

# Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015

## Explanatory Notes for amendments to be moved during consideration in detail by the Honourable Curtis Pitt MP Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships.

### Short title

The short title of the Bill is the Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015.

### Policy objectives and the reasons for them

The amendments to be moved during consideration in detail give effect to the Government's priority to ensure there are no statutory individual contracts for workers covered by industrial instruments as articulated in the Queensland Labor State Policy Platform 2014.

The objectives of the amendments to be moved during consideration in detail are to:

1. remove high-income guarantee contract and related provisions from the *Industrial Relations Act 1999* (IR Act) and the *Hospital and Health Boards Act 2011* (HHB Act); and
2. restore rights and entitlements that were removed from employees who were placed on high-income guarantee contracts, in particular the rights of high-income senior employees to bargain collectively and access unfair dismissal;
3. provide transitional arrangements and make a number of minor, technical and consequential amendments to ensure the policy objectives of the Bill are achieved.

The amendments in relation to the removal of statutory individual contracts were foreshadowed by the Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships upon the introduction of the Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015 on 7 May 2015.

## Achievement of policy objectives

In 2013 the IR Act was amended to include a new Chapter 6A – Arrangements for high-income senior employees (HISE). Chapter 6A provides the conditions under which a HISE may be employed under a statutory individual employment contract, known as a high-income guarantee contract (HIGC). A HISE subject to a HIGC is removed from the provisions of the IR Act that relate to award coverage, collective bargaining, and unfair dismissal.

The HHB Act was also amended to facilitate the use of the IR Act provisions for individual employment contracts for senior health service employees (SHSE). Queensland Health’s senior doctors (SMOs) and visiting medical officers (VMOs) were designated as SHSEs and moved onto individual contract arrangements during 2014.

The Queensland Labor State Policy Platform 2014, at section 4.35, provides that “Labor will ensure there are no statutory individual contracts for workers covered by industrial instruments”.

The entire Chapter 6A: Arrangements for high-income senior employees will be repealed from the IR Act. Any other references to HISE and related terms will be repealed from other parts of the IR Act and regulation. Corresponding repeal of similar contract provisions in the HHB Act will also be made.

The amendments include provisions in both the IR Act and the HHB Act that make it clear the HIGC retains force as a common law contract. The amendments also make clear that the repeal of the provisions relating to HIGCs does not amount to termination of employment or entitle any affected employee to compensation. A provision will ensure that the change from HIGC to common law contract does not constitute termination of employment or entitle an employee who is a party to a HIGC to a payment of money or other compensation.

With the removal of Chapter 6A no further amendments are required in the IR Act to achieve the restoration of rights and entitlements that were lost to high-income senior employees as a result of the 2013 legislative changes. SHSEs will no longer be subject to section 75 of the HHB Act, which excludes certain types of matters and proceedings (industrial matters under the IR Act and judicial review applications).

It is proposed that the employment framework for SMOs will become:

- Queensland Employment Standards
- A modern award for RMOs and SMOs
- A new certified agreement for SMOs and RMOs with common terms and conditions for each cohort group (MOCA4)
- A mechanism to deal with individual benefits
- Individual private practice agreements.

For VMOs, it is proposed that their current HIGC will transition to a common law contract. VMOs are not, and were not prior to the 2013 amendments, subject to coverage by an industrial instrument.

The transitional arrangements for SMOs provide for the continuation of current entitlements under their respective HIGC as common law contracts; the termination of those common law contract arrangements upon the settlement of MOCA4; and transition to the new employment framework from the effective date of MOCA4.

The transitional arrangements will clarify that the Queensland Industrial Relations Commission is to include consideration of the pre-modernised awards for SMOs when reviewing and varying the Resident Medical Officers Modern Award. This transitional arrangement will ensure a single award for RMO and SMO doctors is made at the time the existing modern award is reviewed; and enable the certification of MOCA4 to proceed.

An amendment to the HHB Act will prescribe that industrial instruments prevail over HEDs to the extent of any inconsistency, other than where the HED contains terms and conditions more favourable than the industrial instrument.

The transitional arrangements also include a provision whereby a party may make an application to the QIRC on or after 1 August 2015 to enliven the former medical officers certified agreement (MOCA3) in the event MOCA4 bargaining becomes protracted. The effect of such an application is that SMO contract arrangements are terminated other than to the extent these provide for senior medical officer's private practice and employment details.

An additional amendment is proposed relating to the operation of a certified agreement. Section 164(3) of the Industrial Relations (Fair Work Act Harmonisation No.2) and Other Legislation Amendment Bill 2013 was introduced under the former government to expire agreements three years after their nominal expiry (unless terminated sooner or replaced by another certified agreement). The award modernisation process will be extended beyond December 2015, therefore to avoid any unintended consequences that may arise because of this delay, it is proposed that section 164(3) be removed. In doing so section 164 will be returned to as it was prior to the changes made on 17 October 2013 by the former Government.

A further minor amendment is required to make clear that redundancy provisions superior to those in the QES can be included in a modern award or certified agreement. This amendment is in accordance with the Government's objectives for the amendment Bill.

## **Alternative ways of achieving policy objectives**

The policy objectives can only be achieved by legislative amendment.

## **Estimated cost for government implementation**

There are no direct funding implications with the introduction of the amendments. However, it is noted that the transition from current individual employment contracts for SMOs to a collectively bargained agreement may have cost implications to the Government.

## **Consistency with fundamental legislative principles**

The amendments to be moved during consideration in detail are generally consistent with fundamental legislative principles. Potential breaches of the fundamental legislative principles are addressed below:

The early termination of the SMO contracts raises a possible infringement of the Legislative Standards Act 1992 (Qld) section 4(2) (a) - having sufficient regard to the rights and liberties of individuals; and the regulation-making power (Henry VIII) raises a possible infringement of the Legislative Standards Act 1992 (Qld) section 4(2) (b) - having sufficient regard for the institution of Parliament.

In regard to the early termination of the SMO contracts, this is an essential requirement for the transition from employment regulated by an individual contract to employment arrangements provided for in a collectively bargained industrial agreement certified by the Queensland Industrial Relations Commission. It is noted that the termination of the contract will occur only upon the making of a new collective agreement or a determination, or upon the return of a formerly bargained collective agreement (MOCA3). Private practice and employment details provisions of a senior medical officer's interim SMO contract (as defined at section 323) will remain on-foot in the event the contract is terminated through the action of section 326 (Effect of pre-modernisation instrument order).

In regard to the regulation making power (Henry VIII), this is considered necessary given the complexity around the transition process from individual contract to collectively bargained employment framework.

## **Consultation**

The policy objectives of these amendments were announced in the Queensland Labor State Policy Platform 2014.

Further consultation has been undertaken with Queensland Health, Together Queensland Ltd and the Australian Salaried Medical Officers Federation Queensland (ASMOFQ). Together Queensland Ltd and ASMOFQ are registered industrial organisations in Queensland with industrial coverage for SMOs.

The Australian Medical Association (Queensland) was consulted and has provided no opposition with respect to the proposed changes.

The Local Government Association of Queensland and TAFE Qld were consulted. Both organisations utilise contractual arrangements for some high income senior employees. Both organisations advised that, should the IR Act be amended to remove the high-income contract arrangements, relevant contracts in the local government sector and TAFE Qld will continue in force as common law contracts. In regard to local government sector, those employees the subject of existing contracts will remain exempted from the Queensland Local Government Industry Award 2014 as is contemplated by Clause 4.2 of that award.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation in the Commonwealth or other State jurisdictions.

## Notes on provisions

*Amendment 1, Amendment 2 and Amendment 3* amend the provisions relating to the Queensland Employment Standards in the *Industrial Relations Act 1999* to ensure that a redundancy provision, which is more beneficial than the Queensland Employment Standards, can be included in a modern award or certified agreement. Amendment 1 omits section 71KE(5) which prevents a modern industrial instrument from displacing the redundancy pay provisions in the Queensland Employment Standards. Amendment 2 is a minor amendment relating to numbering. Amendment 3 makes a further amendment to section 71NA, which deals with provisions in modern industrial instruments that relate to the Queensland Employment Standard. New subsection 2 removes the limitation at 71NA(2)(b) that prevents more beneficial redundancy pay being provided for in a modern industrial instrument.

*Amendment 4* is an amendment to section 72 (Employees to whom Chapter 3 – Dismissals – does not apply) of the *Industrial Relations Act 1999*. This amendment is complementary to the removal of high-income senior employee arrangements.

*Amendment 5* is an amendment to section 142 (Who may make a certified agreement) of the *Industrial Relations Act 1999*. This amendment is complementary to the removal of high-income senior employee arrangements.

*Amendment 6* amends section 164 (When a certified agreement is in operation) of the *Industrial Relations Act 1999*. This amendment repeals amendments introduced in the *Industrial Relations (Fair Work Act Harmonisation No.2) and Other Legislation Amendment Act 2013* to automatically expire agreements three years after their nominal expiry (unless terminated sooner or replaced by another certified agreement).

*Amendment 7* repeals Chapter 6A (Arrangements for high income senior employees) from the *Industrial Relations Act 1999*.

*Amendment 8* inserts a new section 844A, that provides specific rules for the modernisation of the awards that apply to Resident Medical Officers (RMOs) and Senior Medical Officers (SMOs) employed by the department in which the HHB Act is administered or a hospital and health service.

A new modern award for RMOs, the *Resident Medical Officers (Queensland Health) Award – State 2014* (RMO modern award) was made by the Queensland Industrial Relations Commission (QIRC) on 31 August 2014. Because of the effect of Division 2: Review of relevant modern awards, the RMO modern award will be reviewed and varied by the QIRC to ensure it is not inconsistent with the amended Act (refer Clause 33 section 840(b)).

The effect of section 844A is to ensure that the QIRC also considers the two pre-modernisation awards that applied to SMOs (*District Health Services – Senior Medical Officers and Residential Medical Officers’ Award – State 2012*; and the *Medical Superintendents with Right of Private Practice and Medical Officers with Right of Private Practice – Queensland Public Hospitals, Award – State 2012* (pre-modernisation SMO awards)) when it reviews and varies the RMO modern award. These awards will be modernised together with the review and variation of the RMO award to provide a single modern award for RMOs and SMOs.

Because of the operation of section 844A, section 851(3) will not apply to the pre-modernisation SMO awards.

Subsection (3) clarifies that the varied RMO Award (which when modernised will include provisions for RMOs and SMOs) will only apply to an SMO or RMO when a new certified agreement or determination is made that covers them.

Subsection (4) names the relevant pre-modernisation SMO awards, and also clarifies that these two awards are the only pre-modernisation awards for the purposes of the QIRC's review under Division 2.

### **Part 3 – Other amendments**

*Amendment 9* amends clause 33 to provide the Division heading as described.

*Amendment 10* introduces further transitional provisions dealing with the repeal of Chapter 6A of the Industrial Relations Act 1999.

Section 854A provides that, if immediately prior to commencement an employee was on a high-income guarantee contract, that contract becomes a 'continuing contract' and continues to have effect even though Chapter 6A does not apply to a continuing contract. The section also makes clear that the repeal of Chapter 6A does not constitute the termination of the employee's employment or entitle the employee to a payment or other compensation.

*Amendment 11*, *Amendment 12* and *Amendment 13* amend clause 35 schedule 5 (Dictionary). This amendment is complementary to the removal of high-income senior employee arrangements, in addition to other amendments to the dictionary.

*Amendment 14* amends clause 35 Part 3 heading as described.

*Amendment 15* introduces amendments to the HHB Act concerning the employment of senior health service employees.

Clause 35A provides that Division 1 to the Bill amends the HHB Act.

Clause 35B amends subsection 20(3) (Powers of Services) to remove the word 'contracted'. The phrase 'contracted senior health service employee' will no longer be used in the HHB Act.

Clause 35C:

- amends subsection 51A(2)(c) to remove the word 'contracted'; and
- omits section 51A(2)(d).

Clause 35D amends existing section 51C to alter the relationship between a health employment directive and an industrial instrument as follows:

- new subsection 51C(1) will provide that, if a health employment directive is inconsistent with an industrial instrument, the industrial instrument prevails to the extent of the inconsistency;
- new subsection 51C(1A) will provide that subsection (1) does not apply if the terms and conditions of employment in the health employment directive are more favourable to the employee than those in the industrial instrument;

- subsections 51C(3) and 51C(4) will be amended to reflect the removal of high-income guarantee contracts as provided by the amendments to the IR Act. These subsections will, following the commencement of the amendments, deal with the relationship between health employment directives and any contract of employment entered into with a senior health service employee;
- the definition of remuneration will be removed from subsection 51C(6). Section 51C will, from the commencement of the amendments, rely upon the common law definition of remuneration for the purposes of section 51C.

Clause 35E amends subsection 66(3)(f) to remove the phrase ‘if the employee is a contracted senior health service employee’. This subsection will now apply to any senior health service employee.

Clause 35F amends subsection 67(2) to remove the word ‘contracted’.

Clause 35G removes section 69B (relationship of high-income guarantee contract with legislation). This change is necessitated by the removal of the concept of high-income guarantee contracts from the IR Act.

Clause 35H amends section 74A to remove references to, and definitions of, ‘remuneration’ and ‘high-income threshold’. These terms are defined in chapter 6A of the IR Act, which this Bill proposes to repeal. The term ‘senior health service employee’ will, as a result of the passage of this Bill, mean a health service employee in a position prescribed under a regulation as a senior health service employee position.

Clause 35I amends section 74B to:

- alter the existing title, which referred to contracted senior health service employees and reflect the title of the similar provision which deals with the basis of employment of health executives (section 74); and
- remove the word ‘contracted’.

Clause 35J amends subsection 75(4) to remove references to senior health service employees.

Clause 35K removes section 80AA.

Clause 35L amends section 80C to remove the word ‘contracted’ from the title of the section and section 80C(1)(a).

Clause 35M inserts transitional provisions, which form a new part 13, division 6. New section 323 defines a number of terms used in this new division.

The term ‘*interim SMO contract*’ will mean:

- a continuing contract (as that term is defined by new section 854A(1) of the IR Act) under which a senior medical officer is engaged; or
- a contract entered into after the commencement of the changes in this Bill but before new collective arrangements are put in place which cover all senior medical officers (being either a new certified agreement or arbitration determination under chapter 6 of the IR Act).

This will ensure that ‘interim SMO contract’ refers to only those employment contracts which apply to senior medical officers (as that term is defined by the *Hospital and Health Boards Regulation 2012*, schedule 1A, part 1) during the transition from high-income guarantee contracts to new collective arrangements under chapter 6 of the IR Act.

The term ‘*pre-modernisation health agreement*’ will mean the ‘Medical Officers’ (Queensland Health) Certified Agreement (No. 3) 2012’.

The term ‘*pre-modernisation health award*’ will mean:

- the ‘District Health Services – Senior Medical Officers and Resident Medical Officers’ Award - State 2012’; or
- the ‘Medical Superintendents with Right of Private Practice and Medical Officers with Right of Private Practice - Queensland Public Hospitals, Award - State 2012’.

The term ‘*pre-modernisation health instruments*’ will mean only:

- the ‘Medical Officers’ (Queensland Health) Certified Agreement (No. 3) 2012’; or
- the ‘District Health Services – Senior Medical Officers and Resident Medical Officers’ Award - State 2012’; or
- the ‘Medical Superintendents with Right of Private Practice and Medical Officers with Right of Private Practice - Queensland Public Hospitals, Award - State 2012’.

The term ‘*senior medical officer*’ will mean a senior health service employee employed in a position at a classification level mentioned in the *Hospital and Health Boards Regulation 2012*, schedule 1A, part 1.

New section 324 provides that, subject to new section 326, pre-modernisation industrial instruments (which, by virtue of subsection 324(4), will have the same meaning as in the IR Act) do not apply to senior medical officers from the commencement of the changes the subject of the Bill. This is the case despite the removal of the restrictions on collective bargaining and the application of industrial instruments brought about by the repeal of chapter 6A of the IR Act.

New subsection 324(3) will provide that, upon reaching its nominal expiry date, the Medical Officers’ (Queensland Health) Certified Agreement (No. 3) 2012 will not become a ‘continuing agreement’ under section 827(2) of the IR Act. This will ensure that the parties can immediately negotiate to finalise a replacement for the Medical Officers’ (Queensland Health) Certified Agreement (No. 3) 2012’ once the RMO modern award is reviewed and varied.

New section 325 provides the chief executive of the Department of Health, or an employee organisation (as that term is defined by the IR Act) that is a party to the Medical Officers’ (Queensland Health) Certified Agreement (No. 3) 2012, may, from 1 August 2015, apply to the QIRC for an order to apply the pre-modernisation health instruments to senior medical officers. Such an application cannot be made if a new agreement is certified, or a new arbitration determination made, under chapter 6 of the IR Act and the new certified agreement or determination has started applying to all senior medical officers. The QIRC must make the order if the application is made, unless the applicant withdraws the application before the QIRC makes the order.



New section 326 will only apply if the QIRC makes an order under new section 325(5). New section 326 provides that, from the start of a senior medical officer's first full pay period that starts on or after the making of an order by the QIRC under section 325:

- pre-modernisation health instruments (other than clause 4.11 of the Medical Officers' (Queensland Health) Certified Agreement (No. 3) 2012) apply to the senior medical officer; and
- the senior medical officer's interim SMO contract is terminated, other than to the extent it provides for the senior medical officer's private practice and employment details.

New subsection 326(5) defines a senior medical officer's employment details in relation to their interim SMO contract.

New subsection 326(4) provides that the operation of subsection 326(2) does not constitute a termination of employment or entitle the senior medical officer to a payment of money or other compensation.

The pre-modernisation health instruments then cease applying to the senior medical officer on the day a new certified agreement or arbitration determination is made under chapter 6 of the IR Act which covers the senior medical officer.

New section 327 outlines what occurs when a new agreement is certified, or a new arbitration determination made, under chapter 6 of the IR Act, that covers a senior medical officer.

The section only applies to a senior medical officer if a new agreement is certified, or a new arbitration determination made, under chapter 6 of the IR Act, that covers the senior medical officer.

If the QIRC had not made an order to apply the pre-modernisation health instruments, the certification of a new agreement or making of a new arbitration determination, under chapter 6 of the IR Act, that covers a senior medical officer will mean that the senior medical officer's interim SMO contract will terminate on the day the agreement is certified or arbitration determination is made.

If, as a result of the QIRC making an order to apply the pre-modernisation health instruments under new section 325, the pre-modernisation health instruments apply to a senior medical officer, the certification of a new agreement or making of a new arbitration determination under chapter 6 of the IR Act that covers a senior medical officer will mean that:

- the senior medical officer's interim SMO contract will terminate (to the extent it provided for the senior medical officer's private practice and employment details); and
- the pre-modernisation health instruments stop applying to the senior medical officer, on the day the agreement is certified or arbitration determination is made.

New subsection 327(4) provides that the operation of subsection 327(2) or (3) does not constitute a termination of employment or entitle the senior medical officer to a payment of money or other compensation.

New section 328 provides that the amendments to section 75 apply only to decisions made or matters otherwise arising after the commencement of the amendments.

New section 329 provides that a transitional regulation may make provision of a saving or transitional nature for which it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of the pre-amended Act to the operation of the amended Act and for which the HHB Act does not make provision or sufficient provision.

New subsection 329(2) provides that a transitional regulation may do anything necessary to facilitate the operation of new sections 326 or 327 and that a transitional regulation may continue the operation of a repealed provision.

New subsection 329(3) provides that such a transitional regulation may have retrospective operation to a day that is not earlier than the day of the commencement of operation of the changes in the Bill.

New subsection 329(4) provides that such a transitional regulation must state that it is a transitional regulation.

New subsection 329(5) provides that the new section 329 and any transitional regulation made under it expire two years after the date of the commencement of the changes in the Bill.

Clause 35N provides for the omission of the following definitions from Schedule 2:

- contracted senior health service employee; and
- high-income guarantee contract.

*Amendment 16* inserts two minor or technical amendments, complementary to the repeal of Chapter 6A of the *Industrial Relations Act 1999* and related amendments in the HHB Act and one minor technical amendment relating to Hospital and Health Boards Regulation 2012.

Clause 1 amends subsection 80(1) of the HHB Act to delete the words ‘other than a person to whom section 80AA applies’ due to the repeal of section 80AA.

Clause 2 amends subsection 80B(1)(a) of the HHB Act to remove references to section 80AA, due to the repeal of section 80AA.

Clause 1 amends the Hospital and Health Boards Regulation 2012, Schedule 5A, section 13 to delete the word ‘contracted’.

*Amendment 17, Amendment 18 and Amendment 19* makes two minor amendments that are complementary to the repeal of Chapter 6A of the *Industrial Relations Act 1999* and a minor amendment to the *Industrial Relations Regulation 2011* on the same.

*Amendment 20* amends the long title.