



REGULATING THE IRREGULAR: ACCIDENT COMPENSATION LAW AND POLICY

A Case Study of 'Contract' Shearing Employers
in the New Zealand Wool Industry

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Abstract

Ongoing developments continue to effect the provision of ACC for those in the rural workforce, particularly the levying of shearing contractors in the wool industry. Atypical high wage transaction costs for 'contract employers' problematise the non-wage cost of individual employers' liability levies. Modern relations of labour between shearing contractors and their workers are largely informal. The fluidity of workers entering and exiting the industry is one part of the fluidity, as it is for contractors entering and exiting the industry. This paper focuses on exposing these contradictions to collapse the assumption of a binary contractual relationship between shearing industry parties in the provision of 'workers' compensation' in woolshed relations.

Keywords: accident compensation, ACC, rural labour, shearing

Over the past one hundred and forty years the New Zealand wool industry has made a rich contribution to the primary sector of the New Zealand economy. However, in recent years the relative importance of rural labour from the primary production sector has diminished relative to other sectors of the economy. One of the consequences of the changing nature of the rural economy is variable implications of government policy in an increasingly regulated framework. This can be illustrated in the wool industry as a significant reduction in the rural workforce through technological and social changes. Despite this reduction there is one key group in raw wool production services, shearing contractors and workers, that illustrates the changing nature of the labour force in relationship to a changing legalised framework. This paper is drawn from current Masters research that investigates the New Zealand accident compensation scheme¹ through an analysis of law and policy, raising contradictions inherent to the provision of ACC in the wool industry. It is important to note that the implementation of the government's ACC policy is interconnected to other legislation, specifically the Health and Safety in Employment Act 1992 (hereafter HASE) and the Occupational Safety and Health (OSH) service monitoring workplace environments.

Government policy

There has been an increase in critiques of government accident compensation policy, specifically worker's compensation over recent years (Campbell, 1996; Palmer, 1994; Duncan, 1993:1995). Several from a policy perspective can be found reflecting on the impact of structural adjustment programmes, or hypothesising on the direction of government policy (Duncan, 1995; St John, 1998). All these exist

within a growing literature on the socio-economic environment of policy analysis in New Zealand (Bollard, 1994; Williamson, 1995). However, there has been little empirical work done on the New Zealand scheme over the past twenty years (Palmer, 1994:252).²

Woodhouse Report

The genesis of the ACC scheme is found in the Royal Commission of Inquiry on Compensation for Personal Injury in New Zealand, and subsequent Select Committee consideration of the Report (Fahy, 1984:5). New Zealand academic reviews of workers' compensation have tended to focus on the historical emergence of the ACC scheme from the Woodhouse Report, 1967 (ACC, 1988; Campbell, 1996; Fahy, 1984; Miller, 1989; Palmer, 1994). The Commission's terms of reference related mainly to employment associated claims for compensation and damages arising from accidents at work sites, as well as medical care, retraining and rehabilitation.

Traditionally workers' compensation was contextualised within employment law, either through interpretations of the appropriate legislation, or through the common law adversarial route to dispute settlement. From the outset the report labelled the avenue of a right to sue under a negligence action as a form of lottery.³ Legal solutions derived from the adversarial system were seen as inadequate (Palmer, 1979; Fahy, 1980:8). Damages rising from the courts produced an adequate indemnity for a small group of injured persons, while the Workers' Compensation Act, 1900 provided meagre compensation for workers only if the accident occurred at work (Fahy, 1984:8).

In a modern neo-liberal policy environment the 'policy creep' of notions of welfarism equating workers' compensation to a benefit, for example universal versus targeted provision of ACC, is a disturbing trend. For example the suspension of the right to sue delivers the current employer a significantly cheaper form of third party liability, in terms of transaction costs, as well as for tort liability comparative to western trends (Goddard, 1998). This is because of current restrictions preventing liability claims for negligence or damages. There are recent claims that the principles⁴ endorsed by the Commission of universal, 'no fault', comprehensive entitlement, complete rehabilitation, real compensation, and administrative efficiency on the basis of community responsibility, are outdated elements.⁵

It is my contention that tampering with the scheme would raise questions of the suspension of the right to sue criteria, despite assurances from government for this essential element of accident compensation policy to be retained in its current form. There is a school of thought in legal circles that government cannot achieve its reform objective⁶ unless by moving to individualised liability rules⁷. After the introduction of the Accident Rehabilitation Compensation Insurance Act 1992 (ARCI), Sir Geoffrey Palmer questioned the legislation on a point of fairness⁸:

"arguments have been made in New Zealand that the government, by reducing the benefits but keeping the common law from returning, was in breach of a social contract made at the time of the scheme's inception."

Such a concern is founded on the principle at the inception of the ACC scheme, that comparable benefits to the common law would be returned to the claimant.⁹ Since ARCI and subsequent regulations have implemented specific roll-backs on compensation benefits (Palmer, 1994: 251), and the common law remains unavailable, the public provision of ACC as an intact scheme in the future remains unclear (New Zealand Law Society, 1997).

The shearing industry

Rural employers and employees have considerable concerns about the inequity of the present delivery of accident compensation. For example the provision of ACC to many participating in the New Zealand wool industry would contend that neither the producer (self employed farmers), the employer (the contractor) nor the worker (over 5000 shed staff) among others, are satisfactorily provided real compensation and complete rehabilitation by the ARCI Act.

I contend that the delivery of a publicly provided workers' compensation scheme is problematic in a rural context for three reasons. Firstly, the scheme emphasises its inadequacy to cater for wool industry parties through the collapse of the formal contractual relationship between parties in the rural sector. Secondly, the introduction of experience rating as policy that is inherently inequitable for 'contract' employers, such employers are levied on their 'permanent' staff, as opposed to levies imposed on other parties who

may or may not be 'permanents'. Thirdly, in a period where the wool industry is in rapid decline, shearing contractors' ACC levy increases have been passed on to producers, thereby increasing producers' costs. Consequently, not only have the employers' cost margins been affected, but it is possible that a significant proportion of workers have had wage stagnation because of the economic 'climate' created by progressive rises in the employers' ACC levies since 1994. It is in such a climate that contractors have been reluctant to support workers' claims for pay rises that may further increase wool production transaction costs.¹⁰ The relationship between the three parties accords complexity to the provision of ACC in the shearing industry, as in the overall context of the rural sector.

Labour Characteristics

Both Martin (1991) and Merritt (1987) have explored historical relations of labour, in particular the characteristics of workers in shearing teams. Within the wool industry employment has always been casualised and itinerant. Modern relations of labour between shearing contractors and their workers remain largely informal. The fluidity of workers entering and exiting the industry is one part of the fluidity, parallel to contractors entering and exiting the industry. Furthermore, many shearing contractors are simultaneous workers and employers. These relationships are made more complex by relations between contractors and producers (sheep farmers) also being informal arrangements. Some contractors are simultaneous farmers and shearers. However, the assumption of labour as a formal contractual relationship is inherent in the legalised environment of the Employment Contracts Act 1991. Both the ECA and ARCI legislation are problematic for the shearing industry because of the assumed binary contractual relationship as the basis for the workers' compensation funding by employers as 'experienced rated' levies.

Experience rating

The rating of an employer is determined by the actual claims experience of the industry group (ACC, 1995). Atypical high wage transaction costs for employers in a high risk industry problematise the non-wage cost of the employers' liability levy. Further, the industry has a relatively high turnover of employers which, in terms of the ACC premiums, has the effect of burdening those employers who are committed to the primary industry for the long haul. This will continue to be a problem in a competitive environment, at the expense of those members unable to attract competitive rates on the grounds of unavailable data to challenge suspected incorrect experience rating inherited from the current 'providers'.

For example, the New Zealand Shearing Contractors Association is concerned that their 'premiums' have been separated from producers (farmers) for the past two years, creating a false divide between the provision of 'contract' and 'open' levies on shearing shed staff. The effect of the 'premium based' compulsory levy scheme has been to see that, as employers committed to primary industry production in

New Zealand, there are substantive financial burdens on those permanently contracting 'professional' staff than for 'open' contractors or farmers employing 'casual' staff.

Experience rating as inequitable ACC policy affects only 'contract' employers in the shearing industry who are then deemed part of a 'high risk liability' category. This distinction is an unsustainable economic burden for two reasons. First, farming in general, and some agri-business industries in particular, are inherently high risk operations. Such risk may be derived from farm workers interacting with natural elements, with unpredictable livestock, or as in the shearing shed, a mixture of both these factors. As uneasy 'liability' companions, shearing contractors are categorised with forestry contractors and top dressing pilots by ACC in one of the highest rating accounts - category 02120.

Second, experience rating has been a costly experiment for some rural employers where a tension operates between permanent and casual woolshed labouring. Shearing contractors operating in a 'contract' framework are liable for a 6.1% levy, whereas 'open' casual shed staff can be employed at a 2.67% levy (paid by the farmer or self employed contractor/worker).¹¹ The levy for shearing contractors has been increased 95% in the past three years by ACC.¹²

Economic Burdens

There is no question that "it does not make economic sense" for continual increases of the levy, particularly given that these costs impact on a declining industry.¹³ In an industry that prides itself on being cost-plus, where shearing shed workers' wages remain true to the historical piece-rate conditions of a century ago, the non-wage labour cost that ACC imposes seriously undermines accountability and efficiency in wool production services. Contract shearing is a business that operates approximately 80% turnover in wage transactions, thereby exposing a greater proportion of turnover to ACC levying than perhaps a farmer whose wages cost is significantly less.

Accident Insurance Bill¹⁴

In their submission on the Accident Insurance Bill 1998 (the Bill), the New Zealand Shearing Contractors Association addressed several fundamental premises creating generic fault in the Bill. Their submission did not follow the Bill on a clause by clause basis, but rather from the point of view of identifying potential risks for members, examined principles implied within the general scheme for providing 'privatised, competitive' employers' third party liability cover for work related accidents. The submission did not address the specific needs of the self-employed. An employers' third party liability for personal injury in the workplace is an entirely separate issue from a self-employed person purchasing personal cover for these elements, albeit incorporating the three principal elements of workers' compensation:

- wage replacement cover
- rehabilitation provisions
- return to work incentives

The Bill is based on the assumption and philosophy that a 'competitive' environment whereby employers will have a 'privatised cover for third party injuries' will minimise costs of injuries to society. This claim is based on the insurer minimising the costs of the insured, ostensibly by aggressive claims management and dis-entitlement to a third party. These premises that the insurer controls the insured in the 'market' for insurance covering 'personal injury in the workplace'.

The unique nature of the shearing contractors illustrated a rare employers' group in discord with these premises. Their stance was a twofold critique based on the need generally held by critics of the Bill that, on the one hand the public submissions required a longer review period than the two weeks given, and on the other, requesting some foundation that substantiated the fundamental premise the legislation is changing to minimise employers' costs.

Ironically the explanatory note to the Bill contains a precautionary note claiming the introduction of competition to the schemes delivery "will result in new administrative compliance and transaction costs". However, the general policy statement claims these costs will be offset by:

- improved incentives on premium payers to prevent injuries
- more control for employers in managing workplace safety and improving rehabilitation for people with workplace injuries
- the ability for premium payers to choose an insurer who provides the services that best meet their needs
- increased focus on the claimants and the achievement of rehabilitation outcomes
- more efficient scheme management and accountability

Greater discussions of the merits and flaws of the Bill would increase the value in making an assessment of the anticipated changes introduced by the Bill. The anticipated impact of privatisation and contestable delivery of employers third party liability requires informed consent as the New Zealand monopoly delivery has been proven the most cost-effective in the world (Dewes, D. and Treblicock, M., 1992). It is quite apparent on examination of the Bill that the principles of the 1972, 1982 and in part, 1992 acts have been removed. Instead, new principles introduced by the competitive frame of the Bill introduces a 'market' philosophy. The 'market' driven principles are expressly contrary to the principles espoused in the Woodhouse Report. Further, there is ample evidence that New Zealand has the lowest costs in comparable terms¹⁵ for the actual cost of ACC through current policies in a number of ways. The Bill assumes flexibility of the worksite to meet the needs of the insurers - but does not indicate flexibility of the insurers to meet the needs of the contract between the insured and the worksite.

Contractors were concerned that an 'open' market will similarly separate large employers from smaller employers in

terms of the benefits of a privatised scheme. But the real question asked of the Special Select Committee was whether there is sufficient evidence that these inequities will change as anticipated by the Bill, with a competitive provision of employers' third party liability for personal injury in the workplace? It was contended that it is problematic for shearing contractors that, as is symptomatic of a private market, private providers (insurers) will compete for the obvious returns of larger employers. The contractors foresee the effect of the Bill to be a 'creaming' of the market at the expense of small employers in such high risk industries as the shearing industry. These arguments are not new, as has been anticipated in previous criticism of privatising ACC (Duncan, 1994).

As a wage intensive industry contractors fear three characteristics present at the emergence of the proposed competitive market will be burdens: their historically unsubstantiated classification; administrative inexperience in classification in the new market; and establishment contingency costs, with the effect of an increase on premiums/levies rather than a lowering of their transaction costs for liability cover.

The historical 'tail'

The current 'tail' is an example loaded onto contractors 'risk', relative to those having previously exited the industry. Based on the inaccurate and incomplete data provided by the Corporation (ACC), contractors argue they shouldn't be paying levies, including wage replacement or rehabilitation costs, for long since departed commercial competitors. Furthermore, such rating burdens employers entering the 'new' market with clearly inaccurate information and inadequate statistics from the current providers, resulting in insupportable 'tail' costs. Such concerns have been reinforced recently by the Government releasing policy confirming that employers will 'carry the costs of the tail'.¹⁶ The effect of that policy, in association with the anticipated outcomes of this Bill, do not meet the needs nor solve the problems that those in the wool industry have in delivery of real and equitable compensation for personal injury in New Zealand. There are unresolved complications as to the role of the unfunded liabilities of the scheme. A contradictory message sent to the industry in the terms of the Bill suggest that contractors ability to 'compete' will be unsustainable in the efficacy of a private market.

The common law right to sue

There are considerable doubts that the provision of compensation for personal injury under the Bill will provide the legal environment for sustainable cover, and for the sustained statutory suspension of the common law right to sue. The right to sue for personal injury was abolished in favour of the Accident Compensation scheme in 1974 because litigation and private insurance cover was too expensive and inefficient. Although the return to the individual right to sue is implicit in privatised 'markets' abroad, it is noteworthy that the Government has drafted legislation preventing such terms. Even the Business Roundtable as

quoted by the Select Committee, acknowledge the suspension of the common law right to sue is a flaw in the Bill.¹⁷

It is of concern that the Bill could create the environment for a judicial challenge for the return of the right to sue to be a corollary of the new privatised market. On the face of the Bill it would appear that the claim would be on the insurer, not the employer. The other side of this equation, though, is that there is bound to be litigation over entitlements. However, it is unlikely that employers will be able to avoid getting dragged into disputes if the first port of call after the accident is the lawyer's office. There is no clear provision that an individual would be prevented from taking a private action for example under exemplary damages for personal injury against a party to the 'insurance' contract were entitlement refused.

'Risk-sharing'

The shearing industry is at present classified high risk. The actual work site for these operations is the average woolshed, which is a site of minimum maintenance for most producers (farmers). Contractors express concern that the creation of a privatised market places contractors at risk for liability notwithstanding that risk is often a woolshed work site characteristic rather than a work practice liability. The consequence of that conflict of interest would potentially pit contractors against self-employed producers in terms of liability. Not only does the Bill encourage private insurers to 'double dip' as both will have mandatory premiums, but the Bill is unclear as to the relationship and liability of the multi-faceted relationship in the informal work sector.

The need to "anchor" worker entitlements in detailed schedules and regulations reduces the potential for flexible and different "products" through which insurers compete. Flexibility is reintroduced through "risk-sharing".¹⁸ This is broadly defined, but it probably means that employers and insurers can agree on some sort of "excess" arrangement (eg. the employer carries the first \$x of cost in any year; the employer carries the cost of the first two weeks of compensation not just one; the employer meets the cost of the first medical treatment).¹⁹ The premium is reduced to recognise the risk that the employer carries. The Bill provides that even if there is risk sharing, it is the insurer that is ultimately responsible for providing the entitlements. This is all very well, but if there is a dispute between an insurer and an employer over who should pay a part of any claim, the worker is the 'meat in the sandwich', and carries the risk of delays in resolving where liability falls.

However the changes in the law will make contractors legally liable to deliver statutory entitlements to employees. Even a neo-liberal response assuming less Government in business would find the element of compulsion on employers to ensure their legal liability as an ominous and problematic change of direction in Government policy. This element is a direct result of privatisation, since the Inland Revenue Service currently acts in a dual role simultaneously as both levy collector and enforcement agency.

The abandonment of the accredited employer scheme, the approved employer scheme and the experience rating system, although flawed in previously mentioned ways, have considered merit when measured against these new terms of a new regulatory bureaucracy to monitor compliance. It is debatable whether the changes proposed are in fact the most efficient and accountable processes for modification of the provision of workplace accident insurance.

Accountability

If the insurer goes out of business, the employer covers the cost of one year's premium²⁰ and the rest of the industry is levied to pay the balance via an Insolvent Insurers Fund.²¹ Once again, this is a recipe for endless acrimony and litigation, where even the insurer has a problematic conflict with the Bill. Why should prudent insurers meet the financial obligations of unsound competitors etc. and/or is the risk carried by the employer or worker?

Such a critique echoes contractors' argument for real analysis of the 'tail' costs. This would also be unacceptable where compliance is at the expense of driving compliance costs for insurers onto the insured, in so doing minimising the rights of the purchaser of the cover, the employer. Increased premium costs incurred by the fully funded costs, because of the requirements of fully funded premiums and payments of 'on-going' claims, are likely. The appearance of choice for the purchase of liability cover is in fact operating by design as a 'compulsory' purchase of an 'insurance contract'. A 'compulsory' purchase of an 'insurance contract' is an anomaly. Is this not reversing the freedom of choice under the guise of a regulated compliance?

Contrary to the anticipated provision that choice may refer to 'shop around' and 'bargain buys', it is of concern that this effect of the Bill will have an undesired long term outcome of increasing costs of contractors' liability cover. Under the current Bill, an insurer will not be able to refuse to insure an applicant, and cannot void a policy for non-disclosure or false information on which the 'insurance cost' is based. This may result in short term employers 'costing' the industry similar to the establishment of the current 'tail', except that insurers will use actuarial techniques to pass the collapsed cost onto other employers. Not only have these issues rewritten the fundamental premises of both insurance and contract law in New Zealand, there is an added concern at the risk that insurance premiums will reflect both added costs and added risks of insurers establishing the market. As stated, compliance costs currently monitored by the Inland Revenue Department would be mirrored by an alternative structure to monitor the competitive market. The effect of privatising compliance costs merely creates another anomaly of 'accountability', which in fact forms a repetitious bureaucracy.

Employers' autonomy

The Bill would allow unscrupulous insurers to arrange the limits on cover to the detriment of businesses that operate within the law. It is inconceivable to allow insurers and workers to agree on the definition of accident, literally to

'dump' the costs out of the employers' liability cover. This defeats the purpose of providing employers' third party liability cover for personal injury in the workplace. There are two further problems:

(i) manipulation of cover

There will be no insurer of last resort. Insurers only have to quote (Clause 152). But they can quote a premium that is out of reach - knowing that the employer could not afford it. Agencies concentrate on the profitable segments of a market. For example, conventional consultant wisdom in banking is to deliberately price some products like retail counter services so high that customers will not use them. In this regime, the insurance industry makes pricing decisions that effectively decide which commercial practices and which industries and enterprises stay in business. But it is doing that in relation to an activity that is only a marginal dimension of the core business of the client.

(ii) not legally sustainable

Some contractors have a problem with private insurers appointing their own appeal officials. How can government expect employees to have a fair review of the cover employers are guaranteed to provide, indeed are compelled to provide, if the review officer is a appointed and paid for by the insurance company? A better review system would be one which is independent of, and seen to be independent of, the insurer. Even if the ACC corporation had this role, it would give greater confidence than what is proposed.

Another problem is if an employee uses a vehicle for work (as many of many shearing employees are required to do) and is injured doing so, it is a work related injury. There is little distinction between a motor vehicle and plant machinery in many of these cases. Clause 34(3) therefore not only goes against common sense but against some of the basic premises and rulings of torts law and employment law. Employees (or their insurer) must take responsibility for these accidents. This subclause must be deleted.

Future research

State policy, through ACC, has determined the provision of employers' liability insurance and compensation exclusively for the past twenty five years. On the eve of a door potentially opening to private, competitive provision of employers' liability insurance, the larger thesis research chronicles the failure of previous legislation, current legislation (the ARCI) and the proposed Bill within the context of current social policy to meet the needs of the respective parties in the shearing industry. It is my contention that although privatisation of accident compensation may promise benefits from private enterprise competition, may improve accountability and will no doubt provide choice for the individual employer, it will also reinforce the inequitable liability basis for all parties in the New Zealand shearing industry. The foundation for such a claim is that it would be incongruent for the suspended principle of common law liability of the present scheme to be retained in a privatised provision of worker's compensation. Other questions include: Who benefits from the current arrangements? Whose

interests should be paramount?²² Should it be the injured or dependants in fatal accidents? Or those paying or underwriting the levy? Ultimately, the question on shearing contractors lips is - will they benefit from privatisation?

Footnotes

- 1 The scheme thereafter is known as ACC.
- 2 See also Dewes, D and Treblicock, M 'The Efficiency of the Tort System and Its Alternatives - A Review of the Empirical Evidence' (1992) 30 Osgoode Hall L J 58, 60; and generally, Guido Calabresi *The Costs of Accidents - A Legal and Economic Analysis* (1970).
- 3 Woodhouse Report, 1967.
- 4 ACC, (1988) at 11.
- 5 NZ Herald, 15 October 1997 (A13).
- 6 Budget announcement 14 May 1998.
- 7 See Angus Burney 'Privatising ACC Conference' A Consultative Report prepared for the Ministry of Agriculture & Forestry (MAF) per comments by David Goddard, 1998 (Chapman Tripp); David Ireland, 1998 (Kensington Swan).
- 8 'New Zealand's Accident Compensation Scheme' (1994) University of Toronto L J 44 (3) 223 at 248.
- 9 *Supra* note 7, per Ross Wilson (CTU).
- 10 Grace, D (1997) 'New Zealand Shearing'. Grace Publications, Wellington.
- 11 Peter Lyon, National President, New Zealand Shearing Contractors Association. Letter to the Chief Executive, ARCI 18 May 1998.
- 12 New Zealand Shearing Contractors Association annual conference, 20 May 1998.
- 13 *Ibid*, Peter Lyon, National President, New Zealand Shearing Contractors Association. President's Report.
- 14 For legal criticisms of the Bill the New Zealand Shearing Contractors Association (NZSCA) relied on substantive discussion established by the following in their submission: Don Rennie; Professor Ken McKinnon; and Grant Duncan. The NZSCA and author of this paper acknowledge these points, where not specifically cross referenced from the NZSCA submission to the Parliamentary Special Select Committee on the Accident Insurance Bill.
- 15 These comparisons are reflected in the nations studied in the Canadian Worker's Compensation Review, 1996.
- 16 Minister of Accident Compensation, Hon. Murray McCully 18 September 1998.
- 17 Special Select Committee on Accident Insurance Bill, Parliament 11 November 1998.
- 18 Clause 151, Accident Insurance Bill 1998 as argued in a submission by Professor K Mackinnon, University of Waikato Law School, 30 October 1998.
- 19 *Ibid*.

20 *Ibid*, Clause 209

21 *Ibid*, Part 9, with its various provisions.

22 A question put by Ian Campbell (1996).

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