IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY

No. S141 of 2017

BETWEEN:

WOOLLAHRA MUNICIPAL COUNCIL

Appellant

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

APPELLANT'S SUBMISSIONS

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Part I: Certification

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

Part II: Issues arising and short answers thereto

2. There are three issues in the appeal, which should be resolved as follows.

3. *First,* in carrying out an inquiry pursuant to s 263 of the *Local Government Act 1993* (the **Act**) into a proposal of the First Respondent (**Minister**) to amalgamate the Randwick, Waverley and Woollahra local government areas, was the Second Respondent (**Delegate**) permitted to receive evidence in a private briefing session with KPMG which was not disclosed to the public? **No.**

4. *Secondly,* in circumstances where the Delegate and the public were not provided with the assumptions, methodology and internal workings and calculations underpinning KPMG's conclusions as to the financial advantages of the proposed merger, upon which the Ministerial proposal was based:

   a. did the Delegate conduct an examination of the proposal in accordance with ss 218F(2) and 263(1) of the Act? **No;** and

   b. did the public meetings convened by the Delegate constitute a public "inquiry" in accordance with ss 263(2A) and 263(5) of the Act? **No.**

5. *Thirdly,* could the Delegate discharge his obligation under s 263(3)(a) of the Act to have regard to "*the financial advantages or disadvantages (including the economies or diseconomies of scale) of [the Proposal] to the residents and ratepayers of the areas concerned*" by considering the financial advantages that would accrue to the amalgamated areas, in aggregate, without having regard to the specific financial advantages or disadvantages that would accrue to the residents and ratepayers of each area? **No**. Was the obligation under s 263(3)(a) discharged? **No.**

Part III: Notice under s 78B of the *Judiciary Act 1903*

6. The appellant certifies that it has considered whether a notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and has concluded that such notice need not be given.

Part IV: Citations for decisions below

7. The judgment of the Court of Appeal is reported as *Woollahra Municipal Council v Minister for Local Government and Others* (2016) 219 LGERA 180. The judgment of the Land and Environment Court is reported as *Woollahra Municipal Council v Minister for Local Government* (2016) 218 LGERA 65.

Part V: Facts

8. On 6 January 2016, the Minister referred a series of proposals for council amalgamations made by him under s 218E(1) of the Act to the Third Respondent, the Acting Chief Executive of the Office of Local Government (**Departmental Chief Executive**), for the purpose of "*examination and report*" under s 218F(1) of the Act.

9. One such proposal was for the amalgamation of the Randwick, Waverley and Woollahra local government areas. The functions in respect of that proposal were delegated by the Departmental Chief Executive to the Delegate, Dr Lang.[1]

10. At the time of the referral of the proposal, a document signed by the Minister dated January 2016 and entitled "Merger Proposal: Randwick City Council, Waverley Council, Woollahra Municipal Council" (**proposal document**) was published on the NSW Government's Council Boundary Review website (**Website**). That document set out the Minister's case in favour of the merger proposal.[2] It referred in several places to analysis and modelling done by KPMG, which, the proposal document claimed, "*shows the proposed merger has the potential to generate a net financial saving of more than $124 million to the new council over 20 years*".[3]

11. The Delegate was required, under ss 218F(2) and 263(2A) of the Act, to hold an inquiry for the purpose of exercising his functions in relation to the proposal. Public notice of the holding of an inquiry was given by way of an advertisement published in local newspapers. The advertisement stated that a public inquiry into the proposal would be held on 4 February 2016 at Club Rose Bay, requested members of the public who wished to attend and speak at the public inquiry to register, invited

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[1] Land and Environment Court Judgment (**LEC**)[1], [115], AB*.

[2] The "Minister's Foreword" on page 2 of the proposal document said that "this document details the benefits the merger will provide to communities": AB*.

[3] LEC[116], AB *; proposal document, pp 3, 8, AB*.

submissions on the proposal from members of the public and advised readers of the advertisement to visit the Website for more information.[4]

12. The material made publicly available on the Website included the proposal document and certain other documents relating to the KPMG analysis of the proposed merger,[5] as well as information about the procedure which would be adopted at the "inquiry"[6]. The Website stated:

> *"The full KPMG report that informed the Minister's 35 merger proposals consists of:*
>
> - *Local Government Reform – Merger impact analysis*
> - *the KPMG technical report."*[7]

13. Despite this statement, the "full KPMG report", including KPMG's internal workings and calculations underpinning the conclusions it expressed in the publicly available documents, was not posted on the Website or otherwise disclosed to the Delegate or the public.[8] In particular, a document entitled "NSW Government (2015), Local Government Reform: Merger Impacts and Analysis, December" (**KPMG long form analysis**), which was cited in the proposal document in support of the merger savings asserted therein[9], was not publicly released[10] nor provided to the appellant.[11]

14. On 14 January 2016, a "delegate briefing" coordinated by the Department of Premier and Cabinet (**DPC**) took place for the various delegates appointed by the Departmental Chief Executive to examine and report on the Minister's merger proposals. The Delegate attended that briefing, at which KPMG gave a presentation entitled "Overview of assumptions underpinning financial modelling" and there was

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[4] LEC[33], AB*.

[5] LEC[117], AB*. Some of the documents, including one entitled "List of Council Data Sources used by KPMG", were only posted on the Website on 5 February 2016, after the public meeting at Club Rose Bay had taken place: see LEC[117](c).

[6] See affidavit of MRG Stewart sworn 1.4.2016 at [16], Ex "MRS-1" Tabs 13, 14; Ex 4, Tab E, AB*.

[7] See Website extract, AB*.

[8] LEC[249], AB*; cf Court of Appeal Judgment (**CA**)[83], AB*.

[9] See proposal document, p 3 (footnote 3), pp 8-9 (footnotes 7 and 9), AB*.

[10] LEC[248]-[249], AB*. Only a "short form" version of that document was publicly disclosed: see LEC[117(a)], AB*; see also *Woollahra Municipal Council v Minister for Local Government* (2016) 217 LGERA 39 at [4], [9].

[11] At a meeting between representatives of the Appellant and the Delegate on 18 January 2016, the General Manager of the Appellant requested from the Delegate a copy of the KPMG long form analysis, but this was not provided: see AB*.

a question and answer session.[12] The delegate briefing was conducted privately and was not open to the public, including the appellant. On 25 January 2016, further matters in relation to KPMG's financial analysis were discussed in a teleconference between the Delegate, other delegates to whom amalgamation proposals had been referred and representatives of the DPC.[13]

15. On 4 February 2016 the Delegate held the "inquiry" at Club Rose Bay over two sessions, one in the afternoon and one in the evening.[14] At each session, representatives of one or more of the three affected councils spoke, followed by other registered speakers, within the designated time limits.[15] The Delegate made clear at the outset of each session that he was present "*just to listen*".[16]

16. A number of speakers challenged the claims made in the proposal document as to the financial savings that would be generated by the merger and pointed to the non-availability of material which would permit KPMG's conclusions as to those savings figures to be interrogated.[17] One speaker said, for example:[18]

> *"We've heard tonight that the KPMG report that under-hems this process has not been released. How can you, how can we, properly assess the Minister's case about the economic positives as said of this proposal? How can they be tested without us having access to the material?... [T]here is, from what little we have, there is a problem there..."*

17. On 26 February 2016 the appellant lodged a written submission with the Delegate that was critical of KPMG's analysis of the financial benefits of the proposed amalgamation and referred to the appellant's concerns that there was "*no credible evidence to support the financial modelling*", that the "*[m]odelled savings [are] not properly costed*" and that there was "*no access to the KPMG modelling*".[19] Similar

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[12] LEC[120], AB*; CA[65], AB*; see also Affidavit of DM Shoebridge affirmed 15 April 2016, Annexures D, F, G, AB*.

[13] LEC[121], AB*; see also AB*.

[14] LEC[75], AB*.

[15] LEC[78]-[79], AB*.

[16] LEC[77]; see also Transcript from 1pm session at pp 3.5, 11.12; 7pm session at p 2.40, AB*.

[17] See LEC[80], AB*; CA[83], AB*; see also, in Transcript from 1pm session: speaker 8 at p 13.20, AB*; speaker 14 at p 16.30, AB*; speaker 33 at p 23.38, AB*; speaker 34 at p 24.29; speaker 57 at p 35.3, AB*; speaker 61 at p 37.25, AB*; speaker 62 at p 38.5, .33, speaker 69 at p 41.25 AB*; speaker 83 at p 52.34, AB*; and in Transcript from 7pm session: speaker 4 at p 14.29, AB*; speaker 14 at p 24.13; speaker 16 at p 25.38, AB*; speaker 28 at p 27.25.

[18] See speaker 45 at p 39.25, AB*.

[19] LEC[123], [136], AB*; see also Woollahra Council's written submission to Delegate, p 36, AB*.

concerns were expressed in the written submissions provided to the Delegate from members of the public.[20] Despite such issues being raised, the documents containing KPMG's detailed modelling and analysis were not provided to the Delegate, to the appellant, or to the public.[21]

18. The Delegate did not, in the course of the sessions held at Rose Bay on 4 February 2016, or at any time thereafter, convey to the appellant or the public:

a. that he had met with KPMG representatives at a private "delegate briefing"; or

b. the information that had been provided to him in the course of that briefing and its follow up by KPMG and/or DPC.

19. On 28 February 2016, the period for making written submissions to the Delegate closed.[22]

20. On 18 March 2016, the Delegate furnished a copy of his report on the amalgamation proposal (**Delegate's report**) to each of the Minister and the Fourth Respondent (**Boundaries Commission**).[23] The Boundaries Commission reviewed the Delegate's report and provided its comments on it to the Minister on 22 April 2016.[24] In light of the pendency of this litigation, the Minister has not yet acted on the report by making a recommendation to the Governor as to the implementation of the amalgamation proposal under s 218F(7) of the Act.

Part VI: Argument

Legislative framework relevant to each ground

21. The questions of construction raised by the appeal involve ones on which differently constituted benches of the NSW Court of Appeal have divided at a high level of

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[20] See extracted submissions at AB*. For example, one of the written submissions (AB*) stated that "*The state government has chosen to release only selected extracts and a high level summary from the study undertaken by its consultants, KPMG, to support these alleged savings. It is impossible for the community to make a full submission on the government's financial case for amalgamation without having access to the complete study for each and every council*": cf CA[111], AB*.

[21] LEC[248]-[249], AB*; cf CA[83], AB*.

[22] LEC[123], AB*.

[23] LEC[172], AB*. A copy of the Delegate's Report is at AB*.

[24] LEC[172], AB*.

principle.[25]

22. Those questions principally concern the meaning of the terms "*examination*" (and "*examine*") and "*inquiry*" as appearing in ss 218F and 263 of the Act. Before turning to address the individual grounds, it is useful to summarise how these statutory concepts arise on the present facts.

23. *First,* in consequence of the Minister's referral of the amalgamation proposal under s 218F(1) to the Departmental Chief Executive for examination and report, ss 263, 264 and 265 applied to the examination of the proposal by the Delegate in the same way as they applied had the referral been made to the Boundaries Commission: s 218F(2).

24. *Secondly,* s 263(1) required the Delegate to "*examine and report on any matter with respect to the boundaries of areas which may be referred by the Minister*". Here, the subject matter of the duty to examine and report was the amalgamation proposal made by the Minister.

25. *Thirdly,* the Delegate was required by s 263(3) of the Act to have regard to a list of mandatory factors when considering any matter referred relating to the boundaries of areas. These included, under s 263(3)(a), "*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*".

26. *Fourthly,* s 263(2A) of the Act obliged the Delegate to *"hold an inquiry for the purpose of exercising [his] functions in relation to [the] proposal for the amalgamation"*. Reasonable public notice needed to be given of the inquiry: s 263(2B). Subsection 263(5) provided that the Delegate "*must allow members of the public to attend any inquiry held*". At any inquiry held by the Delegate, interested parties were entitled to appear and tender documents, submissions or legal advices, albeit they were not permitted to be represented by a lawyer in the proceedings: s 264.

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[25] The Minister agrees that the reasoning of the Court of Appeal in this case is inconsistent with parts of 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***): First Respondent's additional submissions on special leave application dated 13.4.2017 at [2]-[3].

27. Paragraphs [14] and [18] above provide the factual substratum of ground 1, which challenges the receipt by the Delegate of material evidence in private that was not disclosed in the course of the purported public inquiry.

28. Paragraphs [11]-[13] and [15]-[17] above provide the factual substratum of ground 2, which challenges the failure by the Delegate, in conducting the purported examination and inquiry, to scrutinise the merger savings claimed by KPMG and propounded by the Minister in support of the amalgamation proposal.

29. Ground 3 concerns the construction of s 263(3)(a) of the Act as well as whether the Delegate in fact correctly considered that mandatory factor, properly construed.

10 ***Ground 1***

30. The appellant contends that the Delegate, in failing to notify the public of the private delegate briefing he attended with KPMG and the information provided to him in that briefing, did not "*hold an inquiry*" that the public was allowed to attend in accordance with ss 263(2A) and 263(5) of the Act.

31. The construction of s 263 for which the appellant contends is that an "inquiry" into an amalgamation proposal propounded by the Minister only comprises 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. The alternative meaning, for which the First Respondent contends,
20 and which was adopted by the primary judge and the Court of Appeal,[26] is that a delegate obliged to hold an inquiry for the purpose of exercising functions of examining and reporting on an amalgamation proposal is entitled to receive and rely upon evidence that is centrally relevant to an assessment of the merit of the proposal that is never publicly disclosed at, or in advance of, any forum that is open to the public.

32. For the following reasons, the first meaning is to be preferred. It is supported by textual, contextual and purposive considerations.

33. *First*, not all boundaries proposals need to be the subject of an inquiry under s 263 of the Act. For proposals made under s 218B of the Act to *alter* the boundaries of
30 local government areas, whether or not an inquiry is held is left to the discretion of

[26] LEC[112], AB*; CA[67]-[83], AB*.

the Minister: s 263(2). However, in respect of proposals to *amalgamate* two or more areas into one or more new areas under s 218A – which, if implemented, result in the existing areas being dissolved and the councillors of those areas ceasing to hold office – the person to whom the proposal has been referred "*must hold an inquiry*" for the purpose of exercising their functions in relation to the proposal: ss 218F(2), 263(2A). This is to be an inquiry in respect of which "*reasonable public notice must be given*" and which members of the public "*must*" be allowed to attend: ss 263(2B), 263(5). The Governor's power to proclaim an amalgamation of areas under s 218A can only be exercised after an amalgamation proposal is dealt with in this way: s 218D. The text of the statute thus posits the holding of an "inquiry", which is "public" in the requisite sense, as an essential component of the administrative decision-making process for local council mergers. The language that is used must be given meaningful content.

34. *Secondly,* the appellant's construction of an "inquiry" in s 263 derives contextual support from the broader statutory scheme. Subsection 218F(3) of the Act provides that for the purpose of examining a joint proposal of two or more councils for the amalgamation of two or more areas, the Departmental Chief Executive must "*seek the views of electors of each of those areas*":

a. by means of a combination of (i) "*advertised public meetings*"; (ii) "*invitations for public submissions*"; and (iii) "*postal surveys or opinion polls*"; or

b. by means of "*formal polls*".

35. This process must be followed, in respect of such joint amalgamation proposals, *in addition to* an inquiry under s 263(2A) of the Act. Whilst s 218F(3)(a) was not engaged in the instant case – the proposal in issue being one promulgated by the Minister rather than one which was made by the councils concerned – its presence in the statutory scheme is nonetheless telling.

36. In this regard, both the primary judge and the Court of Appeal accepted that the statutory scheme draws a distinction between an "*advertised public meeting*" designed to "*seek the views of electors*" on the one hand, and an "*inquiry*" on the other.[27] However, neither of the Courts below considered that this distinction

[27] LEC[107], AB*; CA[71], AB*.

illuminated how an "inquiry" was to be conducted and each seems to have assumed that an inquiry under s 263 could be held in the same manner as an advertised public meeting under s 218F(3)(a)(i).[28] Such a construction gives the latter provision no work to do and should be rejected.

37. This Court should find that in order for an inquiry into an amalgamation proposal to meet the description in s 263(5) of an "inquiry" which members of the public are allowed to attend, a delegate must do more that convene a meeting to which the public are invited and at which they are afforded an opportunity to give their views. Rather, the language of "*inquiry*" in s 263, as opposed to the language of "*advertised public meeting*" to "*seek the views of electors*" in s 218F(3), connotes a process of inquiring into or investigating, in a public setting, critical aspects of an amalgamation proposal, which include the arguments advanced by the proposer in support of it.

38. *Thirdly*, the appellant's construction of what must be done in order to fulfil the obligation to hold a public inquiry into an amalgamation proposal under s 263 is supported when regard is had to the purpose of the relevant provisions.

39. The statutory obligation to hold an inquiry that members of the public are allowed to attend is clearly intended to ensure the integrity and transparency of, and foster public confidence in, administrative decision-making in respect of council amalgamations. The obligation is relevantly imposed on the Boundaries Commission or Departmental Chief Executive (or their delegate), as the case may be; that is, upon a person other than the proponent of the amalgamation proposal. The inquiry process may thus be seen to provide an important safeguard against the misuse of executive power. The imperative for such a safeguard is particularly pressing where the amalgamation proposal emanates from the Minister, who is the very person empowered by s 218F(7) to recommend that the Governor proceed to implement it.

40. The statutory purpose just identified is discernible from the text and structure of the statute, but is also confirmed when regard is had to the relevant legislative history and extrinsic materials.

41. In this respect, ss 263 and 264 of the Act had their origins in Part IIA of the *Local Government Act 1919* (NSW) (**1919 Act**), which was introduced by the *Local*

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[28] LEC[108], AB*; CA[79], AB*.

Government (Boundaries Commission) Amendment Act 1963 (NSW) (**1963 Act**). By the 1963 Act, the Boundaries Commission was constituted under ss 15A and 15J of the 1919 Act to carry out functions in respect of boundaries matters, including holding inquiries into boundaries proposals, which were required by s 15J(3) to be "*open to the public*".

42. Public inquiries into proposals to alter the structure of local government areas had previously been carried out by local land boards or departmental officers with experience in local government affairs.[29] The second reading speech in connection with the 1963 Act explained that the Boundaries Commission would, in their place, be given the power to hold an inquiry into boundaries proposals; but that the Boundaries Commission would also be given a separate function of examining and reporting on a proposal, without holding an inquiry, for the purpose of advising the Minister whether a public inquiry should proceed at all.[30] It was stated that "*this means that a behind-doors inquiry will not be held and later an amalgamation of areas will take place. The normal procedures must be followed*".[31] It was further observed that an "*examination of a boundary proposal at a public inquiry by a thoroughly impartial body is a far better method of determining the relevant issues than is a poll, which would not attract the majority of people entitled to vote and at which the issues could not be put in a satisfactory manner*".[32] Thus, where the Boundaries Commission *was* charged with holding an inquiry into a proposal (rather than an examination to determine whether any inquiry should be held), public ventilation of the relevant issues was seen to be paramount. That position was maintained when the Act was enacted in 1993 to replace the 1919 Act, through the inclusion of s 263(5).

43. The *Local Government Amendment (Amalgamations and Boundary Changes) Act 1999* (NSW), which relevantly enacted Div 2A of Chapter 9 of the Act, introduced the facility for boundaries proposals to be referred for examination and report to the

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[29] See, *Local Government Act 1919* (NSW) (as made), ss 16, 19(4).

[30] Second Reading Speech to *Local Government (Boundaries Commission) Amendment Bill 1963*, New South Wales, Legislative Assembly, *Parliamentary Debates*, 21 February 1963, p 2715. See also 1963 Act, s 15J(1)(a).

[31] Second Reading Speech to *Local Government (Boundaries Commission) Amendment Bill 1963*, New South Wales, Legislative Assembly, *Parliamentary Debates*, 21 February 1963, p 2715.

[32] Ibid, p 2716.

Departmental Chief Executive (then, the Director-General) instead of the Boundaries Commission. The relevant second reading speech observed that there would be no significant change to the process of dealing with an amalgamation proposal that did not have the support of all the councils affected and that there would continue to be a statutory requirement for an inquiry which must be open to the public.[33]

44. Thus, the legislative history confirms that the reception by a delegate of key material in respect of an amalgamation proposal "behind closed doors" is inimical to the notion of an inquiry that is open to, or capable of attendance by, the public.

45. It is tolerably clear that evidence as to the assumptions and modelling used by KPMG, being the firm whose predictions about the financial advantages of the proposed merger underlay the Ministerial proposal, was material to any consideration of its merits.[34] To permit a delegate of the Departmental Chief Executive to receive such critical information about an amalgamation proposal in private, and in the absence of any public scrutiny thereof, entirely undercuts the legislative imperative mandating that public inquiries into amalgamation proposals be held. To the extent that the Delegate was entitled to hear evidence in private from KPMG (which is not admitted), he was obliged to publicly disclose at least the gist of any information thereby obtained, enabling the public to make submissions in respect of it in the course of the public inquiry. An inquiry, only part of which members of the public are entitled to attend, and at which the Delegate chooses how much or how little information in respect of the proposal to make available to the public, is not an inquiry that members of the public are allowed to attend as required by s 263(5) of the Act.

46. The appellant draws attention to several additional difficulties with the Court of Appeal's treatment of the authorities in connection with ground 1.

47. *First*, the Court of Appeal should have been persuasively guided by the decision of this Court in *Bread Manufacturers of New South Wales v Evans* (1994) 180 CLR 404 (***Bread Manufacturers***).[35] At issue in *Bread Manufacturers* was whether the Prices Commission, in making a prices regulation order under the *Prices Regulation Act*

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[33] See Second Reading Speech to *Local Government Amendment (Amalgamations and Boundary Changes) Bill 1999*, New South Wales, Legislative Assembly, *Parliamentary Debates*, 22 June 1999, p 1094.

[34] Such evidence went directly to the mandatory factor in s 263(3)(a) of the Act.

[35] cf CA[85]-[87], [108] AB*; LEC[113], AB*.

1948 (NSW) (**Prices Act**), was entitled to rely upon a study prepared by research officers of the Commission without tendering it before or otherwise disclosing it in the course of an inquiry that was required by s 8F(1) of the Prices Act to be "*held in public*". The majority ruled that this course was impermissible. Gibbs CJ said at 412-413 (emphasis added):

> "*Section 8F makes it clear that if an inquiry is held, it must be a public inquiry. ...*
>
> ***The holding of a public inquiry would be illusory if the Commission, after solemnly taking evidence in public, could, without notice to the parties, base its decision on material that it had obtained in secret and never disclosed.***
>
> *I do not intend to suggest that the Commission is bound to make public any workings that may be produced by itself or its officers for the purpose of considering the effect of the evidence given or submissions made at an inquiry. In the present case, however, the officers of the Commission did more than make calculations based on the evidence; they obtained evidence, and neither the subject matter nor the result of their study was made known at the inquiry.*"[36]

48. The statement that has been emboldened in the above passage is apt to apply to any statutory scheme which demands the holding of an inquiry that is open to attendance by the public.

49. The respondents in *Bread Manufacturers* had argued that the conferral on the Prices Commission of powers to summon witnesses, take evidence on oath and require the production of documents in connection with its inquiries had the result that the Commission could take evidence in private, or, in undertaking an inquiry, have regard to documents which were never made public. That argument was rejected by the majority.[37] The conferral on the Prices Commission of such coercive powers in aid of its inquiries did not, in this Court's view, detract from the explicit requirement in the Prices Act that such inquiries be "*held in public*". *A fortiori,* that the Act presently in issue does *not* confer on the Departmental Chief Executive or the Boundaries Commission the kinds of coercive investigative powers given to the Prices Commission in *Bread Manufacturers* says nothing about the express requirement of publicity for inquiries held under s 263 of the Act.

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[36] Aickin J similarly took the view (at 444) that the fact that extensive powers of inquiry and investigation were given to the Commission for the limited purpose of the holding of a public inquiry meant that the Commission had an obligation to disclose at the public inquiry information so obtained, "*for otherwise the public inquiry would be pointless*". See also Mason and Wilson JJ at 433-434, 436.

[37] See, per Gibbs CJ at 412.6-413.3; per Mason and Wilson JJ at 433.8-434.8.

50. *Secondly,* the Court of Appeal ought not to have placed reliance upon the reasoning in *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 to inform the proper construction of an "inquiry" under s 263 of the Act given that, as Mason P said in that case, the power to hold a formal inquiry was not there engaged and no inquiry was in fact held.[38]

51. *Thirdly,* the observations by Lord Diplock in *Bushell v Secretary of State for the Environment* [1981] AC 75 at 94-95 (***Bushell***) as to the discretion vested in persons appointed to hold an inquiry provide little if any illumination of what is required in the context of an inquiry under s 263 of the Act.[39] The *Highways Act 1959,* which was the statute at issue in *Bushell,* was silent as to the procedure to be followed at a "*local inquiry*" held thereunder.[40] In contrast, s 263(5) of the Act expressly stipulates that the inquiry, in this case, needed to be one that the public was allowed to attend. Further, to the extent that *Bushell* is apposite authority, the following observations of Lord Diplock at 96 should be emphasised:

> *"Fairness ... requires that the objectors should be given sufficient information about the reasons relied on by the department as justifying the draft scheme to enable them to challenge the accuracy of any facts and the validity of any arguments upon which the departmental reasons [in favour of building the motorway] are based."*

Ground 2

52. Ground 2 directly raises the issue upon which the Court of Appeal below and the Court of Appeal in *Ku-ring-gai* were divided. This Court should find, consistently with the reasons of Basten and Macfarlan JJA in *Ku-ring-gai*, that the Delegate failed to discharge his duty to "examine" the merger proposal, or hold a public inquiry for the purposes of exercising that function, in circumstances where he did not have before him the material which underpinned, and allowed the testing of, the merger savings predicted by KPMG as set out by the Minister in the proposal document.

53. The proposal documents provided to the Delegate in this case and to the delegate in *Ku-ring-gai* each followed a pro-forma template.[41] Each document referred to the

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[38] See *Minister for Local Government v South Sydney City Council* (2002) 55 NSWLR 381 at 427 [218], 430 [228], 434 [240], 437 [253]; cf CA[75]-[76], AB*.

[39] cf LEC[111], AB*; CA[80], AB*.

[40] See *Bushell,* per Lord Diplock at 92.

[41] See KPMG Proposal to DPC to complete merger proposals dated 1 November 2015, AB*; see also Briefing for the Local Government Reform Taskforce: "3.1 Template for a merger proposal", AB*.

relevant merger proposal having been "*supported by independent analysis and modelling by KPMG*" and said that analysis by KPMG showed that the new amalgamated council had the potential to generate net savings to council operations over a 20 year period (the precise savings figures given for each merger cluster differed).[42] Each proposal document referenced the KPMG long form analysis as the source of the calculations undertaken for the Government by KPMG.[43] Complaints were made to each delegate that the documents containing the modelling or assumptions underlying the KPMG figures set out in the publicly available merger proposal documents had not been released.[44] Despite this, the KPMG long form analysis was not provided to either delegate, or made publicly available in connection with either (purported) inquiry.[45]

54. The appellant submitted below that it was incumbent upon the Delegate, as part of any valid examination and inquiry under the Act, to closely scrutinise the assumptions upon which the merger proposal, and the amalgamation savings asserted in the proposal document, were based; and that there was insufficient material made publicly available and/or given to the Delegate, in respect of KPMG's analysis, to enable an examination or inquiry in the requisite sense to occur.[46] That submission was rejected by the primary judge, who found that the Delegate's duty to examine the proposal did not require him to test or interrogate the claims made by the Minister and KPMG in the proposal document, or the assumptions upon which the claimed financial savings were based.[47] The Court of Appeal similarly took the view that the Delegate's function to examine the proposal only required him to have regard to the material provided to him, and did not require him to examine, in the context of a public inquiry or otherwise, the assumptions that underlay the financial savings claimed by KPMG as set out in the proposal document.[48] That approach to the legislative scheme is directly inconsistent with that which has since been endorsed by a differently constituted appellate court in *Ku-ring-gai.*

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[42] *Ku-ring-gai* at [35]; LEC[116], AB*.

[43] See above at [12]; see Proposal Document, pp 4, 7, 8, 9, AB*; *Ku-ring-gai* a [35], fn 26, [100].

[44] *Ku-ring-gai* at [39]-[40], [102], [123]; LEC[80], [136], [249], AB*; CA[83], AB*.

[45] *Ku-ring-gai* at [36]; LEC[231], [249], AB*.

[46] LEC[85]-[87], [90], [133]-[139], AB*; CA[91], [93], [96]-[99], AB*.

[47] LEC[159]-[160], AB*.

[48] CA[74]-[78], [106]-[110], AB*.

55. In *Ku-ring-gai*, Basten JA found, as an independent basis for upholding the Council's appeal, that the relevant delegate had constructively failed to fulfil the statutory function of examining the Minister's proposal in the absence of material – including the KPMG long form analysis – which allowed the financial advantages asserted in support of the proposal to be tested.[49] His Honour said (emphasis added):

> *"99. No doubt the manner of conducting an examination with respect to an amalgamation proposal may depend upon the circumstances of the case. Thus, s 218E envisages that such a proposal may be made (a) by the Minister, (b) by a council affected by the proposal, or (c) by electors constituting, in broad terms, 10% of those in an affected area. Where the proposal emanates from the responsible Minister, the primary purpose of the examination is unlikely to be the examination of the merit of the proposal by someone within the Minister's department. Rather, it will be to examine the merit from the perspective of an affected council and from the perspective of the affected public, and will generally call for examination by someone independent of the proponent Minister.* ***In broad terms, the purpose of the examination requires that it extend to the basis for any opinions underlying the proposal.***
>
> *100. In the present case,* ***a critical element in the reasoning in favour of the proposal was the financial advantage which was expected to accrue from the amalgamation*** *of Ku-ring-gai with part of Hornsby Shire. The document containing the proposal indicated that the calculations were undertaken for the government by KPMG. The footnote to the summary of the financial advantages identified the source [being the KPMG long form analysis] which, it is accepted by the Minister, was a document not provided to the delegate or publicly released.* ***The Council was right to assert that the delegate could not properly carry out his function of examination without having access to that material. Release of the material was also necessary for public participation in the public inquiry to be meaningful."***

56. Similarly, Macfarlan JA found that in order to discharge the duty to "examine" the merger proposal, the Delegate ought to have, relevantly, tested the reliability of the KPMG analysis, including the detail of the assumptions upon which it was based, and could not simply accept the results of the KPMG analysis that were stated in the relevant proposal document "*as a given*".[50]

57. This Court should prefer the construction of the duty to "examine" endorsed by Basten and Macfarlan JJA in *Ku-ring-gai* to the approach adopted in the Courts below in these proceedings and, if it does, Ground 2(a) should be upheld.

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[49] *Ku-ring-gai* at [8], [102], [112(3)].

[50] *Ku-ring-gai* at [119]-[125].

58. Notably, the content of the delegates' reports in this case and in *Ku-ring-gai* as regards the financial consequences of the proposed mergers was substantially similar.

59. In *Ku-ring-gai,* the delegate noted in his report that concerns had been expressed in submissions from the councils and the community that related to the KPMG analysis and modelling, but found that it was not appropriate to pursue those concerns further other than to express the understanding that KPMG's analysis was "*conservative*".[51]

60. In this case, the Delegate similarly noted in his report that the KPMG analysis, which had estimated merger benefits of $149 million over 20 years,[52] was "*based on a set of assumptions that have been questioned by some Councils*".[53] Yet, without saying anything further about the validity of those assumptions – and after merely pointing to the existence of another (unexamined) report by SGS Economics and Planning which predicted greater merger savings than KPMG had and was thus said to make the KPMG analysis "*conservative*" – the Delegate concluded that there would be "*clear benefits*" from the merger of at least the $149 million claimed by KPMG. This Court should conclude that such a process of reasoning did not entail an "examination" of the merger proposal as required by ss 218F(2) and 263(1) of the Act.

61. So too, for the reasons given by Basten and Macfarlan JJA in *Ku-ring-gai,*[54] and in light of the statutory construction matters set out at [33]-[43] above, this Court should find that the inquiry that was required to be conducted was one which canvassed the merits of the KPMG analysis in a manner and forum in which the public could meaningfully participate. The non-accessibility to opponents of the merger proposal of the KPMG long form analysis meant that the "inquiry", and their participation therein, lacked the "public" dimension required by s 263(5) of the Act. Ground 2(b) should be upheld.

Ground 3

62. As noted above, s 263(3)(a) of the Act required the Delegate, when exercising functions in relation to the amalgamation proposal, to have regard to "*the financial*

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[51] See *Ku-ring-gai* at [122]-[124].

[52] This included the $124 million figure referred to above at [10] plus a $25 million grant from the NSW government if the merger proceeded.

[53] Delegate's Report, p 14, AB*.

[54] *Ku-ring-gai* at [100], [126].

advantages or disadvantages (including the economies or diseconomies of scale) of any relevant proposal to the residents and ratepayers of the areas concerned".

63. The words in parentheses in s 263(3)(a), referring to a need to consider economies and diseconomies of scale, indicate that there is a requirement to have regard to the *differential* financial impact of the proposed merger on the residents and ratepayers of *each* of the individual "*areas concerned*" taken separately, and not merely the total financial impact on the residents and ratepayers of all the areas concerned, in aggregate. That reading of the provision is confirmed by a recognition that the various paragraphs within s 263(3) of the Act distinguish between considerations that pertain to the existing "*areas concerned*", and those that pertain to the "*proposed new area*" or "*resulting areas*".

64. The primary judge rejected this construction of the provision. His Honour found that s 263(3)(a) did not require the Delegate to "*break up the financial advantages of the proposal to the residents and ratepayers of each of the individual areas of Randwick, Waverley and Woollahra*", so long as there was consideration of the financial advantages of the proposal to the residents and ratepayers of the three areas, "*considered collectively*".[55]

65. The Court of Appeal found that his Honour had erred in his construction of the section.[56] Beazley P said at CA[119] that she considered that s 263(3)(a) *did* require the Delegate to have regard to the financial advantages or disadvantages of the proposal to the residents and ratepayers of "*each of the areas the subject of the proposal*". However, the balance of her Honour's reasons disclose an approach to the provision that was very similar to that which was said to have been erroneously adopted by the primary judge. At CA[124] her Honour said:

> *"The financial advantages for each individual council are to be found in what can be achieved if there is an amalgamation ... I do not consider that it is necessary for the purposes of s 263(3)(a) that the Delegate specify the extent to which each council will receive or attain a financial benefit..."*

66. This reasoning seemingly endorses a construction of s 263(3)(a) which her Honour previously appears to have identified as being incorrect. That is, it eschews an analysis whereby the financial consequences of the amalgamation to the *residents*

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[55] LEC[169], AB*.

[56] CA[119]-[120], AB*.

and ratepayers of *each* of the areas concerned – and not simply the financial consequences of the amalgamation to *all* the *councils* concerned – are to be considered.

67. Alternatively, to the extent that her Honour, in the passage extracted at [65] above, has reasoned that a delegate need not specify the extent to which the residents and ratepayers of each council will receive or obtain a financial benefit, because an individuated financial benefit to the *residents and ratepayers* of *each* of the areas concerned will necessarily follow from a benefit that accrues to the *councils* concerned in aggregate, such reasoning is based on a flawed assumption.

10 68. While a merger may sound in a net financial saving across three *councils*, on an *in globo* basis, one cannot know, simply from that fact, whether the overall saving will occur as a result of the residents and ratepayers of any particular council being financially advantaged or disadvantaged. As the appellant submitted below, it is perfectly possible that a merger proposal that is financially advantageous at an *in globo* level could result in the financial interests of the residents and/or ratepayers of one local government area being significantly disadvantaged, depending upon what revenues and expenditures are contemplated in order to achieve a net financial saving over the three areas.

69. Without careful examination of the expected financial position of the residents *and*
20 ratepayers of each council proposed to be amalgamated, before and after amalgamation, the obligation to have regard to the factor described by s 263(3)(a) cannot be discharged. This Court should conclude that the obligation was not discharged in the present case.

70. In this respect, the whole of the Delegate's purported examination of the factor in s 263(3)(a) of the Act appears at pp 13-15 of his report, under the heading "6.1 Financial Factors".[57]

71. The Delegate, at section 6.1.1, set out the key comparative financial data of each of the councils (pre-amalgamation), and stated (emphasis added):[58]

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[57] Delegate's Report, pp 13-15, AB*.

[58] Delegate's Report, p 14, AB*.

"For the current proposal, both KPMG analysis and other independent analysis (as described in the next section) both show ***net financial benefits*** *of a merger of the three councils in excess of what is achievable operating alone."*

72. The Delegate further stated, within section 6.1.2: [59]

"... there are clear benefits ranging between $149 million and $235 million of the proposed merger compared with any stand-alone option.

The proposal suggests that any improvements in financial results could enable the new council to improve services, reduce reliance on rate increases and to fund future infrastructure needs."

73. The Court of Appeal took the view that these statements only made sense if the Delegate was considering or having regard to the different position of each of the councils.[60] That reading of the Delegate's report was, with respect, overly generous. These passages of the report, read in context, show that the Delegate was comparing the *net* financial benefits of a merger scenario with the existing stand-alone position of the three *councils,* considered collectively. They do not disclose any consideration by the Delegate of the differential financial impacts of the merger on the *residents and ratepayers* of *each* of the councils concerned.

74. While the Delegate may have proceeded, under the heading "6.1.3 Rates", [61] to discuss what impact the amalgamation would have on the rates payable by ratepayers in each area, any differential consideration of this aspect alone is not enough to do what s 263(3)(a) requires. Had Parliament taken the view that it was sufficient for a delegate to examine changes in the rates paid by persons in each of the areas concerned pre and post-merger, there would have been no reason for s 263(3)(a) to make it mandatory to have regard to the financial advantages or disadvantages of the amalgamation proposal to both "*residents and ratepayers*".

Part VII: Applicable provisions

75. The following provisions are applicable to the application and are annexed:

a. *Local Government Act 1993* (NSW), ss 204-205, 212-218, 218A-218C, 218D-218F, 219-220, 260-265, Schedule 2 (the provisions as presently in force are unchanged from those in force at the relevant time);

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[59] Delegate's Report, p 14, AB*.

[60] CA[122], AB*.

[61] CA[122], AB*.

b. *Local Government Act 1919* (NSW) (as made), ss 16-19;

c. *Local Government (Boundaries Commission) Amendment Act 1963, No 32* (NSW) (whole Act);

d. *Local Government Amendment (Amalgamations and Boundary Changes) Act 1999, No 38* (NSW), s 3 and Schedule 1.

Part VIII: Orders sought by the appellant

76. The appeal be allowed.

77. Set aside the order of the New South Wales Court of Appeal made on 22 December 2016, and in its place order that:

10 a. The appeal be allowed.

b. Orders 1 and 2 of the Land and Environment Court made on 20 July 2016 be set aside.

c. The First Respondent be permanently restrained from making a recommendation to the Governor under s 218F(7) of the *Local Government Act 1993* (NSW) as to the implementation of the proposal made by him on 6 January 2016 to amalgamate the Woollahra, Waverley and Randwick local government areas.

d. The First Respondent pay the Appellant's costs in this Court, the Court of Appeal and in the Land and Environment Court.

Part IX: Estimate of time for oral argument

20 78. The appellant estimates that two hours will be required for the presentation of its oral argument.

Dated: 16 June 2017

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