**Preliminary Legal Issues with the Accident Compensation Act 2001, identified by ARG[1], the NZLS and ACC Futures 2009[2].**

| Issue | Law | Discussion |
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| **Tax On Backdated Compensation.** | An injured person's backdated payment is regarded as being received in the year at which it is paid out. | Claimants then pay tax at the highest rate on the payment. IRD receives a proportion of the compensation payments. Were it to be paid out at as it should have been, that person would likely pay a lower tax rate. This could lead to a monetary loss for the claimant due to ACC's failure in decision making, which may be unfair. It would be fairer for the tax rate to be that at which it would originally have been paid at. |
| **Costs.** | Accident Compensation (Review Costs and Appeals) Regulations 2002, sch 1 sets out the scale of costs that can be awarded against ACC. | The scale of costs being set by regulation leaves no leeway for reviewers to award extra costs. These could be justified where a review is complex, or where ACC has been unreasonable in its decision, or otherwise. Clients do not have the same statutory cost protection against ACC. Some discretion should be available to reviewers in regulation.<br><br>Costs are also too low. |
| **Work Related Gradual Process.** | For a claimant to receive cover for a work related gradual process injury, they must satisfy the three part test under s 30, namely,<br>1. He/she performed an employment task, or was employed in an environment, that contained a property or characteristic that caused, or contributed to the cause of, his/her personal injury; and<br>2. The causative property/characteristic was not found to any material extent in his/her non-work activities or environment; and | The three part test is too stringent a test in establishing a work related gradual process injury.<br><br>The second and third parts of the test operate as artificial barriers to cover. These barriers can result in a claimant who has proved that their injury was caused by workplace exposure being denied cover. If workplace causation can be proven to the requisite standard, there is no principled reason to rule out cover on the basis that the claimant was not at a significantly greater risk, or that the causative workplace property/characteristic existed in the claimant's |

[1] ARG was an advisory group to ACC

[2] ACC Futures submission to the Nick Smith Reform

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| | 3. The risk of suffering his/her personal injury is significantly greater:<br>a. for people who perform the employment task, when compared with people who do not; or<br>b. for people who are employed in that type of environment, when compared with people who are not. | non-work environment.<br><br>The three part test was not a feature of the scheme prior to of the 1992 Act. Prior to 1992 cover for gradual process claims were decided solely on the basis of a causative link (i.e. the first part of the test). |
| **Earner Status At Time Of Injury And At Time Of Incapacity.** | *Vandy* held that entitlement to weekly compensation relies on the claimant being an earner at the time of their injury and at the time of their incapacitation. Justice Gendall held that the statute is clear, despite understandable notions of what might be 'fair' in an individual case; Justice Gendall held the remedy has to be provided by Parliament. | Claimants are only entitled to weekly compensation if they were earning at the date of their injury, and at the date of incapacity.<br><br>Persons could be injured at a point where they are not earning, however, symptoms could later cause incapacity when they are earning. Under *Vandy* this claimant would not get entitlement to weekly compensation. The Statute should be amended to allow weekly compensation if they are earning at the time of incapacity. |
| **Attribution Of Hearing Loss To Idiopathic Cause By ENTs.** | The Accident Compensation Act 2001, s 323 allows the Governor General on the advice of the Minister by order in council to make regulations to creates tests to determine the proportion of Noise Induced Hearing Loss that it work related. This power to make tests is exercised in the Accident Compensation (Apportioning Entitlements for Hearing Loss) Regulations 2010, r 6. | There is concern that the attribution of hearing loss to idiopathic causes by ENTs is a way of denying cover to the claimant.<br><br>An ENT receives information from a claimant on possible noise exposure. The ENT then decides whether the pattern of hearing loss is consistent with the distinguishing features of work related noise induced hearing loss and if not, must give reasons. The ENT attributes a proportion of the hearing loss to occupational noise induced hearing loss, and the rest to other causes. This is a subjective decision. The ENTs do not provide robust reasoning for this attribution.<br><br>The regulations only apply an audiometry test to determine the relevant loss. The subjective assessment of a claimant's history by an ENTs is not a test. Decisions made by ACC with |

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| | | consideration of idiopathic causes determined by ENTs are ultravires. The regulations need to be amended to ensure that any attribution to idiopathic cause, is accompanied by robust reasoning, and is rare, and accompanied by an investigation and testing where relevant.<br><br>Even if it is work-related, but the claimant cannot point to a particular employment, or exposure, then ENTs are attributing hearing loss to an idiopathic cause. It is rare for an ENT to make enquiries into other work related causes such as ototoxic exposures. |
| **Somatic Pain Disorder.** | Injury Prevention, Rehabilitation, and Compensation (Lump Sum and Independence Allowance) Regulations 2002 r (3) states that, The ACC User Handbook to AMA4 prevails if there is a conflict between it and the American Medical Association Guides to the Evaluation of Permanent Impairment (Fourth Edition). | The regulations require assessors to use the AMA Guide 4th Edition; and the ACC handbook for assessors also directs assessors to AMA 4th Edition, and Diagnostic and Statistical Manual of Mental Disorders (DSM) IV. Therefore if a claimant has an injury described by the updated edition DSM V, this would fall outside the regulations and the ACC User Guide for impairment assessors.<br><br>This is an issue for those suffering Chronic Pain Syndrome. DSM V updates DSM IV on the basis of developing science. Chronic Pain can now be classified as a Somatic Symptom Disorder, however this classification would not be able to be assessed due to the limited ability to use DSM IV.<br><br>It is also a conflict of interest that the ACC User Handbook takes priority over the AMA. Therefore to it is suggested there should be a hierarchy or DSM V, DSM IV, then the ACC User Handbook. |

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| **ACC does not contribute to KiwiSaver.** | A KiwiSaver employer contribution is not considered to be lost earnings in the calculation of weekly compensation. | The loss of KiwiSaver employer contributions leaves a claimant in a worse position at the point of retirement. This goes against the Woodhouse principle of comprehensive entitlement. The Act should be amending. |
| **Unenforceability Review Decisions.** | ACC review decisions are not enforceable. | ACC reviews are quasi-judicial in nature. ACC reviews can involve large sums of money with the ability for positive impact on the lives of New Zealanders. Claimants can wait months for weekly compensation to be reinstated following a review decision. These should be able to be enforced in the Courts where necessary.<br><br>Peter Sara highlights a client who had his entitlements suspended in November 2016. That decision was quashed on review in November 2017. Demand was made for accrued payment of weekly compensation. In the absence of any other remedy (save perhaps judicial review or similar) the only remedy was to serve a statutory demand pursuant to s 289 Companies Act 1993. ACC has applied to the High Court to set this aside. The client, at May 2018, is owed about $65,000. |
| **Timeliness of Primary Entitlement Decisions.** | There is no requirement in the Accident Compensation Act 2001 for ACC to make Primary Entitlement Decisions in a timely manner. | There are statutory requirements for timeliness of decisions in regards to decisions on cover, and review decisions.[3] It is not clear why there are no such requirements for entitlement.<br><br>The Accident Insurance Act 1998, ss 56-57 provided statutory requirements for a decision on a claim to be made 'as soon as practicable, and no later than 21 days', or for an extension to be requested and accepted by the insured person. Under the 1998 this applied to both cover and entitlement. |

[3] Accident Compensation Act, ss 54, 56 and 57.

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| | | A claimant can apply for a review of the delay, however, this is post hoc. Requirements of a timely decision are a better mechanism to protect claimants and should be adopted. |
| **Appeals to the Supreme Court** | Accident Compensation Act 2001 s 163 (4) limits appeals of decisions made by ACC to the Court of Appeal. The Supreme Court in *J v ACC* [2017] NZSC 3 refused leave to appeal on the clear reading of the Act. | Limiting appeal to the Court of Appeal is unnecessary. It could have been acceptable where appeals were to the Privy Council, however, the Supreme Court should be able to adjudicate on matters of law of which it sees as relevant. It is an anomaly that decisions and review decision cannot be appealed to the Supreme Court.<br><br>Decisions by ACC should be able to be scrutinised by the Supreme Court. The Senior Courts Act s 74 limits the Supreme Court's ability to take appeals and prevents unnecessary appeals. An internal bar in the Accident Compensation Act on appeals to the Supreme Court is both unnecessary and unfair.<br><br>Accident Compensation Act 2001, ss 163(4) should be removed. |
| **Disentitlement in Cases of Suicide.** | Amendments to the Act in 2009 disentitle claimants where injuries are self-inflicted or are caused by suicide.<br><br>Section 119 means claimants will be covered but are automatically disentitled (except for treatment costs) in cases of self-inflicted injury or suicide, aside from cases where mental injury resulting from a physical injury; or mental injury resulting from certain criminal acts (sex crimes); or mental injury caused by experiencing, seeing or hearing (directly) an event at work, which would reasonably be expected to cause mental injury to people generally. | This is mean-spirited. It shows legislative contempt to those suffering metal illness.<br><br>Further, it is an affront to the underpinning Woodhouse principle of removing fault from personal injury claims.<br><br>It leaves ACC with no power at all to provide for the dependants of claimants who are disentitled – no matter how genuine and deserving the need of those dependants is. Due to the fact that the claimants remain covered, there is no ability for the claimant or his/her dependants to bring a civil claim. This is grossly unfair and completely contrary to the scheme's guiding principles. |

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| | | The limited exemption for mental injury does not reflect how mental injuries actually happen. |
| **Abatement of Holiday Pay.** | The Accident Compensation Act 2001, sch 1 cls 49 allows all payments at the termination of employment to abate the amount of weekly compensation that the claimant can receive under cls 51. | Where an injury results in termination, the payment of holiday pay is abated from the weekly compensation that the claimant is entitled to.<br><br>Holiday pay is a payment made to a claimant in respect of a time when that claimant was not injured. Therefore, even though the actual payment may take place at a point in time when the claimant is incapacitated, it was 'earned' at an earlier point in time.<br><br>This results claimants effectively being forced to put money, which was earned prior to their incapacity, towards the costs of their injury. This shifts some of the costs of injury onto the injured person. Had the employee exhausted their leave entitlements prior to termination of employment, they would not be penalised in this way.<br><br>This is contrary the guiding principles of the scheme. |
| **Re-establishment of the Ministerial Advisory Panel on Work-related Gradual Process, Disease or Infection** | Section 21 of the Act was repealed in 2009, disestablishing the Ministerial Advisory Panel. | Work done by the panel remains a relevant and important part of the evolving law regarding cover and entitlements for occupational disease.<br><br>Because of the latency period between exposure to workplace hazards and diagnosis of occupational disease, identification of risks, injury prevention and monitoring are made more difficult. Good knowledge to shape policy is important.<br><br>It should be re-established, as effective management of occupational disease now will constrain and reduce longer term costs. |

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| **Vocational Independence.** | Vocational independence defined as 30 hours per week. A claimant can be determined as vocationally independent under s 107, and lose entitlement to weekly compensation. | Prior to 2009 vocational independence was defined as 35 hours per week.<br><br>30 hours work per week does not amount to full time work. Determining vocational independence at 30 hours per week can lead to real financial hardship. It should be raised to 35 to ameliorate some hardship.<br><br>ACC Futures calls for the total abandonment of vocational independence testing. However the increase to 35 hours a week is a preliminary step that could decrease financial hardship. |