A pleasing, if minor, stylistic note on which to end: the High Court seems at last to have wholly discarded the inexplicable and totally erroneous tradition of referring to the subsections of section 51 of the Constitution as placita. Stephen J., at all events as reported in the ALRs, as one of his last acts on the Court has led the way in adopting another small modernisation which this writer finds particularly pleasing because he believes that he invented it. Throughout Stephen J.'s judgment those same subsections are signified in Arabic instead of Roman numerals. Thus 51(26) and 51(29) and not 51(xxvi) and 51(xxix). A small aid to communication but a most helpful one.

COLIN HOWARD*

FAI INSURANCES LTD v. WINNEKE AND OTHERS[1]

Administrative Law — Natural Justice — Decision of the Governor in Council affecting rights — Duty to Provide a hearing — Whether subject to judicial review — Administrative Law Act 1978 (Vic.).

INTRODUCTION

In an analysis of the decision of the High Court in *Sankey v. Whitlam*[2] Dr Pearce opined that '[t]he decision can be seen as the final step in the establishment of the fundamental concept that administrative action is subject to judicial review'.[3] Even if this statement is correct in the context of crown privilege the High Court has shown no consciousness of the final step having been taken in other areas. Indeed, as this case shows, the Court has moved to strengthen and extend this 'fundamental concept'.

During this century the traditional immunity of certain administrative bodies from judicial review has been steadily eroded to the extent that since *Padfield v. Minister of Agriculture Fisheries and Food*,[4] which settled the matter as far as Ministers were concerned, only two institutions could claim significant immunities: the legislature and the representative of the Crown. In *Re Toohey (Aboriginal Land Commissioner); Ex parte Northern Land Council*[5] the High Court reviewed an exercise of a regulation-making power by the Administrator of the Northern Territory (acting with the advice of his Executive Council) on the ground that the power had been exercised for a purpose other than that for which it was granted by the statute. A majority of the court treated the Administrator as the representative of the Crown in the Territory. In the instant case the Court held that the Governor in Council for the State of Victoria, when deciding whether to renew an approval of the appellants as workers' compensation insurers, was subject to the requirements of natural justice and was subject to the review of the Court on that basis.

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[1] Unreported judgment of the High Court of Australia — 11 May 1982. A concurrent appeal by Fire and All Risks Insurance Co. Ltd based on similar facts was treated identically by the Court.

[2] (1978) 142 C.L.R. 1.

[3] Pearce D., 'Of Ministers, Referees and Informers — Evidence Inadmissible in the Public Interest' (1980) 54 *Australian Law Journal* 127, 133.

[4] [1968] A.C. 997.

[5] (1982) 56 A.L.J.R. 164.

THE FACTS

The Workers Compensation Act 1958 (Vic.) requires employers to obtain such insurance from an insurer approved by the Governor in Council. The Workers Compensation Regulations 1975 (Vic.) prohibit a company from accepting premiums or carrying on workers' compensation insurance business without such approval. The appellant had carried on such business in Victoria and other states for twenty years, having obtained all the necessary approvals. Each approval operates for a period not exceeding twelve months. In August 1979 the Minister for Labour and Industry wrote to the appellant informing it that approval beyond 1 July 1981 would depend upon its compliance with certain stipulated criteria. The appellant's application for approval for the twelve months commencing 1 January 1981 contained representations in support of approval directed at the Minister's criteria. It also requested the opportunity to make submissions on any other matters which might stand in the way of a renewal. Interim approval was granted until 30 June 1981 while the application was considered. On 18 May 1981 the Minister informed the appellant that he had decided to recommend that its approval not be renewed by the Governor in Council and set out a brief summary of the case against the appellant. The appellant wrote to the Minister and to the Clerk to the Executive Council seeking deferment of the decision until it had a reasonable opportunity to answer the case against it and seeking particulars of that case. On 26 May 1981 by an Order in Council the Governor in Council refused to renew the appellant's approval. No opportunity was given to the appellant to present material to the Executive Council although its letter to the Clerk had been placed before the Council.

The appellant sought an order nisi for review under the Administrative Law Act 1978 (Vic.) seeking a declaration that the Order in Council was void upon the ground *inter alia* that there had been a breach of the rules of natural justice because the appellant had not been afforded a reasonable opportunity to be heard on its application. Jenkinson J. granted an order nisi against the Attorney-General but not against the Governor or the Minister. On return of the order before the Full Court, it discharged the order nisi and dismissed an appeal that orders nisi ought to go to the Governor and the Minister.

THE DECISION

The High Court held by majority (Murphy J. dissenting) that the decision not to approve the appellant was void and made a declaration to that effect.

Murphy J. stated that:

> 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.[6]

His Honour then launched directly into a discussion of the question as to whether the courts could ever review an act of the Governor in Council which was not *ultra vires* in the fundamental sense of the term. This discussion is considered later.

An appropriate framework for the discussion of the majority judgments is found in the judgment of Brennan J. His Honour took the view that any duty to accord natural justice arose as an implied condition from the statute on the exercise of the power it gave. Citing *Salemi v. MacKellar [No. 2]*[7] and the decision of the Privy Council in *Durayappah v. Fernando*[8] his Honour listed three criteria to be considered in order to determine whether the legislature intended that the rules of natural justice applied:

[6] Judgment 25. (All references are to judgment pages.)
[7] (1977) 137 C.L.R. 396.
[8] [1967] 2 A.C. 337.

the statutory text, the interests affected by the statute and the repository of the power.[9] Although the other members of the majority did not adopt the statutory implied condition approach they did consider each of these three criteria.

(a) The Interests Affected by the Statute

It is convenient to consider first the second criterion, the interests affected by the statute, because this was the course followed by the members of the majority other than Brennan J. These judges (Gibbs C.J., Stephen, Mason, Aickin and Wilson JJ.) held that the appellant had a legitimate expectation that its approval as an insurer would be renewed and that, in the general case, fairness would require that the appellant should be informed of the grounds for any proposed rejection and be given an opportunity to combat those grounds.[10] This conclusion was the result of an orthodox application of authority[11] and will not be discussed further in this note. These five judges then went on to consider the other two criteria and whether they displaced the general conclusion flowing from the 'legitimate expectation' authorities.

Brennan J. took an interesting and different approach to the second criterion. His Honour expressed difficulty in understanding how the expectation of a particular applicant could be of assistance in ascertaining whether the legislature intended that the principles of natural justice should apply. Such expectations would be relevant only to the way natural justice (if applicable) was to be observed in the particular case.[12] This reasoning did not lead his Honour to a result different from that of the rest of the majority.

(b) The Statutory Text

The first of Brennan J.'s criteria concerning the applicability of natural justice was the statutory text. The Solicitor-General had argued that the Workers Compensation Act gave the Governor in Council an absolute discretion to approve or not and that this indicated that the rules of natural justice did not apply. This argument had found favour with the Victorian Full Court but received short shrift in the High Court. The Court looked at reg. 202(2) of the Workers Compensation Regulations which required the Governor in Council to have regard to the commitments and financial position of the applicant for approval and decided that the discretion was not absolute.[13]

(c) The Repository of the Power

The third and most important of the criteria was the effect of vesting the power in the Governor in Council. *Ex parte Northern Land Council*[14] had in one sense cleared the ground for the review of a decision of a State Governor in Council. That decision however stopped well short of deciding the instant case, concerning as it did the exercise of a legislative power for improper purposes and not the applicability of the rules of natural justice to an administrative discretion. Putting the matter very broadly three arguments were advanced as to why the Governor in Council should not have to accord natural justice. The first relates to the function of the body: it acts as a cipher or

[9] Judgment 60.

[10] *Ibid.* 1 *per* Gibbs C.J., 4 *per* Stephen J., 14 *per* Mason J., 29-30 *per* Aickin J. and 47 *per* Wilson J.

[11] *E.g. Banks v. Transport Regulation Board (Vic.)* (1968) 119 C.L.R. 222, *Salemi v. MacKellar [No. 2]* (1977) 137 C.L.R. 396, *Heatley v. Tasmanian Racing and Gaming Commission* (1977) 137 C.L.R. 487.

[12] Judgment 62.

[13] *Ibid.* 2 *per* Gibbs C.J., 19 *per* Mason J., 60 *per* Brennan J. Stephen J. agreed with the reasoning of Mason J. generally. Aickin J. at 31 and Wilson J. at 49 suggest that more is needed to exclude the duty to observe natural justice than a discretion without express restrictions.

[14] (1982) 56 A.L.J.R. 164.

rubber-stamp and is merely the formal legal step by which effect is given to decisions of Ministers or the Cabinet already made. As a consequence any hearing or inquiry by it would be quite irrelevant to the making of a decision since that decision is pre-determined by the advice given. Interwoven with this is the related point that Ministers and the Cabinet are responsible for the decisions of the Governor in Council under the doctrine of ministerial responsibility and that political sanctions, not judicial review, are the appropriate safeguard against abuse.[15] Mason J. (with whose reasoning on this point Stephen J. agreed) was prepared to accept the premises on which this argument was based but held that even so the 'Governor in Council cannot by exceeding his statutory authority affect individual rights'.[16] The relationship between the Governor and the Executive Council and the doctrine of ministerial responsibility provide no objection to the application of the rules of natural justice to the exercise of a discretion by the Governor in Council. Because the Governor acts ultimately on advice, the final decision is not one for which he has to account.[17] It appears that his Honour is here saying that review of a decision of the Governor in Council reflects on the Governor personally as much as the decision is his personally; that is, not at all. The effective decision is that of the person who in truth is being reviewed — the Minister, and the decision is reviewed at this point because this is where it attains legal efficacy. Gibbs C.J. echoes this reasoning when he says:

> 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.[18]

Aickin J. approached the matter somewhat differently. His Honour found that it was the Minister's recommendation to which the requirement of natural justice attached.[19] If the Minister failed to provide a hearing where one was required to make his decision, no effective decision and no effective recommendation to the Executive Council would be made and so no effective Order in Council would be made.[20] The Order being the legally operative form of the decision, that is the one to which the sanction of voidness attaches.

Wilson J. was prepared to allow that the remedies lay in the political realm to the exclusion of judicial review but only where the decisions were of a legislative nature affecting the community or large sections of it, or the decision was pre-determined by a general principle of government policy.[21] But if there were considerations personal to the individual which could influence the result then fairness would require a hearing of some sort notwithstanding that the discretion was vested in the Governor in Council.

Brennan J. had held that the duty to accord natural justice was an implied statutory condition on the exercise of the power by the Governor in Council. As such any purported exercise of the power without fulfilling the condition was simply void.[22] The composition of the body and the fact that it acted on advice might raise practical problems as to how to comply with the condition but they did not remove the consequence of non-compliance.

The second major argument as to why the Governor in Council should not have to accord natural justice was put strongly by Murphy J. It was that matters committed to the Governor in Council are considered by the legislature to warrant a political

[15] Judgment 25-6 *per* Murphy J.
[16] *Ibid.* 17.
[17] *Ibid.* 18.
[18] *Ibid.* 2.
[19] *Ibid.* 34.
[20] *Ibid.* 35.
[21] *Ibid.* 49.
[22] *Ibid.* 65.

determination not subject to judicial review.[23] Stephen J. answered this argument squarely by reviewing the matters traditionally committed to the Governor in Council's discretion. His Honour stated that:

> 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.[24]

Having cited such examples as the alteration of the boundaries of a sewerage district and the leasing of sites for water pumps, his Honour concluded:

> 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.[25]

Stephen J. thus discarded any general immunity for the Governor in Council but was apparently prepared to concede immunity to certain types of decision, *semble* those of a high policy nature. On this point Gibbs C.J. expressly refrained from considering whether fairness would require the giving of a hearing if a refusal of approval were based purely on grounds of policy.[26] The distinction made by Wilson J. between types of decisions and their susceptibility to review has already been noted *supra.*

The third major argument put that the Governor in Council should not have to accord natural justice is a practical one — the body is intrinsically unsuited to making an inquiry or providing a hearing. It would be purely fortuitous if the Ministers rostered to attend a session of the Council had any personal knowledge of the matter for decision, leaving aside the heavy demands on its members' time. All the members of the majority reject this argument (although some are prepared to accord the impracticality factor more weight than others) and all propose that the problem will be overcome by the Executive Council delegating to a Committee of its members or the responsible Minister the duty of giving a hearing. The delegate can then report on the submissions made by the applicant and make such recommendations as are appropriate.[27] For Aickin J. this solution is of course a concomitant of his reasoning that the duty to provide a hearing attaches to the Minister's recommendation.[28] Wilson J. suggests that submissions from the particular applicant for approval will form part of the total material on which the Minister bases his recommendation. The Minister's submission to the Executive Council will then show on its face that the dictates of natural justice have been observed and neither the Governor nor the rostered members of the Council need go behind that assurance, although the Governor could question and check that a hearing has been given.[29]

The arguments mentioned above cover most of the grounds given by Murphy J. in his dissent. However, apart from deciding in the alternative that there was no denial of a legitimate expectation,[30] his Honour queries whether the majority opinion will not have the 'startling implication' that recommendations by the Minister to Cabinet and Cabinet decisions to recommend to Council will also be subject to review.[31] In the respectful opinion of the writer no such implication follows. The majority has

[23] *Ibid.* 26.
[24] *Ibid.* 5.
[25] *Ibid.* 7.
[26] Judgment 2, *cf.* Mason J. at 20-1 who noted that no policy issue arose in the instant case.
[27] See *e.g.* Mason J.: *Ibid.* 22.
[28] *Ibid.* 35.
[29] *Ibid.* 51.
[30] *Ibid.* 26-7.
[31] *Ibid.* 26.

evinced a willingness to review a decision at the point it becomes legally operative[32] and hence not in either of his Honour's examples. Further it appears that the Court may be moving towards a selective immunity from review and the duty to accord natural justice based on the high policy content of a decision. Such immunity may often apply in the examples given by Murphy J.

In the result then, the Governor in Council had to accord natural justice to the appellant by providing it with an opportunity to be heard by the Minister or his departmental officers. The nature of this hearing is limited. While the fact that the power is reposed in the Governor in Council does not for that reason alone exclude the duty to accord natural justice it will affect the content of the duty.[33] The general consensus of the majority is that in the instant case the appellant should have been afforded an opportunity to make written submissions on matters which supported a favourable decision and on those which stood in the way of a renewal of approval.[34]

Two subsidiary matters for decision were the appropriateness of proceeding under the Administrative Law Act and the matter of who should be joined as respondents to the application for review. Mason J. (Stephen J. agreeing), Aickin and Wilson JJ. treated the statutory provisions as applicable. Gibbs C.J. found the matter unnecessary to decide as a declaration could alternatively be made under the Rules of the Supreme Court.[35] Brennan J. held that the procedure was unavailable where a rule of natural justice governing the exercise of a statutory power was to be observed by a person (the Minister or his officers) who was not the repository of the power.[36] This did not affect his Honour's decision given the alternative mentioned by Gibbs C.J.

As regards parties, Gibbs C.J., Mason, Aickin and Brennan JJ. considered that the Governor was not an appropriate respondent; the Attorney-General as a representative of the Crown was sufficient. Wilson and Stephen JJ. disagreed, arguing that s. 3 of the Administrative Law Act spoke of an order calling on the tribunal or members thereof and any party interested in maintaining the decision to show cause. The Governor fell in the former category, the Minister for Labour and Industry and the Attorney-General in the latter and hence all three were appropriate respondents.[37] In the result the Governor and the Minister were discharged as parties and the declaration was made against the Attorney-General.[38]

CONCLUSION

The Governor in Council is no longer immune from a duty to accord natural justice and judicial review of the performance of that duty simply by virtue of its status. That this is a recognition by the Court that governments have used the Governor in Council as a shield from judicial review in lieu of ouster clauses which have proved to be to some extent ineffective and embarrassing in these days of 'open government'[39] is shown by the following statement of Mason J.

[32] Although query whether Aickin J. would limit review to this point given his decision that the duty to give a hearing attaches to the Minister's recommendation which has no legal effect.

[33] Judgment 21-2 *per* Mason J.

[34] *Ibid.* 3 *per* Gibbs C.J., 22 *per* Mason J., 35 *per* Aickin J., 50-1 *per* Wilson J. and 66 *per* Brennan J.

[35] *Ibid.* 3. See Rules of the Supreme Court 0.25 r. 5.

[36] *Ibid.* 69.

[37] *Ibid.* 55 *per* Wilson J., 8 *per* Stephen J. agreeing.

[38] The declaration of invalidity of the Order In Council did not restore the appellant's approval since that had expired by effluxion of time on 1 July 1981. Aickin J. considered this point and decided to make the declaration notwithstanding that it could not have any direct operation in respect of past events: Judgment 37-9. Mason and Brennan JJ. agreed in this conclusion. The other judges did not consider the point.

[39] See s. 12 of the Administrative Law Act 1978 which over-rides all ouster clauses specified which exist at the commencement of the Act.

> It [the decision of the Court] 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.[40]

It is the opinion of the writer that the Court will now move towards the view of Stephen J. that the duty to accord natural justice and judicial review thereof will attach to the Governor in Council or not depending on the nature of the decision to be taken. A broad distinction has been made between decisions taken on the basis of an automatic application of policy irrespective of considerations personal to the individual and decisions in which such personal considerations may influence the outcome.[41] The duty attaches to the latter but not the former class. If the Court moves in this direction the distinction may need to be refined.

Whether this decision is likely to lead to the Governor in Council becoming subject to review on other grounds is an open question. However, given the attitude of the Court that review of a decision of the Executive Council does not reflect personally on the Governor, the width of Mason J.'s *dictum* quoted above, and the judicial trend shown by *Ex parte Northern Land Council* and this case, such a possibility is well within reasonable contemplation.

MARK SNEDDON*

R. v. PETER[1]

Criminal Law — Murder — Manslaughter — Abnormality of mind under Queensland Criminal Code — Diminished responsibility of Aboriginal defendant as a factor in sentencing.

> Our case is shortly this: in Queensland, there have been created communities in which the incidence of homicide and very serious assaults is amongst the highest that has been recorded and published anywhere in the world. It is, for example, thought to be at least equivalent to that which is found in the poorest and the most violent ghettoes of New York. Now, Deidre Gilbert, the deceased girl, and Alwyn Peter, the prisoner, were the members of one such community, and they were shaped by it and each has been destroyed by it. Now, I should tell Your Honour that to be a member of such a community one does not have to be bad or mad, but one has to be an Aborigine. . . .[2]

The plight of the Aboriginal living on government-created reserves is a matter of particular concern to Australia's legal profession. As counsel for the accused remarked in the recent case of *R. v. Peter* 'the problems . . . that bring him before this court are the problems of his situation; . . . It is impossible to discuss the moral responsibility of Alwyn Peter unless one talks about the situation in which he lived.'[3] And yet if the law is to be instrumental in breaking the cycle it must not only grapple with questions of guilt or innocence, it must also consider ways of preventing crime so as to protect the individual in society. With violence endemic in the local Aboriginal settlements, Queensland's Public Defender decided that Alwyn Peter be a test case to explore the

[40] Judgment 23.
[41] *Ibid.* 49 *per* Wilson J.

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[1] Unreported decision, Queensland Supreme Court, 18th September 1981.
[2] Opening submission of Mr D. G. Sturgess for the Defence in *The Queen v. Alwyn William Peter*, Brisbane 8 September 1981, Transcript 8-9.
[3] Transcript 30.