

Accident Compensation and Labour Relations: The Impact of Recent Reforms

Grant Duncan and John Nimmo*

In the context of industrial relations, New Zealand's accident compensation scheme (ACC) is an internationally unique system. Recent reforms have been criticised by trade unions, however. They perceive ACC as a positive benefit of employment obtained for workers as of right in exchange for the extinguishment of the right to sue. Any threat to this is seen as a threat to workers' conditions of employment. The 1992 reforms have been criticised by business leaders, on the other hand, for not going far enough along the road of privatisation and maintaining one of the bastions of welfare dependency. In the light of these tensions, the present article examines the history of the scheme, the current reforms and some implications for the future of ACC.

The history of the scheme

Prior to 1974, accident victims in New Zealand could seek compensation and support through a number of avenues. These were summarised in a report by the Royal Commission of Inquiry (1967) headed by Sir Owen Woodhouse.

First, an injured person could seek compensation for damages through a common-law negligence action. According to the Woodhouse Report, such actions only ever benefited less than one percent of all accident victims. Moreover, the court action was seen to be too lengthy and the chance of a successful outcome unpredictable, particularly if contributory negligence could be proven.

For workers injured in the course of employment who did not seek or were unsuccessful at common law remedies, there were the provisions of the Workers Compensation Act 1956. Under this legislation employers would insure themselves against these costs with a range of private insurers, although a minority were able to self-insure. The benefits provided under this scheme were seen to be inadequate by Woodhouse because they had a low ceiling which did not compensate for actual loss of earnings. Furthermore, the scheme covered only work-related injuries. Those incapacitated due to non-work injuries were left to seek benefits from the means-tested Social Security system, or otherwise to fend for themselves.

The Woodhouse Report

The system that the Royal Commission of Inquiry (1967) proposed is summarised in five principles:

- Community responsibility
- Comprehensive entitlement
- Complete rehabilitation
- Real compensation
- Administrative efficiency.

The concept of community responsibility rests on the premise that the whole community both benefits from and promotes the very activities (employment, sports, driving, housework) which result in statistically predictable and inevitable injuries. The costs resulting from these incidents must therefore be borne by the community. This principle is clearly divergent from the individualist theories, such as public choice theory (Boston, 1991) espoused by many policy-makers today. It set the scene, however, for a system which eschews the laying of individual blame and shares the cost of injuries evenly across all funders.

By comprehensive entitlement the Woodhouse Report intended that cover for personal injury should not be determined differently according to when and where the injury occurred. Thus, a worker injured at home loses as much as a worker injured at work. The different cause of accident does not alter the outcome in terms of loss, and the loss to the individual is conceived of as a loss to the community. The Royal Commission extended the same principle to the non-worker, citing in particular "the housewife" and her valuable contribution in supporting the productive labour of workers. In short, work-related injuries should not be privileged in terms of cover by a social insurance agency.

The lengthy delays and the need to prove damages in the negligence action were seen to be a disincentive to the rehabilitation of the injured person and as a cost to both individual and community. Rehabilitation should therefore be provided as a service since money in itself does not achieve that end. Woodhouse maintained that, in his proposed compensation authority, the needs of rehabilitation should never be overshadowed by the administration of compensation benefits.

The basic meaning of real compensation lies in the tying of benefit levels to what the injured person *lost* as a result of the injury, rather than to whatever he or she may *need*. An affluent society creates for itself higher expectations and is also able to afford higher compensation levels, and both economic and non-economic, physical losses should be taken into account. Woodhouse rejected needs-based and flat-rate benefits in favour of compensation of a percentage of lost income.

Finally, administrative efficiency is self-evident, but the point had to be made given the large number of private profit-making insurers and lawyers who benefited from servicing the pre-1974 scheme. This historical point should give us pause before we assume that a

* Massey University, Albany

privatized system will automatically produce the same service more efficiently. Efficiency in the Commission's terms meant returning the greatest proportion possible of the scheme's funds into the hands of injured persons as opposed to lawyers and insurance company shareholders. Little thought was paid to efficiency in terms of the overall cost of the scheme or management decision-making.

The Woodhouse report is clearly the policy document of a time of low unemployment, high productivity, affluence and traditional gender roles. It does not consider what happens to an injured worker whose employment terminates during the period of incapacity. No mechanism was envisaged by Woodhouse for a transition from the status of accident victim to that of unemployed person. Moreover, it is assumed that such a scheme would remain affordable, and indeed was most desirable given the affluence of modern society.

The Woodhouse report clearly portrays a division of labour between the genders: while the "working man" must be supported in order to return him to productive work with minimal disruption, the housewife - who "makes it possible for the productive work to be done" - should also be covered because of her essential contribution to society (p.21). This does not translate into equal benefits, however, because such a non-earner housewife would be entitled to compensation for permanent disability only, and not for loss of earnings.

These assumptions of sustained high employment and productivity, as well as the assumption that "women" and "workers" are separate categories, show the Woodhouse report to be a product of its times, the mid-1960s.

The other major innovation suggested by the Woodhouse report was that such a comprehensive scheme be based on the no-fault principle. This meant that compensation entitlement should be assessed "irrespective of fault and regardless of cause" (p.179). It was felt that the action for damages had not been a fair and consistent remedy for injured persons in the past. Moreover, it had been pursued with success by fewer than one percent of all injured persons, while the lengthy delays involved and the need to prove fault inhibited effective rehabilitation.

From this lifting of responsibility and fault from the individual in favour of the community followed the principle that the scheme would have to be compulsory. There would be one insurer and no contracting out of the scheme. Funds would be gathered by a compulsory scheme of levies on employers and motor vehicles, with the government supplementing other costs for non-earners' non-vehicle-related injuries.

The Accident Compensation Corporation

After some vacillation by central government, it was decided to enact legislation which almost fully followed Woodhouse's recommendations. The crucial principle was that of comprehensive entitlement. Only after a change in government was the Act amended and all New Zealanders given 24-hour cover for personal injury, rather than covering workers' injuries only. The final decision to extend cover to all personal injury (thus removing many cases from the Social Security system) was hailed by many as a progressive and enlightened

decision and probably helped maintain a belief in New Zealand's "world leadership" role among welfare states at that time.

The only significant aspect of the Woodhouse Report to be altered was in compensation for permanent disability. The recommended periodic payments for permanent disability were replaced by a system of lump sums.

So, from 1 April 1974, all New Zealanders - and visitors to New Zealand - were comprehensively covered for personal injury by accident (including industrial diseases), 24 hours a day without recourse to common-law actions for damages. The scheme provided entitlement to a range of benefits to the injured person and, in fatal cases, his or her dependants. These benefits were intended to support the injured person during the period of incapacity and recovery, providing compensation related to losses sustained and costs incurred as a result of injury. This included permanent disability (lump sums based on an assessed percentage of disability), loss of earnings (set at 80 percent of previous income), funeral costs, treatment costs and rehabilitation.

The problem, however, was the eventual financial cost of the scheme. In any injury compensation scheme involving income maintenance, it is the small minority of long-term claims which eventually creates the biggest financial burden. By 1992, new claims registered and compensated in that financial year comprised 59 percent of all claims paid. They accounted, however, for only 21 percent of all compensation costs. Funding the "tail" of old claims was becoming an ever-increasing burden, and the total cost of the scheme was rising at an annual rate well in excess of inflation (see Figure 1). Between 1977 and 1992, the average annual increase in expenditure had been 22 percent. Balanced against high unemployment and poor economic growth, such escalating costs could eventually begin to outweigh the funding base which supports the scheme.

The flip-side of the problem of the cost of the scheme is how to fund it. Figure 2 shows the different sources of income for ACC by percentage of the total. Until 1984, ACC's income had been maintained at a level in excess of expenditure. This had allowed the Corporation to build up reserves of capital sufficient to cover more than 12 months costs. Through investment of those funds, the Corporation could further supplement its income, and it could absorb sudden influxes of claims from a natural disaster. The ideal would have been to maintain a fully-funded system whereby current reserves would be sufficient to pay for all future liabilities from current open claims. Figure 1, which maps annual income and end-of-year reserves alongside expenditure, shows that, while expenditure has risen smoothly, government regulation of ACC's income - and hence ACC reserves - has taken some sudden U-turns. The will to maintain a fully-funded scheme was lost in 1984. By 1987, the scheme had used most of its reserves and was virtually bankrupt. This situation was reversed only by a radical increase in the levy on employers which returned financial reserves to an adequate level by 1990. Funding policies in more recent years, however, reflect a lack of willingness to fully-fund the scheme.

ACC's financial policy is now to maintain a "pay-as-you-go" system, meaning that "the scheme has to have enough income each year to pay for that year's out-goings on claims", while the optimal level of financial reserves is considered to be the equivalent of six months' expenditure (ACC, 1992: 41). By 30 June 1993, reserves had fallen below that level.

The anomaly between injury and illness

The victims of accidents covered by ACC have enjoyed a more generous scheme in terms of income maintenance and medical treatment subsidies than did those incapacitated by illness. The latter were only entitled to a low flat-rate sickness benefit and the less generous general medical benefits. This appeared to imply that the victims of accident were considered a more "deserving" group of needy persons than the sufferers of chronic illness.

Woodhouse himself was aware of this anomaly, and believed it could only be addressed by the eventual provision of benefits of equal generosity and scope for illness. Although this had been considered seriously by the fourth Labour Government, it remains unaddressed under the new Act.

Industrial diseases have always been included under ACC cover, but aside from this, the ACC scheme has biased many doctors and patients towards establishing that a specific condition is personal injury rather than illness. Back pain, to take the most notorious example, if it can be attributed to an incident of heavy lifting rather than the ageing process, may attract subsidies for treatment and compensation for time off work which would not otherwise be available. Given the impossibility of accurately diagnosing the causes of most episodes of back pain (Haldeman, 1990), it is hardly surprising that a blurring of the boundaries of ACC cover can occur here.

Common talk around many workplaces (particularly from disgruntled managers) focuses on which of the local doctors has been identified as the "soft touch" for an ACC medical certificate. It is misleading to speak of "abuse" of the scheme in these cases, though, when such behaviour is only symptomatic of the continuing anomaly by which the creation of ACC has advantaged the injured over the ill.

The 1992 reforms

On 1 July 1992 the Accident Rehabilitation and Compensation Insurance (ARCI) Act 1992 came into force.

While many commentators have emphasised the changes and the "cuts" in the new scheme, it is important to realise that many of its original principles are still retained, particularly that of 24-hour, no-fault coverage for personal injury. This means that *anyone* in New Zealand - as well as New Zealanders travelling overseas - who suffers personal injury (as defined by the Act) will be covered by ACC. Once cover is established, usually immediately after the first medical treatment, the injured person may then apply for further entitlements, such as weekly compensation, rehabilitation, household help or independence allowance.

The primary intentions of the ARCI Act 1992 were to make the accident compensation scheme affordable and fairer. The reformist intentions of the 1992 Act are clearly summarised in its own words: "... to establish an *insurance-based* scheme to rehabilitate

Source: ACC Annual Reports. NB: The 1991 Annual report covered 15 months due to the change of balance date to 30 June. That report's income and expenditure figures were therefore multiplied by a factor of 0.8 for comparability.

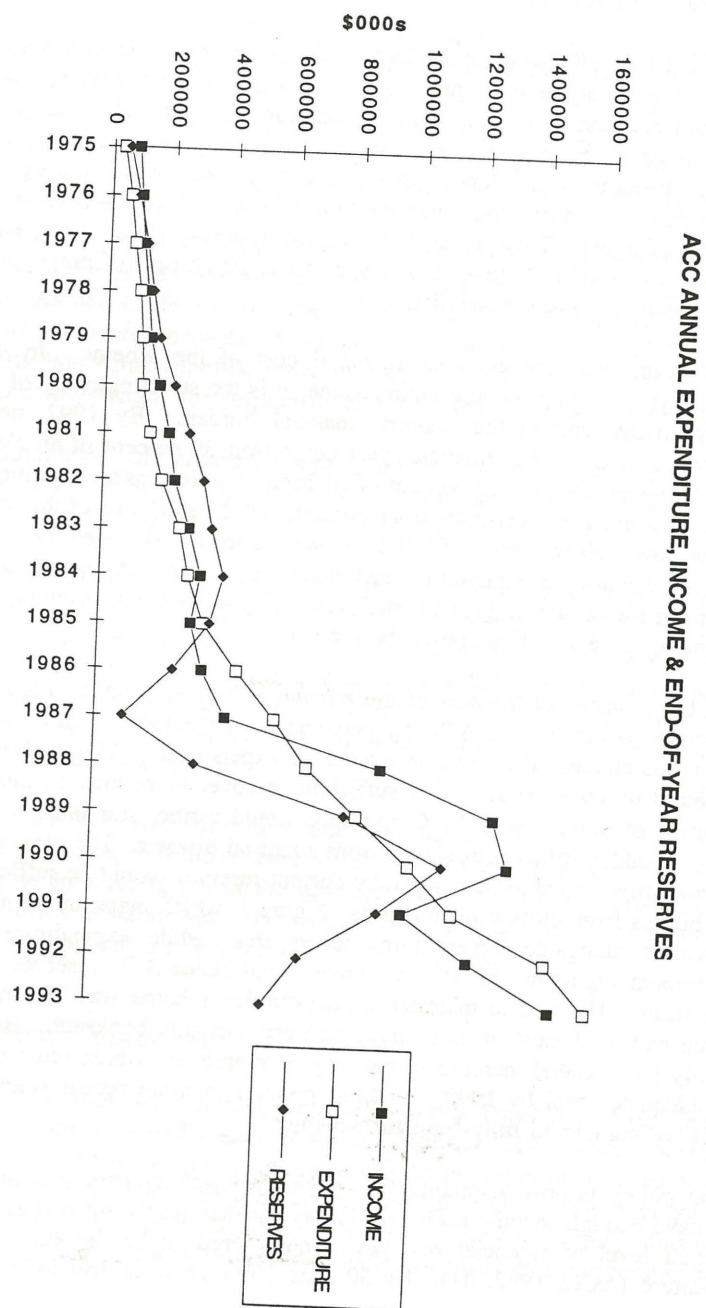


FIGURE 1

and compensate in an *equitable* and *financially affordable* manner those persons who suffer personal injury" (Long Title: italics added).

An explicit intention of the National Government was to change ACC from a rights-based social insurance agency which disburses benefits into an organisation operating on commercial insurance principles paying tightly defined entitlements to injured persons covered under the Act. This means that everyone who benefits as an insured person should contribute financially to the scheme, and it should be clearly delineated as to exactly what benefits would be available. Furthermore, premiums (a term which replaced the old "levies") would be rated according to the cost of claims from an employer - or even an individual. In other words, you get what you pay for, and pay for what you get. The exception to this rule is the non-earner whose premium is paid by a Government contribution.

The notion of making the scheme "financially affordable" reflects the perception that the scheme was fast becoming unaffordable (see Figure 1). Affordability is a relative notion, however - it is relative to one's ability to pay, and the priority accorded to the product concerned. As a proportion of GDP, the cost of ACC had risen from 1.04 percent in 1987 to 1.57 percent in 1991. Individual employers were paying, on average, \$1.71 per \$100 of payroll in the year to 30 June 1992. The perception of the affordability of such costs must be affected by the ideological commitment of government, employers and taxpayers to the socialised, compulsory scheme in place. In other words, it should not be taken for granted that the old scheme was no longer affordable.

As described above, the scheme is funding a growing "tail" of old claims. Since over half its claims expenditure is in income maintenance to injured persons, it is obviously the long-term maintenance of the injured earner on compensation for loss of earnings which is proving to be the greatest cost burden. It is these cases which will be targeted in order to achieve the Government's objective of establishing a "financially affordable" scheme.

ACC's 1993 financial statements - which were released to Parliament only under pressure from the Opposition - show that the new scheme has already achieved a reduction in the rate of growth in expenditure (see Figure 1). This is despite the clearing of a large backlog of lump sum entitlements under the old Act. Much of these savings has come through reducing the levels of treatment fees and through a reduction in the numbers of new work-related claims.

Cover under the new Act

Another obvious way to make the scheme more affordable would be to limit how many claims can be awarded cover. Restricting entry into the scheme required that legislators ensure that the categories of cover and the definitions of key words such as "accident" be clear, unambiguous and able to exclude incontestably the kinds of borderline "injuries" which have in the past been allowed into the scheme and broadened its boundaries.

The five categories of cover under the Act are: personal injury caused by accident, occupational disease, medical misadventure, consequences of treatment for personal injury and sexual abuse. The great majority of claims come under the heading of personal injury caused by accident, and so it was crucial that the conditions defining the word "accident" be very clear in order to prevent a rapid growth in costs.

At the introduction of the Bill, the key paragraph in the interpretation of "accident" read: "A specific event external to the human body where that event involves the application of an external force or resistance that is abnormal in application or excessive in intensity . . .". By the time the Bill had become law, this read: "A specific event or series of events that involves the application of a force or resistance external to the human body and that results in personal injury, but does not include any gradual process . . .".

The two main changes were the addition of the phrase "series of events", and the removal of the phrase "abnormal in application or excessive in intensity". This created several problems for the Corporation in controlling entry into the scheme. ACC policy continued (after the implementation of the new scheme on 1 July) to interpret the definition of accident as though the phrase "abnormal in application or excessive in intensity" were still there. This is more than academic in its effect. It had an impact particularly on sports injuries. For instance, if a sportsperson had been injured by simply running or jumping in a perfectly normal manner, the Corporation would refuse to cover the injury. Some of these kinds of injuries can be particularly severe. Note also that the definition of "accident" provides that "the fact that a personal injury has occurred shall not of itself be construed as an indication or presumption that it was caused by any such event or series of events". In other words, just because you have an injury doesn't mean it was one caused by an accident as covered by the Act.

The other new difficulty was in the distinction between a series of events and a gradual process. Personal injuries caused by gradual process are only covered if they are work injuries, and a whole series of conditions applies to these. The addition of the phrase "series of events" to the definition of "accident" re-opened opportunities for cover under the Act. For instance, an injury caused by long-distance running could be said to be due to a series of events and not a gradual process.

A clamour of complaints against the Corporation's interpretation of the Act arose as patients began to feel the effects of the new criteria for ACC cover in July 1992. The main critique came from the Medical Association, which argued that a person injured while running should be covered because the force of gravity is an external force and the ground is an external resistance (Laracy, 1992). The Corporation's continued insistence that it be somehow *abnormal* force or resistance was not legitimate.

Eventually, the Corporation backed down purely on the force of lobby group action. A bulletin (Accident Rehabilitation and Compensation Insurance Corporation, 1992) was published for treatment providers to explain the new definition of "accident". It states quite clearly that injuries caused by normal actions such as running long distances or twisting while getting out of bed are covered by the Act, thus including most forms of "sprains and strains". A gradual process is usually considered to be of more than a month's duration, as opposed to anything over 24 hours, as the original policy interpretation had maintained.

Those legitimate claims that were previously declined cover were able to be reviewed by the Corporation, and the initial decisions were overturned.

In effect, then, despite the Corporation's attempts to control entry to the scheme, the policy on cover for personal injury caused by accident did not succeed in making ACC harder to get into. One of the main means for improving the affordability of the scheme had failed, much to the relief of many doctors and their patients. Although a cost-cutting measure was clearly behind the attempt to define "accident" restrictively, there is relatively little that was covered under the old legislation that is not covered now. The new Act attempts to be more precise, but no definition will ever be water-tight. Some things which are now specifically excluded, though, are injuries or illnesses due to non-physical stress and the effects of passive smoking and air-conditioning systems. These all have implications for the workplace. Traumatic mental consequences of witnessing another person's death will also be excluded now.

Campbell (1992) argues that the definition of "accident" should be established in the courts by precedent, rather than by statute. His concerns over the impacts of the new interpretation may have been justified at the time his article was written, but subsequent events should have alleviated those fears. Some finer aspects of the new definition, such as the distinction between "series of events" and "gradual process", will no doubt be decided in the long term by precedent.

As for industrial illnesses (section 7 of the Act), their definition will always be much more difficult because their causes are so often harder to identify. The basic criteria here are: first, the identification of a causal property or characteristic in the worker's job or work environment; second, that same causal property is not found "to any material extent" in the worker's activities or environment outside work; and, third, performing that worker's job in his or her place of work creates a risk of suffering the disease which is "significantly greater" than for those who do not do that job in that environment. For cases such as hearing loss, occupational overuse syndrome and diseases covered by section 7, it will clearly be a matter of continual debate as to what is meant by "to any material extent" and "significantly greater risk". Here there is plenty of opportunity for the courts to interpret the law.

The effects of experience rating

Although previous legislation empowered ACC to implement an experience rating system, it is only under the new scheme that it has been more thoroughly pursued. Experience rating means that an employer's premium is adjusted up or down according to a formula which accounts for the payments on claims received up to five years previously. The present scheme assesses only historical costs rather than prospective risks. It presently applies only to employers, particularly those paying over \$10,000 per annum in premiums, but the Act does allow such rating to be applied to individuals.

Naturally, experience rating has caused employers to look more critically at any ACC claims arising from their workplaces. This has had various effects on the relationship

between an injured worker and his or her employer. The employer may attempt to dissuade the employee from lodging a claim, possibly by reimbursing any expenses directly, by on-site treatment and alternative duties, or by less scrupulous means.

If a claim is inevitable, the employer has the right to dispute its status as work-related. These disputes are arbitrated, in the first instance, by an ACC manager. In many cases, the outcome of this dispute will only affect the employee in respect of the first week's compensation which would be paid by the employer for a work injury. For other cases, especially injuries caused by gradual processes, such as industrial diseases or occupational overuse syndrome, the stakes are higher. These injuries can only be covered by ACC if they are work-related. If the employer proves otherwise, then no compensation can be paid by ACC.

Because of the financial impact on the employer of the outcome of work injury disputes, some would argue that this procedure is reintroducing the attribution of fault into the scheme. Making such a determination, can, in many cases, be extremely difficult because of the complexity of the legislation and the likelihood of conflicting evidence being presented. The Corporation's decision-making powers in this respect do add up to the power to attribute fault to the employer.

A more constructive response to experience rating is for the employer to invest more in accident prevention. At present, there appears to be conflicting opinion on the evidence that such systems do reduce accident rates. Chelius (1991) believes that experience rating can have a positive role as an incentive for employers to improve safety. Campbell (1989), on the other hand, claims that there is no adequate evidence to back this up. The Ministerial Working Party accepted this latter view and justified experience rating on the grounds of equity. Birch, as minister responsible for ACC, has held an ambiguous position on this issue, however. On the one hand, he accepts the Working Party's position, while saying that experience rating "will remind employers of the cost benefits of reducing the incidence of accidents" (Birch, 1991: 62, italics added). On another occasion, however, he referred to the Health and Safety in Employment Act as a "big stick" while experience rating represents "the carrot of financial reward for employers with good safety records" (Birch, 1992b: 3). It is difficult to tell whether he intended experience rating to benefit workers by improving safety and health management, or only to benefit employers by spreading costs more equitably.

In any case, previously, poorer performing employers had been unfairly subsidised by those with lower claims costs. Although justifiable on equity grounds, it is not certain that more effective accident prevention in industry will result from experience rating. Even if fewer work injuries and ACC claims do occur in future, it will not be possible to attribute this to experience rating alone, as the new Safety and Health in Employment Act 1992 also places new expectations and sanctions on employers and employees in this area.

Since experience rating takes account of the overall costs of claims, it can also be affected by the length of time off work following an injury. Prompt rehabilitation of workers who have been injured at work will also reduce the employer's experience rating. The danger here is that employees may be pressured into returning to work inappropriately early. This should be avoided with adequate medical supervision. The greater interest likely to be

expressed by an employer in an early return to work would, in general, facilitate rehabilitation.

Experience rating therefore will have effects on the relationship between employer and employee in certain specific ways. Work injury disputes are a new bone of contention not encountered under previous legislation, and the greater accountability applied to employers will mean much greater scrutiny of compensation claims.

The exempt employers scheme

Probably the most significant "thin end of the wedge" of privatisation of accident compensation is the provision in the new Act for exempt employer status. This will mean that employers will be able to assume direct responsibility for work injuries to their employees for the first 12 months after the date of injury. They must use the same conditions to assess whether the injury is covered as a work injury and provide the same rehabilitation, treatment and compensation entitlements as well as administering their own review procedures when the injured employee disputes a decision.

It is this latter provision which has created the greatest suspicion from unions (Barber, 1993). The exempt employer makes all initial decisions regarding the injured person's cover and entitlement. In the case of a dispute over any decision, however, the management of a review process, traditionally conducted by independent officers of ACC, will be conducted by the employer. The integrity and fairness of the exempt employers scheme thus rests to a large extent with the integrity of those employers who join the scheme. There is a potential for the unscrupulous manipulation of claims in order to reduce the employer's costs. Exempt employers may avoid accusations of self-interested manipulation if they contract an independent consultant to conduct review hearings.

To give a balanced view, some employers will tend to be more responsive and lenient in favour of their own employees than ACC would. Exempt employers should be able to provide immediate care and rehabilitation to injured employees to encourage an early return to work. The scheme gives a financial incentive to manage the full range of an injured worker's needs from medical treatment to alternative duties whereas previously employers had left this entirely in the hands of ACC. By managing the administrative and financial aspects of claims, the employer's closer knowledge of earnings should mean that they can provide prompt payment of weekly compensation without the employee having to approach an unfamiliar organisation.

Exempt employer status will create an opportunity for private sector insurers to begin to establish a commercial relationship with exempt employers. Commercial insurers will seek to provide alternative cover for the 12 months for which the employer is directly liable for an injured worker's compensation. If the rebate from the ACC premium is adequate, this may justify the employer's adoption of full or partial commercial insurance for any direct liabilities. Such an arrangement would be particularly advisable to guard against the effects of a low probability event causing severe injuries.

According to Derek Larsen, a risk management consultant and insurance broker, "the insurance industry sees the new ARCI Act as an opportunity to offer alternative finance methods, both to individual employers or groups of employers should they elect to be exempt from insuring with ACC. Insurers see themselves assisting particularly where a small employer may not have a sufficiently large asset base to self-insure the risk" (Larsen, 1992).

The earners' premium

Employers, who historically have contributed most of the funding of the scheme, were in effect paying for injuries which had not occurred at work. Injuries not caused by employment could not have been prevented by the employer, and so that sector of the community was financially responsible for occurrences beyond its control.

Government accepted this argument. From the perspective of the Royal Commission (1967), however, the employer still has a direct interest in the financial support and rehabilitation of injured workers no matter where or when the injury occurred. A good employer will want experienced staff to return to work as promptly as possible, no matter what the cause of absence. Not all employers were insistent that the costs of workers' non-work injuries be removed from their account.

Nevertheless, in order to help spread the increasing burden of cost, the ARCI Act establishes a premium (levy) from individual earners through the pay-as-you-earn taxation system. This is intended to cover the costs of non-work injuries sustained by earners. This premium will increase in rate and size of contribution as it picks up more of the "tail" of claims. The employers' contribution will thus slowly reduce (see Figure 2).

Funding under the new Act operates on a more user-pays principle than before. Thus, earners now pay directly for the cost of non-work injuries. A levy on petrol means that all motor vehicle drivers - and not just owners - pay for road injuries. Medical practitioners will begin to pay a premium for medical misadventure claims. This, along with experience rating, means that the costs are tied more closely to the user, and the funding is extended to more sources, thereby spreading the financial risk.

The employers' account

While it was always recognised that the cost of ACC levies was passed on by industry to the consumer, the government wishes to make New Zealand products and labour costs more internationally competitive. Shifting ACC costs of non-work injuries directly to the worker is undoubtedly an outcome of this strategy. The benefits of this to employers have not been immediately realised, however. The new Act makes employers pay for the public health costs of treating work injuries. This and the continuing costs of pre-1992 non-work injuries have so far cancelled out any significant reduction in employers' premiums. ACC's forecasting of income and expenditure in the employers' account for the 1993 financial year was significantly inaccurate: although a shortfall of income was expected, ACC received

less in premiums and paid more in claims than was expected. This left the employers' account with only two months worth of reserves at 30 June 1993. It is likely that expenditure on work injuries will decrease in the 1994 year. It is unlikely, however, that significant reductions in employers' premiums will be possible in the short term, unless the account is to be managed on close to nil reserves.

Given the possibility of the deregulation of work injury insurance, the fact that much of the employers' future liabilities is presently unfunded raises certain issues. If employers were able to cease contributing to ACC, their future liabilities would need careful consideration. Individual experience rating of employers now makes these costs at least known. If this history of claims is available to the insurance industry, they could provide a competitive quotation in an open market against the ACC levied cost. In effect, the insurance industry could pay the employer's remaining ACC premiums on their behalf, thus securing that customer's business through a single premium.

The present political environment may make such a discussion purely academic, however. It seems unlikely that the Government in its present term will be able to muster the support for legislation deregulating any portion of ACC. Political pressure may instead bring about higher levels of compensation, in which case the rising costs would indicate the need for an adequate reserve in the Employers' Account.

The abolition of lump sums

The main difference which New Zealanders have noticed about the new scheme is the removal of entitlement to a lump sum award. These in the past represented only about 20 percent of ACC's total expenditure. Their removal, however, means that an important aspect of the compensation scheme - which replaced the right to seek compensation for damages under common law - is no longer available. For non-earners (for example, children and their carers) who do not qualify for weekly, earnings-related compensation, the lump sum was their only significant income from ACC. It is now replaced by the independence allowance which will be a maximum of \$40 per week. It is already apparent that even quite severely injured claimants will receive less than half the maximum.

The old lump sums were always known to be much less than would be available by means of law suit or private insurance. The niche that the new legislation leaves open here is already being filled by private insurers offering lump sum entitlements (of, say, \$50,000) for death or disability.

The concept of a lump sum payment is central to any system of compensation for injury or damages, and its removal from ACC entitlements has created a public perception that ACC is not offering real compensation for personal injury. Many injured people will feel they may have received a better deal from private insurers or by pursuing the common-law right to sue denied them by the ARCI Act. Such public dissatisfaction has increased political pressure for a resumption of the right to sue.

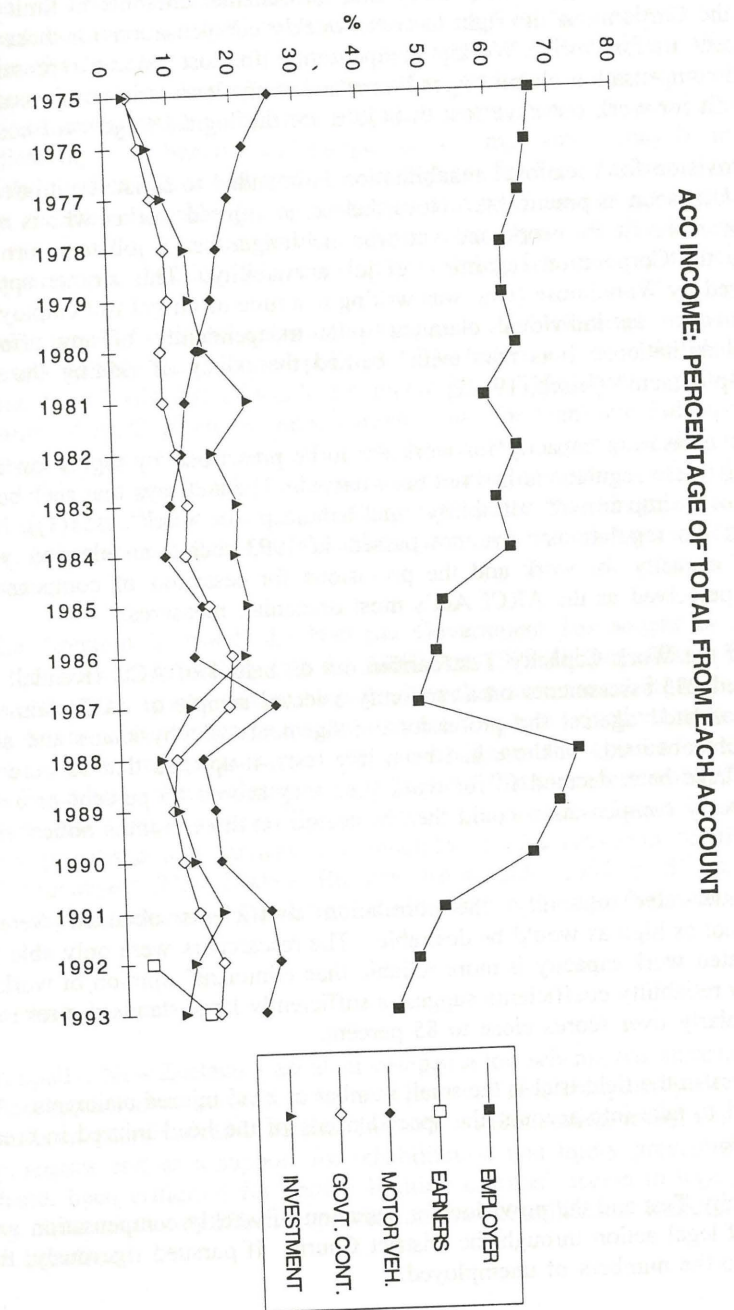


FIGURE 2

The assessment of capacity for work

To ensure the affordability of the accident compensation scheme, the new legislation, having failed to restrict significantly entry into the scheme, attempts to limit expenditure by granting the Corporation the right to cease weekly compensation for those assessed as over 85 percent fit for work. Weekly compensation for lost income represents over 50 percent of all compensation claims expenditure, and so the long-term compensated workers who may be fit for work but have lost their jobs are the logical targets for cost-cutting.

The Act's provision for vocational rehabilitation is intended to assist the injured person to return to work as soon as practicable. Nevertheless, an injured worker who is measured as 85 percent or more fit for work and yet who no longer has a job to return to can be disadvantaged by the Corporation regardless of job availability. This stricter approach was never envisaged by Woodhouse (who was writing at a time of virtual full employment), and may be applied to an individual claimant quite independently of any efforts to use vocational rehabilitation. It is the "teeth" behind the policy of ridding the scheme of "hidden unemployment" (Birch, 1992a).

The scales for measuring capacity for work are to be prescribed by regulation and, at the time of writing, these regulations had not been passed. The Act says that such scales "may take into account impairment, disability and handicap for work" (s51(1)). It is not surprising that the regulations were not passed in 1993, being an election year. The assessment of capacity for work and the provisions for cessation of compensation may eventually be perceived as the ARCI Act's most draconian measures.

A field trial of the Work Capacity Test carried out on behalf of ACC (Kendall and Roy, 1992) conducted 235 assessments on a randomly selected sample of ACC claimants. The results were validated against the professional judgements of physicians and significant correlations were obtained. If these had been live tests, it appears that 55 percent of the sample would have been deemed fit for work (i.e., they scored 85 percent or over on the test). Their weekly compensation could then be ceased on three months notice, regardless of job availability.

In assessing inter-rater reliability, the correlation coefficients obtained were largely significant but not as high as would be desirable. The researchers were only able to report that "the calculated work capacity is more reliable than clinicians' opinion of work fitness" (p.23). The low reliability coefficients suggest a sufficiently large standard error to warrant disputes, particularly over scores close to 85 percent.

Another weakness in the field trial is the small number of head injured claimants. ACC has repeatedly failed to take into account the special needs of the head injured in creating its assessment tools.

The Work Capacity Test and the provision for cessation of weekly compensation are likely to be a source of legal action through the District Courts. If pursued rigorously, they will also contribute to the numbers of unemployed.

The context of a "free" labour market

The ARCI Act 1992 also needs to be seen in the context of an overall legislative programme of labour market reform carried out by Mr Birch. Basic premises of the Employment Contracts Act 1991 are, first, that it is best for the employer and the employee to determine the conditions of employment most appropriate to their specific situation, and, second, the value of freedom of association. Legislation may set minimum (or minimal) standards and sanctions, but, by this reasoning, there should be no further compulsory systems dictating what benefits and obligations of employment may be in place. As an aspect of the total conditions of employment enjoyed by New Zealand workers, ACC is a significant element. A public policy consistent with the Employment Contracts Act would therefore simply set a minimum level of entitlements payable for work injuries, and allow individual employers freedom to choose an appropriate insurer to underwrite the risk.

Legislative control of citizens' common law rights would also seem to be inconsistent with government's current deregulatory policies. The return of the right to sue would be a prerequisite for privatisation of accident compensation. This in turn is a central policy issue in the future of ACC given the implications it has for legal and industrial affairs. The recent campaign by the Engineers' Union to return "the right to sue the unsafe employer" (Speden, 1993) is a predictable response to the perceived removal of "real compensation" under ACC. It implicitly provides further backing for the deregulation of work injury insurance, however, and therefore should be promoted by unions only if they also desire privatisation.

Given the direction in which the National Government has sought to steer the labour market, it is perhaps surprising that the ARCI Act 1992 did not effect a full deregulation of ACC work injury cover. Given the provisions that were passed, however, it is likely that the 1992 Act is only intended as a station on the way to a privatized system (see: Duncan, in press). Concerning privatisation, we cannot ignore the opinion of the New Zealand Business Roundtable which clearly does not believe that the reforms of 1992 go far enough. They state that "The Accident Compensation Corporation should be corporatised and ultimately privatised and barriers to competition in the provision of accident insurance should be removed" (New Zealand Business Roundtable, 1992, p.35). It is now doubtful, however, that the necessary legislation would make it through Parliament.

Conclusion

Internationally, New Zealand's accident compensation scheme has attracted attention for its unique comprehensive, no-fault cover and its socialised, compulsory distribution of costs. This has been perceived as beneficial in terms of eliminating many costly and drawn-out legal processes and as a support for rehabilitation and injury prevention. It has, on the other hand, been criticised for unduly limiting citizens' access to legal remedies and for creating disincentives to effective prevention and rehabilitation while providing relatively meagre benefits.

The fate of the scheme will most probably be decided by its escalating costs, however. The financial costs are always easier to measure than the social benefits of any such programme. The ARCI Act (1992) has clearly been drafted with the benefit of the employer in mind. Although, in terms of privatisation of choice, it does not go as far as the Employment Contracts Act, it is similar in that the emphasis is placed on equity and cost-effectiveness for employers. Furthermore, it creates potential for workers to be disadvantaged if an employer chooses to act unethically (for instance, it raises the likelihood that an employer may discourage the lodging of a legitimate claim). It effectively leaves many New Zealanders, especially the non-earner, without real compensation for permanent disability and with no right to sue.

The new Act creates potential for new tensions and disputes in workplaces that were not encountered before, particularly with work injury disputes and experience rating. On the whole, the reformed scheme is more equitable to employers, especially in removing their payment of the costs of non-work injuries. From the point of view of workers, the reaction has been unfavourable: they now pay more in terms of premiums (essentially a new form of taxation) but are entitled to less in terms of "real compensation".

There can be little doubt that the ARCI Act deliberately creates an environment which will favour the ultimate deregulation and privatisation of accident compensation, in line with the wishes of the Business Roundtable. This would entail the right to proceed with negligence actions. If this policy were carried through, it would have major implications for occupational safety and health and industrial relations. Many New Zealanders would welcome the right to sue, but many others would regret the loss of a comprehensive social insurance system on which they had come to rely. With such a slim majority in the House, however, the logical conclusion to this trend toward privatisation may not be achievable for the present Government.

References

- Accident Compensation Corporation (1992), *Annual Report 1992*, Wellington: Accident Compensation Corporation.
- Accident Rehabilitation and Compensation Insurance Corporation (1992), *Cover, Personal Injury and Accident Explained*, Wellington, Accident Rehabilitation and Compensation Insurance Corporation.
- Barber, J. (1993), Employers to set own compo in test scheme, *Sunday Times*, 11 April, p.1.
- Birch, W.F. (1991), *Accident Compensation: A Fairer Scheme*, Wellington, Office of the Minister of Labour.
- Birch, W.F. (1992a), Accident Rehabilitation and Compensation Insurance Bill 1991 [sic]: Second Reading, Speech Notes, 19 March.

- Birch, W.F. (1992b), *The Government's Perspective*, Unpublished paper delivered to "ACC: the new insurer", Auckland Employers' Association Conference, Auckland, 6 August.
- Boston, J. (1991), The theoretical underpinnings of public sector restructuring. In Boston, J. et al. (eds), *Reshaping the State: New Zealand's Bureaucratic Revolution*, Auckland, Oxford.
- Campbell, I. (1989), *Experience Rating for Accident Compensation: A Necessity or Wishful Thinking?*, Occasional Paper 1989/4, Palmerston North, Massey University.
- Campbell, I. (1992), Accident Compensation and Prevention. *New Zealand Journal of Industrial Relations*, 17(3): 347-358.
- Chelius, J.R. (1991), Role of Workers' Compensation in Developing Safer Workplaces, *Monthly Labor Review*, 114: 22-25.
- Duncan, G. (in press), Accident Compensation: The Trend Toward Privatisation, *Public Sector*.
- Haldeman, S. (1990), Failure of the Pathology Model to Predict Back Pain, *Spine*, 15: 718-724.
- Kendall, N. and Roy, C.W. (1992), The New Zealand Work Capacity Test: Report of a Field Trial, Unpublished report to the Accident Rehabilitation and Compensation Insurance Corporation.
- Laracy, L. (1992), New Accident Definitions Leave Patients Confused, *New Zealand Doctor*, 3 September: 60.
- Larsen, D. (1992), Alternative Agencies, Unpublished paper delivered to "ACC: The New Insurer", Auckland Employers' Association Conference, Auckland, 6 August.
- New Zealand Business Roundtable (1992), *Budgetary Stress: Why New Zealand Needs to Reduce Government Spending Deficits and Debt*, Wellington: New Zealand Business Roundtable.
- Royal Commission of Inquiry (1967), *Compensation for Personal Injury in New Zealand*, Wellington: Government Printer.
- Speden, G. (1993), Unions Seek Return of Right to Sue, *New Zealand Herald*, 6 September, s.1, p.3.