Mutual Assistance in the Commonwealth

COMMISSIONS OF ENQUIRY SITTING IN OTHER JURISDICTIONS

Memorandum by the Government of Australia

(A) INTRODUCTION: GENERAL

1. This paper will confine itself to inquiries established by federal Royal Commission and not deal with lesser statutory inquiries or administratively established inquiries. Federal Royal Commissions are established under both Royal prerogative and the federal Royal Commissions Act 1902, s.18 However, all Commissions rely on their statutory powers and protection under the Act.

2. Australia is a federation and all States have legislation enabling inquiries to be conducted by a Commissioner appointed pursuant to Letters Patent issued by a State Governor. NSW: Royal Commissions Act 1923; QLD Commissions of Inquiry Acts 1950 to 1954; SA Royal Commissions Act 1917-1982; TAS Evidence Act 1910, ss.13A-22; VIC Evidence Act 1958 Part 1, Div 4A; and the WA Royal Commissions Act 1968. However, it is not an uncommon occurence in Australia for State Governments to participate with the Federal Government in the establishment of joint Commonwealth/State Royal Commissions. This is brought about the issue of complementary Letters Patent by the Governor-General and a State Governor and if the subject matters of such a joint inquiry include matters which fall within the legislative powers of both State and the Commonwealth the terms of reference given by the State and the Commonwealth may be the same or similar. This results in the Commission having powers which the Commonwealth's Royal Commissions Act confers on the Royal Commission and in areas outside Commonwealth power, the Commission is reinforced with powers which the Acts of Parliament of participating States confer. For example, the Royal Commission of Inquiry into Drug Trafficking which reported in 1983 was issued with Letters Patent by the State Governments of New South Wales, Queensland and Victoria complementary to those issued by the Commonwealth.

3. A Royal Commission's functions are to inquire into a matter and report to the the executive government. Its findings are only in the nature of recommendations which the executive government may accept or reject. While the Royal Commission Act empowers Royal Commissions to compel attendance of witnesses and the giving of evidence on oath or affirmation, and prescribes offences to encourage co-operation with and respect for Royal Commission proceedings. Royal Commissions are not courts -inasmuch as their conclusions do not determine or alter rights or liabilities. Offences referred to are tried by courts and not by the Commission (except in relation to an offence of contempt of the Commission where the Chairman of the Commission is a judge - there is some doubt as to the constitutional validity of the provision as it would appear to offend against the separation of powers entrenched by Chapter III of the Australian Constitution. A jurisdiction to try and punish offences created by federal law clearly involves an exercise of the judicial power of the Commonwealth and under the Constitution this power is only exercisable by the courts listed in s.71 of the Constitution).

4. Although Royal Commissions are not courts, the taking of evidence on oath or affirmation such as they are empowered to do is generally recognised as a court-like activity, for a Commission, having been appointed by the Australian Government, to engage in this activity in a foreign jurisdiction would at the least be a breach of comity and most likely also be a breach of local law - such as a law preventing unauthorised persons from administering oaths to take evidence - if it purported to operate in another country without authorisation by the Government of that country.

5. In fact, because of the trans-national nature of the subjects of some recent Royal Commissions, the Royal Commissions Act was amended in 1982 to permit Royal Commissions, for the purposes of preparing their reports on their inquiries, i.e., for the purposes of Australian law, to use evidence taken overseas by different methods -

in the court of an inquiry commissioned by the overseas country; and

the taking of evidence on oath pursuant to arrangements with the foreign country.

The Act enables Australian Royal Commissions to function in a foreign country where appropriate arrangements in that regard have been made with a foreign country on the basis of either taking evidence pursuant to an authority issued under the law of the foreign country or pursuant to its Australian Commission.

(B) INQUIRY UNDER LOCAL LAW OF A FOREIGN COUNTRY

6. The Royal Commissions Act, s.78, provides that where by Letters Patent a commission to make inquiry into and report upon matters has been issued to a person and an authority to inquire into and take evidence in relation to significantly related matters is issued under a law of another country to that person, information obtained or evidence taken in that other country may be used for the purpose of the Commission in Australia. For this to occur, however, the Commonwealth Attorney-General must be of the opinion that the matters to be inquired into are the same or substantially the same or are significantly related and that Australia and the other country concerned must have made certain arrangements in relation to the matters.

7. These provisions were enacted in response to the fact that in some instances, there would be considerable benefit to a Royal Commission in its inquiry into the matters specified in its terms of reference which have transnational significance, if arrangements could be made for the taking of evidence, in a formal sense, in a foreign country. This situation arose in the Royal Commission of Inquiry into Drug Trafficking by Mr Justice Stewart. In that particular instance, the matters under inquiry had close connection with New Zealand. It was considered by the Royal Commission that there was a large body of material of interest to the Commission which would not normally be made available on a voluntary basis. Some of the persons under investigation were residents of New Zealand and therefore outside the Commission's jurisdiction and use had been made of financial institutions in New Zealand which were not subject to the Commission's power to require the production of documents and other information. The Royal Commissioner therefore indicated the desirability of some form of Commission being issued to him by the New Zealand Government which would permit the calling of evidence and the production of documentary material in that country, in aid of the Commission's Australian terms of reference.

8. Following inter-governmental consultations, the New Zealand Government appointed the Australian Royal Commission of Inquiry into Drug Trafficking as a Commission of Inquiry under the New Zealand Commissions of Inquiry Act 1908. This enabled the Commissioner to extend the scope of his inquiry from Australia to New Zealand and in particular enabled him to compel the appearance of witnesses living in New Zealand and also to conduct hearings in that country. The New Zealand part of the inquiry was required to comply with the New Zealand statute and case law by the Letters Patent issued to it by the New Zealand Government. This was the first occasion upon which a Royal Commissioner appointed pursuant to Letters Patent issued in Australia had also been issued with Letters Patent by the Government of another country,

(C) TAKING OF EVIDENCE OVERSEAS BY ARRANGEMENT WITH AN OVERSEAS COUNTRY

(1) Taking of Evidence on Oath

9. A Royal Commission which has not been granted an authority to undertake an inquiry or take evidence under a law of a foreign country can only take evidence in a foreign country if arrangements have first been made for that purpose between Australia and the foreign country. This is because, under the Royal Commissions Act 1902, the power to take evidence outside Australia is limited to the circumstances specified in s.78 of the Royal Commissions Act.

10. Section 78 states that where by Letters Patent, a Commission has been issued to a person or persons under the Act and arrangements have been made between Australia and the foreign country in relation to the taking of evidence in that country by the Commission, the Commission may, in that country, subject to any provision of the arrangements and to the laws of that other country, administer an oath or affirmation to any person appearing as a witness before the Commission and take evidence given by that witness on oath or affirmation. Any evidence taken in that country by the Commission in accordance with those arrangements can be used by the Commission in Australia for the purpose of the performance of any function, or the exercise of any power, under the commission.

11. The question of what precisely is the nature of the arrangements contemplated by the provisions is not certain. While a treaty would not be required, it seems that some formal exchange between Governments setting out in detail what is proposed is called for. In the past, the Australian Government has arrived at these arrangements by an exchange of letters or other appropriate correspondence by Ministers of the respective Governments. (An example of these arrangements was the approval of the British Government for the Royal Commission into British Nuclear Tests in Australia to hold sittings in the United Kingdom).

12. It should be noted that S.78 makes the powers of the Commission 'subject to the laws of (the) other country'. For example, the administration of an oath or affirmation by a Royal Commission, but not the taking of the evidence, could be an offence under the laws of the foreign country. In the Royal Commission into the British Nuclear Tests in Australia, evidence was taken on oath in the United Kingdom because the UK Consular Relations Act 1968 enabled the Royal Commission to administer oaths for the purposes of taking evidence in the United Kingdom where an Australian diplomatic or consular officer had been authorised under Australian law to administer an oath or affirmation for the Royal Commission. That authorisation can be given under the Royal Commissions Act. Section 10(1) of the Consular Relations Act 1968 provided as follows:

> '10.(1) A diplomatic agent or consular officer of any State may, if authorised to do so under the laws of that State, administer oaths, take affidavits and do notarial acts
>
> (a) required by a person for use in that State or under the laws thereof;'

(a) Liability of witnesses for false evidence etc.

13. Without foreign legislation authorising it, a person could not be served with a summons under the Royal Commissions Act 1902 to appear before the Commission in the foreign country. Hence the offence provisions of that Act concerning failure to attend pursuant to a summons (s.3) would not apply and s.6 (refusing to be sworn to give evidence) would be irrelevant since the person appearing could simply discontinue his appearance.

14. However, although the matter is not free from doubt, it is considered that the offence provisions of the Royal Commissions Act do have extra territorial application in foreign

countries. Therefore, provided the Royal Commission proceedings had been duly authorised in accordance with s.78 of the Royal Commissions Act (see above), the other provisions creating offences by witnesses (e.g. s.6H on knowingly giving false or misleading evidence and s.60 on contempt) would apply and a person could be prosecuted in Australia for any offence against those proceedings.

(b) Immunity of foreign citizens in giving evidence

15. A major policy issue that gives rise to it in the conduct of an inquiry in a foreign country is the question whether citizens of that country who gave evidence to the Royal Commission should be open to prosecution in Australia for alleged offence against the Royal Commissions Act if they subsequently enter Australia. Assurances may be sought by the foreign government that there will not be proceedings instituted in respect of alleged offences committed by foreign citizens arising out of the presence of the Royal Commissions in the foreign country (The British Government sought such assurances for witnesses appearing before the Royal Commission on British Nuclear Tests in Australia when sitting in the United Kingdom.

16. On the one hand it would be disadvantageous to a Royal Commission if the prospect of immunity for false statements encouraged persons who gave evidence to the Royal Commission to feel that they were not bound to tell the truth before the Commission and for the Commission thereby to be hampered in its inquiries. There is the policy of most countries that persons should, where appropriate, be prosecuted for offences such as perjury. However, in certain particular circumstances the Australian Government has recognised that there are countervailing policy reasons for granting immunity which relate to the need for a Royal Commission to be able, so far as is possible, to get to all the facts concerning the matter in which it is charged with inquiring. That is, the possibility of prosecution in Australia of a citizen of a foreign country for false evidence given in a Royal Commission, if that person travelled to Australia, could be a major barrier to obtaining useful evidence relating to matters under inquiry. Another policy consideration is whether the Australian Government should as a matter of policy prosecute in Australia foreign citizens for conduct in their own country, albeit before an Australian Royal Commission sitting in that foreign country.

17. It would appear that the options open to the Australian Government are:

(a) a decision not to prosecute or a direction to the responsible prosecuting agency not to undertake such a prosecution;

(b) the giving of an indemnity by the Attorney-General (first law officer) to a person who might be prosecuted should the situation arise; or

(c) to have the Royal Commission receive material from witnesses on an informal basis and for evidence not to be taken on oath or affirmation.

18. It has been our experience that in some instances it is necessary for the Australian Government to give an undertaking that citizens of the foreign country are to be immune from prosecution in Australia for offences against a Royal Commission sitting in that foreign country. The Commonwealth Attorney-General has power to give a direction under s.8 of the Director of Public Prosecutions Act 1983 to the Director of Public Prosecutions, (an office established by federal legislation to carry out prosecutions of offences against a Commonwealth law such as ss.6H and 60 of the Royal Commissions Act. Where the Attorney-General does give such a direction, he must publish in the Gazette and table in Parliament a copy of the instrument within 15 days of its issue. Since the commencement of the DPP Act, no such direction has been given.

19. The problem with option (b) is that it is difficult for the Attorney-General to give an indemnity at the stage where consultations are taking place between Governments and no

evidence has been taken so that the persons who may be given an indemnity and the conduct for which they are to be indemnified is not known. It is also uncertain whether an indemnity given by the first law officer could extend to prosecutions brought by private individuals. (see s.10 of the Royal Commissions Act). However, under s.9(5) of the Director of Public Prosecutions Act, the Director of Public Prosecutions may take over a proceeding that was instituted or is being brought by another person where that proceeding was for the commitment of a person for trial in respect of an indictable offence against a law of the Commonwealth or was for the summary conviction of a person in respect of an offence against a law of the Commonwealth. He may then decline to carry on those proceedings further.

20. The problem with option (c) is that the Royal Commission may argue that the greatest value to the Royal Commission would be obtained from evidence which is sworn and that sanctions for false or misleading evidence or for contempt of the Royal Commission which apply to persons giving evidence in Australia should also apply to foreign citizens giving evidence to the Royal Commission.

21. A consideration which needs to be taken account of in this matter is whether the foreign country's legislation could be used to apply sanctions to its citizens who give false evidence to the Royal Commission. For example in the United Kingdom it would appear that the Perjury Act 1911 (UK) would apply to evidence given to an Australian Royal Commission sitting in that country.

22. The Australian Government has taken the view, on one occasion, that it would not wish, for reasons of comity, for there to be prosecutions in Australia in respect of alleged offences committed by the foreign country's citizens arising out of the presence of a Royal Commission in a foreign country.

(2) Taking of evidence informally

23. Where the foreign government does not agree to a Royal Commission taking evidence on oath in their country or to administering oaths under Australian law to the residents of that foreign country who are affected by the Royal Commission, an alternative approach is for a Royal Commission to undertake a fact-finding visit. This could involve informal interviews with the foreign country's nationals affected who would give information to the Royal Commission on an entirely voluntary basis. These persons could in the course of such interviews, be asked to subscribe to written statements or claims that they may make to the Commission, but this would be done in accordance with the law of the foreign country. It may be also advisable in this regard to offer to the foreign country's officials the opportunity to have an observer present at the Commission's proceedings and should any matters arise which cause them concern, to communicate those concerns immediately to the Australian embassy. (The visit of the Commission of Inquiry into Compensation Arising from Social Security conspiracy Prosecutions to Greece to interview persons who had submitted claims to it was an example of this type of arrangement). It has been our experience that this model for a Royal Commission to take evidence informally is the only available option where the foreign country is concerned that the activities of a Commission in their country would amount to an infringement of their sovereignty.

(3) Considerations Common to Taking Evidence on Oath and Informally

(a) Compellability of witnesses

24 Witnesses may not be compelled in the foreign country to give evidence before the Royal Commission pursuant to s.78 of the Royal Commissions Act, thus compellability would depend on the existence of legislation in the foreign country for that purpose.

(b) Question of protection of Commissioner and witnesses

25. Provided the Royal Commission had been duly authorised under the Royal Commissions Act, the protective provisions of that Act would probably apply in respect of evidence given in the foreign country but only, of course, in so far as Australian law is concerned.

26. A Commissioner, in the exercise of his duty, has the same protection and immunity as a Justice of the High Court. A witness appearing before the Commission has the same protection and is subject to the same liabilities in civil or criminal proceeding as a witness in any case tried in the High Court. A legal practitioner assisting or appearing before a Commission has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.

27. A statement or disclosure made by a witness in the course of giving evidence that is taken pursuant to arrangements for taking evidence with a foreign country is not admissible in evidence against that witness in any civil or criminal proceedings in any court of Australia except in proceedings for an offence against the Royal Commissions Act. (see discussion in paras 18-20).

28. The question of any protection in the laws of the foreign country such as the common law defence of qualified privilege in the case of defamation would need to be assessed. In principle, the giving of evidence to the Royal Commission ought to be held as an occasion of qualified privilege. It is our view that it would be prudent to obtain the advice of counsel experienced in the foreign country laws on defamation, use of evidence in criminal proceedings against the witness, etc.

(c) Where a Royal Commission may sit within a foreign country

29. There may be legal obstacles to sitting in Australian diplomatic consular premises or other premises. This question would need to be cleared with the foreign country's government.

(d) Opportunity for foreign government to be able to present its evidence

30. It is important for a Royal Commission visiting a foreign country and taking evidence by arrangement to make sure that the foreign government is given a full opportunity to place before the Royal Commission any evidence it considers relevant to the inquiry. To facilitate this,it may be advisable that the Royal Commission grant leave to appear to the foreign government. This may also help in obtaining access to documents held by the foreign government. It may be prudent for the Letters Patent to include a requirement that the Commission give right of representation to the foreign government concerned.

(e) Restrictions on evidence by foreign nationals

31. There may be need for action to be taken by the foreign government to enable its citizens to disclose information to a Royal Commission. This could arise where the foreign citizens giving evidence are present or past employees of the foreign government and some type of official secrets legislation is applicable.

(f) Matters that the Royal Commission should address

32. Where the Royal Commission takes evidence on oath or affirmation, witnesses would be examined before it by Counsel assisting the Royal Commission. The Foreign jurisdiction may want the right also to examine witnesses.

(g) Arrangements for foreign documents to be made available to the Royal Commission

33. Where a Royal Commission requests release of a particular document of a foreign country, it may be prudent for the Royal Commission to provide the Foreign government with details of the Commission's grounds for believing that the document is relevant to the inquiry, whether the Commission is preparing to give that document public release or whether it will only be available to members of the Commission and arrangements for the status of the documents at the end of the inquiry, i.e. there may be a need for prior agreement governing the use of the document for purposes other than Royal Commission purposes. It should also be pointed out to the foreign government whether any document released to the Royal Commission which are relevant to any legal actions may be required to be tendered in court proceedings. Questions of privilege to protect the confidentiality of any documents may then arise.

(D) BACKGROUND FAMILIARISATION VISIT BY MEMBERS OF A ROYAL COMMISSION TO FOREIGN COUNTRIES

34. Apart from formal arrangements between Australia and foreign countries for the taking of evidence in foreign countries, a number of Australian Royal Commissions have travelled overseas for the purpose not of taking evidence but of obtaining background information which was pertinent to their inquiries (e.g. the Commission of Inquiry on Australia's Security and Intelligence Agencies, the Commission of Inquiry on the Use and Effects of Chemical Agents on Australian Personnel in Vietnam, the Royal Commission on the Activities of the Federated Ship Painters and Dockers' Union and the Royal Commission of Inquiry into Drug Trafficking).

35. In these instances, the Australian Government contacted foreign governments to make arrangements for members of a Royal Commission to hold discussions with officials and citizens of the foreign country. These arrangements are not made pursuant to the Royal Commissions Act, and the Royal Commission does not hold sittings nor does it take evidence in the foreign country.

(E) FOREIGN COMMISSIONS OF INQUIRY SITTING IN AUSTRALIA

36. Australia has had only very limited experience of foreign governments requesting that their commissions of inquiry be able to take evidence in Australia. Recently, however, Australia acceded to a request from the Papua New Guinea Government for its Commission of Inquiry into Pelair/Air Niugini to be allowed to interview australian nationals in Australia and facilitated access by the Commissioner to Australian authorities. In cases where it is proposed that evidence be taken from Australian nationals by a foreign commission of inquiry, a formal agreement should be entered into between the respective governments and that formal agreement followed by an exchange of correspondence which would govern the terms and conditions upon which the Commission could conduct its inquiries in Australia.

37. It is the policy of the Australian Government not to agree to a foreign Commission having power to compel the attendance of witnesses in Australia. The view is taken that the service, without the consent of the Australian Government, of such foreign process is a breach of Australian sovereignty. The particular concern in this area is that non-compliance with compulsory process usually carries criminal penalties and it is regarded as inappropriate that a foreign government exercise any such powers in Australia. It is noted that there is no statutory basis upon which Australia can offer facilities or assistance to a foreign Commission. In relation to a foreign Commission taking evidence and administering oaths, all States and the Australian Capital Territory have legislation permitting foreign authorities to administer oaths within those jurisdictions, subject to certain conditions. These conditions generally require that the person administering the oath be a judge or that the person, if he is not a judge, first receive the consent of the State Attorney-General or Chief Justice.