

# **Submission**

by

**Business|NZ**

to the

**Health Select Committee**

on the

**Injury Prevention, Rehabilitation and  
Compensation Amendment  
Bill (No.3)**

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## **1. INTRODUCTION**

- 1.1 Encompassing four regional business organisations (Employers' & Manufacturers' Association (Northern), Employers' & Manufacturers' Association (Central), Canterbury Employers' Chamber of Commerce, Canterbury Manufacturers' Association, and the Otago-Southland Employers' Association), Business New Zealand is New Zealand's largest business advocacy body. Together with its 53-member Affiliated Industries Group (AIG), which comprises most of New Zealand's national industry associations, Business New Zealand is able to tap into 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.
- 1.2 In addition to advocacy on behalf of enterprise, Business New Zealand contributes to Governmental and tripartite working parties and international bodies including the ILO, the International Organisation of Employers and the Business and Industry Advisory Council to the OECD.
- 1.3 Business New Zealand's key goal is the implementation of policies that would see New Zealand retain a first world national income and regain a place in the top ten of the OECD (a high comparative OECD growth ranking is the most robust indicator of a country's ability to deliver quality health, education, superannuation and other social services). It is widely acknowledged that consistent, sustainable growth well in excess of 4% per capita per year would be required to achieve this goal in the medium term.
- 1.4 Business New Zealand welcomes the opportunity to comment on the Injury Prevention, Rehabilitation and Compensation Amendment Bill (No 3) ('the Bill'), recognises the good intentions behind the proposed extension of the current Act's scope of cover. However, caution must be counselled against too wide an expansion of existing accident compensation, particularly in view of the Government's commitment (as expressed in the Bill's explanatory note) to a "fair and sustainable ACC scheme". Regarding the expansion of the scope of cover for medical misadventure, given that the outcome of medical treatment is far from certain (it has been well said that medicine is an art, not a science) and that individual perceptions of what medical treatment can achieve are often unrealistic, the consequence of what is proposed is likely to be an increase in costs to earners and taxpayers somewhat in excess of those anticipated. This point is underlined by the omission from the Bill's explanatory note of any statement of likely cost increases both in respect to actual compliance – in terms of increased administrative and levy costs – and in terms of compensation and other expenses that may become payable. The absence of both a compliance cost and a regulatory impact statement is the more regrettable given the potential for cost escalation inherent in the Bill.

## **2. RECOMMENDATIONS**

1. That after six months of commencement law a proper assessment be done of the amendment's likely regulatory impact and of the extra levy

impost it is likely to generate and suggest ways of improving patient outcomes.

2. That the new test for medical misadventure be supported, but that ACC be vigilant about applying the new threshold for medical misadventure cases.
3. That ACC be required to manage its new discretion to provide entitlements or payments other than in accordance with the Act in such a way that unnecessary and excessive cost increases through the creation of a de facto type of ex gratia payment system are avoided.
4. That the other improvements to the Act, including the changes to calculation of weekly compensation for the self-employed be supported.

### 3. DISCUSSION

- 3.1 [Business New Zealand's chief concern with the Bill lies in the potential created for a movement from accident compensation per se to the provision of funding for at least some medical conditions? (illnesses) resulting from medical treatment.] Disagree – personal injury must be physical injury.
- 3.2 The removal of medical error together with the removal of the medical mishap provision (particularly the rarity element) will undoubtedly result in a far greater number of claims on the ACC scheme for medical treatment injuries than has been the case for many years. Business New Zealand asks whether there has been a robust analysis of the expected increase.
- 3.3 The explanatory note observes that not requiring ACC to make findings of fault is consistent with the no-fault nature of the scheme generally. However, it is apparent from what is proposed that the Bill does not completely remove ACC from its fault-finding role. The continued existence of the fault-finding element is evidenced by the obligation placed on ACC to inform claimants of the role of the Health and Disability Commissioner and to report any risk of harm to the public, to the person or authority responsible for patient safety in the area in question.
- 3.4 To remove the fault element and the 1% rarity limitation is to remove checks and balances that have gone some way to contain a compensation scheme that has at times threatened to expand to an unsustainable degree. The change of the scope of cover will therefore need to be closely monitored.
- 3.5 Where damage results from treatment, that damage will often manifest itself as some form of illness rather than as something in the nature of a strain or sprain (the examples of physical injury provided in section 26).
- 3.6 The Bill is likely to encourage arguments to the effect that in the particular circumstances, illness arising from treatment (iatrogenic illness) *does*

constitute a physical injury – the more so as illnesses by their nature are typified by physical symptoms.

- 3.7 Latrogenic illnesses are an increasing phenomenon of modern medical treatment and it can therefore be expected that the Bill, if enacted in its present form will lead – in time, if not immediately – to an exponential growth in medical treatment claims and an inevitable widening of compensation coverage.
- 3.8 Therefore, as increased claims and associated costs seem inevitable, Business New Zealand proposes that ACC carry out a review after six months of any claim increase and to take such preventative steps so as to reduce the claims level thereafter.
- 3.9 Another difficulty can be foreseen as a consequence of including oral ingestion of fungus in the definition of “accident” (clause 10, new section 25 (2)(ba)). Again the issue is potential expansion. It could be argued that there is no clear distinction to be made between the oral ingestion of a fungus and the inadvertent oral ingestion of peanuts if the person in question is an allergy sufferer. Caution will need to be exercised to ensure that expansion of coverage does not occur by analogy.
- 3.10 Business New Zealand offers cautious support for the new section 68 (clause 20), allowing the Corporation to exercise its discretion to provide entitlements or payments. Although the ability to exercise discretion is supported, this will need to be carefully managed to avoid unnecessary and excessive cost increases through arbitrary case management and possibly a type of ex gratia system of entitlement.
- 3.11 Business New Zealand supports the changes to the method of calculating earnings for the recently self-employed set out in clause 38 of Schedule 1 in substitution for existing clause 38.

## **RECOMMENDATIONS**

1. That Business New Zealand does not oppose the bill but requests that ACC administers the expansion and cover cautiously.
2. That ACC regards the extension to discretionary spending as exceptional and that it should be treated as such.
3. Business New Zealand supports the changes to the self-employment weekly compensation calculations and the other technical modifications of the Act.