



Australian
Human Rights
Commission

AN v ANZ Banking Group Limited

[2015] AusHRC 93

© Australian Human Rights Commission 2015.



ISSN 1837-1183

The Australian Human Rights Commission encourages the dissemination and exchange of information presented in this publication. All material presented in this publication is licenced under a Creative Commons Attribution 3.0 Australia licence, with the exception of the Australian Human Rights Commission Logo.

To view a copy of this licence, visit <http://creativecommons.org/licences/by/3.0/au>.

In essence, you are free to copy, communicate and adapt the work, as long as you attribute the work to the Australian Human Rights Commission and abide by the other licence terms.

Design and layout Dancingirl Designs

Printing Masterprint Pty Limited

Electronic format

This publication can be found in electronic format on the website of the Australian Human Rights Commission:
www.humanrights.gov.au/publications/index.html.

Contact details

For further information about the Australian Human Rights Commission, please visit www.humanrights.gov.au or email communications@humanrights.gov.au. You can also write to:

Communications Team
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

AN v ANZ Banking Group Limited

Report into discrimination in employment
based on criminal record

[2015] AusHRC 93

Australian Human Rights Commission 2015



**Australian
Human Rights
Commission**

Contents

1	Introduction to this inquiry	3
2	Summary of findings and recommendations	3
3	Background	3
4	Facts	4
5	Relevant legal framework	6
6	Consideration	7
6.1	Is there an act or practice?	7
6.2	Does the act involve a distinction, exclusion or preference on the basis of criminal record?	7
6.3	Did that exclusion have the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation?	9
6.4	Was the exclusion based on the inherent requirements of the Position?	9
7	Recommendations	12
7.1	Mr AN's submissions	12
7.2	ANZ's policies and training	13
7.3	Apology	14
8	Response to Recommendations	15



**Australian
Human Rights
Commission**

March 2015

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) into the complaint made by Mr AN against ANZ Banking Group Limited (ANZ).

I have found that ANZ's act of refusing to engage Mr AN as an Information Technology Project Manager constituted an exclusion made on the basis of criminal record. This had the effect of nullifying or impairing Mr AN's equality of opportunity or treatment in employment or occupation. This exclusion was not based on the inherent requirements of the job.

In light of my findings, I recommended that ANZ further develop its policies in relation to prevention of discrimination in employment on the basis of criminal record and 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. I also recommended that ANZ apologise to Mr AN.

ANZ provided a response to my findings and recommendations on 21 January 2015. In particular, ANZ said that it will conduct refresher training with relevant recruitment decision makers, and that it now places a greater emphasis on the age of a criminal conviction in determining whether an employee or contractor can perform the inherent requirements of a particular role. I have set out ANZ's response to my recommendations at Part 8 of my report.

I enclose a copy of my report.

Yours sincerely,

A handwritten signature in black ink that reads "Gillian Triggs".

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 or occupation on the basis of criminal record. The complaint was made by Mr AN against ANZ Banking Group Limited (ANZ). The Commission issued a preliminary view to the parties on 25 August 2014.
2. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). Mr AN has asked that he not be referred to by name in this report. I consider that the preservation of the anonymity of Mr AN is necessary to protect his privacy. Accordingly, I have given a direction pursuant to s 14(2) of the AHRC Act and have referred to him throughout as Mr AN.

2 Summary of findings and recommendations

3. As a result of this inquiry, I have found that Mr AN was discriminated against by ANZ on the basis of his criminal record.
4. In light of my findings, I recommend that ANZ:
 - further develop its policies in relation to the 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; and
 - provide a formal written apology to Mr AN.

3 Background

5. Mr AN made a written complaint to the Commission on 26 July 2013. He alleges that ANZ refused to engage him as an Information Technology Project Manager because of his criminal record.
6. On 1 October 2013, ANZ provided a response to the complaint, along with copies of:
 - ANZ's Background Checks Policy;
 - ANZ's Process for Engaging a Non-Employee;
 - Mr AN's completed Pre-Employment Check Request Form, including his Confidentiality Undertaking and Consent Form;
 - ANZ's Code of Conduct & Ethics; and
 - the 'Role Mandate' document in relation to the CX [Customer Experience] Project Manager position (Position) for which Mr AN had applied.
7. During the course of this inquiry, ANZ also provided its 'Background Check Guidelines' and a 'Police Check Decision Outcome Form', in relation to the decision not to proceed with Mr AN's engagement.
8. An attempt was made to conciliate the complaint during the course of November 2013 to April 2014. However, the parties were unable to reach agreement on resolving the complaint.

4 Facts

9. Based on the information provided by the parties, the relevant facts are as follows:
- a) On or about 25 May 2013, Robert Walters, a recruitment and labour hire company, was instructed by ANZ to source candidates to be interviewed by ANZ for the Position.
 - b) Shortly thereafter, Ms Nadia Said, a recruitment consultant with Robert Walters, invited Mr AN to apply for the Position.
 - c) On or about 6 June 2013, ANZ interviewed Mr AN in relation to the Position.
 - d) On 11 July 2013, Mr AN received an email from Ms Said which stated that he had been selected by ANZ for the Position with a start date of 5 August 2013, for a twelve month contract. The email included a Robert Walters Incorporated Contractors Agreement (ICA), which stated in its introduction:

Robert Walters has made or proposes to make an agreement with the Client [ANZ] for the engagement of an independent contractor that has the skills and expertise required to perform the Assignment ...

...

The Contractor [Mr AN's company] agrees with Robert Walters that the Contractor will supply its employees, who will apply their skills and expertise in relation to the Assignment on the terms and conditions set out in this Agreement.
 - e) Later that day, Mr AN attended Robert Walters' office to fill out and sign the Robert Walters ICA; ANZ's Pre-Employment Check Request Form; a Confidentiality Undertaking and Consent Form; a Federal Police Record Check consent form and online documentation from First Advantage, a third party engaged by ANZ to conduct criminal record checks. When signing the Confidentiality Undertaking and Consent Form, Mr AN warranted that he had not been convicted of a criminal offence anywhere in the world and acknowledged that ANZ may obtain a police clearance check to validate this.
 - f) On 16 July 2013, First Advantage notified Ms Said that the Criminal Record Check for Mr AN disclosed a prior conviction. It forwarded to her a National Police Certificate which indicated that on 2 January 1979 Mr AN was convicted of 'Armed Robbery with Violence Whilst in Company' and sentenced to 5 years' imprisonment, with a recommendation for parole after serving 12 months.
 - g) On 16 July 2013, Mr AN states that Ms Said telephoned him to seek his input and explanation in relation to the offence. During this conversation, Mr AN states that he:
 - provided details of the conviction and circumstances around it;
 - explained that he had grown up in a rough neighbourhood in Brisbane and had fallen in with the wrong crowd;
 - stated that he had not re-offended; and
 - reiterated his relevant employment history and community volunteer work.

Mr AN states that Ms Said stated that:

- she would convey Mr AN's feedback to ANZ; and
 - she was of the opinion that as the offence was not committed against an institution, and was not of the nature of fraud/embezzlement, it should not affect his engagement by ANZ.
- h) On or about 16 July 2013, ANZ's Contract Management Office received a copy of the results of Mr AN's Criminal Record Check from First Advantage.
- i) On 17 July 2013, Mr Callum Fry, Senior Consultant of Robert Walters, stated that he passed Mr AN's explanation on to Ms Sharon O'Donnell, a Project Director of ANZ. Mr AN states that on 17 July 2013, Ms Said telephoned him and told him that Robert Walters had discussed the matter with Ms O'Donnell who stated that:
- she was not particularly concerned about the offence, given how long ago it occurred;
 - she would nevertheless need to seek clearance for Mr AN's recruitment from ANZ's HR department.
- j) Robert Walters states that on 19 July 2013, Ms O'Donnell informed Robert Walters that 'her hands were tied' and that ANZ could not recruit Mr AN due to the nature of his criminal offence. Ms Said subsequently telephoned Mr AN and conveyed this decision to him. She also emailed Mr AN that day. The email stated:
- To confirm ANZ has withdrawn the position of CX Project Manager due to an unsatisfactory police check as ANZ do issue their roles depending on police checks as typical within the Financial Services space.
- Also to confirm as requested I have escalated this to our HR team and am waiting for further direction on the matter...
- k) Later that day, Mr AN emailed Ms Said and reiterated the substance of their earlier conversation. He stated in the email that:
- his conviction does not impact on his ability to fulfil the inherent requirements of the job;
 - by withdrawing the job offer, ANZ was discriminating against him on the basis of his criminal record;
 - he requests Robert Walters ask ANZ to reconsider its decision.
- l) On 24 July 2013, Mr AN sent an email to Ms Said, and requested that it be passed on to the HR Director of Robert Walters. In the email, he set out details of the submissions he previously made to Ms Said in relation to his offence and his ability to perform the Position. He also stated:
- ANZ did not request me to provide further details of my record or the circumstances around it. Whilst I understand Nadia [Said] verbally briefed a representative of the ANZ Hiring Manager, I have no idea what information was actually provided to ANZ in relation to this. I have had no contact with anyone at ANZ, nor to my knowledge has ANZ requested any further information from me.

...

By refusing to employ me ANZ has discriminated against me on the basis of my criminal record. I consider this grossly unfair, and plan to make a formal complaint to the Australian Human Rights Commission.

- m) Robert Walters states that on receipt of the 24 July 2013 email, Ms Said passed it on to Acting HR Manager of Robert Walters, Ms Danica Burns. On 26 July 2013, Ms Burns, Ms Said and Mr Luke Guanlao, Senior Legal Counsel of Robert Walters, attended a telephone conference with Ms O'Donnell of ANZ. Robert Walters states that during this call, Ms O'Donnell advised that the Group Investigations team of ANZ had reviewed the matter and made the decision not to proceed with the offer.
- n) Mr AN was not afforded an opportunity to discuss this matter directly with ANZ. However, on 25 July 2013 Mr AN contacted via email, through the LinkedIn professional networking tool, Mr Daniel Sammarco, an ANZ Program Director with whom he interviewed for the Position. In his email, he referred to:
- his disappointment that no one from ANZ had contacted him regarding the matter, despite providing comprehensive information to Robert Walters and asking them to provide this to ANZ to reconsider its decision;
 - how long ago the offence took place;
 - his relevant work experience for the Position;
 - his membership of the Australian Institute of Project Management and other professional bodies;
 - his tertiary qualifications;
 - his volunteering work as a fire fighter; and
 - being a husband, father and stepfather.
- o) Later that day, Mr Sammarco responded to Mr AN's 25 July 2013 email. He stated:
- It's most likely that no one has contacted you [as] I have been overseas for two weeks ... so apologies for that.
- It's unfortunate this had occurred however anz's hr policy is quite stringent in these matters and I nor Sharon who is acting in my absence has discretion to counter this.

5 Relevant legal framework

10. 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.
11. 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.

12. 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.
13. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹

6 Consideration

14. 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.

6.1 Is there an act or practice?

15. '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.
16. On or about 19 July 2013, ANZ decided not to engage Mr AN in the Position. I am satisfied that this was an 'act' within the meaning of s 30(1) of the AHRC Act.

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

17. I also consider that ANZ's decision not to engage Mr AN constitutes an 'exclusion' within the scope of the definition of 'discrimination' in the AHRC Act. Mr AN submits that the reason for ANZ's decision was his criminal record.
18. For a case of discrimination to be found regarding ANZ's decision not to engage Mr AN, 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.² It does not need to be the sole reason.
19. There is no dispute between the parties that Mr AN's criminal record was a reason for ANZ's decision not to engage Mr AN. In its submissions, ANZ has stated that it:

decided not to proceed with [Mr AN's] placement at ANZ to perform that role because it determined that he would not be able to perform the inherent requirements of the role as a result of his conviction for the Armed Robbery offence.

20. It is clear from this statement that Mr AN's criminal record was a reason for the exclusion.
21. It appears from ANZ's submissions that the decision not to engage Mr AN may not have been entirely based on his criminal record, but also attributed to another two factors.
22. First, when signing the Confidentiality Undertaking and Consent Form, Mr AN warranted that he had not been convicted of a criminal offence anywhere in the world. Given that Mr AN has a criminal record, ANZ submits that he had provided a false warranty. In ANZ's view, this conduct is inconsistent with its Code of Conduct & Ethics and the requirement that in the Position the person responsible will 'build an environment of openness and trust with ANZ staff and stakeholders'. Mr AN submits that the reason he did not disclose his criminal record to ANZ was because of information he had accessed from the Queensland Government at: <https://www.qld.gov.au/law/crime-and-police/criminal-records-and-history-checks/criminal-records/>. This webpage states that:

You can say you have no convictions if you meet the following criteria:

- you were not imprisoned as part of your sentence or you were imprisoned for less than 30 months;
- enough time has passed (see below);
- you haven't broken the law since your conviction.

For Queensland offences, the time that has to pass before you don't have to mention a conviction is:

- 10 years if you were convicted in the Supreme Court or District Court as an adult;
- 5 years for other cases, unless you were ordered to pay restitution, and then until you have paid.

23. Although, as ANZ submits, Mr AN was ultimately incorrect in his conclusion that his conviction was spent,³ his submission provides an explanation as to why he signed the warranty that he had not been convicted of a criminal offence. Mr AN formed the view that his conviction was spent on the basis that he served 13 months of his five year sentence, his conviction occurred more than 34 years ago and he had no further convictions.
24. Second, ANZ submits that since making the complaint, Mr AN provided conflicting information about the reason he did not disclose his criminal record. ANZ submits that this also raises questions about his integrity and honesty.
25. As stated above, there is no dispute between the parties that Mr AN's criminal record was a reason for the exclusion. It does not need to be the sole reason. Interpreting the phrase 'on the basis of' in the broader sense, to mean 'by reference to', I am satisfied that ANZ's decision not to engage Mr AN constituted an exclusion on the basis of Mr AN's criminal record.

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

26. The AHRC Act was introduced to be the vehicle by which Australia's obligations under the *Discrimination (Employment and Occupation) Convention 1958* (ILO 111 Convention) were implemented.⁴ For this reason, it is appropriate to construe the definition of 'discrimination' in s 3(1) of the AHRC Act in accordance with the construction given in international law to Article 1 of the ILO 111 Convention.⁵
27. Article 1(3) of the ILO 111 Convention provides that 'employment' and 'occupation' includes 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 sector.⁶
28. 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; and
 - 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.
29. Had Mr AN's company (Company), been engaged as an independent contractor by Robert Walters to provide the skills and expertise required by ANZ, Mr AN would have undertaken the work required by ANZ in the Position. He would have had the opportunity to earn an income as an employee of the Company and/or as a shareholder of the Company. He was not given the opportunity to do so on the basis of his criminal record. In the circumstances, I find that the decision not to engage Mr AN in the Position 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.

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

30. Paragraph (c) of the definition of ‘discrimination’ in section 3(1) 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 finding that ANZ’s decision not to engage Mr AN 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.
31. Paragraph (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.⁷
32. ANZ submits that its decision not to engage Mr AN in the Position was based on its assessment that Mr AN’s conviction for the armed robbery offence meant that he was unable to perform the inherent requirements of the role. ANZ made the following submissions:
- The armed robbery offence was a very serious offence; it involved theft, occurred in circumstances where the assailants were armed and where ‘it is clear from the nature of the offence that violence was involved’. It resulted in the Court imposing a sentence of 5 years’ imprisonment.
 - Mr AN’s conviction for such a serious offence demonstrates a failure to act with integrity and honesty and, as a result:
 - » ANZ is not ‘reasonably able to have sufficient trust and confidence in him to allow him to work within the organisation ... or to have access to ANZ’s IT systems with limited supervision’; and
 - » ANZ considers ‘there is a risk [Mr AN] may not keep the sensitive commercial and security information obtained while performing the role confidential, or may misuse such information’.

(a) Identifying the ‘inherent requirements’

33. 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.
34. An ‘inherent requirement’ is something that is ‘essential to the position’⁸ and not ‘peripheral’.⁹ It is an ‘essential feature’ or ‘defining characteristic’.¹⁰
35. 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.¹¹

36. ANZ states that the IT Project Manager Position involved working on a new internet banking system. It states that the Position involved coordinating the activities of various groups (e.g. designers, IT experts, marketing and branding professionals), managing external contractual relationships and ensuring the new internet banking system is delivered on time and within budget.
37. The Role Mandate document prepared by ANZ for the Position states that the skills, knowledge and experience required included the:
- ability to undertake project management within the digital domain;
 - ability to make timely decisions in rapidly changing and high risk situations;
 - ability to present information to groups of people and make use of a variety of tools and techniques to convey ideas;
 - ability to persuade, convince, influence and impress others in order to gain support for an agreement to an idea or concept;
 - ability to 'convey, explain and understand' information in written reports, clearly and concisely; and
 - ability to effectively manage own time and resources.
38. ANZ has stated that it considers the inherent requirements of the Position to be:
- that ANZ be able to have sufficient trust and confidence in the Position holder to allow him to work within the organisation, having regard to the requirements of ANZ's Values and Code of Conduct & Ethics, and having regard to the general expectations of ANZ's customers and shareholders;
 - that the Position holder access ANZ's IT systems (including sensitive commercial and security information) with limited supervision;
 - that the Position holder keep information obtained in the course of performing the role (including information regarding ANZ's IT system, products, business plans, projects, internet banking interface and security requirements and exposures) confidential; and
 - that the Position holder not misuse information gained in the course of performing the role (including information regarding ANZ's IT system, products, business plans, projects, internet banking interface and security requirements and exposures).
39. I accept that the inherent requirements of the Position are those set out in the Role Mandate document prepared by ANZ. I acknowledge that the Position involves access to sensitive commercial and security information with limited supervision and accept that it was an inherent requirement to keep information obtained in the course of the role confidential and not to misuse the information. I also accept that the inherent requirements include trust and confidence, being requirements set out in ANZ's Code of Conduct & Ethics.

(b) Was the distinction, exclusion or preference ‘based on’ the identified inherent requirements of the job?

40. In *Commonwealth v Human Rights and Equal Opportunity Commission and Others*,¹² 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.¹³

41. The Full Court affirmed that approach in *Commonwealth v Bradley*.¹⁴ 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.¹⁵

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

43. As set out above, ANZ submits that Mr AN’s conviction meant that he is unable to perform the inherent requirements of the role. ANZ draws attention to the seriousness of the offence and states that the ‘offence demonstrates a failure to act with integrity and honesty’.

44. There is no doubt that the offence which Mr AN was convicted of was a serious offence. However, the offence occurred in 1978, more than 35 years ago. This offence was Mr AN’s only offence and he has had no subsequent convictions. Mr AN was 21 years old at the time of the offence. He has provided some context around the offence stating that he had ‘fallen in with the wrong crowd’. Mr AN has also submitted that he was not armed and was surprised to learn that another youth was armed.

45. Mr AN has been in full time employment since 1982. He has held senior management roles at Telstra, Lonely Planet and Sensis. His professional referees provided very positive references to Ms Said in relation to the potential recruitment of Mr AN for the Position.

46. Mr AN has volunteered as a fire-fighter for more than 10 years. He received the National Emergency Medal for services as a fire-fighter during the Black Saturday fires. Mr AN has been married for 18 years and is a father to a 17 year old daughter and 32 year old stepson. It is difficult to see what more Mr AN could have done to rehabilitate himself.

47. With these factors in mind, I am not persuaded that there is a sufficiently tight or close correlation between the inherent requirement of the Position and the exclusion of Mr AN. I am not persuaded that Mr AN was unable to perform the inherent requirements of the Position.
48. I consider that ANZ's decision not to engage Mr AN constitutes discrimination against Mr AN in employment or occupation on the ground of criminal record.

7 Recommendations

49. Where, after conducting an inquiry, the Commission finds that an act or practice engaged in by a respondent is inconsistent with or contrary to any human right, the Commission is required to serve notice on the respondent setting out its findings and reasons for those findings.¹⁶ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.¹⁷
50. 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.¹⁸

7.1 Mr AN's submissions

51. Mr AN asked me to make the following recommendations:
- ANZ take steps to amend its policies and procedures to prevent a repeat of the discrimination which occurred with respect to him; and
 - ANZ acknowledge and apologise for the hurt and suffering they have caused him.
52. Mr AN stated that although the Position attracted remuneration of \$190 per day more than he was presently earning, he was not seeking any compensation.

7.2 ANZ's policies and training

53. As part of this inquiry, I have considered ANZ's Background Checks Policy and Global Background Checks Process document. I note that the Background Checks Policy requires a hiring manager to assess whether a job applicant's police record is 'incompatible with the inherent requirements of the role'.¹⁹ Whilst this is an important inclusion, I recommend that ANZ further develop its policies in relation to prevention of discrimination on the basis of criminal record. In this regard, I draw ANZ'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).²⁰

54. 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.

55. I also recommend that ANZ 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 ANZ'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.²¹

56. I also draw ANZ'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.

7.3 Apology

57. Mr AN has also sought an apology. I consider that the provision of a written apology would be an appropriate remedy. Apologies are important remedies for discrimination. They, at least to some extent, alleviate the suffering of those who have been wronged. I recommend that ANZ provide a formal written apology to Mr AN for its discriminatory conduct.

8 Response to Recommendations

58. On 23 December 2014 I provided a notice to ANZ setting out my findings and recommendations in relation to the complaint dealt with in this report.

59. By email dated 21 January 2015, ANZ provided the following responses to each of my recommendations.

60. In relation to my recommendation that ANZ further develop its policies in relation to the prevention of discrimination in employment on the basis of criminal record, ANZ stated:

ANZ's global Background Checks Policy is reviewed annually. Independently of Mr AN's complaint, ANZ recently reviewed its Background Checks Policy, including the section on criminal record checks. ANZ has always taken the age of a conviction into consideration. However, as a result of the review and relevant to Mr AN's complaint, ANZ now places greater emphasis on the age of a criminal conviction in determining whether an employee or contractor can perform the inherent requirements of a role.

61. In relation to my recommendation that ANZ 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, ANZ stated:

As a result of the review of the Background Checks Policy, ANZ will conduct refresher training with the relevant recruitment decision makers on assessing whether a job applicant with a criminal record can perform the inherent requirements of a particular role.

62. In relation to my recommendation that ANZ provide a formal written apology to Mr AN, ANZ stated:

ANZ respectfully declines to provide a formal written apology to Mr AN for the following reasons:

- Mr AN did not disclose his criminal record when asked to do so during the recruitment process;
- since Mr AN has made his complaint, he has provided conflicting information about the reason he did not disclose his criminal record; and
- ANZ holds its employees and contractors to the highest levels of integrity and honesty. Mr AN had been convicted of armed robbery with violence whilst in company, which is a serious criminal offence. It is ANZ's position that, due to the nature of the offence for which he was convicted, Mr AN could not fulfil the inherent requirements of the role, which included that he act in accordance with ANZ's Code of Conduct and display honesty and integrity.

63. I report accordingly to the Attorney-General.



Gillian Triggs
President
Australian Human Rights Commission

March 2015

-
- 1 *Australian Human Rights Commission Regulations 1989* (Cth) reg 4(a)(iii).
 - 2 *Victoria v Macedonian Teachers' Association of Victoria Inc* (1999) 91 FCR 47.
 - 3 *Criminal Law (Rehabilitation of Offenders) Act 1986* (Qld) s 3(2) states that 'the only convictions in relation to which a rehabilitation period is capable of running are convictions upon which – (a) the offender is not ordered to serve any period in custody; or (b) the offender is ordered to serve a period not exceeding 30 months in custody (including ordered by way of default), whether or not in the event the offender is required to actually serve any part of that period in custody'.
 - 4 *Commonwealth v Bradley* (1999) 95 FCR 218, 235 (Black CJ).
 - 5 *Commonwealth v Hamilton* (2000) 108 FCR 378, 385.
 - 6 International Labour Organisation, *General Survey: Discrimination in the field of employment and occupation*, (1988), ILC, (42nd Session, 1988 Report IV(1)), [86].
 - 7 *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* (Cth) 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).
 - 8 *Qantas Airways v Christie* (1998) 193 CLR 280, 294 [34] (Gaudron J).
 - 9 *X v Commonwealth* (1999) 200 CLR 177, 208 [102] (Gummow and Hayne JJ).
 - 10 *X v Commonwealth* (1999) 200 CLR 177, [43] (McHugh J).
 - 11 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).
 - 12 (1998) 158 ALR 468.
 - 13 (1998) 158 ALR 468, 482.
 - 14 (1999) 95 FCR 218.
 - 15 (1999) 95 FCR 218, 235-236.
 - 16 *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(a).
 - 17 *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(b).
 - 18 *Australian Human Rights Commission Act 1986* (Cth) s 35(2)(c).
 - 19 ANZ Background Checks Policy, section 4.2.
 - 20 Available at https://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf.
 - 21 *On the Record: Guidelines for the Prevention of Discrimination in Employment on the Basis of Criminal Record*, available at https://www.humanrights.gov.au/sites/default/files/content/human_rights/criminalrecord/on_the_record/download/otr_guidelines.pdf, 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

For detailed and up to date information about the
Australian Human Rights Commission visit our website at:
www.humanrights.gov.au

To order more publications from the Australian Human
Rights Commission download a Publication Order Form at:
www.humanrights.gov.au/publications/index.html
or call: (02) 9284 9600 fax: (02) 9284 9611
or email: publications@humanrights.gov.au

