

Minority Report by Nick Xenophon, Independent Senator for South Australia

The Barry Crush Case

1.1 In 1988, Mr Barry Crush was Master and Chief Engineer of the *MV Candela*, a Federal Department of Transport and Communications lighthouse support vessel.

1.2 During a severe gale, Mr Crush fell 10 metres onto the deck of *MV Candela* while trying to secure equipment.

1.3 Mr Crush suffered severe injuries to his back, neck, ankles, hips, left knee, left arm and elbow, broken ribs, as well as massive soft tissue damage to his entire body.¹

1.4 Upon eventually returning to Adelaide, Mr Crush's injuries were assessed. As Mr Crush states in his submission:

“...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.”²

1.5 Mr Crush began receiving payments from Comcare in 1989, however these payments had been miscalculated and he was being grossly underpaid. Over the next 13 years, Mr Crush contacted Comcare on a weekly basis to request a review of his case.

1.6 Comcare was unwilling do this, as Mr Crush details in his submission:

“Comcare continually told me, that they were either too understaffed, or too under-resourced to investigate my claim, but advised me to keep writing.”³

1.7 He continues:

“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.

1 Mr Barry Crush, submission 6, pg 2

2 Ibid

3 Ibid, pg 3

... Comcare misplaced or lost this bundle of documents on five separate occasions.”⁴

1.8 In August 2001, Comcare accepted the material provided to them by Mr Crush and determined that he had been underpaid and provided him with two back payments.

1.9 On 10 September 2003 Mr Crush wrote to the then CEO of Comcare, Mr Barry Leahy requesting \$450,000 in compensation in relation to the financial losses and expenses Mr Crush incurred due to the underpayment.

1.10 In a letter dated 12 November 2003 Mr Leahy advised:

“Comcare has not, however, any capacity to pay you more than the amount already paid. The SRC Act makes no provision for payment of interest or other recompense where the amount originally determined is subsequently discovered to have been less than the entitlement. The only possible avenue available to you is to apply for an act of grace payment by writing to the Hon Peter Slipper MP, Parliamentary Secretary to the Minister for Finance and Administration...”⁵

1.11 Three different Ministers and Parliamentary Secretaries considered separate act of grace payment applications by Mr Crush; each one was refused. The basis for the refusals did not rest in a technicality but rather on the fact that:

“Comcare... provided incorrect information to the Department of Finance and Deregulation, stating that Barry had received \$1 million in entitlements, was paid \$50,000 a year, and that there was no underpayment, amongst other incorrect statements”⁶

1.12 It was only in the Ombudsman’s Report (04/2010) did the fact that an “act of grace payment ‘is generally not available’ in relation to the actions of an agency established under the CAC Act”⁷ become apparent to Mr Crush.

A CDDA-type Scheme

1.13 As discussed in the majority report, employees of government agencies covered under the Financial Management Accountability Act 1997 can apply for compensation for maladministration under Compensation for Detriment caused by Defective Administration (CDDA) Scheme.

4 Ibid, pg 4

5 Mr Barry Leahy, *Letter to Barry Crush*, 12 November 2003, pg 1-2

6 Senator Nick Xenophon, *Public Service Amendment (Payments in Special Circumstances) Bill 2011*, Second Reading Speech, 12 May 2011

7 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary payments of compensation*, Report 4, March 2011, pg 4

1.14 The CDDA Scheme is an administrative, not statutory scheme established under section 61 of the Constitution, enabling Ministers and authorised departmental officers to authorise payments to those who have suffered financial losses as a result of defective administration.⁸

1.15 Comcare is established as a body corporate under section 74 of the *Safety, Rehabilitation and Compensation Act 1988*, and therefore falls within the definition of a ‘Commonwealth Authority’ as detailed in the *Commonwealth Authorities and Companies Act 1997*. As such, CDDA claims cannot be made against Comcare for maladministration.

1.16 Neither Comcare nor the Department of Finance have an appropriate mechanism for handling claims of maladministration against Comcare.

1.17 In its March 2010 Report, The Commonwealth Ombudsman recommended that “*Comcare work with Finance to find a way to resolves these claims and to develop a strategy for dealing with similar claims in the future*”⁹.

1.18 As Recommendation 1 of the Ombudsman’s report reads:

“I recommend Comcare and Finance develop a proposal for establishing a scheme, similar to the CDDA, whereby people adversely affected by poor administration of the SRC Act can seek compensation.”¹⁰

1.19 The Committee recommends that under section 73 of the Public Service Act 1999, the maximum amount of a discretionary payment should be increase from \$100,000 to \$250,000.

1.20 This does not allow for adequate compensation for victims such as Barry Crush and will not come close to compensating for his actual loss and damage.

1.21 Given Mr Crush is not eligible for a discretionary payment under the CDDA scheme or an act of grace payment, there is effectively no way for Mr Crush to be appropriately compensated for his losses.

Recommendation 1

The Public Service Amendment (Payments in Special Circumstances) Bill 2011 be passed, with a view that it be repealed once a CDDA-style scheme is established to address defective administration for agencies covered under the Safety, Rehabilitation and Compensation Act 1988.

8 Department of Finance and Deregulation, *The Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme)*, <http://www.finance.gov.au/financial-framework/discretionary-compensation/cdda-scheme.html>, accessed 16 August 2011

9 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary payments of compensation*, Report 4, March 2011, pg 1

10 Ibid, pg 7

Recommendation 2

Taxation on discretionary payments received under the Public Service Amendment (Payments in Special Circumstances) Bill 2011 be waived.

**Nick Xenophon
Independent Senator for South Australia**