

# **Comcare and Department of Finance and Deregulation**

DISCRETIONARY PAYMENTS OF COMPENSATION

March 2010

Report by the Acting Commonwealth Ombudsman,  
Ron Brent, under the *Ombudsman Act 1976*

REPORT NO. **04|2010**

## 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.

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## EXECUTIVE SUMMARY

The Commonwealth Ombudsman's office investigated two separate complaints from Ms A and Mr B about errors that had been made by Comcare in the calculation of their workers compensation payments. In each case the errors resulted in underpayments that were not discovered by Comcare for 10 years in Ms A's case, and 13 years in Mr B's case. In relation to Mr B, the delay occurred despite the fact that he had approached Comcare with concerns about his compensation payment much earlier.

On detecting its errors, Comcare paid each of the complainants the amounts they should have originally received. 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 Commonwealth Ombudsman's investigation of the complaints confirmed that Comcare had made errors in the calculation of each entitlement. Mr B was referred to the Department of Finance and Deregulation (Finance) to request an act of grace payment, which was declined. The investigation found that neither Comcare nor Finance had any direct mechanism for dealing with claims related to the actions of Comcare. However, the Ombudsman concluded that Ms A and Mr B's circumstances did warrant them being compensated.

The Ombudsman recommended that Comcare work with Finance to find a way to resolve these claims and to develop a strategy for dealing with similar claims in the future. In addition, the Ombudsman recommended that Comcare seek legal advice regarding its requirement that all requests for reconsideration of its decisions be initiated in writing. The Ombudsman also recommended Finance invite Mr B to make a claim for Compensation for Detriment caused by Defective Administration (CDDA) in relation to its actions. This was in recognition that Finance did not make the limitations of the act of grace mechanism clear to Mr B after his initial request. Finance agreed and made Mr B aware that he was welcome to lodge a claim under the CDDA Scheme.

In response to the Ombudsman's draft investigation report, Comcare advised that it accepted all of the Ombudsman's recommendations and has compensated Ms A for the loss suffered. The process for compensating Mr B is more complex, given the loss suffered occurred over 13 years and is likely to be much greater than in Ms A's case. Comcare nevertheless agreed to obtain independent actuarial advice to determine the quantum of Mr B's loss and to make a payment to him under the *Public Service Act 1999* (Public Service Act). That provision allows an agency to make a discretionary payment in special circumstances up to a maximum of \$100,000.

Consistent with the Ombudsman's recommendations, Comcare advised that it would also prepare a submission to the Deputy Prime Minister to seek a direction that would allow determining authorities under the *Safety Rehabilitation and Compensation Act 1988* (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. It is intended that creation of the scheme would allow Mr B to receive any additional compensation that independent actuarial advice might show he is entitled to be paid.

Comcare and Finance have both worked with us to resolve Ms A and Mr B's cases.

## PART 1—INTRODUCTION

### Complaints

1.1 This report summarises the two separate investigations conducted by the Ombudsman's office into Comcare's actions and, in one case, the actions of Finance. Each complainant alleged that they had suffered a financial loss due to errors made by Comcare in its administration of the SRC Act. A brief description of each complaint follows.

#### **Ms A's complaint**

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. In response, Comcare told her it had no ability to pay her interest and referred her to Finance to request an act of grace payment. Ms A was subsequently advised by Finance that it was inappropriate to consider her request.

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.

#### **Mr B's complaint**

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 neglected to include 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, and was advised that his only option was to request an act of grace payment through Finance. In response to his requests for an act of grace payment, three Ministers and three Parliamentary Secretaries considered Mr B's requests and either decided to refuse the requests on their merits or determined there was insufficient new information to warrant reconsideration. During the decision making process, Mr B was not directly advised by Finance that an act of grace payment was

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not considered to be an appropriate mechanism for resolving claims relating to Comcare's actions.

Mr B approached the Ombudsman's office because he considered it unreasonable that he should be denied compensation for a loss that had been caused by Comcare's error.

## PART 2—INVESTIGATION AND ISSUES

### Investigation

2.1 Comcare records obtained by this office confirmed that errors had been made in calculating Ms A's lump sum entitlement and Mr B's rate of payment. The office also obtained copies of Comcare briefings provided to Finance in relation to Mr B's requests for an act of grace payment, and submissions prepared by Finance. As part of the investigation of Mr B's complaint, the office met with Finance. The investigation found that although Finance had considered and reconsidered act of grace requests from Mr B, his situation was not one that an act of grace payment was designed to address. The Ombudsman's review of Comcare's internal legal advice also showed that there was no direct means available to Comcare to compensate individuals who had suffered a financial detriment as a result of its administrative error.

### Issues

2.2 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.<sup>1</sup>

2.3 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 s 74 of the SRC Act. As such, it falls within the definition of a 'Commonwealth authority' under s 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.

2.4 Act of grace discretionary payments can be made in certain situations. Finance is solely responsible for the assessment of such claims; decisions are made by the Minister or delegates in Finance, depending on the amount claimed. The Ombudsman notes that an act of grace payment 'is generally not available' in relation to the actions of an agency established under the CAC Act.<sup>2</sup> Although there are exceptions to this rule, the Ombudsman accepts that act of grace payments are not intended to cover financial losses suffered as the direct result of defective administration by a CAC agency. 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

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<sup>1</sup> Commonwealth Ombudsman, *Putting things right: compensating for defective administration*, August 2009, [www.ombudsman.gov.au/files/investigation\\_2009\\_11.pdf](http://www.ombudsman.gov.au/files/investigation_2009_11.pdf). See also [www.finance.gov.au/publications/finance-circulars/2009/09.html](http://www.finance.gov.au/publications/finance-circulars/2009/09.html).

<sup>2</sup> Paragraph 21, Attachment B, Financial Circular 2009/09, *Discretionary Compensation Mechanisms*.

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administration. The Ombudsman considers this should have been made clear to Mr B at a much earlier stage.

2.5 The limitations of the CDDA scheme and act of grace mean that Comcare relies on the powers it is provided under the SRC Act (subject to any limitation contained in the CAC Act) to deal with this type of situation.

2.6 In response to the Ombudsman's 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. Comcare stated that the payment of interest is already contemplated by the SRC Act in a defined set of circumstances. The agency asserted that the existence of an express provision relating to the payment of interest limits its capacity to make discretionary payments to people like Ms A and Mr B.

2.7 It is arguable that the existence of an express provision regarding the payment of interest in the SRC Act does limit Comcare's capacity to settle these sorts of claims. The Ombudsman is concerned that this leaves people like Ms A and Mr B with no direct way of obtaining compensation, even though an acknowledged error has caused them to suffer a quantifiable financial loss.

2.8 The Ombudsman considers that Ms A and Mr B's cases can be distinguished from the general run of cases. Generally, upon review, a new entitlement amount is determined based on the merits of the case or after settlement of a dispute about the provisions that should be applied in the calculation of an entitlement. In such cases, any new decision reached will depend on the evidence and arguments put forward by both parties. By contrast, Ms A and Mr B depended solely on Comcare's internal quality control processes working to ensure that the mistakes in calculations were detected and rectified at an early stage.

2.9 The Ombudsman expects that claimants should be able to trust that Comcare's administrative processes would detect fundamental errors in its calculations within a reasonable timeframe. This is of particular importance because a claimant, due to their work-related injury, may not be in the best position to assess the accuracy of Comcare's calculations at the time of payment. The investigation of Mr B's complaint highlighted that even though he verbally approached Comcare with concerns about his compensation rate, Comcare did not undertake a formal review of the rate decision until 2001 (13 years after payments began). The delay occurred because Comcare's interpretation of the SRC Act is that a request for reconsideration must be in writing. This is of concern because an earlier reconsideration may have prevented much of the hardship Mr B subsequently suffered.

2.10 Although the investigation revealed that the settlement of Ms A and Mr B's claims for compensation present difficulties for Comcare, the Ombudsman considered that Comcare should find a way to compensate each of them. The Ombudsman notes that one option would be to seek a Ministerial direction that would allow Comcare to deal with such claims. In suggesting such an approach, the Ombudsman recognises that the creation of any guidelines to resolve claims for compensation due to defective administration should not be seen as an alternative to seeking internal and/or external review of decisions within the legislated timeframe. However, as Ms A and Mr B's cases illustrate, there are some circumstances in which it is entirely reasonable to expect a person to be able to seek compensation outside the confines of the review options currently available.



## **PART 3—KEY FINDINGS, RECOMMENDATIONS AND AGENCY RESPONSE**

3.1 The Ombudsman’s investigations examined Comcare’s administration of Ms A and Mr B’s claims for compensation.

3.2 The investigations found that:

- Comcare failed to fully compensate Ms A in 1998 due to a fundamental error in calculating her entitlement and the error was not corrected until 2008
- Comcare failed to properly determine Mr B’s compensation entitlement over a 13-year period
- 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
- Comcare’s requirement that requests for reconsideration of decisions must be in writing acted as an impediment to Mr B having his rate of payment formally reviewed at an earlier stage
- Finance did not make it clear to Mr B at a suitably early stage that an act of grace was not an appropriate avenue to address his claim for losses suffered as a result of Comcare’s error.

3.3 In the draft of this report, I made the following recommendations to Comcare and Finance.

### **Remedy for the complainants**

- Ms A and Mr B be compensated for losses they may have incurred due to underpayment, and that Comcare and Finance work together to identify a suitable mechanism for payment. Any decision regarding quantum of loss should be by mutual agreement with Ms A and Mr B or through the use of an independent loss adjustor.
- Finance invite a claim from Mr B, and from other individuals who have acted on his behalf, for compensation under the CDDA scheme for costs incurred in pursuing further act of grace payments after his initial claim was made to Finance.
- Finance apologise to Mr B for not advising him about the limitations of act of grace payments.

3.4 Comcare and Finance accepted these recommendations and have acted on them.

3.5 Comcare has since determined the quantum of the loss suffered by Ms A and arranged for her to be compensated via her original employer. It has also commenced the process of obtaining actuarial advice regarding the loss suffered by Mr B. Comcare intends to compensate him under s 73 of the Public Service Act, which allows payments of up to a maximum of \$100,000 in special circumstances where a person has suffered a loss in the course of their employment with the Australian Government. Comcare proposes to deal with any shortfall in compensation payable in accordance with the proposal described in paragraph 3.8 below.

## **Review of policy and legislation**

### **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.

3.6 In response to a recommendation in my draft report, Comcare obtained independent legal advice confirming that its requirement that requests for reconsideration be made in writing is consistent with the intent of the SRC Act.

### **Recommendation 2**

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.

3.7 The Ombudsman's recommendations have been accepted by both Comcare and Finance.

3.8 In response to the Ombudsman's recommendations, Comcare has also advised that it will 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. It is intended that the scheme would allow Mr B to be paid any additional compensation independent actuarial advice might show he is entitled to above and beyond what is payable under the Public Service Act.

3.9 Finance has written to Mr B expressing regret that Mr B or his representatives were not made aware of the parameters of the act of grace power under s 33(1) of the FMA Act. Finance has also made Mr B aware that he is welcome to lodge a CDDA claim in relation to costs he may have incurred as a result of pursuing an act of grace payment after Finance received his initial claim.

3.10 The Ombudsman commends Comcare and Finance for the positive action the agencies have taken in response to the recommendations, and for their intention to develop a mechanism by which claims for losses suffered as a result of defective administration can be considered and dealt with in the future.

## ABBREVIATIONS AND ACRONYMS

CAC	<i>Commonwealth Authorities and Companies Act 1997</i>
CDDA	Compensation for Detriment caused by Defective Administration
Finance	Department of Finance and Deregulation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
Public Service Act	<i>Public Service Act 1999</i>
SRC Act	<i>Safety Rehabilitation and Compensation Act 1988</i>