PRIME MINISTER

FOR MEDIA

30 August 1983

I was provided with the attached Opinion by the Attorney-General late yesterday.

SENATOR THE HON. GARETH EVANS

ATTORNEY-GENERAL

PARLIAMENT HOUSE

CANBERRA A.C.T. 2600

29 August 1983

GE:AOB

The Hon R J Hawke AC MP
Prime Minister
Parliament House
CANBERRA ACT 2600

Dear Prime Minister,

On 14 July you requested my opinion as to whether the conversation on the evening of 21 April 1983 between the then Special Minister of State, the Hon M J Young, and Mr E J Walsh, may have involved the commission of an offence under the Crimes Act 1914.

On 18 July I wrote to you stating that in my view - with which the Solicitor-General, Sir Maurice Byers QC, concurred - the only relevant provision of the Crimes Act was s.79(3). I said that the possibility of a contravention of that sub-section could not be excluded, but that it was not possible to give any concluded opinion on the matter until more information as to the content of the conversation came to light, and that for all practical purposes that would not occur until the relevant witnesses had given their testimony before the Royal Commission.

The situation now is that the relevant testimony - from Messrs Young, Walsh and Matheson - has all been given and made available to me. (The last of the publicly released parts of the transcript did not become available until 22 August; on that day Mr Justice Hope also made, on the application of Government counsel, an order releasing to me, the Solicitor-General and certain senior officers of my Department the relevant parts of the "in confidence" transcript.) As a result of certain conflicts in that testimony, however, the factual situation remains less clear at this stage than I thought it would be when I wrote to you on 18 July.

Because of that uncertainty, there is much to be said for my further opinion to you awaiting the findings of His Honour on this issue. But because of the time which has already elapsed and the natural desire of everyone

concerned to have the question of criminal liability clarified as soon as possible - so far as it is within my capacity as Attorney-General to do so - I have felt obliged to give you, without further delay, the opinion you sought on the basis of the material now to hand. My task, you will appreciate, has not been an easy one.

The Facts

It is common ground that Mr Young conveyed certain information to Mr Walsh on the evening of 21 April. Mr Young has given evidence that he informed Mr Walsh that:

- the Government had that day been looking at a problem involving Messrs Matheson, Combe and Ivanov (or "a Russian"), and that he (Mr Walsh) ought to be careful in his dealings with the Commercial Bureau of Australia; and

- at the Ministers' meeting in question, some antagonism had been expressed toward Mr Matheson.

Mr Young was asked in cross-examination whether he had said that there had been ASIO tapes or transcript at the meeting; he replied that he was unclear on that and could not recall making mention of it. He was not specifically asked whether he had said to Mr Walsh that Ivanov (or the Russian) was to be expelled.

Mr Walsh's account of the 21 April conversation was to the same general effect as Mr Young's, but added three specific matters of significance, viz. that Mr Young had said:

- "it had been an important meeting and a Russian was going to be expelled the next day";

- "Combe appeared to have had an association with the Russian who was to be expelled"; and

- "there were tapes and everything there, ASIO - I think he said ASIO - tapes".

Mr Matheson gave evidence as to what Mr Walsh had told him on 24 April as a result of what he (Walsh) had learned at a "drinks meeting" on the evening of 21 April: this account is similar to the account of the Young-Walsh conversation in Mr Walsh's evidence, but adds in turn further matters, e.g. that the Director-General of ASIO, Mr Harvey Barnett, was present at the Ministers' meeting.

For present purposes, however, I have set aside Mr Matheson's evidence. Not only would it be technically inadmissible in any proceedings against Mr Young (I share

the view of the Solicitor-General in his appended Opinion in this respect, although a contrary view based on the principle stated by Knox CJ and Dixon J in Morgan v. Babcock and Wilcox Ltd (1929) 43 CLR 163, at p.173, is possibly arguable), but it would appear to be in any event of little probative value: by the time Mr Walsh spoke to Mr Matheson, Ivanov had been expelled and Mr Combe had himself spoken to Mr Matheson, and Mr Walsh acknowledged in cross-examination that it was "highly probable" that what he had told Mr Matheson was a combination of what Mr Young had said plus inferences or conclusions drawn from this.

In ascertaining the facts of this matter, a choice is ultimately forced between Mr Walsh's account, which would certainly be admissible as evidence in any subsequent proceedings, and Mr Young's account, which would be admissible to the extent that he chose to make it so. Either the conversation was, as Mr Young recollected, very general in its terms - mentioning the characters involved in the ministerial deliberations and little else - or, as Mr Walsh recalled, it went into specifics, at least as to the imminent expulsion, the existence of an association between Mr Combe and the Russian, and the existence of ASIO tapes. On this difference, as will appear below, a good deal may well depend when it comes to the application of s.79(3).

I should add that I have also noted, as possibly relevant to the final determination of these factual questions, Mr Young's evidence that he told Mr Rod Cameron (and this was confirmed by Mr Cameron's evidence) before lunch on 22 April that the Government was going to "kick out a Russian", and repeated this to the luncheon group - including both Messrs Cameron and Walsh - during the lunch itself. This, however, cuts both ways in its implications for the conversation of 21 April: it may be thought to assist Mr Walsh's account to the extent it makes more likely some reference by Mr Young to the expulsion, but it also assists Mr Young's account to the extent that it suggests Mr Walsh may well have confused the two occasions in his later recollection.

It is neither necessary nor appropriate for me to weigh, balance and endeavour to decide the factual matters in issue. For present purposes, I shall proceed on the basis that findings in accordance with either Mr Young's account or Mr Walsh's account are open.

The Law

I remain of the view that the only possibly relevant provision in the Crimes Act is s.79(3). This reads in relevant part as follows:

"79(3) If a person communicates ... prescribed information, to a person, other than -

(a) a person to whom he is authorized to communicate it; or
(b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his duty to communicate it,

or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he shall be guilty of an offence.
Penalty: Imprisonment for two years."

"Prescribed information" is defined, in turn, in s.79(1) in relevant part as follows:

"79(1) For the purposes of this section ... information is prescribed information in relation to a person, if the person has it in his possession or control and -

. . .

(b) it has been entrusted to the person by a Commonwealth officer or a person holding office under the Queen or he has made or obtained it owing to his position as a person -
(i) who is or has been a Commonwealth officer;
(ii) who holds or has held office under the Queen;

. . .

and, by reason of its nature or the circumstances under which it was entrusted to him or it was made or obtained by him or for any other reason, it is his duty to treat it as secret; ..."

The crucial legal question is whether Mr Young can be said to have had a "duty" within the meaning of s.79(1)(b) not to disclose to Mr Walsh what he did disclose. As to the other legal tests that would have to be satisfied, it seems clear (though not necessarily completely beyond argument in every case) that what was communicated was "information" within the meaning of the elaborate definitions in s.77(1); that Mr Young had it in his own possession owing to his position inter alia, as a person holding "office under the Queen" within the meaning of that expression in s.79(1)(d)(ii); that Mr Walsh was not someone who fell into either of the exceptional categories of recipient spelt out in s.79(3)(a) and (b); and that by being communicated to Mr Walsh, albeit in confidence, the information in question was not being treated "as secret" within the meaning of s.79(1)(b).

The duty to treat information as secret in s.79(1)(d) is one which arises for a person

> "by reason of its nature or the circumstances under which it was entrusted to him or it was made or obtained by him, or for any other reason".

The language here, which directs attention to the particular context in which information is acquired, is in marked contrast to that which appears in s.70(1) of the Crimes Act:

> "70(1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he is authorized to publish or communicate it, any fact or document which comes to his knowledge, or into his possession, by virtue of his office, and which it is his duty not to disclose, shall be guilty of an offence."

Professor Sawer has argued in a recent newspaper article (Canberra Times, 10 August 1983) that the duty referred to in s.70 must mean a legal duty, i.e. one clearly imposed by some other statutory provision or rule of common law. He suggests that criminal courts would be very reluctant to construe an offence punishable by two years in gaol as extending to situations where the duty is merely a "moral obligation arising from convention, reasonable expectation and honourable relations between colleagues". This argument seems to me compelling in relation to s.70, where the direction to the courts to determine whether or not a duty exists is stark and unadorned. But it is rather less so in relation to s.79, to which Professor Sawer does not refer in the article cited.

The difficulty is that in the latter section the courts are specifically directed to take account of, inter alia, "the nature of the information" or "the circumstances under which it was obtained". It may be possible to read down s.79 and confine it to situations where there is some explicit pre-existing legal duty on the person in question, whether derived from particular statutory prohibitions, public service regulations, employment relationships, express or implied contractual obligations, fiduciary duties or something of that kind (as Professor Sawer has elsewhere suggested). But while the section so read down would still have some scope for operation, such a reading would give little or no effect to the statutory language requiring the court to look at the circumstances of the particular case.

There may well be public policy considerations which should be weighed in the balance in determining whether s.79 could ever have been intended to apply to Cabinet

Ministers in respect of Cabinet or Cabinet Committee business. Some of these are spelt out by Professor Sawer in the article mentioned. But while these may constitute additional grounds for concluding that the expression "Commonwealth officer" in s.70 is not intended to include "Minister of the Crown", I believe they have much less force in the context of s.79, where the reference to those holding "office under the Queen" is certainly broad enough to include Cabinet Ministers, but where the direction to the courts to take account of context in determining the existence or otherwise of a "duty" is also flexible enough to accommodate the kind of public policy concerns that naturally arise if Cabinet Ministers are to be within the scope of the section.

While it would be clearly nonsensical - not least because of the array of other sanctions that operate in Westminster parliamentary systems - for Ministers to be subjected to two years gaol for, say, the premature disclosure, inadvertently or even deliberately, of some statutory appointment, it is difficult to see an overriding public policy reason why a Minister should not be as criminally liable as any other recipient of secret information for disclosing the location of a convoy in wartime.

In my view, then, although the matter is by no means completely beyond doubt, information given to Cabinet Ministers in that capacity may be such as to create a duty not to disclose it, breach of which may be punishable under s.79(3): but everything depends on the nature of the information, and the circumstances in which it is obtained. The language elsewhere in s.79 - for example, the reference to purposes "prejudicial to the safety or defence of the Commonwealth" in sub-section (2) - suggests that the kind of information most likely to attract the operation of the section would be sensitive material directly related to defence and security.

Applying this approach to the present matter, the significance of the difference between Mr Young's account and Mr Walsh's account of their conversation should be readily apparent.

If the conversation was as limited in scope as Mr Young's recollection suggests, then it would be difficult to argue that s.79(3) had application. The problem involving Messrs Matheson, Combe and Ivanov could well have been merely about some trade matter, and in that case the significance of the information passed on would have been commercial or economic rather than having anything to do with matters of national security. While the disclosure of information of this kind might or might not properly attract other sanctions, criminal penalties would hardly

appear appropriate. It is likely that a judge would hold, as a matter of law, that s.79(3) had no application to such a situation; and if the matter did go to a jury, an acquittal would be overwhelmingly probable.

If, on the other hand, Mr Walsh's account were to prevail, the question of the application of s.79(3) would be, in my view, much more finely balanced. As a matter of law, it is possible that an offence may have been committed. The information in question would be seen to squarely relate to national security and foreign affairs matters of great delicacy and sensitivity, and of such a nature that its premature disclosure would put at risk ongoing security and intelligence operations. While obviously still not in the same extreme category as the "convoy in wartime" example, nonetheless it would be much more difficult for either judge or jury to dismiss the existence of the necessary "duty".

In formulating the above views, I have had the benefit of consultations with, and a formal written opinion from, the Solicitor-General, who has, in turn, discussed the legal issues with Mr M Gleeson QC, senior counsel for Mr Young. Sir Maurice's Opinion, with which I generally concur, is appended to this letter.

The Decision to Prosecute

The decision as to whether or not to institute a criminal prosecution always depends in the first instance on the sufficiency of the evidence: whether it is such that it is more likely than not that the prosecution will result in a conviction. If the evidence in the present matter went no further than Mr Young's own account, there would be no sufficient basis on which to proceed. Mr Walsh's evidence, however, makes it necessary to consider the matter further, and the following discussion proceeds, as it must, on what from Mr Young's point of view is this "worst case" assumption.

In my letter of 18 July, I emphasised that merely because criminal proceedings could possibly lie in a particular case, it does not follow that they should be instituted. I retain as Attorney-General a discretion as to the conduct of all Commonwealth criminal prosecutions, and may decline to prosecute if in my view the public interest so requires. Moreover, in the specific context of prosecutions under Part VII of the Crimes Act, my consent is required before any proceedings can be instituted (s.85).

In considering this question I have had regard, as I foreshadowed in my previous letter, to the guidelines document, Prosecution Policy of the Commonwealth, tabled

in the Parliament in December 1982 by the Hon Neil Brown QC on behalf of the then Attorney-General, Senator Peter Durack QC. These guidelines state that it has never been the rule in Australia or in the United Kingdom that all offences brought to the knowledge of the authorities must be prosecuted, and identify a series of factors that can properly be applied in determining whether or not to prosecute. The most obviously applicable of these factors (I exclude for present purposes such considerations as "youth, age or special infirmity") are the following.

(a) Obscurity of the Law. This element is clearly present here, as is evident from the terms of both the Solicitor-General's opinion and my own: the issue of criminal liability, in our view, comes down ultimately to an assessment of what is required by the "nature" of the information, the "circumstances" of the case, and "any other reason". We are aware, moreover, that at least one distinguished constitutional expert (Professor Sawer) has expressed a view of the law contrary to our own.

(b) Need for Deterrence. Criminal prosecution becomes less necessary to the extent that other sanctions of deterrent value attach to the behaviour in question. In the official secrets area, sanctions that have been traditionally regarded as applicable and appropriate to Ministers are not those of the criminal law but the political sanctions of resignation or dismissal. The sanction of resignation has already, of course, applied in the present case.

It is worth noting in this respect that in Australia no prosecution has ever been instituted under the official secrets provisions of the Crimes Act against a Minister or ex-Minister. The same is true in Britain: no prosecution under the Official Secrets Act has ever been instituted against a Minister or ex-Minister (Report of the Committee of Privy Councillors on Ministerial Memoirs (1976, Cmnd. 6386)). It has been stated, moreoever, that the obligation of Cabinet secrecy has often been disregarded with impunity (Halsbury's Laws of England, 4th ed., vol. 8, p.702). No similarly weighty authority for this latter proposition is available in Australia, but nor would it appear to be needed.

(c) Seriousness of Offence and Degree of Culpability. Although the disclosure of the specific matters described in Mr Walsh's account would potentially have been very serious - in terms particularly of what it would reveal about, and the way in which it might have interfered with, security operations - it does not appear, in the event, that any such damage occurred. Nor was there, obviously, any intention to harm Australia's defence, security or international relations.

One other factor which I have felt it proper to take into account, particularly in the context of any exercise of my statutory role under s.85, is that a conviction under s.79(3) of the Crimes Act, which is punishable by two years imprisonment, would result, even if no actual gaol term were imposed, in Mr Young's automatic disqualification from the Parliament. This follows from the draconian terms of s.44 (ii)of the Constitution:

> "Any person who -
>
> (ii) ... has been convicted and is under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer:
>
> shall be incapable of being chosen or of sitting as a senator or member of the House of Representatives."

This gives further weight to the argument that the traditional political sanctions are the appropriate ones for all but the most extraordinary and dangerous ministerial breaches of official secrecy.

Taking all these considerations into account (and also bearing in mind, in turn, their likely impact on a jury in the event that a matter did go to trial), I have concluded that the case is not one in which criminal proceedings would be appropriate in the public interest.

To the extent that issues of larger public interest are involved in this matter, they are already being examined by His Honour Mr Justice Hope pursuant to his present terms of reference. While it may be that some of the issues I have had to consider, following your reference to me, will also be considered by the Royal Commissioner, my decision on the particular question of criminal prosecution - for which, as Attorney-General, I have the ultimate constitutional, and in the case of s.79, statutory, responsibility - should not be regarded as in any way pre-empting His Honour's findings on the matters in issue before him. Certainly my response to your request has not been so intended.

Yours sincerely,

GARETH EVANS

POSSIBLE PROCEEDINGS UNDER

SECTION 79(3) OF THE CRIMES ACT

OPINION

My opinion is sought whether on the evidence given before the Royal Commission on Australia's Security and Intelligence Agencies the view is open that the then Special Minister of State, the Honourable M.J. Young, may have been in breach of section 79(3) of the Crimes Act.

2. Mr E.J. Walsh gave evidence before the Royal Commission of a conversation which he said he had with the then Special Minister of State, the Honourable M.J. Young, on the evening of 21 April 1983 and of a subsequent conversation with Mr Matheson which he conceded "highly" probably was a combination of some things Mr Young had said to him and certain inferences or conclusions Mr Walsh had drawn from things that were said to him (p. 2952). I accordingly disregard it. There is no substantial ground to believe that Mr Matheson's account of Mr Walsh's conversation with him would be admissible in proceedings against Mr Young. Section 6DD of the Royal Commissions Act makes Mr Young's evidence before the Commission inadmissible against him in proceedings under section 79(3) of the Crimes Act. The only immediately relevant account therefore is that of Mr Walsh. I shall later discuss what Mr Young said.

3. I should in fairness add here that Mr Young's account of his conversation differs markedly from Mr Walsh's as to the matters disclosed and that obviously I cannot, nor do I attempt to, choose between them.

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Mr Walsh's Account

4. Mr Walsh said that Mr Young told him on the evening of 21 April that there had been an important meeting and that a Russian was going to be expelled the following day; that Combe appeared to have had an association with the Russian who was to be expelled; that Matheson (or the Commercial Bureau) had in fact got a bagging and had been mentioned several times at the meeting and that Mr Young said something like there were tapes and everything there - ASIO tapes he thought was said. Mr Young had begun by saying that Walsh should be careful in dealing with Matheson or with Commercial Bureau and by advising him (Walsh) that his (Young's) remarks were to be regarded as confidential.

Section 79 of the Crimes Act

5. The first question is the meaning of this difficult provision. Sub-section (3) provides, so far as is relevant,

> "79.(3) If a person communicates ... prescribed information to a person, other than -
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> (a) a person to whom he is authorized to communicate it; or
>
> (b) a person to whom it is, in the interest of the Commonwealth or a part of the Queen's dominions, his duty to communicate it,
>
> or permits a person, other than a person referred to in paragraph (a) or (b), to have access to it, he shall be guilty of an offence ..."

"Information" is defined in section 77(1) to mean information of any kind whatsoever whether true or false and whether in a material form or not and includes (a) an opinion and (b) a report of a conversation.

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6. By sub-section (2)(a) of section 77 information may be communicated whether what is communicated consists of the whole or part of what is obtained or whether the information itself or only the substance, effect or description of the information is communicated. The expression "prescribed information" is defined by section 79(1), the material parts of which are as follows:

> "79.(1) For the purpose of this section... information is prescribed information in relation to a person, if the person has it in his possession or control and -
>
> (a) ...
>
> (b) it has been entrusted to the person by a Commonwealth officer or a person holding office under the Queen or he has made or obtained it owing to his position as a person -
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> (i) who is or has been a Commonwealth officer;
>
> (ii) who holds or has held office under the Queen;
>
> (iii) who holds or has held a contract made on behalf of the Queen or the Commonwealth;
>
> (iv) who is or has been employed by or under a person to whom a preceding sub-paragraph of this paragraph applies; or
>
> (v) acting with the permission of a Minister
>
> and by reason of its nature or the circumstances under which it was entrusted to him or it was made or obtained by him or for any other reason, it is his duty to treat it as secret; ..."

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7. One of the issues before the Royal Commission is "(w)as there any unauthorised or improper disclosure by any and what Minister of the information made available to the NIS Committee concerning the relationship between Combe and Ivanov before 11 May": Issue No. 17. As it seems to me nothing has appeared which suggests that Mr Walsh was a person to whom either paragraph (a) or (b) of sub-section (3) applies. And it is reasonably clear that Mr Young obtained information relating to Ivanov's activities and ASIO's surveillance at the meetings of the National Intelligence Security Committee of Cabinet owing to his position as a person who held office under the Queen (section 79(1)(b)(ii) of the Crimes Act), for his membership of that Committee was due to his being a Minister of the Crown.

8. The questions in the present case turn upon whether that information and the decision that Ivanov should be expelled was by reason of its nature or the circumstances under which it was obtained or for any other reason such that it was his duty to keep it secret.

9. Paragraph (b) of sub-section (1) requires more than that a Minister ("a person who holds office under the Queen") obtain the information owing to his position, for, as well, the information by reason of its nature or the circumstances under which it was obtained or for some other reason must raise a duty to treat it as secret.

10. Should a Minister in time of war obtain information of proposed troop movements, the nature of the information would raise the duty. And it would nonetheless raise it in

the absence of any other statutory or common law obligation to keep it secret. By secret is meant "kept from public knowledge or from the knowledge of specified persons": Shorter Oxford Dictionary Vol. 2 p. 1924. And information innocuous in itself may be obtained in circumstances where the effect of its publication is sufficient to raise the duty; for example, a decision to extend the duration or change the conditions of issue of patents of a particular class by amendments to the Patents Act where disclosure would be unfair. The essence of this paragraph of sub-section (1) lies in the information obtained. It is not merely the communication of a Cabinet decision or breaches of Cabinet confidentiality. The fact that information was given to Ministers is one of the factors relevant to determine whether the duty was raised, but it is one factor only. While decisions of the Cabinet may amount to prescribed information, they are not, irrespective of their subject matter, of necessity so.

11. This means that the standard for determining whether a duty exists is set by the sub-section and hence, while a duty imposed by another law or by an obligation of confidence may be sufficient (because worked on by the sub-section), it is not essential. The decision of the Western Australian Supreme Court in Cortis v. R. /1979/ WAR 30 by comparing the language of section 81 of the Criminal Code with section 79(1) of the Crimes Act rather supports this view. See also Grant v. Headland (1977) 17 ACTR 29 at 31.

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12. It may, I think, be right to say of section 70 of the Act that some exterior obligation must be found either in Statute or the common law which raises the "duty not to disclose", breach of which the two sub-sections punish. But that section, unlike section 79, contains no machinery by which the duty must be ascertained. The crucial point of distinction between them is that section 79 contains in sub-section (1) the statement of the conditions which raise the duty while section 70 assumes its exterior existence.

13. I should add that I do not think Mr Young's oath of secrecy as an Executive Councillor is here relevant. It may be that that oath could be understood, where Cabinet discussion preceded formal recommendation to the Council, as extending to those discussions. But whether or not this is so, nothing of that sort here occurred.

14. And, of course, a Minister must have a wide discretion as to the persons to whom he may reveal information on matters within his constitutional responsibility. The present disclosure, as I understand it, does not fall within that class.

Conclusion

15. It is now necessary to refer to Mr Young's evidence before the Commission. This is because, while section 6DD of the Royal Commissions Act provides that a statement or disclosure made by a witness in the course of giving evidence before a Commission is not admissible against him, it does not exclude him from using what he has said should he desire and be able to do so. Mr Young told Mr Walsh in strictest confidence that the Government had that day been looking at a

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problem concerning Mr Matheson, Mr Combe and Ivanov or a Russian and that Walsh ought to be very careful. He went on to say that one of the Ministers had evidenced antagonism towards Mr Matheson. It will be seen that this account differs markedly from that of Mr Walsh.

16. I have endeavoured to point out that the duty to keep secret, in my view, extends to the information placed before the Cabinet Committee relating to Mr Ivanov's activities and ASIO's surveillance of those activities. I have said that because it is those aspects of the information which indicated the danger that Mr Ivanov posed or could be thought to pose to the country's security and disclosed the steps taken to prevent it.

17. How the Ministers should behave towards Mr Combe is no more significant than how they should behave towards any other lobbyist. What is significant for section 79(1) is the information placed before the Cabinet Committee. It is the information to which the duty attaches and it does so because of the nature of that information. I think, therefore, that should Mr Walsh's evidence be accepted it would be open to a jury to find that Mr Young had committed a breach of section 79(3).

18. The only relevant part of Mr Young's evidence is his indication that the Government had been looking at a problem which concerned Ivanov, Combe and Matheson and that Walsh should be careful. I think it reasonably clear that if Mr Young's evidence is accepted, the jury would acquit him

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even though technically they would not be bound to do so.

19. While, therefore, the question is one solely for the Attorney-General, on this ground without more I think that no proceedings should be taken against Mr Young.

25 August 1983

M.H. BYERS
Solicitor-General