CONFIDENTIAL

PRIME MINISTER

WORKING PAPER ON IMMUNITIES FOR SECONDARY INDUSTRIAL ACTION

I have been thinking further about what you said to me following our meeting yesterday with BISPA and also about the Chancellor's minute of 4 February.

2. I am absolutely certain that amending Section 14 of TULRA now will not help us. It would not avoid individual martyrdom. 95% of strikes are unofficial and the union could hardly be held liable for them. It is, I presume, not proposed that the remedy of injunctions against individuals would no longer be available. Employers are most interested in getting the action stopped and this is their prime remedy. Martyrdom will be possible under the Bill but only in ways which already exist under present legislation and, provided we do not make the legislation itself a matter of conflict with the unions, there is no reason to think that we shall have more martyrs than before.

3. I think also that the Chancellor's proposal overlooks the practical difficulties of setting a maximum limit on fines or damages. Would it, for instance, be open to each plaintiff company to apply (there were 16 in the Duport Steel case)? What happens if the fined union refuses to pay? At what stage does sequestration of union assets take place? What happens when the union then continues or starts a strike until its assets are returned? This was the sequence of events which occurred under the 1971 Act with the AUEW in the ConMech case. The strike was only called off after the payment of the union's fine by an "anonymous donor".

4. But in addition to all this there is the grave political objection pointed to in my minute - that this move would give the emotional content as yet lacking to the campaign against our legislation. It would be taken as an assault on the unions and it would be resisted as such. In the course of that resistance there would be no lack of extremist volunteers for martyrdom. At the moment we have made a discreet venture into making union funds liable for unreasonable exclusion or expulsion of members

/and

and for union pressure in unfair dismissal cases in closed shops. That could be a move of considerable significance for the future which we would hereby set at risk for no practical gain because unions traditionally stand behind their officers in the payment of damages.

5. I do, however, think that there is scope for agreement between us arising from what the Chancellor says in paragraphs 9 and 10 of his minute about the scope of immunity for secondary action. We are of course in the Employment Bill already withdrawing immunity for secondary picketing, by far the most effective method of secondary action. But I am not prepared to go beyond this by outlawing all forms of sympathetic action. This was not done even in 1971. But from the tests that the Chancellor quotes, I think that we may be much closer as regards withdrawing immunity from a wider range of secondary action than may appear. One of the options in my working paper is indeed to set down general tests of the kind that the Chancellor quotes and, although the Court of Appeal in applying those tests did not in the cases before them outlaw the action taken at first supplier or customer, those tests would require that the secondary action is much more closely related to furthering the original dispute and could, depending on the facts of the case, mean that immunity would not necessarily always extend to first supplier and customer.

6. Even on the more precise option for defining the scope of immunity I think that we should have to define "first supplier/customer" in such fashion as to ensure that we do not bring within the net those whose commercial relationship with the party in dispute is incidental or minor. That again would mean that immunity would not necessarily run to all secondary action taken at first customers/suppliers. This, of course, could be of particular significance for the independent steel producers and, indeed, the operation of the general tests in their case would give them some hope of success.

/7.

7. I think if we were to make this clear in the working paper this would go a long way to meeting your own points of concern. I have therefore had pages 3-5 of the working paper revised for this purpose and the new passages are sidelined. I hope that this will ease the anxieties that some colleagues have expressed about my approach.

8. This is as far as I consider it wise to go at the present moment. It is not a matter of whether we have one or more chances to move forward with this problem. What counts is whether we succeed in making use of this chance now or whether we overplay our hand.

9. It is now obviously highly desirable to publish our proposals and to take the views of industry. If colleagues find the working paper in its revised form acceptable as a basis for consultation, I would wish to proceed with publication tomorrow as previously planned.

10. I am sending copies of this minute and its attachment to other members of E Committee, the Lord Chancellor, the Paymaster General, the Attorney General, the Solicitor General and the Lord Advocate and to Sir Robert Armstrong.

J P

6 February 1980

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.

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.

7 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 seem 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. 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.

8 The Government believe that the statutory immunity should now be amended to restore a more widely acceptable balance of interests. 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.

The Government consider that considerably more thought needs to be given to the framework of immunities for industrial action appropriate to modern conditions before such sweeping restriction could be contemplated. 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 6 above).

9 One way of approaching this would be to define the scope of the immunity expressly in statute. This might be done by providing that the Section 13 immunity should continue to apply to inducements to break, or interfere with, contracts where the action, threatened or actual, is taken in furtherance of a trade dispute by

(a) employees of the party in dispute

(b) employees of his first suppliers or customers (who might be identified as someone who was not a party to the dispute but was in a regular or substantial - not incidental or minor - commercial relationship with such a party)

but that the Section 13 immunity should no longer apply to such action in furtherance of the dispute by the employees of any other

employer if it involves interference with commercial contracts. In the case of such an employer inducements to break his employees' contracts of employment would continue to attract immunity if in furtherance of the dispute, but there would no longer be immunity for any inducement to break his commercial contracts, whether directly, or indirectly through breach of the employment contracts.

10 This method would be specific, but could be sometimes arbitrary in effect, depending on the nature of the commercial relationships of the party in dispute. It would be particularly important to provide a definition of "first supplier/customer" which had regard to the size and regularity of the commercial relationship, so as not to extend immunity to action against those too little commercially connected with the party in dispute.

11 Another approach would be to lay down general tests of the kind adopted by the Court of Appeal (see paragraph 6 above) which have to be objectively applied. These would be intended to ensure that immunity extended only to secondary action closely related to furthering the original dispute.

General tests of this kind are, of course, in the nature of guides rather than clear and precise indications to employers and unions in dispute whether action is "in furtherance". They would often have the same effect as the approach outlined in paragraph 9 in regard to secondary action taken by employees of first customers and suppliers, but because they would be capable of being applied to that action as to any other action, they would allow more flexibility in the application of the law to the varied situations which arise.

12 Views are invited on the proposed limitation of immunity for secondary action (other than picketing for which the Employment Bill already provides) and on the approaches set out in paragraphs 9-11 above. In the light of the consultations, the Government propose to introduce the necessary amendment to the Employment Bill, currently before Parliament. Although this limited action is what the Government consider at this stage to be appropriate, their review of trade union immunities will continue.

6 FEB 1980