The Senate

Finance and Public Administration Legislation Committee

Public Service Amendment (Payments in Special Circumstances) Bill 2011

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43rd Parliament

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Participating Members for this inquiry

Senator Nick Xenophon	IND, South Australia

TABLE OF CONTENTS

RECOMMENDATIONS

Recommendation 1

1.39 The committee recommends that the Public Service Amendment (Payments in Special Circumstances) Bill 2011 be amended as follows:

Schedule 1, page 3 (lines 4 and 5), omit item 1, substitute:

1. Subsection 73(4)

Omit "$100,000", substitute "$250,000".

Recommendation 2

1.41 The committee recommends that subsection 66(4) of the *Parliamentary Services Act 1999* be amended to increase the limit of payments available in special circumstances to $250,000.

Recommendation 3

1.43 The committee recommends that the consultations taking place among the Department of Finance and Deregulation, Comcare and the Department of Education, Employment and Workplace Relations to implement recommendation 1 contained in the Commonwealth Ombudsman's Report No. 4 of 2010 be concluded as a matter of priority.

Public Service Amendment (Payments in Special Circumstances) Bill 2011

INTRODUCTION

1.1 The Public Service Amendment (Payments in Special Circumstances) Bill 2011 (the bill) was introduced into the Senate on 12 May 2011 by Senator Nick Xenophon. On 7 July 2011, the Senate, on the recommendation of the Selection of Bills Committee, referred the bill to the Finance and Public Administration Legislation Committee for inquiry and report by 16 August 2011. In undertaking the inquiry, the committee was requested to consider:

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)

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

3. The losses caused to claimants because of administrative errors 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

5. The limitations of discretionary payments in the *Public Service Act 1999*.[1]

Conduct of the inquiry

1.2 The committee advertised the inquiry on the Internet and in *The Australian* and invited submissions from interested organisations and individuals. The committee received six public submissions and one confidential submission. The list of public submissions received is at appendix 1. Submissions can be accessed through the committee's website at: http://www.aph.gov.au/senate/committee/fapa_ctte/index.htm.

1.3 The committee agreed not to hold a public hearing for this inquiry.

THE BILL

1.4 The bill proposes to repeal subsection 73(4) of the *Public Service Act 1999* (Public Service Act).

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1 Senate Selection of Bills Committee, *Report No 9*, 7 July 2011, Appendix 4.

1.5 Section 73 of the Public Service Act provides for payments in special circumstances. A minister may authorise a payment in special circumstances which relate to, or arise out of:

- the payee's employment by the Commonwealth; or
- another person's employment by the Commonwealth.

1.6 Payments may be made as a lump sum or periodic. The minister may authorise the payment even though the payments would not otherwise be authorised by law or required to meet a legal liability. No authorisation can be made for a payment/s in excess of a total of $100,000. Conditions may be attached to the payment and any breach of the conditions could result in the recovery by the Commonwealth of the payment/s.

1.7 A note under section 73 makes clear that payments under the section must be made from money appropriated by the Parliament. Generally, a payment can be debited against an agency's annual appropriation, providing that it relates to some matter that has arisen in the course of its administration.

BACKGROUND

1.8 In March 2010, the Commonwealth Ombudsman reported on discretionary payments by Comcare and the Department of Finance and Deregulation.[2] The report was the result of an investigation into two separate complaints about errors that had been made by Comcare in the calculation of workers compensation payments. In each case, the errors resulted in underpayments that were not discovered for 10 years (the case of Ms A) and 13 years (in the case of Mr B).

1.9 On detecting its errors, Comcare paid each of the complainants the amounts they should have originally received. In addition, both complainants requested further compensation in recognition that, due to Comcare's error, they had been deprived of the benefit of the money for a number of years. The Ombudsman's investigation confirmed that Comcare had made errors in the calculation of payments.[3]

1.10 The Ombudsman's report noted that generally, when a person suffers a quantifiable loss arising from the defective administration of an Australian Government agency, they can make a claim for compensation under the Scheme for Detriment Caused by Defective Administration (CDDA scheme). CDDA scheme payments are made where there is a moral obligation to pay compensation rather than

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2 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary Payments for Compensation*, Report No 04/2010, March 2010. http://www.ombudsman.gov.au/files/comcare_dofd_discretionary_compensation_payments.pdf

3 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary Payments for Compensation*, Report No 04/2010, March 2010, p. 1.

any legal liability arising under the general law.[4] The Department of Finance and Deregulation (Finance) noted that:

> Compensation is payable only where an applicant is found to have suffered detriment as a direct cause of the defective administration. There is no financial ceiling on payments, which are generally approved on the basis that there is a moral, rather than legal, obligation to the claimant.[5]

1.11 Finance is responsible for development of the guidelines for the CDDA scheme. If a payment is made under the CDDA scheme, the agency against which the claim is made is responsible for making the payment out of its appropriation. The CDDA scheme applies only to *Financial Management and Accountability Act 1997* (FMA Act) agencies.

1.12 Comcare is not a FMA Act agency; it is a Commonwealth Authority under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). As such, no claim can be made under the CDDA scheme for matters in relation to Comcare. Similarly, the CDDA scheme is not available to individuals who are seeking compensation for defective administration on the part of contracted service providers or state, territory or local government agencies providing a service on behalf of a Commonwealth Government agency.

1.13 As access to the CDDA scheme was closed to Mr B, he was referred to Finance to request an act of grace payment under section 33 of the FMA Act. Mr B's request for an act of grace payment was declined. The Ombudsman noted that an act of grace payment is 'generally not available' in relation to the actions of an agency established under the CAC Act. The Ombudsman went on to observe that, while there are exceptions to the rule, 'act of grace payments are not intended to cover financial losses suffered as the direct result of defective administration by a CAC agency'. The Ombudsman concluded:

> For this reason, it became apparent in Mr B's case that Finance was not in a position to deal with a number of the claims made in his requests for additional compensation, particularly relating to Comcare's errors in administration.[6]

1.14 The Ombudsman noted that in its response to the investigation, Comcare indicated that it did not consider the incidental powers it commonly relies upon to resolve administrative matters would allow it to compensate a person for a loss that could be characterised as a loss of interest on money owed. Further, the payment of interest is already contemplated by the *Safety, Rehabilitation and Compensation Act 2011* (SRC Act) in a defined set of circumstances and therefore the existence of an

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4 Commonwealth Ombudsman, *Submission 3*, p. 2.

5 Department of Finance and Deregulation, *Submission 1*, p. 7.

6 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary Payments for Compensation*, Report No 04/2010, March 2010, p. 4; see also Department of Finance and Deregulation, *Submission 1*, p. 5.

express provision relating to the payment of interest limits its capacity to make discretionary payments to people like Ms A and Mr B.[7]

1.15 The Ombudsman concluded that the claimants should have been able to rely on Comcare's administrative processes detecting fundamental errors in its calculations within a reasonable time period. However, there is currently no direct means for people who have suffered a financial loss due to Comcare's defective administration to have their claims for compensation considered. The Ombudsman considered that, while there were difficulties in settling Ms A's and Mr B's claims for compensation, Comcare should find a way to compensate each of them.

1.16 To address the difficulties faced in seeking compensation, the Ombudsman recommended 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. Finance supported this recommendation and proposed that it prepare a submission to the Deputy Prime Minister seeking a direction to allow determining authorities under the SRC Act to develop and implement a scheme similar to the CDDA scheme. Such a scheme would allow determining authorities like Comcare to deal with claims for compensation arising from defective administration.[8]

1.17 In relation to the compensation payments sought by Ms A and Mr B, Comcare arranged for Ms A to be compensated via her original employer. In the case of Mr B, Comcare sought actuarial advice regarding the loss suffered and compensated him under section 73 of the Public Service Act to the full amount available under that section, that is $100,000.[9] In addition, Comcare indicated that it would deal with any shortfall in compensation through the proposed compensation scheme.[10]

1.18 Issues arising from access to compensation were also addressed by the Senate Legal and Constitutional Affairs References Committee report on the inquiry into the review of Commonwealth compensation payments tabled in December 2010.[11] The Legal and Constitutional Affairs Committee considered the administration and effectiveness of other mechanisms that enable governments to make discretionary payments or to waive the payment of debts, including act of grace and ex gratia payments; and the CDDA. The Legal and Constitutional Affairs Committee concluded that the CDDA scheme provides a useful mechanism for addressing harm caused by

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7 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary Payments for Compensation*, Report No 04/2010, March 2010, p. 4.

8 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary Payments for Compensation*, Report No 04/2010, March 2010, pp 6–7.

9 Commonwealth Ombudsman, *Submission 3*, p. 3.

10 Commonwealth Ombudsman, *Comcare and Department of Finance and Deregulation: Discretionary Payments for Compensation*, Report No 04/2010, March 2010, pp 6–7.

11 Senate Legal and Constitutional Affairs References Committee, *Review of Commonwealth Compensation Payments*, December 2010.

defective administration; however, it had not 'kept pace' with changes in Commonwealth public administration. In particular, the committee commented that 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, appropriate restitution should be available 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. The Legal and Constitutional Affairs Committee recommended that Finance investigate the extension, in appropriate circumstances, of the CDDA scheme to CAC Act agencies and to third party providers performing functions or providing services on behalf of the Commonwealth.[12]

ISSUES

1.19 Submitters commented on both the proposed amendment to section 73 and the mechanism to address claims for compensation arising from defective administration by agencies not covered by the CDDA scheme.

Section 73 payments

1.20 As noted above, the proposed amendment to the Public Service Act would remove the $100,000 limit on payments for special circumstances. The Community and Public Sector Union (CPSU) welcomed the proposal. The CPSU noted that the amount of $100,000 in subsection 73(4) had not been increased since 1999 and therefore, in relative terms, the maximum payment available has decreased over time.[13]

1.21 Mr Barry Crush, who sought compensation from Comcare for defective administration, commented on the removal of the limit:

> 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.[14]

1.22 However, other submitters did not agree with the proposed amendment. The Australian Public Service Commission (APSC) commented that rather than removing the limit, consideration could be given to increasing the limit and/or introducing a mechanism for automatic adjustment of the limit.

1.23 The APSC noted that the amount available under section 73 had remained unchanged since 1999. The APSC explained that the restriction was intended to ensure that where an amount might exceed $100,000 it would have to be referred for

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12 Senate Legal and Constitutional Affairs References Committee, *Review of Commonwealth Compensation Payments*, December 2010, p. 53.

13 Community and Public Sector Union, *Submission 2*, p. 1.

14 Mr Barry Crush, *Submission 6*, p. 14.

decision by the Minister for Finance and Deregulation under the general arrangements for act of grace payments by the Commonwealth. This reflected the then requirement for act of grace payments above $100,000 to be subject to a report by an Advisory Committee before the Finance Minister could authorise such an amount under section 33 of the FMA Act. The APSC noted that a report by the Advisory Committee now applies to amounts over $250,000.[15]

1.24 According to the APSC's understanding, the section 73 payment mechanism is used rarely. The APSC also provided the committee with information on the intended uses of section 73 as set out in the Explanatory Memorandum to the Public Service Bill 1999:

- the reimbursement of legal costs incurred by APS employees in the course of, or in connection with, their employment;
- payments in lieu of entitlements lost as a result of incorrect advice;
- the settlement of unfair termination claims; or
- the payment of compensation following a recommendation of the (former) Merit Protection and Review Agency.[16]

1.25 The APSC explained that it did not support the removal of the limit on payment in section 73 as:

> ...the Parliament specifically legislated for a ceiling in the interests of providing an appropriate level of accountability and centralised oversight for any larger payments (through the act of grace payment mechanisms under s.33 of the FMA Act), while providing the Public Service Minister (and by delegation, Agency Heads) with a reasonable capacity to make payments relating to circumstances arising out of a person's Commonwealth employment.[17]

1.26 The APSC saw it as 'prudent' that payments made under section 73 remain subject to a greater level of accountability where they involve large amounts of public money. However, as already noted, the APSC considered that the limit could be increased by tying the amount available under section 73 to the amount available under the FMA Act, hence restoring the link to the FMA Act ceiling. The APSC further commented that it will give consideration to amending the Public Service Act in this way as part of the amendments currently being drafted to reflect the Blueprint for the Reform of Australian Government Administration.[18]

1.27 Comcare also commented on the proposed amendment to section 73 and noted that it is 'an important section in the context of discretionary government

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15 Australian Public Service Commission, *Submission 5*, p. 2.

16 Australian Public Service Commission, *Submission 5*, p. 2.

17 Australian Public Service Commission, *Submission 5*, p. 3.

18 Australian Public Service Commission, *Submission 5*, p. 4.

payments'. Comcare agreed that it would be reasonable to review the level of the section 73 limit, however, Comcare suggested that as a proxy for defective administration under the SRC Act it is an imperfect mechanism. In this regard, Comcare pointed to the following issues:

- there are some practical and legal constraints when considering compensation for defective administration using section 73, in particular, the requirement for there to be a nexus with employment; and
- 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. However, only APS employees have access to payments under section 73, thus ACT employees and employees of other non-APS statutory authorities would not have access to this mechanism. Section 73 also does not go any way towards addressing defective claims administered by a self insurer under the SRC Act.[19]

1.28 Comcare concluded that:

> 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. [20]

1.29 Finance also commented on the proposed amendment to section 73 and stated that 'it would be inappropriate to completely remove the threshold of $100,000'. Finance went on to note that while the Public Service Act and *Parliamentary Service Act 1999* have a financial limit of $100,000, the FMA Act has increased its authorisation limit to $250,000 before the consideration of an Advisory Committee report. Finance stated that it 'considers there is a need for consistency in the financial limitations that exist in the discretionary compensation mechanisms'.[21]

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19 Comcare, *Submission 4*, p. 6.

20 Comcare, *Submission 4*, pp 6–7.

21 Department of Finance and Deregulation, *Submission 1*, p. 8.

Claims for compensation arising from actions of agencies not covered by the CDDA scheme

1.30 While welcoming the amendment proposed in the bill, the Commonwealth Ombudsman noted that it will not fully address current inequities in compensation across different agency types. The Ombudsman submitted that more comprehensive work needs to be done to establish CDDA-type schemes to address defective administration by non-FMA Act agencies, contracted government service providers and state, territory and local government authorities which provide services on behalf of Commonwealth Government agencies.[22]

1.31 Mr Barry Crush commented:

> 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.[23]

1.32 Mr Crush provided information on the significant impact of the defective administration on his financial position and personal life. Mr Crush added that if a CDDA-type scheme were established, its objectives should reflect the objectives of the CDDA scheme 'in order to achieve a just outcome in terms of compensation'.[24]

1.33 Comcare also commented that there is only a limited ability to seek compensation if the government agency involved is not covered by the CDDA scheme. Comcare stated that apart from section 73 payments, 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. Comcare went on to state that 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.

1.34 Comcare considered that interest is not sufficient to cover the broader set of economic losses that might be covered in a CDDA scheme. Comcare concluded that:

> ...the only way of being able to 'put things right' where defective administration occurs, so that the process is open, accountable and

22 Commonwealth Ombudsman, *Submission 3*, p. 5.

23 Mr Barry Crush, *Submission 6*, p. 5.

24 Mr Barry Crush, *Submission 6*, p. 6.

> transparent, and applicable to all claims managed under the SRC Act, will involve legislative amendment.[25]

1.35 Comcare commented on the Ombudsman's recommendation in relation to the introduction of a CDDA-style scheme and stated that it 'continues to work with Finance and DEEWR [Department of Education, Employment and Workplace Relations] to develop a proposal addressing this recommendation'. Comcare suggested that the following plan could be implemented:

- 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.[26]

1.36 Finance also commented on the possible avenues for compensation available to CAC Act bodies. Finance noted that there may be mechanisms for CAC Act bodies under their enabling legislation, the CAC Act and the *Corporations Act 2001*. Finance stated that:

> CAC Act bodies are different from other Commonwealth entities in that they are legally and financially separate from the Commonwealth and their directors and officers are subject to a range of directors' duties.
>
> Both the *Corporations Act 2001* and the CAC Act include penalties for misconduct. It would be inappropriate for appropriations and taxpayers to fund administrative errors by CAC Act bodies, including Government Business Enterprises.[27]

1.37 Finance concluded that it is unnecessary and inappropriate to expand the scope of the CDDA scheme to encompass bodies that are financially and legally separate from the Commonwealth and stated:

> Finance considers that a compensation payment under the CDDA Scheme for a non-FMA agency for reasons purely relating to the administrative actions of the agency could be considered to be circumventing the intention of Parliament. The CDDA Scheme is not available to Comcare and there may be alternative avenues available to CAC Act bodies that would allow for individuals to be compensated.[28]

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25 Comcare, *Submission 4*, p. 6.

26 Comcare, *Submission 4*, p. 4.

27 Department of Finance and Deregulation, *Submission 1*, *Attachment 1*, p. 1.

28 Department of Finance and Deregulation, *Submission 1*, p. 9.

1.38 Finance indicated that it has been consulting with Comcare and the DEEWR in implementing the recommendations in the Ombudsman's Report.[29]

Conclusion

1.39 The lack of adequate compensation arrangements for non-CDDA scheme agencies has come under scrutiny by the Commonwealth Ombudsman and the Senate Legal and Constitutional Affairs References Committee. The committee notes the conclusions of Senate Legal and Constitutional Affairs References Committee that the present arrangements do not reflect current Commonwealth public administration and do not provide adequate mechanisms for addressing financial loss arising from defective administration by non-FMA Act government agencies.

1.40 The committee is supportive of these conclusions. However, the committee does not consider that the removal of the limit contained in subsection 73(4) of the Public Service Act is warranted. Rather, the committee supports the alignment of the amount contained in section 73 with the authorisation limit of $250,000 for act of grace payments under the *Financial Management and Accountability Act 1997*.

Recommendation 1

1.41 The committee recommends that the Public Service Amendment (Payments in Special Circumstances) Bill 2011 be amended as follows:

Schedule 1, page 3 (lines 4 and 5), omit item 1, substitute:

1. Subsection 73(4)

Omit "$100,000", substitute "$250,000".

1.42 In addition, the committee notes that the $100,000 limit is also contained in the *Parliamentary Service Act 1999.* As a matter of equity, the committee considers that consideration should also be given to amending the Parliamentary Service Act to increase the limit in line with the FMA Act.

Recommendation 2

1.43 The committee recommends that subsection 66(4) of the *Parliamentary Service Act 1999* be amended to increase the limit of payments available in special circumstances to $250,000.

1.44 In relation to the development of a CDDA-type scheme to address defective administration in non-FMA Act Commonwealth Government agencies, the committee considers that it is important that claims for defective administration are treated in an equitable manner across public sector agencies. The committee therefore considers that the consultations taking place among the Department of Finance and

29 Department of Finance and Deregulation, *Submission 1*, p. 5.

Deregulation, Comcare and the Department of Education, Employment and Workplace Relations to implement the recommendations of the Commonwealth Ombudsman be concluded as a matter of priority.

Recommendation 3

1.45 The committee recommends that the consultations taking place among the Department of Finance and Deregulation, Comcare and the Department of Education, Employment and Workplace Relations to implement recommendation 1 contained in the Commonwealth Ombudsman's Report No. 4 of 2010 be concluded as a matter of priority.

Senator Helen Polley
Chair

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.

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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.

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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.

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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

APPENDIX 1

Submissions and Additional Information received by the Committee

1 Department of Finance and Deregulation

2 Community and Public Sector Union (CPSU)

3 The Commonwealth Ombudsman

4 Comcare

5 Australian Public Service Commission

6 Barry Crush