IN THE WARDEN'S COURT
HOLDEN AT MOSS VALE
ON 20TH DECEMBER, 1982
BEFORE J.L. McMAHON,
CHIEF WARDEN.

Coal Mining Act, 1973 - Section 86.
Huntley Colliery Pty. Ltd. v. Avondale Colliery Pty. Ltd.
Claim for Crown Privilege.
Judgment on an application made by the Secretary of the Department of Mineral Resources in relation to non-disclosure of certain documents produced from within his Department under subpoena.

On 14th September, 1982 at the Court House, Moss Vale, I commenced to hold an Inquiry under Section 86 of the Coal Mining Act, 1973. That section provides that the Minister administering the Department of Mineral Resources (previously called the Department of Mines) may cause to be published in the Government Gazette a notice of his intention to invite either tenders for the grant of a coal lease under Section 32 or a person to apply for the grant of a coal lease under Section 34. Any person may by instrument in writing object to an invitation within thirty days of the publication in the Gazette but the objection itself must contain certain details as set out in subsection 3. The Minister is bound to refer an objection to the Warden for inquiry and report although certain provisions are contained in the section for a cancellation of the notice and a subsequent discontinuance by the Warden of the inquiry; otherwise the section provides that the Governor shall not grant a coal lease until the Warden has inquired into and reported upon the objections.

The nature of this type of inquiry is administrative. While a Warden in receipt of a reference to hold an inquiry under Section 86 must act judicially and in accordance with the requirements of natural justice, no verdict as such is returned by him in favour of any party and he is without jurisdiction to make any conclusive award as to whether or not the invitation was justifiably issued, whether or not the objections or any of them could be sustained, or on any other matter. The only discretion a Warden has as to an award is that of costs which may be awarded by reason of Section 111. A Warden at the conclusion of an

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Inquiry under Section 86 shall announce in open court his findings and the purport of his report to the Minister and shall then transmit to the Minister the evidence (taken at the Inquiry) and documents relating thereto and his findings and report. It would appear that the Minister is not bound to accept the findings of the Warden or any of them and may make his determination on the issue the subject of the invitation and objections on the basis of factors other than the Warden's findings. The fact that in practice in the past the Minister has accepted the Warden's findings and given them effect does not necessarily mean that he could not depart from the Warden's findings in future especially when, for example, there had been some other factors arise since the Warden's Inquiry which were pertinent to either the invitation or objections. I am of the view, however, that just because the proceedings are administrative I am not precluded from entertaining a claim for Crown Privilege in respect of documents.

In this particular matter, by gazettal of 8th January, 1982, notice was published that the Minister intended to invite Huntley Colliery Pty. Ltd. (hereinafter called Huntley) to apply for the grant of a coal lease over certain lands near Albion Park on the south coast of New South Wales. Certain objections were received by the Minister within time. These came from a company called Avondale Colliery Pty. Ltd. (called hereinafter Avondale) which has coal mining interests in adjacent lands, and from various individual persons who are either employed by Avondale or have contractual arrangements with it. The objections having been lodged, in accordance with the Act the Minister referred them to me for inquiry and report. The matter was originally listed on 18th May, 1982 from which date for the convenience of the parties it was adjourned to 13th September, did not commence on that day but commenced on 14th September and continued on the 15th, from which date was adjourned for continuation on 30th November and subsequent days.

Subpoenas having been served on personnel from the Department of Mineral Resources to produce documents to the September sittings on 14th September, Mr. Finnane now of Queen's Counsel, appeared for the Minister and personnel of the

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Department and sought that the matter stand over so that either the Attorney General or the Minister could consider Section 61 of the Evidence Act and the question as to whether or not certificates would be granted. Having heard argument not only from Mr. Finnane but also from Mr. Cowdroy of Counsel for Huntley and Mr. Oslington of Counsel for Avondale, I ruled that the matter should stand over and that the documents should not be produced at that juncture. Certain oral evidence was admitted on behalf of the objectors, which did not go to the admissibility of the subject documents, but which was admitted in order to attempt to save time.

When the hearing resumed on 30th November, Mr. Finnane no longer appeared for the personnel of the Department of Mineral Resources but Mr. Camilleri appeared. It became apparent to me that while the question of certificates had been considered, no certificate had been issued. Notwithstanding that Mr. Camilleri raised the question of Crown Privilege and called Mr. Rose, the Secretary and Permanent Head of the Department of Mineral Resources to make out that claim. As I understand Mr. Rose's evidence, he asserted that the documents the subject of the subpoena came within a class of documents which should not be disclosed because of the public interest and the need to prevent disclosure because the documents:-

1. were of a policy nature;

2. indicated dealings between a Departmental Head and a Permanent Head and if disclosed could well detract from the candour and nature of future communications;

3. were between the Permanent Head and another organisation, and

4. took the form of communication between Ministers.

He felt that the public interest would be adversely influenced because proper future advising could not take place, decision making would be affected and the candour with which communications are made would be lessened if documents of the class of those sought to be subpoenaed were disclosed.

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A schedule was admitted as exhibit B which sets out a brief description of the documents. Again, in order to save time it was initially received in handwritten form but subsequently for the purpose of convenience I have caused it to be typed and then compared with the original. This is attached to this judgment.

It seems clear from the descriptions in exhibit B that there were in fact documents sought to be tendered which were subsequently conceded by the party causing the subpoena to issue, that is Avondale, that were not relevant to these proceedings and for the purpose of this judgment it can be taken that certain documents in the schedule from pages 1 to 8 were not pressed by Avondale and while they were in court on the days that the argument took place I permitted their release on the basis of their lack of relevance. The pagination is defective in that there is no page 9.

I am therefore considering only those documents described in exhibit B from pages 10 to 14 inclusive, which are documents sought to be seen by Avondale and to be produced as being pertinent to the Inquiry. It was strongly put by Mr. Camilleri on behalf of the Minister and Department of Mineral Resources that they come within a class of documents which should not be disclosed because of Crown Privilege. I indicated to the parties that I proposed to look at the documents themselves and this I have done. I accept Mr. Rose's evidence that the documents generally are either minutes from senior officers concerning the decision that had to be made as to whether or not Huntley or Avondale would be given an area or an additional area, representations by a Member of Parliament to the Minister, minutes of meetings with the Electricity Commission, minutes from the Acting Principal Geologist within the Department of Mineral Resources, handwritten notes by other senior officers, communications between the Acting Minister for Mines and another Member of Parliament, and a summary generally of the situation. In all cases Mr. Rose swore that senior officers were involved with the exception of one matter where a junior officer had prepared a report which had been subsequently adopted by a senior officer who had attached his own comments. In cross examination Mr. Rose stated that overall harm would be done to the Public Service in that efficiency of its administration would be undermined and that

there would be repercussions if documents of this nature were allowed to be released. He felt that it would be prejudicial and harmful to the public interest, would affect the administration of his Department and generally if senior officers and the Minister were to have their communications subject to public scrutiny in future the candour with which they dealt with each other would be affected. Further, persons involved in the mining industry and the public at large would have their candour inhibited if it were known that documents communicated to his Department were to be released.

In considering this question I have paid particular attention to the various decisions on claims for Crown Privilege, not the least of which is Sankey v. Whitlam (142 CLR Part 1, 1). Further I have considered two subsequent decisions, one in the United Kingdom, namely Burmah Oil Co. Limited v. Governor and Company of the Bank of England & another, 1980 A.C. 1090 and a New Zealand case of Environmental Defence Society Inc. v. South Pacific Aluminium (No. 2) at1NZ LR 153. There is also in existence a Scottish judgment, the report of which I was unable to obtain in the short time I have reserved this matter for decision. Both overseas judgments discuss the issue generally of Crown Privilege and both make reference to Sankey v. Whitlam in addition to numerous other judgments within their own jurisdictions and overseas. Neither, however, affects the law applicable to Australia as laid down in Sankey v. Whitlam.

This latter judgment is a lengthy one and there are some inherent dangers in attempting to pick out from it particular references which might be applicable to these proceedings. Overall, however, it can be said that the High Court of Australia held that persons claiming Crown Privilege should have read the documents themselves before making an affidavit to so claim it. It is clear that in this matter Mr. Rose had read each of the documents in respect of which he claimed they fell within a class which should not be disclosed, and he gave oral evidence to assert it. The court also held that it might not necessarily be inappropriate for a court itself to depress publication of a document if it is obvious to the court that disclosure of it would be contrary to the public interest

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even if no claim was made by a Minister or civil servant. Again, the court held that while due regard and respect had to be paid to claims by Ministers or senior civil servants that documents came within a class which should not be disclosed, if a strong case was made out for the production of those documents and the court concluded that their disclosure was not really (the underlining is mine) detrimental to the public interest an order for production would be made. The court put a saving provision on such a determination by specifying that a government the subject of such an order for disclosure should have an opportunity to intervene and be heard before an order for disclosure was made, nor should an order be enforced until the government affected had had an opportunity to appeal against the order or to have the decision to make the order tested by appeal or some other process, if that was considered appropriate.

In this particular matter the government has had time to consider the question of whether or not certificates would issue and certificates have not been forthcoming but a claim for Crown Privilege has been asserted. So there can be no disadvantage flowing to the government in this particular case in that there has been sufficient time to consider the situation. I did not consider it appropriate to hold, as suggested that I should hold by Mr. Oslington,that as the question of issue of certificates has been considered and they have not been issued, this should be held to be the only way that a valid claim for Crown Privilege can now be asserted. I am of the considered opinion that this is not the case and that it is still open to the court to receivea privilege claim even though certificates have not issued after consideration.

As stated by the Acting Chief Justice, as he then was, at the foot of page 41 of 142 CLR, the fundamental principal is that documents may be withheld from disclosure only if, and to the extent, that the public interest renders it necessary. The same principle must also apply to what he calls "state papers" which concern policy decisions at a high level. He held that it was impossible to accept that the public interest requires that all state papers should be kept secret forever or until they are only of historical interest. He added towards

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the centre of page 42 that if state papers were absolutely protected from production, great injustice would be caused in cases in which the documents were necessary to support the defence of an accused person whose liberty was at stake in a criminal trial and it seems to be accepted that in those circumstances the documents must be disclosed. While it is clear that in this particular matter I am conducting merely an administrative inquiry and obviously the liberty of a citizen is not at stake, and the Minister is not bound to accept my findings, on the other hand he may accept them and so the result of the inquiry could be of considerable importance to the parties. For instance, Avondale has seen fit to object to the invitation issuing to Huntley and from the evidence so far given I gain the impression that Avondale wants part or the whole of the land for its future operations. I would be surprised if Huntley were not in the same position. Evidence has been led of a mining operation conducted by Avondale over many years in this district over lands adjacent to the one intended to be the subject of the invitation and Avondale is the employer of staff and a supplier of coal to industry. Avondale's interest in the matter is both vital and real and I am satisfied that it is not motivated by mischief or peevishness in seeking to have these documents produced. It is intended that an invitation issue to a company who might be termed a competitor in the coal mining industry and clearly in my mind, Avondale is quite rightly deeply interested in these matters and its actions in objecting to the proposed invitation, along with the other objectors, is an understandable and accepted course of action. The interests of justice in this matter are quite demanding.

While I am conscious of the sincere evidence given by Mr. Rose, the strength with which Mr. Camilleri has put the argument in favour of Crown Privilege, the fact that Mr. Cowdroy on behalf of Huntley has informed me that neither he, his attorney, nor his client was aware of what the documents contained but he supported the claim for non-disclosure, it seems to me on the tests laid down in Sankey v. Whitlam that although there is in this matter a class of documents which may be entitled otherwise to protection from disclosure, I must look at the question as to whether or not they should be withheld from production because

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it is necessary to do so in the public interest.

In this matter I had weighed in the balance the general desirability that documents of the class as described should not be disclosed against the need to produce them for disclosure in the interests of justice. Mr. Camilleri in his address described the documents as innocuous and harmless but he subsequently sought to qualify that comment. I do not think that the fact that the public interest would be adversely affected outweighs the need for justice to be done, and to appear to be done in this matter. I do not think that their disclosure would really be detrimental to the public interest and after considering each conflicting need and interest I find that they should be disclosed and I order that production of them take place.

I would add that I have had the benefit of reading three recent decisions of the Land and Environment Court constituted on two occasions by McCelland J. in the matters of AustralianTrust of Australia v. Parramatta Council (Case No. 40137 of 1981 on 9.12.81), Breen & others v. Minister (Case No. 40992 of 1981 on 28.8.81) and by Cripps J. being Grace Bros. Pty. Ltd. v. Minister and Willoughby Municipal Council (Case No. 40077 of 1981 on 20.8.81). While these decisions are not binding upon me they are persuasive authority and as far as my inquiries go, no appeal was lodged on points relevant to the determination of the matters of disclosure decided by the learned judges in those three matters. In them, Sankey v. Whitlam was considered and applied and disclosure of documents was subsequently ordered.

In relation to this matter, however, I order that the documents be produced and made available for inspection to the parties, being not only those acting for and on behalf of Avondale but also those acting for and on behalf of Huntley. I direct that that order for disclosure not be given effect to until 1st February, 1983 by which time the Crown authorities would have had sufficient opportunity to consider the question of an appeal or other actions. As far as the substantive proceedings are concerned, I would propose to stand them over generally, to be restored to the list on fourteen days notice to the parties.