

Pre-employment criminal records checks - reasons for employers to tread carefully

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A recent finding in March 2013 by the Australian Human Rights Commission (**AHRC**) that an employer discriminated against a job applicant by failing to offer him employment as a market analyst because of previous drink-driving convictions highlights the need for caution when carrying out pre-employment criminal record checks on prospective employees.

Discrimination on the grounds of criminal record - is it unlawful?

Australia-wide Federal legislation recognises that discrimination occurs where a prospective employee has been denied employment on the ground of their criminal conviction if the nature of the conviction does not affect the candidate's ability to perform the inherent requirements of the job. Unusually, however, the legislation does not go as far as making that discrimination unlawful. Yes, as odd as it sounds!

Consequently, although the **AHRC** can investigate alleged acts of criminal record discrimination, it does not have the power to award compensation or to 'punish' the offending employer. For this reason the legislation is sometimes regarded as a toothless tiger. In the above case, the **AHRC** recommended that the employer pay the job applicant \$7500 for hurt, humiliation and loss of confidence. In another case it recommended compensation of \$35,000. In both cases the employers refused to pay, maintaining their position that they had not discriminated against the candidates and this was an end to the matter.

However, employers would be unwise to ignore the issue of discrimination on the grounds of criminal record. Approximately a quarter of all complaints to the AHRC are about criminal record discrimination and although the AHRC cannot enforce fines or compensation, it is empowered to make findings that discrimination has occurred and to prepare a report about the matter for the Attorney General, to be tabled in Parliament. Clearly this may lead to negative publicity for the employer in addition to the time and expense involved in participating in AHRC inquiries.

Just to confuse matters, Tasmania and the Northern Territory have passed specific state/territory legislation making criminal record discrimination there unlawful and be aware that more stringent rules apply to spent convictions throughout Australia.

Cross border issues - visa refusal

In addition to the discrimination issue, pre-employment criminal records checks revealing a criminal record can also cause particular obstacles for an employer seeking to engage a candidate from overseas. Applicants may be denied entry into Australia where they do not pass the 'character' test, particularly if they have a conviction for an offence resulting in a custodial sentence of one year or more. Businesses wishing to employ such candidates may be forced to consider more unconventional approaches to employment such as the employee providing his services from an overseas office.

What can employers do?

- Employers should consider making offers of employment contingent upon a criminal records check satisfactory to the employer.
- Employers should avoid a 'zero tolerance' approach to criminal records in the recruitment process. Instead, employers should consider the nature of the conviction and its likely impact on a candidate's ability to perform the role on a case by case basis.
- Often it will be prudent for an employer to explain why a candidate has been unsuccessful and how it regards the criminal conviction as relevant to his/her ability to perform the role. This may deter the applicant from lodging claims of criminal record discrimination (or even discrimination on other grounds) in the AHRC.

Did you know? ...

Following a Senate Inquiry, the proposed consolidation of the five commonwealth discrimination laws into one Act, reported in the February edition of Workplace View, has been dropped. The government acknowledged that more work needed to be done to ensure any changes made through a consolidation of the laws found the right balance between freedom of speech and protection from discrimination.



CLIENT NOTICEBOARD

Client Corner



Kerry Burke
HR General Manager
Barmingo

What occupation would you have taken up if you had not done your current job?

I wanted to be an archeologist since I was very young. I still hope one day to participate on a dig as a volunteer.

What has been your best professional moment?

I developed and implemented a training program which turned out to hit the sweet spot for the company but more importantly when we held a celebration for all employees who successfully completed the program. The pride and sense of achievement on the faces of the employees (most of whom had not even completed primary school education) and their families is something I will never forget.

As business becomes ever more global, what employee issues are becoming increasingly relevant in your industry?

As business becomes more globally focused and located, the employee issues are becoming more community/family focused and how we can support employees balance these competing challenges.

What do you do for fun and at the weekends?

When I can I love to either go camping or spend time at an old shack we have outside Augusta.

What are two rules you try to live by?

Not take myself seriously and to constantly challenge myself.

Employer Reminder

If you were to find yourself defending a claim in the Federal Magistrates Court of Australia, please note that it has now been renamed the Federal Circuit Court of Australia. Along with the name change, Federal Magistrates have become Judges. In terms of practice and procedure the only change of relevance will be the way in which judicial officers are now addressed. This should be 'Your Honour' in the court room and 'Dear Judge X' in written correspondence.

The changes have been made to more accurately reflect the growing significance of the Court and its work in regional and rural areas.

Legislation update

Legislative instrument	Stage of legislation	Key proposed change
Fair Work Amendment Bill 2013	Before the House Standing Committee on Education and Employment. Submissions have closed.	<p>As the second group of changes to the Fair Work Act 2009 following the review of the Act in 2012 and the bullying report (We Just Want it to Stop), the Bill seeks to:</p> <ul style="list-style-type: none">• introduce new family friendly arrangements including the expanding access to the right to request flexible work arrangements for more groups of employees, more flexible and longer unpaid concurrent parental leave and safe job transfers for pregnant employees;• amend union right of entry to hold discussions to restrict unlimited visits, allow meetings to be held in a place agreed with the occupier and if no agreement is reached then the lunch room and new powers for the FWC to deal with disputes in relation to right of entry;• change the modern awards objective to protect penalty rates in modern awards;• require consultation clauses in both awards and agreements to include when the employer proposes changes to rosters or working hours; and• implement an anti-bullying jurisdiction of the Fair Work Commission (FWC).

Events

Squire Sanders 2013 Australian Labour & Employment Breakfast Series:

- **19 June** – Unwell Employees
- **21 August** – Executive Remuneration and Restrictive Covenants
- **23 October** – Redundancy Refresher

Squire Sanders Global Webinars*:

- **16 May 2013** – Confidentiality & Restrictive Covenants Around the Globe - Featured Countries: Poland, Czech Republic & Slovakia
- **22 May 2013** – Spotlight on Key Labour and Employment Issues - Featured Country: Germany

External events:

- **30 August** – Employment Law Fundamentals 2013; Rydges Hotel, Perth

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