CONFIDENTIAL

Ref. A01400

PRIME MINISTER

## Immunities for Secondary Industrial Action

(E(80) 10 and 12)

BACKGROUND

Last week's meeting failed to reach agreement on the options to be set out in the Consultation Document which Mr. Prior wishes to publish. The Committee asked him to arrange for officials to produce a note on these options. E(80) 10 is the result. Officials concerned consulted their Ministers (including the Solicitor General and the Secretary of State for Trade) and then prepared the paper. You saw it over the weekend; it was revised (mainly as a matter reordering) yesterday. It is confined, in the main, to Section 13; Section 14 is touched on only in the context of 'enforcement'. The note you also commissioned on the 1971 experience has been circulated as a separate paper. There is also a further paper by the Solicitor General, prepared after a talk which he had with the Lord Chancellor over the weekend, circulated under his minute of 11th February to the Secretary of State for Employment. Part 2 of this paper amounts to endorsing officials' description of Options 3 and 5, and setting out again his own proposal (Option 2). Part 3 suggests that repealing or amending Section 14 of TULRA would not be helpful.

Also a note from the Lord Chancellor TL.

HANDLING

2. Whatever the outcome of this morning's discussion, you will probably need to refer the issues to Cabinet on Thursday; conclusions at this meeting need not be final. Moreover, what we are talking about now is the contents of the Consultation Document. There is no need for the Government to take up a final position on any of these points unless it wishes to.

3. A compromise solution might have three components:

(i) Action on strikers and supplementary benefit (discussed at a separate meeting yesterday): a reasonably effective package of measures here would strengthen the Government's hand in presenting the Employment Bill changes to its own supporters.

(ii) A clear public indication that these changes are not necessarily the end of the road: paragraph 12 of the existing draft of the working paper says that 'although this limited action is what the Government consider at this stage to be appropriate, their review of trade union immunities will continue'. This does not specifically mention Section 14, but it contains a clear hint.

(iii) The toughest possible choice among the options listed in the present paper. While it may be agreed to drop Option 1 (a complete ban on secondary action) it might just be possible to persuade Mr. Prior to list the others as options, although he will probably try to avoid mentioning any but his own two preferred courses (Options 3 and 5).

4. Tactically, it may therefore be best to take the Committee through the options listed in the paper, one by one:

Option 1. This was included mainly as a bench-mark. It seems unlikely that Ministers would wish to mention it in any public document, save perhaps as a 'limiting case'. The likely adverse reactions from the trade unions are such that it might not be advisable to mention this even as a theoretical option - especially if Ministers do not regard it as feasible in practice.

Option 2. The Solicitor General originally put forward this proposal at E. Officials have tried to clarify it in drafting their paper, but you need to look at paragraph 8(b) of his own separate note as well. This approach sounds attractively simple. But it would be a mistake for Ministers to underestimate its severity - and therefore the likely reaction to it. The clue is in the second of the two provisos. No union engages in secondary action unless it wants to put pressure on the primary disputant. To do so means cutting off his supplies, or interfering with the flow of his finished product. Either of these, almost always, must involve a breach of a commercial contract; and such action would not be immune. So the Solicitor General's solution is, on its own, drastic. It might nonetheless be the basis of a solution, if it could be modified, e.g. by bringing in some further provisos, like those listed illustratively in Option 4, which might make it slightly less drastic. If the Committee seems attracted, you might try this route. The variant identified in paragraph 13 is even more restrictive than Option 2 itself.

Option 3. This is one of the two courses proposed by Mr. Prior. It gets back very close to the pre-'McShane' position, but it does so by putting fairly specific limits in the Statute, leaving relatively little (though still something) to the discretion of the courts. Paragraph 7 of the Solicitor General's note comments in more detail.

Option 4. Mr. Nott was not very specific at E last week about his suggestions, but this section has been prepared after consultation with him. This option starts by banning all secondary action, and then erects a series of exceptions (the Solicitor General's Option 2 achieves the same result, by affording a legal remedy in all cases except where specific provisos are erected). Once a limited number of exceptions was written into the Bill there would be great pressure to enlarge them: this can be regarded as a disadvantage, or as an advantage, if one regards it as a safety valve. It would also be important, in the Consultative Document, to make clear that any exceptions described were only illustrative. There has not been much time to develop them as yet.

Option 5. This is probably Mr. Prior's preferred option. It has the merit of building on the interpretation which the courts were applying before McShane. But it still leaves plenty of scope to the Judges. In this it offends against Lord Scarman's dictum in the recent House of Lords decision, to which you drew attention over the weekend. Because it is, in this sense, rather different from the other options, it is now placed at the end of the list. Paragraph 8(a) of the Solicitor General's note sets out his comments.

5. Enforcement. It is only at this point that the question of enforcement against trade unions comes in. Mr. Prior remains completely opposed to any action on Section 14, at this or, probably, at any other stage. The Chancellor's position seems to be that this is the best time to move and that there will never be a better one. Mr. Prior promises all sorts of terrible consequences. These have never been fully spelt out (despite Mr. Heseltine's request at the last meeting for an 'Armageddon option'). You may in any case wish to commission some further work on methods of enforcement. Depending on the outcome of this meeting, you may want to end up with an instruction to me to arrange for

officials to do such work. I would advise this course, rather than a remit to the Home Secretary and the Contingencies Unit: this goes a lot wider than straightforward contingency planning.

6. In the version you saw at the weekend, there was a sentence in what is now paragraph 23 which read: "Injunctions apply not only to those named in them but to any who stand in their place." This sentence has been taken out. You thought that it ran counter to a dictum of Lord Diplock in the House of Lords judgment last week that "only those individuals /named in the injunction/ are bound to observe the injunction. Everyone else involved in the industrial action can carry on with impunity....". The Department of Employment lawyers have consulted the Solicitor General's staff. I understand that the Solicitor General would agree that "injunctions apply to those named in them, but persons who knowingly step in so as to do the forbidden act may also be committed for contempt." But he does not think that this point is necessary in the paper, and (since the deadline for circulation had already passed) we did not include it. Mr. Prior, however, does attach importance to this point: he believes it demonstrates the effectiveness of the 'injunctions against individuals' or Section 13 approach, and hence the lack of any real need to move on Section 14.

CONCLUSIONS

7. I hesitate to suggest firm conclusions at this stage. The three points you need to cover, if possible, are:

(i) Whether or not to refer the matter to Cabinet next day or next week.

(ii) Whether to take final Government decisions now, or settle only the contents of a Consultation Document.

(iii) Whether a compromise on the lines indicated in paragraph 3 above seems possible.

RTA

(Robert Armstrong)

12th February, 1980