

**BHP Iron Ore Pty Ltd v Construction, Mining, Energy,  
Timberyards Sawmills and Woodworkers Union of  
Australia Western Australian Branch [1998] WAIRComm  
130 (19 June 1998)**

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

[INDUSTRIAL RELATIONS ACT, 1979](#)

**BHP Iron Ore Pty Ltd**

- and -

Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of  
Australia Western Australian Branch  
(No. CR 274 of 1997)

COMMISSION IN COURT SESSION 19 June 1998

SENIOR COMMISSIONER G.L. FIELDING

COMMISSIONER S.A. CAWLEY

COMMISSIONER A.R. BEECH

REASONS FOR DECISION

COMMISSION IN COURT SESSION: **BHP Iron Ore Pty Ltd** ("the Company") mines and processes **iron ore** at a number of worksites in the Pilbara region of this State. It wishes to introduce a drug and alcohol programme (the "Programme") for all of its employees at each of its workplaces. The Programme has a number of components, including compulsory drug and alcohol testing of employees in the workplace; education regarding the effects of alcohol and drugs; and the provision of assistance for those suspected of having an alcohol and drug dependency condition.

The most controversial aspect of the Programme is that part which involves testing for drugs. In essence, the Programme requires that an employee, as a condition of employment, submit to random testing of a sample of the employee's urine. If such a test proves positive the employee concerned, on the first occasion, is liable to be sent home on paid special leave; on a second occasion within a period of two years, is liable to be sent home on unpaid special leave; and on the third occasion within the same period, further employment of the employee with the Company will be the subject of discussions.

In the process of formulating the policy the Company extensively consulted its employees, principally through the medium of their respective unions. Agreement

in principle for the policy in its current terms appears to have been reached with the unions in the middle of 1997, but this was subject to approval by the workforce at mass meetings. The respective unions held separate meetings of their members to consider the introduction of the Programme. In the case of all the unions, other than the Construction, Mining, Timberyards, Sawmills and Woodworkers Union of Australia Western Australia Branch ("the Union"), a majority of the members who attended these meetings at the Company's various worksites agreed to the implementation of the Programme. In the case of the Union, its members at the Nelson Point worksite voted narrowly to accept the Programme, but its members at the Newman and at the Finucane Island worksites voted overwhelmingly to reject the Programme.

As a consequence, the Company has not introduced the Programme. The Company's view is that it is impracticable for the Programme to be in place unless it applies to all employees alike. In addition, it seems that those unions which do support the Programme do so on the basis that it will apply to all employees alike.

It is only fair to record that the Union does not sanction the use of alcohol or illicit drugs in the workplace, nor sanction any of its members being allowed to work whilst adversely affected by drugs or alcohol. Accordingly it does not object to the Programme in its entirety, but only to those parts which relate to testing for drugs. Originally the Union opposed that part of the Programme which rendered employees liable to submit a sample of their breath for alcohol testing but, at the outset of these proceedings the Union indicated that it now no longer objects to that part of the Programme.

In brief the Union's objection to the drug testing element of the Programme is that it constitutes an unreasonable intrusion into the privacy of the employees. The requirement that a body sample be provided on demand is, of itself, said to constitute a significant intrusion upon the privacy of the individual. In addition, objection is taken to the requirement that employees using prescribed or over-the-counter drugs which might impair them in their work report that fact to the Company and to the fact that the Programme requires the Company to maintain records of drug taking by its employees for at least two years. In short, counsel for the Union contends that the "proposed drug testing regime travels beyond the boundaries of acceptable work related disclosure of personal information".

The Union argues that there is no satisfactory evidence to suggest that there is a need for such drastic measures. In particular, there is said to be little or no evidence of prevalence of drug use by employees either in the workplace or immediately before commencing work, and certainly none to indicate that drug taking had caused problems in the workplace. According to counsel for the Union, such evidence as there was of any drug problem was "impressionistic and anecdotal rather than real or tangible". The Union points to, and relies upon, the fact that there has not been any reported drug related incidents in the last year at the

Respondent's workplaces. During this time, a version of the Programme, with a voluntary drug testing element, has been in force. The Union invites the Commission to draw the conclusion from this that any perceived drug problem in the workplace can be overcome without implementation of random drug testing through heightened awareness of the perils of drug use.

The Union also objects to the drug testing element of the Programme on the ground that urine testing for drugs is not a reliable indicator of actual impairment or intoxication. Counsel for the Union argues that it is repugnant, in those circumstances, for employees to face the prospect of "disciplinary and other potentially serious consequences" from a positive test, as is the effect of the Programme.

Finally, the Union argues that the Commission should not impose the Programme on its members because of the consent of other members of the workforce. In this respect, counsel for the Respondent drew attention to the general rule that industrial tribunals will not normally impose consent arrangements on non-consenting parties. In any event, the Union questions whether the support by members of the other unions is as real as the Company suggests. The Union contends that other unions supported the Programme only out of a fear that a stricter drug and alcohol regime would be imposed on the workforce by the Company.

The Company says that the Programme is necessary to enable it to satisfy its obligations under the [Mines Safety and Inspection Act 1994](#) and the Regulations made thereunder and to enable it to satisfy its common law duty to provide its employees with a safe workplace. The [Mines Safety and Inspection Regulations 1995](#) prohibit anyone from being in or on a mine while the person is adversely affected by intoxicating liquor or drugs and entitle the mine manager or supervisor to direct any employee reporting for duty who, in their opinion, is adversely affected by intoxicating liquor or drugs to leave the mine immediately ([Regulation 4.7](#)).

The Company acknowledges that the proposed drug tests are not a test of impairment, but contends that the cut off levels of drugs allowed under the Programme before a positive result is returned are at such levels that a positive result is a good indicator of there being a real risk of impairment; a risk which the Company argues it is duty bound to eliminate in the interests of safety. The Company also acknowledges the privacy concerns raised by the Union. However, it contends that the Programme recognises the need to protect the privacy of employees as far as possible by providing strict security measures designed to avoid publication of any test result and any other information given as part of the Programme, including information regarding prescription drugs. Furthermore, the Company argues that having discussed the Programme and its implications extensively with its workforce and their representatives, and having obtained the

consent of a significant majority of the workforce, the Company should now be free to implement the policy in accordance with the wishes of that majority, rather than have to yield to the wishes of a minority. Accordingly, by these proceedings, it seeks a declaration that the Programme is fair and reasonable.

Mr Le Miere for the Company submits that in determining whether the Programme is fair and reasonable in an industrial sense, the Commission should consider the matter objectively. It should not act as if it were the manager of the Company and substitute its view for that of the Company's managers. Its sole task is to determine whether, looked at objectively, the Programme is fair and reasonable even if it was not a course which the Commission left to its own devices may have implemented. In general, counsel for the Union agreed with that approach, with the rider that the fairness or reasonableness of the Programme was not to be determined in a vacuum, but having regard to "issues of general industrial relations significance".

Clearly, it is not for the Commission to manage the affairs of the Company as if it was an alternate or surrogate manager. As counsel for both parties correctly suggest, the Commission is required make an objective assessment of the Programme. As a consequence, it is not the function of the Commission, on this occasion, to determine what is the most ideal drug and alcohol programme in the circumstances, but to determine whether this Programme satisfies acceptable industrial standards. Further, as counsel for the Union suggests, that assessment must be made having regard to industrial relations considerations.

Both parties tendered expert evidence designed to support their respective cases. The Company called Associate Professor Christie, a pharmacologist and Medical Foundation Fellow within the Department of Pharmacology at the University of Sydney. He testified that, although it is true to say that urine testing for drugs does not produce direct evidence of impairment, as is the case with breath testing for alcohol, the minimum cut off levels set by the Programme were such that a positive test was a good indication of there being a real risk of impairment. In addition, the Company called Professor Homel, a criminologist and currently the Foundation Professor in the School of Justice Administration within the Faculty of Arts at the Griffith University. Professor Homel is also a member of the Queensland Criminal Justice Commission. He expressed the opinion that the Programme would act as an effective deterrent to drug use in the workplace. The Union, on the other hand, called Associate Professor Allsop, a psychologist who is currently Director of the National Centre for Education and Training on Addiction within the Flinders University and is an Adjunct Associate Professor within the School of Psychology at that University. He testified that "the prevalence of drug use in the workplace is largely unknown and the prevalence of drug related harm (other than tobacco and some studies on alcohol) is largely unknown". He questioned the veracity of Associate Professor Christie's assumption that the prevalence of drug use in the community generally can be translated into the workplace. In his opinion, the extent to which community habits relating to drug use can be translated into the

workplace was unknown. Indeed, there was reason to believe that "the prevalence of drug use in the workplace may be lower than that reported in the general community". In any event in his opinion the scientific material indicated that, unlike testing for alcohol, drug testing and particularly urine testing, is not a reliable indicator of either intoxication or impairment and in fact could be quite misleading in this regard. Furthermore, he suggested that the preventative effects of drug testing programmes of the kind envisaged by the Programme now in question have never been adequately demonstrated. In these circumstances he suggested that the proposed Programme involved unreasonable intrusions into the privacy of the employees. In support of this he referred to, and relied upon, the report of the Privacy Committee of New South Wales on Drug Testing in the Workplace. In addition, unlike random testing for alcohol, he said there was little public support for random drug testing, particularly where it could result in severe penalties for employees.

It must be acknowledged that there was little or no direct evidence as to the extent, if at all, that the consumption of drugs was a problem at the Company's worksites. However, it cannot be said that the Company's concerns in this respect are either baseless or otherwise irrational. There was evidence of illicit drugs being found at the worksites in recent years. For example, in 1995 two employees were caught smoking cannabis in the workplace. In 1996 cannabis was found hidden in a torch in one of the Respondent's vehicles at another of its worksites. In 1997, on two separate occasions, cannabis was discovered in equipment being used at one of the Respondent's worksites. In addition, late in 1994 an employee of the Respondent, who was killed at work when a haul truck she was driving overturned, was found to have a not insignificant level of cannabis in her blood at the time of death. As well, a cannabis and smoking implement was found in the cab of the vehicle she was driving at the time of her death. Whilst it must be acknowledged that there has not been any further incidents of this kind reported for a year, it is assuming too much to attribute this entirely to the modified drug programme applying during this time.

Whether or not it is reasonable to infer in the absence of evidence to the contrary, as did Associate Professor Christie, that much the same levels of drug use which occur in the community generally can be expected to be found in the Company's worksites, might be questionable. Nonetheless, it would be naive in the extreme to suggest that the worksites are immune to the adverse effects of drugs. Such evidence as there is of the use of drugs in the communities where the Company has worksites is reason to conclude that it would be highly improbable if drugs of the nature of those covered by the Programme were not consumed by some members of the Company's workforce, either at work or shortly before commencing work and it cannot be overlooked that a significant proportion of those communities are employees of the Company.

As already noted, the extent to which the consumption of drugs impacts on safety in the workplace was a matter of some considerable debate between the parties during the course of these proceedings **and**, to some extent, the subject of conflicting evidence in the proceedings. Associate Professor Allsop testified that, in contradistinction to the impact of alcohol, "very little is known about the impact of drug use on workplace behaviour". He argues that some drugs, for example amphetamines, "may have a positive effect on performance at lower doses and a negative effect at higher doses". As he points out, "the sedative/depressant effects" of heroin, for example, may contribute to safety in work practices. In the case of cannabis, he said that it "can have impact on a number of important functions that may contribute to safe work practices" and that "the evidence is far from clear just what level of harm may accrue in terms of driving and in terms of workplace behaviour". In his opinion, so far as the workplace is concerned, "the best that can be said is that the evidence is inconclusive".

Associate Professor Christie, on the other hand, testified that "Although little is known on the specific effects of many drugs on workplace behaviour, the effects of these drugs on cognitive function, psychomotor performance and other skilled tasks (such as driving) strongly predict serious adverse effects in the workplace". In short, his evidence was that "A number of drugs do indeed have impact on factors that contribute to safety in work practices". Furthermore, Associate Professor Christie who, unlike Associate Professor Allsop, has had the benefit of observing the activities required of employees at the Company's worksites, testified that many of the tasks employees are required to perform "include performance demands which are adversely affected by intoxicating effects of the drugs tested under the BHPIO Programme". In his opinion the range of the duties he observed at the Company's worksites "are safety sensitive and require sustained vigilance, acute **and** accurate judgement as well as highly skilled performance". We do not consider that anyone with a sound knowledge of the Company's operations could quarrel rationally with that assessment, especially in respect of the tasks which many of the employees, eligible for membership of the Union, are required to undertake. In the main, those employees are involved in operating heavy equipment, including driving some of the longest and heaviest trains in Australia. In Associate Professor Christie's opinion, "Intoxication by any of the drugs or drug classes which are tested in the BHPIO program is likely to produce impairment of a person's ability to perform such tasks ...". Associate Professor Christie acknowledged that there is a paucity of evidence regarding the effects of drugs in the workplace but argues that this paucity "reflects a lack of proper or complete study rather than any uncertainty in the potential for cannabis" and the other drugs to produce impairment. In his opinion "there is no doubt about the performance impairing effects of all the drugs tested under the BHPIO Programme, including cannabis". Moreover, in his opinion, these effects "have been very well characterised and there is no substantial controversy".

It is trite to say that the Company has a duty to ensure, so far as is reasonably possible, that it maintains a safe working environment. Essentially the extent and manner to which drugs are likely to cause action and reaction in those who ingest the drugs is a pharmacological question as, indeed, Associate Professor Allsop acknowledged. We think it would be unwise to dismiss the evidence of Associate Professor Christie as being unreliable or to otherwise ignore it in these circumstances. Having regard to the opinion expressed by him, we consider it reasonable for the Company to take steps to put in place a scheme designed to detect, so far as is possible, the level of consumption of drugs by employees and to implement procedures designed to deter the use of drugs in the workplace. Not only is the presence of drugs in the workplace prohibited by law, but credible evidence before the Commission suggests that the use of certain drugs has the potential to impact on safety in the workplace. As Associate Professor Christie testified, the "urine analysis tests for cannabis and other drugs in place under the BHPIO Programme detect the use of drugs that are both prevalent in the Australian community and have a high likelihood to produce impairment".

The expert evidence suggests that as yet there is no reliable test for detecting drug related impairment. Some tests have been developed but, as Associate Professor Allsop indicated, while these tests may show some promise they are in their infancy. Associate Professor Christie also testified that impairment tests have a limited value at present. In his opinion it is impossible to determine whether a person is adversely affected by drugs simply by observation or by impairment tests, except where high doses of drugs are involved. He testified that "even highly trained observers cannot reliably detect individuals intoxicated by alcohol and other drugs". Much the same opinion was advanced by Professor Homel. He testified that "there is a considerable body of evidence that even trained officers are not particularly good at detecting impairment when an offender comes to notice". In the opinion of Associate Professor Christie urine testing was a more effective means of detecting the presence of drugs and dealing with the "problem". Although not a reliable test of intoxication or impairment, urine testing "can detect a likelihood of impairment". That is particularly so at the cut off levels proposed under the Programme which, in his opinion, are at such levels as to give rise to a strong possibility that the employees recording a positive test are likely to be impaired in the performance of their work. Again, we see no reason why Associate Professor Christie's evidence in relation to these matters should not be accepted. Certainly, it is difficult in view of that evidence to say that the Company is acting unreasonably in seeking to instigate a testing regime rather than simply relying on education and observation as a means of satisfying its obligation to provide a safe system of work.

Apart from these considerations, the evidence of Professor Homel was that random drug testing in all probability would act as a deterrent to the use of drugs in the workplace. While Associate Professor Allsop questioned that assertion, he acknowledged that Professor Homel had more expertise in that field of study. He

did, however, concede that the introduction of random drug testing may cause people to alter their drug habits to avoid the chance of returning a positive result. Like Associate Professor Christie, Professor Homel said that confining the testing regime to "for cause", suspicion and voluntary testing was insufficient because of the difficulty in detecting impairment. According to Professor Homel, adoption of those testing methods "will not influence the behaviour of many drug and alcohol users who may pose a risk in the workplace", principally because regular users have a propensity to develop techniques to conceal the effects of impairment. Random testing was said to be more effective because "both heavy users skilled at concealing impairment and occasional users who are normally prepared to 'take the risk' perceive a higher probability of detection and modify their behaviours accordingly". Although most, but not all, of the data which Professor Homel used to reach his conclusion was based on experience with random breath testing in a road traffic environment, he was adamant that the same principles could be applied to the workplace.

Professor Homel testified that to be an effective deterrent, "random testing for drugs or alcohol should be carried out alongside a range of other activities that educate, persuade, assist, and provide a second chance, and which recognise the social realities of people's lives - particularly in remote parts of Australia". Clearly, as Professor Homel said, the Programme meets that criteria. It contains formal education, counselling and rehabilitation components which the Company regards as important elements. Moreover, the penal elements associated with the Programme are very much subordinated to these concepts. It is not until a third positive reading in a two year period that the offending employee is at risk of losing his or her employment, and even then, as we understand it, termination of employment is not automatic. Furthermore, after the expiration of two years any positive reading is expunged from the employee's record. Moreover, an important feature of the Programme, which distinguishes it from many others which have come to the notice of the Commission in the course of its work, is that the minimum cut off levels set for a positive test are relatively high. They are significantly higher than the cut off levels set by the Australian Standard AS4305-1995.

As Mr Nolan for the Union so ably argued, there can be no doubt that the Programme involves an intrusion into the privacy of individual employees. However, the current standards and expectations of the community concerning health **and** safety in the workplace as evidenced by legislative prescriptions and judgements of courts and industrial tribunals are such that there will, of necessity, be some constraint on the civil liberties at times **and**, in particular, an intrusion into the privacy of employees. Indeed, that is implicit in the Union's concession that random breath testing has a place in the Programme. Similar considerations apply in respect of the growing insistence by employees, as well as employers, that the workplace be smoke free. Even uniform requirements to wear safety hats, goggles

and safety harnesses, irrespective of the wishes of individual employees, can be seen as an infringement of individual civil liberties.

However, having regard for the likelihood of impairment, as explained by Associate Professor Christie, at the cut off levels proposed for the drugs listed in the Company's Programme, we do not consider the testing regime under the Programme to be unreasonable. That is all the more so, given the evidence of Professor Homel, that the random nature of the testing process is likely to be an effective deterrent, more especially because the Programme appears to have the support of a significant majority of the workforce. As previously noted, many of the tasks of employees at the Company's worksites include performance demands which are safety sensitive and adversely affected by the intoxicating effects of the drugs covered by the Programme. In those circumstances it seems to us to be reasonable to require that employees make themselves available for drug testing on demand rather than be required to exhibit some debilitating signs before being required to undergo such a test. It cannot be overlooked that the Company has an obligation to protect the privacy of its employees but it also has an obligation to protect the safety of all of its employees in the workplace so far as is reasonably foreseeable. Even The Privacy Committee of New South Wales, which considered drug testing in the workplace and which, as a general proposition, recommended against drug testing on the grounds of invasion of privacy, acknowledged "that workplace safety is a concern of such importance that drug testing for safety reasons is justified in certain circumstances", albeit that it denounced the concept of random drug testing (*The Privacy Committee of New South Wales (1994) "Drug Testing in the Workplace"* 8.1; 8.2). Much the same was acknowledged by the authors of a study regarding drugs in workforces in the United States of America, to which Associate Professor Allsop referred. The principal conclusion of that study was that there was a need to gather more information about the impact of drug testing programmes on the health and productivity of the workforce before they could be seen as a panacea for curing workplace performance problems. Nonetheless, the authors of the study, as Associate Professor Allsop points out, suggested that drug testing "for safety sensitive positions may still be justified in the interests of public safety" (*Normand J. Lempert and O'Brien CP (1994) Under the Influence? Drugs and the American Workforce. Washington DC: National Academy Press*).

The Programme has a number of elements built into it which, to a marked degree, serve to see that the intrusion into the privacy of the individual employee is limited. Significantly, the Union accepts that the steps the Company proposes to take to protect and maintain the confidentiality of the records which result from the operation of the Programme go a long way towards protecting the privacy of the employees involved in the testing. Further, although the Programme will require the production of a urine sample, the sample is given in private and not witnessed by the tester. Furthermore, because of the high cut off levels, the likelihood of naive drug users being caught is significantly reduced. As a consequence, the

degree to which the regime impacts on the out of work lives of the employees is not likely to be as significant as might at first have been thought by the employees. In this respect, Associate Professor Christie commented -

"The random selection procedures in place under the BHPIO Programme have a modest likelihood of detecting occasional use of drugs in the workplace. The same procedures have a high likelihood of detecting chronic or hazardous alcohol and other drug users. Chronic alcohol and drug users are necessarily intoxicated frequently, greatly increasing the probability of detection by the random selection and for cause procedures. Moreover, alcohol and drug dependent individuals are more likely to fail at abstinence attempts during following day retest procedures, and short interval random retest procedures in place under the BHPIO Programme. This group perhaps presents the greatest safety hazard to themselves and fellow workers by reason of their chronic repeated episodes of intoxication. These individuals might also benefit most from assistance by rehabilitation procedures in place under the BHPIO Programme."

Mr Nolan criticised the policy on the basis that it required "pre-notification of *all* medication to the 'Medical Centre' and actual disclosure to the tester at the time of the test where the employee is selected for testing". As he points out, the intention of this requirement is "purely to avoid confounding the drug test" and to the extent that it does not relate to the likelihood of actual impairment "is a plain breach of medical confidentiality". It should be noted that the Programme, in its amended form, no longer requires individual employees routinely to inform the Company of all prescription drugs they consume, but only those which, on medical advice, are likely to impair their actions in the workplace. There can be no rational objection to that requirement. Indeed, one would have thought that employees had such an obligation, quite apart from the terms of the Programme. Furthermore, given that the drug test is designed to produce an accurate result, it does not seem unreasonable that employees should be required to give information regarding the over-the-counter or prescription drugs they may be taking to the tester, rather than the Company, in order to avoid confounding the drug test.

Mr Nolan points to the fact that no such requirement is required by the law enforcement authorities in respect of the random testing of road users. That may well be the case, but it is hardly a fair comparison to equate the enforcement of the quasi-criminal law, which for every breach carries a penalty, with the enforcement of safety standards which, unlike the traffic laws, only remotely carry penal consequences. Indeed, one of the criticisms of the Union's stance with respect to drug testing, as appears to have been suggested by Associate Professor Christie, is that it appears to treat the matter as if the employees had been charged with an offence rather than being participants in a regime, the sole object of which is to see that drugs and their ill-effects are eradicated from the workplace.

Initially, the Union drew attention to the potential for drastic consequences to employees based on a false positive reading. However, the prospects of an error of that kind occurring on the initial screening test and with a follow-up laboratory test, as required by the Programme, is extremely low. Associate Professor Christie testified that the probability of error in either test was less than 1 per cent. Moreover, as he pointed out in his Commentary Report dated 14 May 1998, even if the probability of error was 1 per cent in both tests "then, the probability of both tests producing erroneous positive results as being in the order 1 in 10,000". Furthermore, as he said, if such an error were to occur, "it would be extremely unlikely if a re-test (on the split sample in the BHPIO Programme) were requested" and it would also be extremely "unlikely to occur again on the sample from a second day test". In short, as he said, "the problem is irrelevant".

Equally, we consider there to be insufficient merit on this occasion in the Union's objection based on the principle that consent arrangements should not be imposed on non-consenting parties in this case. The Company does not seek the Commission's sanction for the Programme because the majority of its employees have consented to its introduction but because it sees it as the most effective device to eradicate drugs from the workplace in the interests of workplace safety. Nonetheless we consider it significant that the Programme was settled only after extensive consultation between the Company and the unions with the stated aim of achieving a consensus in this matter amongst the workforce. The Company's efforts in this regard are significant given the comment of Professor Homel that the introduction of a random alcohol and drug programme can be counter-productive if there is overwhelming opposition to it.

Furthermore, an important aspect of this Programme is the fact that it contains a formal review mechanism which includes within it a provision that "as new, more efficient and effective methods of testing become available, the Company, unions, or site safety committees may seek to introduce appropriate changes to the current logistics structure. This may include ... testing methodologies." Thus the Programme contains a mechanism for the parties to review the reliability of the Programme as an indicator of impairment. It also provides a mechanism to address any other concerns any of the parties may have regarding the operation of the Programme. This could include the Union's concerns regarding the potential for a breach of confidentiality when persons are "booked off" the job following a test. We have considered that the records generated by the Programme may not be privileged from production in civil or criminal proceedings. We doubt that the consequences of these concerns will be as grave as the Union suggests and, again, are content that there is a mechanism within the Programme to enable these concerns to be addressed.

In our view, the Programme cannot be said to be either unreasonable, harsh or unfair. On the contrary, we consider it to be both fair **and** reasonable. In recording this conclusion, it is important to emphasise that the Commission has been

concerned only to review a particular programme for drug testing in the context of the industry in which the Company is engaged.

We will, if need be, issue a declaration to give effect to our conclusion.

Appearances: Mr R.L. Le Miere QC of counsel **and** with him Mr R.A. Lilburne of counsel on behalf of **BHP Iron Ore** Pty Ltd

Mr J.W. Nolan of counsel and with him Ms J.L. Harrison on behalf of the Construction, Mining, Energy, Timberyards Sawmills and Woodworkers Union of Australia Western Australian Branch