



**MINISTRY OF BUSINESS,
INNOVATION & EMPLOYMENT**
HIKINA WHAKATUTUKI



Discussion paper

Proposed amendments to the Accident Compensation (Review Costs and Appeals) Regulations 2002

March 2022

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Submissions process

On behalf of the Minister for ACC, the Ministry of Business, Innovation and Employment (MBIE) seeks written submissions on the issues raised in this document by 5pm on **28 March 2022**.

Your submission may respond to any or all of these issues. Where possible, please include evidence to support your views, for example references to independent research, facts and figures, or relevant examples.

Please use the submission template provided alongside this document. This will help us to collate submissions and ensure that your views are fully considered. Please also include your name and (if applicable) the name of your organisation in your submission.

Please include your contact details in the cover letter or e-mail accompanying your submission.

You can make your submission by:

- sending your submission in as an Adobe Acrobat compatible pdf, Microsoft Word document or a compatible format as an attachment to ACregs@mbie.govt.nz
- mailing your submission to:

The Manager, Accident Compensation Policy

Ministry of Business, Innovation & Employment
PO Box 1473

Wellington 6140
New Zealand

Please direct any questions that you have in relation to the submissions process to ACregs@mbie.govt.nz.

Use of information

The information provided in submissions will be used to inform MBIE's policy development process, and will inform advice to Ministers on the review costs regulations updates. We may contact submitters directly if we require clarification of any matters in submissions.

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List of acronyms

AC Act	Accident Compensation Act 2001
The Scheme	Accident Compensation Scheme (administered by ACC)
ACC	Accident Compensation Corporation
MBIE	Ministry of Business, Innovation and Employment
Review Costs	Costs, as specified in Schedule 1 of the Accident Compensation (Review Costs and Appeals) Regulations 2002

Executive summary

Background

Claimants who disagree with a decision made by ACC are able to have the decision considered by an independent reviewer. Claimants can access reimbursement of some of their costs. Providing costs awards through regulated rates makes it clear that claimants will have access to some level of reimbursement dependent on the outcome of their case. This encourages claimants to seek out medical evidence and appropriate representation. The review costs rates are set out in the *Accident Compensation (Review Costs and Appeals) Regulations 2002* (the Regulations) and are paid for by ACC.

The Regulations currently have 14 cost categories. Reviewers are able to award costs, up to a maximum amount, based on a category limit or the time required for a task. The specific categories provide for a high degree of predictability in awarding costs.

Costs are insufficient in some cases

In May 2016, the *Independent Review of Acclaim Otago's (Inc) July 2015 Report into Accident Compensation Dispute Resolution Processes* (the Dean Review) recommended that review costs should be increased by more than the rate of inflation to ensure that they provide a meaningful contribution to costs. The Dean Review also noted the structure of the Regulations are too prescriptive.

In 2008, the rates were increased by 14.4 per cent to account for inflation between 2002 and 2007. The rates were increased again in 2017 by 16.6 per cent, to account for inflation between 2008 and 2017. Apart from these inflation adjustments, the regulations have not been substantively reviewed since their introduction in 2002.

In 2017, an additional MBIE review also found that the rates prescribed in the Regulations are inadequate for some claimants, particularly those with complex injuries and historical cases. However, the MBIE review noted there was no strong evidence that the Regulations are insufficient in all cases, with maximum reimbursement not being reached in many cost categories.

Proposed approach to reform the Regulations

Reducing the current cost categories from 14 to four

It is proposed that the current cost categories be reduced from 14 to the following four categories:

1. **Application costs:** costs associated with preparing and submitting the application required to initiate a review.
2. **Representation costs:** costs associated with a lawyer or advocate preparing for and attending a review.

3. **Medical and other reports:** costs associated with expert reports that a claimant may require to support their case during the review process.
4. **Other expenses:** costs associated with expenses incurred in the review process such as travel and childcare.

Category 2: Representation costs has two options for consideration

We are looking for feedback on two options for representation costs:

Option 2.1: one set maximum limit for all representatives (including both advocates and lawyers)

Option 2.2: splitting representation costs into a range dependent on complexity and/or time involved, and qualifications of the representative.

Increasing the maximum limits within the four categories

Table 1 below shows the proposed increase for each of the four categories, split by the two proposed options for Category 2: Representation costs.

Table 1: Proposed changes

Category	Current regulations ¹	Proposed changes (option 1)	Proposed changes (option 2)		
1. Application Costs	\$136.35	\$150.00	\$150.00		
2. Representation costs (including advocates)	\$886.32 (across 7 categories)	\$1,320.00	Complexity and/or time →		
				A.	B.
			1. Advocates	\$660	\$1,320
		2. Lawyers	\$1,320	\$2,640	
3. Medical and other reports	\$1,636.26 (across 5 categories)	\$4,150.00	\$4,150.00		
4. Other expenses	\$681.77	\$1,500.00	\$1,500.00		
Maximum award	\$3,340.70	\$7,120.00	\$8,440.00 (assuming 2B of the matrix applies)		

Summary of how the proposed approach will improve access to justice for claimants

Increasing the maximum limits that the reviewer can award:

- allows increased flexibility for reviewers in the award of costs, which addresses the current prescriptiveness in the reviews

¹ Maximum awardable costs are GST inclusive, refer to clause 4(3) of the Regulations.

- provides clarity for claimants, as clear maximum limits are provided for in the categories and the review overall.

Importantly, the reduction in the number of categories (from 14 to four) does not mean a reduced overall range of costs.

Details on how you can submit your response are found on page 3.

We want to gain a more comprehensive understanding of the costs involved for claimants undertaking reviews, particularly for representation and medical report costs. We welcome your views on the proposed changes to the Regulations, and/or any other relevant points. MBIE also encourages the submission of alternative approaches to providing reimbursement for review costs.

1 Introduction

Background

Review costs regulations specify costs incurred that could be partially reimbursed

1. ACC can reimburse claimants for costs incurred in seeking a review. When a review is undertaken, the reviewer can make three formal decisions, which can all potentially result in a contribution towards review costs:
 - a. dismiss the application for review: costs may be awarded if the reviewer considers that the review was “reasonably brought” by the claimant
 - b. modify ACC’s decision, or parts of the decision: if any costs have been requested by the claimant, the reviewer will award them in line with the Regulations
 - c. overturn ACC’s decision: if any costs have been requested by the claimant, the reviewer will award them in line with the Regulations.
2. The maximum rates of reimbursement are set by the *Accident Compensation (Review Costs and Appeals) Regulations 2002* (the Regulations)².
3. Currently, the Regulations prescribe costs in 14 categories, as outlined in Table 2 below.

Table 2: Prescribed Costs under the Regulations

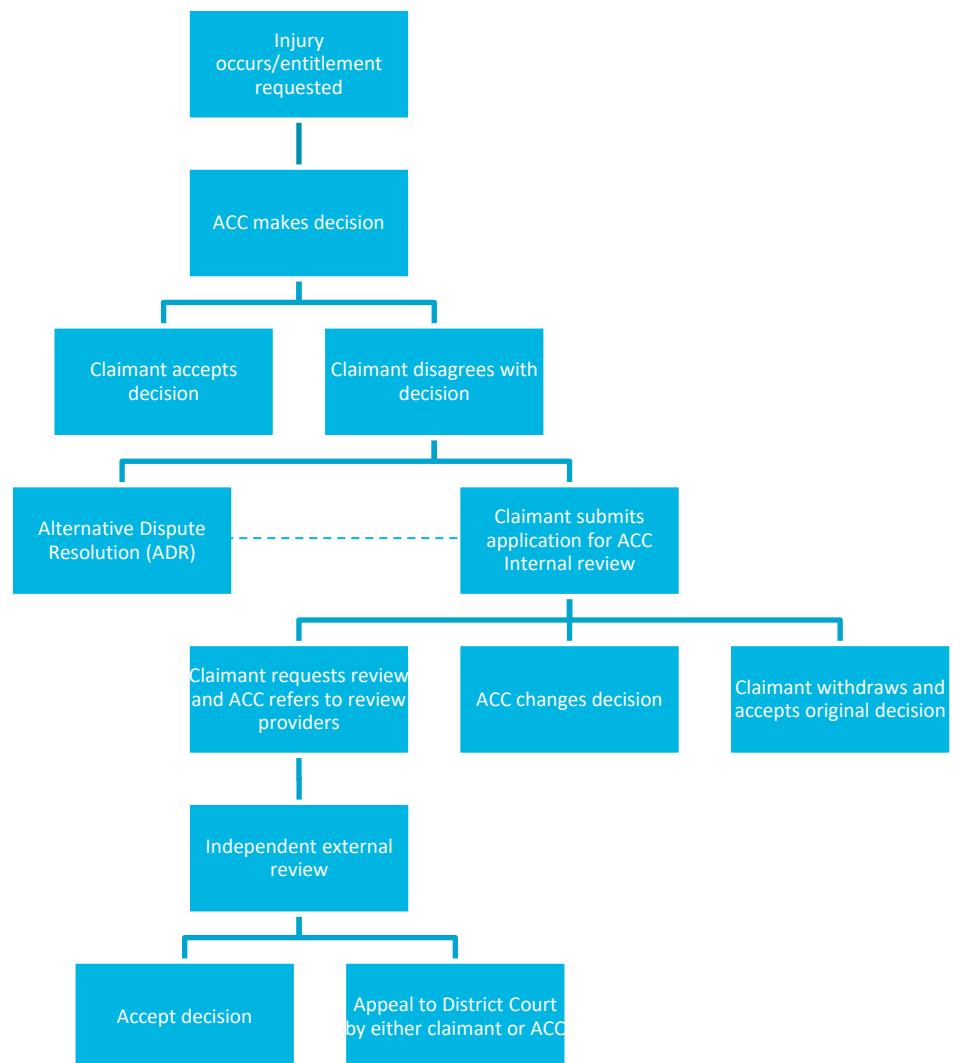
Cost categories under the Regulations		Maximum award	Rate (\$)
1	Preparation and lodging application for review	\$136.35	
2	Participation in case conference before review hearing	\$68.18	
3	Other preparation of case for review	\$409.07	
4	Appearance at hearing	\$409.07	
5	<i>First Hour of Hearing (or part thereof)</i>		\$204.53
6	<i>Second Hour of Hearing (per 15 minutes)</i>		\$34.08
7	<i>Later Hours of Hearing (per 15 minutes)</i>		\$17.05
8	Medical specialist report(s)	\$1,090.84	
9	Other report – one report only	\$545.42	
10	Other report – two or more reports	\$818.12	
11	<i>1st Hour of Preparation</i>		\$204.53
12	<i>2nd Hour of Preparation (per 15 minutes)</i>		\$51.13
13	<i>3rd Hour of Preparation (per 15 minutes)</i>		\$34.08
14	Other reasonable expenses	\$681.77	
	<i>Private Transport</i>	\$178.78	

² Section 328 of the *Accident Compensation Act 2001*.

The review costs regulations are a part of ACC's dispute resolution process

4. Claimants who are dissatisfied with a decision made by ACC can submit an application to have the decision reviewed, by ACC. If the issues remain unresolved, they can either go through an Alternative Dispute Resolution process (e.g. mediation) or apply for an external independent review³.
5. If the claimant disagrees with the review decision, they can appeal to the District Court. District Court decisions can be appealed to the High Court and the Court of Appeal but only on questions of law. ACC may also choose to appeal a review decision to the District Court and to higher courts.
6. The following diagram shows the dispute resolution process.

Diagram 1: Dispute Resolution Process



³ Employers are also able to review some decisions made by ACC, but this has been omitted from this section for simplicity.

Scope of this document

7. The scope of this document is to focus on updating the *Accident Compensation (Review Costs and Appeals) Regulations 2002* (the Regulations). In particular, this document focuses on:
 - the cost categories available to award review costs; and
 - the maximum limits on costs that can be awarded.
7. The purpose of this discussion paper is to obtain feedback on proposals to update the Regulations. The contents of this discussion paper reflects work undertaken to consider the purpose of the Regulations and how they work in practice.

Process and timeline

8. A current timeline for this consultation process is set out below.



The current Review Costs Regulations

There are two main issues that have been identified with the current regulations

9. **Issue 1:** The current level of reimbursement for costs is insufficient in some cases, particularly for those which involve complex or long-term injuries. The costs of accessing medical reports and representation are particular barriers to claimants accessing the review process.
10. **Issue 2:** The overly prescriptive nature of the cost categories may limit claimants' access to justice. Reviewers are constrained by the 14 detailed cost categories, which require reimbursement for specific or time-based tasks. However, some complex cases may require extensive preparation which could fall outside of the current cost categories thereby potentially limiting claimants' access to representation or detailed medical reports.

The Dean Review recommended improvements to the review process

11. In 2016, the *Independent Review of Acclaim Otago's (Inc) July 2015 Report into Accident Compensation Dispute Resolution Processes* (the Dean Review) made a series of recommendations to improve accident compensation dispute resolution systems.

The Dean Review found that costs were insufficient

12. Many of those interviewed as part of the Dean Review indicated that the costs awarded for medical reports fall short of actual costs and that this must be reviewed in order to improve claimants' access to medical evidence⁴. Many claimants indicated that they were reluctant to get a medical report because of the cost.
13. Interviewees also told the Dean Review that preparation costs – particularly if a lawyer or advocate was representing the client – were inadequate and that many claimants were denied competent representation as a result.
14. The Dean Review reported that for many claimants, their ability to continue with a review often came down to their representation's commitment not to abandon them despite the risk of not recovering the financial cost of representation⁵.

The limited supply of representation was also a barrier for some

8. The Dean Review also found that the limited supply of representation was a significant barrier to claimants challenging ACC decisions. The Dean Review specifically noted that poor remuneration was a reason for the low number of specialised accident compensation lawyers⁶. ACC have since undertaken several initiatives to enhance representation, but this is a long-term issue⁷.

There has not been a substantive review of the Regulations since 2002

15. The Regulations have not been reviewed since 2002, apart from the following inflation adjustments. In 2008, the rates were increased by 14.4 per cent to account for inflation between 2002 and 2007. The rates were further adjusted in 2017 by 16.6 per cent, to account for inflation between 2008 and 2017.

An MBIE review found that cost categories were too prescriptive

16. Following the interim increase to rates in 2017, MBIE undertook a review of the cost environment in order to inform approaches to a more substantial update to the Regulations.
17. While there was limited information provided during the review, based the information that was provided we considered that:
 - a. cases with complex and/or long-term injuries were likely to be significantly under reimbursed in review costs

⁴ Dean Review, pg. 31-32.

⁵ Dean Review, pg. 32.

⁶ Dean Review, pg. 58.

⁷ ACC has funded a free independent Navigation Service to assist claimants with queries, advice and support up until the initiation of a review hearing. New provider WayFinders joined the existing service provided by the Workplace Injury Advocacy Service from 2 September 2019.

- b. there was no strong evidence that review costs are insufficient in all categories (refer Appendix 1), however the maximum awardable cost was reached in many of the representation costs categories
 - c. the prescriptive cost categories – in particular, the different rates for specialists and non-specialists – limit the discretion of reviewers and may act as a barrier to access.
18. We are now consulting in order to gain a better understanding of the review costs environment.

2 Objectives for the Regulations

19. We seek your feedback on our proposed objectives for the Regulations.

Objectives

20. The Regulations are not intended to cover a claimant’s full costs, rather they provide a fair contribution. This reflects the Scheme’s mandate to provide fair rather than full compensation⁸. In the context of review costs, this principle acts as a deterrent to excessive litigation and cost inflation, while contributing to the financial sustainability of the Scheme.
21. We set the following objectives in assessing the proposed approach to reforming the Regulations:
- a. improve access to justice for claimants⁹
 - b. be transparent and consistent
 - c. discourage frivolous and excessive litigation
 - d. support an efficient and effective review process.
22. We consider that improving access to justice for claimants should be the primary objective of reforming the Regulations in order to assess what a ‘meaningful contribution’ to costs for undertaking a review ought to be.

⁸ Section 3 of the *Accident Compensation Act 2001*.

⁹ Note that the use of the word justice in this document refers to justice in the principle sense and not the legal sense.

23. Improving access to justice means that costs should not fall substantially on claimants when they have a justified claim. Reimbursement of costs, when a claim is found to be justified, is important to ensure that claimants are not denied access to the medical expertise and appropriate effective representation necessary to make their case when challenging incorrect decisions.
24. This focus on improving access to justice must, however, be balanced by the need to provide an efficient and effective review process for claimants, review providers, and ACC, while ensuring that reviews are not undertaken on frivolous grounds.
25. The review costs system must also be transparent and consistent. Claimants should be aware of the level of reimbursement to which they may be entitled and the assessment of costs awarded ought to be on a consistent basis across all reviews.
26. We encourage submitters to use this framework to guide their own responses and input. We also encourage comment on whether these objectives best reflect what the Regulations should achieve.

Questions on the proposed objectives

- 1 Do you agree with the presented objectives? [Yes/ No/ Not sure]
- 2 Are there alternative objectives that should be considered to help shape the discussion? (please provide detail on any alternative objectives you consider relevant)

3 Proposed changes

Introduction

We recommend simplifying the review cost categories

27. Realigning review costs into the following four categories simplifies the review cost categories in the Regulations and provides more flexibility for reviewers:
 1. **Application costs:** costs associated with preparing and submitting the application required to initiate a review.
 2. **Representation costs:** costs associated with a lawyer or advocate preparing for and attending a review.
 3. **Medical and other reports:** costs associated with expert reports that a claimant may require to support their case during the review process.
 4. **Other expenses:** costs associated with expenses incurred in the review process such as travel and childcare.

- 28. The proposed cap for each of the cost categories is significantly higher than those under the current framework and provides a balance between ensuring access to justice for claimants and minimising cost inflation (without any fundamental change in cost drivers).
- 29. The new approach also reflects the findings from both the Dean Review and MBIE’s review that the current degree of prescriptiveness limits access to the review process.
- 30. Table 3 below provides an overview of how the current cost categories would broadly translate into the proposed cost categories.

Table 3: Overview of current cost categories and proposed cost categories*

Category	Current regulations	Proposed changes (option 1)	Proposed changes (option 2)	
1. Application Costs	\$136.35	\$150.00	\$150.00	
2. Representation costs (including advocates)	\$886.32 (across 7 categories)	\$1,320.00	Complexity and/or time →	
			A.	B.
			1. Advocates	\$742.50 \$1,320
2. Lawyers	\$1,485 \$2,640			
3. Medical and other reports	\$1,636.26 (across 5 categories)	\$4,150.00	\$4,150.00	
4. Other expenses	\$681.77	\$1,500.00	\$1,500.00	
Maximum award	\$3,340.70	\$7,120.00	\$8,440.00 (assuming 2B of the matrix applies)	

* Proposed maximum award rates are subject to change based on additional research and evidence provided through the submissions process.

Questions on the proposed cost categories	
3	What do you think about the proposed cost categories?
4	Do you agree with the proposed categories? [Yes/ No/ Not sure] Why/ Why not?
5	Are there any other alternative options for grouping the cost categories that could be used? Please provide supporting information.

Category 1: Application costs

31. To begin the review process, an application must be made under section 135 of the AC Act. As there are some claimants who choose to represent themselves in a review they should be able to be reimbursed for this cost, if they meet the criteria for review costs to be paid. For these reasons, application costs have been placed in a distinct category separate from all other review-related costs.
32. There is a risk that separating out application costs from representation costs may encourage some claimants to submit frivolous claims in the hopes of recuperating application costs.
33. Currently, the maximum cost for the preparation and lodgement of a review is \$136.35. To ensure administrative simplicity, we now propose to increase this to \$150. Table 4 outlines the proposed increase for application costs.

Table 4: Application costs category

Category		Total Cost	Potential Increase
<i>Current</i>			
1	Preparation and lodgement of application for review	\$136.35	
<i>Proposed</i>			
1	Application costs	\$150.00	\$13.65

Questions on Category 1 – Application Costs

6 Should Application Costs (Category 1) remain separate from Representation Costs (Category 2)? [Yes/ No/ Not sure]

Why/ why not?

7 Do you agree with the proposed increase in maximum costs awardable for Application Costs?

Strongly Disagree

Disagree

Neither

Agree

Strongly Agree

Category 2: Representation costs

34. MBIE's review found that maximum awards were met in many of the current representation cost categories, which indicates that a broad uplift is required. This was consistent with the Dean Review.
35. The prescriptive approach to cost categories may limit claimants' access to justice. For example, reviews for complex and/or long-term claims may require extensive preparation time, but reviewers are bound by award costs based on specific tasks related to the review.
36. To ensure claimants have proper access to relevant representation, we are proposing an increase to the maximum amount awardable for Representation costs (refer Table 5 and 6 below).
37. There are significant complexities involved with representation costs, as both lawyers (governed by NZLS) and advocates (not governed by a professional body and can range from very experienced to not experienced at all) can represent claimants during a review. Given this, we are looking for feedback on two proposed options for representation costs:
 - **Option (2.1):** one set maximum limit for all representatives (including both advocates and lawyers).
 - **Option (2.2):** splitting representation costs into a range dependent on complexity and/or time involved, and qualifications of the representative, in recognition that lawyers charge higher fees and are held to the standards set by NZLS.
38. Both options provide maximum limits in respect of one representative only.

Option 2.1: One maximum limit for all representatives

39. Under Option 2.1, the representation costs category (Category 2) is available for representation from both lawyers and advocates, with no distinction made for complexity or qualifications, in determining maximum cost awards.
40. Using a single maximum cap for representation costs may create a new market for representatives who are not experienced in the AC jurisdiction, which may lead to an increase in reviews without merit. While increasing the cap should ensure a greater access to justice for claimants through increased efficiency there is a trade-off in that it may also encourage frivolous and excessive litigation and lower the effectiveness of the review process.
41. To ensure claimants have proper access to relevant representation, this option proposes to increase the maximum amount awardable to \$1,320. We welcome stakeholder input on this option, and the appropriate level of reimbursement.
42. Table 5 provides a comparison of the current available award costs under the Regulations and a capped approach.

Table 5: Representation Costs

Category		Cost	Potential Increase
<i>Current</i>			
2	Participation in case conference before review hearing	\$68.18	
3	Other preparation of case for review	\$409.07	
4	Appearance at hearing	\$409.07	
5	First hour of Hearing (or part thereof)	\$204.53	
6	Second hour of hearing ¹	\$34.08	
7	Later hours of hearing ¹	\$17.05	
	Total ²	\$886.32	
<i>Proposed</i>			
3	Representation costs	\$1,320.00	\$433.68

¹ per 15 minutes.

²Assumes maximum cost for appearance at hearing is reached (\$409.07).

Option 2.2: Sliding scale based on complexity and/or time involved, and qualifications of the representatives

43. Option 2 proposes a sliding scale based on complexity and/or time, and qualifications of the representatives, in recognition that lawyers charge higher fees and are held to the standards of NZLS. Option 2 includes a 2x2 matrix which takes into account the differences in costs associated with lawyers and advocates on the vertical axis, and a case’s complexity and/ or time on the horizontal. Table 6 shows the matrix.

Table 6: Option 2.2 matrix

	<i>Complexity and/or time →</i>	
	<i>A.</i>	<i>B.</i>
1. Advocates	\$660	\$1,320
2. Lawyers	\$1,320	\$2,640

- 44. The matrix is designed to be relatively simple, to allow for consistent outcomes amongst reviewers.
- 45. The set maximum limit for the highest possible award is set at \$2,640 for lawyers (2B). This amount is based on an estimate that it takes an average of 12 hours of legal work (at a rate of \$220 per hour) per complex review. We are seeking feedback on this proposed rate.
- 46. It is proposed that costs increase by 50% as complexity increases (i.e there is a 50% increase between category A and B). It also allows for more discretion as to which cases should be placed at which level.

47. Category (B), the highest complexity, is designed to cover cases where there are questions of law or where difficult medical questions arise, such as some treatment injury cases. Category (A), the lowest complexity, is meant to cover cases where a decision made by ACC is either clearly correct or incorrect, such as in some cases where cover is concerned. ACC prepares internal guidance for determining review representative costs based on complexity, along with stakeholder feedback this will help to determine the approach for further defining categories A and B. Refer to table 7 for a current list of what is considered a ‘complex review’¹⁰.

Table 7: What is considered as a ‘complex review?’

	<i>Complex and/or time consuming cases</i>
<i>Example cases</i>	<ul style="list-style-type: none"> • Accident Compensation Act 1982 matters • Vocational Independence • Vocational Rehabilitation • Weekly compensation - loss of potential earnings • Rehabilitation - attendant care, home help and child care • Treatment injury • Sensitive claims <p>AND</p> <ul style="list-style-type: none"> • Multiple reviews - however only in the following circumstances: <ol style="list-style-type: none"> 1) All reviews must be from the same claim. 2) All being a referral together to the provider on 1 x ACC6239 (regardless of whether they were lodged together) 3) Are about a matter where the outcome of one will determine the outcome of the other (i.e. cover & surgery)

48. Section 57 of the AC Act also defines steps the Corporation must take to action complicated claims for cover. The categories defined in section 57(1) include work-related mental injury (section 21B), sensitive claims (section 21), work-related gradual process claims (section 30), and treatment injury (section 32). Section 57 provides a good starting point for further defining complexity in Option 2.2.

49. Advocate rates (starting at 1A) are set at 50% of the maximum rates for lawyers. This is based on a High Court ruling (*ACC v Carey* [2021] NZHC 748) that determined the full rate available to lawyers through the District Court rules would not generally be appropriate for non-lawyer advocates. Aligning rates more closely to market rates for lawyers should encourage more lawyers into the AC jurisdiction and increase access to justice for claimants.

50. There is an important professional distinction between advocates and lawyers. Advocates are not subject to review and oversight by NZLS and do not have the additional costs or professional responsibilities borne by a lawyer. Option 2 addresses this distinction, it is also hoped that claimants will seek out lawyers due to higher reimbursement levels for their expertise, which will increase demand and encourage more lawyers into the AC area.

¹⁰ Note that each listed item has a particular code within ACC’s system. Not all cases that fall within a particular category would have a complex code attached to it, eg some weekly compensation cases and rehabilitation cases.

- 51. The use of a scale largely takes the costs exercise away from assessing the skill of a particular representative. It provides a framework for an objective assessment of the skill and experience required due to the nature or complexity of the review, as well as an objective assessment of the time that each step should reasonably take. This allows a degree of predictability in the award of costs and also allows costs to be awarded expeditiously by reviewers.
- 52. Providing maximum limits for the complexity of a case and the level of representation sought should ensure adequate access to justice, while discouraging frivolous and excessive litigation.

Other options considered during development

- 53. Review processing in other domestic settings and overseas jurisdictions were also considered. While some data proved useful, this cannot be directly translated to the ACC review process because they are based on different models that usually do not have an intermediate step between administrative reviews and litigation through the courts and quasi-judicial bodies. The ability to award costs is usually assigned to the equivalent of the District Court.
- 54. Given this, consideration was also given to consulting on an option to use the *District Court Rules 2014* as a basis to provide costs. It was decided not to proceed with consulting on this option due to the difficulty of integrating this approach with the review format and the overall intention of providing greater flexibility and discretion for reviewers.

Questions on Category 2 – Representation Costs	
8	<p>Based on the options provided in this document, what is your preferred option? (please provide the reasons for your view)</p> <p>2.1 One maximum limit for all representatives</p> <p>OR</p> <p>2.2 Sliding scale based on complexity and/or time and, qualification of the representative.</p>
9	<p>Do you have any other suggested options or groupings to categorise Representation Costs (Category 2)?</p>
10	<p>Is there any information to support or reject the distinction that is made between lawyers and advocates (Option 2.2)?</p>
11	<p>Do the proposed new rates reflected in Option 2.2 reflect appropriate market rates for lawyers and advocates? [Yes/ No/ Not sure]</p> <p>If not, is there any information that can be shared to inform this discussion.</p>

12	<p>Do you agree with the proposed new maximum costs awardable for Representation costs (both options)?</p> <table border="1" data-bbox="295 293 628 638"> <tr> <td data-bbox="295 293 628 360">Strongly Disagree</td> </tr> <tr> <td data-bbox="295 360 628 427">Disagree</td> </tr> <tr> <td data-bbox="295 427 628 495">Neither</td> </tr> <tr> <td data-bbox="295 495 628 562">Agree</td> </tr> <tr> <td data-bbox="295 562 628 638">Strongly Agree</td> </tr> </table>	Strongly Disagree	Disagree	Neither	Agree	Strongly Agree
Strongly Disagree						
Disagree						
Neither						
Agree						
Strongly Agree						
13	<p>Do you think the proposed changes will increase access to justice (and therefore improve outcomes) for claimants? [Yes/ No/ Not sure]</p> <p>If not, why not?</p>					
14	<p>Is there any evidence/data or precedence that could be used to determine the complexity of a review (i.e. which cases should sit in which categories (ie A or B)?</p>					

Category 3: Medical and other reports

55. As noted in the Dean Review, costs awarded for specialist (and non-specialist) medical reports often fall short of actual costs, particularly in reviews involving complex or long-term claims. This creates inequities as claimants may be reluctant to seek a medical report to support their claim because of the cost.
56. The Regulations currently provide a two-tiered approach for cost reimbursement for reports from medical professionals:
 - Section 3 of the Regulations prescribes 24 medical specialists where \$1,090.84 can be reimbursed per report.
 - For those specialists that are not defined in Section 3 of the Regulations, \$545.42 can be awarded for the first report and \$818.12 for two or more reports.
57. Increasing the amount awardable under the medical cost category and being less prescriptive, with regards to differences between specialists and non-specialists, should increase access to medical professionals for ACC claimants during the review process.
58. We propose moving from the current prescriptive approach to a more flexible capped cost approach. Table 8 provides a comparison of the current cost categories for medical reports and the proposed capped cost approach.

Table 8: Medical and Other Report expense categories

Category		Cost	Potential Increase
<i>Current</i>			
8	Medical specialists report(s) fee	\$1,090.84	
9	Other report fee – one report only	\$545.42	
10	Other report fee – two or more reports	\$818.12	
11	Claimant contact time – 1 st hour of preparation	\$204.53	
12	Claimant contact time – 2 nd hour of preparation ¹	\$51.13	
13	Claimant contract time – 3 ^{ed} hour of preparation ¹	\$34.08	
	Total ²	\$1,636.26	
<i>Proposed</i>			
3	Medical and other reports	\$4,150.00	\$2,513.74

¹ Rate per 15 minutes

² This assumes that one medical report and one other report is required.

59. The proposed limit of \$4,150 for medical and other reports is based on an estimate that it can take up to 7.5 hours (at a rate of approximately \$550 per hour) to complete a complex medical report.

Questions on Category 3 – Medical and Other Report Costs

15. Currently, the medical reports categories can be used for multiple reports. Is there any information to suggest the capped approach is inappropriate? Please provide supporting information.

16. Do you think the proposed new rates will increase access to medical reports (and therefore access to justice) for claimants? [Yes/ No/ Not sure]
Please explain your view.

17. Do you agree with the proposed new maximum costs awardable for Medical and Other Report Costs?

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

18. Do you think removing the distinction between registered specialist reports and other reports will improve claimant’s access to reports? [Yes/ No/ Not sure]
Please explain your view.

Category 4: Other expenses

60. During the review process, a number of additional expenses may be incurred. These include, but are not limited to, travel costs, time off work, and accommodation costs.
61. While a review of data showed that maximum awards were rarely met in this category, we propose increasing the claimable amount from \$681 to \$1,500. An increase acknowledges the importance of ensuring that claimants have access to in-person hearings and reviews.
62. This category includes the mileage rate for private travel to cover costs associated with the use of a vehicle (such as petrol, insurance, registration, wear and tear etc.). We propose maintaining the mileage rate reference within the Regulations to ensure parity with the current mileage rates seen in other accident compensation regulations.
63. This approach provides the reviewer discretion in awarding travel costs and removes the current cap. Table 9 outlines the proposed increase for other expenses.

Table 9: Other Expenses category

Category		Total Cost	Potential Increase
<i>Current</i>			
14	Other reasonable expenses (travel costs maximum award is \$178.78)	\$681.77	
<i>Proposed</i>			
4	Other expenses	\$1500.00	\$818.23

Questions on Category 4 – Other Expenses

19. Do you think the new rates will increase access to in-person reviews for rural communities? [Yes/ No/ Not sure]
Why/ why not?
20. How can 'Other Expenses' (Category 4) be improved to enhance support for rural communities?
Please provide supporting information.
21. Do you agree with the proposed new maximum costs awardable for Other Expenses?

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

Questions on the overall proposed changes to the Regulations

22	Are there any other costs, benefits, or unintended consequences of the proposed changes that have not been considered in this document?
23	Do you think MBIE should conduct regular reviews of the maximum cost caps in the regulations? [Yes/ No/ Not sure]
24	Do you have any comments on the alternative approaches considered?

4 Analysis of proposed approach to status quo

64. Table 10 below sets out the positives and negatives that we have identified from both providing the new structure for costs and the general uplift in the amount available for award. Table 11 sets out the impact analysis of the proposed options for Category 2 (Representation Costs).

Table 10: Analysis of proposed approach against the status quo

	Status quo	Proposed use of broad categories
Enhance access to justice <i>[weighted higher than other criteria]</i>	- Costs may insufficient for claimants to effectively participate in the review space.	++ There are substantial increases in costs available in the three primary categories which will enhance access to justice for claimants. The increased flexibility available to reviewers in the award of costs provides further access to justice improvements for some cases. However, the capped approach to Medical and other reviews may limit access to justice (see consultation question 15). Claimants with costs above the limit may not be reimbursed substantively, regardless of the necessity of their costs or the merits of their case (for example, complex cases).
Be transparent and consistent	0 Current cost categories are already understood by reviewers and guidance helps to ensure consistency.	+ There is a definite limit, which provides clarity for claimants about the maximum award rates available at both category and review level. There is the potential for costs to be awarded unwarrantedly up to the maximum cap due to cost inflation or through reviewer behaviour.
Discourage frivolous and excessive litigation	0 Status quo, some frivolous cases are pursued in order to claim maximum costs.	0 Clearer maximum awardable costs should reduce unnecessary litigation. However, increased costs available may increase the number of claimants requesting reviews of their decisions on frivolous grounds.
Support efficient and effective reviews and ease of use	0 Status quo, may be more difficult to use than the proposed broad categories.	+ Increases flexibility for reviewers in the award of the costs by providing greater discretion. Costs categories are clear and understandable. Reduces predictability due to degree of flexibility.
Key: ++ much better than doing nothing/the status quo + better than doing nothing/the status quo 0 about the same as doing nothing/the status quo - worse than doing nothing/the status quo - - much worse than doing nothing/the status quo		

Table 11: Impact of options for Category 2 (Representation Costs)

	Option 2.1 (One maximum limit for all representatives)	Option 2.2 (Sliding scale based on complexity and/ or time, and qualifications of the representatives)
Enhance access to justice <i>[weighted higher than other criteria]</i>	+	++
	This option will increase costs awardable, providing claimants with more scope to consider engaging professional representation.	This option provides a scale of costs, providing claimants with more scope to consider the level of representation that best suits their circumstances.
Be transparent and consistent	++	+
	One consistent rate for all representatives will be transparent and less complex.	A matrix of costs provides transparent levels of reimbursement. Slightly more complex than using a single rate.
Discourage frivolous and excessive litigation	-	++
	Possibility of increasing frivolous and excessive litigation, in order to claim the maximum limit, by those without appropriate expertise.	Maximum costs separated by experience/qualification and complexity should discourage frivolous cases.
Support efficient and effective reviews and ease of use	0	+
	We do not expect there to be any significant impact on effectiveness. Potentially negative if costs increase substantially.	Clear cost reimbursement categories should provide ease of use for both reviewers and claimants. Currently we do not have enough data to understand the effect on efficiency and effectiveness.
Key:		
++ much better than doing nothing/the status quo		
+ better than doing nothing/the status quo		
0 about the same as doing nothing/the status quo		
- worse than doing nothing/the status quo		
-- much worse than doing nothing/the status quo		

5 What were the alternative approaches?

Introduction

65. A number of alternative approaches were considered during the development of this discussion paper. However, these have been discounted due to the level of complexity and uncertainty they would introduce. Table 10 below outlines the alternative approaches.

Option 1: Allowing limited reallocation across sub-categories at the discretion of the reviewer.	Option 2: Empowering reviewers to award costs and expenses “as they see fit.”	Option 3: Allowing reimbursement for only the professional services costs incurred, that materially contribute to the resolution of the disputes.	Option 4: Specifying that costs are awarded for reviews ‘reasonably brought’ but unsuccessful only where there is precedent effect.
This may help to enhance access to justice for certain claimants. For example, in some circumstances the case may centre on legal arguments, without disputes over medical evidence. It may also improve the flexibility of the Regulations in such cases. However, this approach would introduce a high level of complexity and uncertainty for both reviewers and claimants	This option provides the ability to recognise varying degrees of responsibility. For example, when withholding of relevant information contributes to the dispute. However, this has the potential to create complexity and introduces a more litigious environment.	While reviewers have discretion to not award costs for unreasonably taken reviews, this would require additional clarification that costs unnecessarily incurred would not be reimbursed (for example when medical reports are procured for conditions unrelated to the matter under dispute). However, the proposed approach provides sufficient discretion for reviewers.	This would narrow the scope of ‘reasonably brought’ reimbursements for unsuccessful reviews to those cases that set precedence for a new question of law or medical opinion. Again, the proposed approach provides sufficient discretion for reviewers. Moreover, specifying the need for legal precedent may conflict with the intended informality of the ACC dispute resolution process.

6 Additional considerations

Rural proofing framework

- 66. In June 2018, the then-Minister for Rural Communities introduced the Rural Proofing framework, which intends to raise awareness of rural communities when considering and implementing policy.
- 67. The 'Other Expenses' category (Category 4) would provide greater flexibility in the award of travel costs, which would enhance access for those in rural communities if they choose to have a review in person. ACC has also sought to increase the use of technology in order to more easily access claimants residing in rural communities.

Legal aid interaction

- 68. Some claimants are able to access legal aid for their review. The legal aid fixed fee schedule provides for a grant of up to \$1,660 for legal costs and up to \$5,000 for related medical evidence for eligible applicants. The Legal Services Commissioner can approve top-ups above the fixed fees.
- 69. As legal aid is technically a loan, repayment of the legal aid is required. We consider that the proposed options would help some claimants in more complex cases, without having to seek legal aid and incur debt.

Questions on the overall proposed changes to the Regulations

- 25. Are there any other costs, benefits, or unintended consequences of the proposed changes that have not been considered in this document?
- 26. Do you think MBIE should conduct regular reviews of the maximum cost caps in the regulations? [Yes/ No/ Not sure]
- 27. Do you have any comments on the alternative approaches considered?

7 Alternative Dispute Resolution (ADR)

Introduction

70. MBIE is also in the preliminary stages of assessing ADR processes. While ADR is not a focus of this document, we would like to take this opportunity to gain stakeholder input, to inform future policy work.

Current situation

71. ADR provides mediation, facilitation, and conciliation services to resolve disputes and can prevent issues escalating to a review.

Table 12: Alternative Dispute Resolution steps

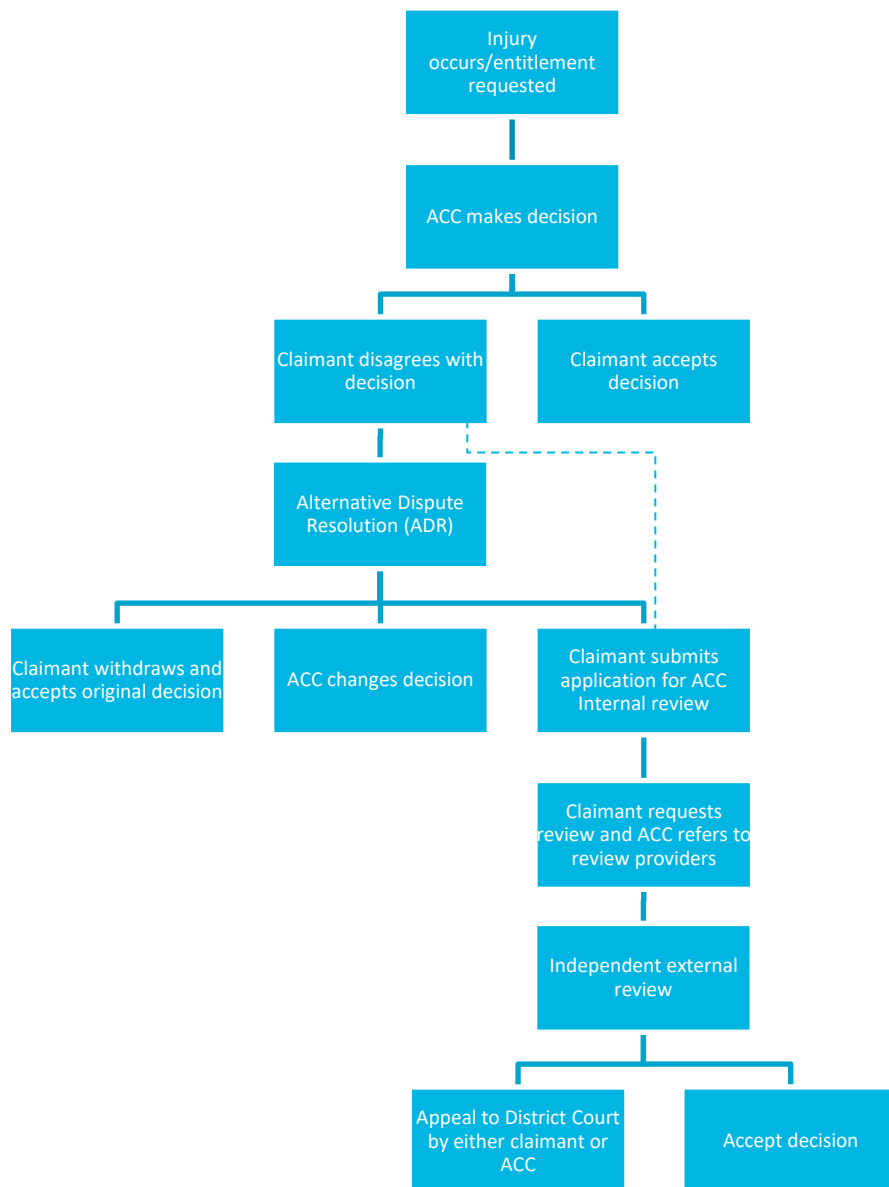
Alternative Dispute Resolution (ADR)	
<i>Conciliation</i>	The review service provides a conciliator who tries to actively find a solution by becoming involved in the process. In this way, conciliation hopes to be less adversarial.
<i>Facilitation</i>	The review service provides a facilitator who acts as an “interpreter” between the claimant and the ACC case manager. They can clarify information and also offer a recommendation to the issue. This is, however, not binding.
<i>Mediation</i>	This step seeks to find an agreement, but without going through a full review process. Mediation can take place through discussions, teleconferencing, and face-to-face discussion.

72. ACC has raised concerns about the current interaction between ADR and external reviews. Lodging a review while the client is engaging in ADR creates an administrative burden for ACC and may confuse some clients.
73. While clients may prefer ADR to a review hearing, the three-month timeframe for setting a review hearing means that ACC must engage with a review provider even if they are currently engaging in ADR. If a review date is not set, then the decision is ‘deemed’ in favour of the applicant¹¹.

¹¹ Section 146 of the *Accident Compensation Act 2001*.

- 74. To avoid this, the review hearing is set and adjourned while ACC and the client engage in ADR. This results in an administrative burden for ACC review specialists, because they must prepare the claim file for review even if ADR resolves the issue, and the review is withdrawn.
- 75. Prescribing extended timeframes for lodging a review application where ADR is conducted would address this issue. For example, a review hearing would not need to be set within the three-month time limit for those parties who are engaged in ADR. If an agreement couldn't be met, then a review hearing could be set. This would create a more linear, and clearer, approach for claimants, diagram 2 refers.

Diagram 2: linear approach for dispute resolution



- 76. MBIE is also interested in understanding the impact of ADR on the wider dispute resolution process for ACC claimants. This includes understanding any costs involved for those undertaking ADR.

Questions on Alternative Dispute Resolution (ADR)

- | | |
|----|---|
| 28 | If the regulated timeframes are extended while clients are engaged in ADR, what effect do you think it will have on claimant's decisions to use ADR and the external review process? Please provide supporting information. |
| 29 | Have you incurred costs as a result of undertaking ADR? What are these and did it impact on decisions to proceed with an external review? |
| 30 | If a level of reimbursement for costs was to be included for ADR in the Regulations, what should be taken into consideration? |
| 31 | Would the inclusion of a level of reimbursement for ADR costs change your position on undertaking ADR in comparison to an external review? |

8 What happens next?

- 77. Submissions on the proposed regulations close on 28 March 2022. The submissions will help to inform MBIE's advice to the Minister for ACC on the future of review costs.
- 78. Following the consultation period, the development of final regulations will take place. There will also be the development of details for monitoring and future evaluation of the updated regulations.

Full list of questions

Questions on the proposed objectives

- | | |
|---|--|
| 1 | Do you agree with the presented objectives? [Yes/ No/ Not sure] |
| 2 | Are there alternative objectives that should be considered to help shape the discussion? (please provide detail on any alternative objectives you consider relevant) |

Questions on the proposed cost categories

- | | |
|---|---|
| 3 | What do you think about the proposed cost categories? |
| 4 | Do you agree with the proposed categories? [Yes/ No/ Not sure]
Why/ Why not? |
| 5 | Are there any other alternative options for grouping the cost categories that could be used? Please provide supporting information. |

Questions on Category 1 – Application Costs

6 Should Application Costs (Category 1) remain separate from Representation Costs (Category 2)? [Yes/ No/ Not sure]

Why/ why not?

7 Do you agree with the proposed increase in maximum costs awardable for Application Costs?

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

Questions on Category 2 – Representation Costs

8 Based on the options provided in this document, what is your preferred option? (please provide the reasons for your view)

2.1 One maximum limit for all representatives

OR

2.2 Sliding scale based on complexity and/or time and, qualification of the representative.

9 Do you have any other suggested options or groupings to categorise Representation Costs (Category 2)?

10 Is there any information to support or reject the distinction that is made between lawyers and advocates (Option 2.2)?

11 Do the proposed new rates reflected in Option 2.2 reflect appropriate market rates for lawyers and advocates? [Yes/ No/ Not sure]

If not, is there any information that can be shared to inform this discussion.

12 Do you agree with the proposed new maximum costs awardable for Representation costs (both options)?

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

13 Do you think the proposed changes will increase access to justice (and therefore improve outcomes) for claimants? [Yes/ No/ Not sure]

If not, why not?

14 Is there any evidence/data or precedence that could be used to determine the complexity of a review (i.e. which cases should sit in which categories (ie A or B)?

Questions on Category 3 – Medical and Other Report Costs

15 Currently, the medical reports categories can be used for multiple reports. Is there any information to suggest the capped approach is inappropriate? Please provide supporting information.

16 Do you think the proposed new rates will increase access to medical reports (and therefore access to justice) for claimants? [Yes/ No/ Not sure]

Please explain your view.

17 Do you agree with the proposed new maximum costs awardable for Medical and Other Report Costs?

Strongly Disagree
Disagree
Neither
Agree
Strongly Agree

18 Do you think removing the distinction between registered specialist reports and other reports will improve claimant's access to reports? [Yes/ No/ Not sure]

Please explain your view.

Questions on Category 4 – Other Expenses

19 Do you think the new rates will increase access to in-person reviews for rural communities? [Yes/ No/ Not sure]

Why/ why not?

20 How can 'Other Expenses' (Category 4) be improved to enhance support for rural communities?

Please provide supporting information.

21 Do you agree with the proposed new maximum costs awardable for Other Expenses?

Strongly Disagree

Disagree

Neither

Agree

Strongly Agree

Questions on the overall proposed changes to the Regulations

22 Are there any other costs, benefits, or unintended consequences of the proposed changes that have not been considered in this document?

23 Do you think MBIE should conduct regular reviews of the maximum cost caps in the regulations? [Yes/ No/ Not sure]

24 Do you have any comments on the alternative approaches considered?

Questions on Alternative Dispute Resolution (ADR)

25 If the regulated timeframes are extended while clients are engaged in ADR, what effect do you think it will have on claimant's decisions to use ADR and the external review process? Please provide supporting information.

26 Have you incurred costs as a result of undertaking ADR? What are these and did it impact on decisions to proceed with an external review?

27 If a level of reimbursement for costs was to be included for ADR in the Regulations, what should be taken into consideration?

28 Would the inclusion of a level of reimbursement for ADR costs change your position on undertaking ADR in comparison to an external review?

Resources

Independent Review of Acclaim Otago's Report into Accident Compensation Dispute Resolution Processes, May 2016.

<https://www.mbie.govt.nz/assets/bb3b087c54/independent-review-acclaim-otago-july-2015-report-acc-dispute-resolution.pdf>

ACC and MBIE Briefing Paper: update on the response to the Miriam Dean Review and next phase of work to improve disputes performance, 12 December 2018.

<https://www.mbie.govt.nz/assets/1db3f2134b/Update-on-the-response-to-the-Miriam-Dean-Review.pdf>