“The Woodhouse vision; 40 years in practice” - Ross Wilson Chair ACC Board

It is a great honour for me to be asked, as the current Chair of ACC, to make a few opening comments at this conference to mark that historic event 40 years ago today; the publication of the report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand, the Woodhouse Report.

The significance of its central recommendation, the abolition of the common law right to sue for personal injury, was best expressed, I think, by the Editors of “The American Journal of Comparative Law”. They described the implementation of the Accident Compensation Act in 1974 as:

“an unparalleled event in our cultural history, the first casualty among the core legal institutions of the civilised world”i.

It was clearly seen as a groundbreaking reform from the beginning and many of us in this room today have been involved, in various ways, in the life of this remarkable innovation.

And we are privileged to be joined by the great man himself. This makes me more than a bit nervous knowing his razor sharp recollection for matters which I will probably be mis-reporting (unintentionally of course).

But can I take the opportunity to pay my own humble tribute Sir Owen; a great jurist, a great visionary, a humble and compassionate man, a remarkable New Zealander.

My first encounter with Sir Owen was in 1979. I can remember it very clearly. I had recently joined the National Union of Railwaymen and had been quoted in the “Evening Post” making some critical comment about the inadequacy of current ACC lump sum maxima.
I was sitting having morning tea the following day and took a telephone call in the tea room. “Owen Woodhouse” a voice said. I was rendered speechless, momentarily. Was this a friend playing a joke or was the President of the Court of Appeal really ringing me?

Well of course it wasn’t a hoax. As many of will know Sir Owen has maintained a lively interest in his reform over the past 40 years. I received my first tutorial by telephone that day on the merits of a loss of earning capacity approach to compensation for long term permanent partial incapacity.

That was the beginning of what is now quite a long acquaintance, and each conversation has been a privilege and an inspiration.

I have been asked to traverse the scheme since the 1967 report. I worked in the UK for four years so my direct involvement with ACC only goes back as far as 1975. I began work with Bell Gully & Co about 10 months after the scheme came into being on the 1st April 1974.

At Bell Gullys I worked closely with Des Dalgety the senior litigation partner, who was one of New Zealand’s leading civil jury lawyers, with a huge personal injury practice. He has been described by Geoffrey Palmer as “the New Zealand version of the Washington DC lawyer, a man who deals with and understands Government.”

Des represented both the Law Society and the railway unions before the Gair Select Committee which considered the Woodhouse Report and, rightly or wrongly, his advocacy was key to the Gair Committee recommendation supporting lump sum benefits for non-economic losses, and to the defusing of opposition from within the law society and trade unions. The social contract was born.

We talked a lot about ACC, and the combination of his encouragement and the experience I have had since then representing injured workers, are what has motivated me to spend quite a lot of my working life trying to hold governments and ACC to account for delivery on the promise of a generous and excellent scheme.

The Gair Committee Report was the basis of the 1972 Act with the addition of the non earners scheme which was grafted on by the incoming Labour Government in 1972.
A feature of the process from the Woodhouse Report to the commencement date of the scheme was its leisurely pace. Given the pace of political change during the last two decades, the period of more than 6 years consultation and legislative process, almost makes one nostalgic for that slower pace of political life.

The “independent authority” recommended by the Royal Commission was strongly supported by Des Dalgety on behalf of the Law Society and the railway unions and he himself was offered, but refused, the Chair of the Accident Compensation Commission when it was established. Ironically the first Chair was a lawyer who had vocally opposed the Woodhouse Report.

On today’s standards the whole process was comparatively consensual at a political level. The Labour Party supported the Woodhouse proposals but the National Party caucus were initially split on the reform. It took key political figures from the “depression” generation who had lived through WW 2; people like Tom Shand Minister of Labour until his death in 1969, Jack Marshall, Ralph Hanan and George Gair to carry the reform through, apparently with important encouragement from the Chief Justice Sir Richard Wild and senior public servants.

George Gair is reported to have said that the Gair Committee process was an exercise in extreme patience, while the National Party MP and Gair Committee opponent of the reform, Sir Leslie Munro, is reported to have said “the idea was basically a socialist one and Tom Shand was one of the best ministers the Labour Party had ever had.”

The consensus around ACC largely held until the end of the 1970s when a new generation of National Party politicians, most notably Derek Quigley, led a Caucus Committee review of the scheme and recommended a number of significant cuts, including the abolition of lump sum compensation.

These proposals led to a spirited coalition of opposition from unions, doctors, and consumer groups and early in 1981, an election year, the then Prime Minister Robert Muldoon (who some suggested had set Mr Quigley up to fail) dropped the amending legislation.
A new 1982 Act evolved after the 1981 General Election with the most significant change being the replacement of the Commission with a Corporation.

ACC also survived the tumultuous reform years of the 4th Labour Government in the late 1980s only (and I can say this as the Deputy Chair of ACC at the time) because of the adept defensive strategies of the Deputy Prime Minister, Geoffrey Palmer. Adroit manoeuvres like a timely referral to the Law Commission into the safe hands of its then President Sir Owen Woodhouse (and fellow Commissioner Professor Ken Keith) kept ahead of the Treasury officials and Ministers who would like to have put ACC on a fast track to private insurance.

The Law Commission published an excellent report in 1988 which was not actioned for similar reasons. However, in the dying days of the Government Michael Cullen introduced a Bill which would have extended the scheme to all serious incapacity, and which returned to such Woodhouse Commission concepts as flat rate benefits for the first 4 weeks of incapacity. It had not passed into law by the time of the 1990 General Election which elected the Bolger National Government, promising “A Decent Society”, in a landslide victory.

The new Minister of Labour, Bill Birch, lost no time in establishing the Galvin Committee which recommended a four step process to private insurance.

The 1992 Act, which followed Minister Birch’s “Fairer Scheme” white paper, introduced some very significant changes in the first stage in that process.

Lump sum compensation for non economic losses was abolished, discretionary entitlements were tightly regulated into prescribed amounts, cover for occupational disease was restricted, the “cornerstone”of the Woodhouse model, the permanent pension for long term incapacity was abolished, and a work capacity process to facilitate the termination of claimants with a long term partial incapacity was introduced.

To say that the 1992 Act was controversial would be an understatement. Its enactment led to the formation of an unlikely coalition of trade union, legal, disability, and women’s
groups, COAC, which campaigned against the Act, and its private insurance sequel, the 1998 Accident Insurance Act.

The 1998 Act you will recall, in an initiative led by Australian insurance companies, privatised the ACC work accident cover for a 9 month period.

However, as they had done in the 1970s the insurance industry under-estimated the resolve of certain politicians and, apparently to the surprise of the Insurance Council, the Clark-led Labour-Alliance Coalition Government which was elected in 1999, restored a national public fund scheme as an early priority. It had strong support from the unions which had influenced Labour Party policy, but there was bitter opposition from opposition parties and the business community.

So it has been something of a tumultuous ride for the ACC scheme through the past two decades.

However, we are left, 40 years on, with an accident compensation scheme retaining the essential elements of the scheme put in place by the political process which followed the 1967 Woodhouse Report.

It is an acknowledgement of the enduring potency of the Woodhouse ideals that both of the two main political parties remain committed to the five Woodhouse principles:

- Community Responsibility
- Comprehensive Entitlement
- Complete Rehabilitation
- Real Compensation
- Administrative Efficiency

These principles, and the scheme which should be constantly measured against them, are the continuing legacy of Sir Owen’s work, but 40 years on we can still be inspired and impressed by the power and elegance of the language and analysis in the Report, all written by Sir Owen himself, which so convincingly exposed the inequity and inefficiency of the common law, and the inadequacy of our old statutory workers compensation scheme.
But as time moves on the world does change and it is of course appropriate that we periodically take account of what is happening in the rest of the world and review ACC against international best practice to ensure that our scheme is continuing to deliver the best possible return for New Zealanders.

Earlier this year the ACC Board decided to commission substantial piece of work to both evaluate and quantify the historical and current return (in both social and economic terms) on our national investment in a national no fault scheme, but also to examine any likely environmental changes we may confront in the years ahead. These include our ageing population, changes in the nature and organisation of work, changes in social values, the changing epidemiology and aetiology of injury and disease, and possible changes in political and public expectations.

Using this information and international evidence, the work will explore any possible alternative models for delivering the Scheme that may maximise the return for the Scheme given those potential changes.

Following a tender process, and with the assistance of independent expert advisers, Price Waterhouse Australia was commissioned to undertake this work. The Board is looking forward to the report in February next year as an evidence base for our own longer term strategic planning. We shall of course be releasing it publicly to inform a wider discussion, and I hope that many of you will take the opportunity to engage in a dialogue with us.

Meanwhile we all have our own views on what we are doing well, and what we are not doing so well. I will conclude with my own reflection on a few of these, using the Woodhouse principles as a benchmark.

Firstly, I can say with confidence that we now have an efficient administration at ACC. I have been impressed since I returned to the Board a few months ago how the overall systems and management at all levels seems to have improved greatly since I was last on the Board 16 or so years ago. Developments in technology have assisted that improvement but there is also a strong commitment from our Chief Executive and staff
to building a culture with a focus on providing excellent service. The improved efficiency and service is reflected in improved levels of surveyed client satisfaction but I accept that there is room for improvement.

Complete rehabilitation. This is an area where we have to do better. In particular I think we have a weakness in both scheme design and performance in relation to injured workers with a significant permanent partial incapacity which prevents them from returning to work in their pre-accident employment, or to modified work with their pre-accident employer. These can be challenging cases and that is acknowledged around the world in workers compensation schemes.

But we need to be more aspirational with our vocational rehabilitation. The existence of a mechanism, whether it was called “light duty assessments” in the 1970s and 80s, work capacity assessment in the 1990s, or vocational assessment in the current decade, to terminate entitlements on the basis of notional employment has had a tendency to undermine the incentive for the scheme to take more of an investment approach.

It is an investment approach to vocational re-training or education which is needed so that an injured worker can be upskilled and re-positioned sustainably in the labour market and thus ensure that future earnings loss is obviated.

The tight labour market conditions we see at present are, according to the experts, likely to be a permanent feature of our economy.

There is a consensus among Government, business and unions that we must upskill our national workforce to underpin the high value high skill economy we all aspire to.

It is entirely consistent with that consensus for ACC to take further steps to ensure that the tragedy of an accident can open up new opportunities for learning and upskilling.

The bottom line objective must be to ensure that the person can be returned to the labour market in a position which sustainably earns as much as the pre-accident employment.

If they do better than that we should see that as a benefit for both the individual and society.
Real Compensation is a related principle. There have been a number of steps taken over the past several years to address issues relating to compensation, including the Bill introduced to Parliament this week to fine tune the calculation of weekly compensation.

And while there are still issues relating to compliance with International Labour Convention 17 which requires all treatment for work accidents to be provided at no cost to the injured worker, the most contentious issue is compensation (or lack of it) for permanent partial incapacity or, more specifically, loss of earning capacity.

The permanent pension was the Woodhouse solution to this issue and this existed, albeit as a difficult to apply actual wage loss model, within our legislation until 1992, but it wasn’t much used.

As a scheme design issue this is a legislative matter for politicians but, particularly in a forum such as this, there needs to be some evidence-based discussion about modern solutions. My personal preference is for the emphasis to be on vocational re-training and sustainable new employment, but as Sir Owen cautioned in his report, there should always be a discretion for individual cases.

The final principle I would like to comment on is the one which isn’t among the five, but was nevertheless a cardinal principle in the Woodhouse Report; “Effective Injury Prevention and Health Protection”.

I think we can all agree that the huge potential which a national scheme like ACC provides for effective injury prevention and health protection is far from being realised.

And there are valid reasons why that is so which include legislative, inter-agency, and policy issues.

I see this as a huge challenge and we are reviewing our strategies with a view to realising that potential, but doing it in effective partnerships with other organisations, whether they are government, business, unions or other NGOs.

In the workplace context, which I am most familiar with, it is interesting to note that the measures originally recommended in the 1967 Royal Commission report are as relevant today as they were then. These are:
• "Active co-operation" between employers, employees and unions.
• Promotion of safety as a priority by ACC.
• Penalties on observed conditions rather than experience rating.
• Underpinning of the criminal law.

Over the past four years ACC has been delivering, in partnerships with the CTU & Business NZ, training of Health and Safety Representatives. More than 20,000 reps have been trained across the country, many to a Stage 3 level.

A recent evaluation of the programme undertaken for ACC has shown an encouragingly high level of activity by these reps. I hope we can now build on this and use this increasing capacity at workplace level to build, in partnership with business and unions, more effective industry programmes and interventions.

Having worked for a number of years in my CTU role in building the HSR training programmes, and building co-operation between the CTU and Business NZ across a range of issues including health and safety, I am very optimistic that ACC can play a key role in taking this to a new level of effectiveness with participatory and applied programmes and interventions which aim for best practice on agreed industry standards.

More broadly, my hope looking forward is that we can achieve a stable environment within which to continue to develop and refine the potential of our unique scheme.

On any comparison we have a very cost effective scheme which delivers prompt effective assistance for injured New Zealanders.

The risk is that we, as a nation, just take it for granted or don’t appreciate its value. Perhaps we have a duty to not only remind ourselves, but others as well, of the cost and inequity of the old system, which many comparable countries, including Australia, are still burdened with, but also to accept the challenge of constantly looking at possible improvements, and to judge them on evidence rather than ideology.

And it is also necessary for us as a society to question why, in a modern and affluent New Zealand, there are different levels of income support and assistance for serious
injury and disease. There is no logic or justice in determining the level of support by reference to the cause of the disability.

It is very appropriate that 40 years on (to the day) we use the inspiration of the great, and modest, man Sir Owen Woodhouse, to rekindle discussion on these important social issues.

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1 Palmer Geoffrey “Compensation for Incapacity” OUP 1979

2 Ibid