



Cook Islands Occupational Safety and Health National Reform

Final Draft National Workers' Compensation Policy (including Employers' Liability Insurance)

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Shaw Idea Pty Ltd

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Preamble

Purpose

This policy sets out the Government of the Cook Islands' approach to workers' compensation, including the system of collection of employer premiums.

Commitment

The Government of the Cook Islands is committed to establishing and maintaining a modern, fair and sustainable workers' compensation system that provides appropriate benefits in a timely fashion to workers who suffer injuries or illnesses as a result of their work. This includes an efficient and effective system for collecting employer premiums and arrangements that facilitate the early and sustainable return to work of injured and ill workers.

Aims

This policy aims to:

- Provide comprehensive coverage of all employees and to some classes of volunteer workers;
- Provide comprehensive coverage of work-related injuries and illnesses;
- Provide a fair system of appropriate benefits to workers who are injured or become ill as a result of their work;
- Assist the Occupational Safety and Health system in preventing injury and illness;
- Facilitate the operation of arrangements that lead to the early and sustainable return to work of injured and ill workers;
- Provide a system of claims determination that results in expeditious and accurate determination of the benefit entitlements of injured and ill workers;
- Provide a system of dispute resolution that allows for the expeditious and inexpensive resolution of disputes relating to workers' compensation entitlements and obligations, including disputes about employer premium obligations;
- Provide a fair and efficient system for collecting employer premiums; and
- Establish appropriate governance arrangements for the efficient administration of the workers' compensation system, including protecting the Workers Compensation Fund and efficiently managing its funds.

Scope

This policy:

- Provides comprehensive coverage of workers – all employees as well as some classes of volunteer workers.
- Provides comprehensive geographic coverage – coverage relates to the Cook Islands' Exclusive Economic Zone (EEZ).

Rationale

The current legal framework for workers' compensation in the Cook Islands, represented by the Workers Compensation Ordinance 1964 and the Employers Insurance Liability Regulations 1965, falls well short of relevant international standards and is unable to meet the needs of Cook Islands' workers and employers. The current framework is deficient in its coverage of workers, in its coverage of injuries and illnesses and in the level and duration of its benefit structure. There are currently no arrangements to facilitate the early and sustainable return to work of injured and ill workers and no system of dispute resolution apart from the complex and highly expensive option of resort to the High Court. The existing framework for the collection of employer premiums is archaic in structure and highly inefficient in its operations. In short, the present system, which has essentially remained untouched for more than half a century, needs a fundamental overhaul.

Principles

This policy is based on the following principles:

1. **Fairness.** This policy aims to create and maintain a system of workers' compensation entitlements and benefits that are fair and equitable for injured and ill workers.
2. **Comprehensiveness.** The system should provide comprehensive coverage of all employees and some classes of volunteer workers and should provide comprehensive coverage of work-related injuries and illnesses.
3. **Prevention.** The workers' compensation and employers' liability insurance systems should contribute, as far as possible, to primary, secondary and tertiary prevention within the workers' compensation system and assist in attaining these goals within the OSH system.
4. **Sustainability.** The system should be able to achieve its various aims into the indefinite future without being an undue burden on the Cook Islands' economy.

Institutions

In order to give effect to this policy, the following government Ministries and tripartite bodies have important roles.

Ministry of Internal Affairs

The Ministry of Internal Affairs (INTAFF) is the regulator and the primary government agency with responsibility for workers' compensation matters, including employers' liability insurance. Specifically, INTAFF is responsible for:

- Advising the Minister for Internal Affairs on workers' compensation matters.
- Facilitating and supporting the preparation of legislation – the Workers Compensation Act and Regulations.
- Monitoring and enforcing the law, in accordance with the policy set out below.
- Overseeing the general operation of the workers' compensation system.
- Conducting awareness campaigns.
- Promoting workers' compensation research, education and training.
- Conducting investigations and inquiries into workers' compensation matters upon request of the Minister for Internal Affairs.
- Providing a secretariat for the tripartite National Labour Advisory Board (NLAB), the Board of Management of the Workers Compensation Fund and the Independent Labour Tribunal (ILT).

Each year, INTAFF will prepare and publish a workplan for its workers' compensation program based on consultation with the NLAB and relevant workers' compensation data.

National Labour Advisory Board

The tripartite NLAB has the following functions:

- Advise the Minister for Internal Affairs, through INTAFF, on workers' compensation matters.
- Provide a forum to discuss national workers' compensation policy and strategy.
- Review and advise on workers' compensation laws, regulations, guidance and policies.
- Promote continuous improvement in workers' compensation throughout the Cook Islands.
- Provide annual reports to the Minister for Internal Affairs about its activities and contributions to improving workers' compensation in the Cook Islands.

These functions will be specified in the Workers Compensation Act.

**Cook Islands’
National
Superannuation
Fund**

The Cook Islands’ National Superannuation Fund (CINSF) has the following functions in relation to workers’ compensation:

- In partnership with INTAFF, oversee the development and implementation of a new premium-setting methodology based on the International Standard Industrial Classification of All Economic Activities (ISIC) or an ISIC variant such as the Australia and New Zealand Standard Industrial Classification (ANZSIC).
- Maintain an up to date database on all employers in the Cook Islands who are liable to pay workers’ compensation premiums.
- On behalf of INTAFF, collect the workers’ compensation premiums owed by employers in the Cook Islands’ workers’ compensation system in a timely, accurate and professional manner.
- In partnership with the Board of Management overseeing the operations of the Workers Compensation Fund, ensure that this Fund is appropriately managed and its funds appropriately invested.

**Treasurer of the
Cook Islands**

The Treasurer of the Cook Islands (currently the Minister of Finance and Economic Management) will be the insurer for the workers’ compensation system.

Legislation

Legal framework

The Government of the Cook Islands will establish a legal framework built on the following legal hierarchy:

- A **Workers Compensation Act**, providing the primary legal foundation for the workers' compensation scheme and setting out the major provisions relating to entitlements, obligations and responsibilities under the scheme and the institutional framework under which the scheme operates. This Act will bind the Crown and will give effect to the key requirements of this Workers Compensation Policy.
- **Workers Compensation Regulations**, which set out the more detailed provisions for the operation of the scheme as authorised by the Workers Compensation Act.
- **Orders in Council** – instruments made by the Queen's Representative in Executive Council, on the advice of the relevant Minister which are used to effect administrative changes in relation to the workers' compensation scheme.

Consistent with the approach adopted for OSH legislation, the Cook Islands Government will ensure that a new Workers Compensation Act will be reviewed every five years to determine whether the statute is appropriately achieving its overall purposes and objectives and where and how changes need to be made.

Objectives of the law

The principal objectives for the Workers Compensation Act are to:

- Provide fair and appropriate benefits to workers who are injured or become ill as a result of their work;
- Facilitate the operation of arrangements that lead to the early and sustainable return to work of injured and ill workers;
- Provide a system of claims determination that results in expeditious and accurate determination of the benefit entitlements of injured and ill workers;
- Provide a system of dispute resolution that allows for the expeditious and inexpensive resolution of disputes; and
- Provide a fair and efficient system for collecting employer premiums.

Immediate priorities

Based on the OSH National Reform Project, the following immediate priorities have been identified:

- The development and implementation of a new premium-setting methodology based on ISIC or an ISIC variant for use in the existing WCO and the new Workers Compensation Act;

- Working with the NLAB to develop guidance on the level and duration of benefits in the new workers' compensation scheme; and
- Developing and delivering a training program for selected doctors on how to undertake a permanent disability benefit assessment using a whole person impairment approach.

Coverage

Coverage of Workers

The Cook Islands Government is committed to the reforming the current workers' compensation system in a manner that combines equity and fairness to workers within a framework that is economically sustainable in the long term. The broadest coverage of workers is one of the hallmarks for such a fair and equitable scheme.

Primary definition of Worker

The new Workers Compensation Act will use the common law distinction between a contract of service (denoting an employee) and a contract for services (denoting an independent contractor) as the basis for its definition of workers, in common with other modern workers' compensation schemes. It will continue to use the definition of "worker" found in section 2 of the existing Workers Compensation Ordinance 1964 (WCO) in terms of a person who has:

entered into or works under a contract of service or apprenticeship with an employer whether by way of manual labour, clerical work, or otherwise, and whether the contract is expressed or implied, is oral or in writing.

This typical coverage definition can be found, in almost identical words, in many workers' compensation statutes. The Cook Islands Government does not find compelling policy grounds to provide for exclusions from this primary definition.

Deemed extension of coverage

There are a range of employment relationships that do not fit easily within the bounds of the traditional contract of service. Some of these arrangements will be afforded coverage under a new Cook Islands' Workers Compensation Act. One is the situation of taxi drivers who pay the owner of a taxi a fee for use of the vehicle under a contract of bailment. As well, the Government is aware that, historically, there has also been some legal uncertainty as to the precise employment status of ministers of religion. Accordingly, the Government will ensure that the new Workers Compensation Act will provide deemed extension of coverage to taxi drivers and to ministers of religion.

The Cook Islands Government is proud of the pivotal role that civil society organisations play in the life of the Cook Islands and is committed to supporting these organisations where it can. To this end, workers' compensation entitlement will be extended to people who are injured or become ill while they are engaged in what are regarded as socially desirable, but voluntary (or nominally remunerated), activities such as volunteer fire fighters or disaster relief workers. Many, if not most, of these volunteers are engaged in such activities alongside or outside their normal paid employment. A major reason for coverage is that an injury sustained in their voluntary role may disable that person from undertaking their paid employment and this coverage can protect the economic and other losses that may result from this.

Accordingly, the new Act will apply to all volunteers affiliated with organisations or bodies that are members of the Cook Islands Civil Society Organisation and to voluntary workers engaged by or working under the auspices of a Cook Islands' Government Ministry or other Cook Islands' Government Authority.

The Government also recognises the important role that sportspeople and cultural performers play as ambassadors for the Cook Islands. Accordingly, deemed workers' coverage will be extended to sportspeople and cultural performers (including dance teams) in their capacity as officially acknowledged representatives of the Cook Islands at international events.

The Cook Islands Government is aware that the notion as to what occupational and allied activities should be accorded workers' compensation coverage is not static. It must move with the times. To achieve this, the new Workers Compensation Act will provide for the Government to prescribe additional employment-like relationships that can receive such deemed coverage.

Coverage of conditions

In common with the Cook Islands Government's commitment to comprehensive and fair coverage within the new workers' compensation system, the new Act will provide for broad coverage of conditions, in terms of 'injuries' and 'diseases'. Thus the coverage of 'injuries' will encompass both physical and mental injury and, for the sake of certainty, will specifically recognise the condition of industrial deafness. Additionally, the Act will recognise conditions of 'secondary disability', namely where work or employment results in an aggravation, deterioration, exacerbation or recurrence of a pre-existing injury or disease.

Occupational diseases

There have been historical difficulties in establishing workers' compensation entitlement in disease cases where there are long latency periods between exposure to a particular substance and the onset of a particular disease. In response to this challenge, the new Workers Compensation Act will include an expansive disease schedule based upon current epidemiological knowledge. This disease schedule will reflect the listing of diseases contained in Schedule 1 of the International Labour Organisation's Employment Injury Benefits Convention, 1964 (EIBC). In order to ensure that the new Act remains current with epidemiological knowledge the Cook Islands Government, through INTAFF, will organise amending legislation to update the list of prescribed occupational diseases in the light of any amendments to Schedule I to the EIBC.

Coverage of circumstances

The new Act will adopt the requirement of an injury or disease 'arising out of or in the course of employment' as the basis for coverage of 'work-related' injury and illness. This means that an entitlement to compensation can exist by the satisfaction of either a causal connection ("arising out of") *or* a temporal relationship ("in the course of") between the injury and employment rather than requiring both.

The Cook Islands Government believes that the new legislation should be based upon best modern practice in relation to the circumstances of coverage in workers' compensation schemes. As a result, the new Workers Compensation Act will provide for coverage of 'journey' or commuting injuries (that is injuries incurred while travelling to and from work) and also 'recess' injuries (that is are injuries that occur within the overall course of a working day while the worker is undertaking a break from their formal work, for instance during a lunch break).

Again, in accordance with fairness and the best standards of modern practice, the Government believes that, where the tests for workers' compensation entitlement are met, such entitlement shall commence from day one of incapacity.

Along with the situation in most other workers' compensation statutes, the new Act will contain provisions that exclude injuries resulting from deliberate self-injury. Similarly, injuries resulting from serious and wilful misconduct will be excluded, except where the injury results in death or serious and permanent disablement.

Geographic coverage

A new, modern, workers' compensation statute must align its geographic coverage with the current and future economic realities and possibilities. Future economic activities could take place anywhere in the Cook Islands, both upon land and at sea. Accordingly, the new Act will align its geographic coverage with the Cook Islands' Exclusive Economic Zone.

Workers' Compensation Benefits

Range of benefits

The new workers' compensation scheme will provide the range of benefits that are found in most modern schemes elsewhere in the world, to meet the Cook Islands Government's commitment to implement a comprehensive, modern, workers' compensation scheme that adequately compensates workers who suffer a disability as a result of their work. To achieve this, the new Act will provide for four main benefit types. These are:

- Medical and like benefits – such benefits meet the cost of health needs caused by the work injury or illness. These may include the costs of medical and allied health (for instance physiotherapy) services, pharmaceutical supplies, aids and appliances and rehabilitation expenses.
- Income replacement benefits – these benefits serve to replace a proportion of the injured person's wages lost because of incapacity to work.
- Permanent disability benefits – these benefits compensate the injured person for the permanent non-economic losses sustained because of the injury.
- Death benefits - funeral expenses and other payments that are made to the dependants of a deceased worker.

There is considerable variation across workers' compensation schemes around the world regarding the structure of benefits for income replacement, permanent disability and death. A key issue is whether such benefits should be paid on a periodical basis or can be taken as a lump sum. The Cook Islands Government will be guided by the international consensus on dealing with this issue as represented by Articles 13, 14, 15 and 18 of the ILO EIBC. These Articles provide a general rule as to the preferred form in which a particular benefit should be paid, together with the situations in which the general rule can be varied. The Government of the Cook Islands will adopt this approach.

Assessment of Permanent Disability Benefits

The standard modern approach for determining permanent disability benefits is to use a whole person impairment approach, such as that set out in the American Medical Association's *Guides to the Evaluation of Permanent Impairment*. Accordingly the Government will adopt such a whole person impairment approach in the new Workers Compensation Act.

The Government recognises, however, that such a change will need to be preceded by training doctors who will undertake the permanent disability assessment so that they can operationalize a whole person impairment approach. INTAFF will establish such a training program for doctors, prior to the new Act coming into effect. The cost of this foundational training programme for doctors in how to conduct a whole person

impairment assessment for permanent disability benefit determination will be met from the Workers Compensation Fund.

Level of benefits

Setting scheme benefit levels requires a balance between the social mandate of the workers' compensation system to provide a fair and equitable replacement for economic and non-economic losses (the fairness principle) and the economic mandate of a sustainable and affordable scheme (the sustainability principle).

The Government will determine this balance between the social and economic imperatives of workers' compensation based on advice from the key scheme players, workers and employers, through NLAB. The Government will direct NLAB to provide guidance as to the level and duration of benefits in a new workers' compensation scheme that represents how the balance between the scheme's twin mandates can best be achieved in the Cook Islands. In undertaking this exercise, NLAB will use Schedule II to the EIBC, which sets out the minimum level of benefits that should apply for three categories of benefit type, by reference to a percentage of the previous earnings of a "standard beneficiary". The Cook Islands Government will provide NLAB with a continuing mandate to consider when and how scheme benefits can be increased in line with improvements in economic conditions in the Cook Islands.

The Cook Islands Government will protect the true value of such a benefit regime against erosion from inflation. The new Act will provide that the level of workers' compensation benefits will be increased on an annual basis according to changes in the Consumer Price Index as determined by the Cook Islands Statistics Office (CISO). If the CISO starts to collect and publish data about movements in wage levels in the future, the Government will consider using this as the basis for indexation of benefit levels.

Injury Notification

All workers' compensation schemes struggle with under-reporting of work injuries and illnesses, but this is a particular problem in the Cook Islands with cultural barriers to reporting workplace injuries, particularly where the employer is a relative of the injured worker. Similarly, many Cook Islands' workers are not aware of the existence of workers' compensation or do not know how to lodge a claim. To address this, the new Workers Compensation Act will require an employer to display a notice providing summary information that can assist a worker in making a claim when they may have suffered a work-related injury or illness in their workplace, in a place readily accessible at all reasonable times to workers employed at the workplace.

The new Act will require that notice of an injury must be given within 30 days after the person becomes aware of the injury. Notice of an injury will be deemed to have been given if the particulars of the injury are entered into the Register of Injuries, a record that will be required under the new OSH Act.

There are some valid reasons why such prior notice of an injury may not have been given and so such a failure (or a defect in the form of the notice) will not constitute a bar to making a claim for compensation. The new Act will make provision that the prior notice requirement may be waived or the time limit for giving notice may be extended where:

- it was not reasonably practicable for the person, or another person on their behalf, to have given notice within the specified time;
- the failure to give notice of the injury within the specified time did not unfairly prejudice the employer;
- to rely on the notice requirement would result in a serious injustice to the person; or
- the failure to give notice was due to ignorance or a mistake; undue influence or duress; or being absent from the Cook Islands.

Claims Determination and Management

Quality claims determination is an essential element of any well-performing workers' compensation scheme. To achieve this as effectively as possible, the Government of the Cook Islands will ensure that the Workers Compensation Act clearly sets out the rights, responsibilities and accountabilities of the various key participants within the scheme. The WC Act will establish tight, but achievable, time frames for the chain of actions that are required so that workers who have made a compensation claim are not left in limbo and can be paid their proper entitlements in a timely fashion.

Employer claims lodgement

The new Act will require an employer to forward a claim for compensation received from a worker to the insurer within five days of receiving it from the worker.

Insurer determinations

The insurer will be required to make prompt determinations in relation to liability, allowing for distance and isolation in the Cook Islands which may make information-gathering more difficult and thus slow proper decision making. The new Act will require the insurer to make a decision about liability of a lodged claim within 28 days of receiving it. If the decision is not made within this period, the claim will be deemed to be accepted, subject to an ability to extend this time frame in tightly restricted circumstances. This provides a sanction to prevent the insurer unnecessarily delaying a decision about liability beyond the prescribed period.

Dispute Resolution

The Cook Islands Government will ensure that dispute resolution in the workers' compensation system will provide a framework in which disputes at all levels of the system can be dealt with expeditiously, inexpensively and at a level appropriate to matter under dispute. This will cover disputes relating to initial entitlement to benefits, ongoing eligibility for benefits, employer disputes about premium classification and any other matters.

The Independent Labour Tribunal (ILT) (to be established through the Employment Relations Act) will have the authority and capacity to deal with such contested matters at a number of levels. In the first instance, the ILT will seek to mediate any such disputes. If mediation does not result in a successful and lawful resolution, the ILT will arbitrate the dispute.

The WC Act will require that all contested matters must be first dealt with at the ILT and that matters can only proceed to the High Court on a question of law. As is the practice internationally, funding the tribunal for its workers' compensation and OSH responsibilities will be provided from the Workers Compensation Fund. Details regarding the establishment and terms of reference for the ILT are provided in the Government of the Cook Islands' Overarching Policy for OSH and Workers' Compensation.

Funding Arrangements

Premium-setting methodology

The Government of the Cook Islands has determined that there is an urgent need to change how premiums are set, even before the enactment of new legislation. The Cook Islands system will move immediately to an industry-based approach that has been adopted by most modern workers' compensation schemes since the 1980s.

The new approach will use the International Standard Industrial Classification of All Economic Activities (ISIC) or an ISIC variant such as the Australia and New Zealand Standard Industrial Classification (ANZSIC), jointly developed by the Australian Bureau of Statistics and Statistics New Zealand. Under this approach, an employer is classified to the industry group that best reflects their predominant area of activity. The premium or levy rate applicable to that classification is applied to the employer's total leviable remuneration (essentially payroll) regardless of the fact that this may encompass a variety of occupational groups and consequently different levels of risk.

The process of moving to an ISIC approach is urgent and will be commenced immediately. INTAFF will therefore overhaul the Employers' Liability Insurance Regulations to set out this new method for premium-setting. It will then be applied to premium collection in relation to employer liability under the current WCO ahead of its application to the new WC Act.

Insurance framework

The size of the Cook Islands' working population constrains the possible alternatives that are available for insurance underwriting. The small market means that there has been no feasible alternative to the Treasurer acting as scheme insurer since the scheme was established in 1964. There is not sufficient interest among insurance companies for a competitive private insurance system to be established. Consequently, the new workers' compensation scheme will continue to be underwritten by a government fund. As has been the case for the history of the scheme, the insurer will be the Treasurer of the Cook Islands, currently the Minister of Finance and Economic Management.

Premium collection

Because of the size and population of the Cook Islands, the Government of the Cook Islands will contract the Cook Islands National Superannuation Fund (CINSF) to collect workers' compensation premiums. Using an existing mechanism that currently deals with Cook Islands' employers on an ongoing basis for collecting another form of levy or premium avoids unnecessarily duplicating functions that can dissipate scarce resources. The relationship that CINSF has with all Cook Islands' employers in ensuring that every employee in their employment is registered with the Fund means that it could efficiently undertake premium collection and associated functions on behalf of the workers' compensation insurer on an agency basis.

CINSF will therefore be contracted to provide the role of registering employers and collecting the requisite workers' compensation premiums from them according to the new workers' compensation statute and regulations. This agency arrangement could commence prior to the enactment and commencement of the new legislation. Once the existing scheme has moved to some ISIC-based system to set premiums, the CINSF could provide an agency premium collection service under the current WCO.

CINSF will provide a monthly report to INTAFF, a quarterly report to NLAB and an annual report to both bodies on its activities in a form agreed to by the Minister.

**Premium
expenditure**

The present WCO does not stipulate the uses for which premium income collected under that system will be used. The new Workers Compensation Act will, in common with other modern workers' compensation legislation, set out the forms of income (including but not restricted to premiums) that can be paid into the Workers Compensation Fund and also the uses to which payments may be made out of the Workers Compensation Fund.

In line with the approach and processes adopted by modern workers' compensation schemes, the payments that could lawfully be made from the Worker Compensation Fund will include claims payments, the administrative costs associated with the operation of the workers' compensation and OSH schemes and the operational costs of the Independent Labour Tribunal associated with workers' compensation and OSH matters.

Governance Arrangements

General oversight

The Government of the Cook Islands has determined that INTAFF will continue to provide general oversight for workers' compensation administration. Workers' compensation is a form of social protection for workers and therefore sits best within a ministry that has the oversight and/or administration of other areas of social protection and labour standards, including occupational safety and health, minimum wages and like matters.

Specific oversight

Specific oversight of the day to day operations of the workers' compensation system will be provided by a Board of Management involving representatives of key stakeholders (employers, workers and government) and people with specialist skills (legal, financial, actuarial etc). This structure will protect the integrity and sustainability of the Workers Compensation Fund. It will provide specialist expertise in relation to the management of the Workers Compensation Fund and its investments, such as determining premiums, actuarial determination of necessary reserves and proper investment of the income of the workers' compensation fund. Stakeholder representatives on the Board will provide public confidence through enabling scrutiny of the management and control of funds held in the Workers Compensation Fund, increasing transparency and reducing the risk of misuse of the funds. The Board of Management will provide Annual Reports to the Minister for Internal Affairs.