

Health Services (Further Amendment) Bill

EXPLANATORY MEMORANDUM

- Clause 1 sets out the purposes of the Bill. The main purposes are to amend the **Health Services Act 1988** ("the Act")—
- to establish the principles for the delivery of public hospital services in Victoria under the new and any future agreement between the State and the Commonwealth for such services; and
 - to enable metropolitan health care networks, public hospitals, registered funded agencies and multi purpose services which are or have been formed following an amalgamation or aggregation of bodies to be eligible to receive benefits from trusts which previously applied in relation to any of the bodies that those networks, hospitals, agencies or services succeeded; and
 - to provide that an order that declares a body to be a multi purpose service may provide for the transfer of assets and liabilities of the former body to the new multi purpose service; and
 - to alter the provision for the removal of directors of metropolitan health care networks.
- Clause 2 is the commencement provision. All of the provisions, except clause 6, are to commence on Royal Assent. Clause 6, which relates to the guidelines for delivery of public hospital services, will commence upon proclamation or on 1 July 1999, whichever is sooner.
- Clause 3 states that the Principal Act that is being amended is the **Health Services Act 1988**.
- Clause 4 inserts a number of definitions in the Act, all of which relate to the amendments relating to trusts.
- "Trust" is given a wide meaning. A trust includes a gift or bequest and any type of trust, whether charitable or non-charitable and includes a discretionary trust under which a

body may be eligible to receive a benefit but in which the body does not have any equitable interest.

The amendments in this Bill regarding trusts apply to trusts which relate to a "former agency" of a body that is created following an amalgamation, aggregation or declaration. The amendments enable a trust in relation to a former agency of a successor agency to be applied in favour of the successor agency. "Former agency" means a body that was at any time—

- a registered funded agency (such as a metropolitan hospital, any other public hospital, a denominational hospital, a community health centre and any other agency registered under section 22 of the Act). Such agencies may be amalgamated under section 65 or 115U of the Act, or may be declared to be a multi purpose service under Part 4A of the Act or, in the case of metropolitan hospitals, in the past could have been aggregated under Division 9A of the Act;
- a body which could be declared to be a multi purpose service under section 115A of the Act or which was deemed to be so declared under section 115V;
- a multi purpose service (which could, for example, be amalgamated under section 115U of the Act);
- a public hospital which was deemed to be a multi purpose service under section 115V of the Act;
- an incorporated institution (such as a public hospital) or a separate institution (such as the Fairfield Hospital or a hospital that is now described as a denominational hospital) within the meaning of the **Hospitals and Charities Act 1958** or any corresponding Act preceding that Act;
- the Cancer Institute and the Cancer Institute Board (which existed under the original **Cancer Act 1958**, prior to the establishment of the Peter MacCallum Cancer Institute as a body corporate).

If any of these bodies have been amalgamated, aggregated or declared to be a multi purpose service under the Act, the **Hospitals and Charities Act 1958** or any corresponding Acts preceding that Act, the amendments apply to any trust under which such a body may be eligible to receive a benefit.

A "successor agency" is a body that is a successor of a "former agency". A body is the successor of a body it replaces if the amalgamation, aggregation, declaration or other change of corporate status occurred under the **Health Services Act 1988** or the **Hospitals and Charities Act 1958** (or any corresponding Acts preceding that Act) and if the relevant Act provided that the new body is, or is deemed to be, the successor of that body or if the new body is deemed to be the "same body" as that body for all purposes or for the purposes of any trust.

A body is to be taken to be the successor not only of the body that it immediately succeeded but also of any earlier bodies which can be traced through the chain of succession as 'ancestors' of that body. This may occur where a previously existing body forms part of the chain of succession leading up to the newly created body as a result of a series of prior amalgamations, aggregations or declarations. For example, bodies A and B may have amalgamated under the **Hospitals and Charities Act 1958** in 1960 to form body C. After the **Health Services Act 1988** replaced the **Hospitals and Charities Act 1958** in 1989, the following may have occurred: body C may have amalgamated with body D in 1995 to form body E and body E may subsequently have been aggregated with bodies F, G and H to become body I. By virtue of the amendments by this Bill, body I is the successor of all of those previous bodies and the trusts in relation to those bodies may therefore be applied in relation to body I. This continues the effect of the now repealed section 30 of the **Hospitals and Charities Act 1958**, which operated until May 1989, in relation to all amalgamations, declarations and aggregations made under the **Health Services Act 1958** from the commencement of that Act (see clauses 8(2), 10, 11(3), 11(5) and 11(7)).

Clause 5 provides that if a trust specifies a purpose of a former agency for which the trust is created, then references to those purposes must be construed as references to a purpose of the successor agency that corresponds with, or is similar to, that specified purpose and the trust must be applied accordingly.

Clause 6 substitutes current section 17AA of the Act. That section currently establishes the medicare principles that were contained in the Medicare Agreement between the State and the

Commonwealth and that applied for 5 years until 30 June 1998. The clause has the effect of replacing those principles with principles contained in any agreement between the State and the Commonwealth that are established as guidelines for the delivery of public hospital services in Victoria.

The clause retains the concept that the principles are not intended to give rise to any legal rights and proceedings.

Clause 7 amends section 40G of the Act. That section restricts the power of the Governor in Council to remove a director of a board of a metropolitan hospital (a health care network) from office to the following grounds: physical or mental incapacity, a finding of guilt for an offence which affects suitability to be a director, absence from all board meetings without leave over a 6 month period or insolvency. This clause amends the section by making these grounds a mandatory basis for removal and by conferring on the Governor in Council a general power to remove, upon the recommendation of the Minister.

Clause 8 amends section 65 of the Act so that a successor agency formed following an amalgamation of registered funded agencies may be entitled or eligible to receive a benefit under a trust in favour of any of its former agencies. This includes the agency that it has replaced and any previous agencies of which it is the ultimate successor following a series of amalgamations, aggregations or declarations (see outline of the meaning of "successor agency" and "former agency" in relation to clause 4).

The Bill achieves this in two separate but complementary ways. First, by providing that the trust will be construed as referring to the successor agency rather than to the former agency and, secondly, by deeming that, for the purposes of any trust, the new agency is the "same body" as the former agencies it replaces. This reflects the effect of the now repealed section 30 of the **Hospitals and Charities Act 1958** (and any corresponding Acts preceding that Act) that a body formed as a result of an amalgamation of other bodies was deemed to be both the successor in law, and also the same body, as each of the bodies it replaced. The amendments by this clause will continue that effect so that, for the purposes of a trust only, a body formed following an amalgamation under section 65 of the **Health Services Act 1988** is the same body as each of the bodies which

formed part of the bodies succeeding that body in the chain of succession. The new body formed as a result of the amalgamation is therefore entitled or eligible to receive a benefit under a trust in respect of which those bodies were entitled or eligible to receive a benefit.

The amendments to section 65 apply from the date the amalgamation order took effect in relation to amalgamations that occurred under that provision before this Bill receives the Royal Assent and to amalgamations after that date. A new agency created as a result of an amalgamation which has already occurred is, for the purposes of any trust, to be deemed to be the same body as the bodies it succeeded. A trust instrument in relation to any of the former agencies of such a new agency is, from the date the order took effect, to be construed as if it were a trust in relation to that new agency (clause 8(2)).

Clauses 9 and 10 make similar amendments to those in clause 8 to sections 65D and 65F of the Act in relation to metropolitan hospitals which were formed from aggregations under section 65C of the Act. (Section 65C no longer applies to future amalgamations of metropolitan hospitals. Section 65 will apply to any future amalgamations involving metropolitan hospitals as they are now a type of registered funded agency.)

The effect of this clause is that, in relation to aggregations that have already occurred, from the date of effect of an aggregation order a new successor agency must be taken to be entitled or eligible to receive a benefit under trusts in respect of any of its former agencies, and trusts instruments are to be construed accordingly.

Clause 11 makes a series of amendments to Part 4A of the Act, which applies to multi purpose services. This clause amends each of the provisions that involve the creation of a multi purpose service or an amalgamation involving, or creating, such a service to ensure that—

- after this Bill receives Royal Assent, an order declaring a body to be a multi purpose service under section 115A may also declare that the new service is the successor in law of the body and that all rights, property and liabilities vest in the service (clause 11(1));

- any entitlement or eligibility of any former agency of the new service to receive a benefit under a trust is conferred on the new service (clause 11 (1));
- the two orders that have already been made under section 115A are to be taken to have had effect as if the assets, rights and liabilities of the respective former agencies of each new multi purpose service are vested in the new service. Each service is also the successor in law of the bodies it succeeds and, from the date each service became the new multi purpose service, is to be taken to have been entitled or eligible to receive a benefit under any trust in respect of any of its former agencies. Any relevant trust instruments are to be construed accordingly (clause 11(2) and (3));
- a body created as a result of an amalgamation under section 115U of the Act is entitled or eligible to receive a benefit under any trust in respect of any of its former agencies. Section 115U applies to amalgamations of registered funded agencies to create a multi purpose service and to amalgamations which involve a multi purpose service. The conferral of that entitlement or eligibility is to apply to amalgamations ordered before and after this Bill receives Royal Assent, and to all trust instruments in relation to the former agencies of bodies created as a result of all such amalgamations (clause 11(4)). In relation to amalgamations that have already taken place, the entitlement or eligibility first arose when the order took effect (clause 11(5));
- each of the three named public hospitals which were deemed to have been declared to be multi purpose services under section 115V are to be taken, from the date the declaration took effect, to be entitled or eligible to receive benefits under any trusts in respect of any of their former agencies (clause 11(6)). From that date the relevant trust instruments are to be construed accordingly (clause 11(7)).

Clause 12 provides that it is the intention of new section 17AA(2) (as substituted by clause 6) and new section 178 (inserted by clause 13) to alter or vary section 85 of the **Constitution Act 1975**.

Clause 13 inserts transitional and savings provisions.

New section 177(1) provides that the amendments made by clause 7 regarding the power to remove directors of boards of

metropolitan hospitals apply to directors appointed in the future and to directors who currently hold office.

New section 177(2) provides that the amendments contained in this Bill relating to trusts apply whether the trust was created before, on or after the amendments receive Royal Assent.

New section 178 contains savings provisions relating to distributions under trusts made prior to the commencement of the amendments relating trusts. This is necessary as the amendments to sections 65, 65D, 65F, 115A, 115U and 115V apply to amalgamations, aggregations and declarations made before this Bill receives Royal Assent and confer an entitlement or eligibility to a benefit under a trust on each new body from the date that the relevant order creating the body took effect (see clauses 8(2), 10, 11(3), 11(5) and 11(7)).

New section 178(1) has the effect of validating any distributions made by a trustee before the commencement of the amendments that were based on the mistaken assumption that a new body formed following an amalgamation, aggregation or declaration was entitled or eligible to receive a benefit that one of its former agencies was entitled or eligible to receive. It also applies to an omission to distribute a benefit in favour of a body that was then in fact entitled or eligible to receive a benefit but that did not receive it because the trustee distributed it to a successor agency of the former agency instead.

New section 178(2) deals with the opposite situation. Where a trustee has already made, or refused to make, a distribution in accordance with the laws at the time that the distribution was made, this provision ensures that a breach of trust does not arise as a consequence of the amendments in this Bill which change the law and which would otherwise make the distribution a breach of trust.

Clause 14 repeals section 22 of the **Miscellaneous Acts (Health and Justice) Amendment Act 1995**. That section is a sunset provision which, if not repealed, would cause Part 4A of the **Health Services Act 1988**, which relates to multi purpose services, to expire in December 1999. Its repeal will enable Part 4A to continue to operate indefinitely.

Clause 15 makes an amendment to the **Charities Act 1958**. Section 2 of that Act sets out the circumstances in which the purposes of a charitable gift may be altered to allow the property to be applied for a similar purpose and requires the trustee administering such a gift to apply the gift according to the altered purpose. This clause clarifies that where the amendments contained in this Bill, or any other enactment, operate on a gift so as to authorise or require application of the property to be made to another body or person, then the trust must not be taken to have failed and the trustee must apply the gift in accordance with the altered purpose. A cy prés application is therefore not required.

Clause 16 provides for statute law revision in the **Health Services Act 1988**.