

Submission

By



To the

Transport and Industrial Relations Select
Committee

On the

Injury Prevention, Rehabilitation and
Compensation Amendment Bill (No 2)

15 February 2008

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SUBMISSION BY BUSINESS NEW ZEALAND ON THE INJURY PREVENTION, REHABILITATION AND COMPENSATION AMENDMENT BILL (NO 2)

1. Summary of Recommendations

- 1.1. That Bill not proceed until the government clarifies its policy intent in respect of the onus of responsibility for dealing with prevention, management and compensation of illness and injury both within the workplace and without. The remaining recommendations herein are without prejudice to this recommendation.**
- 1.2. That proposed section 21B not be introduced or, in the alternative, that its application be restricted to situations where employers have reasonable ability to mitigate the chances of harm through effective selection and training of employees.**
- 1.3. The proposed changes should be delayed and reviewed when the review of general principles of the ACC system is complete, the findings made public and informed consultation with affected persons and organisations has taken place. In the alternative, the proposed changes to sections 30 and 336 should be deleted from the bill and the existing provisions retained.**

2. Introduction

- 2.1. Business New Zealand welcomes the opportunity to comment on the above Bill. It wishes to appear before the select committee to talk to the points herein.
- 2.2. Business New Zealand has serious concerns over several changes proposed by the bill. It also has more general concerns relating to the role of the ACC system in the future. Our submission focuses on these serious concerns rather than the detail of the proposed drafting or the technical changes to calculation of entitlements etc.
- 2.3. Most of the changes proposed will have effects at one level or another. However we see the majority of these as being localised to particular groups or areas and have not dealt with these in detail in this submission. For instance, the extension of access to vocational rehabilitation, the increasing of cover for persons between or out of work or the changes proposed to weekly compensation, will have impacts in the relevant areas, but of themselves do not impact on the essential nature of the current ACC scheme.
- 2.4. Each of these latter issues will clearly affect different groups and areas of society. For instance, changes to weekly compensation will be of concern to seasonal employers. The proposed changes

will increase, perhaps significantly, the cost of ACC to seasonal employers. Earners are able to purchase income insurance from ACC already. The cost of such income insurance is effectively passed to employers under these proposals.

- 2.5. Similarly, the removal of restrictions on cover for instances of self-harm is likely to have far reaching consequences. Self-harm is more than attempted suicide or self-mutilation as might be surmised from the explanatory notes. It also includes smoking, obesity and alcoholism, all situations where the harmful effects are well known, indeed they are emblazoned on every packet of cigarettes. Harm attributable to these causes, however, manifests in many ways, including common conditions such as asthma. Removal of restrictions on cover for self harm combined with provisions attributing work as default cause in cases of doubt mean it is likely that employers will foot a considerably increased liability for illnesses generated by a broad interpretation of the meaning of self harm. Such consequences appear to have been given no consideration in the Bill. They should be.
- 2.6. Each of these issues, while important, sits within the general construct of the ACC. It is the direction of ACC which we feel is of greatest concern, and it is that aspect we draw as a priority to the attention of the Select Committee. If the nature of the ACC system is to be changed this should be done only after in-depth public consultation. It should not, as the proposed legislation suggests is happening, be done by way of stealth.

3. Specific Comments

General.

- 3.1. Overall, Business New Zealand believes that the proposed changes represent a shift in government policy towards employers bearing an increasing share of the costs of the general health and well being of the workforce. Such a shift has significant consequences for the future of the ACC scheme, and for the costs of the general health system.
- 3.2. As its name suggests, the Injury Prevention, Rehabilitation and Compensation Act had its genesis in the prevention management and compensation of injuries, both in the workplace and generally. Historically, issues not caused by trauma fell to the health system, and were a cost to the taxpayer generally.
- 3.3. The growing extension of ACC cover to such things as gradual process diseases effectively blurs these historical distinctions. The shifting of the onus to employers exacerbates this blurring. Furthermore, Accident Compensation was a quid pro quo for the removal of the right to sue in cases of accident. That legal

proposition will be put under strain if the perceived broadening of workplace cover to instances of illness proceeds.

- 3.4. Furthermore, the proposed changes create the potential for disparity of treatment between those who suffer harm in the workplace and those who suffer harm elsewhere. The clearly increased emphasis on access to cover for issues arising from the workplace appears to be at the expense of those who suffer similar conditions arising from causes outside the workplace. For instance, a person contracting leptospirosis outside of employment on a farm will have to seek treatment from the health system and cover from self-insurance. Conversely a farm worker in the same household who contracts the same condition will be presumed to have contracted it at work and will be covered and case managed by ACC.
- 3.5. Business New Zealand is concerned at this apparent shift in direction and calls on the government to clarify its long-term intentions with respect to the prevention, management and compensation of both illness and injury.

Recommendation

That the Bill not proceed until the government clarifies its policy intent in respect of the onus of responsibility for dealing with prevention, management and compensation of illness and injury both within the workplace and without. The remaining recommendations herein are without prejudice to this recommendation.

Costs

- 3.6. Business New Zealand is also very concerned at the overall cost of the proposed changes. The explanatory notes to the Bill indicate in some, but not all, cases a potential impact on levy rates. Yet, the notes are inconsistent in identifying these costs. Indeed, they provide what we regard as excessively wide ranges of cost estimates. These leave an impression of significant uncertainty as to the real costs of these initiatives. For instance, the inclusion of cover for mental harm arising from traumatic events in the workplace indicates potential costs of \$22.6 million, with the projected impact on levies being between 3.8 and 12 cents per hundred dollars of payroll. This is a very wide range, with significant costs for employers inherent in the impact on levies. Similarly the attribution on a contingency basis of the cost impacts of a highly specific occurrence of harm across the whole employer community (through the employer account) appears as little more than a form of wealth redistribution through the sharing of public costs.

Cover for mental harm arising from traumatic events in the workplace

- 3.7. The circumstantial examples given in the explanatory notes to the Bill are narrow in scope, citing bank tellers and train drivers in highly unusual circumstances. The chances of a given person witnessing or experiencing a traumatic event are in fact far higher than the type of examples suggested. For instance emergency services, particularly police and fire services, are highly likely to be present at incidents that provide opportunities for trauma. So are all military personnel on secondment to trouble spots around the world. So are construction and forestry workers and farmers. Even these are in the minority when compared to the possibility of motorists going about their employment being involved in or witnessing motor vehicle accidents. While these may not be intended to be the kind of events covered by the Bill, the wording of the proposed new section 21B would include them.
- 3.8. Certainly not all persons witnessing or involved in traumatic events suffer mental harm. It is clear though that those who do are costly to deal with. Not dealing with them is not an option. Who should deal with them however is an issue. The general imposition of costs covering the addition of proposed section 21B is unbalanced and unfair. Business New Zealand believes it is unreasonable to expect employers to bear the costs of issues that are outside their reasonable ability to prevent or mitigate. Road accidents are a particular case in point.
- 3.9. While it may be possible for emergency and military personnel to be prepared in various ways for dealing with trauma this does not guarantee their invulnerability from mental harm. Effective selection and training make their susceptibility to mental harm less likely however.
- 3.10. But it is not possible for employers, or anyone for that matter, to treat all employees as potential participants in or witnesses to traumatic events. For instance, employees who travel (and they are many) may be trained to be defensive drivers, but they can't be trained to avoid being at the scene of an accident (and there are also many accidents).
- 3.11. Furthermore, there is a high possibility of inequity in the proposed approach as exemplified by the situation of volunteer fire-fighters working alongside professional fire-fighters. If both are present at the same traumatic event and suffer harm, the professional will be covered while the volunteer will have to make self-insurance provision for loss of earnings. This is clearly inequitable.
- 3.12. Business New Zealand believes that the cost estimates for inclusion of proposed section 21B are understated. The effect on levy rates

is therefore potentially either at the high end of the very wide range of cost estimates provided, or more likely, has been understated.

- 3.13. Passing the predicted costs of proposed section 21B on to employers generally will exacerbate the complexity of managing stress in the workplace and may encourage employers to “weed out”, either at selection or later, employees likely to suffer mental harm as a result of their direct involvement in traumatic events. It will also, at a time when much effort is being made to find employment for people on sickness or invalids’ benefits, be likely to make employers particularly wary of taking on anyone known to have suffered from any form of mental illness. This would be discriminatory and untenable.
- 3.14. Overall, Business New Zealand believes this aspect of the Bill requires a major rethink.

Recommendation

That proposed section 21B not be introduced or, in the alternative, that its application be restricted to situations where employers have reasonable ability to mitigate the chances of harm through effective selection and training of employees.

Changes to cover provisions for work-related gradual process disease or infection

- 3.15. Business New Zealand opposes the proposed changes to section 30, and its corollary section 336. The proposed changes in our view are a manifestation of our general concern that employers are being asked to accept a greater burden of the costs of general health and wellbeing of the population. The proposed changes represent a significant step away from the historical separation of injury based cover provided by the ACC and the general health and wellbeing cover provided by the public health system. The changes if implemented will further blur the boundaries between these two systems.
- 3.16. For instance, proposed section 30(1)(c) effectively creates a presumption that if causal possibilities exist in both work and outside work, the work or workplace was the cause.
- 3.17. Giving the ACC the power to rebut this presumption in proposed section 30(2A) is of no comfort. The message conveyed by this presumption we interpret as “business can pay unless there are good reasons not to, any such good reasons will be determined by the ACC.” ACC as an agency of state cannot be independent in such judgements. This itself is a cause for concern.

- 3.18. Furthermore, the proposed changes to section 336 extend the ability of government, through changes to Schedule 2 by Order in Council, to extend the onus on employers to accept responsibility for gradual process issues. While the changes to section 30 shift the general onus of proof onto employers, the proposed changes to section 336, covering the content of Schedule 2, widen the scope of issues on which employers may have to submit against the presumption of accountability under section 30. This shift in onus of proof is not mitigated by the requirements of existing section 57 and 60, which combine to require the ACC to investigate all claims. Under the present system ACC investigates the veracity and attribution of a claim *without presumption of attribution*. The bill would have the ACC add to its investigation the possibility of rebuttal of the proposed presumption of attribution of cause to the employer in all cases where the workplace is a possible causal factor.
- 3.19. Taken together, the effect of the proposed changes to sections 30 and 336 represent a major shift from the traditional injury/illness split of the ACC and health systems. The extent of this shift is at odds with the fact that the government commissioned in late 2007 a major review of the principles underpinning the present “no fault” ACC system. That review, led by PriceWaterHouse Coopers, is far from complete. It is therefore of concern that the effects of the changes sought in this Bill appear to cut across any possibilities of change that might arise from the review.
- 3.20. It is and always has been our view that the existing three-part test for cause and attribution of gradual process conditions is an appropriate means of ascertaining cover for such conditions. Employers stand to be significantly disadvantaged in the process if the proposed changes are made.
- 3.21. Business NZ is not opposed to the concept of the treatment and rehabilitation approach under the ACC scheme being extended to health issues, including disease and mental health. However it is not equitable that employers should solely bear the costs for these policies.
- 3.22. In many cases a hazard an employee has been exposed to during employment may contribute towards an injury/illness, but is not the sole cause.
- 3.23. This is recognised in the case of hearing loss, where ACC will cover the percentage of hearing loss that is deemed to be work related, not necessarily the full loss experienced by a claimant which may also have causes such as aging and non-work exposures.
- 3.24. A similar approach would be equitable for gradual process and disease where claim or epidemiological data can be used to

estimate the percentage causation that is likely to have been caused by work related exposure and fund that portion from the employers account. The other portions could then come from health or the earners accounts, rather than the all or nothing approach that the current Gradual Process provisions and provisions in this Bill perpetuate.

Recommendation

The proposed changes should be delayed and reviewed when the review of general principles of the ACC system is complete, the findings made public and informed consultation with affected persons and organisations has taken place. In the alternative, the proposed changes to sections 30 and 336 should be deleted from the bill and the existing provisions retained.

BACKGROUND INFORMATION ON BUSINESS NEW ZEALAND

Business New Zealand is New Zealand's largest business advocacy organisation.

Through its four founding member organisations – EMA Northern, EMA Central, Canterbury Employers' Chamber of Commerce and the Otago-Southland Employers' Association – and 67 affiliated trade and industry associations, Business NZ represents the views of over 76,000 employers and businesses, ranging from the smallest to the largest and reflecting the make-up of the New Zealand economy.

In addition to advocacy on behalf of enterprise, Business NZ contributes to Governmental and tripartite working parties and international bodies including the International Labour Organisation, the International Organisation of Employers and the Business and Industry Advisory Council to the Organisation for Economic Cooperation and Development.