CONFIDENTIAL

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Prime Minister

See John Hoskyns' and Tom Scott's comments at Flags A and B. D/Employment felt we may be trying to tighten up the last few sections in consultation with the Solicitor General.

12 15/2

PRIME MINISTER

WORKING PAPER ON SECONDARY INDUSTRIAL ACTION

I attach a copy of the revised working paper which now puts forward the policy proposal agreed by E Committee yesterday. The policy proposal is presented so far as possible on the lines suggested by the Lord Chancellor - namely, with more emphasis on the protection accorded to the rights of people to carry on their businesses without interference. I have also inserted a commitment to produce a Green Paper later this year for public debate of the whole subject of trade union immunities.

I intend to publish the working paper next Tuesday 19 February, so that it can be made available on a day when the Standing Committee on the Bill is in session and before I attend the Select Committee on Employment on Wednesday in connection with their examination of immunities. If therefore you have any comment on the presentation of the paper I shall be most grateful to have it in time to put the paper in final form on Monday.

I am sending copies of this minute and the working paper to other members of Cabinet, the Minister of Transport, the Attorney General, the Solicitor General, the Lord Advocate and Sir Robert Armstrong.

Tim - Day I see the minutes of E. I thought we agreed that the Watt clause should contain the language of the Lord Chancellor's suggested amendment. As the working document does it to include it in para 1 of the document but makes no reference to it in connection with the wider issue. Agree with John Hoskyns' observation - delete last sentence of para 11 and amend para 12 - community affected by the dispute.

J P
14 February 1980

SECONDARY INDUSTRIAL ACTION

1. Secondary industrial action in support of a trade dispute can severely curtail the freedom of people who are not concerned in the dispute to carry on their business and for that purpose to have free access to or from their place of work and to their customers and suppliers. Often, those so injured are barred from exercising their normal rights to seek redress in the courts against such interference by the immunities given to those pursuing industrial action by the Trade Union and Labour Relations Act 1974 (TULRA) as amended by the Trade Union and Labour Relations (Amendment) Act 1976.

2. The Government have the law on immunities under review. They have already consulted on the appropriate limitation of the immunities in relation to secondary picketing and have made provision for this in Clause 14 of the Employment Bill. In the Government's view recent interpretation and application of the law, notably by the House of Lords in the case of Express Newspapers v MacShane, demonstrate the need for immediate amendment also of the law on immunities as it applies to other secondary industrial action, such as blacking.

THE STATUTORY PROVISION

3. It is Section 13 of the 1974 Act (as amended by the 1976 Act) which provides immunity for a person from being sued for acts done in contemplation or furtherance of a trade dispute which induce or threaten a breach of contract. This is of great importance to trade unionists, because almost any industrial action involves a person, usually a trade union official, inducing others to break their contracts of employment; and without such immunity that person would be at risk of being sued every time he called or threatened a strike. It is also of great importance to everyone else, because the effect of the immunity is to remove from those persons who are injured by that action the right that they would otherwise have to obtain from the court such relief as may be appropriate to the injury being suffered.

4. The practical effect of the operation of the immunity shouldbbe

made clear. First, people who sue union officials for inducing breaches of contract are very seldom concerned with getting damages. They want the action complained of stopped at once by an injunction from the court. It is most unusual for legal proceedings to be pursued to a final judgement for damages. Even if damages are sought, there is a duty in law on the plaintiff to do all he reasonably can to mitigate the loss that is being wrongfully done to him and he will get damages awarded only for loss which he could not reasonably have avoided. Secondly, the courts will not normally grant an injunction unless very serious loss is being suffered which cannot be compensated for in money.

5. The scope of the immunity given by Section 13 for acts "in contemplation or furtherance of a trade dispute" was extended substantially in 1976. Before that (save for the period of operation of the Industrial Relations Act from 1972-1974) Section 3 of the Trade Disputes Act 1906, and subsequently Section 13 of the 1974 Act, provided immunity only for inducement of breaches of contracts of employment. However, the 1974 Act (Section 13(3)) was designed to establish, on a statutory basis, a wider immunity in certain cases. For instance, it enabled a person to induce employees to break their contracts of employment as a means indirectly, and without legal liability, of preventing their employer from performing a commercial contract.

6. In 1976 the immunity was extended to inducing breaches of all contracts, whether directly or indirectly. From then on the union official (or others) could safely interfere with any contract provided he did so "in contemplation or furtherance of a trade dispute" - and in such case neither party to the contract had any remedy against him, however great the damage suffered.

7. The Conservative Party as HM Opposition in Parliament fought vigorously against the extensions proposed in 1974 and ultimately enacted in 1976 on the ground that the resulting scope of the immunity given would be unnecessarily and dangerously wide. It was unnecessarily wide for trade union officials doing their job of protecting the interests of their members in a dispute; and it was dangerously wide for the rest of the community who would be unable

to protect themselves against industrial action taken against them when they were neither parties to the trade dispute nor had any immediate commercial concern in its outcome.

THE CURRENT POSITION

8. However, in a number of cases decided in 1978 and 1979 the Court of Appeal held that the industrial action in question had not been taken "in furtherance of a trade dispute" and therefore did not qualify for immunity under Section 13, even as extended in 1974 and 1976. For a time it appeared that the extent of the immunity would be governed by the application of tests, such as whether the action taken was too far removed from the original dispute or too lacking in effect or pursued for too extraneous a motive to be reasonably regarded as furthering the dispute. By these tests action in furtherance had to be reasonably closely related to the original dispute and the way the tests were applied by the Court of Appeal in the cases which came before them suggested that the immunity might often extend to action taken to interfere with performance of a contract by the first supplier or customer of the party in dispute, but would rarely go beyond that.

9. There were some hopes, particularly following the decision of the Court of Appeal in the MacShane case, that this development might afford a basis for consensus on the extent of immunity, provided that the immunity for secondary picketing was statutorily restricted because of its special connotations for public order. Since the Government would much prefer to proceed in these matters by consensus, it was felt that further consideration must await the decision of the House of Lords in the case of MacShane.

10. That decision was given in December 1979. Their Lordships found that, under the existing statutes, the test of what is "in furtherance of a trade dispute" is subjective, ie it depends on whether the person taking the action honestly believes that it will further the cause of those taking part in the dispute. The effect of their judgements seems to be that Section 13 is to be interpreted and applied as conferring immunity in every case in which, for example, "blacking" is undertaken in the genuine belief that it will in some way further an imminent or

existing "trade dispute". Thus, it does not seem to matter how remote the person (or business) whose contractual arrangements are thereby interfered with may be from the party to the "trade dispute" whose interests the "blacking" is intended to attack or whether he has any commercial concern in that dispute and its outcome. That this is the current position has been confirmed by their Lordships' more recent judgements in the case of Duport Steels Ltd v Sirs. In short, the fears expressed in 1974 and 1976 about the virtually unlimited extent of the immunity were shown by the Lords judgements to be justified.

THE GOVERNMENT'S PROPOSAL

11. The Government believe that the statutory immunity should now be amended to restore a more widely acceptable balance of interests; and thereby give greater protection for those who are not concerned in a dispute to go about their business without unwarrantable interference. In the case of secondary picketing, where the immunity has been much abused, Clause 14 of the Employment Bill now provides for the immunity to be restricted to acts done in the course of picketing undertaken by employees at their own place of work. It has been argued that, similarly, immunity should no longer extend to other secondary industrial action, like "blacking", but should be restricted to action taken by employees in dispute only with their own employers. [This would, however, result in the proscription of all forms of sympathetic action, even in cases where this may be the only effective industrial action available to assist employees in dispute with their own employer.]

12. The Government consider that considerably more thought needs to be given to the framework of immunities for industrial action appropriate to modern conditions and this is the purpose of their continuing review. However, since the current immunity clearly cannot be allowed to run virtually unlimited, the Government believe that the best basis on which to proceed immediately is to bring the position on immunity broadly into line with that suggested by the Court of Appeal decisions before the House of Lords judgements in Express Newspapers v MacShane (ie as indicated in paragraph 8 above).

13. One approach to this would be to lay down general tests of the kind

adopted by the Court of Appeal which would have to be objectively applied in determining whether secondary action is genuinely in furtherance of a trade dispute. The Government, however, do not believe that this approach on its own would be sufficiently clear. People need to have greater certainty as to when, if at all, their freedom to go about their business without interference can be lawfully constrained by secondary industrial action.

14. The Government accordingly propose that legislation should make clear

(i) the persons whose rights to bring civil proceedings for any interference with commercial contracts as a result of secondary industrial action are to be protected; and

(ii) the tests that have to be satisfied before any industrial action can begregarded as "in furtherance of a trade dispute" and so attract immunity.

THOSE WHOSE RIGHTS WOULD BE PROTECTED

15. Under this approach anyone who was neither a party to a trade dispute nor in an immediate commercial relationship to such a party would be protected from any interference with his commercial contracts where this arose from threatened or actual industrial action taken by his employees in furtherance of that trade dispute. He would therefore be free to exercise his normal rights to seek redress in the courts for any such interference with his commercial contracts.

16. This would, however, not apply to anyone who was a party to the trade dispute. Nor would it apply to those of his first suppliers or customers who regularly conduct a substantial part of their business with a party to the dispute and so are commercially concerned in the dispute. Accordingly, the Section 13 immunity would continue to apply to inducements to break, or interfere with, commercial contracts where the action, threatened or actual, was taken in furtherance of a trade dispute by

(a) employees of the party in dispute;

(b) employees of those of his first customers or suppliers who were not themselves a party to the dispute but who regularly conduct a substantial - not an incidental or minor - part of their business with such a party. Those customers and suppliers falling outside this definition would be free to exercise their normal rights under the law in the case of interference with their commercial contracts.

17. Inducements to break only contracts of employment in furtherance of a trade dispute would continue to attract immunity wherever the secondary industrial action was taken, ie even outside the limits proposed in paragraph 16. Where the breach of employment contract took place within these limits, there would be immunity even if it interfered with a commercial contract. Where, however, the breach took place outside these limits, anyone whose commercial contract was thereby interfered with would be free to exercise his normal rights to seek redress in the courts.

TESTS OF 'IN FURTHERANCE'

18. Furthermore, in order to attract immunity under Section 13, any industrial action taken by employees in a trade dispute would need to satisfy two tests. The action taken would need (a) to be reasonably capable of furthering the trade dispute in question and (b) to be taken predominantly in pursuit of the trade dispute in question and not principally for some extraneous motive. Thus, in the case of any secondary action which failed to satisfy these tests those injured would be free to exercise their normal rights under the law. This would be the case in relation to inducement in these circumstances to break any contract, whether a commercial contract or a contract of employment.

19. Comments are invited on this proposal. These are complex issues and the Government wish to have the views of employers and unions before introducing the necessary amendment to the Employment Bill currently before Parliament. The Government's general review of the law on immunities for industrial action will continue and its results will be published later this year in a Green Paper, so that they can be the subject of public debate.