IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S141of 2017

BETWEEN:

WOOLLAHRA MUNICIPAL COUNCIL
Applicant

and

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

LOCAL GOVERNMENT BOUNDARIES COMMISSION
Fourth Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: Certification

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

Part II: Issues Arising

2. There are three issues arising in the appeal:
3. **Ground 1:** in carrying out his function pursuant to s 263 of the *Local Government Act 1993* (**Act**) of examining and reporting on the proposal made by First Respondent (**Minister**) to amalgamate the local government areas of Randwick, Waverley and Woollahra (**Proposal**), was the Second Respondent (**Delegate**) permitted to receive information outside an inquiry he was required to hold *"for the purpose of exercising* [his] *functions"* in accordance with s 263(2A)? **Answer: Yes**
4. **Ground 2:** did the Delegate fail to examine the Proposal because he did not have KPMG's internal workings and modelling underpinning its predicted savings that could arise from the Proposal, as referred to in a document published by the Minister? **Answer: No**
5. **Ground 3:** was the Delegate required, pursuant to s 263(3)(a), to consider the financial advantages and disadvantages of the proposal on the residents and ratepayers of the areas

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concerned, grouped by reference to the existing areas of Randwick, Waverley and Woollahra?

Answer: No, but in any event he did so.

Part III: Notice under s 78B of the *Judiciary Act*

6. It is certified that notice is not required under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

7. The relevant facts are summarised by the Primary Judge at [1]-[8] (**AB****)(general), [75]-[82] (**AB****) (conduct of the inquiry) and [115]-[139] (**AB****) (examination and report), which were not disturbed by the Court of Appeal and are not the subject of any dispute in this Court. The pertinent facts are summarised below.

10 8. On 6 January 2016, the Minister made a proposal under s 218E of the Act for the amalgamation of the local government areas of Randwick, Waverley and Woollahra (**Proposal**). The Proposal was contained in a document titled *"Merger Proposal, Randwick City Council, Waverley Council, Woollahra Municipal Council"* (**Proposal Document**) (**AB****). The Proposal Document set out the benefits associated with the proposal and referred to analysis by KPMG which showed that the new council had *"the potential to generate…more than $124 million in net savings in 20 years"* (**AB****). The references in the Proposal Document to KPMG's analysis are the subject of appeal grounds 2 and 3.

9. On 6 January 2016, the Minister referred the Proposal to the Third Respondent (**Departmental Chief Executive**) (**AB****) for examination and report, who in turn delegated
20 his functions to the Delegate (**AB****).

10. Various documents associated with the Proposal, the Proposal Document and KPMG's analysis, were made publicly available (PJ [117]; **AB****):

    a. a document prepared by KPMG entitled *"Local Government Reform Merger Impacts and Analysis"* (**AB****), which summarised the types of financial savings that could be achieved from a range of merger proposals that had been made by the Minister, including the Proposal;

    b. a document prepared by KPMG entitled *"Outline of Financial Modelling Assumptions of Local Government Merger Proposals – Technical Paper"* (**Technical Paper**) (**AB****), which provided a detailed outline of the assumptions underpinning KPMG's analysis; and

30 c. a document entitled *"List of Council Data Sources used by KPMG"* (**AB****) and a spreadsheet summarising outputs from KPMG's modelling (**AB****).

11. The primary judge found that the Delegate did not have KPMG's modelling and analysis (PJ [248]; **AB****).

12. As part of his examination of the Proposal, the Delegate met with representatives from Randwick and Waverley Council (who supported the Proposal: see PJ [3]; **AB****) on 12 January 2016 (**AB****) and with representatives of the Appellant on 18 January 2016 (**AB****). Tellingly, the Appellant has never suggested that these meetings were inappropriate, even though they were not part of the "inquiry" held by the Delegate.

13. On 14 January 2016, the Delegate attended a "delegate briefing", co-ordinated by the Department of Premier and Cabinet, held for the various delegates of the Departmental Chief Executive appointed to examine and report on different proposals for amalgamation of local government areas throughout NSW (PJ [120]; **AB****). At this briefing, KPMG gave a presentation entitled *"Overview of assumptions underpinning financial modelling"* (**KPMG Presentation**) (**AB****). This presentation was made with reference to a proposal to amalgamate Pittwater Council with part of Warringah Council and largely summarised publicly available information (see **AB****). This presentation is the subject of appeal ground 1. Despite the wording of ground 1, the Appellant now accepts that this meeting was not "secret", although it was not open to the public (AS [14]).

14. Following the giving of reasonable public notice in accordance with s 263(2B) of the Act, the Delegate held the inquiry in Rose Bay on 4 February 2016 in two sessions: at 1pm and 7pm. The transcripts of those inquiries are at **AB**** and **AB****. 192 people attended the 1pm session (see list of attendees at **AB****) and 165 people attended the 7pm session (see list of attendees at **AB****). A total of 140 speakers registered to speak at the two sessions (PJ [76], **AB****). A range of different submissions, both oral and written, was made to the Delegate, with members of the public expressing their opinions on the Proposal, including by reference to the diverse range of factors listed for consideration in s 263(3) of the Act. During the 1pm session, the Mayor of Randwick made oral submissions as to why the Proposal was sensible, by reference to the factors in s 263(3). The Mayor of Randwick emphasised that while Randwick supported KPMG's forecast savings, it considered them to be understated as Randwick's own financial modelling (undertaken by SGS Economics), which was *"independently analysed, audited and verified"*, estimated savings to the value of $235 million (**AB****).

15. The Mayor of the Appellant spoke at the 7pm session. Relevantly, the Mayor did not attack the validity of KPMG's forecasted benefits *per se*; rather, she questioned how those benefits compared to the rates ratepayers of the Appellant would have to pay (**AB****).

16. Subsequently, 449 separate written submissions were received by the Delegate (**AB****). Randwick made submissions in support of the Proposal, referring to SGS Economic's

analysis (**AB****; analysis at **AB****). The Appellant's submissions to the Delegate referred to KPMG's analysis, but did not suggest that the analysis was not well-founded or that the Appellant did not have sufficient information to evaluate the analysis, although it noted that members of the public had made that complaint (**AB****).

17. In March 2016, the Delegate completed his examination and provided his report (**Delegate's Report**) to the Boundaries Commission for review and comment (**AB****). The Delegate's Report recommended that the Proposal be implemented (**AB****). On 22 April 2016, the Boundaries Commission provided its comments on the Delegate's Report to the Minister, commenting that the Delegate had undertaken the process required by s 263, including considering all the factors in s 263(3) (**AB****).

18. The Minister has yet to make a decision to recommend the implementation of the Proposal or decline to do so, in accordance with ss 218F(7) and (8).

Part V: Applicable Provisions

19. The Minister accepts the Appellant's list of applicable provisions, save that:

    a. schedule 2 of the Act is not applicable;

    b. sections 438U and 745 of the Act should be included; and

    c. chapter 9 and s 740 of the *Local Government Act 1993* (NSW), as enacted, should be included.

Part VI: Argument

Legislation applicable to the appeal

20. The legislative scheme applicable to the three grounds of appeal was comprehensively outlined by the primary judge (PJ [9]-[32]; **AB****). For present purposes, the following elements are emphasised.

21. The Governor's function of amalgamating local government areas under s 218A of the Act can only be exercised after a "proposal" for the exercise of that function has been dealt with under Division 2B of Part 1 of Chapter 9, in accordance with s 218D. The primary judge (PJ [160]; **AB****) and the Court of Appeal (CA [52]; **AB****) held that the "proposal" was no more than the proposal for the exercise of the Governor's function – to amalgamate one or more local government areas; the "proposal" referred to in the Act does not encompass all matters addressed in the Proposal Document containing the Proposal, such as references to KPMG's forecasted benefits associated with the Proposal. This finding is not challenged on appeal.

22. In accordance with s 218E, such a proposal may be made by the Minister, a council affected by the proposal or a sufficient number of electors.

23. On the making or receiving of a proposal, the Minister must refer it for *"examination and report to the Boundaries Commission or the Departmental Chief Executive"* in accordance with s 218F(1). There are three points to note about this subsection. **First**, it is the proposal that is referred for examination and report, and not the assertions made in any supporting document put forward by the proposer (see CA [25]; **AB****). **Secondly**, other than referring the proposal, the Act does not require the Minister to provide the Boundaries Commission or the Departmental Chief Executive (or his delegate) with any information whatsoever concerning the proposal, even where the proposal is made by the Minister. Nor does the Act require other proposers to provide any such information concerning their proposals. **Thirdly**, the Act does not require a proposal made by the Minister to be dealt with under Division 2B differently to proposals made by a council or electors, save that an extra step is required where a joint amalgamation proposal is made by two or more councils, to seek the views of electors, in accordance with s 218F(3). Thus, a proposal by the Minister does not enjoy a privileged or special position under the Act.

24. The function of the Departmental Chief Executive is to examine and report on the proposal referred by the Minister, in accordance with ss 218F(1) and 263(1), which applies pursuant to s 218F(2). In considering the proposal, the Departmental Chief Executive is required to have regard to the factors listed in s 263(3). Otherwise, the Act does not prescribe how the examination and report is to be conducted. There is no requirement, for example, that the report contain a recommendation for or against the implementation of the proposal. Thus, the Departmental Chief Executive could furnish a report which is neutral as to whether the proposal should be implemented, or which concludes that the information available was insufficient in some respect (see CA [107]; **AB****).

25. There is no requirement that the Departmental Chief Executive's report be made public, although it is clear from s 218F(7) that the report must be provided to the Minister (and in certain circumstances, to the Boundaries Commission for review and comment). Thus, the report is made for the benefit of the Minister, in considering whether to make a recommendation under s 218F(7) (with or without modifications) or to decline to make a recommendation under s 218F(8).

26. In certain circumstances, in performing the functions of examining and reporting on a proposal, the Departmental Chief Executive is either permitted or required to hold an inquiry, in accordance with ss 263(2) and (2A). In the current case, the Delegate was required by s 263(2A) to hold an inquiry *"for the purpose of exercising* [his] *functions"*, because the proposal was an amalgamation proposal. The Court of Appeal rightly held that the Departmental

Chief Executive was required to hold an inquiry in aid of his examination and report function rather than to undertake the whole of the examination and report function by inquiry, as the Appellant contended (CA [74]; **AB****).

27. For the most part, the Act is silent as to how such an inquiry is to be conducted, mandating only that:
    a. reasonable public notice must be given of the holding of the inquiry (s 263(2B));
    b. members of the public must be allowed to attend the inquiry (s 263(5)); and
    c. persons are not entitled to be represented by a lawyer or other person acting for a fee or reward at the inquiry (s 264).

10 28. The Act does not require when such an inquiry is to be held – whether at the start of the examination or towards the end, or whether before or after any written submissions are received) (CA [79]; **AB****). Importantly, the person holding the inquiry is not given any powers of compulsion, save that he or she may direct a council, councillor or the general manager of a council to provide documents and information concerning the council (s 429). The grant of this limited power to the Departmental Chief Executive is an indication that Parliament did not consider it necessary, for the purpose of exercising the function, for the Departmental Chief Executive to have power to call for documents from other persons, such as the Minister, the NSW Government or any advisor to the Minister or NSW Government. This is to be contrasted with the powers conferred on an official charged with carrying out a
20 "Public Inquiry" held pursuant s 438U of the Act, which is required before a local government area can be dissolved under s 212 of the Act (see the definition of "Public Inquiry"). The lack of such powers speaks against the construction for which the Appellant contends, which assumes that the Departmental Chief Executive (or his Delegate) must obtain information he has no power to acquire.

29. The primary judge (PJ [111]; **AB****) and Court of Appeal (CA [79]-[80]; **AB****) held that, as the Act was silent as to the manner in which the inquiry was to be conducted, it was left to the discretion of the Delegate (applying *Bushell v Environment Secretary* [1981] AC 75).

30. Sections 263, 264 and 265 apply to an examination of a proposal by the Departmental Chief Executive, in accordance with s 218F(2). Subsection 263(1) requires the Departmental Chief
30 Executive to examine and report on *"any matter with respect to the boundaries of areas and the areas of operation of county councils which may be referred to the Minister"*, being the Proposal (see *Botany Bay City Council v Minister for Local Government & Ors* [2016] NSWCA 74 at [40]).

31. The Appellant's summary of the legislative history (AS [41]-[44]) is incomplete in three respects. **First**, the inquiry regime introduced into the *Local Government Act 1919* (**Old Act**)

by the *Local Government (Boundaries Commission) Amendment Act 1963* (NSW) was relevantly different to the regime in the Act. In particular, the function of the Boundaries Commission upon referral of a proposal by the Minister was to *"hold an inquiry into and report upon"* the proposal (see ss 15J(1) and 19(4)). This is to be contrasted with the obligation of the Departmental Chief Executive to *"examine and report"* (ss 218F(1) and 263(1)) and the subsidiary obligation in particular circumstances to hold an inquiry for the *"purpose"* of the *"examination and report"* (s 263(2A)). The difference in language between the Old Act and Act supports the Minister's construction.

32. **Secondly**, the changes made when the current Act was introduced in 1993 also speak against the Appellant's construction. The Act did not yet include Div 2A of Part 2 of Chapter 9, but Division 2 dealt with the constitution of areas, alteration of boundaries and dissolution of areas. As under Division 2A, before a new area could be constituted or the boundaries of an area altered, a proposal was required to be made and dealt with under Division 2. Such proposals were referred to the Boundaries Commission for *"examination and report"* (s 218(1)). There was no requirement for the Boundaries Commission to hold an inquiry, irrespective of the nature of the proposal, although the Boundaries Commission was permitted to hold an inquiry *"for the purpose of exercising its functions"* with the approval of the Minister (s 263(2)). Any such inquiry was to be accessible to the public (s 263(5)). In the Second Reading Speech it was explained that:[1]

> *"If the Minister decides to proceed with the proposal he must refer it to the Boundaries Commission or, if it is only a minor variation, to the Director General of the Department of Local Government and Cooperatives. The Boundaries Commission must examine and report on any proposal put to it by the Minister. The Boundaries Commission may hold an inquiry, which must be open to the public. The Commission may also conduct a survey or poll to assist in determining the attitude of affected residents and ratepayers."*

33. The new form given to the statutory language when it was re-enacted in the Act, and the Second Reading Speech, confirm that the right or duty to conduct an inquiry or a survey or poll was intended to be subsidiary to the "examination and report" function.

34. Another significant change made in 1993 when the Act was enacted was the inclusion of the power to dissolve an area under s 212(1). In accordance with s 212(2), that power could only be exercised after a *"Public Inquiry"* had been held by a person appointed as a commissioner

[1] NSW, Legislative Assembly, *Parliamentary Debates*, 27 November 1992, p 10412.

for that purpose under s 740 (as opposed to the Boundaries Commission). This change was explained in the Second Reading Speech as follows:[2]

> *"Under the 1919 Act the Government does not have the power to create completely new Local Government areas from the unincorporated area in the far west of the State. Similarly it does not have the power to dissolve existing Local Government areas. Although there are no current proposals to either create new or dissolve existing areas, it is considered appropriate, for completeness, for the State to have these powers. A protection will be provided to residents and ratepayers of any area proposed to be dissolved by providing that the whole or part of an area may not be dissolved until after a public inquiry has been held and the Governor has considered the report made as a consequence of the inquiry. I emphasise that this Government has no intention of invoking the dissolution provisions."*

35. The public inquiry required for proposals to dissolve an area came with many of the features of a Royal Commission (s 740 (now s 438U)). Amongst other things, the person appointed as a commissioner was conferred with the powers, authorities, protections and immunities that are conferred on a Royal Commissioner.

36. **Thirdly**, the *Local Government Amendment (Amalgamations and Boundary Changes) Act 1999* (NSW) introduced Div 2A of Ch 9 into the Act, including the express power to amalgamate in s 218A. As the explanatory note to the Bill stated:

> *"The amalgamation of local government areas and the alteration of local government boundaries are currently dealt with in Division 1 and 2 of Part 1 of Chapter 9 of the principal Act. Amalgamations are not dealt with expressly, but are achievable by a two-step process of dissolving existing areas (under section 212) and constituting new areas (under section 204). The first step of the process involves a public inquiry (section 212(2). The second step of the process involves the making of a proposal (section 215), public consultation (sections 216 and 217) and examination and report by the Boundaries Commission or the Director-General of the Department of Local Government (section 218). The amendments made by the proposed Act aim to simplify these procedures".*

37. The evident purpose of Div 2A was to streamline the process of amalgamation by removing the "first step" of holding a formal public inquiry, with the features of a Royal Commission, and moving the whole process of assessment of an amalgamation proposal into the "examination and report" function of the Boundaries Commission, where the inquiry, which was not to have the features of a Royal Commission, had always been identified as being subsidiary to ("for the purposes of") the exercise of the examination and report function.

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[2] NSW, Legislative Assembly, *Parliamentary Debates*, 27 November 1992, p 10413.

Ground 1: Delegate not permitted to hear evidence in secret

38. The Appellant's arguments in favour of this ground rest on a false premise: that once the Departmental Chief Executive is required (by s 263(2A)) to hold an inquiry *"for the purpose of exercising its functions"* (being to examine and report on the proposal), those functions may **only** be exercised by way of inquiry. This premise was made plain by the Appellant before the primary judge (PJ [89]; **AB****), the Court of Appeal (CA [64]; **AB****) and in its submissions seeking special leave to appeal (SLA [26]), but is left unstated in its submissions on appeal. The Appellant's arguments are flawed for seven reasons.

39. **First**, the principal statutory obligation of the Departmental Chief Executive (or, in this case, the Delegate) was to *"examine and report on any matter with respect to the boundaries of areas and the areas of operation of county councils which may be referred to it by the Minister"*, namely, the proposal to amalgamate, in accordance with s 263(1) (see *Botany Bay City Council v Minister for Local Government & Ors* (2014) 214 LGERA 173 at [40]). It is common ground that the Delegate was required to hold an inquiry *"for the purpose of exercising [his] functions in relation to a proposal for the amalgamation of two or more areas that has been referred ... in accordance with section 218F"*. The natural meaning of those emphasised words supports the Court of Appeal's finding that they required the inquiry to be held *"in aid of"*, or as an adjunct to, the examination and report (CA [74]; **AB****), rather than that the examination must be conducted by way of inquiry, and not otherwise. If the legislature had intended that whenever an inquiry was held, the whole of the Departmental Chief Executive's examination was required to take place "by means of an inquiry", that could readily have been expressed in ss 263(2) and (2A) (as it was under the Old Act).

40. **Secondly**, another textual consideration fatal to the appellant's construction is that the language in s 263(2A) on which the appellant relies is echoed in s 218F(3), which provides that *"for the purpose of the examination a joint proposal of 2 or more councils for the amalgamation of two or more areas...the Boundaries Commission...must..."* seek the views of electors by means of advertised public meetings, invitations for public submissions and postal surveys or opinion polls, or by means of formal polls (emphasis added). The same textual analysis that the appellant asks this Court to accept in relation to s 263(2A) would compel the result that, where s 218F(3) applied, the whole of the examination would need to be conducted by seeking the views of electors by the means specified in s 218F(3) – that is plainly unworkable, especially given that s 263(2A) applies whenever s 218F(3) applies (as an amalgamation process is under examination).

41. Similarly, the phrase *"for the purpose of exercising its functions"* is used in other parts of the Act in relation to powers which plainly could not be the only means by which the ultimate function could be completely exercised – in particular, ss 356(1) and 431(1). The Appellant's restrictive construction could not operate in respect of those sections.

42. **Thirdly**, the Appellant's construction is impracticable. It would require every part of the Delegate's examination (including reading background documents, such as the Proposal Document, and submissions, and considering the issues) and reporting (including drafting and revising his report) to be undertaken as part of the inquiry, in public. The Court would not give the Act such a tedious and inefficient operation. Further, there is no textual reason why the construction for which the appellant contends would apply to the Delegate's "examination" function, but not his "reporting" function.

43. **Fourthly**, s 265 allows the Departmental Chief Executive to conduct an opinion survey or poll of the residents and ratepayers for the purpose of considering s 263(3)(d), in accordance with s 265. Plainly, a survey or poll of all residents and ratepayers could not take place as part of the inquiry. The Departmental Chief Executive's power under s 265 is not excluded in circumstances where an inquiry is permitted. Thus, the Act contemplates that the Departmental Chief Executive's examination may take place outside the inquiry.

44. **Fifthly**, as was explained above at [36] to [37], the amendments to the Act which introduced s 263(2A) were made to simplify the procedure for amalgamating local government areas, including by removing the requirement for a formal "public inquiry" with the features of a Royal Commission. The Appellant's construction would thwart that purpose.

45. **Sixthly**, the primary judge (PJ [113]; **AB****) and Court of Appeal (CA [85]-[87]; **AB****) were right to find that the Appellant's reliance on *Bread Manufacturers of New South Wales v Evans* (1994) 180 CLR 404 was misplaced. The reasoning of the majority in *Bread Manufacturers* was to the effect that the Prices Commission was precluded from obtaining information in private where an inquiry was held <u>because</u> investigative powers were conferred on the Commission *"for the purpose of the inquiry"* (see 413 (Gibbs CJ), 434 (Mason and Wilson JJ) and 444 (Aickin J)). The Departmental Chief Executive is given no powers for the purpose of the inquiry under the Act. As was made plain by Gibbs CJ at 414, the conclusions his Honour reached depended on consideration of the particular provisions of the *Prices Regulation Act 1943* (NSW). The same construction is not attracted by the substantially different provisions of the Act under consideration in this appeal.

46. **Seventhly**, as the Court of Appeal observed, the diversity of mandatory factors specified in s 263(3) indicates that it is unlikely that Parliament intended that the examination be conducted by means of inquiry only (CA [78]; **AB****).

47. The purpose of the holding of the inquiry is to assist the Departmental Chief Executive in performing his function, and to enable the public to express its views concerning the proposal. That purpose is fulfilled by the construction adopted by the Primary Judge and Court of Appeal. In point of fact, the manner in which the inquiry was held enabled the Delegate to hear the opinions of a large section of the public concerning the Proposal, including by reference to the factors in s 263(3). That inquiry was plainly one which was held for the purpose of the Delegate's examination of the Proposal.

48. The Appellant asserts that the proper construction of the Act requires an inquiry to be *"one that members of the public are allowed to attend where the basis of the Minister's opinions underlying the making of the proposal are ventilated and explored in a public setting"* (AS [31]). With respect, that construction finds no support in the Act, which requires the inquiry to be held for the purpose of the Departmental Chief Executive exercising his functions of examination and report of the Proposal, as distinct from the Proposal Document, and which may not involve a Minister's proposal, or a proposal on which the Minister has "opinions", at all. As the Primary Judge correctly held, the Minister's views in relation to the Proposal have no statutory significance, beyond being another submission for the Delegate to consider (PJ [160]-[162]; **AB****).

49. The Appellant submits that an inquiry under s 263(2A) must be distinct from any "advertised public meeting" held under s 218F(3). As was explained above, the latter subsection presents difficulties for the Appellant's construction. Nevertheless, the Primary Judge (PJ [111]; **AB****) and Court of Appeal (CA [79]-[80]; **AB****) were correct to hold that, because the Act is largely silent as to the manner in which the inquiry is to be held, that matter is left to the discretion of the person charged with holding the inquiry. Beazley P cited Lord Diplock's warning against 'overjudicialising' such an inquiry (CA [80]; **AB****). As the Primary Judge observed (PJ [108]; **AB****), the different statutory language in those subsections does not mean that an advertised public meeting and inquiry must be held according to different procedures or that an inquiry under s 263 could not be held in the same manner as an advertised public meeting might be held. That is a matter left to the discretion of the Delegate. The ordinary meaning of "inquiry" (something in the nature of "looking into") comfortably extends to a public meeting at which the views of the public are received and recorded although it is possible to conduct an inquiry in other ways.

50. The Appellant also asserts that the KPMG Presentation received by the Delegate in *"private"* was *"centrally relevant"* to an assessment of the merit of the Proposal and was never publicly disclosed (AS [31]). The Appellant maintains that even if its construction of the Act is not accepted, the Delegate was required, as a matter of construction rather than based upon principles of natural justice, to disclose the gist of the KPMG Presentation to the public (AS [45]). At the outset, it should be observed that the Appellant's contention that it was denied procedural fairness concerning KPMG's analysis was rejected by the primary judge (PJ [241]; **AB****) and was not the subject of its appeal to the Court of Appeal.

51. In any event, the evidence does not support the Appellant's contention that the presentation was *"centrally relevant"* to assessing the merits of the Proposal and was never publicly disclosed. The KPMG Presentation gave an overview of the assumptions underpinning the financial modelling in relation to a proposal to amalgamate Pittwater Council with part of Warringah Council (**AB****). The majority of the content of the presentation was based upon publicly available information, coming from the relevant proposal document and documents referred to above at [10]. An aide memoire was provided to the Primary Judge with highlighting to demonstrate what information was publicly available based upon that presentation (**AB****)(the effect of the highlighting was explained at **AB****). No challenge was made to the correctness of that aide memoire in either Court below.

52. The small amount of information contained in the KPMG Presentation that was not publicly available was either:

    a. concerned with the specific savings associated with the Pittwater and Warringah proposal (eg see **AB****);

    b. obvious commentary ascertainable from that proposal document, such as the meaning of the "Payback Period" (**AB****); or

    c. could not be said to be "centrally relevant" to the assessment of the merits of the proposal to amalgamate Woollahra with Waverley and Randwick.

53. Accordingly, contrary to the Appellant's assumption, the "gist" of the information had already been disclosed to the public (cf AS [45]).

Ground 2:Alleged failure to examine KPMG's Analysis

54. Despite the fact that the Appellant did not attack the reliability of KPMG's forecasted benefits in its submissions to the Delegate, it now criticises him for failing to obtain sufficient information to be able to "closely scrutinise" KPMG's conclusions expressed in the Proposal Document. In essence, it appears that the Appellant contends that to properly scrutinise those conclusions, the Delegate required:

a. a particular document, which was referred to in a footnote of the Proposal Document, *"NSW Government (2015), Local Government Reform: Merger Impacts and Analysis, December"*(**Long Form Document**), it being submitted by the Appellant (not having being submitted to either Court below) that this Court should infer that the Long Form Document contained KPMG's internal workings and calculations underpinning the conclusions expressed in the Proposal Document (AS [13]); or

b. other material that contained KPMG's internal working and calculations.

55. The Primary Judge held, consistently with the words of the Act, that the Delegate was required to examine the Proposal, and that he was not obliged to "examine" or "scrutinise, test and interrogate" the claims made by the Minister and KPMG in the Proposal Document (PJ [159]-[162]; **AB****). The Primary Judge rightly emphasised that the assertions made by the Minister and KPMG in the Proposal Document *"stood in no privileged position compared to other submissions"* (PJ [161]; **AB****). The Court of Appeal accepted the Primary Judge's analysis (CA [48] **AB****, [106]-[110] **AB****).

56. This ground of appeal relies upon 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. In summary, Basten JA held that:

a. where a proposal is made by the Minister, the purpose of the examination *"requires that it extend to the basis for any opinions underlying the proposal"* ([99]);

b. a critical element of the Minister's reasoning in favour of the proposal, as revealed in the proposal document, was the financial advantage expected to accrue, and a footnote to the summary of the financial benefits identified KPMG's Long Form Document which had not been provided to the delegate or the public ([100]); and

c. without the Long Form Document, the delegate constructively failed to examine the proposal ([102]).

57. MacFarlan JA agreed with Basten JA (although he gave some of his own reasons which do not appear to be entirely consistent with that agreement, in that his Honour appeared to accept that there were circumstances in which the delegate could have fulfilled his function without the materials (see [120])). Justice Basten's judgment is directly inconsistent with, but made no mention of, the relevant passages from the earlier, unanimous Court of Appeal judgment in *Woollahra,* in particular, at CA [106]-[110] (**AB****), where the Appellant's argument that the Delegate *"made no examination of the grounds or assumptions that underlay the KPMG or SGS reports"* was rejected (see CA [91]; **AB****).

58. Sackville AJA dissented in *Ku-ring-gai*, observing that ([289]-[290]):

"In determining whether the Delegate discharged his statutory functions, the question is not whether the Delegate correctly interpreted KPMG's analysis or whether the analysis was sound. Nor can this Court be concerned with the merits of the Delegate's approach. The only issue for present purposes is whether the Delegate, in considering the Merger Proposal, had regard to its financial advantages or disadvantages to the residents and ratepayers of Hornsby and Ku-ring-gai. Since the Delegate formed his own assessment of the financial advantages or disadvantages of the Merger Proposal, he complied with the obligation imposed by s 263(3)(a) of the LG Act.

It was open to the Delegate to request the Chief Executive or the Minister to produce the KPMG Documents so that the Delegate himself and interested parties could scrutinise the analysis. But the Delegate had no power to compel production, even if the KPMG Documents had not been the subject of a claim for public interest immunity. In my view, the Delegate was not obliged, in order to discharge his statutory functions, to seek production of the KPMG Documents. Nor was he obliged to report that he was unable to fulfil his statutory responsibilities unless the KPMG Documents were made available to him and to Ku-ring-gai."

59. The reasoning of the majority in *Ku-ring-gai* is incorrect, and this ground of appeal must fail, for the following reasons.

60. **First**, the reasoning of the majority in *Ku-ring-gai* seems to depend on the Long Form Document meeting some assumed criterion or norm of criticality or essentiality. The reasoning seems to be that where an undisclosed document (on which an opinion or submission made to the Delegate is based) meets that criterion, then a valid examination and report cannot be carried out unless the document is obtained by or provided to the Delegate and made public. But there is no basis in the statute for such a criterion and therefore there is no way of better defining its content. Its application in future cases is entirely mysterious.

61. **Secondly**, the reasoning that the Delegate failed to examine, due to the absence of critical or essential information, assumes that whether information meets the criterion is something that can be ascertained in advance of the conclusion of the examination. However, the nature of the statutory task is such that what is appropriately regarded as important (or even critical or essential) will evolve as further information is received. It could not be known, in advance of the examination, what factors in s 263(3) would become critical or essential. For example, if every single resident and ratepayer opposed the proposal, s 263(3)(d) might become the most important factor, regardless of the financial benefits that might be attained by the proposal.

62. **Thirdly**, the Primary Judge (PJ [160]; **AB****) and Court of Appeal (CA [48] **AB****; [106] **AB****) correctly held that the Delegate's function was to examine and report on the Proposal by reference to the factors listed in s 263(3) and did not require him to test the validity of

KPMG's assumptions (cf AS [60]). That is not to say that the information contained in the Proposal Document, including KPMG's predicted savings, was not relevant to the carrying out of Delegate's function. It was relevant in the same way that other information (including opinions and submissions) was relevant. The Delegate received 449 written submissions and heard oral submissions from hundreds of people about a range of matters. Many of those submissions made assertions which are matters of opinion without disclosing the basis for the opinion or the full reasoning process. For example, the Mayor of the Appellant stated during the inquiry, in addressing the factor in s 263(3)(c):

> *"Woollahra has its own identity. What defines us is our beautiful harbour side interface, our attractive streetscapes, our heritage items, our world class heritage precincts of Paddington and Watsons Bay and our 40,000 trees, a veritable state forest in a 12.5 square kilometre footprint."* (**AB****)

63. It cannot sensibly be suggested that the Delegate was required to scrutinise each of the opinions or assertions put before him for the purpose of conducting his examination (and the Appellant did not suggest he was so required: PJ [162]; **AB****). The rules of evidence, including in relation to exposing the basis of opinions (*Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588), did not apply to the Delegate. Further, the predictions in the Proposal Document had no statutory significance other than as submissions (PJ [161]-[162]; **AB****).

64. **Fourthly**, as has been outlined above at paragraph 23, the Act does not treat amalgamation proposals made by the Minister any differently to such proposals made by other persons (cf *Ku-ring-gai* at [99]). The factors in section 263(3) focus upon the Proposal, and they are utterly neutral as to whether that proposal emanates from the Minister or another person. Thus, the reasoning of the majority in *Ku-ring-gai* rests on a false premise.

65. **Fifthly**, the primary judge found that the Delegate did not have KPMG's modelling and analysis (PJ [248]; **AB****) and that finding is not challenged on appeal. Further, the evidence disclosed that the Government was not provided with KPMG's modelling, which remained KPMG's property: **AB****.

66. **Sixthly**, there was no statutory obligation upon the Minister to provide any information whatsoever to the Delegate, and the Delegate had no power to require the Minister or KPMG to provide any information to him. The limited powers the Departmental Chief Executive had to obtain information did not enable it to obtain that information (s 429). Parliament cannot be taken to have intended that the success or failure of the function of the Departmental Chief Executive (or his Delegate) could depend upon the voluntary provision of information by others.

67. **Seventhly**, even assuming that there was a duty on the Minister, or the NSW Government, to provide documents to the Delegate and the public that are essential to the examination (whatever that might mean), the evidence as a whole does not support a finding that the Long Form Document contained the modelling and calculations that lay behind the savings estimates in the Proposal Document.[3] In any event, the Minister's claim for public interest immunity over the Long Form Document was upheld by the Primary Judge and not challenged on appeal: *Woollahra Municipal Council v Minister for Local Government* (2016) LGERA 39. In dealing with the submissions the Appellant now makes about the contents of the Long Form Document, it may be permissible for the Court to inspect the document, without waiving public interest immunity, by analogy with the authorities concerning public interest immunity: *Nicopolous v Commissioner for Corrective Services* [2004] NSWSC 562 at [76]; *Chu v Minister for Immigration and Ethnic Affairs* (1997) 78 FCR 314 at 328.

68. **Eighthly**, as the Court of Appeal rightly observed (CA [107]; **AB****), if the Delegate came to the view that he did not have enough information to come to a conclusion concerning a particular factor in s 263(3) (bearing in mind that the Act does not require a conclusion to be drawn in his report), he was at liberty to observe upon that deficiency of information in his report. The point underscores the observations of Sackville AJA concerning the dangers of trespassing into the merits of the Delegate's examination and report in *Ku-ring-gai* at [294]. The Appellant relied upon two reports from Mr Hall before the primary judge as to the reliability of KPMG's analysis in the absence of further information (**AB****). Those reports simply demonstrate the type of submissions that the Appellant could have made to the Delegate, but chose not to make.

69. **Ninthly**, a substantial amount of information was made available to the Delegate and the public concerning KPMG's analysis, as was outlined above at [10], and see **AB****. That included the assumptions upon which KPMG's analysis was based, the data sources used by KPMG and the outputs from its modelling. KPMG's proprietary Microsoft Excel model, which it used to produce those outputs, was not in the possession of the NSW Government and was not disclosed. To require the disclosure of that model would be to elevate the

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[3] The evidence indicates that the Microsoft Excel modelling that KPMG carried out using the (publicly available) assumptions and Council data sources was done "in house" at KPMG, was regarded by NSW Government as KPMG's intellectual property, and that a copy of the Microsoft Excel Workbook was not provided to the NSW Government (**AB****). Further, instructions were still being received by KPMG on which proposals were to be progressed after the Long Form Document was created: see **AB****

requirements of the Delegate's examination beyond even curial processes. It would be inappropriate to over-judicialise the Delegate's task in that way: *Bushell* at 97.

70. The Delegate's examination of the Proposal was thorough and appropriate. As is clear from the Delegate's Report, he considered the predicted savings outlined in the Proposal Document, noted the criticisms made to him concerning those predictions, and compared those predictions to alternative savings analysis undertaken by SGS Economics in 2013 and updated in 2015 to support the conclusions that *"[d]espite the different assumptions, there are clear benefits ranging from between $149 million and $235 million of the proposed merger compared with any stand-alone options"* (**AB****). This was a perfectly appropriate finding on the information that had been provided to him, particularly in circumstances where: (a) the Appellant did not challenge KPMG's analysis *per se*, but argued that the rates impact on its ratepayers would "dwarf" KPMG's predicted savings (PJ [235]; **AB****) (which argument the Delegate also addressed, as outlined in response to ground 3); and (b) the other affected councils, Waverley and Randwick claimed that while KPMG's analysis was supportable, it underestimated the savings involved. True it is that the Delegate did not come to a concluded view as to the precise amount of savings that were likely to be generated by the Proposal, or as to which of KPMG's or SGS Economics' analysis was to be preferred, but that was not a necessary element of his examination and reporting function.

Ground 3:Alleged failure to consider s 263(3)(a) factor

71. The Primary Judge found that s 263(3)(a) did not require the Delegate to consider the financial advantages of the Proposal of each of the "areas concerned" separately, and that collective consideration was sufficient (PJ [169]; **AB****). The Court of Appeal found that the subsection did require the Delegate to consider each of the "areas concerned" separately, but that the Delegate had done so (CA [119]-[124]; **AB****).

72. The Minister contends in her Notice of Contention that the Primary Judge's construction of the requirements of s 263(3)(a) was correct. The subsection provides that regard must be had to *"the financial advantages or disadvantages (including the economies or diseconomies of scale) of any relevant proposal to the residents and ratepayers of the areas concerned"*.

73. The construction adopted by the Court of Appeal, and supported by the Appellant, has textual difficulties. The Appellant focuses on the phrase "the areas concerned" to support the submission that financial advantages or disadvantages for the residents and ratepayers of each of the existing areas must be considered separately (AS [63]). However, it is notable that Parliament chose not to use the phrase "existing areas", as is used in s 263(3)(b), (c) and (f). Further, the Court of Appeal's construction requires the insertion, at least, of the words

"each of" before the phrase "areas concerned". This is made plain when one compares the subsection with the construction adopted by the Court of Appeal at [119]; **AB****.

74. The Minister submits that the phrase "the areas concerned" merely identifies the particular residents and ratepayers that are the focus of the factor. The focus of the factor is not the residents and ratepayers, grouped by the area concerned or in any other way. That is not to say that the Delegate could not have considered the residents and ratepayers by group, but that he was not required to do so.

75. The purpose and history of s 263(3)(a) supports the Minister's construction. When this factor was introduced (as part of the Act as enacted in 1993), there was no express power to amalgamate. As was explained above, the power to amalgamate under s 218A was only introduced in 1999, along with the additional factors in s 263(3)(e1)-(e5).[4] The only relevant proposals that could be referred for examination and report at the time that s 263(3)(a) was introduced were to constitute new areas (s 206) or alter the boundaries of areas (then contained in s 209). This factor is plainly not relevant to the first type of proposal (as such an area could not be an existing area, see s 204). In dealing with the latter proposal, on the construction adopted by the Court of Appeal and supported by the Appellant, the Departmental Chief Executive would have to consider the residents and ratepayers of the areas affected by the boundary alteration, by grouping them according to the area of which they are a resident or ratepayer. A far more sensible construction would allow the Departmental Chief Executive to consider the residents and ratepayers of the affected areas as a whole, with particular focus upon those residents and ratepayers who will change areas as a result of the boundary alteration (who may be from more than one area). As such, the construction of the Court of Appeal, supported by the Appellant, is impracticable when viewed in the broader context of proposals to which this factor may be relevant.

76. Even if the Minister's contention is not accepted, the Court of Appeal was correct to hold that the Delegate properly considered this factor, as is revealed from his report (**AB****), for the reasons stated (CA [120]-[124]; **AB****). In particular:

    a. he considered Woollahra Council as a stand-alone option, and Randwick and Waverley's proposal to amalgamate (**AB****);

    b. he considered the financial data for each of the areas (**AB****); and

    c. he considered the rates impact on the different areas (**AB****), and made a recommendation in relation to this for the Appellant's benefit (**AB****).

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[4] *Local Government Amendment (Amalgamations and Boundary Changes) Act 1999*, Schedule 1, clauses 8 and 10.

77. Further, it cannot be assumed that the sum total of the Delegate's consideration of this factor is all that was mentioned in the Delegate's Report. It is only if something of *"great importance"* was not mentioned in his report that it can be inferred that he failed to consider it: *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 at [58].

Randwick's Intervention

78. The Minister neither consents to nor opposes Randwick's intervention in these proceedings. However, the Minister notes that Randwick's proceedings in the Land and Environment Court of New South Wales have been commenced almost 1 year after the expiry of the 3 month time limit set by r 59.10 of the *Uniform Civil Procedure Rules (NSW) 2005*, and an application for an extension of time is strongly resisted by the Minister.

79. Randwick's submissions can be dealt with shortly. Most of the points raised by Randwick have been addressed above. The main flaw in Randwick's submissions is that they disregard the important distinction between the Proposal, which the Delegate was tasked to examine, and the Proposal Document which summarised KPMG's predicted savings. Randwick proceeds on the basis that the Proposal included all that was said in the Proposal Document (eg IS [23]), despite the unchallenged findings below (CA [52]; **AB****).

80. Further, Randwick claims that the Delegate merely adopted *"uncritically, the results of the undisclosed KPMG analysis"* (IS [20]). This is a remarkable submission, in light of the submissions Randwick made to the Delegate in support of the Proposal, including providing the analysis of SGS Economics to the Delegate. During the inquiry, the Mayor of Randwick said:

> *"[w]hile we support the findings of the government's KPMG study of $149 million over 20 years... we believe it is an underestimation of the savings. In terms of our own financial modelling which was independently analysed, audited and verified, we estimate this merger option will result in increased services to the value of $235 million"* (**AB****).

81. Randwick and Woollahra now both criticise the Delegate for making use of KPMG's savings estimates when they themselves, who were well placed to assess its reliability given their involvement in earlier economic analyses, either took no substantial issue with the estimates (in the case of Woollahra) or supported them (in the case of Randwick). One of the matters the Delegate might appropriately have taken into account in assessing the reliability of KPMG's estimates was the attitude of those participants in the process who were well-placed to challenge or question them.

82. In any event, the assertion that the Delegate simply adopted KPMG's conclusions is incorrect. The Delegate noted that the savings estimates that he had (KPMG and SGS

Economics) both showed significant financial benefits from the Proposal, despite using different assumptions (**AB****). On that basis, he concluded that there were clear financial benefits from the Proposal compared to the councils standing alone (**AB****).

83. Randwick wrongly assumes that an inquiry is only required into an amalgamation proposal where one of the affected councils does not consent (IS [28]), but that is not so: s 263(2A) requires an inquiry to be held for all amalgamation proposals. To the extent the relevant Second Reading Speech cited by Randwick (IS [27]) suggests otherwise, it is plainly addressed at an earlier form of the Bill, which was subject to later amendment (see NSW, Legislative Council, *Parliamentary Debates*, 1 July 1999, pp 1893-1902). In any event, extrinsic material cannot be used to displace the clear meaning of the text of an act: *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Certain Lloyd's Underwriters v Cross* (2012) 87 ALJR 131; 293 ALR 412 at [70]; *Alcan (NT) v Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27 at [47]. Further, Randwick wrongly asserts that the Delegate was obliged "to inquire" (IS [31]), when the Act required him to hold an inquiry (s 263(2A)).

84. For all of these reasons, the appeal should be dismissed with costs.

Part VII: Notice of Contention

85. The Minister's notice of contention is addressed above at paragraphs 72 to 75.

Part VIII: Estimated Time for Oral Argument

86. The Minister estimates that three hours will be required for the presentation of her oral argument.

Dated: 7 July 2017

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