

# 14

## New Zealand's universal no-fault accident compensation scheme: Embedding community responsibility

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In November 2016, I was careless enough to fall, head first, and suffered mild concussion. Still on my feet, I made two visits to a private accident and emergency clinic. There was no charge. On the second visit, I was advised to go to the emergency room at the local public hospital, where I stayed for three nights. I received three CT scans and was seen by a neurosurgeon, who decided on conservative management—meaning no surgery. On discharge, there was no bill. A few days later, I was called by a case manager from the Accident Compensation Corporation (ACC), who informed me that my claim (lodged already on my behalf by the accident and emergency clinic) had been accepted, asked how I was doing and advised that I could apply for weekly compensation if I was unable to work. She arranged home visits by an occupational therapist and a physiotherapist, at no charge. There was also a visit to a head injury specialist, at no charge, taxi fares included. I recovered and was back at work in time for the new semester. The accident did not happen at work; nor was it covered by private health insurance. But the whole incident cost me almost nothing, other than some serious headaches and inconvenience. Or, more to the point, I had already contributed, through

a compulsory payroll levy, to the state monopoly fund for personal injury caused off-the-job. The flipside is that I am barred from suing anyone for damages in any New Zealand court.

Visitors to New Zealand are often surprised to learn that, on arrival, they are automatically covered by the same universal personal injury insurance scheme and, in return, they too are barred from suing for compensation. It is in part because of this that the visitor can enjoy risky activities such as bungy-jumping and whitewater rafting. Insuring against negligence claims would be a significant, possibly prohibitive, business cost for adventure tourism—a field in which New Zealand excels. Nonetheless, visitors from Australia and the United States often wonder why New Zealanders deprived themselves of the right to hold a negligent party to account for one's pain and suffering and incapacity for work, even though one can still sue for defamation. The removal of this basic element of common law rights is particularly incomprehensible to civil litigators who specialise in personal injury. Moreover, the state monopoly deprives the insurance industry of a lucrative market—albeit one with long-tail risk.

Some often cited principles of public policy suggest the ACC, as a state monopoly with compulsory levies, is not an ideal institutional arrangement, as it lacks contestability and reduces the effect of general deterrence. Public choice theory holds that state monopolies are inherently inefficient. Law and economics logics suggest the threat of damages awarded in court poses an incentive to act with greater regard for others' safety. The costs arising from personal injury and from damages awards may all be insured against and mitigated in a free market, but variable insurance premiums send price signals that inform choices between activities with differing risks, while internalising and spreading the costs. Moreover, in a competitive market, insurers and rehabilitation providers must innovate and adopt best practice in achieving efficiencies and assuring good outcomes for injured persons.

This gives a first impression of how the ACC works, but also raises doubts about whether it represents the best institutional model. My aim, then, is to explain why this state monopoly has endured and why it is a success in political, economic and wellbeing terms. In so doing, we will nonetheless observe that its founding principles have often been compromised and that there remain some outstanding problems. This success story is not an unqualified one.

A brief history will show how New Zealand acquired its unique universal accident insurance system, based on compulsory contributions into a state monopoly with no right to sue. The 1967 report of a royal commission of inquiry (the 'Woodhouse Report') laid out the blueprint for the scheme, based on five founding principles, summarised below. To this day, any national debate about ACC law and policy inevitably refers back to the Woodhouse principles, and this sustained influence in itself represents a notable success. So, what made the Woodhouse Report so effective? There is no 'secret sauce' and policymakers everywhere could benefit from emulating Woodhouse's example: elegant, jargon-free prose; an unwavering focus on the wellbeing of the affected population, coupled with a concern for efficiency; and clear and bold principles that address well-defined problems. Although the royal commission was to inquire into workers' compensation, its report exceeded the terms of reference and made more wideranging recommendations for personal injury *outside of work* and for an end to the application of common law. These bold recommendations came 'out of the blue', as they were not addressing a critical policy failure or public controversy at that time. Nonetheless, the clarity and coherence of the analysis and the guiding principles set the agenda, leading to legislative reform and a new public institution. That institution, the ACC, remains in operation to this day.

While New Zealanders are often dissatisfied with particular aspects of accident compensation law and administration, and although the Woodhouse principles have been 'watered down', the basic 'public value proposition' embodied in the ACC scheme is clear and has stood the test of time. That proposition is: affordable universal no-fault personal injury insurance and rehabilitation in return for the relinquishment of the right to sue. This covers all personal injuries caused by accident, at work or not, occupational diseases and medical misadventure. The enduring political legitimacy and practical application of this proposition constitute a significant *programmatic* success.

The Woodhouse Report was, however, only the beginning of a longer policymaking process. After summarising the report itself, I also outline some key policy steps that considered its merits, resulting in legislation in 1972 supported on both sides of the House of Representatives. All the same, it took a change of government to give the scheme its *universal* coverage. A rigorous bipartisan policy *process*, with strong support from officials across departments, was a necessary element in the successful implementation of the ACC.

There have since been legislative overhauls, institutional changes and political controversies around the ACC. The endurance of the state monopoly model has been contentious, given the preference for competition in New Public Management and public choice theories, plus real-world pressures from employers and insurers for ‘freedom to choose’, especially during the 1990s, when ‘the New Zealand model’ was internationally regarded as a leading example of public management reform (Boston et al. 1996). At the time of writing, however, there is no longer any serious political pressure for either competition or the right to sue. So, there is a noticeable *political* success, in that the no-fault state monopoly insurer persists, by cross-party consensus, for the foreseeable future. The Woodhouse Report is still influential, even after 50 years, and the ACC scheme has been in operation for well over 40 years. For sheer *endurance*, this is a significant success.

#### Box 14.1 Sir Owen Woodhouse (1916–2014)

Sir Owen Woodhouse is the ‘architect’ of the Accident Compensation Corporation scheme. He received a law degree in 1940 and served in the Royal New Zealand Navy during World War II. In 1961, he was appointed judge of the New Zealand Supreme Court. He was commissioned as chair of the Royal Commission to Inquire into Compensation for Personal Injury in 1966. His report was published in December 1967. In 1974, he was commissioned by the Australian Government to conduct a similar inquiry. In 1981, he became president of the Court of Appeal—at that time the highest office in New Zealand’s judiciary. He retired as a judge in 1986 and then served as president of the New Zealand Law Commission until 1991. He contributed to seminars on accident compensation well into his 90s.

## The Woodhouse principles

Summarising Woodhouse’s five principles is made easy thanks to the clarity of his original report. But first, what was the problem?

The royal commission took stock of the whole system that addressed incapacity for work. At the time, victims of accidents had three main sources of support or remedy. They could sue for damages on grounds of negligence under common law. This was historically the oldest approach, but, in by far the majority of cases, it ‘had proved to be no remedy at all’ (New Zealand 1967: 32). When remedies were awarded, they could range from full indemnity to virtually nothing, depending on the attribution of fault between the parties. The second approach dated back to 1900, when New Zealand followed the examples of Germany and Britain in adopting

a workers' compensation system to replace the old employer liability laws. At the time of the Woodhouse Report, the *Workers' Compensation Act 1956* was in force, providing no-fault cover, with loss-related income replacement, funded by employers. The third source of support was the social security system, which, since 1938, provided flat-rate benefits for sickness and long-term disability, alongside free public hospitals.

The problem was there were three mutually inconsistent systems with different entitlements, even for people with effectively the same injuries, disabilities and needs. It meant that a person injured at work (and covered by workers' compensation) received a much better income-related entitlement than the flat-rate social security benefit that may have applied if the same person received the same injury immediately after stepping outside the factory gate. And a dependent spouse injured at home would receive nothing, due to means testing of social security. Sometimes an injured person could 'double-dip', such as by receiving statutory compensation plus common law remedies. In all of the above three systems, however, the costs were, in the end, borne by the whole community. Employers' liability insurance and workers' compensation levies—as costs of doing business—were passed on to consumers. And social security was funded by all taxpayers. Surely, the royal commission reasoned, it would be far better for the community to have 'uniformly generous treatment of all injuries regardless of cause [and] to deal with the whole problem on a basis both comprehensive and consistent' (New Zealand 1967: 35)?

It is not possible to eliminate all accidents and injuries. Every accident is preventable, but a certain rate of accidents is statistically inevitable. The aim should be an optimal balance between the benefits of freedom of action and the costs of prevention, law enforcement, penalties and compensation. General deterrence theory rejects banning or penalising risky activities and/or paying for accident costs through taxes that people cannot avoid. It recommends that accident costs be internalised in the prices of activities, thus

giving people freedom to choose whether they would rather engage in the activity and pay the costs of doing so, including accident costs, or, given the accident costs, engage in safer activities that might otherwise have seemed less desirable. (Calabresi 1970: 69)

Woodhouse did *not* support this general deterrence or market approach. Instead, he favoured the principle of *community responsibility*. He asserted that, as the whole of society benefits from the productive work and voluntary activities of citizens, and as predictable risks of injuries and incapacity are inherent therein, so society should accept responsibility for supporting and rehabilitating those who fall victim. This would lead to a strong version of socialised risk-sharing.

The second principle—*comprehensive entitlement*—addressed the problem of the fragmentation and inconsistency in the legal and institutional status quo ante. Equal losses should be treated equally by society, regardless of the particular place or time of the accident.

Third, ‘the consideration of overriding importance must be to encourage every injured worker to recover the maximum degree of bodily health and vocational utility in a minimum of time’ (New Zealand 1967: 40). This encapsulates the principle of *complete rehabilitation*.

By *real compensation*, Woodhouse intended that the actual losses experienced, both physical and economic, should be recompensed, rather than, as in the social security system, only covering basic needs; this should recognise permanent impairments.

Woodhouse also addressed *administrative efficiency*. The collection of funds and distribution of benefits ‘should be handled speedily, consistently, economically, and without contention’ (New Zealand 1967: 41). In a ‘comprehensive, universal, and compulsory system of social insurance ... there could be no point in retaining *any form* of adversary system in regard to the assessment of compensation’ (New Zealand 1967: 125; emphasis added). Thus, Woodhouse proposed the extinguishment of common law rights regarding personal injury *and* the implementation of an administrative appeals system based on ‘inquiry and investigation’ rather than adversarial techniques (New Zealand 1967: 127).

The Woodhouse principles are clear and bold, and they produced a blueprint for a comprehensive universal scheme with no right to sue. But, as the proverb goes, there’s many a slip ’twixt the cup and the lip. Table 14.1 presents a timeline of the policymaking and legislative steps that established and developed the ACC.

Table 14.1 Timeline of key events, reports and legislation

1967	Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand.
1969	'Commentary' by officials on the report of the royal commission is tabled in the House of Representatives and referred to an ad hoc select committee (the 'Gair committee').
1970	The Gair committee report is tabled. National Party members divided; Labour Party members support Woodhouse principles. National government approves the committee's recommendations 'in principle'.
1971	Accident Compensation Bill introduced and referred to select committee.
1972	Bill passes unanimously, covering work-related and motor vehicle accidents.
1972	Election leads to change to Labour Government.
1973	<i>Amendment Act</i> universalises the scheme to include students, people not in paid employment and visitors to New Zealand.
1974	Accident Compensation Commission opens.
1982	ACC changes from Commission to Corporation, with a governing board appointed by the responsible minister.
1992	National Party Government passes new legislation to make scheme 'insurance-based' and remove 'hidden unemployment'.
1998	<i>Accident Insurance Act</i> introduces competitive private sector provision for workers' compensation.
1999	Six insurance companies enter the market.
2000	New Labour–Alliance coalition government repeals 1998 Act, terminates accident insurance contracts and renationalises workers' compensation.
2001	New legislation reestablishes the ACC as a compulsory state monopoly.

Legislation to implement a new scheme was introduced by the National Party Government in 1972, but only covering those in paid employment and motor vehicle accidents, thus falling short of Woodhouse's recommendation for universality or comprehensive entitlement. The change to a Labour Government in the 1972 election led to a legislative amendment to universalise the scheme, covering students, people not in paid employment and visitors to New Zealand (Palmer 1979). Even then, as recounted below, not all of Woodhouse's recommendations were adopted. (Some commentators attribute recent problems in the scheme to these departures from the original plan—for example, Wilson 2008; Palmer 2013.)

The ACC was opened for business in 1974, after which common law actions were completely barred. A plaintiff's suit would be struck out unless the ACC cover had been lawfully denied, (in very rare cases) if exemplary or punitive damages were warranted or if the claim was for mental injury to a bystander who received no physical injury (Miller 2003). There is some lack of clarity around what exactly is not covered by the ACC—and thus is potentially actionable—such as a pregnancy following a failed sterilisation (Tobin 2008). But, at the time of writing, no political party or vocal interest group is calling for reinstatement of the right to sue for personal injury compensation, although some authors have put the case forward (Duffy 2003; Wilkinson 2003). The universal cover is still in place, providing medical treatment, social and vocational rehabilitation and weekly income-related compensation. It is funded by compulsory levies on employers, wage-earners, motor vehicle registrations and fuel consumption taxes, as well as a government contribution for non-wage-earners.

Sir Geoffrey Palmer (2013: 209), a prominent lawyer and former politician who was closely involved in these policy processes, regards 'the removal of the common law action for damages' as the scheme's greatest accomplishment and 'biggest policy point'. He argues that, organisationally, the corporation has, however, not been such a success. Originally formed as a commission under three appointed commissioners, the ACC was converted in 1982 into a Crown entity with a governing board, appointed by the responsible minister, and a chief executive. Policy advice was the responsibility of the former Department of Labour. Along with its largely separate levy revenue, this made the ACC 'an outlier within the government system', and Palmer (2013: 211) argues instead that it should be administered as 'a department of state operating on the conventional principles of ministerial responsibility'.

## Risk-related or flat-rate funding?

One key recommendation of the Woodhouse Report that was *not* adopted was for a flat-rate employers' levy across all industries. It is common practice in accident insurance systems to vary premiums according to the accident risks of different industries or activities. The royal commission noted there were 137 industrial classifications determining the contributions from employers to the workers' compensation scheme. The commission also

addressed 'merit rating' (or 'experience rating') in which an individual firm's industry-based contributions may retrospectively receive a penalty or rebate, depending on the numbers and costs of claims attributed to its activities. The commission rejected both industrial classification and experience rating of firms. Instead, it recommended 'a uniform levy based upon salary or wages paid' set at 1 per cent (New Zealand 1967: 172).

The basic point against industry classification was that 'all industrial activity is interdependent' (New Zealand 1967: 130). The high-risk industry of coalmining supplied fuel to power generators, which in turn kept the lights going for staff in universities. The last benefited from the work of those facing greater risks. Even so, it proves politically difficult to persuade the employers of university professors and librarians that their payroll-based levy should be the same percentage as that for employers of coalminers. With a flat rate, employers complain about cross-subsidisation.

As for experience rating, Woodhouse (New Zealand 1967: 134) rejected the theory that 'premiums should be made to fit the accident record [of the firm] and so act as a spur to safety'. This theory assumes that managers have more control over the incidence and severity of accidents than they genuinely have. Moreover, employers are liable, regardless of their degree of actual culpability. One-off errors, accidents due to failure to follow safety rules and training and incidents arising from another operator or a neighbouring site can result in penalties to the employer of the injured worker. Employers who dispute the attribution of individual claims against their accounts will look through the lens of fault.

Woodhouse also argued that the financial incentives of experience rating correlate with only an 'insignificant' portion of the costs of accidents, taking into account losses of production and property damage. Moreover, there was no conclusive evidence that experience rating actually improved safety. 'There has [instead] been a tendency to withhold reports of accidents or to contest claims in order to produce a low accident ratio' (New Zealand 1967: 135). Indeed, there is still no conclusive evidence to support claims that experience rating boosts investment in safety, reduces accidents and improves return-to-work rates (Mansfield et al. 2012).

Woodhouse's argument for a flat rate was succinct and persuasive—but unsuccessful. The 1972 Act provided for risk rating of industries and experience rating of firms. Experience rating has been used most rigorously since the 1992 overhaul of the legislation. The idea that 'good'

employers should not subsidise 'bad' ones was easily swallowed and the National Party Government of the day wanted to make the scheme look more insurance based. Nowadays, the ACC itself resorts to justice-based arguments in favour of experience rating, rather than claiming it has efficiency advantages. As there is little hard evidence for a positive impact of experience rating on injury rates, it argues that it is 'fair' that employers with higher than average claim rates and costs should pay more. Experience rating, however, produces disputes over work-relatedness and rehabilitation plans; it encourages suppression of claims rather than prevention of injuries.

So, the Woodhouse vision of flat-rate levies was not realised. Industry classifications and experience rating may not lead to genuine efficiency gains, but the business community supports the reduction of cross-subsidisation on the grounds it is 'fairer' and managers see value in performance feedback about injury frequencies and costs. To give some larger employers increased control, those with adequate inhouse systems may also administer their own claims, in accordance with statute.

## How did the ACC avoid deregulation?

In the 1990s, 'the New Zealand model' of public management and privatisation was held up as a leading and radical example (Boston et al. 1996; Pollitt and Bouckaert 2004). And, as a state monopoly performing an insurance function, the ACC looked ripe for disaggregation and competition. To begin with, the employers' account could be carved off and converted back into a standard workers' compensation scheme, underwritten by competing private insurers.

There were strong cases in favour of a private insurance model from interest groups including the New Zealand Business Roundtable (NZBRT), the Employers' Federation and the Insurance Council. The NZBRT took the most radical approach. It recommended dismantling the ACC, terminating all state provision and deregulating the accident insurance market. Insurance cover itself and its particular benefits would be voluntary and not state-mandated. Contracting parties would be free to accept higher wages, lower prices or warranties of compensation in return for limiting or waiving rights to sue.

Most employers and the insurance industry, however, were content with the idea of competitive provision on a state-mandated model. The *Accident Insurance Act 1998* gave employers the 'freedom to choose' an insurer, including a new state-owned enterprise as default provider. In practice, this meant *compulsion* to choose, as a firm's refusal or failure to negotiate an insurance contract would lead to prosecution. The insurance contracts commenced in mid-1999, with no regulation of pricing, but with a prudential regulator overseeing the market. Otherwise, the ACC continued in operation, covering the non-work-related and motor vehicle accidents—more or less as before—and the ban on the right to sue remained.

Before the 1998 Act was passed, however, the Labour Party (then in opposition) warned the insurance industry that, if successful in gaining office after the 1999 election, it would repeal the Act, the insurance contracts would be terminated and all work-injury cover would be returned to the state monopoly. The insurance industry was 'in the business of risk' and could adjust their pricing accordingly.

Indeed, Labour formed a coalition government with the Alliance after the 1999 election and soon carried out the promise to renationalise workers' compensation—much to the annoyance of many employers. So, the state monopoly model was restored. Private insurance contracts were terminated (by force of law) after only 12 months in operation (Duncan 2002).

In the midst of these dramatic political events and legislative about-turns, a thorough debate about the relative merits of the two delivery models occurred, focused especially on the question of efficiency. Efficiency can mean many things, depending on the goals for which one aims, but the debate around the 1998 Act tended to interpret efficiency as meaning 'lower premiums for employers', associated with the incentives to prevent accidents and injuries and to return injured employees to work. Economic theory supported competition, but there was no robust international comparative evidence that state monopoly schemes were more costly for employers than competitive multi-insurer schemes, or vice versa. The Department of Labour, however, advised the government that employers' premiums could rise due to competitive delivery. Some jurisdictions with competitive schemes, such as California, had employers complaining about rapidly rising premiums (Duncan 2002). The critical factor behind costs appeared to be the statutory entitlements, not the

institutional model of provision, so calling for lower premiums meant calling for lower benefits—or cost-shifting from employers to injured employees and their families (McCluskey 1998). With New Zealand's comprehensive legislation, it could also mean cost-shifting from the employer's account to the wage-earner's account by making work injuries out to be not work-related. If benefits became too restrictive, injured workers and trade unions could start to demand a reinstatement of the right to sue.

The competition policy story did not end in 2000, however. A National-led government came into office in 2008 and began a 'stocktake' of the ACC. The National Party's 2011 election manifesto promised: 'We will introduce choice to the ACC Work Account [for employers] while retaining ACC in the market, and investigate introducing choice in the Motor Vehicle and Earners' accounts' (New Zealand National Party 2011).

The ACC earners' account covers off-the-job injuries that are not motor vehicle related. It is funded by a flat-rate percentage levy on all liable wages and salaries, paid via the taxation system. At the time of writing, the rate was 1.21 per cent. A steering group set up to advise the government in 2010 recommended competitive private delivery of the wage-earners' account along with the work account. The employee's default insurer would be the same as the employer's or the employee could bundle off-the-job injury insurance with other insurance contracts. Insurers, it was argued, could risk rate premiums deducted from every employee's wage based on information about their age, leisure activities, and so on. This aimed to reduce cross-subsidisation between groups of individuals. After all, why should spectators (or any risk-averse, able-bodied individual) subsidise the frequent injuries experienced by rugby players?

It was never clear whether the insurance industry was prepared to risk rate every employee in the country, nor whether there exists a fair and cost-effective methodology for doing so. Problems of the interrelatedness of activities and the difficulty of locating individual liability (as identified originally by Woodhouse) were never fully explored. Indeed, the recommendation was not implemented. But, from time to time, debates have erupted in New Zealand about whether, for instance, sports clubs should pay an ACC levy or whether individuals with no claims should receive a rebate. If the government had followed its steering group's recommendation, and if the insurers had applied differential levies based

on age, leisure activities and so on, there would have been no end to the public debates over the 'unfairness' of levy variations. Moreover, each insurer would presumably have applied its own methods.

Another debate addressed medical practitioners. The ACC covers 'treatment injury' or personal injury due to treatment by a registered medical practitioner that is not a necessary part or ordinary consequence of the treatment, given the person's underlying health condition and the state of clinical knowledge at the time. This means medical practitioners cannot be sued for malpractice and need only general public liability cover. The ACC's Treatment Injury Account is funded by contributions from general taxation and the levy-funded earners' account, not directly by medical practitioners. The National Party Government's steering group recommended this also be subject to private delivery so that medical practitioners and healthcare organisations would purchase malpractice cover as part of general professional indemnity insurance. On the face of it, this seems eminently fair. But medical professionals—not unlike Woodhouse—pointed out that any new insurance premiums would be passed on through user charges anyway, and that put an end to the public debate.

The National Party was returned to office after the 2011 election (and again in 2014), but the policy 'to introduce choice' was never implemented. The ACC's chief executive stated publicly in August 2013 that ministers had advised him that competitive provision was no longer the government's policy. No explanation was offered and there was no public complaint from employers or insurers. A clue as to why the National Government changed its mind, however, is found in a regulatory impact statement provided by the former Department of Labour (the main advisory agency on ACC policy at that time). The minister had recommended that the Cabinet agree in principle to introduce competition to the delivery of the ACC work account, but officials advised that the option of allowing employers a choice of private insurer (with or without the ACC remaining in the market as a competitor) 'would require claims cost savings in the order of 20% to 26% to offset the higher expenses of private insurers' (Department of Labour n.d.: 17–18). The alternative to such dramatic claims costs savings would have been off-setting rises in employers' premiums.

So, the simplest explanation for National's abandonment of the policy to reintroduce competition was that it did not want to choose between either cutting claim costs or imposing higher employer premiums to such a degree, as the advice implied that a 'competitive' insurance market was comparatively *uncompetitive*. Employers were satisfied that the existing provisions gave them a degree of performance-related cost control (or the appearance thereof) and, for many larger employers, inhouse administration of claims. Moreover, the ACC was on the way to being fully funded. This growing publicly owned fund was deriving investment incomes that, in turn, helped to reduce the ACC's levies. Privatisation would have transferred these premium and investment incomes to foreign-owned funds and their shareholders.

The National Government did introduce four differential levies for motor vehicles, based on a classification of risk derived from police-reported crash data. Given the size of the levies (at most, \$80 per annum) in relation to the prices of vehicles, however, the differentials are too small to constitute a real economic incentive to purchase a newer vehicle with superior safety design. There are other motives (status, comfort, reliability, and so on) for buying a late-model car anyway, so the relatively small reductions are a negligible reward for people who are wealthy enough to own one—or a regressive tax on those who are not—with no efficiency in accident prevention.

## Full funding

The next significant controversy concerns the scheme's overall funding model. The view of the royal commission was that financial contributions to the scheme 'may be regarded as a form of taxation' and, for economy of administration, should be collected by the Inland Revenue Department. The commission did not recommend the *fully funded* model required of commercial insurance companies that accumulate reserves sufficient to meet the present *and all future costs* of current claims. It reasoned that 'a formal system of funding cannot be regarded as essential to the stability of the whole system' because the scheme 'must in the final resort receive the backing of the State' (New Zealand 1967: 175). As the ACC was a state monopoly, pay-as-you-go funding sufficed, although any surpluses could be invested.

As it turned out, ACC funding was unstable. In the first decade, reserves were slightly in excess of one year's expenditure. But the 1982 Act allowed for pay-as-you-go, levies were cut, income declined below expenditure and reserves plummeted towards zero. The fourth Labour Government had to dramatically increase employers' levies to avert bankruptcy of the scheme. But they also permitted an open-ended entitlement to weekly compensation, which, along with rising unemployment, led to rapid increases in expenditure. Reserves were restored for a while, but then declined again during the 1990s, as levies failed to keep up with the higher costs. The position of the employers' account was especially perilous. Although total expenditure on work-related injuries was declining due to the 1992 Act, the employers' levies, in total, fell short for five consecutive years (1991–95). The employers' account end-of-year reserves balance was then *negative* for three consecutive years (1994–96). This posed a significant problem for the 1998 policy of introducing competitive provision. Employers had to choose a new insurer, but they also had shared liabilities remaining in the ACC scheme from previous unfunded work injuries. Hence, they had to pay a 'residual levy' to the ACC on top of the insurance premium (Duncan 2002).

It became clear that 'the introduction of choice' is best done only *after* fully funding the state monopoly scheme. Actuarial valuation and full funding of the ACC began in 1998, and continued under consecutive governments, both National and Labour, up to the present. As the ACC reported in 2017:

Our broad financial sustainability objective is to ensure each levied account is in a fully funded solvency position. Full funding means that, at any point in time, the value of our investment portfolio is enough to pay for the future costs of every claim we have received to date. (ACC 2017a: 34)

Levied accounts in total were 121.7 per cent funded. This valuation and funding policy is consistent with the adoption of generally accepted accounting practices in public finance—an integral part of 'the New Zealand model' of public management reform. Any unfunded contingent liability in the ACC now weighs against the Crown's consolidated balance sheet. And, in the 2017 annual report, investment revenue was roughly half the total amount of levy revenue, showing how much the reserve fund contributes to keeping premiums low, while acknowledging the investment risk that accompanies this. The full-funding model has had

its critics, however. One may ask why a state monopoly with compulsory contributions needs to be valued and funded as if it were a commercial insurer. Or, if it really must be, why does the New Zealand Government not actuarially value and fully fund all of its social entitlements (Littlewood 2009; Palmer 2013)?

## Success does not mean ‘problem-free’

While the long-term success of the ACC must be traced back to the Woodhouse Report, implementation has often departed from its recommendations. There are numerous other problems in the present scheme—of the very kinds that Woodhouse wished to avoid.

Concerning the principle of complete rehabilitation, Woodhouse gave a clear description of what that should mean:

[The rehabilitation process] begins with the earliest treatment of the injury or disease. It does not end until everything has been done to achieve maximum social and economic independence. The aim is that this should be achieved in a minimum of time. (New Zealand 1967: 141)

The present statutory provisions for vocational rehabilitation do encourage early treatment, and rehabilitation planning must be initiated within 13 weeks post injury. But they do *not* meet Woodhouse’s requirement that rehabilitation should continue ‘until everything has been done to achieve maximum social and economic independence’. Indeed, the status of what is now termed ‘vocational independence’ frequently falls short of that. A two-stage work capacity assessment is performed, beginning with an occupational assessment of the claimant’s qualifications, skills and experience for various kinds of work. A medical assessor then provides an opinion as to which of the occupations identified as ‘suitable’ are viable and safe after taking account of the effects of the personal injury. This work capacity assessment is not, however, necessarily carried out with direct observations of the actual performance of work tasks. Its technical validity is further compromised by the fact that it is conflated with the assessment of eligibility for weekly compensation.

The criteria for vocational independence may range from readiness for the same job as at the time of injury to readiness for any similar job or for any job for which the claimant is suited through education, training or experience. This often means that skilled tradespeople who, due to

permanent impairment or risk of reinjury, cannot return to a hazardous occupation are occupationally and economically down-skilled to any jobs they may have done in the past, having regard to the personal injury. Termination of weekly compensation does not require that there be any current job vacancy for the claimant to apply for, nor that there be such employment within commuting distance of the claimant's home. The ACC law no longer provides for a permanent partial disability pension that could compensate for a long-term drop in income and it does not require full retraining into a comparably skilled trade. Many of those found to be 'vocationally independent', and whose compensation is subsequently terminated, transition to lower-paid occupations or even to means-tested social security benefits—or sometimes to no income at all. This means many former claimants suffer long-term economic loss, but with no right to sue for compensation in respect of those permanent losses (Crichton et al. 2011).

Advocates for claimants have pointed out other problems with the ACC. Disputes over what is or is not covered by the statute are common and are often experienced negatively by claimants—for instance, when ageing is found to be a factor. 'Personal injury caused wholly or substantially by the ageing process' is excluded by the 2001 Act, but the phrase 'wholly or substantially' leaves a wide interpretative scope for medical evidence and opinion, and for official determination. Bones that have become brittle due to ageing may break more easily in a fall, and hence this kind of injury could be denied cover. The Act does not follow the so-called 'egg-shell skull principle' that the compensation authority should accept claimants as it finds them. What looks like an accident, in commonsense terms, to the victim may not be assessed by the administrator as covered by the Act.

While the ACC model means that workers injured outside work receive the same treatment and entitlements as those injured at work, there are still relative disadvantages to people whose disability is caused by sickness, degeneration or congenital disorders that are not covered by the ACC. The last groups may receive public health subsidies and social security benefits, but these are much less generous. For those with severe long-term incapacity, the discrepancy between accident and illness makes a significant difference. People with equal needs are not being treated equally. Woodhouse foresaw this problem. In line with his principle of comprehensive entitlement, and with the aim of reducing disputes, he recommended eliminating any discrimination between work and non-work accidents. In this, he was successful. But he also realised that there

was an equally persuasive argument to cover all forms of incapacity for work, whether caused by sickness or by personal injury. He stopped short of recommending such a fully comprehensive scheme, but he did argue that, in time, this should be given serious consideration. The extension of the comprehensive ACC model to cover sickness has indeed been investigated several times, not least by the Royal Commission on Social Policy and the Law Commission (the latter chaired by Woodhouse) in 1988. The then Labour Government, in 1989, announced legislation to cover all forms of incapacity, saying ‘there was a failure of social equity in the gulf between accident compensation and assistance for disability and sickness’ (Palmer 2013: 215). But the Bill was dropped by the incoming National Government after the 1990 election.

More recently, a woman with severe disability due to multiple sclerosis argued before the Human Rights Review Tribunal that the less generous benefits under health and welfare subsidies, compared with those under the ACC, amounted to unlawful discrimination on grounds of disability (Duncan 2008). The case went to the Court of Appeal, which accepted that there is *prima facie* discrimination, but this is ‘justified’ under the *New Zealand Bill of Rights Act 1990*, as the ACC law was created on reasonable grounds for recognised public policy aims. The relative disadvantage to people with disabilities that happen not to be covered by the ACC remains a source of grievance for the disability community, and there is no sign at the time of writing that it will be resolved. Cost has always been the sticking point, even though significant costs of sickness are already being paid for through healthcare subsidies and welfare benefits, and in spite of evidence that the ACC rehabilitation model may return to work people with functionally equivalent incapacity more promptly than the social security system (McAllister et al. 2013; Paul et al. 2013).

## What makes the ACC a success?

Having outlined so many anomalies and compromises in the ACC scheme, one may ask: ‘What makes it a success?’ And, if it is a success: ‘Why has no other jurisdiction adopted the model?’

I address the latter question first. Woodhouse also conducted an inquiry in Australia, under Labor prime minister Gough Whitlam. The Australian Government was persuaded to extend the terms of reference to include sickness, which delayed the final report. The inclusion of sickness became

an obstacle, however, and a redrafted Bill—this time covering only injury—was ready to be introduced in November 1975, just when the Whitlam Government was dismissed (Luntz 2003). So, there is a simple historical explanation for the policy not being implemented in Australia.

Furthermore, the interest groups who opposed the reform (lawyers, insurers and some trade unions) were stronger in Australia than in New Zealand. The royal commission in New Zealand also encountered objections from lawyers and insurers, as both groups stood to lose significant income. But many lawyers supported the proposal and the insurers were loath to take their opposition into the public arena. Australia's federal constitution made such a law change more complicated, as both workers' compensation and torts are governed by state laws. New Zealand is a unitary state with no upper house and no written constitution, so there were few constitutional barriers to such an extinguishment of civil legal rights.

In the United States, constitutional barriers and vested economic interests are even more formidable and are backed by academics in the fields of torts and welfare economics. Even during the 1970s, when there was political debate about no-fault compensation, 'Americans never closely inspected the Woodhouse strategy' (Gaskins 2003: 223); they largely preferred to test and develop rights through judicial activism. Meanwhile, economic theory held that optimal investment in safety is best determined in the courts, by assigning home the costs of compensation directly to the party that was 'at fault' and was therefore in a position to prevent future injuries (Gaskins 2003). The tort system, however, has unacceptably high transaction costs, delivering less than 50 cents in benefits to injured persons for every dollar spent. It is 'a colossal waste of money for no good reason' (Palmer 1995: 1167).

There is an element of luck, then, in New Zealand's ACC history. The commission contained 'the right people in the right place at the right time' to produce bold policy proposals that would eventually be adopted in law. While the scheme has matured over four decades, it looks increasingly unlikely to be taken up as a model elsewhere. But, within New Zealand, it looks increasingly unlikely to be dismantled, too. The most powerful interest groups that have rallied against the ACC in the past are those representing the business community, especially the insurance industry. The ACC is now on a sustainable financial footing, levies are relatively low and there is no longer any serious challenge to the

comprehensive monopoly model. In terms of sheer longevity, then, the Woodhouse principles and the ACC make a success story—qualified by the challenges and compromises described above.

There are also substantial outcome-related reasons for regarding the ACC as a relatively successful model. In terms of rehabilitation and efficiency, it compares favourably with workers' compensation schemes in Australian states, most of which have multi-insurer or hybrid public/private arrangements, including self-insurers and third-party providers. In 2014–15, the incidence rate of long-term work-related claims (those needing income-related compensation for 12 weeks or more) was lower in New Zealand (2.3 claims per 1,000 workers) than in Australia (2.8 claims per 1,000 workers). And employers' levies are lower in New Zealand—partly because the ACC does not directly cover mental health conditions such as stress. In 2014–15, the Australian standardised average premium was \$1.39 per \$100 payroll, ranging from \$1.19 in Queensland to \$2.42 in South Australia, compared with \$0.60 in New Zealand (Safe Work Australia 2017: viii, 3). A state monopoly has the advantages of economies of scale, not paying tax or shareholders' dividends and not having to invest in competitive marketing and sales.

Moreover, the ACC has a relatively good record for returning injured employees to work. In a cross-Tasman survey (in 2013–14) of injured workers who had 10 or more days off work and whose claims were submitted seven to nine months earlier, 77 per cent had returned to work following their injury and were still working when interviewed. The rate in New Zealand was closely comparable with the average in the Australian states (Social Research Centre 2016).

Even though a fundamental aim of the ACC was to eliminate causes of litigation, there are still disputes over cover, entitlements and 'vocational independence'. Nonetheless, the rate of reviews and appeals is relatively low. In the Australian workers' compensation schemes, formal appeals (including reviews or mediation, but *excluding* common law actions) arise in over 6 per cent of active claims per annum. In New Zealand, the comparable rate declined to 0.6 per cent in 2014–15 (Safe Work Australia 2017: 31).<sup>1</sup>

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1 A claimant may apply to the ACC for a review of any of its decisions on their claim. The ACC contracts an independent agency to conduct the dispute-resolution service, and the Corporation's decisions are upheld 84 per cent of the time. There is a right of appeal to the District Court.

The lack of general deterrence under compulsory monopoly schemes is thought by some, however, to reduce the incentives to act safely and prevent accidents, and hence necessitates stricter penalties and/or greater investment in law enforcement (Calabresi 1970); while others have argued that there is no evidence that the elimination of torts diminishes safety standards (Campbell 1996). Rates of personal injury are determined by complex social, legal, economic and environmental factors. A jurisdiction's means for insuring against and compensating personal injury are only one set of factors among many, and we cannot attribute differing rates of injuries to those factors any more than others. New Zealand's economy depends on hazardous industries such as fisheries and forestry, it has long, windy rural roads and contact sports are very popular—all of which may contribute to higher injury rates.

The numbers of work-related and compensated fatalities in New Zealand (73 in 2013–14 and 80 in 2014–15) compare poorly with numbers of work-related traumatic fatalities in New South Wales (36 in 2013–14 and 42 in 2014–15) (Safe Work Australia 2017: 6), even though the latter's population is 1.6 times greater.<sup>2</sup> And road accident fatality rates (per million inhabitants) are relatively high in New Zealand: 69.9, compared with 53.7 in Australia—but 109.4 in the United States, despite its relatively litigious environment (OECD 2018). To investigate whether these countries' differing legal and administrative systems predict these differences, we would have to take account of the severity of penalties, the effectiveness of law enforcement, the quality of safety education and training as well as accident compensation and control for numerous extraneous variables. In the absence of comparative research with such sophisticated controls, one can only *hypothesise* that New Zealand's universal no-fault system may have reduced incentives to prevent accidents at work and on the roads, leading to higher injury rates. If so, stricter law enforcement to counteract a 'failure' of general deterrence could be one remedy.

Similarly, physicians and surgeons in New Zealand cannot be sued by patients for negligence. (They must, of course, follow ethical codes and there are disciplinary actions for misconduct.) Nonetheless, 'the type and number of treatment injuries in New Zealand hospitals is comparable to other countries' (ACC 2017b: 9). The advantage of having a state monopoly insurer along with a public health system is that coordinated

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2 Due to differing criteria and methods of data collection, these statistics may not be closely comparable.

monitoring and prevention strategies are much easier to carry out. And the absence of torts makes open and transparent reporting of errors easier for practitioners and healthcare organisations, as they are less constrained by defensive legal advice.

Despite an absence of torts in New Zealand, it possibly benefits from an ‘umbrella’ provided by larger countries that permit product liability claims. New Zealand imports manufactured goods such as automobiles, machine tools, pharmaceuticals and surgical equipment. Arguably, the discipline placed on manufacturers in countries that retain torts, especially the United States, raises the standards of product safety, leading to fewer accidents—or fewer and less severe injuries—thanks to the improved crashworthiness of motor vehicles. New Zealand is perhaps freeriding on the ‘imported value’ of safety investments made by foreign manufacturers who face product liability suits.

For the time being, however, market theory has not prevailed. The National Government’s efforts to rekindle enthusiasm for ‘choice’ in the period 2010–13 was initially energetic (judging by the number of reports) but came to nothing. There was no outcry of complaint when the plans for competition were shelved and the business community appears satisfied with the deal it is now getting.

Trade unions are probably the ACC’s staunchest supporters, but many of the most articulate advocates for the Woodhouse principles are lawyers. There may be occasions when one sympathises with an accident victim’s wish to sue on grounds of negligence, but the legal profession largely accepts the scheme’s overall principles and benefits. Hardly anyone bemoans their inability to sue fellow citizens.

Measured by the costs of accident insurance to individuals and firms, New Zealanders get a good deal. And, except at the margins, claims are processed and accepted expeditiously. Nonetheless, when return to a pre-injury occupation has been ruled out on medical grounds, some long-term claimants are left worse off, due to the lack of entitlement to either pensions for permanent partial disability or retraining for a low-risk occupation of equal status and income.

New Zealanders receive a good standard of medical treatment, rehabilitation and income support from the ACC. There are relatively few disputes, and hence less of the anxiety that goes with them. Negligence action remains a ‘lottery’—and a slow motion one, at that—and New

Zealanders are better off without it (Palmer 1995, 2008; Luntz 2008). In spite of the lack of emulation abroad and the domestic squabbles about particular provisions, the ACC model has basically been a success for New Zealanders, whether we judge it in terms of longevity, political legitimacy, economic efficiency or individual and social wellbeing.

## Conclusion

In drawing lessons from this case study, it makes no sense to recommend that other countries adopt the Woodhouse principles. In spite of well-known problems with the common law as a remedial system, it would require unusually strong public and political support for any other country to follow New Zealand's example. Economic interests and constitutional hurdles stand in the way. Looking at the reasons Woodhouse's vision became a long-term success story, however, does point to some general lessons.

We can begin at the policy blueprint stage. Clearly expressed principles that address both wellbeing and efficiency, written in succinct and jargon-free prose, were critical success factors. Woodhouse presented a bold and compelling case that captured attention and drew support from a range of stakeholders and lawmakers. The ACC's implementation and long-term success have been aided by strong advocacy from vocal supporters—mainly trade unionists, academics and lawyers. Naturally, there was opposition from interest groups and political support has not been universal. The National Party was less enthusiastic than Labour about the Woodhouse principles (especially 'community responsibility') and they have preferred commercial insurance principles and competitive provision. But both political parties have repeatedly acknowledged the relevance of Woodhouse's principles by claiming that their various reforms have upheld them—even if those claims are not always convincing. Both parties have passed legislation that does not fully represent the initial blueprint. But the important point is that there is a clear, consistent and robust blueprint that cannot be ignored.

The royal commission's recommendations were unexpected, as its authors exceeded the terms of reference of their commission, making a bold proposal to terminate key civil legal rights, even though there had been no critical policy failure or public outcry that appeared to necessitate radical reform. It succeeded due to the intelligence and foresight of the

chair of the commission (Woodhouse) and to the particular constitutional environment of New Zealand. As a senior judge, Woodhouse must have been aware that terminating civil legal rights was achievable for New Zealand's unicameral parliament, as it lacks a written overarching constitution with entrenched rights and it does not require the consent or cooperation of states or provinces. But the relinquishment of rights could be acceptable (politically and legally) only with a 'social contract' that guaranteed automatic entitlement to a reasonable alternative. In the 1970s, 'community responsibility' (in contrast to the methodological individualism of neoclassical economics) was a more readily accepted ideal. So, the lesson here is that success can depend on the 'fitness' of policy proposals to their social, historical and constitutional contexts.

Whereas other case studies in this volume present enduring successes of New Public Management reforms, the ACC story represents an exception. And yet the scheme performs well, in terms of efficiency and effectiveness. Costs did get out of control in the late 1980s as unemployment rose, so it seemed reasonable then to propose that the private sector might do a better job. Tighter controls over rehabilitation and claim termination after 1992, however, levelled out expenditure. Full funding has produced investment incomes and helped to stabilise premiums—and businesses want premiums to be both low and stable. Now that the ACC is financially more sustainable, the case for competitive private sector provision looks weaker, especially given the advice that competition could lead to *greater* costs unless benefits were to be radically curtailed. The 'deal' that underpins the ACC—a ban on all negligence actions, in return for state-guaranteed compensation—means that, if benefits were significantly reduced, there would be demands to bring back the right to sue. If the deal collapsed, insuring against the risk of damages awards would load new costs on to firms and medical practitioners. So, accident compensation policy in New Zealand appears to have reached an 'equilibrium', wherein the public is satisfied to forgo the right to sue, everyone pays relatively low premiums and (with some exceptions) cover is promptly assessed and granted. After my accident, my first thought was neither 'Will my insurer cover this?' nor 'Whom can I sue?' My sole concerns were treatment and recovery.

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