

Comcare

IDENTIFYING THE REHABILITATION AUTHORITY OF A FORMER AUSTRALIAN GOVERNMENT EMPLOYEE

December 2007

*This is an abridged version of report 18/2007.
The full report has not been made publicly available
to preserve the privacy of the complainants.*

Report by the Commonwealth Ombudsman,
Prof. John McMillan, under the *Ombudsman Act 1976*

REPORT NO. **18|2007**

Reports by the Ombudsman

Under the *Ombudsman Act 1976* (Cth), the Commonwealth Ombudsman investigates the administrative actions of Australian Government agencies and officers. An investigation can be conducted as a result of a complaint or on the initiative (or own motion) of the Ombudsman.

The *Ombudsman Act 1976* confers five other roles on the Commonwealth Ombudsman—the role of Defence Force Ombudsman, to investigate action arising from the service of a member of the Australian Defence Force; the role of Immigration Ombudsman, to investigate action taken in relation to immigration (including immigration detention); the role of Postal Industry Ombudsman, to investigate complaints against private postal operators; the role of Taxation Ombudsman, to investigate action taken by the Australian Taxation Office; and the role of Law Enforcement Ombudsman, to investigate conduct and practices of the Australian Federal Police (AFP) and its members. There are special procedures applying to complaints about AFP officers contained in the *Australian Federal Police Act 1979*. Complaints about the conduct of AFP officers prior to 2007 are dealt with under the *Complaints (Australian Federal Police) Act 1981* (Cth).

Most complaints to the Ombudsman are resolved without the need for a formal finding or report. The Ombudsman can, however, culminate an investigation by preparing a report that contains the opinions and recommendations of the Ombudsman. A report can be prepared if the Ombudsman is of the opinion that the administrative action under investigation was unlawful, unreasonable, unjust, oppressive, improperly discriminatory, or otherwise wrong or unsupported by the facts; was not properly explained by an agency; or was based on a law that was unreasonable, unjust, oppressive or improperly discriminatory.

A report by the Ombudsman is forwarded to the agency concerned and the responsible minister. If the recommendations in the report are not accepted, the Ombudsman can choose to furnish the report to the Prime Minister or Parliament.

These reports are not always made publicly available. The Ombudsman is subject to statutory secrecy provisions, and for reasons of privacy, confidentiality or privilege it may be inappropriate to publish all or part of a report. Nevertheless, to the extent possible, reports by the Ombudsman are published in full or in an abridged version. Copies or summaries of the reports are usually made available on the Ombudsman website at www.ombudsman.gov.au. Commencing in 2004, the reports prepared by the Ombudsman (in each of the roles mentioned above) are sequenced into a single annual series of reports.

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Mr Q and Mr H complained separately to the Commonwealth Ombudsman, some time apart, that Comcare had failed to identify which Australian Government agency was their 'rehabilitation authority' for the purposes of the *Safety, Rehabilitation and Compensation Act 1988* ('the SRCA').

There were differences in the circumstances of Mr Q and Mr H, but for all practical purposes their complaints were such that they could be considered as one. Each of the men had once been employed by an Australian Government agency, and their employment had ceased as the result of compensable injury. In each case, in the period following cessation of employment, their former employing agency was abolished as the result of machinery of government changes.

Section 36 of the SRCA provides that, on request from a compensated employee, the employee's rehabilitation authority will conduct an assessment of his or her capacity to undertake a rehabilitation program. Mr Q and Mr H each asked Comcare to identify which Australian Government agency was their rehabilitation authority for the purposes of s 36. Comcare was unable to do so, which led to their complaints to the Ombudsman.

Investigation of the two complaints by Ombudsman staff showed that Comcare had been pursuing the subject of an appropriate rehabilitation authority for a considerable time, with no success. Comcare had been in communication with a number of agencies which it considered might have had the responsibility of rehabilitation authority for Mr Q and Mr H, but none of the agencies agreed to take on the responsibility. Comcare's approach to the problem, over an extended period, was broadly to seek the cooperation of the agencies concerned.

The difficulties experienced by both Comcare and the agencies with which it was dealing stemmed from a combination of the abolition of the former employing agency and the wording of the SRCA. Essentially, because Mr Q and Mr H were considered to be former employees, not current ones, their situation was not encompassed by the current legislative regime.

The Ombudsman's investigation showed that Comcare was in possession of legal advice on the subject of identifying a rehabilitation authority for former employees. That advice recommended an administrative approach in the short term, by way of Comcare's consultation with the Department of Prime Minister and Cabinet (PM&C) and other relevant agencies to determine which agency should be responsible for the Commonwealth's liability in relation to former employees. The advice recommended that in the longer term, amendment of the SRCA was necessary 'to provide certainty in relation to who is the responsible employer for former employees under that Act'.

The Ombudsman's report to Comcare concluded that the agency could have acted with greater diligence to resolve the long-identified difficulties encountered by Mr Q and Mr H, as well as others in similar situations. The report observed that Comcare appeared not to have followed up the recommended discussions with PM&C and other relevant agencies. The report concluded in summary that 'Comcare should attach more importance to this problem' than it had thus far done.

The Ombudsman's report recommends that Comcare:

- 1 assign a higher priority to seeking legislative change aimed at providing greater long-term certainty about rehabilitation access for persons who, like Mr Q and Mr H, find themselves affected by machinery of government changes
- 2 consult with PM&C, the Australian Public Service Commission and any other relevant agency to establish, as a matter of policy, what form the proposed amendment might take to achieve the intended outcome
- 3 writes to all the other persons it has identified as being in a position similar to that of Mr Q and Mr H, to explain the situation and inform each of them of their rehabilitation rights and the action Comcare proposes taking to ensure their rights may be adequately exercised
- 4 meet with an identified Australian Government agency (possibly the one most likely to have rehabilitation responsibility) to devise a solution for Mr Q and Mr H.