



Increasing Choice in Workplace Accident Compensation

**Submission to the Department of
Labour**

15 July 2011

Details of respondent

Glenn Barclay
Convenor
ACC Futures Coalition
P.O. Box 5173
Wellington

e-mail: info@accfutures.org.nz

Phone (027) 295-5110

Description:

The ACC Futures Coalition consists of community groups, academics, organisations representing people who need support from ACC, health treatment providers and unions who have come together around the following aim:

To build cross-party support for retaining the status of ACC as a publicly-owned single provider committed to the 'Woodhouse Principles', with a view to maintaining and improving the provision of injury prevention, treatment, rehabilitation and 'no fault' compensation social insurance system for all New Zealanders.

List of ACC Futures Coalition Affiliates

ACC Group	NZ Association of Psychotherapists
Acclaim Otago (Inc)	NZ Audiological Society
Aviation & Marine Engineers Association	NZ Council of Trade Unions
College of Nurses Aotearoa	NZ Dairy Workers Union
DPA (NZ) Inc.	NZ Dental Therapists' Association
Equity Support Group	NZ Nurses Organisation
Engineering, Printing and Manufacturing Union	NZ Recreation Association
Finsec	NZ Register of Acupuncturists
Flight Attendants and Related Services Association	Osteopathic Society of NZ
Maritime Union	Peter Sara (Lawyer)
National Distribution Union	Podiatry NZ
National Foundation for the Deaf	Public Service Association;
NZ Association of Occupational Therapists	Rail and Maritime Transport Union
NZ Association of Counsellors	Service and Food Workers Union Nga Ringa Tota Inc

ACC Futures Coalition

Increasing Choice in Workplace Compensation

Submission to the Department of Labour

1. Introduction

- 1.1 ACC Futures Coalition was established in 2009 as an alliance of health professional associations, consumer groups, community groups and unions, with the aim of building cross-party support for retaining the status of ACC as a publicly-owned single provider committed to the 'Woodhouse Principles'. We seek to maintain and improve the provision of injury prevention, treatment, rehabilitation and 'no fault' compensation social insurance system for all New Zealanders. An analysis of the proposals in the discussion document commissioned by the Coalition¹ is attached as Appendix A.
- 1.2 Our accident compensation scheme came about as the result of a social contract made between the people of New Zealand, and the government in the late 1960s, the significance of which cannot be overstated. In giving up the right to sue for covered injuries, the public necessarily gave up all the Court-ordered remedies which flow from civil suits. These included: complete compensation for lost earnings (both past and future), compensation for pain, suffering and loss of amenity, compensation for loss of congenial employment, compensation for handicap in the labour market, compensation for loss of pension, as well as compensation for the cost of treatment and/or rehabilitation.
- 1.3 The system that was developed was based on the five 'Woodhouse' principles of:
- Community responsibility
 - Comprehensive entitlement
 - Complete rehabilitation
 - Real compensation
 - Administrative efficiency
- 1.4 Sir Owen Woodhouse has spoken of the 'social welfare intent and purpose'² of the scheme established on these principles. He went on in the same speech to describe how the original report said that "as the new system was to be a state scheme, part of the social welfare structure of the state, it should have the final backing of the state³," and that "to equate the social insurance character of ACC with the business of commercial insurers has created much confusion."⁴
- 1.5 ACC has, over time, been subject to pressures to move it away from its origins as part of our social welfare structure. Measures such as the introduction of full-funding and experience rating have all served to threaten the status of the scheme as part of our

¹ Peter Harris, *Choice in the ACC work account: a solution looking for a problem?* July 2011

² http://issues.co.nz/library_images/accfutures/sir-owen-woodhouse_speech.pdf p. 4

³ *ibid.* p. 10

⁴ *ibid.* p. 11

welfare system, yet notwithstanding these initiatives it remains founded on the bedrock of the social contract and its standing as a public service. The proposals in the discussion document *Increasing Choice in Workplace Accident Compensation* would take this process a step further on and by introducing the “business of commercial insurers” potentially undermine the principles upon which the scheme is based.

- 1.6 Our objections to the proposals however, go well beyond the values on which the scheme was founded. There is no evidence to support either of the main proposals in the discussion document: the extension of the Accredited Employers Programme (AEP) and the privatisation of the work account through the introduction of private insurers. There is no demand and the proposals are either unworkable or, in the case of the AEP, will undermine the advantages that the programme is meant to have.

2. General comments on the AEP

- 2.1 The Accredited Employers Programme was introduced in 2000 and has the advantage that joint union-employer programmes can provide effective injury prevention and rehabilitation practice. There is some evidence through the Research NZ research that the return to work rate and sustainable return to work rate is similar to ACC⁵, and that there is greater client satisfaction with employer-managed claims than there is with either third party or ACC-managed claims⁶.
- 2.2 However, the discussion document places too much emphasis on the research conducted by Melville, Jessup, Weaver, as part of the Stocktake of ACC Accounts. On the basis of that research the Minister argued that the AEP delivered safer workplaces with 12% fewer claims and more effective rehabilitation, with 15% lower costs⁷.
- 2.3 There are issues arising from this research:
- It analyses claims not accidents, and there is a risk that employers may put pressure on workers not to lodge claims or to report them as non-work claims.
 - Adverse selection could operate in terms of which employers choose to enter into the AEP – those that have lower good systems and lower accident rates are more likely to think that their costs will be lowered by going into the programme.
 - The research noted that over the last decade “standard employers have had marked improvements in the rate of weekly compensation claims while accredited employers have been virtually static”. The relative claim rate for standard employers was 40 percent above that of accredited employers in 2001, but by 2007 the relative standing reversed, and by 2010 their claim rates are about 25 percent below those of accredited employers. If the AEP was *delivering* fewer claims and lower costs, the expectation would be that those trends would go in the opposite direction.

⁵ Research NZ, November 2008.

⁶ Research NZ, November 2009.

⁷ Minister’s Foreword, *Increasing Choice in Workplace Accident Compensation*, Department of Labour, June 2011, p. 3

- The NZ Research research illustrates another problem with the AEP, given that most accredited employers rely upon TPAs to manage their claims. Their client satisfaction is lower than either employers or ACC but the Melville, Jessup Weaver research did not attempt to distinguish between the outcomes for AEP employers that manage their own claims and those that engaged with DHBs.
- 2.4 It is also worth noting that since 2006, the number of employers participating in the programme has declined steadily, by about 6 percent a year. If it was delivering improved results, it would, over time, be opening up a gap between what the ACC charges for cover and what self-insurance could achieve, and the expectation would be that participant numbers would increase, not decrease.
- 2.5 The ACC Futures Coalition agrees that the accredited employers programme can work well, particularly where there are active partnerships between the employer and unions. However, we question whether the plans for extension of the scheme are well founded and they run the risk of undermining the benefits of the programme through some of the proposals such as the watering down of the audit process.
- 3. General comments on the privatisation of the work account.**
- 3.1 The case for privatising the work account is even weaker. A fundamental problem with it is that whereas for ACC the injured worker is the client, the primary duty of private insurers will be to employers, who must return profits to their shareholders.
- 3.2 The government's proposal to reduce the levy in the work account from next year is because the work account is in good financial shape. It has been one of the better performing accounts over recent years and there is no evidence that it needs to be opened up for competition.
- 3.3 There is sufficient flexibility within the scheme to offer incentives to employers, if incentives are required. There are also a significant number of unknowns in the proposals which suggest that it is hard to see how it can be workable in practice.
- 4. General comments on the questions in the discussion document**
- 4.1 Answers to the questions in the Department of Labour Discussion Document *Increasing Choice in Workplace Accident Compensation* need to be related to a basic specification of what the end objective is. The questions make no sense in their own right, and only make sense if they are regarded as a means to an end. Answers need to be related back to an assessment of whether changes proposed buttress or erode the end objective.
- 4.2 It is precisely because access to remedies via litigation is closed that the delivery of entitlements needs to be robust. Employers have been relieved of a contingent liability, so equity of contractual rights and obligations needs to be restored through legislation and/or regulation. Any changes in the regime need to be assessed against the basic standard: do they protect the entitlements of employees under the social contract?

- 4.3 It is precisely because access to remedies via litigation is closed that the delivery of entitlements needs to be robust. Employers have been relieved of a contingent liability, so equity of contractual rights and obligations needs to be restored through legislation and/or regulation. Any changes in the regime need to be assessed against the basic standard: do they protect the entitlements of employees under the social contract?
- 4.4 Those entitlements have three elements: prevention, rehabilitation and compensation.
- Prevention is in part driven by commercial incentives (employers paying levies), but equally (and perhaps more significantly) by the design, implementation and monitoring of health and safety systems. Employees, individually and collectively have a direct interest in, and given the social contract nature of the regime a right, to be engaged at all levels of that system (design, implementation and monitoring).
 - Rehabilitation has both a medical and social dimension, with attachment to the workplace a critical core element of effective rehabilitation. Risks to receipt of entitlements to rehabilitation and compensation increase with length of the claim, so systems need to ensure that there is a suitably empowered and resourced agency to “stand in the shoes” of the claimant when time blurs the relationship between the employee and the liable employer.
 - Advocacy to secure entitlements is difficult for most workers, and is made more difficult for those with severe injury, recurrence of problems with an earlier injury, or gradual process injuries. Structures (who delivers entitlements) and processes (for handling claims and resolving disputes) need to support claimants.
- 4.5 The questions are addressed by examining potential impacts against these objectives, and in mitigating the risks to employees of changes to systems, rights and obligations.

5. Response to questions in the discussion document

- 5.1. Do you agree that there should be a greater range of claims management periods? Why or why not?

The duration of claims management periods can compromise the integrity of the 24/7 no fault ACC scheme by, for example, encouraging participating employers to cut costs on rehabilitation when the claims period is short and they are soon to be handing claims back to ACC, or creating a risk when an extended claims management period increases the chance that the employer may not be able to afford to meet the ongoing costs associated with the claim when it is handed back.

Over time, organizations – even large ones like the Shell petrol company – get taken over, merge, change their names and exit fields of business. An extended claims management period increases the risk of the longer term claimant being stranded: not

knowing where to go to for continuity of entitlement, and not being seen as “their” responsibility by the new owner of a firm that was not responsible for the accident in the first instance.

The best way of managing the risk to entitlements is to have a limit on the maximum term over which a claim can be managed (by either an individual employer or a third party insurer), and/ or to require the party seeking a longer duration to post a bond with ACC or to insure with ACC to cover potential for handing back ongoing claims in the event of employer insolvency, takeover, or exit from an industry.

- 5.2. Do you agree that the claims management period should be measured from the date of injury, rather than from the end of the current levy year?

This is not a significant matter.

- 5.3 Do you agree that there should be more flexibility in the purchase of high cost claims cover and stop loss cover? If not, why not?

There is no problem with this if the cover is purchased from ACC. This is because ACC takes back the claim at the end of the self cover period at an actuarially assessed cost, so any over or under insurance washes out in the take back price. If flexible cover is provided through third party insurers, there is a need for appropriate prudential regulation of providers and a disputes resolution facility to avoid offloading underinsured cost onto the ACC, and effectively other levy payers.

- 5.4 Do you agree that employers should be able to purchase high cost claims cover and stop loss cover from an approved third party? If not, why not?

We do not agree that employers should be able to purchase high cost claims cover from an approved third party.

Acceptability of this would depend on how robust any prudential regime is for providers of the cover, and who will pay any shortfalls in the event of disputes over coverage or insurer insolvency. It is the “high impact, low probability” event (say a major industrial accident like Pike River where a large number of workers are severely injured or killed) that tends to generate the greatest difficulty with settling claims (witness the ongoing disputes about interpreting the liability of insurance cover on earthquake damaged properties in Christchurch).

Protecting entitlements requires that there be a limit on just how much high cost cover risk can be offloaded onto third parties.

On its own, this appears to create substantial regulatory overhead cost for little apparent benefit and we would therefore oppose it.

- 5.5 Do you agree that an employer’s claims history should be taken into account when setting PDP levies? Why or why not?

With comprehensive experience rating being introduced to all levies, there does not appear to be much value in retaining PDP as a separate category of the AEP. All that is added is an accreditation and auditing process to a universal experience rating regimen.

- 5.6 Do you agree that ACC should be required to take over management of any claim at the employer's request and cost? Why or why not?

This is acceptable provided that the full cost of taking over the claim is met.

- 5.7 Do you agree that in the Full Self Cover option, there should be a choice of a full and final settlement? Why or why not?

No. Almost by definition, reactivated claims cannot be predicted at the time of settlement, and so can never be accurately priced into the hand back charge. This will lead to selection bias to the detriment of ACC and other levy payers: the employer seeking full and final settlement is more likely to be one who suspects that in the particular case reactivation is probable.

- 5.8 Do you think that co-operatives, franchises or other groups should be able to enter the AEP? Why or why not?

We think that there could be problems with co-operatives, franchises or other groups entering the AEP. Accreditation and audit systems would need to be robust, with some form of default guarantee if a franchisee fails, but it would still be difficult to guarantee competence in injury prevention and management across the collective.

We are also concerned that such groups would inevitably have to rely on third party administrators to manage claims and we have a number of concerns about TPA performance. The discussion document raises the possibility of TPAs being centrally accredited, instead of employer by employer. This proposal could help overcome the problem provided that this accreditation process is also robust and that unions have a central role. Workers' experience of TPAs needs to be channeled into the accreditation process and given serious consideration when deciding whether a TPA is up for the job.

- 5.9 Do you agree with the proposal to allow employers to use financial instruments or other forms of security as a means of meeting the AEP financial requirements? Why or why not?

There are risks that loosening the requirements over entry into the AEP scheme in this way could increase the potential of ACC having to fund the cost of third party insurers becoming insolvent. If this was introduced the security would need to be acceptable to ACC, because it is the residual claim funder.

- 5.10 Do you agree with the proposals to streamline injury management practice audits? If not, why not?

As a concept “streamlining” has superficial attraction. However, “streamlining” should not stifle claimant “voice” and reduce rights to know about disputes processes. Any streamlined practice must remain robust and comply with standards that ACC establishes, because it is the residual funder. Worker and union involvement in the audits has added to the effectiveness of the programmes, thus we oppose streamlining if it is likely to result in diminishing their involvement.

If this proposal is to progress then it should go through a tri-partite process involving the government, unions and employers.

5.11 Should health and safety audits be voluntary? If not, why not?

The effect of making health and safety audits voluntary could well be to exclude employee health and safety representatives from the design and monitoring of workplace safety systems, it would conflict with their social contract rights to be involved in accident prevention and would not be acceptable. The ACC partnership programme has been a valuable impetus to improving health and safety in the workplace and enhancing worker involvement. The audits have provided a mechanism for employees to give feedback to the ACC and employers. The mandatory nature of the audits has provided a forum for employees that may otherwise not arise if they were to become voluntary.

5.12 Do you agree with offering a range of claims excess options outside the AEP? Why or why not?

We do not agree with the proposal to offer a range of claims excess options because they will increase the incentives on employers or TPAs to decline claims.

Question relating to greater choice for self-employed people

5.13 Do you agree that self-employed people should be able to choose to purchase cover for both work-related and for non-work injuries from a private insurer? Why or why not?

The self employed are notoriously vulnerable. They have a tendency to minimize their declared earnings and then run into problems if they are injured. It is likely they would underinsure and this will lead to a greater burden falling on the state (health care and welfare). The self employed are also vulnerable because they do not have health and safety systems to fall back on. All of this suggests that the self employed should stay with ACC,.

Questions relating to choice in the Work Account

5.14 Do you agree that transparency and flexibility are necessary to facilitate a competitive environment? Are these proposals adequate? Why or why not?

It is not possible to answer this question in the abstract. Transparency and flexibility would be irrelevant in facilitating a competitive environment if the primary

preconditions for such a market cannot be met. These include whether there is any user need that is currently not being met at a competitive price, whether there is sufficient margin to attract competitors, and whether the regulatory regime needed to ensure full entitlements for employees, and prompt and proper payment for treatment providers, has to be so comprehensive that it would tend to deter competition.

All of these matters are addressed in the attached report, which concludes that there is no evidence base for introducing competition anyway. The report also confirms Officials' views (in the Regulatory Impact Statement prepared for Cabinet) that not only is it not possible to quantify any benefit from introducing competition in the Work Account, but it is not even possible to estimate whether the benefits from such a move are positive or negative!

We are also concerned that the proposal to deregulate the ACC work account products will lead ACC to see the employer as their client, not the injured worker. Further, the resultant loss of consultation over the setting of levies will eliminate interested parties such as unions from the process.

- 5.15 For what purposes would you require claims data? What type of and level of data access would be necessary and why?

We, along with other interest groups, would like to have the opportunity to analyse claims data in order to contribute to the debate about injury prevention and effective rehabilitation. It This would only require access to tstatistically aggregated data by industry, exposure, activity, duration of claim, claim costs, region, gender, age, ethnicity. Effective injury prevention is best done at an industry level based on good data. There is strong evidence from the Forestry sector and meat sectors that co-ordinated injury prevention at an industry level brings down costs for that sector.

- 5.16 Do you see any other issues with the proposals to collect and share data? If so, how might they be addressed?

If ACC is privatized, there would have to be standards imposed on the private insurers to share claims data to enable industry/sector injury prevention effort. The private sector may be reluctant to share the data unless they are compelled to do so. Without data at an industry level, effective injury prevention will not occur at an industry level. Privacy issues are also a major concern.

- 5.17 Is continuous cover assured by the proposals to have ACC cover all workers unless private insurance is in place, and a register of private insurance cover? Why or why not?

The answer to this question depends crucially on whether a provision to meet residual claims arising before the introduction of insurer choice on 1 October 2012 would be levied on insurers entering the market after that date. On current levies, it would constitute **at least** 40 percent of the total levy that would need to be charged, although there are suggestions that improvements in the work account finances will have reduced or eliminated it, but a residual claims liability could emerge again if account assets were severely eroded by another global asset price implosion .

If the levy is **not** included, then employers could avoid that part of the levy by exiting ACC cover, which in turn would make the ACC part of the account unsustainable. In that event, continuous cover would only be assured if there was a taxpayer funded buyout of all the residual claims, which is not provided for in the package. This is expanded on in the accompanying report.

Gradual process injuries are also at risk unless there is a levy to cover the cost of these claims.

- 5.18 Do you agree that the risks and consequences of insurer insolvency are adequately managed by the proposed approach? Why or why not?

The risks of insurer insolvency cannot be managed other than through prudential standards and financial monitoring, but there is no specification of what those standards are likely to be, and hence there is, within the proposal, no explicit approach to managing insolvency risk. The **consequences** of insolvency are covered by levying remaining insurers to cover the costs left by the insolvent insurer. This creates, in the first instance, a perverse incentive for each **individual** insurer to under-price risk and increases the prospect of insolvency. It also has the effect of incentivising insurers **collectively** to under-price risk and to offload that onto the ACC as the residual underwriter of risk. That set of arrangements does not manage the consequences **adequately**. The argument is explored in more detail in the attached report.

- 5.19 Do you agree that the establishment of a market regulator would adequately protect workers' rights and entitlements? If not, what additional practical steps could be taken?

It should be noted that there is not a single regulator proposed in the discussion document but a suite of regulators: register of employers alongside contracted insurer; independent claims lodgement, handling and clearing unit; independent disputes resolution agency; market regulator to monitor and enforce compliance; central data pool administrator; and prudential regulator of insurance providers.

The proposals are comprehensive, and if implemented in a rigorous way could protect rights and entitlements. However, this is about managing the market rather than about monitoring and protecting the rights of injured individuals. There must also be some doubt if this complex set of inter-locking regulations will in fact be constructed and effectively co-ordinated. There is a high risk of regulatory failure, which would tend to impact on worker rights and entitlements.

- 5.20 Do you agree with the proposal to provide for independent dispute resolution in alignment with existing frameworks? Why or why not?

We agree that there should be independent dispute resolution and support the separation of DRSL from ACC for this reason. However, notions of independence will be undermined in the same way should the insurer have a choice of disputes resolution service. As an independent crown entity DSRL should be the disputes resolution service for accident compensation regardless of who the provider is.

Our comments on practicality under the answer to question 5.19 also apply here. The risk that remains is if the party the claimant has the dispute with (employer or insurer) goes out of existence, changes name, merges with another party or the like. This suggests that either there needs to be a time bound period for cover, with hand back of claim at cost at the end of the period, or the posting of a bond to ensure that dispute settlements can be paid.

5.21 Do you agree that a single, central claims lodgement process would be effective?

It would need to be robust to ensure that claims are allocated and health professionals are paid promptly. This was identified as one of the major problems with the privatization experiment of the late 1990s and cannot be allowed to happen again. The claims lodgement process is also likely to become a location for the initial disputation about which accounts claims should be allocated to, not just which insurer. All of this will add to the cost of this particular part of the proposed regulatory framework.

The comments on practicality under the answer to question 5.19 also apply here.

5.22 What else might be done to streamline claims administration processes and reduce the risk of increased transaction costs for providers?

There is a clear trade-off here. The more streamlined claims administration processes become, the greater the risk that workers will not receive their entitlements, or that treatment providers will face higher costs, processing delays, and payment defaults.

5.23 Do you have any comment on how the cost of public health acute services could be fairly allocated?

Firstly, we believe that the retention of the current model of ACC provision is the simplest, most effective way of providing funding to public health acute services. Should private insurers enter the market public health acute services cost **and** the cost of emergency transport services could be allocated on an actual incurred cost basis (invoiced to the employer or insurer) or spread across all providers through a levy.

5.24 Do you agree that private insurers should be able to contract with treatment providers for alternatives to the minimum prices and conditions? Why or why not?

Private insurers should not be able to contract for alternative treatment providers for the simple reason that there is no parallel, competitive, acute service treatment provider available 24/7 and unless the service can be provided on that basis the 24/7 coverage of ACC cannot be assured.

There is a risk that rehabilitation and treatment will be compromised if insurers enter into low cost contracts with treatment/rehabilitation providers. The injured worker will be forced to attend the treatment or rehabilitation provider offered by the employer/insurer. If the treatment/rehabilitation provider has been selected solely on the basis of price, the injured worker may not receive the quality of care that they need

to be effectively treated or rehabilitated. This will in turn lead to lower productivity, health care costs and welfare payments.

- 5.25 Do you agree with the proposed approach to managing gradual process claims? Why or why not?

No. See the comments on selection bias under the answer to question 5.7 above.

Questions on the impacts of the proposed changes

- 5.26 Do you have any comment on the impacts of the proposed changes?

See detailed comment in the attached report

- 5.27 Do you think the proposed risk mitigation and management measures would adequately address the risks? If not, do you have any suggestions for alternative ways to manage these risks?

Risks with the proposed measures have been explored in the answers to a number of the above questions.