned – may do more harm than good, if it creates such resentment on the part of the workforce that it undermines the commitment of employees to the company’s overall occupational health and safety program. The safeguards I am proposing, based as they are on the concerns expressed on behalf of the employees, should help minimise that resentment.

[100] One of the main concerns expressed by the unions is that the D&A Policy is discipline focused, with only a limited role for counselling and rehabilitation. Mr Perry on the other hand described the policy as “*holistic...with an appropriate balance between rehabilitation and managing poor conduct and behaviour.*” The scope for confusion is not at all surprising. The D&A Policy and its associated procedures do not spell out in any detail how the company will respond to an employee who tests positive for drugs or alcohol. Instead it says “[*T*]he company will apply its *Counselling and Disciplinary Policy and Procedures, which may result in the employee’s dismissal*”. The Counselling and Disciplinary Procedures contain five steps, as summarised earlier in this decision, with step 1 being informal counselling and step 5, termination. How the policy would apply to someone testing positive for drugs or alcohol is not entirely clear. However, step 5 indicates that “*in cases of serious or wilful misconduct...the final step is to terminate the employment of the employee*”. Moreover, “*impairment by alcohol or drugs at work*” is specifically described as a form of serious misconduct. While there is some scope for a lesser penalty in mitigating circumstances, it would be reasonable to infer that the normal response of the company to someone testing positive for drugs or alcohol would be to terminate their employment for serious misconduct.

[101] This is in complete contradiction to the evidence of the Human Resources Manager at Kurnell, Mr Mitchell. As summarised earlier he indicated that someone who had tested positive in a random drug test would initially be dealt with under step 2. If an employee came back with a second positive test after a period of time, step 3 (a written warning) would normally be applicable. Only if the employee continued to test positive would a final warning and then the possibility of termination come into play.

[102] The D&A Policy also appears to be inconsistent with the approach outlined by Dr McCartney in his evidence. As quoted earlier, Dr McCartney indicated that once there was a confirmed positive result he – as the Medical Review Officer - would have a discussion with the individual to identify the possible reasons for the positive test. He then “*validates*” the test, which involves looking for reasons why that test might not be valid, given that there are sometimes legitimate medical reasons why someone might be positive for a certain substance. Once the test has been “*validated*” he then has “*a chat with them*” about their drug or (presumably) alcohol use and discusses the implications, including what could be offered by way of assistance (presumably in the form, for example of treatment or rehabilitation services). Only after these steps have been taken does he write an initial report to the employer. It is only at that point that the individual is identified to the company as a person who has breached the drug and alcohol policy. Moreover Dr McCartney does not identify what the test was positive for. He just explains that there has been a breach and that therefore the employee may not be able safely to carry out the essential inherent requirements of a job that is safety critical. He recommends that the employee avoids safety or quality critical work for a period of time, and then there is a follow up, usually after seven days, and a repeat test is done. If the repeat test is negative and the individual does not require any further ongoing assessment or management, he will write a further report to the employer recommending that the individual is now safe to return to safety and quality critical work. He may recommend some follow up, including possibly a series of unannounced tests over the next few weeks or months. If these tests are negative then he will write a final report that says this individual is now fit to carry out all the essential requirements of the safety and quality critical work and can return to the normal regime of testing.

[103] This approach is broadly consistent with that suggested by Mr Mitchell. However it suggests that the line manager is only told of the positive result after the ‘validation’ process has been conducted by the MRO. Moreover, and importantly, from the point of privacy, the manager is not told what the positive test is for. However the key point is that the issue is treated from a medical (and safety) perspective, with the aim being to modify the employee’s behaviour, return him or her to normal duty and treat any drug or alcohol problems that exist, rather than a regime based on punishment. It is consistent with treating a positive result as initially warranting formal counselling (step 2) as suggested by Mr Mitchell. Further breaches could then be dealt with through higher level steps.

[104] The approach outlined by Mr Mitchell and Dr McCartney, when taken together, is both reasonable and fair. However for employees to have confidence that it would apply it needs to be clearly spelled out in a relevant policy document. Of course, any policy would need to allow some flexibility, as there may always be some mitigating or aggravating factor, but the general expectation should be that an employee testing positive would be treated in the manner indicated by Mr Mitchell and Dr McCartney in their evidence to this tribunal.

[105] One concern expressed by the employees, including Mr Grace [Exhibit AWU6, paragraph 10] is that certain parts of the workforce at the Kurnell Refinery will end up being tested more frequently. I am satisfied, based on the evidence, that all safety critical employees will have an equal likelihood of being tested. How this will be ensured should be part of the education phase of the roll out of the D&A Policy.

[106] Another concern is that the employer reserves the right unilaterally to vary its policy, despite any commitments that might be made as part of these proceedings. Based on the conciliation process that occurred before the arbitration hearings, it is the parties' intention that they will enter into a new enterprise agreement. This matter has come before me as part of the process of making that new agreement. The D&A Policy with the associated safeguards referred to in this decision, once implemented at the Kurnell Refinery, should not be varied without the agreement of the AWU and AIMPE, until the new enterprise agreement itself has expired.

[107] The employees also expressed concern about the 'chain of custody' for samples taken during testing. The D&A Policy provides that the relevant Australian standard [tendered as Exhibit C3] would be used in relation to testing for drugs. I am satisfied that this has adequate 'chain of custody' safeguards. This should be covered as part of the education phase of the roll out.

[108] The employees also put forward the view that employees who need to spend time off work because of drug or alcohol problems should receive paid sick leave. The ILO code of practice referred to earlier stipulates that:

“Workers with alcohol or drug related problems should be treated in the same way as workers with other health problems, in terms of benefits such as paid sick leave, paid annual leave, leave without pay and health-care insurance coverage, in accordance with national laws and regulations or as agreed upon in collective bargaining.” [Exhibit AWU2, paragraph 8.1.1]

[109] Employees at Kurnell who need to take time off because of alcohol or drug related problems should have access to the Kurnell Sick Leave Policy [Exhibit C16] in the same way as employees who are ill or injured for other reasons.

[110] Employees also expressed concern at the lack of an appeals mechanism. Disputes about the application of the D&A Policy should be dealt with through the disputes procedure in the enterprise agreement.

[111] These safeguards will require changes to the relevant policy documentation. I strongly suggest that – rather than the D&A Policy cross referring to the Counselling and Disciplinary Procedures - the limited reference to drugs and alcohol in those procedures be removed. Instead all the relevant steps (based on the approach indicated by Dr McCartney and Mr Mitchell) should be included in the D&A Policy itself (or a related document). The revised policy documentation should be drawn up in consultation with the AWU and AIMPE, as representatives of the work force.

[112] The meaning of the word ‘consult’ was considered by a Full Bench of the Commission in *Telstra v TWU*⁵. It clearly encompasses more than informing someone of a decision already taken. Moreover it means more than simply talking to someone. Nor however does ‘consultation’ necessarily entail reaching agreement. It would mean, in the current context, Caltex engaging the unions in a dialogue where there is a real opportunity for the unions to provide input to the revised policy documentation before it is finalised. The consultative process should not however revisit the findings made in this decision. Clearly, the revision of the documentation may take some time, and it seems unlikely that the November 2009 target date for implementation of the D&A Policy at Kurnell will be met. Nevertheless the process should not be allowed to drag out unduly and I suggest a revised target date for implementation no later than 1 February 2010.

[113] Finally, I note that the parties have committed to the introduction of a Fitness for Work Policy during the term of the enterprise agreement. That policy should of course be prepared in consultation with the unions and should cover, at a minimum fatigue and stress.

Summary

[114] Caltex should implement its D&A Policy (including random testing for drugs and alcohol) at Kurnell Refinery by 1 February 2010, subject to the inclusion of the following safeguards:

- Once there is a confirmed positive test result the Medical Review Officer (MRO) would speak to the employee in question to ‘validate’ the result. The MRO would discuss the implications of the test result and the options for treatment or rehabilitation, where appropriate. The MRO would then provide a report to the company indicating that the employee had been tested positive and would recommend future action (consistent with the approach referred to by Dr McCartney in his evidence).
- An employee who has tested positive would – unless there were significant mitigating or aggravating factors – receive formal counselling (consistent with the approach outlined by Mr Mitchell in his evidence).
- Repeat positive tests would receive progressively more serious sanctions, i.e. a formal warning, a final warning and ultimately dismissal (again, consistent with the evidence given by Mr Mitchell).
- Employees who need time off for drug or alcohol related problems would have access to the Kurnell Sick Leave Policy in the same way as employees who are ill or injured for other reasons.
- Disputes about the application of the D&A Policy should be dealt with through the disputes procedure in the enterprise agreement.

⁵ *Telstra Corporation Ltd v Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services union of Australia* (2007) AIRCFB 374

- The revised D&A Policy cannot be revised unilaterally by Caltex until the expiry of the new enterprise agreement.
- The revised policy documentation to reflect this decision should be prepared in consultation with the AWU and AIMPE.

SENIOR DEPUTY PRESIDENT

Appearances:

D Perry for Caltex Refineries (NSW) Pty Ltd, and Caltex Lubricating Oil Refinery Pty Ltd

A Moses SC for the Australian Workers' Union

J Fallone for the Australian Institute of Marine and Power Engineers

Hearing details:

2009

Sydney

1-3 September

Final written submissions:

15 September

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APPENDIX A**August 19, 2009****Summary of Positions in respect of Drug & Alcohol Issues**

[Note: Status as at August 13, 2009 following 4 meetings between the Company, AWU & AIMPE representatives held on August 5, August 6, August 10 and August 13]

	Caltex	AWU / AIMPE	Comments
1	Recommends using the documents titled “Draft Policy Caltex Drug and Alcohol Policy (“D&A Policy”)” and “Drug and Alcohol Draft procedures”	Unions (AWU & AIMPE) recommend using the document titled “Caltex Fitness for Work Policy” dated September 2005	
2	Application date for new policy to start – 14 th November 2009	Application date for new policy to start – dependent on completion of required details as it will apply Caltex wide	
3	Group policy should apply across the Caltex group	AWU / AIMPE outcome should apply across the Group	
4	Random testing applicable to deemed safety critical sites, with ‘special events’ testing (e.g. T&Is) to also apply to critical sites	Cause based testing only as defined in the document titled “Caltex Fitness for Work Policy” dated September 2005	
4(a)	Random testing to apply to the site, at random times, while taking into account attendance profiles to ensure proportionate testing	Testing outside common business hours should not occur as this equates to targeting of operators as they constitute more than 90% of people on-site during those periods	
4(b)	Random testing should occur as a deterrent because there are problems with drug and alcohol	The operator workforce at Kurnell is very different demographically from the Australian general	

	impairment in the Australian population generally	population and there is no evidence that there is a drug or alcohol problem in the operator workforce	
5	Only people at deemed safety critical sites and in key leadership roles should be randomly tested as well as being subject to cause based testing – all other people subject to cause based testing only	Cause based testing as a single policy to be applied to all people within the company with no one subjected to random testing	
6	D&A policy document with reference to legislation, Australian standards and relating independently variable Company policies and programmes such as the Company's Counselling and Discipline Policy and Procedures and the Company's Employee Assistance Programme (EAP)	Other relevant Company policies and programmes should be incorporated in a fixed policy rather than just referenced, and all referenced legislation and Australian standards should be appended	
7	Any person found to exceed stipulated levels of alcohol or drug quantities will be subject to counselling and / or disciplinary measures (in accordance with the Caltex C&D Policy), and access to the company Employee Assistance Program	<p>Company's position is discipline focused policy, with counselling and rehabilitation available. Unions' position is counselling and rehabilitation focused policy, with discipline available.</p> <p>The unions support that D&A testing only measures exposure to substances within the body, as opposed to impairment or their ability to perform their duties. Rehabilitation and consultation are necessary aspects that should be</p>	

		embedded within the policy.	
8	<p>Employees to have access to Employee Assistance Programme (EAP) paid for by Company, to the limit available under the Policy. (The EAP provider has specialised D&A counsellors)</p> <p>Any Rehabilitation required is at employee's cost. Special leave arrangements may be made available.</p>	<p>In addition to EAP, employees to have access to formal case management procedures that may include:</p> <ul style="list-style-type: none"> • referral to a case management consultant • clinical assessment • access to treatment centre programmes • aftercare <p>All costs to be borne by the Company</p>	
9	A 2 nd breath test is the limit of testing for alcohol	At the very least, the minimum of appeals mechanism available in society generally should apply e.g. blood tests are the common 3 rd test in alcohol testing	
10	Chain of custody is dealt with by reference to Australian standards which is referenced in the policy document	To strengthen confidence in the procedure, there needs to be a précis of the chain of custody in the policy document and the Australian standard appended.	
11	Chain of custody complies with Australian standards and is adequate	There is a gap in the chain of custody in that samples are unaccompanied during transit	
12	Dependent on circumstances, an employee may be on paid sick leave, special leave or unpaid leave	Employee should be paid for all time away from work (though willing to consider a ceiling e.g. 52 weeks)	
13	Self-testing facilities will be made available for	Self testing for both alcohol and drugs be	

	alcohol only	available for private individual use prior to entering the refinery. Needs to be included in the policy	
14	Company reserves the right to review and amend the policy	Needs to be full consultation with all Stakeholders prior to any changes being made	
15	Counselling and discipline policy will apply to breaches of D&A policy	'Natural justice' needs to be included in the policy. The right to be represented by a union delegate needs to be enshrined in the policy and therefore not subject to unilateral change by the Company	
16	"B" sample for a positive drug test can be re-tested to confirm initial test results	Employees need to be given the option of a "C" sample (i.e. sampling facilities provided by the Company) that would be subject to a separate chain of custody /independent testing regime to be arranged by the employee / union	
17	Company reserves right to test people where an accident 'nearly' occurs	People can only be tested 'for-cause', these being: <ul style="list-style-type: none"> • Serious incidents as defined in s344 of the OH&S Regulation 2001 – NSW • MVA reportable to the police • Wilful or negligent breach of safety procedures • Wilful act which damages Caltex property, 	

		<p>reputation or customer relations</p> <ul style="list-style-type: none"> • Negligent act which causes damage to Caltex business 	
18	Managers can ask an employee to submit to a test for drugs and alcohol where there is a reasonable suspicion that a person has drugs and / or alcohol in their system equal to or exceeding defined cut off levels	Only trained personnel should be able to make a determination that a person may have drugs and / or alcohol in their system equal to or exceeding defined cut off levels	
19	Refusal to test is treated as a serious breach of the policy	Refusal to undertake testing will result in a consultation session involving management, a third party witness and a representative of the employee involved, at the option of the employee. The determination will be made by the direct manager or supervisor with expedition as to the employee's fitness for work	