

New Zealand's Failed Experiment with State Monopoly Accident Insurance

Bryce Wilkinson

GEORGE ORWELL CHOSE 1984 as the futuristic title for his portentous novel portraying nationalistic dirigisme. For New Zealanders 1984 has become a benchmark year in the relationship between the state and its citizens for a different reason. This was the year in which a Labour government initiated what David Henderson, an experienced observer from the Organization for Economic Co-operation & Development (OECD), has called "one of the most notable episodes of liberalization that history has to offer".¹ These reforms signalled the end in New Zealand of a century-old vision that the

government could sustain 'cradle-to-grave' protection against economic uncertainty.

The subsequent reforms swept away much economic regulation. Wage, rent, interest rate and price controls were scrapped. Business and farming subsidies were virtually eliminated, as were restrictions on capital flow and international trade. The current government intends to eliminate all tariffs well before 2010. In 1991 a century of labour market regulation was scotched, but not entirely killed.

Even so, dirigisme continues. General government spending is around 40 percent of gross domestic product,² with state funding

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1 As cited in L. Evans, A. Grimes & B. Wilkinson, with D. Teece, (1996) *Economic Reform in New Zealand 1984-95: The Pursuit of Efficiency*, JOURNAL OF ECONOMIC LITERATURE 34, pp 1856-1902.

2 The OECD's June 1998 Economic Outlook, Annex Table 28, presents figures for New Zealand general government spending that range from 57.5 percent of gross domestic product in 1990 to a projected 44.9 percent for 1999. However, these estimates materially overstate actual spending by adding

and provision dominating in areas such as health, education and social welfare. Furthermore, social regulation has increased in New Zealand, as in the OECD at large. Reflecting this increase, the government is seeking to improve its regulatory processes so as to reduce business compliance costs.

Accident compensation is one of the many remaining areas of state control. New Zealand's current arrangements stem from the Accident Compensation Act 1972. This legislation made New Zealand the first country to introduce a system of comprehensive, no-fault insurance coverage for accident-related injuries and disabilities.³ New Zealand's post-1972 accident compensation scheme (ACS) has been much studied internationally, but has never been emulated. The system underwent a major shift in 1992. Rejecting the vision of the ACS as being part of the social welfare system, the government legislated to make it an insurance-based scheme. It also terminated the payment of lump-sum benefits to the victims of accidents. Disputes about what constitutes a covered injury or accident, and over the level of benefits, have since intensified, along with calls for a return of the right to sue. In May 1998, the government effectively abandoned the premise that a state monopoly in accident insurance can be made to work.

This essay briefly reviews the scheme as it exists today, outlines how it came about, documents some aspects of New Zealand's unsatisfactory experience with the scheme and summarises the government's latest proposals. As other nations consider proposals to enact their own varieties of tort and liability insurance reform, New Zealand's attempt should be a cautionary tale.

WHAT DOES THE SCHEME CURRENTLY ENTAIL?

All New Zealand residents, including residents temporarily overseas, are covered by a cradle-to-grave, no fault, mandatory, state-provided accident rehabilitation and compensation insurance arrangement. Overseas visitors are similarly covered while in New Zealand. The scheme removes the right to sue for personal injury caused by accident, although one can sue for losses from damage to property, or for compensation for mental distress not arising from a personal injury to oneself, and claimants may hope to benefit from awards of exemplary damages against wrongdoers.

The Accident Rehabilitation and Compensation Insurance Corporation (ARCIC), a Crown entity, administers the ACS. It is responsible for injury prevention, treatment, income maintenance and rehabilitation. It largely funds services supplied by others. It primarily funds:

- the costs of removing the injured from the scene of the accident;
- some, but not all, of the costs associated with medical treatment;
- compensation for loss of earnings at 80 percent of the victim's pre-injury income, up to a set maximum (\$1,246.27 a week in 1996/97⁴). Abated compensation is paid where the injured person can work, but only at reduced earnings;
- vocational support involving retrain-

parliamentary appropriations to the spending of Crown entities that are funded by those appropriations.

³ See, for example, p 184 in the 1998 OFFICIAL YEARBOOK, Government Printing Office, Wellington, New Zealand.

⁴ See p 88 in INJURY STATISTICS 1997, ARCIC, pp 1-127, Wellington, New Zealand.

ing for injured persons; and

- personal support, such as an independence allowance, modifications to homes and cars in the event of permanent incapacity, and a range of care services.

No payments are made under ACS for losses due to sickness as distinct from accident. The state separately provides sickness and invalids benefits, but payments under the ACS for loss of earnings from accident tend to be more generous. Such differentials put pressure on general practitioners to report that an inability to work is due to accident rather than sickness.⁵

Individuals are free to buy private insurance against medical costs and loss of earnings, whether from sickness or from accident. At December 1997, life offices alone had a total of 163,511 individual income replacement, accident, medical or trauma policies outstanding. (More individuals were covered in group scheme arrangements.) This represented one policy for every 7.8 households, as recorded in the 1996 census of households. By contrast, in 1991, the year before the 1992 reforms referred to above, there were only 46,222 policies outstanding.

The ACS began fully funded, but is now funded on a pay-as-you-go basis. All employers, including the self-employed, pay a premium based on their total payrolls. The amount paid depends on industry risk modified by the employer's injury work record. For the 1998/99 employer premium year, the sums range from \$1.04 for every \$100 of payroll (for education) to \$8.34 for every \$100 of payroll (for meat processing). In addition, all earners pay \$1.20 for every \$100 earned to

cover non-workplace accidents (as of April 1998). Motorists pay \$90 for each private car each year and 2 cents on every litre of petrol consumed. The government pays for the costs of accidents to non-earners out of general revenue.

The ARCIC received 1.5 million registered claims in the financial year to June 1997, in a country of 3.6 million people. Of these claims, 1.3 million were compensated for medical treatment only. The average cost of medical treatment is \$130 per claim.⁶ Many people would surely not voluntarily insure against such minor expenses in relation to most incomes, and the burden of processing these claims arguably distracted the ARCIC from other important tasks (see below).

The remaining 127,081 new claims in 1997 (about 8 percent) involved moderate or serious injuries that were compensated by benefits, such as weekly compensation, in addition to medical treatment. The ARCIC refers to such claims as 'entitlement claims'. In addition the ARCIC continued to provide support on 135,391 entitlement claims for the ongoing effects of injuries that occurred in previous years. Most of the ARCIC's money in 1996/97 was spent on these 262,472 new and ongoing entitlement claims.

The ARCIC's expenditures in its 1997 financial year totalled \$1.9 billion (about 2.0 percent of gross domestic product). Medical treatment for the 1.3 million minor new claims cost around \$0.2 billion. Excluding unallocated costs, such as operating costs and collection fees (another \$0.2 billion) and bulk-funded public hospital costs and ambulance charges, expenditures on the 262,476 entitlement claims were reported to be \$1.2 billion. Work-related accidents (excluding motor vehicle ac-

5 CONSUMER, published by New Zealand's Consumers Institute, May 1994, p 9, cited a general practitioner as saying: "You know your patients have no prospect of finding a job so you help them out. You can always find a specialist who will say that your patient is not able to work. Many doctors are acting like a social agency, finding funds for people down on their luck".

6 See p 4 in INJURY STATISTICS 1997.

cidents), which accounted for 33 percent of total entitlement claims, directly cost \$535 million, 46 percent of total expenditures on entitlement claims. Injuries to non-earners and non-work injuries to earners were the next highest category, accounting for fractionally under 38 percent of total entitlement claims. Motor vehicle-related claims cost \$186 million, 16 percent of total entitlement claims. Finally, accidents involving medical misadventure and subsequent work injuries cost \$8 million, representing almost 1 percent of the costs allocated solely to entitlement claims.

While new entitlement claims in 1996/97 accounted for 48 percent of total entitlement claims, they accounted for only 16 percent of the cost of all entitlement claims. The ARCIC estimates that the overall cost of new claims that continue to be supported past the first 12 months is up to 15 times their first year costs.⁷ Under the current pay-as-you-go system, with current payments covering past accidents, the ARCIC estimates that the future cost of current claims is \$7,479 million higher than its account reserves.⁸ This unfunded difference is more than three times higher than ARCIC's entire 1997 income, and 23 times higher than the 1996/97 operating surplus of \$295 million.

HOW DID IT COME ABOUT?

The 1972 legislation referred to above represented a radical departure from New Zealand's previous system of workers' compensation, liability for negligence, and common law remedies. It replaced a statutory workers' compensation scheme, compulsory third-party motor vehicle accident insurance, and a criminal injuries compensation scheme.

Prior to 1900, workers in New Zealand relied on common law for compensatory redress. Legislative changes in Britain in 1897 and a major mining accident in New Zealand in 1896 led to the Workers' Compensation for Accidents Act 1900. After 1900, employers were liable for all work accidents except those caused by serious misconduct by the employee. This Act was rapidly replaced by the Workers' Compensation for Accidents Act 1908. The 1908 Act substantially increased the maximum compensation payable and, though frequently amended, formed the basis of workers' compensation for the next 65 years. Under this Act employers were liable for all accidents, with a prescribed schedule for maximum payments and a proportional scale of compensation for incapacity. In 1947 it became compulsory for employers to insure against accident liability. At the same time a Workers' Compensation Board was set up to cover workers whose employers had failed to insure, recover those payments from the employer and set the maximum rates that state or private insurers could charge. Common law remedies for personal injury or property damage were also available for work and non-work accidents. Workers could take common law actions, on the grounds of employer negligence, in order to increase the compensation they received, although damages awarded were likely to take into account amounts already received.⁹

The 1972 Act originated from the recommendations of the 1967 Royal Commission on Compensation for Personal Injury in New Zealand, chaired by Sir Owen Woodhouse, a senior judge. The Royal Commission set out five principles for an accident compensation scheme:

⁷ See p 5 in *INJURY STATISTICS 1997*.

⁸ See p 84 in *ANNUAL REPORT 1997*, ARCIC, Wellington, New Zealand.

⁹ The historical information in the last two paragraphs is based on section 1 in *A NEW PRESCRIPTION FOR ACCIDENT COMPENSATION*, New Zealand Employers Federation, September 1995, pp 1-69.

- community responsibility;
- comprehensive entitlement;
- complete rehabilitation;
- real compensation; and
- administrative efficiency.

The Royal Commission's concept of community responsibility appeared to put little weight on the concept of individual responsibility and to rule out decentralised arrangements such as private insurance:

We have made recommendations that recognise the inevitability of two fundamental principles. First, no satisfactory system of injury insurance can be organised except on the basis of community responsibility. Second, wisdom, logic and justice all require that every citizen who is injured must be included, and equal losses must be given equal treatment.¹⁰

This emphasis on the replacement of individual responsibility and autonomy by 'one-size-fits-all' state decree is reflected in Sir Geoffrey Palmer's reflections as to why New Zealand took such an extraordinarily ambitious step to state control in 1974:

... let me address the question, which after 20 years is the most intriguing question of all: Why was this scheme introduced in New Zealand? ... The only explanation I can offer is that it was done because the value system was different [from those in other countries]. This principle of community responsibility was accepted and it was a reform based on a set of principles that were carefully articulated in the [1967] Royal Commission's report.¹¹

At least one of the scheme's promoters recognised some of its deficiencies, but anticipated and hoped that the pressures they would

generate might lead to the more ambitious goal of state coverage for losses arising from accidents and sickness.¹²

Some of the design features of the scheme appear to have reflected the desire to have the benefits funded at no apparent additional cost. For example, the drive to have a single state monopoly provider may have reflected the view that savings in overhead costs could help fund benefits. The same thinking might help explain the drive to hold down operating costs at the expense of other objectives. Most particularly, the drive to remove the right to sue apparently reflected a belief that it would be easier to sell the scheme if employer spending in relation to liability litigation was being reduced at the same time as spending on workers' compensation was being increased. Sir Geoffrey Palmer has stressed the importance of this essentially political argument as follows:

Strategically it was essential to the Woodhouse style of reform that a compelling case be developed against the common law. If the common law survived, a comprehensive system for injury was unattainable. If the common law remained, the financial logic of the reform was destroyed – new sources of revenue would be needed rather than making better use of the existing money.¹³

To support this economically illogical, but expedient, funding proposition the reformers also argued that common law remedies were inferior to insurance arrangements as a means of compensating for injuries. Accident victims had to prove fault, and were subject to strict rules of evidence, costly delays and uncertainty, whereas under the reformed system compensation would be automatic. The

¹⁰ Royal Commission of Inquiry, (1967) *COMPENSATION FOR PERSONAL INJURY IN NEW ZEALAND*, Government Printing Office, Wellington, at p 20.

¹¹ Page 611 in G. Palmer, (1993) *The New Zealand Experience*, UNIVERSITY OF HAWAII LAW REVIEW 15(2), pp 604-620. That issue records the proceedings of an international workshop held from March 22-24, 1992 on *Beyond Compensation: Dealing with Accidents in the 21st Century*.

¹² Palmer, cited in footnote 11, at p 614.

¹³ G. Palmer, (1979) *COMPENSATION FOR INCAPACITY*, Oxford University Press, Oxford, at p 25.

reformers failed to take seriously the possibility that well-designed and consistently enforced liability rules could serve a useful deterrent role, absent from the reformed system. The Royal Commission appeared to regard accidents as acts of God whose probability could not be materially influenced by the behaviour of the individuals involved.¹⁴

The public policy rationale for denying common law remedies for personal injuries may have been more defensible if common law remedies were having irredeemably perverse effects. However, at least one of the scheme's proponents admits this was not the case:

While the right to sue existed in New Zealand, it was not availed of nearly with the same vigor or with the same determination that it has been in the United States. Contingent fees, of course, were unlawful in New Zealand. There were a number of factors which tended to make this a moderate system. The judges controlled it. Even though the juries made the findings of liability and the awards of damages, the judges controlled it much more than is possible in the United States because they were allowed to comment on the evidence. When judges comment on the evidence in New Zealand, the juries tend to take notice of them.

You cannot find, therefore, in the legal system of New Zealand or in the jurisprudence relat-

ing to the tort system anything that has any explanatory power in relation to the accident compensation scheme. There was little in the way of abuse or excess. It was a most mild-mannered little tort system.¹⁵

Reflecting the 'government knows best' approach taken to reform at that time, employees were not given the option of receiving, through higher wages, the employers' cost savings associated with abolition of the right to sue – to spend on insurance premiums, or otherwise, as they individually saw fit. Instead, the state put the savings towards the funding of a 'one-size-fits-all' monopoly insurance scheme.

WHAT HAS BEEN NEW ZEALAND'S EXPERIENCE WITH THE SCHEME?

Overview

Proponents of the centralised monopoly structure claimed it would reduce the costs to society of accidents, encourage rehabilitation, and facilitate the collection of detailed information for research. (Why the last of these was regarded as important is not clear.) Although views about the inherent value of the scheme differ widely, the consensus 25 years later is that the system has failed to meet expectations.¹⁶ To the contrary, it has

14 This contrasts with the findings of a number of studies which show a significant and positive response of accident rates and injury duration to increases in workers' compensation benefits. See, for example, B. Meyer, W.K. Viscusi & D. Durbin, (1995) *Worker's Compensation and Injury Duration: Evidence from a Natural Experiment*, AMERICAN ECONOMIC REVIEW 85(3), pp 322-340, or R. Butler, (1994) *Economic Determinants of Workers' Compensation Trends*, JOURNAL OF RISK AND INSURANCE 61(3), pp 383-401.

15 Palmer, cited in footnote 11, at p 612.

16 For example, on 21 April 1995, the National Business Review reported that 67 percent of those surveyed in a nationwide NBR-Consultus poll had an unfavourable view of the ARCIC and another 10 percent had no opinion on the matter. However, 61 percent said they would prefer the scheme itself to be retained rather than disbanded with people taking out private accident insurance and having the right to sue. This indicates the widespread and persistent hope that somehow it can still be made to work. A more detailed poll undertaken around the same time by the Insurance Council found strong support for a scheme covering all New Zealanders for workplace injuries, much reduced – but still majority – support for coverage for non-workplace injuries and for the no-fault provision, 49 percent opposition to the right to sue and 62 percent support for permitting private insurers to compete with the ARCIC for the provision of the government-mandated benefits.

been a source of endless controversy and dissension. Nor does the failure reflect lack of will. Eleven major reviews of the scheme since its inception in 1974 have failed to produce a sustainable configuration.¹⁷

More particularly, as explained at greater length below, rehabilitation has not been a priority. The ARCIC has failed to develop a useful information database. Coverage levels have been a never-ending source of dispute and political pressure.¹⁸ The ARCIC itself is perceived as failing to meet basic standards of professionalism.¹⁹ Media reports suggest a great deal of successful rent-seeking by professionals associated with the scheme and opportunistic claimants.²⁰ Cross-subsidies within and between industries have distorted incentives. Finally, claims have largely been rubber-stamped to minimise administrative costs, yet total costs have nonetheless escalated.

Rehabilitation

One of the major failures of the scheme has been its inability to devote resources to the management of timely rehabilitation. Since case management raises direct operating costs in order to reduce ongoing medical and income replacement costs, the failure to spend money on case management no doubt arises directly from the undue emphasis in the

scheme's first two decades on minimising operating costs. This failure has only recently been acknowledged. In announcing a new case management system in 1995 the ARCIC conceded that:

Until that time [1994] Corporation staff had not taken individual responsibility for managing the recovery of claimants. With around 1.3 million new claims being received each year and around 140,000 claims still being managed from previous years, staff had little option but to function as office-bound information processors.²¹

In June 1997 ARCIC's chairman was quoted as commenting in similar vein that:

I suspect the reason we have so many people on the tail is that we have tended to rely on time to heal them rather than proactive management of people on the scheme. We're now actively managing them back to independence.²²

Data

The greater the level of state control of an industry the less the scope for competition to discover potential cost savings or differences in consumer preferences in relation to quality, quantity and price. A monopoly state-owned provider inevitably operates in an intrinsically politicised, non-commercial environment. It

17 A useful list is contained in section 3 of the New Zealand Employers Federation paper cited above in footnote 9.

18 As the original promoters of the scheme anticipated and intended, the scheme permitted interpretations of what constituted an accident and personal injury to be modified markedly over time. The hidden cross-subsidies in a state monopoly scheme arguably increase the tension between those pushing for benefits to be expanded and those concerned about costs. When there is no market mechanism for resolving such conflicts these tensions must be addressed politically.

19 For example, two of its previous chief executives have departed in inauspicious circumstances, one of them being subsequently convicted of fraud.

20 The pressure on medical practitioners to acquiesce in opportunistic claims is noted in footnote 5 above. Bill Falconer, chairman of the ARCIC, was reported in the NATIONAL BUSINESS REVIEW, 20 June 1997, as commenting that it has "... probably not taken the preventative action that you would expect of a good insurer. You may wonder why we didn't do it years ago but the important thing is that we are doing it now".

21 See pp 12-13 in ANNUAL REPORT 1995, ARCIC, Wellington, New Zealand.

22 NATIONAL BUSINESS REVIEW, 20 June 1997.

has little incentive to collect the sort of information about costs, accident/safety relationships and consumer preferences that would be collected in a commercial environment.

Given these incentives it should be no surprise that potential competitors and social reformers alike complain about the inadequate data emanating from the ACS. For example, one of the scheme's most ardent champions, Sir Geoffrey Palmer, lamented a few years ago that:

... probably the biggest failure in this scheme, in its entire history, has been a failure to keep statistics of a sort that would enable sensible policy changes to be made and to know what is actually going on.²³

An independent US-based academic commented in similar vein that:

Certainly it is one of the sad parts of the New Zealand experience that the hope of the framers for the best accident statistics in the world were never realized and that, in consequence, we don't really have any useful statistics.²⁴

Inadequate data inhibits accountability, assessments of influences on accident trends, the imposition of risk-related premia and the introduction of competition.

Accident experience

Arguably, the ARCIC's limited incentive, or ability, to charge actuarially fair premiums and the abolition of the right to sue have made New Zealand a more risky place. While the lack of adequate data makes it hard to assess the effects of New Zealand's no-fault system on the accident rate, and safety regulation and technological change (leading, for example, to safer roads, safer cars and superior medical

treatments) are possible offsetting factors, there are grounds for taking concerns about incentives seriously.

In 1987 Samuel Rea reviewed a range of empirical evidence drawn from the United States and Canada concerning the effects of no-liability regimes. In the case of New Zealand he could only report that:

It appears that no one has analysed the data. The few articles that exist are written by lawyers who are advocates of this type of system, and they contain no statistical analysis and no mention of the possibility of any change in the number of accidents.²⁵

In a footnote to this remark Rea acknowledges other evidence of a reduction in traffic accidents, but comments that those reports failed to control for other variables. Catherine Yates presents data that indicate that the abolition of the right to sue did not seem to result in a notable increase in criminal prosecutions against employers, despite eliminating a much greater number of civil actions. She infers that:

... whether the deterrent effect of tort actions was minimal or substantial, it has not been replaced.²⁶

The Corporation does publish relatively crude injury statistics annually. While some of the series go back to 1975, they are not detailed enough to permit any conclusions to be drawn about trends in safety adjusted for changes in occupation, activity or age. Based on the available data, the number of services rendered per head of population all but tripled during this period (from 0.67 to 1.99), and the number of claims per thousand people rose 34 percent (from 32 to 43 per thousand).²⁷

23 Palmer, cited in footnote 11, at p 615.

24 R.S. Miller on p 649 in (1993) *Comments: The New Zealand Experience*, UNIVERSITY OF HAWAII LAW REVIEW 15(2), pp 621-658.

25 S. Rea, (1987) *Economic Analysis of Fault and No-liability Liability Systems*, CANADIAN BUSINESS LAW JOURNAL 12(4), pp 444-472.

26 Refer to p 41 in C. Yates, (1989) *Law Commission Proposals for Accident Compensation: What Place for Personal Remedies?*, VICTORIA UNIVERSITY OF WELLINGTON LAW REVIEW 19, pp 29-56.

27 These numbers are derived from pages 7 and 11 in INJURY STATISTICS 1997.

A recent article in *Safeguard*, a magazine published by the Occupational Safety and Health Service in the Department of Labour, confirmed the ongoing paucity of accident statistics in New Zealand – and supported the impression of a woeful trend in accident rates. The author suggested that workplace injuries and illnesses might account for between 4 and 8 percent of New Zealand's gross domestic product. Possibly more noteworthy was the estimate of a workplace fatality rate of 7.2 deaths per 100,000 workers during 1975-84, compared to 8.1 per 100,000 during 1989-90. Although the two statistics come from different sources, suggesting that their comparability may be in doubt, the author (who, it should be cautioned, was making a case for increased government spending on the regulation of occupational safety and health) felt on strong enough grounds to polemically observe that:

Our fatality rates are shamefully high compared to other countries with which we like to be compared. Overseas research reports reductions in occupational related fatality rates of between 60 and 70 percent over the last two decades in Sweden, Japan, Germany and the United States. Table Four shows that in the same period New Zealand's occupational fatality rates have certainly not fallen, if anything, they have increased.²⁸

More research based on better data is clearly needed.

Cost experience

The ARCIC has put great emphasis on controlling its reported operating costs as a percentage of its total expenses, but this has been in an environment in which total

expenses have grown rapidly. Total ACS expenditures have increased at an annual average real growth rate of 8 percent since 1985. This is more than 7 percent per annum in real per capita terms. In addition, the data discussed above on the size of the system's unfunded liability, and the significant tail of long-term claimants, complete the picture on costs.

The actual level of current spending is also far higher than implied by initial cost projections. In 1969, officials projected that the scheme would cost \$43 million a year in 1969 dollars. The implied 1997 cost, adjusted for inflation and population growth, would be \$632 million. The ARCIC's actual expenditures in 1997 were three times higher than this at \$1.9 billion. The comparison is even more invidious in that officials' cost projections in 1969 assumed a claims incidence of 200,000 cases per year, about twice the actual incidence.²⁹ Presumably their cost projections would have been appreciably lower if their projected claims incidence had been more accurate.

WHAT IS THE FUTURE OUTLOOK?

Opinions as to solutions to the problem differ markedly. All the major business groups in New Zealand combined in 1997 to campaign for a first principles review of current arrangements and the replacement of the statutory monopoly by a competitive insurance market.³⁰ Their complaints about existing arrangements encompassed the lack of choice, escalating costs, insufficient attention to rehabilitation and risk-related premiums, weak

28 Page 36 in J. Wren, (1998) *A Matter of Priority*, SAFEGUARD 48, March-April, pp 34-37, New Zealand Department of Labour.

29 Refer to page 10 in *A NEW PRESCRIPTION FOR ACCIDENT COMPENSATION* and to p 11 in *INJURY STATISTICS 1997*.

30 The groups included the Federated Farmers of NZ Inc., the Insurance Council of NZ Inc., NZ Business Roundtable, NZ Employers Federation, NZ Forest Owners' Association, NZ Manufacturers Federation, NZ Master Builders Federation, NZ Meat Industry Association and the NZ Road Transport Association.

accountability, poor incentives and excessive political influence.

In contrast, institutional support for the state monopoly appears to be strongest within the trade union movement, as does support for the removal of the prohibition on the right to sue.³¹ Underlying this viewpoint appears to be a perception that the New Zealand scheme provides the injured with a free lunch that would disappear if workers were permitted the freedom to negotiate their own arrangements with employers. The case for denying workers this freedom appears to rest on the proposition that employers have superior bargaining power when negotiating with workers, and that competition for the same labour between employers does not override that pro-employer bias.

The system is currently undergoing fundamental reform. On 2 December 1997, the government announced its intention to: move to fully fund certain parts of ACS; introduce more competition by expanding a relatively new 'Accredited Employer Programme' that allows qualifying employers to reduce costs by managing their own employee's work injury claims for the first 12 months; and to investigate other options, including allowing the self-employed to purchase private income insurance instead of making payments to the ARCIC. The proposed measures would also separate monies collected to cover unfunded liabilities for past accidents from monies collected to fund current accident costs. While full-scale privatisation was ruled out, these announcements were widely viewed as opening the way for a partial move to competitive insurance arrangements.

On 14 May 1998, the government announced that from 1 July 1999, employers and the self-employed will be able to shop around for their accident insurance. This reform will effectively end about one half of the current state provider's monopoly. Choice will continue to be constrained by requirements for minimum insurance benefits based on currently mandated levels.

This limited move to a competitive insurance market removes a fundamental pillar of the 1974 arrangements, by consolidating the move, commenced in the 1992 Act, to view the scheme as an insurance arrangement rather than as a form of social insurance in which premiums should not be related to risks and benefits should not be closely related to premiums. This move will probably increase pressure to open up to competition the remainder of ARCIC's monopoly, such as coverage for motor vehicle accidents, non-earners, and medical misadventure, and to privatise those operations within the ARCIC that compete with private insurers and case managers.

Similarly, pressures to reconsider the prohibition on the right to sue seem likely to persist. This would remove another major pillar of the original structure. Since provision for lump-sum payments in cases of personal injury by accident was abolished in 1992 the courts have increasingly imposed 'exemplary damages' and awarded a portion of these fines to the injured party. This trend has attracted vigorous scholarly legal criticism.³² As discussed at length in the pending report referred to in the author's footnote to this essay and by Richard Epstein,³³ a better approach, in principle, might be to allow greater freedom of contract

31 For example, in March 1996 the Engineers Union launched a nationwide publicity campaign using a brochure entitled: *Get Mad: Get Even: Return the Right to Sue the Unsafe Employer*. The trade-union-associated Coalition on Accident Compensation supports either a return to the principles in the Woodhouse Report or a return of the right to sue.

32 J. Smillie, (1997) *Exemplary Damages for Personal Injury*, NEW ZEALAND LAW REVIEW, pp 140-175.

33 R. Epstein, (1996) *Accident Compensation: The Faulty Basis for No-fault and State Provision*, NEW ZEALAND BUSINESS ROUNDTABLE, pp 1-41.

for the assignment of risk. This would be most applicable to non-stranger cases (such as those involving employers and their employees, producers and their customers, and medical practitioners and their patients). In practice, the value of this approach would depend on the perceived willingness of courts to respect such contracts. It may also be beneficial to restore a controlled freedom to sue in accidents involving motor vehicles.

While New Zealand is now moving towards a competitive insurance structure, intensive state regulation and continuing state ownership are likely to limit the benefits obtained. The introduction of competition is limited, workers and employers will continue to be denied freedom of choice concerning coverage, and extensive regulation

of the privately-supplied product seems likely. Privatisation remains off the political agenda. The absence of any satisfactory public policy rationale for this degree of government control implies continuing uncertainty about the government's policy objectives and how it will trade off conflicts between them. Ongoing disputes seem inevitable concerning boundary issues, the degree of regulation, and the activities and role of the continuing state-owned insurer. Despite the welcome nature of the recent measures, accident compensation arrangements in New Zealand are likely to remain politicised and controversial for the foreseeable future. They should also be a cautionary tale to other nations experimenting with reforming their own systems. *GB*