

Reference No. HRRT 029/2016

UNDER THE PRIVACY ACT 1993

BETWEEN STUART HAROLD VIVASH

PLAINTIFF

AND ACCIDENT COMPENSATION CORPORATION

DEFENDANT

AT PALMERSTON NORTH

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Mr MJM Keefe QSM JP, Member

Ms ST Scott QSM, Member

REPRESENTATION:

Mr SH Vivash in person

Mr D Tuiqereqere for defendant

DATE OF HEARING: 10, 11 and 12 June 2019

DATE OF DECISION: 27 May 2020

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DECISION OF TRIBUNAL<sup>1</sup>

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<sup>1</sup> [This decision is to be cited as *Vivash v Accident Compensation Corporation* [2020] NZHRRT 16.]

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## INTRODUCTION

**[1]** On 16 June 2006 Mr Vivash, through his then lawyer (Mr Paul Schmidt), sought access to certain personal information which the Accident Compensation Corporation (ACC) held about him. In broad terms the information fell into two categories:

**[1.1]** Information collected by ACC in the period 1985 to September 2002 in relation to certain claims made by Mr Vivash.

**[1.2]** The record of the weekly compensation payments made to Mr Vivash in relation to a 1989 file.

**[2]** By email dated 21 June 2006 ACC replied that in relation to the first category, the physical claim file had been destroyed and the information held on it was no longer available. The request in relation to the second category was not expressly addressed but it would appear the response by ACC has been read by all parties as implying that this information also had been destroyed and was no longer available.

**[3]** In these proceedings Mr Vivash claims that:

**[3.1]** In relation to the first category of documents, destruction of the physical file breached IPP 5.

**[3.2]** In relation to the second category of documents, there was a deemed refusal to make the information available under IPP 6.

**[4]** ACC says:

**[4.1]** As Mr Vivash's physical file was intentionally destroyed and not lost, there was no breach of IPP 5. Destruction of the file was carried out in accordance with the Corporation's document retention policy.

**[4.2]** In relation to the second category, ACC accepts it breached IPP 6 and that there has been a consequential interference with the privacy of Mr Vivash. In relation to this category of documents the dispute between the parties is about the remedies to be granted to Mr Vivash for the admitted breach. ACC takes the position Mr Vivash is entitled to:

**[4.2.1]** Damages of \$15,000 for humiliation, loss of dignity and injury to feelings.

**[4.2.2]** Payment of \$5,000 as a contribution towards Mr Vivash seeking legal advice on his entitlement to backdated weekly compensation on his 1985 claim.

**[5]** In these circumstances there is no need for the narrative of evidence to be a detailed one. In addition it was common ground that all three witnesses who gave evidence to the Tribunal were credible witnesses. Those witnesses were Mr Vivash himself, Mr AC Palmer, Technical Specialist, ACC and Mr S Morgan-Lynch, Privacy Officer, ACC.

**[6]** It is to be noted the acknowledgement by ACC of the IPP 6 breach was made extremely late in these proceedings. After its denial of liability had been upheld by the Privacy Commissioner in May 2016, ACC consistently maintained that denial right up to

the commencement of the hearing before the Tribunal which originally began on 11 April 2018. When the Tribunal convened on that date but before Mr Vivash had opened his case, counsel for ACC (Mr Tuiqereqere) told the Tribunal that ACC now conceded there had been a breach of IPP 6 and that the payment information (being the second category of documents referred to earlier) had been readily retrievable at the time of the request and should have been provided to Mr Schmidt. An apology was offered for the late communication of this concession. He added that written confirmation of the concession would be given to the Tribunal.

[7] The hearing was adjourned for the parties to confer. See the *Minute* issued by the Tribunal on 20 April 2018. In a later amended statement of reply dated 14 May 2018 liability under IPP 6 was formally admitted by ACC.

[8] The delay in publishing the present decision is both acknowledged and regretted. The circumstances were explained to the parties by the Tribunal's Secretary in her email dated 27 November 2019.

## THE EVIDENCE

### The back injuries of 1982, 1985 and 2002

[9] After serving an apprenticeship as a ship-joiner from 1975 to 1981 Mr Vivash worked in the boat building industry. From an early point he was self-employed. His skills as a carpenter and interior cabinet maker were in high demand. In either 1987 or 1988 he was asked to go to the United States of America to work. That invitation had been declined because Mr Vivash held concerns arising from injuries he had suffered in December 1982 and again in October 1985.

[10] It is necessary that the circumstances of those two injury events and their effect on Mr Vivash be briefly mentioned as it is they which largely contextualise the June 2006 request by Mr Vivash (through Mr Schmidt) for access to particular information held by ACC about him. It is not necessary to chart each of the claims for back injury accepted by ACC or to detail the periods during which Mr Vivash was in receipt of earnings-related compensation payments. However, it is necessary to record that a claim in relation to the 1985 injury was not lodged until October 1989 which was at a time when Mr Vivash was experiencing severe pain as a consequence of the 1982 and 1985 injuries. Somewhat erroneously the 1989 claim has at times been referred to as the 1989 "injury".

[11] The first accident occurred in 1982 when Mr Vivash fell on his back onto concrete. The second occurred in 1985 when he fell from a ladder. Medical reports confirm the back injuries sustained in these two workplace accidents caused persistent trouble of a fluctuating nature, becoming worse over a period of time. In late 1989 the pain was so acute Mr Vivash was forced to stop work. It was then he lodged a claim with ACC. Surgery in the form of a lumbosacral disc excision (L5/S1) resulted. At that time an Orthopaedic Surgeon (Dr Timothy Astley) by letter dated 2 November 1989 remarked to Mr Vivash's GP (Dr WA Dickie) that:

As you know he is depressed with his present situation of low back pain and left sided sciatica, if anything getting progressively worse but certainly manifesting with an acute exacerbation some time ago but being present for about four years in total.

[12] While the subsequent surgery was in some respects a "success", Dr Astley by letter dated 28 May 1990 advised ACC he anticipated a real possibility of low back problems as

a consequence of the disc compromise and that boat building and carpentry were not advised for Mr Vivash.

[13] In January 1991 Dr Colin Hooker, Orthopaedic Surgeon, advised ACC that Mr Vivash had significant, permanent physical or functional disability as a result of the injuries to his lumbar spine, that Mr Vivash had still not fully recovered from the surgery and was experiencing variable pain. Dr Hooker expressed the view it was unlikely Mr Vivash would ever again be fit for unrestricted heavy physical work or vigorous activity.

[14] On 28 July 2002 Mr Vivash's knee gave way causing him to fall down some stairs, injuring his mid-back area. A new claim was lodged with ACC. At the same time Mr Vivash reported ongoing back pain following the back injury which had led to the 1989 claim and to the December 1989 surgery. His back pain had not eased and he had been certified by his GP as fully unfit for work from 30 September 2002.

[15] By letter dated 25 October 2002 Dr CE Furneaux, Consultant Neurosurgeon, advised ACC there were ongoing degenerative changes associated with the disc prolapse at L5/S1 and that this would likely cause further pain in the future and was the result of the injury operated on in 1989. Dr Furneaux advised against return to a full-time job as a builder as this would exacerbate and enhance the degeneration occurring at L5/S1.

[16] It is not necessary that further medical evidence be recited in this decision as it is clear Mr Vivash has for a number of years consistently reported severe back pain associated with the injuries sustained in 1982 and 1985. Medical specialists have accepted that Mr Vivash's injuries have been severe and that there is ongoing degenerative change. According to Mr Palmer, ACC has accepted claims for other back injuries suffered on 1 May 1986, 30 September 1995, 14 July 1996, 28 July 2002, 12 April 2004, 24 May 2005, 12 November 2006, 18 February 2008, 14 May 2012, 31 July 2012 and 16 April 2017. He further stated that the claim number given to the back injury suffered on 16 October 1985 was 90139188.

[17] As a consequence of his various injuries Mr Vivash has from time to time been in dispute with ACC over a number of issues, including cover, payments, whether vocational independence has been properly assessed and whether the correct legislation has been applied. The latter point has arisen because Mr Vivash's history of claims has spanned the Accident Compensation Act 1982, the Accident Rehabilitation and Compensation Insurance Act 1992, the Accident Insurance Act 1998 and the Accident Compensation Act 2001.

### **The requests by Mr Vivash for access to his files**

[18] Believing he was in need of professional advice regarding his entitlements under the accident compensation scheme, Mr Vivash in mid-2006 instructed Mr Paul Schmidt, an Auckland lawyer who specialises in ACC claims. Included in the issues Mr Schmidt was asked to address were the questions whether Mr Vivash had received his proper entitlements and whether there was a case for back-dated employment related compensation from at least 1985 and 1989. Mr Schmidt told Mr Vivash by letter dated 19 June 2006 that while at that point it was unclear what the extent of any entitlement to backdated compensation would be, assuming the earnings of Mr Vivash at the date of the second accident were significantly higher than his earnings over the intervening period, Mr Vivash could be entitled to some tens of thousands of dollars as the claim would go back to the 1980s.

**[19]** By letter dated 1 June 2006 to ACC Mr Schmidt requested a copy of the 1985 file, being file 45/90/139188.

**Re Stuart Vivash – File No: 45/90/139188 – Copy of File**

I have been instructed by Mr Vivash to act for him with respect to ACC matters. Please find enclosed a copy of an Authority to Act and Receive backdated Entitlements for your file.

Could you please provide me with a copy of his file.

Thank you in advance.

**[20]** ACC did not provide the requested file 45/90/139188. Instead it provided the file for the back injury suffered on 28 July 2002, being a claim T1683502017.

**[21]** By letter dated 16 June 2006 Mr Schmidt repeated the request for file 45/90/139188 and also asked for a record of the weekly compensation payments made on the 1989 file. Mr Schmidt explained the information was required to advise Mr Vivash regarding his long term incapacity from his pre-1989 accident employment:

**Re Stuart Vivash – File No: 45/90/139188 – Request for a Complete Copy File**

Thank you for the copy file. I note that the file starts from September 2002. The injury was accepted in 1989. Could you please send me the file material from 1989 onwards ie the beginning of the file.

I note from the copy file that there is another accepted back injury claim dating from 1985. Could you please send me this file material as well.

I would also appreciate a record of the weekly compensation payments made on the 1989 file.

I need this material to advise my client regarding his long term incapacity for his pre 1989 accident employment.

Thanking you in advance.

**[22]** By letter dated 21 June 2006 (employing in the subject line the 1985 file number) ACC advised Mr Schmidt that that file had been destroyed and no information regarding it could be provided:

**Re Stuart Vivash – file no: 45/90/139188**

I am sorry to advise you that the above file has been destroyed and I am unable to provide any information with regard to this file.

The copy file I have already sent you Claim Number T1683502017, is the current one opened in the Henderson Branch. This is the file that ACC is currently working on with regard to consideration of further rehabilitation for Mr Vivash.

Please telephone me ... if you have any query.

**[23]** The involvement of Mr Schmidt ended at this point but Mr Vivash never gave up his quest for the missing file and payment records.

**[24]** In May 2015, while in discussion with an ACC officer, Mr Vivash learnt by chance that contrary to what ACC had told Mr Schmidt, the weekly compensation payments for the 1985 injury claim were in fact held by ACC. Copies of the documents were then provided to Mr Vivash under cover of an ACC letter dated 5 May 2015. The records

showed Mr Vivash had received minimum earnings-related compensation on his 1985 claim from November 1989 to December 1991.

**[25]** Upon Mr Vivash lodging a complaint with the Privacy Commissioner, ACC contended (inter alia) not only that the physical file had been destroyed, but also that the payment information, while available at the time of the request, had not been considered as being held on a claim file.

### **ACC document retention policy**

**[26]** The evidence of Mr Palmer was that ACC's documentation retention policy has varied from time to time:

**[26.1]** Pre-1997. Prior to the Health (Retention of Health Information) Regulations 1996 (which came into force on 1 January 1997) ACC followed the IRD retention and disposal policy of seven years. Once a claim file had been closed, ACC stored the file locally in its branch for one year and thereafter for six years in a storage facility. The file would then be destroyed if there had been no activity on the file within the seven year period.

**[26.2]** Post 1997. Following the coming into force of the Health (Retention of Health Information) Regulations physical claim files were retained for a minimum of ten years from the day following the last date of action on the claim file. Mr Palmer pointed out this is now expressly required by the Accident Compensation Act 2001, s 66. If the physical file had been archived, it could be requested by a branch or ACC specialist unit. The physical file would be transferred by the archive security storage unit.

**[26.3]** In 2005, all destruction of claimant files was ceased under the Public Records Act 2005.

**[26.4]** In 2006 the policy became:

- ACC applied a minimum retention period of ten years for records in respect to ACC claims approved or declined at the ACC Service Centre or Contact Centre level.
- ACC claims transferred to a branch or a specialist unit for case management were retained for the life of the claimant.
- Accidental death claims were retained for ten years from the date of the last action on the claim.

**[26.5]** In 2010 ACC amended its policy with respect to ACC claims transferred to a branch or a specialist unit for case management. Those files are now retained for 20 years from the date of the last action on the claim.

### **Destruction of the 1985 claim file**

**[27]** According to Mr Palmer, the most likely date on which Mr Vivash's 1985 physical file was destroyed was either December 2001 or early 2002. His reasons were:

[27.1] The last activity on the 1985 claim appears to have been in December 1991, when weekly compensation payments to Mr Vivash were stopped.

[27.2] It is likely the claim file would have been closed about December 1991 or a short time later. The claim file would likely have been archived about 12 months later in December 1992.

[27.3] As the Health (Retention of Health Information) Regulations 1996 were in place before the expiry of seven years from the last activity on the 1985 file, it is likely that the physical claim file would have been destroyed ten years after the last activity; that is, destroyed either in December 2001 or early 2002.

### **The failure to provide the weekly compensation information**

[28] Mr Morgan-Lynch explained to the Tribunal that at the time Mr Schmidt made request for the weekly compensation payments, that information was held by ACC on a system known as Pathways and would have been readily retrievable by the case manager who was responding to Mr Schmidt's request.

[29] As liability for that breach of IPP 6 is admitted, it is necessary that the Tribunal determine liability only in relation to the destruction of the 1985 physical file. First we comment on the ACC document retention policy applicable at the time.

### **Comment on the ACC document retention policy which applied at the time**

[30] The document retention policy followed by ACC at the relevant time in one form or another assumed that ACC's liability as insurer terminates either at the expiration of a set number of years or at the expiration of a set number of years following the last activity on the file. While such policy may have been appropriate in some contexts, it has been shown by the present case to be inappropriate in the context of a public sector agency tasked with administering an accident compensation scheme. The unique position of ACC as insurer under that scheme is underlined by the purpose statement in the current Accident Compensation Act 2001, s 3 which makes reference to the social contract represented by the scheme, to "a fair and sustainable scheme for managing personal injury" and the minimising of the impact of injury on the community through (inter alia) 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 and ensuring "positive claimant interactions" with ACC.

[31] The references to rehabilitation and to permanent impairment underline the potential for elongated periods during which the individual and ACC may need to engage with each other. No tidy sequences can be assumed and of necessity allowance must be made for broken periods as well as for the resumption of dealings with ACC when, for example, rehabilitation miscarries and issues of degeneration and of permanent impairment surface.

[32] As at the presumed date of destruction in December 2001 or early 2002 it was clear from the medical reports prepared for ACC (some of which have since been gathered by Mr Vivash from various sources) that the 1985 injury (for which a claim was not lodged until the occurrence of acute back pain at the end of 1989) was becoming exacerbated over a period of years. In particular:



**[32.1]** In a report to ACC in January 1991 Dr Hooker opined Mr Vivash had significant permanent physical or functional disability as a result of the 1985 injury and that it was unlikely he would ever be fit for unrestricted heavy physical work or vigorous activity:

In my opinion Mr Vivash has significant permanent physical or functional disability as a result of the injury to his lumbar spine as detailed above. This injury resulted in significant damage to the lumbosacral disc leading to the necessity to have the prolapsed disc material removed surgically and although this has been a successful procedure Mr Vivash has not fully recovered still at this time experiencing variable pain and with clinical evidence of residual left leg neurological deficit.

While there may be steady improvement in Mr Vivash's condition over the next many months and he ultimately be capable of a much wider range of physical activity and work than currently noted I believe that it is unlikely he will ever again be fit for unrestricted heavy physical work or vigorous activity and support the advice given him that he should attempt to return to alternative work other than that of a carpenter and boat builder.

I assess Mr Vivash's entitlement under Section 78 of the Accident Compensation Act in relation to the personal injury by accident of 16 October 1985 as amounting to about 20% of total. Clearly in addition Mr Vivash is entitled to be considered for a settlement also under Section 79 of the Act in relation to the accident and injury in question.

**[32.2]** The earlier report to ACC by Dr Perry in October 1989 was in accord that the pain experienced in 1989 originated from the 1985 injury.

**[33]** In these circumstances it would have been clear that dating from 1985, degenerative changes caused by the 1985 injury had led to the claim in 1989 and that post-operatively the degeneration was expected to continue. On this information there was more than a real possibility that the documents held by ACC as at the date of destruction would be relevant to future potential claims made by Mr Vivash either in relation to the 1985 injury (for example delayed incapacity and degeneration) or in relation to subsequent injuries being exacerbated by the 1985 injury. These medical records would also be essential to any future assessment of incapacity which, while made in the context of a new injury, would need to take into account the earlier injuries sustained in 1982 and 1985. Expressed another way, any retention policy applied by ACC had to take into account the purpose of the accident compensation scheme, the particular circumstances of Mr Vivash and the actual and potential relevance of the physical file both to him and to ACC. Otherwise the application of a blanket, indiscriminate generalised document retention policy would not offer an effective safeguard that was reasonable "in the circumstances" of Mr Vivash's case.

### **DESTRUCTION OF THE 1985 FILE AND IPP 5**

**[34]** There is no dispute that at the time the 1985 physical file was requested by Mr Schmidt in June 2006 it had already been destroyed in accordance with ACC's then file retention policy, the date of destruction being either December 2001 or early 2002.

**[35]** ACC submits that as the physical file was intentionally destroyed and not lost, there was no breach of IPP 5. Moreover, ACC submits it had reasonable safeguards in place to protect documents against loss, including secure offices and computer systems.

### **Information privacy principle 5**

**[36]** Information privacy principle 5 provides:

Principle 5  
*Storage and security of personal information*

An agency that holds personal information shall ensure—

- (a) that the information is protected, by such security safeguards as it is reasonable in the circumstances to take, against—
  - (i) loss; and
  - (ii) access, use, modification, or disclosure, except with the authority of the agency that holds the information; and
  - (iii) other misuse; and
- (b) that if it is necessary for the information to be given to a person in connection with the provision of a service to the agency, everything reasonably within the power of the agency is done to prevent unauthorised use or unauthorised disclosure of the information.

**[37]** This principle applies to information obtained both before and after 1 July 1993. See the Privacy Act 1993, s 8(2).

**[38]** The submission by ACC implies:

**[38.1]** IPP 5 applies only to the unintentional destruction of files.

**[38.2]** That loss is to be read as “to be lost, to go missing, to cease to be possessed of” and does not include destruction.

**[39]** In our opinion to restrict IPP 5(a)(i) to accidental, unintended or fortuitous loss is too narrow a reading:

**[39.1]** There is nothing in IPP 5 to suggest that it does not protect against destruction that is well-motivated, but nevertheless intentional. Even less can it be argued IPP 5 does not impose on an agency a duty to protect against the actions of a third party aimed at the intentional theft or destruction of the file to ensure the personal information is lost to the agency and to the person whose personal information is on the file.

**[39.2]** IPP 5 must be read in the context of the other information privacy principles, particularly IPP 1 (collection of personal information must be necessary for a lawful purpose connected with a function of the agency) and IPP 9 which, in imposing a limit on how long personal information can be kept, implicitly anticipates personal information will be held for as long as it is required for the purposes for which the information may lawfully be used.

**[40]** Here ACC is a public sector agency tasked with administering an accident compensation scheme which 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 generally *Heads v Attorney-General* [2015] NZHRRT 12, (2015) 10 HRNZ 203 at [54] to [59].

**[41]** Of necessity ACC must be the default primary holder of relevant personal information as claimants cannot reasonably be expected to retain over the length of their lives medical reports as well as claim and payment histories. In addition it cannot be assumed claimants will always receive copies of medical reports and assessments requested by ACC directly from a medical practitioner. It would be strange were IPP 5 to protect personal information against accidental, unintentional loss or destruction but not loss or destruction which is intentional on the part of ACC itself. In our view the term “loss” is a broad term and used in IPP 5 without qualification. No compelling justification has been offered by ACC for the Tribunal to read into IPP 5 a limitation which would

substantially reduce the duty on ACC to ensure the security of personal information until, at least, the IPP 9 duty to keep has been spent. IPP 5 must be read as applying to all forms of loss just as the other IPP 5 safeguards relating to access, use, modification, disclosure or “other misuse” are not conditioned by intent, motive or other happenstance.

**[42]** The various document retention policies described by Mr Palmer share a common feature of retention for a period of years from the date of the last action on the claim. But where, as here, a claimant could at any time lodge an application for backdated payments or, where degeneration has occurred over a period of years, a “date of last action” would not be a reliable indicator as to whether, in terms of IPP 9, the information would still be required. In complex cases (and there is little doubt Mr Vivash’s case is such a case) retention for the “life of the claimant” was clearly necessary, as recognised by ACC itself in its subsequent 2006 policy.

**[43]** In the present case the purpose for which the 1985 file had been compiled had not been spent as at the date of destruction in late 2001 or early 2002. In this respect Mr Palmer conceded:

**[43.1]** That the documents on the 1985 physical file would have included the claim for cover, medical reports obtained by ACC, medical certificates certifying Mr Vivash unfit to work, calculations of his payments of earnings-related compensation, any decision letters issued by the Corporation, file notes of any conversations with Mr Vivash in respect of the claim and so on. We are of the opinion that on any view, this information would be essential to both Mr Vivash and to ACC for the life of Mr Vivash given the complexity of his claim.

**[43.2]** Mr Vivash remains eligible to receive ACC entitlements on his 1985 and 2002 claims were he to satisfy the statutory criteria for entitlement. In terms of weekly compensation, if Mr Vivash suffers a deterioration of his vocational independence, he may be reassessed and, if he is found to no longer have vocational independence, he will be entitled to have his weekly compensation reinstated.

**[43.3]** That Mr Schmidt would have requested the physical file to obtain medical information for the purpose of ascertaining whether this information supported the likelihood of a continuous incapacity for the period from 1989 to 2003. Mr Schmidt would have requested the weekly compensation details to ascertain the period for which payments had been made, and the amount of weekly compensation paid, in order to consider whether there was any financial advantage to Mr Vivash pursuing a backdated claim for weekly compensation.

**[43.4]** If Mr Vivash’s impairment increased in the future, he could apply to be reassessed. Compensation claims for delayed incapacity are not uncommon. For ACC to make an informed decision on such claim it would require access to the whole file. He told the Tribunal there was no evidence delayed incapacity had ever been addressed as the 1985 file had been destroyed.

**[43.5]** Without the requested information Mr Schmidt could not advise Mr Vivash whether he had received his correct entitlements. In this connection Mr Palmer made reference to the fact that the then legislation provided that in cases of delayed incapacity the formula for calculating compensation payments included a “fair and reasonable” component. Mr Palmer conceded the obligation to determine delayed incapacity was that of the case manager at the time. Because the file had been

destroyed there was no evidence the issue had ever been addressed or that Mr Vivash had been made aware of the decision and of his appeal rights.

**[44]** It is clear from the medical evidence reviewed earlier in this decision that the 1982 and 1985 accidents have in fact led to progressive degeneration. This underlines the point that a retention policy which hinges on the date of last activity is inappropriate when the liability of the insurer does not terminate at any clearly defined point in time, particularly in the context of personal injuries where there are issues of degeneration, delayed incapacity and backdated employment related earnings.

### **Whether a breach of IPP 5**

**[45]** In these circumstances we conclude IPP 5(a)(i) was breached because:

**[45.1]** As at the date ACC destroyed the physical file containing Mr Vivash's personal information, the purpose for which that information had been collected had not been spent.

**[45.2]** By intentionally destroying the file without taking into account the progressive degenerative changes being experienced by Mr Vivash and the likelihood that both he and ACC would need to have reference to the contents of the file in the future, the information was not protected by such security safeguards as it was reasonable in the circumstances to take against loss of the file by destruction.

### **Whether there was a consequential interference with the privacy of Mr Vivash**

**[46]** The definition of interference with privacy in s 66(1) of the Privacy Act requires not only a finding of breach of IPP 5 but also a decision by the Tribunal that the breach:

**[46.1]** Has caused, or may cause loss, detriment, damage or injury to Mr Vivash; or

**[46.2]** Has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of Mr Vivash; or

**[46.3]** Has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of Mr Vivash.

**[47]** Section 66(1)(a) and (b) provide:

#### **66 Interference with privacy**

- (1) For the purposes of this Part, an action is an interference with the privacy of an individual if, and only if,—
  - (a) in relation to that individual,—
    - (i) the action breaches an information privacy principle; or
    - (ii) the action breaches a code of practice issued under section 63 (which relates to public registers); or
    - (iia) the action breaches an information privacy principle or a code of practice as modified by an Order in Council made under section 96J; or
    - (iib) the provisions of an information sharing agreement approved by an Order in Council made under section 96J have not been complied with; or
    - (iic) the provisions of Part 10 (which relates to information matching) have not been complied with; and
  - (b) in the opinion of the Commissioner or, as the case may be, the Tribunal, the action—
    - (i) has caused, or may cause, loss, detriment, damage, or injury to that individual; or

- (ii) has adversely affected, or may adversely affect, the rights, benefits, privileges, obligations, or interests of that individual; or
- (iii) has resulted in, or may result in, significant humiliation, significant loss of dignity, or significant injury to the feelings of that individual.

**[48]** As to s 66(1)(b), destruction of the file has precluded Mr Vivash obtaining expert legal advice and assistance in relation to complex legislation and an equally complex factual setting regarding entitlement to backdated weekly compensation and the lodging of an application to test his eligibility. It was submitted by ACC it is still open to Mr Vivash to make such application. But the gap in years from destruction of the file in about early 2002 and the complaint to the Privacy Commissioner at the end of 2015 is substantial and cannot be so easily dismissed, even if there is a possibility of interest being paid under ss 114 and 371 of the Accident Compensation Act 2001. It has also been acknowledged by ACC in submission that the historic medical documents are likely to be more relevant (than the weekly compensation payment information) in relation to consideration of Mr Vivash's entitlement to backdated employment-related compensation. Mr Palmer said in cross-examination that it was accepted that without the destroyed file Mr Schmidt could not advise Mr Vivash whether he (Mr Vivash) had been receiving his correct entitlements and without the file there was no evidence that the issue of delayed incapacity had ever been addressed by the case manager.

**[49]** In these circumstances it is difficult to see how it is possible to conclude other than that destruction of the file has caused Mr Vivash loss, detriment, damage or injury and that his rights, benefits and interests have been adversely affected.

**[50]** To underline the point we refer to the fact that a year after the file was destroyed a Dr M Watts was asked by ACC to carry out an independence allowance assessment for Mr Vivash in relation to the back injury sustained in July 2002. The instructions from ACC included a request that he differentiate between the 2002 injury and the 1989 injury. In his report dated 18 September 2003 Dr Watts noted there was "no documentation whatsoever" with respect to the 1989 injury. He nevertheless gave the opinion that the 1989 injury was to be assessed as 0% whole person impairment:

**Analysis and discussion**

This [2002] injury appears to be permanent and stable, and clinical examination is consistent with the history.

Documentation is adequate for the current injury, but there was no documentation whatsoever with respect to the 1989 injury.

**Impairment rating**

Given the calf atrophy of 2cm and the absent ankle jerk and the big toe weakness, he is assessed at DRE lumbosacral category 3, radiculopathy, page 102 10% whole person impairment.

I have been asked to differentiate between this injury and the 1989 injury, and in the absence of documentation to the contrary, and given the history of a good surgical result with little persisting pain, the final outcome of 1989 must be assessed as DRE lumbosacral category 1 0% whole person impairment.

Final assessment is 10% whole person impairment.

**[51]** That ACC requested a medical assessment which could only be made with access to information held on the destroyed file and that a medical practitioner would consequently offer an opinion of 0% whole person impairment underlines the dangers inherent in ACC making important decisions without any or any meaningful information. It

also underlines why we have rejected ACC's submissions on the interpretation of IPP 5. It is necessary to mention that when Dr Hooker, Orthopaedic Surgeon, confirmed to Mr Vivash by letter dated 21 September 2007 that his (Dr Hooker's) opinion both in 1991 and in 2007 was that under DRE category 4 his assessment was 20%, Dr Hooker did not accept the 2003 conclusion reached by Dr Watts.

[52] Even the ACC weekly compensation panel by internal memo dated 14 February 2011 noted that destruction of the 1985 and 1989 documents frustrated the making of "informed comment" unless Mr Vivash himself could produce information about the 1982 injury.

[53] If necessary we would also hold that it was apparent from the evidence given by Mr Vivash that destruction of his file and the consequential thwarting of his attempts to obtain legal advice regarding his entitlements for an injury that had caused him continuing severe pain had caused significant injury to his feelings.

[54] Our conclusion on the balance of probabilities is that although only one of the forms of harm listed in s 66(1)(b) need be satisfied, Mr Vivash has established the forms of harm listed in s 66(1)(b)(i), (ii) and (iii). We turn now to IPP 6 and thereafter to the issue of remedies.

#### **IPP 6 AND THE FAILURE TO PROVIDE THE REQUESTED INFORMATION REGARDING WEEKLY COMPENSATION PAYMENTS**

[55] It is to be recalled that in June 2006 Mr Schmidt made explicit request for the weekly compensation payments made on the 1989 file.

[56] On 21 June 2006 ACC told Mr Schmidt that the information had been destroyed and could not be provided. The Privacy Commissioner was given the same account. Because it was accepted as correct, the complaint by Mr Vivash was dismissed by the Commissioner.

[57] It was not until May 2015 that Mr Vivash made the chance discovery that the requested information was in fact held by ACC and always had been.

#### **Admission of liability**

[58] It was not until the Tribunal hearing first commenced on 11 April 2018 that ACC admitted in these proceedings that there had been a breach of IPP 6. It acknowledged, for the first time, that Mr Vivash's weekly compensation payments on the 1985 claim (the specific information sought by Mr Schmidt) were at the time of the request held by ACC in a form that was readily retrievable and should have been provided to Mr Schmidt in June 2006.

[59] By letter dated 11 May 2018 ACC apologised to Mr Vivash for this failure adding that it had no explanation, apart from human error. ACC also apologised for advising the Privacy Commissioner that it had not breached the privacy of Mr Vivash.

[60] On the same date a letter of apology was sent to Mr Schmidt.

[61] Through counsel ACC has not only admitted liability for the breach of IPP 6 it has also accepted the following payments would be reasonable and appropriate arising from the breach:

**[61.1]** Damages of \$15,000 for humiliation, loss of dignity and injury to the feelings of Mr Vivash (Privacy Act, s 85(1)(c) and 88(1)(c)).

**[61.2]** Payment of \$5,000 as a contribution towards Mr Vivash seeking legal advice on his entitlement to backdated weekly compensation on his 1985 claim (Privacy Act, s 85(1)(d) and (e)).

**[62]** As to the above, two points must be made. First, the remedies to be granted to Mr Vivash (and the quantum of damages) must be determined by the Tribunal, not by ACC, but it is nevertheless helpful to have received ACC's submissions on the point. Second, the acknowledgement of liability made by ACC applies only to the admitted breach of IPP 6. Breach of IPP 5, while denied by ACC, has been found by the Tribunal.

**[63]** In the result the question of remedies is to be determined in relation to both IPP 5 and IPP 6.

## **REMEDY**

**[64]** Where the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual it may grant one or more of the remedies allowed by s 85 of the Act:

### **85 Powers of Human Rights Review Tribunal**

- (1) If, in any proceedings under section 82 or section 83, the Tribunal is satisfied on the balance of probabilities that any action of the defendant is an interference with the privacy of an individual, it may grant 1 or more of the following remedies:
  - (a) a declaration that the action of the defendant is an interference with the privacy of an individual:
  - (b) an order restraining the defendant from continuing or repeating the interference, or from engaging in, or causing or permitting others to engage in, conduct of the same kind as that constituting the interference, or conduct of any similar kind specified in the order:
  - (c) damages in accordance with section 88:
  - (d) an order that the defendant perform any acts specified in the order with a view to remedying the interference, or redressing any loss or damage suffered by the aggrieved individual as a result of the interference, or both:
  - (e) such other relief as the Tribunal thinks fit.
- (2) In any proceedings under section 82 or section 83, the Tribunal may award such costs against the defendant as the Tribunal thinks fit, whether or not the Tribunal makes any other order, or may award costs against the plaintiff, or may decline to award costs against either party.
- (3) Where the Director of Human Rights Proceedings is the plaintiff, any costs awarded against him or her shall be paid by the Privacy Commissioner, and the Privacy Commissioner shall not be entitled to be indemnified by the aggrieved individual (if any).
- (4) It shall not be a defence to proceedings under section 82 or section 83 that the interference was unintentional or without negligence on the part of the defendant, but the Tribunal shall take the conduct of the defendant into account in deciding what, if any, remedy to grant.

**[65]** Section 88(1) relevantly provides that damages may be awarded in relation to three specific heads of damage:

### **88 Damages**

- (1) In any proceedings under section 82 or section 83, the Tribunal may award damages against the defendant for an interference with the privacy of an individual in respect of any 1 or more of the following:
  - (a) pecuniary loss suffered as a result of, and expenses reasonably incurred by the aggrieved individual for the purpose of, the transaction or activity out of which the interference arose:

- (b) loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference:
- (c) humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

**[66]** Mr Vivash is seeking a declaration of interference as well as damages for the injury to his feelings.

#### **Section 85(4) – conduct of the defendant**

**[67]** While it is no defence that an interference with privacy was unintentional or without negligence on the part of the defendant, the Tribunal is required by s 85(4) of the Act to take the conduct of the defendant into account in deciding what, if any, remedy to grant.

**[68]** The following mitigating factors has been put forward on behalf of ACC:

**[68.1]** ACC has now accepted the breach of IPP 6.

**[68.2]** ACC issued apologies on 11 May 2018 to both Mr Vivash and Mr Schmidt.

**[68.3]** The weekly compensation payment information was largely already available to Mr Vivash in that he must be taken to have been aware that he had received such payment and the period of the payment was two years. While Mr Vivash was not likely to have been aware of the exact period payment was made to him or the exact amount, he would likely have recollected that the level of the payment was low.

**[68.4]** It is still open to Mr Vivash to seek legal advice on, and to make application for, backdated weekly compensation.

**[68.5]** Since becoming aware of its breach ACC has taken responsible steps to minimise any further harm to Mr Vivash. It arranged for, and funded, formal mediation with a professional mediator. It also funded Mr Vivash's legal representation for that mediation.

**[69]** These factors do not sufficiently take into account the extraordinary length of time it has taken ACC to accept the IPP 6 breach. The information was requested in June 2006. Acknowledgement that it had at all times been readily available was not made until 11 April 2018, the commencement of the hearing by the Tribunal. Human error cannot explain or excuse a delay of almost 12 years. The file passed through multiple layers of ACC management from the time of the request, through the investigation by the Privacy Commissioner and the preparation of the defence of the claim which had been filed in the Tribunal by Mr Vivash in May 2016. ACC's failure to retrieve documents which were readily retrievable led to Mr Vivash being made to appear (no doubt inadvertently) as the champion of a lost cause, a person who could not face or accept reality. The toll taken on him has been substantial. Only his burning sense of injustice and strong self-belief have kept him going all these years.

**[70]** In these circumstances the belated and eleventh-hour acceptance by ACC of the breach can be given little weight.

**[71]** It is suggested by ACC that the weekly compensation payment information was "largely" available to Mr Vivash because a June 2003 medical report obtained by ACC contained a passing statement to the effect that after the 1989 operation Mr Vivash "was off work on ACC for two years". ACC also submits Mr Vivash would have "likely



recollected” that “the level of the payment was low”. While it is to be doubted that information as scant as that in a 2003 document could have been used to any great effect by Mr Vivash, the point that is missed is that because ACC is a public sector agency charged with administering the accident compensation legislation Mr Vivash had a legal right to the requested payment information. See the Privacy Act, s 11(1). It was not a question whether Mr Vivash could make do with the meagre information identified in the ACC submission, it was a question of ACC fulfilling its legal duty to provide the requested information.

[72] ACC then contends Mr Vivash can still take legal advice on and make application for backdated weekly compensation. However, after a 13 year solo struggle from June 2006 until the Tribunal hearing in June 2019 Mr Vivash is emotionally and physically drained. He concluded his case with a confession of exhaustion:

I have lived in my past with too many very unpleasant memories for such a very long time that I now want to move on.

[73] In these circumstances the prospect of further action by Mr Vivash must be assumed to come at a high cost to him personally. In addition, he no longer has access to a file which Mr Palmer conceded would have contained relevant information. For some nine years Mr Vivash has been shut out from payment records which should have been provided in June 2006. He has been forced to bring the present proceedings as a self-represented litigant. Those proceedings had the initial appearance of being hopeless. In these circumstances we see little mitigation in the fact that he can now seek legal advice on making application for backdated weekly compensation.

[74] The statement by ACC that it will pay \$5,000 as a contribution towards Mr Vivash seeking such advice is gratifying to see. But it does little to mitigate the harm done to Mr Vivash by the destruction of the file and the failure to make the payment information available when requested in 2006.

[75] Similarly, the fact that after the adjournment of the first hearing ACC funded formal mediation was a responsible step but came too late.

[76] We refer now to the apologies of 11 May 2018 addressed to Mr Vivash and to Mr Schmidt.

### **The apology**

[77] The relevance of an apology was addressed in *Williams v Accident Compensation Corporation* [2017] NZHRRT 26 at [38] and [41]:

[38] An appropriate and timely apology can be taken into account under s 85(1)(4) of the Privacy Act when considering whether the defendant’s conduct has ameliorated the harm suffered as a result of the breach of privacy. See *AB v Chief Executive, Ministry of Social Development* [2011] NZHRRT 16 at [37]:

... an appropriate apology given at the right time is a matter that can be taken into account under s.85(4) of the Act in considering whether and to what extent the defendant’s conduct has ameliorated the harm suffered as a result of an interference with privacy. ...

[41] The apology cannot “erase” the humiliation, loss of dignity or injury to feelings caused by the interference with privacy. Nor is it a “get out of jail free” card. The question in each case is whether and to what degree the emotional harm experienced by the particular plaintiff has been ameliorated. While this is a fact specific inquiry it can be said that ordinarily an apology must be timely, effective and sincere before weight can be given to it. It is not inevitable an apology,

even if sincerely and promptly offered, will ameliorate the emotional harm experienced by the plaintiff. Much will depend on who the particular plaintiff is and the particular circumstances of the case.

**[78]** In the present case the apologies addressed the failure to comply with IPP 6. The delay between that failure and the apologies was 12 years. They were not made until an admission of liability on the morning of the original hearing date and after two years of pretrial denials by ACC. As in *AB v Chief Executive, Ministry of Social Development* [2011] NZHRRT 16 the delay is of such magnitude that it has no mitigating effect. The injury to the feelings of Mr Vivash have in no way been ameliorated. Too much has gone on for too long for the apologies to have any measurable consequence in the context of the assessment of remedies.

**[79]** We accordingly conclude there are no mitigating factors which operate in favour of ACC.

## DECLARATION

**[80]** While the grant of a declaration is discretionary, declaratory relief should not ordinarily be denied. See *Geary v New Zealand Psychologists Board* [2012] NZHC 384, [2012] 2 NZLR 414 (Kós J, Ms SL Ineson and Ms PJ Davies) at [107] and [108].

**[81]** On the facts we see nothing that could justify the withholding from Mr Vivash of a formal declaration that ACC has interfered with his privacy. Such declaration is accordingly made.

## DAMAGES

### Damages for loss of benefit

**[82]** No claim is made for pecuniary loss. Damages are, however, sought for loss of benefit.

**[83]** Section 88(1)(b) of the Act confers jurisdiction on the Tribunal to award damages against a defendant for:

loss of any benefit, whether or not of a monetary kind, which the aggrieved individual might reasonably have been expected to obtain but for the interference.

**[84]** The benefit can be of a monetary kind but is not required to be so and in a series of cases the High Court has given an expansive reading to “benefit”.

**[85]** There must also be a causal connection between that interference and one of the forms of loss or harm listed in the Act, s 88(1)(a), (b) or (c). In *Attorney-General v Dotcom* [2018] NZHC 2564, [2019] 2 NZLR 277 at [207] it was stated (obiter) that:

**[207]** As part of analysing the issue of causation, it is therefore necessary to consider the extent to which the information requested is likely to have actually affected the outcome of the litigation for which it was said by Mr Dotcom to be required. That litigation was the forthcoming eligibility hearing in the District Court. It was not necessary for Mr Dotcom to show that the information sought would inevitably have influenced the outcome but there must be at least some evidential basis for assuming that it was potentially relevant.

**[86]** ACC has conceded that it is evident from Mr Schmidt’s correspondence from June 2006 that he sought the weekly compensation payment details (as well as the documents on the 1985 injury claim file) to advise Mr Vivash on his eligibility for backdated weekly

compensation payments on the 1985 claim; specifically whether Mr Vivash was entitled to weekly compensation from the time the weekly compensation payments ceased up to the time the payments commenced on the 2002 injury claim. As the information was not provided to Mr Schmidt, Mr Vivash did not receive any advice. ACC further conceded:

**[86.1]** The physical file would have included the claim for cover, medical reports obtained by ACC, medical certificates certifying Mr Vivash unfit to work, calculations of his payments of earnings-related compensation, any decision letters issued by the Corporation, file notes of any conversations with Mr Vivash in respect of the claim and so on.

**[86.2]** Mr Vivash remains eligible to receive ACC entitlements on his 1985 and 2002 claims. If he suffers a deterioration of his vocational independence he can be reassessed and if found to no longer have vocational independence, will be entitled to have his weekly compensation reinstated.

**[87]** From this it is clear that as a consequence of the breaches by ACC of IPP 5 and IPP 6 Mr Vivash has lost the benefit of taking legal advice on his eligibility for backdated compensation payments and on the lodging of such claim. In his letter dated 19 June 2006 addressed to Mr Vivash, Mr Schmidt had indicated that potentially Mr Vivash could be entitled to “some tens of thousands of dollars”.

**[88]** While loss of benefit claims most commonly occur where the documentation is required for litigation, claims of this nature are not required to fall into this category as the facts in cases such as *Winter v Jans* HC Hamilton CIV-2003-419-854, 6 April 2004 and *Gruppen v Director of Human Rights Proceedings* [2012] NZHC 580 illustrate. In the case of Mr Vivash the information sought was required for the purpose of obtaining specialist legal advice on his rights under complex accident compensation legislation. Any claim lodged by him would carry statutory rights of review and appeal. The potential relevance of the information requested by Mr Schmidt is freely conceded by ACC. It was likely to have affected the eventual outcome of any application for backdated compensation. On the facts we are satisfied there has been a loss of benefit which Mr Vivash might reasonably have been expected to obtain but for the interference.

**[89]** As to quantum it was noted in *Attorney-General v Dotcom* at [199] that past awards for loss of benefit have been in the range of \$4,000 to \$5,000. While the High Court at [200] acknowledged the Tribunal can, in appropriate cases, review a particular quantum of award set in the distant past, we do not intend carrying out such a review in the present case. There are two reasons:

**[89.1]** The breach of IPP 5 and of IPP 6 are but different aspects of the reason why ACC failed to provide the requested information. In the remedy context the separate breaches should not be viewed in isolation.

**[89.2]** If Mr Vivash now takes legal advice and applies for backdated payments the benefit loss would have been of a temporary nature (albeit delayed for 13 years) and ACC has agreed to pay \$5,000 as a contribution to Mr Vivash seeking such legal advice.

**[90]** In the circumstance we award \$5,000 for the loss of the benefit Mr Vivash might reasonably have been expected to obtain from the requested information, but for the interference. As stated, the lost benefit was the benefit of taking legal advice in 2006 on his eligibility for backdated compensation payments and the lodging of such claim.

## **Damages for injury to feelings**

**[91]** Section 88(1)(c) confers jurisdiction on the Tribunal to award damages against a defendant for:

humiliation, loss of dignity, and injury to the feelings of the aggrieved individual.

**[92]** Mr Vivash places primary reliance on injury to his feelings.

**[93]** In *Hammond v Credit Union Baywide* [2015] NZHRRT 6, (2015) 10 HRNZ 66 at [170.5] explicit recognition was given to the subjective nature of the assessment of injury to feelings. Cited in support was *Vento v Chief Constable of West Yorkshire Police* [2002] EWCA Civ 1871 at [50] and [51]. Subjective feelings of upset, frustration, worry, anxiety, mental distress, fear, grief, anguish, humiliation, unhappiness, stress, depression and so on and the degree of their intensity are incapable of objective proof or of measurement in monetary terms. Hurt feelings are nonetheless real in human terms. Because of the inherently subjective assessment required by the Act consistency of awards cannot be pursued at the expense of defeating the intention of Privacy Act, s 88(1)(c) that the award be specific to the particular plaintiff in his or her unique circumstances. The purpose of the three monetary bands referred to in *Hammond* is to foster such consistency as can be achieved notwithstanding the challenges referred to.

**[94]** Mr Vivash is a sincere, genuine individual who has stoically borne the severe pain his various back injuries have caused since 1982. At all times he has dealt with ACC in good faith. After years of dealing with ACC on his own he held high hopes that with the specialist legal assistance of Mr Schmidt he would be able to satisfy himself that he had been paid the full amount of compensation to which he was entitled. The news that the file had been destroyed and that the payment records were also unavailable caused substantial anguish, dismay, unhappiness, stress and depression. When in May 2015 the existence of the payment records emerged seemingly by chance he lodged a complaint with the Privacy Commissioner. Regrettably ACC mistakenly persuaded the Commissioner there had been no breach of the information privacy principles. Both then and in the filing of the present proceedings Mr Vivash's quest for the truth appeared quixotic at best and borderline abusive at worst. When at the commencement of the Tribunal hearing on 11 April 2018 ACC admitted Mr Vivash had wrongly been told the payment information had been destroyed (and had been available all the time) Mr Vivash was visibly dumbfounded and shaken.

**[95]** In his later evidence Mr Vivash gave a heartfelt description of his feelings of extreme stress, depression, feeling isolated and alone, humiliated, intimidated and feeling "blocked" in his dealings with ACC.

**[96]** In its apology letter of 11 May 2018 ACC itself has explicitly recognised the distress caused by the failure to provide the requested information and has acknowledged:

... the fact that your experiences as a whole in dealing with ACC have not been exemplary, and that ACC's actions and communication compounded your stress while dealing both with privacy concerns and other claim-related issues.

**[97]** Nevertheless, even though he was in obvious physical pain from his back injuries, Mr Vivash conducted his case with dignity and without anger, rancour or spite. At the conclusion of the case counsel for ACC expressly acknowledged his gratitude to Mr Vivash for his courtesy. That acknowledgement was extended also to Mrs Vivash who attended the hearing each day. Counsel for ACC also accepted Mr Vivash had been a

completely honest witness. That concession was properly made and was particularly welcome because Mr Vivash had expressed fear that his determined pursuit of his case over a large number of years had shown him to be a vexatious litigant. As the Tribunal remarked to the parties at the conclusion of the hearing, there is no basis at all for Mr Vivash to hold this fear. He was a transparently honest witness and a person of great integrity who only wanted to be treated fairly. His dignity, courage and fortitude have been singular.

**[98]** Returning to the issue of injury to feelings, we have taken care to take into account only the injury to feelings caused by the breaches of IPP 5 and IPP 6 and the consequential interference with Mr Vivash's privacy caused by those breaches and those breaches alone. That is, we have excluded from consideration any injury to feelings which may have been experienced by Mr Vivash in relation to any of his other dealings with ACC.

**[99]** There can be no doubt breach by ACC of IPP 5 and IPP 6 caused Mr Vivash significant injury to feelings.

**[100]** We turn then to the question of quantum. We do not intend making separate awards for the separate breaches of IPP 5 and IPP 6. A global assessment must be made and one award made.

**[101]** In our opinion this is a case which falls inside the second band identified in *Hammond* at [176]. That is, it falls in a band which ranges between \$20,000 and \$50,000.

**[102]** Taking into account all the circumstances we are of the view a proper award of damages under s 88(1)(c) is \$40,000.

### **Redress and other relief**

**[103]** As mentioned, ACC has taken the position that arising from its breach of IPP 6 it is both reasonable and appropriate for it to make payment to Mr Vivash of \$5,000 as a contribution towards his seeking legal advice on his entitlement to backdated weekly compensation in respect of his 1985 claim.

**[104]** By consent we accordingly order that such sum be paid by ACC pursuant to the Privacy Act, s 85(1)(d) and (e).

**[105]** Whether Mr Vivash is eligible to receive ACC entitlements in relation to any of his injuries is not within the Tribunal's jurisdiction to determine. We have, however, recorded some of the concessions made by ACC and its witnesses (particularly Mr Palmer) during the course of the hearing. Those concessions may be of assistance when Mr Vivash takes the further legal advice anticipated by [103] and [104] above.

### **FORMAL ORDERS**

**[106]** For the foregoing reasons the decision of the Tribunal is that it is satisfied that on the balance of probabilities actions of ACC were interferences with the privacy of Mr Vivash and:

**[106.1]** A declaration is made under s 85(1)(a) of the Privacy Act 1993 that the Accident Compensation Corporation interfered with the privacy of Mr Vivash by failing to comply with IPP 5 and with IPP 6.

**[106.2]** Damages of \$5,000 are awarded against ACC under ss 85(1)(c) and 88(1)(b) of the Privacy Act 1993 for the loss of benefit which Mr Vivash might reasonably have been expected to obtain but for the interference.

**[106.3]** Damages of \$40,000 are awarded against ACC under ss 85(1)(c) and 88(1)(c) of the Privacy Act 1993 for injury to the feelings of Mr Vivash.

**[106.4]** The sum of \$5,000 is awarded against ACC under s 85(1)(d) and (e) of the Privacy Act 1993, as a contribution towards Mr Vivash seeking legal advice on his entitlement to backdated weekly compensation on his 1985 claim.

### **COSTS**

**[107]** The costs of Mr Vivash have been agreed to by ACC in the sum of \$1,347.10.

.....	.....	.....
<b>Mr RPG Haines ONZM QC</b>	<b>Mr MJM Keefe QSM JP</b>	<b>Ms ST Scott QSM</b>
<b>Chairperson</b>	<b>Member</b>	<b>Member</b>