

Finance and Public Administration Legislation Committee
**Inquiry into the Public Service Amendment (Payments in Special
Circumstances) Bill 2011**

Submission by Mr Barry Edward Crush

21 July 2011

Summary

In 1988 I was the Master and Chief Engineer of the Federal Department of Transport and Communications lighthouse support vessel *MV Candela*, a trading vessel, in survey for all South Australian waters.

On 27 August 1988, whilst on an itinerary and supply run for the Spencer Gulf region, the *Candela* was caught in a gale which lasted four days. The ship was battered by 35 foot waves and 70 knot winds.

Whilst desperately trying to secure equipment on the deck to stop the boat from potentially capsizing, I fell 10 metres to, and down the stepped deck.

Despite the fact that I had severely injured my back, neck, left and right ankle, hips, left knee, left arm and elbow, broken ribs, as well as suffering massive soft tissue damage to the whole of my body, I was forced to remain on the vessel for another four days while the gale continued to rage.

I had no option but to remain on board and continue the itinerary when the weather abated, as there was no other person in Australia qualified and available to master the Vessel.

I berthed the Vessel at Port Pirie, 14:00 hrs, Saturday 03 September, 1988.

At 15:15 hrs, Saturday, 3 September, 1988, I was admitted to the Port Pirie Hospital where I was seen by a locum doctor.

My left leg was incorrectly x-rayed and I was provided with minimal diagnosis and treatment.

I was told to rest as much as possible and to take Panadol to relieve the pain, and to proceed to Adelaide as soon as possible for further treatment.

I told the doctor that I was the only person qualified to return the Vessel to Adelaide, and that I would comply with his treatment plan.

At 13:30 hrs, 06 September, 1988, I arrived at the *Candela's* Marina, North Haven, South Australia, where I berthed the Vessel, having completed the itinerary.

Prior to the accident I was in peak physical condition, a requirement of my employment as master or captain.

In early 1989, and after many medical procedures and operations, the treating orthopaedic surgeon, in an initial 8 page written report, and many subsequent reports to Comcare, advised Comcare that he had diagnosed me as having a 90% whole of body disability.

These injuries and disabilities were clearly noted on my Comcare file for all to see in early 1989.

On 02 November, 1988, the Staff Clerk, of the Federal Department of Transport and Communications, my employer, notified Comcare in writing of my employment title, Boat Master, *MV Candela*, and my correct Normal Weekly Earnings, (NWE) including sea-going allowances.

On the same day, my acting case manager, a Federal Department of Transport and Communications employee, provided Comcare with my correct Normal Weekly Earnings, \$1028.19 per week, and my title, Boat Master, *MV Candela*.

Both of these documents were received and date stamped by Comcare on 03 November 1988.

I had been made aware of these file notes by my employer.

Comcare had all the relevant and correct information of me, that is, my medical condition and pay scale, on their file, no later than early 1989, but refused to look at my file for 13 years, despite me writing and phoning them weekly, until the intervention of my solicitor Mr Peter Allen, in 2001.

During this 13 year period, Comcare were paying me a weekly salary of between one third and one half of my Normal Weekly Entitlements.

From the 24 February, 1987, through to the 19 April, 1988, the Federal Department of Transport and Communications had provided inter-departmental documents to the Navigational Aids sections of the Commonwealth, declaring the *MV Candela* to be an unsafe workplace, and that steps were being taken to provide a replacement Vessel which would be more suited to the tasks expected, and the waters the Vessel was required to navigate and work in.

In 1990 I again advised Comcare in writing that my sea going allowances were not being paid to me, and that this was the precise error in my NWE.

Comcare did nothing.

Comcare continually told me, that they were either too understaffed, or too under-resourced to investigate my claim, but advised me to keep writing.

One of my case managers from Comcare, also advised me that if I continued to question my pay-scale, and if Comcare's investigations discovered I was being over-paid, Comcare would reduce my entitlements by the appropriate amount, so I had better be very careful.

My requests continued in writing until 1999, and still Comcare did nothing.

In 1999 I again applied to Comcare in writing and resent a large bundle of documents containing my Masters qualifications, areas of operations, and other details.

Comcare ignored these documents initially, but then argued that contrary to the documents, I had held the position of Coxswain, (a person of the lowest rank). In fact, the standing orders required the MV Candela to be manned with a minimum crew of a suitably qualified Master/Chief Engineer, and Mate.

After I made further requests in writing, Comcare again looked at the documents and recognised my Master/Engineer qualifications, but to my surprise, then insisted I was only able to sail from one Port, which was clearly untenable. Had either of these two assumptions been correct, I could not have legally performed my duties.

In fact I was one of the few Masters/Engineers in South Australia with the Qualifications to navigate every square inch of South Australian waters.

I was qualified, in all weathers, day or night, to enter all Ports, primary and secondary, within these waters, including the waters surrounding all island based light houses, and all navigational structures at sea, without having to seek prior dispensation from the South Australian Department of Marine and Harbours before each voyage.

This knowledge was acquired through years of practical experience in these waters, and the tertiary qualification, by written and oral examination, from the South Australian Department of Marine and Harbours.

The Candela was in Federal Government survey for the carriage of 10 persons, and I was solely responsible for the lives and safety of those 10 persons whilst they were on board, and at sea, in all weather.

Comcare misplaced or lost this bundle of documents on five separate occasions.

I resent this same bundle of documents to Comcare a further five times by registered mail before I received a reply.

This process spanned a further 19 months without reply, until the intervention of my solicitor, Mr Peter Allen, which then started to produce a positive result in 2001.

I am disturbed and disappointed with Comcare's failure and unwillingness to look at my file for 13 years, and the documents which contained all the information they required, which clearly established my correct pay-scale in 1989.

I am also disturbed at Comcare's failure to heed written advice from the Federal Department of Transport and Communications in 1988, advising them that a large component of my salary was in the form of marine allowances, and were on the Comcare file.

Response to Terms of Reference

1. The lack of proper compensation scheme for claimants who have been disadvantaged as a result of administrative errors by Government agencies not included under the Scheme for Compensation for Detriment caused by Defective Administration (CDDA).

I believe that in my particular case, very serious administrative errors were made by Comcare, for which I am currently unable to seek appropriate compensation, due to the fact that Comcare is not included under the Scheme for Compensation for Detriment caused by Defective Administration.

Examples of Comcare's administrative errors are discussed in greater detail in my responses that follow, however by way of introduction I provide the following:

- Comcare incorrectly calculated my Normal Weekly Earnings (NWE) for over 13 years.
- My Comcare file was 'misplaced' or 'lost', on five separate occasions.
- Incorrect information was provided by Comcare, to Special Claims and Land Policy Branch, Department of Finance and Administration, 24 December 2003.

Comcare's administrative errors were so gross and inexcusable, that to have no recourse to appropriate compensation caused me extreme financial and personal hardship which will affect me for the remainder of my life.

1. The recommendations of the Commonwealth Ombudsman in the Ombudsman's Report No 4 of 2010 in relation to discretionary payments of compensation.

As you are aware, the Commonwealth Ombudsman's Report No 4 of 2010 dealt specifically with my complaint against Comcare. The overriding theme of this report is reflected in **Recommendation 1**:

I recommend that Comcare and Finance develop a proposal for establishing a scheme, similar to the CDDA scheme, whereby people adversely affected by poor administration of the SRC Act can seek compensation.

In order to achieve this particular task, Comcare were advised that a direction of the Deputy Prime Minister would be required.

It is my understanding that Comcare are yet to prepare a submission seeking the direction of the Deputy Prime Minister, despite the elapse of 16 months since this recommendation was made.

I believe that in order to achieve a just outcome in terms of compensation, a Comcare compensation scheme should reflect the objectives of the CDDA scheme. In particular the Comcare compensation scheme should restore a claimant to the financial position they would have been in, but for the defective administration.

The Ombudsman has not referred to the fact that their investigators were misled by information provided by Commonwealth Public Servants.

That aspect is made clear in apologies received subsequently.

My health and financial circumstances continue to suffer immensely while the establishment of the scheme continues to be delayed.

For example, I am unable to afford heating in my home and as a consequence I was admitted to hospital on 26 June 2011 with pneumonia.

I was told that should I have been admitted even a few hours later I may not have survived.

Pneumonia however is only one of the health battles I am currently facing.

On 13 April 2006, I was admitted to hospital and underwent a lumbar laminectomy and spinal fusion of my lower back.

It was discovered with the new technology then at hand, that my lower back had been broken in the accident.

In August 1997, as a result of my accident, my femoral to ileac arteries were stented under the public health scheme at the Royal Adelaide Hospital, because Comcare refused to accept Specialist advice that this injury was part of my compensable injuries.

Upon receipt of further medical evidence, Comcare accepted liability for this injury.

But it was too late; the operation had already been completed as a training project for the medical students. I am saying here that I may have received more comprehensive treatment had I been admitted as a private patient, to a private hospital, with a private surgeon, which was my legal right.

On 03 August 2010, I was re-admitted to the Royal Adelaide Hospital by ambulance, due to a complete blockage of these stents, stopping the flow of blood to both legs, which were becoming gangrenous.

Again, because Comcare refused to accept liability, I was admitted as a public patient.

I was given the option of amputation of both legs at the groin or re-stenting of the original stents.

I chose re-stenting.

The operation led to complications, in that I developed blood clots on both lungs, and both lungs collapsed.

I was re-hospitalised to dissolve these clots and to re-inflate my lungs.

Comcare refused to allow any of these procedures as being part of my compensable injury, until the intervention of my solicitor Mr. Peter Allen, where upon Comcare found the original determination and approved my claim.

This again refers to Comcare's inability to refer to claim documents when making determinations.

But once again, Comcare's approval came too late, and the operation had already been performed publicly. I believe I would have received superior treatment with fewer complications, had I been cared for privately, which was my legal right.

Had Comcare looked at my file as I had repeatedly requested, acted promptly and in good faith in 1997 and 2010, I would have been admitted as a private patient, and it is likely these complications may not have arisen.

These same failures by Comcare in relation to my medical and rehabilitation process has continued in this way for 23 years now, and it has disadvantaged me physically and psychologically, in more ways than can ever be expressed.

I have been advised by my treating doctors that any medical procedures I now receive are just catch up treatment and are not permanent fixes. These procedures will be on-going.

It is now almost 12 months since the re-stenting, and not only have I not yet received reimbursement from Comcare for my expenses.

If the re-stenting is not successful, I will have the option of a by-pass of the femoral to ileac arteries, which the vascular surgeons are reluctant to perform, as the risks are very high, and that operation is not without complications.

The other option appears to be amputation of my legs.

This operation is not without complications either.

Comcare have continued to make the process of claiming for my travel and medical expenses an extremely arduous task.

Each time I require a procedure or an operation, my doctors and I are required to prove that it is part of my compensable injury, something which was established in 1989.

I am already unable to afford the out of pocket expenses associated with the treatment I require.

I strongly believe that if a suitable compensation scheme had been available from the beginning, my health and financial circumstances would not be suffering to the extent they are now.

In relation to **Recommendation 2** which states:

I recommend that Comcare should develop a procedure to assist any person to make a written request for reconsideration if they make a request that is not in writing or indicate a wish to query a payment.

It should be noted that the Ombudsman was in error in his report, in that he asserts that I had only ever approached Comcare verbally in relation to challenging my payments. I had clearly written to Comcare specifically requesting a review and reconsideration of my entitlements.

The Ombudsman has since apologised to me in writing for this error.

Although I agree with the intention of Recommendation 2, I fear that its implementation will do little to prevent similar mishandling of claims in the future.

Between 1989 and 1999 I provided written and phone requests for Comcare to review my payments at least 50 times. It is my contention that closer attention needs to be paid to Comcare's internal handling of written information provided to them by claimants.

1. The losses caused to claimants to seek compensation if the Government agency in question is not covered by the CDDA scheme.

I experienced losses on a financial, as well as an intimately personal level, due to my inability to seek compensation through the CDDA scheme and the unavailability of a suitable compensation scheme.

Financial losses

i) Interest due

Comcare retained the services of actuaries Taylor Fry to calculate the interest forgone due to the delay in making two back-payments to me, which eventually occurred on 16 August 2001 and 17 July 2003.

Taylor Fry concluded that, using the 3 year banks' term deposit rates, of between 3% and 4% (as published by the Reserve Bank of Australia), the interest owed to me as at 31 January 2011 amounted to \$233,750.

There are three important points in relation to this figure which I wish to discuss.

Firstly I would like to point out that between 1988 and 2001, I was paying interest at the rate of 21.5% at overdraft rates, and 32% at credit card rates.

During the late 1980's and early 1990s the interest rates were above 10% but nearer 15%.

The mean average of my interest rate, as referred to in the Ferrier-Hodgson report of my matter, 08 September 2003, during this time period, was 13.8%.

I was forced to use credit cards only because of Comcare's continuing refusal to review my Normal Weekly earnings.

Prior to this, these credit cards were lying dormant and were there only for emergencies.

I had four freehold properties and no debts, other than a manageable business overdraft.

In other words it was Comcare's maladministration which forced me in to credit card debt.

The second point I wish to raise in relation to the sum arrived at by Taylor Fry is that I would be unable to receive the entire sum of \$233,750 due to the current \$100,000 cap placed on discretionary payments under section 73 of the *Public Service Act 1999*.

And finally, this sum only represents the interest owed to me and does not take into account the other financial losses forced upon me due to the initial underpayment.

ii) Impact on net assets

Comcare calculated that over the course of 13 years I was underpaid by \$296,334.49, with this amount being back paid to me in August 2001 and July 2003. However, almost half of this payment was lost in lump sum tax, with a further third being consumed by legal and accounting fees, as well as loan repayments.

I was left with approximately \$50,000, or one sixth, of my entitlement, as a result of the maladministration.

By being deprived of the benefit of receiving the correct amount of compensation over the course of 13 years I was forced to sell four freehold properties, located at St Morris, Marion Bay and Airlie Beach, which I owned outright.

I strongly refute previous contentions by DOFD, and the then parliamentary secretary for the Minister for DOFA, that I was a “speculative investor” who had “over extended” myself financially.¹

My financial situation was sound prior to my accident in 1988, as demonstrated by the fact that at this time I owned my Marion Bay and St Morris properties outright, and was able to purchase my two Airlie Beach properties outright in 1989.

Had I been able to retain all four properties, it is estimated that my actual net assets would be in excess of \$6 million today.

Personal losses

Comcare did not assist me in obtaining proper medical care and attention or rehabilitation after my injury, meaning I was in continuous and severe pain for years.

After the accident, I spent 3 years in bed without the help of a carer, 2 years in a wheel chair, 2 years on crutches, and 2 years on walking sticks.

I still carry the crutches and walking sticks in the car for times of emergency.

However the physical pain I endured can barely compare with the indignity I suffered scrounging through rubbish bins to feed myself when I was unable to afford food.

Due to my financial circumstances I live a very isolated and marginalised existence.

I have no friends or family near by, my nearest neighbour is 3kms distant, and I am seldom able to phone my children and grandchildren.

¹ Ministerial Briefing to Nick Minchin, 6 July 2004.

The separation from loved ones is a heart breaking experience and impossible for me to put a dollar figure on.

Any parent will tell you that they want to provide their children with the best possible upbringing. I was unable to do so and to this day still feel the shame associated with depriving my children of what should have been theirs.

I did not possess the financial capability to provide my children with a proper education.

I feel responsible for this and live daily with the guilt and shame associated with my perceived shortcomings as a parent.

My parents gave me my grounding in life, which in turn provided me with the tools to become a great achiever, including the strengths to stay with my mother with Comcare for as long as I have, so I also feel a sense of shame and guilt for not having been able to provide for them in their worst hours prior to their deaths.

When my parents died within 7 weeks of each other I was unable to provide them with decent funerals because of my dire financial situation. Again it was a matter of having to go to friends, cap in hand.

I had to borrow money from a relative for their funerals, and as he is now also deceased I am unable to repay him.

This causes me a great deal of regret and guilt.

I have a daughter who is receiving intensive medical treatment, including infusions, and I am unable to spend time with her because my own health will now not allow me to travel the distance she resides from me, as well as the financial implications of this travel.

I feel as though I have been detained in my own country for 23 years.

I have been systematically stripped of all my assets and pride, preventing me from any chance of now returning to a normal life at age approaching 71 years.

It would be unfair of me to draw comparisons, but I know that even criminals in our prisons are afforded a far better standard of living than have I.

They know the length of their sentence. They are fed, clothed, sheltered, and receive a weekly income. They are able to access medical attention during that time.

Rehabilitation services, both medical and educational, are also available to inmates.

I have had none of these luxuries over the past 23 years.

I have not been able to afford three meals a day.

I have only had the limited company of others.

I am financially unable to seek medical attention when it is needed most.

I am wearing the same clothes I wore 23 years ago.

I shower with cold water winter or summer.

I have limited heating and cooling in my home.

I live in a remote area because I do not have the financial means to live elsewhere, and I have been left to live a basic existence, and have done so now for 23 years.

I have been reduced from being a once successful and respected member of the community to now a dreg.

I have lived worse than a street dog in all of this time; and for most of this time, in excruciating agony, in fact animals receive far better treatment

I feel I have been totally de-humanised.

The separation from my family is something I can't describe, as there are just no words.

This matter should have been settled promptly in 1989, at a time when my family would have benefited.

Comcare have not yet settled my permanent impairment claim, now 23 years old.

They have only provided me with an interim payment.

Public Servants and Comcare continue to misrepresent my situation.

It is frustrating to know that government departments can do these things to the very people they were put in power to protect.

1. The limited ability for claimants to seek compensation if the Government agency in question is not covered by the CDDA scheme.

By being unable to claim compensation from Comcare via the CDDA scheme, I was advised to request an Act of Grace payment through the Department of Finance and Deregulation.

However it was determined that an Act of Grace payment was not the appropriate mechanism for resolving claims relating to Comcare's actions.

For 10 years, the Department of Finance and Deregulation, as did the Commonwealth Ombudsman for 3 years, led me to believe that I was eligible for an Act of Grace payment, and that I was eligible for the CDDA scheme, if I could provide them with more information.

The Ombudsman's investigation spanned 5 years.

The thrust of the Department of Finance and Deregulations correspondence to me in all of this time was, provide us with 'New Evidence'.

I would write back with what I thought was new evidence that I thought might not have been considered, and which was clear for all to see on my file, but their return correspondence to me was always, "You have provided no New Evidence".

Heeding Finance's advice, I spent 10 years of my life writing to this department, to Ministers for Finance and Administration, to Parliamentary Secretaries, and Chiefs of Staff, from both political parties, including having personal meetings with these Ministers, and Chiefs of Staff, providing them with a plethora of 'new information'.

Finance eventually advised me by letter, 09 February, 2010, that it was public knowledge that the Act of Grace mechanism did not apply to me.

In this letter I was referred to the government website explaining the scheme, which they advised me as having been made publicly available since 2001.

But Finance had continued to accept my Act of Grace applications for 10 years, building within me a false legitimate expectation.

I would ask, that if it was public knowledge, why did Finance not advise me 10 years earlier that it did not apply to me?

Having been denied access to the CDDA and Act of Grace payment schemes I am left with few options.

I could pursue private legal action against Comcare, and the Department of Finance and Deregulation, however the cost (both financially and emotionally) and my lack of resources, renders that option impractical and unsuitable.

It appears that my last remaining option is to request a discretionary payment limited to \$100,000 through section 73 of the *Public Service Act 1999*. Whilst extremely grateful that this option is available to me, I have serious concerns about the limitations imposed on such a payment.

2. The limitations of discretionary payments in the *Public Service Act 1999*.

Section 73(4) of the *Public Service Act 1999* states that authorisation for a payment cannot be made 'if it would involve, or be likely to involve, a total amount of more than \$100,000'.

I believe the \$100,000 limit imposed on these payments is particularly disadvantageous in my circumstances due to the incredible financial and personal losses I endured as a result of Comcare's administrative errors.

By removing the \$100,000 cap on discretionary payments I believe that myself and others who have been denied compensation through no fault of their own, will finally be able to avail themselves of a mechanism equipped to provide more realistic and individually appropriate compensation.

However I am concerned that even if the cap on payments is removed, claimants will still be liable for any tax incurred as a result of the payment.

The ATO has advised me that they will lump-sum tax me on any compensation, eroding the final amount received by me by up to two thirds.

Centrelink has advised me, that on receipt of what is left of this compensation, they will suspend my aged pension and benefits for two years.

So I will be worse off financially than I am now if I accept what is on offer.

An additional factor of which I am concerned about is the fact that any potential changes to the *Public Service Act 1999* with respect to discretionary payments may not apply retrospectively.

I submit that this is perhaps the greatest potential limitation of all because I would not be able to benefit from changes to the legislation brought about, in part, due to my experience.

To say that I would be disappointed at being ineligible for a discretionary payment of more than \$100,000 under the *Public Service Act 1999* in the future is an understatement of the greatest kind.

It is my hope that through either the cap being removed from the discretionary payment option or through the establishment of Comcare's compensation scheme that I will be awarded compensation reflective of the torment I have endured over the past 23 years.

I do however hold grave concerns about the likelihood of living to see these things occurring.

Conclusion

I thank the Committee for the opportunity to provide you with my submission.

Mine is a story of pain, suffering and helplessness, and being able to share with you my experiences has brought me some relief and hope.

I respectfully request that the Committee fully consider this submission, for even if I do not live to see the changes I desire, it is my hope that others will not have to endure suffering like mine.

Yours faithfully,

Barry Crush

21 July 2011