asmofq
AUSTRALIAN SALARIED MEDICAL OFFICERS' FEDERATION QUEENSLAND

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Attention:
Ms Deborah Jeffrey
Research Director
Finance and Administration Committee
Parliament House
George Street
BRISBANE QLD 4000

By email: fac@parliament.qld.gov.au

Dear Ms Jeffrey

Re: Submission to Finance and Administration Committee
Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015

Thank you for inviting the Australian Salaried Medical Officers' Federation Queensland, Industrial Organisation of Employees (**ASMOFQ**) to make a written submission to the Finance and Administration Committee's inquiry into the *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015* (Qld) (**Bill**).

1. ASMOFQ'S POSITION IN BRIEF

Briefly stated, ASMOFQ submits:

- that the Committee make a recommendation in favour of the Bill;
- that the Committee make a recommendation that the Bill be redrafted so as to repeal Chapter 6A of the *Industrial Relations Act 1999* (Qld) (**IR Act**), pertaining to High-Income Guarantee Contracts (**HIGC**);
- that the Committee make a recommendation to broaden the scope of the Bill so as to repeal the *Industrial Relations (Fair Work Act Harmonisation Number 2) and Other Legislation Amendment Act 2013* (**IRFW Act**) amendments in the *Hospital and Health Boards Act 2011* (Qld) (**HHB Act**) and any other legislation or subordinate legislation referencing the HIGC; and
- that the deliberations of the Committee occur in a timely fashion to allow passage of the legislation to occur by June 2015.

We address these submissions in detail below.

2. CONTEXT

2.1 ASMOFQ and its interest in the Bill

ASMOFQ is Queensland's "doctor's only" industrial organisation, registered with the Queensland Industrial Relations Commission (**QIRC**). ASMOFQ's objectives are:

- to promote and protect the broad interests of salaried medical practitioners;
- to provide services to its members; and
- to advocate the provision and development of quality health services.

As Queensland's "doctors only" union, ASMOFQ has particular interest in ensuring that doctor's industrial rights are protected and enhanced.

2.2 Relevant Industrial Instruments

On 1 November 2012 Deputy President Bloomfield certified the *Medical Officers' (Queensland Health) Certified Agreement (No. 3) 2012* (**MOCA3**). Upon certification, MOCA3 covered the employment of both Senior Medical Officers (**SMOs**) and Resident Medical Officers (**RMOs**, also referred to as junior doctors or Doctors In Training – **DITs**).
At that time MOCA3 was underpinned by the:

- *Medical Superintendents with Right of Private Practice and Medical Officers with Right of Private Practice – Queensland Public Hospitals Award – State 2012* (**RoPP Award**); and
- *District Health Service Senior Medical Officers' and Resident Medical Officers' Award – State 2012* (**SMO/RMO Award**)

However, the IRFW Act dramatically altered this industrial landscape.

The introduction of Chapter 6A of the IR Act established HIGCs for SMOs and Visiting Medical Officers (**VMOs**). The then government suggested that SMOs and VMOs were under no obligation to take up such contracts. However, the reality was that the removal of previously existing industrial rights such as the right of private practice (via the non-allowable provisions and Chapter 15, Part 2 of the IR Act) left SMOs and VMOs with no real choice but to accept the HIGC.

By virtue of section 194 of the IR Act, any employee engaged under a HIGC ceased to be covered by their previous award or certified agreement. In a practical sense this means that MOCA3 now only applies to RMOs.

As noted above, MOCA3 was originally underpinned by the RoPP Award and the SMO/RMO Award. However, on 31 August 2014 the Full Bench of the QIRC handed down its Award Modernisation decision regarding these awards (Case No. MA/2014/126 dated 29 August 2014 – **Attachment 1**). Under this decision the RoPP Award and the SMO/RMO Awards were repealed. The *Resident Medical Officers (Queensland Health) Award – State 2014* (**RMO Modern Award**) was made, subject to section 824 of the IR Act.

Section 824 of the IR Act provides:

> **824 Modern award does not apply to employee covered by continuing agreement or determination**
>
> (1) A modern award does not apply to an employee, or to an employer or employee organisation in relation to the employee, at any time when the employee is covered by a continuing agreement or determination.
>
> (2) In this section—
> ***continuing agreement or determination*** means either of the following to which section 826 applies—
>
> (a) a certified agreement;
> (b) an arbitration determination under chapter 6.

The effect of the abovementioned decision is that the RMO Modern Award has been made, but does not apply until such time as our members cease to be covered by MOCA3 (i.e. when a new agreement is negotiated and certified).

2.3 Impact of Newman Government's industrial laws

ASMOFQ submits that the Newman government's changes to the IR Act had a devastating effect on Queensland industrial rights generally and Queensland public sector health employment specifically.

2.3.1 Senior Salaried Doctors

As noted above, MOCA3 was certified on 1 November 2012 and, at the time of its certification, SMOs were covered by its provisions. With some 19 months left to run before MOCA3's Nominal Expiry Date (**NED**) the LNP government released the HIGC proposal for comment. While portrayed as "voluntary" contracts the proposal to strip private practice rights along with 33% (or more in some cases) of total remuneration from anyone remaining on MOCA3 was used as the impetus to propel the profession toward the LNP Government's desired industrial outcome. As a result the legislation forced approximately 3000 SMOs and VMOs onto these individual statutory "high-income guarantee contracts".

The ensuing bitter dispute between doctors and the then LNP Government was a once in a generation crisis and has had lasting effects on the retention of senior doctors, with many leaving the system (either permanently or part time) for interstate or private sector positions. ASMOFQ is aware of over 70 senior doctors who resigned outright from Queensland's public hospitals as a direct result of the introduction of the IRFW Act provisions. While ASMOFQ is not in a position to release the names of these doctors, it can report that some of them were highly qualified and world class in their field.

While most of Queensland's senior doctors have now signed a HIGC, issues are far from resolved. Under the LNP, the representative contract oversight committee within Queensland Health – the Queensland Health Contract Advisory Committee (**QHCAC**) – failed to meet even once, ensuring that senior doctors' and health administrators' concerns went unheeded. Early reports to this committee since the Queensland election of 31 January 2015 have now unveiled many issues with the HIGCs. Such issues include:

- incorrect or non-payment for work performed after hours and on public holidays;
- ongoing concerns regarding the punitive nature of linking up to 17% of salary to performance indicators relating to the prior twelve months (which may not even be within the personal control of the individual); and
- fatigue related issues, which were specifically excluded from the contract, have become significant in some Hospital and Health Services (**HHSs**), with the attendant risks to patient outcomes.

In addition, failure of some HHSs to honour terms within the contract, and in some instances (e.g. Cairns HHS) decisions to stand down employees for long periods with little transparency, have also contributed to a general malaise within Queensland's public hospitals. The ongoing inability of senior doctors to collectively bargain for their conditions or to access the Queensland Industrial Relations Commission for arbitration of disputes and unfair dismissal, highlights the deterioration in industrial conditions compared with the situation under MOCA3 and a pre-modern award.

For those doctors who have chosen to remain in the Queensland public health system these factors, among others, have led to reduced morale within the workplace. A recent survey of ASMOFQ's members revealed that 75% of respondents indicated that they believe that the introduction of the SMO/VMO contracts has resulted in a reduction of morale within their department (26.55% said morale was slightly worse, 48.67% said much worse).

Recruitment has also been impacted, with employment warnings issued at the time of the dispute not yet having been retracted. For example, on 14 November 2013 the Courier Mail reported that the New Zealand Association of Salaried Medical Specialists' publication, *ASMS Direct*, advised its members to "steer clear" of Queensland because they could expect "fewer rights, fewer protections and less negotiating strength" in the Queensland public health sector under proposed Newman Government legislation.

(see **Attachment 2** http://m.couriermail.com.au/news/queensland/new-zealand-doctors-warned-off-queensland-health-system/story-fnihsrf2-1226759315122).

Similarly, the Australasian Society for Emergency Medicine advised against "taking up any position within Queensland Health at this stage, nor in the future until the legislation has been rescinded"

(see **Attachment 3** http://www.asem.org.au/index.php/industrial-relations-committee***)***

2.3.2 Resident Medical Officers (RMOs)

RMOs have also had their employment rights curtailed as a result of the IRFW Act provisions. The Award Modernisation process and the non-allowable provisions framework have seen important rights and safeguards stripped from industrial instruments.

Fatigue provisions, as for senior doctors, are one of the more concerning areas where non-allowable provisions may have a direct impact on patient outcomes. Junior doctors are more likely to work

long shifts or antisocial hours on rotating rosters, and provisions regarding fatigue and appropriate rostering practices are essential to include within their award to keep patients safe.

Further, junior doctors are all too aware of what awaits them if or when they rise to the ranks of SMO under the current industrial arrangements in Queensland. ASMOFQ is aware of a number of DITs nearing the completion of training who have elected to move interstate to take up senior employment opportunities in preference to Queensland in the climate of the recent industrial turmoil. As a highly mobile population, if DITs' employee rights are eroded with no prospect of restoration, either during their training or after it, Queensland's public hospitals will continue to experience a drain of high quality RMOs away from the state.

ASMOFQ submits that this situation is nothing short of a crisis in public health. Queensland **MUST** position itself to attract and retain high quality doctors and to provide those doctors with a fulfilling and productive working environment. A failure to achieve these goals will surely preclude this government from achieving objectives postulated in the *Department of Health strategic plan 2014-2018*, being:

1. **Healthy Queenslanders**: facilitate the integration of health system services that focus on keeping patients, people and communities well.
2. **Accessible services**: ensure equitable access to safe, timely and quality health services for all Queenslanders.
3. **Innovation and research**: foster innovation and research that contributes to quality patient care and outcomes, and health system improvement.
4. **Governance and partnerships**: provide effective governance of the health system and engage with key partners to provide health services that are sustainable and value for money.
5. **Workforce**: cultivate an engaged, capable, innovative and efficient workforce

3. THE COMMITTEE SHOULD MAKE A RECOMMENDATION TO SUPPORT THE BILL

ASMOFQ supports the passage of the Bill as it returns a number of important industrial safeguards to our members.

In particular ASMOFQ supports the proposal to reverse the non-allowable provisions of the IR Act (found within Chapter 2A, Part 3 of the IR Act) and to repeal Chapter 15, Part 2 of the IR Act, which deemed ineffective provisions in existing public sector industrial instruments which dealt with non-allowable matters.

For the reasons outlined below, the following non-allowable provisions are of greatest concern to our members:

- encouragement provisions (section 71OB of the IR Act);
- organisational change provisions (section 71OC of the IR Act);
- private practice provisions (section 71OE of the IR Act);
- provisions that would restrict the ability of an employer to offer a high-income guarantee contract to a high-income senior employee (section 170J(d) of the IR Act); and

- workload management (sections 71OK(b) and 71OL(d) of the IR Act).

3.1 Encouragement Provisions and organisational change provisions

The prohibition of "encouragement" and "organisational change" provisions in industrial instruments is nothing short of an attack on industrial democracy. Traditionally awards and collective agreements have contained these types of provisions to allow employees to give practical effect to their freedom to associate and to bargain collectively.

3.2 Private Practice Provisions

The Medicare system provides Australian patients with access to universal health cover, including through the private sector. To ensure the highest quality of services for patients, it is important for Australian public hospitals to be able to offer working conditions that are competitive with the private sector. Part of what makes hospital practice competitive for hospital doctors is the opportunity to participate in private practice arrangements known as Rights of Private Practice (**ROPP**). Participation in properly constructed private practice schemes by medical practitioners can improve access to care for patients by providing them with a choice of private or public care. RoPP also provide an important supplement to hospital revenue that can be invested into patient services and improved facilities.

As noted above, prior to the introduction of the IRFW provisions, Queensland's senior public sector doctors had access to RoPP while enjoying the industrial protections of awards and collective agreements. This was achieved through mechanisms such as clause 4.11 of MOCA3, which provides:

> **4.11 Supplementary/Private Practice Benefits**
> Upon appointment, senior medical officers will be offered a supplementary benefit/private practice option.
>
> Where there is an ability to participate in private practice and the senior medical officer elects to receive the supplementary benefit/private practice payment, it will be a requirement for the senior medical officer to participate in private practice arrangements.
>
> The parties agree that the formulae for calculation of Option A benefits at the date of certification of this agreement will not be varied unless by agreement of the parties. Agreement will not be unreasonably withheld.

However, sections 71OE and 691C of the IR Act effectively stripped RoPP out of existing and future collective industrial instruments.

These sections of the IR Act provide, relevantly:

> **71OE Private practice provision**
> A modern industrial instrument must not include a provision about a private practice arrangement for a medical practitioner.
>
> *Example—*

Clause 4.11 of the *Medical Officers' (Queensland Health) Certified Agreement (No. 3) 2012* is an example of a private practice provision.

691C Particular provisions are of no effect

(1) The following provisions of a relevant industrial instrument are of no effect—
- (a) a contracting provision;
- (b) an employment security provision;
- (c) an organisational change provision;
- (d) a policy incorporation provision;
- (e) an encouragement provision;
- (f) a private practice provision;
- (g) a resource allocation provision.

(2) In this section—

....

private practice provision means a provision about a private practice arrangement for a medical practitioner.

Example—
Clause 4.11 of the *Medical Officers' (Queensland Health) Certified Agreement (No. 3) 2012* is an example of a private practice provision.

(underlining added)

Stripping RoPP provisions from industrial instruments was particularly insidious because it was through this act that the LNP was able to coerce SMOs to accept the HIGCs. Essentially these doctors were given the "choice": sign the contract or lose your RoPP.

3.3 Provisions that would restrict the ability of an employer to offer a HIGCs

Please see Section 4 of these submissions regarding ASMOFQ's objections to the HIGC provisions of the IR Act.

3.4 Workload management

Section 71OK(b) of the IR Act provides that a modern award must not include provisions about workload management. This is a particularly concerning provision in the context of public health, where fatigue and fatigue management are essential elements to ensuring the safety of both patients and staff. The deleterious effects of fatigue have been well documented.

A pertinent and tragic example of the need for effective fatigue management can be seen in regards to the death of Elise Susannah Neville, a 10 year old girl who died at the Royal Brisbane Hospital on 9 January 2002 after falling from a bunk bed. While there were a number of factors involved in Miss Neville's death, the Officer of the State Coroner's (**Coroner**) *Finding of Inquest* (**Findings**) clearly demonstrates that fatigue was one such factor. In that case the doctor who treated Miss Neville was working the 19th hour of a 24-hour shift. Relevantly, the Health Practitioner's Tribunal Report (which was considered at page 13 of the Coroner's Findings) noted:

> (vii) Dr [**X**] must have been fatigued by the hours he was working and must have had a reduced capacity to assess the situation when it presented itself.

(viii) The Tribunal stated "that it seems extraordinary in this day that anyone, let alone someone in a position of such responsibility should be asked to work such long hours and that if this tragedy leads to nothing else, it should lead to the abolition of such brutally long shift hours"

Following this tragic event Queensland Health, to its credit, spend much time and money establishing a fatigue risk management strategy. Features of the strategy were subsequently incorporated into the certified agreement but were effectively removed by the changes to the IR Act.

The insertion of provisions within industrial instruments to ensure that proper fatigue management is upheld as best practice is essential to prevent a recurrence of the mistakes of the past.

4. REVERSAL OF HIGC PROVISIONS

ASMOFQ notes, with disappointment, that the Bill as drafted does not reverse HIGC provisions as they apply to senior health service employees (see section 190(b)(iii) of the IR Act), nor does it address the related provisions contained within the HHB Act.

As outlined above, the former LNP Government's treatment of senior doctors and the coercive manner in which these contracts were forced upon doctors has caused significant and lasting damage to morale and trust in Queensland's public sector health system.

By virtue of section 194 of the IR Act senior doctors' employment rights and safeguards have been stripped. In particular, senior doctors who are subject to a HIGC lost their rights to:

- access the independent umpire QIRC in circumstances of alleged unfair dismissal or unfair contracts;
- collective industrial instruments such as Awards, Certified Agreements; and
- initiate industrial disputation even in circumstances where all other options for resolution have been exhausted;

The only solution is for an underpinning award and agreement to be reinstated to our senior doctors as soon as possible through a legitimate collective bargaining arrangement with the representative union bodies. Indeed this was a key element of the election commitment made by both the ALP and the Katter Party. The move to consider the repeal of Chapter 6A at Committee level is commendable: a recommendation in favour is essential to honour pre-election commitments, restore rights, and reverse the deleterious effects of the Fair Work Harmonisation legislation.

We are reassured to some extent by the Minister's First Reading Speech in which he stated:

> The government is committed to ending unreasonable and unfair contracts for doctors and reinstating the right for all doctors to collectively bargain. We will do this by repealing the LNP's 2013 amendments which mandated contracts for all senior medical officers, SMOs, and precluded SMOs from rights to unfair dismissal under the act. The government will look to make amendments that restore the rights of SMOs to have a say in their industrial conditions and negotiate important changes collectively without the fear of unilateral changes to their contract.

We urge the committee to recommend that the Bill be redrafted to omit these draconian provisions.

5. QUICK PASSAGE OF THE BILL AND TIMING OF REVIEW OF THE RMO MODERN AWARD

In the event that the Bill is redrafted to remove the HIGC provisions, ASMOFQ supports the quick passage of the Bill through Parliament. This is of particular importance in regards to the status and effect of the relevant industrial instruments.

We note that the Bill provides that no new collective agreement can be certified until the relevant underpinning modern award has gone through a final "review phase" of the modernisation process. We understand that the intent of the review phase is to:

- remove the previously mandated clause, and any ancillary provisions;
- return particular provision that were removed through the modernisation process

(see Page 3 of Explanatory Notes)

ASMOFQ supports the general approach to Modern Awards. However, we note with some concern that this approach may cause delays and is already causing uncertainty in regards to our members' industrial rights.

This is because:

- the NED for MOCA3 is **30 June 2015**;
- as noted above, the original Awards that underpin MOCA3 have been repealed in favour of the RMO Modern Award;
- the RMO Modern Award does not apply at any time when our members are covered by MOCA3 (i.e. until a new collective agreement is negotiated and certified);
- we cannot certify a new collective agreement until the RMO Modern Award process is finalised.

In short, the relevant Award has no effect until a new certified agreement is finalised, but we cannot finalise a new certified agreement until the RMO Modern Award is further reviewed.

Given the imminence of the MOCA3 NED, this leaves ASMOFQ and our members in the tenuous position where we must commence negotiating terms and conditions without knowing the form or effect of the industrial instrument into which these terms and conditions will be placed (i.e. will the Award be finalised in time to seek certification of an Agreement or will the negotiated provisions need to be addressed in an administrative documents such as a Health Employment Directive).

Given these circumstances ASMOFQ submits that the Bill should provide for the RMO Modern Award to be one of the first, if not the first, award to undergo this final modernisation process.

6. CONCLUSION

As outlined above, ASMOFQ supports the passage of the Bill with one important amendment, the repeal of Chapter 6A and provisions relating to the HIGC as they pertain to SMOs. Furthermore, the provisions relating to the HHB Act that were amended by the IRFW Act must also be addressed. The passage of the Bill, amended as such, will provide the following benefits to Queenslanders:

- Improved morale within the public health service;
- Improved staff recruitment and retention;
- Improved health service delivery; and
- Improved workplace safety practices.

Yours sincerely

Dr Stephen Morrison
State President, ASMOFQ

Dr Suzanne Royle
State Vice President, ASMOFQ

Dr James Finn
State Secretary, ASMOFQ