NEW ZEALAND COUNCIL OF TRADE UNIONS
Te Kauae Kaimahi

Submission of the New Zealand Council of Trade Unions Te Kauae Kaimahi

to the

Accident Compensation Corporation

on the

ACC Levy Consultation 2017/18, 18/19

P O Box 6645
Wellington
19 October 2016

Table of Contents

Summary of recommendations

1. With the removal of the residual levy, the poor fit of the current levy regime to covering occupational disease becomes especially urgent and should be reviewed. Occupational disease claims should be funded by a separate levy imposed on all employers. The levy should be at a flat rate and immune from risk rating due to the difficulties in attributing occupational disease to a particular employer. All employers, including employers in the accredited employers programme, should be required to pay the levy.

2. We are very concerned at the proposals for further intensification of experience rating. We would have expected consultation with the CTU on these proposals at an earlier stage. We strongly recommend that changes to experience rating do not proceed until an independent evaluation has been carried out of the existing scheme. Such an evaluation should look for evidence of positive effects (reductions in harm) and negative effects (including gaming, non-reporting of harm, pressure on workers not to report, to claim under the wrong scheme, to return to work too early or other adverse effects for workers). We would like to participate in the design of such an evaluation. We emphasise that in this context, reductions in claims are not conclusive evidence of reductions in harm. A thorough evaluation is timely in any case because the scheme has been in place for five years and we understand that the Corporation is committed to evidence-based policy.

3. We comment on the proposals for changes to experience rating and the potential for increased "gaming" of the system to the disadvantage of the working people it is intended to support, and observe that there is no proposal to align the Corporation's incentives with the Health and Safety at Work Act's move of responsibility from

employers to Persons Conducting a Business or Undertaking (PCBUs). The levy and experience rating structure encourages employers to transfer their responsibilities to subcontractors or to use labour hire firms. The concept of the PCBU is designed to address this increasingly pervasive problem. We strongly recommend that the Corporation consider new design elements to address this, such as subcontractors and labour hire employers taking the risk classification of the work actually being carried out (with corresponding levy levels); identifying such relationships in claim reporting; and PCBUs sharing the consequences of subcontractors' poor performance. We have also proposed a review of the process under which workers are classified as 'self-employed'.

4. We are very pleased to see a significant increase proposed in injury prevention expenditure. We urge the Corporation to further increase work account injury prevention spending and to take a broad and long term view of the requirement for spending on injury prevention to result in a reduction in levies. We hope that "injury" prevention means "harm" prevention and includes prevention of threats to work-related health.

5. Rather than cuts in work account levies, the available funding should be used to restore and enhance entitlements under the scheme.

6. We do not support a rise in the Earners' levy rate.

7. We are concerned that we have not been consulted on the changes to the auditing of the Accredited Employer Programme's safety management practices and injury management.

8. A different approach to levying the Labour Supply Services classifications should be considered. Levies should match the actual work done by each employee and include a loading for the increased risk in this kind of relationship. A convenient way to manage it may be for the cost of the labour hire to be regarded as liable earnings paid by the receiving employer and levied according to its classification.

9. We have expressed our concern at the lack of ongoing consultation in a number of areas and made a proposal for some joint work. We would like to meet with senior ACC management to discuss this.

1. Introduction

1.1. This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With 320,000 members, the CTU is one of the largest democratic organisations in New Zealand.

1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.

1.3. We have longstanding concerns about experience rating, employer self-cover (the Accredited Employer Programme) and the need to restore fairness in terms of both entitlements and the administration of them. This is in particular in relation to the requirement in ILO Convention 17 that all necessary treatment should be provided for people who are injured in accidents at no cost to the injured person; and the requirement in ILO Convention 42 to provide the same compensation to workers incapacitated by occupational disease as is provided to workers incapacitated by industrial accidents.

1.4. Previous enhancements to the scheme such as cover for a mental injury caused by exposure to a sudden traumatic event in the course of employment; changes to the provisions for work-related gradual process, disease, and infection, to provide more clarity around whether cover is available and how it is determined, and to remove some existing barriers to cover; changes that allow greater flexibility to amend the list of occupational diseases provided in schedule 2; removal of the age-limits for eligibility for vocational rehabilitation; and better compensation for seasonal workers were fully justified. We remain concerned at the loss of entitlements in the last seven years and consider that they should be restored and the scheme further enhanced rather than continuing to reduce levies.

1.5. We are also very aware of how volatile the Corporation's apparent financial position can appear. Changes in investment valuations and returns and changes in discount rates all have the ability to create major variations in its paper position from year to year and even over shorter periods. In the recent past that has been used to justify higher levies, increased pressure on claimants and reduced entitlements. The Corporation reported a $3.4 billion deficit in the year to June 2016 yet the same

reaction has not occurred, showing how politically driven the reaction was in those years.

1.6. The CTU takes an interest in all of the ACC Accounts but in particular the Work, Residual and Earner Accounts.

1.7. Workplace health and safety is a core issue for unions and workers. In the context of ACC levies, reducing workplace injuries and occupational disease is not only a matter of safe workplaces and prevention of injury or death, but also a way to contain costs and hence levy increases. We warmly welcome the significant increase in injury prevention funding proposed (to which we return below) but urge the Corporation to ensure its actions in injury prevention go beyond a predominant focus of reducing the costs of claims. Any reduction in injury and occupational disease will lead to savings to ACC and the health and welfare system more generally, in addition to reductions in pain and suffering.

1.8. Last year we raised the concern regarding on the discontinuation of residual levies that they funded a significant number of claims resulting from occupational disease. It is our longstanding view that the scheme is not currently adequately addressing the needs of New Zealanders suffering from occupational disease and the removal of the residual levies further expose the problem. Further, we note below that experience rating does not align with occupational disease because more often than not it is difficult or impossible to attribute the claims costs to one particular employer. It unlikely to provide employers with an incentive to improve their performance with regard to preventing occupational disease. We are increasingly concerned that despite WorkSafe's welcome focus on work-related health, confirmed with its recently launched strategic plan[1], ACC's efforts do not carry the same urgency, and that compensation and rehabilitation of occupational disease risks being underfunded. We advocate that occupational disease claims should be funded by a separate levy imposed on all employers. The levy should be at a flat rate, fiscally neutral (existing levies should be reduced by an aggregate amount equal to the revenue brought in by the occupational disease levy) and immune from risk rating due to the difficulties in attributing occupational disease to a particular employer. All employers, including employers in the accredited employers programme, should be required to pay the levy.

[1] http://www.worksafe.govt.nz/worksafe/information-guidance/work-related-health/work-related-health-strategic-plan

2. Experience rating

2.1. We are very concerned at the proposals for further intensification of experience rating in the document "Our new approach to helping create healthy and safe workplaces". Our concern is heightened by the lack of prior consultation with the CTU as the internationally recognised most representative body of working people in New Zealand. It is after all workers, not employers, who are the primary clients of the work account. We observe that the questions asked in the consultation documents are aimed at employers ("our customers"), not workers or their representatives. This borders on being offensive.

2.2. We have frequently expressed our concern that experience rating (as well as self-funding) have side effects which adversely affect health and safety in workplaces due to pressure not to report harm, and can lead to workers being pressured into not claiming, not receiving their full entitlements, transferring the claim to another account, or returning to work earlier than is good for their health. See for example our 2013 submission to the levy consultation which included international evidence on these matters. Given that concern, we would have expected to be consulted on the present proposals at a much earlier stage.

2.3. In addition, experience rating does not align well with reducing harm from work-related disease, particularly forms with a long latency. This is because more often than not it is difficult or impossible to attribute the claims costs to one particular employer. The long latency period and cumulative effects of exposure which may have occurred at one or more workplaces make it very difficult to attribute an occupational disease claim to any one employer. Experience rating is therefore unlikely to provide employers with an incentive to improve their performance with regard to preventing occupational disease because a claim is unlikely to be able to be attributed to them. It may also lead to employers resisting claims and undertaking costly litigation while doing little to improve their performance.

2.4. Further, the greater emphasis on what the consultation document refers to as "performance in measures that align to health and safety outcomes" is in reality relying totally on lag indicators. In fact they are imperfect measures even of health and safety outcomes because they measure claims, not harm in the form of injuries or work-related disease. If there is gaming of the system then not all harm will lead to claims.

2.5. The Independent Taskforce on Workplace Health and Safety was very clear in recommending stronger lead indicators as well as lag indicators (e.g. p.75 of its report). To a weak extent the WMD and WSMP schemes made use of lead indicators but even those are now being stopped as the consultation documents explain. We do not regret their demise because we had been aware for a long time that they were poorly designed and ineffectual. However rather than replace them with lag indicators which have increased significance because of the financial weight put on them, better lead indicators, and better processes for auditing them, should be introduced. Some of the processes and criteria proposed for the Safety Star Rating Scheme are examples of how this could be done.

2.6. Experience rating has now been in place for five years (since 2011). We have previously (such as in last year's submission) strongly urged the Corporation to evaluate experience rating for its effects on incidence rates of injury and harm, and its adverse effects for workers. The proposals show no evidence of evaluating the performance of the existing scheme and yet intensify its effects. We have asked the Corporation for any reports on such evaluations and have not received any.

2.7. We noted last year from the Corporation's 2014 Annual Report (p.40) that the Experience Rating programme appeared to be underperforming in reducing claims (though no distinction is made between injuries and claims to enable understanding of whether injury rates are falling at the same rate as claim rates):

> During 2013/14 ACC achieved a 0.6% per annum greater claim reduction amongst employers who had participated in injury prevention programmes compared with employer peer groups not engaged in these programmes. This was against a target of 5%.The measure was not achieved, despite more employers participating in the Experience Rating claims-reduction programme than we expected. Further investigation is needed to identify the drivers of claims performance in the Work Account.

2.8. We **strongly recommend** that changes to experience rating do not proceed until an independent evaluation has been carried out of the existing scheme. Such an evaluation should look for evidence of positive effects (reductions in harm) and negative effects (including gaming, non-reporting of harm, pressure on workers not to report, to claim under the wrong scheme, to return to work too early or other adverse effects for workers). We would like to participate in the design of such an evaluation. We emphasise that in this context, reductions in claims are not

conclusive evidence of reductions in harm. A thorough evaluation is timely in any case because the scheme has been in place for five years and we understand that the Corporation is committed to evidence-based policy.

2.9. We offer the following comments on the proposals put forward, but this is without prejudice to our primary submission that no major change to experience rating should proceed without an independent evaluation of the existing scheme.

2.10. We refer to the “conceptual designs” on pages 3 and 4 of the consultation document “Our new approach to helping create healthy and safe workplaces”.

Design element: Shorten the experience period (p.3)

2.11. The shorter the experience period the less ability it has to accurately recognise events causing harm from forms of occupational disease because many have long latency. Even the current periods are problematic for this purpose. Similarly it is even more susceptible to problems in recognising health and safety problems in industries with high impact but low frequency events such as in mining. Unless lead indicators are used, including the number and seriousness of near-misses and the effectiveness of management systems and worker participation, performance of employers in such industries can deteriorate over long periods without detection by actual events leading to claims. The proposal intensifies these problems.

Proposed design element: Increase the focus on claim frequency performance when assessing experience (p.3); or Remove claim duration from consideration in the experience calculation (p.4).

2.12. These proposals significantly reduce or eliminate the weighting given to claim duration in determining experience rating discounts (rewards) or loadings (penalties). As the document comments, this may reduce incentives for rehabilitation of workers but it may also have the beneficial effect of reducing gaming in the form of pressuring workers to return to work too early. It has at least two other disadvantages. Firstly, because of the greater weight put on claim frequency it provides further encouragement to employers to suppress reporting or pressure workers to claim as a non-work accident. Secondly it requires other measures to incorporate the seriousness of the harm into the experience rating calculation.

Proposed design elements: Only the business' [sic] own experience is used to determine the rating; Remove modifiers within the experience rating calculations that limit the extent of discounts or loading due to business size. (p.4).

2.13. These would further intensify incentives to game the system, such as under-reporting.

Proposed design element: Experience rating outcomes are discrete steps (p.4).

2.14. It is difficult to judge the impact of this without a more specific proposal. However larger steps could mean that at the margin, larger amounts of money are at stake for one additional claim. Again, this risks gaming.

2.15. Similarly, the more that is at stake in the size of discounts and loadings that are applied (p.4) the more incentive there is to game the system at the expense of the health, safety, compensation and rehabilitation entitlements of workers.

2.16. Finally we observe that there is no proposal to align the Corporation's incentives with the Health and Safety at Work Act's move of responsibility from employers to Persons Conducting a Business or Undertaking (PCBUs). The levy and experience rating structure encourages employers to transfer their responsibilities to subcontractors or to use labour hire firms. The concept of the PCBU is designed to address this increasingly pervasive problem. We strongly recommend that the Corporation consider new design elements to address this, such as subcontractors and labour hire employers taking the risk classification of the work actually being carried out (with corresponding levy levels); identifying such relationships in claim reporting; and PCBUs sharing the consequences of a subcontractors' poor performance.

2.17. In this context we also express our concern that workers may be too readily accepted by ACC as being self-employed simply because the employer deems them to be self-employed contractors (a frequent occurrence in high risk industries including forestry). ACC should work with IRD to ensure that the tests for distinguishing employees from self-employed workers are complied with. We suggest a working group on this issue including the CTU, IRD and ACC to ensure workers are not miscategorised and that when a person is deemed to be an independent contractor they are aware of their obligations in respect of ACC levies.

3. Proposed Work and Earners' levies

3.1. We have no substantial comment to make on the reduced Work levies proposed (from $0.80 to $0.72 per $100 of liable earnings for the 2017/18 and 2018/19 levy years) other than to say that rather than cuts in levies, the available funding should be used to restore and enhance entitlements under the scheme.

3.2. We do not see why the Earners' levies should be increased when the Earners' account funding claims is already 25 percent above its funding requirement and 20 percentage points above its funding target of 105 percent of requirements.

3.3. Given that the Earners' Account ran a $959 million deficit in the 2015/16 year according to the Corporation's 2016 Annual Report (p.70) we take it that the Corporation is assuming that this position will correct itself without the need to substantially raise levies beyond what is proposed (from $1.21 to $1.25 per $100 of liable earnings for the 2017/18 and 2018/19 levy years). An explanation of this is in order and should have been part of the consultation documentation.

4. Injury Prevention

4.1. We are very pleased to see a significant increase proposed in injury prevention expenditure. The funding in the Work account is proposed to rise by 10 percent between 2016/17 and 2017/18 from $15.7 million to $17.3 million and then a further 14 percent to $19.7 million in 2018/19. The funding in the Earners' account is proposed to rise by 15 percent between 2016/17 and 2017/18 from $9.6 million to $11.0 million and then a further 14 percent to $12.6 million in 2018/19. There are similar rises in the Motor Vehicle account.

4.2. We encourage the Corporation to increase injury prevention expenditure in the Work account still further because of the rising number of serious harm injuries and the high number of people suffering and dying from occupational disease.

4.3. We hope that "injury" prevention means "harm" prevention and includes prevention of threats to work-related health.

4.4. In the light of underspending of budgeted injury prevention funding in recent years, we urge the Corporation to continue to increase its harm prevention effort to make full use of the funding, and to take a longer term view of the benefits from this spending. We are unconvinced that the returns on investment calculated for various interventions in work-related injury prevention are always robust, nor that they are

always able to be robust. Therefore expert judgement is needed to make choices of interventions. A broader range should be allowed. They have an important place in reducing New Zealand's totally unacceptable toll of work-related harm, injury and death.

4.5. In the past, the Corporation has taken a far too literal and short term interpretation of one of its 'primary functions', to "promote measures to reduce the incidence and severity of personal injury" (s.263(1) of the Accident Compensation Act 2001).

4.6. We urge the Corporation to take a much broader view.

4.7. The requirement under s.263(3) that "the Corporation must undertake or fund such measures only if (a) satisfied that such measures are likely to result in a cost-effective reduction in actual or projected levy rates…" clearly does not require a narrow approach, as is indicated by the fact that under s.263(2) it can undertake a wide variety of preventative activities such as research, campaigns, exhibitions, and the promotion of safety management practices which are unlikely to have identifiable effects on levy rates in any limited time period, but are likely to over a longer time. There are many such activities that need to be undertaken.

4.8. As by far the best-endowed funder of injury prevention, the Corporation has a crucial role and its policies should reflect this.

5. Accredited employer programme

5.1. In principle we welcome the proposed changes to the safety management practices audit standards (p.5), "incorporating references to worker engagement and participation, incorporating requirements to ensure the safety of the people in the workplace, including consulting with other Persons in Control of Business Undertakings (PCBUs) who owe duties to the same people." The changes are also "introducing the concept of workplace illness by using the term harm rather than workplace injury or illness".

5.2. We also note the updates to safety management practices audit standards (p.5-6) including

- increasing verifications via evidence of legislative requirements for cover decisions, including delays
- the inclusion of file records maintained to legislative standards

- providing evidence of:
    - hazard identification and risk management
    - case manager performance
    - injury management procedures in action
- an increased focus on:
    - entitlement eligibility processes
    - privacy breach processes
    - return-to-work outcomes and early interventions for both work-related and non-work-related claims
- increasing evidence of claims staff being trained, and accuracy and checking of entitlement calculations
- tightening up the review process through complaints managers
- the inclusion of enabling and measuring medical provider effectiveness.

5.3. However these again raise the lack of consultation with the CTU on these matters and loss of its ongoing role in monitoring the accredited employer programme which was originally designed as a "partnership" with unions as partners. We do not have the detail of the above changes and have not been consulted on whether they will be effective and reflect the needs of working people whom they are intended to benefit.

5.4. The Corporation will be aware that we have longstanding concerns with the Accredited Employer Programme. Our concerns include the service provided by third party administrators contracted to Accredited Employers which can have a detrimental impact on claimants. It does not appear that the audit process currently picks up such problems. It is important that the fairness, timeliness and efficiency of case management from a claimant's viewpoint should be part of audits.

5.5. We note that "There has been a recent increase in work claims that cannot be attributed to individual employers" (p.2) in the accredited employer programme, or in other words an increase in claim rates. We would be interested in understanding the reasons for that.

6. Levy classification and levy risk groups

6.1. We have no comment on the changes proposed to names of the classifications *Electrical and electronic goods wholesaling* to *Electrical, Electronic and Specialty Goods Wholesaling* and *Petroleum product and speciality wholesaling* to

Commission-based Wholesaling. Nor do we have comment on the various changes to the classification units and levy risk groups.

6.2. However we repeat our suggestion of last year that it is time that a different approach to levying the Labour Supply Services classifications is considered. Workers employed by "temp" labour hire agencies can be working in a wide range of industries with very different risks. The risk is increased by the facts that temp agency employees will frequently be new to the workplace, which is known to increase the risk of accidents and harm, and that the lines of control and responsibility can be blurred in this triangular relationship where the legal employer is the temp agency (which has little knowledge of the workplace) but control and de facto management is by the firm receiving the worker (which has little incentive to carry out proper orientation). Neither have incentive to provide sufficient training. Levies should match the actual work done by each employee and include a loading for the increased risk in this kind of relationship. A convenient way to manage it may be for the cost of the labour hire to be regarded as liable earnings paid by the receiving employer and levied according to its classification.

6.3. This would go some way towards addressing the recommendation of the Independent Taskforce on Workplace Health and Safety that levies should be redesigned to align with PCBU duties as expressed in the new Health and Safety at Work Act. See also our comments on this matter at paragraph 2.16.

7. Conclusion

7.1. We are strong supporters of the no fault ACC scheme and its principles of prevention, rehabilitation and compensation, of it being one of the community responsibility mechanisms that government can provide and can do so more efficiently than the private sector. We are concerned however at a number of the changes by the Government and the Corporation that have eroded these strengths.

7.2. We are very concerned at the proposed changes to experience rating, particularly given that it has occurred without prior consultation with the CTU, without a thorough evaluation of the existing experience rating scheme. It could increase risks to workers.

7.3. We have expressed our concern at the lack of ongoing consultation in a number of areas and made a proposal for some joint work. We would like to meet with senior ACC management to discuss this.