

# ACC and the Woodhouse Principles: administrative efficiency

### BY DON RENNIE

The foundation for the current ACC legislation is found in the recommendations of the 1967 Woodhouse Royal Commission Report "Compensation for Personal Injury in New Zealand" which proposed the abolition of the common law right to sue for damages for personal injury caused by negligence or a breach of statutory duty, and its replacement with a statutory system based on five fundamental principles: community responsibility, comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency.

This is the fifth and final article in a series by Don Rennie that has discussed each of these principles and the extent to which they are embodied in legislation and in its administration by the ACC. Don Rennie is widely published in the area of accident compensation and personal injury and has been an important commentator and participant since the establishment of ACC. He was a special consultant to the three commissioners who set up the ACC, established by the 1972 legislation. He has been a member of the Law Society's Accident Compensation Committee since its establishment in 1990 and was convenor from 2002 until he stepped down earlier this year. While the views expressed in this article are those of Mr Rennie, and not necessarily those of the Law Society, the New Zealand Law Society acknowledges the outstanding contribution he has made to the legal profession and other participants in the ACC system.

The other articles in this series were published in LawTalk 917 (May 2018), LawTalk 919 (July 2018), LawTalk 920 (August 2018) and LawTalk 926 (March 2019).

THE FIFTH PRINCIPLE IN THE WOODHOUSE REPORT RELATES to administrative efficiency.

Paragraph 62 of the report says that administrative efficiency needs no elaboration because it speaks for itself in terms that are clear enough. It says that administrative efficiency looks to: "... evenness and method in every

aspect of assessment, adjudication and administration. The collection of funds and their distributions as benefits should be handled speedily, consistently, economically and without contention."

In paragraph 495, Woodhouse envisaged that the scheme would be administered by an **independent** authority which had the following six elements in its structure:

- Recognition that the scheme involved a partial merger with some aspects of the social welfare system;
- Administration would be by an independent authority whose whole responsibility would be to ensure the successful application in every respect of the principles and philosophy on which the scheme is based;
- 3. The independent authority set up by the Government should operate within the general responsibility of the Minister of Social Security and be attached to that department for administrative purposes;
- 4. The authority should be under the control of a board of three commissioners appointed by the Governor-General in Council for specified terms of at least six years;
- 5. The board chairman should be a barrister of at least seven years practical experience;
- 6.Importantly, no member of the board should be appointed as a representative of any particular group in the community.

A recommendation as to the procedure of the **independent** authority is set out in paragraph 496 which says:

- 1. The pattern of assessment should be application, inquiry, investigation, and decision at the first level; review by a review committee at the request of the claimant; appeal to a review tribunal (of three members including a doctor and a lawyer) which should hold viva voce hearings at which the claimant could be represented; and a final appeal to the board:
- 2. On a point of law there should be an appeal to the Supreme (now High) Court;
- Informal and simple procedure should be the key to all proceedings within the jurisdiction of the board;
- 4. There should be a discretion to deal with any unusual



circumstances and every decision should be based on the real merits and justice of the case:

5. Under the scheme there should be no reason for strictly limited periods of time within which claims could be made. A limited period of six years could be imposed with a wide discretion to the board to extend the time for any reasonable cause.

The ACC structure and operating systems were not reflected in the original legislation or in any subsequent amendment, yet the Woodhouse recommendations show that many of the problems which have arisen in the law and administration of the scheme were anticipated by the Royal Commission and principled and well reasoned solutions to those problems were proposed.

### The 1972 Act

The ACC article in LawTalk 917, May 2018 ("ACC and the Woodhouse Principles: community responsibility", pages 22-23), refers to the original 1972 National government's Accident Compensation Act which established a hybrid scheme for

personal injury, covering only earners and the victims of motor vehicle accidents but leaving the rest of the community with the common law right to sue for damages. That Act established the independent Accident Compensation Commission, as envisaged by Owen Woodhouse, but the drafting of the legislation mirrored the former insurance-based Workers Compensation Act 1956. For example, the 1972 AC Act contained a levy system based on the Workers Compensation risk-related industrial activity classification system. Woodhouse pointed out in paragraph 314 that the system of classification based on risk fails to recognise that all industrial activity is interdependent and that 20 years previous to the report (ie, in 1947), it was abandoned by the United Kingdom. The report said there was therefore even more reason to abandon it in New Zealand in favour of a single flat rate levy based on earnings, adopting the first Woodhouse principle of community responsibility. The Workers Compensation Act required employers to be insured with private insurers, against liability for work-related injuries to workers.

In other words, the 1972 Act, among other things, required a levy system to be on a risk-related classification basis, and described a public insurance system for accident victims modelled on private insurance principles. From the beginning, the Act tried to implement the Woodhouse scheme infected with the private insurance legal virus. There has been no indication that a cure has yet been found which will destroy that virus. There is little evidence that either the authors of the original bill or subsequent ACC boards actually read the Woodhouse Report and understood how different thinking needed to be applied to the drafting task. The final 1972 Act was clearly not based on the five Woodhouse principles.

### The 1973 Amendment

In the latter part of 1973 when the Kirk Labour government came to power, there was, for an unexplained reason, an urgent desire to implement the recommendations of the Woodhouse Royal Commission. However, instead of taking time to consider



how that could be achieved and what appropriate legislation would look like, it was decided that the existing 1972 Act would merely be amended by extending the cover provisions to include non-earners such as retirees, children and visitors to the country, and abolishing the right to sue to recover damages for personal injury. All the private insurance type of provisions in the 1972 Act were retained, thus further spreading the private insurance virus.

The consequences of the decision not to re-write the legislation have led to numerous problems over the years and are clearly the responsibility of the 1973 Kirk Labour government. The 1972 Act as amended in 1973, came into operation on 1 April 1974 and subsequent amendments, instead of being re-written to implement Woodhouse principles, have continued to spread the private insurance virus.

#### The 1982 Amendment

The 1972 Act as amended in 1973, stayed in operation with a number of minor machinery amendments until, in 1982 following the recommendations of the Quigley Cabinet Caucus Committee Review, there was a significant amendment by the Robert Muldoon-led National government, that abolished the statutorily appointed independent Commission, and established the Corporation. The ACC became no longer an independent commission established by statute, but a corporation with a politically appointed board of directors who were required to comply with government policy. None of the directors were required to have legal qualifications to administer the important and unique statutory legal system covering all personal injury. Some of the original board members represented interest groups of employers and workers, which Woodhouse specifically said in paragraph 495(6) of the report, should be excluded.

The establishment of the Corporation changed the character of the ACC scheme. It became no more than a large insurance operation with systems and procedures akin to any large commercial personal injury insurance company, but with a board required to carry out government policy. The emphasis had moved from a system for providing the statutory rights and entitlements of individual accident victims based on the Woodhouse principles, to a politically influenced insurance system. Levies to fund the scheme were to be on a risk-based insurance userpays principle, including a provision for a competitive experience rating system. Consequently, the board adopted a philosophy to restrain the costs of the scheme, often at the expense of accident victims' rights. In this way, the private insurance virus became even more firmly established. Interestingly, a provision was made in the 1982 Act to change the funding system from "fully funded" to "pay-as-you-go".

### The 1988 Law Commission Report

In 1988 the Law Commission, of which Sir Owen Woodhouse was then President, undertook a review of the ACC scheme and brought down a report which included a number of recommendations. These included extending entitlement to include sickness, abolishing the risk-related classification system for setting levies and replacing it with a single levy rate fixed by Parliament, and abolishing the separate compensation accounts.

None of the Law Commission recommendations have yet been reflected in changes to the legislation.

### The 1998 Accident Insurance Act – Privatising ACC

Another disastrous change was made to the legislation in 1998 by a minority Shipley-led National government, when the Accident Insurance Act allowed private insurance companies to compete with the ACC in delivering statutory entitlements to accident victims for work-related injuries. This change moved the scheme even further away from the five basic Woodhouse principles and was absolutely contrary to the fundamental Woodhouse philosophy. The private insurance virus coming from the 1998 Act, resulted in an insurance pandemic affecting the operation of the whole scheme.

Since the introduction of the ACC scheme in 1974, the insurance industry had lost access to a huge pool of premium money previously involved in providing workers compensation and personal injury insurance cover. The 1998 Act allowed private insurers to recover some of that lost premium pool. The Act was long (482 sections and nine Schedules), prolix, complex, convoluted and difficult even for a lawyer to follow. It allowed the setting up of systems for accredited employers to act as agents of the ACC in delivering statutory entitlements to injured workers, and the opportunity for the self-employed and private domestic workers to purchase insurance cover and entitlements which would not otherwise be available to them. It was a true insurance system far removed from what Woodhouse had proposed.

### Private insurers and the need for reserve funds

The Shipley-led National government in 1998 appointed Nick Smith as Minister for ACC. In championing the idea of competition between private insurers and ACC, he apparently realised that if the private insurance industry was to become involved, the private insurance principle of "reserves" had to be a requirement for registration as an insurer. The minister persuaded his fellow politicians and the public that: "ACC was running out of money and would become bankrupt because it had no reserves to pay the future cost of current claims, therefore levies would have to increase".

Insurance 101 teaches that if a private insurance company contracts to provide cover for events which create a liability to pay benefits in the future, the insurer must provide reserves against the possibility that it may, for whatever reason, go out of business. If that happens, the pool of reserve funds is available to pay ongoing benefits and costs. The pre-condition for accessing reserves is that the insurer no longer exists or otherwise ceases to provide the contracted benefits. To authorise the inclusion of the requirement for reserves in the 1998 Act, the government-of-the-day must have anticipated that the ACC and/or some insurers who contracted to provide benefits to injured claimants, might go out of business or cease to offer cover at some time in the future.

### The Accident Compensation Act 2001

Following the election of a Labour-led coalition government in 1999, the Accident Insurance Amendment Act 2000 and the Accident Insurance (Transitional Provisions) Act 2000 were passed, removing competition from workplace insurance. Among other things, the Acts provided that from 1 July 2000, ACC would provide cover and entitlements for all work-related, as well as all other personal injury. No new accident insurance contracts could be written.

However, the Helen Clark-led Labour coalition government, while removing private insurers' ability to handle claims for cover, apparently overlooked the fact that claims for cover under each of the accounts were required, under the private insurance liability principle, to be "fully funded". That provision embedded in the Act was not changed but continued and was confirmed in the 2010 Amendment Act. The omission has allowed the ACC to continue applying the private insurance principle of proposing levies for government approval, on a fully funded basis for each account. In other words, the levies were set at rates in excess of the amount required to pay the annual cost of claims incurred in each financial year together with the continuing cost of claims incurred in previous years.

That surplus levy was calculated by actuaries and provided a fund for investment, ostensibly to provide for payment of entitlements for long-term serious injury cases payable in the future. Using the reserve fund for that purpose breaches the principle that reserves can only be used if and when the insurer goes out of business or ceases to provide the cover and entitlements under the insurance contract. It assumes the insurer will no longer be in receipt of premiums (levies) to pay claims. In other words, the ACC can only use the reserves to meet the ongoing cost of claims, if and when the ACC scheme ceases to operate.

Since the ACC resumed its functions of providing cover and entitlements for all personal injury, there has been no logical reason for the ACC to calculate levies on a fully funded basis. The provision was confirmed by \$ 169AA 9(b) as amended by \$ 17 of the AC Amendment Act 2010. There has been no political will in any government since 1998 to change the full funding private insurance principled provisions in the legislation. It may be because the ACC has accumulated, over the last 20 years, a reserve fund now in excess of \$44 billion, making the ACC the biggest investor in the New Zealand stock exchange after the

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National Superannuation Fund. The reserve funds are administered by an investment committee in the ACC which can be influenced by government's requirements for investments in public enterprises such as assistance with the purchase of Kiwibank or the construction of a new prison in Auckland.

The ACC has recently been criticised for providing funding for the purchase by the Crown of what have been declared to be illegal firearms. There is little evidence of the principles on which the current ACC's Investment Committee operates except its desire to protect the capital of the investment fund, and equal or exceed the fund's investment profile against the market benchmark. ACC's primary purpose appears to the financial health of the scheme. The make-up of the board emphasises members with financial and business acumen and expertise and not an international reputation in medicine or rehabilitation, which might result in policies of advantage to accident victims.

## Reserves unprecedented in the public sector

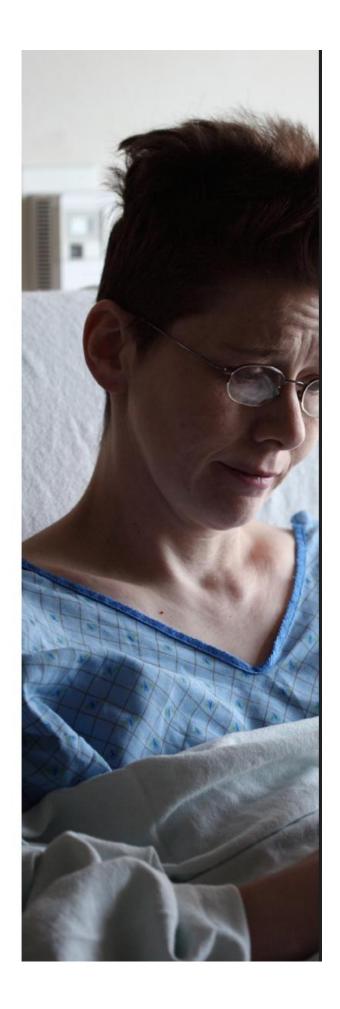
ACC is a state enterprise and ACC levies are a form of compulsory tax based on earnings of employees, self-employed persons and motor vehicle owners. It is unprecedented in the public sector for a state enterprise to collect compulsory taxes in order to provide a pool of public money for investment to fund the possible future cost of current liabilities. For example, decisions made today in the areas of health, education, justice, defence and many other public areas, are certain to create future liabilities, but relevant ministries or departments do not have the ability to raise additional taxes to provide a pool for investment to cover those future costs. Liabilities, whenever created, must be budgeted for when they fall due and are part of the annual budgeting round procedures of government.

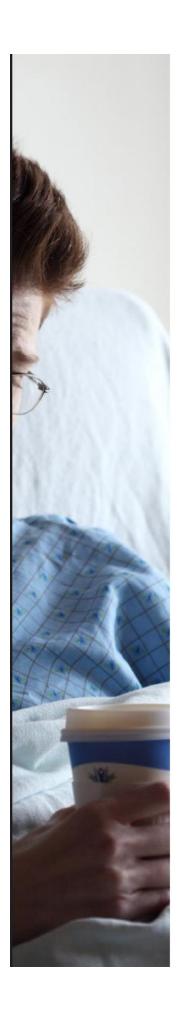
Partly because of the funding system of variable levy rates based on an outdated classification system outlined in the original 1972 ACC Act, and partly due to the adoption of the full funding principle, the ACC now has a massive reserve fund which it says is necessary to pay the cost of serious injury claims which will fall due in the future. The ACC claims that reserves are needed to pay the ever-rising cost of long-term claims, but that reflects the fact that the ACC board has never implemented the five Woodhouse principles which were based on common sense and logic.

With the data available to it over the last 45 years, the ACC should be a world leader in the treatment and rehabilitation of accident victims. Getting an earner back to work and off the system is a private insurance principle, but it does not indicate successful rehabilitation of the whole person as envisaged by Sir Owen Woodhouse. See my article "ACC and the Woodhouse Principles: Complete rehabilitation" in LawTalk 920, August 2018, pages 40-42.

# Safety, accident prevention and rehabilitation

Woodhouse observed that if there was an active and





successful accident prevention programme in place, and an active and successful rehabilitation programme for accident victims in operation, the number of long-term injury claims would be fewer, thus reducing the cost to the scheme. The variable levy rate system puts a higher cost on levy payers in groups classified as high risk, but does nothing to reduce the severity of long-term injury claims in those groups. Neither would the proposed experience rating system, that allows competition between levy payers in the same classification group, result in lower severity of injuries.

The variable levy rates and the experience rating systems do nothing for safety and accident prevention but merely spread the cost of claims on the insurance "user pays" principle. The system ignores the effect of expenditure arising from the difference between frequency and severity of accidents, applying the Poisson distribution rule. An accident is an unlooked for, unexpected and untoward event but the consequences of an accidental injury is a matter of pure chance. For example, in the safest and best regulated environment a highly-paid executive may trip and fall down stairs. The result might be nothing more than bumps and bruises and the accident may not be reported. On the other hand, the fall may result in severe brain damage and the executive may need constant medical and personal care for life. The cause of the accident may have been carelessness or skylarking but the severity of the injuries and the financial consequences could affect the rate of future levy payable and disqualify the employer from an experience rated bonus. In such a case the outcome of the accident would be a matter of pure chance and have nothing to do with accident prevention or safety. The injury was caused by a random event in an otherwise secure environment and it would be unfair, unreasonable and illogical to penalise the employer through the levy system which could not apply until the following levy year.

### Health and Safety at Work Act 2015

The most effective legislation to improve safety and reduce workplace accidents has not related to the ACC levy system, but to the Health and Safety at Work Act 2015. That Act places legal responsibility on a PCBU (person conducting a business or undertaking) to ensure that the workplace is safe. The Act deals with the management of risks and places a duty on the PCBU to eliminate or minimise risks to health and safety so far as reasonably practical. Those duties are not transferable to another person. The PCBU must have regard not only to its own workers, but also to contractors, visitors and the general public who come on to, or may be affected by anything that happens in the workplace. Penalties under that Act can be financially significant and can result in the workplace being shut down. That is obviously a significantly more effective penalty than having to pay a higher tax-deductible levy rate, or being disqualified from earning a bonus, as is the case under ACC legislation.

# Fixing ACC – it's putting it right that counts

- 1. The ACC got off to an unfortunate start with the original 1972 legislation clearly not expressing and implementing any of the five Woodhouse Report recommendations. The hybrid 1972 Act, although it passed into law, could not in practical terms have operated alongside the common law right to sue for damages for personal injury. It mirrored the previous Workers Compensation Act and incorporated private insurance principles in its operation. In particular it incorporated a funding system based on the outdated industrial classification of risks and completely ignored the first Woodhouse principle of community responsibility.
- 2. The problems with ACC cannot be solved by once again amending the current Act. Continually amending existing legislation and expecting it to provide a different result is illogical. There must be a complete re-write of the legislation clearly incorporating the five Woodhouse principles.
- 3. An independent body of the kind envisaged in the Woodhouse Report would be answerable to Parliament, and not to the government of the day, for the administration of the unique statutory legal system covering all personal injury. Nor would it be subject to ministerial direction. The legislation establishing the Health and Disability Commissioner is an example of how it would be possible to establish a Commissioner for Victims of Personal Injury occurring in New Zealand.

- 4. The articles appearing in LawTalk issue 917 on community responsibility; issue 919 on comprehensive entitlement; issue 920 on complete rehabilitation; issue 926 on real compensation, together with this article on administrative efficiency, all indicate the failings of the ACC to administer the principles and recommendations of the Woodhouse Royal Commission Report on which the scheme should be based.
- 5. The ACC can hardly claim that it is merely carrying the will of the government of the day. The ACC Service Agreement for 2019/20 makes clear the Government expectation that ACC should be able to demonstrate that claimants are able to access what they are entitled to easily and consistently. In that agreement the Government outlined its specific priorities which include to: "...ensure that ACC functions as a publicly administered and delivered social insurance scheme distinct in character from a private insurance company."
- 6. The way the ACC operates, has all the hallmarks of a private insurance company in the following respects:
  - It applies insurance practices and procedures by placing the burden on the claimant to prove the injury is covered by the Act and that statutory entitlements apply. This ignores the fact that the ACC statutory cover is comprehensive and the common law rights of accident victims have been abolished. The ACC has the monopoly in decision-making regarding all claims. There is no evidence that the ACC has moved for changes to the legislation to ensure claimants are able to access what they are entitled to easily and consistently, as set out in the Service Agreement;
  - It applies a private insurance principle in attempting
    to "settle" claims by "negotiating" with the claimant
    either directly or with advisors, completely ignoring the
    provisions of s 299 of the AC Act that prohibits contracting out from the legislation. Any so-called "settlement"
    which allows the ACC to pay anything less than what the
    legislation provides, is unlawful and unenforceable. My
    article in LawTalk 916, April 2018 ("Fees for ACC reviews
    and appeals", page 17) indicates complications which can
    arise if the ACC acts unlawfully by paying entitlements
    to persons other than the claimant;
  - As noted above, it follows the private insurance practice of building "reserve funds" to cover future liabilities arising from current claims against the possibility it will go out of business or be unable to continue providing the contracted benefits. It relies on actuaries to calculate levy rates based on the "reserve funds" principle but ignores the fact that the ACC is a state enterprise and levies are a form of compulsory tax. The authority to collect levies is governed by the legislation which requires that funds from each account are to be applied to meet the costs of entitlements, administering the account, audits and assessments and any other expenditure authorised by the Act. It is unprecedented for a state enterprise to build a reserve

- fund from taxes for investment in a fund to pay the future liabilities arising from current decisions.
- 7. The Woodhouse report called for the establishment within the organisation of an efficient medical branch under the leadership of an experienced doctor of high quality. That has not happened. In the recent restructure of the medical section, the ACC Board has failed to follow the Woodhouse recommendation.
- 8. The review and appeal system administered by the ACC is far removed from that recommended by the Woodhouse Royal Commission. Paragraph 308 of the report suggests that initial decision making, up to review level, should be within the organisation with an appeal to an appeal tribunal comprising three persons including a doctor and a lawyer. On a point of law there should be an appeal to the High Court. Paragraph 309 suggested that informal procedure should be the key to all proceedings within the jurisdiction of the ACC and that a drift to legalism should be avoided. To use a phrase from a submission to the recent Royal Commission into the banking system in Australia, administrative philosophy may be better described as delay, deny, litigate.
- 9. Because of the way the ACC has been structured, and because of the way it interprets the legislation under which it operates, and with the lack of political and administrative will to put things right, the future of the ACC scheme looks bleak. There has been no White Knight in any recent parliament who would take the necessary action to change the legislation to adopt the Woodhouse principles and ensure they are implemented by ACC management.
- 10. Speakers at the first three Woodhouse Memorial Lectures - Sir Kenneth Keith (2017), Sir Geoffrey Palmer (2018) and Associate Professor Susan St John (2019) all referred to the shortcomings of the legislation and its departure from the Woodhouse principles.

Nothing will change until there is political will to improve the rights of all accident victims by implementing the five Woodhouse Report Principles and recognising the logic on which the Royal Commission Report was based.