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**

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Third Respondent

**LOCAL GOVERNMENT BOUNDARIES COMMISSION**

Fourth Respondent

**INTERVENER'S SUBMISSIONS**


Filed on behalf of: Randwick City Council

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**Part I: Certification that submission is suitable for publication**

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

**Part II: Basis for intervention in support of the Appellant**

2. Randwick City Council (**Randwick**) seeks leave to intervene on the basis that its legal interests are likely to be substantially affected by the decision of the High Court in this appeal.

3. Randwick was one of three councils the subject of the proposal of the First Respondent (**Minister**), made on 6 January 2016 pursuant to s 218E of the *Local Government Act 1993* (NSW) (the **Act**), for the forced amalgamation of three local government areas (the **Merger Proposal**).

4. Randwick seeks leave to be heard on the issues of statutory construction raised by Ground 2 of the Appellant's grounds of appeal, with respect to whether the Second Respondent (**Delegate**) conducted an examination of the Merger Proposal in accordance with ss 218F(2) and 263(1) of the Act.

**Part III: Why leave to intervene should be granted**

5. Leave to intervene should be granted in this case, pursuant to the High Court's inherent jurisdiction, on the basis that Randwick's legal interests will be, at a minimum,[1] substantially affected by the Court's decision. "Jurisdiction to grant leave to intervene to persons whose legal interests are likely to be substantially affected by a judgment exists in order to avoid a judicial affection of such a person's legal interests without that person being given an opportunity to be heard." [2] Randwick plainly satisfies this precondition for leave to intervene.

6. The direct effect of any decision in these proceedings on Randwick arises by reason of its special position as an entity whose existence is dependent on the decision and whose interests are directly protected by the legislative regime which is to be

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[1] Arguably, Randwick is entitled to intervene in these proceedings on the basis that it will be bound by the decision, even though it is not currently a party to the proceedings: see *Levy v State of Victoria & Ors* (1997) 189 CLR 579 at 601, per Brennan CJ.

[2] *Levy v Victoria* (1997) 189 CLR 579 at 603, per Brennan CJ. See also, *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 38-39 [2], per French CJ, Gummow, Hayne, Crennan and Kiefel JJ.

construed in this matter.[3] There is no risk that granting Randwick leave to intervene would allow any other member of the public who is likely to be affected by the decision to intervene.

7. On 1 April 2016, the Appellant commenced these proceedings in the NSW Land and Environment Court seeking to restrain the Minister from recommending to the Governor that the Merger Proposal be implemented. Given that the court was invited to make orders restraining the Minister from recommending that the Merger Proposal be implemented, the rights of Randwick were directly affected by the proceedings. If the Appellant had been granted the relief sought, the Merger Proposal would not have been implemented. Had the Appellant not exercised its right to appeal the decision made by the primary judge, or subsequently sought and been granted leave to appeal the decision of the Court of Appeal, it is likely that the Minister would have recommended to the Governor that the Merger Proposal be implemented, whereupon, Randwick (along with the Appellant and Waverley Municipal Council) would have ceased to exist.

8. It is also seriously arguable that Randwick was a necessary party to the proceedings and ought to have been joined by either the Appellant or Respondents.[4] A grant of leave to Randwick to intervene now would, at least in part, serve to cure any omission on the part of the parties to join Randwick to the proceedings below.

9. Additionally, on 16 June 2017 Randwick commenced judicial review proceedings in the NSW Land and Environment Court, challenging the legality of the steps taken by the Delegate in the conduct of his examination of the Merger Proposal.[5] Any decision by the High Court in this case, whether affirming or overturning the decision below, will carry concrete implications for the outcome of that litigation. If, as Randwick submits should occur on all grounds raised by the Appellant, this appeal is allowed, then continuation of Randwick's judicial review proceedings in

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[3] See s218F (6) and Minister's Second Reading Speech, Local Government Amendment (Amalgamations and Boundary Changes) Bill, Legislative Assembly Hansard, 22 June 1999 at 1093-4 (particularly 1094 second paragraph).

[4] *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd; Walker Corp Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 1 at 46 [131].

[5] See affidavit of Timothy James Lynch, sworn on 16 June 2017, in support of this application, at [6].

the NSW Land and Environment Court will not be necessary. If the appeal is not allowed, the scope of the issues for determination in those proceedings will be narrowed and quite probably clarified. On that basis alone, Randwick's legal interests will be substantially affected by the decision of the High Court in this case.[6]

10. It is also appropriate that Randwick has an opportunity to respond to or be heard in relation to any submissions made by the Respondents that might be directed to the particular position of Randwick or actions of Randwick at the time that the Delegate was purporting to carry out his statutory function of conducting an examination of the Merger Proposal.

11. Finally, Randwick's submissions on construction which are limited to Ground 2 of the Appellant's appeal (relating to issues dividing differently constituted NSW Courts of Appeal and of general importance to all NSW councils) are concise. There is, and will be, little or no overlap with what has been put on behalf of the Appellant. Randwick's intervention will not unreasonably interfere with the ability of the parties to conduct the appeal as they wish. Further, there is no reason to think that any party will be put to any materially additional cost or that the hearing time would be materially extended (see Part VI below).

**Part IV: Relevant constitutional provisions, statutes and regulations**

12. The Annexure to the Appellant's Submissions, dated 16 June 2017, contains all relevant statutory provisions for the issues in this appeal as they existed at the relevant time, and at present.[7]

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[6] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at 38-39 [2].

[7] Randwick also notes the delegation by the Third Respondent on 6 January 2016 of its functions to the Delegate said to be pursuant to s 745 of the Act. Section 745 (referred to at the end of the second reference to 6 January 2016 in the Appellant's Chronology) provided at the relevant time, and at present, as follows:

**745 Delegation of functions by the Departmental Chief Executive**

1) The Departmental Chief Executive may delegate to any person any of the Departmental Chief Executive's functions under this Act, other than this power of delegation.

2) A delegate may subdelegate to a person employed in the Department any function delegated by the Departmental Chief Executive if the delegate is authorised in writing to do so by the Departmental Chief Executive.

**Part V: Randwick's submissions in relation to Ground 2**

13. Randwick submits that the Court of Appeal below erred in its approach to the construction of the terms "examination" and "examine", as well as of "inquiry", as those terms appear in ss 218F and 263 of the Act. The correct construction of those terms was that adopted by 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; [2017] NSWCA 54 (***Ku-ring-gai***).

14. At the heart of this dispute about the competing constructions of the applicable statutory provisions of the Act adopted by differently constituted Courts of Appeal are the following questions. Do the requirements to conduct an "examination" of, and to "examine", a proposal emanating from the Minister, (that would lead to the forced amalgamation of councils) to enable a report that would ultimately entitle the very same Minister to recommend to the Governor the forced amalgamation, require the person conducting the examination to scrutinise and test material produced by third parties where the Minister relies on their conclusions in support of his or her proposal? Or is it enough that the conclusions reached by the third parties be noted and reported on, without the relevant examiner critically testing the underlying assumptions?

15. Macfarlan JA was correct when his Honour emphasised in *Ku-ring-gai*:[8]

> *"To perform his duties, the Delegate had two choices open to him. He could have tested the reliability of the KPMG analysis or he could have made an independent assessment of the merger's financial advantages or disadvantages."*

16. Randwick submits that, on the proper construction of the terms used in s 218F and s 263 (particularly given s 263(3)(a)) the same two choices applied to the Delegate here. Equally, the Delegate here did not undertake what was required to examine the Merger Proposal.

17. Beazley P below accepted that "The obligation imposed by ss 218F and 263(2A) is to examine the proposal."[9] However, her Honour considered that this obligation

[8] At [120].

only required the Delegate to examine "all of the material that is provided and in doing so, to have regard to the matters specified in s 263(3), insofar as they are relevant."[10] The interposition of the words 'material ... provided' (the identity of the provider of the material is not specified), to qualify the subject matter of the examination, substitutes a different task to the statutory requirement to examine 'the proposal'. The construction below incorrectly limits the examination to a consideration of material, which some unspecified person chose to provide to the examiner; and would allow, as in this case, the stultification of the statutory task of examination of the 'proposal'.

10 18. The Court of Appeal below rejected the Appellant's contention that the Delegate was required to have regard to the "independent analysis and modeling by KPMG" referred to in the Merger Proposal,[11] including the document entitled "NSW Government (2015), Local Government Reform: Merger Impacts and Analysis, December" (**KPMG long form analysis**) that was cited in the Proposal document but not publicly released or provided to the Delegate or the Appellant. This was notwithstanding the fact that it was the KPMG long form analysis that was cited in support of the projected net savings to council operations asserted by the Minister to be generated by the Merger Proposal,[12] the projected operating revenue for the new amalgamated council,[13] and the particulars of the savings to be generated.[14]

20 19. The differently constituted bench of the Court of Appeal in *Ku-ring-gai* found that the obligation to examine the amalgamation proposal in issue there imposed by ss 218F and 263 included a requirement to examine the basis for any opinions underlying the proposal, an obligation to test the reliability of the KPMG analysis, and a duty to form his or her own view about the matter to be examined.[15] This was

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[9] *Woollahra Municipal Council v Minister for Local Government and Others* (2016) 219 LGERA 180 (**CA**) at [106], AB*.

[10] CA, at [109], AB*.

[11] See "Merger Proposal: Randwick City Council, Waverley Council, Woollahra Municipal Council" signed by the Minister and dated January 2016 (**Proposal document**), at 3, AB*.

[12] See Proposal document at p 4, fn 3, AB* and p 8, fn 5, AB*.

[13] See Proposal document at p 7, AB*.

[14] See Proposal document, at p 9, fn 6, AB*.

[15] *Ku-ring-gai*, at [99], per Basten JA, at [117] and [120], per Macfarlan JA.

correctly emphasised by both Basten and Macfarlan JJA to be particularly the case where the proposal emanates from the responsible Minister.[16] Given that a critical element in the reasoning in favour of the proposal in question in *Ku-ring-gai* (as with the subject Merger Proposal) was the financial advantages expected to accrue from the amalgamation, the Delegate could not fulfill his obligation to examine the proposal without having access to the underlying material supporting the asserted financial advantages.[17]

20. In *Ku-ring-gai*, Macfarlan JA observed that the only step the Delegate took to assess the financial advantages of the proposal, beyond adopting the results of the KPMG analysis prepared for the Minister, was to refer to a separate report prepared for Hornsby Shire Council by KPMG.[18] Similarly, in this case, the only step the Delegate took to assess the financial advantages of the Merger Proposal beyond adopting the results of the KPMG analysis prepared by the Minister was to refer to the report prepared by SGS Economics and Planning.[19] Macfarlan JA found that that the mere reference to the separate report there did not mean that the Delegate had properly examined the KPMG analysis in a way that satisfied his statutory obligation. Critical to this finding was the observation that "a proper examination of the ministerial analysis by the Delegate would at least have required him to have knowledge of the detail of that analysis, not simply its conclusions."[20] What was required, in order to conduct a proper examination of the proposal, was for the Delegate to "form his own judgment about the financial advantages or disadvantages of the proposed merger" rather than merely to adopt, uncritically, the results of the undisclosed KPMG analysis.[21]

21. The construction of the term "examine" adopted by Basten and Macfarlan JJA in *Ku-ring-gai* should be preferred to the construction given to it by the Court of Appeal below for at least the following three reasons.

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[16] *Ku-ring-gai*, at [99], per Basten JA, at [124], per Macfarlan JA.

[17] *Ku-ring-gai*, at [100], per Basten JA.

[18] *Ku-ring-gai*, at [124].

[19] See Delegate's Report, at p 14. AB*

[20] *Ku-ring-gai*, at [124].

[21] *Ku-ring-gai*, at [125].

22. **Relevant ordinary meaning**. The construction of the word "examine" adopted by the Court of Appeal in *Ku-ring-gai* accords with the relevant ordinary meaning of the word "examine". The Macquarie Dictionary indicates that the word "examine" has a variety of meanings:

> 1. to inspect or scrutinise carefully; inquire into or investigate.
>
> 2. to test the knowledge, reactions, or qualifications of (a pupil, candidate, etc.), as by questions or assigned tasks.
>
> 3. to subject to legal inquisition; to put to question in regard to conduct or to knowledge of facts; interrogate: to examine a witness; to examine a suspect.[22]

It is the first meaning that is most relevant in the context of the Act. This meaning of the word connotes some level of *active* conduct on the part of the examiner in connection with the object being examined, as opposed to a passive acceptance or uncritical adoption of the subject matter.

23. **The word "examine" must be given some work to do.** Adopting the construction favoured by the Court of Appeal in *Ku-ring-gai* is in accordance with the maxim that all words in a statutory provision must be given meaning and effect. Had the legislature intended that the Boundaries Commission or Departmental Chief Executive (or his or her delegate) could merely reject or adopt the conclusions set out in the Minister's proposal without first scrutinising carefully or testing those conclusions in the manner required by the Court of Appeal in *Ku-ring-gai*, then s 218F of the Act could simply have required the Minister to refer the proposal to the Boundaries Commission or to the Departmental Chief Executive for "report" alone. By imposing an obligation to "examine *and* report" something more than uncritical adoption or summation of the conclusions in the proposal is required, absent which, the delegate will have fulfilled the requirement to "report" (in the sense of providing an account or statement of the matters set out in the proposal), but failed in his or her duty to "examine" the proposal. This then requires the delegate to test or scrutinise the conclusions set out in the proposal, which in turn requires access to the analysis underlying those conclusions.

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[22] The Macquarie Dictionary (6th Edition, 2013), p 511.

24. **The words "examine and report" must be read in their context.** The meaning of the phrase "examine and report" must be determined by reference to the language of the Act when viewed as a whole.[23] In particular, s 218F(6) requires that if an amalgamation proposal has been referred to the Departmental Chief Executive under subsection 218F(1), then the Departmental Chief Executive (or his or her delegate) must furnish his or her report to the Boundaries Commission for "review and comment" in circumstances where *the proposal is not supported by one or more of the councils affected by the proposal.*

25. The words "review and comment" in relation to the function of the Boundaries Commission impose a different function upon the Boundaries Commission to that imposed upon the Delegate. The primary judge made this observation, stating that: "The function of review and comment on the report of that examination is a separate function and is not to be interpreted as co-terminous with the function of examination and report."[24]

26. The function is separate not only because of the distinction between subjects (a review of the report of the Departmental Chief Executive as opposed to an examination of, and report on, the proposal referred by the Minister) but also because of the action required in connection with the subject. The words "review and comment" connote a function that presupposes that the Delegate has already examined and reported on the proposal. The review must be conditioned and framed by the Delegate's anterior function.[25] It is yet a further example of the safeguards included in Chapter 9 Part 1 Division 2B which require a high degree of independent scrutiny of a proposal to amalgamate local councils where it is over the opposition of one of those councils.

27. In the Second Reading speech for the insertion of Division 2B, the then Minister for Local Government said:

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[23] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381.

[24] *Woollahra Municipal Council v Minister for Local Government* (2016) 218 LGERA 65, at [207], AB*

[25] See by analogy *SZBEL v Minister for Immigration and Multicultural Affairs* (2006) 228 CLR 152 at 163 [35].

*"However, as a safeguard, the Act will be changed to allow the Minister to require an inquiry to be held by the Boundaries Commission if I consider the circumstances so warrant.* ***There will be no significant change to the process of dealing with an amalgamation process that does not have the support of all councils affected.*** *There will continue to be a statutory requirement for an* ***inquiry*** *which must be open to the public....*

*Where a proposal that does not have the support of all affected councils is referred to the director-general instead of the Boundaries Commission, the director-general's report* ***of the inquiry into the proposal*** *must be referred to the Boundaries Commission for review before being submitted to the Minister for decision. Again, I stress that it is the policy of this Government to leave the final decision on amalgamation to the councils involved. No council will be amalgamated without its consent."* (Emphasis added)

28. It is clear from the scheme of the Act that where one of the affected councils does not consent to the proposal to amalgamate that there must be 'an inquiry' by the Minister in the first instance (either by, relevantly here, an authorised delegate or by direct referral to the Boundaries Commission) and, if the first instance reference was not to the Boundaries Commission, a further review by the Boundaries Commission of the examination and report of that delegate. Given the mischief to which Part 2B was directed, namely streamlining amalgamation by consent and safeguarding councils where there was not consent by all, the rigour of the examination and report of the proposal was intended to be significant and to provide the foundation for a further review by the independent Boundaries Commission. The need for such rigour to preserve the integrity of the local government system created by the Act applies *a fortiori* where there is some dissent amongst councils who are to be forced together.

29. The obligation on the Boundaries Commission is to carry out an evaluative assessment of the Departmental Chief Executive's report. This makes its statutory function vulnerable to and dependent on the task of examination and inquiry undertaken by the Delegate. The construction adopted by the Court below, which would stultify the rigour of the scope of the Delegate's examination and report, also stultifies the rigour of the Boundaries Commission review which the legislation

intends to be a safeguard on preventing the streamlined mechanisms in Part 2B being used to by-pass the other protections in the Act accompanying amalgamations of local councils (e.g. s 263 of the Act). The use of the words "examine and report" in connection with the function required by s 218F(1) and in distinction to the words "review and comment" used in s 218F(6) therefore suggests an intention on the part of the legislature that something more than a mere review or evaluative assessment of the proposal is required by the Departmental Chief Executive (or, if applicable, his or her delegate) in order that he or she exercises fully the statutory function under s 218F(1).

10 30. Further, the content of the duty to hold an "inquiry" imposed by s 263 of the Act, as understood by the Court of Appeal in *Ku-ring-gai,* should be preferred over the meaning given to that term by the Court of Appeal below. In *Ku-ring-gai*, the Court of Appeal found that access to the material underlying the KPMG analysis was necessary for public participation in the public inquiry to be meaningful.[26] As this material was at the heart of the financial aspects of the merger, the obligation to "hold an inquiry" extended to providing access to that material to the public so that they could meaningfully engage with it.[27] In this connection, it is important to observe that subsection 263(2A) imposes an obligation to "hold an inquiry *for the purposes of exercising its functions* in relation to a proposal", where the function is
20 to "examine and report". As such, the conduct of the inquiry held is linked to and informed by what must be examined. Without providing access to the underlying KPMG analysis and thereby permitting a meaningful engagement by the public with that analysis, the inquiry was impermissibly divorced from the Delegate's functions in relation to the Merger Proposal.

31. It is significant that the Act in this case imposes a positive duty to inquire on the Delegate in contrast to other legislative regimes which involve a more passive evaluation function, even in the context of an inquisitorial setting.[28] The obligation on the Delegate to have inquired into and examined the assertions of financial

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[26] *Ku-ring-gai*, at [100], per Basten JA.

[27] *Ku-ring-gai*, at [126], per Macfarlan JA.

[28] *Minister for Immigration and Citizenship v SZIAI* (2009) 259 ALR 429.

savings on the face of the Merger Proposal by reference to the obvious and available primary materials in the KPMG long form analysis applies a fortiori in this statutory scheme.

**Part VI: Estimate of time for oral argument**

32. Randwick estimates that, if leave is granted, 15 minutes will be required for the presentation of its oral argument.

Dated: 23 June 2017

10 Ian Davidson

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