



BELL GULLY SUBMISSION

PROPOSED INCOME INSURANCE SCHEME

26 April 2022

BELL GULLY

TO
Social Unemployment Insurance Tripartite Working Group

ORGANISATION
**Ministry of Business, Innovation and
Employment**


ADDRESS
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To whom it may concern

We set out below our submissions on the proposed Income Insurance Scheme (**Proposed Scheme**), as set out in the Discussion Document dated 2 February 2022 (**Discussion Document**). Our submissions focus on our assessment of the core issues regarding the Proposed Scheme, the unintended consequences that are likely to be of most concern to employers, and potential solutions to some of the core issues we have identified.

Bell Gully acts for a number of large employers in a wide variety of sectors and industries across New Zealand. Bell Gully has prepared these submissions based on our experience as employment law advisors. However, these submissions also reflect feedback from some of our clients on the Proposed Scheme.

Privacy of natural persons



Submissions in response to Discussion Document

Working Group recommendations	Discussion Document questions	Bell Gully submissions
<p>The aim of the Proposed Scheme is to support employees with payment of 80% of their income (capped at a maximum amount) for up to seven months if they lose their job through no fault of their own.</p> <p>Like ACC, the Proposed Scheme would be funded by levies on wages and salaries, with both employees and employers contributing.</p>	<ul style="list-style-type: none"> • <i>Question 1:</i> Do you agree New Zealand should introduce an income insurance scheme for displacement and loss of work due to health conditions or disabilities? • <i>Question 48:</i> Do you consider that stronger integrity measures are necessary to manage the risk of spurious claims to the income insurance scheme? • <i>Question 83:</i> Do you agree with the proposal to establish an effective offences and penalties framework to protect the scheme's integrity? 	<ul style="list-style-type: none"> • We do not agree that New Zealand requires a compulsory income insurance scheme for displacement and loss of work due to health conditions or disabilities. • In our experience, these matters are adequately provided for through existing employment law protections under statute and individual / collective employment agreements. A compulsory scheme of this nature will impose significant additional cost on employers and employees. • Some employers have very low rates of redundancy, because their workforce is static or there is high turnover for other reasons such that the need for restructuring does not arise. A levy that applies to <i>all</i> employers, including some who make very few employees redundant or terminate very few for medical reasons, is inequitable. • If the Proposed Scheme is introduced on a compulsory basis, some form of "experience rating" concept may be appropriate in relation to the employer levy (similar to ACC). • An alternative to a compulsory approach could be for employers and employees to decide whether or not to "opt in" to the Proposed Scheme, similar to KiwiSaver, with levies being deducted if an employee chooses to remain a member of the Proposed Scheme. In addition, we note that some employers/employees already have their own private insurance cover arrangements in place. • If the Proposed Scheme is implemented in its current form, it will require an effective penalties framework and strong integrity measures. • The concepts of "redundancy" and "loss of work for health conditions or disability" are notoriously difficult to define and are often heavily fact dependent. The risks for abuse of the Proposed Scheme primarily arise from the difficulty in precisely defining the qualifying circumstances for cover, and the potential for employers and employees to exploit that difficulty. • The Proposed Scheme creates incentives for employers and employees to terminate employment in circumstances that fall within the two qualifying circumstances. This is

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		<p>obviously advantageous to employees (compared to other termination circumstances where no “safety net” would apply), and also for employers (as the cover provided under the Proposed Scheme is likely to reduce the number of unjustified dismissal claims in these circumstances).</p> <ul style="list-style-type: none"> • There is potential for employers and employees to agree that a “redundancy” or “loss of work for health conditions or disability” situation exists in order to enable employees to access cover. This may include circumstances where there is not a redundancy or medical incapacity situation as a matter of law. • Further, there is scope for an employer to choose to treat a termination process as being based on one of these two circumstances, even if that is not genuinely the underlying reason for an employee’s termination. For example, if an employer is considering terminating an employee for poor performance, it may be in the interests of both the employer and employee to treat this as a “redundancy” so that the employee can then access cover under the Proposed Scheme, which they otherwise would not have had access to. • Conversely, an employer may be disincentivised to exit employees via a redundancy or medical incapacity process if this means they end up having to pay the employee more under the Proposed Scheme (i.e., at least four weeks’ notice and a four week bridging payment) than the employee’s contractual notice period.
<p>The proposal is for employees and employers to both contribute 1.39% of all earnings from employment to the income insurance scheme.</p> <p>In return, employees will receive (1) a requirement to have 4-weeks’ notice of redundancy, (2) an additional 4-weeks’ pay, at 80% from the employer (the ‘bridging payment’); (3) up to 6 months’ pay, on up to 80% of normal earnings. Possibility for 6 months to be extended.</p> <p>However, an expectation that the individual will be actively seeking work and must take</p>	<ul style="list-style-type: none"> • <i>Question 41:</i> Do you agree with a base insurance entitlement length of six months, plus a four-week bridging payment paid by the employer? • <i>Question 42:</i> Would you support a longer or shorter length of base insurance entitlement? • <i>Question 61:</i> Do you agree that claimants would not be expected or required to 	<ul style="list-style-type: none"> • If the Proposed Scheme is introduced in its current form, we consider that the insurance entitlement length is longer than is reasonably necessary. Seven months is a considerable period of cover and longer than is reasonably necessary for most employees to find new employment (particularly in a low unemployment context). This issue becomes less significant if the Proposed Scheme applies on an optional “opt in” basis only. • We disagree with the bridging payment concept, given that employers will have already contributed to the cost of the Proposed Scheme through levies and will have needed to pay for a notice period applicable under their employment agreement with the employee. Requiring employers to also make a four-week “bridging payment” to employees effectively extends the cost of all contractual notice periods by four weeks as a matter of law. • If the Proposed Scheme is introduced, we consider that claimants should be required to accept offers of employment that provide similar wages or conditions, even if these are “lower” or less favourable than their most recent employment. The current proposal allows

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<p>any suitable job offered on equal or better terms from the position they were made redundant from.</p>	<p>accept offers of employment that provide lower wages or conditions?</p>	<p>claimants to continue to receive cover, even where they receive offers of employment that provide only fractionally lower wages or conditions than their previous employment (which may incentivise individuals to reject such offers). An alternative could be to provide that employees can only remain in the Proposed Scheme if the offer of employment that they have declined would result in wages that are less than the rate they are receiving as cover (i.e., the terms of employment on offer would need to be 80% or less of the remuneration applicable under their previous role).</p> <ul style="list-style-type: none"> The logistics of actively monitoring claimants' job searches need to be carefully considered. In the absence of active "check ins" and monitoring, it could be easy for a claimant not to properly search for a new role and/or argue that the wages and conditions for a new role are not "like for like", and continue to receive cover on that basis. One option may be to require individuals receiving cover to provide weekly reports, including records of jobs applied for, recruitment processes that they are involved in, and offers received (including details of the terms of those offers).
<p>It may be that insurance recipients need to travel overseas during their entitlement period, for example, to visit ill family, attend a wedding or funeral. To allow for this, insurance payments could continue for a short time, for example, up to 28 days. This could be extended in certain circumstances, for example, if a claimant was required to be overseas to support ill family for a period longer than 28 days. This aligns with the period in which beneficiaries can travel overseas (for approved reasons) while continuing to receive a main benefit, including that circumstances are limited where a benefit could be paid for longer than 28 days.</p>	<ul style="list-style-type: none"> <i>Question 63:</i> Do you agree claimants should be obligated to remain in New Zealand to remain eligible for income insurance? <i>Question 64:</i> Do you think a period of time, such as 28 days, should be allowed for travel overseas, for example, to support ill family? 	<ul style="list-style-type: none"> We consider that claimants should be required to remain in New Zealand and actively looking for new employment to remain eligible for income insurance. This aspect of the Proposed Scheme also poses a potential moral hazard element to the Proposed Scheme, in that a claimant can potentially enjoy a 28 day paid holiday while on the Proposed Scheme. To better ensure the integrity of the system, payments should cease on travel overseas (and potentially re-start on return to New Zealand) to adequately ensure claimants are committed to finding work on their return and limit potential abuse of the Proposed Scheme.
<p>Funding income insurance – most funding would come from compulsory levy</p>	<ul style="list-style-type: none"> <i>Question 85:</i> Do you agree the income insurance 	<ul style="list-style-type: none"> We do not agree with funding any scheme of this nature through compulsory levies on employee income. As noted in our response to Question 1 above, the proposal forces

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<p>payments on income.</p> <p>Levy payments would be shared by employers and workers, and both the employee and employer would be charged at a flat rate.</p> <p>The levy percentage is estimated at 1.39% on wages and salaries for both the worker and employer, with the amount to be reviewed after two years and adjusted over time as appropriate with independent fund management.</p>	<p>scheme should be funded from compulsory levies on the income that is insured, rather than from general taxation?</p>	<p>individuals to purchase insurance cover, when they may prefer to carry the risk of redundancy and/or medical incapacity and keep that money, or purchase other cover instead. It removes a level of autonomy that currently exists. It is reasonable to expect that cover under the Proposed Scheme will be more attractive to certain workforces and/or demographics, which are more vulnerable to redundancy and/or medical incapacity situations, and then less attractive to others.</p> <ul style="list-style-type: none"> • This aspect of the proposal is particularly of concern for lower income earners, where a compulsory income insurance scheme contribution would further lower their take-home pay (in circumstances where it may be quite unlikely that their employment would end for either of the qualifying circumstances).
<p>As above.</p>	<ul style="list-style-type: none"> • <i>Question 33:</i> Do you agree that someone should be able to earn some income from paid employment before it affects their entitlements to income insurance? • <i>Question 34:</i> Do you agree that insurance should abate 'dollar for dollar' when earned income and insurance combined reach 100 percent of previous income? 	<ul style="list-style-type: none"> • If the Proposed Scheme is introduced and an employee receives cover, section 128 of the Employment Relations Act 2000 (which provides for awards of lost remuneration in relation to unjustified dismissals) should be amended to provide for an automatic "offset" of the amount of cover against any lost remuneration award. This would avoid the risk of "double dipping" where any claimant receives cover <i>and</i> pursues a successful unjustified dismissal claim against their employer in respect of the applicable termination. • In a redundancy situation, there is a risk of "double dipping" if an employee is entitled to redundancy compensation in an employment agreement. The Proposed Scheme would provide that individual with both a contractual compensation payment <i>and</i> cover in a redundancy situation. • For existing employment relationships at the time any scheme is introduced, it will not be straight-forward to remove contractual redundancy compensation entitlements already in practice. Amending an individual employment agreement requires an employee's consent and consideration; and removing a long-held redundancy compensation entitlement included in a collective agreement will likely be resisted by unions in collective bargaining. Accordingly, we recommend that any redundancy compensation payments paid to an employee by their employer operate to reduce the amount of any cover provided under the Proposed Scheme.
<p>A limit would apply so that employees could only claim up to six months of cover</p>	<ul style="list-style-type: none"> • <i>Question 24:</i> Do you agree limits should be placed on 	<ul style="list-style-type: none"> • We agree that limits should be placed on the number of claims that individuals can make

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within every 18 month period.	<p>the number of claims people can make?</p> <ul style="list-style-type: none"> • <i>Question 25:</i> Do you agree with limiting claims to a total of six months within an 18-month period? 	<p>under the Proposed Scheme.</p> <ul style="list-style-type: none"> • We consider that it would be appropriate to restrict this to six months within a longer period, however (e.g., over three years), to reduce any incentive to “game” the system on a repeated basis.

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