DECISION

Fair Work Act 2009
s.739—Dispute resolution

"Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)
v
Opal Packaging Australia Pty Ltd T/A Opal Fibre Packaging
(C2024/892)

DEPUTY PRESIDENT MASSON MELBOURNE, 31 JULY 2024

Application to deal with a dispute under an enterprise agreement.

[1] On 14 February 2024, the "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU) applied to the Fair Work Commission (the Commission) to deal with a dispute pursuant to s 739 of the *Fair Work Act 2009* (the Act) under the dispute resolution procedure at clause 16 of the *Opal Fibre Packaging National Enterprise Agreement 2022*[1] (the 2022 Agreement). The Respondent in the matter is Opal Packaging Australia Pty Ltd T/A Opal Fibre Packaging (Opal).

[2] The AMWU contends by its dispute notification that Opal has announced changes to its Alcohol and Other Drugs Policy (the AOD Policy) and implementation of same that will negatively impact employees. The changes that the AMWU has raised concerns about include movement from blanket site alcohol and drug testing to random site testing, changes to the policy relating to the treatment of non-negative test results for over the counter or prescription medication and removal of blood alcohol concentration (BAC) self-testing units at sites where they are present. The AMWU dispute the content of the policy and practice changes and also contend that Opal failed to properly consult in relation to the changes.

Jurisdiction of the Commission

[3] Section 739 of the Act empowers the Commission to deal with certain disputes under enterprise agreement dispute settlement terms. The 2022 Agreement contains such a term which is set out at clause 16 of the Agreement which relevantly provides as follows;

> **"16. Dispute resolution procedures**
>
> **16.1 Scope**
>
> The dispute resolution clause will be used if there is a dispute in relation to all matters which pertain to the relationship between the parties and the Union/s

covered by this Agreement. For the sake of clarity this may include any dispute arising in relation to the following:

(a) a dispute in relation to a matter under this Agreement;

(b) a dispute in relation to any workplace industrial policy, practice or procedure

(c) a dispute in relation to any amendment or termination, or proposed amendment or termination of this Agreement or workplace policy or procedure, or any bargaining or negotiating for, or making of, a new agreement or workplace policy or procedure;

(d) the Awards referred to at sub-clause 3(b) and any other incorporated instrument;

(e) the NES.

16.2 Procedures to be used

The following procedure for the avoidance or resolution of a dispute shall apply:

(a) At any stage during this dispute's process an employee is entitled to appoint a Union representative, including a Union delegate, or any other representative as requested by the employee, to act on their behalf.

(b) In the first instance the parties will attempt to resolve the matter at the workplace by discussions between the employee or employees concerned and the relevant supervisor/manager.

(c) If such discussions do not resolve the dispute, discussions between the employee or employees concerned with the State Official or State Secretary or their nominated representative and more senior levels of management will take place.

(d) If the dispute cannot be resolved at a workplace level, the National Official or Assistant National Secretary or their nominated representative will have discussions with a more senior representative of the Company.

(e) If a dispute is unable to be resolved at the workplace, and all agreed steps for resolving it have been taken, the dispute may be referred to the FWC for resolution by mediation and/or conciliation.

(f) If FWC is unable to resolve the dispute by way of mediation and/or conciliation and where the matter in dispute remains unresolved, the parties will have the matter heard by the FWC by way of arbitration.

(g) The Company, the employee(s) and the Union agree to abide by any decisions or orders made by FWC, subject to exercising any right of appeal to a Full Bench.

……..”

[4] It was not contested that the questions to be determined by the Commission, which are set out below, are capable of constituting a dispute relating to *‘matters which pertain to the relationship between the parties and the Unions’* covered by the 2022 Agreement, as required by clause 16.1. Nor was it in dispute that the steps taken by the parties to resolve the dispute constituted compliance with the dispute resolution procedures (the DRP) of the 2022 Agreement. Having regard to the information in the Form F10 applications filed by the AMWU and the views of the parties, I am satisfied that the Commission has jurisdiction to deal with the dispute, including by arbitration as provided by clause 16.2(f) of the 2022 Agreement.

[5] The matter was subject to conciliation before the Commission in conferences conducted with the parties on 5 & 22 March 2024 pursuant to clause 16.2(e) of the 2022 Agreement but was not resolved. The Unions subsequently requested the matter be programmed for arbitration pursuant to clause 16.2(f) of the 2022 Agreement.

The hearing

[6] The matter was listed for hearing on 29 May 2024 in advance of which the parties filed material on which they intended to rely in accordance with directions issued. At the hearing, Ms K Presdee (Senior National Legal Officer) appeared for the AMWU and called the following persons to give evidence;

- David Henry – Acting Assistant National Secretary of the AMWU
- Margaret Hogan – National Industrial Officer of the AMWU

[7] Mr S Kelleher (Workplace Relations Practice Leader for the Ai Group) appeared on behalf of Opal along with Mr J Hyde (Opal Fibre Packaging In-house Legal Counsel) and the following witnesses were called;

- Rod Beales – General Manager-Workplace Relations for Opal Commercial
- David Tregoweth – General Manager-Health and Safety for Opal Commercial

Issues for determination

[8] The following questions arise for determination by the Commission;

1. In respect of the sites covered by the Opal Fibre Packaging National Enterprise Agreement 2022 (“the Agreement”), was Opal prevented from implementing any or all of the following measures arising from the January 2024 amendments to its Alcohol and Other Drugs Policy, namely:

    a. the removal of alcohol self-testing machines on sites;

b. permitting paid stand down of employees on prescription or over the counter medication following a non-negative result in a random drug test;

c. review of positive laboratory confirmation tests by an independent medical review officer ("MRO").

2. In respect of the sites covered by the Agreement was Opal prevented from:

a. re-introducing random alcohol and other drug testing after a hiatus since 2020; and/or

b. using a sample selection methodology for random testing at a site, rather than the testing of all workers at a site selected at random; and/or

c. discontinuing the previous practice of seeking assessment by an MRO of a non-negative random drug test result (prior to the confirmatory drug test result) in circumstances where the employee provided a declaration that they are taking prescription or over the counter medication.

3. If the Commission answers "Yes" to any or all of questions 1.a-c or 2a-c, what steps does the Commission recommend Opal adopt to address any matters that the Commission determined prevented Opal from implementing the relevant changes?

Background and evidence

[9] On 1 May 2020, an asset sale arrangement (the Sale) was completed between Opal and an unrelated entity, the Orora Group that brought a number of assets into the newly created Opal Group together with the existing assets of Paper Australia Pty Ltd. Ten of the Orora Groups' fibre packaging sites came across to Opal, those sites being; Knoxfield (Vic), Scoresby (Vic), Scoresby Pre-print (Vic), Brooklyn (Vic), Revesby (NSW), Rocklea (Qld), Bohle/Townsville (Qld), Athol Park (SA), Bibra Lake/Spearwood (WA), and Launceston (Tas)[2].

[10] As part of Sale, employees covered by *the Orora Fibre Packaging National Enterprise Agreement 2019* (the 2019 Agreement) were offered employment by Opal and those who accepted employment offers commenced with Opal on 1 May 2020. The 2019 Agreement continued to apply (as a transferrable instrument) until its replacement by the 2022 Agreement on or around January 2023. The 2022 Agreement covers the ten fibre packaging sites listed above at which Opal undertakes activities associated with manufacturing cardboard box packaging[3].

[11] Prior to the Sale, Paper Australia had its own alcohol and drugs policy which continued to apply after the Sale and still applies at manufacturing and distribution sites that had previously been part of the Paper Australia network prior to the Sale. Those sites are now part of Opal Australian Paper[4]. Opal and the rest of the Opal Group in Australia adopted the Orora AOD Policy. While post-incident, reasonable suspicion and return to work testing continued to be undertaken by Opal, random testing under the AOD Policy was paused between 1 May 2020 and 13 February 2024[5], in part due to COVID-19 pandemic restrictions and did not resume until

February 2023. By contrast, the Opal Australian Paper business uses a different testing provider to that which Orora had used (and which Opal now uses) and Opal Australian Paper did not pause testing during the COVID-19 pandemic and continued testing without interruption[6].

[12] Ms Hogan gave evidence on the origin of the AOD Policy prior to the Sale. She states that when Orora was considering the development of the AOD Policy it established a committee of occupational, health and safety representatives and delegates to consult on the development of the policy. She says she worked closely with this committee and although the AMWU suggested the committee consider other relevant issues, Orora did not accept that suggestion. She further states that the Committee met in person six times and canvassed issues such as detection window periods, the presence of substances and its relationship to impairment and other issues including the discipline model. Ms Hogan states there was much debate about testing during these meetings with the final position being that of saliva testing for drugs with random testing to be conducted on a site blanket basis once a site had been randomly selected[7].

[13] Ms Hogan also referred to Orora having separately established a National Occupational Health and Safety Committee (NHSC) which dealt with issues such as the AOD Policy and included management and employee representatives drawn from various sites. The NHSC continued after the Sale but was said by Ms Hogan to have been disbanded in late 2022 or early 2023[8].

[14] According to Mr Tregoweth who commenced as General Manager – Health and Safety with Opal Commercial in November 2022, a review of AOD Policy was conducted in May-June 2023 by Heidi D'Elton, Health & Wellbeing Manager. The review followed the earlier endorsement by Opal Commercial's executive management of the resumption of random testing at the sites covered by the AOD Policy[9]. Ms D'Elton's recommendations which are set out below were endorsed by Mr Tregoweth in or around July 2023[10]. Mr Tregoweth concedes that the proposed changes were not informed by a formal risk assessment as to his mind the changes were minor and administrative in nature. He opined that the changes related to testing processes and that there was no associated change in the risk presented by potential impairment of an individual at work having consumed alcohol or drugs[11].

[15] It is the announced changes to the AOD Policy that are disputed by the AMWU. These changes are set out below.

Changes to random testing

[16] The AOD Policy provides for random testing as follows;

> "**Random testing**
>
> Team Members are required to submit for testing as part of random testing programs.
>
> The process to select the random sample of Team Members and/or sites/shifts for testing will be determined by the Testing Provider."

[17] While no change has been made to the AOD Policy, Opal has announced a change to the process of conducting random testing. Prior to the COVID-19 pandemic, Orora's practice

was to conduct 'blanket' testing of all employees at a site selected by the Testing Provider. As earlier stated, Opal did not undertake drug testing between the date of the Sale in May 2020 and December 2023. While blanket testing may still occur at smaller sites from time to time it is intended by Opal that random drug and alcohol testing will be conducted on the basis of a random sample of employees selected from the list of Team Members on a particular site by the Testing Provider.

[18] Mr Tregoweth acknowledged that Orora's practice had been to test all employees on-site at the particular site selected for testing. While feasible for small sites, that approach brings with it significant operational disruption for larger sites and effectively means closure of the site and discontinuance of production for the day according to Mr Tregoweth. The proposal which was endorsed by him involves a reduction in the testing pool from 100% to 10% of employees on-site for those sites with a headcount above a certain threshold (a level of 50 was recommended). While the modified approach to the conduct of random testing delivers reduced operational impacts, the selection of a random sample of all employees on a site is in Mr Tregoweth's opinion regarded as the best practice approach to AOD testing at large manufacturing sites and was also recommended by Opal's testing provider, TDDA[12].

Alcohol self-testing

[19] The AOD Policy formerly included a section headed 'Self-exclusion from duties following self-testing for alcohol'. This element of the AOD Policy allowed for employees to use self-test facilities prior to commencing work at sites where self-testing facilities were installed. The change to the AOD Policy involves removal of the self-testing provisions which previously read as follows;

> **"Self-exclusion from duties following self-testing for alcohol**
>
> Opal will provide self-testing facilities for alcohol at the workplace wherever reasonably possible. A Team Member may elect to use available facilities to self-test prior to the commencement of their duties. If a Team Member returns a result of anything over 0.00% BAC, they must exclude themselves from duty on the basis that they are unfit for work.
>
> If the test indicates a BAC of 0.02% or less, and the Team Member is prepared to disclose this to his/her People Leader, the Team Member may remain on site in a safe location away from the work area for up to two hours and commence duties if the Team Member can demonstrate the reading has returned to 0.00% BAC.
>
> For Team Members that are Opal employees, any absence as a result of self-exclusion will be treated as personal (or if appropriate and agreed, annual) leave.
>
> Where there is an unreasonable pattern of, or excessive reliance on, the self-exclusion opportunity, this may result in-disciplinary outcomes.
>
> The opportunity for Team Members to self-test is only applicable prior to the commencement of duties. Any self-test that indicates a positive result for alcohol after a Team Member has commenced duties will be treated as a breach of this policy."

[20] Mr Tregoweth explained the rationale for this change as follows. He states that self-testing units were fitted at some sites, but he did not believe it was practical for Opal to service and maintain such units at every site across Australia. He also held the view that the provision of self-testing units may encourage some employees to attend for work while potentially affected by alcohol, rather than self-testing at home and/or taking personal leave if uncertain. He states he was also informed by Ms D'Elton that some employees had raised concerns about hygiene issues associated with use of shared breath testing units and how the disposable mouthpieces stored near the units could be stored and disposed of in a hygienic manner[13].

Non-negative drug screening test result – where Team Member has provided a Prescription Pharmaceutical Fitness for Work Assessment

[21] The next area of policy change that has been announced is that relating to how employees who have obtained over the counter or prescription medication or have provided a Prescription Pharmaceutical Fitness for Work Assessment (PPFWA) and produce a non-negative drug screening result are managed in terms of stand down and the confirmatory test process. A copy of the policy with mark-ups showing the changes to the policy immediately follow below;

Screening and confirmation testing for drugs

The first stage of drug testing will be a screening test. The result of the screening test will either be (a) negative; or (b) non-negative.

If the screening test is negative (and the alcohol test was negative), the Team Member may return to work.

If a Team Member receives a non-negative screening test result, the Team Member must submit to a confirmation test. A Team Member must supply another sample (if required) to be sent to a laboratory for confirmation testing.

~~Subject to the section regarding pharmaceuticals below:~~

- ~~a~~A Team Member may be stood-down ~~on full pay~~ while waiting for the result of a confirmation test. For full-time and part-time Opal employees, the stand down will be paid.~~;~~ ~~and~~
- ~~i~~If a Team Member returns a positive confirmation test result, this will constitute a breach of this policy, except where the section below applies regarding the detection of a corresponding substance in the confirmation test after proper disclosure of pharmaceuticals.

Pharmaceuticals – disclosure to Testing Provider

Prior to participating in an AOD test, Team Members are required to disclose any over-the-counter or prescription medication which they are currently taking to the Testing Provider. For prescription medication, if the Team Member is required to have a PPFWA completed in accordance with this policy, they must provide a copy of the current PPFWA to the Testing Provider at the time of the test.

Where corresponding substance detected after proper disclosure

~~If a Team Member discloses to the Testing Provider that they are taking an over-the-counter or prescription medication, and provides the Testing Provider with a copy of any required PPFWA documentation, and a corresponding substance is detected in the screening test, then pending receipt of the confirmatory result:~~

- ~~If the testing circumstances are Reasonable Suspicion or Post-incident to Work testing, the Team Member will be stood down on full pay; and~~
- ~~If the testing circumstances are Random testing or follow-up Return to Work testing, the Team Member may return to work.~~

If the subsequent confirmation test is positive and ~~the Testing Provider indicates~~ Opal's contracted provider of independent medical review officer services advises that result is consistent with normal and/or PPFWA dosage, there will be no breach of this policy.

If Opal's contracted provider of independent medical review officer services advises that confirmation test results indicate concentration levels in excess of the normal and/or prescribed dosage, this will be considered a breach of this policy. ~~The Team Member may request a review by Opal's contracted provider of independent medical review officer services which, in the case of Opal employees, will be paid for by Opal. In these circumstances, only if the medical review officer is able to verify that the dosage is consistent with the Team Member's PPFWA, will the Team Member not be considered to be in breach of this policy.~~

In any event, the PPFWA may need to be reviewed in light of the testing results to ensure ongoing fitness for work.

Where Restricted Substance detected in the absence of proper disclosure

If a Team Member has a non-negative screening test in circumstances where they have not disclosed any medication to the Testing Provider, or where they have failed to provide required PPFWA documentation to the Testing Provider at the time of testing, ~~the Team Member will be stood down on full pay until the confirmatory result is received.~~

~~If~~and the confirmatory test returns a positive result, this will constitute a breach of this policy.

[22] Mr Tregoweth states that the AOD Policy prior to the announced change provided for the following treatment of non-negative screening test results in respect of over the counter or prescription medications or where a PPFWA had been produced. Employees who had disclosed to the testing provider that they were taking an over the counter or prescription medication or had provided a PPFWA and then produced a non-negative screening result were not necessarily stood down on pay pending a confirmatory test. They were permitted to continue to work pending the confirmatory test unless the testing was on the basis of post-incident or reasonable suspicion in which case they were stood down. This approach was contrasted with the approach taken to non-negative screening results for other drugs, where employees were immediately stood down pending the confirmatory test result[14].

[23] Mr Tregoweth explained that the AOD Policy as it previously was, was silent on the process of how and by whom an assessment was made as to whether the non-negative screening test result was for a 'corresponding substance' to that disclosed in any required PPFWA. While not dealt with in the AOD Policy as it then was, Mr Tregoweth states that he understood that subject to the employee providing consent the assessment was made by a medical review officer (MRO) who was available on an 'on-call' basis. Mr Tregoweth states that this approach was adopted by Orora as a practical measure to meet the equivalent of the policy requirement. A copy of the process was set out in an Orora document titled 'On-call Medical Review ("MRO") Process[15]. He further explained that having an MRO 'on-call' would not be practical in circumstances where the proposed approach to random testing involves a higher frequency of testing across sites with fewer employees per test event[16].

[24] Another aspect of the policy change that Mr Tregoweth drew attention to includes the former policy element that stipulated that the testing provider's assessment of consistency between a positive laboratory confirmatory test and the declared medical dosage/PPFWA was conclusive of whether the employee had breached the AOD Policy. Mr Tregoweth states he

held two concerns over this aspect of the former policy. Firstly, the AOD Policy did not reflect the practice, that being the assessment of consistency between the declared medication/PPFWA, and confirmatory test result was undertaken by the MRO and not the testing provider. Secondly, Mr Tregoweth also believes that the testing provider does not have the medical expertise to provide a robust assessment of consistency between the declared medication/PPFWA and confirmatory test result, and indeed TDDA do not provide that service[17].

[25] Another change in the AOD Policy identified by Mr Tregoweth was that of the removal of an employee's ability to request a review by the MRO of the testing provider's assessment of consistency between the declared medication/PPFWA and confirmatory test result. This was according to Mr Tregoweth a logical consequence of the insertion into the AOD Policy of the role of the MRO to conduct the consistency assessment as part of the confirmatory test process[18].

[26] The announced change to the AOD Policy would, according to Mr Tregoweth, bring the approach to management of a non-negative screening test results for random or return to work testing for over the counter or prescription medication into line with reasonable suspicion and post-incident drug testing. That is, on production of a non-negative drug screening test result, an employee would be stood down pending receipt of an MRO assessment of the lab confirmatory results for consistency with the disclosed medication/PPFWA. Mr Tregoweth also expressed the view that there was no apparent safety rationale for permitting an employee to return to work pending laboratory confirmation results in circumstances of a non-negative drug screening test result for random or return-to-work drug testing[19].

[27] Mr Tregoweth was cross-examined on the nature of any risk assessment undertaken by Opal in relation to the changes to the AOD Policy changes in practice. He stated in response that discussions regarding a range of risks were held between himself and Ms D'Elton and with others within the organisation, including in relation to legal and commercial risks. He further stated that to his knowledge there were no specific discussions regarding risk with the workforce[20].

Consultation with employees

[28] On 23 October 2023, an email was sent by Ms D'Elton to all Opal employees notifying employees of the recommencement of random testing under the AOD Policy and also highlighting three key changes to the policy that were proposed. A copy of a presentation attached to the email was titled 'Update on random testing and consultation on proposed policy changes' (AOD Presentation) which set out the proposed changes[21]. The email made clear that certain Opal sites were excluded, those being OAP sites at Maryvale, Preston, Bassendean and Carole Park.

[29] Mr Tregoweth states that between 23 October and around 23 December 2023, consultation was then undertaken with employees at all sites covered by the AOD Policy, including sites not covered by the 2022 Agreement, the process of consultation led by Ms D'Elton. That consultation was supported by the AOD Presentation which was also circulated in hard copy form at sites from 23 October 2023. Employees were invited to provide feedback through various means including by; speaking with their People Leader, HR Business Partner

or Safety Business Partner, by emailing their written feedback, or by requesting their appointed Health and Safety Representative (HSR) for their site or other representative to provide feedback on their behalf[22].

[30] Consultation steps taken were described by Mr Tregoweth to have included the following;

- Brooklyn (Vic) site – on 7 December 2023, the AOD Presentation was provided by a Ms Kikas at the HSE Committee Meeting for which minutes were recorded[23]. This was followed by two shift consultation sessions on 15 December 2023 from which feedback was received[24].

- Scoresby Box Plant (Vic) – on 4 December 2023, the AOD Presentation was presented and worked through by Jenny McClean (Head of Health and Safety – OFP – VIC/TAS) with the HSRs at the Safety Committee Meeting. The AOD Presentation was also presented at Communication Meetings with day, afternoon and night shifts on or around 8 December 2023. 120 copies of the presentation were also printed off and provided to employees[25].

- DAP Knoxfield (Vic) – on or around 4 December 2023, Ray Scicluna (Site Manager) presented the AOD Presentation at Communication Meetings[26].

- Revesby (NSW) – on 25 October 2023, Ahmad Ibrahim-Elgarhy (Site Manager) delivered the AOD Presentation via site Communications Meetings covering day, afternoon and night shifts. On 6 December 2023, the site HSE Committee also discussed the AOD Policy changes and 'relaunch'[27].

- Rocklea (Qld) – on 7 November 2023, site management met with union delegates to discuss concerns from the shopfloor regarding the proposed AOD Policy changes. A summary of the issues raised was provided by Mathew Whyte (HR Manager Qld Packaging & OSP)[28]. A further meeting with the AMWU at Rocklea was held on 16 November 2023[29].

- OFP Townsville (Qld) – on 13 November 2023, site management met with union delegates to discuss concerns from the shopfloor regarding proposed changes to the AOD Policy. The feedback received was summarised by Mr Whyte in an email that same day[30].

- Spearwood (WA) – on 24 October 2023, Sean Preston (Production Manager WA) delivered consultation sessions for day and afternoon shift in respect of the AOD Policy changes proposed[31].

- Launceston (Tas) – on 29 & 30 November 2023, Karen McCarrol (Health & Safety Business Partner) delivered the AOD Presentation to employees[32].

- Athol Park (SA) – between 23 October and 10 November 2023, the AOD Presentation was cascaded to all employees on site. On 25 & 26 October 2023 respectively the day and afternoon production supervisors delivered the AOD Presentation and sought

feedback from production employees. The AOD Policy changes were also discussed at the HSE Committee Meeting on 8 November 2023[33].

Consultation with AMWU

[31] Mr Beales states that following distribution of the AOD Presentation, he sought to meet with the two relevant unions, those being the AMWU and Construction, Forestry, Mining and Energy Union (CFMEU). He further states that along with Ms D'Elton he met with the CFMEU on 26 October 2023 during which meeting he received feedback from the CFMEU[34]. When questioned on the feedback received from the CFMEU, Mr Beales stated that while he could not recall the specific feedback received, he was not concerned at any matters raised by the CFMEU[35]. He further confirmed that the three points captured in Ms D'Elton's feedback summary pack of CFMEU feedback was not discussed in the meeting of 26 October 2023 nor subsequently raised with him by the CFMEU[36].

[32] With respect to the AMWU, Mr Beales states that he arranged for a meeting via Teams with Ms Hogan of the AMWU for 26 October 2023. While the original purpose of the meeting was to hold 'Level 3' discussions on an unrelated dispute, he had planned to contact Ms Hogan on 23 October 2023 to ask if the AOD Policy could be added to the agenda for the meeting. On 23 October 2023, Ms Hogan pre-empted Mr Beales by emailing Ms D'Elton indicating that the AMWU were seeking an urgent meeting to discuss the AOD Policy consultation process[37]. After being forwarded Ms Hogan's email from Ms D'Elton, Mr Beales responded directly to Ms Hogan to the effect that he had been planning to have that conversation with Ms Hogan and Lorraine Casson (AMWU Assistant National Secretary) in the meeting already scheduled for 26 October 2023[38]. Ms Hogan states that it was the view of both the delegates and AMWU officials at this point that the proposed consultation process appeared tokenistic and unlikely to be genuine, particularly given her experience in the original process undertaken by Orora in developing the AOD Policy[39].

[33] At the on-line meeting on 26 October 2023, Mr Beales states that Ms Hogan and Ms Cassin were resistant to engaging in consultation over the AOD Policy. Ms Hogan states she did not recall exactly what was said at the meeting but did recall either Ms Cassin or herself raising concerns over random sample testing at sites being used to target AMWU delegates[40]. Mr Beales states that when he attempted to raise the AOD Policy Ms Hogan said words to the effect of "We're putting that in dispute". Mr Beales also states that when he attempted to share his screen to go through and discuss the AOD Presentation Ms Cassin said words to the effect of "Don't bother, we've already seen it, we had it sent to us by our delegates"[41]. Mr Beales further states that in the following weeks he was informed by various site leads and HR/Safety representatives that the AOD Policy was being 'put in dispute' at certain sites and dispute meetings were being arranged in accordance with the DRP in the 2022 Agreement[42].

[34] When cross-examined on the meeting on 26 October 2023, Ms Hogan agreed that she could not recall exactly what was said in the meeting although did recall the AMWU's preference for site blanket testing being discussed. When pressed on whether she or Ms Cassin had sought any additional information from Mr Beales or had put forward proposals at the meeting, Ms Hogan restated that she could not recall. Ms Hogan rejected the proposition put to her that the AMWU had never intended to engage with Mr Beales and explained that the AMWU at that point saw no option but to put the matter in dispute given what it regarded as a

deficient consultation process. While acknowledging that the AMWU had placed the matter in dispute only three days after the consultation process had commenced on 23 October 2023, Ms Hogan stated that she had already formed the view that the consultation process was not going to be transparent, that view having been formed through her experience with Opal[43].

[35] Mr Beales was also cross-examined on the meeting of 26 October 2023. He confirmed that Ms Cassin and Ms Hogan had not asked for any additional information regarding proposed changes to the AOD Policy, had not sought to be provided with employee feedback on the policy changes, nor made any proposals about alternative consultation processes[44]. He also confirmed during cross-examination that in attending the 26 October 2023 meeting he was not provided with speaking notes or dot points in addition to the AOD Presentation. He did explain that he had seen the material in draft form as it been developed and also draft FAQs that had been prepared[45]. He further stated that, had Ms Cassin or Ms Hogan asked any questions during the meeting that he could not answer, he would have taken them on notice, sought answers and responded. Mr Beales also confirmed that beyond requesting a marked up copy of the AOD Policy on 9 January 2024, Ms Cassin and Ms Hogan did not address any questions to him via email or otherwise about the AOD Policy changes following the 26 October 2023 meeting[46].

[36] Mr Beales states he attended a 'Level 2' dispute meeting with Mick Bull (AMWU Organiser) on 20 December 2023. According to Mr Beales, Mr Bull was only interested in discussing concerns about the allegedly inadequate consultation process adopted by Opal. This view was reiterated in an email from Mr Bull to Mr Beales on 21 December 2023[47]. Correspondence to which Mr Beales was copied in on was subsequently exchanged between Ms Cassin and Brad Hinds (Opal Group General Manager) on 21 December 2023 and 9 January 2024.

[37] In her email of 21 December 2023 to Mr Hinds, Ms Cassin wrote as follows;

> "Hi Brad, the matter of the dispute surrounding changes to the AOD policy is at the third tier level of disputation under Clause 16 of the enterprise agreement.
>
> The main matters in dispute are:
>
> - the manner of consultation set up by Opal which we say was and is inadequate;
> - the shift from blanket to a random model targeting 10% of the workforce at any given workplace, and the method of the provision of that 10% sample;
> - the compulsory provision of medical conditions and medications by employees regardless of impairment levels.
>
> Can you please advise a date in the first part of January you are available to meet."[48]

[38] Mr Hinds responded to Ms Cassin's email on 9 January 2023 and advised that he would accommodate a Teams Meeting on any date suitable to Ms Cassin. He then went on to respond to the particular concerns raised by Ms Cassin as follows;

> "Just a few comments/clarifications:

- In relation to item 2, in response to the feedback from the AMWU regarding your concerns about the method of random selection, David Tregoweth (General Manager Safety for Opal) has reached out to you to seek to arrange a time for you and David to meet with our external AOD testing provider TDDA so that they can explain to you in detail the random selection method and answer your questions. May I suggest that you have the meeting with David and TDDA to see if it resolves your concerns on this aspect? Please let me know if you're open to this.

- In relation to item 3, there seems to be some confusion. Opal is not making any changes to the existing AOD policy (which came across from Orora) in relation to "compulsory provision of medical conditions and medications by employees". There never has been anything in the Policy that requires an employee to provide details of medical conditions or medications to Opal, and there is no proposal to change this - the Policy only requires employees to confidentially provide this information to the testing provider in the van at the time of testing (which is not passed on to Opal):"[49]

[39] Ms Hogan then replied on 9 January 2024 to Mr Hinds email of that same date in the following terms;

> "Hi Brad, thanks for responding. Lorraine on leave but we have had a chat and she will make herself available to meet.
>
> We can confirm that we are at Level 3 of the DRP with respect to the Qld, NSW, Tas and SA sites. We are aware of meetings that have occurred at the Vic and WA sites and we are seeking clarification on the levels covered off.
>
> With respect to the point about random testing and Mr Tregoweth, we can confirm Mr Tregoweth reached out in respect of the testing methodology last year and we made our position clear; that the random element should be the site chosen and then blanket testing is applied at that site. Lorraine advises she has not subsequently been approached by Mr Tregoweth in respect of any further meetings.
>
> The position on employees declaring medications at the point of testing only and to the tester is as per the original policy but this was not clear from the communications given to employees. To avoid further confusion can Opal please provide the original Orora policy with clear marked up changes on the alterations Opal is seeking.
>
> Lorraine is available next week to meet if you can nominate a time."[50]

[40] Ms Hogan was questioned on the above-referred email exchange between Ms Cassin and Mr Hinds. While agreeing that Mr Tregoweth had responded to the matters raised in Ms Cassin's email of 21 December 2023, his response failed to address AMWU concerns in relation to random selection of employees for testing (and removal of blanket testing) and the immediate stand down of an employee taking medications if they produced a non-negative screening test result[51]. Ms Hogan further clarified that preserving blanket testing eliminates the

AMWU's identified risk of Opal targeting some employees through a curated random selection process[52].

[41] At 10.03am on 23 January 2023, Mr Hinds responded to Ms Hogan's email of 9 January 2024 and in doing so included a tracked changes version of the AOD Policy document. Mr Hinds response was as follows;

> "Hi Margaret
>
> Thankyou for your email, I will send Lorraine a Teams invite for next week.
>
> We have records of the 2 levels of meeting occurring at the Old, NSW and SA sites but are not clear on Tas - can you please confirm the dates and attendees for the level 1 and level 2 meetings re Tas?
>
> Apologies if there has been any confusion but David has attempted to contact Lorraine to offer the opportunity for a meeting with Opal, the AMWU and our testing provider TDDA, so that TDDA can take you through their random selection process and answer any questions you may have about that. Would you like me to ask David to see if TDDA is available next week for that meeting as well?
>
> Please see attached as requested:
>
> - Orora policy
> - Rebranded Opal policy with admin changes from Orora policy - this is the policy currently in place
> - Proposed updated Opal policy with mark-up showing the proposed changes from the current policy, which were the subject of the recent consultation process
>
> ……..."[53]

[42] Ms Hogan then replied to Mr Hinds at 10.52am that same day in the following terms;

> "Hi Brad, am getting advice re Tas meetings.
>
> However, your email this morning regarding "proposed changes" and meetings under the DRP is at odds with an email sent this morning at 9.55am by Heid D'Elton, Head of Health, Safety and Wellbeing for Opal.
>
> In that email, Ms D'Elton advises that the policy has been updated with the proposed changes and takes effect immediately.
>
> This email has been sent to all Opal users.
>
> This needs to be rectified.
>
> ……"[54]

[43] Mr Beales was questioned on the timing of Mr Hind's response to Ms Hogan at 10.03am on 23 January 2023 in which Mr Tregoweth attached a marked up copy of the AOD Policy changes. He agreed that the response to Ms Hogan was sent out eight minutes immediately prior to the decision to proceed with the revised AOD Policy being communicated by email by Ms D'Elton to all Opal employees on 23 January 2024[55] to which was attached a copy of the revised AOD Policy[56].

[44] Mr Beales states that to his knowledge the AMWU never took up the opportunity offered by Opal for the AMWU to meet with TDDA to discuss concerns over the random selection methodology.[57] Ms Hogan stated during cross-examination that the AMWU did not need to speak with TDDA as they didn't hold a concern about the random selection methodology or integrity of the process used by TDDA. Rather, the concern held by the AMWU was over the integrity of the information provided to TDDA by Opal, that being the potential for a curated list of employees to be provided by Opal at sites selected for testing. This in the AMWU's view held the potential for targeting of particular employees[58].

Outcome of consultation

[45] Mr Tregoweth states that on or about 15 December 2023, Ms D'Elton collated the feedback she had received through various feedback channels into a document titled 'AOD Consultation – Comments, Questions and Feedback' (Feedback Summary)[59]. Mr Tregoweth was taken to the Feedback Summary during cross-examination and was questioned on what action was taken in response to feedback received from the workforce, particularly in relation to questions asked. Mr Tregoweth explained that a FAQ document was progressively updated and circulated to site HR & WHS personnel but was not placed on a central intranet for employees to access. He also accepted that while he believed that feedback was provided to employees, he was unable to provide dates on when this occurred and that it was possible that information provided by Ms D'Elton to sites may not have been passed on to employees[60].

[46] Between mid-December 2023 and mid-late January 2024 Mr Tregoweth states he carefully considered the Feedback Summary and after consulting with the relevant General Managers formed the view that the changes to the random testing process and the AOD Policy should be implemented as proposed[61]. In reaching this conclusion Mr Tregoweth states he gave particular consideration to the following matters;

- The approach to removal of the BAC self-testing units from sites at which they were present was modified such that site managers were given discretion over the timing of decommissioning of the self-test units[62].

- In response to concerns raised by employees that random selection of employees for testing would allow 'targeting' of individuals, Mr Tregoweth was satisfied with further information sought from TDDA which revealed that it uses a 'randomising program' that sorts the list of all employees on site using the reliable 'Mersenne Twister algorithm' which has passed numerous independent tests on statistical randomness[63].

- Feedback from employees regarding selection of the contracted independent MRO prompted further consideration of the need to ensure that the MRO is able to demonstrate a comprehensive understanding of factors other than AOD consumption

that may result in impairment at work. This would assist Opal manage employee well-being in an integrated way[64].

[47] The decision to proceed with the revised AOD Policy was communicated by email from Ms D'Elton to all Opal employees on 23 January 2024 to which was attached a copy of the revised AOD Policy[65]. Mr Tregoweth states that commencement of random testing was deferred until 13 February 2024 to allow sites time to conduct toolbox talks and/or site communications meetings to inform employees that the changes were coming into effect[66]. Random testing was then conducted at several sites from mid-February including three sites covered by the 2022 Agreement. It was subsequently agreed by Opal to not undertake random testing at sites covered by the 2022 Agreement until resolution or determination of the dispute before the Commission[67].

[48] Mr Henry gave evidence for the AMWU that he received feedback from delegates that at some sites, there were discussions at a site level safety committee but not at other sites. He states that he was also aware that delegates at all sites covered by the 2022 Agreement had placed the proposed changes to the policy in dispute[68]. He further states that he also learned from Ms Hogan that changes to the AOD Policy had been introduced by Opal while the dispute process was underway and that he was also asked to review the AOD Policy. When he had done so he was concerned at a number of elements, including removal of BAC self-testing units and the stand down of employees who were on prescribed medication or taking over the counter medication who returned a non-negative screening test[69]. Mr Henry attended a Level 3 dispute resolution meeting with Ms Hogan on 1 February 2024 and raised his concerns with Mr Hinds and Mr Beales who attended the meeting on behalf of Opal. Mr Henry then put those concerns in an email on 1 February 2024[70] to Mr Beales and Mr Hinds to which Mr Beales responded on 8 February[71]. Mr Henry also referred to further correspondence received from Opal on 20 March 2024[72] that was provided in response to a series of questions posed by the AMWU.

[49] In considering the AOD Policy changes, Mr Henry states that he examined the policy by reference to relevant OHS/WHS legislation. As Opal have sites across the country, he assessed the policy by reference to the model Workplace, Health and Safety Act (the Model WHS Act) as the obligations contained therein were matched by equivalent provisions in applicable state legislation[73].

[50] In noting that Opal had not conducted a formal risk assessment prior to implementing the changes, Mr Henry disagreed with Opal's view that removal of BAC self-testing units did not constitute a risk. Furthermore, the formal risk assessment of the stand down of workers who return a non-negative screening test result for over the counter or prescription medication was not undertaken until 15 March 2024. While the AMWU agrees that the risk of injury to an impaired worker in these circumstances is high and needs to be managed, the previous practice involved an immediate assessment of an employee with reference to the employee's PPFWA. The belated risk assessment did not appear to Mr Henry to have taken account of the past practice and furthermore did not appear to have involved consultation with employees, that failure being in conflict with Opal's own WHS Policy and Risk Assessment procedure[74].

[51] In respect of Opal's consultation with employees, Mr Henry made the following criticisms;

- The various WHS Act obligations require consultation with employees prior to there being change. Opal also has a policy for this process[75].

- One of the requirements under the section 48 of the NSW WHS Act is that the views of employees must be taken into account by Opal before implementing the change. Mr Henry says Opal appears to have only 'considered' employees' views at best.

- It is a further requirement that information about the change be shared with employees. There was no information about why the changes were being implemented, no discussion of the risk and it is unclear whether employees who had questions received any proper information.

- Feedback has been received from AMWU delegates that there is concern that random testing may be used by management to target particular workers.[76]

[52] Mr Henry also states that employers are prohibited from requiring employees to bear the costs of complying with policies affecting their safety, that obligation being breached by the AOD Policy requirement that employees must obtain a completed PPFWA from their doctor (at their personal cost potentially) if they are taking medication that contains a restricted substance. While the AMWU accepts this aspect was a feature of the AOD Policy prior to the most recent changes, Mr Henry argues that imposition of this obligation may give rise to costs being incurred by employees which may be non-compliant with the relevant WHS Acts[77].

[53] Mr Henry states that in June-August 2022, he participated in Opal's since disbanded National Health and Safety Committee's (NHSC) review of particular documents, including Opal's Risk Management Procedure & the Communication and Consultation Procedure. Mr Henry provided copies of the minutes of the June 2022 NHSC meeting which reveals that NHSC committee members were asked for feedback in relation to the two procedures under review. Mr Henry understands the two policies were existing policies 'inherited' from Orora that had been amended in March 2022 to reflect the change of ownership from Orora to Opal[78]. Mr Henry further states that as the NHSC was disbanded in late 2022, the review was never completed to his knowledge, and the Consultation Procedure retained its status as an 'agreed consultation process' for the purpose of section 47(2) of the model WHS legislation.

[54] Mr Beales states in his evidence that he had never seen the Consultation Procedure referred to in Mr Henry's evidence and was not aware that Opal and its employees had ever agreed that the Consultation Procedure is the procedure for the purpose of consultation on WHS matters. For his part Mr Tregoweth stated that he was not specifically aware of the Consultation Procedure[79].

[55] Mr Henry expressed the view that the Consultation Procedure requires consultation to occur when either making decisions about ways to minimise or eliminate risks and/or when proposing changes that might affect workers health and safety, both of which features were present in respect of the changes to the AOD Policy. Mr Henry further states that there is nothing in the AOD Presentation that suggests how or how many workers will be selected for random testing under the revised testing arrangements. Further, while the discretion given to site managers to determine the timing of removal of BAC self-testing units might indicate that employee feedback was considered, it does not mean there was a material change in the decision

to remove the self-test units. Finally, there was nothing to indicate that Opal had assessed the risk of removal of the BAC self-testing units or the hygiene concerns for that matter[80].

Case for the AMWU

[56] The AMWU agrees with Opal's characterisation of the AOD Policy as being a factor in meeting their obligation to provide a safe workplace under health and safety legislation. They contend however that Opal's conduct in relation to consultation, management of risk and the levying of employees in safety matters are deficiencies that render the changes to the AOD Policy (both in content and procedure) void. While not seeking a determination from the Commission under any particular WHS Legislation, they contend that compliance with the applicable legislation goes to the reasonableness of any direction issued by Opal in relation to the AOD Policy changes.

[57] The AMWU contend that the Model WHS Act includes a requirement to consult with workers in relation to matters affecting their safety in the workplace. The AMWU says that obligation is understood by Opal and is supported by Opal having its own procedure in place dealing with consultation, that being the Consultation Procedure. The AMWU contend that the Consultation Procedure was an 'agreed' policy and as such compliance with it is required, the failure to do so meaning that introduction of the changes is rendered void. Even if it were found by the Commission that the Consultation Procedure did not apply for the purpose of s 48 of the WHS Legislation there was an obligation on Opal to nonetheless consult in relation to the AOD Policy and practice changes.

[58] While Opal provided employees with an opportunity to provide input on the proposed change to the AOD Policy prior to its implementation, that opportunity did not equate to proper consultation according to the AMWU, both in respect of relevant WHS Legislation and under the Consultation Procedure. The standard to be met by an employer in relation to its consultation obligations is well established at law according to the AMWU and was traversed in *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd t/a Mt Arthur Coal*[81] (Mt Arthur).

[59] The AMWU further submit that genuine consultation would generally take place where decision making is still at a formative stage, must be real and not perfunctory and the right of employees is not just to be heard, but there is also an entitlement to have their views taken into account before the decision is made[82]. According to the AMWU, the material provided to employees by Opal was merely a notification of the changes that were going to be made, there was no discussion as to why the changes were being made or how the policy would be amended to reflect those changes. That approach gave rise to questions from employees that were not properly answered, and which did not constitute employees providing a view for the purposes of proper consultation. The AMWU also contend that section 48 of the Model WHS Act requires that 'relevant information about the matter is shared with workers'. The requirement to provide 'relevant information' to employees is also found at clause 4 of the Consultation Procedure where it states that 'Relevant information about the HSE matter is shared with employee'. That obligation to provide relevant information was not met according to the AMWU.

[60] In relation to Opal meeting its consultation obligations, the AMWU make the following further points;

- It recognises that consultation is not shared decision making and nor does it confer a right of veto.

- While acknowledging that the views of employees were sought on the AOD Policy, it appears that this was the first review of that policy since Opal inherited it from Orora and in these circumstances the views of employees that had lived experience of the AOD Policy and its testing regime might have provided insights that Opal management did not have.

- The views provided by employees were not informed by the provision to employees of 'relevant information'.

[61] In relation to the matter of risk, the AMWU also submit the following;

- It is not contested that Opal is required to eliminate all risk as far as reasonably practical.

- The genuineness of the consultation process is called into question by the fact that Opal did not conduct a formal risk assessment in relation to the changes prior to announcing its decision to implement the AOD Policy changes in January 2024.

- There was no recognition in the belatedly completed risk assessment (in March 2024) of the change in policy regarding the automatic stand down of employees that produce a non-negative screening test result for over the counter or prescription medication.

- While WHS Legislation recognises that elimination of risk may involve a cost, use of the term 'reasonably practical' allows for consideration of the cost of the measure in determining whether to introduce or retain a practice/policy, this being relevant in circumstances where the BAC self-test units had operated as a means of reducing the risk of an employee attending work while impaired by alcohol.

[62] The AMWU also submit that the requirement for employees on prescribed medication that may contain a restricted substance to provide a PPFWA completed by their treating physician goes further than assessment of whether an employee is taking particular medication as it requires dosage and extent of treatment. This may require additional visits to treating practitioners, may require longer consultations and may lead to an employee incurring actual or additional costs not covered by bulk billing. This is said by the AMWU to be contrary to s 273 of WHS Legislation.

[63] The AMWU submits in conclusion that employees were simply notified of the changes and the changes were then introduced three months later regardless of concerns put forward by employees. The AMWU urge that Questions 1 & 2 should both be answered 'yes' in circumstances where Opal's consultation process fell short of WHS Legislation requirements.

Case for Opal

[64] Opal submits that the requirement that employees comply with policy and practice changes on recommencement of random AOD testing under the AOD Policy amounts to a lawful and reasonable direction in the sense contemplated by the Full Bench in *Mt Arthur*. It submits that the changes were lawful in the sense that they arise within the scope of the employment relationship and there is nothing unlawful, or illegal about AOD testing in the workplace for the purpose of managing the risk of impairment[83]. As to the question of reasonableness, that is a question of fact having regard to all the circumstances[84] and that the changes giving rise to the dispute in the present case have a logical and reasonable basis taking into account all of the circumstances.

[65] Opal does not concede that it was required to consult in accordance with s 49 of the Model WHS Act as it was not enlivened. That is because Opal argues that the changes subject of the dispute do not engage any of the health and safety matters set out at paragraphs (a)-(f) of s 49. Opal contends in the alternative that if the consultation obligations did apply, it met the requirements of ss 47 & 48 of the Model WHS Act.

[66] Opal further submits that it does not have an agreed consultation policy for the purposes of s 47(2) of the Model WHS Act and that the AMWU failed to advance evidence that would allow a finding to be made that the Consultation Procedure was an 'agreed policy'. Opal does however concede that it was a procedure 'inherited' from Orora, was the subject of some discussion in 2022 and was updated in March 2022 to reflect the transition from Orora to Opal however it (the procedure) has no status for the purpose of assessing Opal's compliance with its consultation obligations. Consequently, any non-compliance with the Consultation Procedure is not relevant for the purposes of determining whether Opal has met its consultation obligations.

[67] Opal seeks to distinguish the circumstances of the present case from those confronted in *Mt Arthur* where the Full Bench found that the employer in that case failed to consult with employees until after a definite decision had been made to introduce the Site Access Requirement that entering the site must be COVID-19 vaccinated. Opal further submits that in reaching its conclusion the Full Bench's determinative consideration was that the employer had failed to consult employees in accordance with ss 47 & 48 of the WHS Act.

[68] The circumstances in the present case are said by Opal to be materially different from those considered in *Mt Arthur* in two key respects. Firstly, Opal undertook a process of consultation between October 2023 and January 2024 and gave employees, HSRs, delegates and the AMWU an opportunity to meaningfully influence the final decision. Secondly, the changes subject of the present dispute involves minor changes to the established policy and practice, as opposed to an entirely novel direction by the employer in *Mt Arthur* to deal with an entirely novel risk.

[69] In assessing whether Opal has met its consultation requirements pursuant to ss 47 and 48 of the Model WHS Act, it submits the Commission should have regard to the following circumstances;

- AOD testing is an established practice in the workplace.

- The changes did not involve a material alteration in the risk the AOD Policy is designed to address.

- The AOD Policy at all times contemplated random AOD testing.

- Random selection of a subset of individuals to be tested at a site is a common and well established industry practice.

- Stand down arrangements for non-negative drug test results, pending review of laboratory confirmation results, was already a feature of the AOD Policy in relation to post-incident and reasonable suspicion-based drug testing.

- Paid stand down pending laboratory confirmatory test results involves minimal detriment to employees.

- Removal of voluntary alcohol self-testing facilities involves minimal detriment to employees.

- The requirement for disclosure of medication, including the PPFWA process were not changed.

- Opal intends to undertake a further review of the AOD Policy, affording employees an opportunity to raise further matters beyond the scope of the changes proposed by Opal in October 2023.

[70] Opal contends that the evidence of Mr Beales and Mr Tregoweth reveals that Opal consulted employees and their representatives regarding the proposed changes and took their views into account before making a definite decision regarding the proposed changes. As regards specific matters set out in ss 47 & 48 of the model WHA Act. Opal submits that it;

- consulted with relevant workers affected by the proposed changes, and their representatives;

- shared relevant information about the changes with the workers;

- gave workers and their representatives, including HSRs, AMWU delegates and AMWU officials, a reasonable opportunity to express their views and contribute to the decision making process;

- took into account the views of workers in relation to the changes; and

- advised workers of the outcome of the consultation in a timely manner.

[71] Opal referred to the efforts it made to engage with the AMWU over the proposed changes and submits those efforts were rebuffed. Opal submits that its representatives advised the AMWU of the changes on 23 October 2023, met with Ms Cassin and Ms Hogan on 26 October 2023 and met with Organiser Mr Bull on 20 December 2023. Opal further submits that

despite its attempts to engage with the AMWU and it (the AMWU) being aware of the consultation period, the AMWU repeatedly expressed its disagreement with the proposed changes, criticised the consultation process, did not seek further information within the consultation timeframe and otherwise declined to engage with Opal. That refusal to engage was in Opal's submission based on the AMWU's pre-determined view that because consultation was not taking place on the basis of the AMWU's preferred model it was bound to fall short.

[72] In relation to the provision of relevant information, Opal concedes that the rationale for the proposed changes were not spelt out in the AOD Presentation provided to employees. It submits however that an inference may be drawn that answers were provided to questions raised by employees based on the recorded exchange between Company representatives and employees at the Rocklea and Scoresby sites. The inference Opal asks the Commission to draw is that similar conversations occurred at each of the ten fibre packaging sites. Opal urges that inference be drawn notwithstanding the absence of records of those broader discussions, nor evidence of talking points having been provided to company representatives to aid the communication at HSE or communications meetings and despite the lack of evidence of the distribution of the prepared FAQs beyond Opal's site HR and HSE personnel. Opal also relies on Mr Tregoweth's evidence that he was satisfied on the basis of regular briefings from Ms D'Elton that questions from employees were answered.

[73] In elaborating on how and to what extent Opal took into account the views of employees, Opal submits that it did alter its position on aspects of the AOD Policy changes proposed. It points to the delay in the implementation of the random testing regime from the initially proposed January 2024 timeframe to February 2024 and also to the timing of the removal of the site BAC self-testing kits being at the discretion of site management.

[74] Opal concedes that provision of information regarding a risk assessment for the purpose of consultation may be a relevant consideration for the purpose of assessing whether consultation undertaken meets the requirements of s 48 of the model WHA Act and whether an associated directions is reasonable. Opal argues that the omission of the provision of information regarding a risk assessment to employees was not significant in the circumstances of the proposed changes to the AOD Policy. That is because the changes to the AOD Policy and practice were not informed by a risk assessment and were not of a character or magnitude that warranted a risk assessment.

[75] As to the AMWU submission that the AOD Policy is in breach of s 273 of the Model WHS Act by imposing a 'levy' or 'charge' on workers, Opal submits that the provision is not engaged. That is because it has not, for example, sought to impose a charge on workers for the cost of Opal obtaining MRO advice in relation to employees' declared medication and laboratory confirmed drug test results. Opal also contends that the AMWU's submissions in relation to the issue go beyond the scope of the questions to be answered for arbitration and need not be considered.

[76] Opal submits in conclusion that the answers to each of questions 1a, 1b, 1c, 2a, 2b and 2c should be 'No' and that given those answers question 3 does not arise for consideration.

Consideration

[77] Before turning to consider whether Opal is prevented from introducing some or all of the notified changes to the AOD Policy and practice it is necessary to identify any relevant statutory obligations and applicable case law. It appears uncontroversial between the parties that the questions before me require consideration of whether Opal's February 2024 direction that employees comply with the revised AOD Policy and practice constitutes a 'lawful and reasonable' direction. The meaning of those terms was examined by the Full Bench in *Mt Arthur* when considering whether the employer's implementation of a mandatory COVID-19 vaccination requirement as a site entry condition constituted a lawful and reasonable direction. On the meaning of a lawful direction, the Full Bench made the following observations;

> **"[68]** It is uncontentious that a lawful direction is one which falls within the scope of the employee's employment. There is no obligation to obey a direction which goes beyond the nature of the work the employee has contracted to perform, though an employee is expected to obey instructions which are incidental to that work.
>
> **[69]** Further, employer directions which endanger the employee's life or health, or which the employee reasonably believes endanger his or her life or health, are not lawful orders; unless the nature of the work itself is inherently dangerous, in which case the employee has contracted to undertake the risk.
>
> **[70]** The order or direction must also be 'lawful' in the sense that an employee cannot be instructed to do something that would be unlawful; such as a direction to drive an unregistered and unroadworthy vehicle."[85]

[78] it is also noted that the Full Bench in *Mt Arthur* considered whether the failure of an employer to consult in accordance with the NSW WHS Act had the effect of invalidating a direction issued pursuant to an implied contractual power. That is, whether a direction would be rendered unlawful by reason of a failure to meet the statutory obligation to consult. The Full Bench in the circumstances of Mt Arthur felt that it did not need to express a concluded view on that point but did consider that non-compliance with a statutory obligation to consult would be relevant to the question of whether the direction was reasonable.

[79] I discern from the above that in determining whether required compliance with the changes made by Opal to the AOD Policy and practice would constitute a lawful direction requires me to determine whether compliance with the revised policy and practice fell within the scope of Opal employees' employment, whether compliance would endanger employees' life or health and whether an instruction to comply would require employees to do something unlawful.

[80] In now turning to consider the factors that will bear upon whether a direction is reasonable, the Full Bench in *Mr Arthur* stated that the 'reasonableness of a direction is a question of fact having regard to *all* the circumstances which may include whether or not the employer has complied with any relevant consultation obligations.'[86] The Full bench then went on to relevantly state;

> **"[96]** Whether a particular direction is reasonable is not to be determined in a vacuum, it requires consideration of all the circumstances, including the nature of the particular employment, the established usages affecting the employment, the common practices that exist and the general provisions of any instrument governing the relationship. In NSW, this would include consideration of obligations in the WHS Act, which governs employment relationships in that jurisdiction. The assessment of reasonableness and proportionality is essentially one of fact and balance and needs to be assessed on a case-by-case basis. The assessment will include, but not be determined by, whether there is a logical and understandable basis for the direction."

[81] It follows from the foregoing that compliance with any consultation obligations found under applicable WHS legislation or relevant industrial instruments are matters to be weighed as part of the evaluation of 'all the circumstances' in determining whether a direction is reasonable. As to what constitutes consultation the Full Bench in *Mt Arthur* also helpfully summarised a number of propositions drawn from case law as follows;

> **"[108]** The following propositions may be drawn from these cases about what constitutes consultation:
>
> - the content of any specific requirement to consult is necessarily dictated by the precise terms in which such a requirement is expressed; the nature of the factual or legal issues the subject of the requirement; and the factual context in which the requirement is exercised, including the particular circumstances of the persons with whom there must be consultation
>
> - a responsibility to consult carries a responsibility to give those consulted an opportunity to be heard and to express their views so that they may be taken into account
>
> - the consultation needs to be real; it must not be a merely formal or perfunctory exercise
>
> - even though management retained the right to make the final decision, it is not to be assumed that the required consultation was to be a formality. Management has no monopoly of knowledge and understanding of how a business operates, or of the wisdom to make the right decisions about it. The process of consultation is designed to assist management, by giving it access to ideas from employees, as well as to assist employees to point out aspects of a proposal that will produce negative consequences and suggest ways to eliminate or alleviate those consequences
>
> - the party to be consulted [must] be given notice of the subject upon which that party's views are being sought before any final decision is made or course of action embarked upon
>
> - while the word 'consultation' always carries with it a consequential requirement for the affording of a meaningful opportunity to the party being consulted to present those views, what will constitute such an opportunity will vary according

[to] the nature and circumstances of the case. In other words, what will amount to 'consultation' has about it an inherent flexibility

- a right to be consulted, though a valuable right, is not a right of veto

- the consultation obligation is not concerned with a likelihood of success of the process, only to ensure that it occurs before a decision is made to implement a proposal

- an ordinary understanding of the word "consult" would suggest that the obligation to consult does not carry with it any obligation either to seek or to reach agreement on the subject for consultation. Consultation is not an exercise in collaborative decision making. All that is necessary is that a genuine opportunity to be heard about the nominated subjects be extended to those required to be consulted before any final decision is made

- the requirement to consult affected workers would not be satisfied by providing the employees with a mere opportunity to be heard; the requirement involves both extending to affected workers an opportunity to be heard and an entitlement to have their views taken into account when a decision is made

- genuine consultation would generally take place where a process of decision-making is still at a formative stage

- the opportunity to consult must be a real opportunity not simply an after thought

- consultations can be of very real value in enabling points of view to be put forward which can be met by modifications of a scheme and sometimes even by its withdrawal

- there is a difference between saying to someone who may be affected by a proposed decision or course of action, even, perhaps, with detailed elaboration, this is what is going to be done' and saying to that person 'I'm thinking of doing this; what have you got to say about that?'. Only in the latter case is there 'consultation'

- it is implicit in the obligation to consult that a genuine opportunity be provided for the affected party to attempt to persuade the decision-maker to adopt a different course of action. If a change has already been implemented or if the employer has already made a definite or irrevocable decision to implement a change then subsequent 'consultation' is robbed of this essential characteristic

- any offer to consult in relation to the matter was in the context that the respondent had already made an irrevocable decision, then the party had not, to use his honour's words, consulted about the decision in any meaningful way."[87] (citations omitted)

What were Opal's consultation obligations?

[82] Turning now to what if any consultation obligations may apply in the present case, it is accepted by the parties that the relevant framework for the purposes of assessing compliance with applicable consultation obligations is that set out in ss 47 & 48 of the Model WHS Act on which applicable state based legislation is based and which applies to Opal's various sites. The Model WHS Act relevantly states as follows;

> **"47 Duty to consult workers**
>
> (1) The person conducting a business or undertaking must, so far as is reasonably practicable, consult, in accordance with this Division and the regulations, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety.
>
> ……..
>
> (2) If the person conducting the business or undertaking and the workers have agreed to procedures for consultation, the consultation must be in accordance with those procedures.
>
> (3) The agreed procedures must not be inconsistent with section 48.
>
> **48 Nature of consultation**
>
> (1) Consultation under this Division requires —
>
> (a) that relevant information about the matter is shared with workers, and
>
> (b) that workers be given a reasonable opportunity—
>
> (i) to express their views and to raise work health or safety issues in relation to the matter, and
>
> (ii) to contribute to the decision-making process relating to the matter, and
>
> (c) that the views of workers are taken into account by the person conducting the business or undertaking, and
>
> (d) that the workers consulted are advised of the outcome of the consultation in a timely manner.
>
> (2) If the workers are represented by a health and safety representative, the consultation must involve that representative.
>
> **49 When consultation is required**

Consultation under this Division is required in relation to the following health and safety matters—

(a) when identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out by the business or undertaking,

(b) when making decisions about ways to eliminate or minimise those risks,

(c) when making decisions about the adequacy of facilities for the welfare of workers,

(d) when proposing changes that may affect the health or safety of workers,

(e) when making decisions about the procedures for—

(i) consulting with workers, or

(ii) resolving work health or safety issues at the workplace, or

(iii) monitoring the health of workers, or

(iv) monitoring the conditions at any workplace under the management or control of the person conducting the business or undertaking, or

(v) providing information and training for workers, or

(f) when carrying out any other activity prescribed by the regulations for the purposes of this section."

[83] As earlier set out, Opal argues that the Model WHS Act does not apply as the circumstances in the present case do not fall within the matters set out at ss 49(a)-(f) of the Model WHS Act. That submission is plainly wrong in my opinion. While Opal may argue that the changes are administrative or minimal in their nature, I am satisfied the changes 'may affect the health and safety of workers' (s 49(d)) and may eliminate or minimise risks (s 49(b)) for the following reasons.

[84] Self-evidently, a change in the manner of selection for random drug and alcohol testing may affect the health and safety of employees. The changes may well have a neutral impact as argued by Opal, but even if they are correct in that view, s 49(d) does not state that only changes that positively or negatively impact on employees' health or safety must be the subject of consultation. The other crucial point is that the language in s 49(d) uses the word 'may'. It is not necessary for there to be a concluded view on whether employees' health or safety will be impacted by a proposed change. It is sufficient that there is potential for employees' health or safety to be affected. I also accept AMWU submissions that removal of BAC self-testing units may affect employee's health and safety. In these circumstances I believe there is little doubt the changes proposed by Opal fall within the scope of s 49(f).

[85] It is also clear in my view that the proposed changes in the AOD Policy in respect of the stand down of employees taking over the counter or prescription medication and who produce

a non-negative screening test result comes within the scope of s 49(b). The change in policy will result in adoption of a uniform approach to the stand down of employees that produce a non-negative screening test result for over the counter or prescription medication, whether that test result is produced through a random test or through post incident or reasonable suspicion-based testing, the latter two circumstances being a feature of the previous AOD Policy. In fact, Mr Tregoweth could see 'no apparent safety rationale for permitting an employee to return to work pending lab confirmation results following a non-negative drug screening test result in random or return-to-work drug testing'[88]. While not explicitly stated by Mr Tregoweth the change was clearly driven, at least in part, by a desire to minimise risk. The change squarely falls within s 49(d).

[86] It follows from the foregoing that Opal was obliged to consult pursuant to ss 47 & 48 of the Model WHS Act. Having found that the Model WHS Act consultation obligations apply, the further question that arises is whether Opal was also obliged to consult in accordance with the Consultation Procedure by reason of s 47(2) of the Model WHS Act. While Opal accepts that the Consultation Procedure was 'inherited' by it when it took over Orora's business, it submits there is insufficient evidence that it is an 'agreed' procedure for the purpose of s 47(2) of the Model WHS Act. Absent persuasive evidence, Opal submits that the Commission could not safely conclude that it was required to comply with it, in assessing whether it has met its consultation obligations.

[87] The only evidence led on the status of the Consultation Procedure was that provided by Mr Henry. While no evidence was led on the origin of the procedure, Mr Henry did give unchallenged evidence on the review of various policies/procedures undertaken by Opal's NHSC in 2022. The review included the Consultation Procedure, although the review process was not completed by the NHSC due to it being disbanded in late 2022. Mr Henry stated that it was his understanding that the Consultation Procedure was an 'agreed' consultation procedure for the purpose of s 47(2) of the Model WHS Act. For their parts Mr Beales and Mr Tregoweth were unaware of the procedure and could shed no light on whether it was or was not an 'agreed' procedure.

[88] The fact that the NHSC commenced a review of the Consultation Procedure in 2022 might suggest the procedure was an 'agreed' procedure within the meaning of s 47(2). The status of the procedure as an agreed procedure is however undermined by Opal's abolition of the NHSC and Mr Beales and Mr Tregoweth's lack of awareness of the procedure or its origin. Beyond 'rebadging' of the procedure in March 2022 to reflect the transition from Orora to Opal it is not apparent that any other changes were made to it following the Sale in 2020. In the absence of evidence on the procedure's provenance I am unable to conclude that it was an 'agreed' consultation procedure for the purpose of s 47(2) of the Model WHS Act.

[89] The above conclusion begs the question as to what status the Consultation Procedure does have in assessing Opal's compliance with its consultation obligations. Opal was unable to state with any clarity what status it does have while simply maintaining it (the procedure) was irrelevant to my consideration of the matters before me. Its position on the status of the Consultation Procedure is at odds with its position on the AOD Policy. Both were 'inherited' from Orora, yet Opal now seeks to rely on the AOD Policy while dismissing the Consultation Procedure as irrelevant to meeting its consultation obligations. That tension was not effectively reconciled by Opal in my view.

[90] I am unable to conclude that the Consultation Procedure was an 'agreed' procedure for the purpose of assessing Opal's compliance with its consultation obligations under s 48 & 49 of the Model WHS Act. The procedure was however adopted by Opal on the takeover of Orora's fibre packaging business. It took no steps to cancel the procedure following the asset sale in May 2020 and did in fact amend the procedure in March 2022 to reflect the transition from Orora to Opal. For Opal to now argue that the procedure is irrelevant, undermines its apparent reliance on other policies and procedures that it may have 'inherited' and applied following the transition from Orora to Opal, most relevantly including the AOD Policy.

[91] I also make the passing observation that employers are apt to hold employees accountable for breaches of company policies and procedures. Just as employees are rightly held accountable for breaches of company policies and procedures so must employers be accountable for following their own policies and procedures. In the present case, Opal has an at least 'approved' procedure in place dealing with communication and consultation. In these circumstances it is reasonable to expect that Opal would follow that procedure as a minimum when communicating or consulting with employees over matters that fall within its scope. To the extent that the consultation obligations in the Consultation Procedure were less favourable (for employees) than those set out in the Model WHS Act, the latter would prevail.

[92] It follows from the foregoing that Opal's compliance with its Consultation Procedure, while not constituting a statutory obligation, is a matter that nonetheless bears upon the question of whether the direction issued by Opal to employees in February 2024 regarding the AOD Policy and practice changes was a reasonable direction. It is a matter to be weighed in the assessment of all the circumstances. The Consultation Procedure has the following relevant elements.

[93] The purpose and scope of the Consultation Procedure is stated as follows;

> **"1. Purpose**
>
> The purpose of this procedure is to achieve effective and open consultation with employees, contractors and other stakeholders (internal and external) and encourage relevant parties to participate in the identification and implementation of health, safety, and environmental improvements.
>
> **2. Scope**
>
> This procedure relates to the relevant Health and Safety legislation and applies to all Opal Fibre Packaging (OFP)sites for relevant managers to consult, cooperate and coordinate with employees, contractors, subcontractors, labour hire workers and other stakeholders, so far as is reasonably practicable, who are likely to be directly affected by a work health and safety matter."

[94] The procedure then defines consultation for the purpose of the procedure in clause 3 as follows;

> "Involves taking the views of employees and health and safety representatives into account before making a decision. Consultation does not require consensus or agreement, but it does entitle employees to contribute to any decisions made."

[95] The roles and responsibilities are then set out in clause 4, with those for managers stated to be as follows;

> "The relevant manager will ensure the following actions are taken:
>
> - Relevant information about the HSE matter is shared with employee;
> - Stakeholders are given a reasonable opportunity to express their views, raise issues and contribute to the decision making process on how to deal with HSE matters;
> - Views of stakeholders are taken into account;
> - Stakeholders are advised of the outcome of the consultation in a timely manner;
> - Where employees are represented by a HSR, and consultation must involve that HSR;
> - If more than one person has a duty in relation to the same matter, each must consult, cooperate and coordinate activities with each other, so far as is reasonably practicable. This could include a supplier, a contractor, the building owner where the work is carried out, an officer or an employee;
> - Ensure that regular meetings and similar forums e.g. team or shift briefs are held for all persons under their direction;
> - Ensure the availability and adequate allocation of resources, meeting facilities and time;
>
> Ensure that adequate systems are in place to manage the needs for non-English speaking employees, and deal with any barriers to effective communication."

[96] Clause 5.1 of the procedure also sets out the circumstances where consultation is required to occur;

> "Consultation shall occur when:
>
> - Identifying hazards and assessing risks and making decisions about ways to eliminate or minimise those risks;
> - Making decisions about facilities for the welfare of employees;
> - Proposing changes that may affect the health or safety of employees;
> - Making decisions about the procedures, including those for:

- Consultation with employees;
- Resolving work health or safety issues;
- Monitoring the health and safety of employees;
- Monitoring workplace conditions;
- Providing information and training to employees,
- Conducting incident (includes near misses) investigations.

WHS issues that cannot be resolved shall be addressed through the company's issue resolution procedures.

A process shall be in place to ensure communication and consultation is undertaken in the absence of key stakeholders."

[97] The procedure then sets the documentation records requirement as follows;

"5.4 Documentation

Records are kept in order to document dialogue between the workplace parties and record the outcomes.

Typical examples of consultation records may include HSE Committee minutes, toolbox meetings, team meetings, incident investigations, risk assessments, action items."

[98] In comparing the Model WHS Act consultation obligations against the Consultation Procedure, it can be seen that the two are similar in terms of the circumstances in which consultation obligations arise and what the specific consultation obligations are. One significant difference to be found is that the consultation obligations in clause 49 of the Model WHS Act operate in respect of 'workers' whereas the various (and similar) obligations found at clause 4 of the Consultation Procedure apply with respect to 'stakeholders'. While that term is not defined in the procedure it does appears to have a broader scope than 'workers' as the term 'employees' is used elsewhere in the procedure. The meaning of the term 'stakeholders' was not agitated in the proceedings, but it may be reasonably assumed that that the term would extend to include unions entitled to represent the industrial interests of employees, which in this case includes the AMWU. Little turns on this point in the present matter however as Opal has proceeded in its roll-out of the proposed changes to the AOD Policy on the basis of including the AMWU in the consultation process.

[99] A further difference between the Model WHS Act and the Consultation Procedure is that the latter provides at clause 5.2 a list of the typical forms of consultation and communication while the Model WHS Act is silent on the forms of communication and meetings save for mandating a role for WHS representatives. The only other differences of note between the Model WHS Act and the Consultation Procedure is that the latter specifies in clause 5.1 the process for resolving unresolved WHS issues and specifies at clause 5.4 the documentation record requirements.

Has Opal met its consultation obligations?

[100] Having established that Opal was required to consult in accordance with ss 47 & 48 of the Model WHS Act and that its compliance with the Consultation Procedure is also a matter to be weighed, it is necessary for me to assess Opal's compliance with the relevant obligations found within each of those instruments.

[101] It is useful to firstly deal with the process of consultation adopted by Opal as the AMWU are critical of both the process followed by Opal and its consultation bone fides, perhaps due in part to the AMWU's previous experience with Orora and the manner in which the AOD Policy was originally developed by Orora through use of the NHSC. While the AMWU may have preferred a 'centralist' type of consultative approach as used by Orora, the Model WHS Act and Consultation Procedure do not mandate such an approach and Opal's abolition of the NHSC and its focus on consultation activities at a site level does not in itself render the consultation process non-compliant or unreasonable.

[102] The evidence reveals that Opal conducted its consultation activities through a number of different forms. It included arranging meetings with relevant union officials of the AMWU and CFMEU. It also engaged in site level consultation through the use of HSE Committees, team meetings and toolbox meetings. Without commenting on the quality of the consultation at this point, these different forms of consultation and communication are consistent with Opal's obligation to consult with 'workers' and their HSE representatives under the Model WHS Act as well as the forms of consultation and communication set out in clause 5.2 of the Consultation Procedure. The fact that Opal has adopted a site level approach to consultation as opposed to a central NHSC type of approach does not lead me to conclude that it has failed to meet is consultation obligations under either the Model WHS Act or Consultation Procedure.

[103] Turning now to the specific obligations set out in clause 48 of the Model WHS Act and the Consultation Procedure, the first obligation is that 'relevant information about the matter is shared with workers' which the AMWU contends has not been done.

[104] The information that can be confidently assumed was provided to all employees, the HSE representatives and union officials is that found in the AOD Presentation, which was used in HSE Committee meetings, Team Meetings and Toolbox Meetings. The presentation sets out the background to the policy review, that being the AOD Policy was 'inherited' from Orora in May 2020 as a consequence of the Sale. The presentation then explains that random testing will recommence after the COVID-19 'pause' and then distinguishes the proposed random selection methodology from the blanket methodology previously applied by Orora and then briefly summarises the other key changes proposed. The evidence reveals that there were no speaking notes provided to assist leaders responsible for delivering the presentation, although a series of FAQs progressively updated through the consultation period was said to have been made available to site mangers, HR and HSE personnel from commencement of the consultation process.

[105] It must be said that the content of the AOD presentation is more significant for what is not included in the presentation. Specifically, the rationale for each of the proposed changes was not included, a point Opal was forced to concede during its closing submission. For example, Opal contended in the proceedings that shutting down larger sites to undertake blanket

testing involves significant operational and financial impacts and that random testing is regarded as industry best practice and is recommended by the testing provider. While those assertions may be correct and appear entirely reasonable, there is no evidence that such information going to the operational/cost impacts or industry practice was included in the presentations or widely discussed at a site level. None of the proposed changes included in the AOD presentation were supported by the rationale, cost benefit analysis or alternatives considered etc.

[106] Opal urges that an inference be drawn that the discussions held at a site level involved a more detailed discussion of the rationale for the changes. That submission was based on the record of discussions at the Rocklea and Scoresby sites which showed there was a more significant dialogue about the detail of the changes proposed. It would be unsafe however to draw an inference based on discussions recorded to have occurred at two sites in circumstances where there is no evidence of detailed supporting notes being made available to leaders at the various sites. I consequently decline to draw the inference urged by Opal.

[107] Opal also submits that the quality of information available to employees was supplemented by the preparation of FAQs which answered a range of questions about the AOD Policy, many of which dealt with the AOD Policy more generally and not merely the proposed policy changes. Tellingly, the FAQ documents updated in January 2024 does not include the type of information relevant to the question that was posed by employees at a number of sites, that of 'why' the changes were necessary. Rather, the FAQs dealt at length with the mechanics of the AOD Policy. While that information is of course relevant to the understanding of the AOD Policy, it falls short in my view of the relevant information that ought to have been provided to employees to inform their understanding of the proposed changes. In any case, distribution of the FAQs was limited to site management, HR and HSE personnel who were then responsible for distributing at a site level. There is no evidence on how the FAQs were distributed to employees at a site level or whether questions raised during the consultation process were answered beyond Mr Tregoweth stating he was assured by Ms D'Elton that site questions were answered.

[108] A further point to be made is that the AOD Policy changes proposed were not informed by a risk assessment at the time of the roll-out in October 2023. Opal submits that the changes are minimal and administrative in nature and Mr Tregoweth's opinion is that the changes do not impact on the level of HSE risk. Mr Tregoweth may be correct but in circumstances where the changes proposed provoked immediate concern from the AMWU and Opal employees when announced, it may have been prudent for Opal to have completed and discussed with 'stakeholders' a risk assessment of the changes sooner than they did.

[109] Finally, the 9 January 2024 request by Ms Hogan of the AMWU for a tracked changes version of the AOD Policy reflecting the proposed changes was a reasonable request but was not met until 23 January 2024. As it turned out, the provision by Opal of the tracked changes AOD Policy to the AMWU occurred at the same time as Opal announced to employees that it would proceed with the AOD Policy changes proposed albeit with some minor changes to the original proposal. It would have been appropriate for Opal to have prepared and provided employees, HSE representatives and the relevant unions with copies of the tracked changes version of the AOD Policy at the start of the consultation period rather than at the end.

[110] It follows from the foregoing that Opal had at the time it announced its intention to proceed with the AOD Policy changes failed to comply with its obligation to provide 'relevant information' to employees as required by both the Model WHS Act and Consultation Procedure.

[111] Turning next to whether 'workers' and/or 'stakeholders' were given a reasonable opportunity to express their views and contribute to decision making. The timeline of the process was that the announcement and commencement of consultation occurred on 23 October 2023 following which various meetings were held at each site and with the CFMEU and AMWU. Employees and the unions were invited to provide feedback during the consultation period by speaking with site management, HR or HSE staff as well as through their HSE representative or to a dedicated email address. The consultation period was initially open until 10 November 2024 but was subsequently extended to mid-December 2023.

[112] As earlier stated, the use by Opal of a site level approach to consultation as well as engaging with the relevant unions is consistent with its obligations to consult with both 'workers' and 'stakeholders'. The timeframe in which Opal undertook that consultation was also reasonable in my view having regard to the nature of the changes proposed, those being a small number of changes to the existing AOD Policy. The several different means through which employees could ask questions and/or provide feedback were also appropriate and ensured that employees could provide their feedback both directly to Opal representatives or through their representative.

[113] All of the above-referred aspects of the consultation process tell in favour of a conclusion that employees were provided with a 'reasonable opportunity' to provide feedback and contribute to decision making. However, the finding that I have previously made that employees were not provided with all 'relevant information' tells firmly against such a conclusion as a reasonable opportunity for employees and stakeholders to express their views and contribute to the decision making also relies in my view on relevant information being provided to employees to enable them to respond effectively. In the circumstances and only because of Opal's omissions regarding the provision of all relevant information I conclude that workers/stakeholders were not provided with a reasonable opportunity to express their views and influence the decision making.

[114] The next consultation obligation found in both the Model WHS Act and Consultation Procedure is that requiring the views of the workers to be taken into account. As earlier stated, the AMWU contend that Opal merely notified employees of the change and that the views of employees were not properly taken into account. Opal rejects that submission and points to Mr Tregoweth's evidence on the steps he took to consider and take into account the feedback from employees which was summarised and provided to him by Ms D'Elton. Mr Tregoweth's evidence, which was not challenged, revealed that firstly, the timing of the implementation of the proposed changes was delayed. Secondly, decision making on the timing of removal of the BAC self-testing units was placed at the discretion of each site manager. Thirdly, feedback from employees regarding the random selection process caused Mr Tregoweth to closely review and seek further information from TDDA regarding the 'randomising program.' Finally, employee feedback on selection of the MRO prompted further consideration of the need to ensure the selected MRO is able to demonstrate a comprehensive understanding of factors other than AOD consumption that may result in impairment.

[115] It is clear that the AMWU and at least some of Opal's employees are opposed to the proposed changes to the AOD Policy. That Opal has been largely unmoved by objections to the AOD Policy changes does not in itself evidence that Opal had a pre-determined view or did not take employees views into account. The fact that steps were taken by Opal to gather and consolidate all of the feedback received and then adjust aspects of the policy implementation suggests that consideration was given to the feedback albeit the adjustments made to the AOD Policy changes did not go to the substantive changes proposed. Even so, the AMWU's dissatisfaction with the outcome of the consultation does not of itself lead me to conclude that Opal has failed to take employees' views into account, though noting my earlier finding that the expression of those views was compromised by a lack of relevant information having been provided to employees. I am not however persuaded on the evidence that Opal's decision to change the AOD Policy in the terms proposed had already been taken, that the decision was irrevocable, that the opportunity to provide feedback was an afterthought or that it was merely perfunctory.

[116] Notwithstanding my conclusion above, Opal could have taken an additional step in the consultation process and that is to provide feedback to employees and their representatives about why it (Opal) had declined to alter the proposed AOD Policy changes in the manner sought by employees and to advise where adjustments had been made. Such an approach would have assisted demonstrate that employees' views had been taken into account.

[117] The next point in assessing Opal's compliance with its consultation obligations is that of whether employees and the unions were notified of the changes once the decision had been made. The notification of the decision to proceed with the proposed changes to the AOD Policy occurred on 23 January 2024, thus satisfying the notification obligation.

[118] Turning finally to the supplementary consultation elements found within the Consultation Procedure, clause 5.4 of the procedure requires that records be kept to document dialogue between the workplace parties and to record the outcomes. Ms D'Elton prepared a detailed summary of site level discussions and feedback from both employees and the unions. It was not argued that the records of the site level discussions failed to meet the document record requirements and I make no such finding. The final supplementary consultation element, that of the dispute resolution process is not relevant in the circumstances.

[119] Having assessed Opal's compliance with its consultation obligations under the Model WHS Act and Consultation Procedure I have found that it failed to provide employees and the AMWU with all 'relevant information' which had the knock-on effect of compromising the opportunity of employees to provide their feedback and influence the decision making. These consultation failures weigh against a finding that the direction to comply with the revised AOD Policy was 'reasonable'.

Was Opal's direction to its employees to comply with the revised AOD Policy lawful and reasonable?

[120] It was not contended by the AMWU that compliance of employees with the revised AOD Policy fell outside the scope of employees' employment or that compliance would endanger employees' life or health or require employees to do something unlawful. The

AMWU did contend however that the requirement for some employees to obtain a PPWFA from a medical practitioner for which they may bear additional cost is in breach of s 237 of the Model WHS Act. I note that the requirement to obtain a PPWFA is a long standing feature of the AOD Policy and in any case falls outside the scope of the matters I am required to determine and is therefore not relevant to resolution of the present dispute. In these circumstances, I am satisfied that the changes to the AOD Policy proposed by Opal which are the subject of the dispute before me are not unlawful.

[121] Turning now to whether the direction to comply with the revised AOD Policy was reasonable, it is firstly useful to consider the context within which the changes were proposed by Opal. As earlier set out, Opal acquired the Orora fibre packaging assets through the Sale completed in May 2020. In doing so it adopted the AOD Policy that it inherited from Orora, and which had previously been developed by Orora in part through a consultative process undertaken with employees and their representatives. The evidence reveals that despite the AOD Policy's adoption and rebranding as an Opal policy following the Sale, a key element of the AOD Policy, that of the random testing element, was paused during the COVID-19 pandemic. It was only in late 2023 that Opal gave notice of its intention to re-commence random testing across its fibre packaging sites as part of the roll out the proposed AOD Policy and practice changes.

[122] The above context is significant in that a core element of the proposed changes, that of the random testing element, had not been undertaken by Opal on its fibre packaging sites since the Sale, being a hiatus of over three years. It might be said that recommencement of the random testing alone without any changes after a hiatus of over three years was worthy of consultation and communication. Added to the notified recommencement of random testing were the proposed changes to both the AOD Policy and practice. Opal correctly recognised a need for consultation in these circumstances and I have made findings above regarding the process followed by it.

[123] The next relevant matter to be considered is that of the nature of the changes proposed to the AOD Policy and practice. The first point to be made is that the changes proposed did not involve a wholesale review or re-writing of the AOD Policy. The changes were limited in number but were nonetheless of some substance. As outlined above, the changes went to a change in the treatment of non-negative results for prescription and over the counter medication, removal of BAC self-testing units and a change in the methodology for the conduct of random testing, that of moving from blanket site testing to random selection of individuals at a site level. These changes are considered further below.

[124] Removal of BAC self-testing units from sites where they were located was said by Mr Tregoweth to be driven by the following; servicing and maintenance issues, anecdotally raised hygiene concerns and the potential that the presence of BAC self-testing units on sites may encourage employees to attend for work while potentially affected by alcohol rather than testing at home and/or taking personal leave. Beyond that stated rationale for removal of the self-testing units there was no evidence before me going to the number of units, costs of servicing and maintenance, utilisation, assessment of hygiene risks and risk assessment of removal. While the removal of the units appears to be logically based, it is not possible for me to reach a conclusion on whether the case for the proposed removal of the BAC self-testing units is compelling in the absence of evidence going to matters of the type referred to above. Were a compelling case for

change advanced in the proceedings, it would have weighed more strongly in favour of a finding that the change was reasonable.

[125] Turning next to the proposed adoption of random sample selection for site AOD testing versus blanket testing, the AMWU's objection appears to be primarily based on its fear that selection may be used by Opal to target individuals. Beyond expression of that concern, no evidence or material was advanced in support of it beyond Ms Hogan referring to her negative experiences with Opal. Tellingly, the AMWU declined the invitation extended by Opal for their officials to meet with TDDA to receive a briefing on TDDA's testing approach and methodology including random selection. The AMWU explained its rejection of the invitation on the basis that they held no concerns about the integrity of TDDA's approach. Rather, its concern was in respect of the potential for Opal to curate the list of employees provided to TDDA for random selection. The AMWU concern is in my opinion exaggerated at the very least and to the extent that some assurance of the integrity of the employee lists were sought it would not seem beyond the capability of the parties to put processes in place to build confidence in the process of site employee lists and random selection. I consequently reject the AMWU's concerns as being a legitimate basis for resisting random site selection.

[126] A further key point to be made is that the change proposed is in relation to practice rather than the policy itself. The AOD Policy relevantly remains unchanged and continues to state as follows;

> "**Random testing**
>
> Team Members are required to submit for testing as part of random testing programs.
>
> The process to select the random sample of Team Members and/or sites/shifts for testing will be determined by the Testing Provider."

[127] While the policy is not proposed to be change in terms of random testing, it is proposed to change the practice by implementing random selection at a site level rather than the blanket site testing approach previously applied by Orora. Although blanket testing may still be undertaken by Opal at smaller sites, introduction of random individual selection will result in higher frequency of testing across sites with fewer employees per test event. Opal's stated rationale for the change was that of the significant operational impacts of blanket testing on larger sites and that adoption of random selection at a site level would be consistent with best practice testing regimes. While the claimed operational impacts of random selection was not supported by evidence, the submission was not seriously challenged by the AMWU and appears to have a strong logical basis. As to random individual selection versus blanket site testing, the former is a common feature of drug and alcohol testing regimes in my experience although there was no evidence before me going to the relative use of each methodology across industry. A sound logical basis for moving from blanket testing to random individual selection at a site level exists in my view and would be consistent with an approach widely adopted across industry. This weighs in favour of a finding that the change in practice in relation to random selection is reasonable.

[128] Turning now to the final area of policy change, that of the proposed approach to non-negative test results for over the counter and prescription medication. There are a number of

changes proposed to the AOD Policy and practice which were outlined by Mr Tregoweth and are set out above at [22]-[27] and which may be shortly summarised as follows;

- Application of a common approach across random testing, for cause and post incident testing, that of applying an automatic stand-down of employees that produce non-negative screening test results for over the counter or prescription medication.

- Removal of the use of an on-call MRO to assess consistency of a non-negative screening test result for over the counter or prescription medication with declared medication/PPWFA.

- Placement of responsibility for assessing consistency between a positive laboratory confirmatory test result and declared medical dosage/PPWFA with the MRO rather than the testing provider in circumstances where the latter may not have the medical expertise and in the case of TDDA do not provide that service.

- Removal of the ability of an employee to request an MRO to review consistency of a non-negative screening test result for over the counter or pharmaceutical medication with the declared medication/PPWFA, the change logically flowing from insertion into the policy of the MRO role at the confirmatory test result stage.

[129] Opal submits that the changes to both the policy and practice are required to ensure that a consistent approach is applied to the treatment of employees who produce a non-negative screening test result for over the counter or prescription medication. That is, employees producing non-negative screening test results in these circumstances would be stood down on pay pending receipt of a confirmatory laboratory test result regardless of whether the screening test result was produced through random testing, for cause or post incident testing. Opal further argues that such an approach would also align with the approach taken for non-negative screening test results for other drugs. According to Opal the changes would also appropriately place the role of assessing consistency between a test result and declared medication with the MRO at the point where a confirmatory laboratory test result is obtained. It is also noted that employees would not be adversely impacted in a financial sense given that the stand down of employees would be on pay. Beyond its complaint that a risk assessment was not completed to support the proposed change the AMWU has not advanced a compelling argument in opposition to the merits of the proposed change.

[130] I accept that the changes proposed by Opal in relation to treatment of non-negative screening test results for over the counter of prescription medication are not merely cosmetic changes but are of substance. The changes have a sound logic on the basis of consistency notwithstanding the limited material before me. I also accept Mr Tregoweth's view that there is no apparent safety rationale for treating a non-negative screening test result for over the counter or prescription medication obtained through random testing differently to non-negative screening test result obtained through for cause or post-incident testing. That view of Mr Tregoweth appears to be formed out of his assessment of the risk although it is telling that a risk assessment was not undertaken prior to communication of Opal's decision to proceed with the proposed changes. On balance however, I am of the view that the proposed changes have a sound rationale, are logically based and would if implemented ensure a consistent approach to managing non-negative screening test results for over the counter or prescription medication.

This tells in favour of a conclusion that the direction to comply with the proposed change is reasonable.

[131] The AMWU submit that Opal's consultation obligation failures are decisive to the Commission determining Opal's directions to comply with the revised AOD Policy and practice are not reasonable therefore meaning that Opal is not permitted to proceed with the proposed changes. Opal submits that in the event it was found that there were consultation obligations, it complied with such obligations and consequently the directions were both lawful and reasonable. I accept that compliance with the consultation obligations is a relevant matter to be weighed but as stated by the Full Bench in *Mt Arthur*, all of the circumstances must be considered.

[132] There are a range of matters that are relevant to determining whether Opal's implementation of the revised AOD Policy and practice would be reasonable. As set out above, these include the historical context of the AOD Policy, that being its adoption by Opal without amendment beyond rebranding it as an Opal policy on completion of the Sale in 2020. Other relevant matters include the lengthy pause on random testing between the Sale in May 2020 and its proposed resumption late 2023 and the limited scope of the changes although they remain of substance. Significantly I have also found there were consultation failures in respect of the provision of relevant information which had the consequent impact of denying employees a proper opportunity to provide their views and influence the decision making. Finally, the merits of the proposed changes are also to be weighed although it must be said I was not assisted in that task due to the limited material filed on the merits of the changes.

[133] Some of the matters considered above weigh in favour of a finding that the direction to comply with the revised AOD Policy and practice was reasonable. They are firstly the limited scope of the change which distinguishes it from the circumstances dealt with in Mt Arthur which involved the imposition of a COVID-19 vaccination site entry regime which on any view constituted a unique and significant change to site entry requirements. The present case does not rise to the level of significant change or novelty dealt with in *Mt Arthur* although the changes proposed in the present case are of substance. Secondly, the logic of the changes proposed in respect to the move from blanket site testing to a random selection methodology and the treatment of non-negative screening test results for over the counter and prescription medication weighs in favour of the direction being found to be reasonable. No such finding was made in relation to removal of the BAC self-testing units.

[134] Telling against a finding that the policy change and practice directions were reasonable were the following. Firstly, there were deficiencies in the consultation process applied by Opal in respect of the provision of relevant information to employees and the consequential impact that failure had on the ability of employees to provide their views and influence the decision. It cannot in my view be said that the deficiencies were not such as to have deprived employees of the opportunity of influencing changes to the final decision. Secondly, the pause on random testing for over three years following the Sale of Orora assets to Opal, and the fact that the AOD Policy had not been subject to review or modification by Opal (beyond Opal rebranding of the policy) following the Sale required a rigorous approach to consultation on the proposed changes to the policy and practice on resumption of random testing. That is particularly so in circumstances where the workforce and its representatives had considerable experience and knowledge of the AOD Policy development and implementation under Orora.

[135] In all of the circumstances of the present case I find that the directions to comply with the revised AOD Policy and practice while lawful were not reasonable. I have reached this conclusion based in particular on my finding regarding the identified consultation failures, vis a vis ss 48(a)&(b) of the Model WHS Act. The matters telling in favour of the directions being found to be reasonable are not sufficient to persuade me that the decision outcome would not have been different had Opal complied with those consultation obligations. In reaching this conclusion I have considered the logic of the changes proposed, albeit with limited material before me. While I accept there is sound logic to the changes proposed by Opal in relation to random selection and treatment of non-negative screening test results for over the counter or prescription medication, that should not be taken to be Commission approval of the proposed changes. It is entirely possible that properly informed of the rationale for the proposed changes accompanied by appropriate risk assessments that employees may identify further opportunities to improve or modify the proposed changes to the AOD Policy and practice.

[136] Having reached a conclusion that the changes proposed to the AOD Policy and practice are not reasonable in the circumstances, it necessarily follows that Opal is at this stage not permitted to introduce those changes. That said, there is nothing to prevent Opal from recommencing random testing in accordance with the AOD Policy and practice as existed prior to the proposed changes. Nor is Opal prevented from pursuing implementation of its proposed changes to the AOD Policy and practice through a consultative process that remedies the deficiencies I have identified. Additionally, it may wish to consider whether it pursues that as part of a more comprehensive review of the AOD Policy that it has foreshadowed it will undertake.

Conclusion

[137] It follows from the foregoing that the answers to the questions posed for determination are as follows;

1. In respect of the sites covered by the Opal Fibre Packaging National Enterprise Agreement 2022 (“the Agreement”), was Opal prevented from implementing any or all of the following measures arising from the January 2024 amendments to its Alcohol and Other Drugs Policy, namely:

    a. the removal of alcohol self-testing machines on sites;

    The answer to question 1a. is “Yes”

    b. permitting paid stand down of employees on prescription or over the counter medication following a non-negative result in a random drug test;

    The answer to question 1b. is “Yes”

    c. review of positive laboratory confirmation tests by an independent medical review officer ("MRO").

    The answer to question 1c. is “Yes”

2. In respect of the sites covered by the Agreement was Opal prevented from:

   a. re-introducing random alcohol and other drug testing after a hiatus since 2020; and/or

      The answer to question 2a. is "No"

   b. using a sample selection methodology for random testing at a site, rather than the testing of all workers at a site selected at random; and/or

      The answer to question 2b. is "Yes"

   c. discontinuing the previous practice of seeking assessment by an MRO of a non-negative random drug test result (prior to the confirmatory drug test result) in circumstances where the employee provided a declaration that they are taking prescription or over the counter medication.

      The answer to question 2c. is "Yes"

3. If the Commission answers "Yes" to any or all of questions 1.a-c or 2a-c, what steps does the Commission recommend Opal adopt to address any matters that the Commission determined prevented Opal from implementing the relevant changes?

   The answer to question 3 is as follows.

   The Commission recommends that Opal takes the following additional steps to address the identified consultation deficiencies as part of a consultation process that in all other respects is consistent with the approach previously applied by Opal between October – December 2023;

   (i) Opal to provide 'relevant information' to employees and union representatives including the rationale for each of the proposed changes. This may include any completed cost/benefit analysis, operational impacts analysis, risk assessments of the proposed changes, marked-up copies of the AOD Policy reflecting the proposed changes, relevant information on industry practice, and any other information pertinent to the proposed changes.

   (ii) Opal to undertake further meetings/briefings of employees and union representatives regarding proposed AOD Policy and practice changes and through that process provide the 'relevant information' referred to in (i) above.

   (iii) Following (i) & (ii), employees and their representatives to be provided with a further opportunity to provide feedback, seek clarification, or ask further questions on the proposed changes prior to a decision being taken.

(iv) *Robust process to be put in place to record any feedback, clarification or questions asked by employees and/or their representatives and to capture and circulate to all employees Opal's responses to matters raised by employees and their representatives.*

[138] The matter is determined accordingly.

DEPUTY PRESIDENT

Appearances:
K Presdee for the Applicant.
S Kelleher and *J Hyde* for the Respondent.

Hearing details:
2024.
Melbourne:
May 29.

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[1]AE518969.

[2] Exhibit R1, Witness Statement of Rod Beales, dated 17 May 2024, at [7]

[3] Exhibit R1, at [8]

[4] Exhibit R1, at [9]

[5] Exhibit R2, Witness Statement of David Tregoweth, dated 17 May 2024, at [8]

[6] Exhibit R1, at [10]

[7] Exhibit A3, Witness Statement of Margaret Hogan, dated 24 May 2024, at [4]-[5]

[8] Exhibit A3, at [6]-[8]

[9] Exhibit R2, at [9]-[10]

[10] Exhibit R2, at [11]

[11] Exhibit R2, at [12]

[12] Exhibit R2, at [19]-[20]

[13] Exhibit R2, at [14]-[17]

[14] Exhibit R2, at [21]

[15] Exhibit R2, at[22]-[23], Attachment DT-2, Orora 'On-call Medical Review ("MRO") Process'

[16] Exhibit R2, at [27]

[17] Exhibit R2, at [28](a)

[18] Exhibit R2, at [28](b)

[19] Exhibit R2, at [25]-[26]

[20] Transcript at PN513-PN520

[21] Exhibit A1, Witness Statement of David Henry, dated 3 May 2024, Attachment DH-1, Email from Heidi D'Elton to all Opal employees, dated 23 October 2023, titled 'Update on random testing and consultation on proposed policy changes'

[22] Exhibit R2, at [31]

[23] Exhibit R2, at [33], Attachment DT-4 Brooklyn HSE Meeting Minutes 7 December 2023

[24] Exhibit R2, at [34], Attachment DT-5, Email from Joe Lercara, dated 15 December 2023, titled 'Re: regard AOD policy changes feedback'

[25] Exhibit R2, at [35]-[36]

[26] Exhibit R2, at [37]

[27] Exhibit R2, at [38], Attachment DT-6, Revesby HSE Committee Meeting Minutes of 6 December 2023

[28] Exhibit R2, at [39], Attachment DT-7, Email from Mathew Whyte, dated 10 November 2023, titled 'AOD Feedback from OFP Rocklea'

[29] Exhibit R2, at [40], Attachment DT-8, Email from Mathew Whyte, dated 17 November 2023, titled 'AOD Feedback from OFP Rocklea'

[30] Exhibit R2, at [41], Attachment DT-9, Email from Mathew Whyte, dated 13 November 2023, titled 'AOD Feedback from OFP Townsville'

[31] Exhibit R2, at [42], Attachment DT-10, Communication Session Feedback Record, dated 24 October 2023

[32] Exhibit R2, at [43], Attachment DT-11, Training Register, dated 29 & 30 November 2023

[33] Exhibit R2, at [45]-[47], Attachment DT-12, Consultation Session Feedback Record, dated 25&26 October 2023, Attachment DT-13, Athol Park HSE Committee Minutes, dated 8 November 2023

[34] Exhibit R1, at [16]

[35] Transcript at PN315

[36] Transcript at PN314

[37] Exhibit A3, at [10], Attachment MH-1, Email from Margaret Hogan to Heidi D'Elton, dated 23 October 2023, titled 'AOD Consultation'

[38] Exhibit R1, at [17]-[18]

[39] Exhibit R1, at [12]

[40] Exhibit A3, at [13]

[41] Exhibit R1, at [19]

[42] Exhibit R1, at [20]

[43] Transcript at PN77-PN84

[44] Ibid at PN216-PN221

[45] Transcript at PN291-PN301

[46] Transcript at PN359, PN365

[47] Exhibit R1, at [22], Attachment RB-10, Email from Mick Bull to Rod Beales, dated 21 December 2023, titled 'Re: Opal Drug and Alcohol Policy'

[48] Exhibit R1, Attachment RB-11, Email from Lorraine Cassin to Brad Hinds, dated 21 December 2023, titled 'AOD policy changes'

[49] Exhibit R1, Attachment RB-12, Email from Brad Hinds to Lorraine Cassin, dated 9 January 2024, titled 'Re: AOD policy changes'

[50] Exhibit R1, Attachment RB-13, Email from Margaret Hogan to Brad Hinds, dated 9 January 2024, titled 'RE: AOD policy changes'

[51] Transcript at PN120-PN123

[52] Ibid at PN140-PN144

[53] Exhibit A3, Attachment MH3, Email exchange between Margaret Hogan and Brad Hinds, dated 23 January 2023, titled 'AOD Policy Changes'

[54] Ibid

[55] Exhibit A1, Attachment DH2, Email from Opal Communications, dated 23 January 2024

[56] Transcript at PN271-PN

[57] Exhibit R1, at [27]

[58] Transcript at PN86

[59] Exhibit R2, at [46], Attachment DT-14, 'AOD Consultation – Comments, Questions and Feedback'

[60] Transcript at PN472-PN484

[61] Exhibit R2, at [48]-[49]

[62] Exhibit R2, at [50]

[63] Exhibit R2, at [51]

[64] Exhibit R2, at [52]

[65] Exhibit A1, Attachment DH2, Email from Opal Communications, dated 23 January 2024

[66] Exhibit R2, at [54]

[67] Exhibit R2, at [55]-[57]

[68] Exhibit A1, at [8]-[9]

[69] Exhibit A1, at [11]-[12]

[70] Exhibit A1, Attachment DH3, Email from David Henry to Rod Beales and Brad Hinds, dated 1 February 2024, titled 'Level 3 – Disputes Procedure Meeting (per EA)'

[71] Exhibit A1, Attachment DH4, Email from Rod Beales to David Henry, dated 8 February 2024, titled 'Re: 'Level 3 – Disputes Procedure Meeting (per EA)'

[72] Exhibit A1, Attachment DH5, Letter from Celia Yuen (of Opal) to Kathryn Presdee, dated 20 March 2023, titled 'C2024/892 – AMWU v Opal Packaging Pty Ltd

[73] Exhibit A1, at [18]

[74] Exhibit A1, at [21]-[22], Attachment DH9, Opal Risk Assessment Procedure, Issue Date: September 2021

[75] Exhibit A1, Attachment DH10, Opal Communication and Consultation Procedure, Issue Date: March 2022

[76] Exhibit A1, at [24]-[27]

[77] Exhibit A1, at [28]-[32]

[78] Exhibit A, Second Witness Statement of David Henry, dated 24 May 2024, at [3]-[5], Attachment DH13, NHSC Meeting Minutes 15 June 2022, Attachment DH14, NHSC June 2022 Meeting Summary

[79] Transcript at PN410

[80] Exhibit A2, at [15]-17]

[81] [2021] FWCFB 6059 at [105]-[107]

[82] Ibid at [108]

[83] Mt Arthur at [70], [93], [179]

[84] Ibid at [79]

[85] Mt Arthur at [68]-[70]

[86] *Mt Arthur* at [95]

[87] Ibid at [108]

[88] Exhibit R2, at [26]