EQUAL OPPORTUNITY TRIBUNAL of WA

Nos 28 and 30 of 1992

B E T W E E N :

HEATHER HORNE **First Complainant**

and

GAIL McINTOSH **Second Complainant**

v

PRESS CLOUGH JOINT VENTURE (Comprising: Press Offshore Limited and Clough Engineering Limited)

First Respondent

and

THE METALS AND ENGINEERING WORKERS' UNION - WESTERN AUSTRALIA

Second Respondent

RULING ON APPLICATION TO DISMISS COMPLAINTS UNDER SECTION 125

BEFORE: Mr L W Roberts-Smith, Q.C. (Deputy President)

Counsel for the Complainants - Ms H Andrews
Counsel for the First Respondent - Ms L Rafferty
Counsel for the Second Respondent - Mr S Edwards

HEARD: 27, 28, 29 October, 1 & 2 November 1993

RULING DELIVERED: 26 November 1993

These two complaints are being heard together pursuant to section 108 Equal Opportunity Act 1984 ("the Act"), by order of the President made on 16 December 1992.

Mss Horne and McIntosh complain of sexual discrimination in employment, and victimization.

They were employed as Trades Assistants by the Press Clough Joint Venture, the First Respondent, in September and December 1990 respectively.

The Joint Venture was a business registered in Western Australia. It was engaged in the construction of modules for the Goodwyn "A" Platform Project. The work was being undertaken at a construction site at Jervoise Bay, South of Fremantle.

It is common ground that the site was, and was regarded as, a strong "Union" site. The major union on site was the Metals and Engineering Workers' Union - Western Australia ("the MEWU" or "the Union") the Second Respondent.

Both of the Complainants were at all material times, members of the MEWU.

The MEWU itself was a registered organization under section 58 Industrial Relations Act 1979 (WA). One effect of such registration was to render the MEWU a body corporate, capable of suing and being sued in its own name (section 60, ibid). There is no doubt the MEWU has a legal personality quite independent of its members (see also *Williams v Hursey* (1959) 103 CLR 30, per Fullagar J).

The issue immediately before the Tribunal is an application by the MEWU for an order under section 125(1) of the Act dismissing the complaint of each Complainant against it.

An application under section 125 is a matter of law or procedure, which accordingly falls to be determined by me as the

presidential member of the Tribunal, under section 105(3) of the Act (and see *Ralph M Lee (WA) Pty Ltd & Ors v Fost & Anor* (1991) EOC 92-357; (1991) 4 WAR 176).

For the same reasons as those expressed in *DL (representing the members of People Living with AIDS (WA) Inc & Ors v Perth City Council & Ors* (1992) EOC 92-422 ("*DL v Perth City Council* ") at 79,009-79,010, I entertained the application to dismiss, without requiring the Second Respondent to first elect whether or not to call evidence.

So too, I proceed on the basis that the proper test to be applied on this application is whether there is at this stage sufficient evidence upon which the Tribunal could find the complaints substantiated as against the Union - not whether it would do so. I expressly adopt the reasoning set out in *DL v Perth City Council* as to that at pages 79,010-79,012, supra) and summary of the correct approach there stated in the following terms:

> "To paraphrase Glass J in his article "The Insufficiency of Evidence to Raise a Case to Answer" (1981) 55 ALJ 842 at 843, I must consider whether there is evidence capable of satisfying the Tribunal, on the balance of probabilities, that each of the essential constituents of the complaints has been established. In this, I must confine myself to the evidence which favours the Complainants; evidence favouring the Respondents is to be disregarded. The evidence will be sufficient if the Tribunal, accepting the Complainants' evidence and disregarding all evidence to the contrary, could reasonably be satisfied that the complaint in each instance has more probably than not, been established."

Before turning to the substantive application there is a preliminary issue with which it is necessary to deal.

From the outset and throughout the course of the pre-hearing procedures and the hearing itself, the complainant's case against the MEWU in respect of the complaints of victimization had been conducted expressly and exclusively on the basis that the liability alleged was a vicarious liability founded on section 161 of the Act.

That section reads as follows -

> "161.(1) Subject to subsection (2), where an employee or agent of a person does, in connection with the employment of the employee or with the duties of the agent as an agent -

(a) an act that would, if it were done by the person, be unlawful under this Act (whether or not the act done by the employee or agent is unlawful under this Act); or

(b) an act that is unlawful under this Act,

this Act applies in relation to that person as if that person had also done the act.

(2) Subsection (1) does not apply in relation to an act of a kind referred to in paragraph (a) or (b) of that subsection done by an employee or agent of a person if it is established that the person took all reasonable steps to prevent the employee or agent from doing acts of the kind referred to in that paragraph."

I say expressly and exclusively, because in May 1993 the Complainant's legal representative provided further and better particulars of the Complainants' case against the MEWU in response to a written request from the solicitors for the MEWU. It is not necessary to set out here the details of either the request or the response; it is sufficient to observe that the latter made it quite clear the Complainants' case against the MEWU as to the alleged victimization was founded on section 161 only. It is probably not putting it too high to say that the tenor of the answers to the request for further and better particulars actually disavowed any other basis for liability.

At the conclusion of the Complainants' case (which was then closed, subject only to the calling of certain medical evidence which all parties conceded would not affect the determination of the application under section 125), Mr Edwards made his submissions. Ms Andrews then made hers. It was not until the end of Ms Andrews' submission that the suggestion was made, for the first time, that if the Tribunal did not find the MEWU liable under section 161 for the alleged victimization suffered by the Complainants, it could do so under section 160 of the Act.

Section 160 postulates quite a different basis for liability for breaches of the Act. It provides that -

"160. A person who causes, instructs, induces, aids, or permits another person to do an act that is unlawful under this Act shall for the purposes of this Act be taken also to have done the act."

Mr Edwards strenuously objected to this at the time and in his subsequent reply. He contended that the MEWU had deliberately sought to ascertain the case against it, both in fact and law, and the conduct of his cross-examination of the Complainants and Mr Hickey (the three of whom were the only witnesses called by Counsel for the Complainants) had been predicated on meeting the case the MEWU believed - in reliance upon the Points of Claim, the further and better particulars and Ms Andrews' opening - was being advanced against it.

Ms Andrews, on the other hand, pointed out that the Tribunal is not a court but rather conducts an inquiry, and the rules of pleading do not apply. In any event, she said, the Equal Opportunity Regulations 1986 ("the Regulations") require only that a complainant set out in the Points of claim

> "... the material facts upon which the complainant relies and the relief (if any) which the complainant seeks." (Reg. 7(1)).

- there is no requirement that a complainant plead the law.

In passing, I note that there is no express provision in the Regulations authorizing a request for further and better particulars and providing a procedure for that process; nor are those matters covered by any practice direction under reg. 30(1). Nonetheless, it is clear I think that the presidential member in a particular case could make orders or give directions of that nature in appropriate circumstances, under section 105(3) and reg 30(2). Be all that as it may, I do not think anything turns on that here, because particulars were in fact sought and were in fact given.

I accept Ms Andrews' submission that this Tribunal is not a court and that it is not bound by the rules of pleading. The rules of evidence do not apply (section 120) and the whole emphasis of the Act in relation to proceedings before the Tribunal is upon informality, conciliation and inquiry.

But that does not dispose of the point.

In my view, the rules of natural justice apply to proceedings before this Tribunal. The Act itself, neither expressly nor by necessary implication, excludes them. There is no question that the rights and/or interests of a respondent may be adversely affected by findings or orders made. The point raised by Counsel for the MEWU here is not dissimilar to that raised on behalf of the applicant in *ex parte Archer* (unreported) Supreme Court of WA (Full Court), Library no. 920504, delivered 6 October 1992. The applicant had been charged on a complaint by the Barristers' Board of Western Australia (now the Legal Practice Board) of unprofessional conduct in that, shortly put, he had accepted a brief to act for one client knowing there was a conflict of interest between that client and another. The case was conducted before the Board on that basis. The Board ultimately found the complaint proved, not on the basis the applicant had known there was a conflict of interest, but on the basis that he should have known. As to this, Rowland J (with whom Malcolm CJ and Franklyn J agreed on that aspect), observed -

> "This was not a general enquiry into the appellant's conduct that led to the matter being dealt with as if a specific complaint had been made. The inquiry was started with a specific complaint making specific allegations that the appellant knew that there was a conflict of interest at the time he accepted the brief. The inquiry was opened on that basis, dealt with on that basis at the hearing and closed on that basis by counsel. The Board seemed to appreciate this." (page 16, ibid).

At page 21 of his judgment, Rowland J referred to the judgment of the Privy Council in *Mahon v Air New Zealand* [1984] AC 808, 821 and continued -

> "Whether the hearing in this case can be categorized as the hearing of a complaint or simply an inquiry into the appellant's conduct, the appellant is entitled to be accorded procedural fairness. (*Kioa v West* (1985) 159 CLR 550 at 582; *Annetts v McCann* (1990) 170 CLR 596; *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321.) In my view, procedural fairness required that in an enquiry of this nature where the allegation concerned a state of affairs at a particular time, then if the inquiry was to be enlarged in a significant way then the appellant should have been told and should have been given the opportunity to answer."

The conclusion that the rules of natural justice (or procedural fairness) do apply to proceedings before the Tribunal is reinforced by the statutory obligation that it act "according to equity, good conscience and the substantial merits of the case..." (Section

120(b)). In my view, natural justice would in this case require that if the Complainants are now to be permitted to change the expressed basis upon which their complaints against the MEWU are said to be put, then the MEWU must be afforded the opportunity to deal with them on that basis - and that would include cross-examining the Complainants and their witness to that end.

They have plainly not been afforded that opportunity (in any practical sense) to this stage, and I accept Mr Edward's submission that they have thereby been embarrassed in the presentation of their case in that his cross-examination would have been significantly different had there been notice that section 160 was being relied upon by the Complainants in respect of the alleged victimization.

The question now is what should be done about it. That question is to be resolved by what the interests of justice require - which of course includes the avoidance of injustice to any party - and consistently with the object that all matters in issue between the parties should be resolved so as to give rise to a final determination as between them in this forum (see generally *Ryan v Shire of Shark Bay* (1992) EOC 92-441).

On the one hand, it would be unjust to the Complainants to prevent them relying upon whatever provisions of the legislation under which their complaints may be made out on the facts (subject of course to such findings of fact as may ultimately be made by the Tribunal) - and that is particularly so having regard to the nature and objects of this legislation.

On the other hand, there would be an injustice to the MEWU were the submissions by counsel for the Complainants in respect of section 160 and the victimization allegations, to be considered without that party having been afforded an opportunity to deal with them in cross-examination.

I would therefore be prepared to accede to the application foreshadowed by Mr Edwards, should he make it, that the Complainants (and if necessary, Mr Hickey - although I would have thought it unlikely that his evidence could have any relevance to this issue) be recalled for further cross-examination limited to the possible liability of the Union under section 160 of the Act, in respect of the alleged victimization, before hearing further submissions from him and Ms Andrews on that aspect of his application for an order that the complaints be dismissed under section 125 of the Act, should counsel wish to make them.

Whether or not that situation will arise, however, will depend in large part upon the conclusions reached by the Tribunal on the substantive arguments of this application. Before turning to them, it is necessary to outline the evidence thus far.

In very brief summary, the case for the Complainants was as follows.

They were the only female "blue collar" workers on site, in a workforce the size of which ranged up to approximately 300 workers.

As Trades Assistants, their duties included cleaning the amenities and crib rooms.

Initially, various crib rooms and offices around the site had displays of posters and pictures of naked or semi-naked women. These were generally limited to women with bare breasts. The Complainants described them as "soft porn" of the "People" magazine variety. Whilst they would have preferred them not to be there, the Complainants were prepared to tolerate them as incidental to their work in a male environment of a certain kind.

The evidence was that in January 1991, when Ms McIntosh went into a supervisor's office to clean it, she was confronted by a prominently placed poster of a naked woman with her legs apart and genitals exposed. She and Ms Horne immediately complained to the Site Supervisor.

The poster was not removed, but a circular "Press Clough Joint Venture" sticker was affixed to it over the vagina.

In late January 1991 a poster was placed on the wall of Crib hut #7, which it was one of the Complainant's duties to clean. The poster depicted a man and woman engaged in anal sex. It was the property of an MEWU Shop Steward, Paul Morgan, although he denied he had put it on the wall. The poster was removed at the request of the Complainants but only after an angry confrontation with Mr Morgan.

This incident occasioned some comment against the Complainants from male workers.

Also from about that time, so the Complainants said, there was a general increase in the number of posters being put up.

In about March 1991 Ms McIntosh approached Ms Horne, quite upset, and asked the latter to accompany her to crib hut #5. They saw about a dozen particularly offensive posters on the walls. They included a naked woman astride a statue of a large black panther, inserting its tongue in her vagina, another of two women having sex together and one showing a woman inserting a banana in her anus.

The Complainants found this display in their workplace, highly offensive and degrading.

They went to see Mr Bob Dalrymple, the MEWU site organizer, in the Union office. Ms Horne said he was preoccupied with a telephone call at the time. They told him there were offensive posters on the walls of crib hut #5 and asked him if it would be all right if they removed them. He indicated agreement, so they returned to the crib hut and removed the most offensive posters.

There was an almost immediate reaction. By lunch time it was common knowledge amongst the workforce. There were loud

protests from the men. There was shouting and general uproar. The men were outraged that the Complainants had had the temerity to remove the posters.

After lunch they were summoned to Mr Dalrymple's office.

He told them a delegation of men from around the site had seen him to express their discontent with what had been done. He said he had told the men that although he did not necessarily agree with the Complainants, his hands were tied because of some law he had heard of and as far as he knew they were within their rights to have the posters removed and there was nothing he could do about it.

According to them, he then went on to tell the Complainants it was very unfortunate they had taken the attitude they had towards the posters, and if they maintained that position it would make them very unpopular on site. It could even lead the men to go on strike - and if that occurred the Complainants would get little or no support from the Union. He said that Woodside Petroleum had a computer black-list and the Complainants were likely to find themselves on it as troublemakers.

Their evidence was that they felt intimidated and threatened by what he told them. They left the meeting feeling there was a total lack of support for them.

Beyond that, the resentment of the male workers continued and manifested itself in aggressive and offensive behaviour towards, and verbal abuse of, the Complainants.

They were confronted by two men purportedly speaking on behalf of the occupants of crib room #5. The men demanded their posters back. The Complainants tried to explain their position, and why the posters were offensive to them. The men responded by pointing out (again, in summary) that it was a male workplace, the Complainants had no right to bring a woman's perspective into

it, they were lucky to have jobs and if they wanted to work in a male environment they would just have to "cop it".

The Complainants had retained the posters and they returned them to the men.

Again, they were intimidated and depressed by this confrontation.

From that point on, they said, they were singled out for constant and unpleasant attention from the male work-force. So too, an increasing number of posters were put up; the content of them became more explicit and offensive.

Many male workers seemed to take some delight in telling the Complainants about graffiti of a gross and disgusting nature which had been written about them in the male toilets. This upset them.

They were subjected to personal abuse, particularly as posters began to disappear from the walls. The Complainants were blamed for this. In fact it was not them who were doing that; it was a group of Christian male workers on the site - although this was not discovered until some months later.

In August 1991 Ms Horne attended a two-week TLC course at the MEWU State Office in Perth. She took that opportunity to raise with the Assistant State Secretary of the MEWU, Mr Jock Ferguson, the problems she and Ms McIntosh had been experiencing on the Jervoise Bay site. She explained that Ms McIntosh was going to change over to night shift because of the victimization.

Ms Horne testified that she pleaded with Mr Ferguson for him or the State leadership to intervene. She felt the situation could be remedied even then if the Union were to demonstrate leadership and make it clear to the male members that pornographic material was not suitable for the workplace. She said she suggested that shop stewards and Union officials should attend equal opportunity courses, because they were obviously not aware of their responsibilities under the Act.

Her evidence was that Mr Ferguson pointed out he could not force people to undergo equal opportunity courses if they did not want to - and they did not. So far as the Complainants were aware, there was no action taken by the Union in response to their complaints.

In September 1991 Ms McIntosh had to do some work in crib hut #10. As were all the crib huts on site, this was the responsibility of the Joint Venture. It was, however, occupied by workers employed by Deblyn Scaffolders, a subcontractor. According to Ms Horne, the Deblyn workers were all exclusively members of the MEWU. On entering the hut Ms McIntosh saw a number of pornographic and sexually explicit posters displayed on the wall, including pictures of women masturbating. She described this in evidence as "a montage of pornography".

She said she immediately approached Mr Michael Richardson who was a Health and Safety Representative and an Assistant Shop Steward for the night shift. She told him about the pornographic display. He asked her what she wanted him to do about it. She told him she wanted him to have it taken down. He observed that if he did, she would not be very popular with the men. She retorted that she was there to work, not win a popularity contest. He said he would look at it, and left. She understood he was indicating he would take some action.

What in fact occurred was that a curtain of rubbish bags was placed over the display, with a note saying it was to protect the "virginal morality" of the second Complainant. There was also a note pinned to the wall to the effect that if the Complainants did not like it they should get out; that they were working in a male environment; that they were holding jobs which should have gone to men and generally containing personal abuse directed to them.

Ms McIntosh was unhappy with that response, believing it both unsatisfactory and personally disparaging. She left a note for Ms Horne when the latter came in on the day shift.

Ms Horne approached the Deblyn Health and Safety Representative, Mr Craig Ford, explained the situation to him and asked him to request the owners of the posters to remove them. He indicated that he did not think the men would be receptive.

The posters were still there some time later. Ms Horne then went to see Mr Dalrymple. He was with the MEWU Shop Stewards. She asked them to have the posters removed before the night shift came on. Nonetheless, when she left work that day the posters were still there. Ms Horne also approached two other MEWU Health and Safety representatives, but "they just didn't want to know".

The posters were still there that night when Ms McIntosh came in on the night shift, as were the rubbish bags and the note.

The following morning, Ms Horne went to the Union office. She walked in on a meeting attended by Mr Jock Ferguson, Mr Dalrymple and several shop stewards. She was angry. She told them it did not take 48 hours to get that material off the wall, it was about time they "got their act together and started acting like a Union" and when they did they would know where to find her. She would be at home. She walked out of the office. She was on her way home.

On her way out of the store-room she was stopped by a couple of safety representatives and a Deblyn foreman. There was some conversation. Helen Palethorpe, a junior Safety Officer with the Joint Venture joined them. The group went to look at the posters. Ms Horne was asked to point out the posters she found most offensive. She did so. The foreman agreed to remove them. Apparently no particular reference was made to the note, and that remained. Ms Horne went on with her duties.

A short time later the foreman spoke to her in the crib room. He told her they had taken down the posters. She expressed apprehension that she and Ms McIntosh would be victimized as a

result and asked what could be done to prevent a "backlash" from the men. The foreman said he could not do anything. He also mentioned that they had left the note in place because he felt it was fair comment.

Later that afternoon Ms Horne went to see Mr Mark Diamond, the Joint Venture site Industrial Relations and Personnel Manager. Her purpose was to discuss generally the situation which had developed. She spoke to him about the Company's affirmative action policy and things which might be done, such as the employment of more women.

Ms Horne testified that Mr Diamond pointed out there was no further action required about the crib hut #10 incident because the posters had already been removed. The previous incidents were not specifically discussed because Ms Horne just assumed Mr Diamond was aware of them.

Nothing changed as a result of Ms Horne's conversation with Mr Diamond.

The number of posters being put up increased, as did the proportion of "hard-core" pictures.

The Complainants' relationship with the male workforce deteriorated even further. They were subjected to more personal abuse and offensive remarks. They felt threatened and intimidated.

Sometime before Christmas 1991 Ms Horne was cleaning crib hut #2 only to be confronted with a full length female nude poster. Although the poster itself was what she described as "soft core", what she found frightening was what had been done to it. The figure had not only been used for dart practice (which she would not have found surprising), but had also been violently stabbed several times through the heart, head and genitals.

Ms Horne said she was very frightened and distressed by this.

There was another incident with Ms McIntosh.

At one stage the Joint Venture brought in a half-sized crib hut which was placed near a full-sized hut situated near the fabrication shop. The first night Ms McIntosh went into the new hut to clean it she saw that all four walls and the ceiling were covered with hard-core pornographic material. As she described it, there was no space not covered by posters, except on the floor. She thought all that could not have been done over the single day the hut had been there at that stage and so she concluded it must have been brought onto the site in that state.

She immediately reported the matter to her night shift supervisor, Mr Ernie Clark, and told him she was not going to clean that hut. She testified he said to her

> "That's all right; I understand why. I'll get one of the boys to do it. Don't you worry about it."

That was the end of the incident. She never entered that crib hut again; and in fact it was removed from the site soon afterwards, probably just after Christmas 1991.

Meantime though, in November 1991, Ms McIntosh had had occasion to go into the Union Site Office to clean it. She saw, on the wall above the MEWU Convenor's desk, a double-page picture of a woman lying back with her knees drawn up and her vagina, genital area and anus exposed.

Ms McIntosh' immediate reaction was one of anger, because this was the Union office - the Union which was supposed to represent her interests, and yet it was (in her view) "attacking" her with this material, and obviously condoning it by allowing it to be there.

She took the poster down, spoke to Ms Horne on the telephone and then made an appointment to see the Women's Officer for the Trades and Labour Council, Ms Jo Gaines.

Having seen Ms Gaines, she subsequently contacted the Trade Union Training Authority ("TUTA") and obtained from them the dates of forthcoming equal opportunity courses which could be conducted for the men on site. She then made an appointment to see Mr Jock Ferguson, the Assistant State Secretary of the MEWU.

The meeting took place on site, but in his car, apparently because there were other people then in the office and there was no privacy. Ms McIntosh showed Mr Ferguson the poster which had been on the wall of the Union office. She told him what she had found out about the TUTA equal opportunity courses and tried to persuade him to arrange for them to be held.

Mr Ferguson took the poster from her. He said he was going in to TUTA the next day, as it happened. He said he thought what she was suggesting was a good idea. She asked if she should approach the Company. He said she should not; that he would organize it. He told her he would contact her later and let her know the outcome.

Her impression at the end of the meeting was that Mr Ferguson was very keen on the idea and it was all very positive.

Having not heard from him after a few days, Ms McIntosh made a number of telephone calls to his office. She called him on his mobile telephone. She left a series of telephone messages. There was no reply . She had heard nothing from Mr Ferguson when she went on holiday in mid-December 1991 and she was not aware of any courses of the kind she had suggested, ever being conducted on the site.

Ms McIntosh was on holiday until the end of the following January.

Ms Horne continued to work day shift.

There were celebrations planned on site for Christmas. The site was to work until midday Christmas Eve, after which management

was to have a Christmas party for the whole blue-collar workforce at the South Fremantle Football Club. The men bought cartons of beer to work and began drinking from about 7.00 am Christmas Eve. According to Ms Horne, a lot of them were "pretty drunk" by morning smoko. There was a lot of horseplay. There were about 200 men on site at the time. Men were playing high-pressure hoses on each other. Food was being thrown around. Ms Horne was having to do her work through all of this, and as the morning went on she began to have a very bad feeling that it was getting out of control. As she left the last crib room to which she had to take the morning smokos, she heard John Gleinster yell out "Get Heather", but Paul Morgan, the Shop Steward grabbed hold of Gleinster and told him to leave her alone. She ran to the store-room and locked herself in. She was later joined by two male Trades Assistants, one of whom had been hurt, who were hiding from the fray outside. They kept the door locked. Through it they could hear men yelling. There were a couple of attempts to force the door but nobody got in.

Whilst locked in the shed Ms Horne heard cries of "Get Mike". She later became aware that a group of men had attacked her supervisor, Mike. They dunked him head first in a rubbish-bin full of rubbish, water and urine. They had pelted his office with rubbish from the bins and bags containing urine. Considerable damage was caused. Ms Horne exclaimed when she saw that, and one of the other men then present said

> "You should have seen what they had planned for you."

The site closed then for a 10-day Christmas holiday.

By then, and after the events just described in particular, Ms Horne felt so alienated and physically threatened she became ill. She experienced symptoms of nausea and depression. She realized she could not continue to work under those conditions much longer.

Nonetheless, she did return to work after the Christmas break. The situation had not improved.

She decided to make what she described as a "last ditch attempt" to bring the problem to the attention of management and try to get them to act.

She requested a meeting with Mr Mark Diamond and Mr Paul Morgan.

The meeting was held on 9 January 1992, but Mr Morgan did not attend. It was held in crib hut #4, which was one which had had a lot of pornographic material displayed in it. At the time of the meeting the offensive material was all over the ceiling as well.

It transpired that Ms Horne secreted a tape recorder on her person for the purpose of recording what was said at this meeting. The tape was tendered in evidence as exhibit PC.7A. Ms Rafferty, Counsel for the First Respondent, tendered a typed transcript, exhibit PC.7B. The evidence to which the Tribunal must have regard is what is on the tape; the transcript is no more than an aid to understanding the content of the tape.

In fact, the tape is of poor quality. Much of it is difficult to understand.

The day after Ms Horne's meeting with Mr Diamond, she was approached by Mr Morgan and Mr Glynn, two MEWU Shop Stewards. She found them intimidating. They asked to speak to her in a crib room. They told her they had spoken to Mr Diamond and wanted to know what she wanted done about the situation.

She repeated that unless they could protect her from further victimization by the men, she wanted them to do nothing. They said they had looked around the place and could not find anything they deemed to be offensive anyway, so it was not a problem.

A few days later Ms Horne had an accident at work as a result of which she suffered concussion and whiplash. She was off work for about 6 weeks from January 1992. She never returned to that site.

As she recovered from her accident injury, she said, the prospect of having to return to the situation at the Joint Venture site became increasingly distressing. She suffered a mental and emotional decline and eventually could not cope with the prospect of returning at all.

It is not necessary for the purposes of the present application to here canvass what occurred with Ms Horne thereafter.

Ms McIntosh returned to work from her holidays on 30 January 1992.

The situation had not changed. She was still subjected to abuse from the men. Almost as soon as she returned to work, one of the men accosted her and in abusive terms, demanded to know what she had done with their posters. This was apparently a reference to posters which were being removed by the clandestine group of Christian men, for which activity the Complainants were being blamed.

There were still many pornographic posters around. There were more of them and they were more explicitly pornographic.

Ms McIntosh decided to selectively remove some of these and retain them to show people outside the site as some sort of tangible proof of what they were being subjected to in their work environment.

Apart from the abuse, male workers apparently took pleasure in telling her there were graffiti drawings of an offensive and disgusting nature of her and Ms Horne in the male toilets. They had been taunted in this way for some time.

Eventually, she too reached the stage at which she could not cope any longer. She decided to leave work. The night before she intended to finish, she took her camera to work, went into the male toilets and took photographs of the graffiti she could see

which expressly or apparently referred to her or Ms Horne. They were tendered in evidence as exhibit C.16.

Ms McIntosh told the Tribunal that when the photographs were developed and she saw them properly for the first time, she felt physically ill, frightened and disgusted.

Some of the photographs were not clear, so Ms McIntosh went back into the toilets that night, checked them against what was on the walls, and wrote on the back of the photographs a copy of the words on the walls. She then wrote a note for her supervisor to the effect that she was going home sick and left the site. She never returned.

Once again, it is unnecessary for the purposes of this application to canvass the evidence of the effect of all of this upon her, nor what happened thereafter.

Mr James Hickey was the only other witness for the Complainants. He is Ms Horne's partner. He testified he has had some 20 years experience in the construction and mining industry in this State, mostly as a blue-collar worker. He has been a member of the MEWU and its predecessor, the AMSWU. He was a shop steward for the Transport Workers' Union at Mount Newman and filled a similar role with the AMSWU on the Burup Peninsula at King Bay. He gave evidence of his experience of women coming into the workforce in that industry. He recounted specific examples of incipient discrimination and how they had been dealt with by management and Unions.

He told the Tribunal of his own experience as a shop steward and of his knowledge and understanding of the shop steward's role. In substance, it was his understanding that the shop steward represented both the workers and the Union, and had authority to speak on behalf of the Union to the men and to management, on issues pertinent to the matters affecting those workers on the particular site.

Against the foregoing outline of the evidence led for the Complainants, I can now come to deal with the particular application made by Mr Edwards on behalf of the MEWU.

By their Points of Claim, the Complainants contend the MEWU, through its employees or agents, caused, instructed, induced, aided or permitted the First Respondent to discriminate against them on the ground of their sex. This claim is founded on section 160 of the Act. It is asserted that the MEWU did this through its employees or agents who failed or refused to support the Complainants in their endeavours to have the First Respondent remove the pornographic material from the site. It is also pleaded that the MEWU discriminated against the Complainants in that its employees or agents were responsible for the display of the pornographic poster in the Union Site Office in November 1991.

The complaint of victimization against the MEWU (subject to what I have already said about the late reliance on section 160 of the Act) relies upon sections 67 and 161. It is asserted here that the Complainants were threatened with and subjected to detriment as a result of claiming they had been unlawfully discriminated against by employees of the First Respondent. The detriment is said to have been threatened or caused by employees or agents of the MEWU for whose actions the Second Respondent is liable under section 161 of the Act.

Discrimination

Mr Edwards points out that the employees or agents of the MEWU whose acts are relied on as being discriminatory as against the Complainants, have been particularized as Messrs Dalrymple, Ferguson, Richardson, Morgan and McGlynn.

He concedes there is evidence that Messrs Dalrymple and Ferguson were employers or agents of the MEWU, but says there is no evidence of any unlawful discrimination on their part.

As to Messrs Richardson, Morgan and McGlynn, he says there is no evidence that they were employees or agents of the MEWU and accordingly the Second Respondent cannot be held liable for their acts or omissions.

It is convenient to deal with this latter submission first.

There is evidence that Mr McGlynn was an MEWU Shop Steward and Messrs Richardson and Morgan were Assistant Shop Stewards.

None of them were employees of the MEWU. They were full-time employees of the Joint Venture. The question therefore is whether they were "agents" of the MEWU.

There is evidence that Shop Stewards and Assistant Shop Stewards were elected by cells or groups of workers.

Mr Edwards contends, however, that they were so elected to represent the workers, not the Union, and that they have not been shown to have had any authority to represent nor act on behalf of the MEWU, and nor has there been any evidence that the MEWU held them out as having any such authority.

He points to the registered rules of the MEWU (exhibit MU.1) which contain no reference at all to shop stewards. By contrast, the rules of the (Federal) Metals and Engineering Workers' Union (exhibit MU.3) do contain specific provisions for the election, powers and duties of shop stewards (see rule 22(6)), but that is a different legal entity. (I note in passing that although section 71A Industrial Relations Act 1979 provides for the adoption by a State registered industrial organization, of rules of its Federal counterpart, there is no evidence of that having been done here).

The Complainants gave evidence that they certainly regarded the shop stewards and assistant shop stewards as representing and acting on behalf of the MEWU. Mr Edwards argues nonetheless, that it makes no difference if the workers and the stewards themselves may have thought the latter had such authority: he

says there is no evidence that they did in fact and no evidence the MEWU held them out as having it.

It has to be said there is a surprising paucity of satisfactory evidence on this issue. Given the nature of the Complainants' case, one would have thought evidence would have been available - and would have been led - to properly establish that the named stewards were agents of the Second Respondent.

Ms Andrews submitted (inter alia) that the perception of the Complainants and Mr Hickey that shop stewards represent the Union, would be such a common perception that the Tribunal might even take judicial notice of the fact.

I am not prepared to do that in the circumstances of this case. The fact is contested. The question is not whether shop stewards generally have authority to act on behalf of their Unions, but whether those named here had such authority in respect of the MEWU.

The general rule is that a court or tribunal will take judicial notice of facts without inquiry

> "wherever a fact is so generally known that every ordinary person may reasonably be presumed to be aware of it"

(per Isaacs J in *Holland v Jones* (1917) 23 CLR 149 at 153). As Malcolm CJ observed in *Bowdidge v The Queen* (unreported) Supreme Court (WA) Library No. 920191, 3/4/92), the courts are traditionally reluctant to take judicial notice of any fact that is not proved by evidence (see p.11, ibid).

Furthermore, judicial notice can only be used to assist the tribunal of fact in discovering what the facts are and in drawing inferences from those facts. Speaking of members of a court martial resorting to their "service knowledge", what was then the Court Martial Appeals Tribunal in *Wallace's Appeal* 18 FLR 220 observed at 227 -

> "Members of the Court Martial are not entitled to use their service experience as a substitute for meagre evidence or to aid an ill-prepared case. If the evidence is so vague or insufficient that the findings of fact are difficult, service experience cannot be used to manufacture facts not warranted by the evidence."

That observation is apt here.

In my view it would be inappropriate to take judicial notice of the fact sought to be proved here, having regard to the foregoing considerations.

As I have said, there is no doubt each of the Complainants regarded the shop stewards and assistant shop stewards with whom they dealt, as representing the Union, reflecting Union policies and able to speak on its behalf. That is not to say they did not also see those individuals as representing their own interests as Union members, because (again on their evidence) they obviously did.

There is evidence that at an early stage in the employment of the Complainants on this site, after they had raised an issue directly with company representatives, they were confronted by Joe Jones and Paul Morgan, speaking as shop stewards, who remonstrated with them and told them that the Union was upset about what had occurred and in future if they had any problems they should report to Jones and Morgan and they would sort it all out within the Union.

The workers named could be found on the evidence generally, to have purported to act on behalf of the Union. There is evidence of a close association between them and the Union officials, particularly Mr Dalrymple, including that when he was away the shop stewards had a key to the Union office. There is evidence they were a conduit to the workers for Union directives.

In short, they behaved as though they had Union authority and they were perceived by the Complainants (and apparently the other workers) as having it.

Mr Hickey's evidence gave some support to this. He had been a shop steward of the AMWSU (see exhibit MU.1) and testified that as such he represented both the Union and the Workers on that particular site and was able to communicate with the company on behalf of the Union on minor matters (more serious matters had to be referred to the Union organizer). He stated that the shop stewards were the Union's first point of contact.

In a sense, all of this is what one might expect. The Macquarie Dictionary (second revised edition) for example, defines "shop steward" (at p.1566) as

> "a trade-union official representing workers in a factory, workshop etc"

What takes the matter beyond merely Mr Hickey's understanding and the experiences and perceptions of the Complainants in this case, is the Jervoise Bay Site Agreement (exhibit PC.2B).

That Agreement was negotiated between the relevant Unions - including the MEWU - and the Press Clough Joint Venture. It sets out the industrial and employment conditions which apply to the site. It contains a number of references to shop stewards. I shall not detail them here, but they include provisions that recognize the role of the elected shop steward in the handling of industrial grievances and the dispute settlement and prevention processes (page 45) and refer to the election of a shop steward for each Contractor and each Union (page 45), provided that

> "...such stewards shall represent and deal with matters pertaining to members of his/her Union employed by his/her employer only"
>
> (page 45)

Any request of the employer that a shop steward be released with payment for ordinary hours to attend to specified duties at the Union office off site is to be made by the Union (page 45, ibid).

A Consultative Committee is established, comprising

> "...up to two shop stewards representing each Union on site and up to an equal number of senior employer representatives."
>
> (my emphasis).

Given that the MEWU is a signatory to that Agreement, it seems to me open to the Tribunal to find, on a fair reading of it, and having regard to the evidence of the Complainants and Mr Hickey, that the persons described as shop stewards (or assistant shop stewards) of the MEWU more likely than not did represent the MEWU and were the workers' first point of contact with it. The Tribunal could find, therefore, that the persons so named were agents of the MEWU for the purposes of section 160 of the Act.

The next question is whether there is evidence the nominated Union officials and/or shop stewards have acted in an unlawfully discriminating way against the Complainants.

The Complainants allege the MEWU, through its employees or agents, caused, instructed, induced, aided or permitted the First Respondent to discriminate against them on the ground of their sex.

This, in turn, is put essentially on two bases, namely that first the Union failed or refused to support the Complainants in their endeavours to have the Joint Venture remove the pornographic material from the site; and secondly, its own employees or agents were responsible for the display of a pornographic poster in the Union Site Office in November 1991.

Mr Edwards contends that a refusal or failure of the MEWU to support the Complainants in the manner suggested could not bring it within any of the verbs in section 160. A mere omission to act cannot be enough unless there is a duty or obligation to act. And even then (he says) there must be a causal link between the act or omission and the discrimination.

Ms Andrews, on the other hand, argues that the Union failed to provide leadership, it failed to provide support for the Complainants against the discriminatory acts of their fellow workers, it failed to implement the dispute resolution procedure prescribed by the Site Agreement, it failed to prevent the display in or removal from, the workplace, pornographic material and it failed to educate its own officials when specifically asked to do so.

But the issue is, whether or not all or any of this is sufficient to attract liability under section 160 of the Act.

There is no evidence the MEWU "instructed" any of its employees or agents (nor that they "instructed" anyone else) to engage in discriminatory conduct.

Resorting again to the Macquarie Dictionary, we find the following relevant definitions -

> "**Cause**... that which produces an effect; the thing, person, etc from which something results..."
>
> "**Induce**... to lead or move by persuasion or influence, as to some action, state of mind etc; to bring about, produce or cause..."
>
> "**Aid**... to afford support or relief to; help. To promote the course of accomplishment of; facilitate... To give help or assistance..."
>
> "**Permit**... to allow (a person, etc) to do something. To let (something) be done or occur. To tolerate; agree to. To afford opportunity for, or admit of..."

The distinction between "cause" and "allow" was considered by the Defence Force Discipline Appeal Tribunal in *Victor v Chief of Naval Staff* 115 ALR 716. That case concerned a charge under section 39(3) *Defence Force Discipline Act* 1982 (Com) that the appellant negligently caused or allowed a service ship to be hazarded. The charge (and conviction) was held bad for duplicity. The two words had different meanings.

> "The word "cause" refers to an act or actions or antecedent conditions which bring about or produce in a positive sense a certain effect or consequence, whereas the word "allow" refers to permitting or standing by as someone else causes that effect or consequence."
>
> (per Northrop J at p.723, ibid).

When considering the position of the MEWU, it is necessary to consider not only the actions or omissions of the particular individual employees or agents in isolation, but also the combined effect of them from the point of view of the Complainants' case.

On the evidence thus far, there were only two relevant sources of authority on the site - they being the Joint Venture management and the Unions, respectively. So far as the Unions were

concerned, there is evidence (inter alia, from the affidavit of Mr Jock Watt) that there was an exceptionally strong Union presence and the site was generally regarded as an MEWU site.

There is evidence that the Complainants were discriminated against on the ground of their sex, by the First Respondent, through the actions of its employees, and that such discrimination went to the conditions of employment afforded them by the First Respondent. Alternatively, it could be found they were subjected to a detriment in their employment, namely a working environment in which they were degraded, insulted and more by the prominent display of grossly pornographic material in the environment in which they were obliged to work.

In these circumstances, it would be natural for the Complainants to turn to their Union for support and assistance. This is not to say that a complainant must necessarily prove that he or she complained of discrimination, or sought assistance to deal with it, for a complaint of sexual discrimination to be made out.

The evidence here is however, that on a number of occasions they did complain to Union representatives and seek their support. Notwithstanding that on one view it might be said that each discrete incident complained of was resolved (sometimes only because of the complainant's own actions in removing posters etc) the basic problem continued and became worse over the period of the Complainants' employment.

On the Complainants' evidence, the Union representatives on site must have been well aware of what was occurring. They not only took no steps to stop it, but (it would be open to the Tribunal to find) by their very inaction, encouraged and tolerated it. Indeed, on the evidence, the Union representatives actively attempted to dissuade the Complainants from expressing their concerns and (in November 1991) gave an overt demonstration of their lack of support for the Complainants and their solidarity with the male workers by displaying or allowing the display of a pornographic poster in the Union site office above the MEWU organizer's desk.

In the context of what had been occurring, in which the MEWU was a de facto authority on the site, and accepting (as the Tribunal could, on the evidence of Mr Hickey, for example) that even though the Union had no power to direct nor instruct its members, it could well have been expected to make it clear to them that discriminatory conduct would not be tolerated and any worker against whom the Joint Venture took action for such conduct would not be supported by the Union, the reaction and apparent attitudes of the Union representatives could have done little else but afford support for and encourage the continuation of the discriminatory conduct.

I consider that if it took this view the Tribunal could find on the balance of probabilities that the Union, through its employees and agents, at least aided the discriminatory conduct in this sense.

Mr Edwards argued that Messrs Dalrymple and Ferguson could not be said to have "permitted" the discrimination where a mere omission or failure to act was complained of, unless there was also proved a duty to act. He relied upon *Adelaide Corporation v Australasian Performing Right Association Ltd* (1928) 40 CLR 481 and *Broad v Parish & Others* (1941) 64 CLR 588.

The *Adelaide Corporation* case involved the interpretation of section 2(3) of the British Copyright Act 1911. The majority judgments of the High Court were those of Higgins, Gavan Duffy and Starke JJ.

Higgins J commented that

> "As the learned Judges of the Supreme Court have said, mere indifference or omission cannot be treated as 'permission' unless the Corporation had the power to permit the performance, and unless there was some duty to interfere..."
>
> (page 497, ibid)

His Honour also quoted Atkin L J in *Berton v Alliance Economic Investment Co* [1922] 1 KB at 759, who said "permit" means -

> "either to give leave for an act which without that leave could not be legally done, or to abstain from taking reasonable steps to prevent the act where it is within a man's power to prevent it"
>
> (at page 498-9, ibid)

It is clear from the judgment of Higgins J that he accepted a permission could be either express or implied from the circumstances, and he did emphasize (at page 500) that although judicial dicta as to the meaning of words in particular circumstances may be useful, it is necessary always in the end to apply the mind to the particular circumstances before the Court or tribunal.

In their joint judgment, Gavan Duffy and Starke JJ noted that

> "Permission to do an act involves some power or authority to control the act to be done..."
>
> (page 503)

and that whilst

> "Mere inactivity or failure to take some steps to prevent the performance of the work does not necessarily establish permission. Inactivity or "indifference", exhibited by acts of commission or omission, may reach a degree from which an authorization or permission may be inferred"
>
> (page 504)

Broad v Parish was a case in which it was held that the driving of a motor car by the hirer thereof under a hire-purchase agreement was a use "permitted" by the other party to the agreement within the meaning of section 63(1) Traffic Act 1925 (Tas) so as to render such other party liable to an action for damages resulting from the breach of duty imposed by that section.

Referring to the meaning of the word "permit", Rich ACJ said it connotes an authorization by a person who has at least de facto control of the vehicle.

Given the vastly different statutory context between that case and this, it seems to me that *Broad v Parish* affords very little assistance in determining the proper meaning of the word in section 160 of the Act.

To use the terminology in the *Adelaide Corporation* case, there is evidence here that the MEWU was far from "neutral" or "indifferent". By the actions (and omissions) of its employees and agents it showed its lack of willingness to intervene on behalf of, or to support the Complainants and at the same time, it showed tacit - if not overt - support of the conduct of the male workers.

The relationship of the Union to the Complainants who were its members, the obligation of the Union to protect the interests of its members in industrial matters (to be gleaned from the Objects expressed in its Rules) and the de facto authority the Union had on this site, are all factors capable of militating in favour of the conclusion that it was in the power of the Union (especially if done in cooperation with the First Respondent) to take effective action to prevent the discrimination against the Complainants by male workers of the First Respondent. So too it might be found the Union had a fiduciary or contractual obligation to the Complainants to take such action in the circumstances.

And so I conclude that on the Complainants' case as it presently stands, the Tribunal could find the Union "permitted" the discrimination complained of. Whether or not it would so find is, of course, another matter.

I come now to the complaints of victimization.

Victimization

It is said by Counsel for the MEWU that these are no more than "double-dipping"; that the detriment the Complainants are alleged to have suffered was the very same discriminatory conduct which is the subject of the complaints of discrimination. I do not accept this. The latter complaints principally concern the prominent display of pornographic material in the work environment of the Complainants; the former principally concern the harassment, the verbal abuse, the hostility, the animosity and the generally gross, offensive and intimidatory behaviour of male employees of the First Respondent towards the Complainants whenever they protested against the posters and sought the removal of them.

Mr Edwards then says there is no evidence that any detriment was caused by any act of the employees or agents of the MEWU, nor that such detriment occurred as the result of any complaint of victimization under section 67 of the Act.

For the purposes of section 161, the word "act" includes an omission and extends to a series of acts and/or omissions (section 5 Interpretation Act 1984).

I accept that section 67 requires a causative link between the actions of a complainant under subsection (1)(a) to (f) inclusive and the detriment. I consider such a causative link could be found by the Tribunal here between the assertion by the Complainants of their rights under the Act not to be sexually discriminated against in the workplace (section 67(1)(e)) and the detriment to which I have referred.

But the immediate issue is whether there is evidence the MEWU; not the workers, or the First Respondent, breached section 67 by victimizing the Complainants. In this regard their case initially was that its employees or agents were responsible for the behaviour, pleaded in paragraphs 11, 13 and 22 of the Points of Claim and further, in that they failed or refused to implement the dispute resolution procedure prescribed in the Site Agreement, to assist the Complainants resolve the issue with the First Respondent. It is put that each of these constituted victimization under section 67.

Paragraph 11 of the Points of Claim refers to the interview between the Complainants and Mr Dalrymple in March 1991 after they had removed pornographic posters from crib hut #5, and his statements to the effect that if there was industrial action by the men over the matter the Union would be unable to support the Complainants, his references to the computer blacklist and so on.

Paragraph 13 of the Points of Claim pleads the conversation between Ms Horne and Mr Ferguson in August 1991 regarding the

problems experienced at the site by the Complainants, and asserts he took no action on their behalf.

Paragraph 22 pleads the meeting between Ms Horne and the shop stewards Paul Morgan and Michael McGlynn on 11 January 1992 at which (it is asserted) she was advised that if she and Ms McIntosh felt strongly about the issue of pornographic material in the workplace, they would have to cope with the consequences of their own actions and objections.

In my view, the evidence going to the matters pleaded in paragraphs 11 and 22, is capable of supporting a conclusion that the Complainants did suffer a detriment as a consequence of asserting their rights under the Act not to be unlawfully discriminated against, that the detriment was the result of acts done by an employee (Mr Dalrymple) and agents (Messrs Morgan and McGlynn) of the MEWU in connection with their employment or duties as agents, and that those acts would have been unlawful under section 67 if done by the Union.

On the other hand, Mr Ferguson's failure to take action as pleaded in paragraph 13 would not constitute a relevant detriment within the meaning of section 67 and nor would the failure of the Union to implement the dispute resolution procedure. In my view, neither of the last two matters are capable of constituting victimization under the Act.

My conclusions as to paragraphs 11 and 22 are sufficient to determine the present application insofar as it concerns the allegations of victimization.

In summary, I am not satisfied that the complaints against the Second Respondent are misconceived or lacking in substance nor that for any other reason they should not be entertained and I accordingly refuse the application of the Second Respondent to dismiss the complaints against it.