

Reference No. HRRT 048/2011

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN ERNEST FINDLAY HEADS

PLAINTIFF

AND ATTORNEY-GENERAL

DEFENDANT

AT DUNEDIN

BEFORE:

Mr RPG Haines QC, Chairperson

Ms WV Gilchrist, Member

Ms ST Scott, Member

REPRESENTATION:

Dr F McCrimmon for plaintiff

Mr IC Carter and Ms AL Graham for defendant

DATE OF HEARING: 19, 20 and 21 February 2013; 23 and 24 April 2013; 11
and 12 June 2013

DATE OF DECISION: 17 April 2015

DECISION OF TRIBUNAL

Introduction

[1] Where a person who has cover for personal injury dies as a result of a fatal injury, the Accident Compensation Corporation (the Corporation) is liable under the Accident Compensation Act 2001 (the AC Act) to pay weekly compensation to the surviving spouse for five consecutive years. Such compensation is neither means tested nor offset against other income or assets.

[2] However, if the surviving spouse becomes entitled to weekly compensation at a time when he or she has reached New Zealand superannuation qualification age (NZSQA), he or she is entitled to such weekly compensation for a period of twelve months only.

The four year balance can only be accessed if he or she makes an election to receive surviving spouse weekly compensation instead of New Zealand superannuation for that period. If such election is made the surviving spouse will receive no New Zealand superannuation payments for the entire duration of the four year period in which weekly accident compensation payments are received.

[3] The issue for determination in these proceedings is whether the requirement that a superannuitant surviving spouse elect between weekly accident compensation on the one hand and New Zealand superannuation on the other breaches the right to be free from discrimination on the grounds of age. An alternative claim based on the grounds of marital status was abandoned during the hearing.

[4] Should the plaintiff's argument succeed, it is estimated by the Corporation that, at most, some 30 surviving spouses over NZSQA and drawing New Zealand superannuation only will become eligible for weekly compensation under the AC Act each year at an additional annual cost of approximately \$1.3 million, a sum which, it is accepted, will have a negligible effect on the levies which fund the accident compensation scheme. Conversely, if the same number of surviving spouses are presently receiving only weekly compensation, the additional cost to New Zealand superannuation will be less than \$700,000 (gross) per annum which is a similarly negligible figure.

An apology to the parties

[5] Before the evidence is addressed the long delay in publishing this decision is acknowledged and an apology offered to the parties. This case was not overlooked. Rather delays regrettably occurred because all members of the Tribunal are part-time appointees and despite best endeavours it is not always possible to publish decisions timeously.

THE EVIDENCE

The background facts

[6] Mr Heads was born on 2 June 1941 and is currently 73 years of age. He is a retired plumber, gas fitter and drain-layer. He turned 65 on 2 June 2006 and commenced receiving New Zealand superannuation from that date.

[7] Mr Heads' wife, Shirley, was born on 7 June 1943. The couple married on 30 September 1961 and there are four adult children of the marriage.

[8] Prior to her death Shirley Heads was employed full-time by the Otago District Health Board and worked at Dunedin Hospital as a senior sterile supply technician. Her wage was one of the couple's two main sources of income. The other main source was the New Zealand superannuation received by Mr Heads.

[9] At lunchtime on 28 April 2008 Mrs Heads was hit by a truck and killed while on the pedestrian crossing outside Dunedin Hospital. She died from the injuries suffered. The driver of the truck was convicted of careless use of a motor vehicle causing death.

[10] At the time of her death Mrs Heads was 64 years of age and Mr Heads was nearly 67.

ACC payments

[11] Among the “entitlements” (the term is used in the statute) available under the AC Act are funeral grants, survivors’ grants, weekly compensation for the spouse or partner, children and other dependents of a deceased claimant, and childcare payments. See s 69(1)(e). Schedule 1 of the Act, Part 4, sets out with greater particularity the “Entitlements arising from fatal injuries”.

[12] By letter dated 13 May 2008 the Corporation advised Mr Heads that it had accepted cover on the claim lodged by him in relation to his wife’s accidental death. Under Part 4, cl 64 Mr Heads received a funeral grant of \$5,101.38. In addition, under cl 65 a survivor’s grant of \$5,469.34 was paid. This was a one-off, non-taxable payment.

[13] By letter dated 20 May 2008 the Corporation advised Mr Heads a determination had been made that he was eligible to receive also weekly compensation as a surviving spouse and the Corporation would pay such compensation from 28 April 2008. Mr Heads was entitled to receive 60% of 80% of his wife’s weekly earnings. The letter stated:

This amount has been calculated on the basis that Shirley Heads was earning \$802.66 a week and weekly compensation is set at 80% of this (\$642.13). You are entitled to receive 60% of this weekly compensation (ie 60% of 80% of weekly earnings – 60% of \$642.13).

[14] It is not in dispute the weekly compensation payments under the AC Act to a surviving spouse are not means tested in the sense that they are not adjusted by taking into account any other income or asset.

[15] The letter went on to advise Mr Heads that at the end of the first year he would need to elect between weekly accident compensation payments and New Zealand superannuation:

You are entitled to be paid weekly compensation for one year until 27 April 2009. From 28 April 2009 you will need to elect either weekly compensation or New Zealand superannuation. We will write to you about this approximately two months prior to that date with a form to elect.

[16] By later letter dated 26 February 2009 the Corporation advised Mr Heads his continued entitlement as a surviving spouse to weekly compensation depended on his making an election to receive those payments rather than New Zealand superannuation:

This letter is to advise you that your continued entitlement to weekly compensation from 28 April 2009 is dependent on you electing to receive weekly compensation rather than New Zealand Superannuation payable by Work and Income.

You must use the attached form (*ACC173 New Zealand Superannuation election notice*) to make a choice to receive either weekly compensation or New Zealand Superannuation. ACC needs advice of your decision by 28 March 2009 at the latest. Please complete and return the form by 28 March 2009 in the freepost envelope provided.

If you do not make a choice by 28 March 2009, ACC must assume that you have chosen to receive New Zealand Superannuation and your weekly compensation payments will stop on 27 April 2009.

If you choose to receive New Zealand Superannuation, you will need to contact Work and Income to make an application.

If you choose to continue receiving weekly compensation your election applies for the period from 28 April 2009 until 27 April 2013.

[17] On 19 March 2009 Mr Heads completed *Form ACC173* and elected to receive weekly compensation payments as a surviving spouse. The New Zealand

superannuation payments received by Mr Heads accordingly came to an end. They resumed on 27 April 2013 on the termination of the five year weekly compensation period.

[18] By letter dated 24 April 2009 the Corporation provided Mr Heads with (inter alia) a brochure from Work and Income, being *Form SFT07*, in which it was stated that any benefit from Work and Income would take into account any accident weekly compensation payment and the benefit would be reduced by the net amount of that weekly compensation payment. In other words, while the accident compensation payment was not subject to a means test, any benefit paid by Work and Income would be means tested and reduced by the net amount of the weekly accident compensation payment.

[19] Mr Heads subsequently sought a review under Part 5 of the AC Act of the requirement that at the end of year 1 of the five year surviving spouse compensation period he elect between receiving weekly accident compensation or New Zealand superannuation. In a decision given on 24 November 2010 the Reviewer dismissed the application, holding the Corporation correctly applied the law when it required Mr Heads to make the election. The Reviewer acknowledged Mr Heads believed it was unfair that had his wife not died in the accident the couple would have continued to receive both her earnings and his superannuation entitlement. However, "fairness" lay outside the scope of the review and the Reviewer was not able to modify the terms of the AC Act. The Reviewer concluded:

On the facts presented to me, in April 2009 Mr Heads had received 12 months of weekly compensation. He had no entitlement to further payments under the Act unless he elected to receive weekly compensation instead of superannuation payments. In offering the choice, and obliging Mr Heads to make it, ACC correctly applied clauses 68 of Schedule 1 of the Act. Mr Heads' application for a review must fail as a result.

[20] These present proceedings eventually followed. Mr Heads does not challenge the five year ceiling to the surviving spouse entitlement prescribed by Schedule 1, Part 4, cl 66(5)(a) of the AC Act. Nor does he challenge that under Part 2, cl 52 a claimant who has suffered a non-fatal personal injury loses his or her entitlement to weekly compensation on reaching NZSQA. There is also no challenge to the setting of that age at 65. The challenge is to the election requirement in cl 68(3)(b) and (5) which attaches to the surviving spouse entitled to weekly compensation.

The plaintiff's case

[21] Given that Schedule 1, Part 4, cl 68 of the AC Act addresses the relationship between a surviving spouse's weekly accident compensation payments and New Zealand superannuation, Mr Heads made the following points in his evidence:

[21.1] New Zealand superannuation is not means tested. A superannuitant is allowed to earn any income in addition to his or her New Zealand superannuation. Superannuation continues unaffected as to both entitlement and as to quantum even if other income is received. This much was conceded by the Crown's witnesses and is common ground.

[21.2] New Zealand superannuation is, Mr Heads believes, an entitlement and he is being unfairly penalised by losing an entitlement which everyone else gets once they reach 65 years of age. The choice he was required to make between surviving spouse weekly compensation under the AC Act and New Zealand superannuation was not a choice he would have been required to make had he been under 65 years of age. See cl 66(5)(a).

[21.3] If his wife had not died in the accident they would have continued to have received both her earnings from any employment plus Mr Heads' superannuation payments. Upon his wife reaching NZSQA they would have received her superannuation as well.

[21.4] He does not accept he should lose the right to receive under the AC Act weekly compensation as a surviving spouse in order to continue to receive his New Zealand superannuation.

[21.5] He believes superannuitants who receive surviving spouse compensation payments from the Corporation should be treated the same as other surviving spouses who are under 65 years of age and able to receive accident compensation payments for five years without having to elect between receiving those payments and other entitlements.

[21.6] His financial loss from not receiving New Zealand superannuation over four years is approximately \$75,000 gross (\$364.50 x 208). He also believes he temporarily lost access to other forms of assistance available to superannuitants but not to persons in his situation ie persons who have reached NZSQA but who are not in receipt of superannuation.

[22] As articulated by Dr McCrimmon in her closing submissions, the claim by Mr Heads is that:

[22.1] Schedule 1, Part 4, cl 68 of the AC Act is discriminatory on the basis of age because it does not allow those who are over 65 to be paid surviving spouse weekly compensation for five years unless they give up their own New Zealand superannuation payments after one year.

[22.2] As a surviving spouse Mr Heads should be entitled to surviving spouse weekly compensation payments until the end of five consecutive years from the date on which compensation first became payable.

[22.3] The effect of cl 68 is that those who lose a spouse or partner due to a fatal work-related accident are provided with survivor's weekly compensation for five years if they are under 65 but are only provided with survivor's weekly compensation for one year if they are over 65.

[22.4] Clause 68 operates to treat those who are older than 65 differently from those under 65.

[22.5] The requirement to elect between the two entitlements is not justified discrimination under s 5 of the New Zealand Bill of Rights Act 1990.

[22.6] A declaration is sought pursuant to s 92J(1) of the Human Rights Act 1993 (HRA) that cl 68 is in breach of Part 1A of the HRA because it is inconsistent with s 19 of the Bill of Rights.

[23] Dr McCrimmon stressed that a clear distinction must be made between accident compensation paid to a **surviving spouse** on the one hand and accident compensation paid to an **injured worker** on the other. Only where there has been a fatal work related injury is the surviving spouse entitled to weekly compensation for five consecutive years. See cl 66(5)(a). This entitlement is enlarged where children or other dependents are involved (see cl 66(5)(b), (c) and (d)) but as children and other dependents are not involved in the present case, these provisions do not require consideration. The

important point is that cl 66(5) is the minimum or “default position”. This case is not about the entitlement of an injured or incapacitated worker whose general weekly compensation (paid only for the period of incapacity) is being replaced by his or her own superannuation entitlement at 65 as provided for in cl 52.

[24] It was submitted much of the evidence and submissions by the Crown impermissibly sought to broaden the issue into worker’s compensation generally instead of surviving spouse weekly compensation. The aim was to run a floodgates argument and to ignore the policy underpinning the payment of weekly compensation to a surviving spouse namely, that payment of survivor’s weekly compensation is compensation payable for the loss (in Mr Heads’ situation) of the wife’s potential earning capacity and to provide a five year period of adjustment to the sudden change in financial circumstances.

The Crown’s defence

[25] In the statement of reply filed by the Attorney-General it was accepted that:

[25.1] The AC Act limits the ability of any person who has reached NZSQA to claim both weekly compensation and New Zealand superannuation except during a limited transition period and reference is made to cll 52 and 68 of Schedule 1;

[25.2] The Social Security Act 1964 (SSA) is similarly premised on the principle that more than one form of state-funded income support should be limited so that individuals do not receive two payments for the same purpose.

[25.3] Mr Heads would have been entitled to New Zealand superannuation had he not elected to receive weekly compensation.

[26] The substantive defence as advanced in opening submissions at the hearing was twofold:

[26.1] There is no differential treatment or no sufficient or material disadvantage. There is insufficient evidence before the Tribunal to establish that older people are, in substance, disadvantaged by the election requirement or the general age limit on weekly compensation. All that is before the Tribunal is a statute which, like many others, makes a distinction between groups of people on the basis of age. This is not sufficient to establish prima facie discrimination and so pass the burden to the Crown to justify the limit on the right.

[26.2] If, however, the requirement to so elect is discrimination on the prohibited ground of age, it is nevertheless justified under s 5 of the New Zealand Bill of Rights Act 1990.

The Crown’s evidence – the cost implications of the plaintiff’s challenge

[27] Understandably, the cost implications of the plaintiff’s challenge cannot be calculated with exactness. It was reported in 2010 or 2011 that Senior Business Analysts within the Corporation had advised there had been only four clients over the preceding five years who were over the age of 65 when a partner under 65 had been killed in a workplace accident. See the email sent to the Electorate Office Manager for Clare Curran, MP Dunedin South by Ms Sandra M Smith who has worked for the Corporation and its predecessors for more than 20 years and who has been the Claims Manager of the Accidental Death Unit for the past eight years. She has managed Mr Heads’ compensation claim (as a surviving spouse) from the time the claim was lodged.

Another estimate given to the Tribunal was that between 21 and 28 surviving spouses or partners each year become ineligible for weekly compensation at, around or after NZSQA. Precise figures are not available because neither the Accident Compensation Corporation nor the Ministry of Social Development store this information.

[28] More substantive evidence was given to the Tribunal by Mr Andrew A Burton, a Senior Business Analyst employed by the Corporation in Dunedin and who has been in that role for 13 years. His responsibilities include costing work for the Actuarial Services Department within the Corporation including completion of financial analyses from an actuarial perspective. He was asked to calculate the estimated, additional, annual cost to the accident compensation scheme of providing entitlement to weekly compensation to people over 65 years on the same basis as those under 65 years. His calculations were based on two alternative scenarios:

[28.1] The additional cost to the accident compensation scheme if the eligible age for the Corporation paying **fatal weekly compensation** were extended beyond age 65 **for the surviving spouse** for up to a maximum of five years. That is, the additional cash cost of removing the election provisions in cl 68 of Schedule 1.

[28.2] The additional cost to the accident compensation scheme if entitlement to weekly compensation for **non-fatal** injury was generally extended **until death** to all persons over NZSQA instead of terminating, as at present, at the age of 65.

[29] As to the first scenario, Table 1 shows the additional cost impact for 2014 would be \$1.0 million. For each of the succeeding years it would be \$1.1 million. The net impact on levies for the 2014 year was estimated to be an increase of \$1.3 million in total.

Table 1

Cash Cost Impact (\$Million)	2014	2015	2016	2017
Earners	\$0.4	\$0.5	\$0.5	\$0.5
Employers and SE work	\$0.1	\$0.2	\$0.2	\$0.2
Motor Vehicle	\$0.4	\$0.4	\$0.4	\$0.4
Non-earners	\$0.0	\$0.0	\$0.0	\$0.0
Residual	\$0.0	\$0.0	\$0.0	\$0.0
Treatment injury	\$0.0	\$0.0	\$0.1	\$0.1
Total	\$1.0	\$1.1	\$1.1	\$1.1

Levy Impact (\$Million)	2014	2015	2016	2017
Earners	\$0.6	\$0.6	\$0.6	\$0.6
Employers and SE work	\$0.2	\$0.2	\$0.2	\$0.2
Motor Vehicle	\$0.5	\$0.5	\$0.5	\$0.5
Non-earners	\$0.0	\$0.0	\$0.0	\$0.0
Residual	\$0.0	\$0.0	\$0.0	\$0.0
Total	\$1.3	\$1.3	\$1.3	\$1.3

Levy impact (per \$100 liable earnings or vehicle)	2014	2015	2016	2017
Earners	\$0.00	\$0.00	\$0.00	\$0.00
Employers and SE work	\$0.00	\$0.00	\$0.00	\$0.00
Motor Vehicle	\$0.14	\$0.13	\$0.13	\$0.13
Residual	\$0.00	\$0.00	\$0.00	\$0.00

[30] As to the second scenario, the calculations in Table 2 were based on the assumption that entitlement to weekly compensation for non-fatal injury was generally

extended to all persons over the NZSQA until death. That is, on the assumption that cl 52 of Schedule 1 would no longer stipulate that a claimant in a non-fatal injury loses his or her entitlement to weekly compensation on reaching NZSQA. On this scenario the estimated additional cash cost would be \$27.1 million in 2014, \$41.4 million in 2015, \$53.0 million in 2016 and \$63.2 million in 2017. The outstanding liability would be \$1,727.2 million in 2014 rising to \$1,847.7 million in 2017. The net impact on levies for the 2014 year is estimated to be an increase of \$338 million in total, a rise of approximately 6%:

Table 2

Cash Cost Impact (\$Million)	2014	2015	2016	2017
Earners	\$7.6	\$10.8	\$13.8	\$16.3
Employers and SE work	\$4.4	\$6.6	\$8.4	\$10.1
Motor Vehicle	\$3.5	\$6.0	\$7.5	\$9.1
Non-earners	\$0.1	\$0.1	\$0.2	\$0.2
Residual	\$10.0	\$15.5	\$20.0	\$24.0
Treatment injury	\$1.5	\$2.3	\$3.1	\$3.5
Total	\$27.1	\$41.4	\$53.0	\$63.2

Outstanding Liability (\$Million)	2014	2015	2016	2017
Earners	\$478.2	\$493.6	\$505.9	\$515.6
Employers and SE work	\$280.3	\$288.8	\$295.5	\$300.2
Motor Vehicle	\$367.7	\$382.2	\$395.6	\$407.6
Non-earners	\$16.9	\$17.8	\$18.7	\$19.6
Residual	\$507.6	\$518.8	\$524.7	\$525.7
Treatment injury	\$76.5	\$78.1	\$78.8	\$78.9
Total	\$1,727.2	\$1,779.3	\$1,819.1	\$1,847.7

Levy Impact (\$Million)	2014	2015	2016	2017
Earners	\$103.4	\$104.3	\$105.3	\$106.3
Employers and SE work	\$58.9	\$59.4	\$60.0	\$60.6
Motor Vehicle	\$70.9	\$71.1	\$71.3	\$71.5
Non-earners	\$10.9	\$10.9	\$11.0	\$10.2
Residual	\$94.1	\$94.1	\$94.1	\$94.1
Total	\$338.1	\$339.9	\$341.6	\$342.6

Levy impact (per \$100 liable earnings or vehicle)	2014	2015	2016	2017
Earners	\$0.10	\$0.10	\$0.09	\$0.09
Employers and SE work	\$0.07	\$0.07	\$0.07	\$0.07
Motor Vehicle	\$19.86	\$19.39	\$18.92	\$18.47
Residual	\$0.09	\$0.09	\$0.09	\$0.09

[31] It is to be recalled, however, that Mr Heads does not challenge the five year limit to accident compensation payments made to surviving spouses. Nor does he challenge the present terminating age in cl 52 for claimants injured in non-fatal accidents. His submission is that the second scenario as laid out by Mr Burton in Table 2 is not relevant.

[32] When cross-examining Mr Burton on the first scenario and Table 1, Dr McCrimmon put to him the following paragraph from the Tribunal's decision in *Howard v Attorney-General* (2008) 8 HRNZ 378 (Mr RDC Hindle Chairperson, Ms J Grant and Ms DA Clapshaw):

[83] The evidence given by ACC's Chief Actuary was that the long run annual cost of removing limits on eligibility to access vocational rehabilitation could be expected to be considerably less

than \$1.171 million; instead he estimated that (in 2007/08 equivalent dollars) the long run annual cost might be expected to be in the order of \$500,000 to 600,000. As he put it, even at a figure of \$1.171 million per annum the extra cost of funding unrestricted eligibility for vocational rehabilitation has a negligible effect on the rates at which levies are gathered to fund the ACC scheme. The long run implication of removing age limits on eligibility for vocational rehabilitation has no material effect on levies at all.

[33] In relation to his own cash cost impact figure of approximately \$1 million per annum in Table 1, Mr Burton was asked whether it would be reasonable to describe as “negligible” the effect on the levies which fund the accident compensation scheme. He agreed that such would be a reasonable description. Asked whether he agreed the cost of bringing 30 superannuitant surviving spouses into the compensation payment scheme was not of any real significance, he again agreed.

[34] When questioned why his costings were based on an estimate of 30 surviving spouses, Mr Burton’s attention was drawn to the evidence given by Ms Jocelyn M Burton, Acting Manager, Accident Compensation Scheme Policy, Labour Environment Branch in the Ministry of Business, Innovation and Employment that between 21 and 28 surviving spouses or partners each year are estimated to become ineligible for weekly compensation at, around or after NZSQA. Mr Burton stated that his figure of 30 surviving spouses was a round number and as a costing principle, it was best to overstate the actual cost. His calculations in Table 1 represent a worst case scenario. He conceded the figures in Table 1 potentially overstate the cost of the first scenario. He agreed that were the calculations to be reassessed on the basis there were 20 surviving spouses in a year, his figures would be reduced by approximately 33% in which case the annual cost would be in the region of approximately \$660,000. He also clarified that from approximately 2009 ACC levies have been reducing and it could be assumed that over the next few years they will continue to reduce. Mr Burton agreed this was relevant to the sustainability of the accident compensation scheme.

[35] The counterpart scenario to that addressed by Mr Burton will arise if the estimated 30 surviving spouses make an election to receive New Zealand superannuation for the four year balance. In this regard evidence was given by Mr Ananda Domingo, an Analyst employed by the Ministry of Social Development, a position he has held for 15 years. His responsibilities include costing work for the Forecasting and Modelling team of the Ministry. He was asked to calculate the estimated, additional, annual cost to the New Zealand Superannuation Scheme based on two alternative assumptions:

[35.1] A person aged 65 or over being able to receive both New Zealand superannuation and surviving spouse weekly compensation under the AC Act. That is, if the restriction on a surviving spouse receiving both weekly compensation and New Zealand superannuation was removed from cll 66 to 69 in Part 4 of Schedule 1 of the AC Act.

[35.2] A person aged 65 or over being able to receive New Zealand superannuation and (under the AC Act) their own weekly compensation or surviving spouse weekly compensation. That is, if the general restriction on persons over NZSQA was removed from cll 52 to 53, Part 2, Schedule 1 of the AC Act.

[36] As to the first scenario, Table 3 shows that after the half year period of 2013/14, the annual additional cost to the New Zealand Superannuation Scheme would be well under \$700,000 (gross):

Table 3

Additional expenditure on NZS amounts for recipients of surviving spouse weekly compensation

	Cost (\$millions)			
	2013/14	2014/15	2015/16	2016/17
Gross	\$0.321	\$0.657	\$0.673	\$0.685
Net	\$0.280	\$0.571	\$0.585	\$0.595

[37] Mr Domingo said that compared to the overall cost of the New Zealand Superannuation Scheme of approximately of \$10.850 billion in 2013/2014, increasing to \$12.686 billion by 2016/2017, the estimated figures in Table 3 are “relatively insignificant” if considered in isolation. However, every additional cost to the Scheme is potentially significant and would contribute to the increased funding pressures to which the Scheme is already subject due to the aging of the general population.

[38] As to the second scenario, Table 4 shows the additional amounts of New Zealand superannuation that would be payable if a person aged 65 or over (injured in a non-fatal accident) was able to receive either their own ACC weekly payment or the ACC surviving spouse weekly compensation and New Zealand superannuation. The figures in Table 3 also assume a commencement date of 1 January 2014 and represent the additional expenditure (before tax) each year:

Table 4

Additional expenditure on NZS for recipients of surviving spouse weekly compensation or their own weekly compensation

	Cost (\$millions)			
	2013/14	2014/15	2015/16	2016/17
Gross	\$10.363	\$23.952	\$29.203	\$32.986
Net	\$9.172	\$21.179	\$25.782	\$29.090

[39] The estimated figures in Table 4 are of course considerably higher than those in Table 3.

[40] It must be observed, however, that when questioned by Dr McCrimmon and by the Tribunal as to what has been included in Table 4 and how his evidence was to be interpreted, Mr Domingo was unable to provide the clarity sought. Consequently we have been left in doubt as to the reliability of Table 4 in a number of respects. In particular, Mr Domingo was unable to clarify whether the table includes a cohort who would in any event be in receipt of New Zealand superannuation. Nevertheless, Table 3 is clear and without ambiguity and Table 4 is illustrative of the general point made by the Crown as to the cost of allowing those injured in workplace accidents to receive both weekly compensation and New Zealand superannuation for life.

[41] Other points made by Mr Domingo were:

[41.1] The cohort figure of 30 had been provided by Mr Burton of the Accident Compensation Corporation. If that figure overstates the number of surviving spouses, the figures in Table 3 must be adjusted downwards.

[41.2] It has been assumed for the purpose of the calculations in Table 3 that none of the 30 have elected in favour of New Zealand superannuation. This means that if (say) 20 surviving spouses have already elected NZ

superannuation, the additional cost to the Scheme will in fact be of only ten additional persons.

[41.3] The figures in Table 3 are “negligible”.

[41.4] Removal of the election provisions in cl 68 will not lead to a combined additional cost of the figures in Tables 1 and 3 because one of those costs is already being borne either by accident compensation or by superannuation. That is, the surviving spouse in the notional cohort of 30 will be receiving either one or the other.

The Crown’s evidence – broadening the issues – the one benefit principle

[42] The second scenario painted by Mr Burton in his evidence may seem remote from the basis on which Mr Heads has advanced his case. Nevertheless, a substantial part of the case for the Crown was that the accident compensation scheme must be seen in the context of the general system of state funded assistance and the Government is entitled to allocate resources on the basis of what was said to be the “one pension principle”.

[43] As articulated by Ms Jocelyn M Burton, Acting Manager, Accident Compensation Scheme Policy, Labour Environment Branch in the Ministry of Business, Innovation and Employment, the one pension principle means no person can be in receipt of two forms of publicly-funded main income support. Clause 68 of Schedule 1 does not amount to discrimination on the basis of age because it ensures those who have reached NZSQA are treated the same (and not more advantageously) as those under that age. It ensures no one, regardless of age, can receive two forms of publicly-funded main income support. There is no difference in treatment between those who are over NZSQA and those under NZSQA in comparable circumstances (that is, in receipt of main income support).

[44] We turn now to the detail of Ms Burton’s evidence. Her statement was 87 paragraphs in length and in addition she was questioned by Dr McCrimmon and by the Tribunal. It is not possible to provide a comprehensive summary of her evidence. Hopefully the account which follows fairly captures the main points. In the interests of clarity we foreshadow, where appropriate, points to which we will return in our analysis of the issues.

[44.1] The aim of providing weekly compensation to a surviving spouse, child or other dependent is to provide income support for those who are likely to suffer pecuniary losses following the death of someone close to them. A means test is not, however, applied. After five years it is assumed there has been sufficient time for financial adjustment or recovery (unless the surviving spouse has care of dependent children) and the weekly compensation ceases. For surviving spouses who have reached or are at NZSQA an election must be made.

[44.2] Ms Burton was unable to say why the chosen period of transition is set at five years rather than (say) four, six or eight years. Nor could she say why the weekly payments to a surviving spouse not of NZSQA are not subject to a means test. As will be seen this evidentiary vacuum will become relevant in different contexts, including determining whether the weekly compensation payments made to a surviving spouse under Part 4 of Schedule 1 of the AC Act are to be treated as a special category, distinct from the balance of the entitlements under Schedule 1 which attach to those who have been injured in a non-fatal accident.

[44.3] The accident compensation scheme must be “fair and sustainable”. This principle guides the development of the scheme and is the context for policy review and development. The NZSQA restriction provides an accurate proxy for the end of a person’s working life and so marks the sensible point at which to cease weekly compensation. It is a fair and sustainable policy.

Mr Heads responds that the actuarial evidence given by Mr Burton is that the cost of removing the election provision in cl 68 of Schedule 1 will be negligible if not inconsequential. Sustainability will not be affected. Likewise the evidence given by Mr Domingo is that removal of the election provision in cl 68 will have insignificant if not negligible effect on the New Zealand Superannuation Scheme.

[44.4] Clause 68 of Part 4 of Schedule 1 is similar to the cessation clause in Part 2 (cl 52) which applies to normal weekly compensation for non-fatal accidents.

As to this Mr Heads does not concede the similarity as cl 52 and cl 68 are driven by different policy considerations. He points out that the clauses address different circumstances and the different policy considerations involved cannot be lightly ignored or put to one side.

[44.5] Accident compensation is part of the wider scheme of social welfare provision in New Zealand. Seen in this light there is no difference in treatment between those who are under or over NZSQA and are in comparable circumstances (in receipt of a main benefit).

As to this Mr Heads does not accept accident compensation is part of the wider scheme of social welfare provision in New Zealand. The AC Act has a very different purpose, including the provision of fair compensation for lost earnings following from personal injury.

[44.6] Even if there is a difference in treatment, there is no discriminatory impact, as the law does not perpetuate existing disadvantage or prejudice against older New Zealanders.

Mr Heads disagrees and says those required by cl 68 to make the election miss either four years of surviving spouse weekly compensation or four years of New Zealand superannuation. They have only one year to adjust to the financial consequences flowing from the loss of their spouses income. Those under 65 have five years uninterrupted surviving spouse weekly compensation to adjust.

[44.7] Even if older New Zealanders were economically disadvantaged, the disadvantage is ameliorated by the fact that the rate for New Zealand superannuation is higher than that for income-tested benefits available under the Social Security Act. Those over 65 are able to continue to work and receive New Zealand superannuation unabated despite any additional income earned; and the surviving spouse has a right to elect to continue receiving weekly compensation instead of New Zealand superannuation.

Mr Heads submits this is beside the point and it does not address the question whether the disadvantage is unlawful discrimination.

[44.8] The larger income support framework ensures those at or over NZSQA get more, not less, economic support than those under that age. The evidence is that people on New Zealand superannuation have income adequate for their

needs. The over 65s have the best living standards profile of any age group in New Zealand with very low rates of severe and significant hardship.

Mr Heads submits this is a generalisation and does not speak to the economic situation of the 30 or so people affected each year by the election provision.

[44.9] If there is discrimination arising from the requirement to elect between superannuation and weekly accident compensation, any discriminatory impact is reasonable and justified for the following reasons:

[44.9.1] The aim of providing weekly accident compensation to a surviving spouse, child or other dependent is to provide income support to those likely to be in financial hardship. The aim of the election provision in cl 68 is to maintain the principle that individuals may only receive one form of publicly-funded main income support.

Mr Heads submits it is not appropriate to categorise weekly compensation payments under the AC Act as “income support”. While that term is appropriate in the context of benefits paid under the Social Security Act, payments under the AC Act are for treatment, social and vocational rehabilitation, weekly compensation for loss of earnings, lump sum compensation for personal impairment and weekly compensation for a surviving spouse where there is a fatal injury.

[44.9.2] The limit is rationally connected to the aim because it allows for a choice between two forms of government-funded income support, but prevents continuation of both forms.

[44.9.3] It is minimally impairing because it is linked to eligibility for New Zealand superannuation, rather than age, and because it allows a generous transition period.

Mr Heads replies a one year period out of five is hardly generous and that he should not be required to elect in the first place.

[44.9.4] The benefit is proportionate to the detriment because the detriment does not exceed that required to ensure those in financial hardship are supported by the government but do not receive two benefits.

Mr Heads submits this proposition is not demonstrated on the evidence.

[44.9.5] The government may draw bright lines in relation to assumptions of financial hardship. The alternatives are to means test – at substantial additional administrative cost – those receiving superannuation (as is done with other income support benefits), or to allow a small number of people to receive two forms of income support, while the rest of the population may only receive one.

Mr Heads makes the point that if the government does not means test accident compensation payments or New Zealand superannuation and if at most only 30 people are required to elect each year under cl 68, it is difficult to see how discrimination against those in the group of 30 can be justified.

[45] We pause to record the submission by Dr McCrimmon that Mr Heads is not challenging the NZSQA of 65 years. Nor does he challenge the fact that NZSQA is the appropriate age at which earners who are injured at work in a non-fatal accident transit from weekly compensation under the AC Act to NZ superannuation for the balance of their lives. His challenge is to the fact that where there has been a fatal injury, a surviving spouse who has not reached NZSQA receives five full years of weekly compensation payments plus all other sources of income whereas a surviving spouse who has reached NZSQA receives only one such year and either forfeits the four year ACC balance or forfeits four years of New Zealand superannuation. There is no challenge to the period of compensation being for a five year period. His claim is not about removing an upper age limit. Dr McCrimmon submits it is illogical to interpret his case as involving the removal of the upper age limit for the wider group, that is the Table 2 group.

[46] Ms Burton said the principle that no one should receive more than one benefit for the same set of circumstances can be found as an expressly articulated principle, or as a necessary inference, from a number of policy documents. We do not intend listing all of the documents to which our attention was drawn. The primary sources were:

[46.1] Report of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (December 1967) (the Woodhouse Report).

[46.2] *Personal Injury: A Commentary on the Report of the Royal Commission of Inquiry into Compensation for Personal Injury in New Zealand* (1969).

[46.3] Report of the Royal Commission of Inquiry *Social Security in New Zealand* (December 1971).

[46.4] *Report of the Ministerial Working Party on the Accident Compensation Corporation and Incapacity* (1991).

[46.5] *Report of the Department of Labour on the Injury Prevention and Rehabilitation Bill*.

[47] Enlarging on her view that Accident Compensation is part of the wider scheme of social welfare provision in New Zealand, Ms Burton conceded weekly accident compensation is based on the concept of loss of employment opportunity and further conceded New Zealand superannuation is a universal age-based scheme available until death. She said citizenship or permanent residence creates a non-income tested, automatic, personal and universal entitlement to superannuation once the age of eligibility has been reached. However, she went on to say:

[47.1] It is appropriate for the government to move people from one “social assistance scheme” to the other at some point in time. She cited by way of example people receiving the unemployment benefit. When they reach NZSQA they are notified of their ability to choose the higher superannuation benefit. In addition s 72 of the Social Security Act prevents a person from receiving both the unemployment benefit and New Zealand superannuation. Once a person on an unemployment benefit reaches NZSQA and wants to receive superannuation, they must cease receiving the unemployment benefit. In addition, other income-tested social assistance benefits are reduced by the amount of weekly accident compensation payments received by the individual.

[47.2] While weekly accident compensation payments for surviving a spouse are based on the concept of lost earnings opportunities, New Zealand

superannuation is a universal age-based scheme available until death. Accident compensation payments were recognised as part of the wider government social assistance programme in 1992 when the original age limits on weekly compensation for surviving spouses were linked with the eligibility age for superannuation. Both weekly compensation for surviving spouses and government superannuation “are designed as social assistance income replacement for the individual”.

[47.3] Other social assistance schemes “follow a similar approach to the ACC scheme and move people off one scheme onto another at some point in time. The general rule is that no-one is entitled to be in receipt of more than one income replacement benefit”. In addition other income-tested social assistance benefits are reduced by the amount of weekly accident compensation (including to a surviving spouse) a person receives (s 71A of the Social Security Act 1964 (SSA)).

[48] Ms Burton also said that to provide earnings-related compensation beyond the current age limits would substantially increase the amount of levies paid by workers and employers. Here Ms Burton referred to the cost estimate given in *Howard v Attorney-General* of \$241.1 million in the 2007/08 accident year.

[49] In addressing the rationale for age limits on weekly compensation she said a “bright line” is drawn after five years as it is assumed this period is sufficient for financial recovery (unless the spouse has care of dependent children). The five year bright line is varied by the NZSQA election requirement, which “reflects eligibility for NZS that is intended to provide main income support. The election must therefore be seen in the wider context of social welfare legislation which aims to provide an integrated, but not overlapping, support system”. She cited Hon WF Birch *Accident Compensation: A Fairer Scheme* at 44:

There is little logic in persons being eligible for income maintenance from two overlapping Government-mandated schemes and thus receiving income replacement in excess of 100 percent of previous earnings.

[50] As to this it must be observed that acceptance of Mr Heads’ argument will not result in him receiving income replacement in excess of 100 percent of previous earnings. More fundamentally, it will be seen the accident compensation legislation is not social welfare legislation.

[51] The relationship between accident compensation and social welfare benefits was further explained by Mr AR McKenzie, Principal Analyst, Ministry of Social Development who has spent the past twenty years in policy and management roles in the Ministry and its predecessor organisations. Again, it is not practical to provide a comprehensive summary of his evidence. The key points were:

[51.1] A longstanding principle of the New Zealand social security system is the “one pension principle”. This principle is reflected in, for example, the purpose and principles sections in the Social Security Act, which were inserted by the Social Security Amendment Act 2007 and were effective from 24 September 2007. Section 1A(c) of the SSA recognises that eligibility for social assistance must take account of the resources available to persons before they may seek financial support under the Act and must take account of any other financial support for which they are eligible or already receive from publicly funded sources other than the SSA.

As to this Mr Heads does not challenge the principle and accepts that some benefits granted under the SSA are income or means tested. But the fact that they are so tested and that ACC payments are not, draws a clear distinction between the two schemes. Furthermore, superannuation is equally not means-tested even though it is a form of social assistance. So the premise on which Mr McKenzie and Ms Burton proceed must necessarily be qualified. The one pension principle is not absolute. This is further demonstrated by the fact that surviving spouses below NZSQA do not have this principle applied to them in the context of weekly ACC compensation payments and by the fact that those over 65 can receive both benefits for one year. It is also necessary to challenge the characterisation of the weekly compensation payments to a surviving spouse as income or financial support. This is because while financial support by way of a benefit is provided under the SSA for so long as the support is needed, weekly payments to a surviving spouse are made under the AC Act for a flat five year period irrespective of need or means at a fixed rate of 60% of 80% of the deceased's pre-injury earnings. This suggests different policy considerations are at work under the two Acts.

[51.2] In the opinion of Mr McKenzie, the one pension principle underpins the provision of state assistance for people who require support through the social security system, accident compensation or student support. In practice this means an individual should not be able to receive two forms of state financial assistance for the **same or similar circumstances**. [emphasis added]

Mr Heads responds it is significant the "one pension principle" is in the SSA, not the AC Act. Furthermore, it is not possible to read into the AC Act those provisions of the Social Security Act referred to by Mr McKenzie, particularly ss 1A(c), 71A and 72. Finally, Mr Heads says that becoming eligible for New Zealand superannuation ie reaching NZSQA is not the "same circumstance" as becoming eligible for weekly compensation as a surviving spouse following a work-related fatality.

[51.3] Income support under the Social Security Act is often described as falling within three broad categories: First, second or third tier assistance. First tier assistance refers to main benefits such as the Domestic Purposes benefit, the Unemployment benefit and New Zealand superannuation. The main benefits are for basic living costs and are subject to income tax. The second tier of assistance refers to additional assistance to people in particular situations and/or for specific ongoing costs, such as accommodation, disability and child care. People may be eligible for second tier assistance whether or not they are receiving a main benefit. Second tier assistance is mostly income tested and may be cash asset tested. Third tier assistance is tightly income and asset tested and provided generally in relation to presenting hardship, such as Temporary Additional Support.

[51.4] Section 72(a) of the Social Security Act states no person is entitled to receive more than one benefit in his or her own right, except as provided in certain sections of the Social Security (Working for Families) Amendment Act 2004. These exceptions relate only to supplementary benefits and not main benefits. Supplementary or second and third tier benefits are generally paid subject to income and sometimes asset testing in particular circumstances or with particular costs that are on-going.

[51.5] However, people who qualify for ACC payments may also be eligible for second and third tier payments. So a person receiving weekly compensation from the Corporation may also be eligible for a main benefit or second and third tier payments if they meet the eligibility criteria under the Social Security Act.

[51.6] Main benefits under the Social Security Act are, however, reduced by a dollar for each dollar of weekly compensation received from the Corporation under the AC Act. Consequently no benefit is paid under the Social Security Act when the rate of weekly compensation under the AC Act exceeds the rate of benefit for which a person is eligible under the Social Security Act. This arises by operation of s 71A of the Social Security Act. The weekly accident compensation may be included in the income assessment for second and third tier forms of assistance for non-beneficiaries.

[52] It is now possible to address the legal issues. We begin with the legislation.

THE LEGISLATION

[53] The primary legislative provisions of relevance are those in the Accident Compensation Act 2001 (the AC Act), the New Zealand Superannuation and Retirement Income Act 2001 (NZSRIA) and the Social Security Act 1964 (SSA).

The Accident Compensation Act 2001

[54] As is well known, the present New Zealand approach to personal injury arising out of accident was first established by the Accident Compensation Act 1972 which in turn was the outcome of the Royal Commission of Inquiry *Compensation for Personal Injury in New Zealand* (1967) (the Woodhouse Report). In general terms the scheme, both then and now, provides comprehensive and extensive cover for injuries arising out of accident, in return for which the right to sue at common law has been abolished. See *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549 (CA) at 554-555:

Essentially, the accident compensation legislation in both its original and amended forms denied those persons covered under the Act access to the courts at common law in return for the perceived advantages of the statutory scheme. The legislation reflected this policy from the outset. The exchange has frequently been spoken of as a social contract or social compact.

[55] The purpose of the provision barring common law claims is to prevent persons who suffer personal injury being compensated twice over, once under the AC Act and then at common law. The bar is not designed to prevent them recovering any compensation at all. See *Queenstown Lakes District Court v Palmer* at 555.

[56] Furthermore these present proceedings under s 92B of the Human Rights Act 1993 are not caught by the bar on proceedings for damages arising directly or indirectly out of personal injury. See s 317(4) of the AC Act.

[57] The “public good” and the “social contract” explicitly referred to in the “purpose” section of the AC Act (s 3) requires claimants to receive “fair compensation” for loss from injury. Such compensation is referred to in the AC Act as “an entitlement”:

Part 4
Entitlements and related matters

Entitlements

67 Who is entitled to entitlements

A claimant who has suffered a personal injury is entitled to 1 or more entitlements if he or she—
(a) has cover for the personal injury; and
(b) is eligible under this Act for the entitlement or entitlements in respect of the personal injury.

[58] These entitlements are specifically listed in s 69. For present purposes, attention is drawn to the reference in subs (1)(e) to weekly compensation for the spouse of a deceased claimant. That is, the payments made to Mr Heads under the AC Act are statutorily recognised and described as an entitlement:

69 Entitlements provided under this Act

- (1) The entitlements provided under this Act are—
(a) rehabilitation, comprising treatment, social rehabilitation, and vocational rehabilitation;
(b) first week compensation;
(c) weekly compensation;
(d) lump sum compensation for permanent impairment;
(e) funeral grants, survivors' grants, weekly compensation for the spouse or partner, children and other dependants of a deceased claimant, and child care payments.
- (2) The entitlements provided under this Act also include the entitlements referred to in Parts 10 and 11.

[59] The entitlements referred to in ss 67 and 69 are more fully particularised in Schedule 1 to the AC Act. That schedule is in four parts:

[59.1] Part 1: Rehabilitation (cll 1 to 29)

[59.2] Part 2: Weekly compensation (cll 30 to 53)

[59.3] Part 3: Lump sum compensation for permanent impairment (cll 54 to 62)

[59.4] Part 4: Entitlements arising from fatal injuries (cll 63 to 78).

The different policies point: Part 2 and Part 4 to be differentiated

[60] While it might be stating the obvious, the weekly compensation payments made to Mr Heads fall under the fatal injuries (surviving spouse) provisions of Part 4, not Part 2 which relates to compensation paid to a claimant who him or herself is injured in a non-fatal accident. We mention this because Part 2 and Part 4 have separate and explicit provisions addressing the relationship between the different kinds of weekly compensation payments and New Zealand superannuation. The Crown contends the interpretation of the one will impact on the other. Mr Heads challenges this view and submits different policies are at work, with the Part 4 provisions differentiating surviving spouse weekly compensation from weekly compensation paid to a claimant where there has been injury in a non-fatal accident.

[61] For the reasons which we now develop, we agree that upholding the challenge to cl 68(3)(b) in Part 4 of Schedule 1 of the AC Act will not impact on cl 52 in Part 2 and thereby expose the Crown to substantial financial liability.

[62] Under Part 2, cl 32 the Corporation is liable to pay weekly compensation for loss of earnings to a claimant who has an incapacity resulting from a personal injury for which he or she has cover and was an earner immediately before his or her incapacity commenced. The weekly compensation payable is 80% of the claimant's weekly earnings, as calculated under Part 2. While there are abatement provisions (ss 252 and 253 read with cll 49 to 51) the AC Act does not impose a means test or offset Part 2 weekly compensation payments by reference to benefits received under the Social Security Act. The relationship between weekly compensation and New Zealand superannuation is, however, explicitly managed by cl 52:

Effect of New Zealand superannuation

52 Relationship between weekly compensation and New Zealand superannuation

- (1) Subclause (2) applies to a claimant who—
 - (a) first becomes entitled to weekly compensation before reaching New Zealand superannuation qualification age; and
 - (b) has been entitled to it for 24 months or longer before reaching that age.
- (2) Such a claimant loses his or her entitlement to weekly compensation on reaching that age.
- (3) Subclauses (4) and (5) apply to a claimant who first becomes entitled to weekly compensation 12 months or more, but less than 24 months, before reaching New Zealand superannuation qualification age.
- (4) Such a claimant is entitled to weekly compensation for 24 months from the date of entitlement to the compensation.
- (5) However, the claimant's entitlement to the compensation is dependent on his or her making an election to be entitled, after reaching New Zealand superannuation qualification age, to the compensation, rather than to New Zealand superannuation.
- (6) Subclauses (7) and (8) apply to a claimant who first becomes entitled to weekly compensation—
 - (a) within 12 months before reaching New Zealand superannuation qualification age; or
 - (b) on or after reaching New Zealand superannuation qualification age.
- (7) Such a claimant is entitled to the weekly compensation for a period of 12 months following the later of—
 - (a) the date of reaching New Zealand superannuation qualification age; or
 - (b) the date of entitlement to weekly compensation.
- (8) The claimant is then entitled to the weekly compensation for the next 12 months, if he or she makes an election to be entitled, during those 12 months, to the compensation, rather than to New Zealand superannuation.
- (9) Nothing in this clause entitles a claimant to weekly compensation if he or she is not otherwise entitled to it under this schedule.

[63] It can be seen that Parliament has chosen to manage the interface between Part 2 weekly compensation entitlements (where the personal injury is not fatal) and New Zealand superannuation by providing for a limited degree of overlap between the two schemes. See *Accident Compensation Corporation v Stewart* [2012] NZHC 772 at [21] to [31]. The clause contemplates a person will possibly become entitled to weekly compensation in respect of a particular injury on more than one occasion. It also contemplates that a person may cease to be incapacitated but then again become incapacitated whereupon their entitlements to weekly compensation will resume. As pointed out in *Accident Compensation Corporation v Stewart*, three different scenarios are catered for:

Scenario 1

[22] Scenario 1 is governed by sub-cl 52(1) and (2) of Schedule 1 of the Act. To be in this category a person must have first become entitled to weekly compensation 24 months or more, before they turn 65, which is the New Zealand superannuation qualification age. Once a person in this category turns 65 they lose their entitlement to weekly compensation.

Scenario 2

[23] Scenario 2 is governed by sub-cl 52(3), (4) and (5) of Schedule 1 of the Act. To be in this category a person must have first become entitled to weekly compensation 12 months or more, but less than 24 months before they turn 65. Persons in this category are entitled to receive weekly compensation for a maximum period of 24 months. However, once a person in this category turns 65 they must choose between receiving weekly compensation and New Zealand superannuation.

Scenario 3

[24] Scenario 3 is governed by sub-cl 52(6), (7) and (8) of Schedule 1 of the Act. To be in this category a person must have first become entitled to weekly compensation either:

- (1) within 12 months before they turned 65; or
- (2) after they turned 65.

[25] Persons in this category are entitled to weekly compensation for an initial period of 12 months from:

- (1) the date they turned 65; or
- (2) the date they became entitled to weekly compensation.

In addition, a person in this category may be entitled to receive weekly compensation for a further 12 months if they elect to receive weekly compensation rather than New Zealand superannuation.

[64] In the *Accident Compensation Corporation v Stewart* scenarios 1 and 2 a person injured in a **non-fatal** accident who reaches NZSQA cannot simultaneously receive both ACC weekly compensation and New Zealand superannuation. However, in scenario 3, the injured person who on or after reaching NZSQA first becomes entitled to weekly compensation can receive such compensation and superannuation for the next 12 months before having to elect to be entitled to compensation, rather than to superannuation. The weekly compensation then continues for the next 12 months. Thereafter New Zealand superannuation resumes.

[65] It was submitted for the Crown that the interface between worker's weekly compensation and New Zealand superannuation as provided for in Part 2, cl 52 were either closely similar to or identical to Part 4, cl 68 and therefore the outcome of the challenge by Mr Heads would have a flow on effect. The difficulty with this submission is that cl 52 and 68 address entirely different circumstances and the policy underpinnings are not shared.

[66] It is to be recalled that Part 4 of Schedule 1 addresses the situation where the earning spouse does not survive the accident. In that circumstance the surviving spouse receives weekly compensation (at the rate of 60% of 80% of the pre-accident earnings of the deceased spouse) for five consecutive years. There is no means or asset test. See cl 66:

66 Weekly compensation for surviving spouse or partner

- (1) The Corporation is liable to pay weekly compensation to a surviving spouse or partner of a deceased claimant.
- (2) Weekly compensation payable under this clause is payable from the date of the claimant's death at the rate of 60% of—
 - (a) the weekly compensation for loss of earnings to which the claimant would have been entitled at the end of 5 weeks of incapacity, had he or she lived but been totally incapacitated; or
 - (b) the weekly compensation for loss of potential earning capacity to which the claimant would have been entitled at the end of 6 months of incapacity, had he or she lived but been totally incapacitated.
- (3) Subclause (2) is subject to clause 74.
- (4) The Corporation must not cancel or suspend the surviving spouse's or partner's weekly compensation—

- (a) because the spouse or partner marries, enters into a civil union, or enters into a de facto relationship; or
- (b) [Repealed]
- (c) because of the age that the claimant would have reached if he or she had not died.
- (5) The surviving spouse or partner ceases to be entitled to weekly compensation on the latest of—
 - (a) the end of 5 consecutive years from the date on which it first became payable;
 - (b) the surviving spouse or partner ceasing to have the care of all of the children who are under the age of 18 years;
 - (c) the youngest of the children of the deceased who is in the care of the surviving spouse or partner turning 18 years;
 - (d) the surviving spouse or partner ceasing to have the care of all other dependants of the deceased claimant who were in the surviving spouse's or partner's care.

[67] In the interests of simplicity (and because on the facts no children or dependents are involved) we will proceed as if the five consecutive years is the only period prescribed by cl 66 and that we do not need to address those provisions which relate to children and dependents.

[68] As to the policy underlying cl 66, Ms Burton was unable to refer to any specific policy document but said that it was to aid the financial recovery of the surviving spouse who is likely to be in financial transition, if not hardship. She could not say why five years is the chosen period.

[69] In our view assistance can be drawn from the analogous wrongful death jurisdiction, particularly the Deaths by Accidents Compensation Act 1952 and the discussion of that Act in *Pou v British American Tobacco (New Zealand) Ltd* [2006] 1 NZLR 661 (CA) at [11] and [15] to [18]. Under that Act damages could be awarded for the amount of actual pecuniary benefit which the person for whose benefit the action was brought might reasonably have expected to enjoy if the deceased person had not been killed. Actual dependency was not a prerequisite but only pecuniary losses could be the subject of an award of damages. Just what was included as a pecuniary loss was the subject of dispute and litigation. See *Pou v British American Tobacco (New Zealand) Ltd* at [34] to [41]. However, the development of the law under the Act largely came to an end as a result of the adoption of the no-fault accident compensation scheme in 1974.

[70] In contrast to the Deaths by Accidents Compensation Act, weekly compensation under the AC Act is paid automatically to a surviving spouse. The distinguishing features of cl 66 are:

[70.1] It is paid at a flat rate of 60% of 80% of lost earnings.

[70.2] It is paid for five years.

[70.3] The surviving spouse does not have to establish dependency.

[70.4] No means test is applied before the compensation is paid.

[71] It is reasonably clear the purpose of surviving spouse compensation is to compensate the surviving spouse for loss of the pecuniary benefit which the spouse might reasonably have expected to enjoy if the deceased person had not been killed. We think the point being made by Ms Burton is that death inevitably results in unique circumstances, often resulting in financial transition, if not hardship. This uniqueness is recognised by the inclusion in the AC Act of specific statutory provisions (eg s 69(1)(e) and Part 4 of Schedule 1). In the interests of clarity, simplicity and affordability the compensation is paid automatically, irrespective of need, means or dependency. The only calculation required is in respect of the percentages of the baseline quantum.

Because of the “no inquiry, flat rate, limited time” provisions, there is no need for consideration to be given to whether “new” heads of damages should be acknowledged as occurred in *Pou v British American Tobacco (New Zealand) Ltd*.

[72] One of the defining differences between earner’s weekly compensation and surviving spouse weekly compensation is that in the former category the duration of the payments is based on the period of incapacity (see cl 32(2)) whereas in the latter it is paid for a fixed period of five years (and at a reduced rate) irrespective of dependency or need. Put more bluntly, the one is for incapacity of the earner, the other for the financial impact on the surviving spouse of the death of the earner. For this most final of financial impacts only five years is allowed for recovery.

[73] It is for these reasons we do not accept that the interpretation of cll 52 and 68 are interdependent. Any ruling we make on cl 68 will not have the flow on effect claimed by the Crown.

[74] We turn then to the interface between surviving spouse weekly compensation and New Zealand superannuation.

The interface between surviving spouse weekly compensation and New Zealand superannuation

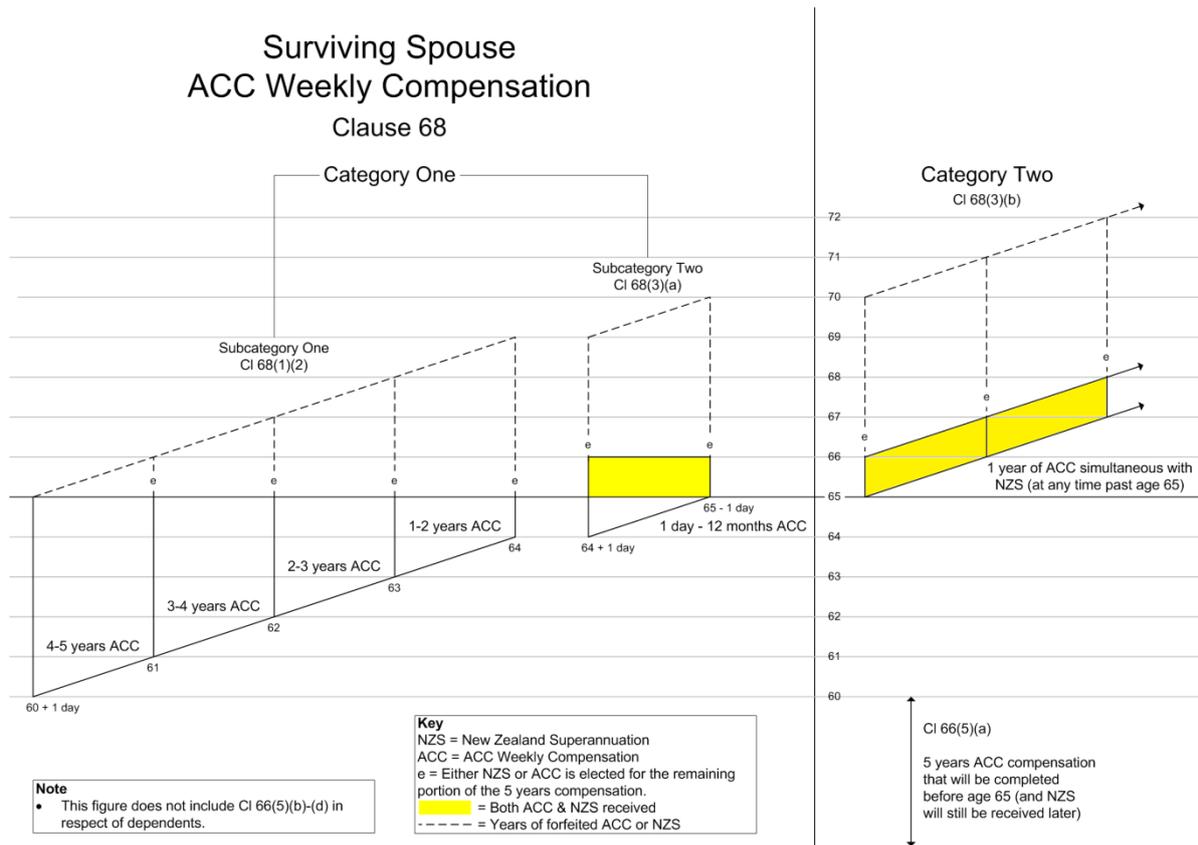
[75] Clause 68 in Part 4 of Schedule 1 to the AC Act contemplates two distinct fact circumstances or categories. The first category relates to those surviving spouses who have not reached NZSQA but are within five years of that age, that is between 60 and 64 years. The second relates to those who (like Mr Heads) have already reached NZSQA at the time of the death of their spouse by way of fatal accident. Clause 68 provides:

68 Relationship between surviving spouse's or partner's weekly compensation and New Zealand superannuation

- (1) Subclause (2) applies to a surviving spouse or partner who—
 - (a) is entitled to weekly compensation immediately before reaching New Zealand superannuation qualification age; and
 - (b) has been entitled to it for 12 months or longer before reaching that age.
- (2) Such a surviving spouse or partner is entitled to the weekly compensation if he or she makes an election to be entitled to it, rather than to New Zealand superannuation.
- (3) Subclauses (4) and (5) apply to a surviving spouse or partner who becomes entitled to weekly compensation—
 - (a) within 12 months before reaching New Zealand superannuation qualification age; or
 - (b) on or after reaching New Zealand superannuation qualification age.
- (4) Such a surviving spouse or partner is entitled to the weekly compensation for a period of 12 months following the later of—
 - (a) the date of reaching New Zealand superannuation qualification age; or
 - (b) the date of entitlement to weekly compensation.
- (5) The surviving spouse or partner then continues to be entitled to the weekly compensation if he or she makes an election to be entitled to it, rather than to New Zealand superannuation.
- (6) Nothing in this clause entitles a surviving spouse or partner to weekly compensation if he or she is not otherwise entitled to it under this schedule.

[76] The operation of this clause is depicted in Table 5 – Surviving Spouse ACC Weekly Compensation which follows below in reduced size. It is annexed in full size as Appendix 1 to this decision.

Table 5



[77] The first category is divided into two sub-categories. Sub-category 1 is governed by cl 68, sub-cl (1) and (2). To be in this sub-category a person must be 60 plus one day but no older than 64 (from the day after the claimant's 64th birthday until NZSQA he or she will be governed by cl 68, sub-cl (3)(a)). The nearer the date of entitlement is to 60 plus one day, the longer the period the surviving spouse has to enjoy the five years of surviving spouse weekly compensation prior to reaching NZSQA and having to elect between surviving spouse compensation and New Zealand superannuation. So a surviving spouse who becomes eligible just after turning 61 will receive surviving spouse weekly compensation for a period of 4 years. For a surviving spouse just aged 62, the period of surviving spouse weekly compensation will be 3 years prior to election. For a person aged 63, the period will be 2 years. No one who falls within cl 68, sub-cl (1) and (2) is able to receive simultaneously both surviving spouse weekly compensation and New Zealand superannuation. They must elect either one or the other on reaching 65 years.

[78] Sub-category 2 is governed by sub-cl (3)(a). To be in this sub-category the surviving spouse must be aged 64 years plus one day but not yet 65. Such a surviving spouse is entitled to surviving spouse weekly compensation for the whole of the remaining balance of their 64th year (depending on the date of entitlement). On reaching 65 years (NZSQA) the spouse is entitled to surviving spouse weekly compensation for a further period of 12 months while simultaneously receiving 12 months superannuation. A person in this sub-category will potentially (depending on the date of entitlement) receive up to 24 months of surviving spouse weekly compensation plus all of the first year of New Zealand superannuation. Thereafter an election must be made between surviving spouse weekly compensation and New Zealand superannuation.

[79] The second category is governed by sub-cl (3)(b). To be in this category a person must have become entitled to surviving spouse weekly compensation **after** having already reached NZSQA. Persons in this category are entitled to surviving spouse weekly compensation for a period of 12 months while simultaneously receiving New Zealand superannuation. At the end of the 12 months period an election must be made between surviving spouse weekly compensation and superannuation.

[80] On this analysis the most disadvantaged group is that governed by sub-category 2 described in sub-cl (3)(b) ie persons who become entitled to surviving spouse weekly compensation on or after reaching 65 years of age. They must forfeit either four years of surviving spouse weekly compensation or four years of superannuation. By contrast, the next most disadvantaged group (those who are 64 plus one day and who become entitled at or near the commencement of this age bracket and are governed by sub-cl (3)(a)) forfeits either up to three years less one day of surviving spouse weekly compensation or three years less one day of New Zealand superannuation.

[81] It has been necessary to delve into the working of cl 68 at this level of detail because the submission for the Crown was that the comparator group for the second category (which applies to Mr Heads) must be drawn from cl 68 itself. That submission will be addressed shortly. First it is necessary to complete the overview of the legislation.

The New Zealand Superannuation and Retirement Income Act 2001

[82] The purpose of the NZSRIA as relevantly stated in s 3(a) is “to continue current entitlements to New Zealand superannuation”. Part 1 of the Act addresses those “entitlements”. Section 7 specifies the age qualification for New Zealand superannuation:

Part 1
Entitlements to New Zealand superannuation
Standard New Zealand superannuation entitlements

7 Age qualification for New Zealand superannuation

- (1) Every person is entitled to receive New Zealand superannuation who attains the age of 65 years.
- (2) However, a person is not entitled to receive New Zealand superannuation in respect of any period for which he or she has made an election under any of clause 52 or clause 68 or clause 72 of Schedule 1 of the Injury Prevention, Rehabilitation, and Compensation Act 2001 to be entitled to weekly compensation under that Act rather than to New Zealand superannuation.
- (3) Subsection (1) applies subject to the provisions of this Part and of the Social Security Act 1964.

[83] It is to be noted the “entitlement” does not apply where an election has been made under cll 52, 68 or 72 of Schedule 1 of the AC Act.

The Social Security Act 1964

[84] This Act is made relevant to the present proceedings because of the assertion by the Crown the policy underlying both the AC Act and the NZSRIA is that a person can be in receipt of only one form of publicly funded assistance at any one time.

[85] The claimed principle is not, however, articulated in these terms by the SSA. The Act provides only that any decision to provide financial support **under the SSA** must take into account any financial support received otherwise than under the SSA from publicly funded sources. Section 1A states:

1A Purpose

The purpose of this Act is—

- (a) to enable the provision of financial and other support as appropriate—
 - (i) to help people to support themselves and their dependants while not in paid employment; and
 - (ii) to help people to find or retain paid employment; and
 - (iii) to help people for whom work may not currently be appropriate because of sickness, injury, disability, or caring responsibilities, to support themselves and their dependants:
- (b) to enable in certain circumstances the provision of financial support to people to help alleviate hardship:
- (c) **to ensure that the financial support referred to in paragraphs (a) and (b) is provided to people taking into account—**
 - (i) that where appropriate they should use the resources available to them before seeking financial support under this Act; and
 - (ii) **any financial support that they are eligible for or already receive, otherwise than under this Act, from publicly funded sources:**
- (ca) to provide services to encourage and help young persons to move to education, training, and employment rather than to receiving financial support under this Act:
- (d) to impose, on the following specified people or young persons, the following specified requirements or obligations:
 - (i) on people seeking or receiving financial support under this Act, administrative and, where appropriate, work-related requirements; and
 - (ii) on young persons who are seeking or receiving financial support under this Act, educational, budget management, and (where appropriate) parenting requirements; and
 - (iii) on people receiving certain financial support under this Act, social obligations relating to the education and primary health care of their dependent children.

[Emphasis added]

[86] Section 72 of the SSA further provides that no person is entitled to receive more than one **benefit** [under the SSA] in his or her own right:

72 Limitation where applicant receiving another benefit or pension

Notwithstanding anything to the contrary in this Act,—

- (a) no person is entitled to receive more than 1 benefit in his or her own right, except as provided in sections 39D, 61EA, 61G, 61GA, and 69C, and section 23 of the Social Security (Working for Families) Amendment Act 2004:
- (b) ...

[87] But even under the SSA the one benefit principle is not, however, an absolute. First, ss 71(2) and 74(2) stipulate that any “impairment lump sum” received under Schedule 1 of the AC Act is not to be taken into account by the Ministry of Social Development. Second, weekly compensation payable under the AC Act is not included in the definition of “benefit” in s 3 of the SSA. New Zealand superannuation is included in the definition but is specifically exempted from the SSA off-set provisions which require income-tested benefits to be reduced by any loss of earning weekly compensation paid under the AC Act. See s 71A of the SSA:

71A Deduction of weekly compensation from income-tested benefits

- (1) Subject to subsection (4), this section applies to a person who is qualified to receive an income-tested benefit (**other than New Zealand superannuation** or a veteran's pension unless the veteran's pension would be subject to abatement under section 171 of the Veterans' Support Act 2014) where—
 - (a) the person is entitled to receive or receives weekly compensation in respect of the person or his or her spouse or partner or a dependent child; or
 - (b) the person's spouse or partner receives weekly compensation.
- (2) Where this section applies, the rate of the benefit payable to the person must be reduced by the amount of weekly compensation payable to the person.

- (3) In this section, *weekly compensation* means weekly compensation for loss of earnings or loss of potential earning capacity payable to the person by the Corporation under the Accident Compensation Act 2001.
- (4) Subsection (2) does not apply where the person—
 - (a) was receiving the income-tested benefit immediately before 1 July 1999 and continues to receive that benefit; and
 - (b) was receiving compensation for loss of earnings or loss of potential earning capacity under the Accident Rehabilitation Compensation and Insurance Act 1992 immediately before that date; and
 - (c) section 71A(2) (as it was before it was repealed and substituted by the Accident Insurance Act 1998) required the compensation payments to be brought to charge as income in the assessment of the person's benefit. [Emphasis added]

[88] The submission for the Crown is that weekly compensation payments under the AC Act is “financial support” from “publicly funded sources”. We do not accept this characterisation is accurate given:

[88.1] Section 1A of the SSA (from which the Crown draws its language) applies only to benefits paid under the SSA. That is, the offset is against benefit payments under the SSA. The section does not enunciate a principle of general application that requires all payments outside the SSA and from publicly funded sources be offset against each other. The off-set only attaches to some (not all) benefits **paid under the SSA**.

[88.2] Payments under the AC Act are not made as financial support, but as compensation for lost earnings following a non-fatal accident or to assist the financial adjustment of a surviving spouse following a fatal accident.

[89] The Crown submits, however, support for its argument is found in the Woodhouse Report (1967), in the *Report of the Royal Commission on Social Policy* (1972) and in the *Report of the Ministerial Working Party on the Accident Compensation Corporation and Incapacity* (1991).

[90] In our view a proper reading of these reports establishes the opposite contention, namely there is a clear and long established conceptual distinction between a social security system on the one hand and on the other, a scheme of social insurance for workers who are compensated for lost earnings following personal injury by accident.

The one-benefit principle examined

[91] The present system of injury insurance, first mapped in the Woodhouse report and now described in s 3 of the AC Act, has as its focus, inter alia, the provision of real compensation (in s 3 referred to as fair compensation) for lost income. See the Woodhouse Report at [4]:

4. Five General Principles—We have made recommendations which recognise the inevitability of two fundamental principles-

First, no satisfactory system of injury insurance can be organised except on a 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. There must be a comprehensive entitlement.

Moreover, always accepting the obvious need to produce something which the country can afford, it seemed necessary to lay down three further rules which, taken together with the two fundamental matters, would provide the framework for the new system. There must be complete rehabilitation. **There must be real compensation – income-related benefits for income losses, payment throughout the whole period of incapacity,** recognition of

permanent bodily impairment as a loss in itself. And there must be administrative efficiency. The five guiding principles can be summarised as-

Community responsibility
Comprehensive entitlement
Complete rehabilitation
Real compensation
Administrative efficiency. [Emphasis added]

[92] Section 3 of the AC Act, in setting out the purpose of the Act, makes explicit reference to “reinforcing the social contract” represented by the first accident compensation scheme which followed the Woodhouse Report and emphasises the need for fair compensation:

3 Purpose

The purpose of this Act is to enhance the public good and reinforce the social contract represented by the first accident compensation scheme by providing for a fair and sustainable scheme for managing personal injury that has, as its overriding goals, minimising both the overall incidence of injury in the community, and the impact of injury on the community (including economic, social, and personal costs), through—

- (a) establishing as a primary function of the Corporation the promotion of measures to reduce the incidence and severity of personal injury:
- (b) providing for a framework for the collection, co-ordination, and analysis of injury-related information:
- (c) ensuring that, where injuries occur, the Corporation's primary focus should be on rehabilitation with the goal of achieving an appropriate quality of life through the provision of entitlements that restores to the maximum practicable extent a claimant's health, independence, and participation:
- (d) ensuring that, during their rehabilitation, claimants receive fair compensation for loss from injury, including fair determination of weekly compensation and, where appropriate, lump sums for permanent impairment:
- (e) ensuring positive claimant interactions with the Corporation through the development and operation of a Code of ACC Claimants' Rights:
- (f) ensuring that persons who suffered personal injuries before the commencement of this Act continue to receive entitlements where appropriate.

[93] Both the Woodhouse Report and subsequent accident compensation schemes have rejected a test based on need. Instead, compensation is based on an assessment of actual loss, both physical and economic. See the Woodhouse Report at [59] to [61]:

Real Compensation

59. Clearly if compensation is to meet real losses it must provide adequate recompense, unrestricted by earlier philosophies which put forward tests related merely to need. Such an approach may have been appropriate when poverty was a widespread evil demanding considerable mobilisation of the country's financial resources. ...

...

61. Accordingly, we are in no doubt that in modern conditions a compensation scheme of the type under discussion should rest upon a realistic assessment of actual loss, both physical and economic, followed by a shifting of that loss on a suitably generous basis. If there might seem to be an issue as to whether the compensation due to injured workers should be restricted to meet their current needs or be assessed on a uniform flat rate basis, then these are propositions which we reject as entirely unacceptable. These are the considerations which support the fourth principle.

[94] The Woodhouse Report was highly critical of the erosion of benefits paid under the (then) Workers Compensation Act and the movement away from compensation towards a social assistance principle based on need:

220. However, one of the most striking aspects of the compensation process is the way in which the value of benefits has gradually been eroded (particularly over the last 20 years), and the accompanying tendency to move away from the strict compensation principle towards

payments which have been levelled out in a fashion akin to the social security system. Such a tendency certainly must be reversed if real recompense for individual losses is to be offered to injured workmen.

...

227. The low maximum level of the benefit and its restricted duration have had the effect of pushing the compensation process in the direction of a system of flat rate payments. Together with the provision of flat rate supplements for dependants the trend is in accord with the social assistance principle that need should be the test for assistance rather than loss the measure of recompense.

...

229. All this needs to be changed. ...

[95] Addressing specifically the relationship of the social security system to the proposed accident insurance scheme, the authors of the Woodhouse Report explicitly stated that the social security system is not a scheme of social insurance:

243. The social security system is not a scheme of social insurance in the sense that benefits should be balanced against contributions or that the benefits should be related to the varied income losses of individual beneficiaries. Instead, its first purpose has always been to provide basic assistance at a level which would enable every person to maintain himself against need without undue strain.

...

245. Benefits are not related to past earnings but are provided on a uniform flat rate basis. ...

...

248. ... It is due also to the fact that a system of flat rate payments, whether increased by special allowances or not, is regarded as an unacceptable substitute for processes which attempt (even if in stumbling fashion) to match lost income and make some provision for damaged or lost limbs.

[96] Integration of social security legislation with accident compensation was rejected on the grounds that it was not feasible:

250. Nevertheless, integration is not feasible if compensation for injury would then have to take the form of the same flat rate payments for all. Few would accept such a scheme. Nor would it be just. And special provision for economic hardship or allowances for dependents would neither avoid the injustice nor gain general acceptance. The losses of individuals vary greatly and so do their continuing commitments. A fair part of their different losses and a fair part of their sudden problems will not be relieved by a system which ignores lost earnings in favour of a general average of assistance. The only way in which a comprehensive system of compensation could operate equitably is by linking benefits to earning capacity and by taking into account permanent physical disability.

[97] A means test was described as “an unnecessary intervention” and “quite irrelevant” to any attempt to compensate for injury. The principle must be compensation for losses, not assistance for need:

260. ... Fourth, the inquiry into means which would become necessary to establish entitlement seems to us as unnecessary intervention and quite irrelevant to any attempt to compensate a man for injury. Fifth, an income-related means test would be a serious disincentive to rehabilitation and a return to work. In the present context the principle must be compensation for losses, not assistance for need which already is the subject of generous attention in New Zealand.

[98] In Part 9 of the Woodhouse Report, the Conclusions and Recommendations again emphasised the principled distinction between social assistance and accident compensation:

487. THE SOCIAL SECURITY SYSTEM

- (1) The social security fund frequently has supplemented awards of damages or compensation and those concerned have thus been assisted twice in respect of the same injury. It is a situation which should not continue.
- (2) The system itself provides uniform flat rate benefits and on this basis it cannot provide the framework for a comprehensive scheme of injury compensation. Flat rate benefits would be an unacceptable substitute for varied income losses or permanent physical impairment.
- (3) Nor could an income-related means test be retained as a qualification for fair recompense. It would interfere inequitably with the principle of compensation for losses; it would be a serious disincentive to rehabilitation and a return to work ...

[99] In the first paragraph of this last quote there is, as pointed out by the Crown, recognition that the social welfare system should not supplement compensation awards. A person should not be assisted twice in respect of the same injury. The point is enlarged upon in the Woodhouse Report at [231] to [238] and [247]. But it does not follow that because a social welfare benefit should not be granted for an injury compensated under accident compensation legislation that such compensation payment is a form of social welfare assistance. We can find no support whatever for Ms Burton's assertion that:

[a]ccident compensation is part of the wider scheme of social welfare provision.

[100] While some may conflate the accident compensation scheme and the social welfare scheme, the same error has not been made by Parliament. Specifically, accident compensation payments are not means tested or reduced where benefits are simultaneously received under the SSA. Rather "double compensation" is avoided by controlling the social welfare payments via mechanisms such as that in s 1A of the SSA (account to be taken of financial support from publicly funded sources) and s 71A (deduction of weekly compensation from income-tested benefits). But the fact that social welfare payments (with the conspicuous exception of New Zealand superannuation) are so controlled does not mean compensation payments under the AC Act are also so controlled.

[101] The conceptual distinction between compensation for loss of earnings following accidental injury and social security was highlighted also in the Report of the *Royal Commission on Social Policy* (1972):

[101.1] Social security alleviates the imperfect distribution of the proceeds of the production from which every person's living standards are derived (p 53).

[101.2] Flat-rate benefits are based on need and the degree of need rather than past individual earnings or contributions (pp 57 and 65).

[101.3] Social security and accident compensation perform different functions. See p 177:

72. It will be seen, then, that the function of social security is very different from that of accident compensation. Its job is not to maintain the economic situation, before accidents, of a particular section of the community. Instead, it is to ensure that all members of the community have income sufficient to reach an adequate living standard. It discharges a community obligation to meet need wherever need exists.

[102] While in these proceedings it has been contended by Ms Burton and the Crown that accident compensation is part of the wider scheme of social welfare provision, other advisers to the government have not done so. In particular the *Report of the Ministerial*

Working Party on the Accident Compensation Corporation and Incapacity (1991) opened at p 2 with the statement that:

We consider that provision of compensation in the event of an injury is essentially an insurance, rather than a welfare, matter.

[103] The principled distinction between compensation and social welfare was made at p 13:

5. A third assumption is that there is some minimum standard of living standard below which the government would not wish to see individuals fall. That is, whatever the circumstances, and whatever the degree of individual responsibility for them, the state will ensure that people receive health care and a minimum income. This is however a principle of social welfare and not of compensation. "Compensation" implies the making good of a harm or injury, varying with the extent of the injury and the previous circumstances of the injured person. There are thus two conflicting principles on which to base the level of assistance which should be available under any future accident compensation scheme.

[104] And again at p 35:

100. Income support in the New Zealand social security system has always been based on a "flat rate" core benefit. Total aid available to any individual beneficiary can vary according to personal circumstances such as dependents, unusually high accommodation or other special costs and other sources of income. Assistance has never however taken account of the previous earnings of the claimant.

101. On the other hand, the ACC system is founded on earnings related compensation for loss of income. This has been justified both as a matter of principle and of precedent. The principle claimed in support of ERC is that it is the other end of a social contract which saw the injured give up their right to sue in the courts ...

Conclusions on the "one benefit" principle asserted by the Crown

[105] Our conclusions on the "one benefit" contention by the Crown are:

[105.1] Whereas social welfare is based on need, the accident compensation system is based on earnings related compensation for loss of income.

[105.2] Social welfare benefits granted under the SSA are subject to the "one benefit" principle in that:

[105.2.1] Section 1A of the Act lists as a purpose of that Act the need to ensure any financial support provided to beneficiaries under the SSA takes into account financial support they are eligible to receive or already receive from publicly funded sources.

[105.2.2] Section 72(a) of the SSA states no person is entitled to receive more than one benefit in his or her own right. The term "benefit" is defined in s 3(1) as a monetary benefit payable under the SSA and includes New Zealand superannuation. That is, it is not generally possible to receive a social welfare benefit at the same time as New Zealand superannuation.

[105.2.3] Section 71A of the SSA stipulates that an income-tested benefit must be reduced by the amount of weekly compensation payable to the person under the AC Act. For a recent case on the operation of this section see *Hennessy v Chief Executive of the Ministry of Social Development* [2012] NZHC 3104, [2013] NZAR 110.

[105.3] New Zealand Superannuation is expressly removed from the operation of s 71A.

[105.4] Neither New Zealand Superannuation nor weekly compensation payable under the AC Act is subject to a test based on need or means or which takes into account the receipt of other sources of income, publicly funded or otherwise.

[105.5] The assertion by the Crown that accident compensation is part of the wider scheme of social welfare provision is unpersuasive and not demonstrated.

[105.6] It is not possible to defend cl 68, Schedule 1 of the AC Act on the basis asserted by Ms Burton, namely that it ensures that no one, regardless of age, can receive two forms of publicly-funded main income support. Clauses 68(3)(a) and (3)(b) in fact support the contrary argument in that accident compensation and superannuation are paid simultaneously for at least twelve months.

[106] Against this background we turn to the central question in these proceedings, namely whether cl 68 of the AC Act is inconsistent with s 19 of the New Zealand Bill of Rights Act 1990.

THE DISCRIMINATION ISSUE

[107] Mr Heads' claim is that cl 68 in Part 4 of Schedule 1 of the AC Act is discriminatory on the grounds of age because it does not allow those who are 65 years or over to be paid surviving spouses' weekly compensation for five years unless they elect to give up their own New Zealand superannuation payments after one year.

[108] The provisions relating to discrimination are found in the New Zealand Bill of Rights Act 1990 and in the Human Rights Act 1993.

[109] Section 20L of the Human Rights Act sets out the obligation of Government to act consistently with s 19 of the Bill of Rights:

20L Acts or omissions in breach of this Part

- (1) An act or omission in relation to which this Part applies (including an enactment) is in breach of this Part if it is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990.
- (2) For the purposes of subsection (1), an act or omission is inconsistent with section 19 of the New Zealand Bill of Rights Act 1990 if the act or omission—
 - (a) limits the right to freedom from discrimination affirmed by that section; and
 - (b) is not, under section 5 of the New Zealand Bill of Rights Act 1990, a justified limitation on that right.
- (3) To avoid doubt, subsections (1) and (2) apply in relation to an act or omission even if it is authorised or required by an enactment.

[110] Section 19 of the Bill of Rights provides:

19 Freedom from discrimination

- (1) Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.
- (2) Measures taken in good faith for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination that is unlawful by virtue of Part 2 of the Human Rights Act 1993 do not constitute discrimination.

[111] The prohibited grounds of discrimination listed in s 21 of the HRA include age.

The test for discrimination

[112] The first requirement of s 20L(2) is that the act complained of must limit the right to freedom from discrimination on a prohibited ground (here, age). In *Ministry of Health v Atkinson* [2012] NZCA 184, [2012] 3 NZLR 456 at [55] and [109] (followed and applied in

Attorney-General v IDEA Services Ltd [2012] NZHC 3229, [2013] 2 NZLR 512 at [125]) it was said there are two steps to determining whether there has been discrimination under s 19 of the Bill of Rights:

[112.1] First, there must be differential treatment or effects as between persons or groups in analogous or comparable situations on the basis of a prohibited ground of discrimination.

[112.2] Second, there must be a discriminatory impact (meaning that the differential treatment imposes a material disadvantage on the person or group differentiated against).

The relevant comparator

[113] As pointed out in *IDEA Services* at [126], the first step is sometimes approached by identifying the group affected by the decision at issue (the affected group) and comparing that group with those “whose treatment is logically relevant to the person or group alleging discrimination (the comparator group)”. See *Quilter v Attorney-General* [1998] 1 NZLR 523 (CA) at 573 per Tipping J. This is because, as pointed out by Tipping J, “[t]he essence of discrimination lies in difference of treatment in comparable circumstances”. Identifying the affected group and the relevant comparator group assists in making an assessment whether there has been a difference in treatment of people in comparable circumstances.

[114] For Mr Heads it is submitted the **affected group** comprises those surviving spouses who become entitled to surviving spouse weekly compensation on or after reaching NZSQA and who must, within 12 months of first eligibility for such weekly compensation, elect between receiving either weekly compensation or New Zealand superannuation. The **comparator group** comprises those surviving spouses who became entitled to weekly compensation before reaching NZSQA and who fall **outside** of the provisions of cl 68.

[115] On the other hand, the Crown submits the comparator group must be drawn **from** cl 68:

The comparator group is a surviving spouse or partner, entitled to survivor weekly compensation under clause 68, who is less than NZSQA and who is subject to the same requirement to elect between weekly compensation and NZS, on reaching NZSQA. This group, younger than NZSQA and the plaintiff, are governed by clause 68(1) and (2) and clause 68(3)(a), (4) and (5). A surviving spouse or partner in this category are either entirely disentitled from simultaneously receiving both accident compensation and superannuation for any period, or enjoy a period shorter than 12 months when both accident compensation and superannuation may be simultaneously received.

[116] Put another way the submission for the Crown is that the affected group is cl 68(3)(b) whereas the comparator group is anyone else covered by cl 68, ie cl 68(1) and (2) and cl 68(3)(a).

[117] The cl 68(1) and (2) sub-categories must be aged between 60 plus one day and 64. A member of this group who is 60 plus one day will receive almost all of the surviving spouse weekly compensation five year entitlement before having to make the election. A member of this sub-category who is 62 years of age will potentially receive three years surviving spouse weekly compensation before making the election whereas a person who is 63 years will potentially receive two years. A person 64 years of age will receive one year of compensation only. None of these groups can receive surviving spouse weekly compensation simultaneously with NZS once they reach NZSQA.

However, a person in cl 68(3)(a) who is 64 plus one day will potentially receive up to two years of surviving spouse weekly compensation plus one year of simultaneous receipt of New Zealand superannuation. The Tribunal was told by the Crown that the policy reasons for these distinctions is not known and that every document of potential relevance which can be found has been put in evidence. It was submitted by the Crown that the unarticulated premise is the one benefit principle.

[118] It was further submitted by the Crown that the effect of cl 68(1) and (2) and cl 68(3)(a) is that the sub-categories embraced by these provisions are the most disadvantaged group because this cohort never receive accident compensation and superannuation at the same time. They are therefore an appropriate comparator group.

[119] There are difficulties with the Crown submission:

[119.1] Some in the proposed comparator group do in fact receive weekly compensation simultaneously with New Zealand superannuation. See cl 68(3)(a) and (4):

- (4) Such a surviving spouse or partner is entitled to the weekly compensation **for a period of 12 months** following the later of ... [Emphasis added]

The Crown is therefore mistaken in asserting there are in the proposed comparator group persons who enjoy a period shorter than 12 months when both accident compensation and superannuation may be simultaneously received.

[119.2] The more important point, however, is that the proposed comparator group is comprised of disparate groups who have different entitlements with different outcomes in terms of the amount of weekly compensation and superannuation received.

[119.3] These differences are not explained by the claimed one benefit rule because the cl 68(3)(a) and (b) categories do receive two “benefits” simultaneously for at least a period of time. Furthermore in the absence of evidence as to the policy considerations which were taken into account when cl 68 was drafted we do not consider it safe to infer from the disparate groups and differing outcomes a coherent policy. Particularly when we have rejected the Crown submission that the one benefit principle operates outside of the Social Security Act.

[119.4] The most that can be said about cl 68 is that it is a necessary but untidy transitional provision framed around the unique intersection of NZSQA and surviving spouse weekly compensation.

[119.5] The Crown’s reliance on the transitional provisions in cl 52 do not assist with the interpretation of cl 68. This is because the groups are different as is the rationale for their compensation payments. A person injured in a non-fatal accident is compensated for loss of earnings. Those earnings will necessarily come to a natural end on the retirement of the individual from the workforce. Logically, compensation must end at that same point. In this regard NZSQA is an appropriate proxy for the fixing of that point. Surviving spouse weekly compensation, on the other hand, is paid to assist the surviving spouse to address the financial impact of the loss of an income earning spouse and is not only paid at a lower rate, but is paid for five years only. There is no need for a proxy to be fixed for identifying the point at which compensation payments to the surviving spouse should terminate.

[120] It is necessary to go back to the principles which guide the framing of the comparator group:

[120.1] The approach to the comparator issue should be guided by the underlying purpose of anti-discrimination laws and the context in which the issue arises: *Air New Zealand Ltd v McAlister* [2009] NZSC 78, [2010] 1 NZLR 153 at [51] per Tipping J.

[120.2] It is necessary to avoid an approach which would impose too high a threshold and effectively cut out the inquiry into potential discriminatory action too soon. The intention of the Human Rights Act is to take what has been described as a “purposive and untechnical” approach to whether there is prima facie discrimination and so to avoid artificially ruling out discrimination at the first stage of the inquiry. See *Child Poverty Action Group Inc v Attorney-General* [2013] NZCA 402, [2013] 3 NZLR 729 at [48] (hereinafter *CPAG v Attorney-General*).

[120.3] The “mirror” comparison analysis can lead to problems. First, the definition of the comparator group can determine the analysis and the outcome. Second, the search for a precisely corresponding comparator becomes a search for sameness, rather than a search for disadvantage, occluding the real issue. A range of criteria could be established for eligibility but with the knowledge that one of those criteria will effectively cut out and so discriminate against, for example, all those of a particular ethnic group. See *CPAG v Attorney-General* at [49] and [50].

[120.4] It is also necessary to come back to why it is a comparison is being undertaken. The need to consider this exercise arises, at least in part, because legislation and policy decisions will involve to a greater or lesser extent differential treatment or the making of distinctions of some sort. What the decision-maker is trying to do by reference to the comparator is to sort out those distinctions which are made on the basis of a prohibited ground. The decision-maker is looking at the reality of the situation not in the abstract. See *CPAG v Attorney-General* at [51].

[120.5] It is necessary also to be comparing apples with apples and hence the inquiry focuses on analogous or comparable situations. The comparator exercise is simply a tool in that analysis. In some cases, particularly those where there is a single criterion, the comparator analysis will effectively answer the first stage of the inquiry. See *CPAG v Attorney-General* at [51].

[120.6] Where there are multiple statutory criteria or where effects-based discrimination is being considered, further analysis may be required. There may be questions about how the multiple criteria impact on the choice of comparator and whether the discrimination is on the basis of a prohibited ground. See *CPAG v Attorney-General* at [52].

[120.7] The selection of the comparator group must be conducive to a determination of the potential impact of the impugned policy without a negation of its relevance. The comparator group selected should be one that enables a determination whether this difference is on the basis of age or on some other (non-discriminatory) basis. See *IDEA Services* at [139].

[121] In the present case the comparator advanced by the Crown cannot be accepted for the following reasons:

[121.1] As previously pointed out cl 68 addresses two distinct categories:

[121.1.1] First, those in cl 68(1) and (3)(a) ie persons who have become entitled to surviving spouse weekly compensation **prior** to reaching NZSQA but whose five year period of compensation will not expire until after they pass NZSQA.

[121.1.2] Second, those in cl 68(3)(b) ie persons who, **subsequent** to reaching 65 years of age, have become entitled to surviving spouse weekly compensation.

Mr Heads belongs to the second category, not the first. To ensure apples are compared with apples, the comparable situation to Mr Heads is not the first group, but surviving spouses entitled to weekly compensation and who fall outside of cl 68. This, we believe, is the “purposive and untechnical” approach recommended in *CPAG v Attorney-General* at [48]. Given the disparate nature of the groups in cl 68 the only natural and logically relevant comparator group is surviving spouses who fall outside cl 68. Mr Heads complains not of discrimination within the transition groups covered by cl 68 but with surviving spouses outside it. The Crown’s approach will occlude the real issue.

[121.2] The policy of ss 67, 69(1)(e) and cl 66 of the AC Act is that where there has been a fatal injury, the surviving spouse is to receive weekly compensation for a flat period of five years at the fixed rate of 60% of 80% of the deceased’s earnings and that that compensation is to be paid regardless of the surviving spouse’s need, income, assets or other payments from publicly funded sources. The formulation of the comparator group as advanced by Mr Heads will be consistent with this policy. The Crown formulation will not.

[121.3] The transition of the first category from surviving spouse’s weekly compensation to superannuation could have been on a “bright line” basis, that is the five years could have been allowed to run without interruption by NZSQA or alternatively, inflexibly brought to an end at NZSQA. The Crown concedes the policy reasons behind the formulation found in cl 68 and the various election outcomes prescribed by that provision are not known. However, it is submitted the presence of the one benefit principle can be discerned. As to this, however, the cl 66 entitlement to a surviving spouse compensation, as with all other compensation entitlements under the AC Act, are not subject to such principle. Furthermore, cl 68 does in fact allow accident compensation and superannuation to be received simultaneously. We do not in these circumstances see how the asserted one benefit principle assists in identifying the comparator group.

[121.4] It must also be emphasised that this is not a case about the simultaneous receipt of two forms of payments, it is about a person in Mr Heads’ position receiving either one year of the five year entitlement to compensation or forfeiting four years of superannuation. Not only is such treatment very different compared with that of a surviving spouse who is younger than 60 plus one day, he is also worse off than all of the age groups which fall within the first category of cl 68 ie surviving spouses receiving weekly compensation but then reaching NZSQA with the five year period of compensation still running. Specifically a person in the cl 68(3)(a) group will potentially receive up to 24 months compensation plus one year of superannuation before having to make the election. The maximum period of overlap for those in Mr Heads’ situation is 12 months only. Even if the two categories are to be collapsed into one “group” we do not accept that Mr Heads

can appropriately be compared with other members of the same group, each of whom enjoys a more advantaged position than him.

Conclusions on differential treatment

[122] For the reasons given we conclude Mr Heads, as a surviving spouse entitled to weekly compensation under cl 66, has been treated differently from other surviving spouses entitled to weekly compensation under that clause and who are not within cl 68. The reason for such treatment is his age. Clause 68(3)(b) provides that because Mr Heads became entitled to surviving spouse's weekly compensation after he reached NZSQA, he can receive only one year of the five year compensation entitlement unless he elects to receive compensation instead of superannuation. It is clear his age is the reason for the differential treatment and the causative link between the treatment and the prohibited ground is clearly established.

Material disadvantage

[123] We turn now to the second step in determining whether there has been discrimination under s 19 of the Bill of Rights, namely the question whether the differential treatment has imposed on Mr Heads a material disadvantage.

[124] It might be thought only an affirmative answer is possible given Mr Heads was for four years without New Zealand superannuation, the disadvantage amounting to approximately \$75,000.

[125] However, for the Crown it was submitted the material disadvantage must be something other than this loss. That is Mr Heads must establish a disadvantage beyond a direct loss. Reference was made to the need to show the perpetuation of an "existing disadvantage or prejudice against older New Zealanders". In support it was contended the "wider scheme of social welfare provisions" does not stereotype older New Zealanders as needing less, or being less worthy recipients of, income support than those who are younger. Older New Zealanders are not economically disadvantaged and cl 68 does not perpetuate disadvantage.

[126] In addition to deploying "social welfare" terminology inappropriately in the context of a compensation scheme, this submission is altogether too broad and perhaps mistakes the nature of the claim made by Mr Heads. Above all, it places on Mr Heads an impossible burden to show not that he has suffered material disadvantage by having to make the election, but that somehow all older New Zealanders have been disadvantaged.

[127] As stated in *CPAG v Attorney-General* at [72] there is no need to complicate this part of the analysis. The point of the exercise is to consider the impact **on the claimant** in context and that impact must be material. In *CPAG v Attorney-General* the lack of a comparable gain (the ability to receive the in-work tax gain) met the test. In *IDEA Services* at [164] it was not having access to government funding to assist participation in the community. In *Ministry of Health v Atkinson* at [137] the parents had shown they wanted to care for their children ie do the work for the Ministry providers and were available to do so. They had not received paid work because of the Ministry policy. This was accepted as a material disadvantage. The adult children similarly had been disadvantaged because they were denied access to the range of paid service providers that other disabled persons could access. In none of these cases was the plaintiff required to establish material disadvantage written in the broad terms contended for by the Crown in the present case.

[128] We are of the view material disadvantage is established because Mr Heads was required to make an election to receive either compensation or superannuation. He consequently forfeited four years of his superannuation entitlement amounting to \$75,000. This is a material disadvantage.

[129] For these reasons we find the election requirement attached to cl 68(3)(b) to be prima facie discriminatory.

[130] Mr Heads having discharged his burden of proof we turn to the second requirement of s 20L(2) of the Human Rights Act, that is to s 5 of the Bill of Rights and the question whether the discrimination we have identified can be justified as a limitation on the right.

WHETHER A JUSTIFIED LIMITATION

[131] As explained in *IDEA Services* at [165], once a claimant has shown that his or her right to be free from discrimination has been limited by the actions of government, the government must show (see s 92F of the HRA) the limit has legal authorisation and that the limit is a reasonable one. To show the latter, the limit must be demonstrably justified in a free and democratic society:

5 Justified limitations

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[132] First we address the requirement that the limit be prescribed by law.

Prescribed by law

[133] It is plain that because cl 68 is included in Part 4 of Schedule 1 of the AC Act, its terms are prescribed by law. So much was accepted by both parties. There is accordingly no need to explore further the issues left open in *Atkinson* at [181] to [184] and addressed in *IDEA Services* at [171] to [193].

Reasonable and justified

[134] We approach the statutory test in the terms framed by Tipping J in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104] and adopted in *Atkinson* at [143] and in *CPAG v Attorney-General* at [76] from which the following quote has been taken:

[76] In *Atkinson*, this Court approached s 5 considering the headings set out by Tipping J in *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1 at [104], namely:

- (a) does the limiting measure serve a purpose sufficiently important to justify [curtailing the right]?
- (b) (i) is the limiting measure rationally connected with its purpose?
(ii) does the limiting measure impair the right ... no more than is reasonably necessary for sufficient achievement of its purpose [minimal impairment]?
- (iii) is the limit in due proportion to the importance of the objective [proportionality]?

[135] We accept that in approaching the s 5 analysis some latitude or leeway must be afforded to the legislature. See *CPAG v Attorney-General* at [79] to [92]:

The approach to s 5

[79] The authorities suggest that how much choice will be afforded to the legislature or decision maker depends on the circumstances. It is generally accepted, and it is accepted in this case,

that in matters involving social security and the allocation of spending, a greater degree of leeway will be afforded to the decision maker's choice.

New Zealand

[80] Tipping J in *Hansen* referred to a spectrum extending "from matters which involve major political, social or economic decisions at one end to matters which have a substantial legal content at the other". Tipping J envisaged that the nearer to the legal end of the spectrum the more intense the review by the courts was likely to be. As his Honour said, though, particular matters may have a number of different elements involving different aspects of the spectrum. To illustrate, Tipping J said, "the allocation of scarce public resources can often intersect with questions which, from a different standpoint, may seem more legal than political".

[81] We find helpful this observation:

[117] Ultimately, judicial assessment of whether a limit on a right or freedom is justified under s 5 of the Bill of Rights involves a difficult balance. Judges are expected to uphold individual rights but, at the same time, can be expected to show some restraint when policy choices arise, as they may do even with matters primarily involving legal issues. ... [Depending on the circumstances] the Court should allow the decision maker ... some degree of discretion or judgment. If the decision maker is Parliament, and it has manifested its decision in primary legislation, the case for allowing a degree of latitude may well be the stronger.

[82] Tipping J went on to develop the concept of a bull's-eye, a concept relied on by CPAG in this case. The margin of judgement or leeway left to Parliament represents the area of the target outside the bull's-eye. The idea is that the size of the target beyond the bull's-eye will turn on the subject matter. But, and this is the aspect CPAG relies on, Tipping J made the point that Parliament's view must not miss the target altogether. We come back to this aspect in considering the proportionality of the off-benefit rule. [footnote citations omitted]

[136] We address now the *Hansen* test.

Whether cl 68(3)(b) of the AC Act serves a purpose sufficiently important to justify the curtailment of the right to be free from discrimination on the basis of age

[137] As pointed out in *IDEA Services* at [206], it is necessary to address the objective of the challenged provision in order to consider whether that objective is sufficiently important to justify the curtailment of the right to be free from discrimination (in this case on the basis of age). The High Court concluded at [216] that the budgetary constraints established by the evidence and which required the Ministry of Health to make decisions about competing priorities for disability services funding was an objective sufficiently important to justify a curtailment of the right to be free from discrimination. The High Court stated at [216]:

... we agree that a limiting measure taken because expenditure had to be controlled and prioritised is a sufficiently important objective which can justify curtailment of the right to be free from discrimination.

[138] In the present case it was submitted by the Crown the evidence given by Ms Burton established:

[138.1] The link between weekly compensation and NZSQA as well as limits on entitlements for surviving spouses were introduced following the review of the ACC scheme in 1991 (*Accident Compensation: A Fairer Scheme* (30 July 1991) (The Birch Report)). Evidence at the time showed that the cost of the scheme had grown by an average rate of 25% a year between 1985 and 1990. Employers in particular were concerned at spiralling costs and they were

contributing nearly 70% of the cost of the scheme while only 40% of payments were related to work accidents. A number of changes to the legislation resulted.

[138.2] The upper age limit that applies to weekly compensation has an important objective, that is to ensure the ACC scheme is fair (to those who are expected to contribute to its cost) and sustainable.

[139] As to this submission it is to be recalled that cl 68 addresses two distinct categories:

[139.1] Persons who become entitled to surviving spouse weekly compensation prior to their reaching NZSQA but whose five year entitlement will not expire until after they reach NZSQA.

[139.2] Persons who, subsequent to reaching NZSQA, become entitled to receiving surviving spouse weekly compensation following the death of their spouse in a fatal workplace injury.

Plainly the purpose or objective of cl 68 in relation to the first category is to facilitate the transition of the surviving spouse from surviving spouse weekly compensation to New Zealand superannuation. But the real question, not addressed by the evidence, is why the clause does not employ a bright line termination at NZSQA or an equally bright line recognition that the five years must be allowed to run their course. Instead, depending on the age at which entitlement arises, the surviving spouse receives anything from almost the full five years to almost one year of compensation before having to make an election between surviving spouse weekly compensation and superannuation.

[140] As to the second category, the purpose or objective of cl 68 is to allow a surviving spouse 65 years of age or older to receive surviving spouse compensation where his or her spouse dies in a **fatal accident**. But again, the real question is why the five year period is made the subject of an election and why the overlap between the compensation payments and superannuation is set at one year only. It is this question which is the subject of the inquiry under the *Hansen* analysis. The Crown conceded almost no evidence on this question can be found.

[141] For Mr Heads it is submitted such policy evidence as was produced by the Crown is primarily, if not exclusively focused on the cost of paying weekly compensation for incapacity resulting from personal injury ie claims arising out of **non-fatal accidents**. The Crown has not been able to produce any policy documents specific to the second scenario addressed by cl 68. Those Cabinet Papers which were cited by Ms Burton are simply summaries of conclusions. They do not provide any reliable indication of what policy considerations were in fact considered in relation to cl 68(3)(b).

[142] We agree. Our assessment is that the policy considerations which have been produced in evidence by the Crown relate to the cost of compensating earners injured in **non-fatal** accidents. The one document which recognises concerns about age discrimination (Briefing to Hon Ruth Dyson "Weekly Compensation for Claimants Incapacitated Near or Over the New Zealand Qualification Age (65 years) (12 October 2007)) relates to workers compensation, that is to older workers who remain in the workforce and who are incapacitated near or over NZSQA. That is, the cl 52 cohort. It has no bearing on the surviving spouse compensation issue.

[143] Even the policy considerations affecting the first category in cl 68 (persons who have become entitled to surviving spouse weekly compensation prior to reaching NZSQA but whose five year period of compensation will not expire until after they reach

NZSQA) is largely unexplained. That is, the reasons why some in this group get most of their surviving spouse weekly compensation entitlement whereas others get no more than one year. The proposals in The Birch Report at p 44 do assert that earnings-related compensation will **normally** cease once the claimant reaches the age of eligibility for superannuation but as cl 68 abundantly demonstrates, no bright line cut off point was ultimately adopted and surviving spouse weekly compensation and New Zealand superannuation can be received simultaneously by two age groups, being those 64 plus one day to 65 and those 65 and over age group. The shaded boxes in Table 5 underline the point. The reasons for cl 68 being in its present form are not known.

[144] The Crown falls back on the assertion that there is, across government, a generalised principle that a person may receive only one form of publicly funded support. It is true this is a principle explicitly acknowledged by the SSA in the context of social welfare benefits paid under that Act but it is not acknowledged in the context of the AC Act and it is common ground the “entitlements” under that Act are not means tested. It is true also a person receiving such entitlement cannot also receive a social welfare benefit. The important point, however, is that the one benefit principle applies to the benefit, not the entitlement.

[145] Having regard to what was said in *IDEA Services* at [216] about budgetary constraints we accept that a limiting measure taken because expenditure must be controlled and prioritised is a sufficiently important objective which can justify curtailment of the right to be free from discrimination. However, as stated in that judgment at [217], there must be evidence that the need to control expenditure and to choose between priorities was the objective.

[146] In the present case there was no such evidence. In default the Crown relied on the asserted one benefit principle, a principle we believe is not established as having application to the AC Act. Rather it is a principle which operates on the social welfare side of the fence. This is not an accident. Both the AC Act and the NZSRIA speak of weekly compensation and of superannuation as an “entitlement”. Social welfare benefits, on the other hand, are based on need and are therefore understandably governed by the one benefit rule articulated in ss 1A and 72 of the SSA. But it is wrong in principle to extrapolate that **all** publicly funded payments are governed by the same rule, particularly payments statutorily characterised as entitlements.

[147] Our conclusion is the Crown has not established that the limiting measure in cl 68(3)(b) serves a purpose sufficiently important to justify curtailing the right to be free from discrimination on the basis of age. To assert that it saves money is too vague and general a proposition to satisfy the Crown’s onus. However, even if we are wrong, it will be seen the provision does not satisfy the balance of the *Hansen* analysis.

Whether cl 68(3)(b) of the AC Act is rationally connected to its purpose

[148] As explained, the policy objectives served by cl 68(3)(b) was not the subject of specific evidence but it is asserted by the Crown the purpose served by the age restriction is to ensure a surviving spouse receives only one form of financial support from publicly funded sources. If we are correct in holding that such purpose has not been established, this limb of the *Hansen* analysis is answered “No”. If we are wrong, the Crown must still satisfy the minimal impairment and proportionality tests.

Minimal impairment: does cl 68(3)(b) impair the right to be free from age-related discrimination no more than reasonably necessary to achieve its purpose

[149] As pointed out in *IDEA Services* at [222], it is here that consideration is given to whether any less rights-intrusive means of addressing the objective would have a similar level of effectiveness:

A decision will meet the minimal impairment standard if it falls within a range of reasonable alternatives. A decision is not disproportionate merely because the court "can conceive of an alternative which might better tailor objective to infringement". [footnote citations omitted]

[150] The Crown's case rests on the proposition that the accident compensation scheme must remain fair and sustainable. It contends any relaxation of the cl 68(3)(b) restrictions will have an impact on the claims liability of the Accident Compensation Corporation. Mr Burton made the point in the following terms:

17. ACC has a responsibility to provide for the rehabilitation and compensation of people in New Zealand who have injuries. To do this ACC needs to hold assets at least equal to the expected future cost of providing these benefits. Each year an estimate is made of the expected total discounted amount of the future claims payments in respect of injuries occurring before the end of the financial year. This is the ACC claims liability. The claim payments are discounted to reflect the future expected investment return on the funds invested; this is referred to as the "net present value" of the future claim payments.

18. The claims liability can be thought of as the lump sum needed to be invested now in order to meet the expected future payments for injuries that occurred before the liability valuation date as they fall due, allowing for investment income between the valuation date and the expected payment dates.

[151] In addressing the cost implications of the claim made by Mr Heads, Mr Burton offered two sets of figures, details of which have already been set out at some length earlier in this decision in Tables 1 and 2.

[152] Essentially, on a worst case scenario of 30 surviving spouses who will become eligible for surviving spouse's weekly compensation at or after NZSQA, the additional cost impact will be \$1.0 million in the first year and \$1.3 million thereafter. If there were only 20 surviving spouses the annual cost will be in the region of \$660,000 approximately. As the number of surviving spouses could be as low as 4 the additional cost will potentially be even lower. Mr Burton also made the point that from approximately 2009 ACC levies have been falling and it can be assumed they will continue to fall until a plateau is reached.

[153] The evidence of Mr Domingo was that the additional cost to the New Zealand superannuation fund would be \$657,000 in the first year rising to \$685,000 in the second year.

[154] Both Mr Burton and Mr Domingo accepted these additional costs are negligible.

[155] In the face of this evidence it is difficult to see how it is possible to demonstrably justify imposing on persons who, after reaching NZSQA, suffer the death of an income earning spouse, an obligation to elect (after 12 months) between their entitlement to surviving spouse weekly compensation and their entitlement to New Zealand superannuation. Particularly bearing in mind weekly compensation is not means tested for any other surviving spouses and that surviving spouse weekly compensation payments are intended to provide financial support consequent on the loss of the income earning spouse.

[156] The Crown endeavoured to bring into the equation the cost of removing age-based restrictions not only in relation to surviving spouses where there has been a **fatal** accident (Part 4, cl 68(3)(b)), but also in relation to all claimants injured in **non-fatal accidents** and who are at or approaching NZSQA, that is to the Part 2, cl 52 category of individuals. Not only that, the Crown put forward figures which assumed this category of individuals (cl 52) would receive superannuation for life as well as weekly compensation for life. The figures offered by Mr Burton were consequently dramatic. As can be seen from Table 2, the additional cost would be \$27.1 million in 2014, rising to \$63.2 million in 2017. Levies would rise by approximately 6%. The additional cost to the New Zealand superannuation fund would be \$10.363 million in the first year rising to \$32.986 million in the fourth year.

[157] It is not accepted by us that Part 2, cl 52 and the Crown's alternative figures have relevance to the analysis:

[157.1] The case for Mr Heads is confined solely to the Part 4, cl 68(3)(b) category – spouses who, having reached or passed NZSQA, become entitled to survivors weekly compensation. The Crown is endeavouring to re-cast his case and thereby draw in extraneous factors such as cl 52.

[157.2] Payment of compensation for lost earnings following a personal injury by non-fatal accident is altogether different to compensating a surviving spouse where there has been death by accident. This is recognised in part by the difference in the duration for which compensation is paid. The one lasts for as long (or short) as the incapacity. The other lasts for a flat period of five years. The one is 80% of earnings, the other is 60% of 80%. Schedule 1 itself treats the two categories differently. The one appears in Part 2 of Schedule 1, the other in Part 4.

[157.3] Because earner's compensation lasts only for so long as the incapacity to which it relates, it is unhelpful to put forward figures which assume entitlement for life.

[157.4] Furthermore, as compensation under Part 2 of Schedule 1 is paid as compensation for lost earnings, those earnings will inevitably come to an end once the individual retires from the paid workforce. A suitable proxy for fixing that point is NZSQA. It is not realistic to assume that weekly compensation will continue for the whole of life post-retirement. Because surviving spouse weekly compensation is paid not for incapacity of the earner but to allow adjustment for pecuniary losses following from the death, the five year ceiling is a finite, limited financial liability to the Corporation, as demonstrated by Mr Burton in Table 1.

[158] The Crown advanced a further submission that if the limitation in cl 68(3)(b) were removed the flow on effects would be:

[158.1] People over the age of 65 would be provided with a financial advantage not available to those who are under 65 which would potentially lead to discrimination on the basis of age.

As to this, a surviving spouse under 65 (and not within cl 68) receives five full years of compensation without being means tested. Later in life New Zealand superannuation follows. It too is not means tested. Mr Heads is asking for no more than this. Whether the payments are received sequentially or

simultaneously does not affect quantum. In the circumstances no financial advantage arises.

[158.2] A precedent would be set, weakening the one pension principle.

As to this, for the reasons given earlier, the submission fails to take into account the long established conceptual distinction between accident compensation and social welfare. The supposed principle is not incorporated in the AC Act. Indeed, cl 68(3)(a) and (b) specifically stipulate that compensation payments and superannuation can be received at the same time.

[158.3] People receiving ACC payments would be able to receive also New Zealand superannuation, placing an inequitable financial burden on levy and tax payers.

As already explained, compensation is paid to an injured worker not for life, but for the duration of the incapacity. Furthermore, it can be assumed the earnings of that individual will come to an end at some point. The NZSQA is a logical proxy for identifying that end point. Compensation cannot continue beyond either point. Allowance is already made for those over NZSQA who remain in the workforce and are injured. As explained in *Stewart v Accident Compensation Corporation* at [21] to [31], a limited degree of overlap between the two schemes is provided for in cl 52. In the circumstances it is difficult to see force to the Crown's submission.

[159] For these reasons we do not defer to the Crown's claim that fiscal sustainability is at risk should the case for Mr Heads prevail. The following passage from *IDEA Services* at [228] is appropriate:

As in *Atkinson* the MOH's submission really suggests that in the face of fiscal unsustainability a court should accept (because it should simply defer to the government agency) that the decision made is justified. As in *Atkinson* we do not accept that submission. [footnote citations omitted]

[160] Notwithstanding the negligible, if not almost invisible additional cost involved in removing cl 68(3)(b) no consideration appears to have ever been given to whether it serves any point. Nor has consideration been given to the question of discrimination. It is notable that most of the accident compensation policy documents in evidence predate 1 February 1994 (the date the HRA came into force) and 1 January 2002 (the date on which Part 1A of the Act was inserted by s 6 of the Human Rights Amendment Act 2001). None address cl 68. Perhaps this is because the clause has never been viewed through the prism of human rights law. More particularly, such policy as may underlie cl 68(3)(b) has (according to Crown counsel and to the witnesses called by the Crown) not been addressed in these papers even though this is one of those cases where there is an obvious reasonable alternative (removal of the election requirement) less impairing of the right. See *CPAG v Attorney-General* at [129].

[161] The Crown has the burden of proving cl 68(3)(b) impairs the right to be free from discrimination (on the ground of age) no more than reasonably necessary for its purpose. We are far from satisfied that it has discharged that burden.

Proportionality: is the limit in cl 68(3)(b) in due proportion to the importance of its objective?

[162] As noted in *IDEA Services* at [232] the last step in determining whether a limit is reasonable and justified requires the decision-maker to stand back and make a broad

assessment as to whether the discrimination is in due proportion to the objective of the provision.

[163] In the absence of evidence of the actual policy objective underlying cl 68(3)(b), the most that can be said is that the election provision has the effect of saving the government money. If ultimately this is the underlying policy, the amount saved by the Accident Compensation Corporation is at most \$1.3 million per annum in a worst case scenario and it could be as little as \$660,000 or even less. The amount saved by the New Zealand superannuation fund is at most \$685,000 per annum and could well be less. As mentioned, even when combined these figures can only be described as negligible.

[164] The savings come at the expense of a small group of superannuitants who, had their status as surviving spouses come about prior to their reaching NZSQA (and prior to their reaching 60 years of age less one day) would have enjoyed five uninterrupted years of compensation to allow adjustment for the pecuniary losses flowing from being deprived of the income earned by their spouse. Later they would have received New Zealand superannuation. Neither their compensation nor their superannuation would have been means or assets tested. This group is now at a stage in their lives when they cannot easily (or at all) return to the workforce to make up for the income formerly earned by the deceased spouse. By having to elect after one year between survivor's compensation and superannuation they forfeit either four years of compensation or four years of superannuation. The amount so lost is, for them, a substantial sum. In the case of Mr Heads, the financial loss is approximately \$75,000. It is not a loss imposed on other surviving spouses or recipients of superannuation. It also undermines the principle of universal individual entitlement to superannuation. The surviving spouse who elects to receive compensation forgoes for four years the "citizenship dividend" described by the Retirement Commission in the *Review of Retirement Income Policy* 2010 at 77:

Subject only to tests for age and length of New Zealand residency, each person is eligible to receive NZS irrespective of (most) other personal circumstances. Unlike the usual working age benefits aimed at social protection and based on the income support model, getting NZS does not depend on whether a person is employed or partnered. Nor is it based on 'need' as indicated by the amount of their income or their partner's income.

This is an essential feature of the **citizenship dividend** model, as distinct from the **income support** model. In some respects, focusing on the circumstances of the individual puts NZS on a similar basis to the income tax system that uses the individual as the unit of assessment (although family tax credits require joint assessment of a couple to determine entitlement).

The broad principle that NZS is a non-income-tested personal entitlement is worth defending and preserving. It supports gender equality, taking personal responsibility for one's own financial future and it does not distort paid employment decisions. In addition, its universality makes it simple and cost-effective to administer.

[165] Yet the amount of money saved by the government is negligible and of no real significance. The Crown suggests remedying the discrimination could have a spill over effect. If there were indeed a real risk of this happening we are confident much more than vague premonitions would have been led in evidence and developed in submissions. But such was not offered beyond the unsustainable reliance on cl 52 and on the claimed one benefit rule. Weighing these factors we are of the clear view the discrimination which results from cl 68(3)(b) is not in due proportion to the importance of its objective.

CONCLUSION

[166] For these reasons we conclude the terms of cl 68(3)(b) in Part 4 of Schedule 1 of the Accident Compensation Act 2001 read with sub-cl (4) and (5) are in breach of Part 1A of the Human Rights Act 1993.

DECLARATION

[167] The only remedy which can be granted by the Tribunal in such situation is a declaration of inconsistency. See s 92J of the Human Rights Act:

92J Remedy for enactments in breach of Part 1A

- (1) If, in proceedings before the Human Rights Review Tribunal, the Tribunal finds that an enactment is in breach of Part 1A, the only remedy that the Tribunal may grant is the declaration referred to in subsection (2).
- (2) The declaration that may be granted by the Tribunal, if subsection (1) applies, is a declaration that the enactment that is the subject of the finding is inconsistent with the right to freedom from discrimination affirmed by section 19 of the New Zealand Bill of Rights Act 1990.
- (3) The Tribunal may not grant a declaration under subsection (2) unless that decision has the support of all or a majority of the members of the Tribunal.
- (4) Nothing in this section affects the New Zealand Bill of Rights Act 1990.

[168] We accordingly declare that cl 68(3)(b) in Part 4 of Schedule 1 of the Accident Compensation Act 2001 is inconsistent with the right to freedom from discrimination on the basis of age affirmed by s 19 of the New Zealand Bill of Rights Act 1990.

COSTS

[169] Costs are reserved. Unless the parties have come to an arrangement on costs the following timetable is to apply:

[169.1] Mr Heads is to file his submissions within 14 days after the date of this decision. The submissions for the Crown are to be filed within a further 14 days with a right of reply by Mr Heads within seven days after that.

[169.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without further oral hearing.

[169.3] In case it should prove necessary, we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

.....
Mr RPG Haines QC
Chairperson

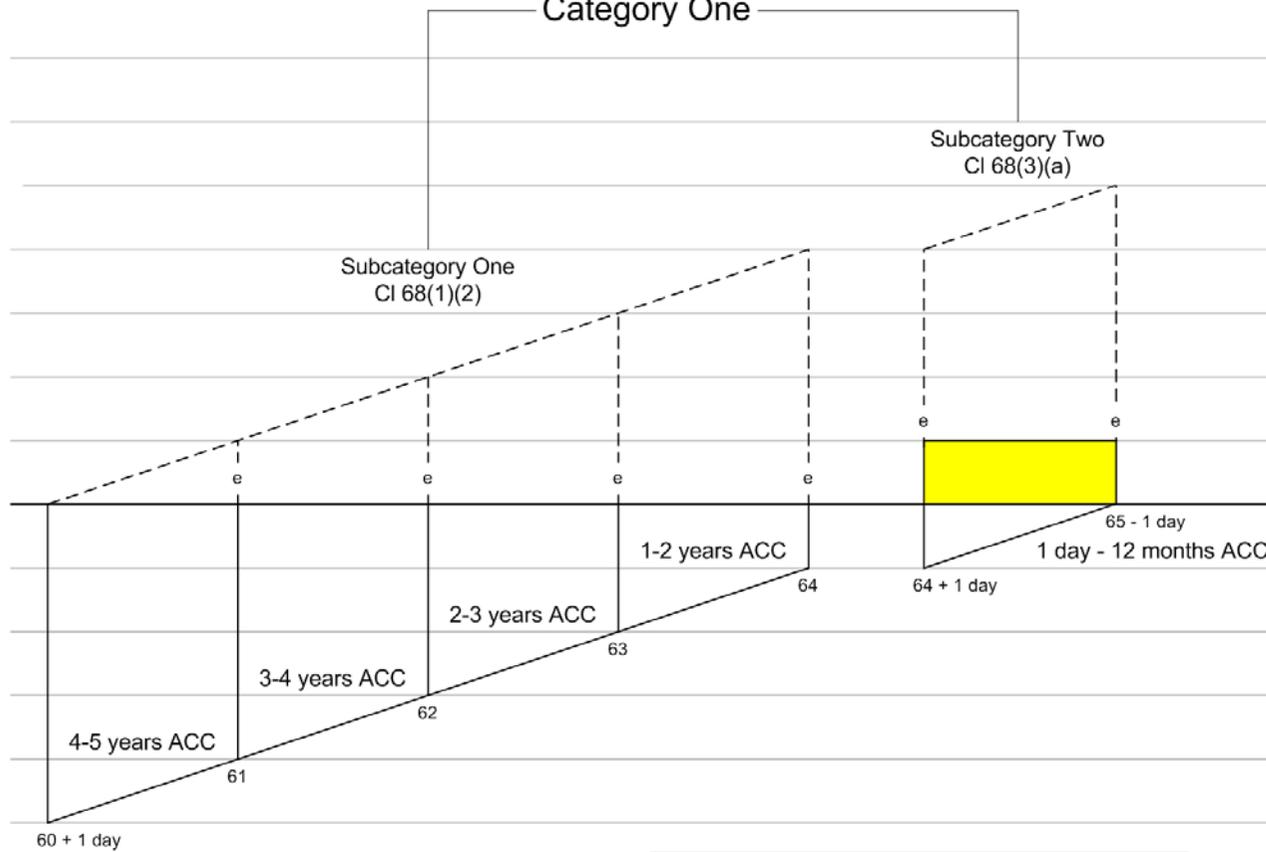
.....
Ms WV Gilchrist
Member

.....
Ms ST Scott
Member

Appendix 1 - Table 5 Surviving Spouse ACC Weekly Compensation

Clause 68

Category One



Subcategory One
CI 68(1)(2)

Subcategory Two
CI 68(3)(a)

1-2 years ACC

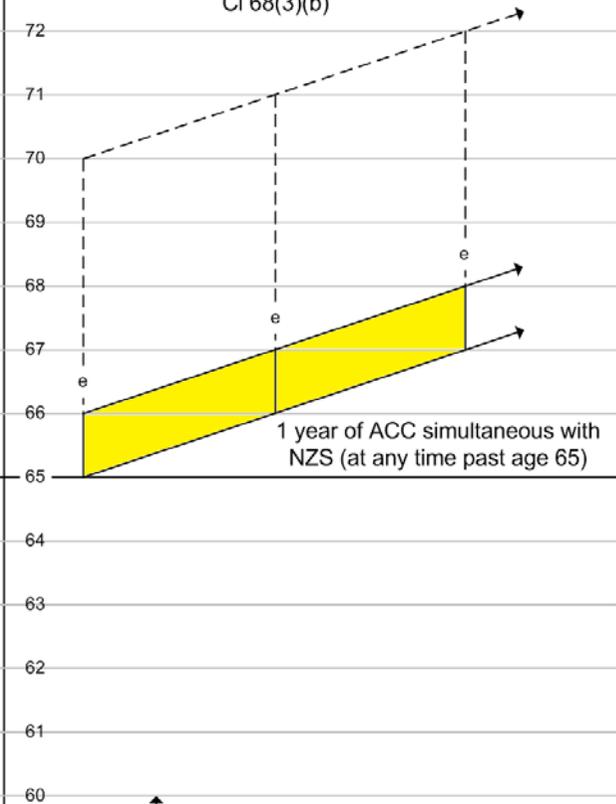
2-3 years ACC

3-4 years ACC

4-5 years ACC

65 - 1 day
1 day - 12 months ACC

Category Two CI 68(3)(b)



Decision para [76]

Note

- This figure does not include CI 66(5)(b)-(d) in respect of dependents.

Key

NZS = New Zealand Superannuation
 ACC = ACC Weekly Compensation
 e = Either NZS or ACC is elected for the remaining portion of the 5 years compensation.
 [Yellow Box] = Both ACC & NZS received
 - - - - = Years of forfeited ACC or NZS

CI 66(5)(a)

5 years ACC compensation that will be completed before age 65 (and NZS will still be received later)

