

**Special Commission of Inquiry (James
Hardie Records) Bill 2004**
New South Wales

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

- (a) to provide for the transfer of the control of records of the Special Commission of Inquiry into the Medical Research and Compensation Foundation (the **Special Commission**) to the Australian Securities and Investments Commission (**ASIC**), and
- (b) to make provision with respect to the use, and admissibility in proceedings, of the transferred records, and
- (c) to facilitate the use of records of the Special Commission held by the Medical Research and Compensation Foundation (the **Foundation**) in certain civil proceedings brought by the Foundation (and certain other bodies and persons) in NSW courts by preventing certain claims of privilege from being brought in respect of the records.

Part 2 of the Bill provides for the statutory transfer to ASIC of the records of the Special Commission to overcome potential procedural impediments to ASIC pursuing efficiently and expeditiously any functions or powers conferred on it by or under the *Australian Securities and Investments Commission Act 2001*, or any other legislation, of the Commonwealth. In the absence of this legislation, the transfer of documents would result in a lengthy process of giving notice to owners of documents and settling any objections to transfer. This may frustrate the expeditious investigation and prosecution of potential offences that have come to light as a consequence of the Special Commission.

Section 23 of the *Special Commissions of Inquiry Act 1983* makes an answer made, or record produced, by a witness to or before the Special Commission who objects to answering the question or producing the document on the ground of legal professional or other privilege or any other ground inadmissible in evidence against the person in civil or criminal proceedings. Part 3 of the Bill includes provisions to overcome the effect of section 23 in this respect and to ensure that such privilege cannot be claimed so as to make such evidence inadmissible in civil proceedings brought by the Foundation and certain other bodies and persons. The Part also provides that certain directions given by the Commissioner of the Special Commission do not apply to prevent or restrict the publication of evidence contained in specified records.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Clause 3 defines certain words and expressions used in the proposed Act.

Part 2 Transfer of records to ASIC

Clause 4 confers on ASIC an entitlement to control of any record that is a document or thing made, kept or received by the Special Commission and that ASIC requests a public office entitled to control the record under the *State Records Act 1998* to provide or make available to it. The clause makes it clear that ASIC may give possession or custody of the record to any other person (whether within or outside New South Wales) for any purpose it considers appropriate. ASIC might, for example, disclose information obtained from such a record to assist a government or

agency such as the US Securities Exchange Commission that is investigating potential breaches of the law of a foreign country.

Clause 5 requires a public office to provide or make available a record of the Special Commission requested by ASIC as soon as practicable after the request is made.

Clause 6 makes it clear that ASIC may retain control of a record provided or made available to it for so long as it wishes but that it may return the record to the control of the public office from which it was obtained at any time.

Clause 7 prevents a person from objecting to the use of a transferred record by ASIC, or to the disclosure of any matter contained in a transferred record, on certain grounds of privilege.

Section 23 of the *Special Commissions of Inquiry Act 1983* limits the admissibility in any NSW civil or criminal proceedings against a person of an answer made or record produced by the witness to or before the Special Commission. Section 31 (2) of that Act makes it an offence to contravene a direction given by the Commissioner preventing publication of evidence given before the Commissioner or of matters contained in documents lodged with the Commission.

Clause 8 makes it clear that a transferred record is to be treated for the purposes of a law of the State as if it were a record that ASIC had lawfully obtained in the performance of its functions or the exercise of its powers under Commonwealth law and that, accordingly, if a record would be admissible in a court under Commonwealth law it will be treated as being admissible in a NSW court. The effect of this is that a record that might be the subject of legal professional privilege and inadmissible under NSW law but for the clause could be admissible despite that claim. The clause preserves the operation of sections 23 and 31 (2) to a limited extent. The clause makes it clear that those sections do not operate to prevent the records from being provided or made available to ASIC or to prevent it from using or publishing those records in connection with the performance of its functions or the exercise of its powers under Commonwealth law.

Clause 9 ensures that a person does not contravene section 21 of the *State Records Act 1998* (which, among other things, makes it an offence to take or send a State record out of New South Wales) by taking any action to transfer a record under the proposed Act.

Part 3 Facilitation of certain civil proceedings

Clause 10 contains definitions for the purposes of the proposed Part.

Clause 11 provides for the Attorney General to make an order declaring the proposed Part to apply to and in respect of proceedings specified in the order. An order may be made only in respect of a special class of proceedings. These are civil proceedings brought by the Foundation, Amaca Pty Ltd or Amaba Pty Ltd or another body or person prescribed by the regulations in which such a party (a **facilitated party**) seeks to adduce evidence of an answer made, or record produced, by a witness to or before the Special Commission.

Clause 12 makes it clear that a record produced by a witness to or before the Special Commission that is in the possession of a facilitated party on the commencement of the proposed Act may be retained and used by the facilitated party.

Clause 13 makes an answer made, or record produced, by a witness to or before the Special Commission generally admissible in evidence. It overrides section 23 (2) of the *Special Commissions of Inquiry Act 1983* to a limited extent so that evidence of an answer made, or record produced, by a witness may be admitted in evidence against the person in civil proceedings to and in respect of which the proposed Part applies. However, this does not apply to an answer made or record produced that may incriminate or tend to incriminate the person. The clause prevents a person from being excused from answering a question or producing a record of the Special Commission in proceedings to and in respect of which the proposed Part applies on the ground of legal professional privilege or that the question or record is privileged

because it may disclose a protected confidence. However, the clause does not otherwise affect the discretion of a court in relation to the admissibility of evidence.

Clause 14 provides that certain directions given by the Commissioner of the Special Commission do not prevent or restrict the publication of certain specified records of the Special Commission for the purposes of proceedings to and in respect of which the proposed Part applies. No action or penalty lies against a person who publishes such a matter in or for the purposes of proceedings to and in respect of which the proposed Part applies on the ground that the person has breached any express or implied obligation (whether or not arising under law) not to disclose the matter.

Part 4 Miscellaneous

Clause 15 is a regulation-making power.