



## *Express law* fast track information for clients

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### Natural justice and 'act of grace' payments

**The Federal Court has confirmed that the Finance Minister is bound by requirements of procedural fairness in making decisions regarding 'act of grace' payments under s 33 of the FMA Act.**

In [G & M Nicholas Pty Ltd and Others v Minister for Finance and Deregulation \[2009\] FCA 121](#) (20 February 2009), Cowdroy J of the Federal Court considered whether, and to what extent, procedural fairness requirements apply in relation to s 33 of the *Financial Management and Accountability Act 1997* (Cth) (the FMA Act). That section allows the Minister for Finance and Deregulation (the Finance Minister) to authorise the making of act of grace payments where he or she considers it appropriate to do so because of special circumstances.

In an earlier decision, *Toomer v Slipper* [2001] FCA 981 (*Toomer*), Weinberg J considered an application for review pursuant to s 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (the ADJR Act) of two decisions of a delegate of the Finance Minister under section 33 of the FMA Act. His Honour considered the applicant's complaint that the Finance Minister had failed to accord procedural fairness in making those decisions and found that no such breach had occurred. He was clearly proceeding on the basis that the rules of natural justice applied in relation to decisions made under that section. See also *Clement v Minister for Finance and Deregulation* [2009] FMCA 43 at [85]–[94], where it was assumed that a breach of natural justice was a ground for review of a Minister's decision; however, no breach was found.

Cowdroy J's decision confirms that the rules of natural justice apply in relation to decisions made under s 33 of the FMA Act and discusses the extent of their application. In this instance, his Honour found that those requirements had been breached. Specifically, it was held that the Finance Minister breached the rules of natural justice by failing to provide the applicants with an opportunity to respond to information relating to a critical issue in their claim for an act of grace payment that was relied on in making the decision.

### **Background**

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The applicants, G & M Nicholas Pty Ltd and its directors, sought judicial review pursuant to s 5 of the ADJR Act of a decision of the Finance Minister declining to approve an act of grace payment to the applicants pursuant to s 33 of the FMA Act.

G & M Nicholas Pty Ltd was formerly known as Medtest Pty Ltd (Medtest). As at 2000 Medtest was an 'approved pathology authority' operating an 'accredited pathology laboratory' within the meaning of the *Health Insurance Act 1973* (Cth). In March 2001 an inspection of the Medtest

laboratory was conducted and a report prepared. The report stated that defects were found in the staffing, resources and procedures of the Medtest laboratory.

On 16 November 2005, the applicants applied to the Finance Minister for an act of grace payment, claiming that 'special circumstances' existed as a result of harm suffered by them in consequence of certain actions taken following the report (including adverse statements made by the Minister for Health and Ageing in the Senate in 2002 and notifications being sent to all medical practitioners who had referred patients to Medtest over the previous three years informing them of the concerns).

On 2 March 2006 the Parliamentary Secretary to the Finance Minister purported to make a decision declining to approve the applicant's application for an act of grace payment. The applicants initiated judicial review proceedings to challenge the lawfulness of this decision, and by consent it was set aside and remitted to the decision maker.

On 23 February 2007 the Finance Minister forwarded a folder of documents to the applicants. By letter dated 15 March 2007, the solicitors for the applicant sought confirmation that there were no documents other than those listed in the Statement of Reasons which were used in making the first decision, noting that they had not been provided with a brief referred to in the Statement of Reasons. Further, in a letter of 26 June 2007, the applicants sought confirmation that there were no further documents before the Minister which would be used in making the decision on the reconsideration.

In December 2007, the Finance Minister informed the applicants that he had declined to approve an act of grace payment. The Finance Minister later provided a Statement of Reasons on request. The reasons listed the documents relied on in making the decision, including an issues paper which disclosed that the Minister for Health had been provided with a brief for Question Time (a QTB) concerning Medtest and summarised that QTB. Neither the issues paper, nor the QTB, nor the summary of the QTB had been provided to the applicants.

## ***Decision***

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### **The rules of natural justice applied**

The power of the Finance Minister to approve an act of grace payment under s 33 is broad—the Finance Minister can approve such payment if he or she considers it 'appropriate' to do so. Section 33 provides no indication of the manner in which the Finance Minister is to exercise his or her discretion.

However, Cowdroy J considered that the width of the power did not have the consequence that the rules of procedural fairness did not apply.

His Honour relied on a number of decisions of the High Court, including *Annetts and Another v McCann* (1990) 170 CLR 596 (confirmed by the High Court in *Jarratt v Commissioner of Police for New South Wales* (2005) 224 CLR 44) where Mason CJ, Deane and McHugh JJ observed (at p 598):

It can now be taken as settled that, when a statute confers power upon a public official to destroy, defeat or prejudice a person's rights, interests or legitimate expectations, the rules of natural justice regulate the exercise of that power unless they are excluded by plain words of necessary intentment.

Cowdroy J also noted that Weinberg J in *Toomer* (mentioned above) had considered a complaint that the Finance Minister had failed to accord procedural fairness to the applicant in

making a decision under s 33, proceeding on the assumption that the rules of natural justice applied to such decisions.

His Honour considered that decisions of the Finance Minister made upon an application under s 33 affected the rights of the applicants since they determined whether an act of grace payment may be made in respect of a claim which may or may not otherwise be compensable at law. As such, the rules of natural justice attached to such decisions.

### **Extent of the application of the rules of natural justice and whether they were breached**

Cowdroy J, having found that the rules of natural justice applied in relation to decisions made under s 33 of the FMA Act, went on to consider the extent of their application. His Honour considered that the authorities established that:

... in general, natural justice will demand that the party to be affected by a decision must be given an opportunity to deal with matters which are adverse to their interests and are credible, relevant and significant to the decision. However, the extent of the obligation to provide such opportunity is dependent upon the statutory framework and particular circumstances of the case.

His Honour held that the Finance Minister breached the rules of natural justice by failing to put the issues paper containing the QTB summary—which related to a critical issue for the applicants in their claim for an act of grace payment—before the applicants to allow them an opportunity to respond to it before any decision was made under s 33. This was especially so given the applicants had previously requested that they be provided with the information that would be relied upon to enable them to comment on it.

### **Other submissions put by the applicants**

As well as claiming a denial of procedural fairness, the applicants claim raised a second ground of review: namely, a failure to consider all of the applicant's claims. In the alternative to the second ground the applicants raised a third ground, submitting that the Finance Minister had erred by assuming that any award by him in favour of the applicants could infringe on parliamentary privilege. These claims were dismissed.

### ***Implications***

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This decision has confirmed that a decision to authorise the making of an act of grace payment under s 33 is a decision which is subject to judicial review on procedural fairness grounds. Persons who have sought an act of grace payment will need to be given an opportunity to comment at least in relation to adverse information that is significant to the decision.

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