



Australian
Human Rights
Commission

AW v

Data#3 Limited

[2016] AusHRC 105

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For further information about the Australian Human Rights Commission or copyright in this publication, please contact:

Communications Unit
Australian Human Rights Commission
GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600
Email: communications@humanrights.gov.au.

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AW v Data#3

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Report into a complaint of
discrimination in employment
on the basis of criminal record

Australian Human Rights Commission 2016

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**Australian
Human Rights
Commission**

March 2016

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

Dear Attorney,

I have completed my report pursuant to section 11(1)(f)(ii) of the *Australian Human Rights Commission Act 1986* (Cth) into the complaint of discrimination in employment on the basis of criminal record made by Mr AW against Data#3 Limited (Data#3).

I have found that Data#3's act of terminating Mr AW's employment as a Microsoft Solution Specialist constituted an exclusion made on the basis of criminal record. This had the effect of nullifying or impairing Mr AW's equality of opportunity or treatment in employment or occupation. The exclusion was not based on the inherent requirements of the job.

In light of my findings I recommended that Data#3 develop workplace policies in relation to prevention of discrimination in employment on the basis of criminal record; conduct training to assist staff to fairly assess a job applicant with a criminal record; pay Mr AW an amount in compensation for loss of earnings; and pay Mr AW \$5,000 in compensation for hurt, humiliation and distress as a result of being discriminated against.

Data#3 provided its response to my findings and recommendations on 8 January 2016. In particular, it agreed to develop a workplace policy to prevent discrimination on the basis of criminal record and to conduct staff training on how to fairly assess whether a job applicant with a criminal record can perform the inherent requirements of a particular job. Data#3's response is set out in part 7 of this report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the bottom.

Gillian Triggs
President
Australian Human Rights Commission

Australian Human Rights Commission

Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

1 Introduction to this inquiry

1. This report sets out the Australian Human Rights Commission's findings following an inquiry into a complaint of discrimination in employment on the basis of criminal record. The complaint was made by Mr AW against Data#3 Limited (Data#3). The Commission issued a Preliminary View to the parties on 31 July 2015.
2. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. Mr AW has asked that his identity not be disclosed in the Commission's report. I have removed his name and referred to Mr AW by a pseudonym. I have made a direction under section 14(2) of the AHRC Act that Mr AW's name not be disclosed.

2 Summary of findings and recommendations

4. As a result of this inquiry, I have found that Mr AW was discriminated against by Data#3 on the basis of his criminal record.
5. In light of my findings, I recommend that Data#3:
 - develop workplace policies in relation to prevention of discrimination in employment on the basis of criminal record;
 - conduct training to assist staff to fairly assess whether a job applicant with a criminal record can perform the inherent requirements of a particular job;
 - pay Mr AW an amount in compensation for loss of earnings, caused by its termination of his employment, which I have found to be discriminatory; and
 - pay Mr AW \$5,000 in compensation for hurt, humiliation and distress as a result of being discriminated against.

3 Background

3.1 Complaint by Mr AW

6. Mr AW made a written complaint to the Commission on 1 May 2014. He alleges that Data#3 terminated his employment due to his criminal record.
7. Based on the information provided by the parties, the relevant facts appear to be as follows:
 - a) In early December 2013, Mr AW interviewed with Data#3 for an IT position described as 'Solution Specialist – Microsoft' (the Position), with a remuneration package of about \$185,000 per annum.
 - b) On or about 12 December 2013, Data#3 made a job offer to Mr AW, which he accepted.

- c) On 16 December 2013, Data#3 forwarded to Mr AW its letter of offer and new starter pack, including the Employment Agreement (that included a requirement to perform all duties of the role), Code of Conduct Guidelines and Declaration, and the Position Description. The new starter pack did not include any documents in relation to a security check or a criminal record check to be completed by Mr AW.
- d) On 6 January 2014, Mr AW commenced work at Data#3.
- e) On 14 January 2014, Data#3 discovered that Mr AW had a criminal record. Data#3 submits that a representative of a 'major strategic supplier' contacted Data#3 and said that he had found two media reports which indicated that Mr AW had a 'serious criminal record'.
- f) On 16 January 2014, Mr AW's manager, Mr AX scheduled a meeting with Mr AW. The precise details of this meeting are in dispute. However, it is agreed that at this meeting Mr AW either disclosed that he had a criminal conviction in New Zealand for selling MDMA (Data#3's position), or confirmed that he had this conviction when it was put to him (Mr AW's position).
- g) On 17 January 2014, Mr AX had another meeting with Mr AW. Mr AW submits that during this meeting Mr AX told him that his employment would be terminated due to his criminal conviction.
- h) Subsequently, Mr AW received a letter from Mr AX, dated 17 January 2014. It stated:

It has been decided not to continue your employment under 'Clause 2. Period of employment'. We refer below, to the extract from your Employment Agreement:

2.5 The first six months of your employment is a probation period. During the probation period, we will endeavor to provide you with the necessary guidance, feedback and assistance to succeed in your position.

2.6 At any time during the probation period you or we may terminate your employment by giving one week's notice. If we terminate your employment, we may elect to pay you in lieu of notice.

Your last day of employment is the 17th of January 2014... Data#3 is only required to give you one week of notice, however in this instance we have decided to pay you up to and including 3rd February 2014 to provide you with a period to find alternative employment.

8. In connection with his complaint, Mr AW submits as follows:

- He has a criminal conviction from 2011, when he was found by a New Zealand court to have committed six counts of selling the drug MDMA. He was sentenced to one year home detention.
- During the process of interviewing for the Position with Data#3, Mr AW submits: 'I specifically asked on at least two occasions whether it was a condition of my employment at Data#3 that I pass a criminal record check or needed to obtain a security clearance. I was assured on each occasion that there was no such condition to my employment.'

- In relation to his conviction, Mr AW states ‘[T]he crime of selling ecstasy, for which I was convicted, arose in my personal life and involved me exercising very poor judgement at the time...in sentencing it was shown that I had been an insignificant part in the dealing of others, namely being involved in the communications between the dealing parties. Furthermore I was supported through dozens of references attesting to my good character and work ethic.’
- He was and remains able to perform all the inherent requirements of the Position.

3.2 Response of Data#3

9. On 11 July 2014, Data#3 provided a response to the complaint (Response).
10. Data#3 stated that, as is evidenced by the role’s remuneration level of \$185,000 and Position Description, the role is positioned to ‘strong candidates who, relevantly, are required to demonstrate professionalism and integrity in their interactions with Data#3 senior management, Data#3’s customer base of large government and corporate customers and Data#3’s vendor partners’.
11. Data#3 further submitted that:

Under the contract of employment, Data#3 Limited was entitled to terminate [Mr AW’s] employment during his probation period for any reason on the payment of one week’s notice.

Data #3 Limited terminated [Mr AW’s] employment on 17 January 2014, during his probation period, after reviewing his suitability for the role and concerns about his ability to perform the inherent requirements of that role. ...

[Mr AW’s] recent and serious criminal actions are inconsistent with Data#3 Limited’s core values and the requirement that both it and its employees (particularly senior employees) must have and exhibit the highest ethical standards. In those circumstances, [Mr AW’s] continued employment was untenable.
12. Data#3 also submits that Mr AW was verbally notified during the interview process of the possibility that a security clearance may be required for certain Data#3 work:

During the interview process [Mr AW] asked [Mr AX] if he was required to get a “security clearance” as part of this role. [Mr AX] responded with words to the effect that as far as he was aware it was not a requirement for pre-sales resources to obtain security clearances. However ... Data #3’s National Microsoft Practice Manager, [Mr AY], notified [Mr AW] during his interview process that it may be necessary for his role to pass security clearances to perform work for and meet with certain government customers of Data#3.

4 Relevant legal framework

13. Part II, Division 4 of the AHRC Act, which is comprised of sections 30-35, is concerned with the Commission's functions relating to equal opportunity in employment.
14. 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.
15. 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 AHRC 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.
16. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹

5 Consideration

17. In deciding whether there has been discrimination within the terms of s 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 s 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.

5.1 Is there an act or practice?

18. 'Act' and 'practice' are defined at s 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.
19. On 17 January 2014, Data#3 terminated Mr AW's employment. I am satisfied that this was an 'act' within the meaning of s 30(1) of the AHRC Act.

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

20. I consider that Data#3's decision to terminate Mr AW's employment constitutes an 'exclusion' within the scope of the definition of 'discrimination' in the AHRC Act. Mr AW submits that the reason for Data#3's decision was his criminal record.
21. For a case of discrimination to be found regarding Data#3's decision to terminate Mr AW's employment, it would need to be shown that the relevant exclusion was made 'on the basis' of his criminal record.
22. 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.² It does not need to be the sole reason.
23. In its Response dated 11 July 2014, Data#3 stated:

Data#3 Limited terminated [Mr AW's] employment on 17 January 2014, during his probation period, after reviewing his suitability for the role and concerns about his ability to perform the inherent requirements of that role. ...

[Mr AW's] recent and serious criminal actions are inconsistent with Data#3 Limited's core values and the requirement that both it and its employees (particularly senior employees) must have and exhibit the highest ethical standards. In those circumstances, [Mr AW's] continued employment was untenable. Further, Data#3's National Practice Manager...recalls mentioning to [Mr AW] verbally during his interview that it may be necessary for pre-sales roles to pass security clearances to perform work for and meet with certain government customers of Data#3.
24. It is evident from this statement that Mr AW's criminal record was a reason for the exclusion.
25. However, Data#3 disputes this. It states that it's 'decision to terminate was not based on the fact that he had a serious criminal conviction'. Rather, Data#3 submits that the decision to terminate Mr AW's employment was attributable to another reason:

[Mr AW's] history of criminal activity and associated criminal conviction caused (but was not the only cause) Data#3 to question his ability to perform these highlighted inherent behavioural requirements of the position. Separately [Mr AW's] criminal record caused Data#3 to question the integrity of [Mr AW's] conduct during the interview process. Our expectation was, that it was incumbent on [Mr AW] to volunteer information that may impact on his ability to perform the role – and it would be misleading or deceptive not to do so. During this process, [Mr AW] was informed by Data#3's National Practice Manager for Microsoft that security clearances may be required to perform work for and meet certain government customers, and [Mr AW] did not volunteer any concerns in this regard. We formed an internal view that this amounted to dishonest conduct and his employment became untenable on that footing alone. If [Mr AW] had volunteered the relevant information, this would have been assessed fairly and equitably as part of the recruitment process.

26. In its 26 August 2015 response to the Commission's Preliminary View, Data#3 stated:

The decision of Data#3 to terminate [Mr AW's] employment was entirely based upon his lack of candour, lack of good faith, lack of demonstration of Data#3 core values and his lack of honesty in failing to disclose a serious criminal conviction to Data#3 during the recruitment process ... had [Mr AW] fully disclosed his serious criminal conviction to Data#3 at this time ... Data#3 would have assessed the honesty of that disclosure, and his ability to perform the role fully, within the context of assessment of other candidates for the position (who were subsequently unsuccessful). During the recruitment process [Mr AW] was informed by Data#3 that security clearances were a requirement to perform the role for Data#3, having regard to its customer and vendor requirements ...

[Mr AW] was duty bound to disclose his serious criminal conviction ...

... he failed in his disclosure obligations.

27. I have carefully considered Data#3's submissions. I find that Mr AW's criminal record was a reason for the termination of his employment. It is evident from Data#3's submissions that once Data#3 became aware of Mr AW's criminal record, it became concerned about his suitability for the role and his ability to perform the inherent requirements of the role and decided to terminate his employment. It is not necessary for me to find that criminal record was the sole reason for the exclusion. In this regard, I note that I accept Data#3's submission that Mr AW's decision not to disclose his criminal record during the interview process was also a reason for Data#3's decision to terminate his employment.

28. Interpreting the phrase 'on the basis of' in the broader sense, to mean 'by reference to', I am satisfied that Data#3's decision to terminate Mr AW's employment constituted an exclusion on the basis of his criminal record.

5.3 Did that exclusion have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?

29. The decision to terminate Mr AW on the basis of his criminal record constitutes an impairment of his equality of opportunity and treatment in employment.

30. Had Mr AW's employment not been terminated, he would have:

- continued working in the Position and earning a fortnightly or monthly salary in line with the base amount of \$150,000.00 per annum (plus superannuation); and

- had the opportunity to achieve the key performance indicators of the Position, attracting a bonus payment of up to \$20,000.00 per annum.

31. Mr AW was not given the opportunity to do so on the basis of his criminal record. Data#3's termination of his employment constituted an exclusion which impaired his equality of opportunity and treatment in employment.

5.4 Was the exclusion based on the inherent requirements of the Position?

32. Section 3(1)(c) of the AHRC Act provides that discrimination 'does not include any distinction, exclusion or preference, in respect of a particular job, that is based on the inherent requirements of the job'. Given my findings that Data#3's decision not to engage Mr AW in the Position was an exclusion on the basis of criminal record, I must consider whether the exclusion was based on the inherent requirements of the job.

33. Section 3(1)(c) is an 'exception' to the prohibition against discrimination. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection conferred by the legislation.³

(a) Data#3's submissions

34. Data#3 provided the Commission with Mr AW's contract of employment and the Position Description and stated that these two documents demonstrate the minimum and inherent requirements of the role. The Position Description describes the role as follows:

Work with account teams and vendors to assess customer requirements and provide technical presales activity which includes architecting, scoping, costing and proposing solutions for the SWS Presales Practice.

35. The Position Description also identifies Data#3's core values which include 'honesty & integrity' and 'respect & trust.'

36. When asked which inherent requirements of the Position Mr AW was assessed as being unable to perform, Data#3 stated:

The inherent requirements of the role that [Mr AW] was assessed as being unable to perform, which *contributed* to a decision to terminate his employment in accordance with Data#3 and [Mr AW's] employment agreement relate specifically to the customer liaison and behavioural aspects of the position. ...

In the key responsibilities [section of the Position Description document], the following phrases and words have been highlighted, "provide customers with value solutions", "scoping", "trust and credibility", "actively participate in ... customer events" and "build close working relationships with ... vendor partners". These words and phrases speak to the customer facing nature of the role ...

In the key experience, skills and abilities section [of the Position Description document], the following phrases have been highlighted, "experience in a customer facing role", "ability to present to...business audiences", "communication of the values of solutions to clients", "valued relationships with clients, suppliers and industry leaders", "history of ethical business practices". These phrases speak to the customer facing nature of the role.

37. Data#3 also submits that certain government agencies require security clearances as part of project specific requirements. Data#3 states that '6 current NSW/ACT employees of Data#3 performing pre-sales and delivery roles [out of a pool of approximately 32] have required a security clearance'. Data#3 further states:

[I]n addition to government clients, the following other clients also require police checks for employees undertaking work for them:

Law enforcement agencies

Education agencies

ASIO

ACCC ...

(b) Identifying the 'inherent requirements'

38. Appropriate identification of the inherent requirements of the job is a pre-condition to proving that the complainant is unable to perform those inherent requirements.

39. An 'inherent requirement' is something that is 'essential to the position'⁴ and not 'peripheral'.⁵ It is an 'essential feature' or 'defining characteristic'.⁶

40. Further, the inherent requirements must be in respect of 'a particular job'. The term 'a particular job' in Article 1(2) of the ILO 111 Convention has been construed by reference to the preparatory work and the text of the Convention to mean 'a specific and definable job, function or task' and its 'inherent requirements' are those required by the characteristics of the particular job.⁷

41. The fact that certain statements appear in the Position Description document, is not sufficient to establish that they are 'inherent requirements' of his particular job. In *Qantas Airways v Christie*, Brennan J stated that:

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.⁸

42. For this reason, as discussed in the Commission's *Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*:

Broad general statements about a job's requirements are not clear enough to allow for an assessment of inherent requirements.⁹

43. For the purposes of assessing this complaint, it is not necessary for me to consider each item listed in the Position Description and form a view as to which items constitute inherent requirements and which do not. However, I am required to identify and form a view in relation to the inherent requirements which Data#3 has assessed Mr AW as not being able to perform.

44. Based on Data#3's Response and further submissions of 15 May 2015, it appears that the following are the requirements of the Position that it has assessed Mr AW as not being able to perform:
- The customer-facing nature of the role, including providing customers with value solutions, communicating value solutions to clients, ability to present to business audiences, building close working relationships with vendor partners and actively participating in customer events;
 - Integrity, trust and credibility, as reflected in a demonstrated history of ethical business practices; and
 - Ability to obtain a security clearance or pass a police check to perform work for certain Commonwealth and NSW government clients.
45. I accept that the customer liaison aspects of the Position, including the attendant skills, behaviours and attributes, are inherent requirements of the Position.
46. I also accept that integrity, trust and credibility, including a history of ethical business practices, are inherent requirements of the Position.
47. However, based on the information provided by Data#3, I am not persuaded that obtaining a security clearance or passing a police check is an inherent requirement of the Position. The reasons for this finding are as follows:
- Mr AW expressly raised the issue of whether he was required to get a security clearance as part of the role during the interview process. Data#3 has submitted that it responded as follows:

During the interview process [Mr AW] asked [Mr AX] if he was required to get a "security clearance" as part of this role. [Mr AX] responded with words to the effect that as far as he was aware it was not a requirement for pre-sales resources to obtain security clearances. However ... Data #3's National Microsoft Practice Manager, [Mr AY], notified [Mr AW] during his interview process that it **may be necessary for his role to pass security clearances to perform work for and meet with certain government customers** of Data#3. [Emphasis added]
 - Data#3 has further stated that:

all Federal and NSW government agencies **can** request security clearances as part of project specific requirements. [Emphasis added]

The fact that this may potentially arise on a given project does not mean that a security clearance is an inherent requirement for every person holding the Position.
 - Data#3 has stated that:

There is no set or standard proportion of work undertaken by Solution Specialists that requires security clearances for members of the presales team. It varies greatly depending on the nature of the work being performed and the engagement with the client.

Presales and Delivery staff employed by Data#3 form part of a national pool of resources. At times these resources may be redeployed to work on projects interstate if the skills are not available in that location...Data#3 had 3 presales employees with security clearances and 6 presale employees [out of a pool of 32] who have had to pass Police Security checks in order to complete their roles.

An inherent requirement must be 'essential' or a 'defining characteristic'. As Data#3 has a mobile and flexible presales team, it is not clear that it is essential for every Solution Specialist to have a security clearance. Many Solution Specialists employed by Data#3 do not have security clearances.

- An inherent requirement must be 'specific and definable'. Data#3 has not been able to specify what is required for a security clearance. It is not clear whether any police record (including a conviction of any kind, at any point in time) would result in an adverse security clearance. Data#3 state '[t]he process involved is driven by the relevant government agency. It is their assessment process and we are not at liberty to comment on it.'
- Finally, I note that there is no reference in the Employment contract or Position Description to a successful candidate being required to pass any sort of security clearance or police check. While this is not a significant factor in my reasoning, one would expect this to be clearly stated in any position application documents if it were an inherent requirement of the Position. The Commission's *Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* discuss this issue at section 5.4.¹⁰

48. For the foregoing reasons, on the basis of information before me, I am not persuaded that the ability to obtain a security clearance, or the ability to pass a Police check, were inherent requirements of the Position.

(c) Was the distinction, exclusion or preference 'based on' the identified inherent requirements of the job?

49. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,¹¹ 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.¹²

50. The Full Court affirmed that approach in *Commonwealth v Bradley*¹³ (Bradley). 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.¹⁴

51. 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.

52. In accordance with *Bradley*, the issue for consideration is whether there is a tight or close connection between the inherent requirements of the Position, as discussed above, and the termination of Mr AW’s employment.

53. The following matters are relevant to this assessment.

(i) *Nature of criminal record including any custodial sentence*

54. There is no doubt that the offences which Mr AW was convicted of were serious offences. He was found guilty on six counts of selling the Class B controlled drug MDMA, in relation to one particular drug operation in New Zealand.

55. Class B refers to one of the classes in a classification system which is based on the drug’s projected risk of serious harm or loss of life.¹⁵ Class A is a classification for drugs which pose a ‘very high risk of harm’. Class B is a classification for drugs which pose a ‘high risk of harm’.¹⁶ As discussed by the Judge sentencing Mr AW:

[D]rug offending is regarded seriously in this country. The use of drugs comes at an enormous cost, both in terms of lives and families ruined ... and money lost from the local community through lost productivity and the huge amounts of cash drained out of it for the benefit of drug dealers.

56. However, Mr AW’s involvement in the drug operation was not at the higher levels. The Sentencing Judge observed that Mr AW’s ‘culpability was at a lower level’ and he was sentenced on that basis.

57. A non-custodial sentence was imposed of 12 months’ home detention. The principal reason a non-custodial sentence was imposed was because of Mr AW’s medical condition, discussed at paragraph 61 below.

58. I note that Mr AW has no pattern of criminal offending. I understand that Mr AW has some minor prior convictions but they are now old.

(ii) *Circumstances surrounding offending*

59. Mr AW has stated that the conviction arose in his personal life and involved him exercising very poor judgement.
60. In sentencing Mr AW, the Judge accepted that his involvement in drug dealing was not for financial gain. His Honour also accepted that Mr AW's 'involvement in drugs was out of character [and] a massive error of judgment'.
61. One of the factors which contributed to Mr AW's involvement in the drug scene was his medical condition, being a rare form of immune deficiency disorder. As stated by the Sentencing Judge:

The immunologist who has treated you since 1987 has provided a report. It seems that you are one of the oldest survivors in the world of this condition. Worldwide there are currently only three survivors over the age of 40 and none over the age of 50. ...

It is very likely that your life expectancy may only be another ten years or so. It is, I accept, likely that this knowledge which has to have been a significant burden for you throughout your life contributed to your involvement in the drug scene.

(iii) *Character references and professional reputation at the time of conviction*

62. In sentencing Mr AW, the Sentencing Judge found as follows:

You have throughout your adult life shown yourself to be a fine member of the community. You have had a good education and good employment. Your work colleagues, employers and clients alike, have provided character references that speak not only of your technical skill but honesty, reliability and trustworthiness in your work context. At the time of your offending you held down a very responsible and well-paid position. ... In your personal life you have shown yourself to be a caring and supportive friend and one prepared to provide real and significant help to those in need. There are many strong character references that attest to your kindness, empathy towards others and preparedness to step in and shoulder responsibility.

Particularly prominent amongst those who have spoken for you are the co-owners of the leaky building complex in which you were an owner and the chairman of the body corporate. Those other owners have spoken of the hundreds of hours of personal time you have devoted to co-ordinating the litigation and remediation work that was needed and helping your co-owners through the stress of all that. In short, you have shown yourself to be a worthy member of society.

63. I note, particularly, His Honour's acknowledgement that Mr AW was honest, reliable and trustworthy in his professional capacity, being a view which was also held by Mr AW's former colleagues, employers and clients alike.

(iv) *Time since conviction and risk of re-offending*

64. The conviction is relatively recent, dating back to October 2011.
65. I do note, however, the Sentencing Judge's assessment that 'there is no significant risk of [Mr AW] re-offending.'

(v) *Assessment*

66. This is a finely balanced case. The offence is a very serious one. There is a close proximity between the conviction and Mr AW's employment with Data#3. It is difficult in the circumstances to obtain evidence of rehabilitation in this short period of time. Moreover, the Position Mr AW held at Data#3 was a senior role positioned to strong candidates who are required to demonstrate the requisite level of professionalism and integrity.
67. On the other hand, Mr AW's case has some very persuasive mitigating factors. Although it was a serious offence, Mr AW's culpability was at a lower level. Mr AW does not have a pattern of criminal behaviour. The Sentencing Judge found that the offence was out of character, a massive error of judgment and there is no significant risk of re-offending. The Judge also found that his involvement in the offence was not for financial gain. Mr AW's clients and colleagues have attested to his technical skill as well as his honesty, reliability and trustworthiness in a work context, being character references which were accepted by the Court in sentencing.
- Mr AW has served his sentence of home detention and endeavoured to move forward with his life and career.
68. On balance, and with the above factors in mind, I am not persuaded that there is a sufficiently tight or close correlation between the inherent requirements of the Position and the exclusion of Mr AW. I am not persuaded that Mr AW was unable to perform the inherent requirements of the Position.

6 Recommendations

69. 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.¹⁷ The Commission may include any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁸
70. The Commission may also recommend:
- the payment of compensation to, or in respect of, a person who has suffered damage; and
 - the taking of other action to remedy or reduce the loss or damage suffered by a person.¹⁹

6.1 Mr AW's submissions

71. Mr AW has asked me to make a recommendation that Data#3 pay him an amount of \$135,362.50 in compensation for the loss and damage he has suffered as a result of Data#3's discrimination. Mr AW provided the following breakdown in support of his submission:

Loss of earnings

- The amount of \$92,862.50 represents six months' loss of earnings.
- I was terminated from my employment at Data#3 on 17 January 2014. My contract of employment set out my on target earnings at that time at \$185,725 per annum (incl super).
- Despite working hard to endeavour to mitigate my loss during that time by applying for jobs, both at the same level and less than my current level of expertise as an IT professional, I was not able to secure paid employment for a period of six months.
- On 30 July 2014, I managed to secure a temporary contract position as Business Analyst with PM-Partners Group at a fixed rate of \$750 per day. This was not a permanent position, but had it been, it would be equivalent to an annual salary less than my annual rate of pay at Data#3.
- On 10 November 2014, I commenced employment with Readify with on target earnings of \$169,300 per annum.

Legal expenses

- The amount of \$2,500 represents the legal expenses I have incurred in relation to the termination of my employment at Data#3 and this complaint.
- As previously identified to the Commission, Data#3 has had the benefit of its in-house legal counsel dealing with this matter. As a result, I have been forced to take my own legal advice to address this complaint.

Damage to my professional reputation and standing

- The amount of \$20,000 represents damage to my professional reputation and standing in the IT industry.
- As previously identified to the Commission, I am very concerned that staff from Data#3 have sought to interfere with my professional reputation by spreading rumour and gossip about my criminal convictions in an attempt to discredit me within the IT industry. In about June 2014, I was informed that a written offer of employment for a job I applied for was being "typed up" and it was, without explanation, withdrawn. I am aware of other gossip and innuendo that exists amongst my peers who have not been made aware of my past criminal conviction by me and now appear to cast doubts about my IT abilities on that basis. I am very concerned that Data#3, in an attempt to justify their position in relation to this complaint, have sought to involve people in this matter who were unconnected to the decision to terminate my employment. ...

Damage for hurt, humiliation and distress

- The amount of \$20,000 represents damage for hurt, humiliation and distress.
- While I have maintained my innocence of the crime, I accept the conviction which was recorded and I have served the sentence imposed on me. It was a dreadful and entirely out of character period of my personal life, as noted by the sentencing judge.

- I have been dogged by Data#3's decision to terminate my employment on the basis of my past criminal record. The humiliation of unemployment has affected my relationships with my family and friends. It has caused me great personal distress and embarrassment.
- In the time I was unemployed from January 2014 through July 2014 I had to rely on my family and friends for financial support. This comes after an extended period of stress for my family and close friends. I had no other form of income during this period and did not rely on government assistance during this time.

6.2 Data#3's submissions

72. Data#3 chose not to make any detailed submissions on the question of recommendation. It submitted that 'Data#3 is not under any legal obligation to pay [Mr AW] any compensation and will not do so.'

6.3 Consideration of compensation

73. 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.²⁰ I am of the view that this is the appropriate approach to take in relation 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.²¹

(a) Hurt, humiliation and distress

74. Compensation for Mr AW'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.²²
75. I am satisfied that Mr AW suffered hurt, humiliation and distress as a result of being discriminated against on the basis of his criminal record. I accept that the humiliation of losing his job at Data#3 has caused him personal distress and embarrassment and has negatively impacted relationships with family and friends.
76. 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 Data#3 pay him that amount.

(b) Reputational and professional damage

77. Mr AW submitted that:
- Data#3 have sought to interfere with my professional reputation by spreading rumour and gossip about my criminal convictions in an attempt to discredit me within the IT industry.
78. I note that in the absence of any specific details or evidence, I am not able to draw any conclusions about such a submission.

79. Mr AW has also submitted that:

In about June 2014, I was informed that a written offer of employment for a job I applied for was being “typed up” and it was, without explanation, withdrawn. I am aware of other gossip and innuendo that exists amongst my peers who have not been made aware of my past criminal conviction by me ...

80. There is no evidence before the Commission that Data#3 had a role to play in this incident. I am unable to draw any conclusion as to what may have occurred.

(c) Legal expenses

81. While a person may reasonably wish to obtain legal advice in connection with a complaint of discrimination to the Commission, the Commission’s procedure does not require this. Moreover, Commission inquiries under Division 4 of the AHRC Act are in no way akin to a ‘costs jurisdiction’, where it is a general principle that ‘costs follow the event’.

82. For this reason, I do not recommend any compensation for Mr AW’s legal expenses of bringing this complaint.

(d) Economic loss

83. The measure of damages for economic loss in wrongful dismissal cases is prima facie, the amount that the claimant would have earned had the employment continued according to the contract subject to a deduction in respect of any amount accruing from any other employment which the claimant, in minimising damages, either had obtained or should reasonably have obtained.²³

(i) The amount Mr AW would have earned under the contract

84. Mr AW’s remuneration package under his contract with Data#3 was expressed as follows:

Base salary per annum	\$ 150,000.00
Variable Reward (VR)	
VR2 – 60/40 split local v national Revenue performance actual v budget	\$ 15,000.00
VR3 – Based on achievement of role KPI’s	\$ 5,000.00
Superannuation	\$ 15,725.00
ON TARGET EARNINGS	\$ 185,725.00

85. While \$165,725.00 was the amount Mr AW would have earned under the contract as a minimum, a further \$20,000 was contingent on Mr AW’s performance in the Position, including his financial performance and his manager’s assessment of his performance against the Position’s ‘key performance indicators’ (KPIs).

86. In determining whether, on the balance of probabilities, Mr AW would have earned this 'variable reward', I am faced with two difficulties:
- Neither party made any submissions or submitted any evidence on the likelihood of Mr AW earning a bonus; and
 - Any submissions on this point would have been based on Mr AW's performance in the Position over the course of two weeks that he was employed.
87. There is insufficient evidence for me to conclude that Mr AW would have earned a 'variable reward' at all. Accordingly, I conclude that had Mr AW remained in employment with Data#3, he would have earned a salary of \$165,725 per annum. His gross earnings from 4 February 2014 to 11 December 2015, would have been approximately \$307,547.

(ii) The amount Mr AW has earned in alternative employment

88. Mr AW secured alternative employment on 30 July 2014. This was a position as Business Analyst with PM-Partners Group at a fixed rate of \$750 per day. Mr AW was in this role for approximately a 14 week period from 30 July 2014, until he commenced his role at Readify on 10 November 2014. I have estimated, on the evidence before me, that the amount Mr AW would have earned during this period is approximately \$52,500.
89. On 10 November 2014, Mr AW commenced employment with Readify with 'on target earnings' of \$169,300 per annum. At that rate, from 10 November 2014 to 11 December 2015, I have estimated that Mr AW would have earned approximately \$183,408.
90. In total, since 4 February 2014, Mr AW's earnings were approximately \$235,908.

(iii) Duty to mitigate

91. At common law, the failure of a claimant to take steps to mitigate a claimed loss may be raised as a defence to a claim. Although Data#3 has not raised this point in relation to Mr AW's discrimination complaint, I have nonetheless assessed whether he has complied with his duty to mitigate loss.
92. The courts have accepted the following principles, as an accurate statement of the law concerning mitigation.
- (i) The law disallows recovery of damages in respect of any loss that could have been avoided but which the plaintiff has failed to avoid through unreasonable action or inaction.
 - (ii) The plaintiff may recover loss or expense incurred in a reasonable attempt to mitigate.
 - (iii) The plaintiff may not recover loss in fact avoided, even though damages for that loss would have been recoverable because the efforts that went to mitigation went beyond what was required of the plaintiff under the first principle.²⁴
93. Thus, it becomes necessary to consider whether the steps taken by Mr AW to mitigate his loss, being loss of remuneration, were a 'reasonable attempt' in the circumstances.

94. In support of his claim, Mr AW submitted to the Commission a document which he generated from the work search website, www.seek.com.au (Seek), which sets out details of job applications he submitted through Seek in the period January – June 2014. In total, Mr AW made 117 job applications in this period. It is unnecessary for me to set out all the roles he applied for, however I note the following selection:

Application Date	Job Title	Advertiser
29/01/2014	Solutions Architect (Support Services) – Macquarie Park	UXC
17/02/2014	IT Infrastructure Lead	McDonald's
28/02/2014	Project Manager – Data Centre Migration	Radius Solutions Group
3/03/2014	Solutions Architect	GWG Partners
13/03/14	Senior Infrastructure, Systems Engineer	Ecareer Employment Services
4/04/2014	Technical Lead – Solution Designer	Enterprise IT Resources Pty Ltd
17/04/2014	Senior Business Development Manager – IT Managed Services and Solutions	Cubic Resources
30/04/2014	Presales Microsoft Solution Architect	Green Light Australia Pty Ltd
7/05/2014	Technical Consultant	MACRO Recruitment
9/05/2014	Infrastructure Solution Architect/ Designer	Bluefin Resources Pty Limited
15/05/2014	IT Manager	Talent International

Application Date	Job Title	Advertiser
10/06/2014	IT Manager	Frontline Retail – Executive
13/06/2014	Microsoft Practice Manger / Microsoft Solution Architect	Higher Recruitment P/L
23/06/2014	Pre Sales Solution Architect	Perigon Group Pty Limited
23/06/2014	Enterprise IT Sales Executive	Oakstone Bridge Consulting

95. I note Mr AW's submission that the jobs he applied for ranged in seniority in the IT industry and in levels of pay. While the Seek list Mr AW provided did not, for the most part, indicate salary level, some of the jobs were listed at a salary level of approximately \$80,000 per annum, significantly below Mr AW's salary at Data#3.
96. I have reflected on discrimination case law to assess Mr AW's efforts at mitigating his loss, set out above. While there are no hard or fast rules regarding how many jobs one must apply for in a reasonable attempt to mitigate one's loss, it is clear that 117 job applications in one's professional field, in approximately 180 days of unemployment, is a reasonable effort.
97. I conclude that Mr AW's attempts to secure alternative employment following termination by Data#3 were not unreasonable and that he has therefore complied with his duty to mitigate his loss.
98. I therefore calculate Mr AW's economic loss as follows:
- | | |
|--|------------|
| Amount he would have earned under the contract with Data#3 | \$ 307,547 |
| Amount he earned in alternative employment | \$ 235,908 |
| Economic loss | \$ 71,639 |
99. I recommend that Data#3 pay Mr AW an amount for the economic loss he has incurred while making a reasonable attempt to mitigate his loss. I note that it is standard practice for courts and tribunals in Australia to calculate past loss of wages by using gross figures, as the actual payment of taxation on any compensation which relates to lost earnings is a matter for the taxpayer.²⁵

6.4 Consideration of Data#3's policies and training

100. As part of this inquiry, I have considered Data#3's discrimination policies. In its Response to Mr AW's complaint, Data#3 provided a copy of its Vision, Strategy & Code of Conduct Guidelines. This document does not have a section specifically addressing non-discrimination in the workplace. However, under the heading 'Respect and Trust' it states as follows:

Respect and Trust

Treating all others with respect and trust is essential to building the personal and professional relationships that we need to operate every day. We are expected to treat all people we deal with, with dignity and respect, regardless of their position or circumstances. ...

What are some examples of showing respect and trust to others?

...

— Never discriminate against, harass or bully fellow Data#3 team members, customers or vendors. Apart from being disrespectful, it is illegal.

101. On 22 April 2015, as part of this inquiry, Data#3 was asked whether it had any other workplace policies which addressed workplace discrimination. Data#3 responded by providing a copy of its Harassment, Discrimination & Victimisation Guideline (Discrimination Guideline) which is marked with '© 2015 Data#3 Limited'. It appears that this Discrimination Guideline came into existence sometime in 2015, after Mr AW's complaint of discrimination to the Commission.

102. Relevantly, page 3 of the Discrimination Guideline provides as follows:

Discrimination

Discrimination is any practice that makes distinction between individuals or groups so as to disadvantage some and advantage others.

Harassment on any of these grounds is a form of discrimination:

- race, colour, descent or national or ethnic origin;
- sex, marital status, pregnancy, family or carer responsibilities, breastfeeding
- medical record, disability or impairment
- sexual preference or gender identity
- religion, criminal record, political belief or activity, or trade union activity
- age

103. The Discrimination Guideline goes on to address what is direct discrimination, indirect discrimination and victimisation and Data#3's policy for how to deal with any discrimination or harassment complaints. It states that:

If an employee feels that their rights have been breached, they should immediately speak to their manager/supervisor or contact the General Manager of OD&HR. All complaints will be taken seriously and handled promptly, confidentially and impartially in accordance with Data#3's Complaints and Investigations Guidelines.

104. I consider that Data#3's development of a Discrimination Guideline is a positive development. However, with regard to criminal record discrimination, the Discrimination Guideline provides insufficient guidance as to what it is and how decision making in relation to job applicants with a criminal record will be undertaken.

105. I recommend that Data#3 further develop its policies in relation to prevention of discrimination on the basis of criminal record. In this regard, I draw Data#3's attention to the Commission's publication *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (Guidelines).²⁶

106. The Guidelines state:

9. A written policy and procedure

If an employer decides that a criminal record is relevant to the positions of a workplace, a written policy can help ensure that all staff have an understanding of the organisation's requirements and the legal obligations of the organisation towards people with a criminal record. A policy and an outline of procedure can be incorporated into other workplace policy on equal opportunity and anti-discrimination if such policy exists.

Ideally, a policy and procedure would include:

- a statement about the employer's commitment to treating people with a criminal record fairly and in accordance with anti-discrimination, spent conviction and privacy laws
- a brief summary of employee and employer rights and responsibilities under these laws, or inclusion of up-to-date literature which provides this information
- an outline of other relevant legal requirements for the workplace, such as the employer's responsibilities under licensing and registration laws, or working with children laws
- the procedure for assessing the inherent requirements of the position, requesting criminal record information if necessary and assessing individual job applications or employee histories
- information on internal or external complaint or grievance procedures if someone thinks they have been unfairly treated
- designated officers with responsibility for different elements of the procedure,

In order for a policy to gain widespread acceptance, it is vital that staff, workplace representatives and management are involved in the development of the policy.

Developing appropriate policies and procedures does not have to be overly complex or long. However, any policy should be clear, informative and available to all staff and job applicants.

107. I also recommend that Data#3 conduct training for its human resources and management staff involved in employment decisions. This training should assist staff to assess fairly whether an individual with a criminal record can perform the inherent requirements of a particular job. Again, I draw Data#3's attention to the Guidelines, which state as follows:

5.10 Assessing a job applicant's criminal record against the inherent requirements of the job

In some cases, the connection between the criminal record and the job will be clear enough for the employer to decide on the suitability of the applicant for the job...

However, *in most* cases it will be unclear to the employer simply on the basis of the results of a police check alone whether or not the conviction or offence is relevant to the inherent requirements of the job...

An employer will generally need to discuss the relevance of the criminal record with the job applicant, or invite them to provide further information, in order to assess whether the person can meet the inherent requirements of the job.

...

The type of information which an employer may need to consider when assessing the relevance of a person's criminal record includes:

- the seriousness of the conviction or offence and its relevance to the job in question
- whether in relation to the offence there was a finding of guilt without conviction, which indicates a less serious view of the offence by the courts
- the age of the applicant when the offence occurred
- the length of time since the offence occurred
- whether the applicant has a pattern of offences
- the circumstances in which the offence took place, for example if it was an offence that took place in a work, domestic or personal context
- whether the applicant's circumstances have changed since the offence was committed...
- whether the offence was decriminalised by Parliament ...
- the attitude of the job applicant to their previous offending behaviour
- references from people who know about the offending history.²⁷

108. I also draw Data#3's attention to Part 4 of the Guidelines, which discusses (among other matters) how an employer should determine whether a criminal record is relevant to the inherent requirements of a job and key principles in case law for assessing the inherent requirements.

7 Response to recommendations

109. On 15 December 2015 I provided a notice to Data#3 under s 29(2)(a) of the AHRC Act setting out my findings and recommendations in relation to the complaint.
110. By email dated 8 January 2016 Data#3 provided the following response to my findings and recommendations:

Data#3 appreciates the time taken by the Commission in reviewing and deciding on this matter. We have reviewed the recommendations and have outlined the actions to be taken below.

1. Develop workplace policies in relation to prevention of discrimination of employment on the basis of criminal record.

Data#3 will review the recommended report titled "On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record" and develop a workplace policy to be used in preventing discrimination on the basis of criminal record in the future. Further reviews will be conducted on the existing Workplace Harassment, Discrimination and Victimization Policy to ensure that it contains appropriate measures to complement this new policy. Relevant workplace representatives and managers will be involved in the creation of this policy and once ratified, it will be made available to all staff.

2. Conduct training to assist staff to fairly assess whether a job applicant with a criminal record can perform the inherent requirements of a particular job.

Once the recommended policy relating to the prevention of discrimination of [sic] employment on the basis of criminal record has been created and ratified, Data#3 will use this policy to roll out training to relevant staff on how to fairly assess whether a job applicant with a criminal record can perform the inherent requirements of a particular job. This training will also be incorporated into the induction program so that it will be undertaken by all relevant incoming staff.

3. Pay Mr AW an amount in compensation for loss of earnings, caused by the termination of his employment.

4. Pay Mr AW \$5,000 in compensation for hurt, humiliation and distress as a result of being discriminated against.

For the following reasons, Data#3 respectfully declines to pay any compensation to Mr AW, either the sum recommended by the Commission or otherwise:

- Data#3 was legally entitled to terminate his employment within the probationary period.
- Mr AW's recent and serious criminal conviction would prevent him, on a reasonable assessment, from performing the inherent requirements of his role.

111. I report accordingly to the Attorney-General.

Yours sincerely

A handwritten signature in black ink, reading "Gillian Triggs". The signature is written in a cursive style with a long horizontal flourish at the end.

Gillian Triggs
President
Australian Human Rights Commission
March 2016

- 1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
- 2 *State of Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47.
- 3 *X v Commonwealth* (1999) 200 CLR 177, 222-223, [146] (Kirby J); *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, 333, [152.4] and footnotes 168-169 (Kirby J). This approach has been applied to Part II, Division 4 of the *Sex Discrimination Act 1984* in *Gardner v All Australian Netball Association Limited* (2003) 197 ALR 28, [19], [23]-[24] (Raphael FM); *Ferneley v Boxing Authority of New South Wales* (2001) 191 ALR 739, [89] (Wilcox J).
- 4 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
- 5 *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
- 6 *X v Commonwealth* (1999) 200 CLR 177, [43] (McHugh J).
- 7 International Labour Organisation, *General Survey: Equality in Employment and Occupation*, (1988), [126]. See also *Qantas Airways Ltd v Christie* (1998) 193 CLR 280, [72] (McHugh J).
- 8 *Qantas Airways v Christie* (1998) 193 CLR 280, 284.
- 9 Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012), 16 <http://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf>.
- 10 Above, 22.
- 11 (1998) 158 ALR 468.
- 12 Above, 482.
- 13 (1999) 95 FCR 218.
- 14 Above, 235-236.
- 15 *Misuse of Drugs Act 1975* (New Zealand), s 3A.
- 16 Above.
- 17 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
- 18 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
- 19 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
- 20 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J).
- 21 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
- 22 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).
- 23 See Harvey McGregor, *McGregor on Damages* (2014, 19th ed), 1113; Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (2008), 707-709.
- 24 Judicial Commission of New South Wales, *Civil Trial Bench Book* (2015), 7055 <http://jirs.judcom.nsw.gov.au/public/wservice/benchbooks/docs/Civil_Trials_Bench_Book-Update_29-November_2015.pdf>.
- 25 Neil Rees, Katherine Lindsay and Simon Rice, *Australian Anti-Discrimination Law* (2008), 711.
- 26 Australian Human Rights Commission, *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record* (2012), <http://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf>.
- 27 Above, 14-19.

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001
Telephone: (02) 9284 9600

Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

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