IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S141 of 2017

BETWEEN:

WOOLLAHRA MUNICIPAL COUNCIL

Appellant

10 **MINISTER FOR LOCAL GOVERNMENT**

First Respondent

DR ROBERT LANG, DELEGATE OF THE CHIEF EXECUTIVE OF THE OFFICE OF LOCAL GOVERNMENT

Second Respondent

CHIEF EXECUTIVE, OFFICE OF LOCAL GOVERNMENT

Third Respondent

20 **LOCAL GOVERNMENT BOUNDARIES COMMISSION**

Fourth Respondent

APPELLANT'S REPLY

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Part I: Certification

1. These submissions are in a form suitable for publication on the internet.

Part II: Argument

Ground 1

2. The First Respondent's (**Minister's**) submissions (**RS**) on Ground 1 should be rejected for the following reasons.

3. *First,* the Minister's entire response to this ground is premised on her attribution to the Appellant of an argument that the Appellant does not make. The Appellant does not contend that the entirety of the Delegate's examination and reporting functions needed to be discharged in public, by way of an inquiry, or that the Delegate ought to have adopted an "open file policy" enabling the public to access all of the material that he received (see LEC[238], AB**, CA[132], AB**). The Appellant's contention is and was, rather, that an "inquiry" at which a delegate publicly explores but a narrow subset of the mandatory factors in s 263(3) of the Act, and which fails to engage in a critical element in the reasoning in favour of a ministerial proposal for amalgamation, does not meet the description in s 263 of the *Local Government Act 1993* (NSW) (**Act**) of "*an inquiry for the purpose of exercising ... functions in relation to a proposal for the amalgamation of two or more areas*" that the public is allowed to attend. Here, the basis for the Ministerial proposal was the projected financial savings from the merger[1] yet the only factor the subject of the "inquiry" was the attitude of the residents and ratepayers of the areas concerned to the proposed merger (s 263(3)(d); RS[47]). The Minister's submissions at RS[38]-[53] attack a straw man.

4. *Secondly,* the Minister's assertion (RS[39], [47]) that the purpose of holding an inquiry is to assist the Departmental Chief Executive in performing his function (in the sense of being "*an adjunct to*" the examination of and report on a proposal), and/or to enable the public to express its views concerning a proposal, should be rejected. That characterisation of the legislative object is at odds with the Second Reading Speech introducing the Act, extracted at RS[34]. This made clear that a public inquiry should be held before dissolving an area so as to provide "*a protection*" for the residents and ratepayers of that area.[2] That the Minister, here, instructed the Delegate that the s 263(2A)

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[1] The centrality of this issue to the requisite inquiry is not diminished by any distinction that is drawn between the Minister's "proposal" and the "proposal document" which contained it: cf RS[48].

[2] Second Reading Speech to *Local Government Bill 1992*, NSW, Legislative Assembly, *Parliamentary Debates*, 27 November 1992, p 10413; see also Appellant's Submissions (**AS**) at [39].

inquiry was to be public meeting for the main purpose of obtaining the views of the public (AB**) does not make this so as a matter of construction: see AS[34]-[37], cf RS[49].

5. *Thirdly,* and connected to the above, the amalgamation provisions in Chapter 9 of the Act were introduced in 1999 to simplify the process for *voluntary* amalgamations only. Nothing in the legislative history or extrinsic materials discloses an intention to reduce the rigours of an inquiry (or examination) already required to be held for a *forced amalgamation*: see AS[43]; cf RS[36]-[37], [44].[3] The relevant Second Reading Speech stated:[4]

> "... [T]here are a number of complex and unnecessary procedural impediments where councils have agreed to an amalgamation or boundary change. The principal purpose of this bill is to amend the Act to streamline the voluntary amalgamation process. In the cases of unilateral proposals, the normal process will apply. The proposals do not provide a mechanism to enable amalgamation by stealth."

6. The explanatory note to the 1999 Bill, selectively extracted at RS[36], made clear that ss 263(2), (2A) and (2B) were inserted into the Act to ensure that an inquiry would be held in relation to an amalgamation proposal that was not supported by one or more of the councils affected by it. Further, at the time that the current form of those provisions were introduced, a new s 429(1)(c) of the Act was inserted, which empowered the Departmental Chief Executive (then the Director-General) to require councils to provide information as to the s 263(3) factors relevant to an amalgamation proposal. The purpose of this amendment was explained as being to "*enable councils to be required to furnish information relevant to any inquiry being held into a proposed amalgamation of local government areas*".[5]

7. *Fourthly,* RS[45] truncates and thereby misstates the reasoning in *Bread Manufacturers of New South Wales v Evans* (1994) 180 CLR 404. This Court did not hold in *Bread Manufacturers* that the Prices Commission was precluded from obtaining information in private where an inquiry was held merely because investigative powers were conferred on the Commission for the purpose of its inquiry. Rather, it held that *although* the Commission possessed various investigative powers – which powers might ordinarily be exercised in private (for example, taking evidence on oath or requiring the production of documents) – this "*[did] not mean that the Commission [could] take evidence in private, or, in making its inquiry, have regard to documents which are never made public*",

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[3] The Act has always required a public inquiry to be held, and for the Minister to consider a report thereon, prior to recommending the making of a proclamation that would have the effect of dissolving whole or part of an area: see Act as made, s 212; RS[34], cf RS[32].

[4] See Second Reading Speech to *Local Government Amendment (Amalgamations and Boundary Changes) Bill 1999* (**1999 Bill**), NSW, Legislative Assembly, *Parliamentary Debates*, 22 June 1999, p 1093.

[5] Ibid, p 1094; and see also Explanatory Note to 1999 Bill.

because those investigative powers were given to the Commission for the purpose of its inquiry and that inquiry was required to be *"held in public"*: see per Gibbs CJ at 412-413, Mason and Wilson JJ at 434.6, Aickin J at 444.8; AS[49].

8. In *Bread Manufacturers,* the Prices Commission did not ultimately allow the percentage return on investment that had been identified in the privately obtained study. Nonetheless, a proper public inquiry was not conducted since *"if the study had been made known at the inquiry, the parties to the inquiry would have been entitled to lead evidence to show that it was based on errors of fact, or to make submissions that the study was irrelevant or misconceived"*: per Gibbs CJ at 413. So too here. The Delegate received in a private forum information and an explanation as to how KPMG derived its conclusions – being conclusions which were central to the Ministerial case for the merger, and which were not explicable from the other publicly available material (AB**) – that the public was not afforded any opportunity to test or challenge: cf RS[13], [51]-[52]. The "inquiry" conducted was therefore invalid.

Ground 2

9. In relation to Ground 2, this Court should prefer the reasoning of Basten and Macfarlan JJA in *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* (2017) 220 LGERA 386 (***Ku-ring-gai***) – which is not the subject of any special leave application – to the reasoning of Sackville AJA in that case or of the Court of Appeal below.

10. *First,* the Appellant's contention, endorsed by Basten and Macfarlan JJA in *Ku-ring-gai,* that a proper examination of the amalgamation proposal required the Delegate to probe the basis for the financial savings asserted by the NSW Government in support of it, does not require that the particular material which was *not* examined by the Delegate be fixed with some criterion of criticality or essentiality that is transposable to future cases: cf RS[60]-[61]. Nor, as the primary judge found in his public interest immunity ruling in this case (at [10], AB**), does that contention turn on the actual content of the material that the Appellant submitted the Delegate should have sought, including the "Long Form Document": cf AS[67].[6] The Delegate needed to take steps to obtain the material upon which KPMG based its merger savings figures, to carry out his function of examination, since:

    a. that material, including the "Long Form Document", was referred to by the Minister in the proposal document as underpinning the financial case for the merger; and

[6] There is thus no reason for the Court to conduct the inspection requested at RS[67].

b. the reliability of KPMG's forecasted savings, and the ability to test the methodology by which they were derived based on the publicly available material, were specifically called in issue before the Delegate (AS[16]-[17]),[7] including by the Appellant (LEC[136], AB**; cf RS[16], [54]).

11. *Secondly,* the Minister's submission that a delegate, in performing their functions of examining a ministerial amalgamation proposal under the Act, should attribute no "*statutory significance*" to the claims made by the proponent in support of the proposal, and should approach those claims in the "*same way*" as any other submission received in connection with the proposal, should be rejected as inconsistent with the statutory scheme: cf RS[23], [62]-[64]. The Act demands as a pre-condition for the exercise by the Minister of her statutory power under s 218F(7) to recommend the proclamation of an amalgamation proposal that she has made that the merit of her proposal be independently assessed – by the Departmental Chief Executive or Boundaries Commission, as the case may be – from the perspective of persons other than the Minister: Act, ss 218D, 218F(1); *Ku-ring-gai* at [99], [117]-[119]; *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 393 [41], 416 [158]. As such, testing the veracity of the case advanced by the Minister in favour of her own proposal, before she proceeds to implement it, is central to a delegate's examination function. To require a delegate to scrutinise the case for a ministerial amalgamation proposal as part of their examination does not "*over-judicialise*"[8] their task; rather, it is critical for the delegate to perform any meaningful task at all: cf RS[69].

12. *Thirdly,* the reasoning of Sackville AJA at [289] of *Ku-ring-gai* propounded by the Minister (RS[58]-[59]) does not confront the issue that is engaged by Ground 2. That ground does not merely concern "*whether the Delegate, in considering the Merger Proposal, had regard to its financial advantages or disadvantages*": cf Ground 3. It rather concerns whether there was, in the language of Basten JA, a "*constructive failure*" on the part of the Delegate to fulfil his statutory function of examining the subject proposal. Were this Court to endorse the view adopted by Sackville AJA at [289], namely, that a delegate will discharge their statutory functions so long as they form any assessment of the financial advantages or disadvantages of a merger proposal on the available material, it would enable Councils to be forcibly amalgamated based on financial

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[7] The Appellant's unchallenged expert evidence that the publicly available documents as to KPMG's assumptions and modelling (see RS[10]) did not, without more, validate KPMG's conclusions, established that the complaints as to the transparency of KPMG's methodology were well-founded: AB**; cf RS[68]-[69].

[8] The reliance at RS[69] on the language in *Bushell v Secretary of State for the Environment* [1981] AC 75 at 97 is misplaced, not only for the reasons given at AS[51], but because no duty to examine was in issue in that case.

forecasts that are never subjected to any real scrutiny. Such a result is inconsistent with a statutory scheme that is predicated on amalgamation proposals being "examined" as a condition precedent to the exercise of the power to amalgamate local government areas.

Ground 3

13. The Court should reject the construction of s 263(3)(a) for which the Minister contends (RS[74]), namely, that it is open to a delegate to close his eyes to any financial disadvantages of a merger to the inhabitants of one of the areas concerned, so long as the financial consequences to the inhabitants of the merged area, as a whole, are addressed. That construction would leave the words in parentheses in that provision with no work to do, given that the whole notion of economies or diseconomies of scale requires a financial comparison to be undertaken as between the unmerged and merged areas, both separately and collectively. It is also at odds with a statutory scheme that has deliberately placed the financial impacts of an amalgamation proposal as the principal consideration for the Boundaries Commission (and here, the Delegate) in the course of exercising the examination and inquiry functions.[9] To say that there are financial advantages or disadvantages to the residents and ratepayers of one of the areas concerned that may be ignored is to say that there are financial advantages or disadvantages that may be ignored.

14. Further, nothing said by the Full Federal Court in *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 limits the circumstances in which an inference may be drawn that a decision-maker failed to have regard to a mandatory relevant consideration: cf RS[77]. To the contrary, in circumstances where the Delegate has a statutory obligation to "*examine and report*", it may readily be inferred that, to the extent that the individuated impacts of the merger on the residents and ratepayers of the Appellant were not reported upon, this was not the subject of the requisite examination or consideration: see *Minister for Immigration and Multicultural Affairs Yusuf* (2001) 206 CLR 323 at 331-332 [10], 340 [44], 346 [68]-[69].

Dated: 21 July 2017

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[9] The mandatory factor now appearing in s 263(3)(a) of the Act was introduced in the predecessor legislation (*Local Government Act 1919* (NSW), s 15J(1A)) in order to specify criteria to be taken into account when considering boundaries proposals, *including* amalgamation proposals: cf RS[75]; see Second Reading Speech for *Local Government (Boundaries Commission) Amendment Bill 1982,* NSW, Legislative Assembly, *Parliamentary Debates*, 1 April 1982 at 3255; and also 1919 Act, ss 16(e), 19.