



Australian Government

Comcare

PUTTING YOU *FIRST*

INQUIRY INTO THE PUBLIC SERVICE AMENDMENT (PAYMENTS IN SPECIAL CIRCUMSTANCES) BILL 2011

SUBMISSION TO THE STANDING COMMITTEE ON FINANCE AND
PUBLIC ADMINISTRATION

BY COMCARE
21 JULY 2011

Contents

| | |
|---|---|
| INTRODUCTION | 2 |
| The lack of proper compensation scheme for claimants who have been disadvantaged as a result of administrative error by Government agencies not included under the CDDA Scheme .. | 3 |
| The recommendations of the Commonwealth Ombudsman in the Ombudsman's Report No 4 of 2010 in relation to discretionary payments of compensation | 4 |
| The losses caused to claimants because of administrative error within Government agencies not covered by the CDDA Scheme | 4 |
| The limited ability for claimants to seek compensation if the Government agency in question is not covered by the CDDA Scheme | 6 |
| The limitations of discretionary payments in the <i>Public Service Act 1999</i> | 6 |
| SUMMARY | 7 |
| ATTACHMENT B | 8 |

INTRODUCTION

Comcare contributes to a safer, fairer, more productive and socially inclusive Australia. The Comcare scheme is a national, integrated work health safety, rehabilitation and compensation system.

Comcare is established under the *Safety, Rehabilitation and Compensation Act 1988* (SRC Act) and has a number of powers and functions conferred under the SRC Act to ensure an early and safe return to work and access to compensation for injured workers.

Comcare administers the Commonwealth workers' compensation scheme for all workers employed by Commonwealth departments and most Commonwealth authorities and the ACT Government, providing safety, rehabilitation and compensation services. Self-insurers, licensed by the Safety, Rehabilitation and Compensation Commission (SRCC), provide the same services to their employees. The system administered by Comcare, and the licensed self-insurers, provides access to compensation for employees who are injured or ill as a result of their employment.

Comcare is a *Commonwealth Authorities and Companies Act 1997* (CAC Act) body. Each CAC Act body is:

- > a statutory authority (called a Commonwealth authority), or a company controlled by the Commonwealth (called a Commonwealth company)
- > established for a public purpose that holds money on its own account
- > in most cases, governed by a board of directors
- > legally financially separate from the Commonwealth
- > subject to a range of directors' duties.

Comcare's funding comes from workers' compensation premiums, annual and special appropriations (from Comcare's portfolio agency—DEEWR), investment income and regulatory contributions from employers.

Comcare's response to the issues being considered by the Standing Committee on Finance and Public Administration (the Committee) are as follows:

THE LACK OF PROPER COMPENSATION SCHEME FOR CLAIMANTS WHO HAVE BEEN DISADVANTAGED AS A RESULT OF ADMINISTRATIVE ERROR BY GOVERNMENT AGENCIES NOT INCLUDED UNDER THE CDDA SCHEME

The lack of a proper compensation scheme for claimants who have been disadvantaged as a result of defective administration by Government agencies not included under the Compensation for Detriment caused by Defective Administration (CDDA) Scheme has recently been recognised in two important reports:

- > Comcare and Department of Finance and Deregulation, Discretionary Payments of Compensation, Commonwealth Ombudsman's Report No 4 of 2010
- > Review of Government Compensation Payments—Senate Legal and Constitutional Affairs References Committee 2010, December 2010.

The Ombudsman observed:

In most situations where a person suffers a quantifiable financial loss arising from the defective administration of an Australian Government agency, they can make a claim for compensation under the CDDA scheme. Finance is responsible for the development of relevant guidelines and the administration of the scheme. Where it is decided that compensation is payable, the agency against which the claim is made is responsible for making payment out of its appropriation. It should be noted that a CDDA payment is available where there is a moral obligation to pay compensation rather than any legal liability arising under the general law. Additional information about the CDDA scheme can be found in a recent Ombudsman report and on the Finance website.

The CDDA scheme applies only to Australian Government agencies established under the *Financial Management and Accountability Act 1997* (FMA Act). Comcare is established as a body corporate under section 74 of the SRC Act. As such, it falls within the definition of a 'Commonwealth authority' under section 7 of the *Commonwealth Authorities and Companies Act 1997* (CAC Act), not under the FMA Act. This means that a claim under the CDDA scheme cannot be made against Comcare because it is a CAC agency.

The report of the Senate Legal and Constitutional Affairs References Committee states:

The committee acknowledges the actions of the Department of Finance and Deregulation in responding to many of the recommendations of the Commonwealth Ombudsman's report into the CDDA scheme, *Putting things right*. The committee considers that the CDDA scheme provides a useful mechanism for addressing harm caused by defective administration; however, from the evidence received, it appears that the CDDA scheme has not 'kept pace' with changes in Commonwealth public administration. In particular, the application of the CDDA scheme to FMA Act agencies only appears to create anomalous outcomes. If a person suffers loss or damage due to defective administration they should be entitled to appropriate restitution, regardless of whether the loss or damage was caused by a FMA Act agency, a CAC Act body or a third party contracted to provide a Commonwealth service.

And then recommends:

that the Department of Finance and Deregulation investigate the extension, in appropriate circumstances, of the Compensation for Detriment caused by Defective Administration

scheme to *Commonwealth Authorities and Corporations Act 1997* agencies and to third party providers performing functions or providing services on behalf of the Commonwealth.

It is Comcare's view that the first question being considered by the Committee has already been well considered, both by the Commonwealth Ombudsman and also the Legal and Constitutional Affairs References Committee.

THE RECOMMENDATIONS OF THE COMMONWEALTH OMBUDSMAN IN THE OMBUDSMAN'S REPORT NO 4 OF 2010 IN RELATION TO DISCRETIONARY PAYMENTS OF COMPENSATION

The recommendation of the Commonwealth Ombudsman relevant to this Inquiry is:

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.

Comcare is strongly committed to getting decisions right the first time. Where there is evidence of defective administration, Comcare is committed to actively seeking to compensate an injured worker for their loss (see **Attachment A**).

Comcare continues to work with Finance and DEEWR to develop a proposal addressing this recommendation of the Commonwealth Ombudsman.

It is Comcare's view that the following plan could be implemented in order to address the Ombudsman recommendation:

Step 1

Amendment to the SRC Act, specifically section 69 of the SRC Act that sets out Comcare's functions. This section should be amended to confer on Comcare an additional function authorising it to provide compensation to claimants for financial detriment caused by defective administration.

Step 2

The Minister for Education, Employment and Workplace Relations issue directions and guidelines to the whole of the Comcare jurisdiction in applying the CDDA requirements.

THE LOSSES CAUSED TO CLAIMANTS BECAUSE OF ADMINISTRATIVE ERROR WITHIN GOVERNMENT AGENCIES NOT COVERED BY THE CDDA SCHEME

To assist the Committee, Comcare has provided short examples of the type of defective administration that can occur in the Comcare claims process:

Example 1:

Comcare commenced paying Ms A weekly workers compensation in 1994. Ms A approached Comcare in 1998 to request redemption of her future entitlement to compensation under the SRC Act. Comcare agreed to Ms A's request and paid her a lump sum in lieu of her future entitlement.

In 2008, Ms A realised that in 1998 she may have not received her full entitlement. Comcare acknowledged that it had made an error in its original calculation. Specifically, Comcare had inadvertently deducted the tax owing on the amount twice.

On detecting the mistake, Comcare paid Ms A the outstanding amount. Ms A approached Comcare to seek an additional payment in recognition that she had not had the benefit of that money for a period of 10 years.

Ms A considered it unreasonable that she should be denied compensation for a loss suffered as a result of Comcare's error in calculating her lump sum entitlement.

Example 2:

During the 1980s, Comcare accepted liability for Mr B's workplace injury. From that time, Mr B received regular compensation payments from Comcare.

In the years that followed, Mr B became concerned that Comcare had not calculated his payments at the correct rate. Although Mr B verbally expressed his concerns to Comcare several times, Comcare did not formally review the rate for 13 years. The review resulted in Comcare identifying that it had not included loading on Mr B's regular payments for the entire period.

In response to the review, Comcare arranged for Mr B to receive the outstanding amount in a lump sum payment. The payment did not include an additional amount for interest or consequential loss.

Mr B asked to receive additional compensation in recognition of the loss of benefit over the period.

Example 3:

Comcare accepted liability for Ms C's claim in 2007. In 2009 Ms C resigned from her job and began receiving reimbursement for medical expenses, as well as incapacity payments, directly from Comcare.

Ms C notified Comcare in 2011 that her banking details had changed and she provided Comcare with her new account details. In response to Ms C's notification, her bank details were changed in relation to the reimbursement of any medical expenses she incurred, but not in relation to her incapacity payments.

As a result of the failure to update the relevant account details for the transfer of Ms C's incapacity payments, her incapacity payments were not transferred to her new account. With the absence of the required funds in her new account, Ms C incurred dishonour (bank) fees.

Ms C asked Comcare to compensate her for the dishonour fees.

Example 4:

Mrs C lodged a claim in 2006 for the death of her husband. Comcare misplaced the claim and did not process it until Mrs C approached Comcare nine months later requesting an update on the progress of her claim.

Subsequent to Mrs C approaching Comcare, Comcare located and processed the claim, liability was accepted and death and funeral benefits were paid. Mrs C approached Comcare to seek an additional payment in recognition that she had not received the benefit of that money for a period of nine months.

Mrs C considered it unreasonable that she should be denied compensation for a loss suffered as a result of Comcare misplacing her claim.

THE LIMITED ABILITY FOR CLAIMANTS TO SEEK COMPENSATION IF THE GOVERNMENT AGENCY IN QUESTION IS NOT COVERED BY THE CDDA SCHEME

Comcare agrees that there is only a limited ability for claimants to seek compensation if the Government agency in question is not covered by the CDDA scheme. Any other options, including section 73 of the *Public Service Act 1999* (PS Act), are not without some limitations, restrictions and risks. It will depend upon the factual circumstances at the time as to what may be applicable and none of those options provide the scope that a CDDA scheme would provide.

There are some practical and legal constraints imposed upon Comcare when considering compensation for defective administration using section 73 of the PS Act. The greatest constraints are the requirement for there to be a nexus with employment, and the amount that can be paid.

The only existing option for payment of interest on the delay of payment of compensation is contained in section 26 of the SRC Act in respect of the payment of permanent impairment. Section 26 of the SRC Act provides that where a compensation payment for a permanent impairment is delayed over 30 days, interest is payable (**Attachment B**). There are some limitations in the use of this provision, for example, this section applies **only** to compensation for permanent impairment and interest is not payable where Comcare has been requested to reconsider the determination or where the matter has been appealed to the Administrative Appeals Tribunal.

Comcare considers that interest is not sufficient to cover the broader set of economic losses that might be covered in a CDDA scheme. Comcare considers that the only way of being able to 'put things right' where defective administration occurs, so that the process is open, accountable and transparent, and applicable to all claims managed under the SRC Act, will involve legislative amendment .

THE LIMITATIONS OF DISCRETIONARY PAYMENTS IN THE *PUBLIC SERVICE ACT 1999*

As noted above, a limitation of discretionary payments under the PS Act is the requirement for there to be a nexus with APS employment.

As noted in the introduction to this paper, Comcare administers claims under the SRC Act for all workers employed by Commonwealth departments and most Commonwealth authorities and the ACT Government, providing safety, rehabilitation and compensation services. Self-insurers, licensed by the Safety, Rehabilitation and Compensation Commission (SRCC), provide the same services to their employees.

Using section 73 of the PS Act as a proxy CDDA in the long term would create an inequity in the treatment of claimants.

In relation to claims administered by Comcare, where defective administration arises, only APS employees will have access to a payment under section 73 of the PS Act. This excludes ACT Government employees and employees of other non-APS statutory authorities.

The use of section 73 of the PS Act does not go any way towards addressing defective administration in relation to claims administered by a self insurer under the SRC Act. It is

Comcare's view that for the purposes of equity and fairness, any CDDA options available to claimants under the SRC Act should be available to all claimants, not just APS employees.

Comcare notes that whether section 73 of the PS Act is used as a proxy CDDA scheme or not, the original purpose of this section, i.e. to compensate for special circumstances that arise connected with Commonwealth employment still remains. Given that the quantum of the maximum payable under this section has not been increased since its inception, it would seem reasonable to review the amount.

SUMMARY

In summary, section 73 of the PS Act is an important section in the context of discretionary government payments; however as a proxy for defective administration under the SRC Act it is imperfect.

Comcare considers;

- > It would be reasonable to review the level of the section 73 cap; and
- > The SRC Act should be amended in order to provide an efficient and effective defective administration scheme that covers administrative errors made in the management of any SRC Act claim.

ATTACHMENT B

Safety, Rehabilitation and Compensation Act 1988

24 Compensation for injuries resulting in permanent impairment

24(1) Where an injury to an employee results in a permanent impairment, Comcare is liable to pay compensation to the employee in respect of the injury.

24(2) For the purpose of determining whether an impairment is permanent, Comcare shall have regard to:

- (a) the duration of the impairment;
- (b) the likelihood of improvement in the employee's condition;
- (c) whether the employee has undertaken all reasonable rehabilitative treatment for the impairment; and
- (d) any other relevant matters.

24(3) Subject to this section, the amount of compensation payable to the employee is such amount, as is assessed by Comcare under subsection (4), being an amount not exceeding the maximum amount at the date of the assessment.

24(4) The amount assessed by Comcare shall be an amount that is the same percentage of the maximum amount as the percentage determined by Comcare under subsection (5).

24(5) Comcare shall determine the degree of permanent impairment of the employee resulting from an injury under the provisions of the approved Guide.

24(6) The degree of permanent impairment shall be expressed as a percentage.

24(7) Subject to [section 25](#), if:

- (a) the employee has a permanent impairment other than a hearing loss; and
 - (b) Comcare determines that the degree of permanent impairment is less than 10%;
- an amount of compensation is not payable to the employee under this section.

24(7A) Subject to [section 25](#), if:

- (a) the employee has a permanent impairment that is a hearing loss; and
 - (b) Comcare determines that the binaural hearing loss suffered by the employee is less than 5%;
- an amount of compensation is not payable to the employee under this section.

24(8) Subsection (7) does not apply to any one or more of the following:

- (a) the impairment constituted by the loss, or the loss of the use, of a finger;
- (b) the impairment constituted by the loss, or the loss of the use, of a toe;
- (c) the impairment constituted by the loss of the sense of taste;
- (d) the impairment constituted by the loss of the sense of smell.

24(9) For the purposes of this section, the maximum amount is \$80,000.

25 Interim payment of compensation

25(1) Where Comcare:

(a) makes a determination that an employee is suffering from a permanent impairment as a result of an injury; and

(b) is satisfied that the degree of the impairment is equal to or more than 10% but has not made a final determination of the degree of impairment;

Comcare shall, on the written request of the employee made at any time before the final determination is made, make an interim determination of the degree of permanent impairment under [section 24](#) and assess an amount of compensation payable to the employee.

25(2) The amount assessed by Comcare under subsection (1) shall be an amount that is the same percentage of the maximum amount specified in [subsection 24\(9\)](#) as the percentage determined by Comcare under subsection (1) to be the degree of permanent impairment of the employee.

25(3) Where, after an amount of compensation has been paid to an employee following the making of an interim determination, Comcare makes a final determination of the degree of permanent impairment of the employee, there is payable to the employee an amount equal to the difference (if any) between the amount payable under [section 24](#) on the making of the final determination and the amount paid to the employee under this section.

25(4) Where Comcare has made a final assessment of the degree of permanent impairment of an employee (other than a hearing loss), no further amounts of compensation shall be payable to the employee in respect of a subsequent increase in the degree of impairment, unless the increase is 10% or more.

25(5) If Comcare has made a final assessment of the degree of permanent impairment of an employee constituted by a hearing loss, no further amounts of compensation are payable to the employee in respect of a subsequent increase in the hearing loss, unless the subsequent increase in the degree of binaural hearing loss is 5% or more.

26 Payment of compensation

26(1) Subject to this section, an amount of compensation payable to an employee under [section 24](#) or [25](#), shall be paid to the employee within 30 days after the date of the assessment of the amount.

26(2) Where an amount of compensation is not paid to an employee in accordance with subsection (1), interest is payable to the employee on that amount in respect of the period commencing on the expiration of the period of 30 days referred to in that subsection and ending on the day on which the amount is paid.

26(3) Interest payable under subsection (2) shall be paid at such rate as is from time to time specified by the Minister for the purposes of this section by legislative instrument.

26(4) This section does not apply where:

(a) Comcare has been requested under [Part VI](#) to reconsider a determination under [section 24](#) or [25](#), as the case may be; or

(b) a proceeding in respect of such a determination has been instituted under [Part VI](#).