PREM 19/264

PART 5

Confidential Filing

Industrial Relations Legislation
The Employment Bill

INDUSTRIAL POLICY

Part 1: May 1979
Part 5: April 1980

PREM 19/264

Referred to	Date	Referred to	Date	Referred to	Date	Referred to	Date
~~17.4.80~~							
~~21.4.80~~							
~~24.4.80~~							
~~15.5.80~~							
~~28/5/80~~							
~~30/5/80~~							
~~4.6.80~~							
~~9.6.80~~							
~~21.6.80~~							
~~2.7.80~~							
~~7.7.80~~							
~~16.7.80~~							
~~(illegible)~~							
~~15.7.80~~							
16.7.80							
ENDS.							

PART 5 ends:-

H. Sec to S/S Emp 16/7

PART 6 begins:-

Tony to Emp 17/7/80.

~~Leighton to NUS~~ (+ ~~S/S Emp Spend~~).

CONFIDENTIAL

QUEEN ANNE'S GATE LONDON SWIH 9AT

16 July 1980

CODE OF PRACTICE ON PICKETING

Thank you for sending me a copy of your minute of 2nd July to the Prime Minister.

As to the Code on Picketing, I believe it essential, if we are to have a generally acceptable draft, for me to consult the police in confidence on it before its publication. It will be better for us to try to hear any thoughts the police may have in private, rather than as part of the public debate that will accompany the Code's publication. I understand that you would be content with this and my officials are, therefore, consulting the police as a matter of urgency though I am afraid this will inevitably take a week or so. I shall write to you again as soon as these consultations have been completed.

I will also need to consider whether there are any points I will need to make in the light of my interest as chairman of the Civil Contingencies Unit.

I am sending copies of this letter to the recipients of your minute to the Prime Minister.

CONFIDENTIAL

The Rt. Hon. James Prior, M.P.

With the Compliments
of
THE LORD ADVOCATE

15 July 1980

LORD ADVOCATE'S CHAMBERS
FIELDEN HOUSE
10 GREAT COLLEGE STREET
LONDON, SW1P 3SL

Telephone : Direct Line 01-212 0515
Switchboard 01-212 7676

CONFIDENTIAL Ind Pol.

Lord Advocate's Chambers
Fielden House
10 Great College Street
London SW1P 3SL

T

Telephone : Direct Line 01-212
Switchboard 01-212 7676

The Rt. Hon. James Prior, M.P.,
Secretary of State for Employment,
Department of Employment,
Caxton House,
Tothill Street,
LONDON SW1.

P. 167

15 July 1980

CODES OF PRACTICE ON PICKETING AND THE CLOSED SHOP

Thank you for sending me a copy of your minute of 2nd July to the Prime Minister.

I have studied the draft Codes enclosed with your minute and, subject to certain minor drafting points which I have raised direct with your officials, I am content with what you propose.

Copies of this letter go to the recipients of your minute.

MACKAY OF CLASHFERN

CONFIDENTIAL

DS

Ind Pol

10 DOWNING STREET

From the Private Secretary

14 July 1980

Dear Richard.

Codes of Practice on Picketing and the Closed Shop

The Prime Minister has now considered your Secretary of State's minute of 2 July, and is content for him to circulate for consultation the draft codes of practice which he enclosed with it. She would be grateful if, at the end of the consultation process and before the codes are finalised, Mr. Prior would circulate to colleagues the main comments which he has received.

I am sending copies of this letter to Private Secretaries to members of E Committee, Ian Maxwell (Lord Chancellor's Office), John Halliday (Home Office), Bill Beckett (Law Officers' Department), Mary Howat (Lord Advocate's Department) and David Wright (Cabinet Office).

Yours ever.

Tim Lankester.

Richard Dykes, Esq.,
Department of Employment.

JS

JU

DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
SWITCHBOARD 01-212 7676

Secretary of State for Industry

10 July 1980

The Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer
HM Treasury
Parliament Street
London SW1P 3HE

Jim Gowrie. R. 11/7

UNION LABOUR ONLY CLAUSES IN COMMERCIAL CONTRACTS

In your letter of 27 May to Jim Prior you invited colleagues to consider what action they might take with nationalised industries and local authorities to make clear the Government's views on this practice.

This is simply to record that I have now written to the Chairmen of those nationalised industries for which I am responsible and to Michael Edwardes, Lord McFadzean and Lord Glenamara. I have drawn their attention to Grey Gowrie's statement in the Lords' debate and to Jim Prior's initiative through the CBI and expressed the hope that they will feel able to support our objectives in this area.

I am copying this letter to the Prime Minister, members of E Committee and the Lord Chancellor.

Yours,
Keith

PS/Mins
PS-SofC
MR MANZIE
MR CROFT
MR Ridley
MR BULLOCK
MR I Lightbown
MR Fairlow
MR Russell
MR Gross
MR Mountfield
DR Needham
MR Kerry
MR CULHAM
(With File).

01-405 7641 Ext. 242-5688
Communications on this subject should be addressed to
THE LEGAL SECRETARY
ATTORNEY GENERAL'S CHAMBERS

ATTORNEY GENERAL'S CHAMBERS,
LAW OFFICERS' DEPARTMENT,
ROYAL COURTS OF JUSTICE,
LONDON, W.C.2.

Our Ref: 400/80/126

10 July 1980

T Lankester Esq
10 Downing Street
SWI

Dear Tim

CLAUSE 17: EMPLOYMENT BILL

You should see the attached copy of a letter of 8 July from Sir John Stebbings in reply to the Attorney General's letter to him of 4 July (which you have).

The Attorney General has asked me to draw to your attention in particular what Sir John says about the disclosure to the press of his letter to the Prime Minister of 18 June. The Attorney General is anxious that the impression should not be given that Sir John "leaked" it.

I take the last paragraph of Sir John's letter as declining the Attorney General's request that his views should be reported to the profession. This was one of the main objects of the Attorney General's letter and I shall now ask him whether he wishes to release it himself or ask Sir John to reconsider.

I am copying this letter, with enclosure, to Richard Dykes at the Department of Employment, who will give it the necessary circulation there, and to Ian Maxwell at the Lord Chancellor's Department.

Yours sincerely

J R Mallinson

J R Mallinson

enc

From SIR JOHN STEVENS

10, NEW SQUARE,
LINCOLN'S INN,
LONDON, WC2A 3QG.
01-242 6041

Dear Michael

8 July 1980

Clause 17, Employment Bill

Many thanks for your letter of 4 July since when I have seen the Prime Minister's letter of 3 July.

Patrick Mayhew and his colleagues very kindly saw me on this subject and I had brief words with the Lord Chancellor. I wish I could say that my fears were allayed. In a sense, it has nothing to do with the approach of HMG and its strategy. The exercise of their political judgment is a matter for them.

My fear is simple, namely that in a great many cases intelligent appreciation of the architect of an industrial dispute will enable him to bring secondary action with all its spin-off consequences into the realm of permissible secondary action and thus prevent any person seeking to rely on Clause 1 from satisfying the second condition precedent to success. I expect, however, it is nearly all academic at least for the time-being.

What concerned me most about this little episode is that it was not my nor, I believe, Peter's intention to enter the public arena at all. Perhaps I am too naive, but I was surprised and a little disturbed to be telephoned by a reliable journalist who reported to me his understanding that a letter which I had written lay on the Prime Minister's desk and in essence precisely what it contained. This was followed by a request to see the letter as he would be writing about it the following day. It was quite obvious that he or one of his colleagues had seen a copy of the letter and I therefore gave him a copy in the hope of ensuring correct reporting.

I only tell you this because it was my last wish to rock the boat but the issue is too important if one has fears not to express them while there appeared to be time.

Cont / .....

Whether anything Peter or I would say now would have any effect on the future, I do not know but certainly it is not easy for us to go public on the subject and of course I am now out of Office.

Yours ever,

Denis

The Rt. Hon. Sir Michael Havers,
Q.C., M.P.,
Attorney General,
Royal Courts of Justice,
London WC2A 2LL.

From, SIR JOHN STEBBINGS

10, NEW SQUARE,
LINCOLN'S INN,
LONDON, WC2A 3QG.
01-242 6041

9 July 1980

Dear Margaret,

Employment Bill

Thank you very much for your letter of 3 July.

The Attorney General wrote to me on 4 July and I enclose a copy of my letter to him of yesterday.

In view of the Lords' proceedings yesterday, the Clause will now stand as drawn.

I realise of course that it was impractical to amend it without bringing it back to the House of Commons and thereby delaying its passage to the Statute Book.

I did have a word informally with the Lord Chancellor and I only hope that my fears prove to be unfounded. It was my last wish "to rock the boat" and had we intended to enter the public arena I suppose we should have written to the Times.

As you know, it would be my last wish to cause any problem to you.

Yours ever,

John

The Rt. Hon. Mrs. Margaret Thatcher, MP,
House of Commons,
London SW1.

From SIR JOHN STEBBINGS

10, NEW SQUARE,
LINCOLN'S INN,
LONDON, WC2A 3QG.
01-242 6041

8 July 1980

Clause 17, Employment Bill

Many thanks for your letter of 4 July since when I have seen the Prime Minister's letter of 3 July.

Patrick Mayhew and his colleagues very kindly saw me on this subject and I had brief words with the Lord Chancellor. I wish I could say that my fears were allayed. In a sense, it has nothing to do with the approach of HMG and its strategy. The exercise of their political judgment is a matter for them.

My fear is simple, namely that in a great many cases intelligent appreciation of the architect of an industrial dispute will enable him to bring secondary action with all its spin-off consequences into the realm of permissible secondary action and thus prevent any person seeking to rely on Clause 1 from satisfying the second condition precedent to success. I expect, however, it is nearly all academic at least for the time-being.

What concerned me most about this little episode is that it was not my nor, I believe, Peter's intention to enter the public arena at all. Perhaps I am too naive, but I was surprised and a little disturbed to be telephoned by a reliable journalist who reported to me his understanding that a letter which I had written lay on the Prime Minister's desk and in essence precisely what it contained. This was followed by a request to see the letter as he would be writing about it the following day. It was quite obvious that he or one of his colleagues had seen a copy of the letter and I therefore gave him a copy in the hope of ensuring correct reporting.

I only tell you this because it was my last wish to rock the boat but the issue is too important if one has fears not to express them while there appeared to be time.

Cont / .....

Whether anything Peter or I would say now would have any effect on the future, I do not know but certainly it is not easy for us to go public on the subject and of course I am now out of Office.

The Rt. Hon. Sir Michael Havers,
Q.C., M.P.,
Attorney General,
Royal Courts of Justice,
London WC2A 2LL.

PMG NOTE 51/80

PRIME MINISTER

CLAUSES 16 and 17 OF THE EMPLOYMENT BILL

Extracts from a letter from The Rt Hon James PRIOR, MP (Lowestoft) Secretary of State for Employment to Mr George Gardiner MP (Reigate) on Sunday 6 July 1980

I think it might be helpful if I took this opportunity to reiterate certain points about the Clause and to clear up certain misconceptions about the Bill which have been voiced recently.

Clauses 16 and 17 represent the Government's considered view of how far it is right and practicable to go in this Bill in restricting secondary picketing and secondary action generally. Clause 16 specifically withdraws immunity from all picketing which does not take place at the picket's own place of work and thus effectively makes all such picketing - including flying-pickets - unlawful.

Clause 17 is concerned primarily with other forms of secondary action - particularly blacking and so-called 'sympathetic' strikes. It means that in future employers will be able to claim the protection of the law against damaging secondary action if they are not themselves party to the original dispute or in a direct and active business relationship with the employer in that dispute. For example the clause will withdraw the present immunity in the following circumstances.

- Where the secondary action is taken by employees of those who are not current suppliers or customers of the employer in dispute;
- where no business is being conducted between the employer in dispute and his suppliers or customers, perhaps because the employer in dispute had been closed down as a result of a total strike by his own employees (as during the recent steel strike);
- where the purpose is to interfere with the business between other companies or to spread the effects of the dispute to other industries on to the community as a whole;
- where the secondary action indirectly disrupts the supply of goods or services between the employer in dispute and his current customer or supplier, for example by interfering with business between the supplier and the employer in dispute.

The Clause reflects the outcome of the extensive consultations on the Working Paper which preceded the drafting and resulted in a considerable strengthening of the original proposals. It was debated for a full day in the House of Commons on 17 April. The principle it embodies is clear and straightforward. Industrial action should have immunity only in so far as it is aimed directly at the business of the employer in the original dispute. This is a principle easily understood in industrial terms and in the vast majority of cases it is employers and trade unionists - not the courts - who will have to apply the legislation. We believe that as drafted this clause will ensure that there is adequate protection against the reckless and indiscriminate secondary action which has rightly occasioned so much public concern.

The amendment to Clause 17 which has been tabled by Lord Orr-Ewing and others may indeed be simpler than our draft, but the policy it embodies is quite different. It would in effect restrict immunity to industrial action by employees of a party to the dispute, that is, to primary action alone. Whatever may be argued for that - and the Green Paper later this year will examine the whole question of trade union immunities - there is no doubt that a total ban on secondary action would conflict with the strong tradition of sympathetic action. It would also give rise to a real danger of a concerted campaign which would make this Bill unworkable. Nothing is more likely to bring the law into disrepute than for it to be flagrantly disobeyed or if the remedies it provides are not used by those people it is designed to help.

It has been suggested that the Bill will in some way 'entrench' or 'enshrine' certain forms of secondary action. But of course it is the existing law which does this. As was spelt out so clearly in the MacShane and Duport Steel cases the present statutes unfortunately confer a virtually unlimited immunity for industrial action, however remote from the original dispute and however slight its connection with it. It is that licence to spread industrial disruption far and wide 'in contemplation or furtherance of a trade dispute' which we are restricting by Clause 17.

Again it has been said that the tests of purpose and of likely effect in subsection 3 of Clause 17 are both 'subjective', in the sense that

the courts will simply rely on the honest belief of the trade union defendant; and that consequently the Clause will easily be evaded as well as setting the courts an impossible task. In fact, the test of 'likely effect' has been drafted so as to make it clear that it is to be treated objectively. It will not be possible for a defendant to ensure immunity merely by declaring that his principal purpose is directly to disrupt supplies going to or from the employer in dispute. Even without the test of 'likely effect', the court would have to satisfy itself that the declared purpose was genuine. But this will be reinforced by the need for the court to reach an objective view of the likely effects. The operation of the clause therefore depends on the interaction of the tests of 'purpose' and 'likely effect'.

It is, of course, quite common for the courts to have regard to the likely effects of a particular course of action when deciding whether to grant an interim injunction. Indeed the granting of an injunction often depends (as in the recent case of Express Newspapers v Keys) on the court's assessment of what damage would otherwise be caused to the plaintiff. We do not believe that Clause 17 will be easily evaded or that it will set the courts an impossible task or ask them to decide questions which are different in kind from those they have been asked to decide in the past.

The Paymaster General's Office
Privy Council Office
68 Whitehall
SW1

8 July 1980

Published Papers

The following published paper(s) enclosed on this file have been removed and destroyed. Copies may be found elsewhere in The National Archives.

House of Lords Hansard, 7 and 8 July 1980, columns 985 – 1146
"Employment Bill"

Signed Wayland Date 13 May 2010

PREM Records Team

Confederation of British Industry
Centre Point
103 New Oxford Street
London WC1A 1DU
Telephone 01-379 7400
Telex 21332
Telegrams Cobustry London WC1

NEWS RELEASE

CBI CONFEDERATION OF BRITISH INDUSTRY

hnd Pol.

P.59.80.PD

CBI believes the first priority is to get the Employment Bill through as soon as possible

The Confederation of British Industry said today that the most important priority was for the Government to press ahead and get the Employment Bill on the Statute book as soon as possible. Sir Raymond Pennock, President, said "The CBI's policy has been all along that the Government should first remedy major abuses, particularly on secondary picketing and the closed shop so that legislation is in existence this winter. It also encourages the use of secret ballots which is important.

"On the question of trade union immunity from the consequences of secondary action, businessmen are divided and many CBI members would have liked the Government to go further. The whole question of trade union immunity is complex and requires further careful study leading to a full and comprehensive debate which should be initiated by the forthcoming Green Paper.

"Meanwhile, the Cabinet has made its judgement that the present Employment Bill is as far as it should go at the moment. The CBI believes that having made that judgement the Government should now stick to its guns. To make major changes in the Bill at this very late stage would be a reversal of the Government's whole approach to legal reform which would damage the chances of the Bill being widely accepted as fair and reasonable. If future changes are found to be necessary in the light of experience, the Government has both the time and the public support to introduce them".

7 July 1980

2

PRIME MINISTER

The Attorney strongly in favour of Clause 17 as it stands

MS

4/7

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL
01-405 7641 Extn 3201

4 July 1980

Sir John Stebbings
President of the Law Society
The Law Society's Hall
Chancery Lane WC2A 1PL

Dear John.

CLAUSE 17 OF EMPLOYMENT BILL

I have seen your letter of 18 June to the Prime Minister and her reply. Peter Taylor has copied to me his letter of 25 June to the Prime Minister, which is to a similar effect.

I endorse what the Prime Minister has said in her letter to you, which I understand has been copied to Peter Taylor.

In particular, although the instincts of both of us as lawyers is to favour a clause drafted in straightforward a manner as possible, as in the case of all legislation, I have to tell you that - given the policy of HMG which I support - I think clause 17 is the best that can be devised.

I am aware that the clause is very complex but that is an unavoidable result of giving clear expression to the policy, which cannot be done in simple terms. I have been closely in touch with the draftsman of the clause and you should know that we have tried to simplify it; but in each case it has become clear that there would be side effects which are inconsistent with the intent; and this has led us to conclude that the work of the draftsman cannot be improved upon within the limits set by the policy.

Having said this I accept that the clause will not yield a clear and predictable conclusion on every set of facts. The circumstances which arise in trade disputes are many and varied and there are bound to be the odd marginal cases where it will not be obvious whether or not there is immunity. There may be litigation and appeals on difficult points but that is not a justifiable criticism of the clause; it will be the result of the interaction of a necessarily complex clause with complex facts. I am satisfied that there is no way of avoiding this within the terms of the policy.

I understand from Jim Prior that he is very worried lest adverse comment by some members of the legal profession may cause reluctance on the part of employers to make full use of the protection which the clause, once enacted, will afford them.

/I share

ROYAL COURTS OF JUSTICE
LONDON, WC2A 2LL

01-405 7641 Extn

I share his concern and can well see that such adverse comment could result in legal practitioners being more cautious in their advice to employers who may seek to rely on the clause than is actually justified by its wording.

I recognise that the decision on whether or not to resort to the clause in particular cases will be a matter for employers alone after they have taken legal advice, but it would be very unfortunate if their decisions were to be influenced, directly or indirectly, by this kind of criticism.

While I respect the reasons which caused you and Peter Taylor to write to the Prime Minister, I believe that the difficulties have been overstated and I hope this letter (with that of the Prime Minister) will allay your fears. It would be most helpful if each of you could now do something to meet Jim Prior's concerns by reporting my views in this letter to your colleagues on the two sides of the profession.

I have copied this to the Prime Minister, the Lord Chancellor, and Jim Prior and Peter Taylor.

Yours &c, Michael.

FILE

VLB

cc IG
Ross
L.Chan
DJM

10 DOWNING STREET

THE PRIME MINISTER

3 July 1980

Dear Mr. Taylor,

Thank you for your letter of 25 June.

I have discussed your letter, and also the letters the President of the Law Society and Mr. Thomas Morison, Q.C. have sent me, with the Lord Chancellor. He has assured me that, in his opinion, Clause 17 of the Employment Bill is adequate. However, he would be very happy to discuss the various points which you and the others have raised. If you would like to have a discussion, perhaps you would get in touch with his office.

Yours sincerely

Margaret Thatcher

Peter Taylor, Esq., Q.C.

RA

VLB

FILE

cc DM
L Chan
PRESS
IG

10 DOWNING STREET

THE PRIME MINISTER

3 July 1980

Dear John.

Thank you for your letter of 18 June.

I have discussed your letter, and also the letters the Chairman of the Bar and Mr. Thomas Morison, Q.C., have sent me, with the Lord Chancellor. He has assured me that, in his opinion, Clause 17 of the Employment Bill is adequate. However, he would be very happy to discuss the various points which you and the others have raised. If you would like to have a discussion, perhaps you would get in touch with his office.

Yours ever

Margaret

Sir John Stebbings

FILE

VLB

cc DJM
PRESS
IG
LCHON.

10 DOWNING STREET

THE PRIME MINISTER

3 July, 1980

Dear Mr. Morison,

Thank you for your recent letter.

I have discussed your letter, and also the letters the Chairman of the Bar and the President of the Law Society have sent me, with the Lord Chancellor. He has assured me that, in his opinion, Clause 17 of the Employment Bill is adequate. However, he would be very happy to discuss the various points which you and the others have raised. If you would like to have a discussion, perhaps you would get in touch with his office.

Yours sincerely,

Margaret Thatcher

Thomas Morison, Esq., Q.C.

CCIG

2

PRIME MINISTER

MJS

3rd July 1980

Dear Prime Minister.

This will be a little late in reaching you, so please forgive me, but I want to thank you for giving our Group the opportunity of stating our case on the Employment Bill.

May I say that so far as I know none of us wants to see the Bill destroyed, but, as we said to you, we should like to see the House of Commons given another chance of debating some of the clauses.

Thank you for listening to us and for giving us your full attention at the end of what must have been another long day for you.

Yours sincerely,

Michael Spens.

1/7

Closed Shop.

Refusal to join because of political affiliations.

Reason for which dismissed.

From Meeting in Lord Chancellor 2/7/80.

2/17

(i) Car component manufacturers.

Overseas customers Zold withdraw their custom.

(ii) Natl Ind.

- all customers
- all suppliers.

(iii) Loss complex.

3 of 8

Fortsetzung → Blockblatt.

"Prepared to go further
as soon opportunity offers."

Meeting with the Prime Minister at the House of Commons at 10 pm on Wednesday 2nd July 1980

The following will be present:

1. Secretary of State for Employment

2. Lord Gowrie

3. Mr Patrick Mayhew QC MP

4. Lord Denham

5. Cross Bench Peers

   Lord Spens (Chairman)
   Lord Harris of High Cross
   Lord Halsbury

6. Independent Unionist Peers

   Lord De L'Isle
   Lord Renton
   Lord Orr-Ewing

CONFIDENTIAL

Prime Minister 1

We think the attached drafts, which are intended for consultation, are pretty good. But in the light of what happened over the secondary action consultation, it would be useful if we asked the Prime to circulate the main comments that he receives. Content?

PRIME MINISTER

CODES OF PRACTICE ON PICKETING AND THE CLOSED SHOP

I intend to publish consultative drafts of these codes as soon as the Employment Bill receives Royal Assent and gives me the statutory authority to do so. The Bill is now unlikely to return to the Commons before the week beginning 21 July so I am thinking of publication of the draft codes around the end of July.

It is most important that the codes should be in operation as early as possible in the autumn and I intend to seek Parliamentary approval for them soon after the summer recess. This will allow only August and September for consultation, which is bound to be criticised as too short. But since I have no statutory authority to publish drafts before the Bill becomes law, we shall have to risk this. As it is, I have taken powers in the Bill to carry out the required consultation with ACAS before the Bill becomes law and have already asked ACAS for any views they wish to give me on preparation of the codes.

I have now prepared the attached draft Codes, in the drafting of which my officials were helped by confidential and informal contacts with the CBI. The Code on picketing explains the law - both civil and criminal - as it affects pickets themselves and also others affected by picketing; and it gives guidance on the conduct and organisation of pickets. The Code on the closed shop gives detailed guidance on the operation of a closed shop, whether it already exists or is to be newly established; and also sets out the matters that industrial tribunals will be expected to take into account in deciding cases of unreasonable exclusion or expulsion from a trade union.

In view of the importance of the issues covered by these two codes, I should welcome any comments that you and colleagues have on the enclosed drafts and on the accompanying papers under cover of which I intend to issue them for consultation. In order to keep to the timetable for publication, I should be grateful to receive any comments by Wednesday 16 July.

I am sending copies of this minute and of the draft codes and covering papers to all members of E Committee, the Lord Chancellor, the Home Secretary, the Attorney General and the Lord Advocate and to Sir Robert Armstrong.

JP
2 JULY 1980

DRAFT COVERING PAPER FOR CODE OF PRACTICE ON PICKETING

Requirements of the Employment Act 1980

1 Section 3 of the Employment Act 1980 gives the Secretary of State power to issue Codes of Practice containing such practical guidance he thinks fit for the purpose of promoting the improvement of industrial relations. On 17 December last year the Secretary of State in introducing the Employment Bill told the House of Commons that, in the absence of comprehensive and effective voluntary guidance, the Government intended to produce a Code on picketing. The TUC have since made clear that they are unwilling to participate in the production of voluntary guidance which takes account of the requirements of the Employment Act 1980. The Secretary of State has accordingly decided to exercise his powers under the Act.

2 The Act requires the Secretary of State, when he proposes to issue a Code, to prepare and publish a draft following consultation with ACAS. Such consultation has taken place and the attached draft Code is being issued pursuant to the statutory requirements of Section 3(2) of the Act. The Secretary of State will be pleased to receive representations on the draft which, under the terms of Section 3(3), he is required to consider. The draft may then be modified by him following any such representations before he lays it before both Houses of Parliament for approval.

Purpose of the Code

3 Since 1906 the law has declared the purpose of picketing to be "peacefully obtaining or communicating information or peacefully persuading any person to work or abstain from working". Under the Employment Act 1980 the law protects someone who pickets peacefully at his own place of work in furtherance of a trade dispute with his own employer from civil proceedings for any interference with contracts which may result.

4 However the law affords protection for those who want to go to work normally. Provided a person remains within the law, he has the right to go about his daily business free from interference by others. That applies just as much to workers involved in a dispute as to anyone else. Every person is free as an individual to decide in a dispute whether or not to go to his work and to come and go as he wishes between his home and place of work. This means that a person has the full protection of the law in crossing a picket line if that is what he wishes to do.

5 It is in the interests of everyone concerned - the pickets themselves, other workers, employers and the general public - that picketing is carried out peacefully and lawfully wherever it takes place. It is essential that the rights and responsibilities of all those who may be involved in picketing or affected by it are clearly understood. Failure to understand the law or to follow simple rules of good practice has led to problems of conflict and disorder on the picket line which could have been avoided. The purpose of this Code is to give guidance on both the civil and criminal law as it affects picketing and on the proper conduct and organisation of pickets.

Closing Date for Representations

6 Views on the contents of the draft Code should be submitted as soon as possible but in any event not later than [ ] to the Department of Employment, Caxton House, Tothill Street, London.

DRAFT CODE OF PRACTICE ON PICKETING

CONTENTS

DRAFT CODE ON PICKETING

A INTRODUCTION

1 The Code is intended to provide practical guidance on picketing in trade disputes for those who may be contemplating, organising or taking part in a picket and for those who as employers or other workers or members of the general public may be affected by it.

2 There is no legal "right to picket" as such but peaceful picketing has long been recognised as being lawful. However, the law imposes certain limits on how and where lawful picketing can be undertaken so as to ensure that there is proper protection for those who may be affected by picketing, particularly those who want to go to work normally.

3 It is a civil wrong, actionable in the civil courts, to try to persuade someone to break his contract of employment or to try to secure the breaking of a commercial contract. But the law exempts from this liability those acting in contemplation or furtherance of a trade dispute, including pickets provided that they are picketing only at their own place of work*. The criminal law, however, applies to pickets just as it applies to everyone else: they have no exemption from the provisions of the criminal law (eg as to obstruction).

4 The Code explains the law on picketing and sets out rules of good practice which will help to avoid the conflict and disorder to which picketing has sometimes given rise.

5 The Code itself imposes no legal obligations and failure to observe it does not by itself render anyone liable to proceedings. But Section 3(8) of the

* subject additionally in cases of secondary action to the limitations described in para 9 below

Employment Act requires any relevant provisions of the Code to be taken into account in proceedings before any court or industrial tribunal or the Central Arbitration Committee.

B PICKETING AND THE CIVIL LAW

6 Section 15 of the Trade Union and Labour Relations Act 1974 (as amended by the Employment Act 1980) provides the basic rules for lawful industrial picketing:

(i) it must be undertaken in contemplation or furtherance of a trade dispute;

(ii) it must be carried out by a person attending at or near his own place of work; or in the case of a trade union official at or near the place of work of a member of his trade union whom he is accompanying on the picket line and whom he represents;

(iii) its only purpose must be peacefully obtaining or communicating information or peacefully persuading a person to work or not to work.

7 Picketing commonly involves persuading employees to break their contracts of employment by not going into work and, by disrupting the business of the employer who is being picketed, interfering with his commercial contracts with other employers. If pickets follow the rules outlined in para 6 they are protected by section 13 of the Trade Union and Labour Relations Act 1974 (as amended)* from being sued in the civil courts for these civil wrongs. These rules are explained more fully in paras 10 to 18 below.

8 These provisions apply in the normal cases where employees picket at their own place of work in support of a dispute with their own employer. Cases may arise, however, where employees picket at their own place of work in support of a dispute between another employer and his employees, for example, where employees at one place are involved in a strike in support of a dispute elsewhere and have mounted a picket line at their own place of work in the course of that strik

*by the Trade Union and Labour Relations (Amendment) Act 1976

9 In such cases the picketing, in order to be protected, must further satisfy the requirements of lawful secondary action contained in section 17 of the Employment Act 1980. (These are explained in detail in Annex A). In practice this means that these pickets will have to target their picketing precisely on the supply of goods or services between their employer and the employer in dispute. If they try to impose an indiscriminate blockade on their employer's premises, they will be liable to be sued in the civil courts.

In contemplation or furtherance of a trade dispute

10 Picketing is lawful only if it is carried out in contemplation or furtherance of a trade dispute. A trade dispute is defined in section 29 of the Trade Union and Labour Relations Act 1974 (as amended). It covers all the matters which normally occasion disputes between employers and workers such as terms and conditions of employment, the allocation of work, matters of discipline and membership or non-membership of a trade union.

Attendance at or near his own place of work

11 A person may picket* lawfully only at or near his own place of work.

12 Except for those covered by paragraphs 13 and 14 below, "at or near his place of work" means the entrance or entrances to the factory or offices at which the picket works. There is no protection for pickets who try to picket on or inside any part of the premises which are the property of the employer. That would constitute trespass.

13 Section 15 of the 1974 Act (as amended by the Employment Act 1980) distinguishes two specific groups of employees :

- those (eg mobile workers) who work at more than one place; and

*in the sense of inducing breaches of contract by picketing

- those for whom it is impractical to picket at their place of work because of its location.

It declares that it is lawful for such workers to picket those premises of their employer from which they work or from which their work is administered. In practice this will usually mean those offices of their employer from which they receive their instructions or pay packet or the depot or garage from which their vehicle operates.

14 Special provisions also govern people who are not in employment and who have lost their jobs for reasons connected with the dispute which has occasioned the picketing. This might arise, for example, where the dismissal of a group of employees had led directly to a strike, or where in the course of a dispute an employer has terminated his employees' contracts of employment because they refuse to work normally. In such cases section 15 declares that it is lawful for a worker to picket at his former place of work. This does not apply, however, if workers have subsequently found a job at another place of work. Such workers may only picket lawfully at their new place of work.

Trade union officials

15 It is often helpful to the orderly organisation and conduct of picketing for a trade union official to be present on a picket line where his members are picketing. Section 15 of the 1974 Act (as amended) therefore makes it lawful for a trade union official to picket at any place of work provided that:

(i) he is accompanying members of his trade union who are picketing lawfully at or near their own place of work; and

(ii) he personally represents those members within their trade union.

If these conditions are satisfied then a trade union official has the same legal protection as other pickets who picket lawfully at or near their own place of work.

16 An official* is regarded as representing only those members of his trade union whom he has been specifically appointed or elected to represent. An official cannot, therefore, claim that he represents a group of members simply because they belong to his trade union. He must represent and be responsible for them in the normal course of his trade union duties. This means, for example, that an official (such as a shop steward) who represents members at a particular factory or factories is entitled to be present on a picket line of members of his union only at that factory or those factories; a branch official (whether a lay official or an employee of the union) only where members of his branch are lawfully picketing; and a national official (again, whether a lay official or an employee of the union) wherever members of his union are lawfully picketing.

17 Trade union officials, may of course, picket lawfully at their own place of work, whether or not their members are also picketing. However, to be entitled to picket at a place of work other than their own, they must satisfy the conditions in paragraph 16.

Lawful purpose of picketing

18 The only purposes of picketing declared lawful by section 15 are:

- peacefully obtaining and communicating information; and
- peacefully persuading a person to work or not to work.

Picketing which is accompanied by, for example, violent, threatening or obstructive behaviour is unlawful. Pickets may seek to explain their case as persuasively as possible, but they have no powers to require other people to stop or to compel them to listen or to do what they have asked them to do. If, even before a picket has put his case, a person decides to cross the picket line he must be allowed to do so. A picket who threatens or intimidates someone or obstructs the entrance to the workplace commits a criminal offence. Not only is he liable for criminal prosecution (see para 23 below), but he may also be liable to be sued for inducing a breach of contract.

* as defined in S.30 of TULRA 1974 (as amended by the Employment Protection Act 1975

Seeking redress

19 An employer or an employee whose interests are harmed by picketing which does not comply with the rules described in paras 10-18 above has a civil law remedy. He may start an action for damages against those responsible and also ask the court to make an order (an injunction) stopping the unlawful picketing.

20 An injunction* will normally be sought against the person on whose instructions or advice the picketing is taking place, but it will usually apply not only to him but to any others acting on his behalf or on his instructions. If a person knows that such an injunction has been made against someone and yet aids and abets him in breaking it, he may be in contempt of court himself and liable to be punished by the court. Thus an injunction can apply to people beyond those named in it, and an organiser of picketing cannot avoid liability by, for example, changing the members of the picket line each day.

*in England and Wales - an interdict in Scotland

C PICKETING AND THE CRIMINAL LAW

21 If a picket commits a criminal offence he is just as liable to be prosecuted as any other member of the public who breaks the law. The immunity provided under the civil law does not protect him in any way.

22 The criminal law protects the right of every person to go about his lawful daily business free from interference by others. No one is under any obligation to stop when a picket asks him to do so or, if he does stop, to comply with the picket's request, for example, not to go into work. Everyone has the right, if he wishes to do so, to cross a picket line in order to go into his place of work. A picket may exercise peaceful persuasion, but if he goes beyond that and tries by means other than peaceful persuasion to deter another person from exercising those rights he may commit a criminal offence.

23 Among other matters it is a criminal offence for pickets (as for others)

- to use threatening or abusive language or behaviour directed against any person, whether a worker seeking to cross a picket line, an employer, an ordinary member of the public or the police;

- to use or threaten violence to a person or to his family;

- to intimidate a person by threatening words or behaviour which cause him to fear harm or damage if he fails to comply with the pickets' demands;

- to obstruct the highway or the entrance to premises or to seek physically to bar the passage of vehicles or persons by lying down in the road, linking arms across or circling in the road, or jostling or physically restraining those entering or leaving the premises;

- to be in possession of an offensive weapon;

- purposely or recklessly to damage property;

- to engage in violent, disorderly and unruly behaviour or to take any action which is likely to lead to a breach of the peace;

- to obstruct a police officer in the execution of his duty.

24 A picket has no right to require a vehicle to stop or to be stopped. His right is limited to asking a driver to stop by words or signals. A picket may not physically obstruct a vehicle, if the driver decides to drive on or, indeed, in any other circumstances. A driver must exercise due care and attention when approaching or driving past a picket line, and may not drive in such a manner as to give rise to a reasonably forseable risk of injury.

Mass picketing

25 Those who take part in mass picketing always run the risk of arrest and prosecution. This is so whenever pickets seek by sheer numbers to stop people going into work or delivering or collecting goods. In such cases the pickets intend not peaceful persuasion but obstruction, if not intimidation. Furthermore, mass picketing will often lead to a breach of the peace.

26 The law does not impose a specific limit on the number of pickets who may picket at any one workplace. But the law does give the police considerable discretionary powers to limit the number of pickets in any one place where they have reasonable cause to fear disorder. If a picket does not leave the picket line when asked to do so by the police he is liable to be arrested for obstructing a police officer in the execution of his duty if the obstruction is such as to cause, or be likely to cause, a breach of the peace. (As to numbers /see also para 33).

D ROLE OF THE POLICE

27 It is not the function of the police to take a view of the merits of a particular trade dispute. They have a general duty to uphold the law and keep the peace, whether on the picket line or elsewhere. The law gives the police discretion to take whatever measures may reasonably be considered necessary to ensure that picketing remains peaceful and orderly.

28 The police have no responsibility for enforcing the civil law. An employer cannot require the police to help in identifying the unlawful pickets against whom he wishes to seek an injunction. Nor is it the job of the police to enforce the terms of an injunction. Enforcement of an injunction on the application of a plaintiff is a matter for the court and its officers. The police may, however, be called on by the court to assist its officers by preventing a breach of the peace.

29 An organiser of pickets should always maintain close contact with the police. Prior consultation with the police is always in the best interests of all concerned. In particular, the organiser and the pickets should seek early advice from the police on where they should stand on a picket line in order to avoid obstructing the highway, and agree with them a limit on the number of pickets.

E ORGANISATION OF PICKETING

Functions of the picket organiser

30 An experienced person, preferably a trade union official who represents those picketing, should always be in charge of the picket line. He should have a letter of authority from his union which he can show to police officers or to people who want to cross the picket line. Even when he is not on the picket line himself he should be available to give the pickets advice if a problem arises.

31 The main functions of the organiser should be:

- to assume responsibility for organising the pickets; for example, where they should stand, how many pickets should be present at any one time, how they should approach those who may want to cross the picket line;

- to ensure that pickets understand the law and that the picketing is conducted peacefully and lawfully;

- to be responsible for distributing badges or armbands to pickets, so that authorised pickets are clearly identified;

- to ensure that employees from other places of work do not join the picket line and that any offers of support on the picket line from outsiders are refused;

- to remain in close contact with his own union office, with the offices of other unions if they are involved in the picketing, and with the police;

- to ensure that such special arrangements as may be necessary for essential supplies (see para 36) or maintenance are understood and observed by the pickets.

Consultation with other trade unions

32 Where several unions are involved in a dispute, they should consult each other about the organisation of any picketing. It is important that they should agree how the picketing is to be carried out, how many pickets there should be from each union and who should have overall responsibility for organising them.

Limiting numbers

33 The main cause of violence and disorder on the picket line is excessive numbers. In any situation where large numbers of people with strong feelings are involved there is a danger that things can get out of control. The number of pickets at the entrance to a workplace should, therefore, never exceed what is reasonably needed to permit the peaceful persuasion of those entering and leaving the premises who are prepared to listen. It will be rare for such a number to exceed 6.

Right of trade unionists to cross picket lines

34 Pickets must respect the right of any individual, including a trade union member, to decide for himself whether he will cross a picket line. A trade union member who decides to cross a picket line should not be subject to any sanctions or disciplinary action by his union. Under section 4 of the Employment Act 1980 crossing a picket line is one of the grounds on which exclusion or expulsion from a union may be held to be unreasonable [See para 53(d) of the Code of Practice on the Closed Shop]

F ESSENTIAL SUPPLIES AND SERVICES

35 Pickets should take very great care to ensure that their activities do not cause distress, hardship or inconvenience to members of the public who are not involved in the dispute. Pickets should take particular care to ensure that the movement of essential goods and supplies and the carrying out of essential maintenance of plant and equipment are not impeded, still less prevented. Arrangements to ensure this should be agreed in advance between the unions and employers concerned.

36 The following list of essential goods and supplies is provided as an illustration but is not intended to be comprehensive:

- supplies for the production, packaging, marketing and/or distribution of medical and pharmaceutical products;
- supplies essential to health and welfare institutions eg hospitals, old peoples' homes;
- heating fuel for schools, residential institutions and private residential accommodation;
- other supplies for which there is a crucial need during a crisis in the interests of public health and safety;
- supplies of goods and services necessary to the maintenance of plant and machinery
- livestock;
- supplies for the production, packaging, marketing and/or distribution of food for animal feeding stuffs.

ANNEX

SECONDARY ACTION AND PICKETING

1 It is lawful for employees who are in dispute with their own employer to picket peacefully at their own place of work. As the Code explains such pickets have immunity from civil actions if in the course of picketing they interfere with contracts.

2 Anyone who contemplates picketing at his own place of work in furtherance of a dispute between another employer and his workers is subject to separate and more restrictive provisions. In such cases picketing must satisfy the requirements of section 17 of the Employment Act 1980 (as set out in paras 3 and 4 below).

3 If such pickets interfere only with contracts of employment then they are protected by the statutory immunity. If, however, they also interfere with commercial contracts, their activities will be immune from civil proceedings only if

(a) their employer is a supplier or customer providing goods or services under contract to the employer in dispute;

(b) the principal purpose of the picketing is directly to prevent or disrupt the supply of goods or services during the dispute between their employer and the employer in dispute; and

(c) the picketing is likely to achieve that purpose.

4 Employees of an associated employer* of the employer in dispute and of suppliers and customers of that associated employer may also picket lawfully at their own place of work if

(a) their principal purpose is to disrupt the supply of goods and services between the associated employer and his supplier or customer;

(b) those goods or services are in substitution for goods or services which but for the dispute would have been supplied to or by the employer in dispute; and

(c) the secondary action is likely to achieve the purpose in (a) above.

5 In practice this means that any picketing by employees who are not in dispute with their own employer must be very specifically targetted

- in the case of customers and suppliers to the employer in dispute, on the business being carried out during the dispute between the customer or supplier and the employer in dispute; or

- in the case of the associated employer, on work which has been transferred from the employer in dispute because of the dispute.

There is no immunity for indiscriminate picketing at customers and suppliers or at associated employers of the employer in dispute.

*Two employers are associated if one is a company of which the other has control or both are companies of which a third has control (S.30(5) of the Trade Union and Labour Relations Act 1974)

DRAFT COVERING PAPER FOR CODE OF PRACTICE ON THE CLOSED SHOP

Requirements of the Employment Act 1980

1 Section 3 of the Employment Act 1980 gives the Secretary of State power to issue Codes of Practice containing such practical guidance he thinks fit for the purpose of promoting the improvement of industrial relations. On 17 December last year the Secretary of State in introducing the Employment Bill told the House of Commons that the Government intended to produce a Code on the closed shop.

2 The Act requires the Secretary of State, where he proposes to issue a Code, to prepare and publish a draft following consultation with ACAS. Such consultation has taken place and the attached draft Code is being issued pursuant to the statutory requirements of Section 3(2) of the Act. The Secretary of State will be pleased to receive representations on the draft which, under the terms of Section 3(3), he is required to consider. The draft may then be modified by him following any such representations before he lays it before both Houses of Parliament for approval.

Purpose of the Code and Government Policy

3 A closed shop is an agreement or arrangement under which employees are required to join a union as a condition of getting or holding a job. The purpose of this Code is to give practical guidance to those concerned in industry with their operation in the light of the relevant provisions of the Employment Act.

4 The publication of this Code does not mean that the Government support the closed shop. The Government remain opposed to the very principle underlying it. That people should be required to join a union as a condition of getting

or holding a job runs contrary to the traditions of personal liberty in this country. The Government have no quarrel with the aim of 100% membership as an objective to be achieved by trade unions voluntarily. What is objectionable is that it should be enforced by a closed shop. We believe that a closed shop damages the image of trade unionism itself.

5 The Government believe that these views are increasingly shared by employers and by many trade unionists. Nevertheless, closed shops are a fact of our industrial life and there are employers and trade unions who believe that such agreements can help create stability in industrial relations. At present upwards of 5 million workers are covered by closed shop agreements. Experience with the Industrial Relations Act 1971 showed that legislation to ban the closed shop simply drives the system underground to the detriment of the individuals covered by it - the very people whose individual rights the Government are trying to protect.

6 What the law can do is to provide safeguards for individuals and remedies against abuses of the closed shop. That is what the Employment Act has been framed to do. This Code explains the relevant provisions and gives advice on good practice by employers and trade unions with a view to ensuring that where closed shops already exist they are operated flexibly and tolerantly, and that where any new closed shops might be established they will be set up only if there is overwhelming support for them amongst those who would be affected.

Closing Date for Representations

7 Views on the contents of the draft Code should be submitted as soon as possible but in any event not later than to the Department of Employment, Caxton House, Tothill Street, London.

CONFIDENTIAL

DRAFT CODE OF PRACTICE ON THE CLOSED SHOP

CONTENTS

A INTRODUCTION

1 The purpose of the Code is to provide practical guidance on questions which arise out of the formulation and operation of closed shop agreements* - that is collective agreements that have the effect of requiring employees as a condition of employment to be members of one or more unions.

2 The Code applies to all employment and to all closed shops whether these are written agreements or informal arrangements which have grown up between employer and union. It applies to closed shops already in existence as well as those which might be proposed for the future.

3 Changes in existing practices and written agreements required to meet the standards set by the Code should be adopted in the light of the Code's general approach - and that of the 1980 Employment Act, which it complements. This is that any agreement or practice on union membership should protect basic individual rights; should enjoy the overwhelming support of those affected; and should be flexibly and tolerantly applied.

4 The Code itself imposes no legal obligations and failure to observe it does not by itself render anyone liable to proceedings. But Section 3(8) of the Employment Act requires any relevant provisions of the Code to be taken into account in proceedings before any court or industrial tribunal or the Central Arbitration Committee.

*Closed shop agreements in the Code are union membership agreements as defined by Section 30 of the Trade Union and Labour Relations Act 1974 as amended in 1976. That definition covers both agreements and arrangements requiring employees to become or remain union members.

B LEGAL RIGHTS OF INDIVIDUALS

5 The statutory rights of individuals in relation to the closed shop are now contained in the Employment Act 1980.

Unfair dismissal or action short of dismissal

6 It is unfair in the circumstances listed below to dismiss an employee for not complying with a requirement to be or become a member of a union. An employee so dismissed has a right of complaint against the employer to an industrial tribunal.*

7 Similarly in these circumstances an employee has a right of complaint to an industrial tribunal if in a closed shop action short of dismissal is taken against him by his employer in order to compel him to be or become a union member.

8 The circumstances in which these rights apply are where

(a) the employee genuinely objects on grounds of conscience or other deeply held personal conviction to being a member of any trade union whatsoever, or of a particular trade union;

(b) the employee belonged to the class of employee covered by the closed shop agreement before it took effect, and has not been a union member since;

(c) the closed shop agreement came into effect for the first time after [September 1st 1980] and has not been approved by a secret ballot of all employees affected showing that at least 80% of those entitled to vote supported the agreement.

*The normal service qualification necessary to make a complaint of unfair dismissal - one year's service - does not apply in the circumstances described below.

9 A complaint of unfair dismissal, or action short of dismissal may be made to an industrial tribunal within a period of three months* after the action complained of. If the dismissed employee's complaint is upheld the tribunal may award compensation. Alternatively or in addition it may make an order requiring the employer to reinstate or re-engage the individual. In a case of action short of dismissal the tribunal may make a declaration that the complaint is well-founded and may award compensation.

Joinder

10 An employer who faces a complaint of unfair dismissal or action short of dismissal , and whose action resulted from pressure put on him by a union or other person calling or threatening to take industrial action because of the complainant's non-membership of the appropriate union, may require the person who has exerted that pressure to be joined as a party to the proceedings. If the tribunal finds the employer's claim well-founded it may make an order requiring that person to pay the employer any contribution which it considers to be just and equitable up to the full amount of any compensation it has awarded.

11 Similar provisions apply where an employer who faces an unfair dismissal complaint claims that he has taken the action against the employee concerned because of a requirement in a contract that employees doing certain work should be members of a union. If the employer has asked the contractor to waive that requirement in respect of the employee concerned but the contractor has refused and the tribunal finds the employer's claim well-founded, it may make an order requiring the contractor to indemnify the employer for the compensation awarded. If the contractor claims that he refused to waive the requirement of union membership in this case because of pressure exerted on him by a union or other person calling or threatening to take industrial action, he may require

*A tribunal may consent to examine a complaint presented outside this period if it considers that it was not reasonably practicable for it to be presented within the period.

the person he claims exercised the pressure to be joined as a party.

Unreasonable exclusion or expulsion from a union

12 The Employment Act 1980 provides individuals with new statutory rights in relation to their unions. Any person who is employed or is seeking employment in a job where it is the practice, in accordance with the closed shop agreement, to require membership of a specified trade union or unions, has the right not to have an application for membership of the union unreasonably refused and the right not to be unreasonably expelled from that union.

13 An individual may present a complaint to an industrial tribunal against a trade union that he has been unreasonably excluded or expelled from that union, within the period of six months* of the refusal or expulsion. Where the tribunal finds the complaint well-founded it will make a declaration to that effect.

14 Where such a declaration has been made by the tribunal, or by the Employment Appeal Tribunal on appeal, the person who made the complaint may make an application for compensation for any loss he has suffered. Such an application may not be made before the end of the period of four weeks following the date of declaration or after the end of the period of six months following the date of the declaration.

15 If at the time of the application the complainant has been admitted or re-admitted to the union, the application shall be to the industrial tribunal which may award compensation to be paid by the union up to a statutory maximum.

16 If at the time of the application the complainant has not been admitted or re-admitted to the union, the application shall be to the Employment Appeal Tribunal which may award compensation to be paid by the union up to a higher

*A tribunal may consent to examine a complaint presented outside this period if it considers that it was not reasonably practicable for it to be presented within the period.

maximum which is also fixed by the legislation.

Common Law Rights

17 The provisions of the Act do not in any way detract from existing rights under common law. A person may complain to the courts that action taken against him by a trade union is either contrary to its own rules or that in expelling or otherwise disciplining him the union did not act in accordance with the requirements of natural justice.

C CLOSED SHOP AGREEMENTS AND ARRANGEMENTS

(a) Before a Closed Shop is Considered

18 Before there is any question of negotiating on proposals for a closed shop, employers and trade unions should take account of the following factors.

Employers

19 Closed shop agreements, like other collective agreements, require the willing participation of both parties. Employers are under no obligation to agree to a closed shop.

20 Employers' associations may be able to appreciate the implications of a closed shop agreement for industrial relations in the industry or locality generally. They should be consulted at an early stage.

21 Employers should expect a union to show a very high level of membership before even entertaining the possibility of agreeing to a closed shop.

22 Employers should acquiant themselves with the legislation (see Section B above). In particular they should be aware that there will need to be a secret ballot of those who would come within the scope of a proposed closed shop.

23 The employer should have special regard to the interests of particular groups of staff who as members of professional associations are subject to their own code of ethics or conduct. Because the obligations imposed by such a code may be incompatible with the full range of union activities including, for example, participation in industrial action, the employees concerned might well reasonably object to joining a union.

24 The employer should also carefully consider the effects of a closed shop on

his future employment policy or industrial relations. It might, for example, impede the flexible use of manpower or limit the field of choice in recruiting new staff.

Unions

25 Before seeking a closed shop a union should already have recruited, voluntarily, a very high proportion of the employees concerned.

26 A union should be sure that its members themselves favour a closed shop. High union membership among those to be covered by the proposed closed shop agreement is not in itself a sufficient indication of their views on this question. Some members may wish to leave the union before the agreement takes effect in order to preserve their future freedom of choice to belong or not to belong to a union.

27 A union should not start negotiations for a closed shop agreement which excludes other unions with a membership interest in the area concerned, before the matter has been resolved with the other unions. If affiliated to the TUC, the union should have regard to any relevant TUC guidance and comply with TUC rules and procedures on such matters.

28 If proposals for a new closed shop agreement become a matter of dispute between employer and union, the issue should be dealt with in accordance with the disputes procedure of the firm or industry concerned. The conciliation services of the Advisory, Conciliation and Arbitration Service will be available.

(b) Scope and Content of Agreements

29 Any new closed shop agreements should be clearly drafted. The agreement should therefore :

a indicate clearly the class of employees to be covered. This can be done by reference, for example, to the grade or location or bargaining unit concerned. An agreement should not necessarily cover all employees at a location or in a grade. Some examples of groups which might well be excluded are professional, managerial, part-time staff, or personnel staff. All exclusions or exemptions should be clearly stated in the agreement.

b make clear that existing employees, and those who can show that they have genuine objections on grounds of conscience or other deeply-held personal conviction to union membership, will not be required to be union members.

c make clear that where an individual has been excluded or expelled by his union, no other action, whether by the union or the employer, will be taken against him before any appeal or complaint regarding the exclusion or expulsion has been determined.

d provide that an employee will not be dismissed if expelled from his union for refusal to take part in industrial action.

e set out clearly how complaints or disputes arising from it are to be resolved It should provide appropriate procedures which give the individual concerned an adequate right to be heard and enable any question about non-membership of a union to be fairly tested. Such procedures can usefully provide for independent arbitration of an individual's objection to union membership.

f provide for periodic reviews (see paragraphs 41-45 below).

30 If the parties agree that an alternative to union membership would be the payment to a charity by individual non-unionists of a sum equivalent to the union membership subscription, the agreement should clearly recognise that such a payment would be voluntary. The agreement between the parties cannot

limit the statutory right of the individuals concerned.

31 Where other unions have a known interest in the area to be covered by the agreement, it may provide for membership of unions other than those actually party to it. Where unions affiliated to the TUC find themselves in a dispute which has not been settled locally, they should refer the issue to the TUC.

(c) Secret Ballots

32 Under the Employment Act 1980 (see paragraph 8(c) above) a secret ballot should be held of those to be included within the scope of any proposed new closed shop.

33 Employers and unions will need to reach agreement on the following aspects of the management of such a ballot:

(a) The proposed union membership agreement

The terms of the proposed agreement should be worked out before it is put to the test of a ballot of those to be affected by it

(b) The definition of the electorate

The electorate should be all members of the class of employee to be covered by the proposed closed shop including those, like existing non-union employees, who will retain a personal right not to join the union, whatever the outcome of the ballot. Where there are different occupational groups with different views on the issue, these should be identified as separate electorates and balloted separately.

(c) Informing the electorate

Notice of the intention to hold a ballot and any relevant information, such as copies of the proposed agreement, should be made available for a reasonable time before the date of the ballot. Suitable arrangements should be made to inform those who might otherwise not have access to such

information due to sickness or absence from work or for other reasons.

(d) The framing of the question

The ballot form should be clear and simple. The question asked should be limited to the single issue of whether or not membership of the union(s) party to the proposed agreement, or otherwise specified in it (see paragraph 31 above), should be a requirement for employees in the class of employment it would cover. If several questions are asked on other issues raised in the ballot, this may confuse the outcome.

(e) Method of balloting

The ballot should be conducted in such a way as to ensure that, so far as reasonably practicable, all those entitled to vote have an opportunity of voting, and of doing so in secret. Either a workplace or a postal ballot may meet these requirements. In the case of a workplace ballot, arrangements should be made for those absent from work for any reason at the date(s) of the ballot to register their vote.

(f) Conduct of the ballot

Before the ballot can be held, decisions will be needed on such matters as the method of distributing the ballot forms and arranging for their return and counting, the time to be allowed for voting, and the persons charged with conducting the ballot. There will clearly be greater confidence in the ballot if it is conducted by an independent body or persons who are also made responsible for publishing the results.

(g) Other matters

Agreement should also be reached in advance on such matters as procedure for handling disputes about eligibility, spoilt votes and any other issues, and the safe keeping of ballot papers until an agreed destruction date.

34 The Employment Act 1980 lays down a minimum level of support for a new closed shop - that is 80% of those entitled to vote - if this is to furnish employers with a defence against possible future unfair dismissal claims or complaints of action short of dismissal. Employers may well feel that a higher figure than this should be required before they agree to such a radical change in employees' terms and conditions of employment. Employers should agree with the union on the figure appropriate in their case before the ballot and make this known to those entitled to vote.

35 Disagreements on arrangements for secret ballots should be dealt with, if necessary, by the normal disputes machinery for the firm or industry concerned. The conciliation services of ACAS will be available.

(d) Operation of new or existing agreements

36 Closed shop agreements should be applied flexibly and tolerantly.

37 Before any potential new employee is recruited he should be told of any requirement to become a union member and any relevant arrangements which apply to the operation of the closed shop.

38 Employers and unions who have negotiated a closed shop, and employees in scope of it, should not impose unreasonable requirements on those who are not parties or in scope of the agreement. A requirement of union membership should not be imposed on the employees of contractors, suppliers and customers of an employer.*

39 Employers and unions should not contemplate any disciplinary action before procedures for resolving disputes and grievances which arise under the agreement are exhausted.

*The Employment Act 1980 provides special provisions for joinder in unfair dismissal cases in this situation. See paragraph 11 above.

40 Employers and unions should take no action against an employee who has been expelled or excluded from a union, until any appeal under union appeal procedures, including those provided by the TUC, has been determined and any industrial tribunal proceedings on the case have been completed.

(e) Review of closed shop agreements and arrangements

41 All closed shop agreements, new or existing, should be subject to periodic review.

42 Reviews should take place regularly every few years, and more frequently if changes of the following types occur:-

(i) changes in the law affecting closed shops, like those of the Employment Act 1980;

(ii) changes in the parties to a closed shop agreement; for example where the business of the original employer is taken over by another;

(iii) a significant change in the nature of the work performed by those covered in the agreement with consequential changes in the occupational structure;

(iv) changes in the composition of the workforce, for example where skills required are altered by substantial technological change;

(v) a substantial turnover of the labour force since the agreement or arrangement was entered into.

43 If in the course of the review the parties decide that they wish to continue the agreement (or informal arrangements) they should consider what changes need to be renegotiated to bring it into line with the requirements of paragraph 29 above. If, however, the agreement is thought no longer to serve the purpose for which it was intended or there is evidence of insufficient support

among those covered by the agreement, the parties should agree to allow it to lapse. As with all collective agreements either party is free, after giving any required period of notice, to terminate the agreement.

44 Where as a result of this review the employer and union favour continuing the agreement or arrangement, they should ensure that it has continued support among the current employees to whom it applies. Where no secret ballot has previously been held - or has not been held for a long time - it would be appropriate to use one to test opinion. In that event the guidance in paragraphs 32-35 above will be relevant.

45 Closed shop agreements which require people to belong to a trade union before they can be employed (the pre-entry closed shop) particularly may infringe the right to work. No new agreements of this type should be contemplated and where they currently exist the need for their continuation should be carefully reviewed.

D UNION TREATMENT OF MEMBERS AND APPLICANTS

46 Union decisions on exclusion or expulsion from membership in closed shop situations should be taken only after all rules and procedures have been fully complied with.

Union rules and procedures

47 In handling admissions unions should adopt and apply clear and fair rules covering:

(a) who is qualified for membership;

(b) who has power to consider and decide upon applications;

(c) what reasons will justify rejecting an application;

(d) the appeals procedure open to a rejected applicant;

(e) the power to admit applicants where an appeal is upheld.

48 Unions should also adopt and apply clear and fair rules covering:

(a) the offence for which the union is entitled to take disciplinary action and the penalties applicable for each of these offences;

(b) the procedure for hearing and determining complaints in which offences against the rules are alleged;

(c) a right to appeal against the imposition of any penalty;

(d) the procedure for the hearing of appeals against any penalty by a higher authority comprised of persons other than those who imposed the penalty;

(e) the right of an expelled member to remain a member so long as he is bona fide pursuing his appeal against the original decisions.

49 Union procedures on exclusion or expulsion should comply with the rules of natural justice which include giving the individual member fair notice of the complaint against him, a fair opportunity ofbeing heard, a fair hearing, and a bona fide decision.

50 Unions affiliated to the Trades Union Congress should bear in mind its guidance on these matters, and inform individuals of the appeals procedure the TUC provides for those expelled or excluded from membership of a union.

51 In general voluntary procedures are to be preferred to legal action and all parties should be prepared to use them. However, where an individual faces considerable economic loss or adverse social consequences as a result of his exclusion or expulsion it would be unreasonable to expect him to defer his application to a tribunal.* Unions should therefore not take action likely to lead to an individual losing his job, until its own procedures have been fully used and any decision of an external body, such as the Independent Review Committee of the TUC, has been received.

52 When determining whom they might accept into membership the factors which unions may reasonably have regard to include the following:

(a) whether the person applying for membership of a union or section of it has the appropriate qualifications for the type of work done by members of the union or section concerned;

(b) whether, because of the nature of the work concerned, for example acting, the number of applicants or potential applicants is so great as to pose a serious threat of undermining negotiated terms and conditions of employment;

*Complaints of unreasonable exclusion or expulsion to a tribunal are subject to a time limit of six months. [See paragraph 13 above.]

(c) whether the TUC's principles and procedures governing relations between unions or any findings of a TUC Dispute Committee are relevant.

Industrial Action

53 Disciplinary action - or the threat of it - should not be taken by a union against a member for refusal to take part in industrial action undertaken by the union

(a) because the action would involve a breach of a statutory duty or the criminal law, would contravene the member's professional or other code of ethics, would constitute a serious risk to public safety health or property, or would be contrary to the union's own rules;

(b) because the action was in breach of a procedure agreement;

(c) because the action had not been affirmed in a secret ballot;

(d) by simply crossing a picket line.

E THE CLOSED SHOP AND THE FREEDOM OF THE PRESS

54 The freedom of the Press to collect and publish information and to publish comment and criticism is an essential part of our democratic society. All concerned have a duty to ensure that industrial relations are conducted so as not to infringe or jeopardise this principle.

55 Journalists, wherever employed, should enjoy the same rights as other employees to join trade unions and participate in their activities. However, the actions of unions must not be such as to conflict with the principles of Press freedom. In particular any requirement on journalists to join a union creates the possibility of such a conflict.

56 Individual journalists may genuinely feel that membership of a trade union is incompatible with their need to be free from any serious risk of interference with their freedom to report or comment. This should be respected by employers and unions.

57 Journalists should not be disciplined by management or trade union for acting in accordance with professional standards.

58 Editors have final responsibility for the content of their publications. An editor should not be subjected to improper pressure - that is, any action or threat calculated to induce him or her to distort news, comment or criticism, or contrary to his or her judgement, to publish or to suppress or to modify news, comment or criticisms. Editors should be free to decide whether or not to join a trade union.

59 The editor should be free to decide whether or not to publish any material submitted to him for publication but shall exercise this right responsibly with due regard for the interests of the readers of the publication, the employment or opportunities of employment of professional journalists, and the agreed policy of the publication.

FILE

Copied to Master Set. VLS

cc D/M Lee Hobbins
LOD Wolfson
LAD Ingham
Gow

10 DOWNING STREET

From the Private Secretary

2 July 1980

At lunchtime today, the Prime Minister had a word with the Lord Chancellor about the amendment to Clause 17 of the Employment Bill which has been proposed by Lord Orr-Ewing, and about the letters which the Prime Minister has received from Sir John Stebbings, Mr. Peter Taylor, Q.C., and Mr. Thomas Morison, Q.C..

The Lord Chancellor said that, while Clause 17 of the Bill was complicated and might have been drafted differently, it was in his view workable, and a satisfactory expression of the policy line that had been agreed. He considered the criticisms of Sir John Stebbings and the other correspondents to be ill founded, and he was opposed to the Orr-Ewing amendment on policy grounds. If it would be of any help, he would be happy to meet Sir John Stebbings and the others to go over their criticisms.

The Prime Minister said that she did not wish to reply to Sir John Stebbings with a point-by-point rebuttal as suggested by the Department of Employment (Richard Dykes' letter of 2 July). Instead, if the Lord Chancellor agreed, she would reply that she had spoken with him, in his opinion Clause 17 was quite adequate, but he would be happy to discuss the various criticisms with them if they so wished. The Lord Chancellor said that he was quite content.

I am sending copies of this letter to Richard Dykes (Department of Employment), Bill Beckett (Law Officers' Department) and Mary Howat (Lord Advocate's Department).

T. P. LANKESTER

Ian Maxwell, Esq.,
Lord Chancellor's Office.

CS

cc LG

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Tim Lankester Esq
Private Secretary
10 Downing Street
London SW1

2 July 1980

Dear Tim,

EMPLOYMENT BILL: CLAUSE 17

You asked for comments on the letters from Sir John Stebbings (18 June), Mr Peter Taylor QC (25 June) and Mr Thomas Morison QC (25 June) on this subject and for draft replies for the Prime Minister to send.

The letters from Sir John Stebbings and Mr Taylor make the same points. They appear to have been written in a personal, not a representative, capacity. They are unclear in a number of respects. For example, both letters seem to confuse picketing (covered by Clause 16) with other forms of secondary action, such as blacking and sympathetic strikes (covered by Clause 17). Their criticism of Clause 17 takes the same line as several recent letters to the Times and presents the case for a quite different policy (namely, limiting immunity to primary action alone) as if it were simply a matter of producing a clearer draft of the Clause. On one point the letter from Sir John Stebbings is plainly wrong; the test of "likely effect" in subsection 3(b) is objective, not subjective. Both letters, while disclaiming any wish to comment on matters of policy, endorse the amendments tabled at Committee Stage in the Lords by Lord Orr-Ewing and others, the effect of which would be to cut immunity back to primary action alone.

The draft reply to Sir John Stebbings has been approved by the Lord Chancellor and incorporates amendments suggested by him. As Mr Taylor's letter makes no additional points, it is suggested that the Prime Minister should reply to Mr Taylor in the terms of the attached draft, enclosing a copy of her letter to Sir John. The draft letter to Sir John Stebbings also takes account of comments just received from the Law Officers.

The letter from Mr Morison contains more detailed points, but he has already raised most of these with Ministers here at earlier stages in the preparation of Clause 17 and we do not believe that his criticisms are well founded. However, the Secretary of State has asked Mr Mayhew to arrange an urgent meeting with Mr Morison to discuss the points in his letter. Accordingly, I enclose a shorter draft reply for the Prime Minister to send to Mr Morison.

The Secretary of State has also asked Mr Mayhew to meet Sir John Stebbings and Mr Taylor later this week in order to explain the Government's approach in this Clause in greater detail before the Report Stage in the Lords next week. So if the Prime Minister approves the draft replies it would be helpful if they could be despatched quickly.

I am sending copies of this letter to the private secretaries to the Lord Chancellor, the Attorney General and the Lord Advocate.

Yours ever

Richard Dykes

R T B DYKES
Principal Private Secretary

DRAFT LETTER FROM THE PRIME MINISTER TO SIR JOHN STEBBINGS, PRESIDENT OF THE LAW SOCIETY

Thank you for your letter of 18 June on Clause 17 of the Employment Bill. This is a very difficult but vitally important matter and I am glad to have this opportunity to explain the policy the Government have adopted towards limiting secondary action and how we expect Clause 17 to operate in practice. Perhaps I may take the points in your letter in the order in which you make them.

First, you refer to the law being held up to public ridicule in the sphere of picketing. I imagine that you are referring in particular to the excesses of secondary picketing which accompanied the strikes of the winter of 1978-79 and of which the more recent Steel and Isle of Grain disputes have afforded further examples. Much that was seen to occur on these occasions was, and remains, contrary to the criminal law already. But it is not the case, as your letter seems to suggest, that the Employment Bill does nothing to tackle secondary picketing. On the contrary, Clause 16 of the Bill specifically withdraws immunity from all picketing which does not take place at the picket's own place of work. It thus effectively makes all picketing other than at the picket's own place of work - including flying pickets - unlawful. Clause 17 is concerned primarily with other forms of secondary action - particularly blacking and so-called "sympathetic" strikes.

Secondly, you ask whether Clause 17 is intended to grant rights or limit immunities. The rights are already available at Common Law provided the immunities are successfully restricted. I am sure that I do not need to point out that it is the present statutes whose implications were spelt out so clearly in the MacShane and Duport Steel cases, which unfortunately confer a virtually unlimited immunity for

industrial action, however remote from the original dispute and however slight its connection with it. It is that licence to spread industrial disruption far and wide "in contemplation or furtherance of a trade dispute" which is restricted by our Clause 17. The clause will enable employers to claim the protection of the law against damaging secondary action if they are not themselves parties to the original dispute or in a direct and active business relationship with the employer in that dispute. Moreover, in future, secondary action will have to be directed at business which is actually being carried out during the dispute with that employer. Thus, even employers who supply goods to or receive goods from the employer in the course of the dispute will be protected against secondary action which is not targeted on their actual business with the employer in dispute. This represents a very considerable restriction of the existing immunity. The drafting is unavoidably (though not unusually) complex, but the Parliamentary debates on the Bill and the reports of recent trade union conferences have indicated that the full extent to which clause 17 draws back the present immunity is being more widely recognised. I therefore cannot accept that it "endorses the right to indulge in secondary action of the widest nature".

Clause 17 represents the Government's considered view of how far it is right and practicable to go in this Bill in restricting secondary action. It reflects the outcome of the extensive consultations on the Working Paper which preceded the drafting and resulted in a considerable strengthening of the original proposals. The principle is clear and straightforward. Industrial action should have immunity only in so far as it is aimed directly at the business of the employer in the original dispute. This is a principle easily understood in industrial

terms and in the vast majority of cases it is employers and trade unionists - not the courts - who will have to apply the legislation. We believe that as drafted this clause will ensure that there is adequate protection against the reckless and indiscriminate secondary action which has rightly occasioned so much public concern. As you know, we have undertaken to publish in the autumn a Green Paper on the whole question of trade union immunities and we do not close the door on further legislation if it is found to be necessary.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may indeed be simpler than our draft but the policy they embody is quite different. The Government have stated in the House of Lords that in their view this would in effect restrict immunity to industrial action by employees of a party to the dispute, that is, to primary action alone. Whatever may be argued for that - and the Green Paper will enable an informed debate - there is no doubt that a total ban on secondary action would directly conflict with the strong tradition of sympathetic action and would give rise to a real danger of a concerted campaign to make the Bill unworkable. Nothing is more likely to bring the law into disrepute than for it to be flagrantly disobeyed or if the remedies it provides are not used by those people it is designed to help, as happened with the 1971 Act.

Turning to your specific criticisms, you fear that it will easily be evaded and suggest that the tests of purpose and of likely effect in subsection 3 are both "subjective", in the sense that the courts will simply rely on the honest belief of the trade union defendant. In fact, the test of "likely effect" has been drafted so as to make it clear that it is to be treated objectively. It will not be possible

for a defendant to ensure immunity merely by declaring that his principal purpose is directly to disrupt supplies going to or from the employer in dispute. And the test of "likely effect" will require the court to reach an objective view of the likely effects of the action. The operation of the clause therefore depends on the interaction of the tests of "purpose" and "likely effect".

It is, of course, quite common for the courts to have regard to the likely effects of a particular course of action when deciding whether to grant an interim injunction. Indeed the granting of an injunction often depends (as in the recent case of Express Newspapers v Keys) on the court's assessment of what damage would otherwise be caused to the plaintiff. We do not believe that Clause 17 will be easily evaded or that it will set the courts an impossible task or ask them to decide questions which are different in kind from those they have been asked to decide in the past.

I conclude that it would be an error to modify the approach which is embodied in Clause 17 or to accept amendments which, as I have explained, represent an approach basically inconsistent with ours. However, I can give you the assurance that all these issues will be thoroughly explored in the Green Paper.

I hope that I have been able to set at rest your fears about the way in which Clause 17 will operate in practice. Jim Prior (to whom you sent a copy of your letter) would very much welcome your discussing the points raised in your letter in more detail with Patrick Mayhew, who will be getting in touch with you to arrange this.

DRAFT LETTER TO MR PETER TAYLOR QC FROM THE PRIME MINISTER

Thank you for your letter of 25 June about Clause 17 of the Employment Bill.

I enclose a copy of the letter that I have written to Sir John Stebbings explaining the Government's approach to this issue and why we believe the fears expressed about the drafting and effectiveness of Clause 17 are misplaced. I hope that this explanation will allay the concerns you mentioned in your own letter.

Jim Prior would very much welcome your discussing the points raised in your letter in more detail with Patrick Mayhew, who will be getting in touch with you to arrange this.

DRAFT LETTER TO MR THOMAS MORISON QC FROM THE PRIME MINISTER

Thank you for your letter about Clause 17 of the Employment Bill on secondary action.

This is a very difficult but vitally important matter and I am glad to have this opportunity to explain the policy the Government have adopted towards limiting secondary action and how we expect Clause 17 to operate in practice. Clause 17 requires secondary action which interferes with commercial contracts to be targeted very precisely on the supply of goods or services going to or from the employer in dispute. It provides no immunity for secondary action beyond the employees of the customer or supplier who has a current contract with the employer in dispute at the time of the dispute; and even action by employees of such first customers and suppliers must have as its principal purpose and likely effect directly preventing or disrupting the supply of goods or services during the dispute between the employer in dispute and his customer or supplier.

The Clause is not therefore intended to allow secondary action whose purpose is to give moral support to the employees in dispute or to prevent the making of a contract. Such action would fail the test of principal purpose set out in subsection (3) of Clause 17 and, if it interfered with commercial contracts, would have no immunity. Our advice is that the courts are very unlikely to take as narrow a view as you suggest of whether the test of "purpose" has been satisfied. But even if they did, the test of "likely effect" should ensure that they look beyond the test of "purpose" and consider objectively, on the facts before them, whether that purpose is likely to be achieved.

Nor in our view will someone organising sympathetic strikes or other supportive action at second, third or fourth suppliers be able to avoid liability under the clause because of any difficulty in establishing the connection between secondary action and interference with commercial contracts. Most secondary action has as one

/of

of its main aime interference with the commercial business of the employers concerned.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may indeed be simpler than our draft, but the policy they embody is quite different. For all practical purposes they would remove immunity from all but primary action. Whatever may be argued for that - and the Green Paper will enable an informed debate - that is not the policy that the Government have decided to adopt in this Bill.

I conclude that it would be an error to modify the approach which is embodied in Clause 17 or to accept amendments which, as I have explained, represent an approach basically inconsistent with ours. However, I can give you the assurance that all these issues will be thoroughly explored in the Green Paper.

2 July 1980
Policy Unit

PRIME MINISTER

EMPLOYMENT BILL

1. THE APPARENT PROBLEM

1.1 Outside experts say that the secondary blacking provisions won't work.

1.2 They also say that Section 17 makes interlocutory injunctions impossible.

1.3 We find the letter from Thomas Morrison QC very convincing indeed. The key point is that, as he says, even if he is wrong he is confident that he is sufficiently correct to prevent an interlocutory injunction. This means that Clause 17 will not provide protection promised in the Manifesto. (Jim Prior's letter does not refer to Mr Morrison's at all, although we understand he has seen it.)

1.4 Jim Prior is, of course, correct in saying that Cabinet did not decide to make all forms of secondary action unlawful. But Cabinet bought a formula from Jim Prior on the basis that it was workable. Powerful evidence has now come forward to the effect that it is not workable as presently drafted.

1.5 Jim maintains that if all secondary action was unlawful, this would be unenforceable. This stems partly or wholly from our failure, so far, to expose trade union funds.

2. OPTIONS OPEN

2.1 Do nothing.

2.2 Get the drafting right so that the present Bill achieves its own objectives.

2.3 Use this as an opportunity for making all forms of secondary action unlawful.

3. THE LEGAL QUESTIONS

3.1 Are the legal experts right in saying that the secondary blacking provisions won't work?

3.2 If so, is JP right in saying that to remove all immunities for secondary action would make the law unenforceable? If he is, would exposure of trade union funds solve that problem? If it would, can it be done fast or is it a complex change, raising all sorts of other problems (eg Percival appeared to be against that, though with us on most other issues)? If it can be done fast, will JP agree to doing it? He has said that he would change the provisions on secondary blacking if the present ones didn't work. (This is slightly inconsistent because he then says that that wouldn't be enforceable; or else he is saying that the only way of enforcing it - exposure of funds - is something he would not accept.)

4. THE POLITICAL QUESTIONS

4.1 Let's assume the outside experts are right and the unions will be able to ~~cause mayhem under~~ abuse these provisions. Can we balance the tactical damage caused by that (the actual damage to employers, the further winning of big wage awards and consequent unemployment, the public demonstration that the Tories' Employment Bill didn't work) against the possible strategic advantage both in the country at large and internally?

- For example, it would create the public opinion conditions which are conducive to "a shock package" or a stronger Green Paper.

- It could powerfully influence Cabinet colleagues' minds on JP's whole approach.

- It could allow a general stiffening of our whole posture on industrial relations provided JP was agreeable to it.

- It may be the only way to persuade the trade unions to walk into the "exposure of funds" trap, which seems to be the measure they really fear, for obvious reasons.

4.2 Is a second bite at industrial relations <u>really</u> difficult within the life of this Parliament? Or can it be done provided we start now the necessary contingency planning to ensure that we are ready to do it just as soon as there is evidence of another winter of discontent? Is there a risk that union militants might play it cool and only use the loopholes in the present Bill to start tearing the place apart during the run-up to the next election? (This seems unlikely. Grass roots militants do not seem to be sufficiently well-disciplined to be held back in a conscious game plan of this kind; and the game plan could itself misfire completely and bring exactly the same pro-Tory response from the public as we saw before the last election - we would sail into victory on another anti-union Manifesto.)

4.3 ([redacted]) What is our real objective in moral and legal terms? Do we regard limited secondary blacking as a necessary concession in horse trading with the trade unions? Or do we regard secondary blacking of any kind as simply morally wrong? Not in the spirit of our Manifesto, out of line with prevailing practice in other countries?

PRIME MINISTER

Employment Bill: Lord Soames

Lord Soames's office telephoned to say that he would be glad to have a few words with you about the Employment Bill after your meeting on the Civil Service at 2015 tonight, if you would like to discuss it with him.

His office said that Lord Soames is very worried by rumours, which are rife in the House of Lords, that you personally are in favour of revising clauses 7 and 17 of the Bill. I gather that he would like you to scotch those rumours publicly.

Your meeting with Lord Harris, Lord Orr-Ewing and others is known to the Press already. Our Press Office have been taking a very quiet line about it.

Finally, we had a message from the Solicitor General earlier in the day that he was unhappy about the draft replies to the President of the Law Society and so on which the Department of Employment had submitted to you. In view of your decision to send only a very short reply, the need to change the draft does not, of course, arise.

MJS

2 July 1980

CONFIDENTIAL

1

Prime Minister.

My private response to the Attorney-General's letter about your second reading today, together with a letter he sent the Lord Chancellor earlier in the day.

MF

Sent 30/6

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon Sir Michael Havers QC MP
Attorney General
Law Officers' Department
Attorney General's Chambers
Royal Courts of Justice
LONDON WC2A 2LL

30 June 1980

Dear Michael

Employment Bill: Clause 17

Flag A.

Your letter of 30 June has evidently crossed with mine of the same date to the Lord Chancellor which I copied to you. You will have seen from that letter and its enclosed draft reply to Sir John Stebbing that I do not think the fears expressed in the letters to the Prime Minister from the President of the Law Society and the Chairman of the Bar are at all well founded. Indeed, in some respects what they say is plainly wrong.

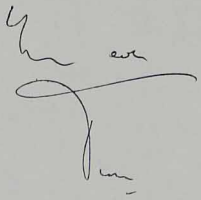
There is no uncertainty about the policy to which the Clause is intended to give effect. That policy was adopted by E Committee on 23 March and the draft clause giving effect to it was approved by Legislation Committee on 1 April. Because of the importance of the issue, we took the unusual step of appending a statement of the policy to the paper for Legislation Committee (L(80)26). I believe you were present at both meetings.

Nothing that has happened since then has caused me to doubt that the policy agreed by E is the right one or to suppose that the expression given to it in the Bill is defective. The amendments put down in the Lords by Orr Ewing and others (to which both Sir John Stebbing and Peter Taylor refer) are of course designed to implement a quite different policy, namely, limiting immunity to primary action alone. They are not, as the letters to the Prime Minister seem to suggest, designed primarily to achieve greater clarity of drafting than Clause 17.

My objective throughout has been to devise the clearest and most direct legislative expression of our agreed policy. Clause 17 was approved by Legislation Committee as getting as near as any draft was likely to get to that objective and Parliamentary Counsel's letter of 31 March to you explained why he had drafted the Clause in this particular form and how he expected it to operate. If even at this late stage - the Lords are due to debate the Bill on Report on Monday

and Tuesday of next week - some way can be found of improving the drafting of the Clause in order to give effect the better to the agreed policy, I would of course be very happy to consider it and I have asked my office to arrange for us to meet to discuss this tomorrow.

I am copying this letter to the Prime Minister (with a copy of my letter of earlier today to the Lord Chancellor which she may find it helpful to see at this stage) and to the Lord Chancellor.



A.2.

ROYAL COURTS OF JUSTICE.
LONDON. WC2A 2LL

ATTORNEY GENERAL

01-405 7641 Extn

30 June, 1980

MO 2

The Rt. Hon. James Prior, MP,
Secretary of State for Employment,
Department of Employment,
Caxton House,
Tothill Street,
London, SW1.

Prime Minister.
This will cause Mr Prior some problems.
Lord Hailsham is coming to see you about the Stebbings and Taylor letters on Wednesday of this week. The Report stage in the Lords is on 7th July.
MAP
30 vi.

Dear Jim,

Employment Bill Clause 17

The Solicitor General and I have seen and discussed the letters written to the Prime Minister by the President of the Law Society (18th June) and the Chairman of the Bar (25th June).

We agree that the present wording of Clause 17 may lead to the results which they fear.

We also feel that great attention must be paid to the leaders of the two professions who will be called upon first to advise clients as to the meaning and effect of the Clause and then to argue those matters in Court.

As with all drafts of any complexity it cannot have been easy either for the Department or the draftsman trying to foresee and cope with every possible difficulty. Now that there has been discussion of the Clause in both the Commons and the Lords and we have all had the benefit of that and of the comments made in the Press and in these letters some things are perhaps more apparent.

If the purpose of Clause 17 were simply to provide immunity only against legal action by identified persons in identified circumstances, e.g. against action by parties to the dispute and their "first suppliers and customers," the Clause could be more neatly drafted to lead to the required result.

If the intention is to provide immunity beyond that stage then in the absence of clear identification of how far it is intended to go, and where it is intended to stop, it is

/difficult

ROYAL COURTS OF JUSTICE.
LONDON, WC2A 2LL

01-405 7541 Extn

difficult to see how the drafting can be improved and, as I say, we feel that the Clause as at present drafted will have the consequences which Stebbings and Taylor fear.

Our real difficulty is to identify exactly what is required. If we knew that, which still is unclear, we would be better able to advise.

We would like to emphasise again that we are not concerned with policy save that we would like to know precisely what it is so that we can be satisfied that the drafting both represents the policy and is as clear as is possible.

I am copying this to the Prime Minister.

Yours ever. Michael.

Caxton House Tothill Street London S
Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

B

Lord Hailsham PC CH FRS DL
Lord Chancellor
Lord Chancellor's Department
House of Lords
LONDON SW1

30 June 1980

Dear [illegible]

CLAUSE 17 OF THE EMPLOYMENT BILL

The President of the Law Society has written the attached letter to the Prime Minister criticising this Clause. He seems simply to be putting a personal view, not writing in a representative capacity.

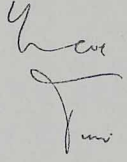
His letter is unclear in a number of respects. For example, at one point he seems to confuse picketing (covered by Clause 16) with other forms of secondary action, such as blacking and sympathetic strikes (covered by Clause 17). His criticism of Clause 17 takes the same line as several recent letters to the Times and presents the case for a quite different policy (namely, limiting immunity to primary action alone) as if it were simply a matter of producing a clearer draft of the Clause. On one point he is plainly wrong: the test of "likely effect" in subsection 3(b) is objective, not subjective.

J.F. & C

The enclosed draft of a reply for the Prime Minister attempts to make these points. I should be most grateful for any comments that you may have on Sir John Stebbing's letter and any suggestions for improving the draft reply before I submit it to the Prime Minister. I should like to get it to her quickly so that the reply may go before the Report Stage in the Lords.

I understand that the Chairman of the Bar has also written to the Prime Minister - though I have not yet seen his letter - and I am therefore copying this to the Attorney General. Obviously, I want to do everything I can to set their minds at rest and prevent any impression gaining ground that Clause 17 is unworkable. I am quite prepared to see Sir John Stebbing to explain our position in more detail and if there is anything more that you or the Attorney think that we can and ought to do, please let me know.

May I say how much I appreciate the help you have been giving us with the Bill in the Lords. I know that Grey Gowrie was immensely grateful for your contributions in Committee and I very much hope that you will be able to take part in the debates on Report when, I understand, we can expect a similar attack from the Opposition as well as continuing pressure from our own side.



PS

I have now received the letter, referred to above, from the Chairman of the Bar. I enclose a copy. It adds nothing to the letter from Sir John Stebbings and, if you agree, I would propose to advise the Prime Minister to reply to him in the same terms.

DRAFT LETTER FROM THE PRIME MINISTER TO SIR JOHN STEBBING, PRESIDENT OF THE LAW SOCIETY

Thank you for your letter of 18 June on the subject of Clause 17 of the Employment Bill. This is a very difficult but vitally important matter and I am glad to have this opportunity to explain the policy the Government have adopted towards limiting secondary action and how we expect Clause 17 to operate in practice. Perhaps I can take the points in your letter in the order in which you make them.

First, you refer to the law being held up to public ridicule in the sphere of picketing. I imagine that you are referring in particular to the excesses of secondary picketing which accompanied the strikes of the winter of 1978-79 and of which the more recent Steel and Isle of Grain disputes have afforded further examples. It is not the case, as your letter seems to suggest, that the Employment Bill does nothing to tackle secondary picketing. On the contrary Clause 16 of the Bill specifically withdraws immunity from all picketing which does not take place at the picket's own place of work. It thus effectively makes all secondary picketing - including the use of flying pickets - unlawful. Clause 17 is concerned primarily with other forms of secondary action - particularly blacking and so-called sympathetic strikes.

Secondly, you ask whether Clause 17 is intended to grant rights or limit immunities. I am sure that I do not need to point out that it is the present law, whose implications were spelt out so clearly in the MacShane and Duport Steel cases, which confers a virtually unlimited immunity for industrial action, however remote from the original dispute and however slight its connection with that dispute. It is that licence to spread industrial disruption far and wide "in contemplation or furtherance of a trade dispute" which Clause 17 restricts. The clause will enable employers to claim the protection of the law against damaging secondary action if they are not themselves parties to the dispute or in a direct and active business relationship with the employer in dispute. Moreover,

/in

in future secondary action will have to be targeted directly on business which is actually being carried out with the employer in dispute during the dispute. So even employers who supply goods to or receive goods from the employer in the course of the dispute will be protected against reckless secondary action which is not targeted on their business with the employer in dispute. This represents a very considerable restriction of the present immunity. The drafting of the clause is unavoidably (though not unusually) complex, but the Parliamentary debates on the Bill and the reports of recent trade union conferences have indicated that the full extent to which clause 17 draws back the present immunity is being more widely recognised. I cannot accept therefore that it "endorses the right to indulge in secondary action of the widest nature".

Clause 17 represents the Government's considered view of how far it is right and practicable to go in restricting secondary action in this Bill. It reflects the outcome of the extensive consultations on the Working Paper on secondary industrial action which preceded the drafting of the clause and which resulted in a considerable strengthening of the original proposals. The principle underlying the clause is clear and straightforward: that industrial action should have immunity only in so far as it is targeted directly on the business of the employer in dispute. It is a principle which is easily understood in industrial terms and it is employers and trade unionists - not the courts - who will have to apply the legislation in the vast majority of cases. We believe that this clause will ensure that there is protection against the reckless and indiscriminate secondary action which has rightly occasioned so much public concern. We have, as you know, undertaken to publish a Green Paper in the autumn on the whole question of trade union immunities and we do not close the door on further legislation if it is found to be right and necessary.

The amendments to Clause 17 which have been tabled by Lords Orr-Ewing, Spens and Renton may be simpler than the present clause, but the policy they embody is quite different from that of the Government. They would in effect restrict

/[illegible]

immunity to industrial action by employees of a party to the dispute, that is, to primary action alone. Whatever may be argued for that - and the Green Paper will enable an informed debate - there is no doubt that a total ban on secondary action would directly conflict with the strong tradition of sympathetic action and that there would be real danger of a concerted campaign to try to make the Bill unworkable. Nothing is more likely to bring the law into dispute than for it to be flagrantly disobeyed or if the remedies it provides are not used by those people it is designed to help, as happened with the 1971 Act.

Turning to your specific criticisms of Clause 17, you fear that it will easily be evaded and suggest that the tests of purpose and of likely effect in subsection 3 are both "subjective", in the sense that the courts will simply rely on the honest belief of the trade union defendant. In fact, the test of "likely effect" has been drafted so as to make it clear that it is to be treated objectively. It will not be possible for a trade union defendant to ensure immunity merely by declaring that his principal purpose is directly to disrupt supplies going to or from the employer in dispute. Even without the test of "likely effect", the court would have to satisfy itself that the declared purpose was genuine. But this will be reinforced by the need for the court to reach an objective view of the likely effects of the action. The operation of the clause therefore depends on the interaction of the tests of "purpose" and "likely effect."

It is, of course, quite common for the courts to have regard to the likely effects of a particular course of action when deciding whether to grant an interim injunction. Indeed the granting of an injunction often depends (as in the recent case of Express Newspapers v Keys) on the court's assessment on what damage would otherwise be caused to the plaintiff. We do not believe that Clause 17 will be easily evaded or that it will set the courts an impossible task or ask them to decide questions which are different in kind from those they have been asked to decide in the past.

/I cannot

I cannot therefore undertake that the Government will modify the approach to the restriction of immunity for secondary action which is embodied in Clause 17 or that it will be able to accept the amendments tabled in the Lords which, as I have explained, represent a quite different approach. However, I can assure you that all these issues will be thoroughly explored in the Green Paper.

I hope that I have been able to set at rest your fears about the way in which Clause 17 will operate in practice. The Secretary of State for Employment (to whom you sent a copy of your letter) has asked me to say that he would be very happy to meet you to discuss the points you raise in your letter in greater detail. Could I suggest that you get in touch with his office to arrange an early meeting?

Miss Stephens.

I have arranged for the Lord Chancellor to come at 12.30 p.m. on Wednesday 2 July, i.e. just before he leaves for City Chambers.

10 DOWNING STREET

From the Principal Private Secretary

30 June 1980

PERSONAL

The Prime Minister has asked me to let the Lord Chancellor have the attached copies of letters about the Employment Bill which she has recently received from the President of the Law Society and the Chairman of the Bar.

We are seeking the advice of the Secretary of State for Employment on these letters, but in the meantime the Prime Minister would welcome a private word about them with the Lord Chancellor. I will be in touch with you to arrange a meeting in the next day or so.

C. A. WHITMORE

Ian Maxwell, Esq.,
Lord Chancellor's Office.

FROM: THE PRESIDENT OF THE LAW SOCIETY

TELEPHONE: 01-242 1222

PRESIDENT'S ROOM
THE LAW SOCIETY'S HALL
CHANCERY LANE
LONDON WC2A 1PL

27 June 1980

Dear Mr Lancaster,

Employment Bill

Thank you very much for your letter of 20 June.

I do not wish to trouble the Prime Minister with any reply to my letter. As she knows, there is no need for her to discuss the problems with us unless indeed we can be of any help.

My colleague, the Chairman of the Bar, has kindly sent to me a copy of his letter to her dated 25 June and I understand that Mr. Tom Morison, Q.C., has also written.

As long as the Prime Minister is aware of our fears for the future of the law and hopefully can meet the points which have been raised, our approach will have been worthwhile and certainly require no acknowledgement.

I am sure you will understand that it is in no way our wish as Heads of our respective professions to enter the political discussion which must ensue.

Yours sincerely,

Thomas Skyrme

T. Lancaster, Esq.,
Private Secretary,
10 Downing Street,
London SW1.

file

The Law Society

26 June 1980

I enclose copies of two further letters which the Prime Minister has received about Clause 17 of the Employment Bill. I would be grateful if you could take into account these letters in the advice you are preparing on the earlier letter from the President of the Law Society, and also provide me with draft replies for the Prime Minister to send.

T. P. LANKESTER

Richard Dykes, Esq.,
Department of Employment

file

ds

25 June 1980

I am writing on behalf of the Prime Minister to acknowledge your recent letter. This is receiving attention and a reply will be sent to you as soon as possible.

TIM LANKESTER

Thomas Morison, Esq., Q.C.

file

ds

25 June 1980

I am writing on behalf of the Prime Minister to acknowledge your letter of 25 June. This is receiving attention and you will be sent a reply as soon as possible.

TIM LANKESTER

Peter Taylor, Esq., Q.C.

1

10 DOWNING STREET

PRIME MINISTER

Two more letters about Clause 17 of the Employment Bill (i.e. the Clause dealing with secondary action) - one from the Chairman of the Bar, the other from Mr. Thomas Morison QC. I am getting comments on the earlier letter from the President of the Law Society, and will do the same with these letters. Agree? (You did of course discuss the substance of these letters briefly with Lord Gowrie after Cabinet last Thursday; but when we have the Department's comments, you can take this up again if you wish.)

25 June 1980

f25

THE SENATE OF THE INNS OF COURT AND THE BAR

cc 19/

11 SOUTH SQUARE
GRAY'S INN
LONDON WC1R 5EL

From the Chairman of the Bar
PETER TAYLOR QC

Telephone: 01-242 0082
Records Office: 01-242 0934

25th June, 1980

Please quote reference

Dear Prime Minister

EMPLOYMENT BILL - CLAUSE 17

I write to express my grave concern about the present form of Clause 17 of the Employment Bill. I would not have taken the unusual step of writing to you direct, but I have received copies of letters already sent to you by the President of the Law Society and Mr. T.R. Morison, Q.C.

Without repeating them in detail I wish to associate myself with the views they have expressed. There are two points :-

[1] If the object is to remove immunity for the kind of secondary ~~picketing~~ action the country has suffered in recent months, then Clause 17 fails to achieve it, except to a very limited extent.

[2] Whatever may be the right balance to be achieved, the actual form and wording of this clause is depressingly convoluted and bristles with words of uncertain and arguable interpretation (e.g. "purpose" "likelihood" and "means"). The "Orr-Ewing Amendment" is crisp and clear.

As Chairman of the Bar it is no part of my function to write to you on point [1] which is primarily political. But I am, in that capacity, most anxious about point [2] lest the law be brought into disrepute. If Clause 17 is enacted we shall again have the unseemly spectacle of legal wrangling as to the meaning and application of the provisions. There may again be differing judicial views up to and in the House of Lords. I sincerely hope this

THE SENATE OF THE INNS OF COURT AND THE BAR

11 SOUTH SQUARE
GRAY'S INN
LONDON WC1R 5EL

From the Chairman of the Bar
PETER TAYLOR QC

Telephone: 01-242 0082
Records Office 01-242 0934

Please quote reference

will be avoided and that there is still time to reconsider this Clause.

Yours sincerely

Peter Taylor

The Right Honourable Margaret Thatcher, M.P.,
No. 10 Downing Street
Whitehall
London S.W.1.

Fountain Court, Temple, London EC4 9DH.
01-353-7356

cc 19 ✓

R 25/6

Dear Prime Minister,

I am a practising barrister and, as such, have been involved in most of the recent trade dispute cases (including MacShane). I have submitted two fairly lengthy, semi-technical papers to the Department of Employment about the Government's "secondary action" proposals and, latterley, clause 16 (now 17) of the Employment Bill. Having looked at the official report of the recent debate in the House of Lords (June 12, 13) on clause 17 and the "Orr-Ewing Amendment", I believe that a number of important points need to be made but, because of the nature of my practice, I cannot easily take part in a public debate about secondary action without appearing to be political. Hence this letter to you. I hope I shall be forgiven for writing directly in this way; I have assumed that at this stage decisions about the Orr Ewing amendment are for the Government and not just the Department.

May I make the following points about clause 17.

(1) The clause is extremely complicated and oddly drafted.

For example, secondary action is defined in such a way that picketing at the factory gates of the employer in dispute by his own employees may constitute secondary action, within the definition, although no-one in his right mind would so categorise it. Clause 17(5) has been put in to cover this point. This is not just a drafting point. The real problem with clause 17 is that it seeks to define secondary action by reference to the legal 'cause of action' rather than to the event itself, and, as I can quickly show, this leads to anomalies and absurdities.

(2) Clause 17 introduces concepts of "purpose" "means" and "likelihood".

The problem for the practitioner is that unless speedy injunction relief is likely to be granted by the Court the client should be advised not to pursue his legal remedy. An interlocutory injunction in trade dispute cases will not

be granted where the defendant has a reasonable claim to immunity. Inevitably, the more complicated the statutory provision and the 'looser' the concepts the harder it will be for an employer to succeed.

(3) Clause 17 only applies to cases where the plaintiff's cause of action relates to a commercial contract (inducing its breach or interfering with its performance; the 'economic torts'). If clause 17 does not apply then Section 13 of the Act will apply. In other words the claim for immunity is bound to succeed (in the light of MacShane's case in the House of Lords) unless clause 17 applies. It is plain from the recent debate in the House of Lords that lawyers do not agree about the nature and extent of the economic torts. I agree that the common law is unclear and, therefore, practitioners will find it very difficult to give confident advice to affected employers. On the whole, employers will only resort to law, in such circumstances, when they can be reasonably confident of success. Clause 17 is, therefore, not very helpful to employers.

(4) Because clause 17 has defined secondary action in this peculiar way, its application will not only be very limited (and therefore the immunity will remain very wide) but also produce some odd results. May I give three cases in which I think clause 17 will not apply however far 'down the line' from the employer in dispute the plaintiff might be (e.g. at least second third or fourth suppliers):

(1) if the purpose of the industrial action was to give moral support to the workers in dispute;

(2) if the purpose of the industrial action was to stop an employer from making (as opposed to performing) a commercial contract;

(3) if the union official directly induces an employer to break a commercial contract.

(5) If I was advising a union about the extent of the immunity I would advise that an official would be immune:

(a) in respect of industrial action at the first supplier, if he shouted from the rooftops that the purpose of the action was to stop goods going to the employer in dispute. Even though that purpose could be achieved by more selective industrial action than he organised there would still be immunity. I would advise that he had immunity however much damage was done to the first supplier's business or to all those who did business with the first

supplier. If the employer in dispute was unable to take any supplies during the dispute the union official would still have immunity if the ostensible purpose of the industrial action was to show solidarity. Of course the ostensible purpose might not be the real purpose,

(b) in respect of industrial action against second third or fourth suppliers (down the line) provided that he did not ostensibly organise the action for the purpose of interfering with a commercial contract. He could be sure to have immunity if he organised a sympathy strike which would have the effect of interfering with commercial contracts.

In short, the purpose of the action will determine the extent of the immunity. With sensible legal advice immunity will always be available 'right down the line'. And even if I am wrong about this I am confident that I am at least arguably correct or sufficiently correct to prevent an interlocutory injunction.

In plain terms clause 17 is of very limited effect. Accordingly, the problems caused by the MacShane judgment have not been grappled with.

As to the 'Orr-Ewing amendment', it has the considerable merit of being more simply drafted. However, because it has adopted the same definition of secondary action it requires a provision equivalent to clause 17(5), else primary picketing could cease to be immune. May I, respectfully, ask you to intervene before it is too late? If the choice at this stage is between the Department's clause or the Orr-Ewing clause could I urge you to accept the latter? I feel very strongly that Parliament should try and legislate clearly, in this field otherwise the Courts are in danger of being brought into contempt through involvement in matters such as "purpose" (motive) "likelihood" and "means". The Courts should not be asked to draw lines during industrial disputes when passions run high; Parliament should do so and do so as clearly as possible. Some of the law Lords have already made this point: as a practitioner I strongly support them.

Finally, can I add that I belong to no pressure group or organisation of any sort. These are my own views. The whole subject is immensely complex and should you or your colleagues find it helpful I would willingly make

myself available at any time to elaborate my misgivings from a practitioner's point of view.

Yours sincerely

Thomas Morison

THOMAS MORISON Q.C.

cc Chairman of the Bar

FILE

RH

Sir J. STEBBINGS

23 June, 1980

Your Secretary of State will have received a copy of the enclosed letter from the President of the Law Society. The Prime Minister would be grateful for comments on it, and for a draft reply.

T. P. LANKESTER

R Dykes, Esq
Department of Employment

DSS

Original in B/R

FILE

VB

cc HMT
PM

10 DOWNING STREET

THE PRIME MINISTER

21 June 1980

Dear Mr. Brown,

Thank you for your letter of 20 May in which you reported the views of your Central Executive Council on the causes of inflation and on the Employment Bill.

I would certainly agree that it is wrong to lay the blame of causing inflation wholly on the trade unions. Many factors have worked together to increase the rate of inflation. Not least, past Governments contributed by allowing public expenditure to take an excessive share of the nation's resources, and by allowing the amount of money in the economy to grow too fast. But there is no denying that wage negotiators - employers and unions in the public and private sectors - have contributed also by agreeing pay increases which are well in excess of what could be justified by increases in productivity and which are passed on in higher prices.

The Government is determined to get the rate of inflation down. We are committed to a progressive reduction in monetary growth. We are committed, too, to getting public spending back to sensible levels. This is crucial not only to bringing down inflation, but also if we are to lighten the tax burden. Provided wage settlements are moderate, we should see the inflation rate start to fall significantly later this year.

Many of the factors which you mention as contributing to inflation on the Government's side are temporary in their effect. For instance, the large increase in VAT in last year's Budget, which was necessary in order to allow the large reduction in income tax, had a once-for-all effect. Recent 'catching-up' pay increases

/ in public services,

VLL

in public services, which were necessary because the previous Government had held back public services' pay behind that of other workers, will not be repeated.

You mentioned also your Union's concern about the Employment Bill. The proposals in the Employment Bill are by no means anti-trade union. We are proposing limited but vital changes to the law which will bring some common sense back into our industrial relations.

Our proposed changes to existing employment protection legislation, for example, will make the minimum number of changes necessary to achieve a balance between the protection of the individual employee and the creation of new jobs. In other areas we are extending the protection available to the individual. For example, the Bill will create a new right not to be unreasonably excluded or expelled from trade union membership for those in or seeking employment to which a closed shop agreement applies. The Bill also gives a new statutory right for pregnant women to have reasonable time off with pay for ante-natal care.

We are also seeking to establish a balance between the trade union's legal safeguards and employers' and employees' rights to go about their business free from unwarrantable interference. Secondary picketing, for example, has been used increasingly to spread the effects of a dispute to employers and employees who have no connection with it, nor any direct interest in its outcome, with the consequence that their very livelihood has sometimes been threatened. That is a state of affairs that we can no longer tolerate, and on which the vast majority of people, including very many trade union members, have expressed a desire for change. That is why we propose to limit lawful picketing to a picket's own place of work.

We believe that the proposals in the Employment Bill offer the prospect of a real improvement in industrial relations. They

/will help

will help management to get on with the job of managing, and give trade unions the chance to restore the public's confidence and their members' faith in them. Public opinion polls have repeatedly shown that the proposals in the Employment Bill have the support of a majority of trade unionists.

Yours sincerely

Margaret Thatcher

Jack Brown, Esq., J.P.

10 DOWNING STREET

PRIME MINISTER

This letter from the President of the Law Society embodies a criticism of Clause 17 of the Employment Bill which - I am told - the Solicitor-General feels very strongly about. He has sent a copy to Mr. Prior.

I suggest that we ask Mr. Prior for his comments; and then, if you wish, you can consult the Solicitor-General privately.

Agree?

Duty Clerk

pp TL

20 June 1980

20 June 1980

I am writing on behalf of the Prime Minister to thank you for your letter of 18 June about Clause 17 of the Employment Bill. I have placed your letter before the Prime Minister and a reply will be sent to you as soon as possible.

T. P. LANKESTER

Sir John Stebbings.

FROM: THE PRESIDENT OF THE LAW SOCIETY

R20

cc 19 ✓

PRESIDENT'S ROOM
THE LAW SOCIETY'S HALL
CHANCERY LANE
LONDON WC2A 1PL

TELEPHONE: 01-242 1222

18 June 1980

Dear Prime Minister,

Employment Bill, Clause 17

It is not customary for any President of the Law Society to address the Prime Minister upon what some may regard as a party political issue, but I have an intense desire to ensure that the high importance and dignity of the Law is maintained.

The one really depressing event in my year of office has been the awful spectacle of the Law being held up to public ridicule in the sphere of "picketing". The subject has since been debated in public and in Parliament but with what result?

I have read with incredulity the Employment Bill as printed on 13 June and I asked myself whether Clause 17 is intended by the Government to grant rights or to limit immunities; the political intent can only be inferred from the construction of the Clause as a whole.

It may be thought from the opening words of Clause 17(1) that the intention of the Clause is to restrict the area of immunity from liability in tort for those involved in an industrial dispute; the Clause, however, then goes on to recognise and, indeed, endorse the right to indulge in secondary action of the widest nature; moreover, it appears to me to re-import the subjective test (recognised in the McShane Case) of what is the purpose, means and likelihood of success of the secondary action. Indeed, it seems to me to require no ingenuity on the part of any Trade Union to ensure that secondary action of the most vicious nature is rendered lawful.

I envisage that it will be quite impractical for the Courts under Clause 17 to place any effective restriction on "the purpose" referred to in 3(a); the means referred to in 3(a) and 6(b) and "the likelihood" referred to in 3(b).

It follows that any attempt by aggrieved parties to invoke the jurisdiction of the Courts will re-create the ugly spectacle of the ridicule of the Law.

That is a matter, I believe, of vital concern not only to my profession but to the whole nation.

I have noted the amendments put down and conditionally withdrawn in the House of Lords by the Lords Orr Ewing, Spens and Renton designed, no doubt, to avoid the awful prospective consequences to which I have referred. The political decision is for the Government but I beg that this important matter should be urgently reconsidered by the Cabinet while there is yet time.

I am taking the liberty of sending a copy of this letter to Mr. James Prior and to the Law Officers and my colleague Mr. Peter Taylor, Q.C., Chairman of the Bar.

Yours ever.

Rt. Hon. Mrs. Margaret Thatcher, MP,
House of Commons,
London SW1.

to its responsibilities and then we can truly earn the headline which was prominent last week and we can say: "Lords to the Rescue". I beg to move.

10.8 p.m.

Lord SPENS: I want to support this amendment. I hope to claim some credit for its construction. When our group were thinking about what we should do about Clause 16, it was rather opportune that a letter appeared in *The Times* signed by Mr. Alan Campbell Q.C. which, if I may quote from his introduction, said:

"An examination of the complex provisions of Clause 16 of the Employment Bill reveals an intention to reflect the 'first supplier first customer' concept; to entrench the legality of all industrial action within this ambit; also to legalise the 'repercussive' effect of such action against third parties".

That is a letter of 27th May. That letter confirmed the views that I had taken about this clause, that it is much too complicated as it has been drafted and, much more than that, I dislike the way that it appears to entrench positively in statute law immunities for the trade unions. I do not believe that they have been so far entrenched positively before. If one looks at subsection (3) it says:

"Secondary action satisfies the requirements of this subsection if . . ."

and subsection (4) is similar. Subsection (5) is similar. These entrenchments are being made by a Conservative Government, and that to my mind means that—

The Earl of GOWRIE: If I may, I should like to make the point that the kind of immunities the noble Lord referred to have been entrenched in law ever since the Liberal Government of 1906.

Lord SPENS: Yes, I realise there have been entrenchments, but what worries me is that these entrenchments are about to be made by a Conservative Government, because once a Conservative Government has made these positive entrenchments it is going to be extraordinarily difficult ever to get them altered. No future Labour Government will want to alter them, and it is going to be very difficult to find a future Conservative Government who will want to alter them. Therefore it seemed to me that this entrenchment of immunities was a dangerous thing and so I set about trying to draft a much simpler clause and I gave it to my noble friend Lord Orr-Ewing. At the same time he was having similar thoughts on the subject, and together we produced the amendments that are now before your Lordships.

If I may just indicate the effect, Clause 16 will now read:

"Nothing in Section 13 of the 1974 Act shall prevent an act from being actionable in tort on a ground specified in subsection (1)(*a*) or (*b*) of that section in any case where—

(*a*) the contract concerned is not a contract of employment, and

(*b*) one of the facts relied upon for the purpose of establishing liability is that there has been secondary action as defined, and

(*c*) the person claiming the benefit of this section is not a party to the dispute".

Subsection (2) we leave as it is; and we take out, or hope to take out, subsection (3), (4), (5) and (6).

Having tabled these amendments and I was delighted to read a letter on Tuesday of this week in the *Daily Telegraph* from Edward Grayson, saying:

"These amendments to Clause 16 provide with the most admirable simplicity and clarity that Section 13 of the Trade Union Relations Act 1974 will not apply, and a person will therefore be able to pursue his common law rights when he is

(*a*) suing for interference with a contract other than a contract of employment (e.g. a commercial contract);

(*b*) relying upon secondary action as defined in subsection (2) of the existing Clause 16, and

(*c*) himself not a party to the dispute".

So we have got a positive acclaim from Mr. Grayson that we have done what we had hoped in the form of making Clause 16 simple and also, I think, more effective than the present Clause 16 will be. I therefore support the amendment.

Lord HANKEY: I should like to support my noble friends in putting forward these amendments. I see great difficulty in the present text of Clause 16. I have had to spend years of my life arguing with foreigners about the meaning of various texts of treaties and so on. My experience is that people are confused whenever anything is very complicated. In particular, the French always make rings round everybody else, and so do the Russians. It is true that we do not deal with the French and the Russians, but when you mislead a lot of people by the

Ind Pol

QUEEN ANNE'S GATE LONDON SW1H 9AT

6 June 1980

Dear Jim

UNION LABOUR ONLY CLAUSES IN GOVERNMENT CONTRACTS

Thank you for sending me copies of your letters of 15th May and 6th May to Geoffrey Howe.

Neither Home Office nor Metropolitan Police contracts contain a clause obliging contractors to use only union labour, nor am I aware of any occasion on which such a condition has been imposed.

I have no particular influence over the forms of contract used for my sponsored local authority services and it would be better, I suggest, to leave police and fire authorities to be guided by any advice that Michael Heseltine may wish to give to local authorities generally.

Nor do I have any influence over the form of contract used by the B.B.C. or the Independent Broadcasting Authority, though I would be prepared to draw their attention to any advice which may emerge and which is relevant to their activities.

I have no comments on the statement you enclosed with your letter of 6th June.

I am sending copies of this letter to the recipients of yours.

Yours

The Rt. Hon. James Prior, M.P.

JJ

SECRETARY OF STATE FOR THE ENVIRONMENT

Ind Pol.

2 MARSHAM STREET
LONDON SW1P 3EB

My ref: PSO/14109/80

Your ref:

9 June 1980

Dear Secretary of State

UNION LABOUR ONLY CLAUSES IN CONTRACTS

Thank you for sending me copies of your letters of 15 May and 6 June to Geoffrey Howe. My Department has only received a few complaints about local authorities using union labour only clauses in contracts, despite advice against this; however I agree that more should be done to stop the practice.

I welcome your proposal for a provision in the Code of Practice and a general statement of the Government's position. I feel less enthusiasm for a right of joinder against client employers as a local authority might have to use public funds towards compensation for dismissal of a contractor's non-union employees. I would prefer to see legislation making such clauses void, but assume you have good reason for preferring to introduce the right of joinder. If you can confirm that this is so I will be happy to support your proposal.

One final point on the drafting of Lord Cowrie's draft statement. In line 5 of the penultimate paragraph the reference to 'standard conditions for contracts' should be amended to read "and the major standard forms of contract do not contain...." // Perhaps your officials will keep mine informed of developments so that in due course, the attention of local authorities can be drawn to new points in the legislation.

I am copying this letter to the Prime Minister, members of E Committee and the Lord Chancellor.

Yours ever,

MICHAEL HESELTINE

Approved by the Secretary of State and signed in his absence

Rt Hon James Prior MP
Secretary of State for Employment
Caxton House
Tothill Street
SW1

CONFIDENTIAL

Cc Mr Duguid TL(oa) MJS

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400

Switchboard 01-213 3000

Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer
Treasury
Great George Street
LONDON
SW1

6 June 1980

Dear Geoffrey

UNION LABOUR ONLY CLAUSES IN CONTRACTS

Thank you for your letter of 27 May. You will have seen the helpful responses of our colleagues.

... I attach a draft statement which I propose be included in a speech Lord Gowrie will make, probably next Tuesday, in response to amendments put down at the Lords committee stage of the Employment Bill.

The statement does, I hope, reflect the useful comments you and others have made but if there are any aspects of it with which colleagues are not content no doubt they will let me know before next Tuesday.

I am copying this letter to the Prime Minister, members of 'E' Committee, and the Lord Chancellor.

Yours

UNION LABOUR ONLY CLAUSES IN CONTRACTS
DRAFT STATEMENT BY LORD GOWRIE FOR COMMITTEE PROCEEDINGS

/To follow explanation of why the Government cannot accept the amendments put down by Lord Orr Ewing/

Let me be absolutely clear about the Government's position on clauses in contracts requiring the use of union labour. The Government strongly dislikes this practice, which can readily be seen as a way of requiring reluctant contractor employers to impose conditions of union membership on their employees who have no desire to join a trade union.

The central purpose of the closed shop provisions of the Bill is to provide basic protections for employees against abuses of the closed shop and these protections must be maintained. But the imposition by client employers on contractors in a dependent commercial position of union-labour only clauses in contracts can place contractors who have no other suitable work available for their non-union employees in an invidious position. Either they lose a contract vital for the continued survival of the business or they dismiss such employees and perhaps find that they have to pay substantial sums in unfair dismissal compensation. The extended protections for individuals in the Bill, and particularly the protection for 'existing employees' and the closed shop ballot provision, whilst absolutely vital may, I accept, increase contractors' difficulties in this respect.

We therefore propose to bring forward an amendment at Report Stage to provide a new right of joinder against client employers who insist upon the implementation of a term in a commercial contract requiring the contractor's employees to be union members. If an employee who is not a union member is dismissed in consequence the contractor who is facing a claim of unfair dismissal will be able to join the client employer in the case and the latter might be required to pay any compensation awarded.

This, in the Government's view will enable the responsibility for these clauses and the ultimate financial consequences to be placed where they belong - with the employers who insist on them.

But legislation by itself is not enough. The Government is anxious that employers should voluntarily desist from and resist such practices. My Rt Honourable Friend the Secretary of State has recently written to the CBI to enlist its aid in such voluntary efforts and proposes to include in the forthcoming Code of Practice on the Closed Shop a declaration to the effect that any such practice is unreasonable. The contractors themselves might explore further how they might

co-operate together to resist the offending contract terms and my Rt Hon Friend the Secretary of State for Trade is considering whether any amendment to restrictive trade practices legislation is required to facilitate such co-operation.

Reference has been made to the existence in the public sector of contracts containing these objectionable clauses. I have no information about how prevalent these are among public sector purchasers but I can say that we know of no instance where a Government department or health authority has used a clause of this kind, and the standard conditions for contracts do not contain such a clause. We have no examples of nationalised industries or local authorities imposing such clauses in contracts, although there may well have been cases not necessarily known to sponsoring departments.

In any event, the Government will take care to ensure that voluntary action taken in the private sector to resist this practice is appropriately reflected in action taken by sponsoring Departments concerning industries and local authorities in the public sector. The Government would of course also expect these industries and authorities, as responsible employers to have full regard to the forthcoming Code of Practice on the Closed Shop.

DIRECT. filed. PM : PM's mtg. with Tom Boardman etc.

RECORD OF A MEETING WITH REPRESENTATIVES OF THE ASSOCIATION OF BRITISH CHAMBERS OF COMMERCE AT NO. 10 AT 1600 HOURS ON 4 JUNE 1980

Present:

Prime Minister
Secretary of State for Employment
Secretary of State for the Environment
Secretary of State for Health and Social Services
Secretary of State for Education
Mr. David Wolfson
Mr. John Hoskyns
Mr. Bernard Ingham
Mr. Tim Lankester

Mr. Tom Boardman
Mr. John Madocks
Mr. Stanley Speight
Mr. John Risk
Mr. J.R.S. Egerton

* * * * * * * * *

Mr. Boardman said that the ABCC had strong views on the question of trade union immunities and legislation. They were grateful to Mr. Prior for having considered their representations, but on several matters they had not been able to convince him. There were many things in the Employment Bill which they welcomed; but there were also some important omissions which would make it much less effective in its operation than otherwise might have been. Their main disappointment was that the immunity for union funds contained in Section 14 of the 1974 Act would remain intact. Despite the restriction on the Section 13 immunities in the Bill, it would still be impossible to sue the unions for their members' actions; and as a consequence, the actions which the Bill was intended to outlaw would in very many cases continue. ABCC members were opposed to proceeding against individuals because this would create martyrs and would encourage worker solidarity. By contrast, they felt that there would be less protest if employers took out proceedings against the unions. Furthermore, there was the general point

/ that

that, as a counterpart to the powers conferred on them by the closed shop, unions should be expected to discipline members who went against their instructions. It had been argued against this that 95 per cent of strikes were unofficial. But very often unions were conniving in unofficial strikes, and therefore in these circumstances it ought to be possible to proceed against them.

Mr. Prior said that, in his view, in most cases of unofficial strikes, the courts could not be expected to hold the union responsible. The experience of the 1971 Act showed how difficult it was to apply the concept of "vicarious liability". In most cases, therefore, even if union funds were to be put at risk, the employer's only recourse would still be the existing one of taking the individual to court. Employers were also known to be reluctant to pursue actions for damages. More generally, if the Government had tried to remove the immunity for trade union funds, this would have united the trade union movement in all-out opposition to the legislation; and this could have been very damaging indeed. The more subtle "step by step" approach was preferable; for this allowed the idea of legislation in the trade union field to grow. He did not deny that there might be individual martyrs as a consequence of the present approach (though in many cases employers could take out proceedings against union officials); but the alternative of going for union funds would have been much worse. Nonetheless, the Green Paper would discuss the whole question of immunity of union funds in detail.

Mr. Madocks said that he disagreed with Mr Prior's assessment that to have repealed Section 14 would have rallied the trade union movement against the Government. If union funds were seen to be at risk for legitimate reasons, this would be acceptable: he quoted two cases under the 1971 Act in which the unions had paid up.

/Mr. Boardman

Mr. Boardman said that the ABCC were also disappointed with the Clause in the Bill on secondary action. In their view, all secondary action should be illegal. Mr. Risk added that the Clause seemed to legitimise secondary action in a way which it had not done before. The failure to outlaw all secondary action seemed inconsistent with the Government's Election Manifesto.

Mr. Prior commented that, of course, all of the immunities, except in respect of contracts between the employer and the employee party to a dispute, could have been removed. But this would have taken the law back to what it had been before 1906, and it would have been even more restrictive than the 1927 Act. If the Government had gone down this route, again it would have caused great trouble. At the same time, critics of the Bill ought to recognise that the provisions on secondary action were more restrictive than they often thought: the immunities were confined to first customer/first supplier, and the action in question had to be targeted at the company in dispute if it were to attract immunity. It was better to legislate further if experience with the Bill proved it was necessary. The trade unions understood that the Government would be forced to go further if they tried to circumvent the Bill.

Mr. Boardman said that he was concerned about the timing of future legislation. If the Government was to wait to see what would be the experience of the existing Bill, it would be several years before anything further was done. Meanwhile, the balance of power between employers and trade unions would continue to be heavily weighted in favour of the unions; and this would make it difficult to get sensible pay settlements.

Mr. Madocks then raised the question of the closed shop. If employers and employees genuinely wanted a closed shop then they should have one. ABCC were opposed to compulsion, and they were disappointed with the relevant provisions in the Bill. Mr. Prior said that he was confident that, following the passage of the Bill, very few new closed shops would be set up; and he thought that under the proposed Code of Practice many would be renegotiated. He hoped that the ABCC would encourage their members to renegotiate.

/He also

He also thought that the expulsion and exclusion Clauses in the Bill would reduce the power of the closed shop - and all the more so since an employer would be able to join as a party in unfair dismissal proceedings the trade union which was ultimately responsible. Compensation in unfair dismissal cases could go as high as £16,000. Mr. Boardman said that these Clauses would not be very effective because all too often it would not be possible to find clear evidence against the union. The Prime Minister commented that insofar as there was the right of joinder in unfair dismissal cases, the principle of taking action against the trade unions, as opposed to individuals, was already in the Bill.

Mr. Prior said that he could not publish the Codes of Practice until the Bill became law. He was quite prepared, however, to consult privately with the ABCC on their content before then.

Mr. Madocks said that the ABCC's concerns were relevant not only to the private sector but also to the public sector. With the Bill as it stood, the unions would have the potential to cause continuing large-scale disruption in the public sector.

Mr. Risk said that he hoped that the Government would in future use the phrase "industrial disruption" rather than "industrial action".

Finally, Mr. Prior said that besides dealing with the immunity of union funds, the Green Paper would cover the whole question of immunities and related issues such as compulsory ballots and union labour only contracts. He would gladly consult with the ABCC in the drafting of the Green Paper.

The meeting finished at 1700 hours.

PL

5 June 1980

cc Mr Ingham

MINISTRY OF AGRICULTURE, FISHERIES AND FOOD
WHITEHALL PLACE, LONDON SW1A 2HH

From the Minister

The Rt Hon James Prior MP
Secretary of State for Employment
Caxton House
Tothill Street
London SW1H 9NA

4 June 1980

Dear Secretary of State

UNION LABOUR ONLY CLAUSES IN COMMERCIAL CONTRACTS

Thank you for copying to me your letter of 15 May to Geoffrey Howe.

The course of action you propose is unlikely to cause difficulties for my Department or its fringe bodies. We do not know of any instance where we or they are using a "union labour only" clause in their contracts.

I am copying this letter to the Prime Minister, members of 'E' Committee, the Lord Chancellor and to Sir Robert Armstrong.

Yours sincerely

D E Jones

for PETER WALKER
(Approved by the Minister and signed in his absence)

10 DOWNING STREET

From the Private Secretary 30 May 1980

When I wrote to Richard Dykes on 28 May about the Prime Minister's meeting with a delegation from the Association of British Chambers of Commerce, I promised to send you and the other copy recipients of that letter a copy of the ABCC's Memorandum on Restricting Trade Union Immunities. This I now enclose.

I am sending a copy of this letter and its enclosure to David Edmonds (Department of the Environment) and Peter Shaw (Department of Education and Science).

T. P. LANKESTER

Don Brereton, Esq.,
Department of Health and Social Security.

PRELIMINARY MEMORANDUM

ON RESTRICTING

TRADE UNION IMMUNITIES

The Association of British Chambers of Commerce

April 1980

This submission was prepared by the ABCC Economic and Industrial Committee, whose membership is:

G N Mobbs (Chairman)
ABCC Vice-President
Chairman, Slough Estates Ltd
Chairman, Charterhouse Group Ltd
Member, Committee on Invisible Exports

T G Boardman MC TD DL
ABCC President
Chairman, Steetley Co Ltd

S L Speight OBE
ABCC Chairman of Council
Chairman & Managing Director, Neepsend Ltd
Vice Chairman, Raine Engineering Industries Ltd
Past Chairman, Association of Yorkshire and Humberside Chambers of Commerce
Past President, Sheffield Chamber of Commerce & Manufactures

J E Madocks CBE DL
ABCC Deputy Chairman of Council
Past President, Nottinghamshire Chamber of Commerce & Industry
Past Chairman, East Midlands Region of Chambers of Commerce

J R Jeffryes
ABCC Honorary Treasurer
Managing Director of M Braithwaite Internation Marketing Services Ltd
Past President, Teesside and District Chamber of Commerce & Industry

B W Sutherland FCA
ABCC Vice-President
Chairman, ABCC Taxation Committee

K A Millichap FCA
ABCC Vice-President
Partner, Josolyne Layton-Bennett & Co
Vice Chairman, Trustee Savings Bank (North-West Central Region)
Director, H & J Quick Group Ltd
Past President, Manchester Chamber of Commerce & Industry

W A Newsome
ABCC Director General

J G Ackers
Chairman, Ackers Jarratt Ltd
Past President, Walsall Chamber of Commerce & Industry

R Bailey
Senior Consultant Economist, Sir Alexander Gibb & Partners
Economic Adviser, London Chamber of Commerce & Industry

R Ireland
Finance Director, Wolseley Hughes
Past Chairman, Birmingham Chamber Industrial Affairs Committee

M L Kilby
General Motors

J Lyles JP
Chairman, S Lyles Sons & Co Ltd
Past Chairman, Association of Yorkshire & Humberside Chambers of Commerce
Past President, Dewsbury Chamber of Commerce

D M Mowat JP
Chief Executive, Edinburgh Chamber of Commerce & Manufactures

C J Risk
Secretary, Coats Patons Ltd
Director and Secretary, J & P Coats
Past President, Glasgow Chamber of Commerce

J B Wood
Institute of Economic Affairs
Economic Consultant to the Committee

J M Young
Group Finance Director, Pauls & Whites Ltd
Past President, Ipswich Chamber of Commerce & Shipping
Past Chairman, East Anglian Region Chambers of Commerce

Committee Secretary and Editor
J R S Egerton, ABCC Economics Director

THE ASSOCIATION OF BRITISH CHAMBERS OF COMMERCE

PRELIMINARY MEMORANDUM

ON RESTRICTING

TRADE UNION IMMUNITIES

This paper has been prepared by the Economic and Industrial Committee of the Association of British Chambers of Commerce. Comments on the proposals set out would be most gratefully received.

---ooo0ooo---

The Association of British Chambers of Commerce
Sovereign House, 212A Shaftesbury Avenue, London WC3H 8EW

NOTES

SUMMARY

1. In view of the fact that the position originally produced by the Acts of 1871 and 1906 and re-established by the Acts of 1974 and 1976 is one which gives trade unions immunity for wrongful acts, a state of things which is improper, and moreoever creates a privileged class which is not subject to the ordinary laws of the realm, this Association believes Parliament should amend these Acts at an early date.

2. Immunities on the scale enjoyed by the trade unions is inconsistent with the fundamental role of law, namely the protection of the rights of the subject.

3. Industrial disruption should be limited to disruption of contracts of employment between the employer and employee party to a dispute. Immunity should not extend to secondary disruption.

4. Procedural agreements between unions and employers should be made legally enforceable and there should be no immunity for disruption in breach of such agreements.

5. Provision should be made for the resolution of union recognition disputes and there should be no immunity for disruption by unions in pursuit of an unreasonable claim for recognition.

6. Section 14 of the 1974 Act should be amended so that unions are made liable for wrongful actions and their funds are placed at risk.

---oooOooo---

NOTES

INTRODUCTION

Industrial disruption is a major contributory factor to Britain's poor economic performance. Disruption has slowed down deliveries, discouraged innovation, demoralised management. The end product of disruption has been lower wages for the very people the unions ostensibly set out to help - their members.

This process has been cumulative. A great nation with a large industrial base and world wide markets is not reduced to poverty over night. Rather, there is a slow process of decline. In the past century, Britain has undergone such a decline from being the wealthiest nation in the world to one of the poorest in Western Europe. One of the factors which has contributed to this decline has been the policy of the British trade unions. Britain's present sadly diminished state demonstrates the truth of the warning given by Robert Lowe, Chancellor of the Exchequer in in Gladstone's first government:

> "We do not find fault with the policy of trade unions for being selfish; what we object to is that, meaning to be selfish, it is actually suicidal."

One peculiar feature of British trade unionism is the remarkable extent of union immunity from action in tort. Since 1906, trade unions have enjoyed what Sidney and Beatrice Webb described as: "an extraordinary and unlimited immunity, however great may be the damage caused, and however unwarranted the act".

This immunity is now widely criticised. There has in recent years been a marked increase in secondary disruption - that is disruption aimed at firms not party to a dispute. There have also been far too many occasions when bargains entered into by employer and union have been disregarded by union members. Industrial disruption has impoverished us all.

---oooOooo---

NOTES

PART I

THE THEORY OF IMMUNITIES

The granting of immunities on the scale enjoyed by the trade unions is in total contradiction to the entire tradition of British legal theory. The great constitutional lawyer, A V Dicey, wrote of the 1906 Act: "It makes a trade union a privileged body exempted from the ordinary law of the land. No such privileged body has ever before been deliberately created by an English Parliament."

The tradition of English (and Scots) law has been of equality under the law: "Be ye never so high, the law is above you" is the guiding principle upon which the entire concept of the rule of law rests. The immunity granted to trade unions is in direct contradiction of this principle.

English law has had as its fundamental role the protection of the subjects. The greatest of the English political philosophers, Thomas Hobbes, based his theory of society on the need to protect the individual from the evils of anarchy, the greatest of which, he argued, is violent death. Explicit in the Hobbesian rationale of the state is the argument that each citizen must yield certain rights to the state but that such yielding is contingent upon all other citizens yielding the same rights.

It is clear that the granting of immunities from action in tort strikes at the very foundation of society. Certain groups or individuals are to be permitted to seek the gratification of their wishes by means others are denied. The law can no longer provide a framework for reconciliation of differences by consideration of the rights and wrongs of a matter - disputes are only to be resolved by a trial of strength.

Thus the immunities enjoyed by the trade unions are in direct conflict with one fundamental principle of constitutional government and the rule of law. In place of an agreed system for resolving disputes, there is to be substituted naked power.

.../...

NOTES

Such a situation inevitably creates tensions which threaten the stability of society. Union immunities have provided a basis from which political influence flows. Governments go in fear of unions who are freed from constraints. Great damage can be done to the entirety of British industry by the escalation of disputes. Already there are signs of further weakening of respect for the law: in the BSC dispute, threats of withholding taxation were made by outraged employers who have been made the victims of secondary disruption.

A further consequence of the granting of immunities is the almost casual disregard for the consequences of disruption by its perpetrators. The immunities have created the illusion of a society apart - the union has come to matter more than the nation.

The defence most often advanced for immunities is that the unions would not stand for the removal. This is of course a straightforward admission that the unions have become too powerful and surely points to the need for careful reduction of such powers.

NOTES

PART 2

THE LIMITS OF INDUSTRIAL DISRUPTION

Traditionally the main purpose of industrial disruption is to achieve higher wages and better working conditions. The employer has capital equipment from which he expects to earn a return. The employees, by withdrawing their labour or otherwise being disruptive, can deprive him of a return on his capital.

It is fairly easy to see how trade unions have a role to play: the loss of one employee's labour may be tiresome but the loss of several will halt the factory. Hence the desire of employees to combine. The use of primary picketing also follows: a strike cannot work if an employer brings in other labour, so picketing is used to prevent this.

Industrial disruption, collective organisation and primary picketing thus have an economic rationale. There are certain points about the use of such tactics which need to be examined, but in essence the case for them is an economic one.

But union immunities extend beyond this. The current position is that unions are legally free to disrupt firms not a party to a dispute. Thus, in the BSC dispute we see:

a) secondary picketing, that is to say picketing of firms where the employer was not in dispute with the union;

b) secondary disruption, that is to say disruption of firms not a party to a dispute. Most of this disruption was in fact sympathetic disruption.

In practice, such disruption is usually aimed at first suppliers of customers of a firm in dispute - the total disruption of transport in January 1979 was something of an aberation. Usually 'blacking' is only possible against first suppliers or customers because only these are readily identifiable by a union. It is therefore these who most need protection.

.../...

NOTES

This Association would eventually wish to see suppliers and customers granted complete protection: but at the very least, we believe that when firm A is in dispute, immunity should only extend to the disruption of contracts between firm A and firm B and should not permit disruption of contracts between firm B and firm C, which may be remote from the original dispute.

The logic behind this type of disruption is not so clear. The victims are unable directly to determine the outcome of the original dispute: a firm deprived of imported steel cannot tell BSC employees that that firm will pay what is demanded. What it can of course do is bring pressure on the government to get BSC to settle.

It is in our view intolerable that when one firm is in dispute the entire of British industry should be threatened. The present situation does harm to efforts to export by firms who avoid disputes. Apart from the interests of their shareholders, it is monstrous that the future job security of their employees should be jeopardised.

A particular case which is often raised in this context is the case of disruption against a competitor of a firm in dispute. This case is perhaps less clear cut than the case for protecting independent firms. But is such disruption really justified? The justification must rest upon the argument that because a firm has a competitor its management is able to hold down wages because a strike will lead to loss of everyone's job. So, it is argued, to improve wages unions need to disrupt not just firms but whole sectors of British industry.

This argument ignores the existence of competition in the EEC and overseas. Even were import controls to be imposed, the threat of disruption of whole sectors of British industry would still be of benefit principally - and probably solely - to competitors in France, Germany, America, Japan etc. who would be able to make inroads into our export markets which cannot be protected by any action by the British government - only by the success and reliability of British exporters.

.../...

NOTES

PART 3

BREACH OF AGREEMENTS

There is no parallel in German, French or American law for unlimited immunity conferred on unions who cause breach of an agreement to which they themselves have been a party. In Britain, a bargain laboriously negotiated can be torn up with impunity.

This has had some extremely serious consequences for British industry. 'Wildcat' stoppages and consequent delays in delivery do not contribute to successful marketing. Even firms with good records can suffer from a bad image because of our reputation for strikes. Investors can hardly be blamed for looking elsewhere to invest capital. This is particularly true in the export markets as is shown by the survey printed as Appendix 2 of the ABCC commentary on the Employment Bill. This is a point which it is scarcely possible to overstress, especially as so many component manufacturers are forced to look overseas as a result of our relatively poor economic performance especially in finished goods. An obvious sector is the motor car industry where we have a thriving components sector which, if given the opportunity, can expand even if the domestic car sector continues to decline.

This immunity is of course in sharp contrast with the ordinary law of contract. The consistent trend over many years has been towards tightening up the law in favour of the consumer. The idea of suppliers enjoying immunity from action in tort is anathema.

The case for removing immunity for legal action consequent to breach of agreement in essence rests upon the proposition that societies cannot function unless most agreements are honoured. If no one paid bills or worked as they had agreed, civilized life would cease. Industrial agreements are just as important as other agreements.

.../...

NOTES

The immediate removal of immunity for breach of a pay agreement would undoubtedly cause a great deal of trouble for many firms with good industrial relations who find flexibility useful and would find the dislocation caused by an instant change in industrial practice intolerable.

Such an argument does not, however, apply to a proposal to remove immunity for disruption in defiance of a procedural agreement between a union and an employer. This would mean that if a union called or supported wildcat strikes it would lose its immunity but that if it followed proper procedures it would not.

NOTES

PART 4

UNION RECOGNITION

The proposals in parts 2 & 3 inevitably open up the thorny question of recognition issues and establishment of procedural agreements. Under the last government's legislation, there was a procedure whereby a union could in effect ask ACAS to force an employer to recognise it. This procedure is to be repealed by the Employment Bill.

The provisions which it is proposed to repeal under the Employment Bill are unsatisfactory in a number of aspects. They only allowed a union to force recognition while offering no protection to the employer even when there was a ruling to the effect that a union claim for recogntion was unfounded. In practice, as a result of various court rulings, ACAS finds it impossible to operate the existing provisions. Furthermore, the terms of reference of ACAS, which require ACAS to promote collective bargaining, have generally been felt to be biassed and therefore unsatisfactory.

The position cannot be left either as it stands at present or as it will stand after the enactment of the Employment Bill. There is a clear need for machinery to deal with recognition and other disputes.

The fundamental principle must be that unions should not enjoy immunity for disruption of a firm in pursuit of an unreasonable claim to recognition. On the other hand, if an employer has refused a reasonable claim to recognition, then the union should be permitted to pursue its claim by industrial disruption.

The determination of whether a claim for recognition is reasonable or unreasonable presents certain difficulties, but these are by no means insuperable. The existing TUC rules - the Bridlington agreement - offer some encouragement in this area. It would surely be possible to devise objective tests as to the reasonableness of a claim. One such criterion would be the number of members a union had among a

.../...

NOTES

defined class of employees. Another would be the wishes expressed by the employees. Another would be the need to avoid or at least minimise the scope for demarkation disputes. This criterion would, of course, operate to limit industrial disruption when another union already enjoyed a recognition agreement. In particular, it would be clearly right for an employer to resist attempts for recognition unless the union was willing to negotiate a procedural agreement which laid down methods of resolving disputes so that industrial disruption was the last resort rather than the first resort.

Such an approach would surely encourage one most desirable reform - the development of single plant, and hence, single industry, unions.

The actual enactment of such provisions could be achieved by a number of ways. One possibility would be to use the existing ACAS machinery; another would be to develop new machinery. The third option would be simply to legislate to limit the immunity to pursuit of a reasonable claim for recognition and rely upon the powers of the Secretary of State to promulgate a code of practice so as to give guidance to the courts as to what constitutes a reasonable claim.

NOTES

PART 5

IMMUNITIES FOR UNIONS - OR INDIVIDUALS?

Section 13 of TULRA 1974 (as amended in 1976) provides for immunities for individuals who induce breaches of contract. Section 14 provides immunities for unions.

The Government in its working paper on secondary action proposed to restrict immunities under Section 13. This in effect enables injunctions to be obtained against individuals. We believe an essential part of any successful reform must be the tackling of Section 14 immunities. This would put union funds at risk.

The justification for making a union liable is that this will force unions to discipline members - if necessary, by expelling them. It is, of course, then up to management to deal with non-members of unions and unofficial action.

The reform would meet one major problem of British management. At present any attempt to deal firmly with unofficial disruption leads to escalation which compels the union leadership (frequently against its will) to declare the disruption official. If unions were liable for the consequences of their actions then they would be compelled to use their best endeavours to discourage irresponsible disruption and this would enable management to deal with troublemakers.

In suggesting this, we do not seek to achieve management by shop steward; rather we wish to return to a situation in which unions uphold the law and the bargains they have struck and in which management is able to get on with achieving its essential purpose - the creation of wealth by the productive use of capital investment.

The amendment of section 14 should be seen as complimentary to that of section 13. We would, however, wish to see the granting of injunctions under section 13 limited to cases where individuals are

.../...

NOTES

likely to do really serious damage to the community as a whole although we see no reason why individuals engaged in unlawful disruption should not risk the possibility of orders for compensation being granted against them. Enforcement of such orders would make it impossible to obtain HP etc. In recent years, there has been far too much reluctance to insist that those who do wrong do so at their peril. Sophistic excuses for wrong doing do undoubtedly weaken Britain's social and political fabric as well as contributing to relative economic decline.

As to restriction of section 14 immunities this will in our view achieve a change of attitude by the unions, especially if it is not tied to great interference with their internal working. During the operation of the Industrial Relations Act, the TGWU nearly broke ranks and registered. Had it not been for the imprisonment of the dockers, the fining of the union would have provided the excuse sought by some of its leadership.

In contrast with the strong response to the imprisonment of the dockers, it was significant that the bulk of union members seemed unmoved by the impoundment of union funds. This was not, of course, true of the union leadership but it should not be forgotten that when Mr. Jones threatened a strike by the TGWU unless the government legislated for his political benefit, he was with impunity defied by the then Secretary of State for Employment. Experience suggests that union members will indeed rally round if fellow members are threatened with imprisonment and are quite willing to demand more money or shorter hours, but have no sympathy with essentially political ambitions of union apparatchniks.

In essence, we feel that the issue might be more profitably examined on a basis of history rather than myth.

DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
SWITCHBOARD 01-212 7676

Secretary of State for Industry

The Rt Hon James Prior MP
Secretary of State for Employment
Caxton House
Tothill Street
LONDON SW1.

28 May 1980

Dear Jim.

UNION LABOUR ONLY CLAUSES IN COMMERCIAL CONTRACTS

Thank you for sending me a copy of your letter of 15 May to Geoffrey Howe about the objectionable practice requiring contractors to employ only union members.

I am sure that you are right to press the CBI and the Federation of Civil Engineering Contractors (FCEC) to do what they can to discourage their members from this; such an initiative can do nothing but good. However, voluntary action will be of only limited effectiveness; nor is a reference in a Code of Practice a complete answer. While I appreciate the difficulties of taking legislative action it is thoroughly unsatisfactory that this form of coercion is legal especially when the CBI and FCEC have been pressing for some action from us. I was pleased to see that Patrick Mayhew gave an indication that action by trade unions to enforce such a requirement on their employers' contractors would be relevant to the forthcoming Green Paper on trade union immunities. I would hope very much that the Green Paper thoroughly airs the whole issue, including the question of whether such clauses and related practices should be outlawed completely. I shall shortly be writing to you separately about what other issues might be covered in the Green Paper including our policy in the long and medium term towards closed shops in general.

I support your proposal that we should consider what steps we might take to discourage the practice in the public sector. Before your latest letter my officials had already ascertained from nationalised industries coming within my responsibilities that they do not have formal requirements to this effect in their contracts, although there may well be local 'understandings'. Nor, despite Jock Bruce-Gardyne's comments in the Report Stage, do BL appear to have any general practice of this kind although instances may occur. However, I am quite certain that these industries in the public sector would be sympathetic to any request from the CBI (of which they are members) which may result from your initiative, and it would be better if the

2/ request

request came to them from the CBI than from the Government direct, although I would certainly be willing to write to my industries to commend any CBI initiative. I would of course also expect these industries, as responsible employers, to have regard to your forthcoming statutory Code of Practice on the Closed Shop.

I am content with your suggestion to amend the Employment Bill at the request of the FCEC to give the employer the right of joinder against the contractor in a claim from a non-union member for unfair dismissal resulting from a contractual clause. I assume that this would not make it more difficult for the employee to pursue his claim.

I am sending copies of my letter to the recipients of yours.

Yours,

Ken.

DEPARTMENT OF TRADE 1 VICTORIA STREET LONDON SW1H 0ET Telephone 01-215 7877

Wd Pol

From the Secretary of State

The Rt Hon James Prior MP
Secretary of State for Employment
Department of Employment
Caxton House
Tothill Street
London, SW1H 9NA

28 May 1980

Dear Secretary of State,

UNION LABOUR ONLY CLAUSES IN COMMERCIAL CONTRACTS

In your letter to Geoffrey Howe of 15 May, you asked me to consider whether anything could be done to remove impediments under the Restrictive Trade Practices Legislation to co-operation by contractors in resisting the imposition by clients of "union labour only" clauses in commercial contracts.

I understand that the Federation were in touch with the Office of Fair Trading recently about proposed arrangements which would have helped their members to resist clauses of this nature. It appears that the arrangements might well have been registrable, as they went beyond the terms of the exemptions in the Restrictive Trade Practices Act 1976, which provide that in determining whether an agreement is registrable, no account shall be taken of restrictions which relate to workers to be employed or to conditions of employment.

Section 2(3) of the Restrictive Trade Practices Act 1977 enables me by order to provide that additional matters may be disregarded in determining whether agreements in relation to goods are registrable. I have similar powers in relation to services agreements under Section 11 of the Restrictive Trade Practices Act 1976. These two provisions would in theory enable me to remove from liability to registration agreements designed to strengthen the hand of participants against union labour only contracts.

From the Secretary of State

I have asked my officials to consult with yours and with those of the Office of Fair Trading to see whether this line of approach offers a suitable way out of the Federation's difficulties.

I am copying this letter to the Prime Minister, to Members of "E" Committee and to the Lord Chancellor.

Yours sincerely,

Nicholas McInnes

JOHN NOTT
(Approved by the Secretary of State and signed in his absence.)

2

PRIME MINISTER

To note the timing

- not till October

MJS

27/5

Caxton House Tothill Street London SW1H 9NA
Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon Michael Jopling Esq MP
Parliamentary Secretary
HM Treasury
12 Downing Street
LONDON SW1

27 May 1980

Dear Michael

As you know, it is imperative that we should have the Codes on picketing and the closed shop in operation for next winter.

I am therefore writing now to give you advance warning that during the spill-over session I shall be laying these two Codes in draft for the approval of both Houses (affirmative resolution procedure). While for most Codes an hour and a half's debate late in the evening is sufficient, in view of the importance and sensitivity of the subjects I think we will run into difficulties if we do not allocate at a minimum a half-day to each. Perhaps we could have an early word about this.

I am copying this letter to the Prime Minister, the Chancellor of the Duchy, the Lord President and Sir Robert Armstrong.

Yours

2

PRIME MINISTER

To note
MJS
27/5

Treasury Chambers, Parliament Street, SW1P 3AG
01-233 3000

27 May 1980

Rt. Hon. James Prior MP
Secretary of State for
Employment

UNION LABOUR ONLY CLAUSES IN GOVERNMENT CONTRACTS

attached MJS

Thank you for your letter of 15 May. I fully support your view that the practice of obliging contractors to use only unionised labour is damaging. It tends to restrict competition and to impose a constraint on contractors not directly related to the performance of the contract. The result must inevitably be an increase in costs. I would, therefore, be happy for you to make a statement on this point when the Employment Bill reaches the Lords, as you propose.

We lack information on how prevalent the practice is among public sector purchasers. Certainly no instance is known to the Treasury where a government department or health authority has used a clause of this kind, and the standard conditions for government contracts do not contain such a clause. No examples have been produced to us of local authorities or nationalised industries imposing such conditions in contracts, although of course there may well have been cases not necessarily known to sponsoring departments. However, there have no doubt been occasions when authorities have required the use of union labour by means other than a contract condition, and there have certainly been cases when purchasers similarly have been obliged to use union labour, as you will know from the Leggatt Report. I can see no objection to the proposal for a right of joinder against client employers outlined in your last substantive paragraph.

/I see

I see considerable merit, therefore, in making our position clear on this point, and will take appropriate action to ensure that departments are fully aware of it. No doubt our colleagues in the departments sponsoring local authorities and nationalised industries will wish to consider what parallel action they might take.

I am copying this letter to the Prime Minister, members of E Committee and the Lord Chancellor.

GEOFFREY HOWE

SECRETARY OF STATE FOR EMPLOYMENT

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400

Switchboard 01-213 3000

Prime Minister

To please

PL

16/5

Rt Hon Sir Geoffrey Howe QC MP
Chancellor of the Exchequer
Treasury
Great George Street
LONDON
SW1P 3AG

15 May 1980

Dear Chancellor,

UNION LABOUR ONLY CLAUSES IN COMMERCIAL CONTRACTS

During the passage of the Employment Bill my attention has been increasingly drawn to the objectionable practice of client employers who require their contractors to employ only union members. This apparently is especially prevalent among public sector bodies like local authorities and nationalised industries. The CBI have asked that action be taken to stop it and the Federation of Civil Engineering Contractors (FCEC) have pressed the case for action most cogently and persistently. I have also received critical letters concerning the matter from John Hoskyns and Keith Joseph.

When we debated the issue at the Report Stageof the Employment Bill Patrick Mayhew indicated our strong dislike of the practice which can readily be seen as a way of forcing union membership on those who have no desire to join. He pointed out that this was a matter on which voluntary action by employers could help since what was generally involved was one employer imposing a union membership requirement on another as a condition of a commercial contract. We agreed with the suggestion made in the debate that since public sector authorities often imposed such conditions the Government could also help discourage the practice. Patrick said:

> "I hope that the Government, through their various Departments, will act upon that advice. I see no reason why a Government who takes the view I have described about the closed shop as an institution should encourage it through these contractual provisions".

We have been pressing the FCEC to do what it can to resist the practice and I shall be similarly pressing the CBI. I also intend to include in the forthcoming Code of Practice on the Closed Shop a provision to the effect that any such practice is unreasonable. It is therefore very important if our views are to be taken seriously that we consider what comparable steps we can take in the public sector. Since it lies with you to coordinate policy on matters concerning public sector purchasing and contracts I should be most grateful if you

would give this question urgent consideration in conjunction with our colleagues who have responsibility for public sector bodies. It would be most helpful if we could make a general statement of the Government's position on this practice whilst the Bill is going through the Lords.

I might add here that in the context of the voluntary action by private sector employers, the FCEC itself has recently approached the Office of Fair Trading to see how contractors might combine together to resist the offending contract terms. The FCEC have since written to me to say that there appear to be serious practical and legal difficulties in the way of such action on their part because of the effect of restrictive practices legislation. I would welcome any comments John Nott might have on how to remove any impediment on that score.

I have also been considering the concern of the FCEC about the effect on them of extending in the Employment Bill the rights of individuals in the Closed Shop. They have made the particular point that their own position might be made worse by the Bill. This could happen in the following way. At present, when faced with the objectionable clause in a contract, the contractor can impose a union membership requirement on his own employees and still be protected against a possible claim of unfair dismissal if he dismisses an employee for not joining a union. In future the Bill will extend the protection of unfair dismissal legislation to non-union employees who are on the payroll at the time any union membership requirement is introduced. It will also require a ballot with an 80% majority of those entitled to vote before a new closed shop can afford the employer with any protection against unfair dismissal claims.

The FCEC is especially concerned that if commercial pressures from clients force contractors to comply, it will be the contractors and not the clients who must meet any compensation claim for unfair dismissal. The Federation suggest this is especially anomalous because, elsewhere, the Bill provides that where a union puts industrial pressure on an employer to dismiss a non-unionist, then the union may be joined in any resulting tribunal proceedings and made to contribute to any award of compensation. The FCEC complain that in the situation they have described the client employer who imposes the condition in the contract on the contractor cannot similarly be joined.

I am urgently exploring means of meeting this last point by amending the Bill during the Lords Committee Stages to provide a new right of joinder against client employers who insist upon the implementation of a term in a commercial contract requiring

the contractor's employees to be union members. If an employee who is not a union member is dismissed in consequence the contractor who is facing a claim on unfair dismissal will be able to join the client employer in the case and the latter might be required to pay a contribution towards any compensation awarded. He in turn if he had been induced to take this action through union pressure should be able to join the trade union concerned.

I am copying this letter to the Prime Minister, members of 'E' Committee, and the Lord Chancellor.

Yours sincerely,

RTB Dykes

R T B DYKES
Private Secretary

/approved by the Secretary of State and signed in his absence/

PA MS cc TPL Prem

PRIME MINISTER

This puts the record straight on previous refusals by unions to respect Court decisions — only the NIRC

gs 14/5

NOTE

Thank you very much MF

TRADE UNIONS WHICH HAVE DEFIED HIGH COURT ORDERS SINCE 1964

1. It is only possible to list instances which have been reported in the Law Reports or otherwise attracted publicity. Until the recently reported decision of the executive of NATSOPA, there have been no known instances of defiance of orders of the existing High Court. Under the Industrial Relations Act 1971 the National Industrial Relations Court was established with equivalent status to that of the High Court. Unions known to have defied an order of NIRC are:

AUEW (Engineering Section)
TGWU

2. The AUEW (Engineering Section) defied the Court in two cases: Goad v AUEW (E) and Con-Mech (Engineers) Ltd v AUEW. Goad is the case of the factory quality contrd inspector who was excluded from the union and not permitted to attend branch meetings. NIRC held that he was a member of the union and should not be arbitrarily or unreasonably excluded from attending branch meetings and ordered accordingly. The union branch defied the order and continued to refuse to admit him to branch meetings; the union was fined a total of £55,000 for contempt. In Con-Mech a strike in connection with a recognition dispute was declared to be an unfair industrial practice under the Act and the union was ordered to pay compensation to the company as a result. The union refused to pay the compensation; this was held to be contempt and sequestration of some of the union's assets was ordered. The TGWU was held to be in defiance of the Court in Heatons Transport v TGWU. This is the container dispute case in which the union was held to be vicariously responsible for the unofficial blacking campaign at the docks against container firms which was found to constitute an unfair industrial practice under the Act. NIRC issued restraining orders and the union was fined for contempt upon the action led by its shop stewards continuing.

3. It is now reported that NATSOPA has defied the order of the High Court in Express Newspapers Ltd v Keys & others ordering its General Secretary to withdraw a circular inducing its members to strike on the TUC's "day of action" on May 14th. As yet, no enforcement proceedings have been brought.

LO/Sol A

14 May 1980

24 April 1980

PRIME MINISTER

GREEN PAPER PREPARATIONS

I have had a brief talk with Tom Boardman since the Birmingham speech - about which he was very complimentary - and he would like to post a letter to you, tomorrow, suggesting a presentation on further trade union reform; all this on the lines agreed in principle when David and I spoke with you about it a couple of weeks ago.

He would prefer to do this right away, even though it is rather early, because he finishes as Chairman of the ABCC on 8 May and it would be less easy for him to participate in that presentation if he was not the original author of the suggestion.

If you are agreeable, I will tell him to go ahead and post it tomorrow, Friday. If not, we will hold it until after he has finished at ABCC and we may then have to get his successor to take the initiative.

Are you happy for him to send the letter to you, now? He would be copying it to Jim.

JOHN HOSKYNS

Original in C&R.

c.c. D/M
IG

10 DOWNING STREET

THE PRIME MINISTER

23 April, 1980.

Dear Bob,

Thank you for your letter of 3 April enclosing a copy of your letter to Jim Prior with details of the new clause you put down for the debate on the Employment Bill. I have seen a copy of Jim Prior's reply to you, and there is very little that I can add. I do know, of course, how strongly many Government supporters feel on this issue.

Thank you very much for your very kind remarks in your last paragraph; I can assure you that I will continue to uphold the principles and policies for which the electorate voted.

Yours sincerely,

(SGD) MT

R. J. Dunn, Esq., M.P.

SW

Ind Pol

V
MJ

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon Sir Keith Joseph Bt MP
Secretary of State
Department of Industry
Ashdown House
123 Victoria Street
LONDON SW1

21 April 1980

Dear Keith

You wrote to me on 14 April supporting Geoffrey Howe's suggestion (in his letter of 31 January) that officials should jointly examine the time scale for renouncing ILO Convention 94 and repealing the FWR.

As I pointed out in my reply of 17 to Geoffrey Howe, the Cabinet decision was to review the FWR in the light of debate on Schedule 11 during the passage of the Employment Bill; and on that there is still some way to go. I also pointed out that the timetable for denouncing the ILO Convention is a straightforward matter of fact.

If, nevertheless, your officials or Geoffrey Howe's have suggestions about timetable or about possible "transitional arrangements" I should be quite happy for these to be discussed. I am asking my officials to follow this up.

I am copying this to the Prime Minister, other members of E Committee and Sir Robert Armstrong.

Yours
Jim

Mr Speaker

Speaker's House Westminster London SW1A 0AA

STRICTLY PRIVATE

17th April 1980

GT/EB

The Rt.Hon. James Prior, M.P.
Secretary of State for EMPLOYMENT
St. James's Square
LONDON SW1

My sincere thanks to you for the enquiries that you have made following my earlier letter.

I am deeply grateful to you for the assurance that you have given concerning the conditions of service of staff in the House of Commons.

STRICTLY PERSONAL

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Rt Hon George Thomas MP
Speaker's House
Westminster
LONDON SW1

17 April 1980

Dear Mr Speaker

Thank you for your letter of 15 April.

I hasten to reassure you that there is no intention on my part nor on that of any Minister in my Department to discuss with representatives of the House of Commons staff the terms of any amendment to the Employment Bill dealing with their conditions of service. Nor is there any question of my Department being in negotiation with them, or of any Minister having invited Miss Baines and Mr Limon to discuss the terms of an amendment to the Employment Bill.

The facts are these. I have received three letters from Miss Baines on the possibility of applying the employment legislation to the staff of the House of Commons. On receipt of the first one (dated 8 November last) I consulted the Leader of the House, but before a substantive reply had been prepared the Opposition tabled an amendment to the Employment Bill providing for the application of the Trade Union and Labour Relations Act 1974 (as amended) to the staff of the House. I again consulted the Leader of the House and, after he had taken the views of the Commission, Patrick Mayhew and I both stated categorically on the Committee Stage of the Bill that no amendments of the kind proposed could be considered while negotiations between the House of Commons Commission and the staff were still in progress.

Miss Baines has since written again to me, expressing dismay at the position taken by the Government, and asking for a meeting. No reply has yet been sent, and no meeting has been arranged with Miss Baines. In the course of considering the advice to be given to me on these letters, my officials spoke to the Clerk to the Commission (Mr Limon) and mentioned the possibility of a meeting as a means of explaining the Government's position. I quite agree with you, however, that such a meeting would not be appropriate and we shall simply reply by letter to the points that Miss Baines has made.

You will see from this that we have been, and will continue to be very careful to see that everything is done in accordance with the wishes of the Commission.

I am sending a copy of this letter to the Prime Minister and to the Leader of the House.

Cabinet / Cabinet Committee Document

The following document, which was enclosed on this file, has been removed and destroyed. Such documents are the responsibility of the Cabinet Office. When released they are available in the appropriate **CAB** (CABINET OFFICE) CLASSES.

Reference: CC (80) 16th Conclusions, Minute 1 (extract)

Date: 17 April 1980

Signed M Wayland Date 13 May 2010

PREM Records Team

PRIVY COUNCIL OFFICE
WHITEHALL, LONDON SW1A 2AT

Chancellor of the Duchy of Lancaster

16 April 1980

Dear Nick

The Chancellor of the Duchy received a copy of the Speaker's letter to the Secretary of State for Employment about the invitation from the Department of Employment to Miss Priscilla Baines and Mr Donald Limon regarding a meeting to discuss the terms of an amendment to the Employment Bill. The Chancellor of the Duchy has asked me to let you know that he fully supports the Speaker's view of the matter and is deeply concerned about the developments described in Mr Speaker's letter.

I understand that it is likely that the Prime Minister's view will be that the matter is one for the Secretary of State and the Chancellor of the Duchy (as a member of the House of Commons Commission) to deal with.

I am copying this to Richard Dykes (Employment).

Yours ever
John Stevens

J W STEVENS
Private Secretary

N Sanders Esq
Private Secretary
10 Downing St

cc HO TRADE
FCO ENG
HMT CS, HMT
IND CO
LPO

MAFF

CONFIDENTIAL

16 April 1980

Employment Bill: Ballots at the Workplace

The Prime Minister has seen your letter to me of 15 April. She is entirely content with your Secretary of State should proceed as he suggests.

I am copying this letter to the Private Secretaries to the members of E Committee and to David Wright (Cabinet Office).;

NJS

Richard Dykes, Esq.,
Department of Employment.

CONFIDENTIAL

jd

2

PRIME MINISTER

To see

NJS

16/4

cc Mr Duguid
Mr Walker

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400

Switchboard 01-213 3000

Nick Sanders Esq
Private Secretary
10 Downing Street
LONDON SW1

16 April 1980

Dear Nick,

Tim Lankester wrote to me on 11 April about a report in the Daily Telegraph that Mr Prior has initiated further consultations on the repeal of certain provisions of the Employment Protection Act 1975.

The provisions referred to are those of Schedule 11 of the 1975 Act, which clause 16(c) of the Employment Bill proposes to repeal in its entirety. There was some support in the Standing Committee on the Bill for concern expressed by some employers' associations and trade unions about the likely effects of repealing the first leg of the Schedule, which relates to "recognised terms and conditions". In the light of this, Mr Prior indicated that he was prepared to consider carefully any further representations which might be made to him on this matter. He emphasised however that the Government had not changed its mind and offered no assurance that the Government would seek to amend the Bill at a later stage.

Mr Mayhew subsequently answered a PQ by John Grant on this subject ... (copy attached). Mr Prior has also written to the TUC and CBI seeking any further comments they might have to offer, as the most appropriate means of drawing attention to his remarks in the Standing Committee. Naturally if he were to conclude that some change in existing policy was desirable he would put proposals to his colleagues. He has consistently made clear however that he believes it is right to repeal the Schedule as a whole and remains to be persuaded that any part of it should be retained.

I am copying this letter to Martin Hall (HM Treasury) and Ian Ellison (Department of Industry).

Yours sincerely

ANDREW HARDMAN
Private Secretary

DEPARTMENT OF EMPLOYMENT
WEDNESDAY 2 APRIL 1980
WRITTEN REPLY
THURSDAY 3 APRIL 1980

117 MR JOHN GRANT (ISLINGTON CENTRAL): To ask the Secretary of State for Employment, if he will take steps to ensure that interested parties are fully aware of his intention to give immediate consideration to further representations on the decision to repeal Schedule 11 to the Employment Protection Act.

MR PATRICK MAYHEW REPLIED:

In the Standing Committee on the Employment Bill on 27 March, my rt hon Friend said that the Government would be prepared to consider further representations about the proposed repeal of the "recognised terms and conditions" provision of Schedule 11. My rt hon Friend has subsequently written to the TUC and CBI seeking any further comments they might have to offer and my Department has also written to all those organisations which have commented earlier on this issue. In doing so we have emphasised, as my rt hon Friend did to the Committee, that the Government's present view remains that the whole Schedule should be repealed.

Mr Speaker

Speaker's House Westminster London SW1A 0AA

STRICTLY PERSONAL

15th April 1980

GT/EB

The Rt.Hon. Mrs Margaret Thatcher, MP
PRIME MINISTER
10.Downing Street
LONDON SW1

Dear Margaret,

I am sorry to trouble you with the enclosed correspondence, but I am deeply anxious about the indications that the proposed Employment Bill will seek to make all its terms applicable to the House of Commons.

This place is not like any other place of work in the country.

It is possible for members of the staff to nobble both Members of Parliament and Ministers because they meet them in the corridors of the House. I believe that we could have the mat pulled from beneath us at any time to suit the people concerned if they are given legal protection so to do.

Yours ever,
George.

enc

Mr Speaker
GT/EB

Speaker's House Westminster London SW1A 0AA

15th April 1980

STRICTLY PERSONAL

The Rt.Hon. James Prior, MP
Secretary of State for EMPLOYMENT
St. James's Square
LONDON SW1

I was horrified to learn this morning that a Junior Minister in your Department has invited Miss Priscilla Baines, a Union Shop Steward in the House of Commons, and Mr. Donald Limon, a Clerk in the House of Commons, to discuss the terms of an Amendment to your Employment Bill. Apparently this Amendment is to deal with the conditions of service of those who serve us in the House of Commons.

I think you are aware that difficult negotiations are underway between the Commission of the House of Commons and the staff and that there is a sticking point over the Union's refusal to sign the normal Agreement "not to impede the work of the House of Commons".

If we are not to give power to people to stop the House of Commons sitting at all, I believe that agreement on the non-impeding clause is essential. It would be a startling innovation if that Agreement were to be abandoned.

I wish to register a strong protest that your Department is negotiating not with Unions, but with Shop Stewards, without the Commission being aware of what is happening. I cannot stress too strongly the danger that I see to the House itself if the position of the Commission is to be undermined by Amendments to your proposed legislation.

It is only because I feel that the interests of the House are at stake that I am taking the unusual step of writing to you in this way.

I am sending a copy of this letter to the Prime Minister and to the Leader of the House.

CONFIDENTIAL

cc Mr Wolfson
Mr Hoskyns

Q 1

PRIME MINISTER

Context with this approach and these tactics?

NJS 15/4

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Nick Sanders Esq
Private Secretary
Prime Minister's Office
10 Downing Street
LONDON SW1

Will leave to Tuesday & S.N.

15 April 1980

Dear Nick.

EMPLOYMENT BILL: BALLOTS AT THE WORKPLACE

I am replying to Tim Lankester's letter of 10 April conveying the Prime Minister's support in principle for the proposal outlined in my Secretary of State's minute of 8 April and raising two additional points. (both attached)

The purpose of the proposal - and the reason it has the full support of the CBI - is to encourage and enable unions to take decisions by means of secret ballots at the workplace rather than out of doors at mass meetings by ensuring them the availability of a suitable place for holding the ballot. To require external supervision of the ballot which would be strongly resented by the trade unions would be inconsistent with this purpose. Such a requirement would make it unlikely that the provision would be used. Unions would continue holding meetings rather than avail themselves of the statutory provision under such conditions.

The suggestion that the Clause should also contain a provision for a ballot where a majority of the workforce had indicated their desire to be balloted but the union had not asked for one would involve placing the obligation to hold the ballot either on the employer or on the union. In the case of the employer this would seem unnecessary. If over 50% of his workforce had intimated to him their desire for a ballot, the employer would surely take the initiative himself in holding a ballot. If he did not, he would doubtless have good reasons for this and we should not force his hand in the matter.

To place the obligation to hold the ballot on the union would fundamentally alter the character of the Clause. It would go against the Government's philosophy embodied in Clause 1 of the Bill of encouraging greater use of secret ballots by voluntary means. To impose compulsory ballots would lose us the chance we at present have - and to which I attach very great importance - of splitting the unions on the Bill by enticing some - notably the EETPU and AUEW - to seek Government finance despite TUC opposition. It would also give rise to extremely difficult, if not insuperable, problems of practicality and enforcement.

As it happens, four new clauses have now been put down by back-benchers for Report Stage which would have the common effect of requiring unions to hold ballots where strike action was contemplated, in three cases at the request of a small percentage of members. These suffer from the same - and sometimes greater - objections of policy and of practicality and enforcement and my Secretary of State will be asking for their withdrawal in the context of the present Bill. The whole question of compulsory ballots on industrial action will, of course, be discussed in the Green Paper on immunities, which my Secretary of State believes to be the right way of dealing with this.

On further consideration of the tactics of the Bill the Secretary of State now considers that it would be preferable that his own new clause on ballots at the workplace should be taken in the House of Lords rather than at Report Stage. He would, however, intend to make known at Report Stage the Government's intentions in the matter.

I am sending copies of this letter to the Private Secretaries of E Committee and David Wright (Cabinet Office).

Yours ever

Richard Dykes

RICHARD DYKES
Private Secretary

CONFIDENTIAL

PRIME MINISTER

The earlier clause was absorbed in the Working Paper - so the answer is yes. MS 15/4

PRIME MINISTER

EMPLOYMENT BILL: Picketing

cc Mr Whitmore
Mr Wolfson
Mr Hoskyns

PA MS 16/4

PRIME MINISTER

The Lord Chancellor has agreed not to press his clause, and Mr Prior proposes to refer to the Code instead. MS 14/4

At the meeting of E on 13 February the Lord Chancellor suggested adding some words to Clause 14 of the Employment Bill on the following lines:

> "A person shall not be treated as attending for the purpose stated in sub-section (1) above if while there (a) he is in possession of an offensive weapon or (b) he forms one of a group so numerous that by reason of its size it might cause reasonable apprehension in the minds of persons seeking lawful access to their place of work or (c) he obstructs the police or (d) he is insulting or offensive in his language or his behaviour".

He explained that this would be a largely declaratory provision and that its purpose would be to make it clear that S.15 of the 1974 Act provides no immunity for the criminal offences cited and that immunity for civil actions under S.13 is forfeited if a picket commits such an offence; and to remove immunity where pickets are present in such large numbers as to cause intimidation.

It was agreed at the meeting on 13 February that the Home Secretary should consult the police associations about an amendment on these lines. These consultations have now been completed. Broadly speaking, the police associations covering England and Wales were not enthusiastic although they said they would not oppose an amendment on these lines. The Scottish associations were opposed to such an amendment. They feared that, far from clarifying the legal position of pickets, it might create confusion about the respective roles of the civil and criminal law and misunderstanding about the duties of the police.

I am afraid that I have similar misgivings. It would not of course be practicable to list all the offences which might be committed by pickets but by citing particular examples we might create the impression that S.15 did provide some immunity for offences not cited. This difficulty might

well arise in the case of obstruction of the highway, where as you may know, the Opposition have been trying to take the line that S.15 does provide some significant immunity against criminal prosecution. I am advised that if S.15 does in fact confer any such immunity it is only in a technical sense and certainly does not extend to any actual obstruction of a person or vehicle trying to enter a factory. However if obstruction of the highway were added to the list of cited offences it might be necessary to provide a specific exemption to cover "technical" obstruction. This would be very difficult to draft and could create further confusion. The same difficulty would arise if the amendment simply referred to "any criminal offence" without specifying examples. Moreover, if we cited only a few specific offences there would almost certainly be pressure to add others, such as assault and obstruction of the highway, which may be thought particularly relevant to picketing.

Furthermore, a provision of the kind proposed might be misunderstood by employers who thought the sub-section provided a civil remedy against the offences listed. In fact, of course, it would simply mean that a picket had no immunity under S.13 of the 1974 Act from civil action for inducing a breach of contract if in doing so he committed a criminal offence. That is already the position under the existing law if the criminal offence is linked with the inducement.

The risk of misunderstanding is, I think, particularly serious if we were to single out mass picketing for special mention in Clause 14. To the extent that mass picketing is wholly or mainly secondary picketing the Bill already covers it. But the Bill, even with the proposed addition, deals only with the civil law, whereas mass picketing is essentially a matter for the criminal law. Public confidence in the Bill as a whole could be undermined if the wording of the picketing provisions aroused expectations about the future treatment of mass picketing which the civil law cannot, by its nature, fulfil.

However, I believe the most important reason for not now proceeding with an amendment on these lines, is the impact of Michael Haver's statement on the law on picketing on 19 February. His authoritative explanation of the

role of the criminal law in relation to picketing seems to have dispelled much of the public confusion and misapprehension about the legal status of pickets and to have changed the atmosphere in which this whole issue is discussed. His statement made it clear that pickets have no immunity for criminal behaviour and that "the police may limit the number of pickets in any one place where they have reasonable cause to fear disorder". I think the successful containment of the pickets at Sheerness last month - and the public reactions to it - have shown that most people do now understand that the law provides immunity only for "peacefully obtaining or communicating information or peacefully persuading" and that the moment a picket goes beyond that the law affords him no protection.

I believe therefore that there is now less of a case for a declaratory provision than we thought when we discussed this issue at E on 13 February. The purpose the Lord Chancellor had in mind - and which we all supported when he raised this issue at E - can, I now think, be better achieved in the Code on picketing. I intend that the Code should explain in detail how the criminal law affects picketing and how the criminal and civil law interact and that it should take a firm line on the issue of mass picketing.

I sought the views of Willie Whitelaw and George Younger on this. Willie Whitelaw feels that if we were to proceed with an amendment on these lines it would be better to confine it to numbers or mass picketing (since this is the issue on which the Police Federation feel most strongly).

George Younger shares my reservations about proceeding with any amendment on these lines and takes the view that we should try to keep the law in this area as simple as possible. The Lord Advocate is of the same view.

I have written to the Lord Chancellor explaining why, for all these reasons, I do not think that we should now proceed with an amendment of the kind we discussed at E. He has agreed not to press his suggestion. I do not therefore propose to table an amendment but I intend to make it clear at Report Stage that the Code on picketing will provide a comprehensive explanation of the relationship of the criminal law to picketing.

I am sending copies of this minute to the Lord Chancellor, other members of E and Sir Robert Armstrong.

JP
14 April 1980

Department of Employment
Caxton House


1/4 AFTER 1500

CONFIDENTIAL

To await revised version of letter by end Tuesday NOP has been.

Caxton House Tothill Street London SW1H 9NA

Telephone Direct Line 01-213 6400
Switchboard 01-213 3000

Tim Lankester Esq
Private Secretary
10 Downing Street
LONDON SW1

14 April 1980

Dear Tim,

EMPLOYMENT BILL: BALLOTS AT THE WORKPLACE

I am replying to your letter of 10 April conveying the Prime Minister's support in principle for the proposal outlined in my Secretary of State's minute of 8 April and raising two additional points.

The purpose of the proposal - and the reason it has the full support of the CBI - is to encourage and enable unions to take decisions by means of secret ballots at the workplace rather than out of doors at mass meetings by ensuring them the availability of a suitable place for holding the ballot. To require external supervision of the ballot which would be strongly resented by the trade unions would be inconsistent with this purpose. Such a requirement would make it unlikely that the provision would be used. Unions would continue holding meetings rather than avail themselves of the statutory provision under such conditions.

The suggestion that the Clause should also contain a provision for a ballot where a majority of the workforce had indicated their desire to be balloted but the union had not asked for one would involve placing the obligation to hold the ballot either on the employer or on the union. In the case of the employer this would seem unnecessary. If over 50% of his workforce had intimated to him their desire for a ballot, the employer would surely take the initiative himself in holding a ballot. If he did not, he would doubtless have good reasons for this and we should not force his hand in the matter.

To place the obligation to hold the ballot on the union would fundamentally alter the character of the Clause. It would go against the Government's philosophy embodied in Clause 1 of the Bill of encouraging greater use of secret ballots by voluntary means. To impose compulsory ballots would lose us the chance we at present have - and to which I attach very great importance - of splitting the unions on the Bill by enticing some - notably the EETPU and AUEW - to seek Government finance despite TUC opposition. It would also give rise to extremely difficult, if not insuperable, problems of practicality and enforcement.

CONFIDENTIAL

John Browne, as the Prime Minister will know, has put down a Clause at Report Stage suggesting a somewhat similar provision at union level- ie that a union should be required to hold a secret ballot if this is requested by 15% of the union's total membership or 5,000 members whichever number may be the less. This Clause suffers from the same objections of policy and of practicality and enforcement and my Secretary of State will have to ask him to withdraw it, so far as the present Bill is concerned. Mr Prior will of course be discussing the question of compulsory ballots in the Green Paper, which he believes to be the right way of dealing with this.

I am sending copies of this letter to the Private Secretaries of E Committee and David Wright (Cabinet Office).

Yours ever
Richard Dykes

RICHARD DYKES
Private Secretary

DEPARTMENT OF INDUSTRY
ASHDOWN HOUSE
123 VICTORIA STREET
LONDON SW1E 6RB
TELEPHONE DIRECT LINE 01-212 3301
SWITCHBOARD 01-212 7676

Secretary of State for Industry

14 April 1980

NSPM
MS

The Rt Hon James Prior MP
Secretary of State for Employment
Caxton House
Tothill Street
London SW1

Dear Jim.

FAIR WAGES RESOLUTION: CENTRAL ARBITRATION COMMITTEE

Thank you for sending me a copy of your letter of 12 March to Geoffrey Howe about the Fair Wages Resolution (FWR).

We should not underestimate the damage done to industry by the retention of FWR. Since I brought to your attention the compleints from Ford and British Shipbuilders, we have heard of similar comments from Alfred Herbert Ltd. As you will see from the enclosed copy of their letter to the President of the Machine Tool Trades Association, they assert that the decisions of one 'Schedule 11' and two 'Fair Wages' hearings in 1977 in favour of employees were based on misleading comparisons and cost Alfred Herbert £1.2m (after allowing for 'ripple' effects) and considerable work.

I therefore support Geoffrey Howe's suggestion that officials jointly look into the timetable for repealing FWR. They could also consider, if indeed we cannot repeal it before 1983 (a year after the denunciation), whether there could be transitional arrangements to make it less onerous for industry in the meantime. 3 years is a very long time! Such a study would enable us to take an informed decision on FWR quickly in the light of the debate on Schedule 11 during the course of the Employment Bill.

I am sending copies of the letter (but not of the enclosure) to the Prime Minister, to other members of E and to Sir Robert Armstrong.

Yours ever,

Keith

PART 4 ends:-

s/s Ind to PM 11/4/80

PART 5 begins:-

s/s Ind to s/s Temp 14/4/80