HIGH COURT OF AUSTRALIA

F.A.I. Insurances Ltd.

Vs.

Winneke

(Gibbs C.J.(1), Stephen(2), Mason(3), Murphy(4), Aickin(5), Wilson(6) and Brennan(7) JJ.)

11 May 1982

GIBBS C.J.

1.The facts of these two appeals, and the legislative provisions on (at p348)

2. The first, and most important, question that arises is whether the Governor in Council for the State of Victoria, when deciding whether to renew an approval previously granted to a company for the purpose of s. 72(1) of the Workers Compensation Act 1958 (Vict.) ("the Act"), is subject to the requirements of the rules of natural justice. Such an approval entitles the company to issue the policies of insurance mentioned in that section; the refusal to renew an approval has the result that the company may no longer accept any premiums or carry on any insurance business against liability in relation to workers' compensation to which employers are subject under the Act. It is obvious that a company may, in reliance on an approval, set up an insurance business, or expand its existing business into another field of insurance, and that the refusal to renew an approval will mean that the business, or part of the business, of the insurer must immediately come to an end. A company does not set up a business of insurance in the expectation that it will last for only one year - that would be quite inconsistent with the nature of a business of insurance. The natural expectation is that the business will continue indefinitely, so long as it is properly conducted and proves successful. It is apparent that the refusal to renew an approval may have a seriously adverse effect on a company which was previously an approved insurer. In these circumstances, a company which becomes an approved insurer has a legitimate expectation that its approval will be renewed unless some good reason exists for refusing to renew it. It would not be fair to deprive a company of the ability to carry on its business without revealing the reason for doing so, and, if the reason is one related to some alleged misconduct or deficiency in the conduct of the company's affairs, without allowing the company a full and fair opportunity of placing before the authority making the decision its case against the existence of the alleged misconduct or deficiency. I have recently set out my views as to the application of the rules of natural justice in Salemi v. MacKellar (No. 2) [1977] HCA 26; (1977) 137 CLR 396 ; and Bread Manufacturers of New South Wales v. Evans [1981] HCA 69; (1981) 56 ALJR 89; 38 ALR 93 . In accordance with the views that I have there expressed, I regard it as clear that, in circumstances such as the present, the exercise of the power to grant or refuse a renewal of an approval will be subject to the common law rule whose effect is that a company that would be affected by a refusal to grant a renewal should be given an opportunity to be heard before a decision is made, unless that rule is either excluded by the Act on its proper construction, or is rendered inapplicable by the fact that the power is vested in the Governor in Council. (at p349)

3. The Act does not contain any indication that it was the intention of the legislature to exclude the requirements of natural justice. It would not be right to impute to the legislature an intention to confer an arbitrary or unfettered power to refuse to renew an approval, having regard to the consequences that such a refusal might entail. The authority making the decision is bound to have regard to the commitments and financial position of the applicant, and to the observance of the regulations by the applicant during a previous period when it was an approved insurer: reg. 202(2). That regulation seems to me to be a valid exercise of the power given by s. 73(1)(i) of the Act. It does not, however, limit the matters to which regard may be had. It would be absurd to suggest, for example, that it would not be legitimate to have regard to the fact that the directors of a company seeking the renewal of an approval had been guilty of fraud in the conduct of another insurance business. It is unnecessary to consider whether the Governor in Council is entitled to refuse to renew an approval on grounds of policy, e.g., for the purpose of limiting the number of approved insurers, or whether, if a refusal were to be based purely on grounds of policy, fairness would require that the company affected be given an opportunity to be heard. However, it is clear, both from the words of reg. 202(2) and on general principles, that the authority deciding whether to renew an approval may refuse to grant a renewal by reason of matters personal to the applicant - for example, that it is not financially secure or that it has in the past not carried on its business in a proper manner. There is nothing in the Act or regulations to exclude the rule of fairness that would require that when matters of that kind are being considered the applicant should be heard before the decision is made. (at p349)

4. The fact that the Governor in Council is the authority which grants the approval provides no ground for excluding the rules of natural justice. In exercising the power given by s. 72 the Governor does not act personally or as a representative of the Crown exercising any of its prerogatives. He acts on the advice of his Ministers, and it is to be expected that such advice will be based upon the recommendation of the Minister in charge of the Department concerned. It would be to confuse form with substance to hold that the rules of natural justice are excluded simply because the power is technically confided in the Governor in Council. I can see no reason in principle why the rules of natural justice should not apply to an exercise of power by the Governor in Council, who is of course not above the law. Indeed, there is old authority in Victoria that the Governor in Council must, in an appropriate case, before exercising a statutory power, give the party affected the opportunity to be heard: Roebuck v. Borough of Geelong West (1876) 2 VLR (L) 189 ; Shire of Kowree v. Shire of Lowan (1897) 19 ALT 153 . A decision of the Judicial Committee, given during the last century, provides a close analogy to the present case. In Smith v. The Queen (1878) 3 App Cas 614 , the Governor of Queensland had power to forfeit a lease if it should be proved to the satisfaction of a commissioner that the lessee had abandoned his selection and failed to perform conditions of residence. It was held that the lessee was entitled to be heard by the commissioner "in the sense required by the elementary principles of natural justice" and that the failure of the commissioner to give the lessee a proper hearing rendered void the forfeiture effected by the Governor. In Canada it has been recognized in a number of recent cases that the fact that a statutory power is vested in the Governor in Council does not mean that it is beyond review: see particularly Attorney-General (Canada) v. Inuit Tapirisat of Canada (1980) 115 DLR (3d) 1, at p 11 . These authorities are consistent with the recent decision of this Court in Reg. v. Toohey; Ex parte Northern Land Council [1981] HCA 74; (1981) 151 CLR 170 that the Court is free to inquire whether a statutory power granted to the Crown has been exercised for the purpose which the statute did not authorize. In New Zealand also the discretion of the Governor-General has been held to be examinable: Reade v. Smith (1959) NZLR 996 . (at p350)

5. No practical difficulty exists in affording a proper hearing to a person who will be affected by the

refusal of an application for renewal of an approval under the Act. The nature of the hearing to which a person affected is entitled must always depend on the circumstances of the case, and in a case such as the present fairness requires that the applicant company should be apprised of the allegations against it and should be given a full and fair opportunity to answer those allegations in writing. The hearing, of course, is not by the Governor in Council as a body, but by the person - whether the Minister or the Departmental Head - who in fact makes the decision. (at p350)

6. In the present case the Minister did receive certain submissions from the appellants, but the appellants were not given an opportunity to be heard after they had been informed of the reasons for the recommendation to refuse a renewal. In these circumstances the learned Solicitor-General did not wish to submit that the rules of natural justice, if applicable, had been complied with. (at p351)

7. It seems to me unnecessary to decide whether the procedure provided by the Administrative Law Act 1978 (Vict.) was available. The authorities which I cited in Reg. v. Toohey; Ex parte Northern Land Council (1981) 151 CLR, at p 186 indicate that the writs of certiorari and mandamus are not available against the Crown. Similarly, in the absence of express statutory provision, there is no power to make a declaration against the Governor in Council, although a declaration may be made against the Attorney-General as the representative of the Crown. Section 7 of the Administrative Law Act 1978 which gives the court the powers which it might have exercised, inter alia, in proceedings for a prerogative writ or in an action for a declaration, therefore does not enable orders or declarations to be made against the Governor in Council. Whether under the Act, or under the Rules of the Supreme Court, the proper course in a case such as the present was to seek a declaration against the Attorney-General. For reasons I have given, a declaration should have been made. (at p351)

8. The Full Court of the Supreme Court was correct in dismissing the appeal and the application for leave to appeal, which were brought for the purpose of joining His Excellency the Governor and the Minister as parties. However, as I have indicated, a declaration should have been made, as against the Attorney-General, that the decision of the Governor in Council was void in each case since the rules of natural justice had not been complied with in making the decision. I would allow the appeals. (at p351)

STEPHEN J. I have had the considerable advantage of reading the judgments of Mason J. and of Wilson J., in which are described the circumstances of these appeals, their curial and statutory context and the state of the recent authorities in this Court concerning natural justice and the concept of reasonable expectation as applied to administrative decisions. (at p351)

2. I am in general agreement with the analysis made by Mason J. both of the applicability of the rules of natural justice in the context of this case and of the relationship between the Governor and the Executive Council. (at p351)

3. For the reasons stated by his Honour the appellants might, in my view, have entertained a legitimate expectation that their applications for renewal of approval as workers' compensation insurers would be granted. If, instead, it were proposed that their applications should be rejected they would, on the authorities, be entitled as a general rule to learn of the grounds for that proposed rejection and to have an opportunity to combat those grounds. The question is whether the special circumstances of this case make inapplicable that general rule. (at p352)

4. What is special about this case is that, by virtue of s. 72(1)(a) of the Workers Compensation Act

1958 (Vict.), it is to the Governor in Council that the function is assigned of granting or withholding approval to write workers' compensation insurance business in Victoria. That it was the approval of the Governor in Council which the appellants failed to obtain is relied upon by the respondent as denying to the appellants any ground of complaint on the score that they had no opportunity to answer the case against them. (at p352)

5. It is said that the Governor in Council acts exclusively upon advice, tendered either by Cabinet or by an individual Minister; and that advice is, as the Solicitor-General puts it, political in its nature. Decisions of the Governor in Council are no more than "the formal legal act which gives effect to the advice tendered to the Crown by the Ministers of the Crown" - Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, at p 179 , per Dixon J. - and they are accordingly said by the respondents to be no matter for the courts, whose intrusion would deny the doctrine of ministerial responsibility. The fact that the legislation selects the Governor in Council as the appropriate body to grant or withhold approval is said to be a clear legislative indication that the decision is one foreclosed to judicial intervention. The practical problems involved in applying to the Governor in Council the concepts involved in the principles of natural justice are also said to provide strong support for the view that those concepts must be inapplicable. (at p352)

6. Were the Governor in Council habitually concerned with essentially political decisions, the making of which involved matters of high public policy, it would seem misconceived to have entrusted to such a body the mundane task of approving individual insurers for the purpose of workers' compensation insurance. The legislation itself suggests that policy considerations will not be to the forefront when such approvals are under consideration; regulations are to prescribe "the requirements to be complied with and the securities to be lodged before approval of such an insurer" (s. 73(1)), suggesting that the qualities to be possessed by a suitable insurer will be capable of specification in advance in objective terms. The resultant regulations, which are set out in the judgment of Wilson J., bear this out: they concentrate upon an applicant's financial situation as at least the prime, if not the exclusive, concern when approval is being sought; and this is scarcely surprising, there would seem to be little legitimate scope for the approval of some applicants and the rejection of others on grounds other than financial. (at p353)

7. But there was, I think, in fact no misconception involved in assigning this function to the Governor in Council. Any apparent incongruity lies rather in a quite different misconception, that of attributing to the Governor in Council a decision-making role in the legislative and administrative processes of the State quite different from that which he in fact plays. In Victorian legislation it is the merest commonplace to assign to the Governor in Council the making of a host of routine administrative decisions, involving neither matters of high government policy nor any nice exercises of policy-oriented discretion. (at p353)

8. The Workers Compensation Act itself provides instances of this. Leaving aside the role of the Governor in Council as the maker of much subordinate legislation under that Act, the Governor in Council also proclaims industrial diseases (s. 21), appoints medical referees for the purposes of the Act (s. 24(1)), appoints and removes members of the Workers Compensation Board and determines their salary and allowances (s. 80), and approves the Board's annual estimates of payments to be made out of the statutory fund (s. 82(5)). (at p353)

9. In this respect the Workers Compensation Act is in no way unusual. The Water Act 1958, a complex enactment conveniently appearing in the same volume of the Victorian Statutes as the Workers Compensation Act, illustrates the extent to which recourse is had to Orders in Council for

the recording of the most commonplace of administrative decisions. That Act confers upon the Governor in Council very many discretionary powers, many of them of little importance to any but the particular individual affected: powers to license landowners to maintain levee banks on their land (s. 107(2)), to consent to a landowner being required to repair such a bank (s. 111(1)), to require any waterworks trust to remove any employee at any time (s. 160), to grant leases of sites for water pumps at annual rentals of not less than $4 per annum, and so on. Any issue of the Victorian Government Gazette will testify to the minutiae of administration with which the Governor in Council is concerned: the hours of closing of polls at a particular municipal election, the application to a named officer of a particular college of advanced education of the provisions of the State's Superannuation Act, the alteration of the boundaries of a sewerage district within a particular country shire; all these were the subject of Orders in Council published in the first issue of the Gazette for 1980. (at p354)

10. The Governor in Council would thus appear in Victoria to be a conventional instrument for the formal making both of subordinate legislation and of a host of routine administrative decisions. His selection as the person entrusted with the granting of approval of an insurer under the Workers Compensation Act of itself carries with it no suggestion that any matters of high policy or political significance are in question. (at p354)

11. It is not easy to discern any coherent pattern which in Victoria dictates in particular instances the selection of the Governor in Council rather than a Minister as the appropriate recipient of statutory power to make administrative decisions. The Victorian scheme of things would not seem at all to conform to the English model described by C. K. Allen, Law and Orders (1945), p. 45, where it is said that generally matters "of special importance or of wide scope are accorded the dignity of Orders in Council"; nor does there seem to be any adherence to the distinction described by A.B. Keith in The King and the Imperial Crown (1936), pp. 60-61, as one between those statutes which "invade the realm of prerogative" and which usually give discretionary powers to the Queen in Council, and the great mass of modern statutes affecting social and economic life, which confer discretionary powers upon Ministers or other bodies. (at p354)

12. That in Victoria so much more detailed administrative decision-making is done by Order in Council than would appear to be the case in the United Kingdom is no doubt due to the very different course of development of the two polities. As Professor Sawer points out in his article, "Councils, Ministers and Cabinets in Australia" in (1956) Public Law p. 110, the Executive Councils of Australian colonies bore, in their early days, the air "of the Tudor rather than the Victorian Privy Council" (at p. 111). (at p354)

13. The subsequent transition to responsible government in the 1850's nevertheless left the Governors, in their colonial spheres, in a position better able than was Queen Victoria in hers to exercise what Bagehot described as the core of the Sovereign's power, the right to be consulted, to encourage and to warn - W.G. McMinn, Constitutional History of Australian (1979), p. 60. (at p354)

14. The institution of Governor in Council was thus a familiar and highly significant one in colonial Australia. With the advent of responsible government the position of colonial Ministers and Cabinets was, in contrast, not only a novelty but was much affected by the endemic instability which affected colonial governments in the first thirty years of responsible government. This was largely due to the initial absence of anything like cohesive political parties. As Professor Sawer points out, at p. 114, "Until the 1890's politics were in fact more a matter of faction and of personal intrigue than of distinct party opposition, and changes of Ministry were frequent"; McMinn gives a

striking account of this instability at pp. 60-61. (at p355)

15. In those circumstances it is perhaps not remarkable that many formal executive functions which are, in Britain legislatively assigned to Minister or to the great Departments of State have, in Australia, in large measure been left to Governors and their Executive Councils. Professor Jenks, in The Government in Victoria (1891) refers at p. 260 to "the familiarity of the community" with the institution of Governor in Council, as it existed before responsible government, as explaining what he called the increasing tendency in later times to entrust legislative power to that executive body. It may also go far to explain the entrusting to that body of so great a range of routine administrative decisions of a quite formal character. By the time fully functioning responsible government was operating in Victoria the mechanism of Orders in Council had no doubt long been accepted as an appropriate medium for the formal making and recording of executive decisions, regardless of their routine nature and lack of policy content. (at p355)

16. If no particular significance attaches in Victoria to the selection of the Governor in Council as the appropriate approving body it will be the nature of the decision and its effect upon interested parties that will be decisive of the question raised in these appeals, rather than the fact that the vehicle for the decision is an Order in Council. For the reasons appearing in the judgment of Mason J. I conclude that there was here a duty to observe natural justice and that this is a duty which the courts will enforce. (at p355)

17. There are, of course, difficulties created by the vesting in the Governor in Council of the power here in question; it would obviously be inappropriate that the Governor in Council, which will have done no more than act upon a recommendation of a Minister or of Cabinet, should be the recipient of representations by a party seeking some change in that recommendation. As the Solicitor-General made clear, it may be quite fortuitous if at a particular meeting of the Executive Council a Minister of the Crown with any knowledge of the matter in issue is present. A hearing by a body having no first-hand knowledge of the matter and presided over by the Governor, who would be in no position, according to constitutional convention, to disregard the advice of his Ministers, would be as inappropriate as it would be likely to be inefficacious. It must be to the real decision-maker, not to the formal authenticating body, that representations are to be made. (at p356)

18. I agree with all that is said by Mason J. concerning the overcoming of this essentially practical difficulty by means of a hearing undertaken by the responsible Minister or by appropriate officers of his Department. I would make an order in the form of a declaration as proposed by his Honour but would, for the reasons stated by Wilson J., retain as parties those whom the appellants originally joined. (at p356)

MASON J. These appeals present for decision the important question whether the Governor is under an obligation to comply with the principles of natural justice when, acting with the advice of the Executive Council, he declines to approve an application for renewal of a workers' compensation insurer's licence under the Workers Compensation Act 1958 (Vict.) ("the Act"). (at p356)

2. Section 72(1)(a) of the Act requires every employer to obtain either from the Insurance Commissioner or from an insurer approved by the Governor in Council a policy of accident insurance or indemnity which indemnifies the employer for the full amount of his liability to pay compensation under the Act, other than, in respect of each particular injury to a worker, the first $500 of his total liability and for the full amount of any other liability imposed upon him under the Act. The expression "Governor in Council" in s. 72(1)(a) means "Governor with the advice of the

Executive Council" (s. 17 of the Acts Interpretation Act 1958 (Vict.)). (at p356)

3. By s. 73(1) the Governor in Council may make regulations, inter alia:
"(d) for prescribing the requirements to be complied with and the securities to be lodged by an insurer before approval of such insurer under section seventy-two of this Act;" and "(i) generally as to any matters necessary or convenient to be prescribed for carrying out or giving effect to the provisions of this Act." (at p356)

4. By the Workers Compensation Regulations 1975 (Vict.) a company is prohibited from accepting premiums or carrying on any insurance business against workers' compensation liability without first having obtained the approval of the Governor in Council (reg. 201). An approval granted by the Governor in Council operates for a period not exceeding twelve months and may on application be renewed for any period not exceeding twelve months if the Governor in Council thinks fit (reg. 202(1)). In the granting of any approval or renewal:
". . . regard shall be had to the commitments and financial position of the applicant and in the case of renewal to the observance of these Regulations by the applicant"
(reg. 202(2)). (at p357)

5. The facts relating to the application by Fire and All Risks Insurance Co. Ltd. are in all relevant respects similar to those relating to F.A.I. Insurances Ltd. It is sufficient to recount only those relating to the latter company. (at p357)

6. F.A.I. Insurances Ltd. ("the appellant") is an insurance company which for twenty years has carried on the business of workers' compensation insurance in Victoria, having obtained all necessary approvals, and apparently in other States. Workers' compensation business is evidently not a major part of the appellant's total business but is nevertheless important in enabling the company to offer a comprehensive insurance service. On 25 May 1979 the company applied for renewal of its approval as an insurer for the year ending 30 June 1980. Approval was granted until 31 December 1979. In his letter informing the appellant of the approval the Minister of Labour and Industry drew attention to various considerations affecting the financial position of insurers generally which he considered to be important and went on to set out certain criteria which workers' compensation insurers should be required to satisfy before 1 July 1981. The Minister specifically stated that, apart from other matters in relation to the criteria, the appellant's investments and those of another company in the group "in related bodies represent too high a proportion of total assets". (at p357)

7. On 2 December 1980 the appellant applied for renewal of approval for twelve months from 31 December 1980. The application dealt with the general financial position and liquidity of the appellant and with its expense rates. The application contained a series of submissions directed to the criteria previously prescribed by the Minister. The appellant contended that the criteria should not go beyond the provisions of reg. 202(2) and should not prevent each individual case from receiving separate consideration. The appellant claimed that it satisfied all the Minister's criteria except that it did not meet the minimum requirement for premiums written in respect of Victorian workers' compensation business and the requirement in respect of investment in related bodies. It argued against the imposition of these criteria and contended that their application would be illegal. It acknowledged that on 31 October 1980 its corresponding licence in New South Wales had been terminated by a judge of the Workers' Compensation Commission but stated that an appeal had been lodged and that the decision was incorrect. The appellant specifically requested that:
". . . if it be considered that there is any matter which might give rise to its approval not being

renewed, F.A.I. be given notice thereof and an opportunity to make submissions and provide evidence (as appropriate) specifically directed to it." (at p358)

8. On 23 March 1981 the Minister informed the appellant that the application for renewal was still under consideration and that the Governor in Council had given interim approval effective until 1 June 1981. On 18 May the Minister advised the appellant that he had decided to recommend to the Governor in Council that the application be not approved. He set out what he described as "a summary of the case against the applicant". Matters mentioned in this summary were the high level of investment in related bodies, certain aspects of group and inter-company transactions, inadequate provision for inflation in respect of unsettled claims, the purchase of investments at prices above independent valuations and the manner in which the appellant had conducted its workers' compensation business in New South Wales. (at p358)

9. On 21 May the appellant's solicitors wrote to the Minister and to the Clerk to the Executive Council seeking particulars of the matters raised by the Minister, asking for an opportunity to answer them, and at the same time inquiring whether the original application and supporting documents had been or were to be placed before the Executive Council. On 26 May by an Order in Council the Governor in Council refused to grant approval to the appellant as an insurer for the purposes of s. 72, the Order operating from and including 2 June 1981. No opportunity was given to the appellant to present material to the Executive Council to answer the matters raised by the Minister. (at p358)

10. The appellant instituted proceedings by way of order nisi for review under the Administrative Law Act 1978 (Vict.) seeking a declaration that the decision of 26 May was void upon the ground inter alia that in breach of the rules of natural justice the Governor in Council did not give the appellant a reasonable opportunity to be heard on its application. An order nisi was made by Jenkinson J. against the Attorney-General, but he dismissed the application for an order nisi against the Governor and against the Minister. On appeal the Full Court of the Supreme Court of Victoria discharged the order nisi and dismissed an appeal by the appellant against that part of Jenkinson J.'s judgment that dismissed the proceedings against the Governor and the Minister. (at p358)

11. The principal object of the Administrative Law Act is to facilitate procedure and to eliminate problems associated with judicial review of administrative decisions. As will be seen, the provisions of the Administrative Law Act do not substantially affect the issue which the Court is now required to determine, but for a clear understanding of the precise question which is before the Court it is necessary to set out the relevant provisions of that Act. Section 3 provides:
"Any person affected by a decision of a tribunal may make application (hereinafter called an application for review) to the Supreme Court or a Judge thereof for an order calling on the tribunal or the members thereof (hereinafter called an order for review) and also any party interested in maintaining the decision to show cause why the same should not be reviewed." (at p359)

12. The words "decision" and "tribunal" are defined by s. 2. It provides that, unless the context or subject matter otherwise requires -
" 'Decision' means a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision.

. . .
'Tribunal' means a person or body of persons (not being a court of law

or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice." (at p359)

13. Section 7 provides:
"Upon the return of the order to review, the Court or Judge may discharge the order or may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for or upon the return of any prerogative writ or any proceedings in an action for quo warranto or in an action for a declaration of invalidity in respect of the decision or for an injunction to restrain the implementation thereof and may extend the period limited by statute for the making of the decision but shall not exercise any other jurisdiction or power or grant any other remedy." (at p359)

14. Section 8(1) provides:
"A tribunal shall, if requested to do so by any person affected by a decision made or to be made by it, furnish him with a statement of its reasons for the decision." (at p359)

15. It is not in dispute that the Governor in Council's refusal of the appellant's application was a "decision" within the meaning of s. 2 of the Administrative Law Act. What was in question is whether the Governor in Council is a "tribunal" within the meaning of the statutory definition. But the answer to this question hinges on the fundamental issue whether the Governor in Council is bound to observe one or more of the rules of natural justice. It is not, nor could it be, suggested that the reference to acting in a judicial manner adds some further element to the statutory definition. (at p360)

16. The Full Court's reasons for concluding that the Governor in Council was under no such obligation may be summarized in this way: (1) Section 72 confers an unfettered discretion to approve or refuse the grant of a licence; (2) This circumstance suggests that the rules of natural justice are not intended to apply; (3) The duty of the Governor is to act only on the advice of a Minister or the Cabinet; (4) Consequently, any inquiry by him would have no relevance to the decision which he must make; and (5) The Governor in Council is a body intrinsically unsuited to making an inquiry of the kind suggested. (at p360)

17. The fundamental rule is that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power (Twist v. Randwick Municipal Council [1976] HCA 58; (1976) 136 CLR 106, at p 109 ; Heatley v. Tasmanian Racing and Gaming Commission [1977] HCA 39; (1977) 137 CLR 487, at p 499). The application of the rules is not limited to cases where the exercise of the power affects rights in the strict sense. It extends to the exercise of a power which affects an interest or a privilege (Banks v. Transport Regulation Board (Vict.) [1968] HCA 23; (1968) 119 CLR 222) or which deprives a person of a "legitimate expectation", to borrow the expression of Lord Denning M.R. in Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch 149, at p 170 , in circumstances where it would not be fair to deprive him of that expectation without a hearing (Salemi v. MacKellar (No. 2) [1977] HCA 26; (1977) 137 CLR 396, at p 419).

(at p360)

18. Natural justice in its application to decisions affecting the grant, refusal, renewal and revocation of licences has been beset with complexities. Some of these abstract complexities have been banished from the stage or at least relegated to the wings - the shadowy distinction between judicial or quasi-judicial and legislative or administrative functions, the difference between decisions which determine antecedent or existing rights and those which result in the creation of new rights and the classification of licences into those which amount to no more than a mere permission or privilege and those which create an interest in, or a right of, property. It is now authoritatively established that the exercise of a power revoking a licence will attract the rules of natural justice, certainly when the revocation results in the loss of a right to earn a livelihood or to carry on a financially rewarding activity (Banks (1968) 119 CLR, at pp 233-234 ; Reg. v. Barnsley Metropolitan Borough Council; Ex parte Hook (1976) 1 WLR 1052; (1976) 3 All ER 452 ; McInnes v. Onslow-Fane (1978) 1 WLR 1520; (1978) 3 All ER 211). On the other hand, there has been a greater reluctance to insist upon the application of natural justice when power is exercised to grant or refuse an initial application for a licence. Generally speaking, in such a case the issues are not clearly defined; they often involve policy issues; and, though they raise the general suitability of the applicant to hold a licence, they do not often generate allegations of past misconduct. (at p361)

19. Here we are concerned with an application for the renewal of an approval which closely resembles an application for the renewal of a licence. It is in this area that the concept of "legitimate expectation" has facilitated the application of the natural justice requirements. In Hook (1976) 1 WLR, at p 1058; (1976) 3 All ER, at p 457 Scarman L.J. cited the passage now to be found in de Smith's Judicial Review of Administrative Action, 4th ed. (1980), pp. 223-224, in which the author, after observing that non-renewal is usually a more serious matter than refusal to grant a licence in the first place, goes on to say:
"Unless the licensee has already been given to understand when he was granted the licence that renewal is not to be expected, non-renewal may seriously upset his plans, cause him economic loss and perhaps cast a slur on his reputation. It may therefore be right to imply a duty to hear before a decision not to renew when there is a legitimate expectation of renewal, even though no such duty is implied in the making of the original decision to grant or refuse the licence." (at p361)

20. The distinction was accepted and applied in McInnes. There Megarry V.C., speaking of the differences between "expectation cases" (which include non-renewal of licences) and "forfeiture cases" (which include revocation of licences), said (1978) 1 WLR, at p 1529; (1978) 3 All ER, at p 218 :
"The intermediate category, that of the expectation cases, may at least in some respects be regarded as being more akin to the forfeiture cases than the application cases; for although in form there is no forfeiture but merely an attempt at acquisition that fails, the legitimate expectation of a renewal of the licence . . . is one which raises the question of what it is that has happened to make the applicant unsuitable for the . . . licence for which he was previously thought suitable." (at p361)

21. The same distinction between the initial grant and the subsequent renewal of a licence was made by this Court in Salemi v. MacKellar (No. 2) (1977) 137 CLR, at pp 405, 439, 451-452 , the salient point being that the applicant for renewal has a legitimate or lawful expectation of renewal and that this will or may attract the duty of fairness. (at p362)

22. Our starting point then is that an applicant for renewal of a licence generally has a legitimate expectation that his licence will be renewed when the statutory power is entrusted to a statutory authority. Does the appellant here have a similar legitimate expectation that its approval will be renewed? The answer to this question depends on the nature and effect of the statutory power, the circumstances of its exercise and the fact that the power is reposed in the Governor in Council. (at p362)

23. In Twist (1976) 136 CLR, at pp 109-110 , Barwick C.J. noted that the legislature may dispense with the requirements of natural justice and provide for the exercise of the statutory power so that it is not subject to all or any of the requirements. His Honour went on to observe that "if that is the legislative intention it must be made unambiguously clear" and in the absence of such an intention the court supplements the legislation by insisting that the statutory powers are to be exercised only after an appropriate opportunity has been afforded to the person affected. Here, however, we are not so much concerned with the question whether the general rule has been displaced, as with the question whether it applies at all. As the Governor in Council is not usually described as a statutory authority it may be taken that the various enunciations of the general rule have not been formulated with the specific intention of including him within its sweep. Nonetheless, as the rule gives expression to a basic principle of natural justice applicable to the making of decisions affecting the rights of an individual, the question we have to determine is whether the rule should apply to the Governor in Council in the circumstances of this case. (at p362)

24. Parliament has not specifically directed its attention to the question whether the rule is to apply or not, perhaps because it was thought that the general rule had no application to the Governor in Council. Indeed, it seems to me that the matters relied upon by the Full Court and by the respondents before us are as much intended to show that the function undertaken by the Governor in Council is not susceptible of compliance with the rules of natural justice as to show that Parliament has displaced the rule by some manifestation of intention. (at p362)

25. The fact that the statute confers an unfettered discretion has frequently been regarded as an indication that the rules of natural justice have no application - see Salemi (No. 2) (1977) 137 CLR, at p 420 ; Reg. v. MacKellar; Ex parte Ratu [1977] HCA 35; (1977) 137 CLR 461, at pp 470, 479 ; Franklin v. Minister of Town and Country Planning [1947] UKHL 3; (1948) AC 87 ; Schmidt (1969) 2 Ch 149 ; and Testro Bros. Pty. Ltd. v. Tait [1963] HCA 29[1963] HCA 29; ; (1963) 109 CLR 353 . In Testro Kitto J. instanced as an example of the statutory displacement of the rules of natural justice the case where "the relevant statute may give a completely unfettered discretion, the power being purely administrative or executive in character" (1963) 109 CLR, at p 369 . His Honour went on to say:
"It is the duty of antecedent decision upon some question that makes the analogy of judicial powers at once appropriate and compelling . . . The kind of decision here referred to is not a mere decision to act; it is a decision upon a question which is posed by the relevant statute as requiring investigation before the act may be done; for, by contrast, the mark of a purely executive power is its independence of any preliminary necessity to decide whether a particular state of things exists." (at p363)

26. Although the remarks of Kitto J. reflect the old distinction, now unfashionable, between the judicial function and the executive or administrative function, they do focus attention on elements in the exercise of a statutory discretion which are likely to attract an obligation to act in conformity with natural justice - the need for a decision and what it is that has to be decided. In this respect his

Honour's remarks support the view that even in the case of a wide discretion the repository may be under a duty to receive representations before arriving at a decision and that this is more likely to be the situation where the decision turns on "findings of adjudicative facts or the interpretation or application of decisional criteria of greater specificity than those contained in the statute" (de Smith, p. 186). (at p363)

27. In saying that the Governor in Council had an unfettered discretion the Full Court appears to have thought that the discretion was not examinable or reviewable because a discretion vested in the Governor in Council is generally immune from judicial review and more especially because the Governor is bound to act, and act only, upon the advice of a Minister or the Cabinet. Consequently, the decision which is made is not made by the Governor but is predetermined by the advice which is tendered to him. Any decision which he might make independently of that advice is irrelevant, so the argument runs. (at p363)

28. Yet in Reg. v. Toohey; Ex parte Northern Land Council [1981] HCA 74; (1981) 151 CLR 170 this court held that the exercise of a statutory discretion by the Administrator in Council (who was assumed to be the Crown for the purposes of the case) was reviewable for ultra vires and improper purpose. The Court declined to follow Duncan v. Theodore [1917] HCA 38; (1917) 23 CLR 510, at p 544 , and the observations of Dixon J. in Australian Communist Party v. The Commonwealth (1951) 83 CLR 1, at p 179 , to the effect that a decision made by the Governor-General in Council in the exercise of a statutory power cannot be invalidated for want of good faith resulting in ultra vires and refused to apply to the exercise of a statutory discretion the old common law rule that the acts of the Crown and its agents are immune from challenge. There is no point in again reviewing the authorities examined in the judgments in that case. But it is significant that in none of the cases then examined was it suggested that the doctrine of ministerial responsibility, now invoked by the Solicitor-General for Victoria, was a reason for denying the availability of judicial review for excess of power, including improper purpose. Other reasons were advanced, e.g. the secrecy of the counsels of the Crown, but not ministerial responsibility as such. (at p364)

29. Of course it is one thing to say that the Governor in Council's exercise of a statutory discretion is subject to judicial review for excess of power; it is quite another thing to say that it is subject to judicial review for denial of natural justice. Ex parte Northern Land Council certainly does not decide this case. (at p364)

30. In passing I should observe that ministerial responsibility means (1) the individual responsibility of Ministers to Parliament for the administration of their departments, and (2) the collective responsibility of Cabinet to Parliament (and the public) for the whole conduct of administration (Emy, "The Public Service and Political Control" in the appendix to the report of the Royal Commission on Australian Government Administration (1976) vol. 1, p. 16; Mackintosh, The Government and Politics of Britain, 4th ed. (1977), p. 17). The principle that in general the Governor defers to, or acts upon, the advice of his Ministers, though it forms a vital element in the concept of responsible government, is not in itself an instance of the doctrine of ministerial responsibility. It is a convention, compliance with which enables the doctrine of ministerial responsibility to come into play so that a Minister or Ministers become responsible to Parliament for the decision made by the Governor in Council, thereby contributing to the concept of responsible government. "The principal convention of the British constitution", says de Smith in his Constitutional and Administrative Law, 3rd ed. (1977), p. 99, "is that the Queen shall exercise her formal legal powers only upon and in accordance with the advice of her Ministers, save in a few exceptional situations". Comformably with this principle there is a convention that in general the

Governor-General or the Governor of a State acts in accordance with the advice tendered to him by his Ministers and not otherwise (Sawer, Federation under Strain (1977), p. 142; see also Keith, Responsible Government in the Dominions, 2nd ed. (1928), pp. 107- 108). He does this by acting in comformity with the advice given by the Executive Council on consideration of the recommendation by the responsible Minister which may in some cases reflect Government policy as settled by Cabinet or determined by the Minister. The Royal Instructions to the Governor of Victoria expressly allow him to disregard advice (cl. VI). This does not affect the convention that he will act on advice. But it is not to be thought that the Queen, the Governor-General or a Governor is bound to accept without question the advice proffered. History and practice provide many instances in which the Queen or her Australian representatives have called in question the advice which has been tendered, have suggested modifications to it and have asked the Ministry to reconsider it even though in the last resort the advice tendered must be accepted (see, for example, de Smith, Constitutional and Administrative Law, 3rd ed. (1977), p. 99). (at p365)

31. When Parliament by statute confers a discretionary power on the Governor acting with the advice of the Executive Council it ordinarily assumes that the convention will apply and that the Governor will act in accordance with the advice tendered to him and not otherwise, ultimately, if not sooner. It may be too much to say that the effect of the statute is to replace the force of convention with the force of law. Be this as it may, the nature of the relationship between the Governor and the Executive Council supplies no reason for denying the availability of judicial review for ultra vires, including improper purpose, once as a matter of construction of a statute the conclusion is reached that the discretion given to the Governor in Council is limited, whether in scope or purpose or by reference to criteria or otherwise. The Governor in Council cannot by exceeding his statutory authority affect individual rights. As Ex parte Northern Land Council [1981] HCA 74; (1981) 151 CLR 170 shows there is no more reason for permitting the Governor in Council to exceed his statutory authority than for allowing a Minister to do so. (at p365)

32. Once the true relationship between the Governor and the Executive Council is understood, it becomes apparent that the doctrines of ministerial and collective responsibility provide no objection to the application of the rules of natural justice to the exercise of a discretion by the Governor in Council. As the Governor ultimately acts in accordance with advice tendered to him, the final decision is not a decision for which he has to account. The effective decision is that of the Executive Council or the Minister. It is the Government and the Minister who are responsible for that decision to the Parliament and to the electorate. (at p366)

33. The related argument that the Governor in Council is intrinsically unsuited to making an inquiry of the kind suggested is best left for later consideration. At this stage it is enough to say that, having regard to the relationship between the Governor, the Executive Council and the responsible Minister, procedures could be devised for the making of any relevant inquiry and recommendation by the Minister or by a committee of the Executive Council, if the latter course should be considered desirable. (at p366)

34. The next question is one of statutory construction. Does the statute entrust the Governor in Council with an absolute discretion or a discretion subject to some limitations? Whether a particular exercise of discretion by the Governor in Council is subject to judicial review is a question of construction the answer to which will depend on a variety of considerations including the nature, width and subject matter of the discretion and the peculiar character of the Governor in Council as the chosen repository of it. This is the approach that was taken by Barwick C.J. in Banks. There the Board was given power by statute to revoke a taxi licence for breach of a condition to which the

licence was subject. Revocation of a licence by the Board had no force or effect until it was reviewed and approved by the Governor in Council. Certiorari was granted to the Board to quash a decision to revoke a licence on erroneous grounds, notwithstanding that the decision had been approved by order of the Governor in Council. Barwick C.J. said (1968) 119 CLR, at pp 240-241 : "The statute therefore placed upon the Governor in Council an obligation to consider the matter for himself and to reach a conclusion, upon all the material available to the Board, whether or no the Board's decision should be approved, or disapproved, or whether the circumstances called for some other action on the part of the Council within s. 32(2)(c). The statute did not create, in my opinion, a situation where the Governor in Council could act merely on the recommendation of a Minister: nor was the situation comparable to the conversion of a ministerial or a Cabinet decision in point of policy into a decision of the Executive Council. That Council was by the statute given both the power and the duty to consider the matter for itself." (at p367)

35. Although the Full Court in the present case noted that Barwick C.J. had construed the statutory provisions in a manner inconsistent with the construction given to similar provisions by Latham C.J. in Riverina Transport Pty. Ltd. v. Victoria [1937] HCA 33; (1937) 57 CLR 327, at pp 342-343 , where his Honour spoke of the Governor in Council possessing "an arbitrary power under the statute", I prefer the construction adopted by Barwick C.J. Of course agreement with that construction does not answer the present case because in Banks the Governor in Council was entrusted with the function of reviewing the decision of the Board. This aspect of the provisions, which has no counterpart here, was an important element influencing the Chief Justice's conclusion. (at p367)

36. Regulation 202(2) requires the Governor in Council to have regard to the commitments and financial position of the applicant. I very much doubt whether it can be classed as a regulation within s. 73(1)(d) for "prescribing the requirements to be complied with . . . by an insurer before approval of such insurer". But I think it falls within s. 73(1)(i) as a regulation as to a matter convenient to be prescribed for carrying out or giving effect to a provision of the Act, i.e., the power to grant or refuse approval. What is more the regulation does no more than spell out two matters for consideration which would in any event be relevant to the exercise of the statutory discretion. (at p367)

37. The Solicitor-General submits that it is not legitimate to construe the ambit of the statutory discretion by reference to a regulation and that the regulation is invalid to the extent to which it is inconsistent with the statute. The argument is that if by statute the discretion is absolute the regulation cannot confine it. This is to regard the statute as if it stated that the discretion is to be absolute - yet it does no such thing - and to regard the regulation-making power as if it did not authorize reg. 202(2). The true position is that the width of the discretion is to be gleaned from the relevant provisions in the regulations as well as the statute because the statute has nothing to say directly upon the ambit of the discretion and the statute contains a regulation-making power which extends to the prescription of the matters mentioned in reg. 202(2). (at p367)

38. The Solicitor-General also submits that the Order in Council refusing the appellant's application operated to repeal reg. 202(2). It is apparent that it was not intended to have this result and in any event if the Order in Council is void or voidable for want of natural justice, the regulation being an effective law at the relevant time, the Order in Council would be ineffective to repeal the regulation. (at p368)

39. The consequences is that the discretion is not absolute. The Governor in Council is required to have regard to the commitments and financial position of the appellant and, as will appear later, by implication, to arrive at a conclusion with respect to those matters, which are central to the appellant's fitness to hold a licence. (at p368)

40. Quite apart from reg. 202(2), the court will not ordinarily regard a statutory discretion the exercise of which will affect the rights of a citizen as absolute and unfettered. If Parliament intends to make such a discretion absolute and unfettered it should do so by a very plain expression of its intent. The general rule is that the extent of the discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment (Swan Hill Corporation v. Bradbury [1937] HCA 15; (1937) 56 CLR 746, at pp 757-758 ; Water Conservation and Irrigation Commission (N.S.W.) v. Browning (1947) 74 CLR 492, at p 505). In the words of Kitto J. in Reg. v. Anderson; Ex parte Ipec-Air Pty. Ltd. [1965] HCA 27; (1965) 113 CLR 177, at p 189 :
". . . a discretion allowed by statute to the holder of an office is intended to be exercised according to the rules of reason and justice, not according to private opinion; according to law, and not humour, and within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself . . ."
In principle the same approach should be taken to a statutory discretion affecting rights when it is vested in the Governor in Council. The mere fact that he is the repository of the discretion does not warrant the implication that the discretion is entirely at large. (at p368)

41. The statute merely refers to an "approved" insurer in the context of imposing an obligation on employers to insure. The statute does not take the form of prohibiting persons from carrying on workers' compensation business without approval and then relaxing that prohibition in favour of those who obtain approval. Perhaps for this reason the statute itself makes no provision for applications and does not expressly impose on the Governor in Council an obligation to make a decision on an application. These factors tend to support the view that the discretion is a mere administrative discretion, that it is unfettered and that in exercising it the Governor in Council is not required to make a decision after investigation of an issue. However, the practical effect of the obligation imposed on employers is to prevent persons carrying on workers' compensation insurance business without approval. Because the statute has this restrictive practical effect on persons wishing to carry on workers' compensation insurance business I think that the better view is that the statute contemplates that a person wishing to act as insurer under the Act will make an application for approval and that the Governor in Council will make a decision on that application, after considering at least those specific matters which have already been referred to. (at p369)

42. For these reasons I do not accept the view that the statutory discretion given to the Governor in Council is absolute or unlimited. I concede that an exercise of the discretion may involve policy issues, e.g., the possible need to limit the number of licences as a means of ensuring that unrestricted competition will not result in unacceptable underwriting losses leading to inability of insurers to meet their commitments - see, for example, Reg. v. Liverpool Corporation; Ex parte Liverpool Taxi Fleet Operators' Association (1972) 2 QB 299 . But it is not suggested that any such issue arose in the present case. At all times the central question seems to have been, as one would expect it to be in cases of application for the renewal of a licence: Was the applicant a fit and proper person to act as a workers' compensation insurer? The answer to this question seems to have turned on a view taken as to the commitments and financial position of the appellant, based on the particular matters referred to by the Minister. In these circumstances the appellant had a legitimate expectation that its approval would be renewed or at the very least that it would not be refused without its having an opportunity of meeting objections raised against it. (at p369)

43. We are left with the argument that the Governor acting with the advice of the Executive Council is intrinsically unsuited to the making of an inquiry of the kind suggested. By reason of the nature of its proceedings, the formal nature of the business which it transacts, the nature of its membership - in Victoria it consists of all past and present Ministers of the Crown and has a quorum of two - the very heavy demands which are made on the time of many of its members in the performance of their principal duties as Ministers of the Crown and members of Parliament and the growing volume of Government business, it is apparent that the Executive Council is not adapted to the conduct of proceedings similar to a judicial hearing. Rather it is adapted to the making of a formal decision based on the recommendation of the responsible Minister expressed in the papers presented to the Governor. For this reason, the Court should be less inclined to hold that the Governor in Council is under an obligation to comply with the rules of natural justice than it would in the case of a statutory officer had a similar discretion been entrusted to him. It is less, perhaps much less, likely that Parliament intends the Governor in Council to be under such an obligation. (at p370)

44. But where as here the function reposed in the Governor in Council, that of granting or refusing an application by an individual for the renewal of approval to act as an insurer - a matter to be decided in the circumstances of this case, not on issues of general policy, but principally, if not exclusively, by reference to the financial position and commitments of the applicant - would unquestionably attract a duty to comply with the rules of natural justice had it been reposed in a statutory officer, the difference in the nature and character of the Governor in Council is not sufficient in my opinion to deny the existence of some duty to accord natural justice, though the difference will be reflected in the content of the duty and what is to be expected by way of discharge of the duty, it being accepted now that the content of the duty varies with the particular circumstances of the case. It is impossible to suppose that Parliament intended that the Governor in Council would conduct a hearing similar to a judicial hearing. But it is possible, indeed proper, to attribute to Parliament the intention that the Governor in Council will act in conformity with natural justice, by giving to the applicant an adequate opportunity to present its case, as, for example, by written submissions on matters alleged to be relevant. (at p370)

45. This, it seems to me, was the approach which the Judicial Committee took almost sixty years ago in Wilson v. Esquimalt and Nanaimo Ry. Co. (1922) 1 AC 202, at pp 213-214 . This approach was recently applied in Attorney-General (Canada) v. Inuit Tapirisat of Canada (1980) 115 DLR (3d) 1, at p 15 where Estey J. said:
"That is quite a different matter (and one with which we are not here faced) from the assertion of some principal of law that requires the Governor in Council, before discharging its duty under the section, to read either individually or en masse the petition itself and all supporting material, the evidence taken before the CRTC and all the submissions and arguments advanced by the petitioner and responding parties. The very nature of the body must be taken into account in assessing the technique of review which has been adopted by the Governor in Council. The executive branch cannot be deprived of the right to resort to its staff, to departmental personnel concerned with the subject-matter, and above all to the comments and advice of ministerial members of the Council who are by virtue of their office concerned with the policy issues arising by reason of the petition whether those policies be economic, political, commercial or of some other nature." (at p371)

46. The Governor in Council can without undue inconvenience give the appellant an adequate opportunity of presenting his case either by delegating to a committee of its members (as in Re Gray Line of Victoria Ltd. and Chabot (1980) 117 DLR (3d) 89) or to the responsible Minister the function of considering the appellant's written submissions and reporting on them. Here the second

alternative would appear to be preferable and that, after all, is what the appellant seeks. The Minister can then report on the submissions and make such recommendations as he thinks fit. (at p371)

47. It matters not that the person or persons to whom this function is delegated do not make the ultimate decision. In Testro Bros. (1963) 109 CLR, at p 368 Kitto J. drew attention to Smith v. The Queen (1878) 3 App Cas 614 , where the Governor of Queensland was authorized by statute to declare a lease forfeited if it be proved to the satisfaction of a Commissioner that the lessee had abandoned his selection and had failed to perform conditions of residence. The Commissioner, having certified that the lessee had abandoned his selection and failed to perform conditions of residence without giving him any opportunity of answering the charges, the Governor declared his lease forfeited. It was held that the Commissioner had an obligation to accord natural justice and that for this reason the declaration of forfeiture was void. Kitto J. remarked (1963) 109 CLR, at p 368 :
"The general conclusion seems justified that an inquiry may be of the character that implies a necessity to allow a person affected a fair opportunity to be heard, notwithstanding that an adverse report will do no more than expose him to a possibility not previously existing of a deprivation of rights by the exercise of a discretionary power by another authority." (at p371)

48. There it was possible to conclude that the legislature looked to a compliance with the rules of natural justice by the Commissioner in whom had been reposed the important function of issuing a certificate. Here it is otherwise. The statute looks only to the Governor in Council so that it is for him to see that the application is dealt with fairly and justly. This he can do by delegating to the responsible Minister the task of giving the appellant a fair hearing, in this instance by considering its written submissions in accordance with this request. (at p372)

49. To conclude that the Governor in Council may be under a duty to accord natural justice is to provide another instance of the application of judicial review to the exercise by the Governor in Council of a statutory discretion. As we have seen, Ex parte Northern Land Council [1981] HCA 74; (1982) 151 CLR 170 shows that his exercise of statutory power is subject to judicial review for ultra vires and improper purpose. Other cases show that his exercise of a regulation-making power conditioned on the existence of his opinion as to a state of affairs is examinable (Attorney-General (Canada) v. Hallet & Carey Ltd. (1952) AC 427, at p 450 ; Reade v. Smith (1959) NZLR 996). This conclusion conforms to the early decisions in Roebuck v. Borough of Geelong West (1876) 2 VLR (L) 189 and Shire of Kowree v. Shire of Lowan (1897) 19 ALR 143 which, whatever their shortcomings may be, were made after the grant of responsible government in Victoria. It is a conclusion which offers some protection to the citizen against the legislative practice of conferring statutory discretions on a Governor in Council instead of the Minister or a statutory officer in the hope of thereby avoiding judicial review, particularly for want of compliance with the rules of natural justice, in circumstances where the legislature does not directly dispense with the duty to accord natural justice. (at p372)

50. Although the matter was not agitated in argument it is by no means clear to me that there has been any denial of natural justice. There is a case for saying that the appellant's case was presented in its initial written submissions, that this case was put to and considered by the Minister and that the Minister in his summary has done no more than express reasons for rejecting the appellant's case. However, as the Solicitor-General does not argue for this view I am led to accept the appellant's argument that the Minister in his summary has raised matters which in fairness the

appellant should have an opportunity to answer. (at p372)

51. Finally there are the questions of parties and relief. As to parties it is my opinion that the Attorney-General is a sufficient and necessary party - the Governor himself should not have been joined. As to relief, the declaration is the appropriate remedy. It is the form of relief traditionally granted against the Crown. (at p372)

52. Since writing this judgment I have had the benefit of reading the reasons for judgment prepared by Aickin J. I would, with respect, adopt the reasons stated by his Honour for granting declaratory relief notwithstanding the fact that the order cannot have any direct operation in respect of past events. (at p373)

53. I would allow the appeals. (at p373)

MURPHY J. The Full Court of the Supreme Court of Victoria (Lush, Murphy and Fullagar JJ.) were correct in holding that the appellant companies were not entitled to relief. The importance of this case is not in the particular circumstances, but in the relationship of the judicial to the legislative and executive branches of government. I will deal briefly with some aspects of these. (at p373)

2. In Reg v. Toohey; Ex parte Northern Land Council ("Northern Lands Case") [1981] HCA 74; (1981) 151 CLR 170 this Court held that the judicial power was available to inquire into the good faith or ulterior purpose of the Administrator (acting with the advice of the Executive Council) of the Northern Territory in legislating by delegation. Then, it held that the Aboriginal Land Commissioner (who although a judge, does not in this office exercise judicial power) had jurisdiction to entertain a claim that the legislation was invalid because of the ulterior purpose or absence of good faith of the Administrator (acting with the advice of the Executive Council). If that decision is correct, it would be astonishing if courts could not enquire into the good faith of an executive act of bodies such as the Administrator, or a State Governor in Council. However although agreeing with the order for other reasons, I dissented from these views, and remain of the same opinion. (at p373)

3. In the absence of authorizing legislation, there is no power in the courts to inquire into questions of good faith, observance of natural justice or other propriety of an act of a Governor in Council which is otherwise within power.

Governor-in-Council and Cabinet. (at p373)

4. Leaving aside the controversy over vice-regal "reserved powers" the Governor is bound to take the advice tendered by his Ministers. Under our system of responsible government the decisions of the Governor in Council are formal. A Governor is sometimes given the courtesy of explanations but is not entitled to them. The decisions give effect to the will of the Cabinet. Thus in theory, the Governor in Council, and in practice the Cabinet, is the highest political organ of the State. The Cabinet, which has no place in the formal Constitution, is a committee of Ministers of the ruling parliamentary party or parties. The Cabinet is responsible for all decisions of the Governor in Council, even if in practice the real decisions are left to several Ministers or (as often in regulation-making) to one Minister. The Cabinet decisions are collective decisions. It is well-known that the Ministers who attend and recommend the Council action (including the Minister in charge of the Department concerned) may on occasion disapprove of the action. A Minister making the recommendation for action by the Council may be of opinion that the action proposed is

undesirable, contrary to good government or even unconstitutional; he may make the recommendation because a majority of his Cabinet colleagues decide otherwise (or occasionally because a majority of his parliamentary party think otherwise). In this system, the validity of an act, legislative or executive, obviously cannot depend on the state of mind of the Governor, or of the Minister making the recommendation to the Governor in Council. This does not mean that standards of good faith, fair dealing, natural justice and propriety are not applicable. They are, but they are political standards enforceable by the political process, sometimes very effectively and sometimes ineffectively. The standards vary from time to time and sometimes differ markedly between the various States. (at p374)

5. When Parliament authorizes the Council to make a decision it is because Parliament considers the decision warrants a political determination. No Act of the Victorian Parliament authorizes judicial review of the Council's decision. The only justification can be common or decisional law. It is unwise by decisional law to extend judicial review into this executive area. (see Clough v. Leahy [1904] HCA 38; (1904) 2 CLR 139). (at p374)

6. There is a proper and important place for the exercise of judicial power. There is also a proper and important place for the exercise of legislative and of executive powers. Traditionally, in our system of government, certain functions are committed to the executive branch of government which are to be determined not in a judicial nor in a quasi-judicial way, but in an executive way (see Barton v. The Queen [1980] HCA 48; (1980) 147 CLR 75). Apart from the Northern Lands Case there is no authority in this Court for an extension such as this into decision-making at the highest political level. Because of the very long tradition to the contrary, this is sought to be done indirectly by a declaratory order directed not at the Governor in Council, but at the Attorney-General, and additionally or alternatively by treating the recommendation of the Minister as a decision which is void. (at p374)

7. When the Parliament authorized the Governor in Council to approve of the renewal of insurance companies' licences this was intended to be an executive matter not subject to judicial review. A holding that a Minister's recommendation to Council is subject to declaratory orders has startling implications. Are recommendations by the Minister to Cabinet, and Cabinet decisions to recommend to the Council, also subject to declaratory orders? (at p375)

8. References to legitimate expectation tend, in the context of this case, to suggest that the Council's decision not to approve renewals was equivalent to cancellation, or a positive step against the appellant companies. It was not. The Council was empowered to approve renewals. Assume that the Council was not a formal body, but was the real decision-maker, and on the day of its decision, 26 May 1981, was informed of all that had taken place between the Minister and the appellant. Even if it considered that the Minister had been dilatory, nevertheless taking into account the outstanding questions about the fitness of the appellant, it would have been correct in deciding not then to approve the appellant (because of the paramount public interest in the matter). It could have stood the matter over. That would have been a decision to not approve then, but to consider the question again. The appellant does not contend that the decision taken was never to approve the appellant. The actual decision not to approve cannot be faulted. The Council was entitled not to approve until it was satisfied that it should do so. Because of this, even if judicial review were available, the Council's decision should not be treated as void. (at p375)

9. The appeal should be dismissed. (at p375)

AICKIN J. The material facts and the relevant legislation are discussed and set out in the reasons for judgment of my brother Mason which I have had the advantage of reading. It is however necessary for me to mention the sequence of events. The appellant in the first appeal had had an approval of the Governor in Council to carry on workers' compensation insurance business in Victoria for many years and its then current approval was due to expire on 30 June 1979. The company applied for its renewal for a further year but approval was granted only until 31 December 1980. A letter from the Minister of Labour and Industry ("the Minister") informed the appellant of his approval and set out certain criteria which he said workers' compensation insurers would be required to satisfy before 1 July 1981. On 2 December 1980 the appellant applied for a renewal of its approval for twelve months from 31 December 1980 and made certain submissions as to the criteria which had been prescribed by the Minister and as to the regulations. On 23 March 1981 the Minister informed the appellant that its application for renewal was still under consideration and that the Governor in Council had given interim approval effective until 1 June 1981. On 18 May the Minister informed the appellant in writing that he had decided to recommend to the Governor in Council that the application be not approved. In that letter he set out what he called "a summary of the case against the applicant" in which he mentioned a number of aspects of the company's activities and those of a group of companies of which it was one. On 21 May 1981 the appellant's solicitors wrote to the Minister and to the Clerk to the Executive Council seeking particulars of the matters raised by the Minister and asking for an opportunity to answer those matters. On 26 May 1981 an Order in Council was made by the Governor in Council refusing to grant approval to the appellant, the order being expressed to operate on and from 2 June 1981. No opportunity was given to the appellant to place material before, or to make representations to, the Minister or to the Executive Council in response to the matters raised by the Minister. (at p376)

2. The first question which arose was whether the Governor in Council was "a tribunal" within the meaning of the Administrative Law Act 1978 (Vict.) and that, in its turn, depends on whether the Governor in Council is bound to observe "one or more of the rules of natural justice". My brother Mason has reviewed the authorities on this aspect of the matter. (at p376)

3. The operation of the principles of natural justice in respect of applications for licences and applications for renewal of existing licences has been the subject of a considerable number of authorities in recent times. In this Court it has been clearly established that a statutory authority which has a power or authority to affect the rights of individual citizens is bound to provide a "hearing" before exercising such a power. It is sufficient in this context to refer to Twist v. Randwick Municipal Council [1976] HCA 58; (1976) 136 CLR 106 and Heatley v. Tasmanian Racing and Gaming Commission (1977) 137 CLR 487 . The earlier decision of Banks v. Transport Regulation Board (Vict.) [1968] HCA 23; (1968) 119 CLR 222 establishes that this principle extends not only to the exercise of a statutory discretion which affects the rights of an individual citizen but also to the exercise of a power which affects what may be described as an "interest or a privilege" (e.g. a licence or authority to carry on a particular business) or which disappoints what has been called a "legitimate expectation". The exact extent of that expression has not been determined but it certainly applies to renewal of licences to carry on a particular business where there is no statutory right of renewal. It applies where the nature of the "interest or privilege" is such that it would not be fair to deprive the person of the continuation or renewal of the authority or permit without granting him a hearing. Underlying that view is the fact that, where the circumstances make it reasonable to expect a renewal, the holder may have built up a business and expended money on business assets on the basis of that expectation. The authorities on this aspect of the matter are referred to in the decision of this Court in Salemi v. MacKellar (No. 2) [1977] HCA 26; (1977) 137 CLR 396 . (at p377)

4. The content of the conception of "natural justice" in this area remains imprecise but it is now clear at least that in the absence of a contrary legislative provision the cancellation of, or refusal to renew, a permit or licence to carry on some business activity must comply with the rules of natural justice. This is clearly established by the decision in Banks' Case. (at p377)

5. At the other end of the scale it requires most unusual circumstances to warrant the view that upon an initial application for a licence which is not one which the relevant authority must issue as of course upon the complicance with specified procedures, there is a duty to provide a hearing. Such licences rest in the discretion of the licensing authority and are not often the subject of clearly prescribed criteria upon satisfaction of which the grant of a licence must follow as of right. An example of the latter situation may be the issue of a licence to drive a motor vehicle. In a case where the criteria are not prescribed in detail and where matters of policy may be involved, the situation is unlikely to warrant the drawing of the inference that there is some entitlement to a licence or some entitlement to a hearing before a licence is refused. The number of activities which require a licence is no doubt large and frequently their issue may depend upon matters of general public policy not necessarily related to the conduct or character of the particular applicant. No doubt there are many where the latter consideration is relevant in the case of the grant of an initial licence. (at p377)

6. The application for renewal of an existing licence which is about to expire stands in a different situation. The development of the notion of "legitimate expectation" has produced some extension of the area of operation of the conception of natural justice. The well-known passage in de Smith's Judicial Review of Administrative Action, 4th ed. (1980), pp. 223-224, which is quoted by my brother Mason, indicates the conceptions which have led the courts to take the view that administrative authorities should not refuse to renew licences without there being at least some opportunity to answer the grounds upon which the authority relies in its decision to refuse renewal or extension. Whether something in the nature of a "hearing" is required in order to satisfy the requirements of natural justice will depend upon the particular circumstances of the case, including the nature of the activity for which the licence is required, the nature of the licensing authority and the nature of the applicant's conduct and of any complaints about his activities either by the public or the licensing authority itself. It is however a mistake to suppose that the presence of those factors will necessarily oblige the authority to conduct a hearing properly so called with opportunities for the presentation of evidence and the cross examination of witnesses. In some cases all of that may be necessarily implied in the concept of natural justice is an opportunity to make submissions (whether oral or in writing) to the authority and to be informed of the reasons for the refusal. Generally speaking the nature of the licensing authority will not be a determining factor but it may affect the nature of the "hearing" required. (at p378)

7. The distinction between the original grant of a licence or authority to do some act or carry on some business and the subsequent renewal of such a licence or authority arises from a "reasonable expectation". In strict terms a renewal of such a licence does not differ from the grant of a new licence as may be illustrated by the view long held that the "renewal" of a lease constitutes the grant of a new lease - see per Isaacs J. in Gerraty v. McGavin [1914] HCA 23; (1914) 18 CLR 152, at pp 163-164 . However the technical nature of the renewal or regrant of a licence cannot be decisive in this context because of the development of the notion that a citizen may have a "legitimate expectation" that a licence previously granted to him will be "renewed" at least in the absence of some disqualifying circumstance. It is that expectation which generally will entitle him to be told the reasons for the refusal to renew and to be given an opportunity to endeavour to persuade the relevant authority to change its view and to demonstrate that the reasons which had actuated the decision were mistaken or erroneous and that material facts had been overlooked or matters which

were untrue or irrelevant had been relied on. The requirement that there should be such an opportunity to comment on the reasons and material relied upon by the licensing authority does not necessarily involve the right to a "hearing", although that will be so in some cases. Generally the requirement is that the authority will act fairly in dealing with the application for renewal but particular statutory provisions may not necessarily give rise to the inference that the authority must consider fairly the basis upon which the applicant relies for renewal. (at p379)

8. There is in my opinion no material difference between the grant of an "approval" to an insurance company to carry on insurance business or a particular kind of insurance business and the grant of a "licence" to do so. The difference is one of terminology only. In cases raising the present question it is necessary to consider the surrounding circumstances, the nature of the statutory power and the nature of the governmental authority in which that statutory power is reposed. In this case it is the last of those considerations which is the most important. (at p379)

9. The Governor in Council in each of the Australian States represents a well-known organ of government with a long common law and statutory history. To designate the Governor in Council as a "statutory authority" would not be an ordinary use of language even though it may not be technically incorrect. (at p379)

10. In Reg. v. Toohey; Ex parte Northern Land Council [1981] HCA 74; (1981) 151 CLR 170 this Court had to consider the position of the Administrator in Council in the Northern Territory in a statutory context in which the Administrator was treated by a majority of the Court as being in the same position as a Governor of a State for relevant purposes and in which the relevant power was vested by Northern Territory Ordinance in the Administrator in Council, not in the Administrator as an individual. (at p379)

11. The view expressed by the Full Court of the Supreme Court of Victoria in this case was that the Governor in Council had an "unfettered discretion". That may well be a correct description of many of the administrative and "legislative" activities which the Governor in Council is required or authorized by the Crown or by statute to carry out. Thus the nature of the act or decision authorized or required may not by itself determine whether the relevant power is examinable or not. Some statutory powers may from their nature be capable of valid exercise without prior inquiry into particular facts for the nature of the subject matter may make particular facts irrelevant. On the other hand a power given to a Minister to revoke a licence to carry on a particular business from its nature will generally speaking require the Minister to investigate the facts and to invite and consider representations and explanations by the person immediately concerned, but without there being a duty to hold any kind of formal hearing. In this context it is difficult if not impossible to lay down general rules capable of automatic application, for each case will involve a different statute. The grant of a very wide discretion may in some cases be a clear indication of a parliamentary intention to displace the rules of natural justice, but generally something more than a discretion without express restrictions will be necessary to exclude the duty to observe the principles of natural justice. The circumstances in which this kind of problem may arise are, from their very nature, diverse and unpredictable and moreover the problem is still likely to arise in circumstances in which the draftsman has not had occasion specifically to direct his mind to the question of whether the "rules of natural justice" are to be applicable to the exercise of the particular power in question. The provisions of the Administrative Law Act represent a recent attempt to formulate general rules governing the extent to which and the manner in which administrative decisions may be challenged but it is not unfair to say that the context of the legislation makes it clear that the position of the Governor in Council was not expressly in the mind of the draftsman or of those, one must assume,

who directed the preparation of the Bill which ultimately became that Act. (at p380)

12. In the Northern Land Council Case I examined a number of authorities from various common law jurisdictions on the position of the Governor in Council in relation to the extent to which the decisions of that body or its equivalent were subject to challenge. I do not need to go over that examination again. For present purposes it is important to note the decision of this Court in Murphyores Incorporated Pty. Ltd. v. The Commonwealth [1976] HCA 20; (1976) 136 CLR 1 in which the Court proceeded upon the footing that it may investigate the exercise of statutory powers by Ministers of the Crown in order to determine whether such exercise of power was authorized by statute or was otherwise within the lawful scope of the powers of the Minister. The Court was unanimous in expressing the view, either explicitly or implicitly, that the Court could investigate acts done by Ministers pursuant to statutory powers for the purpose of ascertaining whether or not they had been done for improper purposes, as distinct from being outside the boundaries of the power itself in the sense of being ultra vires. The House of Lords had arrived at a similar conclusion in Padfield v. Minister of Agriculture, Fisheries and Food [1968] UKHL 1; (1968) AC 997 . The position of a Minister of the Crown acting pursuant to statutory authority was thus clear and the purposes which had actuated the Minister in arriving at a particular decision may be examined to see whether they were improper in the sense that the power was exercised for some purpose foreign to the grant of the power. (at p381)

13. I there said that in considering whether that proposition was also true of the Crown or the Crown's representative it was necessary to bear in mind that powers now exercised by the Crown in Council or the Governor in Council do not involve a personal decision by the Queen or a Governor-General or a Governor. Despite the large number of authorities relied upon in the Northern Land Council Case the present question, and the one which was at the heart of that case, had never been directly considered in the case of the exercise of a power honestly but for a purpose for which the statutory power had not in fact been conferred, i.e. a case in which the power was purported to be exercised in the mistaken but honest belief that the power extended to that which was purported to be done. (at p381)

14. The decision in the Northern Land Council Case stops short of providing a direct answer to the question which is central to this case, which is whether in its context the statutory provision requires not merely good faith on the part of the relevant Minister and the Governor in Council, but the observance of the requirements of natural justice. (at p381)

15. There had in the Northern Land Council Case been no occasion for any hearing or notification of the intention to make the relevant regulation which required that the particular area in question should be treated as a town. That was a matter committed under the statute to the Administrator in Council to be dealt with by the making of appropriate regulations. It did not however mean that no investigation was possible and no question arose as to the manner in which the matter should be or might be pursued before the Aboriginal Lands Commissioner. All that the case decided was that the Commissioner had been wrong in supposing that he had no power to compel the production of the documents sought, i.e. sought from the Administration of the Northern Territory. The point had not been reached in which any question arose of investigation of the motives or knowledge of the Minister or of the Administrator in Council. The case therefore throws no light on how the requirements of natural justice should properly be applied in a case such as the present where what is in question is not a quasilegislative act but the refusal of a particular application for the renewal of an approval to carry on a specified business. (at p381)

16. In the present case we are concerned with the question of whether the requirements of natural justice were not complied with in the making of the decision to recommend the refusal of the application made for the renewal of the licence. That refusal was a formal act of the executive government of the State, an act which could only be done under the legislation by the Governor in Council on the recommendation of the relevant Minister. It does not follow that, even if the view were taken that some kind of actual hearing is in these circumstances a requirement of natural justice, the Governor in Council is the body to conduct such a hearing. To take such a view is to misunderstand the constitutional function of the Governor in Council. It is the body which gives the force of law to, and thus makes effective, decisions of the executive government, i.e. the Cabinet and individual Ministers. That is the body in which executive power is vested by the constitutional system although the mode of the carrying into effect of the decisions of executive government differs according to the circumstances. Some executive acts may be wholly performed by Ministers or delegated to heads of government departments or to statutory authorities and some may be a formal order of the Governor in Council. Under the present legislation the Governor in Council is the body which gives legal operation to a decision made by a particular Minister who is responsible for the administration of the relevant legislation. It is necessary to observe and to apply what Kitto J. said in Australian Communist Party v. The Commonwealth (1951) 83 CLR 1, at p 280 , viz:
"Finally, it must be remembered that the satisfaction with which alone the section is concerned is the satisfaction of the Governor-General acting with the advice of the Executive Council. So acting he has not to consider for himself either questions of fact or questions of law, but will be satisfied as he may be advised."
That observation is equally true of the Governor of the State of Victoria when acting with the consent and advice of the Executive Council. It is true that the Executive Council in the State of Victoria is an oddly-constituted body comprising all present and former Ministers, a body which never meets as constituted, but to which individual Ministers are summoned from time to time to make up the required quorum of two. We would be closing our eyes to well-known and thoroughly-understood facts about the manner in which the Constitution of the State of Victoria operates if we were to suppose that the Governor in Council is a deliberative body which makes an independent investigation or judgment as to the merits of particular proposals which are placed before it. It is the traditional legal means by which operative force is given to decisions made by the Cabinet or individual Ministers of the Crown authorized by statute, perhaps also in some cases the common law, to make particular administrative and political decisions to which legal effect can be given pursuant to statute only by a formal decision of the Governor in Council. It was suggested in the course of argument, and it may be, that the Governor personally may make suggestions or ask that particular measures be given further consideration before being brought into operation. Even if that were so the deciding mind would be that of the Minister who recommends the particular measure or action or, in the case of a decision by the Cabinet, the members of the Cabinet. (at p383)

17. It is in my opinion destructive of the notion of natural justice to proceed upon the basis that, where a hearing or an examination of old and new material relevant to a decision made by a Minister is concerned, such hearing or re-examination should be carried out by some person who was not the deciding mind in relation to the original decision. If a recommendation is made to the Governor in Council by a Minister who has arrived at his recommendation without giving a required opportunity to the person affected by the decision to bring to his attention all the material regarded as relevant to the Minister's decision, including answers to complaints by or questions asked by the Minister, then it is the recommendation to which the requirement of natural justice attaches. It is contrary to the scheme of organized government in the States to suppose that the Governor in Council constituted in the same manner as it was on the day on which the original decision was

made, or constituted in some other way, should itself conduct some kind of a hearing or some kind of an investigation or to examine the new material, as well as the old material which was not before it, and then conclude what recommendation the Minister ought to have made on the new material. A true analysis is that, if by reason of the failure of the Minister to give the opportunity for the submission of answers to questions raised by or material relied upon by the Minister, there has been a failure to provide natural justice, then the result must be that the proceedings before the Governor in Council have miscarried so that no effective Order in Council has been made, there having been no effective recommendation. The Minister has mistakenly exceeded his powers in advising the Governor, either directly if he is present or indirectly through such Ministers as were present when the particular recommendation was made to the Governor in Council. In those circumstances it seems to me that the Order in Council recording the decision not to renew must be void. There is nothing that the Governor in Council has effectively done and nothing that the Governor in Council as such can do unless and until the relevant Minister makes a recommendation either personally or through another Minsiter or member after he, as the deciding authority, has in fact taken into account all the material that he should have taken into account. In the present case that means the examination and consideration by the Minister of the answers which would have been made by the appellant to the factors which the Minister had set out in his communication as "the case against" the appellant. (at p384)

18. In my view it follows that no question arises as to whether the Governor in Council is a suitable body to make an investigation or reconsideration of the kind suggested in argument, whether by way of a hearing or by way of consideration of written submissions. In fact the Governor in Council would be an unsuitable body to perform such a task but it seems to me that nothing which has occurred in the present case and nothing in the constitutional position of the Governor in Council nor in the relevant legislation requires the Governor in Council to assume so unsuitable a role. (at p384)

19. The situation is that the Minister failed to provide an opportunity for the appellant, who was directly affected by a decision which would destroy part of its existing business, to provide material in answer to the circumstances and considerations upon which the Minister had relied in arriving at his decision. In the result he made no effective decision and no effective recommendation, so that no effective Order in Council was made, but that did not produce the result that the approval previously granted continued beyond its expiry date. (at p384)

20. The difficulty is that the statute and the regulations provide that approvals granted expire automatically upon the expiration of the period for which they were granted, the maximum being twelve months, though they may be "renewed" by the Governor in Council, but that did not happen. (at p384)

21. Under the Administrative Law Act provision is made in ss. 3 and 4 for applications to the Supreme Court of Victoria to review the decisions of "Tribunals". The term "Tribunal" is defined as follows:
"'Tribunal' means a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice."
Applications are made ex parte to the Supreme Court which may make an "order to review" returnable before the Full Court or a single Judge. In the present case the application was made returnable before the Full Court. Section 7 prescribes the powers of the Supreme Court in dealing

with such order to review and is as follows:
"Upon the return of the order to review, the Court or Judge may discharge the order or may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for or upon the return of any prerogative writ or any proceedings in an action for quo warranto or in an action for a declaration of invalidity in respect of the decision or for an injunction to restrain the implementation thereof and may extend the period limited by statute for the making of the decision but shall not exercise any other jurisdiction or power or grant any other remedy." (at p385)

22. Upon the assumption that the Governor in Council was a "Tribunal" within the meaning of the definition, the Full Court of the Supreme Court would have had the powers conferred by s. 7 if it had taken the view that the decision of the Governor in Council should be "reviewed", namely, those powers and remedies which might be exercised or granted in proceedings for - (a) any prerogative writ; (b) quo warranto; (c) a declaration of invalidity; (d) an injunction restraining the implementation of the decision and has power to extend the period limited by statute for the making of a decision, but may not exercise any other jurisdiction or power or grant any other remedy. (at p385)

23. It is necessary to consider what order the Supreme Court could have made at the date on which the matter came before it, and also what order this Court could direct should be substituted for the Supreme Court's order if it took the view that the Governor in Council was obliged to provide some kind of hearing or opportunity to answer the adverse comments by the Minister. (at p385)

24. Under the Workers' Compensation Act 1958 (Vict.) and Regulations thereunder no person may carry on workers' compensation insurance business without the approval of the Governor in Council (reg. 201). Regulation 202(1) provides:
"Any approval granted by the Governor in Council shall be operative for a period not exceeding twelve months from the date thereof and may on application be renewed for any period not exceeding twelve months if the Governor in Council thinks fit." (at p385)

25. In the present case the last approval given by the Governor in Council to the appellant expired on 1 June 1981. (at p385)

26. By the time these proceedings came on for hearing before Jenkinson J. in the Supreme Court on 5 June 1981 the appellant no longer held an approval and was therefore precluded by the legislation from carrying on workers' compensation insurance business. (at p386)

27. The conclusion that the Minister wrongly denied "natural justice" to the appellant and that the Minister's decision to recommend to the Governor in Council that renewal be not granted should therefore be regarded as void cannot produce the result that the appellant should be regarded as having been granted an approval for some unspecified period as from 2 June 1981. That is a result that no order of the Supreme Court could achieve, any more than such an order could extend the period of the expired approval. This is a result which flows from the statute and not from the Minister's failure to provide an opportunity for the appellant to answer "the case against" it. It follows therefore that the Supreme Court could not have made any order which could have resulted in the "renewal" or the "extension" of the licence which expired on 1 June. Of the various remedies which the Supreme Court was authorized to grant under s. 7 the only two which could have been

appropriate or possible would have been a mandamus or a declaration. (at p386)

28. It is well settled that a writ of mandamus cannot go against the Crown, and for present purposes the Governor and the Governor in Council are in the position of the Crown and the Crown in Council. Even if, contrary to settled law, a mandamus could issue against the Governor in Council there is nothing the Governor in Council could be ordered to do. On the view that I have taken as to the respective roles of the Minister and the Governor in Council, there is nothing relevant which the Minister could be ordered to do. The old approval has expired and no application for a new approval has been made. (at p386)

29. The Supreme Court could have made a declaration of invalidity. If this appeal were allowed the only order which this Court could make would be to set aside the order of the Full Court of the Supreme Court and order that there be substituted therefor a declaration that the decision of the Minister to recommend to the Governor in Council that the renewal of the approval be not approved and that the refusal of approval by the Governor in Council were both void. (at p386)

30. That however would be an order without any legal effect because the approval had expired before the hearing before Jenkinson J. had begun and the Supreme Court had no power to deem an extension to have been granted. (at p386)

31. The present situation appears not previously to have arisen in a case of the failure to observe the requirements of natural justice. Ordinarily the conclusion that a decision was void because of failure to observe the relevant requirements of natural justice would restore the status quo, but that is not so in this case. The situation which prevailed before the Minister reached his decision to recommend refusal to renew cannot now be revived. All that the appellant can do is to apply for the grant of an approval de novo. (at p387)

32. It may be regarded as a substantial extension of the present law as to the requirements of natural justice and the consequence of failure to observe them to require something in the nature of a hearing or an opportunity to reply to a licensing authority's reasons for refusing to grant a fresh licence de novo as distinct from refusing to grant a renewal where the circumstances are such as to produce a "legitimate expectation" that a renewal will be approved in the absence of some adequate reason for refusal. In the present case however I would regard that as an artificial and arbitrary distinction. The nature of the legislation and the timing of the Minister's action produce the result that the opportunity to answer the Minister's reasons for recommending that approval be refused did not arise until the old approval had expired. Further time has been occupied in litigation, but it should be noted that the appellant instituted its proceedings in the Supreme Court under the Administrative Law Act promptly after being informed on 18 May of the Minister's decision to recommend that the application to renew be not approved. The proceedings were commenced on 5 June 1981. (at p387)

33. A further consideration is that courts are generally reluctant to deal with hypothetical questions but the position of the appellant in relation to a fresh application is not a purely hypothetical situation. It is realistic to suppose that a fresh application will be made and it would not be desirable that matters which have been fully litigated in the present proceedings should be re-litigated simply because no immediately effective order could be made. (at p387)

34. It appears to me that it would involve no extension of existing principles to hold that in these particular and unusual circumstances an application by the appellant to the Minister for the approval

of the appellant so as to enable it to carry on the business of workers' compensation insurance would be one in respect of which the Minister would be obliged to give the appellant an opportunity to answer what had been the case against it in relation to its application for renewal, as well as to answer any further consider ations which the Minister may regard as reasons for refusing a new approval. (at p387)

35. Accordingly I would regard a declaration in respect of the Minister's earlier decision as having a sufficient indirect effect to warrant the Court making an order, notwithstanding the fact that it cannot have any direct operation in respect of past events. (at p387)

36. In the result therefore the appeal should in my opinion be allowed and there should be a declaration that the Minister's decision to recommend that the approval be not renewed was void, and that the Order in Council was void. I would add that on the view which I have taken the Governor of Victoria was neither a necessary nor a proper party. (at p388)

37. All that I have said above applies not only to the appeal by F.A.I. Insurances Ltd. but also to the appeal by Fire and All Risks Insurance Co. Ltd. (at p388)

WILSON J. These appeals each raise a single question: should the Governor of Victoria have given the appellant companies an opportunity to make representations before he resolved to withhold his approval of them as insurers under the Workers Compensation Act 1958 (Vict.) ("the Act")? Despite its apparent simplicity, it is a difficult and complex question.

The statutory framework. (at p388)

2. The relevant provisions of the Act are as follows:
"72. (1)(a) Save as provided in this Act as to schemes of compensation, it shall be obligatory for every employer to obtain either from the Insurance Commissioner or from an insurer approved by the Governor in Council, a policy of accident insurance or indemnity which indemnifies the employer -
(i) for the full amount of his liability to pay compensation under this Act, other than, in respect of each particular injury to a worker, the first $500 of his total liability to pay compensation to the worker by way of weekly payments or in respect of medical, hospital, nursing or ambulance services; and
(ii) for the full amount of any other liability imposed upon him under this Act.

. . .
73. (1) The Governor in Council may subject to the provisions of this

Act make regulations -

. . .
(d) for prescribing the requirements to be complied with and the

securities to be lodged by an insurer before approval of such insurer under section seventy-two of this Act;

. . .
(i) generally as to any matters necessary or convenient to be prescribed

for carrying out or giving effect to the provisions of this Act."

The Workers Compensation Act Regulations 1975 (S.R. 367 of 1975) include the following regulations:

"PART II.

Conditions on which approval to carry on Accident Insurance Business will be granted: Section 72(1) and Section 73(1)(d) and (i) of the Act.
201. No company shall without first having obtained the approval of the Governor in Council accept any premiums or carry on any insurance business against liability in relation to workers' compensation to which employers are subject under the Acts.
202. (1) Any approval granted by the Governor in Council shall be operative for a period not exceeding twelve months from the date thereof and may on application be renewed for any period not exceeding twelve months if the Governor in Council thinks fit.
(2) In the granting of any approval or renewal thereof regard shall be had to the commitments and financial position of the applicant and in the case of renewal to the observance of these Regulations by the applicant."

The Acts Interpretation Act 1958 (Vict.) provides that "the expression 'Governor in Council' shall mean Governor with the advice of the Executive Council" (s. 17). (at p389)

3. Finally, it is necessary to refer to the Administrative Law Act 1978 (Vict.), an enactment designed to provide a simple procedure for the judicial review of certain administrative decisions. The present proceedings have their origin in applications made pursuant to this Act. The material provisions include the following:
"2. In this Act unless the context or subject-matter otherwise requires -
'Decision' means a decision operating in law to determine a question affecting the rights of any person or to grant, deny, terminate, suspend or alter a privilege or licence and includes a refusal or failure to perform a duty or to exercise a power to make such a decision.

. . .
'Tribunal' means a person or body of persons (not being a court of law

or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.
7. Upon the return of the order to review, the Court or Judge may discharge the order or may exercise all or any of the jurisdiction or powers and grant all or any of the remedies which upon the material adduced and upon the grounds stated in the order might be exercised or granted in proceedings for or upon the return of any prerogative writ or any proceedings in an action for quo warranto or in an action for a declaration of invalidity in respect of the decision or for an injunction to restrain the implementation thereof and may extend the period limited by statute for the making of the decision but shall not exercise any other jurisdiction or power or grant any other remedy.
8. (1) A tribunal shall, if requested to do so by any person affected by a decision made or to be made by it, furnish him with a statement of its reasons for the decision."

The duty to be fair. (at p390)

4. The content and application of the principles of natural justice and the obligation resting upon persons making certain decisions of an administrative nature to act fairly have been discussed at length in a number of recent decisions of this Court: Twist v. Randwick Municipal Council [1976] HCA 58; (1976) 136 CLR 106 ; Salemi v. MacKellar (No. 2) [1977] HCA 26; (1977) 137 CLR 396 ; Reg. v. MacKellar; Ex parte Ratu [1977] HCA 35[1977] HCA 35; ; (1977) 137 CLR 461 ; Heatley v. Tasmanian Racing and Gaming Commission [1977] HCA 39; (1977) 137 CLR 487 . It would be presumptuous and quite unnecessary for me to embark upon a dissertation of my own. However, I would take, with gratitude, the following brief general conspectus of the law from the judgment of Gibbs J. (as the Chief Justice then was) in Salemi (No. 2) (1977) 137 CLR, at pp 419-420 :
"There is nothing technical about the principles of natural justice. It is sometimes said, or suggested, that those principles apply only to proceedings which are judicial, or quasi-judicial, or where there is a duty to act judicially. To state the rule in that way seems to me to be unduly restrictive and misleading. It is at least clear that when the power which is being exercised is a statutory one, it is not necessary to be able to find in the words of the statute itself a duty to hear the party affected or otherwise to act judicially. To repeat the well-known words of Byles J. in Cooper v. Wandsworth Board of Works [1863] EngR 424; (1863) 14 CB (NS) 180, at p 194 [1863] EngR 424; (143 ER 414, at p 420) , 'although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature'. As Lord Reid said in Ridge v. Baldwin [1963] UKHL 2; (1964) AC 40, at p 76 , it may be possible 'to infer a judicial element from the nature of the power' in the case. Further, the application of the principles is not limited to cases where the power that is exercised affects rights in the strict sense: see, e.g., Banks v. Transport Regulation Board (Vict.) [1968] HCA 23; (1968) 119 CLR 222 . It may be enough if an interest or privilege is affected, or, as Lord Denning M.R. has said, if a man has a 'legitimate expectation', of which it would not be fair to deprive him without a hearing, or reasons given: Breen v. Amalgamated Engineering Union (1971) 2 QB 175, at p 191 ; and see Schmidt v. Secretary of State for Home Affairs (1969) 2 Ch 149, at p 170 . But it would be wrong to attempt to give an exhaustive classification of the cases where the principle should be applied: Durayappah v. Fernando (1967) 2 AC 337, at p 349 .
The question whether the principles of natural justice must be applied, and if so what those principles require, depends on the circumstances of each case. In the case of a statutory power, the question will depend on the true construction of the statutory provision in light of the common law principles (cf. Durayappah v. Fernando (1967) 2 AC, at p 350 .
In Durayappah v. Fernando, Lord Upjohn, delivering the reasons of the Privy Council, said that 'there are three matters which must always be borne in mind when considering whether the principle should be applied or not (1967) 2 AC, at p 349 . He went on:
'These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other.' There may of course be other matters that will be relevant in deciding whether the principles apply: for example, the nature of the body on which the power is conferred, the language in which the power is conferred, and the presence in the statute of provisions enabling the exercise of the power to be reviewed."

The facts of the case. (at p391)

5. It is against this background of statute and principle that the particular features of these appeals must be considered. I turn first to the facts. For all practical purposes the position of each of the

appellant companies is comparable, save that one is incorporated in Victoria and the other in New South Wales; it will be sufficient to refer directly to F.A.I. Insurances Ltd. ("the company"). (at p391)

6. The company is incorporated in Victoria. For many years it has carried on the business of insurance in that State, being authorised in that regard pursuant to the Insurance Act 1973 (Cth). Also for many years its business has included the provision of workers' compensation insurance, and from year to year it has received the approval of the Governor in Council as required by s. 72 of the Act. In August 1979 the Minister administering the Act ("the Minister") wrote to the company, informing it that approval beyond 1 July 1981 would depend upon its compliance with certain criteria which were described in the letter. In December 1980 the company applied pursuant to reg. 202 for the approval to be renewed for a period of twelve months commencing 1 January 1981. The letter of application contained representations in support of approval, and included references to the Minister's criteria. In particular, it requested the opportunity of making further submissions in relation to any matter which might be thought to stand in the way of a renewal. In March 1981 the company was advised that its application was still receiving consideration and that the Governor in Council as an interim measure had renewed his approval until 1 June 1981. On 18 May 1981 the Minister informed the company that he had decided to recommend to the Governor in Council that F.A.I. Insurances Ltd. and Fire and All Risks Insurance Co. Ltd. "be not approved as insurers for the purposes of Section 72 of the Workers Compensation Act 1958 beyond 1 June 1981". The letter advising the company in these terms included the following passage:
"A summary of the case against the applicant companies is set out below:

1. the high level of investment in related bodies;
2. inadequate provision for inflation in respect of unsettled claims;
3. the diversified nature of the group and the level of intergroup

transactions;

4. the purchase of investments above independent valuations;
5. inter-company transactions for the benefit of the Group rather than

for the individual inter-related company;

6. a stated disregard for guidelines in New South Wales; and
7. the comments of McGrath J showing disapproval of the standard of

conduct in relation to workers compensation insurance in New South Wales.
In coming to a decision, I have had regard to the information submitted to me and the comments of McGrath J in his judgment in the matter of the Workers Compensation Commission of New South Wales and F.A.I. Insurances Limited. I expect to make my recommendation to the Governor in Council on 26 May 1981 and I will let you know the decision as soon as I am able to do so."
The company's solicitors responded without delay to this communication, addressing letters to both the Minister and the Clerk to the Executive Council seeking the deferment of a decision until the company had a reasonable opportunity to answer the case against them. With respect to that case, the solicitors asserted
"Some matters relied upon by the Minister are factually incorrect. Some are matters of judgment as to which our clients wish to put their answer. Many, our clients wish to submit, are irrelevant to matters proper for consideration within the terms of Workers Compensation Regulations 1975,

Regulation 202(1) and (2)." (at p392)

7. The company's plea, however, was in vain. On 26 May 1981 the Clerk of the Executive Council advised the solicitors that their letter had been "placed before and considered by the Governor in Council in relation to your clients' application for renewal of approval", but that the decision had been made to withhold approval as from and including 2 June 1981. The formal Order in Council was published in the Victorian Government Gazette on 3 June 1981. It recorded that the Governor, by and with the advice of the Executive Council, "doth by this Order not approve" the two companies as insurers for the purposes of s. 72 of the Act. It is the validity of this Order which is in question.

The issues. (at p393)

8. It is helpful to identify the twin aspects of the problem, and discuss them separately. In the first place, there is the position of the company. What is the nature of the property or status possessed by the company which is affected or threatened by the Order? Is there any right or legitimate expectation to which it can lay claim and on which it can base a right to be heard? In this regard it may be necessary to consider whether there was here any "decision" at all in the strict sense of the word. In the second place, there is the overriding consideration that the legislature has committed to the Governor in Council the responsibility of approving insurers under the Act. Does the choice of such a body evidence a reasonably plain intendment by the Parliament to exclude a right in the applicant insurers to be heard before a decision is made? If it does, then that conclusion will determine the fate of these appeals, notwithstanding that with a different decision-making body the appellants may have had a right to be heard before the question of a renewal was determined. Nevertheless, although the answer to the problem will depend on the construction of the Act in its entire application to the company in this particular instance, it is convenient to examine briefly the first aspect to which I have referred.

Legitimate expectation. (at p393)

9. In its earlier formulations the doctrine of natural justice related to powers which by their exercise affected legal rights: Cooper v. Wandsworth Board of Works [1863] EngR 424; (1863) 14 CB (NS) 180 (143 ER 414) . In recent times, it has become commonplace to refer to the possibility that a person is under a duty to be fair if in the exercise of a power he can affect the "legitimate expectation" of a person to some form of right or liberty: see the cases referred to by Aickin J. in Heatley (1977) 137 CLR, at pp 508-509 . Aickin J., with whom Stephen and Mason JJ. agreed, referred to this concept as a "relatively recent development". On the other hand, it may be noted that Barwick C.J. was of the opinion that the notion of legitimate expectation conveyed a meaning which expressed the concept of entitlement or recognition by law and therefore "the expectation must spring from or be associated with legal right": Heatley (1977) 137 CLR, at p 491 ; see also Salemi (No. 2) (1977) 137 CLR, at p 406 . I do not suggest that there is necessarily any opposition between these observations, although see the comment of Megarry V.C. in McInnes v. OnslowFane (1978) 1 WLR 1520, at p 1529; (1978) 3 A11 ER 211, at p 218 . It is undoubtedly true, as Aickin J. remarks in Heatley, that the true extent of the notion of expectation has yet to be fully worked out and stated with precision. The position of the company in the present case requires a degree of exploration, although by no means an exhaustive one, of the question where the boundary is to be drawn. (at p394)

10. Section 72 of the Act confers on an applicant insurer no legal right to be approved. There are no criteria contained in the Act (including the regulations), compliance with which would lead automatically to approval. Nor, on an initial application, could an applicant entertain any legitimate expectation of approval. He could not assert any right to have his views invited upon matters which the Governor in Council considered to be material to a consideration of the application. Nor could he expect to be given any reasons for the refusal of that initial application. (at p394)

11. Is the position any different if, having been an approved insurer for a period which is about to expire, the insurer applies for a renewal of the approval? Again, it may be said that the Act confers no legal right to a renewal of that approval, notwithstanding that an applicant could establish full compliance with the requirements of the Act and the demonstration of a high standard of commercial integrity and efficiency. Nevertheless, there is no objection in principle to the Act having a different operation in such circumstances. In Heatley, Aickin J. put the matter succinctly (1977) 137 CLR, at pp 513-514 :
"The cases show clearly that the principles of natural justice do not comprise rigid rules, but the requirements of compliance with those principles will depend upon the particular circumstances. 'Fairness' may require, or be satisfied by, different procedures even by the same statutory authority in different circumstances."
His Honour then cited a passage from the judgment of Kitto J. in Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475, at pp 503-504 . In Salemi (No. 2) several members of the Court made the same point with particular reference to the distinction between the grant, and the renewal of an annual licence. Barwick C.J. (1977) 137 CLR, at p 405 said:
"Where a licence or permit is given for a fixed term in relation to a subject matter and in circumstances which carry the implication that if the licensee or permittee has fulfilled the obligation of the licence he may expect a renewal of the licence or permit, the grant will be construed as importing a term that at least the interests of the existing licensee will be considered before a renewal is refused. Such a person thus has a legal basis for asking for that consideration: and, if so, ought to be heard."
Stephen J., after reviewing a number of authorities, summed up the principle in these terms (1977) 137 CLR, at p 439 :
"When the discretionary grant of a licence, permit or the like carries with it a reasonable expectation of, although no legal right to, renewal or non-revocation, summarily to disappoint that expectation is seen as unfair; hence the requirement that the expectant person should first be heard and this no doubt as much to aid those who exercise discretions in pursuing the goal of a just result as to safeguard the interests of the expectant party."
Cf., also, Jacobs J. (1977) 137 CLR, at pp 451-452 . To a like effect are the observations of Megarry V.C. in McInnes v. Onslow-Fane (1978) 1 WLR, at p 1529; (1978) 3 All ER, at p 218 . (at p395)

12. In my opinion, in the light of these cases and having regard to the issues which have been contested by the parties, it is quite clear that, subject to the considerations pertaining to the fact that the Parliament has chosen the Governor in Council as the repository of the power, the nature of the interest of the company in the renewal of its status as an approved insurer is such as to give rise to a legitimate expectation that a renewal of approval would not be withheld. Fairness would then require that it be given the opportunity of making submissions in writing upon the matters the general nature of which had been disclosed in the "case against the applicant companies" conveyed in the Minister's letter of 18 May. I doubt whether the company was entitled to interrogate the Minister, as it attempted to do, with respect to those matters but it is unnecessary for me to come to a conclusion upon that point. It is not suggested, as perhaps it might have been, that the Minister's

letter of August 1979, warning that approval beyond 1 July 1981 would depend upon the company's compliance with the criteria specified therein, qualified any legitimate expectation of renewal beyond that date that the company might otherwise have had, and that the submissions relative to those criteria which the company made when making the application in question satisfied any requirement for a hearing.

The Governor in Council. (at p396)

13. This being the nature of the company's interest, the resolution of the case depends upon the effect on the construction of the Act that flows from the selection by the Parliament of the Governor in Council as the repository of the power. The Solicitor-General argues that the decision of the Parliament to select the Governor in Council as the body which must approve of a licensed insurer under the Act clearly evinces the intention that the decision be reserved to the "political" or "administrative" realm. There is a recognition of the part that government policy will play in the approval of insurers, with the result that the decision is not intended to be open to judicial review. The government must take responsibility for the decision, and be responsible in that regard to the Parliament and the electorate. (at p396)

14. The argument is said to be supported by two considerations, both of which stem from the nature of the body chosen to make the decision. (at p396)

15. First, the Governor in Council is not a deliberative body. It is no more than a formal stage in the process whereby decisions of Ministers and the government are transformed into effective decisions. The Royal Instructions provide for a quorum of two members, the membership consisting theoretically of all Ministers past or present. The practice is that no more than two Ministers, both present members of the Government chosen on a roster basis, constitute a "working" session of the Executive Council, and there is neither occasion nor opportunity for any discussion of the matters that require the decision of the Governor. The papers placed before the Governor convey the recommendation of the responsible Minister, and those Ministers who constitute the Council on any particular occasion formally convey that "advice" to the Governor. (at p396)

16. Second, it is contrary to convention and principle that the Governor should assume any personal responsibility for the decisions of the Governor in Council. For him to direct the Council, and therefore the government, would be contrary to the institution of responsible government and it would offend basic democratic principles. He is in fact no more than a rubber stamp, bound to give effect to the advice which is tendered to him. Although cl. vi of the Royal Instructions empowers him to refuse to follow that advice in specified circumstances and thereupon to report the matter immediately to Her Majesty, that clause must now in the Solicitor-General's submission be regarded as a dead letter and any attempt by a Governor of an Australian State to exercise such an independent judgment would provoke a constitutional crisis. (at p397)

17. In these circumstances, it is said to be impossible to read into the statute a legislative intent that in approving an insurer the Governor in Council should give an insurer, whose renewal of a licence is under consideration, an opportunity to be heard before any decision is made. The Solicitor-General argues that even if it be conceded that the Governor in Council could delegate the discharge of the duty to hear to a Minister, such a delegation would be futile and a sham because the process could not fetter the freedom of the Minister to base his recommendation to the Governor on government policy, however just or unjust that may be to the particular insurer. (at p397)

18. Counsel for the company argues that the discretion reposed in the Governor in Council with respect to a renewal of the approval is not unfettered. He points to reg. 202(2) as supplying the criteria by which it is controlled, namely, the commitments and financial position of the applicant and its observance of the Regulations. In the Supreme Court of Victoria, Lush J., with whose reasons Murphy and Fullagar JJ. agreed, expressed the opinion that the regulation did not fetter the discretion of the Governor and remarked that in any event its validity might be open to question. With all respect, I see no reason to question the validity of the regulation, having regard to the power contained in s. 73(1)(i) of the Act. The terms of the regulation must be observed, but they are not exhaustive of the matters which may be taken into consideration. The choice of the Governor in Council as the repository of the power would seem to emphasise the discretionary content of that power, and suggest a legislative intent that it provide a vehicle for the expression of government policy. The merits involved in the exercise of such a power in any particular case, as distinct possibly from its lawfulness, are not subject to judicial review. (at p397)

19. But this view of the scope of the power, while material, is not determinative of the question whether there is to be implied in the Act an obligation to give the company the opportunity of being heard before the power is exercised so as to withhold a renewal of the approval. It is undoubtedly a serious consideration. As Gibbs J. said in Salemi (No. 2) (1977) 137 CLR, at p 420 , speaking of the power of deportation conferred on the Minister by s. 18 of the Migration Act 1958 (Cth):
"This is a field in which it is unwise to generalize, but the fact that the power is conferred quite unconditionally is a circumstance that suggests - not necessarily conclusively - that the principles of natural justice are not intended to apply".
This may be a case where the discretionary content of a power reposed in the Governor is not of itself sufficient to exclude a right to be heard. Much depends upon the nature of the decision that is made in a particular case. In many cases where decisions are committed to the Governor in Council there could be no question of that decision-making process being attended with a duty to be fair and so to allow individual representations from persons affected by the decision to be incorporated into the process. The problem does not arise where decisions are of a legislative character or of a kind which affect the community as a whole or large sections of it. Again, if it were the fact that a decision affecting an individual is dictated by the application of a principle of government policy, with the result that considerations personal to the individual do not and could not influence the outcome, then there is no applicable principle of fairness which requires more than that the individual in question be informed of that overriding policy consideration. In such a case it would be positively unfair to encourage the person concerned to think that anything could be gained by his making representations. Of course, in a democracy there are ways and means of challenging government policy but the processes of judicial review cannot be harnessed to that end. On the other hand, there will be cases where there is no relevant policy or the policy is not so clear-cut in its application to a particular case as to pre-determine the result. So long as there are considerations personal to the individual which may influence the outcome, then the objective of fairness may require that he be given to understand the general nature of those considerations and provided with an opportunity to submit written material by way of answer or explanation in relation to them together with any other matters which may support a favourable decision. In such a case fairness would no doubt require that such material be honestly considered. But that having been done, there can be no fetter on the freedom of the Governor and his advisers to determine the result, whether because of countervailing considerations or because, ultimately, of the effect given to government policy. (at p399)

20. It would appear that the present case falls into the class of case to which I have last referred. The refusal to renew the approval of the company as an insurer for the purposes of the Act was based on

considerations personal to the company. There is no suggestion of any overriding government policy which dictated the result. (at p399)

21. Reference may be made to s. 73(1)(d) of the Act. In the Supreme Court, their Honours were of the view that the paragraph did not have the effect of imposing a fetter on the discretion conferred by s. 72. That may well be so, but, with respect, I think the presence of the paragraph in the Act contributes to the conclusion that the legislature intended, without any impairment of the scope of the Governor's discretion, that he should nevertheless in a proper case hear the applicant. Suppose the power to have been exercised with the result that there was a regulation in existence which outlined quite specifically the matters with which an applicant insurer was required to comply before it could be approved. While the ultimate decision of the Governor may not be controlled by the satisfaction of those criteria, it would seem to have been intended that in the event of the administration taking the view that the applicant had not satisfied the requirements of any particular regulation it should have the opportunity of providing material or submissions in support of a contrary conclusion. The fact that there has been no attempt to exercise the regulation-making power in the manner postulated does not affect the process of construing the Act. (at p399)

22. I conclude my consideration of the nature of the power which was exercised in this case by reflecting upon the position if the responsibility for approving insurers had been committed to the Minister administering the Act instead of to the Governor in Council. When acting in such a capacity, as when with others he is "advising" the Governor, the Minister is a political figure responsible for implementing, consistently with the law, the policies of the government. It could be said that by selecting the Minister as the repository of the power the legislature clearly identified the political character of the decision, and the reflection of government policy that it would convey. Yet it would be difficult in such a case to conclude that the Parliament intended the Minister to decide not to renew his approval of the company as an insurer on the basis of material which reflected adversely on the conduct and financial position of the company without giving the company the opportunity to defend itself: cf. generally, the reasons of all the members of the Court in Salemi (No. 2) [1977] HCA 26; (1977) 137 CLR 396 . I would be unable to find anything in the Act on which to base such a harsh imputation. It may be seen, then, in the light of this reflection, that to assign a discretionary power to the political area does not necessarily deny the existence of a duty to be fair.

Practical problems. (at p400)

23. The Solicitor-General referred to practical problems which he said were necessarily attendant upon a finding that the Governor in Council was under a duty to be fair. Undoubtedly, there would be grave difficulty if the Executive Council itself was obliged to discharge the duty. But if the proper construction of the Act favours a right to be heard, then in my opinion that construction contemplates that the discharge of the duty may be delegated to the appropriate Minister. The practical difficulties are then not nearly so great, and yet with no denial of the principle of fairness. I would expect the matter to be handled consistently with the normal procedures of the public service. Ordinarily, the decision of the Governor in Council is based on a recommendation of a Minister of the Crown. That recommendation normally will have the backing of a Cabinet decision or represent an implementation of a policy approved by the Cabinet. In the course of preparing a recommendation for submission by the appropriate Minister, his officers will have gathered the material relevant to the matter. If it concerns an application by an insurer for renewal of approval pursuant to s. 72 of the Act, and it appears that the recommendation could be adverse because of considerations that are personal to the applicant, then the applicant will be informed and given the

opportunity of contributing to the relevant material. The Minister then decides on his recommendation in the light of the total material, including any relevant policy. His submission to the Governor in Council will show on its face that the dictates of natural justice have been observed. Neither the Governor nor the members of the Executive Council who constitute the quorum on the particular day are required to go behind that assurance. No discussion of the merits of a particular case will ordinarily proceed in the Executive Council. It would be pure coincidence that the relevant Minister happened to be present, and in any event the Governor is obliged to act on the advice of his Ministers. It is they and the Government who are responsible for that advice to the Parliament and ultimately to the electorate. (at p400)

24. That is not to say that the Governor may not ask questions of his Ministers, directed perhaps among other things to the observance in a proper case of the principles of natural justice. Hence the desirability of an assurance to that effect appearing on the face of the submission. It would be absurd to suppose that the principle of responsible government requires the Governor to act purely as an automaton. He may be described as a rubber stamp, in the sense that his executive acts are based, and necessarily based, on the advice that he is given. But his responsibility is to administer the executive government, and to do so with integrity, discretion and a complete absence of political partiality. Bagehot's famous observation, that "the sovereign has, under a constitutional monarchy such as ours, three rights - the right to be consulted, the right to encourage, the right to warn." (Bagehot, The English Constitution, Crossman ed. (1964), p. 111), is still good law and good constitutional practice. Sir Ivor Jennings cites the advice of Lord Esher to King George V. at the time of the Home Rule crisis in 1913 to the effect that the King "may endeavour to influence their actions. He may delay decisions in order to give more time for reflection." His was "a prerogative of criticism and delay, of personal influence and remonstrance" but not "the final right of private judgment" (Cabinet Government, 3rd ed. (1959), p. 337). Ministerial responsibility is the safeguard of the monarchy. See, also, S. A. de Smith, Constitutional and Administrative Law, 3rd ed. (1977), p. 99. I see no reason why in a case where it appears to the Governor that some further consideration by the Minister or the Cabinet would be desirable he could not request that further consideration be given before he acts on the advice that is tendered to him. Let it be said that such action may well be most infrequent, but the possibility of it serves to illustrate the true function of the Governor in Council and the practicality of a legislative step which commits to him a decision which imports the requirements of natural justice.

The cases. (at p401)

25. In arguing that the citizen finds his protection, where decisions of the Governor in Council are concerned, in the principles of responsible government rather than in the processes of judicial review, the Solicitor-General understandably relied on earlier decisions such as Theodore v. Duncan (1919) AC 696, at p 706 , and Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, at pp 179, 221, 257, 280 . However, the views of members of this Court in the recent case of Reg. v. Toohey; Ex parte Northern Land Council (1981) 151 CLR 170 supply a somewhat different perspective. It is a perspective which attempts to deal realistically with the role of the courts in providing a measure of review of the decisions of an expanding executive government. In so doing the decision reflects the trend which has been evident for some time in England, Canada and New Zealand. It is unnecessary to refer again to the cases which are discussed in the judgments in that case. The Supreme Court of Canada, in a unanimous judgment in a recent case dealing with the duty of the Governor in Council to be fair - Attorney-General (Canada) v. Inuit Tapirisat of Canada (1980) 115 DLR (3d) 1, at p 14 - affirmed
". . . the essence of the principle of law here operating is simply that in the exercise of a statutory

power the Governor in Council, like any other person or group of persons, must keep within the law as laid down by Parliament or the Legislature. Failure to do so will call into action the supervising function of the Superior Court whose responsibility is to enforce the law, that is to ensure that such actions as may be authorised by statute shall be carried out in accordance with its terms, or that a public authority shall not fail to respond to a duty assigned to it by statute."
It is the legislative intent of the statute in question which will determine the availability of judicial review, and the courts will not be excluded merely because a power is reposed in the Governor in Council. (at p402)

26. I am therefore of the opinion that the old Victorian cases of Roebuck v. Borough of Geelong West (1876) 2 VLR (L) 189 and Shire of Kowree v. Shire of Lowan (1897) 19 ALT 143 are still good law. I would also indorse the statement of Newton J. in Treasury Gate Pty. Ltd. v. Rice (1972) VR 148, at p 162 .

Administrative Law Act 1978. (at p402)

27. The appellant companies initiated these proceedings by applications for review in accordance with the provisions of the Administrative Law Act. In this section of my reasons, I shall refer to that Act as "the statute". As I understand the position, it is common ground that if they cannot succeed under the statute, then there is no prospect of a different result if they sought relief under the general law by way of an action for a declaration of invalidity. Nevertheless, reference was made in the course of argument to some questions touching the application of the statute, and to those I now turn. (at p402)

28. In the first place, the Solicitor-General posed the question whether there was any "decision" within the meaning of that term as defined in the statute, although without developing any submissions in support of a negative answer. I do not think there can be any doubt that the Governor in Council made a decision "operating in law to . . . deny . . . a privelege or licence" (s. 2). It was not a case where His Excellency refrained from making any decision at all. It was a case of a positive decision to "not approve" the applicant companies as insurers for the purposes of s. 72 of the Act. This is confirmed by the publication of the Order in Council in the Gazette. (at p403)

29. In the second place, there is the question whether the Governor in Council is a "Tribunal" within the meaning of that term as defined in the statute. The "Governor in Council" means the Governor with the advice of the Executive Council. Can it be said that in deciding whether or not to approve an insurer for the purposes of s. 72 of the Act the Governor and his advisers "are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice"? (Administrative Law Act, s. 2). (at p403)

30. It may seem somewhat strange to contemplate the Governor in Council as a body which is required "to act in a judicial manner". However, the definition here supplies its own dictionary so far as concerns the meaning of the phrase. If a body is required to observe one or more of the rules of natural justice, then to that extent the body is acting in a judical manner. The language is reminiscent of the observation of Lord Reid in Ridge v. Baldwin [1963] UKHL 2; (1964) AC 40, at p 76 which the Chief Justice has repeated in the passage of his reasons in Salemi (No. 2) (1977) 137 CLR, at pp 419-420 which I have cited earlier in these reasons, namely, that "it may be possible to infer a judicial element from the nature of the power in the case". It follows in my opinion, subject to the considerations which follow, that a conclusion that the Governor in Council is under a duty to give an applicant insurer an opportunity of presenting his case will without more designate the

Governor in Council a "Tribunal" for the purposes of the statute. (at p403)

31. In the third place, attention was directed to the remedies which are available to the court on an application to review. It is said that many of those remedies are not available against the Governor, and that this consideration serves to make explicit a legislative intent that the Governor in Council is outside the concept of "Tribunal" in the statute. I am unable to accept the argument. The statute casts a wide net, and I do not think that it matters that several of the remedies specifically mentioned in s. 7 would not be available on an application to review the decision of the Governor in Council. What is important is the fact that among the remedies provided by s. 7 is the power to make a declaration of invalidity in respect of a decision, if the court could ordinarily grant such relief in an action for a declaration. The statute therefore provides a remedy which is appropriate to the review of a decision of the Governor in Council, and the fact that other remedies are inappropriate is of no consequence. (at p404)

32. In the fourth place, it is said that the obligation placed on a tribunal to furnish any person affected by a decision with a statement of its reasons for the decision tends against a conclusion that the Governor in Council could be placed in such a position. I agree that at first sight it does seem surprising that such a body should be placed under such an obligation, but on reflection the surprise flows from the assumption that the Governor himself would be making the decision of which the reasons are to be given. The objection is answered by the same considerations which I have discussed in these reasons in relation to the propriety or otherwise of placing the Governor in Council under a duty to be fair. When that obligation is placed in the administrative framework of the public service and the conventions of constitutional practice, there is no plausible reason why the Minister responsible for making the recommendation upon which is based the advice of the Executive Council should not disclose to the applicant the reasons for that recommendation. Such a disclosure would in my opinion meet the obligation imposed by s. 8 upon the tribunal. (at p404)

33. Finally, there is the question of parties. There are three respondents to the application for review: the Governor, the Attorney-General and the Minister in charge of the Act. This is not a case where one is free to consider without regard to the statute the propriety of naming the Governor personally as a defendant. If it were, then in my opinion it would be inappropriate to involve His Excellency personally in the litigation, even though it is clear that he is being sued in his official capacity. In such a case, it would be both proper and sufficient to sue the Attorney-General as representing the Crown in its executive capacity (cf. Dyson v. Attorney-General (1911) 1 KB 410). However, in the present case the statute (s. 3) speaks of an "order calling on the tribunal or the members thereof . . . and also any party interested in maintaining the decision to show cause". If it be the fact that the Governor in Council is a "Tribunal" for the purposes of the statute, then in my opinion the statute requires that the Governor be named as a respondent to the application for review. I say the Governor rather than the Governor and the members of the Executive Council because as I read the definition of "Governor in Council" in the Acts Interpretation Act it is the Governor who makes the decision "by and with the advice of the Executive Council". The remaining respondents are the Attorney-General and the Minister administering the Act. Each of these persons answer the description of "any party interested in maintaining the decision", and therefore in my opinion are properly joined. The statute therefore supplies the answer to any criticism of the choice of parties to the proceedings.

Conclusion (at p405)

34. For the foregoing reasons, I have come to the conclusion that the appellants are entitled to

succeed. I think the Act on its proper construction required the Minister, on receipt of the applicants' letter of 21 May, to delay consideration of the matter by the Governor in Council so as to allow to the companies a reasonable opportunity to make an answer to the case against them contained in the Minister's letter of 18 May. Failing such action by the Minister, I respectfully think that it was within the province of the Governor on being apprised of the applicants' letter to the Clerk of the Executive Council, to defer a decision on the matter so as to allow them an opportunity to be heard in the manner that I have indicated. (at p405)

35. I would allow the appeals. (at p405)

BRENNAN J. Applications for orders nisi to review decisions of the Governor in Council made on 26 May 1981 refusing to renew the approval of the respective appellants as insurers under the Workers Compensation Act 1958 (Vict.) ("the Act") were made ex parte to Master Barker in the Supreme Court of Victoria. The orders nisi were returned before Jenkinson J. For reasons which do not appear now to be material, the applicants submitted to an order that each order nisi be discharged with costs. However, the applicants applied to Jenkinson J. for fresh orders nisi calling upon his Excellency the Governor (the Honourable Sir Henry Arthur Winneke), Her Majesty's Attorney-General for the State of Victoria and James H. Ramsay (the Minister for Labour and Industry) to show cause why the decisions of the Governor in Council should not be declared void. The Minister for Labour and Industry is the Minister responsible for carrying into effect the provisions of the Act and the Workers Compensation Regulations 1975 (Vict.) ("the Regulations"). Jenkinson J. refused to make orders calling upon his Excellency the Governor or upon Mr. Ramsay to show cause, but he made orders nisi calling upon the Attorney-General to show cause before the Full Court why the decisions should not be declared void. Before the Full Court, the applicants sought against the Attorney-General declarations that the decisions of the Governor in Council were void and they appealed against the refusal of Jenkinson J. to call upon his Excellency the Governor and Mr. Ramsay to show cause. The orders nisi were discharged and the appeals dismissed. The appeals to this Court are brought by special leave against the judgment and orders of the Full Court. (at p406)

2. The applications made to the Supreme Court of Victoria were made pursuant to the Administrative Law Act 1978 (Vict.) in accordance with the procedure appropriate to cases falling within its terms. The Administrative Law Act empowers the Supreme Court to exercise "all or any of the jurisdiction or powers" and to grant "all or any of the remedies" which might be exercised or granted upon the return of a prerogative writ, upon a proceeding in an action for quo warranto, or in an action for a declaration of invalidity in respect of a challenged decision or for an injunction to restrain the implementation of a challenged decision (s. 7). It is not suggested that the Administrative Law Act alters the substantive law in any respect which is relevant to the present appeals. Its present relevance lies only in the provision of a simplified procedure for seeking an order to review in lieu of the ordinary procedures for seeking an administrative law remedy. (at p406)

3. In these appeals, the appellant in each case seeks no more than a declaration that the decision made by the Governor in Council to refuse that appellant's application for renewal of approval as an insurer under the Act is void. No writ of mandamus or order in the nature of mandamus is sought by either appellant. The learned Solicitor-General for Victoria did not contend that, if the decisions were void but the cases did not fall within the Administrative Law Act, the appellants should fail for seeking orders to review under that Act instead of seeking declarations under the ordinary procedure of the Supreme Court. (at p406)

4. Therefore I put to one side for the moment the definitions of "Decision" and "Tribunal" in s. 2 of the Administrative Law Act. They do not bear upon the question whether the decisions of the Governor in Council were void. That is a question of substantive law which turns upon the facts of the case and the true construction of the statutory provisions which confer the power purportedly exercised by the Governor in Council. (at p406)

5. The relevant facts and the relevant provisions of the Act and the Regulations are set out in the reasons for judgment of my brothers, and I need not repeat them. It is agreed that the fate of the appeal by Fire and All Risks Insurance Co. Ltd. ("F.A.R.") should depend upon the outcome of the appeal by F.A.I. Insurances Ltd. ("F.A.I.") and it is convenient to confine consideration to the latter appeal. In each appeal, there are three questions for determination: was the decision void, should a declaration be made and, if so, against whom should the declaration be made?

The Validity of the Decision. (at p407)

6. The decision made by the Governor in Council to refuse renewal of approval was made in purported exercise of a power conferred by the Act. A power to approve an insurer is to be implied from the requirement that employers must insure against their liability under the Act with approved insurers (s. 72(1)(a)). A temporal limit upon an approval is set by reg. 202(1) of the Regulations: the period of approval may not exceed twelve months. Regulation 201 prohibits a company from accepting premiums or carrying on workers' compensation insurance business without an approval. An approval is therefore a licence to carry on a business, a licence which has to be renewed annually or at more frequent intervals. The principal and essential qualification for approval of a company as an insurer, one would think, is its ability to meet its commitments, current and future. Regulation 202(2) requires the Governor in Council to have regard "to the commitments and financial position of the applicant and in the case of renewal to the observance of these Regulations by the applicant". Apart from the direction contained in reg. 202(2), the Act and the Regulations contain no express condition governing the exercise by the Governor in Council of the power to approve conferred by s. 72(1)(a). The Regulations prescribe matters necessary or convenient for giving effect to s. 72(1)(a), and they are supported by s. 73(1)(i). (at p407)

7. The validity of the decision not to renew approval of F.A.I. as an insurer was challenged on the ground that the Governor in Council, in breach of the rules of natural justice, did not give F.A.I. a reasonable opportunity to be heard on its application for renewal before deciding to refuse its application. That was the only ground argued before this Court. (at p407)

8. The rules of natural justice affecting the exercise of a power do not create common law duties, the breach of any of which attracts some consequence other than invalidity of the purported exercise of the power. Rather, the rules of natural justice describe collectively the kinds of procedural conditions implied by the common law in statutes which confer powers but which do not express, or do not express exhaustively, the procedures to be observed in exercising the powers conferred. In the familiar words of Byles J. in Cooper v. Wandsworth Board of Works [1863] EngR 424; (1863) 14 CB (NS) 180, at p 194 (143 ER 414, at p 420) , "although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". The justice of the common law is the matrix of legislation and where legislation is silent as to conditions governing the exercise of a statutory power, it may be inferred that the legislature intended that the justice of the common law should engraft "the principles of natural justice on to a host of provisions authorizing administrative interference with private rights" (per Lord Reid in Ridge v. Baldwin [1963] UKHL 2; (1964) AC 40, at p 73 and cf. Testro Bros. Pty. Ltd.

v. Tait [1963] HCA 29[1963] HCA 29; ; (1963) 109 CLR 353, at p 365 , per Kitto J.). In Twist v. Randwick Municipal Council [1976] HCA 58; (1976) 136 CLR 106 and in Salemi v. MacKellar (No. 2) [1977] HCA 26; (1977) 137 CLR 396 this Court considered whether the legislature should be taken to have intended that the principles of natural justice be applied in the exercise of the statutory powers then under consideration: see Twist (1976) 136 CLR, at pp 110, 113, 118 ; Salemi (No. 2) (1977) 137 CLR, at pp 400, 401, 419, 451 . In Heatley v. Tasmanian Racing and Gaming Commission [1977] HCA 39; (1977) 137 CLR 487, at p 491 , Barwick C.J. recalled what he had said in those cases and added:
". . . I have emphasized that the court's function in this connexion is to construe a statute by which the power is granted and to educe the qualification of the power by construction of the statute. The court thus, if it is of opinion that the statute properly construed does require, though not expressly but implicitly, the observance of natural justice, does supplement the express language of the statute by effecting the qualification of the grant of power. . . . Because the legislature is not presumed to authorize injustice, it is easier to imply the qualification where the statute is silent. But this does not mean, in my opinion, that because the statute is silent, the provision of natural justice is presumed. It remains always a question of construction, bearing in mind the subject matter of the power, the repository of the power and the terms of the statute as a whole."
In Bread Manufacturers of New South Wales v. Evans [1981] HCA 69; (1981) 56 ALJR 89, at p 94 [1981] HCA 69; ; 38 ALR 93, at p 102 , Gibbs C.J. said:
"It is necessary to examine the nature of the power in question in deciding whether the observance of the principle audi alteram partem is a condition of its exercise. It is sometimes said that the question whether the rules of natural justice are applicable is one of statutory interpretation. That is only partly true. The words of a statute may of course reveal an intention to exclude the rules of natural justice. But, in order that those rules should apply, it is not necessary that the statute in question should, on its proper construction, render them applicable."
I do not understand the Chief Justice to say that a requirement that the principles of natural justice be applied does not depend upon the intention to be attributed to the legislature, but rather that express terms are not necessary to import the requirement. The cases earlier cited show legislative intention to be the foundation upon which a requirement to apply the principles of natural justice rests. Indeed, if a statute were to confer a power in terms which, upon their true construction, did not require the observance of a rule of natural justice, an exercise of the power in accordance with the statute would be effective though the rule were not observed: see Twist (1976) 136 CLR, at p 109 ; Salemi (No. 2) (1977) 137 CLR, at pp 401, 422, 451 . (at p409)

9. The construing of a statute with a view to determining whether the principles of natural justice are to be applied requires more than mere exegesis of the statutory text; the common law attributes to the statute an operation which accords as closely as may be with the requirements of justice. The common law attributes to the legislature an intention that the principles of natural justice be applied in the exercise of certain statutory powers, and the legislature's intention provides the sole and sufficient warrant for judicial review of the exercise of those powers when an applicable rule of natural justice is not observed. And so, where a challenge to the validity of an exercise of a statutory power is made on the grounds that a rule of natural justice has not been observed, the true foundation for the challenge is that a condition imposed by the statute upon the exercise of the power, albeit an implied condition, is not fulfilled and that an exercise of the power is not efficacious unless the condition is fulfilled. (at p409)

10. The subjects of statutory powers are so various, the repositories of power so differently constituted and the language of statutes so diverse that the conditions to be implied are not - indeed cannot be - constant from statute to statute. In each case it is necessary to infer the true intention of

the legislature by examining both the text of the statute and those extrinsic matters to which reference might properly be made in aid of interpretation. That examination is no longer impeded by drawing a rigid distinction between powers to be exercised judicially and powers to be exercised ministerially. The rigidity of that distinction has given way to a consideration of the functions to be performed as an aid in ascertaining the legislature's intention. The concepts of natural justice and fairness, for all their imprecision, have illuminated the perception of the legislature's intention by the courts. (at p410)

11. In Salemi (No. 2) (1977) 137 CLR, at pp 419-420 , Gibbs J. (as the Chief Justice then was) pointed to matters which might legitimately aid in ascertaining whether the principles of natural justice are to be applied. The list is not exhaustive, but it includes matters relevant to the present case. His Honour said:
"In Durayappah v. Fernando, Lord Upjohn, delivering the reasons of the Privy Council, said that 'there are three matters which must always be borne in mind when considering whether the principle should be applied or not' (1967) 2 AC 337, at p 349 . He went on: 'These three matters are: first, what is the nature of the property, the office held, status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when a right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other.' There may of course be other matters that will be relevant in deciding whether the principles apply: for example, the nature of the body on which the power is conferred, the language in which the power is conferred, and the presence in the statute of provisions enabling the exercise of the power to be reviewed."
In the present case the chief matters for consideration in ascertaining whether the legislature intended that the principles of natural justice should be applied are the statutory text, the interests affected by the statute and the repository of the power. (at p410)

12. The first matter is the text of the Act and of the Regulations, for these texts define the relevant power: it is a power to renew a licence required for the carrying on of an insurance business by a company which is carrying on that business under a licence for a period not exceeding twelve months and which may have been carrying on that business for a longer period. It is a power which is not to be exercised unless regard is had to the solvency of the company and its observance of the Regulations. It is right to amplify the legislature's intention by reference to the Regulations, for they were made under statutory authority and were amenable to disallowance under the Subordinate Legislation Act 1962 (Vict.): cf. In re Langlois and Biden (1891) 1 QB 349, at p 355 ; Dale's Case (1881) LR 6 QB 376, at p 455 . (at p410)

13. The second matter for consideration is the interests which are likely to be affected by the exercise of the power. It is of the nature of a workers' compensation insurance business that the insurer maintains a fund into which premiums, investment returns and other income are paid, and out of which claims, expenses and other outgoings are paid. An insurance company may be effected by a cessation of the flow of money into the fund, for that would necessitate the realization of assets to meet current liabilities. It is a consequence of reg. 201 that a cessation of receipt of premium income follows forthwith upon the expiry of an approval, and it is foreseeable that such a cessation would in many cases force a realization of some of the assets in which the insurer's fund is invested in order to meet current liabilities. Refusal to renew an approval may thus be productive of loss in the realization of assets to the detriment of a solvent company, and, if the company should be insolvent or be forced into insolvency, to the detriment of creditors also. On the other hand, the statutory licensing system is clearly intended to ensure protection against the risks involved in the

erosion or elimination of an insurer's margin of solvency: see reg. 202(2). If detection of an insurer's impending insolvency is left too late, financial loss to employers, to their employees who are injured and to other creditors of the insurer may result. Renewal of an approval to carry on a business for any period when the continued solvency of an insurer is uncertain may fail to prevent widespread losses. The exercise of the power to renew approval may thus affect the interests of persons other than the insurer, and the legislature must be taken to have intended the power to be exercised in a way which is appropriate to take account of the interests of policy holders and creditors as well as the interests of the insurer. However, a procedure which does not afford an insurer some opportunity to be heard would be unlikely to take account of the insurer's interests. Such an opportunity is not incompatible with the interests of policy holders and other creditors, for it might aid in acquiring the information needed in taking account of those interests. (at p411)

14. The general principle to be applied when the exercise of the statutory power is apt to affect financial interests was expressed in Commissioner of Police v. Tanos [1958] HCA 6; (1958) 98 CLR 383, at p 395 by Dixon C.J. and Webb J. who said that: ". . . it is a deep-rooted principle of the law that before any one can be punished or prejudiced in his person or property by any judicial or quasi-judicial proceeding he must be afforded an adequate opportunity of being heard." And in Twist (1976) 136 CLR, at p 109 Barwick C.J. said: "The common law rule that a statutory authority having power to affect the rights of a person is bound to hear him before exercising the power is both fundamental and universal". A particular application of the principle governs the exercise of a power to renew a licence to carry on a business. Where the lawful carrying on of a business requires a current licence, it is unfair to refuse renewal of the licence without giving the licensee an opportunity to be heard unless the licence is of such an exceptional kind that non-renewal of it is unlikely to affect adversely the licensee's proprietary or financial interest or, I think, his reputation. In the cases, the reason why it is unfair has been stated in different ways. In Salemi (No. 2) (1977) 137 CLR, at p 405 Barwick C.J. expressed the view that where the circumstances of the giving of a licence carry the implication that the licensee might expect a renewal if he fulfils the obligations of the licence, the licensee has a "lawful expectation" that his interests will be considered before renewal is refused. In Heatley v. Tasmanian Racing and Gaming Commission (1977) 137 CLR, at pp 508-509 Aickin J. collected the leading English cases in which a "reasonable" or "legitimate" or "settled" expectation of a licensee that his licence will be renewed has been advanced as the reason for requiring the licensing authority to observe the rules of natural justice in considering the licensee's application for renewal. But his Honour then made an observation with which I respectfully agree:
"It cannot be said that the true extent of the notion that an expectation may be the foundation of a right to compel observance of the relevant principles of natural justice has yet been fully worked out or stated with precision." (at p412)

15. For my part, I have difficulty in understanding how the expectation of a particular applicant is capable of aiding in the ascertainment of the legislature's intention as to the application of the principles of natural justice by a repository of a statutory power. The aptitude of the exercise of the power to affect proprietary or financial interests or reputation furnishes a surer ground for implying that the principles of natural justice are to be applied in its exercise. Although the implication does not, in my view, depend upon the expectations of a particular applicant, those expectations may be relevant to the way in which a repository who is bound to observe a rule of natural justice must exercise his power in a particular case. (at p412)

16. Another statement of the reason why it is unfair not to give a licensee an opportunity to be heard

when the refusal of renewal of his licence is contemplated was offered by the late Professor de Smith in his work Judicial Review of Administrative Action, 4th ed. (1980), pp. 223-224. His view, cited with approval by Scarman L.J. in Reg. v. Barnsley Council; Ex parte Hook (1976) 1 WLR 1052, at p 1058; (1976) 3 All ER 452, at p 218 , was that the possibility of seriously upsetting a licensee's plans, of causing him economic loss and of casting a slur on his reputation made it right to imply a duty to hear before deciding not to renew, unless "the licensee has already been given to understand when he was granted the licence that renewal is not to be expected". Again, if the exercise of a power is apt to produce these consequences, the consequences aid in the ascertainment of the legislature's intention, though I should think that a particular applicant's understanding or expectation may be material only to determine whether the repository of the power has observed a rule which governs its exercise. (at p413)

17. The general principle - or its particular application to a power to renew a business licence - may be overridden by statute, but the text of a statute is not construed as intending to deny the protection of a hearing to a person who is liable to be prejudiced unless that intention clearly appears (see Tanos (1958) 98 CLR, at p 396 ; Twist (1976) 136 CLR, at pp 110, 114). However, the content of a requirement to afford an opportunity to be heard may be affected by the provisions of a statute. The judgment of Mason J. in Twist illustrates the importance of considering the administrative framework created by the statute in order to ascertain how the repository of the power is required to exercise it. In Bread Manufacturers (1981) 56 ALJR, at p 101; 38 ALR, at p 117 Mason and Wilson JJ. said:
"The application of the rules is flexible, varying in extent from case to case, and falls to be determined in the case of a statutory body exercising statutory powers by reference to the proper construction of the statute."
As an insurer is obliged to cease accepting premiums and carrying on business so soon as its approval expires, and as a decision upon renewal before a current approval expires serves the interests of insurer, policy holders and creditors alike, the legislature could not have intended that the procedure for disposing of an insurer's annual (or more frequent) application for renewal should take a great time once the current financial statements showing the insurer's "commitments and financial position" become available. Though there may not be an opportunity for an extended hearing, the common law, in the absence of countervailing statutory provision, would impute to the legislature an intention that the repository of the power should give an insurer as full and fair an opportunity as time permits to say why its approval should not be renewed. (at p414)

18. In Salemi (No. 2) (1977) 137 CLR, at p 444 , Stephen J. spoke of the variable content of the rules of natural justice:
"It is, no doubt, now a truism that in cases in which the rules of natural justice are applicable the procedural consequences will not necessarily be uniform. On the contrary they will depend upon what Kitto J. describes, in Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475, at p 504 , as 'the particular statutory framework' within which they are to apply. But not only will their effect and application thus vary depending upon the character and function of the particular statutory tribunal or person in relation to whose deliberations they are invoked (Ridge v. Baldwin, per Lord Reid [1963] UKHL 2; (1964) AC 40, at pp 65, 72), they may also vary from case to case although each be conducted before one and the same tribunal or person. Kitto J. gave recognition to this fact in the course of his reasoning in the Mobil Oil Case (1963) 113 CLR, at p 504 . In Durayappah v. Fernando (1967) 2 AC 337 their Lordships' reference to particular instances in which the existence of great urgency would require the limitation, 'timeously, perhaps severely', of the right to be heard, although never justifying a denial of that right (1967) 2 AC, at p 346 , emphasizes how much the concept of fairness, inherent in the audi alteram partem rule, may

require to be moulded to the particular circumstances of the case." (at p414)

19. Though the concept of fairness would require an insurer to be heard, however briefly, before renewal is refused, by whom is he to be heard? This brings me to the third factor which aids in ascertaining the relevant legislative intention, the repository of the power. (at p414)

20. The Governor in Council is not an administrative agency fitted to investigate or adjudicate upon disputed matters of fact. By clear convention, if not by strict constitutional obligation, the Governor in exercising statutory powers which are conferred upon the Governor in Council is accustomed to act upon the advice of his Ministers. The legislature cannot be taken to have intended to interfere with so central a function of responsible government unless it has expressed such an intention in the clearest terms. Alpheus Todd's Parliamentary Government in England, 2nd ed. (1887), vol. 1, p. 3, quoting Earl Grey on the same subject, described as the "distinguishing feature" of Parliamentary government the practice which requires the powers belonging to the Crown to be exercised by ministers who possess the confidence of Parliament. In accordance with that practice, the responsibility for a decision made by Order in Council does not rest with the members in attendance when the Order is made. Speaking of the passing of an Order by the Privy Council, Professor Berriedale Keith (The King and the Imperial Crown (1936), p. 70) wrote:
"The responsibility for making the Order plainly cannot rest with the small body of members of the Council, who often know nothing whatever regarding the Order laid before them. The responsibility rests with the minister in whose department the Order is drafted and by whom it is sent to the Privy Council Office for enactment in due course."
Equally, a decision made by a Governor in Council is no more than the formal legal act which gives effect to the advice tendered to the Crown by its Ministers (cf. Australian Communist Party v. The Commonwealth [1951] HCA 5; (1951) 83 CLR 1, at p 179 , per Dixon J.). (at p415)

21. To support a submission that the Governor in Council is not bound to act in accordance with ministerial advice in approving an insurer, some reliance was placed upon cl. VI of the Royal Instructions of 1913 to the Governor of Victoria, which is expressed as authorizing the Governor to act "in opposition to the opinion of the Council". This clause, in form a reservation from the plenitude of the grant of responsible government - a matter much in controversy in relation to British colonies in the nineteenth century (see Evatt: The King and His Dominion Governors (1936), pp. 25, 35) - can have no relevance to ascertaining the intention of the Victorian Parliament when the Act was passed. Having regard to the course of constitutional practice, the mere reposing of the relevant power in the Governor in Council could not be construed as authorizing the Governor in Council, much less imposing an obligation upon the Governor in Council, actually to hear an insurer in order to determine independently of ministerial advice whether to approve or to renew the approval of an insurer. In Australian Alliance Assurance Co. Ltd. v. Attorney-General (Q.) (1917) AC 537 , where the Judicial Committee considered a similar power of approval in s. 7 of the Workers' Compensation Act of 1916 (Q.), Lord Sumner said (1917) AC, at p 540 :
"The Governor in Council acts as chief of the Executive, and acts constitutionally on the advice of his Ministers. Approval or disapproval is an act involving a choice, which (subject to his constitutional obligation) is his choice. This act, therefore, is not merely ministerial. He approves or disapproves in his discretion. If he disapproves, there is an end of the matter. No appeal lies from his refusal to approve, nor is he subject in this matter to control by any Court."
With respect, I would agree that the power to refuse approval should be exercised upon the advice of Ministers though, for reasons presently to be mentioned, I see no reason why a court should not declare the invalidity of a decision taken by the Governor in Council without fulfilling a condition

governing its exercise. The statutory provisions now under consideration are comparable with those considered in the Australian Alliance Assurance Co. Case; they are to be distinguished from the unusual provisions considered in Banks v. Transport Regulation Board (Vict.) [1968] HCA 23; (1968) 119 CLR 222 where the Governor in Council was required to review the grant or refusal of a licence application, and it was held that he was obliged to consider the matter for himself (see per Barwick C.J. (1968) 119 CLR, at p 240). (at p416)

22. Though it is impossible to impute to the legislature an intention that the Governor in Council should hear and determine an insurer's application for renewal, it does not follow that a power to refuse an application for renewal may be exercised without giving some opportunity to the insurer to be heard. The ordinary administrative arrangements of government distribute responsibility for administering the Acts in force among Ministers. The Minister for Labour and Industry, being responsible for the administration of the Act, has the responsibility of seeing to the observance of a condition governing the exercise by the Governor in Council of a power conferred by the Act. In discharging the responsibilities of his office, the Minister has the assistance of his departmental officers. Subject to statute, the Minister may allocate to them the performance of such functions as he sees fit, and in the ordinary course one would expect the Minister to allocate to his officers the function of hearing what an insurer had to say as to his application to renew an approval. What Lord Reid said in Ridge v. Baldwin (1964) AC, at p 72 as to the exercise of a power conferred upon a Minister applies with greater force in respect of the Governor in Council:
"As explained in Local Government Board v. Arlidge (1915) AC 120 a minister cannot do everything himself. His officers will have to gather and sift all the facts, including objections by individuals, and no individual can complain if the ordinary accepted methods of carrying on public business do not give him as good protection as would be given by the principles of natural justice in a different kind of case." (at p416)

23. The legislature must be taken to have in mind the ordinary processes of government when it creates a power to be exercised by the Governor in Council, and therefore to have intended that the Minister administering the Act will see to the observance of any conditions upon the exercise of a power before the Governor in Council is advised to exercise it. A hearing by the Minister or his officers furnishes the insurer with an opportunity to place before the Minister (or Cabinet, as the case may be) the information which the insurer wishes to be taken into account in deciding upon the advice to be tendered to the Governor in Council. Of course, there is no power to compel the attendance of witnesses or the production of documents, no power to administer an oath or affirmation or to require a witness to submit to cross examination. Information can be acquired by whatever lawful method the Minister - or his officers, subject to his direction - thinks best. The hearing, however wide-ranging the relevant issues may be, must be completed within the limits of time which arise from the necessity of disposing of the application for renewal before the expiry of the current approval. It must be completed in time to allow a report to be furnished to inform the mind of the Minister (or Cabinet) deciding upon the advice to be tendered to the Governor in Council. The inquiry must consider the interests of the policy holders and creditors of the company as well as the interests of the company itself. (at p417)

24. It is clear that a hearing by the Minister or his officers may not be as full as a hearing by a court in the trial of proceedings between parties, but that consequence inheres in the nature of the administrative power which is to be exercised. The processes of administration would be clogged to the point of immobility if all administrative hearings which fall short of the curial standard were insufficient to satisfy the rules of natural justice. "The administrative process is not, and cannot be, a

succession of justiciable controversies" (de Smith, p. 3). The basic intention to be imputed to the legislature is that the statutory schemes which it creates should work, and the rules of natural justice respond to the exigencies of the schemes as they are created. The universality of the principle that a party should be heard before administrative action is taken to his prejudice in property, person or reputation is compatible only with a variable content in the rules to be applied in the exercise of various statutory powers. Flexibility in the content of the rules permits the application of the principle to a wider range of administrative decision-making than would be possible if the rules imported by the principle contained some irreducible requirement as to a hearing. Kitto J. said in Mobil Oil Australia Pty. Ltd. v. Federal Commissioner of Taxation (1963) 113 CLR, at p 504 : "What the law requires in the discharge of a quasi-judicial function is judicial fairness. That is not a label for any fixed body of rules. What is fair in a given situation depends upon the circumstances. And it is not a one-sided business." (at p418)

25. No doubt the flexibility in the rules of natural justice invites the criticism which Lord Shaw made in Local Government Board v. Arlidge (1915) AC 120, at p 138 that in so far as natural justice "means that a result or process should be just, it is a harmless though it may be a high-sounding expression". Yet the vitality and utility of the concept is not reasonably open to doubt. It is capable of evoking from the court the articulation of the procedural rule by which the legislature intended the repository of the power to be bound, though the legislature did not express or did not fully express the intended rule. The court, for its part, is not free either to dismiss or to diminish the proper significance of such indications of the legislature's intention as the legislature has provided. Nor has the court any authority either to exact some higher standard of procedural fairness or to sanction some lower standard of procedural fairness than the standard reasonably to be expected in administering the statutory scheme. (at p418)

26. In the present case, an administrative hearing, albeit limited in the respects stated, was required before F.A.I.'s application for renewal was refused. The circumstances leading up to the refusal must now be briefly stated. F.A.I. had been approved as an insurer for many years prior to December 1980. On 2 December 1980 it applied for renewal of approval for twelve months from 31 December 1980. The haste with which the application might have had to be disposed of was relieved by an approval until 1 June 1981 "as an interim measure". On 18 May 1981, the Minister, having made his decision to recommend to the Governor in Council that F.A.I. be not approved as an insurer beyond 1 June 1981, wrote to advise F.A.I. of his decision and to furnish what the Minister described as "a summary of the case against the applicant companies". (at p418)

27. Between 2 December 1980 and 18 May 1981, F.A.I. was given no advice as to the points in the summary nor any opportunity to deal with them, though it is clear that F.A.I. may have been able and would have wished to provide further information upon some if not all of those points. When the Minister wrote on 18 May, it was too late to affect the advice which was to be tendered to the Governor in Council. That advice was tendered and accepted on 26 May 1981. It was unfair not to let F.A.I. know what were the grounds of the Minister's concern so that the company might have had an opportunity to dispel what it regarded as the misconceptions which led the Minister to advise refusal of its application to renew. (at p419)

28. It may be that the pressure of work prevented the Minister and his departmental officers from communicating earlier with F.A.I. But the pressure upon a Minister or his department is not relevant to the standard of procedural fairness reasonably to be expected in administering a statutory scheme. The Executive is constrained to comply with the intention of Parliament, and the invalidity of

executive action for want of observance of a rule of natural justice is not avoided by showing that the pressure of work prevented compliance with the standards of procedural fairness reasonably to be expected in the exercise of the relevant power (cf. per Mason J. in Twist (1976) 136 CLR, at p 113). F.A.I. was given no opportunity to be heard, the condition governing the exercise of the power to refuse renewal was not fufilled, and the purported refusal of renewal was therefore ineffective to determine F.A.I.'s application.

The Remedy and the Parties. (at p419)

29. Where the exercise of a power is conditioned upon the provision of an opportunity to be heard, and there is a failure to provide such an opportunity, the consequence is that the purported exercise of the power is not efficacious, and the resulting ineffectiveness of the decision may be established by declaratory order (Delta Properties Pty. Ltd. v. Brisbane City Council [1955] HCA 51; (1955) 95 CLR 11, at p 18). There is no obstacle to declaring the invalidity of the purported exercise of a statutory power by the Governor in Council in an appropriate case (Banks v. Transport Regulation Board (Vict.) (1968) 119 CLR, at p 241 , per Barwick C.J.). It is not necessary or desirable that the Governor in Council be a party to the proceedings in which the declaration is made. Since Dyson v. Attorney-General (1911) 1 KB 410 , if not earlier, the Attorney-General has been an appropriate defendant in proceedings for a declaration that an act done by the Executive government adversely affecting the rights of a plaintiff and in purported exercise of a statutory power is ineffective (see, for example, Colonial Sugar Refining Co. Ltd. v. Attorney-General (Cth) [1912] HCA 94; (1912) 15 CLR 182). In Australian Alliance Assurance Co. Ltd. v. Attorney-General (Q.) and Goodwyn (1916) St R Qd 135 it was held that a declaration may be made against the Attorney-General upon questions affecting the entitlement of the plaintiff to carry on business as an insurer under the Workers' Compensation Act of 1916 (Q.). That case appears to have been the case which went on appeal to the Judicial Committee but it seems that, in the meantime, a nominal defendant had been appointed (1917) AC 537, at pp 538-539; (1916) St R Qd 225 . In the present case, the Governor in Council is appropriately represented by the Attorney-General. (at p420)

30. Although no decision according to law has been made on F.A.I.'s application, a declaration to that effect would now be too late to serve the purpose of having a timeous decision made. Should a declaration now be made? F.A.I.'s approval has expired; its business has been affected. In my view, a declaration should be made nevertheless in order to establish that the refusal of the application was invalid and to ensure that the purported refusal of 26 May 1981 is not taken to be determinative of any future application by F.A.I. for approval as an insurer. (at p420)

31. It is not necessary to determine whether there is an enforceable duty upon the Minister to observe or to see to the observance of the rules of natural justice which govern the exercise of the power to renew. F.A.I. does not seek mandamus to compel performance of such a duty. These proceedings are concerned only with the effectiveness of the purported decision by the Governor in Council on 26 May 1981 to refuse renewal of approval. (at p420)

32. Although a declaration of invalidity should be made against the Attorney-General, the declaration should not be made under the Administrative Law Act. That Act applies only when an applicant is affected by "a decision of a tribunal" (s. 3). The Governor in Council is not a "Tribunal" as defined by s. 2 of that Act, for the Governor in Council in arriving at a decision under s. 72(1) of the Act acts upon the advice tendered, and is not required "to act in a judicial manner to the extent of observing one or more of the rules of natural justice". The Administrative Law Act does not operate where a rule of natural justice governing the exercise of a statutory power is to be observed

by a person (in this case by the Minister or his officers) who is not the repository of the power. The issues between F.A.I. and the Attorney-General were fully litigated between them and the error in choosing the procedure of the Administrative Law Act is no bar to the making of a declaration against the Attorney-General under O. 25, r. 5 of the Rules of the Supreme Court of Victoria. (at p420)

33. The only applications made to the Supreme Court against other parties were made under the Administrative Law Act. As no order should be made under that Act, I would dismiss the appeal against the order of the Full Court dismissing the appeal from the order of Jenkinson J. whereby his Honour refused to make an order under that Act calling upon the Governor in Council and the Minister for Labour and Industry to show cause why the decision made by the Governor in Council to refuse to renew F.A.I.'s approval as an insurer under the Act should not be reviewed. (at p421)

34. I would allow the appeal in part, however, making a declaration against the Attorney-General that the decision of the Governor in Council of 26 May 1981 not approving F.A.I. as an insurer for the purpose of s. 72 of the Workers Compensation Act as and from 2 June 1981 was invalid. I would order the respondent Attorney-General to pay the appellant's costs here and in the Full Court except to the extent that they were increased by the proceedings against the Governor in Council and the Minister for Labour and Industry. I would make similar orders in the proceedings brought by F.A.R. (at p421)

ORDER

In each case:

Appeal allowed with costs against the Attorney-General for the State of Victoria.

Order that the Honourable Sir Henry Arthur Winneke and James H. Ramsay cease to be parties to the proceedings.

Order of the Full Court of the Supreme Court of Victoria set aside, and in lieu thereof order as follows:

Appeal against the order of Jenkinson J. and motion for leave to appeal against that order, dismissed with costs.

Declare that the decision of the Governor in Council made on 26 May 1981 not to approve the appellant as an insurer under the Workers Compensation Act 1958(Vict.) is void.

Order that the Attorney-General pay the applicant's costs other than those incurred in relation to the attempt to add the first and third-named respondents as parties.

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