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TO FLASH FCO
TELNO 107
OF 191330Z NOVEMBER 86
INFO FLASH HOME OFFICE (FOR CUBBON AND NURSAW)
INFO FLASH LAW OFFICERS DEPT (FOR SAUNDERS)
INFO FLASH SNUFFBOX (FOR DUFF AND SHELDON)

FOLLOWING PERSONAL FOR MALLABY, CABINET OFFICE, FROM ARMSTRONG

1. I THINK THAT WE MAY BE COMING TO A CRUNCH POINT HERE, AT WHICH WE SHALL HAVE TO ASK FOR INSTRUCTIONS FROM LONDON. THIS IS NOT A REQUEST FOR SUCH INSTRUCTIONS, BUT I HOPE THAT IT MAY ENABLE YOU AND OTHERS TO START THINKING ABOUT THE ADVICE WHICH MIGHT NEED TO BE GIVEN TO MINISTERS IN CERTAIN CIRCUMSTANCES.

2. IN THE COURT OF APPEAL THIS MORNING WE WERE REFUSED LEAVE TO APPEAL AGAINST POWELL'S ORDER ON DISCOVERY. TURNBULL HAD INDICATED THAT HIS CLIENT WAS OLD AND SICK, THAT FINANCIAL RESOURCES WERE LIMITED, AND, AT ONE STAGE, THAT HE WOULD RATHER DROP ALL HIS DEMANDS FOR DISCOVERY THAN BE OBLIGED TO ACCEPT FURTHER DELAY IN THE MAIN PROCEEDINGS. THE BEST HOPE OF OVERTHROWING POWELL'S ORDER ON DISCOVERY IS BY MEANS OF A PUBLIC INTEREST IMMUNITY (PII) CLAIM.

own counsel 3. SIMOS SEEMS TO BE WILLING TO PROCEED WITH SUCH A CLAIM ON HIS OWN, WITHOUT AUSTRALIAN GOVERNMENT SUPPORT. BUT COUNSEL'S ADVICE IS THAT OUR CHANCES OF SUCCEEDING ON OUR OWN ARE SMALL. BAILEY WILL THEREFORE EXPLORE WITH THE SOLICITOR GENERAL TOMORROW (20TH) MORNING SYDNEY TIME THE POSSIBILITY OF COMMONWEALTH GOVERNMENT SUPPORT FOR SUCH A CLAIM. HE WILL SEEK TO FIND OUT WHETHER, IF THEY WERE DISPOSED TO SUPPORT, THEY WOULD BE PREPARED TO DO SO WITHOUT SEEING ANY OF THE PAPERS IN QUESTION, OR ALTERNATIVELY ON THE BASIS OF SEEING ONLY A SELECTION OF THE DOCUMENTS IN QUESTION, SUFFICIENT TO SATISFY THEM AS TO THE MERITS OF THE CLAIM AND ITS RELEVANCE TO AUSTRALIAN (AS WELL AS BRITISH) PUBLIC INTEREST. THIS OF COURSE ASSUMES THAT WE SHOULD BE WILLING TO DISCLOSE SUCH A SELECTION TO THE COMMONWEALTH ATTORNEY-GENERAL (AS WELL AS TO OFFICIALS OF HIS OFFICE, ASIO AND PROBABLY DPMC) OR POSSIBLY, IF THE COMMONWEALTH ATTORNEY GENERAL AGREED, ONLY TO CODD, AND IF NECESSARY SUBSEQUENTLY TO THE AUSTRALIAN COURT. IT MIGHT BE POSSIBLE TO ARRANGE MATTERS SO THAT THEY HAD TO BE SHOWN TO THE COURT ONLY ON APPEAL (EITHER TO THE COURT OF APPEAL OR TO THE HIGH COURT) AND NOT TO THE COURT OF FIRST INSTANCE, WHICH WOULD BE POWELL'S COURT.

4. IF WE DO NOT PROCEED WITH A CLAIM FOR PII, OR WE DO PROCEED BUT DO NOT SUCCEED, WE SHALL FACE A STARK CHOICE: EITHER TO DISCOVER THE DOCUMENTS OR TO ALLOW THE CASE TO BE DISMISSED. THAT WOULD BE THE CHOICE ON WHICH WE SHOULD NEED INSTRUCTIONS.

5. THE QUESTION WOULD BE WHETHER THE DAMAGE TO NATIONAL SECURITY WOULD BE GREATER IF WE DISCOVERED THE DOCUMENTS TO BE DISCOVERED THAN IF WE ALLOWED THE CASE TO BE DISMISSED.

6. THERE ARE TWO POSSIBLE SETS OF DANGERS FROM DISCOVERY:

A. THE DAMAGE RESULTING FROM DISCLOSING TO THE COURT AND TO THE DEFENDENTS THE MATERIAL IN THE DOCUMENTS TO BE DISCOVERED SEMI-COLON

B. THE DANGER OF SETTING A PRECEDENT FOR DISCOVERY OF DOCUMENTS TO WHICH IN ENGLISH COURTS WE SHOULD EXPECT TO SUCCEED IN A CLAIM FOR PII, AND THUS PUTTING AT RISK OUR PROSPECTS OF SUCCEEDING IN PII CLAIMS, INCLUDING 'CLASS' CLAIMS, IN THE ENGLISH COURTS.

7. THERE ARE ALSO TWO SETS OF DANGERS FROM ALLOWING THE CASE TO BE DISMISSED:

A. THE DAMAGE TO NATIONAL SECURITY FROM THE PUBLICATION OF WRIGHT'S BOOK, INCLUDING THE DAMAGE FROM THE CONTENTS AND THE PRECEDENT FOR OTHER FORMER MEMBERS OF THE SECURITY SERVICE MINDED TO PUBLISH.

B. THE POLITICAL CONSEQUENCES OF EXPOSING THE GOVERNMENT TO CHARGES OF 'GIVING UP' OR OF 'BEING DEFEATED'.

8. THE DISCOVERY ORDER HAS BEEN STAYED UNTIL MONDAY 24 NOVEMBER OR UNTIL FURTHER NOTICE. WE THUS HAVE A LITTLE TIME IN HAND, DURING WHICH THE MAIN PROCEEDINGS CAN CONTINUE WITH FURTHER ROUNDS OF TURNBULL VERSUS ARMSTRONG. BUT, IF THE AUSTRALIAN GOVERNMENT IS NOT WILLING TO SUPPORT US IN A PII CLAIM, OR IS WILLING TO CONSIDER SUPPORTING US ONLY ON A BASIS WHICH WE COULD NOT ACCEPT BECAUSE IT WOULD MEAN SHOWING THEM DOCUMENTS WHICH WE ARE NOT PREPARED TO SHOW THEM, WE SHOULD FIND OURSELVES, QUITE POSSIBLY BEFORE MONDAY MORNING, IN A POSITION WHERE WE COULD GO FORWARD WITH A PII CLAIM ONLY ON OUR OWN. GIVEN COUNSEL'S ADVICE THAT WE SHOULD BE VERY UNLIKELY TO SUCCEED, WE SHOULD NEED TO CONSIDER WHETHER NONETHELESS TO GO FORWARD, IN ORDER AT LEAST TO DEMONSTRATE THAT WE HAD TRIED EVERY POSSIBILITY OPEN TO US BEFORE ALLOWING THE CASE TO BE DISMISSED.

9. IT IS DIFFICULT FOR US HERE TO ADVISE SENSIBLY, SINCE WE DO NOT KNOW ENOUGH ABOUT THE DOCUMENTS IN QUESTION, AND THEREFORE ABOUT THE DANGERS OF DISCLOSING EVEN A SELECTION OF THEM TO MICHAEL CODD OR THE COMMONWEALTH ATTORNEY GENERAL (IF HE WAS PREPARED TO REGARD SIGHT OF A SELECTION AS A SUFFICIENT BASIS FOR SWEARING AN AFFIDAVIT IN SUPPORT OF OUR CLAIM). WE HAVE ASSUMED FROM YOUR TELNO MISC 371 THAT THERE IS NO QUESTION OF DISCOVERY OF ALL THE DOCUMENTS TO THE COURT AND THE DEFENCE, AND WE ACCEPT THAT. WE SHOULD BE GLAD TO KNOW WHAT IS YOUR PROVISIONAL VIEW ON THE POSSIBILITY OF EXHIBITING A SELECTION OF DOCUMENTS TO MICHAEL CODD AND/OR THE COMMONWEALTH ATTORNEY GENERAL AND IF NECESSARY THE COURT IN ORDER TO SECURE AUSTRALIAN GOVERNMENT SUPPORT FOR A PII CLAIM SEMI-COLON OR WHETHER YOU THINK THAT THAT IS OUT OF THE QUESTION, EVEN IF THE POSSIBILITY OF AUSTRALIAN SUPPORT, AND THEREFORE OF SUCCEEDING IN THE CLAIM, TURNS ON IT.

10. ON THE FACTORS DISCUSSED IN PARAGRAPHS 6 AND 7, I DO NOT EXPRESS A JUDGEMENT ON 6A, SAVE THAT I DO NOT BELIEVE WE COULD DISCOVER ANY OF THE DOCUMENTS USED OR REFERRED TO IN THE PREPARATION OF THE PRIME MINISTER'S STATEMENT OF 26 MARCH 1981 (THOUGH THERE HAVE BEEN INDICATIONS IN THE COURT OF APPEAL THAT TURNBULL HAS DROPPED OR WOULD BE PREPARED TO DROP THAT PART OF HIS DEMANDS). ON 6B, IT SEEMS TO ME TO BE VERY IMPORTANT NOT TO PUT AT RISK THE INTEGRITY OF OUR ENTITLEMENT TO CLAIM PII IN THE ENGLISH COURTS. I DO NOT KNOW HOW FAR WE SHOULD RISK DOING SO BY DISCOVERING IN AUSTRALIA DOCUMENTS WHICH WOULD BE PROTECTED BY PII IN ENGLAND. ON 7A, THE INTRINSIC DAMAGE FROM PUBLICATION OF THE CONTENTS OF WRIGHT'S BOOK MAY BE LIMITED, GIVEN THE AMOUNT ALREADY PUBLISHED IN PINCHER AND ELSEWHERE SEMI-COLON AND ONCE THIS CASE IS OVER WE SHALL BE FREE TO REASSERT AND REINFORCE WHAT THE PRIME MINISTER SAID IN MARCH 1981 ABOUT THE HOLLIS ALLEGATIONS. THERE REMAINS THE DAMAGE DONE BY THE FACT THAT THIS WOULD BE PUBLICATION BY AN INSIDER. THE QUESTION HERE IS WHETHER WE HAVE GONE FAR ENOUGH WITH THIS CASE IN AUSTRALIA, EVEN IF IT DOES NOT SUCCEED, TO DEMONSTRATE BOTH OUR DETERMINATION TO STOP INSIDER PUBLICATION IN ENGLAND AND (IF WE HAVE TO STOP SIMPLY IN ORDER TO AVOID DISCOVERY OF DOCUMENTS FOR WHICH WE SHOULD HAVE PII IN ENGLAND) A CONSIDERABLE DEGREE OF PROBABILITY THAT WE SHOULD BE ABLE TO SUCCEED IN A SIMILAR CASE IN ENGLAND. I EXPRESS NO VIEW ABOUT 7B, SAVE THAT THERE OBVIOUSLY WOULD BE SOME POLITICAL EMBARRASSMENT. I SUPPOSE THAT THE MAIN DEFENCE WOULD HAVE TO BE THAT WE WERE NOT ABLE TO PERSUADE THE AUSTRALIAN COURTS TO GRANT US PII, THAT WE HAD CONCLUDED THAT THE DAMAGE TO NATIONAL INTEREST FROM DISCOVERY WOULD BE GREATER THAN THAT FROM DROPPING THE CASE AND ALLOWING PUBLICATION OF WRIGHT'S BOOK TO PROCEED, BUT THAT THE GOVERNMENT'S POLICY ON THE DUTY OF CONFIDENTIALITY AND ON INSIDER PUBLICATION REMAINED UNCHANGED AND THE GOVERNMENT WOULD CONTINUE TO SEEK TO ENFORCE IT IN THE ENGLISH COURTS. THAT COULD, I SUPPOSE, ENTAIL TAKING STEPS TO TRY TO PREVENT DISTRIBUTION OF WRIGHT'S BOOK IN THE UNITED KINGDOM, AND POSSIBLY ALSO CONSIDERATION OF SOME ACTION AGAINST ARTHUR MARTIN, WHO HAS CLEARLY BREACHED HIS DUTY OF CONFIDENTIALITY AGAIN WITH FREEMAN AND PENROSE, DESPITE THE WARNINGS GIVEN TO HIM AFTER HE BREACHED IT WITH WEST.

11. THE PURPOSE OF THIS MESSAGE IS TO CONTRIBUTE TO YOUR THINKING, AND GIVE YOU SOME IDEA OF MATTERS AS SEEN FROM HERE. AFTER ALL THAT HAS HAPPENED, WE HERE HAVE A NATURAL DESIRE TO CARRY THE CASE THROUGH TO A CONCLUSION, IN THE HIGH COURT OF AUSTRALIA IF NEED BE. BUT WE RECOGNISE THAT THE DECISION WILL HAVE TO BE TAKEN ON A COOL CALCULATION OF CONFLICTING CONSIDERATIONS OF PUBLIC INTEREST, WHICH CAN IN THE END BE MADE ONLY IN LONDON.

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