

Special Commission of Inquiry (James Hardie Records) Act 2004 No 78

[2004-78]



New South Wales

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Provisions in force

The provisions displayed in this version of the legislation have all commenced.

Authorisation

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Special Commission of Inquiry (James Hardie Records) Act 2004 No 78



New South Wales

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.

Part 1 Preliminary

1 Name of Act

This Act is the *Special Commission of Inquiry (James Hardie Records) Act 2004*.

2 Commencement

This Act commences on the date of assent.

3 Definitions

(1) In this Act:

ACCC means the Australian Competition and Consumer Commission established under the *Trade Practices Act 1974* of the Commonwealth.

ASIC means the Australian Securities and Investments Commission.

Foundation means the Medical Research and Compensation Foundation (ACN 095 924 137).

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.

record has the same meaning as in the *State Records Act 1998*.

transferred record means a record that ASIC has control of under Part 2.

(2) Notes included in this Act do not form part of this Act.

Part 2 Transfer of records to ASIC

4 ASIC entitled to control of records of James Hardie Special Commission of Inquiry

- (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 [State Records Act 1998](#) to provide or make available to it.
- (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 the ACCC or any other person, whether within or outside New South Wales.
- (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).

Note—

Under section 127 (4) of the [Australian Securities and Investments Commission Act 2001](#) 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.

5 Public office responsible for records to transfer them to ASIC

- (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.
- (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.

6 Retention and return of transferred records

- (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.
- (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.

7 Use of transferred records

The provision or making available of a record to ASIC, or giving of possession or custody by ASIC to the ACCC or any other person, under this Part operates, by force of this section, to prevent any person from objecting to the use by ASIC, the ACCC or other person of the record, or the disclosure of any matter contained in the record to ASIC, the ACCC or other person, 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, or given into the possession or custody of the ACCC or any other person, 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, or
 - (c) the giving into the possession or the custody of the ACCC or any other person of any record under this Part, or
 - (d) the publication or use by the ACCC or other person of the record, or of matter in or referred to in the record, in connection with the performance of its functions or the exercise of its powers under any 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.

9 No contravention of section 21 of *State Records Act 1998*

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

Part 3 Facilitation of certain civil proceedings

10 Definitions

In this Part:

civil proceedings includes interlocutory or similar proceedings but does not include proceedings relating to the imposition of a civil penalty.

facilitated party means:

- (a) the Foundation,
- (b) Amaca Pty Limited (ACN 000 035 512),
- (c) Amaba Pty Limited (ACN 000 387 342),
- (d) any other body or person (whether of the same or a different kind) prescribed by the regulations.

NSW court has the same meaning as it has in the *Evidence Act 1995*.

11 Application of Part

- (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.
- (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.
- (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.

12 Retention and use of records

- (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.
- (2) The use or retention of such a record does not, for the purposes of the *Special Commissions of Inquiry Act 1983* or any other law, constitute contempt of court.

13 Admissibility and use of certain evidence in proceedings to which this Part applies

- (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).
- (2) Subsection (1) applies even if a person would be excused from answering the question or producing the record:
 - (a) on the ground (whether arising under the *Evidence Act 1995* 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
 - (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 *Evidence Act 1995*.
- (3) Subsection (1) applies despite section 23 (2) of the *Special Commissions of Inquiry Act 1983* but evidence is not admissible under that subsection against a natural person if it may incriminate or tend to incriminate the person.
- (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 *Special Commissions of Inquiry Act 1983* and this section.

14 Directions preventing or restricting publication of evidence not to apply

- (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.
- (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.

Part 4 Miscellaneous

15 Regulations

- (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.

16 Savings and transitional provisions

Schedule 1 has effect.

Schedule 1 Savings and transitional provisions

(Section 16)

1 Transferred records given to ACCC and other persons

Section 7, as amended by the *Special Commission of Inquiry (James Hardie Records) Amendment Act 2004*, extends to the giving of possession or custody of a record by ASIC to the ACCC or any other person under Part 2 before the commencement of that Act.