

# Shell Refining v CFMEU

## Recent Tribunal Decisions

### Workplace Drug and Alcohol Testing and Policy Development

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# Shell Refining v CFMEU

**August 2008:** after hearing extensive expert evidence **SDP Hamberger** of the AIRC makes a decision in a private arbitration about the introduction and application of drug and alcohol testing at the Shell Clyde Refinery.

**May 2009:** Rejecting an appeal from Shell, a Full Bench of the AIRC upholds the original decision.

## **What do these decisions represent:**

A breakthrough in employee rights? - Maybe

The end of urine testing? - Probably

Commission approval of random testing in all cases? No

# Shell Refining v CFMEU

## What were the decisions actually about?

Commission's jurisdiction arose in a private arbitration context – the parties set the questions the Commission had to answer.

1. Could Shell randomly test only some operators or must everyone on site be tested?
2. Could Shell randomly test employees if not all contractors on site were being tested.
3. Could Shell use urine testing as an initial random test or should it be limited to oral fluid testing.

The parties agreed that the proper legal test was whether the employer was asking its employees to do something which was ***unjust or unreasonable***.

# Shell Refining v CFMEU

## What did the Commission decide?

1. Use of urine sample random testing (when a breach could lead to termination of employment) was unjust and unreasonable given that oral fluid testing was available.

(subject to circumstances: has to be laboratory analysis not onsite and must comply with Australian Standard)

# Shell Refining v CFMEU

## What did the Commission decide?

“The question now is **whether it would be unjust or unreasonable for the company to implement a urine based random testing regime** with its wide “window of detection”, with all that implies for interfering with the private lives of employees, when **a much more focussed method is available**, where a positive test is **far more likely to indicate actual impairment**, and is far less likely to detect the use of drugs at a time that would have no consequential effect on the employee’s performance at work. **My conclusion is that the implementation of a urine based random drug testing regime in these circumstances would be unjust and unreasonable”**

# Shell Refining v CFMEU

## What did the Commission decide?

2. Adoption of a risk assessment process to identify which employees should be tested was appropriate and not unreasonable.

“random drug testing involves a trade off between the privacy of the individual and workplace safety. Employees should not have to suffer the intrusion into their privacy involved in random testing unless there is a good safety reason for doing so. Accordingly there is no basis to conclude that it would be unjust or unreasonable for some employees to be subject to testing and not others, if there is an objective reason for this distinction.”

# Shell Refining v CFMEU

## What did the Commission decide?

3. It was reasonable to randomly test Shell employees even where not all contractors or their employees were being tested – as long as steps were taken to ensure that contractors had D&A policies consistent with the Shell policy within reasonable timeframes.

# The Limits of the Shell Case

A decision in private arbitration is not binding on other members of the Commission (now Fair Work Australia) although Full Bench consideration may be persuasive.

Each case before the Fair Work Australia will turn on its own facts, particularly when resolving disputes in private arbitration, and in the Shell Case several factors may make it distinguishable.

# The Limits of the Shell Case

- The union and employer had already agreed that some testing was necessary for safety. The dispute was only about what method of testing was appropriate and who should be tested.
- The form of oral fluid testing under consideration was onsite swab with laboratory analysis to the Australian Standard. Oral fluid testing with onsite analysis of the kind used in roadside testing which may have higher levels of false positives and negatives, was not the subject of the dispute.

# The Limits of the Shell Case

- Shell gave evidence that their random testing regime was constructed on the basis that each employee could expect to be tested on average once every two years. Depending on the workplace Fair Work Australia might consider more frequent testing regimes onerous and unreasonable.

# Other tribunal decisions

**Unfair dismissal jurisdiction:** mere application of a policy is not the only question a dismissal must be fair in all the circumstances:

“Employers can promulgate policies and give directions to employees as they see fit, but they cannot exclude the possibility that instant dismissal of an individual employee for non-compliance may, in the particular circumstances of an individual case, be harsh, unjust and unreasonable” (Policy in question related to smoking on site). *Bostik (Australia) Pty Ltd v Gorgevski* (1992) 36 FCR 2

# Other tribunal decisions

**Unfair dismissal jurisdiction:** zero tolerance policies are unlikely to be uniformly appropriate:

“I am prepared to accept that there may be some limited exceptions to this, especially where important issues of public safety are involved. But instances of where a “zero tolerance” policy (in the sense in which that term has been used in this case) could be considered appropriate, would in my view be few and far between. The respondent’s operation is not, in my view, one of the exceptional instances.” (respondent operated a hay press plant)

Perkins v Golden Plains Fodder Australia Dangerfield C, Macpri Pty Ltd [2004] SAIRComm 5 [174]

# Other tribunal decisions

## **Bargaining Disputes: *Caltex v AIMPE and the AWU.***

October 2009 - Another decision of SDP Hamberger. Caltex sought the assistance of FWA in resolving a bargaining dispute having reached impasse in its negotiations with the unions regarding Drug and Alcohol testing policy at its Kurnell refinery site (a major hazard facility). Caltex had proposed a random testing policy which had been rejected by the unions.

**Only Safety Critical employees were to be tested.**

# Other tribunal decisions

## **Bargaining Disputes:** *Caltex v AIMPE and the AWU.*

Caltex has an absolute obligation to obviate any risk – even one not reasonably foreseeable, although they did not have to address risks which are merely speculative or remote – in the context of the site the seriousness of the consequences of even a remote risk occurring meant that testing was justified even in the absence of any formal demonstration that there was a problem with drug and alcohol abuse on the site (2 issues in 37 years).

# Other tribunal decisions

**Bargaining Disputes:** *Caltex v AIMPE and the AWU.*

This does not automatically mean that random testing will be justified and the Tribunal held that Caltex's proposed policy was inappropriate because of its focus on the disciplinary results of a positive test:

“the normal response of the company to someone testing positive for drugs and alcohol would be to terminate their employment for serious misconduct”.

# Other tribunal decisions

## **Bargaining Disputes: *Caltex v AIMPE and the AWU.***

“[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, ...“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 share the union’s concerns that the safeguards that currently exist in the D&A policy are inadequate ”

# Other tribunal decisions

**Bargaining Disputes:** *Caltex v AIMPE and the AWU.*

RECOMMENDATION:

“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.”

# Other tribunal decisions

**Unlawful dismissal jurisdiction:** drug addiction is considered a disability in some jurisdictions – this does not appear to have been tested in federal tribunal or court in the unlawful dismissal context yet.

“prima facie, the applicant’s condition of addiction was comprehended by subparagraph (g) of the statutory definition of “disability”. – Federal Court, Branson J, *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women’s Memorial Club Ltd* [2000] FCA 1619, [54]

# Ordinary OH&S Principles Apply

Hazard Identification and Risk Assessment and Risk Management were fundamental to the Commission's decision that testing was reasonable.

- *Shell* gave evidence that:

“there is no value to be gained by allocating resources to management of risk where objectively applying risk management techniques it is assessed that none exists... It also undermines Shell's policy approach of setting the expectation that individuals act and behave responsibly”

- In *Caltex* – only **safety critical employees** were to be tested (although this meant everyone on site because of the nature of the site).

# Ordinary OH&S Principles Apply

Are there other workplace factors which lead to drug use which, if rectified, would reduce the risk of the hazard arising?

- Shift patterns, noise, injuries, repetitive work patterns.
- Consider the example of the road transport industry:  
trip time requirements anecdotally contribute to drug use - stimulants may be used in order to stay awake to meet delivery obligations.
- Note the Tribunal's recommendation in *Caltex* that in addition to the D&A policy the parties develop a policy which addressed risks arising from fatigue and stress.

# Ordinary OH&S Principles Apply

**Consultation is important – in *Caltex* the Tribunal held:**

The revised policy documentation should be drawn up in consultation with the AWU and AIMPE, as representatives of the work force.

“The meaning of the word ‘consult’ was considered by a Full Bench of the Commission in *Telstra v TWU* . 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.”

[112]

# Employee Privacy is Relevant

Obligation to provide a safe workplace is not determinative but just one of a number of relevant considerations including privacy.

Privacy means more than just having a confidentiality policy and procedures about how testing occurs it also encompasses an employees right to privacy about how they use their own time:

“The employer has a legitimate right (and indeed obligation) to try and eliminate the risk that employees might come to work **impaired** by drugs or alcohol such that they could pose a risk to health or safety. Beyond that the employer has no right to dictate what drugs or alcohol its employees take in their own time. Indeed it would be unjust and unreasonable to do so.” *Shell*

It is clear that the likelihood of correlation between oral fluid testing and impairment was persuasive to the Commission.

# Resources

- *Shell Refining (Australia) Pty Ltd (Clyde Refinery) v CFMEU* [2008] AIRC 510, 23 August 2008
- *Shell Refining (Australia) Pty Ltd v CFMEU* [2009] AIRCFB 428 (Appeal Decision) 15 May 2009
- *Caltex Australia Limited v AIMPE and the AWU*, [2009] FWA 424, 19 October 2009
- *Perkins v Golden Plains Fodder Australia Macpri Pty Ltd* [2004] SAIRComm 5
- *Marsden v HREOC & Coffs Harbour & District Ex-Servicemen & Women's Memorial Club Ltd* [2000] FCA 1619
- *Bostik (Australia) Pty Ltd v Gorgevski* (1992) 36 FCR 2
- ILO Code of Practice: Management of Alcohol and Drug Related issues in the Workplace;  
<http://www.ilo.org/public/english/protection/safework/cops/english/download/e970709.pdf>