



ACC and MBIE Briefing Paper: Improving ACC's dispute resolution processes, including ACC's response to the Independent Review of Acclaim Otago's report

Date:	20 December 2017	Priority	Not urgent
Security classification:	In confidence	Briefing paper no:	BP 17/022

Action Sought

	Action sought	Deadline
Iain Lees-Galloway Minister for ACC	Note officials are available to discuss the direction and ongoing progress of implementing the recommendations from the Independent Review.	N/A

Contact for Telephone Discussion (if required)

Name	Position	Telephone	1st contact
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Supporting documents: Yes

ACC and MBIE Briefing Paper: Improving ACC's dispute resolution processes, including ACC's response to the Independent Review of Acclaim Otago's report

Report to: Minister for ACC

Executive summary

- 1 This briefing updates you on a key ACC and Ministry for Business, Innovation and Employment (**MBIE**) work programme, which was part of manifesto commitments, and is of key interest to stakeholders.
- 2 Dispute resolution is a strong focus for ACC and our stakeholders. Over the last seven years ACC has introduced changes to the disputes process to improve our customers' (claimants') experience and promote early resolution of issues. As a result, we have reduced the number of reviews lodged down from 10,190 in 2009/10 to 7,223 in 2016/17.
- 3 ACC is focused on continuing to improve the disputes process. For example, ACC recently restructured its Resolution Services, providing the review teams with an increased scope to objectively assess and challenge decisions made by case owners, and achieve early resolution of disputes.
- 4 Following a report on the accident compensation dispute resolution process by Acclaim Otago (an advocacy group for ACC customers) MBIE commissioned a review of the report's findings. The Independent Review of Acclaim Otago's report into accident compensation dispute resolution processes (**the Independent Review**) made 20 recommendations for ACC, MBIE, the Ministry of Justice, and FairWay Resolution Ltd. (**FairWay**).¹ The majority of the recommendations relate to the operational processes of ACC and FairWay.
- 5 The Independent Review made a number of recommendations in five key areas:
 - **Wider picture** – wider themes were identified including the need for ACC to collect and analyse data better to understand the triggers, outcomes, costs, and trends of disputes as a basis to continue to improve performance.
 - **Being heard** – some customers do not have confidence that the statutory review process ensures that their side of the story will be heard. This is often related to a perceived lack of independence of FairWay from ACC.
 - **Access to the law** – inadequate access to legal resources (eg. case law, review decisions, and guidance material), along with ACC's complex legislation, can be a barrier to customers (particularly self-advocating customers) having a full understanding of the law.
 - **Access to medical evidence** – there are a number of issues associated with how customers can access medical evidence through the disputes process, and

¹ FairWay is contracted by ACC to conduct independent statutory reviews.

these needed to be explored by relevant medical representatives and stakeholders to find solutions.

- **Access to representation** – a lack of representation (eg. a suitable lawyer or advocate) can be a barrier to customers seeking to challenge ACC decisions.

- 6 ACC is committed to addressing the recommendations from the Independent Review and has completed some of the recommendations. Other agencies have also made good progress with implementing recommendations.
- 7 Recommendations that have yet-to-be completed are progressing well. For example, the recommendations to increase the rates in the Review Costs Regulations, and for ACC to consider funding a nationwide advocacy service are complex and will take more time to progress, but are underway.

Recommended actions

It is recommended that you:

Note that ACC continues to focus on dispute resolution and is working on reducing the volume of reviews sought by customers.

Noted

Note the progress made to date on progressing the Independent Review's recommendations.

Noted

Note officials are available to discuss the direction and ongoing progress of implementing the recommendations from the Independent Review.

Noted

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Date:

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Date:

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Date:

Purpose of paper

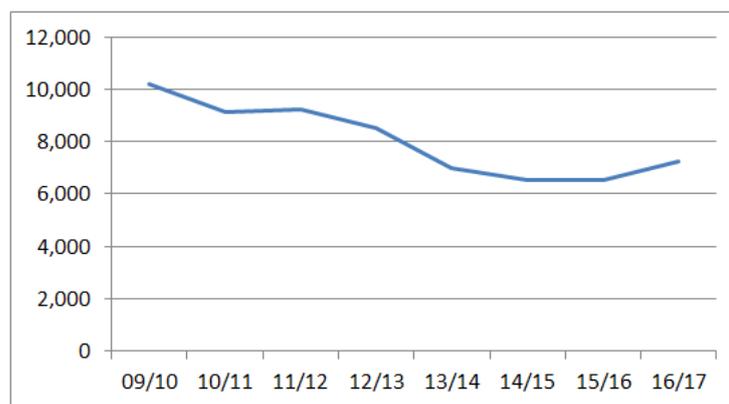
- 1 This paper provides you with an overview of the improvements ACC has made to the dispute resolution and review processes, including the response to the Independent Review of Acclaim Otago's report into accident compensation dispute resolution processes (the **Independent Review**).
- 2 We are providing you with this information at this time because:
 - implementing the findings of the Independent Review is one of the Government's priorities for the scheme (as outlined in the New Zealand Labour Party Manifesto on Accident Compensation)
 - there is strong ongoing interest from stakeholders about the progress of the recommendations.

Dispute resolution is a focus for ACC

Since 2009/10 improvements to the ACC dispute resolution process resulted in a downward trend of review numbers...

- 3 Dispute resolution has been a strong area of focus for ACC for many years. In 2009/10, the number of customers seeking a review of their ACC decision peaked. In that year customers lodged 10,190 reviews. Since then, review numbers have fallen to 7,223 in 2016/17.
- 4 **Figure 1** shows the decline in the numbers of reviews lodged since 2009/10 to 2016/17. Further review data is shown in **Appendix 1**.

Figure 1: Number of review applications lodged between 2009/10 and 2016/17



- 5 Reviews on decisions declining ACC funding for elective surgery made up 34% of all reviews in 2016/17, followed by reviews for declined cover decisions (25%).

- 6 ACC introduced changes to tackle the high number of reviews by improving customer experience of the review process and achieving early resolution. This removes the need for clients go through the process of preparing for, and attending a review hearing. Early resolution can also prevent or reduce an adversarial relationship that can develop between customers and ACC. Some of the changes to achieve early resolution include:
- extending the administrative (internal) review timeframe to allow ACC more time to resolve issues before proceeding to external review
 - increasing the financial delegation for settling reviews to assist settling disputes of low financial value (ie. less than \$2,000)
 - introducing an alternative dispute resolution (**ADR**) process to resolve disputes and prevent escalation of customer issues that lead to formal review hearings. Since ADR was implemented in December 2015 uptake increased from 195 cases in 2015/16 to 300 in 2016/17, with 38% of cases settled and 23% of cases reaching a partial settlement.
- 7 ACC is incorporating feedback from complaints and formal review decisions into the continuous improvement of the design and delivery of ACC's services. This should help eliminate some of the common pain-points that customers experience.

Further improvements and implementation of the Independent Review

- 8 ACC remains committed to improving the customer experience and addressing the issues that cause customers to lodge a complaint or review. Further recent improvements and work on the Independent Review recommendations will assist in achieving this goal.
- 9 In July 2017, ACC introduced a centralised structure to the dispute management functions. As part of this restructure, new review teams were established. The centralised structure aims to develop a broad, flexible knowledge base to ensure consistent claim decisions and management of reviews.
- 10 In the new review teams, review specialists are provided with additional scope to evaluate and revisit decisions made by case owners. While these changes are recent, ACC expects that review specialists will improve customer experience and achieve early resolution by:
- objectively evaluating all relevant information to either support or challenge the original decision of the case owner
 - liaising with the customer and decision maker (case owner) to seek resolution, which may involve coordinating an ADR process
 - managing the review application process (where resolution cannot be reached internally) and ensuring the customer is kept fully informed about the process
 - proactively working to improve frontline decision making by providing feedback to the decision-maker around approaches to avoid reviews in future
 - settling reviews where it is uneconomic to proceed further.

Independent Review of Acclaim Otago's report

- 11 As well as these recent changes, implementation of the recommendations from the Independent Review will result in further improvements to the customer experience with the ACC dispute process. A background on the Independent Review, and the progress that agencies are making implementing the recommendations are detailed below, and the full report is attached as **Appendix 2**.
- 12 In July 2015, the advocacy group Acclaim Otago completed the report, 'Understanding the Problem: An analysis of ACC appeals processes to identify barriers to access to justice for injured New Zealanders'. Acclaim's report raised the following key issues:
- **Being heard** – some customers do not have confidence that the statutory review process ensures that their side of the story will be heard. This is often related to a perceived lack of independence of FairWay from ACC.
 - **Access to the law** – inadequate access to legal resources (eg. case law, review decisions, and guidance material), along with ACC's complex legislation, can be a barrier to customers (particularly self-advocating customers) having a full understanding of the law.
 - **Access to medical evidence** – there are a number of issues associated with customer access to medical evidence during the disputes process, and these needed to be explored by relevant medical representatives and stakeholders to find solutions.
 - **Access to representation** – a lack of representation (eg. a suitable lawyer or advocate) can be a barrier to customers seeking to challenge ACC decisions.
- 13 Following the release of Acclaim Otago's report, the then Minister for ACC (Hon. Nikki Kaye) asked MBIE to commission an independent review of Acclaim Otago's report. The Independent Review confirmed a number of Acclaim Otago's concerns. The Independent Review recognised the significant improvements that ACC and FairWay had made to the dispute resolution process, including ACC introducing ADR, and FairWay's Service Delivery Improvement Programme.
- 14 The previous Government's response to the Independent Review's report is attached as **Appendix 3**.
- 15 One of the Government priorities for the scheme (as outlined in the New Zealand Labour Party Manifesto on Accident Compensation) is to make the ACC system fairer and more transparent for customers, by implementing the findings of the Independent Review. This briefing is an opportunity for agencies to provide an overview on the progress of implementing the recommendations.
- 16 The majority of the Independent Review's recommendations relate to ACC and FairWay's operational processes, however, there are also recommendations for MBIE, and the Ministry for Justice. Agencies are making good progress with implementation; a number of recommendations are completed or will be completed by the new year. The more substantive recommendations (eg. reviewing the Review Cost regulations, and considering a nationwide advocacy service) are progressing and require more significant work to ensure the right outcomes for customers.

Agencies are implementing the Independent Review recommendations to improve the dispute resolution experience for ACC customers

17 Progress on the Independent Review's recommendations is discussed below and set out against the key issues identified in the Independent Review.

Wider picture

Collection and analysis of claims and disputes data

18 The Independent Review noted the need for ACC to collect and analyse data better to understand the triggers, outcomes, costs and trends of disputes. To address this ACC has improved the information collected on cover and entitlement decisions and disputes data by:

- standardising and reducing the number of decline decision letters, improving ACC's ability to determine the number of formal decline decisions issued
- improving data collection on disputes, including collecting the number of decisions resolved in the customer's favour when settling at the administrative review stage.

19 As well as specific data initiatives undertaken as a result of the Review, major projects underway as part of ACC's Transformation Programme will make general improvements to how we collect, store, and manage data. This will support our ability to monitor performance over time in key operational areas like disputes resolution.

Being heard

20 The Independent Review explained that some customers feel that they are not genuinely heard by ACC, and do not feel they have 'had their day in court'. The Independent Review found that this often related to a perceived lack of independence of FairWay from ACC.

FairWay develops and publishes guidelines with an improved review process

21 The Independent Review recommended guidelines to explain FairWay's new case management review process. FairWay introduced its new process and guidelines in June 2017. The new process involves tracking and triaging cases. This new process aims to avoid a 'one-size-fits-all' approach, and cases are classified as, simple, standard or complex and dealt with accordingly, both in terms of speed and process. The guidelines provide clarity to people about how reviews are managed and conducted.

Consider how to address problems, perceived or otherwise, with FairWay's independence

22 The Independent Review did not question FairWay's independence, but it recognised that some customers think that FairWay is biased in favour of ACC. Agencies were recommended to consider how to address this perception, citing a change in ownership as a possible solution.

23 Following this, FairWay's board expressed an interest in employee ownership to the Treasury. The Treasury supported this proposal and, having informed shareholding

Ministers, engaged Deloitte to provide an independent valuation of the company.² FairWay was transferred to employee ownership in July 2017.

24 The New Zealand Labour Party Manifesto on Accident Compensation proposes to consider the future of the review jurisdiction, including the impact of privatising FairWay, and whether the Ministry of Justice should oversee the jurisdiction [MBIE briefing 0772 17-18 refers]. Further work on potential options to understand the appropriate jurisdiction for reviews could be undertaken by MBIE and the Ministry of Justice.

Increase the rate of contribution to review costs for customers

25 The Independent Review noted that contributions from ACC to customer costs for reviews have fallen significantly short of customers' expenses in some areas. The Independent Review recommended that review costs be increased, and by more than just inflation.

26 Review costs are not intended to fully reimburse customers' expenses. The costs awarded should strike a balance between compensating the customer, and addressing the risk of excessive or meritless litigation by ensuring there is an incentive to minimise expenditure. However, if the non-reimbursed cost is too high, customers may be discouraged from using services.

27 To address this recommendation, the then Minister for ACC (Hon. Nikki Kaye) agreed to a two-step approach to increasing the review costs. In July 2017, a 16.6% increase was made to the Review Cost Regulations to cover inflation since the last adjustment in 2008. This was intended as an interim measure while a more substantive review was undertaken.

28 The substantive review is well advanced and MBIE is seeking additional evidence of costs from a survey of customers. While ACC captures the amounts reimbursed to customers, this survey will determine customers' actual costs for medical opinions and legal support. MBIE expects to provide you with advice on further changes early in 2018.

Adopting a model litigant policy and improving settlement processes

29 The Independent Review recommended that ACC adopt a formal model litigant policy. Such a policy provides best practice guidelines for conducting civil litigation. It is founded upon the concepts of behaving ethically, fairly and honestly to model best practice in litigation. In December 2016, ACC formalised its pre-existing practice and commitment to behave as a model litigant by publishing a policy. The policy, which is available on the ACC website, is similar to equivalent policies adopted by agencies such as Crown Law Office and the Commerce Commission.

30 ACC has improved its process for early analysis of appeal files, which should help with earlier settlement of appeals (where appropriate to settle), providing greater certainty for customers. ACC has also improved processes to consistently capture data on reasons why cases are settled and continues to refine the data collected improve understanding.

² The Minister for ACC and the Minister of Finance were the shareholding Ministers for FairWay.

- 31 The Independent Review also recommended that ACC adopt a public settlement policy to dispel the perception that ACC is unwilling to settle. A public settlement policy outlines broadly outlines an agency's approach, and factors it considers, in deciding to settle. The Commerce Commission is an example of a government agency that has made their settlement policy and process public. ACC considers a public settlement policy would create a litigation risk as settlement decisions could be reviewed, and undermine the purpose of settling (ie. reaching a final decision).
- 32 In place of a public settlement policy, ACC has decided to begin publishing settlement data to show that ACC is willing to settle. Options for publishing the data will be developed once a representative data set is available and publication is likely from July 2018.

Access to the law

- 33 The Independent Review found that inadequate access to legal resources (case law, review decisions and guidance material), along with ACC's complex legislation, can be a barrier to customers (particularly self-advocating customers) having a full understanding of the law and their entitlements and rights.

ACC to fund greater access to case law and court decisions and the District Court considers how it can help customers to easily search for relevant cases

- 34 To help customers to better present their case at review or in the District Court when appealing a review decision, ACC has funded New Zealand Legal Information Institute (NZLII) to provide a guide to accident compensation case law. This is now available on the NZLII website.
- 35 Judgments of the Senior Courts are already accessible and can be searched for by Act and section on the Ministry of Justice's website. ACC also assisted NZLII to complete their library of High Court and Court of Appeal accident compensation cases. This work is now completed.

FairWay to publish review decisions, and provide a submission builder

- 36 FairWay created case summaries (similar to case studies) to better inform those involved in the review process. An online submission tool went live on 2 November 2017 to guide people through preparing a submission, prompting users through questions, examples, and explanatory notes. The tool helps people to present their position to a Reviewer and makes it easier for all parties involved to prepare their case.

Consider other ways to easily explain the dispute resolution process and navigate the Accident Compensation Act

- 37 The Independent Review found that customers need to help navigate the dispute resolution system, given the complexity of the legislation and ACC's processes. As recommended, MBIE and ACC have developed visual maps for a range of injury types to assist customers to understand their entitlements and the process ACC follows, and these will be on ACC's website by January 2018.
- 38 FairWay has completed an instructive video on the review process to explain to customers how dispute resolution processes work. It is available on FairWay's website.

Access to evidence

Working group to address problems with accessing medical evidence

39 The Independent Review concluded that a wide group of representatives were needed to discuss solutions to the policy and process-related problems with accessing medical evidence, for example:

- the imbalance of power and resources available to ACC and the client
- the lack of medical experts in some specialised areas of medicine
- the perceived lack of objectivity involved in ACC's process when seeking information from medical practitioners, including the preferential selection of medical practitioners by ACC, and the questions ACC asks
- decisions issued without all the relevant medical information
- inconsistencies related to decisions and their timeliness
- the variation in the quality of medical practitioners' reports
- lack of equity in the impairment and vocational independence assessment.

40 To respond to this recommendation, ACC convened the Medical Issues Working Group (**the Working Group**) comprising representatives from the NZ Medical Association, the Council of Medical Colleges, Te Ora, Royal NZ College of General Practitioners, NZ Orthopaedic Association (**NZOA**), Forster & Associates, and the NZ Law Society. Other representatives were from Acclaim Otago, the Disabled Persons Assembly, NZ Association of Accredited Employers, FairWay, NZ Council of Trade Unions' (**NZCTU**) Workplace Injury Advocacy Service, the Ministry of Justice and MBIE.

41 The Working Group met four times (most recently in November). ACC is finalising with the Working Group their identified solutions to the issues associated with medical expert evidence for customers. ACC, along with the Working Group and NZOA have also started a number of initiatives to resolve these issues, which have been discussed with the group. These initiatives include:

- NZOA subspecialty societies and ACC have agreed on injury-related factors for knee and rotator cuff tears that indicate whether it was caused by an accident – as opposed to a degenerative condition. This initiative aims to reduce medical expert disagreement and fast-track surgery requests. Also, good progress is being made on developing injury-related factors for hip arthroscopy.
- ACC is considering developing a post-graduate module on causation to encourage more medical experts to provide opinions. To progress this we will need to work with medical bodies outside of the Working Group.
- members from the NZ Shoulder and Elbow Society will provide input into ACC's Clinical Advisory Panel (**CAP**) to increase the pool of experts to provide a wider range of views.

- considering a trial through the NZOA where a clinical conversation can occur between a CAP member and the treating surgeon to clarify medical evidence. This may reduce the need for customers to seek further medical evidence following a decline decision.

42 Following an update to the ACC Board, ACC will provide you with information on the outcome of the Working Group.

District Court judges could commission an expert medical report for customers who are unable to, and direct experts to confer

43 The Independent Review recommended the Government consider whether the District Court should have the ability, where appropriate, to commission an expert medical report for customers who are unable to.

44 This recommendation is on hold while options for improving access to medical evidence were considered more broadly by the Medical Issues Working Group. A number of issues contribute to barriers customers experience when trying to obtain medical evidence, such as the lack of available medical experts to provide evidence (see paragraph 39). The solutions developed by the Working Group may effectively address the barriers, reducing the need for implementing the recommendation. This recommendation will be revisited following the outcome of the Working Group.

45 In addition, customers can already receive support to obtain evidence, therefore implementing the recommendation would result in duplication of processes that already exist, such as:

- at the review stage, customers can receive funding for medical reports (which recently increased and as noted above, we will be providing advice on increasing this further in 2018)
- at the court stage, legally aided customers can receive funding to obtain medical reports
- the District Court Rules already provide for District Court judges to appoint an independent expert to assist and produce a report
- all customers can apply for costs at the conclusion of the District Court appeal.

46 The Independent Review also recommended that the power to direct experts to confer is added to the District Court's proposed document Guidelines to Practice and Procedure for Accident Compensation Appeals in the District Court. This recommendation is now complete.

Access to representation

47 The Independent Review found that lack of representation (eg. a suitable lawyer or advocate) can be a barrier to customers seeking to challenge ACC decisions. This barrier exists because of a considerable imbalance in the resources ACC can access compared with those available to customers. Customer demand for expert legal services often exceeds supply, with very few lawyers (less than 1%) practicing in the area of accident compensation law.

Funding and promoting advocacy services

- 48 The Independent Review recommended that ACC increase funding to existing free advocacy services, consider funding a free nationwide advocacy service, and promote advocacy organisations.
- 49 ACC funds the NZCTU to provide disputes advice to customers through their Workplace Injury Advocacy Service. This service is promoted on ACC's website. The funding for the NZCTU was increased in October 2017 as Linkage Trust (a previous supplier of ACC advisory services) withdrew from providing accident compensation dispute advice to focus their business on social housing issues.
- 50 In addition, ACC is considering funding a free nationwide advocacy service to help customers through accident compensation dispute resolution. ACC's Board is due to consider options for this service. ACC will provide you with a separate briefing about the advocacy service recommendation following the Board's consideration.

Explore initiatives to encourage more lawyers into accident compensation law

- 51 The Independent Review recommended that agencies investigate initiatives to encourage more lawyers into accident compensation law. There are gaps between demand and supply, and options to address this issue are likely to be limited or require long timeframes.
- 52 MBIE discussed this recommendation with advocacy sector stakeholders in ACC's Voice of the Customer group, and considers that it may be best to leverage off initiatives driven more appropriately by other agencies and organisations such as law faculties, and professional bodies. MBIE is investigating ways to engage with these organisations for them to take this work forward.

Appointment of counsel in exceptional circumstances

- 53 The Independent Review recommended that consideration be given to the District Court's having the power to appoint counsel to represent customers in those exceptional cases where justice and efficiency require it. MBIE has consulted with the Ministry of Justice on opportunities to improve the effectiveness of existing mechanisms.
- 54 The proposed power is likely to create a separate process for ACC customers compared with other parties before the Court. This is problematic given other groups who appear before the courts may also benefit from the appointment of counsel and may have unintended consequences in limiting customers' right to self-representation.
- 55 Other than powers specified under the District Court Rules, District Court judges can appoint amicus curiae for a wide range of situations and roles. Customers are also generally entitled to a support person in any court, although not one who is a barrister or solicitor of the High Court.
- 56 Previously this work was not considered as a priority, particularly given the equity considerations, however, we seek your guidance as to whether you would like agencies to progress with options for addressing the recommendation.

Next steps

- 57 If you would like to discuss the Independent Review and its recommendations further, officials are available to meet with you.
- 58 ACC's Board is due to consider options for a nationwide advocacy service, and will be updated on the findings from the Medical Issues Working Group. We will brief you on these issues following the Board's consideration.
- 59 Following an indication from you on your preferences regarding the direction of implementation of the recommendations that are not yet complete, agencies will continue to progress the Independent Review's recommendations.

Appendices

Appendix 1: Additional review data

Appendix 2: Independent Review of Acclaim Otago's Report into accident compensation dispute resolution processes

Appendix 3: The Government Response to the Independent Review's report

Appendix 1: Additional review data

Table 1: Reviews sent through to FairWay

Year ending 30 June	09/10	10/11	11/12	12/13	13/14	14/15	15/16	16/17
Reviews sent to FairWay	9,450	8,350	8,130	7,670	6,060	5,570	5,510	6,160

Table 2: Outcome of customer review applications since 2009/2010

Outcome by year ending 30 June	09/10 %	10/11 %	11/12 %	12/13 %	13/14 %	14/15 %	15/16 %	16/17 %
Review decision in customer's favour	19.0	21.8	19.6	17.2	15.6	15.9	15.8	18.2
ACC outcome result	81.0	78.2	80.4	82.8	84.4	84.1	84.2	81.8
<p>The ACC outcome result comprises the review hearings resulting in ACC's favour and customers withdrawing their review application.</p> <p>Withdrawals may be due to an outcome from the administrative review (such as settlement, change in ACC decision, explanation of decline), or a settlement through the ADR process.</p>								
Review decision in favour of ACC	46.4	47.2	47.4	48.0	43.7	42.3	39.3	38.3
Withdrawal of review application	34.7	31.0	33.0	34.8	40.7	41.8	44.9	43.5