SOME REFLECTIONS ON THE WOODHOUSE AND ACC LEGACY

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In this summary of the symposium, Alan Clayton urges New Zealanders to recognize the uniqueness and importance of the original Woodhouse vision and the resulting Accident Compensation regime, but also encourages New Zealanders to look towards improving the system. Having placed the Woodhouse vision within its historical context, the author argues that it has stood the test of subsequent developments well but he criticises the failure to properly focus on accident prevention. While he notes a recent change in both political and administrative commitment to accident prevention, he believes that there is clearly still much work to be done.

I INTRODUCTION

This conference has brought together a diverse range of persons to consider a number of aspects of the origins and historical development of the New Zealand Accident Compensation Corporation (ACC) scheme. It is an exercise whose utility has been enhanced by the participation – both directly as presenters and indirectly as audience interlocutors – of many of those who, in the words of the title of Dean Acheson's memoirs, were "present at the creation".

In providing some form of commentary to these deliberations, I have chosen to follow the general contours of the conference's title, "Looking Back at Accident Compensation: Finding Lessons for the Future". First, "looking back". The ACC scheme represents one of the seminal events in a process of twelve decades of social policy experimentation in dealing with the consequences of personal trauma in society. In a process of foreshortening of perspective that often results from familiarity, most New Zealanders perhaps do not appreciate the uniqueness of, and boldness of vision that underpins, their everyday arrangements for dealing with personal injury. However, different and striking as the current ACC arrangements are, in terms of an international perspective, they differ significantly, in some important structural and operational aspects, from the blueprint that was set out in the Woodhouse report. Consequently, it is appropriate to consider the

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legacy of the Woodhouse report(s) – plural given the fact of the Australian initiative of the mid 1970s – separately from that of the ACC scheme itself.

Secondly, "finding lessons for the future". As this is a lead-in to a conference next year that will consider, in greater detail, the viability of the Woodhouse framework and of the ACC model, for the future evolution of the New Zealand scheme and as a possible basis for policy development in other jurisdictions, I will confine myself to positing some headings and a limited exploration of some lessons that the author believes can be drawn from the quarter century experience of the ACC scheme to date.

II LOOKING BACK AT ACCIDENT COMPENSATION

A Compensation Arrangements for Personal Trauma

In his paper for this conference, Brian Easton has provided a grand historical sweep of compensation arrangements going back a thousand years. However, modern systems for accident compensation have existed for less than twelve decades with their *fons et origo* lying with Bismarck's Imperial German Accident Insurance Law which was promulgated on 6 July 1884 and came into force on 1 October 1885. The first such initiative in the Anglophonic world was the English Workmen's Compensation Act of 1897 and New Zealand led the rest of the jurisdictions encompassed by the British Empire in enacting similar legislation in 1900.

The reasons for the emergence of workers' compensation initiatives are many and varied. In Bismarck's case it was, at least in large part, a pre-emptive strike by the Iron Chancellor to undercut the appeal of the emerging Social Democratic Party and an attempt to garner working class support for the Emperor and the German imperial system. The English legislation of 1897 represented a somewhat maverick Tory response, imbued with *noblesse oblige*, to once again "dish the Whigs" and their attempts at reform through successive amendment of the Employers' Liability legislation. However, behind such more immediate motives, there lay the need to respond to the human carnage wrought by the process of industrialisation commonly called the Industrial Revolution. In countries whose legal systems were based on the principles of English common law, the fashioning by a conservative judiciary of a series of employer defences – the "unholy trinity" of the doctrines of common employment, voluntary assumption of the risk and contributory negligence as a complete defence – meant that relatively few victims of occupational trauma could successfully claim compensation even if they had the financial means to pursue an action for damages. Workers' compensation represented the supplanting of the notion of "fault" for that of "cause" – "arising out of and in the course of employment" – as the defining trigger that could enable compensation to injured workers and some of those afflicted with occupational disease.

Another major cause for death and serious injury emerged with the development of the motor vehicle. The first modern petrol driven internal combustion engine automobile was developed by Karl Benz and appeared on the streets of Mannheim on 3 July 1886. This three-wheel vehicle and the four-wheel counterpart released by Gottlieb Daimler in the same year were not fast moving

vehicles. A decade later the first recorded motor vehicle accident fatality – that of Bridget Driscoll – occurred on August 17 1896 in Crystal Palace, London, through the agency of a "horseless carriage" travelling at 4 mph. As motor vehicles became faster and more numerous the death and injury toll rose exponentially. Over the next hundred years some 200,000 pedestrians alone in Britain would die as the result of motor vehicle accidents with more than ten times that number seriously injured.

Despite the enormous loss of life and serious injury as the result of accidents involving motor vehicles, a response in terms of no-fault compensation arrangements proved slow in eventuating and then in a miniscule number of relatively circumscribed schemes. The first such scheme did not emerge until 1946 when the Saskatchewan legislature in Canada enacted a system providing relatively limited no fault benefits. In his paper, Richard Gaskins refers to the debate in the United States concerning the possibilities for no-fault compensation arrangements for personal injuries arising from motor vehicle accidents that extends to the 1930s and even earlier and which re-emerged with certain vigour in the 1960s and fostered, particularly at an academic level, a plethora of different plans. During the 1960s a number of American states introduced no-fault schemes but these were overwhelmingly very limited in scope, often in the form of essentially tokenistic add-ons to the tort system. Even these efforts stopped in the mid-1960s, largely for reasons that are so masterly mapped out in Richard Gaskins' paper. In Australia, two states – Victoria and Tasmania – introduced add-on no fault motor schemes in 1974.

Outside of workers' compensation and the limited number of no-fault motor vehicle accident compensation schemes, the world of specific no-fault accident compensation schemes essentially comes to a halt. The major qualification to this statement lies in the area of patient injury. However, apart from a few jurisdictions with very limited measures for a narrow class of infants with severe birth-related injuries, this is essentially a Nordic phenomenon represented by the Swedish Patient Insurance and Finnish Patient Injury Act schemes.

Workers' compensation, in Sir William Beveridge's phrase, was the pioneer system of social security. Social security arrangements, either based on social insurance principles or financed from general taxation revenue, have developed over the course of the twentieth century to supply a general social safety net and provide income and other support for those afflicted by a range of personal vicissitudes including those of injury and illness. While in Europe, particularly in the period following the Second World War, there was a movement for the integration of workers' compensation arrangements into a wider social insurance framework, this was not the Antipodean way and in both New Zealand and Australia accident compensation and social security have remained largely separate domains. The distinctions, differences and separate processes are ably sketched out in Margaret McClure's paper tracing the uncertain evolution of social security policy development during the 1970s.

It is against this backdrop that New Zealand's pioneering comprehensive, no-fault accident compensation scheme providing 24-hour coverage for traumatic injury and some other conditions

must be viewed. It perhaps represents the major twentieth century milestone in a tradition of social progressivism that, especially during the late nineteenth century and early twentieth century, made New Zealand the envy of many European social theorists, a tradition that the French writer, Albert Metin, characterised as "socialisme sans doctrines".

B The Place of the Woodhouse Reports

The modern history of experimentation in social policy development in respect of accident compensation arrangements to which reference has been made above has generated a myriad of reviews and reports. The overwhelming bulk of such reports are dry, technical reviews ploughing within existing furrows and rarely straying beyond established forms. However, there have also been a number of influential reports that have broken new ground and laid the basis for often radical change to existing structures and practices. The introduction of workers' compensation schemes in the various United States and Canadian jurisdictions, from the first decade of the twentieth century, was usually preceded by a commission of inquiry. Some of these inquiries produced elegant and insightful reports, such as the 1916 report of the commission chaired by Arvid Pineo in British Columbia. As schemes developed, there was a need to review their performance and inquiries were appointed to discharge this task. Perhaps the most ambitious of these was the 1972 report of the National Commission on State Workmen's Compensation Laws, chaired by the economist John Burton Jr, charged with the task of undertaking a national review. The report outlined a range of gross inadequacies in the benefit and other arrangements among the various United States schemes and set out 19 essential recommendations as constituting benchmark minimum requirements. In part, the fear that failure to move on at least some of these minimum requirements would invite mandated federal action, prompted many states to move in the direction of bringing their schemes towards compliance with the 19 recommendations.

The inadequacies and failings of the common law action for damages has been a recurrent subject of investigation, whether by formally constituted commissions of inquiry (such as the Pearson Royal Commission in the United Kingdom), other committees (such as the famed 1932 report into the compensation of victims of motor vehicle accidents by the Columbia University Council for Research in the Social Sciences) or treatises by individual academics (such as Terry Ison's influential 1967 work, *The Forensic Lottery*).

However, over this sweep of history, three reviews/reports stand out, at least in the experience of the Anglophonic world, as particularly noteworthy. The first is that conducted by Sir William Meredith, an Ontario judge (and later Chief Justice) appointed in 1910 by the then Premier of Ontario, James Whitney, to review the current workers' compensation arrangements and recommend changes. In a series of reports, Sir William Meredith excoriated the existing arrangements, based on the English legislative model, as primitive and barbarous and recommended a new approach based on five concepts, now known as the "Meredith principles". The Ontario legislature enacted a statute, based on the Meredith recommendations, that came into force on 1 January 1915. This model was subsequently adopted by all other Canadian provinces.

The second seminal report is that by Sir William Beveridge, in 1942, which laid the basis for the modern British welfare state. Beveridge had an established reputation as an authority on various aspects of social insurance. As the recognised authority on unemployment insurance he joined the Board of Trade in 1909 and helped implement a national system of labour exchanges. His views helped shape the pioneer English social insurance measure, the National Insurance Act of 1911. In 1940 Ernest Bevan, then Minister of Labour, asked Beveridge to review the existing social security measures which had developed in a somewhat unsystematic manner and make recommendations. The report on Social Insurance and Allied Services was published in December 1942 and recommended a coordinated system of benefits for those who were sick, unemployed, retired or widowed.

The third member of this triumvirate is Sir Owen Woodhouse and his 1967 New Zealand and 1974 Australian reports. The New Zealand Woodhouse review was established as the result of complaints about a number of inadequacies of the then workers' compensation system in New Zealand, especially its benefits structure. A liberal interpretation of the terms of reference for the Royal Commission by Mr Justice Woodhouse resulted in a report that recommended the move to a comprehensive no fault system that encompassed arrangements for personal injury generally and not simply such injuries that were occupational in nature. The establishment of the Australian Woodhouse review – the National Committee of Inquiry into Compensation and Rehabilitation in Australia – was one of the first acts by Gough Whitlam, the newly elected Australian Labor Prime Minister in 1972. Its primary remit was not the issue of the desirability or not of a national accident compensation scheme but the manner in which such a scheme should be implemented. The vicissitudes faced by the Australian Woodhouse committee and its report is traced in Harold Luntz's paper. While not implemented, the report of the Australian Woodhouse Committee remains as an important background feature – a Banquo's ghost – to ongoing debates in Australia concerning the future direction of accident compensation arrangements, a debate most recently sparked by crises in relation to public liability and medical malpractice insurance.

These three reviews/reports – Meredith, Beveridge and Woodhouse – stand out for a number of reasons. First there is the fusion of a powerful critique of the operational deficiencies of the existing system with a clearly articulated solution or sets of solutions. Although it has become somewhat fashionable in current times to deride what is called "the vision thing", the great advances in social policy making have come from a well-developed view of future arrangements that are self-evidently superior to current conditions. All three endeavours argued for a fundamental change in the principles and practices underpinning existing arrangements to a more rational – both in social and economic terms – approach.

Secondly, the articulated vision of the future was firmly grounded in a number of guiding basal principles.[1] In the case of Meredith these were the precepts of "no fault compensation", "security of benefits", "collective liability", "exclusive jurisdiction" and "administration by independent Boards". Half a century later the New Zealand Woodhouse report also set out five principles upon which its proposed arrangements were based; those of "community responsibility", "comprehensive entitlement", "complete rehabilitation", "real compensation" and "administrative efficiency". These principles have taken on almost talismanic significance. In any Canadian debate concerning workers' compensation reform there is always reference to the "Meredith principles". Similarly, in New Zealand testimony at select committee on changes to the ACC scheme usually contains some genuflection to the five Woodhouse postulates.

Thirdly, the glue that binds the vision, the principles and the solution together is the language of the reports. All three authors were master craftsmen of the English language. A snippet or two from each of the reports illustrates this point. From the final Meredith report:[2]

> It would be the gravest mistake if questions as to the scope of the proposed legislation was to be determined, not by consideration of what is just to the working man, but of what he can be least put off with or if the legislature were to be deterred from passing a law designed to do full justice, owing to groundless fears that disaster to the industries of the province would follow from the enactment of it.

Next, Beveridge articulating the argument for a wider, undifferentiated approach to accident compensation:[3]

> If the matter were now being considered in a clear field, it might well be argued that the general principle of a flat rate of compensation for interruption of earnings adopted for all other forms of interruption, should be applied without reserve or qualification to the results of industrial accident and disease, leaving those who felt the need for greater security by voluntary insurance to provide an

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1 Although Sir William Beveridge, in his report, stated that "three guiding principles may be laid down at the outset", the approach is significantly different to that in the case of Meredith and Woodhouse. The reason is that the Beveridge report was written at a time of war and this temporality is clearly reflected in the nature in which the guiding principles are stated. Thus the first of his three principles is that of not being constrained by past practice ("a revolutionary moment in the world's history is a time for revolutions, not for patching"). The second principle was "that organisation of social insurance should be treated as one part only of a comprehensive policy of social progress." That is, while social security was an attack on "want", this was only "one of five giants on the road to reconstruction", the others being (in an interesting barometer of the values of a nineteenth century liberal) "disease, ignorance, squalor and idleness". The third principle was that "social security must be achieved by co-operation between the State and the individual".

2 Sir William Ralph Meredith CJO, Commissioner, *Final Report on laws relating to the liability of employers to make compensation to their employees for injuries received in the course of their employment which are in force in other countries, and as to how far such laws are found to work satisfactorily* (Toronto, Government Printer, 1913) para 105.

3 Sir William Beveridge, *Social Insurance and Allied Services* (1942) Cmnd 6404, para 80.

> addition to the flat rate subsistence guaranteed by the State. If a workman loses his leg in a factory or in the street; if he is killed, the needs of his widow and other dependents are the same, however the death occurred. Acceptance of this argument and the adoption of a flat rate of compensation for disability, however caused, would avoid the anomaly of treating equal needs different and the administrative and legal difficulties of defining just what injuries were to be treated as arising out of and in the course of employment. Interpretation of these words has been a fruitful cause of dispute in the past; whatever words are chosen difficulties and anomalies are bound to arise. A complete solution is to be found only in a completely unified system of disability without demarcation by the cause of disability.

Finally, Mr Justice Woodhouse in the 1967 New Zealand report:[4]

> The toll of personal injury is one of the disastrous incidents of social progress and the statistically inevitable victims are entitled to receive a co-ordinated response from the nation as a whole.
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> The negligence action is a form of lottery. In the case of industrial accidents it provides inconsistent solutions for less than one victim in every hundred. The Workers Compensation Act provides meagre compensation for workers, but only if their injury occurred at their work. The Social Security Act will assist with the pressing needs of those who remain, provided that they can meet the means test. All others are left to fend for themselves. Such a fragmented and capricious response to a social problem which cries out for co-ordinated and comprehensive treatment cannot be good enough. No economic reason justifies it. It is a situation that needs to be changed.

The upshot is that, for these – and doubtless other – reasons, the work of a hitherto largely unknown judge in the Antipodes stands as one of the seminal contributions to the field of social policy development in the area of accident compensation. However, the proverbial difficulties of a prophet in his or her own land apply here as well, as we turn to the ACC scheme, the most tangible byproduct of the New Zealand Woodhouse report.

C The Place of the ACC

In his paper to this conference, Bryce Wilkinson notes that "[the accident compensation scheme] is not the Woodhouse scheme, but Woodhouse is its father."[5] This is a felicitous characterization of the relationship between the report and the resulting scheme, a process in which the new Woodhouse wine was placed in old bottles, primarily the bottles of the preceding workers' compensation scheme. There was a significant disjunction between the "bold spirits" of the Woodhouse committee in drawing out a new blueprint for the future and the political and

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

5 Bryce Wilkinson "The Accident Compensation Scheme: A Case Study in Public Policy Failure" (2003) 34 VUWLR 313, 320.

administrative caution of the comparatively more "timorous souls" of the executive and legislature in seeking to make a radical change less threatening through the embrace of more familiar forms and practices. The process by which the recommendations of the Woodhouse committee became transmuted into the statutory form of the Accident Compensation Act 1972 and the Accident Compensation Amendment Act (No 2) 1973 is touched upon in a number of papers, particularly those by John Martin, Geoffrey Palmer and Don Rennie. This included their consideration by an interdepartmental committee, being the subject of an influential White Paper, and the further process of examination of the Gair and McLachlan Committees.

The provisions that were finally enacted in 1972 and 1973 differed from the Commission proposals in a number of important areas. These included the nature of weekly compensation benefits (particularly in respect of short term incapacity), the provision for lump sum compensation and in the principles of levy setting for the scheme. The more innovative and novel approaches of the Commission on all three matters were rejected in favour of approaches that were more readily understood from past practice. The inclusion of lump compensation provisions reflected a political recognition of some of the concerns of the trade union movement, but such provisions were also an integral feature of the former workers' compensation scheme. Similarly, the rejection of the Commission's proposal for undifferentiated levies meant the default adoption of workers' compensation underwriting practice. The adoption of the Commission's recommendations on these important features of scheme design would have had a significant influence upon the subsequent history and practices of the ACC scheme. However, important as these matters are, the essential essence of the Woodhouse Commission report was implemented in the statutory measures that took effect from 1 April 1974. That essence was the establishment of a comprehensive, pure no-fault system of compensation, providing coverage in respect of all personal injury by accident, regardless of cause, on a 24-hour basis. This was then and has remained the unique distinguishing feature of the New Zealand ACC scheme.

So in looking at the place and role of the ACC scheme, both in domestic New Zealand terms and in an international context, this feature of comprehensive no-fault coverage is both the starting point and the note of conclusion. Throughout the many vicissitudes of the ACC scheme's quarter century history this grundnorm feature has remained basically undisturbed. There have been occasional legislative nibblings at the edges of this principle of comprehensive coverage – usually as a pre-emptive, atavistic response to the possible financial impact upon the scheme of particular perceived potential threats (such as Legionnaires' Disease) – but there has been no real pressure to revisit the underlying central principle of the scheme.

While in one sense this situation may seem unremarkable and hardly worthy of comment – that is, the principle of comprehensive no-fault coverage appears (as near as is practicable in an imperfect world) to optimize both the social goal of equal and comprehensive benefit to New Zealand residents (and visitors) and the goal of economic efficiency, particularly compared to the transaction costs and other fiscal inefficiencies of the tort system – it is, in fact, quite remarkable. In

terms of recent New Zealand history, the survival of the ACC in its present form is a most notable achievement. The tsunami of neo-liberal, free-market change that broke over New Zealand during the excesses of the fourth Labour government and the succeeding National administration was based upon principles totally antipathetic to those (particular the notion of community responsibility) that underpinned the Woodhouse vision and the ACC scheme. In its path, almost the entire infrastructure of state business enterprises was either swept away or shaken to its very foundations.

While there were measures to tighten features of the ACC scheme, particularly in respect to particular aspects of continuing benefit entitlement, the overall structural aspects of the scheme were quite incredibly largely immune from this assault. This is especially so since the ACC, as a corporate body rather than as (or part of) a department of state, was increasingly characterized as a provider of *insurance* rather than *welfare* services. Similarly, the rise of the "law and economics" school to a position of hegemonic orthodoxy, traced in Richard Gaskins' paper, would have given buttressing support to the Rogernomics programme. Much of the efforts of the "law and economics" school have been give to a theoretical justification – ironically in direct contradiction to most empirical evidence – of the efficacy and utility of the tort action as a mechanism for the allocation of losses suffered in society.

The conditions appeared ideal for the dismantling of the ACC scheme as a state entity providing a unique, comprehensive, compensation programme. This did not happen. Although I have not seen this documented in any authoritative manner, my own view is that this situation owes its outcome to a very significant (and perhaps determinative) extent to the actions of Geoffrey Palmer within the fourth Labour Government, perhaps aided and abetted by the support and political savvy of other "Woodhouseans" in and around government and other institutions, including the Law Commission.

The ground remained equally barren for a reintroduction of the tort remedy. This may owe a lot to the nature of the legal culture in New Zealand, compared to other jurisdictions such as in Australia and especially the United States. Peter McKenzie's paper explores aspects of this culture in the late 1960s and early 1970s, an environment in which the opposition to the supplanting of the tort system from organized elements of the legal profession, particularly the Bar and Law Society, was fragmented in nature and quite muted compared to the response from similar bodies in Australia at the time of the Australian Woodhouse report. As well, there was a strong body of support for the Woodhouse approach from the academic legal fraternity, especially from a very distinguished faculty at the Victoria University Wellington Law School, including the late Colin Aikman, Dean of the Law School at the time of the Woodhouse report. Influential members of the VUW Law School faculty, including Ken Keith, continued to provide strong support for a comprehensive pure no-fault scheme during the 1970s and 1980s. While the language and precepts of the "law and economics" movement has intruded into legal discourse and scholarship in Australia and New Zealand, the movement has not attracted many committed acolytes among legal academics in the Antipodes. Its major support base rests among economists and members of free-market "think tanks".

The most significant assault upon the basic structure of the ACC scheme occurred more recently. However it was not overtly directed at its core principles but at the structure of its funding regime. This was the move by the last National Government to privatize the employer account through a move to private insurer underwriting of this segment of the scheme. The impetus for this move remains somewhat unclear and puzzling. Apart from groups such as the New Zealand Business Round Table, for whom the principles of small government and the provision of services by private market actors constitute an article of faith, there does not appear to have been any concerted clamour from employer interests generally for such a move. Australian insurance interests also appear to have been significant players in the lobbying for private underwriting of the employer account. As the result of changes in a number of the larger Australian workers' compensation schemes in the mid-1980s, the vast majority of Australian workers' compensation insurance premium income has been removed from private underwriting. Workers' compensation/ employers' liability insurance consistently represents more than a third of general insurance premium income in Australia and the private insurance industry (and its peak body, the Insurance Council of Australia) has been extremely energetic in efforts to re-open all the monopoly state funds to private underwriting. All such efforts in Australia, over almost two decades, have failed to return a single jurisdiction to private underwriting. [6] New Zealand, with its unitary state and unicameral legislature, by comparison presented a promising opportunity.

My view is that the Australian insurance industry was not so much interested in the premium pool that the New Zealand employers' account represented but in establishing some momentum and a successful precedent that could be used to help pry open the resistant monopoly state schemes in Australia. The now failed Australian insurance group – HIH Insurance – maintained a full time lobbyist in New Zealand for an extended period. However, the success in achieving private underwriting was short-lived. The opposition Labour Party was resolutely opposed to the move and reversed it on achieving Government.

Looking back over a quarter of a century, then, a (and perhaps the) major achievement is the survival of the ACC scheme in its present form. What might have been a rare endangered species has survived institutional infancy and adolescence and now provides a more mature exemplar (and in the author's view, the most exemplary example) of a rational approach to personal injury compensation in the common law world. This is a cause for quiet satisfaction rather than for hubristic celebration. The ACC scheme has exhibited over the course of its history – and still has – some significant shortcomings. This is perhaps the cue for turning to the second element of this presentation, namely briefly exploring some "lessons for the future".

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6 There is the case of New South Wales, where a recommendation in the 1997 Grellman report for a move to private underwriting was accepted by the New South Wales Government. However, this represents a Pyrrhic victory in that there has been no enthusiasm among private insurers to return to underwriting in New South Wales unless they are inoculated from assuming responsibility for the scheme's "tail".

III FINDING LESSONS FOR THE FUTURE

The first lesson is related to what – at least to my mind – has been the most serious shortcoming of the ACC scheme: its failure to develop any real prevention focus and substantial prevention programme. As has generally been the case with Australian workers' compensation schemes, this role, in respect of occupationally related trauma, has been seen to lie predominantly with the occupational health and safety agency. However, as leading European schemes, such as the German Berufsgenossenschaften and the Caisse Regionale d'Assurance Maladie (CRAM) in France, have demonstrated, workers' compensation schemes can develop extremely sophisticated programmes for effective, targeted prevention activities. The ACC has undertaken initiatives in road safety, but they have largely been pale imitations of more developed programmes elsewhere such as those initiated by the Transport Accident Commission in Victoria. In like manner, the ACC has been involved with prevention activities in other areas, including sports (particularly rugby) injuries and injuries in the home. However these have largely been relatively ad hoc, uncoordinated endeavours.

This failure may have historical roots. My major quibble with the Woodhouse principles is that, while they specifically address both rehabilitation and compensation, there is no overt reference to prevention. It is not enough – and is indeed unconvincing – to suggest that prevention is implicitly subsumed under the principle of community responsibility. Having said that, the community responsibility perspective is, in fact, the starting point for what I would like to see as the future approach by the ACC to prevention. That is, an approach that recognises the accident/injury process as one that is essentially structural and social in nature rather than one that approaches the issue in terms of individual foibles and deficiencies. That is one that, for instance, recognises that motor vehicle accidents generally – in the words of a leading Australian accident researcher – involve "ordinary drivers behaving in an ordinary way". Such a perspective leads almost inexorably to the approach underpinning the road safety programme of the Swedish National Road Administration – Vision Zero – in which countermeasures are seen as involving a whole chain of people from land use planners, road designers, engineers, motor vehicle manufacturers etc – all of whose actions contribute to the level of safety in the road system.

Things may be changing. It is pleasing to see that the current Minister has enthusiastically embraced the principle of injury prevention as a principal goal of the ACC scheme and that she has initiated a comprehensive New Zealand Injury Prevention Strategy for which the ACC has a central coordinating role. This is a very welcome change. My principal reservation is that it may simply become a grab bag of disparate measures rather than a truly coordinated approach on the lines of the Swedish Vision Zero programme.

The second lesson may also have its roots in the origins of the scheme. Mention has been made of the fact that, in a number of areas, the Woodhouse Commission recommendations were not followed and recourse was made to principles and practices of the former workers' compensation scheme. This may have perpetuated some of the incubus of the past. In particular, a range of principles and practices with private insurance practice appear to have carried with them more than

a penumbral impact upon the operational practice of the new scheme. These include the use of differentiated levies or premiums, the embracing of experience rating and sometimes an ethos of aggressive claims management (manifested, for instance, in sometimes draconian application of work capacity testing) that has appeared primarily driven by balance sheet concerns. While administrative efficiency is one of the Woodhouse principles, this was enunciated in a spirit of public trusteeship, a concern that scarce public resources are managed in a responsible and non-wasteful fashion; it was not formulated as a mandate for a Scrooge-like preoccupation with claims costs that borders on public misanthropy.

Again, much of the weight of these concerns relate to the past – although some of them to a relatively recent past – particularly the period when the *insurance* aspects of the scheme were emphasised in a number of ways, including in the title of the governing statute. As a long-time interested observer (albeit from afar), l have been heartened by much of the recent change in the operational ethos and practice of the ACC. This appears to have gathered pace under the active stewardship of the current Minister and evidenced by such matters as the promulgation of the Code of ACC Claimants' Rights. However, there is no reason to be Pollyanish about the future. Despite the disavowal by the present Government of the principle of experience rating, there seems to be a strong residual hankering for this – and a number of related insurance pricing approaches – from both inside and outside the Corporation. This is despite the fact that there is no convincing empirical evidence that these approaches have any real impact upon achieving their purported goal – bringing about safer environments – and strong empirical evidence of their distorting impact upon a range of scheme functions, including an inducement to greater disputation of claims.

There has also been a recurrent debate about the funding principles of the scheme; whether it should operate on a full funding basis, pay-as-you go, or some intermediate basis. Full funding is advocated on a number of grounds, including inter-generational equity in a long-tail system, and is the current ruling dogma in Australian compulsory insurance schemes, principally workers' compensation and motor accident compensation. While seductively alluring in theory, it is largely chimerical in practice. In a long-tail system such as the ACC it is an essentially actuarial notion that involves projecting out into the future –often forty years or more – estimated performance on a number of fronts. These include claims incidence, claims duration, wage inflation (because of the impact on weekly payments of compensation), other cost inflation (particularly that for medical and allied services) and the return on investment upon funds held in reserve. It is an assumption driven exercise and even minor departures from the given assumption on particular measures – for instance claims incidence and claims duration – has a major impact on the figure for overall outstanding claims liability. Closed case examples – for instance the claims run-off for the failed Palmdale Insurance group in Australia – have often shown deviations of more than one hundred percent from the actuarial projection. Thus, as scientific exercise, it is almost as pointless as the debate in mediaeval scholasticism as to the number of angels that can dance on the head of a pin.

Pure pay-as-you go funding is philosophically more appropriate for a comprehensive, state fund scheme as the ACC. However, in practice, it also can have some practical difficulties. Most dramatically, as the earlier history of the ACC scheme has demonstrated, under some circumstances it can lead to severe cash flow problems for the scheme. In my view an intermediate position is the most appropriate for a scheme of the nature and scale of the ACC system. It is to hold *x* number of years claims payments (at current annual payment rates) in reserve. The precise number of years that *x* should represent is essentially a matter for judgment, but probably a number between six and nine would be appropriate. Such a position avoids the arcane and fundamentally pointless exercise of positing a notional actuarially projected figure as to outstanding claims liability of the scheme on the one hand and the practical difficulties of pure pay-as-you-go on the other.

Alongside any listing of qualifications upon the performance of the ACC to date, there should also be recognition of the strengths of its organising principles and operational performance, particularly compared to that of other schemes. The first is that of a comprehensive no-fault scheme. The strength of this model has been highlighted by the recent difficulties in Australia that have confronted a number of areas of personal injury compensation regimes, particularly some such as public liability and medical malpractice that are totally reliant upon the tort remedy. It has illustrated many if not all of the deficiencies of the common law action for damages for personal injury that Geoffrey Palmer has outlined in his paper as being detailed in the New Zealand and Australian Woodhouse reports. These include the failure of the common law system to compensate large numbers of accident victims, the waste of its transaction costs (legal and administrative expenses), the long delays in the delivery of benefits to those who do secure a remedy, any theoretical deterrent effect being effectively blunted by the presence of liability insurance and its impediment to real injury prevention.

As well, the skyrocketing cost of insurance premiums has put insurance coverage – for instance for public liability insurance – beyond the economic capacity to pay of many community groups. The result of the public liability insurance crisis has been the curtailment or cancellation of many community sporting, social and cultural activities. The crisis in medical malpractice and misadventure insurance has seen the largest medical defence organisation in Australia go into liquidation and the need for an emergency government rescue plan simply to ensure that many doctors would continue to provide medical and surgical services. All Australian jurisdictions have moved to implement tort reform measures that have had the effect of limiting access to the tort system and capping various heads of damages. However, these are knee jerk, band-aid measures designed to slow the financial haemorrhaging of the system through bearing down on benefits. If anything they exacerbate some of the system inadequacies and inequities. The common law system is a capricious, economically inefficient lottery for dealing with the consequences of injury. Australia missed the opportunity to adopt a more rational, equitable and economically efficient system in 1974/75 with the political sabotage of the legislation embodying the Australian Woodhouse proposals. Recent Australian events have amply demonstrated the wisdom of New

Zealand's move in 1974 to a comprehensive no-fault scheme compared to the chaotic, inconsistent, limited and expensive mishmash of measures for dealing with personal injury in Australia.

These recent Australian events have also thrown into relief the benefits of the stability of a state fund for financing scheme operations in New Zealand compared to the variegated system of public and private funding of workers' compensation and motor accident compensation arrangements and the purely privately underwritten systems for other areas of personal injury compensation. As mentioned, the largest medical defence organisation, underwriting medical malpractice and misadventure insurance has gone into liquidation and many areas of medical activity in Australia have only continued to function because of an emergency government bailout of insurance operations. Similarly the second largest general insurance group in the country – the HIH Insurance Group – has not only gone into liquidation but its activities are currently the subject of a Royal Commission investigation. It is somewhat ironical that it was in fact HIH Insurance that led the insurer charge for privatisation of the employer account of the ACC scheme.

IV CONCLUDING REMARKS

I come to this forum as outsider, in the sense that I live and work across the Tasman (on the offshore island as some New Zealanders would say), but also one whose ancestry makes me (proudly) half New Zealander, a heritage bolstered by strong family roots in southern Taranaki. In visits to New Zealand I continue to be struck by a general lack of appreciation among most New Zealanders of the uniqueness and special nature of the arrangements in place in their country for personal injury compensation. This may in fact reflect the fact that, for a considerable segment of the population, the ACC scheme is the only one that they have known. However, in historical perspective and in terms of the nature of international arrangements, the 1967 Woodhouse report and the scheme that it fostered stand as seminal monuments to rational public policy development, in terms of arrangements for dealing with the consequences of personal injury.

The survival of the ACC following the neo-liberal programmes of the fourth Labour Government and succeeding National administrations in its present form is a major achievement and blessing. The basic foundations of the scheme – comprehensive no-fault and public underwriting – are sound. However, many tasks still remain to be done. The extension beyond personal trauma to other disabling conditions and the basis upon which this can be achieved is one major such task. It will undoubtedly be one of the topics for the projected next symposium. But, even within its existing mandate and remit, there is also much to be done. I can think of few compensation systems in which there is such unrealised potential. The development and implementation of a truly effective prevention focus is simply one such dimension.

Given the nature of the world in which we live, it is certain that the ACC scheme will be faced with future significant challenges. Perhaps the spectre of private underwriting will again raise its head. The best defence is for the scheme, through its attention to social and economic efficiency – being responsive to claimants and in a non-paternalistic manner assisting them to return to their

former activities if this is possible and assisting them to rebuild their lives if it is not – to win the respect (and possibly even the affection) of New Zealanders. This seems to be a road down which the present Minister is proceeding. Those of us here who have a genuine pride in the scheme – in a critically supportive manner – may perhaps also consider how to contribute to the next quarter century evolution of the scheme.