



New South Wales

Special Commission of Inquiry (James Hardie Records) Bill 2004

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.



New South Wales

Special Commission of Inquiry (James Hardie Records) Bill 2004

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New South Wales

Special Commission of Inquiry (James Hardie Records) Bill 2004

No. , 2004

A Bill for

An Act to provide for the transfer of control of records of the Special Commission of Inquiry into the Medical Research and Compensation Foundation to the Australian Securities and Investments Commission; to make provision to facilitate certain civil proceedings taken by that Foundation and others; and for other purposes.

Clause 1 Special Commission of Inquiry (James Hardie Records) Bill 2004

Part 1 Preliminary

The Legislature of New South Wales enacts:	1
Part 1 Preliminary	2
1 Name of Act	3
This Act is the <i>Special Commission of Inquiry (James Hardie Records) Act 2004</i> .	4 5
2 Commencement	6
This Act commences on the date of assent.	7
3 Definitions	8
(1) In this Act:	9
ASIC means the Australian Securities and Investments Commission.	10
Foundation means the Medical Research and Compensation Foundation (ACN 095 924 137).	11 12
James Hardie Special Commission of Inquiry means the Special Commission of Inquiry that was commissioned, by Letters Patent dated 27 February 2004 and 30 June 2004, to inquire into and report on certain matters relating to the establishment of the Foundation.	13 14 15 16
record has the same meaning as in the <i>State Records Act 1998</i> .	17
transferred record means a record that ASIC has control of under Part 2.	18 19
(2) Notes included in this Act do not form part of this Act.	20

Part 2	Transfer of records to ASIC	1
4	ASIC entitled to control of records of James Hardie Special Commission of Inquiry	2
		3
(1)	ASIC is, by force of this section, entitled to control of any record that was made, kept or received by the James Hardie Special Commission of Inquiry that ASIC, in the performance of its functions or exercise of its powers under Commonwealth law, requests a public office entitled to control of the record under section 7 of the <i>State Records Act 1998</i> to provide or make available to it.	4 5 6 7 8 9
(2)	ASIC may give possession or custody, for any purpose it considers appropriate in the performance of its functions or exercise of its powers under Commonwealth law, of any record that it has in its control under this Part to any person, whether within or outside New South Wales.	10 11 12 13
(3)	For the purposes of this section, an entitlement of ASIC to control of a record is an entitlement to possession and custody of the record (including by having it in the possession or custody of some other person whether within or outside New South Wales).	14 15 16 17
	Note. Under section 127 (4) of the <i>Australian Securities and Investments Commission Act 2001</i> of the Commonwealth, the Chairperson of ASIC can authorise the use or disclosure of information ASIC has been given in connection with the performance of its functions or the exercise of its powers to enable or assist a government, or an agency (such as the US Securities Exchange Commission), of a foreign country to perform a function, or exercise a power, conferred by a law in force in that foreign country.	18 19 20 21 22 23 24
5	Public office responsible for records to transfer them to ASIC	25
(1)	The public office entitled to control of a record must provide or make the record available to ASIC as soon as practicable after the request referred to in section 4 is made.	26 27 28
(2)	If the public office has an electronic version of the record concerned it must ensure that an electronic copy of that electronic version is provided or made available to ASIC as soon as practicable after the request for the record is made.	29 30 31 32
6	Retention and return of transferred records	33
(1)	ASIC may retain control of a record provided or made available to it under section 5 for so long as ASIC considers, in relation to the performance of its functions or exercise of its powers under Commonwealth law, that it is desirable to do so.	34 35 36 37
(2)	The public office that provided or made the record available to ASIC must take control of a record ASIC no longer wishes to retain if requested to do so by ASIC.	38 39 40

7 Use of transferred record by ASIC

The provision or making available of a record to ASIC under this Part operates, by force of this section, to prevent any person from objecting to the use by ASIC of the record, or the disclosure of any matter contained in the record to ASIC, on the following grounds:

- (a) that the record is or contains a privileged communication passing between a legal practitioner (in his or her capacity as a legal practitioner) and a person for the purpose of providing or receiving legal professional services or that the use or disclosure of the record or any matter contained in it would be a breach of an express or implied obligation (whether or not arising under law) not to disclose the record or matter,
- (b) that the record was produced to the James Hardie Special Commission of Inquiry under compulsion of law.

8 Use and admissibility in proceedings of transferred records

- (1) A transferred record is to be treated for the purposes of any 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. Accordingly, nothing in any law of the State prevents the use of such a record in any proceedings or renders the record inadmissible if it would be able to be used or would be admissible in proceedings had any law of the Commonwealth applied to or in respect of it.
- (2) In particular, sections 23 and 31 (2) of the *Special Commissions of Inquiry Act 1983* do not prevent or restrict:
 - (a) the provision or making available to ASIC of any record under this Part, or
 - (b) the publication or use by ASIC of a transferred record, or of matter in or referred to in a transferred record, in connection with the performance of its functions or the exercise of its powers under any Commonwealth law.

Note. Section 23 limits the admissibility in any NSW civil or criminal proceedings against a person of an answer made or book, document or writing produced by the person as a witness to or before the James Hardie Special Commission of Inquiry. Section 31 (2) 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.
- (3) Except as provided by this section, nothing in this Part affects the operation of section 23 or 31 (2) of the *Special Commissions of Inquiry Act 1983* in relation to the transferred records.

(4) If a question arises with respect to the admissibility of a transferred record in any proceedings before a court in which Part 3.10 of the *Evidence Act 1995* is not applicable, the court may order that the record be produced to it and may inspect the record for the purpose of determining the question. 1
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9 No contravention of section 21 of State Records Act 1998 6

This Part has effect despite section 21 of the *State Records Act 1998*. 7

Part 3	Facilitation of certain civil proceedings	1
10	Definitions	2
	In this Part:	3
	<i>civil proceedings</i> includes interlocutory or similar proceedings but does not include proceedings relating to the imposition of a civil penalty.	4 5
	<i>facilitated party</i> means:	6
	(a) the Foundation,	7
	(b) Amaca Pty Limited (ACN 000 035 512),	8
	(c) Amaba Pty Limited (ACN 000 387 342),	9
	(d) any other body or person (whether of the same or a different kind) prescribed by the regulations.	10 11
	<i>NSW court</i> has the same meaning as it has in the <i>Evidence Act 1995</i> .	12
11	Application of Part	13
	(1) The Attorney General may, if the Attorney General considers it appropriate to do so in the public interest, by order published in the Gazette, declare that this Part applies to and in respect of civil proceedings in a NSW court specified in the order.	14 15 16 17
	(2) An order under this section may be made only if a facilitated party advises the Attorney General that it intends to seek to adduce evidence of an answer made, or record produced, by a witness to or before the James Hardie Special Commission of Inquiry in the proceedings concerned.	18 19 20 21 22
	(3) An order or purported order under this section cannot be challenged, reviewed or called into question in any proceedings before a NSW court, and a NSW court cannot prevent any such proposed order from being made.	23 24 25 26
12	Retention and use of records	27
	(1) A record produced by a witness to or before the James Hardie Special Commission of Inquiry in the possession of a facilitated party on the commencement of this Act may be retained and used by the facilitated party for the purposes of proceedings to and in respect of which this Part applies.	28 29 30 31 32
	(2) The use or retention of such a record does not, for the purposes of the <i>Special Commissions of Inquiry Act 1983</i> or any other law, constitute contempt of court.	33 34 35

13	Admissibility and use of certain evidence in proceedings to which this Part applies	1 2
(1)	An answer made, or record produced, by a witness to or before the James Hardie Special Commission of Inquiry is admissible in evidence in proceedings to and in respect of which this Part applies (including being admissible against the person who made the answer or produced the record to or before that Inquiry).	3 4 5 6 7
(2)	Subsection (1) applies even if a person would be excused from answering the question or producing the record:	8 9
(a)	on the ground (whether arising under the <i>Evidence Act 1995</i> or any other law) that the answer to the question, or the record, is or contains a privileged communication passing between a legal practitioner (in his or her capacity as a legal practitioner) and a person for the purpose of providing or receiving legal professional services, or	10 11 12 13 14 15
(b)	on the ground that the answer to the question, or the record, would disclose a protected confidence within the meaning of Division 1A of Part 3.10 of the <i>Evidence Act 1995</i> .	16 17 18
(3)	Subsection (1) applies despite section 23 (2) of the <i>Special Commissions of Inquiry Act 1983</i> but evidence is not admissible under that subsection against a natural person if it may incriminate or tend to incriminate the person.	19 20 21 22
(4)	This section does not operate to render admissible in proceedings to and in respect of which this Part applies evidence that would not be admissible apart from section 23 (2) of the <i>Special Commissions of Inquiry Act 1983</i> and this section.	23 24 25 26
14	Directions preventing or restricting publication of evidence not to apply	27
(1)	Paragraph 2 of the direction given by the Commissioner of the James Hardie Special Commission of Inquiry on 17 September 2004 does not prevent or restrict publication of matters contained in any document referred to in that paragraph in or for the purposes of proceedings to and in respect of which this Part applies.	28 29 30 31 32
(2)	No action or penalty lies against a person who publishes a matter referred to in subsection (1) in or for the purposes of proceedings to and in respect of which this 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.	33 34 35 36 37

Clause 15 Special Commission of Inquiry (James Hardie Records) Bill 2004

Part 4 Miscellaneous

Part 4 Miscellaneous

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15 Regulations

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- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) In particular, the regulations may provide that section 31 (2) of the *Special Commissions of Inquiry Act 1983* does not apply, to the extent specified in the regulations, in relation to a direction given in relation to any particular record or class of records.

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