

Pine Minister'

You may want to glance.

SECRET  
FM SYDNEY  
TO DESKBY 030830Z CABINET OFFICE  
TELNO 017  
OF 030505Z DECEMBER 86

R. T. A's specific request at Xow  
has been refused. We agreed

instead the formula which you saw  
this morning. N.L.U. 3.12

FOR MALLABY FROM ARMSTRONG  
YOUR TELNO 424.

OUR APPLICATION FOR LEAVE TO APPEAL AND (IF LEAVE IS GRANTED) THE APPEAL ITSELF WILL BE HEARD TOMORROW 4 DECEMBER BEGINNING AT 10.15 AM SYDNEY TIME. IF LEAVE IS GRANTED, THE HEARING IS LIKELY TO LAST ALL DAY AND JUDGEMENT MAY NOT BE DELIVERED UNTIL SOME TIME ON FRIDAY, PERHAPS LATER RATHER THAN EARLIER IN THE DAY.

2. THE AUSTRALIAN COURTS HAVE NOT SO FAR BEEN RECEPTIVE TO A CLASS CLAIM FOR PII BASED ON BRITISH PUBLIC INTEREST. IT WOULD THEREFORE BE UNWISE TO REST OUR APPEAL ON THIS GROUND ALONE. IT IS CLEARLY IMPORTANT, HOWEVER, THAT THE CLASS CLAIM SHOULD FEATURE IN OUR SUBMISSION, AND IT WILL. IT WILL CONTINUE TO BE A CLASS PLUS CONTENTS CLAIM ON THE LINES OF THE MALLABY AFFIDAVIT. ARGUMENTS ABOUT CONFIDENTIALITY WILL ALSO BE USED. WE WILL ENDEAVOUR TO KEEP OPEN RELEVANCE AS A POSSIBLE GROUND FOR ARGUMENT. THE COURT OF APPEAL HAS NOT YET RULED ON THIS: IT ONLY REFUSED US LEAVE TO APPEAL IN RELATION TO THE JUDGE'S ORDER FOR DISCOVERY. THE OTHER, AND NARROWER, GROUND OF ARGUMENT WILL BE THAT DISCOVERY OF THESE DOCUMENTS IS NOT NECESSARY IN ORDER FAIRLY TO DISPOSE OF THE ISSUES WHICH THE COURT IS BEING ASKED TO DECIDE BECAUSE THERE IS ALREADY EVIDENCE IN THE TRANSCRIPT TO THE SAME EFFECT AS THAT RECORDED IN THE DOCUMENTS.

3. WE WILL TRY TO ENSURE THAT YOU HAVE A FULL DAY TO CONSIDER YOUR REACTION TO THE APPEAL COURT'S DECISION. YOU WILL UNDERSTAND THAT WE SHALL BE DEPENDENT UPON THE LENGTH OF THE STAY WHICH THE COURT PUTS ON ANY ORDER RESULTING FROM THE DECISION REACHED: BUT THE COURTS HAVE SHOWN THAT THEY ARE SENSITIVE TO THE PROBLEM CAUSED BY OUR NEED TO GET INSTRUCTIONS FROM LONDON.

4. WE HAVE ASKED SIMOS FOR AN OPINION ON OUR CHANCES OF OUR WINNING A CLAIM FOR PII HERE. WE THINK THAT HE IS SUFFICIENTLY VERSED IN THE FIELD, HAVING APPEARED FOR THE COMMONWEALTH IN A CASE WHICH PII WAS CLAIMED: ANY ONE ELSE WOULD HAVE TO BE SHOWN THE DOCUMENTS WHICH SIMOS HAS ALREADY SEEN AND KNOWS: AND IT WOULD NOT BE HELPFUL IN OUR DEALINGS WITH HIM TO SUGGEST A LACK OF CONFIDENCE IN HIS JUDGEMENT BY INSISTING ON GOING ELSEWHERE. HE HAS AGREED TO PREPARE AN OPINION WHICH WE SHOULD BE ABLE TO FAX THROUGH TO YOU DURING THE COURSE OF WEDNESDAY MORNING YOUR TIME. PRELIMINARY INDICATIONS ARE THAT THE OPINION MAY BE TO THE EFFECT THAT WE HAVE A GOOD PROSPECT OF AT LEAST PARTIAL SUCCESS, BUT THAT THE COURT OF APPEAL ( AND IF IT EVER GOT THERE, THE HIGH COURT) MIGHT CONSIDER THAT THERE WAS A CASE FOR DISCOVERY OF AT LEAST SOME OF THE DOCUMENTS. THEY COULD THEMSELVES DEFINE AN AMENDED AND SHORTER LIST OF DOCUMENTS: THEY COULD (PERHAPS MORE PROBABLY) REDEFINE THE CRITERIA TO BE FOLLOWED IN SELECTING THE DOCUMENTS TO BE DISCOVERED AND INVITE MR JUSTICE POWELL TO AMEND HIS ORDER SO AS TO COMPLY WITH THE REVISED CRITERIA.

5. WE DO NOT REPEAT NOT HAVE IT IN MIND THAT SIMOS SHOULD IN HIS SUBMISSION TO THE COURT OF APPEAL OFFER TO CONSIDER OR ACCEPT A MORE LIMITED LIST OF DOCUMENTS. THE SUBMISSION WILL SEEK PROTECTION FOR ALL THE DOCUMENTS. BUT, IF THE COURT OF APPEAL - WHO WILL READ THE DOCUMENTS - WERE DISPOSED TO SAY THAT THEY SEE SOME MERIT IN OUR CLAIM BUT THAT NEVERTHELESS THEY CONSIDER THAT CERTAIN DOCUMENTS ARE NECESSARY IN ORDER FAIRLY TO DISPOSE OF THE ISSUES IN THE CASE, TURNBULL MIGHT SAY THAT HE WOULD BE WILLING TO SETTLE FOR A LIMITED LIST. WE HAVE NO MEANS OF KNOWING HOW LIMITED A LIST HE WOULD ACCEPT, BUT HE HAS TALKED IN COURT OF QUOTE THREE WHALES IN THE BAY UNQUOTE, THE WHALES INCLUDING THE DOCUMENTS NUMBERED SCHEDULE 1 PART 3B.1 AND B.5. IN THIS CONTEXT YOU WILL WISH TO CONSIDER IN PARTICULAR THE USE THAT COULD BE MADE BY THE DEFENCE OF THE SECOND PARAGRAPH OF 3 B 1 TO SUPPORT HOWEVER UNJUSTIFIABLY, THE ARGUMENT THAT THE GOVERNMENT CONNIVED IN THE PUBLICATION OF THEIR TRADE IS TREACHERY.

6. WE SHOULD NOT WANT TO GET INTO THE POSITION OF SEEMING READY TO RESPOND TO THE IDEA OF AN AMENDED AND SHORTER LIST OF DOCUMENTS IF THERE SEEMED A REASONABLE PROSPECT OF SUCCEEDING WITH A CLASS PLUS CONTENTS CLAIM ON P11. BUT THIS HAS PROVED SO FRAGILE IN THE AUSTRALIAN COURTS THAT COUNSEL MIGHT JUDGE THAT THE MOST FAVOURABLE OUTCOME WE COULD HOPE FOR WOULD BE A RULING FOR REDEFINED CRITERIA OR FOR A LIMITED LIST OF DOCUMENTS WHICH WE MIGHT BE ABLE TO ACCEPT. IT MAY BE THAT THE COURT OF APPEAL WOULD CONFINE ITSELF TO REDEFINING CRITERIAS. IF, HOWEVER, THE COURT DECIDED ITSELF TO DEFINE AN AMENDED LIST, CANNOT BE CONFIDENT THAT THERE WOULD BE NO PROCESS OF ARGUMENT WITH THE COURT AS TO WHETHER THIS OR THAT DOCUMENT SHOULD OR SHOULD NOT BE INCLUDED. IN THAT EVENT THE COURT MIGHT BE READIER TO ACCEPT ARGUMENTS FOR THE EXCLUSION OF PARTICULAR DOCUMENTS IF WE HAD SHOWN WILLING TO CONSIDER DISCOVERY OF AT LEAST SOME DOCUMENTS (OR CONCEIVABLY SUMMARIES OF SOME DOCUMENTS : SUCH SUMMARIES WOULD HAVE TO AGREE WITH THE COURT). PRODUCTION WOULD BE CONFINED TO THE DEFENDANT AND HIS LEGAL ADVISERS (WE WOULD SEEK TO EXCLUDE GREENGRASS) AND WOULD BE ON A RESTRICTED AND CONFIDENTIAL BASIS. ANY ENSUING CROSS-EXAMINATION ON THE DOCUMENTS WOULD BE IN CLOSED COURT.

7. IF THIS SITUATION ARISES AT ALL, IT WILL ARISE DURING THE COURSE OF THURSDAY (SYDNEY TIME) IN THE COURT OF APPEAL, AND IT WILL PROBABLY BE IMPOSSIBLE TO SEEK INSTRUCTIONS AT THAT STAGE. WE SHOULD THEREFORE BE GRATEFUL IF YOU COULD LET US KNOW BY 032100Z WHETHER INSTRUCTIONS TO COUNSEL MAY INCLUDE A WILLINGNESS TO CONSIDER A MORE LIMITED LIST OF DOCUMENTS THAN THAT PRESENTLY ORDERED BY MR JUSTICE POWELL; AND, IF THAT AUTHORITY IS GIVEN, WE SHALL ALSO NEED TO KNOW WHICH OF THE DOCUMENTS (AND WITH WHAT DELETIONS) WE SHOULD BE AUTHORISED TO AGREE TO DISCOVER; AND WHETHER WE SHOULD BE AUTHORISED TO CONSIDER PROVIDING SUMMARIES (TO BE AGREED WITH THE COURT) OF DOCUMENTS RATHER THAN DOCUMENTS THEMSELVES.

3. HAVING NOW TALKED TO THE SOLICITOR GENERAL, WE ARE HOPEFUL THAT COUNSEL FOR THE COMMONWEALTH WILL SUPPORT US IN THE COURT OF APPEAL ON THE SAME BASIS AS HE DID IN THE SUPREME COURT: THE AUTHORITY OF THE PRIME MINISTER IS BEING SOUGHT FOR THIS. WE DO NOT DOUBT THE DEFENCE'S STAYING POWER FOR THE COURT OF APPEAL PHASE. THEY WOULD UNDOUBTEDLY NOT WELCOME AN APPEAL TO THE HIGH COURT DEFERRED UNTIL FEBRUARY: WE DO NOT KNOW WHETHER THAT WOULD LEAD THEM TO DROP THEIR DEMAND FOR DISCOVERY, BUT WE DOUBT WHETHER IT WOULD DO SO, IF THEY HAD WON IN THE COURT OF APPEAL. NOW WE HAVE REACHED THIS STAGE, THEY WOULD NO DOUBT PREFER THAT WE SHOULD BE FORCED TO ABANDON THE CASE BECAUSE OF UNWILLINGNESS TO COMPLY WITH AN ORDER FOR DISCOVERY, RATHER THAN THAT THEY SHOULD RUN THE RISKS AND INCUR THE EXPENSE OF TAKING THE MAIN CASE TO A CONCLUSION.

9. TURNBULL HAS SAID THAT HE WILL NOT CALL WRIGHT UNTIL AFTER HE HAS CONCLUDED ANY FURTHER CROSS-EXAMINATION OF ME ON DOCUMENTS. HE IS SHOWING SIGNS OF WISHING TO RESTRICT THE LENGTH OF WRIGHT'S APPEARANCE IN THE BOX. HE TALKS OF GIVING THE WHOLE OF WRIGHT'S EVIDENCE IN CHIEF IN AN AFFIDAVIT. SINCE HE SAYS THAT WRIGHT IS GOING TO JUSTIFY THE PUBLICATION OF EACH SEPARATE EPISODE OR ALLEGATION IN THE BOOK, IT COULD BE A LONG AFFIDAVIT. WE ARE PREPARING SUGGESTED QUESTIONS FOR SIMOS'S CROSS-EXAMINATION. IT IS NOT CLEAR WHETHER THE DESIRE TO LIMIT THE LENGTH OF WRIGHT'S EXPOSURE TO EXAMINATION IN THE BOX IS BASED ON CONCERN FOR HIS HEALTH, WHICH SEEMS TO BE SOMEWHAT FRAGILE, OR ON A FEAR THAT HE WOULD NOT BE A VERY GOOD WITNESS. THOSE WHO KNOW HIM OF OLD AND HAVE SEEN HIM HERE SAY THAT THEY THINK THAT OBSESSION HAS DEVELOPED INTO PARANOIA.

IT IS CLEAR, HOWEVER, THAT WRIGHT WILL NOT APPEAR IN THE BOX UNTIL AFTER THE PII CLAIM HAS BEEN RESOLVED, AND OF COURSE IF WE COULD NOT ACCEPT THE FINAL RULING ON PII AND HAD TO ABANDON THE CASE HE WOULD NEVER APPEAR AT ALL.

10. AS A TAILPIECE I SHOULD REPORT THAT, WHEN I WENT WITH THE CONSUL GENERAL AND HIS WIFE TO A RESTAURANT FOR DINNER LAST NIGHT, WE FOUND MALCOLM TURNBULL, HIS WIFE, HIS MOTHER, PAUL GREENGRASS AND THE ENTIRE BRITISH PRESS CORPS (INCLUDING LEIGH, NORTON-5-6)94, FISHLOCK AND HEATHER ROGERS) DINING TOGETHER THERE. WE DECLINED POLITELY THEIR PRESSING INVITATION THAT WE SHOULD JOIN THEM.

SINDALL

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FCO PLSE PASS

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