



Australian
Human Rights
Commission

PJ v AMP Financial Planning Pty Limited

[2014] AusHRC 89

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PJ v AMP Financial Planning Pty Limited

Report into discrimination in
employment on the basis
of criminal record

[2014] AusHRC 89

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Contents

1	Introduction and summary of findings	3
2	Background to complaint	3
2.1	Complaint by PJ	3
2.2	Submissions by AMPFP	5
2.3	Conciliation	7
3	Relevant legal framework	7
4	Consideration	8
4.1	Is there an act or practice?	8
4.2	Does the act or practice involve a distinction, exclusion or preference on the basis of criminal record?	8
4.3	Does the distinction, exclusion or preference have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?	9
4.4	Was the exclusion based on the inherent requirements of the job?	10
5	Conclusion	11
6	Findings and recommendations	13
6.1	Power to make recommendations	13
6.2	Consideration of compensation	13
6.3	Apology	15
7	AMP Financial Planning Pty Limited's reponse to my findings and recommendations	16



**Australian
Human Rights
Commission**

October 2014

Senator the Hon. George Brandis QC
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I have completed my report pursuant to section 31(b)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act) into the complaint made by PJ against AMP Financial Planning Pty Limited (AMPFP).

I have found that AMPFP's act of refusing to appoint PJ as an authorised representative under AMPFP's Australian Financial Services Licence because of PJ's criminal record constituted an exclusion made on the basis of a criminal record.

On 4 August 2014, I invited AMPFP to inform me of any action it had taken, or proposed to take, with respect to my findings and recommendations. On 5 September 2014, AMPFP indicated that it would not provide any substantive response to this request.

I enclose a copy of my report.

Yours sincerely

A handwritten signature in black ink, reading "Gillian Triggs".

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction and summary of findings

1. This is a notice of the findings of the Australian Human Rights Commission following an inquiry into a complaint by PJ against AMP Financial Planning Pty Limited (AMPFP) alleging discrimination in employment on the basis of criminal record. The Commission issued a preliminary view to the parties on 30 August 2013 and, following the receipt of further submissions, issued a revised preliminary view on 4 November 2013.
2. This inquiry was undertaken pursuant to section 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). As a result of this inquiry, the Commission has found that PJ was discriminated against by AMPFP on the basis of his criminal record.
3. In light of these findings, I recommend that AMPFP:
 - pay financial compensation to PJ in the amount of \$5,000 as general damages for hurt, humiliation and distress; and
 - apologise in writing to PJ.
4. Following a request from PJ, I have made an order prohibiting disclosure of PJ's identity pursuant to section 14(2) of the AHRC Act. For that reason he has been referred to in this notice by the pseudonym 'PJ'.

2 Background to complaint

2.1 Complaint by PJ

5. PJ made a complaint in writing to the Commission on 12 June 2012 alleging discrimination in employment or occupation on the basis of his criminal record.
6. On 13 April 2012, PJ applied to AMPFP to become an Authorised Representative under AMPFP's Australian Financial Services Licence (AFS Licence). Such authorisation would have enabled PJ to provide financial services on AMPFP's behalf under the *Corporations Act 2001* (Cth) (Corporations Act). Had he been so authorised, PJ wished to purchase a financial planning business and to work in it as a financial planner under the aegis of AMPFP.
7. PJ claims that on 5 June 2012 he was contacted by **a representative** from AMPFP who advised that AMPFP would not appoint PJ as an Authorised Representative because of PJ's criminal record. PJ further states that:

AMP did a police check which I authorised and from that I have 6 drink driving offences, one for driving under the influence and 5 for exceeding the statutory limit.
8. PJ states:

I have been an accountant (Member of CPA Australia), registered tax agent and financial planner (Member of the various bodies) since 1981. I have never had a professional complaint against me. My drink driving offences in no way affect my ability to perform the inherent requirements of a financial planner.

9. PJ has been convicted of seven offences, including driving with excess blood alcohol and driving whilst disqualified, spanning a timeframe from 1975 to 2007. The offences are listed below:

Date	Offence	Convictions
13 March 2007	Drive Under the Influence Fail to drive within marked lane on multi-lane road	Fined \$700 Licence disqualified for 12 months
13 May 2004	Drive Whilst Disqualified	Fined \$400
6 February 2002	Drive with Excess Blood Alcohol	Fined \$1,200 Licence disqualified for 3 years
25 August 1999	Drive with Excess Blood Alcohol	Fined \$575 Licence disqualified for 6 months
13 April 1992	Drive with Excess Blood Alcohol Fail to signal	Fined \$700 and \$50 Licence disqualified for 12 months
13 July 1984	Fail to exhale into breath analysis apparatus Cross barrier lines	Fined \$450 and \$60 Licence disqualified for 12 months
11 February 1975	Drive with excess blood alcohol	Fined \$50 Licence disqualified for 3 months

10. In relation to the drive whilst disqualified offence, PJ states that:

The driving while disqualified relates to me driving in South Australia when I had been disqualified from driving BUT held a Northern Territory drivers licence...I was advised by a solicitor in the NT at the time that if I held an NT licence I could still drive up there and in fact anywhere in Australia including SA.

11. In relation to the other offences, PJ states that:

In regards to the repeat offences three are for exceeding the prescribed limit which I would argue are errors of judgement on my behalf. I now carry a breathalyser in my car to avoid this issue. The failing to submit was because I could not blow hard enough into the machine and after two attempts was charged. I have had respiratory problems in the past and could only put it down to this. The driving under the influence is something I am not proud of and there is no defence for this.

12. PJ contends that he advised representatives of AMPFP of his criminal record on 30 March 2012. PJ states that:

In my meeting with **representatives from AMPFP** on 30 March I specifically told them that I had seven drink driving charges...I said at the time that I knew there would be a police check and that I did not want there to be any surprises as far as AMPFP was concerned, I did not want to waste their time or mine if it was going to be an issue.

13. PJ submits that his criminal record is irrelevant to the position in the following terms:

I contend that my criminal history is not relevant to the job and does not affect me carrying out the inherent requirements of a financial planner. I have been in the accounting/financial planning industry since 1981. I have never had a complaint against me.

2.2 Submissions by AMPFP

14. AMPFP submits that it has obligations under the financial services legislation contained in the Corporations Act and subordinate legislation. AMPFP submits that under this regulatory framework, an inherent requirement of the role of a financial planner is an awareness of, and a respect for, law and regulation. AMPFP's letter to the Commission of 4 September 2012 states:

AMPFP needs to be able to trust inherently that all of its authorised representatives will exercise appropriate professional judgement in providing financial advice, as the advice given will impact significantly on:

- (i) its clients' livelihoods; and
- (ii) whether AMPFP can be said to have met its legal obligations as an AFS licensee under the [Corporations Act]. Meeting these obligations is key to AMPFP being able to continue providing a financial services business in Australia.¹

15. AMPFP submits that it has comprehensive policies and procedures that are systematically applied in the application process, which include ASIC's Handbook on Reference Checking. AMPFP stated in its letter to the Commission of 4 September 2012:

The Australian Securities and Investment Commission (ASIC), which administers the [Corporations Act], expects AFS licensees to conduct thorough background checks on prospective authorised representatives. This reflects that a key policy object of the AFS licensing regime is consumer protection. We believe our decision not to enter into an Authorised Representative agreement with [PJ] gives effect to the policy of the Act.²

16. AMPFP submits that PJ's criminal history of repeat offending suggested that he is unlikely to be able to fulfil the inherent requirements of the role of a financial planner (and hence of an Authorised Representative of AMPFP). The particular offences recorded included driving whilst disqualified, which in the view of AMPFP may indicate a lack of regard for licensing systems that apply as law. AMPFP considers that PJ's criminal history is indicative of a risk that he will not conduct himself in a manner that promotes ongoing compliance with the complex requirements that apply to the work of financial planners.³
17. AMPFP submits that applicants for AFS licences are subject to a test of 'good fame and character' under the scheme of financial regulation administered by ASIC.⁴ Under the *Corporations Regulations 2001* (Cth), to apply for registration, AFS Licensees must make a statement to ASIC that they are of good fame and character.⁵ In considering what constitutes 'good fame and character', ASIC must have regard to:
- (a) any conviction of the person, within 10 years before the application was made, for an offence that involves dishonesty and is punishable by imprisonment for at least 3 months;
 - (b) whether the person has held an Australian financial services licence that was suspended or cancelled;
 - (c) whether a banning order or disqualification has previously been made against the person; and
 - (d) any other matter ASIC considers relevant.⁶
- AMPFP submits that this requirement is indicative of the high standard of conduct required of participants in the financial services industry.⁷
18. AMPFP submits that PJ's criminal history was not the only factor taken into account in the decision making process and that prior to discovering the full criminal history of PJ, AMPFP already had reservations about his application because:
- The sale of an existing AMPFP financial planning practice, which PJ was intending to purchase, fell through after the existing owner decided to delay selling the business
 - PJ was unable to identify a suitable external client base to purchase and transfer to the AMPFP brand as an alternative to purchasing an existing AMPFP branded business
 - AMPFP considered that PJ had been uncooperative in discussions with AMPFP about helping to identify an external client base.
19. AMPFP also asserts that had PJ been appointed as an Authorised Representative, the nature of its relationship with him would not have been that of employer and employee. PJ would have been authorised under an agreement with AMPFP to provide certain financial services on its behalf:
- [W]e wish to highlight that PJ did not apply for employment with AMPFP but rather appointment as an Authorised Representative operating under AMPFP's licence. If successful in his application, he would have been an independent contractor subject to the terms of an Authorised Representative agreement.⁸

20. AMPFP later characterised the hypothetical relationship as one of 'two businesses working with each other through a commercial contractual relationship'.¹⁹
21. AMPFP further submits that its decision not to appoint PJ as an Authorised Representative did not constitute a decision in relation to 'occupation', and therefore 'there is no ground for it to be considered further under the [AHRC Act]'.¹⁹
22. I take the purport of these submissions to be that AMPFP's dealings with PJ did not relate to 'employment or occupation', and therefore could not constitute discrimination within the meaning of section 3(1) AHRC Act.

2.3 Conciliation

23. PJ and AMPFP participated in a conciliation conference facilitated by the Commission on 25 September 2012, but the matter was ultimately unable to be settled by conciliation.

3 Relevant legal framework

24. Part II, Division 4 of the AHRC Act, which contains sections 30-35, is concerned with the Commission's functions relating to equal opportunity in employment.
25. Section 31(b) confers on the Commission a function of inquiring into any act or practice that may constitute discrimination. Section 32(1)(b) requires the Commission to exercise this function when a complaint is made to it in writing alleging that an act or practice constitutes discrimination. Section 8(6) of the AHRC Act requires that the function of the Commission under section 31(b) be performed by the President.
26. Section 3(1) of the AHRC Act defines discrimination for the purposes of section 31(b) 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;but does not include any distinction, exclusion or preference:
 - (c) in respect of a particular job based on the inherent requirements of the job; or
 - (d) in connection with employment as a member of the staff of an institution that is conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed, being a distinction, exclusion or preference made in good faith in order to avoid injury to the religious susceptibilities of adherents of that religion or that creed.

27. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹⁰
28. In deciding whether there has been discrimination within the terms of section 31(b) of the AHRC Act, I am required to consider the following questions:
- whether there was an act or practice within the meaning of section 30(1) of the AHRC Act;
 - whether that act or practice involved a distinction, exclusion or preference that was made on the basis of the complainant's criminal record;
 - whether that distinction, exclusion or preference had the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation; and
 - whether that distinction, exclusion, or preference was based on the inherent requirements of the job.

4 Consideration

4.1 Is there an act or practice?

29. 'Act' and 'practice' are defined at section 30(1) of the AHRC Act. 'Act' and 'practice' have their ordinary meanings. An act is a thing done and a practice is a course of repeated conduct.
30. On 5 June 2012, AMPFP rejected PJ's application to be an Authorised Representative under AMPFP's AFS Licence. I am satisfied that this is an 'act' within the meaning of section 30(1) of the AHRC Act.

4.2 Does the act or practice involve a distinction, exclusion or preference on the basis of criminal record?

31. The rejection of PJ's application to be appointed as an Authorised Representative is an 'exclusion' within the scope of the definition of 'discrimination'. PJ contends that the reason for the rejection of his application was his criminal record.
32. For a case of discrimination to be found regarding the rejection of PJ's application to be an Authorised Representative, it would need to be shown that the relevant exclusion was made 'on the basis' of his criminal record. In considering the expression 'based on', in a similar definition of discrimination under section 9(1) of the *Racial Discrimination Act 1975* (Cth), the Federal Court held that the words were to be equated with the phrase 'by reference to', rather than the more limited 'by reason of' or 'on the ground of' which have been interpreted elsewhere to require some sort of causal connection.¹¹ It does not need to be the sole reason.

33. AMPFP admits that PJ's criminal record was a factor taken into account when assessing his application to be made an Authorised Representative. However, AMPFP contends that the rejection of PJ's application was not entirely based on his criminal record and past criminal behaviour, but also attributed to a number of other factors.
34. It appears from the submissions of AMPFP that it had initial reservations about PJ's application for the reasons set out in [18] above. Once it discovered PJ's full criminal record it decided not to proceed with his application to be an Authorised Representative.
35. Interpreting the phrase 'on the basis of' more widely to mean 'by reference to', I am satisfied that the decision to reject PJ's application to be an Authorised Representative involved an exclusion on the basis of his criminal record.

4.3 Does the distinction, exclusion or preference have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?

36. The AHRC Act was introduced to be the vehicle by which Australia's obligations under the *Discrimination (Employment and Occupation) Convention 1958*¹² (ILO 111 Convention) were implemented.¹³ For this reason, it is appropriate to construe the definition of 'discrimination' in section 3(1) of the AHRC Act in accordance with the construction given in international law to Article 1 of the ILO 111 Convention.¹⁴
37. Article 1(3) of the ILO 111 Convention defines 'employment' and 'occupation' as including access to employment and to particular occupations, and terms and conditions of employment. Further, the background materials to the ILO 111 Convention reveal that the Convention was intended to protect all workers, in all fields, including self-employed workers in both the public and private sectors.¹⁵
38. As noted above, AMPFP submits that PJ did not apply for employment; that if appointed an Authorised Representative, PJ would not have become in form or substance an 'employee' of AMPFP; and that the decision not to appoint PJ as an authorised representative was not a decision made in relation to 'occupation'. AMPFP states that had PJ been appointed as an Authorised Representative, he would have become authorised under an agreement with AMPFP to provide financial services on AMPFP's behalf under its AFS Licence. In so doing, he would have been an 'independent contractor,'¹⁶ or that the relationship would have been 'that of two businesses working with each other through a commercial contractual relationship.'¹⁷
39. I am satisfied that the reference to employment and occupation in section 3(1) of the AHRC Act is not limited to the traditional employment relationship of employer and employee. I am satisfied that the ILO 111 Convention and section 3(1) of the AHRC Act was intended to protect all workers including independent contractors and self-employed workers.
40. Had PJ been appointed as an Authorised Representative by AMPFP, he would have been able to provide financial services on AMPFP's behalf. He would have been legally entitled under the relevant regulatory regime to work as a financial planner. He would have been able to seek to earn an income in doing so. He was not given that opportunity on the basis of his criminal record. In the circumstances, I find that the rejection of PJ's application had the effect of nullifying or impairing his equality of opportunity or treatment in employment or occupation within the meaning of section 3(1) of the AHRC Act.

4.4 Was the exclusion based on the inherent requirements of the job?

(a) Identifying 'inherent requirements'

41. In *Qantas Airways v Christie*¹⁸, the High Court considered the meaning of the term 'inherent requirements of the particular position' in section 170DF(2) of the *Industrial Relations Act 1988* (Cth). Brennan CJ stated:

The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.¹⁹

42. In addition, Gaudron J stated:

It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position. And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done.²⁰

43. Justice Gummow noted that the term 'inherent' suggests 'an essential element of that spoken of rather than something incidental or accidental'.²¹

44. Similarly, in *X v The Commonwealth*,²² Gummow and Hayne JJ stated that the inherent requirements of employment are those which are 'characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral'.²³

(b) 'Based on'

45. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,²⁴ Wilcox J interpreted the phrase 'based on' as follows:

In the present case, there are policy reasons for requiring a tight correlation between the inherent requirements of the job and the relevant 'distinction', 'exclusion' or 'preference'. Otherwise, as Mr O'Gorman pointed out, the object of the legislation would readily be defeated. A major objective of anti-discrimination legislation is to prevent people being stereotyped; that is, judged not according to their individual merits but by reference to a general or common characteristic of people of their race, gender, age etc, as the case may be. If the words 'based on' are so interpreted that it is sufficient to find a link between the restriction and the stereotype, as distinct from the individual, the legislation will have the effect of perpetuating the very process it was designed to bring to an end.²⁵

46. The Full Court affirmed that approach in *Commonwealth v Bradley*.²⁶ In particular, Black CJ discussed the phrase 'based on' as follows:

Respect for human rights and the ideal of equality – including equality of opportunity in employment – requires that every person be treated according to his or her individual merit and not by reference to stereotypes ascribed by virtue of membership of a particular group, whether that group be one of gender, race, nationality or age. These considerations must be reflected in any construction of the definition of 'discrimination' presently under consideration because, if they are not, and a construction is adopted that enables the ascription of negative stereotypes or the avoidance of individual assessment, the essential object of the Act to promote equality of opportunity in employment will be frustrated.²⁷

47. The Chief Justice then held that there must be more than a 'logical' link between the inherent requirements of the position and the exclusion of the applicant. Rather, his Honour held that there must be a 'tight' or 'close' connection.

(c) Good character requirements

48. Where there are 'good character' requirements, the case law states that the mere fact of a criminal record does not determine a person's character and that the passage of time can heal past wrongdoing.²⁸ As Coldrey J stated in *Avelaid v Dental Board of Victoria*:

In summary, each case will necessarily turn on its own facts. The nature of the initial misconduct, the subsequent attitude of the person disqualified towards it, that person's behaviour during the period of disqualification, and the passage of time itself, are all factors which will be relevant in determining whether a person has demonstrated that they are currently of good character.²⁹

5 Conclusion

49. AMPFP submits that a 'respect for the law' is an inherent requirement of the position of an Authorised Representative. AMPFP has also pointed to the existence of a requirement that persons are required to be of 'good fame and character' to hold an AFS licence. It submits that this fact illustrates 'the highly regulated nature of the financial services industry, and the high standard of conduct expected from participants.'³⁰
50. I accept that an awareness of, and respect for, the law is an inherent requirement of the position of an Authorised Representative of an AFS licence holder. I have also accepted for the purposes of this inquiry that the 'good fame and character' test for AFS licence holders, while not applying directly to Authorised Representatives, has some relevance in determining the inherent requirements of that role.
51. There is no doubt that PJ has a lengthy criminal history spanning some 30 years. The most recent conviction was five years before PJ's application to AMPFP. This passage of time is not particularly significant in light of the extended period of PJ's offending.

52. However, the convictions are almost all connected with driving with excess blood alcohol. None of the offences involved dishonesty. The Courts responsible for sentencing PJ at no time considered that a custodial sentence was appropriate. The penalty on each occasion was a fine and/or disqualification of his driver's licence.
53. I note that only offences involving dishonesty are expressly stated to be relevant in determining whether a person is of 'good fame and character' for the purposes of holding an AFS licence.³¹ Whilst ASIC may have regard to any other matter it considers relevant, the factors set out in the legislation suggest that relevant matters include those that have a tight or close connection to the inherent requirements of the role. I am not persuaded that a criminal record containing convictions for driving with excess blood alcohol would necessarily prevent ASIC finding good fame and character in the context of an application for registration as an AFS Licensee. AMPFP has made no submission to the effect that a higher standard should apply when assessing the inherent requirements of the role of an Authorised Representative of an AFS Licensee.
54. PJ has been an accountant and financial planner for about 30 years. He states that he has never had a professional misconduct complaint made against him. AMPFP submitted that it had no way of verifying this claim. It further submitted that PJ might well be unaware of complaints made against him, as these might have been resolved (presumably favourably) without him being informed. However, AMPFP did not assert that PJ's claims were false (and on the basis of its own submission, it lacks any evidence to maintain such a claim). Taken at its highest, then, the most I can take from AMPFP's submissions on this topic is that if any complaints of professional misconduct had been made against PJ, they were 'finalised without further action' by ASIC. I consider this to be no more than a hypothetical possibility.
55. In summary, I have no reason to doubt PJ's claim that he has never had a professional misconduct claim made against him. This suggests that he has an awareness of, and a respect for, the laws relevant to this area of practice. I also note that he is not required to drive as part of the role of Authorised Representative.
56. On balance, I am not persuaded that there is a sufficiently tight or close connection between the inherent requirements of the role and PJ's criminal record. I am not persuaded that PJ would be unable to perform the inherent requirements of the role of an Authorised Representative.
57. For these reasons, I find that the exclusion of PJ was not based on the inherent requirements of the job.

6 Findings and recommendations

6.1 Power to make recommendations

58. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent constitutes discrimination, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.³² The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.³³
59. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered loss or damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.³⁴

6.2 Consideration of compensation

60. I am satisfied that PJ suffered loss and damage and should be compensated. I consider that compensation in the sum of \$5,000 is appropriate to compensate PJ for his hurt, humiliation, and distress. I am not satisfied that it is appropriate to make a recommendation that compensation be paid for economic loss, in all the circumstances of this case.
61. In assessing the recommended sum, I have taken into account the matters discussed below.
62. In considering the assessment of a recommendation for compensation in cases of this type, the Federal Court has indicated that tort principles for the assessment of damages should be applied.³⁵ I am of the view that this is the appropriate approach to take to the present matter. For this reason, so far as is possible in the case of a recommendation for compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.³⁶
- (a) Economic loss**
63. Both parties made multiple submissions about whether or not PJ had suffered any economic loss, and, if so, how much. The parties' positions differed with respect to a number of factual issues.
64. PJ submits that he suffered economic loss as a result of AMPFP's discriminatory conduct. He requested that the Commission make a recommendation that AMPFP pay him financial compensation.
65. PJ did not specify the quantum of his claimed economic loss, despite requests that he do so. Rather, he made general submissions about what his earning capacity might have been had he been appointed an Authorised Representative.
66. It is clear from the submissions of both parties that, as well as considering appointing PJ as its Authorised Representative, AMPFP was involved in the process of identifying established financial planning businesses that PJ might purchase once so appointed. (On the material before me, it seems that it was also possible that PJ could, had he wished, have independently identified opportunities to purchase or establish a business).

67. PJ submits that the process of identifying a suitable practice for him to purchase was well advanced. In particular he submits that discussions had been held about the possibility of him purchasing an identified financial planning practice at Murray Bridge. He claims that AMPFP had obtained financial statements and prepared financial projections showing that had PJ purchased the business, he would have made a combined pre-tax salary and profit of about \$245,000 per year. He claims that AMPFP, or a related entity, was in the process of arranging finance to allow PJ to purchase this practice.
68. AMPFP denies that the process of identifying a suitable practice for PJ to purchase was well advanced. It denies preparing any financial projections for PJ. It states that it had done no more than prepare some documents by way of example to assist PJ with preparing his own business plan. AMPFP also denies that, had PJ purchased the Murray Bridge practice, he would have earned \$245,000 per year. AMPFP states that the practice the owner was contemplating selling would have produced a lower profit. It also points to certain discrepancies in the figures in the financial documents provided by PJ. While I do not accept all of AMPFP's submissions in that regard, several of the discrepancies pointed to do suggest that the figure of \$245,000 was not a guaranteed or final one.
69. Both parties agree that at least some discussions had been held about the purchase of the Murray Bridge practice. It appears from the submissions of both parties that at the time of AMPFP's discriminatory conduct, the owner of the practice had decided to defer making any decision about its sale for a period of six months. Both parties agree that PJ was unhappy with this. From the submissions of both parties, I can only conclude that no agreement had been reached that PJ would purchase the Murray Bridge practice. Were any such sale to have proceeded, it would not have done so for at least six months after the date of AMPFP's discriminatory conduct.
70. PJ claims that it had been proposed by an AMPFP employee that PJ might be employed in the Murray Bridge practice pending the sale; however there is nothing before me to suggest that this was more than a possibility. PJ has not submitted that this suggestion was ever put to, or accepted by, the owner of the Murray Bridge practice.
71. PJ claims that had the sale of the Murray Bridge practice not proceeded, various other practices had been identified which he might potentially buy. However, he has given the name of only one such practice, has provided no submissions about how advanced the discussions were about the purchase of any of these practices, and made no submissions about what his earnings might have been had he been appointed an Authorised Representative and proceeded to purchase one of these practices.
72. PJ submitted that when he had previously been a part-time employee in a financial planning business, he had been paid a salary equivalent to a full-time salary of \$150,000 per year.
73. PJ did not submit that he had given up any employment or turned down any other employment opportunities as a result of his expectations that he would be appointed an Authorised Representative by AMPFP.
74. Following AMPFP's decision not to appoint him as an Authorised Representative, PJ did not pursue other opportunities to work in the financial planning field, either as an employee in another practice, or in his own business. He states that he made some 'inquiries' about becoming an Authorised Representative for some other appropriately licenced entity, but was told that his convictions would make that difficult. PJ has not informed me of the form his inquiries took or to whom they were directed. In any event it appears that he did not make any applications for employment in the field after the conclusion of his dealings with AMPFP.

75. Instead, PJ commenced work selling 'solar systems'. He commenced doing so within a few months of learning of AMPFP's decision. PJ has supplied details of his earnings from that work. It appears that it took some time for him to become established, and he initially earned little. However the figures provided by PJ indicate that for the period of October – December 2013, he made a net income (before tax) of \$42,000. He informed the Commission orally that this amount has continued to rise, and that in one particular financial quarter he was expecting to earn over \$100,000.
76. Considering all of the above, I am unable to conclude that PJ in fact suffered quantifiable economic loss as a result of AMPFP's conduct. The most promising income-earning opportunity he was deprived of by AMPFP's conduct was the purchase of the Murray Bridge practice. It was not certain that opportunity would eventuate, and, if it had, it would not have done so for six months. PJ could, and did, pursue other employment opportunities in that time. I acknowledge that he has not obtained employment as a financial planner. While I acknowledge that he was, understandably, disheartened by AMPFP's discriminatory conduct, I do not consider that he was precluded from pursuing employment in that field. I am not satisfied that he could not have identified other employment opportunities, whether in financial planning or otherwise, as lucrative as those that might have been available through AMPFP. I note that PJ's current employment now appears to be bringing in a significant, and growing, income.
77. For these reasons, I do not consider it appropriate to make any recommendations with respect to payment of compensation for economic loss in this matter.

(b) Hurt, humiliation and distress

78. Compensation for PJ's hurt, humiliation and distress would, in tort law, be characterised as 'non-economic loss'. There is no obvious monetary equivalent for such loss and courts therefore strive to achieve fair rather than full or perfect compensation.³⁷
79. I am satisfied that PJ suffered hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record. I accept that he considered that working as an Authorised Representative of AMPFP was the 'ideal job' for him, but that after that conduct he was discouraged about working in the industry and now works in a different field. I accept that he found it humiliating to inform friends and family about the reasons that his discussions with AMPFP were discontinued. In all the circumstances, I consider an award of monetary compensation for hurt, humiliation and distress in the amount of \$5,000 is appropriate. I therefore recommend that AMPFP pay him that amount.

6.3 Apology

80. I consider it appropriate that AMPFP provide a formal written apology to PJ. Apologies are important remedies for discrimination. They, at least to some extent, alleviate the suffering of those who have been wronged.³⁸

7 AMP Financial Planning Pty Limited's response to my findings and recommendations

81. On 4 August 2014, I invited AMPFP to inform me of any action it had taken, or proposed to take, with respect to my findings and recommendations.
82. By letter dated 5 September 2014, AMPFP indicated that it would not provide any substantive response to this request.
83. I report accordingly to the Attorney-General.

A handwritten signature in black ink, appearing to read 'Gillian Triggs', with a stylized flourish at the end.

Gillian Triggs
President
Australian Human Rights Commission
October 2014

1 Paragraph 1.
2 Paragraph 1.
3 Letter from AMPFP to the Commission dated 4 September 2012, paragraph 1.
4 Letter from AMPFP to the Commission dated 13 July 2012, paragraph 3.3.
5 *Corporations Regulations 2001* (Cth), regs 7.6.02AGA(5l) and (5J)(f).
6 *Corporations Act 2001* (Cth), paras 913B(4)(a) to (d).
7 Letter from AMPFP to the Commission dated 13 July 2012, paragraph 3.3; letter from AMPFP to the Commission dated 10 September 2013, p 2.
8 Letter from AMPFP to the Commission dated 4 September 2012, paragraph 9.
9 Letter from AMPFP to the Commission dated 10 September 2013, p 1.
10 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
11 *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47.
12 Done at Geneva on 25 June 1958.
13 *Commonwealth v Bradley* (1999) 95 FCR 218, 235 (Black CJ).
14 *Commonwealth v Hamilton* (2000) 108 FCR 378, 385.
15 International Labour Organisation, 1988, *General Survey: Discrimination in the field of employment and occupation*, ILC, (42nd Session, 1988 Report IV(1)), [86].
16 Letter from AMPFP dated 4 September 2012 at [9].
17 Letter from AMPFP dated 10 September 2013, p 1.
18 (1998) 193 CLR 280.
19 Above at page 284.
20 Above at page 295.
21 Above at page 316.
22 (1999) 200 CLR 177.
23 Above at page 208.
24 (1998) 158 ALR 468.
25 Above at page 482.
26 (1999) 95 FCR 218.
27 Above at page 235-236.
28 *Z v Director General, Department of Transport* [2002] NSWADT 67 at [30]-[32].
29 *Avelaid v Dental Board of Victoria* [1999] VSC 255 at [75] (Coldrey J).
30 Letter from AMPFP dated 10 September 2013, p 2.
31 *Corporations Regulations 2001* (Cth), regs 7.6.02AGA(5l) and (5J)(f).
32 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
33 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
34 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
35 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
36 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
37 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).
38 D Shelton, *Remedies in International Human Rights Law* (2000), 151.

Further Information

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