



Australian
Human Rights
Commission

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Mr CG v
.....
State of NSW
.....
(RailCorp NSW)
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[2012] AusHRC 48
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Mr CG v State of New South Wales (Rail Corporation New South Wales)

Report into discrimination in employment
on the basis of criminal record

[2012] AusHRC 48

Australian Human Rights Commission 2012



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Human Rights
Commission**



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Human Rights
Commission**

January 2012

The Hon Nicola Roxon MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

Pursuant to s 31(b)(ii) of the *Australian Human Rights Commission Act 1986* (Cth), I attach my report of an inquiry into the complaint made by Mr CG of discrimination in employment on the basis of criminal record by the Rail Corporation New South Wales.

I have found that the act complained of constitutes discrimination in employment on the basis of criminal record.

By letter dated 16 August 2011 RailCorp provided the following response to my notice of recommendations:

1. RailCorp, with respect, maintains its view that its decision not to offer Mr CG employment was not conduct that amounted to discrimination for the purposes of the *Australian Human Rights Commission Act 1986*.
2. In these circumstances, and also having regard to Mr CG's lack of candour during the employment application process, RailCorp declines to pay compensation to Mr CG.
3. Notwithstanding the above, and as part of RailCorp's ongoing and demonstrated commitment to non discrimination and equal employment opportunity, RailCorp will be undertaking a review of its recruitment procedures with a view to ensuring that persons are not inappropriately excluded from employment with RailCorp on the basis of criminal record.

Yours sincerely

A handwritten signature in black ink, appearing to read 'C Branson'.

Catherine Branson
President
Australian Human Rights Commission

Australian Human Rights Commission

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1 Introduction

1. This is a report setting out the findings of the Australian Human Rights Commission following an inquiry into a complaint of discrimination in employment on the basis of criminal record made to the Commission by Mr CG. The complaint was made against the State of New South Wales, Rail Corporation New South Wales (RailCorp).
2. As a result of the inquiry, the Commission has found that Mr CG was discriminated against on the basis of his criminal record.
3. This inquiry has been undertaken pursuant to s 31(b) of the *Australian Human Rights Commission Act 1986* (Cth) (the AHRC Act).
4. I have directed that the complainant's identity be protected in accordance with s 14(2) of the AHRC Act.

2 Summary

5. Mr CG was convicted of driving with a middle range of prohibited consumption of alcohol in 2001 and driving with a low range of prohibited consumption of alcohol in 2008. Around June 2009 Mr CG applied for a position as Market Analyst with RailCorp. Although Mr CG met all the selection criteria and was the selection panel's preferred candidate he was advised that he was not offered employment on the basis of his criminal record.
6. RailCorp denies that the decision not to offer Mr CG employment as a Market Analyst because of his criminal record constitutes discrimination in employment. RailCorp submits that Mr CG, in light of his criminal record, is unable to perform the inherent requirements of the Market Analyst job. After carefully considering all of the material available to me, I am not satisfied that the exclusion of Mr CG from the job of Market Analyst was based on the inherent requirements of that job. In reaching this conclusion I found the following factors persuasive:
 - It is not suggested that during Mr CG's 8 years of previous employment at RailCorp he behaved in a way that was inconsistent with the inherent requirements of the Market Analyst job.
 - Mr CG's criminal offences had no connection with his employment; they did not occur during work hours and he was not driving as part of any work activity at the time.
 - Mr CG is not required to drive as part of his employment with RailCorp; indeed, it appears that he is not required to engage in any safety critical activity related to the provision of rail transport services.
7. I have recommended that RailCorp pay Mr CG \$7 500 in compensation for hurt, humiliation and distress.

3 Outline of the complaint

8. Mr CG made his complaint to the Commission on 21 December 2009. On 30 March 2010 RailCorp provided a detailed response to Mr CG's complaint.
9. A directions hearing was held on 21 September 2010 at which I requested further information from RailCorp. RailCorp provided further information by way of submissions on 20 October 2010.
10. On 28 January 2011, having formed the tentative view that the act relied on by Mr CG constituted discrimination, the Commission provided RailCorp with a further opportunity to make submissions in relation to the alleged act of discrimination (s 27 and s 33 of the AHRC Act). On 4 March 2011 RailCorp made further written submissions to the Commission.
11. Mr CG provided a written submission to the Commission on 8 May 2011.
12. I consider the following statements about the circumstances which have given rise to the complaint to be uncontentious:
 - Mr CG was employed by RailCorp from 1999–2007 in various roles;
 - from September 2003 to April 2005 Mr CG worked in the Market Analyst role at RailCorp;
 - in or about June 2009 Mr CG applied for a job as a Market Analyst with RailCorp;
 - Mr CG met all essential selection criteria and was the selection panel's recommended candidate for the Market Analyst job;
 - during the recruitment process, Mr CG was asked by RailCorp to provide comments about his criminal record;
 - Mr CG was convicted of driving with a middle range of prohibited consumption of alcohol in 2001 and driving with a low range of prohibited consumption of alcohol in 2008; and
 - on 10 September 2009 RailCorp sent Mr CG an e-mail advising that he was not selected for employment as a Market Analyst with RailCorp because of his criminal record.
13. Mr CG alleges that RailCorp's failure to offer him employment as a Market Analyst because of his criminal record constitutes discrimination in employment on the basis of his criminal record.
14. RailCorp accepts that Mr CG was not offered employment because of his criminal record. RailCorp disputes, however, that its failure to employ him amounts to discrimination. It contends that Mr CG, in light of his criminal record, is unable to perform the inherent requirements of the Market Analyst job.
15. RailCorp describes the inherent requirements of the Market Analyst job as follows:
 - compliance with its Drug and Alcohol Policy;
 - upholding its safety first values; and
 - perform the duties faithfully, diligently, carefully, honestly and with the exercise of skill and good judgment.

4 Conciliation

16. The Commission has endeavoured without success to conciliate a settlement of the complaint.

5 Relevant legal framework

17. Part II, Division 4 of the AHRC Act confers functions on the Commission in relation to equal opportunity in employment in pursuance of Australia's international obligations under the Discrimination (Employment and Occupation) Convention 1958 (ILO 111).
18. ILO 111 prohibits discrimination in employment on the grounds of race, colour, sex, religion, political opinion, national extraction or social origin and other grounds specified by ratifying States.
19. Section 3(1) of the AHRC Act defines discrimination for the purposes of s 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.
20. Australia has declared criminal record as a ground of discrimination for the purposes of the AHRC Act.¹
21. Section 31(b) of the AHRC Act confers on the Commission the following function:
 - (b) to inquire into any act or practice, including any systemic practice, that may constitute discrimination and:
 - (i) where the Commission considers it appropriate to do so—to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and
 - (ii) where the Commission is of the opinion that the act or practice constitutes discrimination, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement—to report to the Minister in relation to the inquiry;...
22. Section 8(6) of the AHRC Act requires that the function of the Commission under s 31(b) be performed by the President.

6 Findings

6.1 Relevant questions to be considered

23. 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.
24. I consider that the failure to offer Mr CG employment was an 'act' within the meaning of s 30(1) of the AHRC Act. I also consider that this act involved an exclusion that was made on the basis of Mr CG's criminal record and that the exclusion had the effect of nullifying or impairing equality of opportunity or treatment in employment. RailCorp does not dispute these findings.
25. The central dispute between the parties is whether that exclusion was based on the inherent requirements of the job in question.

6.2 Relevant legal principles

(a) International jurisprudence

26. As outlined earlier, a distinction, exclusion or preference in respect of a particular job will not amount to 'discrimination' under s 3(1) of the AHRC Act if the distinction etc is based on the inherent requirements of the job. This exception is based, in substance, on article 1(2) of ILO 111. The AHRC Act was 'introduced to be the vehicle by which Australia's obligations under [ILO 111] are implemented'.² For this reason paragraph 3(1)(c) should be construed in accordance with the construction given in international law to article 1(2) of ILO 111.³
27. The Governing Body of the International Labour Organisation (ILO) created a committee known as the Committee of Experts on the Application of Conventions and Recommendations (the Committee of Experts). It is 'orthodox' to rely upon the expressions of opinion of the Committee of Experts for the purposes of interpreting ILO 111.⁴

28. The meaning of article 1(2) was discussed in Chapter 3 of the Committee of Experts' *Special Survey on Equality in Employment and Occupation 1996*:
A qualification may be brought to bear as an inherent requirement without coming into conflict with the principle of equality of opportunity and treatment. In no circumstances, however, may the same qualification be required for an entire sector of activity. Systematic application of requirements involving one or more grounds of discrimination envisaged by Convention 111 is inadmissible; careful examination of each individual case is required.
29. Similarly, in an ILO Commission of Inquiry regarding a complaint made against the Federal Republic of Germany, it was stated:
It needs to be borne in mind that Article 2, para 1, [of the Convention] is an exception clause. It should therefore be interpreted strictly, so as not to result in undue limitation of the protection which the Convention is intended to provide.⁵

(b) Identifying inherent requirements

30. In *Qantas Airways v Christie*,⁶ the High Court considered the meaning of the term 'inherent requirements of the particular position' in s 170DF(2) of the *Industrial Relations Act 1988* (Cth). Brennan CJ stated:
The question whether a requirement is inherent in a position must be answered by reference not only to the terms of the employment contract but also by reference to the function which the employee performs as part of the employer's undertaking and, except where the employer's undertaking is organised on a basis which impermissibly discriminates against the employee, by reference to that organisation.⁷
31. In the same case Gaudron J stated:
It is correct to say, as did Gray J in the Full Court, that an inherent requirement is something that is essential to the position. And certainly, an employer cannot create an inherent requirement for the purposes of s 170DF(2) by stipulating for something that is not essential or, even, by stipulating for qualifications or skills which are disproportionately high when related to the work to be done.⁸
32. Justice Gummow noted that the term 'inherent' suggests 'an essential element of that spoken of rather than something incidental or accidental'.⁹
33. Similarly, in *X v The Commonwealth*,¹⁰ Gummow and Hayne JJ stated that the inherent requirements of employment are those which are 'characteristic or essential requirements of the employment as opposed to those requirements that might be described as peripheral'.¹¹

(c) 'Based on'

34. 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 stereo-typed; 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 stereo-type, 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

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

36. 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 stating:

It is for this reason that I would reject the appellant's argument regarding the expression 'based on' in par (c) of the definition of 'discrimination'. The essence of that argument is that 'based on' requires no more than a logical link, with the result that the exclusion of a category of persons from a particular job will not be discriminatory under the Act if a logical link can be shown between that exclusion and the inherent requirements of the job. In my view, to interpret par (c) in this way would be to defeat the Act's object of promoting equality of opportunity in employment by, in effect, permitting the assessment of persons' suitability for a particular job on grounds other than their individual merit. The nebulousness of notions of 'logic' in this area makes it an inappropriate test for discrimination.¹⁶

37. The Chief Justice further observed:

In my view, the definition adopted by Wilcox J – that is, as requiring a connection that is 'tight' or 'close' – sits easily with the language of par (c) and promotes the objects of the Act by closing a path by which consideration of individual merit may be avoided.¹⁷

38. I also note the decision of the Northern Territory Anti-Discrimination Commission in *Wall v Northern Territory Police*.¹⁸ Northern Territory legislation prohibits discrimination on the basis of 'irrelevant criminal record'. In that decision the complainant, Mr Wall, was convicted for theft when he was 19 years old and sentenced to a six month good behaviour bond. Twenty-five years later, he applied for a position as a police officer with the Northern Territory Police. His application was rejected. One of the arguments raised by the Northern Territory Police was that Mr Wall was unable to meet a 'genuine occupational qualification' of the position that all police recruits maintain the integrity of the Northern Territory Police by being free of any adult criminal conviction. The Anti-Discrimination Tribunal rejected this submission, stating:

The burden is on the employer to identify the inherent requirements of the *particular* position and consider their application to the *specific* employee before the inherent requirements exception may be invoked. There must be a 'tight correlation' between the inherent requirements of the particular job and an individual's criminal record and there must be more than a 'logical link' between the job and a criminal record.

I am not satisfied however that the occupational qualification required of recruits by police is sufficiently 'genuine' to qualify as an exemption under s 35. This is because the Respondent has not demonstrated a 'tight correlation' between the purported inherent integrity requirement and the Complainant's spent criminal record.¹⁹ (original emphasis, references omitted)

39. It further observed:

It is not possible to adequately assess the integrity and honesty, or lack thereof, of a candidate without considering a whole range of factors and characteristics ... – not just criminal history (spent or otherwise).²⁰

(d) Proof

40. The authorities suggest that ordinarily the concept of 'onus of proof' is not directly applicable in administrative proceedings (see particularly *McDonald v Director-General of Social Security* (1984) 6 ALD 6). The position will be otherwise where the legislation being applied by the administrator specifically places an onus on one or other of the parties to establish facts upon which the decision-maker's decision depends.
41. Further, in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Others* (1996) 136 ALR 481, Brennan CJ, Toohey, McHugh and Gummow JJ considered that the use of terms such as 'balance of probabilities' and 'evidence' provides little assistance in the context of administrative decision-making and could be misleading.
42. Nonetheless, in view of the agreed facts in this matter, I can only find in favour of RailCorp if I am satisfied that the exclusion of Mr CG was based on the inherent requirements of the job²¹ and that there is a sufficiently tight connection between the inherent requirements of the job and the exclusion of Mr CG in the circumstances of this case.

(e) Inherent requirements

43. RailCorp submits that the inherent requirements of the Market Analyst position that Mr CG applied for include that:
- the position holder comply with RailCorp's Drug and Alcohol Policy;
 - the position holder uphold RailCorp's safety first values; and

- RailCorp have trust and confidence in the position holder to discharge all of his or her duties faithfully, diligently, carefully, honestly and with the exercise of skill and good judgment – including that RailCorp has trust and confidence that the position holder is willing and able to take personal responsibility for their safe behaviour and that RailCorp has trust and confidence that the position holder will comply with RailCorp’s Drug & Alcohol policy and be drug and alcohol free at work.²²
44. RailCorp, which is constituted under s 4 of the *Transport Administration Act 1988* (NSW), places reliance on s 5 of that Act which states that its principal objectives are:
- a) to deliver safe and reliable railway passenger services in New South Wales in an efficient, effective and financially responsible manner; and
 - b) to ensure that the part of the NSW rail network vested in or owned by RailCorp enables safe and reliable railway passenger and freight services to be provided in an efficient, effective and financially responsible manner.
45. RailCorp submits that:
- RailCorp’s safety first obligations are also enshrined in railway specific safety legislation. For example, under the *Rail Safety Act 2008* (NSW), and as a condition of our accreditation as a rail operator in New South Wales, RailCorp is required to develop, implement, comply with, and periodically review, a comprehensive safety management system that deals with all facets of railway operations.²³
46. RailCorp places reliance on the fact that, after the 2005 Waterfall and Glenbrook train accidents, the Waterfall Special Commission of Inquiry (the Commission of Inquiry) found that RailCorp had a weak and reactive safety culture. Since that inquiry, as RailCorp submits, it has undergone a major transformation of its entire culture so as to prioritise the value of safety.
47. RailCorp refers to the following statements in their Safety Strategic Plan dated August 2007 as evidence of its safety first values:
- Safety has already been elevated as the top priority at all levels of RailCorp.²⁴
 - In a truly successful safety culture every employee, contractor and associate of RailCorp will be a ‘safety ambassador’ and an example to industry and the travelling public at large. Our safety culture will be based on the willing acceptance by all RailCorp employees of personal responsibility for safe behaviours and practices.²⁵
 - We will work with and involve all our employees in creating a strong, risk aware safety culture, from the board to the workplace.²⁶
 - As a fundamental corporate value we aim to put safety first in everything we do.²⁷
48. Based on the above information, I accept that safety is a key priority of RailCorp and that significant effort has been made to create a culture of safety throughout the organisation. I also accept that to successfully implement a safety first culture all employees must take personal responsibility for safe behaviour and practices in their work. I am therefore willing to proceed on the basis that a requirement that a RailCorp employee be willing and able to take personal responsibility for their safe behaviour in their work is an inherent requirement of all jobs at RailCorp.
49. RailCorp submits that its Drug and Alcohol Policy is a product of its commitment to building a safer rail network and the broader safety first culture. The Drug and Alcohol Policy is contained in RailCorp’s Code of Conduct.

50. RailCorp's Drug and Alcohol Policy stipulates that:²⁸
RailCorp is a drug and alcohol free workplace. All employees, consultants and contractors are required to be drug and alcohol free whilst at work.
51. I accept that it is an inherent requirement of the Market Analyst job that the job holder comply with the Drug and Alcohol Policy and be drug and alcohol free whilst at work.
52. I further accept that an inherent requirement of the Market Analyst job is to perform the duties of the job faithfully, diligently, carefully, honestly and with the exercise of skill and good judgment. I am also willing to accept that it is necessary for the employer reasonably to be able to have trust and confidence in the person holding the position.

(f) Was the exclusion based on the inherent requirements of the job?

53. RailCorp took the view that, having regard to the nature of Mr CG's convictions, he was not able to meet the inherent requirements of the Market Analyst job. The submission made by RailCorp states:²⁹
Mr CG's two convictions for drink driving make him an unsuitable applicant for employment with RailCorp for two reasons. Firstly, they call into question whether he will be able to comply with RailCorp's Drug & Alcohol Policy. Secondly, and most importantly, the behaviour underlying the convictions manifests a disregard for accepted and legislated community safety standards that is incompatible with RailCorp's safety first ethos.
54. In accordance with *Bradley*, the issue for consideration is whether there is a tight or close connection between the inherent requirements of the job of Market Analyst as set out above and the exclusion of Mr CG from employment.
55. When giving RailCorp the opportunity to make submissions, I advised it of my tentative view that RailCorp had failed to demonstrate a sufficiently tight correlation between the decision not to offer Mr CG employment and the inherent requirements of the job of Market Analyst.
56. In response RailCorp submitted:
RailCorp respectfully disagrees with this conclusion. We further say the opportunity provided here to respond to the President's view is in part illusory given the limited reasons provided by the President to justify the finding that there was an insufficiently tight correlation and the lack of any exposition around the issue of what would constitute a sufficiently tight correlation.
In this regard, and centrally, it is not clear to RailCorp whether the President:
(a) accepts that there is a connection between the criminal convictions and the inherent requirements of the position, but considers there to be an insufficiently close connection; or whether, alternatively,
(b) is of the view that there is no connection between the criminal convictions and the inherent requirements of the position.³⁰
57. The question before me is not whether there is a connection between the criminal convictions and the inherent requirements of the position. The proper question before me is whether I am satisfied that there is a tight or close connection between the inherent requirements of the job of Market Analyst and the exclusion of Mr CG from employment.

58. RailCorp further submitted:
it is not a matter for the President to substitute her view on whether RailCorp *should* have trust and confidence in Mr CG. The question is simply whether, as an objective matter, RailCorp does, or does not, have the requisite trust and confidence. In this regard we say that RailCorp, in both its words and deeds, has demonstrated that it does not have trust and confidence in Mr CG.³¹
59. As my conclusions regarding the inherent requirements of the position reveal, I reject this submission. It would plainly be inconsistent with the declaration of criminal record as a ground of discrimination for the purposes of the AHRC Act for employers generally to be able to demonstrate that they lack requisite trust and confidence in potential employees simply because they have criminal records. While the absence of a criminal record might be an inherent requirement of some positions with a limited class of employers, I am not satisfied that this position of Market Analyst is such a position or that RailCorp is an employer of this class.
60. In its submissions, RailCorp raised an additional factor that it asserts I should consider when assessing whether there is a tight or close connection:
In our view, the President fails, in addressing the question of sufficiency of connection, to consider the overarching context in which RailCorp made its decision not to offer Mr CG employment. As referred to in paragraphs 22, 25, 27 of our First Submission, Mr CG was refused employment after a competitive selection process in which there was available to RailCorp another qualified and recommended applicant that did not have criminal convictions. This is a factor to which the President rightly and reasonably should have regard in assessing what would constitute a sufficiently close correlation between the convictions and the inherent requirements.³²
61. I acknowledge that the decision to refuse Mr CG employment was made after a competitive selection process undertaken by RailCorp. However, I am of the view that the competitive selection process is not itself directly relevant to whether there is a tight or close connection between the inherent requirements of the job and the exclusion of Mr CG from employment. Mr CG's ability to fulfil the inherent requirements of the Market Analyst job ought to have been assessed according to his individual merit. Accordingly, the presence of another qualified applicant does not bear on an assessment of Mr CG's individual ability to perform the inherent requirements of the position.
62. RailCorp relied solely on Mr CG's criminal record in concluding that he was an unsuitable applicant for employment. It identified no other reason for concluding that it was open to question whether, were he to be employed by RailCorp, he would comply with its Drug & Alcohol policy and uphold its safety first values. It is therefore necessary to examine carefully the nature of that record, the circumstances surrounding the events which gave rise to that record and the nature of the job for which Mr CG applied. It is also appropriate to give consideration to Mr CG's previous employment history with RailCorp. This is because the object of Part II, Division 4 of the AHRC Act is to ensure that, in employment, individuals are judged on their individual merits rather than by reference to stereotypical assumptions based on their criminal records.

(i) *Nature of criminal record*

63. Mr CG's criminal record indicates that he has been convicted of the following offences:
- 26 March 2008 Driving with low range of prohibited consumption of alcohol- fined \$500 and disqualified from driving for 3 months.
 - 10 October 2001 Driving with middle range of prohibited consumption of alcohol- fined \$600 and disqualified from driving for 9 months.
64. In relation to his criminal record, RailCorp state as follows:
- In deciding not to offer Mr CG employment, RailCorp had particular regard to the fact that Mr CG had two DUI offences and the most recent of these offences occurred only about 15 months prior to his application for the Market Analyst position. RailCorp also had regard to the fact that Mr CG was a previous RailCorp employee and, as such, would have been schooled in RailCorp's 'Safety First' ideal.³³

(ii) *Circumstances surrounding offending*

65. In relation to the 2001 offence Mr CG states that he was at his friend's birthday party and that he thought he was within the alcohol limit because he had one drink every hour. After the party he had to drive some of his friends home when he was pulled over by a RBT and informed he was over the limit. Mr CG states that he thought he was truly within his range.
66. In relation to the 2008 offence Mr CG states that since his 2001 offence he tends to always watch his alcohol intake. He states he was caught driving on a low range of alcohol while driving his girlfriend home. Mr CG states that as a result of these incidents he tends not to drink when he goes out.
67. I particularly note that neither of these offences had any apparent connection with Mr CG's employment. They occurred outside of work hours and away from his workplace.

(iii) *Nature of Market Analyst job*

68. RailCorp has provided the position description document for the position of Market Analyst. The document summarises the role of a Market Analyst as follows:
- The Market Analyst provides business and market analysis service [sic] for CountryLink stakeholders and managers in order to assist them with their business forward planning requirements & management responsibilities.
- The role encompasses combining market intelligence with business intelligence to provide meaningful insights to stakeholders about the current and likely future performance of the business based on relevant scenarios.
69. From the position description document it does not appear that a Market Analyst will engage in safety critical work or be involved with the provision of rail services. It does not appear that the position holder would be required to drive a vehicle as part of the Market Analyst role.

(iv) *Previous employment with RailCorp*

70. Mr CG was employed by RailCorp from 1999-2007 in various roles. From September 2003 to April 2005 Mr CG worked in the Market Analyst role at RailCorp.

71. RailCorp makes the following submissions to relation to Mr CG's previous employment by RailCorp.³⁴

RailCorp does not keep records of when individual employees are subjected to random alcohol tests and we are unable to ascertain whether Mr CG was ever tested while working for RailCorp. In any event, merely because Mr CG was not found to have breached the D & A Policy while employed by RailCorp does not mean either that a) he did not breach the policy while so employed or b) that he would not breach the policy if re-employed.

The fact that an employee has not had any adverse safety incidents or has not been found to have breached the D & A Policy is not necessarily a reliable indicator of future conduct. For example, and had the question been asked in February 2008, most observers might have said that given the 6 ½ years since Mr CG's last drink driving conviction he was unlikely to re-offend. He did of course re-offend in March 2008.

RailCorp was strongly criticised for its reactive safety culture by Waterfall Commissioner McInerney. In response, RailCorp has put in place measures designed to effect an entire transformation of this culture.

That Mr CG previously discharged the duties of other positions in RailCorp without reported safety incidents does not, in RailCorp's submission, lead to a conclusion that he can be trusted to uphold and be an agent of RailCorp's new 'Safety First' culture. In forming a view about whether Mr CG can be so trusted we say that we are entitled to take into account Mr CG's disregard for legislated safety standards, as manifested in his criminal behaviour.

72. In summary, RailCorp is of the view that Mr CG's compliance with the Drug and Alcohol Policy when he was previously employed by RailCorp cannot be definitively established and, even if it can be, RailCorp does not accord any weight to his previous compliance.

7 Conclusion

73. I commend RailCorp for its commitment to implementing the recommendations of the Commission of Inquiry Report. It would appear that following the tragic Glenbrook and Waterfall rail accidents RailCorp has undergone a significant transformation to create a culture of safety throughout the organisation in order to deliver safe and reliable railway passenger services.
74. In its submissions RailCorp argued:
- The President gives insufficient weight to the nature of criminal offending at paragraphs 53 to 55 and at paragraph 66 of the Tentative View. We suggest the President's comments might be seen as downplaying or minimising the seriousness of Mr CG's criminal conduct. This would be unfortunate given that there remains a view in some parts of the community that drink driving is only really criminal conduct if you are caught.
- The President also downplays, in our view, the connection between the criminal offending and the inherent requirements. In this regard, the President particularly notes that the criminal offending occurred outside of the workplace. RailCorp says that this is not to the point and that RailCorp is entitled to, and does consider, the criminal conduct to be a cogent manifestation of Mr CG's attitude to mandated alcohol limits and legislated safety standards.³⁵
75. I am conscious of the serious nature of drink-driving and the devastating effects this behaviour can have on the community. However, the purpose of this inquiry is not to assess the gravity of the offences of which Mr CG has been convicted. The purpose of this inquiry is to determine whether Mr CG was discriminated against in employment on the basis of his criminal record.
76. As noted above, RailCorp has submitted that Mr CG's exclusion from employment was based on his inability to perform the inherent requirements of the job for which he applied.
77. My conclusions with respect to the inherent requirements of the position for which Mr CG applied are set out in [48], [51] and [52] above. I am not willing to conclude that the mere fact of having two convictions within the preceding period of eight years is necessarily inconsistent with these inherent requirements.
78. I note that Mr CG was previously employed by RailCorp for eight years. Nothing before me suggests that during this period Mr CG behaved in a way that was inconsistent with RailCorp's Drug and Alcohol Policy or the safety first values. Nothing before me suggests that Mr CG has ever been under the influence of alcohol whilst in employment. Furthermore, nothing before me suggests that Mr CG failed to perform his duties faithfully, diligently, carefully, honestly and with the exercise of skill and good judgment. The drink-driving convictions aside, RailCorp has not identified anything that calls into question Mr CG's ability to comply with its Drug and Alcohol Policy or that suggests that he shows a disregard for accepted and legislated community safety standards. Nor has it been suggested that RailCorp did not have trust and confidence in Mr CG's ability to perform his duties during his eight years of employment.

79. The following factors regarding Mr CG's drink-driving offences are, in my view, relevant to my consideration of whether the decision to exclude Mr CG was based on the inherent requirements of the Market Analyst role:
- the offences had no connection with Mr CG's employment; they did not occur during work hours and he was not driving as part of any work activity at the time.
 - the most recent of the offences was driving with a low range of prohibited consumption of alcohol and the relatively short period of suspension (3 months) expired one year before Mr CG applied for the Market Analyst job. It seems to me to be harsh in the circumstances to conclude, as RailCorp appears to have done, that this conviction, which came nearly 6.5 years after the earlier conviction, represents more than a one-off error of judgment from which Mr CG is likely, as he claims, to have learnt a lesson.
 - were it not for the more recent of the offences, the first offence would be irrelevant for present purposes because of its age.
80. Finally, I note that Mr CG is not required to drive as part of his employment with RailCorp. In fact, it appears that he is not required to engage in any safety critical activity related to the provision of rail transport services.
81. For the above reasons I am not satisfied that there is a sufficiently tight correlation between the inherent requirements of the job of Market Analyst and the exclusion of Mr CG on the basis of his two drink-driving convictions.

8 Failure to disclose criminal record

82. RailCorp states that Mr CG did not disclose his 2001 conviction in his application for the position of Market Analyst (Mr CG only disclosed his 2008 conviction). RailCorp submits that this lack of candour would, of itself, arguably disentitle him for any claim to the position.
83. I accept that an inherent requirement of most jobs is honesty and trustworthiness, and the failure to make a relevant disclosure may demonstrate dishonesty. The Commission may decline a complaint of the present kind if it finds that the act of the employer was based on dishonesty only, not on the criminal record.
84. However, from the information before the Commission, it appears that the decision not to offer Mr CG employment was based on his criminal record and not because of dishonesty in failing to disclose the 2001 conviction. The possibility that Mr CG *could* have been denied the position because he failed to disclose the 2001 conviction is irrelevant. What is relevant is that RailCorp did not offer Mr CG employment because he had been convicted of two drink-driving offences.

9 Power to make recommendations

85. 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.³⁶ The Commission may include in the notice any recommendation for preventing a repetition of the act or a continuation of the practice.³⁷
86. 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.³⁸
87. Mr CG has requested that I make the following recommendations:
- Railcorp should practice (sic) their own policies which are already in place instead of just advertising that they are an employer which offers Equal Employment Opportunities (EEO). Make sure that there is clear communications amongst their own HR departments to prevent such cases of discrimination to occur again in [the] future.
 - Financial compensation for the loss of money, time, as well as injury to feelings and injury to self-confidence/esteem in applying for other positions to the amount of \$30,828.81.

9.1 Policy

88. I recommend that RailCorp ensure that its human resources and management staff involved in employment decisions undertake anti-discrimination training to prevent discrimination on the basis of criminal record occurring again.

9.2 Compensation

89. I am of the view that compensation should be paid to Mr CG for loss and damage suffered. I consider that compensation in the sum of \$7 500 is appropriate. I therefore recommend payment to him of \$7 500. In assessing the sum recommended, I have taken into account the matters discussed below.
90. 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.³⁹ I am of the view that this is the appropriate approach to take in the present matter. For this reason, so far as is possible by a payment of compensation, the object should be to place the injured party in the same position as if the wrong had not occurred.⁴⁰
91. In relation to any loss or harm suffered Mr CG submitted:
- I have been affected by the outcome of this whole event as I have now been neglected a chance to enter back into employment with RailCorp and I am somewhat affected mentally as I now feel that I should not apply for any other roles within RailCorp (as per the emails no longer suggesting that I should seek any further employment opportunities with RailCorp) and for that matter, I feel that I should probably not apply for any other roles within the public service at all.

I feel that I have lost the opportunity at entering a job which gives me a higher salary than I am currently earning and know that I would be entirely competent and proficient in performing as I have previously performed the role for CountryLink/RailCorp before.

I have lost a bit of confidence in applying for work as I now feel that this criminal record will forever loom in the back of my mind and make me wonder whether this in fact should affect [sic] my chances in applying for other roles, not just for RailCorp but for any other workplace.

I also feel that I have missed the opportunity to enter back into a workplace with which I am familiar with and had dedicated 8 years of my career with, and am familiar with a great deal of the employees of this company I'd also made a lot of leway [sic] in order for myself to go to and attend all these different hiring tests and interviews for RailCorp and in the process have had to make up time at work and take days in annual leave etc.⁴¹

92. RailCorp submits that it is not appropriate to recommend compensation because of Mr CG's lack of honesty when he failed to disclose his 2001 conviction in his application for the position of Market Analyst:

Where Mr CG has not come to the Commission with clean hands, and where the President seems to accept that this lack of honesty would have entitled RailCorp to deny him the position without having regard to his criminal convictions, the President will not consider it appropriate to recommend the payment of compensation to Mr CG.⁴²

(a) Hurt, humiliation and distress

93. Compensation for Mr CG'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.⁴³

94. I am satisfied that Mr CG suffered hurt, humiliation and loss of self-confidence as a result of being discriminated against on the basis of his criminal record. I am not willing to treat his failure to disclose his 2001 conviction as a basis for refusing or limiting compensation otherwise payable to him. I do not regard Mr CG's conduct as analogous to contributory negligence nor do I believe that the equitable principle of 'clean hands' has any relevant application. No other principle has been identified as providing support for RailCorp's submission in this regard. I regard payment to Mr CG of a sum of \$7 500 as appropriate compensation for hurt, humiliation and loss of self-confidence.

(b) Loss of earnings

95. Mr CG seeks compensation for economic loss for the period September 2009 to May 2011. Mr CG seeks the difference in salary between the Market Analyst job at RailCorp and his current position.
96. I note that Mr CG has not been out of employment since he was refused employment at RailCorp, nor have I been provided with any evidence that Mr CG applied for roles at the same level as the Market Analyst job at RailCorp. Accordingly, I do not recommend that any compensation for economic loss be paid to him.

10 RailCorp's response to the Recommendations

97. By letter 28 July 2011, RailCorp was requested to advise the Commission by 12 August 2011 whether it had taken or is taking any action as a result of my findings and recommendations and, if so, the nature of that action.
98. By letter dated 16 August 2011 RailCorp provided the following response to my notice of recommendations:
1. RailCorp, with respect, maintains its view that its decision not to offer Mr CG employment was not conduct that amounted to discrimination for the purposes of the *Australian Human Rights Commission Act 1986*.
 2. In these circumstances, and also having regard to Mr CG's lack of candour during the employment application process, RailCorp declines to pay compensation to Mr CG.
 3. Notwithstanding the above, and as part of RailCorp's ongoing and demonstrated commitment to non discrimination and equal employment opportunity, RailCorp will be undertaking a review of its recruitment procedures with a view to ensuring that persons are not inappropriately excluded from employment with RailCorp on the basis of criminal record.
99. I report accordingly to the Attorney-General.



Catherine Branson
President
Australian Human Rights Commission
January 2012

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- 1 *Australian Human Rights Commission Regulations 1989* (Cth), reg 4(a)(iii).
 - 1 *Commonwealth v Bradley* (1999) 95 FCR 218 at 235 [35] (Black CJ).
 - 3 *Commonwealth v Human Rights & Equal Opportunity Commission and Hamilton* (2000) 180 ALR 635, 642 [31] and following.
 - 4 *Ibid*, 644 [36].
 - 5 (1987) 70 ILO Official Bulletin, Ser B, Supp 1.
 - 6 (1998) 193 CLR 280.
 - 7 *Qantas Airways v Christie* (1998) 193 CLR 280, 284.
 - 8 *Ibid*, 295.
 - 9 *Ibid*, 318.
 - 10 (1999) 200 CLR 177.
 - 11 *Ibid*, 208.
 - 12 (1998) 158 ALR 468.
 - 13 *Ibid*, 482.
 - 14 *Commonwealth v Bradley* (1999) 95 FCR 218 at 235 [35] (Black CJ).
 - 15 *Ibid*, 235 [36].
 - 16 *Ibid*, 235-6 [37].
 - 17 *Ibid*, 237 [40].
 - 18 Unreported, Northern Territory Anti-Discrimination Commission, Commissioner Fitzgerald, 22 April 2005.
 - 19 *Ibid* [5.3.5].
 - 20 *Ibid* [5.3.8].
 - 21 Above n 3, [61].
 - 22 Letter from RailCorp to President Catherine Branson dated 4 March 2011, p 2.
 - 23 Letter from RailCorp to President Catherine Branson dated 20 October 2010, p 2.
 - 24 RailCorp's Safety Strategic Plan 2005-2010, (3rd version dated August 2007), p 2.
 - 25 *Ibid*, p 5.
 - 26 *Ibid*, p 21.
 - 27 *Ibid*, p 22.
 - 28 RailCorp Policy: Drug and Alcohol, 1 May 2006, p 2.
 - 29 Letter from RailCorp to Jodie Ball dated 30 March 2010, p 3.
 - 30 Letter from RailCorp to President Catherine Branson dated 4 March 2011, p 3.
 - 31 *Ibid*, p 5.
 - 32 *Ibid*, p 3.
 - 33 Letter from RailCorp to President Catherine Branson dated 20 October 2010.
 - 34 *Ibid*, p 9.
 - 35 Letter from RailCorp to President Catherine Branson dated 4 March 2011, p 5.
 - 36 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(a).
 - 37 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(b).
 - 38 *Australian Human Rights Commission Act 1986* (Cth), s 35(2)(c).
 - 39 *Peacock v Commonwealth* (2000) 104 FCR 464, 483 (Wilcox J) [55].
 - 40 See *Hall v A & A Sheiban Pty Limited* (1989) 20 FCR 217, 239 (Lockhart J).
 - 41 Original complaint made by Mr CG to the Australian Human Rights Commission dated 21 December 2009.
 - 42 Above n35, p 6.
 - 43 *Sharman v Evans* (1977) 138 CLR 563, 589 (Gibbs and Stephen JJ).

Further Information

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