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Bill 2003

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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HIH Royal Commission (Transfer of Records) Bill 2003

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23 June 2003

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HIH Royal Commission (Transfer of Records) Bill 2003

Date Introduced: 18 June 2003

House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent

Purpose

The purpose of this Bill is to put in place arrangements to facilitate the transfer of information across from the HIH Royal Commission to the Australian Securities and Investments Commission (ASIC).

Background

The major companies in the HIH Insurance Group (HIH) were placed in provisional liquidation on 15 March 2001. The collapse of HIH is likely to be the largest corporate failure in Australia to date. The losses and hardship inflicted on the Australian community by this corporate failure have been significant and have been a contributing factor to the current insurance crisis. The liquidation process could take up to ten years and the financial return to creditors is expected to be negligible.

The suspicions about a serious level of corporate mismanagement within HIH saw the appointment of a Royal Commission in August 2001. The Royal Commission's report (the Report) was publicly released on 16 April 2003.

The Report recommended that 56 possible breaches of the *Corporations Act 2001* and the *New South Wales Crimes Act 1900* be referred to either ASIC or (in a small number of cases) the New South Wales Director of Public Prosecutions for further investigation. Since this time, the Government has referred all 56 possible breaches of the law to the relevant authorities. The 2003 Federal budget allocated an extra \$28.2 million over the next two years to ASIC to fund a taskforce to investigate and pursue charges.

The Explanatory Memorandum to the Bill states that:

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

The HIH Royal Commission (Transfer of Records) Bill 2003 provides for the transfer of custody of certain records of the HIH Royal Commission (the Royal Commission) to the Australian Securities and Investments Commission (ASIC).

Subsection 22 of the *Archives Act 1983* states that the Commonwealth is entitled to the possession of records of a Commonwealth Royal Commission. The Act deems these records to be Commonwealth records.

Subsection 22(3) gives the Minister the discretionary power to determine who retains custody of the records. As a result of the High Court decision in *Johns v Australian Securities Commission*¹ if the Minister decides that custody in the records is to be transferred, the Minister must notify the person who originally provided the records to the Royal Commission that custody in the records is being transferred. The Minister must consult with the person to determine whether they object to the transfer. It is the discretionary nature of the Minister's power in subsection 22(3) which leads to the need to consult.

Therefore, as a result of this decision, any documents of a Royal Commission that vest in the Commonwealth can only be transferred to a particular agency once the Commonwealth has gone through the process of giving notice to owners of documents and settling any objections to the transfer.

To overcome this procedural requirement in relation to the HIH Royal Commission, the Bill contains a series of provisions, which state that custody in HIH Royal Commission documents will automatically vest in ASIC. This removes the discretionary power of the Minister to determine custody and hence the need to consult with the original owners of the document.

The Bill puts in place arrangements for ASIC to make use of the records and states that elements of confidentiality, any associated legal professional privilege and protection against self incrimination are maintained.

Main Provisions

Transfer of information

Transfer of paper records

Clause 4 of the Bill facilitates the transfer of the HIH Royal Commission records to ASIC by stating that by force of the section, ASIC gains custody of records that were produced to the Royal Commission and which subsequently have become Commonwealth records (by virtue of subsection 22(2) of the *Archives Act 1983*).

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This proposed amendment does not cover records that were produced by persons employed or retained by the Royal Commission (ie internal Royal Commission documents).

The transfer is to take place as soon as practicable following commencement of the Bill.

Transfer of electronic records to ASIC

Clause 5 of the Bill also facilitates the transfer of HIH Royal Commission electronic records to ASIC. **Clause 5** states that by force of the section ASIC will gain custody of an electronic version of documents or things produced to the Royal Commission, and which have subsequently become Commonwealth records (by virtue of subsection 22(2) *Archives Act 1983*).

Other records

The Bill in **clause 6** also makes provision for the transfer to ASIC of other HIH Royal Commission records that are not covered by clauses 4 and 5 of the Bill. Clause 6 is a regulation making power and it states that regulations can be made to allow for the further transfer of records that remain in possession of the Commonwealth.

Use of transferred records

ASIC's use of the transferred records is limited by the Bill. **Clause 7** states that ASIC will only be able to use the records transferred under the Bill in the course of performing its functions and exercising its powers under the ASIC Act.

Confidentiality

Section 127 of the *Australian Securities and Investments Commission Act 2001* deals with confidentiality of information held by ASIC. Section 127 states that ASIC must take all reasonable measures to protect from unauthorised use or disclosure, information that is 'protected information'.

'Protected information' is defined in section 127 and essentially refers to information and documents, relating to a person or body regulated by ASIC, which has been given to or obtained by ASIC in accordance with section 12A.

The Bill in **clause 7** deems that the Royal Commission information transferred to ASIC by this Bill is 'protected information' for the purposes of section 127 of the ASIC Act. Accordingly ASIC must take all reasonable measures to protect the information against unauthorised use or disclosure.

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Retention of records

Clause 7 of the Bill states that ASIC is able to retain the transferred records for as long as it considers it desirable for the purpose of exercising its powers and functions.

Self incrimination

Witnesses appearing before the HIH Royal Commission can be compelled to give evidence even where that evidence is self incriminating.² Witnesses are protected from direct use of that evidence against them by section 6DD of the *Royal Commissions Act 1902* which provides that no evidence given to a Royal Commission, may be used against the witness who gave it.

The Bill in **clause 8** makes it clear that section 6DD of the *Royal Commissions Act 1902* continues to apply to records of the Royal Commission that are transferred to ASIC.

Legal Professional Privilege

Legal professional privilege has been described in the following manner:

Legal professional privilege is a substantive general principle of the common law under which a person is entitled, subject to defined qualifications and exceptions, to preserve the confidentiality of statements and other materials which have been made or brought into existence for the dominant purpose of the person seeking or being furnished with legal advice or legal services by a practising lawyer or for the dominant purpose of preparing for existing or anticipated judicial or quasi-judicial proceedings³

Clause 9 of the Bill states that any right to claim legal professional privilege over records that have been transferred to ASIC will remain if once the records have been transferred to ASIC and if ASIC seeks to use these records

Concluding Comments

This Bill puts in place arrangements so that information collected during the course of the HIH Royal Commission, can be expeditiously transferred across to ASIC, to assist ASIC in the course of their investigations into HIH.

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Endnotes

- 1 1993 CLR 408.
- 2 *Royal Commissions Act 1902*, section 2,3 and 6A.
- 3 *Halsburys Laws of Australia*, volume 16, Butterworths, 1997, p. 462, 424.

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