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ACC Levy Consultation 2014-2015

Introduction

The New Zealand Law Society (Law Society) welcomes the opportunity to make a submission on the Accident Compensation Corporation's (ACC) Levy Consultation 2014-2015 (Consultation Document).

The Consultation Document needs to be considered in its historical context. The introduction of the statutory accident compensation scheme in 1972 was a significant development in New Zealand's legal and social history, and the ACC scheme continues to be a very important component of the regulatory regime applying to health and safety in New Zealand workplaces.

This submission relates to the proposal to change the maximum experience rating loading of levies in the Work Account from 50% to 75%.

The Law Society is concerned with the proposal to change the maximum experience rating loading from 50% to 75%, in the absence of evidence that the current 50% loading introduced on 1 April 2011 has been an effective incentive for workplace safety and injury prevention. Without evidence that the experience rating loading has in fact resulted in improved workplace safety and a reduction in workplace injuries, there can be no justification for increasing the maximum loading from 50% to 75%.

Experience rating

In previous submissions the Law Society has expressed concern about the recent introduction of experience rating as a method to reduce injury rates:[1]

> "The experience rating policy was introduced on 1 April 2011. The Department of Labour suggested that "[t]he more employers are exposed to the actual costs of injuries in their workplace, the stronger their incentives to reduce those costs by reducing injury rates …".[2] The Law Society commented on the reintroduction of

[1] Independent Taskforce on Workplace Health and Safety – Safer Workplaces Consultation Document, submission dated 19.11.12, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0004/58315/Independent-Taskforce-on-Workplace-Health-Safety-Safer-Workplaces-161112.pdf.

[2] *Increasing Choice in Workplace Accident Compensation*, Department of Labour, 2011, at p13.

experience rating as a method to reduce injury rates, in a submission to the Department of Labour in July 2011.[3] The Law Society remains of the view that there does not appear to be any evidence to support experience rating as effective in ensuring workplace safety. To the contrary, international evidence suggests otherwise. For example, a submission to an Ontario Workers Compensation Board by an Experience Rating Working Group in April 2011[4] refers to several studies by Canadian experts, along with a substantial amount of other evidence from day-to-day experience, in support of its recommendation that experience rating should be abolished. There appears to be no quantitative or qualitative evidence that the New Zealand experience is any different.

The architect of the New Zealand accident compensation scheme, Sir Owen Woodhouse, opposed risk and experience rating of levies because there was no evidence that employers could control the incidence of accidents, and the financial incentive provided by levies was too small to induce employer investment in a safer workplace. Both the Consultation Document[5] and the Woodhouse Report[6] point out that experience rating may lead to the under-reporting of accidents rather than a reduction in the frequency with which accidents occur. Experience rating also cuts across the notion of community responsibility to pool the costs of all accidents, given the interdependence of different sectors of the economy.[7]

There have been failed attempts, both in New Zealand and overseas, to implement a system of economic incentive schemes as a means of reducing workplace injuries, and there is only moderate evidence of some schemes that are thought to be successful.[8] However, that evidence must be weighed against the adverse effects of experience rating schemes.

Experience rating schemes can lead to a number of negative health and safety outcomes because the imposition of a penalty will not encourage improved health and safety practices by employers, for the following reasons:

- self-employed or small employers' non-reporting of workplace injuries in order to avoid experience rating loadings;
- misreporting of workplace injuries as non-work injuries;
- employers with unsafe workplaces qualifying for an experience rating discount because of a 'chance' clean claims record;
- current employer liability for loading resulting from occupational diseases or diseases with long latency periods (that were contracted during employment with a previous employer, but cause incapacity later and trigger the premium loading for the new employer);

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3 Increasing Choice in Workplace Accident Compensation, submission dated 15.7.11, available at http://www.lawsociety.org.nz/__data/assets/pdf_file/0018/41445/increasing-choice-workplace-accident-compensation.pdf.

4 Experience Rating Working Group, "An Addiction looking for a Rationale", submission dated 5 April 2011 to Ontario Workers Compensation Board Funding Review, see http://www.injuredworkersonline.org/Documents/WSIBFR_ER_Group_Submission_April_2011.pdf

5 At p47, paragraph 197.

6 At paragraphs 328-336.

7 Ibid.

8 "Update on a systematic literature review on the effectiveness of experience rating", Tompa, Cullen and McLeod from Canadian Journal "Policy & Practice in Health and Safety" Vol.10 issue 2 published by IOSH Service Limited in 2012.

- arguments about liability for experience rating loading between employers where the injured worker has multiple employers;

- experience rating loading being imposed unfairly on employers when the employee was injured by the actions of a third party; and

- employer dissatisfaction with the delay between the accidental injury date (when the cause of the accident may have been remedied) and the date of imposition of the loading.

In addition, an unintended consequence of the imposition of a penalty loading on an employer's levy can be a breakdown in the employer/employee relationship where the acceptance of the injury as work-related has been in dispute.

Conclusion

The experience rating scheme was introduced in 2011 with the stated aim of being a way "to incentivise businesses to improve their workplace safety performance with regards to preventing injuries, and when injuries do occur, returning injured workers as quickly and sustainably as possible to the workplace." There must be evidence that the experience rating policy is achieving the stated aim of incentivising employers, before the proposed increase in maximum loading to 75% can be justified.

There should be no changes to the experience rating scheme until the suite of changes to be incorporated in the Health and Safety at Work Bill proposed by government, have been implemented.

This submission has been prepared by the Law Society's Accident Compensation Committee. If you wish to discuss the submission please contact the committee convenor, Don Rennie, through the committee secretary, Jo Holland (phone (04) 463 2967 or email jo.holland@lawsociety.org.nz).

Yours sincerely

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