

ADMINISTERING ACCIDENT COMPENSATION IN THE 1980s

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Having met its initial administrative challenges, ACC encountered serious political pressures in the turbulent economy of the 1980s. Pressure from employers to reduce costs, as well as controversies over lump-sum payments and other benefit levels, led to changes in entitlements, in conjunction with corporate reorganisation. This paper describes the shifts in organisational culture within ACC in the early 1980s and explains the fiscal consequences of the new "pay-as-you-go" funding formula. Even though formal reviews of the scheme paid homage to the original Woodhouse principles, the assumptions underlying these principles were losing ground in the face of economic tensions and eroding confidence in state-run programmes.

I BACKGROUND

This paper deals with the administration of the accident compensation scheme during the 1980s, but to understand what happened during that period it is necessary to recap some of the developments during the first six years of implementation of the Accident Compensation Act 1972.

Having been an early leader by the adoption in 1900 of "no-fault" workers' compensation legislation based on the Bismarck model, and having passed in 1928 the Motor Vehicles Insurance (Third Parties Risk Act 1928), it was not surprising that in 1963 a Committee on Absolute Liability found that:

There is a case for an accident insurance scheme which would cover all persons who are injured in any way without negligence on their part, provided the community can bear the cost on an equitable basis.

At about this time the Workers Compensation Act 1956 was delivering inadequate benefits and the common law was recognised as a "forensic lottery" and a hindrance to rehabilitation. In 1966 the Government established a Royal Commission of Inquiry chaired by (now) Sir Owen Woodhouse to:

[I]nquire into, investigate and report on the law relating to compensation and claims for damages for incapacity or death arising out of accidents (including diseases) suffered by persons in employment and

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the medical care, retraining and rehabilitation of persons so incapacitated, and the administration of the said law, and to recommend such changes therein as the Commission considers desirable.

The resulting Report of the Royal Commission recommended the adoption of a comprehensive "no-fault" scheme covering all personal injury suffered by accident, based on five fundamental principles of community responsibility; comprehensive entitlement; complete rehabilitation; real compensation; and administrative efficiency.¹

The Woodhouse Report proposed such fundamental changes to the law as it then was, that the recommendations were submitted to a bi-partisan Select Committee of Parliament, chaired by the Hon G F Gair MP, for in depth consideration. That Committee recommended a scheme from which injured non-earners were to be excluded, apart from injuries caused by motor-vehicle accidents. There was further debate before another Select Committee, chaired by C C A McLachlan MP, and after considerable discussion and argument the Accident Compensation Act was passed into law in 1972.

II LEGISLATION

The original 1972 accident compensation legislation was a product of the bi-partisan Gair and McLachlan Select Committees' recommendations. While accepting that changes needed to be made to workers compensation law and the law relating to personal injury arising out of the use of motor vehicles, the then National Government was nervous about adopting a radical change to the traditional common law right to sue to recover damages for personal injury caused by negligence.

By way of implementing the main Select Committee recommendations, the original 1972 Act introduced a "no-fault" scheme covering earners (that is employees and self-employed persons) and the victims of motor vehicle accidents. The legislation made provision for two schemes, the Earners' Scheme and the Motor Vehicle Accidents Scheme, while the rest of the community retained the common law right to sue to recover damages for personal injury where negligence could be proved.

It was felt that the dichotomy between those who were covered by the scheme and could not sue for damages and those who were not covered and could sue, required the prescriptive and prolix drafting of the legislation so that it was clear who was covered and could therefore claim the statutory entitlements, and who was excluded. It was obvious that some accident victims who were covered by the scheme might have thought that they would have done better suing at common law and would argue to avoid cover, while some who were not covered and could not prove negligence, would do their utmost to find a way to obtain cover.

¹ New Zealand Royal Commission of Inquiry into Compensation for Personal Injury *Compensation for Personal Injury in New Zealand: Report of the Royal Commission of Inquiry* (Government Printer, Wellington 1967) [*Woodhouse Report*].

When the Labour Government came to power in October 1972 it was recognised that it would be difficult, if not impossible, to have two parallel systems for compensating personal injury. A decision was made to extend the scheme to cover "non-earners" (such as children, retired people, visitors or those who for whatever reason were not working) and to remove the common law right to sue to recover damages. In other words, the scheme was to be comprehensive and to apply to all personal injury or death suffered by accident in New Zealand to the exclusion of common law rights.

The Government was anxious to implement the scheme by 1 October 1973 and accordingly gave instructions to draft a new Act. With all the implications attached to implementing a comprehensive national scheme and the necessary bureaucracy to administer the scheme, it was impossible to completely re-draft and have a new Act passed by Parliament in the time available. A decision was therefore taken to merely amend the 1972 Act by grafting on the Supplementary Scheme and making the necessary amendments to remove the common law right to sue to recover damages for personal injury. This resulted in the passing on 23 November 1973 of the Accident Compensation Amendment Act (No 2) 1973 which introduced the Supplementary Scheme to cover everyone in New Zealand suffering personal injury by accident not covered under either the Earners' Scheme or the Motor Vehicle Accidents Scheme, and other necessary changes to enable the schemes to operate from 1 April 1974 instead of 1 October 1973.

III 1974 – 1979 – THE HONEYMOON PERIOD

The period 1974 to about 1977 could be called the "honeymoon" period during which time the old common law and workers' compensation claims were working their way out of the system and the public was beginning to experience the new "no-fault" comprehensive accident compensation environment. Claims processes were being established and developed and costs and expenses were being monitored if not controlled. In the first year of its operations 105,018 claims were received and registered, gross income from levies and investments totalled \$81.316 million and expenditure on entitlements was \$48.625 million.² Accident victims who had no expectation of recovering damages under the common law system, by merely making a claim that they had suffered "personal injury by accident", had their medical and hospital expenses paid and they began receiving compensation for loss of earnings and other entitlements. People injured at work began receiving realistic compensation based on their actual loss of earnings. Unfortunately, the cost saving from implementing effective safety, accident prevention and rehabilitation programmes was not fully grasped by the administration and resources were concentrated on managing levy income and compensation payments and on the administration of the scheme.

² Accident Compensation Commission "Report of the Accident Compensation Commission for the year ended 31 March 1975" [1975] II AJHR E 19.

In the early years, the State Insurance Office (SIO) was the principal claims handler for ACC claims. The SIO was able to receive and accept claims in accordance with prescribed criteria and make payments on behalf of the ACC but had no authority to reject claims. Those claims which did not fall within the acceptance criteria were referred to the ACC Head Office Compensation Division for consideration and decision making.

IV THE REVIEW AND APPEAL PROCESS

The original 1972 Act provided in section 154 that applications for review could be heard by the Commission itself or by a Hearing Officer appointed either generally or in relation to a particular application. The applicant could appear personally or be represented at the review hearing and the Hearing Officer could accept any relevant evidence whether or not the evidence would be admissible in a court of law. The Hearing Officer could give a decision on the application if authorised to do so, or if not so authorised, or for any reason declined to give a decision, was required to forward a written report of the findings to the Commission with a recommendation. The Commission and a Hearing Officer were given the same power to summon witnesses, administer oaths and hear evidence as are conferred upon Commissions of Inquiry by the Commissions of Inquiry Act 1908. Hearing Officers were appointed by the Commission and were not required to act independently of the Commission.

Under section 102 of the Accident Compensation Act 1982, the Corporation was authorised to appoint suitable persons to be Review Officers who were required to act independently to hear applications for review of Corporation decisions. Review Officers could accept any relevant evidence whether or not the evidence would be admissible in a court of law but did not have the powers of a Commission of Inquiry to summon witnesses or administer oaths and hear evidence given under the Commissions of Inquiry Act 1908. Although required to act independently, there were questions about the independence of Review Officers with regard to decisions based on Corporation policy, which, as officers of the Corporation, Review Officers would in the normal course be required to follow.

V ANNUAL REPORTS TO PARLIAMENT

The Workers' Compensation Board Annual Reports indicated something of the costs and expenses related to compensation paid for injuries to employees at work. However, it was not until the annual report of the ACC in 1975 that the public became aware for the first time of the true cost of accidents in the community (with the exception of the cost of treatment of accident victims in public hospitals for which the ACC did not pay).

The original Accident Compensation Act 1972 required the Corporation, when making recommendations to the Minister on rates of levies for the Earners' Compensation Fund and the Motor Vehicle Accidents Fund, to ensure that the levies and any income from each fund were

sufficient to meet the current and future liabilities of the Fund.³ In other words each fund was to be "fully funded". It was anticipated that reserves would be built up to a level where in about 25–27 years from commencement of the scheme, the cost of new claims coming into the system would be offset by the claims leaving the system either by effective rehabilitation or attrition through ageing or death. This requirement for full funding meant that by 1979 reserves had built up to \$137.388 million in the Earners' Fund and \$85.802 million in the Motor Vehicle Accidents Fund or in total \$223.19 million.⁴

VI EMPLOYER COMPLAINTS ABOUT "COST" OF SCHEME

With the level of reserves appearing in the Annual Accounts, it was not long before employers began to question the "cost" of the ACC scheme. Employers believed that the premiums they were paying were too high and any "reserves" resulting, were "their" money which they were in a better position to invest than the ACC. Strong political pressure began to build through employer organisations for reduced premiums and for controls to be placed on ACC expenditure. There was considerable debate about the appropriateness of lump sum compensation for loss of faculty and for pain and suffering. Originally it had not been intended to provide lump sums, but strong representations from a Medico-Legal Committee, among others, resulted in it being included in sections 119 and 120 of the 1972 Act. Furthermore, the 1972 Act required the ACC when making recommendations on levy rates, to have regard to the movement in earnings of earners who had cover under the Earners' Scheme since the passing of the Act.⁵ As will be seen later, this requirement was not observed by the Commission in relation to lump-sum compensation.

VII VARIABLE LEVY RATES

On the basis that all industry is interdependent, the *Woodhouse Report* recommended that funds for the scheme should come from a flat rate of levy payable by all employers equivalent to about one per cent of the national payroll. This proposal was not favoured by employers who saw high risk industries being subsidised by low risk industries. The 1972 Act therefore provided that employers were required to pay a levy on the earnings paid to employees at a rate which depended on the "industrial activity" of the business. Those industries which were perceived as having the highest "risk" such as mining, forestry or aerial topdressing, had the highest levy rate while "clerical management" had the lowest. The ACC levy rates were based on the New Zealand Standard Industrial Classification (NZSIC) used by the Government Statistician to classify industries for economic purposes and were not related to the actual incidence or cost of injuries caused by accidents (including industrial diseases). Employers naturally sought to classify their employees in

3 Accident Compensation Act 1972, s 15(7).

4 Accident Compensation Commission "Report of the Accident Compensation Commission for the year ended 31 March 1980" [1980] II AJHR E 19.

5 Accident Compensation Act 1972, s 15(5).

the classification which attracted the lowest levy rate so perhaps it was not so surprising to see the number of staff whom employers classified as "clerical management" and who were apparently necessary to operate high risk businesses.

VIII ANNUAL LEVY RECOMMENDATIONS

Since the new accident compensation scheme was required to be financially independent of funding by Treasury (except for the cost of the Supplementary Scheme for non-earners) and since there was no parallel in public sector financing, a number of estimates had to be made to ensure that the scheme was financially viable.

The 1972 Act required the Commission in each financial year to review and make recommendations on adjustments to levies payable by employers, self-employed persons and motor vehicle owners and adjustments to various compensation entitlements.⁶ In relation to compensation entitlements the Commission was required, after taking into account past relevant adjustments, to provide that any adjustment would reflect movements in earnings of earners who had cover.⁷ In making its recommendations the Commission was required to base its assessments on its own financial and statistical records, and any other relevant data and indices, provided it adopted a basis which would reflect the movement in earnings of earners who had cover under the scheme.⁸

In the early days of its operations a system was established whereby the Commission made regular recommendations strictly in accordance with the requirements of section 15. However, there was considerable discussion amongst the Commissioners on the effect of recommending adjustments, based on movements in earnings, to the maximum lump sums payable under section 119 for loss or permanent impairment of bodily function, and section 120 for pain and mental suffering and loss of enjoyment of life. For several years prior to 1979, no recommendations were made to adjust these lump sums.

IX SCALING OF LUMP SUM COMPENSATION

In relation to the assessment of compensation payable under section 120, under which the maximum payable was \$10,000, the Corporation adopted a policy of scaling payments so that the maximum was reserved for the most serious cases. This policy was challenged in the High Court,⁹ which said that the policy was not justified by the legislation and that the correct approach was to establish an appropriate figure for compensating the particular injury and then apply the statutory maximum in relation to the payment which could be made. This resulted in accident victims who

⁶ Accident Compensation Act 1972, s 15(2).

⁷ Accident Compensation Act 1972, s 15(4).

⁸ Accident Compensation Act 1972, s 15(6).

⁹ See *Jones v ACC* [1980] 2 NZLR 379 (HC).

had suffered relatively minor injuries receiving the same level of compensation as those with serious injuries such as severe brain damage, total blindness, tetraplegia and so on. Although it was strongly recommended on several occasions, the Commission failed to move to have the legislation amended to permit scaling, with the result that the maximum \$10,000 was being paid for relatively minor injuries. This resulted in the so-called "blow out" in lump sum payments. For the financial year ended 31 March 1979, the compensation paid by the Commission for non-economic loss from the earners, motor vehicle and supplementary fund was \$18.109 million and for the year ended 31 March 1980 figure was \$16.832 million.¹⁰

X THE CABINET/CAUCUS (QUIGLEY) COMMITTEE

Employer and political pressure grew during the late 1970s and in 1979 the Government appointed a Cabinet/Caucus committee chaired by the Hon Derek Quigley MP, to review the scheme. The terms of reference required the Committee to review the administration and funding of the scheme as well as the entitlements for accident victims.

The Cabinet/Caucus Committee was the first departure from what had been until then a bi-partisan approach to accident compensation. The make up of the Committee comprising five Cabinet Ministers and two Government Members of Parliament, together with the single Government approach with an emphasis on cost containment and suggestions of a reduction in entitlements, sparked considerable public comment and led to the Federation of Labour and many Unions boycotting the Committee hearings and refusing to make submissions.

The Cabinet/Caucus Committee reported in October 1980 with the following principal recommendations:¹¹

- That the three person Accident Compensation Commission be replaced by a part-time board of directors and that a full-time managing director be appointed to control day-to-day administration;
- That a change be made, over time, from a cash accumulation method of funding to a pay-as-you-go scheme;
- That the self-employed be offered the option of nominating a cover equal to 80 per cent of the average ordinary time wage, or of retaining the existing cover; the levy to be appropriate to the amount of the cover obtained; and in both cases the period before compensation payments commence to be set at two weeks;

10 Accident Compensation Commission "Report of the Accident Compensation Commission for the year ended 31 March 1979" [1979] VI AJHR E 19, 14.

11 Cabinet/Caucus Committee Accident Compensation Review *The New Zealand Accident Compensation Scheme: A Review* (Government Printer, Wellington, 1980).

- That compensation not be paid to those whose injuries are sustained during the commission of certain crimes, including murder, rape, aggravated robbery, resisting arrest, burglary and drunken driving where the injured person has been convicted of that offence and sentenced to a term of imprisonment;
- That no compensation be paid by the Commission for the first two weeks following non-work accidents;
- That greater emphasis be placed on safety in the work place by requiring employers to pay earnings-related compensation for up to the first two weeks after a work related accident;
- That the level of earnings-related compensation required to be paid by employers be 80 per cent of pre-accident earnings, and that this rate also apply to an employer's obligation for the second week of incapacity;
- That lump sum payments for minor injuries be abolished and that except for such injuries resulting in serious cosmetic disfigurement the compensation payable under the provisions of section 120 be abolished;
- That part of the cost of the first two visits to a general medical practitioner be met by the accident victim, with the provision for an injured employee to recover payment for work related accidents from their employer;
- That the Commission be given wider discretion, having regard to individual circumstances, where injured claimants or eligible dependents of a deceased person decide to travel or live overseas;
- That working parties be established to:
 - Review the present levy system and report on savings likely to flow from the Committee's recommendations;
 - Review forms and procedures including the levy collection methods used by the Inland Revenue Department and the Post Office;
 - Review management procedures;
- Consider the implications of the recommended changes in respect of sections 119 and 120 and the efficacy of the present percentage disabilities specified in the second schedule.

The recommendations caused considerable public disquiet. The unions saw the recommendations for change as a breach of the "social contract" and an attack on workers' entitlements. Many lawyers regarded the proposed abolition of lump sum compensation for pain and suffering and loss of enjoyment of life, and the whittling down of other entitlements, as a serious departure from the principle that the statutory scheme was intended to be a replacement for common law damages.

XI 1980 – THE CHANGE FROM A COMMISSION TO A CORPORATION

The original Accident Compensation Commissioners appointed in December 1972 were Mr K L Sandford LLB, Mr J L Fahy FCA, FCIS, ANZIM and Mr A R Perry LLM, whose appointment was temporary and who retired on the appointment of Mr L M Graham LLB on 5 February 1974. Mr Graham's appointment expired on 28 April 1976 and on 1 July 1976, a former Minister of Labour the Rt Hon H Watt PC, JP was appointed a Commissioner. The Rt Hon Hugh Watt was replaced by another former Cabinet Minister the Hon H J Walker FCA JP on 1 July 1979.

The Accident Compensation Act 1972 required that of the three Commissioners, one was to be appointed as Chairman and either the Chairman or one other member must have been a barrister and solicitor of the Supreme Court of not less than seven years practice.¹² This was a clear recognition that the statutory scheme was in substitution for common law and statutory rights and principles, and required the policy administrators to have an understanding of legal principles and practices. After the expiry of Mr Graham's term, the only Commissioner who met the requirement of legal qualification was the Chairman, Mr K L Sandford LLB.

Mr J L Fahy had been seconded from the State Services Commission in 1972 for the purpose of assisting in setting up the Commission organisationally and administratively. He had been Chief Deputy Commissioner of Inland Revenue. For a period he had been attached to the International Monetary Fund in Washington and for twelve months was Taxation Adviser to the Ministry of Finance in Ethiopia.¹³

XII ACCIDENT COMPENSATION AMENDMENT BILL (NO 2) 1980

The Accident Compensation Amendment Bill (No 2) was introduced on 6 November 1980 and proposed a wide variety of amendments as suggested by the Quigley Committee. The Bill was referred to the Select Committee on Labour and Education for detailed consideration over the parliamentary recess. As mentioned above, the unions had boycotted the Quigley Committee hearings but made submissions on the Bill. Great emphasis was placed on the alleged breach of the "social contract" and on the proposal to require accident victims to pay part of the costs of medical treatment and sustain a loss of compensation entitlements, particularly lump sums, when they had lost the right to sue.

In reporting back to Parliament, the Select Committee recommended that the Bill together with submissions, be referred to the Corporation for further study and further, that the Commission be

12 Accident Compensation Act 1972, s 6(4).

13 New Zealand Accident Compensation Corporation *ACC Report: May 1980 (Volume 5, Number 2)* (Accident Compensation Corporation, Wellington, 1980) 53.

invited to "rewrite the present Act to remove its present complexity and prolixity".¹⁴ In order to achieve the rewriting of the Act, a committee was established within the Corporation to consult with interested parties and draft a piece of legislation which would for the first time, propose an Act designed to implement a comprehensive "no-fault" accident compensation scheme as suggested by the Woodhouse Report. The Committee operated for about two months when it was wound up by direction of the Managing Director, who made a decision that the Chief Solicitor of the Corporation would head a team to rewrite the 1972 Act. As can be seen from the final legislation, this "rewrite" was achieved by merely amending some of the provisions while including many of the complex and prolix provisions of the original Act.

The fact that the original Act has been amended rather than re-written to bring into being a comprehensive "no-fault" accident compensation scheme has had significant implications on the development and implementation of a comprehensive scheme as envisaged by the Woodhouse Report. Each successive amending Act has incorporated many of the original prescriptive provisions and has prevented the administrative body (the ACC) from exercising any discretion to recognise differences between accident victims and their various needs.

A draft of the type of "no-fault" legislation which might have met the needs of New Zealand accident victims may be found in the Draft Bill appended to the Australian Woodhouse Report of 1974.¹⁵

XIII ACCIDENT COMPENSATION AMENDMENT ACT 1980

On 16 December 1980 the Accident Compensation Amendment Act 1980 was enacted and came into effect on 1 January 1981. The Amendment Act abolished the three person Commission and established the Accident Compensation Corporation. The first Chairman was Mr B D Inglis QC, BA, JD, LLD (later appointed a District Court Judge) and the first Board Members were Sir Robertson Stewart CBE, FPI, FI PROD E, CE (Deputy Chairman), Mrs V M Duncan, Dr J M Fahey MB, CHB, MRCGP, FRNZCGP and Mrs C M B Purdue MBE. The deputy Chairman of the previous Commission, Mr J L Fahy, was appointed by the Minister of Labour as the Corporation's first Managing Director and as such, was an *ex officio* member of the Board, as was the General Manager of the State Insurance Office, Mr J F Stirton.

14 Accident Compensation Corporation "Report of the Accident Compensation Corporation for the year ended 31 March 1982" [1982] IV AJHR E19, 3.

15 National Rehabilitation and Compensation Committee of Inquiry *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (Australian Government Publishing Service, Canberra, 1974) vol 1, 269.

XIV THE ACCIDENT COMPENSATION ACT 1982

The Accident Compensation Act 1982 entitled, "An Act to consolidate and amend the Accident Compensation Act 1972 and its amendments" received Royal Assent on 17 December 1982. It came into force on 1 April 1983.

Over 60 sections from the original Act were omitted and the principle changes made by the Act were that:

- All statutory references to Funds and Schemes were omitted but the Corporation would maintain separate accounts for administrative purposes;
- The requirement that levies should be set on a "fully funded" basis was removed and future levies could be set on a pay-as-you-go basis;
- The cost of all motor vehicle accidents would be met from levies payable by motor vehicle owners (under the 1972 Act work related motor-vehicle accidents were funded from the levies payable by employers and self-employed people through the Earners' Fund);
- The statutory requirement for separate divisions within ACC for safety and rehabilitation was removed;
- First week compensation for work related injuries was payable by the employer at 80 per cent of pre-injury earnings inclusive of overtime;
- The Corporation was given power to assess the real value of allowances under section 72 of the Income Tax Act for inclusion as part of relevant earnings;
- A definition of "spouse" was inserted in the Act and the compensation payable to a dependent spouse and dependent children was increased;
- Provisions relating to payment for the continuing care of natural teeth damaged by accident were changed;
- Separate lump sums for permanent loss or impairment of bodily function and for pain and mental suffering were retained. The maximum compensation for loss of function above 5 per cent was raised to \$17,000, but compensation for pain and suffering remained at a maximum of \$10,000. There was no provision for scaling this lump sum;
- Lump sum payments for dependant spouses and children were increased;
- The Corporation retained the power to continue, commute, reduce, postpone or cancel payments of earnings related compensation for persons absent from New Zealand for periods in excess of 12 months;

- Where a person was injured in the course of committing a criminal offence and sentenced to imprisonment, the Corporation was given power to decline compensation and rehabilitation where to grant it would be repugnant to justice;
- The Corporation was given greater powers of debt recovery.

Removal of the requirement in the 1972 Act that recommendations relating to premium rates must be made on the basis that each of the Funds would be "fully funded" was a major change which had a dramatic effect in later premium rates. The 1982 Act required that premium rates be designed to "ensure that the levies are sufficient to meet liabilities over such period or periods as [the Corporation] may determine".¹⁶

XV MOVE TO PAY-AS-YOU-GO FUNDING

The move to pay-as-you-go funding, which took effect from 1 April 1984, meant lower levy rates for employers and the self-employed. Future levy rates were set to provide sufficient reserves for the payment of approximately five years' worth of compensation entitlements in the Earners Account and four years' worth in the Motor Vehicle Account. The overall effect was to reduce the average levy rate from \$1.07 to \$0.74 per \$100 of leviable earnings for employers and from \$1.07 to \$0.80 per \$100 of leviable income for the self-employed.¹⁷ The Fund balance in the Earners' and Motor Vehicle accounts at 31 March 1984 totalled \$396.003 million; at 31 March 1985 they totalled \$356.154 million.

In 1985/86 the average levy rate was reduced from \$0.74 to \$0.71 per \$100 of earnings paid by employers but increased from \$0.80 to \$1.00 per \$100 of leviable earnings for the self-employed. It was anticipated that the levy income would produce sufficient money to pay approximately four years of compensation entitlements from the Earners Account. Motor vehicle levies were not altered and it was anticipated the levy income from this source would pay approximately two years compensation entitlements with a reduction in the reserves in the Motor Vehicle Account.

By the year ended 31 March 1986 the reserves in the Earners' and Motor Vehicle Accounts totalled only \$244.152 million. It was noted that the actual levy rates achieved had been significantly below those considered necessary by the Government Actuary to support a "pay-as-you-go" scheme from 1 April 1983 without any provision for any shortfall in reserves for the pre 1 April 1983 claims.¹⁸ The level of compensation expenditure rose faster than income leading to a

¹⁶ Accident Compensation Act 1982, s 7(2).

¹⁷ Accident Compensation Corporation "Report of the Accident Compensation Corporation for the year ended 31 March 1984" [1984] VI AJHR E 19, 9.

¹⁸ Accident Compensation Corporation "Report of the Accident Compensation Corporation for the year ended 31 March 1985" [1984-85] VI AJHR E 19, 14.

rapid reduction in reserves. It was inevitable that significant increases in levy rates would be required.

By Order in Council dated 19 December 1986 levy rates for employers were increased by 192 per cent and for self-employed by 265 per cent. In addition a further levy was imposed of \$0.008/\$100 of leviable earnings to fund the Industrial Health Safety and Welfare programme of the Labour Department. The average employer levy rate (excluding the \$0.08 levy for the Labour Department programme) was \$2.25 per \$100 of leviable earnings. In its annual report for the 1986/87 year the Corporation said:¹⁹

Now that the scheme, is on a strictly pay-as-you-go basis, levies will continue to increase each year by the margin between cost increases in the scheme and the leviable bases (ie national payroll and motor vehicle numbers). Since the scheme began, costs have increased faster than the leviable bases and there is no indication of any turnaround in this trend.

XVI THE OFFICIALS' COMMITTEE ON THE ACCIDENT COMPENSATION SCHEME

In 1986 the Government undertook another review of the Accident Compensation Scheme through an officials' committee made up of representatives from the Accident Compensation Corporation, the Department of Social Welfare, the Department of Labour, the Department of Health and the Treasury. The committee conducted its review in relation to the five fundamental principles enunciated in the Woodhouse Report. The officials' committee was asked "to review the substance of the scheme to ensure that the foundation principles are put into practice in a manner appropriate to the environment of today and the future".²⁰

The two volume report followed a comprehensive review of the operation of the scheme, which included a discussion of the issues affecting the equity and efficiency of the accident compensation system. Particular emphasis was placed on the question of equity, especially the disparity between the treatment of accident victims and the illness-disabled. Within this context it considered numerous options for containing the rapidly escalating real costs of the scheme and for achieving the greatest value for money.

19 Accident Compensation Corporation "Report of the Accident Compensation Corporation for the year ended 31 March 1987" [1986-87] VI AJHR E.19, 11.

20 New Zealand Officials' Committee of the Accident Compensation Scheme *Review by Officials' Committee of the Accident Compensation Scheme* (Government Printer, Wellington, 1986) vol 1, para 1.2.

XVII THE LAW COMMISSION REPORT

In 1987, following the publication of the officials' committee report, the Government asked the Law Commission (the chair of which was then Sir Owen Woodhouse) to review the accident compensation scheme. The terms of reference were:²¹

To examine and review that part of the Accident Compensation Act 1982 which recognises and is intended to promote the general principles of community responsibility, comprehensive entitlement, complete rehabilitation, and real compensation and, in particular, administrative efficiency, as propounded by the 1967 Royal Commission Report on Personal Injury in New Zealand. It may be accepted that those principles are broadly acceptable and deserve to be supported.

The Law Commission Report was published in 1988. It proposed changes to the scheme designed to remove some of the perceived anomalies between earnings related compensation available to accident victims and the means tested welfare benefits payable to those who were incapacitated through sickness or disease. It was aimed at simplifying the administration of the scheme and removing some of the inconsistencies that had been met in applying the concept of "personal injury by accident". It proposed the abolition of lump sums for permanent loss or impairment of bodily function, for pain and mental suffering and for loss of enjoyment of life and advocated that they be replaced with periodic payments.

The Commission made the following six recommendations:²²

1 Safety and rehabilitation

- 1.2 A Minister should be charged with a general policy responsibility for the promotion of safety and prevention of accidents of all kinds, and for the optimum rehabilitation of all persons who suffer physical or mental impairment, whatever the origin or cause.
- 1.2 The best statistical picture should be compiled by the Accident Compensation Corporation.

2 Entitlement

- 2.1 The rights to benefits dependent on injury, and sickness should be included as soon as possible.

3 Accident and incapacity

- 3.1 Physical or mental injury should be related to the comprehensive list of external causes of injury formulated by the World Health Organisation. Medical mishap should not be excluded from compensation simply because there was some recognised risk in advance of the therapy, in the

21 New Zealand Law Commission *Personal Injury: Prevention and Recovery (Report on the Accident Compensation Scheme)* (NZLC R4, Wellington, 1988).

22 New Zealand Law Commission, above.

same way that the risks of using the highway could not sensibly disqualify victims of road accidents.

- 3.2 Special provision should be made for victims of sexual assault or other criminal attack involving significant or lasting mental distress or other impairment.

4 Benefits

- 4.1 Periodic benefits should, in general, be earnings related, have no means test qualification, be payable during incapacity until age 65 (or dependency in the case of survivors) and be assessed at a level for total incapacity of 80 per cent of earnings.
- 4.2 Incapacities suffered after age 60 should carry a benefit for a maximum period of five years.
- 4.3 There should be a waiting period of two weeks, rather than one, before commencement of earnings related benefit; with a statutory obligation upon the employer to pay an employee in a work-related accident an amount equivalent to the benefit to cover the waiting period.
- 4.4 Housewives and other non-earners should have a periodic benefit assessed against notional earnings equal to average ordinary weekly earnings for "all sectors all persons".

5 Permanent disability

- 5.1 Lump sums for permanent impairment or for pain and suffering should be abolished. Instead to encompass lost physical faculty and any economic consequences, any significant partial disability should be evaluated as a percentage of total disability by reference to the American Medical Association, Guides to the Evaluation of Permanent Impairment.
- 5.2 However, to avoid over compensation for higher paid and sedentary earners, or under-compensation of manual and lower paid earners, the base for everybody, including non-earners, should be average ordinary weekly earnings.
- 5.3 There should be a discretion to increase that earnings base in order to avoid injustice in any particular case.
- 5.4 In exceptional cases there should be a discretion to commute part of a periodic payment to a present capital sum where it would clearly be in the beneficiary's real interest to do so.
- 5.5 To qualify for a permanent partial benefit the impairment should be five per cent or more of total; and impairment of 85 per cent or higher should be assessed as 100 per cent.

6 Income

- 6.1 The motor vehicle levy should be geared to changes in the consumer price index.
- 6.2 An appropriate part of the excise duty paid on petrol should be paid in support of the accident fund.

- 6.2 Employers and the self-employed should no longer be levied by reference to classified business activities, but at the same uniform rate for all.

The recommendations of the Law Commission were given careful consideration by the Government. A Cabinet Committee on Social Equity was formed comprising the then Deputy Prime Minister Geoffrey Palmer, MP the Minister of Social Welfare and the Minister of Health. Further work was done by officials' committees and, in the budget presented on 27 July 1989, major changes were proposed. The scheme was to be extended to cover incapacity from sickness and disease and was clearly directed towards compensating the more seriously incapacitated.

XVIII THE 1992 ACCIDENT REHABILITATION AND COMPENSATION INSURANCE ACT 1992

The reforms to the scheme proposed in the 1989 budget did not proceed. Driven by pressure and demands from the Employers' Federation and the Business Round Table to relieve employers of the financial burden of paying for employees' non-work accident claims, and to counter a perceived "blow out" in the cost of the scheme, the National Government which came to power in October 1990 established yet another committee to look into the accident compensation scheme. The Ministerial Working Party on the Accident Compensation Corporation and Incapacity was given terms of reference with the following objectives:

- (a) To ensure that in the event of incapacity, everyone had access to an acceptable level of income support and health care services;
- (b) To ensure that the cost of providing income support and health care services in the event of incapacity falls fairly among Government, employers, motorists, and individuals;
- (c) To recognise the obligations on the Government that flow from removal of the right to sue for personal injury by accident;
- (d) To recognise and foster the responsibility to take care of all those (employers, motorists, and individuals) who are in a position to prevent accidents and other causes of incapacity;
- (f) To minimise the cost to society of the system of compensation for incapacity. This may require
 - (i) A greater freedom of choice between employers;
 - (ii) Competition between private and public insurers; and
 - (iii) Minimising barriers to competition among insurers and ensuring that they compete on a neutral basis.

The Accident Rehabilitation and Compensation Insurance Bill was introduced into parliament in November 1991 and referred to the Labour Select Committee for consideration. Forty one petitions and 562 written submissions were received and 306 people or organisations appeared before the

Select Committee. The Bill was reported back to the House on 19 March 1992 with suggested amendments and was passed into law on 1 April 1992.

XIX ADMINISTRATION DURING THE 1980S

During the turbulent days of the 1980s after the adoption of the pay-as-you-go funding system when there were dramatic changes in levy rates, the administrators of the scheme introduced various ways and means of balancing expenditure to the levy income. As noted above, it had been recognised by the Corporation that expenditure on entitlements was running ahead of levy income. Under the administration of first Mr J L Fahy, a former tax administrator and later, Mr J T Chapman, a former deputy Auditor-General, the Corporation began to "toughen up" the administration of the scheme.

As an example, in a case where an earner did not recover completely from incapacity and the medical condition had stabilised, and all practicable steps had been taken towards the person's retraining and rehabilitation, section 60 of the 1982 Act provided for an assessment to be made of permanent incapacity. The assessment was intended to determine the diminution of the person's capacity to earn by comparing pre-accident earnings with post-accident earnings. Compensation awarded under section 60 could not be reduced by reason of the person's increase in earning capacity in the future. In other words in cases of permanent incapacity which affected ability to earn at the pre-accident earnings level, section 60 provided a permanent pension. During the 1980s the Corporation, realising the cost attached to awarding permanent inflation adjusted pensions for life, adopted a policy that it would make no assessments under section 60 and consequently no recommendations for increasing levy income. This policy resulted in many permanently incapacitated claimants not receiving their proper statutory entitlement, although it had the desired effect of reducing expenditure from the compensation Accounts.

After the State Insurance Office had relinquished its position as claims handler and the Corporation had taken over the administration of all claims, it was not easy to recruit and train competent claims staff. Some staff came from the insurance industry and brought their "fault" prejudices with them, while others came from all walks of life and required basic training in how the legislation should be applied, and how claimants should be dealt with. The result of this recruitment and training was that many Corporation staff were not capable of delivering an adequate service to claimants. There were mounting complaints from the public about the way claimants were treated by Corporation staff and the way their claims were being handled. There were reports of claimants being threatened with termination of their weekly compensation entitlement if they did not comply with Corporation requests for repeated medical examinations and assessments. Various demands were made on claimants which were to be met at short notice and claimants complained that their files were being handled by numerous staff so that it was necessary to go over the same ground time after time. Staff adopted an adversarial attitude towards claimants and claimants were forced to fight to obtain their statutory entitlements.

One of the major complaints concerned the fact that the Corporation insisted on claimants being examined by specified medical specialists. There was also a question about the Corporation's procedures which allowed confidential medical reports containing private information to be available to, and seen by, persons other than qualified medical personnel who were concerned with treating or reporting on the claimant's medical condition.

XX THE TRAPSKI REPORT

The outcome of the public disquiet was the appointment of former Chief District Court Judge Mr Peter Trapski CBE to look into the operations of the Corporation with particular reference to its procedure for obtaining reports, opinions and advice from specialist medical practitioners, particularly one practitioner Dr Gluckman.

Although Mr Trapski issued his report on 11 November 1994,²³ the report related to the claims administration by the Corporation during the previous 10 years. The report made the following recommendations:

- (1) The Corporation must positively address any inclination towards adversarial attitudes by members of its staff towards claimants. Claimants must be given a measure of security and assurance particularly at the early stage of the claims process. They must be kept fully informed of the progress of their claim. Any mistakes must be acknowledged and put right immediately.
- (2) The Corporation must seek and take note of appropriate legal and medical advice before making decisions. It must make every effort to ensure that the right decision is made the first time, and should not rely on the review process to put things right.
- (3) There should be medical input in most claims. The Corporation's functioning requires a major input from medically trained and experienced people at branch level as well as district level. Direct medical input is also required in monitoring the quality and quantity of services provided by the Corporation, and to review their effectiveness and appropriateness.
- (4) Medical practitioners reporting to the Corporation must have a clear working knowledge of the legal requirements of the Corporation's statute.
- (5) Referrals for medical examination should only be made by people with appropriate medical knowledge and experience. Reports should be addressed to and only opened by the Corporation's Medical Officer or by suitably trained staff directly under his or her control. Such material as is needed by claims officers should be taken from the report by medical staff. The report should then be placed on a medical file retained under the direct custody and control of the Medical Officer.

²³ Peter J Trapski *Report of the Inquiry into the Procedures of the Accident Compensation Corporation* (Peter Trapski, New Zealand, 1994).

- (6) Claimants should be informed, preferably in person and then a confirming letter, when specialist medical examination is required, and why. They should be informed of the specialist suggested by the Corporation and given the opportunity to nominate an alternative specialist if the suggested practitioner is unacceptable to them. They must be informed that their consent is required to the specialist reporting to the Corporation and to the Corporation's supplying the specialist with such medical information as it holds. In all matters of consent the Corporation must ensure on each occasion that claimants are fully informed about what is to happen.
- (7) Claimants should be given a copy of the Corporation's instructions to specialists, and a copy of the specialist's subsequent report. They should also have the opportunity to comment on the report and to correct any factual errors or obtain another report if they consider that necessary or appropriate.
- (8) The Corporation must ensure that the opinions it obtains from medical practitioners are independent, not only of the claimant but also of the Corporation, and that they are seen to be so.
- (9) The Corporation must put procedures in place to ensure the confidentiality of information it receives about claimants, and must ensure that any information is used only for the purpose for which it was obtained. Information about claimants must only be accessible to those directly involved in the purpose for which it is given. It is suggested that appropriate computer technology be used to store and track files, and to ensure that procedures are followed.
- (10) The Corporation must institute and operate an effective system of recording, investigating and dealing with complaints. This must include a system of reporting promptly to the claimant the result of the investigation.
- (11) There is a need for a Compensation Ombudsman with functions and powers similar to those of the Banking Ombudsman and the Insurance Ombudsman.
- (12) The Corporation should report perceived breaches of professional obligations and standards in the same way as it is required to in the case of medical misadventure under the 1992 Act.

XXI CONCLUSIONS

It can be said that the 1980s was a period of dramatic and turbulent change in the administration of the accident compensation scheme. The change from a Commission with at least one legally qualified Commissioner, to a Corporation with no requirement for legal input at the policy level, was at least part of the reason for a change in public perception of what the scheme was about. The scheme came to be regarded by many as part of the social security system and not a substitute for common law and statutory rights previously available to accident victims.

The comprehensive national public scheme for compensating accident victims which required annual publication of the amount of levy income and the amount expended on entitlements, meant that for the first time the public became aware of the actual cost of accidents in the community.

Without any means of comparing the cost of the new scheme with the costs attached to the previous common law and workers' compensation systems including the cost of the supporting infrastructure, there was an immediate criticism that the ACC scheme was "too expensive". Levy payers complained that the premiums were excessive and claimants complained that their entitlements were insufficient.

The Government appointed Cabinet/Caucus (Quigley) Committee openly politicised the scheme and encouraged pressure groups to press for changes favouring their supporters. This led, under pressure from employers, to the adoption of the disastrous pay-as-you-go funding system which produced a short term reduction in levies but a subsequent "blow out" in levy rates and the obliteration of reserves in the Employers' and Motor Vehicle Accounts. The necessary increase in levy rates to keep the scheme financially viable, naturally led to further criticism by levy payers and demands for reviews of the operation of the scheme.

The Quigley Committee proposals for sharing the cost of medical treatment of accident victims between the victim and the ACC, and the proposed abolition of lump sums and reduction in other entitlements, polarised the community between those who criticised cost and those who criticised the paucity of entitlements. There was considerable criticism of the perceived breach of the "social contract" under which the right to sue was relinquished in exchange for what was to have been a comprehensive scheme based on the five "Woodhouse" principles.

It cannot be overlooked that the administration of the Corporation was in the hands of the Managing Director Mr J T Chapman from 1 June 1985 to 30 November 1992 and that Mr Chapman was later convicted of fraud in relation to his use of Corporation funds. His replacement Mr G Robins who was Managing Director between 1 February 1993 and 26 May 1997 was also charged with fraud but acquitted. The conduct of these two successive Chief Executives over a 12 year period, was hardly conducive to the smooth operation of a novel system of compensation for personal injury which was in the world spotlight. The five "Woodhouse" principles were not the focus of the administration during this period. Instead, administrative efforts were concentrated on cost containment and an increasingly confrontational attitude towards claimants through many incompetent and badly trained staff.

With a levy income of \$1.972 billion for the year ended 30 June 2001²⁴ the ACC plays a very significant part in the New Zealand economy. It is therefore not surprising that there is considerable interest in ACC and its purposes and in the efficacy of its administration. The major levy payers are employers and the self employed who claim a proprietary interest in the scheme. However, at the end of each financial year, these levy payers are usually only interested in the "bottom-line" for that year. Business managers are concerned with the annual financial report to their shareholders and are

24 Accident Compensation Corporation "Annual Report of the Accident Compensation Corporation for the year ended 30 June 2001" [2001-2002] AJHR E19.

anxious to show that the business is in good financial health. To achieve good returns for shareholders, most managers will do their best to minimise overheads, one item of which is the compulsory ACC levy. Management is concerned with the current year's bottom line and how their administration of the company's business can be explained in the most favourable light to shareholders at the annual meeting. A lower ACC levy payment may be achieved by reclassifying staff in a lower levy category or, by levies being set on the basis of a pay-as-you-go funding system, thus contributing to lower overheads. Most managers would gladly accept a lower premium with little or no thought for future years. Management is not concerned to look at the likely effect on business of levy rates in two, five or 10 years time. Similar arguments are applicable to the self-employed who are concerned with reducing current overheads where they can.

Unlike most workers' compensation systems, the ACC scheme covers not only employees but also self-employed persons as well as shareholder-employees. While it is usually not difficult to calculate entitlement to earnings related compensation for an employee, it is not always easy to determine the entitlement of a self-employed person. Generally, if an employee is injured, the employer's business continues and the employee merely loses wages. But for a self-employed person, and often for a shareholder-employee, the income of the business is usually dependent on the person being actively engaged in contributing his or her personal exertions to the business and the entire income of the business ceases if the person is not actively engaged. The administration of self-employed and shareholder-employee claims has never been easy and calls for an understanding of how businesses work in practice and what financial losses follow from a self-employed proprietor or a shareholder-employee being unable to work. Numerous court cases on appeal resulted from policy decisions by the ACC and poor staff administration of self-employed and shareholder-employee claims during the 1980s.

Throughout the 1980s there was no call to return to the former common law system of compensating accident victims. During this period each of the reviews of the scheme and its administration accepted that the five "Woodhouse" principles provided the appropriate base from which to work. It is interesting to note that when looking for solutions to the spiraling cost of State based common law systems for public liability insurance in Australia, in January 2002 the Federal Minister for Small Business Mr Joe Hockey cited the New Zealand ACC system as an example of an alternative scheme for compensating accident victims. The collapse of the HIH Insurance company has also prompted a search for alternatives to the common law but it is likely to be some time before Australia would consider adopting a comprehensive Federal scheme.

