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Report of an inquiry into Dr Julie Copeman's complaint that Derbarl Yerrigan Health Service terminated her employment on the basis of her trade union activity

HREOC REPORT NO. 37 (2007)

Human Rights and Equal Opportunity Commission
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The Hon Phillip Ruddock MP
Attorney-General
House of Representatives
Parliament House
CANBERRA ACT 2600

Dear Attorney,

Pursuant to section 11(1)(d) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)('HREOC Act'), I attach a report of my inquiry into a complaint made by Dr Julie Copeman. I have found that Dr Copeman's employment as a general medical practitioner was terminated by Derbarl Yerrigan Health Service (her employer) in circumstances that amounted to discrimination, and that such termination constitutes discrimination in employment for the purposes of s 31(b) of the HREOC Act.

Yours sincerely,

Carolyn Tan
Delegate of the President

23 May 2007

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1. REPORT AND SUMMARY

This report is the outcome of my inquiry into Dr Julie Anne Copeman's complaint that Derbarl Yerrigan Health Service ('DYHS') terminated her employment as a general medical practitioner on the basis of her trade union activity.[1]

On 5 April 2007, following the hearing described in section 4 below, I issued a notice of my findings and recommendations in relation to the complaint, the contents of which are reproduced below. In summary, I found that the complaint by Dr Copeman was made out and that Dr Copeman's employment was terminated in circumstances that amounted to discrimination by DYHS on the basis of her trade union activities. I recommended that DYHS should provide an apology to Dr Copeman and pay her compensation totalling $76,185.

2. RESPONDENT'S REPLY

Under s 35(2)(e) of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)('HREOC Act'), the Commission is required to state in its report to the Attorney-General whether the respondent has taken, or is taking, any action as a result of my findings and recommendations.

By facsimile dated 8 May 2007, DYHS' representatives advised that DYHS does not propose to take any action in response to my recommendations. It stated:

> DYHS has limited funds and many calls upon those funds for the provision of its services. Its primary responsibility in relation to those funds must be in regard to the health and well being of the Aboriginal people for whom it was set up. … The Board of DYHS acted at all times in good faith and upon advice from qualified professional staff, with the best interests of the Aboriginal people very much in mind.

It is a pity that the important priority of Aboriginal health did not prevail to avoid the events leading to the complaint or at least to enable an early, conciliatory and cost-effective resolution of it.

On further inquiry on 9 May 2007, the Commission was informed by the lawyers for DYHS that DYHS will not be providing an apology to Dr Copeman of any kind. While such an apology would not divert DYHS funds from the provision of vital health services to Aboriginal people, the reason given by DYHS Board through its lawyers to the Commission for refusing to give an apology was that it believes the Board had acted in good faith at all times in regards to Dr Copeman and that the Board takes no responsibility for the actions of its staff in relation to this matter.

DYHS' response is unfortunate given that, at law, DYHS, represented by its board, is undoubtedly responsible for the actions of its senior staff, irrespective of the actions or intentions of the board members.

3. COMPLAINT AND CONCILIATION

3.1 Background

DYHS is an Aboriginal medical service located in Perth, Western Australia. It operates three clinics, known as East Perth, Maddington and Mirrabooka. East Perth is the largest clinic and is the administrative centre of DYHS. At the time to which this complaint relates, DYHS employed about 130 staff across these three sites.

Dr Copeman was employed as a medical practitioner by DYHS from August 1998 to February 2001 and again from July 2001 until April 2004. She worked a regular roster involving a minimum of six sessions per week, but often with additional sessions required of her by DYHS, thus averaging between about 15-30 hours per week.

Around the time of the events leading to Dr Copeman's complaint, DYHS was or had recently been through a period of funds administration. At the same time, there had been changes of personnel at senior management level.

Ms Margot Tobin commenced employment as Human Resources Manager with DYHS on 25 July 2003. Ms Tobin was responsible for conducting a staffing review of DYHS.

Ms Vanessa Davies commenced employment as Chief Executive Officer with DYHS on 3 November 2003. Shortly before commencing this position, Ms Davies worked as a DYHS consultant producing corporate policies for DYHS. Upon her commencement, Ms Davies identified several problems requiring change, including the role of 'Senior Medical Officer' which was at that time performed by Dr Dianne Faulkner-Hill.

Ms Tobin and Ms Davies were based at the East Perth site.

Dr Copeman was mainly rostered to work at the Mirrabooka site and preferred to do so to ensure continuity of patient care at that clinic. From time to time she also worked sessions at the East Perth site.

3.2 Dr Copeman's complaint

On 11 March 2005, the Human Rights and Equal Opportunity Commission ('HREOC') received Dr Copeman's written complaint alleging that DYHS discriminated against her by terminating her employment on the basis of her trade union activity. She stated that her employment was terminated when she received a letter from DYHS dated 2 April 2004 which stated that she was 'no longer required for the clinic roster' and was asked to return access keys and any property of DYHS.

Dr Copeman alleged that she was a member of the Australian Medical Association, West Australia Branch ('AMA(WA)') and had also for some time been the AMA(WA) representative at DYHS. She said that she had regularly acted as the AMA representative in matters concerning salaries of doctors, an AMA industrial

agreement, medical practitioner's legal risks arising from inappropriate dispensing of pharmaceuticals at DYHS, professional indemnity insurance and other matters. She had also been consulted by staff in relation to bullying and harassment issues. More particularly, she alleged that in February and March 2004 she had represented some other doctors employed by DYHS in meetings with management.

Dr Copeman complained that she had suffered emotional distress, damage to her professional reputation and economic loss as a consequence of DYHS's treatment of her. By way of redress Dr Copeman sought a range of remedies, including an apology and compensation.

3.3 DYHS's response

DYHS provided a written response signed by Ms Tobin dated 27 June 2005. In substance, Ms Tobin denied that Dr Copeman:

- Was terminated from her employment with DYHS;
- Engaged in trade union activity;
- Ever informed her that she was a union representative of the AMA(WA);
- Ever made any representations to the AMA(WA) on behalf of DYHS;
- Participated in the meetings in February-March 2004 in a trade union capacity.

Ms Tobin further alleged in defence of the allegations against DYHS that:

- Dr Copeman was employed on a casual basis;
- The reason that Dr Copeman was not required to work was because:
  - There was an excess of medical staff at Mirrabooka;
  - Dr Copeman refused Ms Tobin's request that she work a shift at another site, without giving a reason; and
  - Dr Copeman was 'hostile and uncooperative' and 'critical of DYHS operations'.

3.4 Other evidence

Dr Copeman provided HREOC with a further statement dated 17 August 2005 in which she addressed certain claims made in Ms Tobin's statement of 27 June 2005. Dr Copeman's statement attached the signed statements of nine people which she sought to rely on to corroborate her version of events. Those people are listed in Annexure A.

3.5 Conciliation

On 31 May 2006, in accordance with s 31(b)(i) of the *Human Rights and Equal Opportunity Act 1986* (Cth) ('HREOC Act'), HREOC attempted to conciliate Dr Copeman's complaint. The conciliation was unsuccessful.

3.6 Delegation

On 10 August 2006, the President of HREOC delegated his powers to conduct this inquiry to me pursuant to s 19(2)(b) of the HREOC Act. I decided to conduct an oral hearing.

4. INQUIRY AND HEARING

HREOC notified the parties by letter dated 15 August 2006 that the inquiry had been delegated to me and that I wished to conduct an oral hearing.

That letter set out my powers on the inquiry and attached a 'Draft statement of issues' which outlined the legal framework of the complaint and summarised the parties' arguments, relevant facts, witnesses and remedies sought.

My statutory powers on this inquiry are limited.[2] For instance, I cannot compel the production of documents or attendance of witnesses at a hearing to give evidence under oath. Nevertheless, Mr Levitt (on behalf of Dr Copeman) requested Ms Davies and Ms Tobin to give evidence under oath, which they voluntarily agreed to do. The procedure adopted in the inquiry was agreed by the parties following discussion with me at several pre-hearing teleconferences.

The parties agreed to an informal process of discovery, the provision of further evidence in the form of signed witness statements annexing any documentary evidence the witness referred to or sought to rely on. The parties agreed to advise which witnesses they wished to attend the hearing for cross-examination. It was agreed that where a witness was not required to attend the hearing, that witness's statement would be received as evidence, subject to any objections as to admissibility or submissions as to the weight of the evidence.

To assist the parties, on 31 August 2006 and 16 October 2006 HREOC produced documents entitled 'Questions arising' and 'Detailed questions arising' identifying the further evidence that I considered might be important to determining the complaint and which the parties had not yet provided.

A public hearing was initially set down for 1 - 2 November 2006 in Perth but was adjourned by agreement to 29 - 30 January 2007 at the request of DYHS.

Prior to the hearing, the parties provided additional witness statements and written submissions (see Annexure A).

Dr Copeman was represented at the hearing by Mr William Levitt, who is not a lawyer. DYHS was represented at the hearing by Mr Laurie James of Kott Gunning Lawyers. Ms Natasha Case, a lawyer of the legal section of HREOC, appeared as counsel assisting the Inquiry.

Additional documentary evidence was produced by both parties in the course of the hearing (see Annexure A). One witness not identified prior to the hearing, Mr Colin Garlett, gave evidence on behalf of DYHS.

The parties agreed that evidence would be presented in accordance with the availability of witnesses. Each party was given an opportunity to examine, cross examine and re-examine each witness. In addition, Ms Case and I questioned some witnesses, giving the parties an opportunity to re-examine if they wished to do so.

To assist the parties, on 29 January 2007, Ms Case provided a list of some authorities potentially relevant to the question of the definition of 'trade union activity', a question which I consider central to the inquiry and about which I invited the parties to make submissions.

At the conclusion of the hearing, the parties agreed that Dr Copeman could provide additional documentary evidence in support of her claim for damages by 7 February 2007 and that the parties would make their final submissions orally. By agreement, those submissions were made at a teleconference on 20 February 2007.

5. LEGAL FRAMEWORK

5.1 Discrimination on the basis of trade union activity

Any distinction, exclusion or preference made on the basis of trade union activity that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation constitutes discrimination for the purposes of the HREOC Act and the Human Rights and Equal Opportunity Commission Regulations 1989 (Cth) ('HREOC Regulations 1989').[3]

5.1.1 Trade union

Dr Copeman was at all relevant times a member of the AMA (WA). The AMA (WA) is a registered organisation under the *Industrial Relations Act 1979* (WA)[4] and is therefore a 'trade union' within the definition contained in section 3 of the HREOC Act. This was accepted by DYHS.

5.1.2 Trade union activity

The relevant provisions of the HREOC Act and HREOC Regulations 1989 are intended[5] to implement Australia's obligations under International Labour Organisation Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation ('ILO 111'),[6] which is reproduced in Schedule 1 of the HREOC Act.

After Australia ratified ILO 111 in 1973 and before the enactment of the HREOC Act in 1986, the Federal Government set up the National Committee on Discrimination in Employment ('NCDE') to hear complaints arising under ILO 111 and set policy in accordance with it.[7] The NCDE heard complaints on grounds other than those specified in ILO 111. Its ability to hear such complaints was considered to arise under Article 1(b) of ILO 111,[8] which states that the grounds of discrimination for the purpose of that Convention may include:

> Such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member [State] concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.[9]

The International Labour Conference Committee of Experts has expressed the view that inclusion of additional grounds of discrimination in domestic legislation implementing the Convention is sufficient to affect the content of ILO 111 as it applies to that member state.[10] The nine additional grounds of discrimination, including trade union activity, that are recognised by the HREOC Regulations 1989 were grounds of discrimination raised in complaints considered by the NCDE.[11]

The NCDE defined 'trade union activities' for the purposes of hearing complaints of discrimination on that ground as:

> '…those actions taken by a person as a result of his/her trade union affiliation.'[12]

Under this definition, the 'trade union' character of the activities is found in the reasons and motivations of the person engaged in the activity. Discrimination on this ground may arise by reference to the activity, rather than by reference to the trade union affiliation.

I have adopted this broad definition of trade union activity for the purposes of this inquiry. A broad definition accords with the general principle that beneficial legislation, including anti-discrimination legislation, should be interpreted liberally[13] 'within the confines of the actual language employed and what is fairly open on the words used'.[14] The actual and natural language used in the HREOC Act and HREOC Regulations 1989 is similarly broad and is consistent with such a definition.

5.1.3 Discrimination

The International Labour Conference Committee of Experts has interpreted the definition of discrimination in Article 1 paragraph 1(a) of ILO 111 as a:

> purely descriptive definition contain[ing] three elements:
>
> 1. a factual element (the existence of a distinction, exclusion or preference originating in an act or omission) which constitutes a difference in treatment;
> 2. a ground on which the difference in treatment is based, and
> 3. the objective result of this difference in treatment (the nullification or impairment of equality of opportunity or treatment).[15]

Section 3 of the HREOC Act defines discrimination using the same words as are used in Article 1 paragraph 1(a) of ILO 111. In accordance with the principle that important terms used in international agreements should be construed consistently both across related international agreements and as they are used in domestic legislation implementing such agreements, I have adopted the International Labour Conference Committee of Experts' interpretation of the definition of discrimination for the purposes of this inquiry.[16]

5.2 Reasons for findings

The purpose of this inquiry has been to enable me to determine whether DYHS's treatment of Dr Copeman constitutes discrimination in employment. While the HREOC Act does not impose any onus on the complainant, an evidentiary standard must be met before I may be satisfied that an act or practice constitutes discrimination in employment.

The relevant standard of proof is the civil standard, namely the balance of probabilities, bearing in mind that, in accordance with the principles considered by Dixon J in *Briginshaw v Briginshaw*[17] the seriousness of allegations made by the parties may affect the basis on which reasonable satisfaction is attained.

5.3 Drawing inferences

In this inquiry, there is no direct evidence of discrimination. Dr Copeman relies on indirect evidence in support of her allegation against DYHS. If I am to find that discrimination has occurred, I must do so by inference.

In a judicial context, it has been observed that:

> …The drawing of an inference is an exercise of the ordinary powers of human reason in the light of human experience; it is not affected directly by any rule of law. Legal principle may confine the basic facts in order to exclude irrelevancies… (citing Martin v Osborne (1936) 55 CLR 367). But the drawing of an inference is part of the process of fact finding: it has to do with the minor premises in the syllogism of judgment, not with the major premises of legal principle.[18]

Recently, it has been said that '[A]n inference may only be reasonably drawn upon the basis of facts which have been established by the applicant in evidence such that *"it is more probable that it exists than that it does not'"*.[19]

In *Sharma v Legal Aid* (Qld), a case arising under the *Racial Discrimination Act 1975* (Cth) the Full Court of the Federal Court (Heerey, Mansfield and Hely JJ) stated:

> … It may be accepted that it is unusual to find direct evidence of racial discrimination, and the outcome of a case will usually depend on what inferences it is proper to draw from the primary facts found: Glasgow City Council v Zafar [1998] 2 All ER 953, 958.
>
> …
>
> In a case depending on circumstantial evidence, it is well established that the trier of fact must consider 'the weight which is to be given to the united force of all of the circumstances put together'. One should not put a piece of circumstantial evidence out of consideration merely because an inference does not arise from it alone: Chamberlain v The Queen [No. 2] (1983-1984) 153 CLR 521 at 535. It is the cumulative effect of the circumstances which is important provided, of course, that the circumstances relied upon are established as facts.[20]

Before making my determination, I have carefully considered and weighed the evidence of both parties and have drawn inferences in accordance with the principles referred to above.

6. ISSUES FOR DETERMINATION

6.1 Was there a 'distinction, exclusion or preference' constituting a difference in treatment?

The first issue is whether there was a distinction, exclusion or preference arising in employment or occupation for the purposes of the definition of discrimination in s 3 of the HREOC Act. The distinction or exclusion relied on by Dr Copeman was the termination of her employment which would have otherwise continued as it had for the past few years.

DYHS denies that Dr Copeman's employment was terminated. However, DYHS admitted that Dr Copeman was not required to work for DYHS after 2 April 2004 and she was asked to return keys and other property. Whether her employment was casual or part-time, a matter discussed further in section 6.3.2, it was terminated and there was no indication in the letter sent to Dr Copeman that she might be called upon to work sessions in future as required. It was clear that she was not even to attend for the sessions that she had been already rostered for in April 2004.

The Minutes of DYHS Executive Committee meeting on 30 March 2004 refer to the Board 'not renewing the contract of employment for Dr Julie Copeman'. If these minutes are based on the recommendations of Ms Davies, which I find to be the case for reasons set out later in section 6.3.1, this further supports the view that her employment was not expected to be continuing.

It is clear from this evidence that Dr Copeman's employment, in which she had been engaged for a number of years, even if on a casual basis, was at an end.[21] This exclusion from working for DYHS was a difference in treatment which, if done on a proscribed basis, may constitute discrimination.

As was submitted by Mr James, I do not need to determine whether this was permissible under the terms of her employment, as this jurisdiction does not require that the distinction or exclusion to have been otherwise unlawful. The basis of the treatment and whether the treatment had the effect of nullifying or impairing equality of opportunity or treatment in employment, is discussed below at section 6.4.

6.2 Was Dr Copeman engaged in trade union activities?

6.2.1 What were the activities?

DYHS did not dispute or object to the considerable evidence produced on behalf of Dr Copeman to the effect that she was a member of AMA(WA) and was known to be and accepted by DYHS staff to be a representative of the AMA(WA).

Evidence to the effect that Dr Copeman was the AMA(WA) representative at DYHS was given by Dr Copeman herself and Mr Jennings of the AMA(WA). Evidence of the

fact that this was well-known to doctors and other staff at DYHS was given by numerous witnesses, including the Health Services Manager, Mr Josh Collard, the former Chief Executive Officer, Ms Marion Kickett, the Director of Client Services, Ms Lydianne Francis (nee Fulton), the Senior Medical Officer, Dr Diane Faulkner-Hill, a former Acting Chief Executive Officer, Sandra Harben, medical practitioners, Dr Ryback, Dr Krishnan and Dr Milligan, who all indicated that it was a matter of common knowledge. It appears as though most people, other than perhaps Ms Davies and Ms Tobin, were probably aware of Dr Copeman's AMA role.

Dr Copeman spoke of many trade union activities over a number of years. Some of these pre-date the employment of Ms Davies and Ms Tobin at DYHS and no evidence suggests that these earlier activities had any significance in the termination of Dr Copeman's employment or Ms Davies' or Ms Tobin's awareness of her AMA role. The most relevant of Dr Copeman's alleged trade union activities included:

- On 5 February 2004, attending a meeting at East Perth together with Dr Rybak, Ms Tobin and Ms Davies;
- On 18 or 19 February 2004, attending a meeting at East Perth together with Dr Faulkner-Hill, Ms Davies, Ms Tobin and Ms Colleen Keen; and
- On 3 and 19 March attending further meetings with Dr Faulkner-Hill, Ms Davies and Ms Tobin.

It was not disputed that:

- Dr Copeman attended these meetings;
- Dr Faulkner-Hill and Dr Rybak understood that Dr Copeman attended the meetings as their trade union representative; and
- Dr Copeman believed herself to be acting as Dr Faulkner-Hill's and Dr Rybak's trade union representative when she attended these meetings.

However, DYHS contends that it was not aware that Dr Copeman:

- Was a member of the AMA(WA);
- Was an AMA(WA) representative; and
- Was attending those meetings as a trade union representative.

6.2.2 Meetings about Dr Rybak

Reason for the first meeting

Dr Rybak was employed at the East Perth site of DYHS. She sent emails to doctors and others at DYHS in late January and early February 2004 expressing objections to the appointment of the new pharmacist for various reasons and being critical of management in relation to the appointment. There was much evidence about these issues but I have only summarised the salient points.

On 3 February 2004, Ms Davies forwarded one of Dr Rybak's emails to Ms Tobin. In

that email she asks 'Can we urgently discuss?' Ms Davies then sent an email to 'Dr Rybak', 'All Doctors', 'Margot Tobin', 'Diane Faulkner-Hill' and 'Colleen Keen' in which she asks Ms Tobin to arrange a meeting with Dr Faulkner-Hill, Dr Rybak, Ms Keen (Manager of Clinical Services), herself and Ms Tobin to discuss Dr Rybak's email. Dr Copeman was not invited.

Dr Rybak's response to the request for a meeting

Dr Rybak stated that she was asked to attend a meeting with Ms Tobin and Ms Davies on 5 February 2004. Dr Rybak stated that the scheduling of this meeting made her aware that her email may have 'caused some problems' because no explanation was given to her as to what the meeting was for. She said that it was 'bad news' to be requested to attend a meeting with Ms Tobin and Ms Davies. Dr Rybak stated that she was afraid that she was 'in trouble' and that the meeting was for disciplinary purposes. She thought the meeting might be of this nature because she would have expected a performance or practice-related issue to be raised through her mentor or the Senior Medical Officer, not raised directly with her by senior managers.

Dr Rybak stated that she wanted Dr Copeman to attend the meeting as a 'witness' and as the AMA representative. Dr Rybak says that she contacted Dr Copeman prior to the meeting and that Dr Copeman agreed that the general issues that Dr Rybak raised in the email were legitimate. She says that Dr Copeman said that at the meeting it should be clear that the problem was with the East Perth pharmacy and not Dr Rybak, to 'turn it into something positive'.

Dr Copeman's preparation for the meeting

Dr Copeman stated that Dr Rybak asked her to represent her at the meeting on 5 February 2004. Dr Copeman says that she reprimanded Dr Rybak for not raising the issues in a more appropriate manner but agreed that they were important issues. Dr Copeman stated that it was 'obvious' to her that Dr Rybak was 'under threat' and that she 'immediately, as an industrial rep' wrote an outline of the meeting to put it on a 'more constructive basis'. That outline focussed on the issues raised in Dr Rybak's email about the East Perth pharmacy.

Dr Copeman said that she sought permission from the Mirrabooka site manager, Mr Josh Collard, to travel from Mirrabooka to East Perth to attend the meeting on 5 February 2004 in her capacity as AMA representative. This permission was duly given by Mr Collard.

Mr Collard said that it was usual for trade union representatives to seek his permission to attend such meetings and he would customarily do so and notify senior management as to why permission was sought and given. He did not specifically recall notifying senior management in relation to the meeting of 5 March but recalled someone in senior management asking him why Dr Copeman was required to attend a meeting about Dr Rybak. Although he did not recall who asked the question, he said that from his response, that Dr Copeman attended because of her involvement in supporting Dr Rybak, it would have been 'obvious' that Dr Copeman was a union representative.

What happened at the meeting?

Dr Copeman stated that her outline was adopted and expanded upon at the meeting on 5 February 2004, which was 'not acrimonious'. In Dr Copeman's view, her actions in providing an outline and attending the meeting had successfully 'deflected' attention from the form of Dr Rybak's email to the issues raised in it and 'diverted' the perceived threat to Dr Rybak on that occasion.

Dr Rybak stated that she felt that Dr Copeman's outline, attendance at and direction of the meeting had 'diffused' the tension arising from her email. Dr Rybak 'felt happy' after the meeting because there was good communication between the administrative staff and doctors. She understood the outcomes of the meeting to be general agreement that there were problems with the way the new pharmacist was chosen and that the doctors should have a role in such decisions.

Submissions about this meeting

Ms Tobin's minutes of the meeting on 5 February 2004 note Dr Copeman's name beside the words 'Mirrabooka representative'. Mr James suggested the minutes should be interpreted to mean that Dr Copeman attended the meeting as a representative of the Mirrabooka site, rather than as Dr Rybak's trade union representative or industrial advocate.

I do not consider Ms Tobin's minutes to be a coherent record of the meeting. They were not available to the inquiry until 30 January 2007, the second day of the hearing, when they were produced by Dr Copeman. Ms Tobin's recollection of the meeting was confused. She gave evidence on 29 January 2007 and was not available to attend to give further evidence. She could not recall the meeting but stated that there could have been a meeting and that if there was, it would have been the CEO's meeting and that she would have attended at the request of the CEO. She also stated that the meeting was not a disciplinary meeting but a meeting about 'operational' issues relevant to the pharmacy.

Dr Copeman's outline details the reasons for the change of pharmacist and the consultative process engaged in changing the pharmacist. The outline compares the East Perth site pharmaceutical practices with pharmaceutical practices at other sites. One of the options raised in the outline is the possibility of nominating a doctor at each site to form a pharmacy practices working party. If, as Dr Copeman stated, her outline was followed at the meeting, Ms Tobin's minutes may reflect an intention for Dr Copeman to become the Mirrabooka site representative on the working group. At any rate, nothing would prevent Dr Copeman from being both a Mirrabooka representative and a trade union representative at the meeting.

Mr James suggested that, as the meeting on 5 February 2005 was not a disciplinary meeting, Dr Rybak did not require trade union representation. The fact that disciplinary issues were not discussed does not, in my view, prevent Dr Copeman from attending as a trade union representative. There were certainly concerns on the part of Dr Rybak that disciplinary issues were to be raised and they might have been, if not for Dr Copeman's actions in sending out an agenda to 'deflect' the issues.

Regardless of disciplinary issues, the role that Dr Copeman believed she was playing at the meeting and the reason for her being there as understood by herself, Dr Rybak and Mr Collard, was to play a trade union representative role. There was no evidence that Dr Copeman was invited to attend the meeting by anyone other than Dr Rybak.

Dr Copeman's evidence and that of Mr Jennings was that AMA(WA) representatives' roles encompassed representation of individual staff members at workplaces in an industrial advocate capacity and representation of the AMA as a professional organisation within the workplace in relation to particular issues. Dr Copeman appears to have acted simultaneously in both of these roles at the meeting of 5 February 2004, by diverting disciplinary action against Dr Rybak and by promoting appropriate pharmaceutical protocols within DYHS. Pressing for better policies that impacted on the working environment and conditions of doctors would also appear to be typical activities of trade union representatives, even if these could also be classified as 'operational'.

In my view, Dr Copeman attended the meeting on 5 February 2005 as Dr Rybak's trade union representative. Mr Collard's evidence suggests that Ms Davies and Ms Tobin ought to have been aware of Dr Copeman's trade union role at that meeting. There was, however, no direct evidence that Ms Davies or Ms Tobin was specifically told that this was Dr Copeman's role at the meeting.

The second meeting

Dr Rybak stated that on 24 February 2004, Ms Davies and Ms Tobin emailed her requesting a meeting on the morning of 25 February 2004. Dr Rybak stated that it was 'clearly put forward' that the meeting was because they were not happy with her performance and they wanted to talk to her about 'issues'. The existence of such an email was not challenged. Dr Rybak stated that she asked for the issues to be put in writing and for time to ask an AMA representative and colleague to be present with her. Those requests were refused. Dr Rybak stated that she then communicated by email that she would not attend a meeting if she could not have the issues in writing and could not have a representative present.

That afternoon, Ms Tobin and Ms Davies arrived at Dr Rybak's office and asked if they could speak to her. Dr Rybak went into her room with them. Dr Rybak recalled that one of the issues then raised by Ms Davies was that she thought that Dr Rybak had spoken out of turn and been critical of her. Dr Rybak could not recall the full details of the meeting but recalled stating that she wished Dr Copeman to attend the meeting with her, that she did not feel comfortable and asking that the meeting be discontinued. She says her requests were denied by Ms Davies and Ms Tobin. This would have put Ms Davies and Ms Tobin on notice of the support role that Dr Copeman was to play for Dr Rybak in a disciplinary context.

Dr Copeman stated that Dr Rybak called her on the night of 25 February 2004. Dr Copeman was unable to attend the meeting on 25 February 2004 because she was otherwise engaged. Dr Copeman spoke to Mr Prendergast of the AMA on behalf of Dr Rybak to obtain his advice. She stated that Dr Rybak subsequently lodged both a worker's compensation application and a worksafe grievance.

On 26 February 2004, Dr Rybak received a letter entitled 'written warning - unsatisfactory performance' from DYHS, which had been signed by Ms Tobin. This letter refers to several matters concerning Dr Rybak's conduct but does not refer to Dr Rybak's email of 3 February 2004.

Ms Tobin stated that the meeting on 25 February 2004 was the 'trigger' for Dr Rybak's absence from work. She recalled that Dr Copeman did not attend the meeting. She recalled subsequently trying to resolve the workers compensation issue and get Dr Rybak back to work, which she eventually did.

6.2.3 Meetings about Dr Faulkner-Hill

Dr Copeman attended meetings between Dr Faulkner-Hill and Ms Davies and Ms Tobin on 18 or 19 February, 3 March and 19 March 2004.

The meeting on 18 or 19 February

Ms Davies stated that she requested a meeting with Dr Faulkner-Hill in writing, setting out the issues for discussion. Those issues included performance, operational and management issues. She said that Dr Faulkner-Hill was aware that the meeting was a form of performance management. Ms Davies stated that this was a 'first meeting' to clarify what the performance issues were.

Dr Faulkner-Hill stated that she was asked to attend a meeting on 19 February 2004 with Ms Davies and Ms Tobin to discuss the role of Senior Medical Officer. She says that she did not know that it was a performance management meeting until she read Ms Tobin's response dated 27 June 2005. While Dr Faulkner-Hill said she did not know that it was a performance management meeting, she felt 'threatened' to go to a meeting with Ms Davies and Ms Tobin on her own. She said that, 'everyone' was taking 'someone' to meetings with Ms Davies and Ms Tobin.

Dr Copeman stated that her understanding of the purpose of the meeting on 19 February, as well as those held on 3 March and 19 March, was to assess what the Senior Medical Officer was doing and what a proposed replacement role should be. Dr Copeman stated that Dr Faulkner-Hill was 'on board with the fact' that it was going to be a more corporate role.

Ms Tobin stated that the meeting was between Ms Davies, as Chief Executive Officer, and Dr Faulkner-Hill, as Senior Medical Officer, which she attended to take notes and act as a witness. Dr Copeman, Dr Faulkner-Hill, Ms Tobin and Ms Davies all agreed that a broad range of performance, operational and management issues were raised at this meeting. Ms Tobin's notes indicate that the issues raised included: the new role of Medical Director, Dr Faulkner-Hill's role as Senior Medical Officer, Dr Copeman's role, pharmacy and Dr Rybak's emails.

Why did Dr Copeman attend this meeting?

Dr Faulkner-Hill stated that she asked Dr Copeman to attend the meeting with her as a representative and as a person of 'high standing'. Dr Faulkner-Hill stated that she requested that Dr Copeman attend the meeting as a trade union representative. Dr Faulkner-Hill did not say to whom she made this request but I infer that she made the request to Ms Tobin and/or Ms Davies. She said that at the meeting, Ms Tobin and Ms Davies did not question Dr Copeman's attendance, nor did she explain Dr Copeman's attendance to them; she just bought Dr Copeman in with her. Neither Dr Copeman nor Dr Faulkner-Hill recall Ms Davies or Ms Tobin commenting on Dr Copeman's presence at the meeting.

Ms Davies and Ms Tobin did not ask why Dr Copeman was present at the meeting. Ms Davies stated that 'it was asked' (presumably by Dr Faulkner-Hill and prior to the meeting) if Dr Copeman could attend the meeting as peer support because she was a friend of Dr Faulkner-Hill's. Ms Davies and Ms Tobin both stated that, at the meeting, it was stated that Dr Copeman was attending as Dr Faulkner-Hill's 'peer support' and that the words 'childhood friend' were used. Ms Davies recalls making a comment, in that context, that she did not have a problem with Dr Copeman attending. Neither Ms Davies nor Ms Tobin could recall who had made the statement referring to 'peer support' or 'childhood friend'.

Dr Faulkner-Hill stated that she did not say to Ms Tobin or Ms Davies that Dr Copeman was her childhood friend, either at the meeting or prior to it. Both Dr Faulkner-Hill and Dr Copeman stated that they were not childhood friends. Although they knew each other from being in sick bay once when they attended the same primary school, they had only become friends through university and working at DYHS. Neither Dr Copeman nor Dr Faulkner-Hill could account for how Ms Tobin and Ms Davies otherwise knew about their childhood association as they did not have much to do with them. Dr Copeman stated that 'it was not secret' at DYHS that they were friends and that anyone (presumably at DYHS) could have told them.

Ms Colleen Keen, who also attended the meeting, did not give evidence.

What happened at the meeting?

Ms Tobin stated that in the course of the meeting, Dr Copeman 'acknowledged some of Dr Faulkner-Hill's weaknesses' and said words to the effect that Dr Faulkner-Hill 'sometimes needed a good kick up the backside'. Ms Tobin's notes appear to record Dr Copeman commenting that Dr Faulkner-Hill's 'paperwork and appearance [was] disorganised'. Ms Tobin's notes do not record the words 'kick up the backside' being used. Ms Davies stated that Dr Copeman's use of the expression 'kick up the backside' was contextualised by reference to the friendship between them. Ms Tobin said it was not used in a 'serious' way.

Dr Copeman did not specifically address the issue of whether she used the expression 'kick up the backside' at the meeting. Dr Faulkner-Hill could not recall Dr Copeman using those words and could not imagine that she would have used such words at a meeting, but did recall Dr Copeman saying that her paperwork was disorganised.

All recall Dr Copeman saying that Dr Faulkner-Hill (or at least her paperwork) was disorganised in some way and that she offered to, and subsequently did, assist Dr Faulkner-Hill to sort out some of her paperwork.

Dr Copeman stated that the meeting became acrimonious when Ms Tobin told Dr Faulkner-Hill that the other doctors were complaining about her. Ms Tobin made this statement about one hour into the meeting when both Ms Davies and Dr Copeman were out of the room. Dr Copeman stated that Dr Faulkner-Hill became quite distressed. Upon her return to the room, Dr Copeman remonstrated with Ms Tobin that her comments were untrue and that if there were such complaints, there were mechanisms for dealing with them.

Ms Tobin did not deny this account, which is corroborated in an email from Dr Faulkner-Hill to Ms Tobin dated 19 February 2004 at 5.46 pm.

The meetings on 3 and 19 March 2004

Dr Copeman says that she attended two subsequent meetings at which Dr Faulkner-Hill's role as Senior Medical Officer was discussed.

On 3 March 2004, she attended a meeting at East Perth which was also attended by Ms Tobin, Ms Davies and Ms Keen. Dr Copeman says that, at this meeting, she explained that the scope of Dr Faulkner-Hill's role as Senior Medical Officer was 'unrealistic' and could not be effectively performed by a part-time employee. A range of other issues relevant to DYHS doctors' medical practice were also discussed, including accreditation and the maintenance of current medical practitioner provider numbers by DYHS doctors and inadequacies with doctors' support staff.

19 March 2004 was the last day on which Dr Copeman worked at DYHS. She attended a meeting at East Perth at which Ms Tobin and Dr Faulkner-Hill were also present. She cannot recall Ms Davies being present and was uncertain whether Ms Keen was also present. Dr Faulkner-Hill had, on 18 March, sent an email to Ms Tobin in which she expressed her concerns about there being a shortage of doctors at all DYHS clinics for the next six weeks partly because two had unexpectedly taken extraordinary leave and several others were taking annual leave. Dr Copeman recalls that at this meeting, Ms Tobin 'attacked' Dr Faulkner-Hill for failing to inform her about the doctor shortage. Dr Copeman says that Dr Faulkner-Hill pointed out to Ms Tobin that management had 'unilaterally' changed the employment of Dr Krishnan, one of DYHS's full-time doctors to part-time without consulting her, on 16 March 2004. Dr Copeman said that she told Ms Tobin that DYHS was experiencing a 'medical staffing crisis' as a result of Dr Rybak and Dr Krishnan going on sick leave as a result of Ms Tobin's way of dealing with them. She says she also told Ms Tobin that her failure to formalise working conditions meant that staff on short-term contracts sought work elsewhere and considered themselves to be 'casual' and were therefore unwilling to work extra shifts. Dr Copeman says that Ms Tobin became 'almost incandescent' in response to these comments and says that the meeting became 'highly acrimonious'.

6.2.4 Were these actions taken by Dr Copeman as a result of her trade union affiliation?

Mr James submitted on behalf of DYHS that I should find that Dr Copeman's activities were not in the nature of trade union activities because the meetings concerned operational matters not usually of concern to trade unions. Mr James did, however, concede that redundancy would usually be a matter of concern to a trade union.

Mr James submitted that Dr Copeman's comments did not support an inference that her attendance at the meeting on 18 February 2004 was 'trade union activity' because they were not comments that supported or defended Dr Faulkner-Hill.

Dr Copeman stated that at the meeting on 18 February 2004, she was defending Dr Faulkner-Hill by pointing out that the amount of administrative work she had to do was overwhelming. She stated that at the meeting on 5 February 2004, she was trying to deflect any negative consequences flowing from Dr Rybak's criticism of management's change of pharmacy. In relation to the meetings in March, there were discussions about Dr Faulkner-Hill's role and duties as Senior Medical Officer and there was a discussion about the doctor staffing crisis.

The historic and continuing role of trade unions (conducted through their representatives) is to protect, support and work for the improvement of the rights and conditions of employees and to challenge perceived injustice or unfairness towards such employees. Trade union representatives are often a critical voice for employees, questioning and objecting to actions of management which impact adversely on the way in which employees are treated. The activities engaged in by Dr Copeman involved supporting and being an advocate for fellow employee doctors on issues relating to performance, potential disciplinary action, redundancy issues affecting professional practice and policies affecting the working environment. Mr Levitt, in his submissions for Dr Copeman, characterised her activities as standing up against a culture of bullying and harassment of employees and an abuse of power. These are activities in which trade union representatives are typically engaged.

The 'trade union' nature of the activity may be determined by reference to objective or subjective factors, or a combination of both. In this case, there is the objective fact of Dr Copeman's trade union affiliation, namely that she was in fact the AMA(WA) representatives at DYHS. There is the fact that the activities in question are typical activities of trade union representatives. It is also clear that Dr Copeman's activities and her altercation with Ms Davies and Ms Tobin was as a result of what she perceived to be her role as a trade union representative. This all gives those activities their trade union character.

Ms Davies and Ms Tobin denied knowing that Dr Copeman was a trade union representative. It is clear that this was a matter within the knowledge of DYHS through its senior employees such as previous Chief Executive Officers and other senior managers as outlined above at 6.2.1 and 6.2.2. Various witnesses such as Ms Marion Kickett and Mr Josh Collard believed that they had told Ms Davies and Ms

Tobin of this, even if they could not be precise as to what was said and when. Ms Lydianne Francis, who was at the time Director of Client Services, was more definitive. She said she clearly recalled telling Ms Tobin in the first week of Ms Tobin's employment with DYHS of the role of the Senior Medical Officer, the AMA representative, nurses and site managers. At any rate, it would seem strange that Ms Davies and Ms Tobin would not question why Dr Copeman was taking the time off from her duties at Mirrabooka to attend the meetings or whether it was necessary for her to do so if they had not known of her role. One would also expect that a Chief Executive Officer and a Human Resources Manager would make a point of knowing who the union representatives for the workplace were.

While there is certainly evidence pointing to it, in my view, I do not need to finally decide whether Ms Davies or Ms Tobin were aware of Dr Copeman's precise trade union affiliation. This will be expanded on later in section 6.3.3. It would appear to have been obvious that the role played by Dr Copeman at the meetings was to represent and be an advocate for the doctors. They were aware of her activities in relation to these meetings and it is not necessary for me to decide if they had actual knowledge of the formal role she had within the AMA(WA) as opposed to the knowledge of the activities, which resulted from Dr Copeman's trade union role and which were by their nature typical trade union activities.

I find that:

- Dr Faulkner-Hill and Dr Rybak understood that Dr Copeman attended the meetings as their trade union representative.
- Dr Copeman intended to act and was acting as Dr Faulkner-Hill's and Dr Rybak's trade union representative when she attended the meetings in February 2004.
- The meetings about the proposed redundancy of the Senior Medical Officer position were meetings at which a trade union representative would be present.
- The role that Dr Copeman played at these meetings was consistent with the role that a trade union representative would perform.
- Dr Copeman's role as a trade union representative was within the knowledge of senior management at DYHS over the years and of at least some senior managers at the relevant time.

6.3 Was the difference in treatment based on trade union activities?

Ms Tobin stated that Dr Copeman was one of only two doctors in relation to whose employment 'management action' was taken. The other doctor was Dr Faulkner-Hill, whose position was made redundant.

6.3.1 Who decided to terminate Dr Copeman's employment?

Ms Tobin stated that the decision to terminate Dr Copeman's employment was a decision of the Executive Committee made in a meeting on 30 March 2004. DYHS produced the minutes of that meeting to the inquiry in the course of the hearing on 30 January 2004.

The minutes of that Executive Committee meeting indicate that Ms Tobin and Ms Davies were both present. They do not record either Ms Tobin or Ms Davies absenting themselves from discussion about that agenda item.

Ms Tobin could not recall attending the meeting but stated that she would have been informed about the outcome of the meeting by Ms Davies. Ms Davies admitted that she would have attended the meeting but could not recall any discussion about Dr Copeman. Mr Colin Garlett, who gave oral evidence on behalf of DYHS and attended that Executive Committee meeting as a member, could not recall any discussion of the decision to terminate Dr Copeman's employment.

Mr Garlett and Ms Davies stated that Dr Copeman's employment would have arisen in the context of the general discussion around the proposed redundancy of the Senior Medical Officer position then occupied by Dr Faulkner-Hill and the creation of a new position of Medical Director. Mr Garlett stated that the Executive Committee would have acted on the advice of Ms Davies. Ms Davies in turn stated that she would have acted on the advice of Ms Tobin, amongst others.

In my view, although there was a resolution by the Executive Committee to terminate Dr Copeman's employment, it was based on the views and recommendations of Ms Davies and Ms Tobin. They were the people who effectively made the decision and Dr Copeman's employment would not have ended if not for their reasons for doing so. This is reinforced by the fact that the existence of a resolution of the Executive Committee only emerged in the course of the hearing and was not advised to the legal representatives of DYHS prior to the hearing. In the earlier responses submitted by Ms Tobin on behalf of DYHS, the clear impression was that the decision was made by herself and Ms Davies, not something that was directed by an Executive Committee and there was no suggestion in their responses or statements that the Executive Committee had any influence in the matter. It is therefore necessary for me to examine Ms Tobin and Ms Davies' reasons for deciding to terminate Dr Copeman's employment in order to determine whether that decision was based on Dr Copeman's trade union activity.[22]

6.3.2 Why was Dr Copeman's employment terminated?

Ms Davies and Ms Tobin gave several reasons for deciding to terminate Dr Copeman's employment. The primary reasons given included: her status as a casual employee; the perception that there was an excess of doctors at the Mirrabooka site; Dr Copeman's refusal to work at other sites. There was also a suggestion, not given as a reason for the discontinuance, that Dr Copeman was 'part of the problem and not

the solution'. I note that no witness suggested that there was any concern about Dr Copeman's professional performance as a doctor at DYHS and Ms Davies agreed that no complaints had been received about Dr Copeman from others.

Casual

The suggestion by DYHS was that, due to casual loading, casual employees were too expensive. Dr Copeman was a casual employee and the discontinuance of her employment was a cost-saving measure brought about by the need to save money, and was unrelated to any trade union activity or any performance issues. For these purposes I do not need to make a finding on whether or not Dr Copeman was in fact a casual employee. The relevant issue is whether Dr Copeman was terminated because doing so reduced casual employment and saved money.

Ms Davies says that she understood, both from information provided to her by Ms Tobin and directly from statements made by Dr Copeman, that Dr Copeman was a casual employee. She says that Dr Copeman regularly made statements about her ability to come and go as she pleased at staff meetings but could not recall any specific instances. Ms Davies also stated that she understood that at the time that her employment was terminated, Dr Copeman was the only casual employee at the Mirrabooka site. She understood that the rest of the doctors were on contracts. The suggestion by DYHS was that, due to the need to save money, casual employees were too expensive due to the casual loading and the discontinuance of Dr Copeman's employment was a cost-saving measure, unrelated to any trade union activity or any performance issues.

Dr Copeman denies ever having said that she was a casual employee. She says that she was employed on a regular 'sessional' basis, equivalent to 'permanent part-time'.

Ms Davies says that she formed the view that Dr Copeman relied on her status as a casual employee to pick and choose issues that she wished to become involved in as well as 'protection from taking direction'. Ms Davies cited the pharmaceutical issues raised in the 5 February meeting with Dr Rybak as a specific example of Dr Copeman's refusal to take direction. However Ms Davies also referred to Dr Copeman's updating of pharmaceutical protocols as an example of Dr Copeman's satisfactory professional performance.

Ms Tobin stated that she formed the view that Dr Copeman was a casual employee based on payroll information, including the fact that she was paid a casual loading. Ms Tobin said that she was aware of the legally established criteria by which casual employment is determined and that mere classification of a person's employment as casual did not necessarily mean that it was. Despite her knowledge of this and her human resources experience, Ms Tobin did not apply the criteria to Dr Copeman's employment to determine her casual status nor give any real consideration to the possibility that she was not casual. Instead, she said she relied on her general observations and conversations with Dr Copeman and other staff. Ms Tobin also referred to a telephone conversation that she had with Dr Copeman on 18 September 2003 about a draft contract. She says that Dr Copeman refused to sign the contract and said that she preferred to remain casual. Ms Tobin's notes of that

conversation state that Dr Copeman 'prefers to leave arrangements loose'. Her reference to this could give the impression that what was offered was a permanent part-time contract rather than a casual one and that the refusal to sign it was a preference to remain as a casual employee. However, the contract, which was produced to the inquiry, specifies that the classification of employment offered was 'casual' so could not be construed as an offer to change her status.

Dr Copeman recalled this conversation but denies saying that she was casual. Further, she points out that the contract on offer specified that the terms of employment would be 'casual' and that her refusal to sign such a contract was consistent with her view that she was not casual but 'sessional' or equivalent to permanent part-time. She said that the terms of the contract were unacceptable to her, and that she had consulted with the AMA about them.

Ms Kickett, a former Chief Executive Officer at DYHS and Dr Faulkner-Hill said that Dr Copeman was a sessional employee not a casual employee.

Ms Tobin and Ms Davies did not discuss with Dr Copeman the need for her to become a permanent part-time employee instead of a casual in order to save costs, nor that her employment would be at risk, if she remained as a casual employee. If the only reason was to save the cost of the casual loading for an experienced and well-respected employee, one would have expected such a discussion to take place. There was no evidence of whether other sessional doctors at DYHS were treated in a similar way or even had their casual loading situation considered. For these reasons, I do not accept that Dr Copeman's employment was terminated because the casual loading was too costly.

The other aspect that would be relevant if there was a concern about saving costs was the issue of earning income. The evidence of Dr Faulkner-Hill and submissions by Dr Copeman were to the effect that Dr Copeman saw a large number of patients in her sessions and was the highest Medicare revenue earner amongst the doctors. This would suggest that the loss of income from the loss of Dr Copeman was a consideration that one would expect should be taken into account if cost measures were the key issue.

Excess of doctors

Another reason given for discontinuing Dr Copeman's services was the excess of doctors at the Mirrabooka clinic compared with the East Perth clinic in particular and the need to better use resources by diverting doctors who would work at East Perth. It was said that Dr Copeman was not prepared to work at any clinic other than Mirrabooka and that was a reason for the termination of her employment.

Both Ms Davies and Ms Tobin said that there was an excess of staff at the Mirrabooka site and that this was another reason that Dr Copeman's employment was terminated.

However, Dr Faulkner-Hill, Mr Josh Collard and several other witnesses for Dr Copeman stated that there was never any excess of doctors at any DYHS clinic. Their

evidence is supported, in my view, by DYHS's registration for a locum doctor for all three DYHS clinics on 7 April 2004, five days after Dr Copeman's employment was terminated.

Neither Ms Davies nor Ms Tobin satisfactorily explained, by reference to either funding or client need, how Mirrabooka had an excess of doctors or 'doctor hours' or how it was proposed to deal with this excess, either before or after Dr Copeman's employment was terminated. They did not point to any documents or any specific facts upon which their claims of an excess of doctors was based.

Mr Collard, the Health Services Manager at DYHS, said that there was no excess of doctors at Mirrabooka and that they rarely had a full week of doctors there. Dr Faulkner-Hill was responsible for doctors' rostering and gave extensive evidence about the fluctuation in doctor availability and the need for doctors to work at different sites. She stated that if there was an excess of doctors at Mirrabooka and a shortage at the Central site, she would have reshuffled those doctors who were available. She stated that, at the time that Dr Copeman's employment was terminated, there was no excess of doctors at the Mirrabooka site. She also stated, and the documents produced to the inquiry show, that Dr Copeman was rostered to work for the month of April 2004.

As noted above at 6.2.3, the time that Dr Copeman's employment was terminated was also a time when several other doctors were on leave and, in fact, the shortage of doctors was particularly extreme, at least in the March and April period. There would appear to be no good reason for terminating the casual employment of a person already rostered in the circumstances if the primary reason was to divert funds for doctors' salaries to East Perth. No such reason was offered by DYHS.

Ms Davies and Ms Tobin did not suggest that there was an excess of doctors generally, but just at Mirrabooka. However, if there was a need for doctors, then the expected course would be that, rather than lose a good and experienced doctor, the more obvious action would have been to ask Dr Copeman to transfer to East Perth or at least to warn her that she would need to do so. No discussion of the sort occurred. The issue of working at East Perth is discussed below.

In the circumstances, I do not accept that the discontinuance of Dr Copeman's employment was due to an excess of doctors at Mirrabooka.

Refusal to work at other sites

Ms Davies said that she understood that Dr Copeman had refused to work at other sites. This understanding was based on Ms Davies' conversations with Ms Tobin, and other staff, including other doctors, but she did not discuss the matter with Dr Copeman directly.

However, Ms Davies also said that it was up to doctors as to whether they wanted to increase their hours or transfer to other sites.

Further, Dr Faulkner-Hill, who managed the doctors' rosters, stated that Dr Copeman was the only doctor at the Mirrabooka site who was prepared to work at other sites including East Perth and that many doctors employed by DYHS only worked at one site. She said that Dr Copeman did fill in with working the evening clinics at East Perth and had also filled in at Maddington when they were desperate. DYHS rosters for March and April 2004 which were produced to the inquiry show that Dr Copeman's final shift on 18 March 2004 was at East Perth. Dr Copeman has said that her last session was at the East Perth site but said it was on 19 March.

Ms Tobin stated that in late March 2004, she rang Dr Copeman to offer her a Monday evening shift at East Perth. She says that Dr Copeman refused the shift without giving a reason. This, she said, was an example of Dr Copeman's uncooperativeness and also that she was a casual and could do as she pleased. Ms Tobin says that as a consequence of Dr Copeman's refusal of the shift, the East Perth clinic had to be closed for the evening. Ms Tobin could not recall asking any other doctor to work that shift and could recall little other detail about the incident.

Dr Copeman says that Ms Tobin did not telephone her in late March to offer her a shift. Dr Copeman says that the conversation recalled by Ms Tobin did not occur. She says she was on leave from 23 March 2004 and gave notice of that leave at the meeting on 18 February 2004. This is supported by Ms Tobin's minutes of the meeting of 18 February 2004. She also produced documentary evidence which she said showed that another doctor was rostered to work the shift supposedly offered to her and further documentary evidence showing that she did work those shifts. Ms Tobin stated that those documents did not necessarily reflect what happened, and referred to other records which neither she nor DYHS produced.

The roster also shows other days on which no doctors were available to work at a particular site. However, no other doctors' employment was terminated as a result of clinics being closed.

There was no evidence given by Ms Tobin or Ms Davies about any other incident in which Dr Copeman allegedly refused to work at East Perth. Dr Copeman and Dr Faulkner-Hill both gave evidence that Dr Copeman did work additional shifts at East Perth countering any more generalised claim that Dr Copeman was inflexible and refused to work at clinics other than Mirrabooka. This is confirmed by the rosters showing Dr Copeman as rostered to work there. I do not accept that her employment was terminated because of a refusal to work at clinics other than Mirrabooka and there is no basis for Ms Davies and Ms Tobin to form any such conclusion. I therefore do not see this as a real reason for the termination of Dr Copeman's employment.

'Part of the problem, not the solution'

This issue was not put forward by DYHS as a reason for Dr Copeman's termination, though it may have been suggested as a contributing factor. Ms Tobin stated that in early 2004, a 'high level plan' was in place requiring commitment from staff to be

effective. She said that in the period February – March 2004, she formed the opinion that Dr Copeman was going to be part of the ongoing problems at DYHS rather than solutions. She formed this opinion on the basis of her observation and interaction with Dr Copeman at several meetings that she attended with Dr Copeman and with the CEO. At those meetings, she said, she did not like Dr Copeman's 'tone and attitude' towards Ms Tobin and Ms Davies 'as displayed in several meetings where I (Ms Tobin) was present and was with the CEO'. She said that she felt Dr Copeman was rude, and found her to be hostile and uncooperative towards DYHS, to be dwelling on the past rather than accepting the new board and CEO helping DYHS to move forward.

Ms Davies stated that her own concern that Dr Copeman was not part of the solution arose chiefly in respect of Dr Copeman's comment that Dr Faulkner-Hill could be disorganised and needed a kick up the backside at the meeting on 18 February 2004. This, said Ms Davies, downplayed the seriousness of the issues raised in that meeting. That comment, together with the perception that Dr Copeman 'picked and chose' which issues to become involved with was the extent of the evidence provided by Ms Davies on this point. As I have previously noted, the comment about the downplaying of the seriousness of the situation in order to minimise the seriousness of problems with Dr Faulkner-Hill's performance is the type of thing an advocate or trade union representative would do if representing an employee.

Dr Copeman's evidence about the events at the meeting of 19 March 2004 has been referred to above at section 6.2.3. It is apparent from this evidence that the meeting resulted in acrimony between Ms Tobin and Dr Copeman and would no doubt have been thought of by Ms Tobin as being 'hostile and uncooperative'. This was the last contact between Dr Copeman and Ms Tobin and Ms Davies before her employment was terminated.

It may be that Ms Davies and Ms Tobin did genuinely see Dr Copeman as 'part of the problem'. The question which could not be answered by either of them is 'what was the problem'? There were no concerns about Dr Copeman's competence or work performance. There were suggestions made by Ms Davies and Ms Tobin to the effect that Dr Copeman was not pro-active in trying to resolve problems or put forward suggestions for improvements, but Ms Davies and Ms Tobin accepted that she did, in fact, make some useful suggestions. They had little direct contact with her as she was based at a different centre. The main involvement they had with her seemed to be at the meetings referred to in February and March 2004 mentioned previously.

It appears that what Ms Davies and Ms Tobin thought was a 'problem' was that Dr Copeman was not supportive of, nor simply acquiescing in, the changes that they sought to make at DYHS which impacted on the employment or working environment of the doctors, or that she expressed doctors' concerns about the work environment. The fact that Dr Copeman expressed these concerns quite openly and forcefully was interpreted as being hostile. Ms Tobin and Ms Davies' objections appeared to relate to the activities which Dr Copeman has alleged were her 'trade union' activities.

6.3.3 The test

Mr James submitted, on behalf of DYHS, that Dr Copeman's alleged trade union activities could not have formed part of Ms Davies' and Ms Tobin's reasons for deciding to terminate Dr Copeman's employment because they were:

- unaware of Dr Copeman's status as a trade union representative;
- not informed that Dr Copeman was acting in a trade union representative at the relevant times, or alternatively
- the meetings were not meetings at which one would expect a trade union representative to be present.

This submission implies that knowledge of trade union activity is a necessary element of the discrimination. In the comparable unlawful discrimination jurisdiction established under the *Racial Discrimination Act 1975* (Cth) ('RDA'), the motive and intention of an alleged discriminator may be relevant to a consideration of all of the circumstances of a case but is not determinative of the question whether discrimination has occurred.[23] To the extent that it informs the question of their intention, Ms Davies' and Ms Tobin's actual or constructive notice that an activity was of a 'trade union' nature, may be relevant to a consideration of all of the circumstances of the case, but is neither an element of the discrimination nor determinative of the question whether discrimination has occurred.

In *Sharma v Legal Aid* (Qld), it was observed:

> There may be cases in which the motivation may be subconscious. There may be cases in which the proper inference to be drawn from the evidence is that, whether or not the employer realised it at the time or not, race was the reason it acted as it did…[24]

As set out above in section in section 6.2.4, there is certainly evidence to suggest that Ms Davies and Ms Tobin had at least constructive notice that Dr Copeman was a trade union representative. However, it is not necessary for me to make a finding on this issue in order to make my findings about whether Dr Copeman's trade union activity was a basis of Ms Davies' and Ms Tobin's decision to terminate her employment.

The test in this jurisdiction is whether I am satisfied on the evidence that the trade union activity was a basis of the differential treatment.[25] Although its language is different from that used in the HREOC Act and ILO 111, section 659 of the *Workplace Relations Act 1996* (Cth) is intended to implement ILO 111, which it refers to as 'set out in' the HREOC Act.[26] The courts have decided that a finding of discrimination under this provision may be made when a proscribed reason is merely 'a' reason for the impugned conduct.[27] As I have noted, important terms used in international agreements should be construed consistently both across related international agreements and as they are used in domestic legislation implementing such agreements.[28] In addition, it is appropriate to take a broad approach to anti-discrimination legislation and I am of the view that it is only necessary for trade union activity to be a reason for the decision. It is therefore not necessary for me to find that trade union activity was the only reason for the decision to terminate Dr Copeman's employment.

Section 3 of the HREOC Act proscribes discrimination 'on the basis of' a range of characteristics, including race. The courts have interpreted the expression 'based on', as used in s 9 of the RDA, as requiring a 'sufficient connection' between the proscribed characteristic and the impugned conduct before a finding of discrimination can be made.[29] In my view, the definition of discrimination in s 3 of the HREOC Act imposes the same requirement. It is therefore necessary for DYHS to have had knowledge of Dr Copeman's alleged trade union activities.

Ms Davies and Ms Tobin say that they decided to terminate Dr Copeman's employment for a range of reasons. I have traversed these reasons in section 6.3.2 and found that they are either not supported by the evidence or are inconsistent with other evidence before me. The perceived casual nature of Dr Copeman's employment and the perceived need to divert resources to the East Perth clinic may have been reasons why it was thought that the discontinuance of Dr Copeman's employment could be more easily justified than the dismissal of another doctor but I find that the key reason was the dislike of Dr Copeman's trade union activities and a desire to end them. Even if there were a number of reasons contributing to the decision to terminate Dr Copeman's employment, and if the matters raised by Ms Davies and Ms Tobin were taken into account, I consider that Dr Copeman's trade union activities were clearly a basis for their decision to terminate her employment.

Ms Davies and Ms Tobin attended the meetings constituting the relevant trade union activity and witnessed Dr Copeman's conduct at them. Dr Copeman was not expressly invited to any of the meetings by Ms Davies or Ms Tobin. They failed to inquire as to the reason for her presence at the 5 February 2004 meeting with Dr Rybak. I do not consider that their understanding that Dr Copeman attended the meeting on 18 February 2004 with Dr Faulkner-Hill as a 'peer support' or as a friend to be inconsistent with her attendance as a trade union representative. It was admitted that a redundancy would be an issue that a trade union representative would be interested in. The Meeting on 19 March was acrimonious and raised issues typically of interest to trade unions and in which trade union representatives typically participate.

Ms Davies and Ms Tobin both stated that they had limited other contact with Dr Copeman during which they might have observed her and formed an opinion about her. Indeed, the only specific instance of 'attitude' which they say formed a reason for their decision to terminate Dr Copeman's employment and which is not contradicted by other evidence was observed at those meetings. Further, the decision to terminate Dr Copeman's employment was made soon after those meetings. The timing of the events, and lack of any other cogent explanation, all lead me to conclude that the main reason for the termination related to Dr Copeman's activities at these meetings. There was obviously some sense of urgency on the part of Ms Tobin and Ms Davies for Dr Copeman's services to be terminated because, if the real concerns were to reduce casual costs or concerns about an excess of doctors at Mirrabooka, the far more logical approach would be to at least continue her employment while there was a medical staff shortage at all clinics instead of looking for locums.

Mr James for DYHS submitted after the hearing that the basis for the termination may have been to remove long term DYHS doctors, because those who had been there a long time were perceived to be opposed to change and did not share a common philosophy with the new managers. He submitted that this perception about the long-term employees did not have to be correct but that Dr Copeman was not singled out because she engaged in trade union activities. However DYHS did not lead evidence of any such plan to remove long-term employees and this would be inconsistent with the evidence of its own witnesses. I find it unlikely that if Dr Copeman had kept her profile low and just kept performing as a respected and high revenue-producing doctor at DYHS, her employment would not have been terminated.

I infer from my findings that there was a 'sufficient connection' between Dr Copeman's trade union activities and Ms Davies' and Ms Tobin's decision to terminate her employment.

6.4 Was there an impairment of equality?

Having found that DYHS's decision to terminate Dr Copeman's employment was a difference in treatment based on her trade union activities, I must now consider whether that distinction has had the effect of nullifying or impairing equality of treatment.

It was admitted that no other doctors' employment was at the relevant time terminated for any reason, with the exception of Dr Faulkner-Hill, whose position was made redundant. If Dr Copeman's employment had not been terminated, her employment with DYHS would, like that of the other doctors, have continued. The fact that Dr Copeman's employment was terminated is of itself evidence of a nullification or impairment of equality of treatment, being her ongoing employment.

To further flesh out the nature and extent of the effect of the impairment of equality on Dr Copeman, I may consider her position before and after the decision was made to terminate her employment.[30]

Dr Copeman produced evidence of her loss of income since her employment with DYHS was terminated. By comparing her annual salary for the year before her employment was terminated with her annual income after her employment was terminated, Dr Copeman demonstrated an economic loss of some $63,473.00 for the financial years 2005 – 2006. Dr Copeman also claimed superannuation losses of $5,712.00. These total $69,185.

I find, on the basis of the circumstances in which it was decided to terminate Dr Copeman's employment and the economic loss consequently suffered by her, that the decision to terminate Dr Copeman's employment had the effect of nullifying or impairing her equality of opportunity or treatment in her ongoing employment by DYHS.

7. SUMMARY OF FINDINGS

I am satisfied that Dr Copeman was engaged in trade union activities at the relevant times.

I am satisfied that Dr Copeman's trade union activities, as observed by Ms Davies and Ms Tobin, were the main reason for their decision to terminate her employment with DYHS.

The discontinuation of Dr Copeman's employment constituted an exclusion which impaired Dr Copeman's equality of opportunity in employment, being her ongoing employment by DYHS.

Accordingly, I find that DYHS's termination of Dr Copeman's employment on the basis of her trade union activity constitutes discrimination in employment for the purposes of s 31(b) of the HREOC Act.

8. RECOMMENDATIONS

I may, upon finding that an act constitutes discrimination, make recommendations for the payment of compensation for loss or damage or the taking of other action to remedy or reduce loss or damage suffered by a person as a result of the act.[31]

Dr Copeman has sought a formal public apology to redress the injury to her reputation in the Commonwealth of Australia and the State of Western Australia, compensation for loss of income, loss of entitlement to a redundancy package, general damages for professional loss, damage, pain, suffering and trauma, expenses incurred as a consequence of the complaint, the costs of legal advice and travel and other expenses and a penalty amount against DYHS.

I do not consider that Dr Copeman's professional reputation has suffered as a result of DYHS's actions. Dr Copeman's witnesses testified to her continuing high standing and good reputation in the Western Australian medical and Aboriginal health communities. Further, these reasons will stand as a public statement in relation to the cessation of Dr Copeman's employment at DYHS. It is difficult to recommend any form of public apology that will be satisfactory and not exacerbate the situation and I do not make any recommendations in this regard. I do recommend however that DYHS write a personal apology to Dr Copeman which she can make public if she wishes.

I am satisfied that Dr Copeman has suffered emotional hurt as a result of DYHS's actions. I am not satisfied that Dr Copeman's suffering was aggravated by DYHS's conduct, as submitted by Mr Levitt, and do not find that it is appropriate to recommend any amount of aggravated damages. I recommend that DYHS pay Dr Copeman the sum of $7,000.00 by way of compensation for emotional hurt.

As set out above in section 6.4, Dr Copeman has suffered a loss of income in the years ending June 2004 to June 2006. She has produced evidence demonstrating her mitigation of her loss of salary by seeking alternative employment. Mr James for DYHS did not challenge these figures but said that they could not be claimed as ongoing losses. Dr Copeman did not submit a claim for losses beyond 30 June 2006. I therefore recommend that DYHS pay Dr Copeman $69,185.00 in compensation for her loss of salary and superannuation (see above section 6.4). Given the compensation for loss of salary, I do not regard it as appropriate to add on an item for loss of entitlement to a redundancy package as I have not found that Dr Copeman was redundant.

I am not satisfied that the evidence supports a recommendation for the payment of compensation in the nature of exemplary damages.

The HREOC Act gives me the power to recommend compensation. It does not give me the specific power to recommend the payment of costs. I am therefore of the view that I cannot recommend that DYHS pay Dr Copeman's costs associated with the inquiry. It is a general principle of tort law that costs may not be recovered as

damages and I believe it is appropriate to apply that principle here.[32] I am therefore of the view that I should not recommend that DYHS pay Dr Copeman's costs associated with the inquiry.

I report accordingly to the Attorney-General.

Carolyn Tan
Delegate of the President

APPENDIX A: EVIDENCE BEFORE HREOC

Dr Copeman

On 19 August 2005, the Complainant provided HREOC with evidence in reply to the response comprising statements from:
Dr Copeman dated 17 August 2005;
Marian Kickett dated 10 August 2005;
Lydianne Fulton dated15 August 2005;
Josh Collard dated 5 August 2005;
Dr Raji Krishnan dated 3 August 2005;
Dr Anetta Rybak dated 15 August 2005;
Mr Michael Prendergast dated 11 August 2005;
Dr Dianne Faulkner-Hill dated 16 August 2005;
Dr Amanda Milligan dated 16 August 2005; and
Ms Yvette Walley dated 3 August 2005.

Letter from Megan Bilston Executive Officer of AMA(WA) Inc, enclosing a letter from Noelle Jones, Director Health and Community Services to the Delegate dated 30 August 2006 to the effect that DYHS had requested a locum medical practitioner for each of the three AMS sites in Perth, Maddington and Mirrabooka.

Letter from P Jennings, AMA Acting Executive Officer to HREOC, 5 October 2006.

Letter from Sandra Harben (DYHS A/CEO 2003) 10 January 2007.

Written submission from Dr Copeman to HREOC 12 January 2007.

Additional documents handed up on 29 and 30 January 2007 in course of the hearing.

Chronology dated 27 January 2007.

DYHS

Statement of Margot Tobin 22 December 2006.
Statement of Vanessa Davies 22 December 2006.
Submissions (undated).

Witnesses for Dr Copeman

Mr P Jennings, Deputy Executive Director AMA(WA) Inc
Dr Dianne Faulkner-Hill (former SMO DYHS)
Josh Collard (former site manager Mirrabooka)
Marian Kickett (former CEO)
Lydianne Fulton (former Clinical Services Supervisor)
Dr Anetta Rybak (former sessional medical practitioner)
Dr Julie Copeman (former general practitioner).

Witness for DYHS

Margot Tobin (former manager, Human Resources)
Vanessa Davies (former CEO)
Mr Colin Garlett (current CEO former board member)

APPENDIX B: FUNCTIONS OF THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

The Commission's functions

The long title of the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) is 'an Act to establish the Human Rights and Equal Opportunity Commission (and) to make provision in relation to human rights and in relation to equal opportunity in employment ...'.

Part II Division 4 of the Act confers functions on the Human Rights and Equal Opportunity Commission ('the Commission') in relation to equal opportunity in employment in pursuance of Australia's international obligations under the International Labour Organisation *Discrimination (Employment and Occupation) Convention 1958 (ILO 111).*[33]

Section 8(6) of the Act provides that the President shall perform the Commission's function of inquiring into any act or practice that may constitute discrimination as defined by the Act. Under section 31(b) of the Act the President is to inquire into any act or practice that may constitute discrimination and

(i) where the President considers it appropriate to do so - to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and

(ii) where the President is of the opinion that the act or practice constitutes discrimination, and President has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement - to report to the Minister in relation to the inquiry.[34]

Discrimination in employment and occupation

Under the Act discrimination means

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:
  (i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
  (ii) has been declared by the regulations to constitute discrimination for the purposes of this Act;

but does not include any distinction, exclusion or preference:

(c) in respect of a particular job based on the inherent requirements of the job; ...[35]

ILO 111 prohibits discrimination on certain specified grounds.[36] Those grounds are contained in the Act in subparagraph (a) of the definition of discrimination. ILO 111 also provides that ratifying States may address discrimination on additional grounds.[37]

The Act provides in subparagraph (b)(ii) of the definition of discrimination for the adoption of regulations to declare additional grounds in accordance with this provision in ILO 111. Under this power the *Human Rights and Equal Opportunity Commission Regulations* in 1989 declared trade union activity as a ground of discrimination for the purposes of the Act with effect from 1 January 1990.[38]

It is an accepted principle in domestic law that where a statute contains language that derives directly from an international instrument, such as the HREOC Act, it should be interpreted in accordance with the meaning it has been given at the international level.[39]

The comments of the International Labour Conference Committee of Experts on the Application of Conventions and Recommendations ('the Committee of Experts') are relevant to the interpretation of the Act's definition of discrimination. According to the Committee of Experts there are essentially three elements to the definition of discrimination in ILO 111:

1. an objective factual element, being the existence of a distinction, exclusion or preference which effects a difference in treatment in comparison with another in the same situation;
2. a ground on which the difference of treatment is based that is declared or prescribed;
3. the objective result of this treatment, that is, a nullification or impairment of equality of opportunity or treatment in employment or occupation.

Further the Committee of Experts has expressed the view that 'the adoption of impersonal standards based on forbidden grounds' and 'apparently neutral regulations and practices [that] result in inequalities in respect of persons with certain characteristics' also constitute discrimination.[40]

The Committee of Experts has also commented on the ILO 111 provision of 'any distinction, exclusion or preference in respect of a particular job based on inherent requirements of the job'. To be an inherent requirement the condition imposed must be proportionate to the aim being pursued and must be necessary because of the very nature of the job in question. The Committee stated for example that the exception 'refers to a specific and definable job, function or task. Any limitation within the context of this exception must be required by characteristics of the particular job, and be in proportion to its inherent requirements.'[41]

The Committee of Experts has agreed that an intention to discriminate is not necessary for a finding of discrimination under ILO 111.[42]

ENDNOTES

1 This inquiry has been conducted pursuant to s 11(1)(d) and 31(b) of the HREOC Act. Sections 31(b) and 32(1)(b) of the HREOC Act require me to give reasons for my findings. I am required to give notice of my findings pursuant to s 35(2)(a) of the HREOC Act.

2 Broader powers are available to HREOC in the conduct of inquiries into acts and practices of the Commonwealth: see ss 21, 33 of the HREOC Act.

3 Section 3(1) of the HREOC Act defines discrimination as:

(a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(b) any other distinction, exclusion or preference that:

(i) has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and

(ii) has been declared by the regulations to constitute discrimination for the purposes of this Act.

Regulation 4 of the Human Rights and Equal Opportunity Commission Regulations 1989 (Cth) declares that trade union activity (Reg 4(a)(x)) is a ground of discrimination for the purposes of s 3(1) of the HREOC Act.

4 Section 72B of the *Industrial Relations Act 1976* (WA) provides that orders may be made declaring the AMA(WA) to be the representative of medical practitioners.

5 Explanatory Memorandum, Human Rights and Equal Opportunity Commission Bill 1985 (Cth), 1 & 2; *Human Rights and Equal Opportunity Bill 1985 Second Reading Speech*, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 1985, 1711 (L.F. Bowen, Deputy Prime Minister; Attorney General), 1711.

6 International Labour Organisation Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation 362 U.N.T.S. 31, entered into force June 15, 1960.

7 National Committee on Discrimination in Employment and Occupation *Tenth Annual Report 1982-83* (1983) 48; Human Rights and Equal Opportunity Commission, *Annual Report 1988 – 89* (1989), 27-29 and *Human Rights and Equal Opportunity Bill 1985 Second Reading Speech*, Commonwealth, *Parliamentary Debates*, House of Representatives, 9 October 1985, 1711 (L.F. Bowen, Deputy Prime Minister; Attorney General), 1711.

8 Ibid.

9 Ibid, above n 5.

10 International Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva 1996 para 49, 295 and para 297.

11 See NCDE Annual reports 1973- 1984. In 1984, the complaints function was transferred to the then Human Rights Commission and State Commissions.

12 National Committee on Discrimination in Employment and Occupation *Tenth Annual Report 1982-83* (1983) 48.

13 *IW v City of Perth* (1997) 146 ALR 696, 702; *Commonwealth v HREOC* (1998) 152 ALR 182.

14 *Khoury (M & S) v Government Insurance Office of NSW* (1984) 54 ALR 639, 650.

15 International Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, ILO, Geneva, 1996, paragraph 23. The Committee of Experts has also observed that the definition of discrimination in Article 1(a) of ILO 111 includes indirect discrimination: International Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations*, ILO Geneva, 1988, paragraph 23.

16 See Article 31 Vienna Convention; *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* [2000] FCA 1854. See also, HREOC Report No. 9 (May 2000) and HRC Report No. 3 (31 October 1997).

17 (1938) 60 CLR 266 (at 361 - 362).

18 *G v H* (1994) 124 ALR 353 per Brennan and McHugh JJ.

19 *Gama v Qantas* (No. 2) [2006] FMCA 1767 (Unreported, Raphael FM), para 7 citing Carr v Baker (1963) 36 SR(NSW) 301, 306 – 307, in which Jordan CJ went on to say that 'Inference of probability may range from a faint probability – a mere scintilla of probability such as would not warrant a finding in a civil action… to such practical certainty as would justify a conviction in a criminal prosecution.'

20 [2002] FCAFC 196, [41]. See also *Lafferty v Zimmer* [2006] HEA04/7 (Unreported, Member Mullins, 21 April 2006) para 19, a complaint of unlawful discrimination in employment on the ground of trade union activity before the Qld Anti-Discrimination Tribunal.

21 For similar reasoning in a comparable context, see *Australian Meat Industry Employees Union v Belandra Pty Ltd* [2003] FCA 910 (Unreported, North J, 29 August 2003) 79.

22 See *Automotive, Metals, Engineering, Printing and Kindred Industries Industrial Union of Employees, Queensland (for Vincent Fenech) AND CHR Group Pty Ltd* [2004] Case No. B 2110 of 2003 (Unreported, Commissioner Asbury, 24 December 2004) 11, where Commissioner Asbury applied the reasoning of Justice Smithers in *Wood (on behalf of the Industrial Relations Bureau) v Lord Mayor, Councillors and Citizens of the City of Melbourne* (1979) 41 FLR 1, 19:

'in the task of ascertaining the mind of the defendant corporation…It is a pure question of fact, where in particular circumstances that corporate mind may be located. In a case where two officers are concerned win the solution of an administrative problem and are working jointly to solve it and decide what the corporation is to do and are working in harmony and full confidence, the one with the other, the mind of the corporation is to be found in the course of conduct agreed upon between them and the reasons which in the end are the operating reasons for the conduct agreed upon'.

23 *Australian Medical Council v Wilson* (1996) 68 FCR 46, 74. See also *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8, 40-41.

24 Ibid, above n 20, (austlii para 40).

25 See earlier HREOC reports.

26 Section 659 (1)(a) of the WRA. Section 659(1)(c) expresses the intention to implement 'the Termination of Employment Recommendation, 1982, which the General Conference of the International Labour Organisation adopted on 22 June 1982 and is also known as Recommendation No. 166.'

27 *Maritime Union of Australia & Ors v Geraldton Port Authority & Ors* (1999) 93 FCR 34 (n 57).

28 See above, n 15.

29 *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8, 33, affirmed in *Victoria v Macedonian Teacher's Association of Victoria Inc* (1999) 91 FCR 47 and *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56, 61. This may be contrasted with expressions used in other anti-discrimination legislation, such as 'because of' or 'on the ground of'.

30 For a court's reasoning in similar circumstances, see *Mc Illwain v Ramsey Food Packaging Pty Ltd v Others* [2006] FCA 828, 349.

31 Section 35(2)(c)(i) HREOC Act.

32 See, eg, *Avenhouse and Anor v The Council of the Shire of Hornsby* (1998) 44 NSWLR 1, 58.

33 Ratified by Australia in 1973.

34 Section 31(b) HREOC Act.

35 Section 3(1) HREOC Act.

36 Article 1(1)(a).

37 Article 1(1)(b).

38 S R 1989 407, notified in the Commonwealth of Australia Gazette on 21 December 1989.

39 *Koowarta v Bjelke-Petersen and Others* (1981) 153 CLR 168 at 265 (Brennan J); *Minister for Foreign Affairs and Trade and Ors v Magno and Another* (1992) 112 ALR 529 at 535-6 (Gummow J).

40 International Labour Conference, *Equality in Employment and Occupation: General Survey by the Committee of Experts on the Application of Conventions and Recommendations* ILO, Geneva, 1988, at 23.

41 Ibid, at 138.

42 Ibid, at 22.