Possible challenge to merger proposal for Randwick City Council

Memorandum of Advice

of

Ian E. Davidson SC

Beswick Lynch
DX 174 Sydney
Attn: Mr Tim Lynch

8th Floor, Selborne Chambers • 174 Phillip Street • Sydney NSW 2000
email: idavidson@eightselborne.com.au
DX: 395 SYDNEY • Fax: (02) 9232 7740
Tel: (02) 9235 1141
ABN 70 954 511 748
Liability limited by a scheme approved under Professional Standards Legislation

Possible challenge to merger proposal for Randwick City Council

MEMORANDUM OF ADVICE

Introduction

1. My instructing solicitors act for certain Councillors of Randwick City Council (**Randwick**). They requested on 5 May my urgent opinion in relation to the impact of the 17 March 2017 NSW Court of Appeal decision in *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54 (***Ku-ring-gai decision***) on the council merger proposal affecting Randwick.

2. Randwick is subject to the same merger proposal under the *Local Government Act 1993* (NSW) (the **Act**) that the Woollahra Municipal Council has opposed. The 22 December 2016 NSW Court of Appeal decision in *Woollahra Municipal Council v Minister for Local Government* (2016) 219 LGERA 180; [2016] NSWCA 380 (***Woollahra decision***) is subject to an application for special leave to appeal to the High Court[1]. (That application was commenced before, but its ultimate outcome arguably may be affected by, the *Ku-ring-gai decision*.)

3. I am instructed the Randwick merger proposal relied upon a KPMG report (similar to the KPMG report subject to consideration in the *Ku-ring-gai decision*) that also was not made available to the public or the Delegate for that merger proposal. Randwick did not join with the Woollahra Municipal Council in formally opposing the merger proposal[2] and obtained its own economic study (an SGS report) which was made available to the Delegate during the inquiry process.

[1] No S7 of 2017 (filed on 6 January 2017 and, I am instructed, to be heard on 12 May 2017). The NSW Court of Appeal in the *Woollahra decision* had dismissed the Woollahra Municipal Council appeal against *Woollahra Municipal Council v Minister for Local Government* (2016) 218 LGERA 65; [2016] NSWLEC 86 (***Woollahra LEC***).

[2] According to Preston CJ in *Woollahra LEC* at [4] Randwick had supported the proposal.

Specific Questions Asked and My Summary Answers

4. I set out the specific questions about which my opinion is sought and my summary answers below:

Q1 Does the Court of Appeal *Ku-ring-gai decision* provide a basis for Randwick City Council to challenge the merger proposal with Woollahra and Waverley Councils?

A1 *Yes. In my opinion, the Ku-ring-gai decision (though on this point by a 2-1 majority and, at least arguably, in "obiter" given that the appeal was also allowed by all 3 judges on another basis not applicable here) plainly now suggests that Randwick could challenge the merger proposal on the basis that, because the Delegate did not have access to the documents underlying the KPMG analysis, the Delegate had constructively failed to fulfil the function of examining the Minister's merger proposal as required by ss 263(3) of the Act.*

The further majority reasoning in the Ku-ring-gai decision that, because that Council there was denied access to the documents underlying the KPMG analysis, there had also been a denial of procedural fairness arguably might also suggest that there was a denial of procedural fairness to Randwick. However, this potential basis of challenge is less clear (including given that Randwick does not appear originally to have disputed the KPMG analysis and this point was not expressly raised by the appeal dealt with in the Woollahra decision). I would require more information on the precise original attitude of Randwick to the original merger proposal before I could express any definite opinion about whether the denial of procedural fairness ground would also now provide an additional basis for Randwick to challenge the merger proposal.

I.O

Q2 At [100] in the *Ku-ring-gai decision* Justice Basten, of the majority, held:

> "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 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."

The calculations undertaken for the government by KPMG with respect to the proposal to amalgamate Randwick, Waverley and Woollahra Councils were also not provided to Dr Robert Lang, the Delegate that considered this proposal, and nor were they publicly released. In light of the Court of Appeal *Ku-ring-gai decision* are there avenues of redress with respect to the proposal to amalgamate it with Waverley and Woollahra Council's?

A2 *Yes. See the first paragraph of my summary answer to A1 above.*

Q3 Are there any time limitations in which Randwick City Council can launch an action against the NSW Government, the Minister, the Delegate or any other relevant body or representative (Pt 59 UCPR)?

A3 *Yes, there is a 3 month time limit under UCPR 59.10(1) for commencing proceedings for judicial review of a decision which has expired. However, the 3 month time limit can be extended "at any time" under UCPR 59.10(2) and the Ku-ring-gai decision*

might very well provide a strong reason for an extension to be granted if any proceedings are now commenced promptly..

Q4 As the NSW State Government has not challenged the Court of Appeal *Ku-ring-gai decision* and in particular the Court's factual finding that a failure to provide the Delegate with the full KPMG amounts to a denial of procedural fairness, can the NSW State Government legitimately challenge an action based on a denial of procedural fairness where the Delegate did not receive the full KPMG report?

A4 *I do not consider that an "issue estoppel" would strictly prevent the NSW State Government from challenging findings in the Ku-ring-gai decision if Randwick, a different Council to that in the Ku-ring-gai decision, sought to rely on what was there decided. Also, the correctness of that part of the reasoning in the Ku-ring-gai decision will presumably be at least debated before the High Court as part of any appeal should the High Court grant leave to appeal the Woollahra decision.*

However, subject to any ultimate views of the High Court or further reconsideration by a differently constituted (perhaps 5 judges) NSW Court of Appeal, in my opinion the Ku-ring-gai decision would, as a practical matter, now make it considerably more difficult for the NSW State Government to succeed in challenging an action based on the basis that, because the Delegate did not have access to the documents underlying the KPMG analysis, the Delegate had constructively failed to fulfil the function of examining the Minister's merger proposal.

Whether the NSW State Government would also find it difficult to succeed in a challenge to an action based on a denial of procedural fairness (the precise subject of Q4) where the

I.D

Delegate did not receive the full KPMG report would (consistent with my observations in the second paragraph of my summary answer to Q1) be a more problematic question to answer which would require more information on the precise original attitude of Randwick to the original merger proposal before I could express a definite opinion.

Q5 Is there utility in commencing proceedings (i.e. can the Government take action to overcome any identified errors in the process)?

A5 *As further explained below, a question like this, which at its heart involves speculation about what action the Government might or might not take, is not one that it is practicable for this legal opinion to answer.*

Material Considered by Me

5. In addition, to my observations with the questions asked of me (set out, in substance above), I have considered the *Ku-ring-gai decision*, the *Woollahra decision* and the decision of Preston CJ at first instance in *Woollahra LEC.*

6. I have also considered the relevant provisions of the Act (in the applicable form between 13 November 2015 to 31 May 2016 as were considered by the NSW Court of Appeal in both the *Ku-ring-gai decision* and the *Woollahra decision*). The most important provisions for consideration appear to be s 218F and s 263 (especially s 263(3)(a)) of the Act which are relevantly extracted out in the various judgments I have considered and are not repeated here.

7. I have not been briefed with or considered any report of any Delegate or any of the evidence before Preston CJ in *Woollahra LEC* not specifically extracted in any of the three judgments I have considered.

IO

More Detailed Reasons for My Summary Answers to the five Questions

8. The *Ku-ring-gai decision* and the *Woollahra decision* involved the same statutory provisions and consideration of their application to a forced amalgamation process.

9. In each case the Minister for Local Government had referred to the relevant amalgamation process to a (different) Delegate of the Chief Executive of the Office of Local Government for examination and report under the Act. In each case a pro-forma document entitled "Merger Proposal" was provided to the relevant Delegate and cited a long form document which contained detailed analysis conducted by KPMG in relation to the proposed mergers across NSW but was not made publicly available or given to the relevant Delegate.[3]

10. There is at least an argument that the reasoning in the *Ku-ring-gai decision* including that of Basten JA at [100] (set out in Q2 above) and more generally at [99]-[102] (with which Macfarlan JA relevantly agreed (see [119]-[126]) is strictly "obiter".

11. That is because Basten and Macfarlan JJA also agreed with the reasoning of Sackville AJA in allowing the Ku-ring-gai Council appeal that the Delegate there had committed jurisdictional error in failing to take account of the effects of the merger proposal there for the area south of the M2 in Hornsby Council. The reasoning for that unanimous ground for the appeal succeeding in the *Ku-ring-gai decision* has no applicability to the issues affecting Randwick Council.

12. However, the reasoning of Basten and Macfarlan JJA (with whom Sackville AJA dissented on these two issues, see especially at [289]-[290] and [261]-[275], in the *Ku-ring-gai decision*) both that the failure of the Delegate to have access to KPMG's detailed calculations involved a failure to conduct the examination required under s 263(3) of the Act and that there had been a denial of procedural fairness to

---

[3] See, in particular, *Woollahra LEC* at [116], [231] and [249] and the *Ku-ring-gai decision* at [32], [35] and [36].

ID

the Ku-ring-gai Council in it being denied access to the KPMG detailed calculations would each have provided an independent basis for allowing the appeal.

13. Therefore, the reasoning of Basten and Macfarlan JJA on those two issues would in the ordinary course be binding on any first instance judicial officer.

14. It also seems clear to me that, had the approach of Basten and Macfarlan JJA (relevantly at [99]-[102] and [119]-[126]) in the later *Ku-ring-gai decision* prevailed in the earlier *Woollahra decision*, then the appellant in the *Woollahra decision* would have won on the basis that the Delegate there also ought to have had access to the documents underlying the KPMG analysis to comply with the applicable obligations under s 263(3) of the Act.

15. That approach of Basten and Macfarlan JJA appears to me to be contrary to that of Beazley P (with whom Bathurst CJ and Ward JA agreed) at [106]-[111] of the *Woollahra decision* which relevantly appears to have concluded that the Delegate there was not required to have access to the documents underlying the KPMG analysis to satisfy the applicable obligations under s 263(3) of the Act.

16. However, in relation to both Q1 and Q2, that approach of Basten and Macfarlan JJA requiring the Delegate in the *Ku-ring-gai decision* to have had access to the documents underlying the KPMG analysis to comply with the applicable obligations under s 263(3) of the Act appears to me to mean that Randwick would be entitled to challenge what the Delegate in the *Woollahra decision* did on precisely the same basis.

17. The urgency of making any available challenge, if Randwick opposes a merger, might be heightened if the High Court declines to grant special leave to the Woollahra Municipal Council to appeal the *Woollahra decision*.

ID

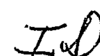
18. The position is less clear in relation to the denial of procedural fairness point. This is first because, although that was raised at first instance, and rejected by Preston CJ in *Woollahra LEC*, the denial of procedural fairness argument considered in the *Woollahra decision* was not based on the Council there not having access to the documents underlying the KPMG analysis. The second reason why it is not clear to me that the denial of procedural fairness point would apply to Randwick is because, subject to any further instructions, I have not seen anything in *Woollahra LEC* or the *Woollahra decision* to suggest that Randwick (unlike the Woollahra Municipal Council) had asked for access to the underlying KPMG documents.

19. In respect of Q3 it is clear that the usual 3 month period under UCPR 59.10 for challenging the decision of the Delegate by way of judicial review has expired. However, the relevant court has a discretion to extend that period at any time.

20. While an extension of the period cannot be guaranteed, the changed circumstances arising from the 17 March 2017 *Ku-ring-gai decision* might well in my opinion provide a strong basis for arguing that an extension should be granted. Particularly if any application for judicial review were commenced very promptly.

21. In relation to Q4, there is a useful discussion of Issue Estoppel principles by the Hon K.R. Handley AO (a former NSW Court of Appeal judge) in chapter 8 of the 4th edition of *Spence Bower and Handley Res Judicata* (LexisNexis 2009).

22. While the issue about whether or not the Delegate should have had regard to the documents underlying the KPMG analysis to comply with the applicable obligations under s 263(3) of the Act decided adversely to the respondent in the in *Ku-ring-gai decision* appears to me to be identical to that which would be raised in any proceedings commenced by Randwick, I do not consider that there would be any strict issue estoppel binding the State government.



23. That is because the requirement for an issue estoppel that the relevant issue cannot be afterwards raised between the "same parties or their privies" (*Blair v Curran* (1939) 62 CLR 466 at 531-532, see also *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at [22]) would not apply. Randwick is not the same party or a privy of the Ku-ring-gai Council.

24. However, the reasoning of the majority in the later *Ku-ring-gai decision* would be highly persuasive and, prima facie, binding on a lower court. It would therefore considerably assist Randwick were it to decide to challenge the actions of the Delegate.

25. I did not consider that Q5 was one that a legal opinion could usefully answer, given the speculation involved in assessing what future actions of a government might be if confronted by an unfavourable Court decision.

26. I would merely note that the Court in the *Ku-ring-gai decision* itself (including Sackville AJA) rejected the view that relief would be "futile" even if it were likely that the Delegate would make the same decision again. See the *Ku-ring-gai decision* at [62]-[66] and [241]-[242].

27. There are also well known examples of bodies seeking to avoid relegation from a competition having initial success in lower courts overturned ultimately by a higher court but succeeding in retaining their intended identity. South Sydney is still a participating club in the N.R,L Despite the success of that club in the Full Federal Court having been ultimately reversed by the High Court.[4].

Ian Davidson

Ian E. Davidson SC

Selborne Chambers 8 May 2017

[4] In *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563.