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21 April 2017

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Dear General Manager,

Re: Advice – Potential legal implications of the 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

We refer to the email received on 7 April 2017 from Council's Director, Governance and Financial Services concerning the decision published on 27 March 2017 by the NSW Court of Appeal in *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54 (the "Ku-ring-gai case") where the examination and report of the delegate of the Chief Executive of the Office of Local Government in relation to the proposed amalgamation of part of Hornsby Shire and Ku-ring-gai local government areas was set aside.

Council seeks our advice on the following question:

1. Does the decision handed down by the Court of Appeal in the *Ku-ring-gai* case, in particular the 'procedural fairness' findings, have any legal implications for the decision in the *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380 case regarding the proposed merger of Randwick, Waverley and Woollahra?

ADVICE

In the *Ku-ring-gai* case, which concerned the proposal by the NSW Minister for Local Government for "the merger of Hornsby Shire and *Ku-ring-gai* local government areas north of the M2 [motorway]", the NSW Court of Appeal determined, among other things that:

1. The primary judge (Justice Moore) erred in upholding the government's claim of public interest immunity over the withheld KPMG documents.

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2. The examination and report of the delegate of the Chief Executive, Mr Garry West, in relation to the proposed amalgamation should be set aside because:

(a) the delegate could not properly carry out his function of examination under s 263(3)(a) of the Local Government Act 1993 (“LG Act”) without access to the KPMG documents which were the source of the calculations relied upon and failed to form his own judgment about the financial advantages or disadvantages, and therefore constructively failed to fulfil his statutory function of examining the proposal ; and

(b) the Council was denied procedural fairness in that the delegate had relied in his report on the KPMG documents which were not made available to either the Council or the delegate.

3. The review of the Boundaries Commission and the comments sent to the Minister should be set aside because it did not relate to a valid examination by the delegate.

The operation of s 263 of the LG Act was central to the case run by Ku-ring-gai Council. The section relevantly states:

263 Functions of the Boundaries Commission

(1) The Boundaries Commission is required 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.

...

(3) When considering any matter referred to it that relates to the boundaries of areas or the areas of operations of county councils, the Boundaries Commission is required to have regard to the following factors:

(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,...

The grounds of appeal in the Ku-ring-gai case focussed on certain KPMG studies which were said to underpin the financial assessment of the proposal to amalgamate and for which the government had

successfully claimed immunity from production on the basis of secrecy or confidentiality (public interest immunity) in the Land and Environment Court.¹

The merger proposal outlined that it had been “*informed by four years of extensive council and community consultation and [was] supported by independent analysis and modelling by KPMG*”. Importantly, the Minister acknowledged that the proposal was informed by a “long form document” entitled “Merger Impacts and Analysis” prepared by KPMG which had not been made available to the public, the delegate or Ku-ring-gai Council. A short version of this document was released and was before the Court and importantly suggested that the long form document addressed on a case-by-case basis, the “Long-Term Financial Plans” for specific councils involved in the amalgamations.

The Court of Appeal decided that Justice Moore of the Land and Environment Court had erred in upholding the public interest immunity claim in respect of the “Merger Impacts and Analysis” document and related “Implementation of Local Government Mergers: Business Case” document (the “KPMG material”).

The Court of Appeal relevantly stated in the Ku-ring-gai case:

94. The factors which militate against immunity in the present case are (a) the identity of the party responsible for preparing the documents, being a large commercial enterprise external to the government; (b) the statutory context, which included the need for a separate examination, including a public inquiry, of each proposal made by the Minister prior to implementation; (c) the fact that figures derived from the documents were relied on by the Minister in preparing the proposal; (d) the fact that such reliance was expressly identified in the merger proposal which was publicly released, and (e) the subject matter of the documents sought to be protected, as revealed in broad terms by their titles and by reference to the matters which were publicly disclosed. The countervailing considerations depend almost entirely upon the broad proposition that disclosure of any document relating to current and controversial matters, which has been presented to Cabinet for its consideration, will tend to undermine the candour and frankness with which such documents are prepared in the future.

95. In considering the public interest in the production of the documents for the purposes of the litigation, the following matters are significant:

- (a) the litigation concerns the structure of local government in an area of metropolitan Sydney;*
- (b) the statutory scheme requires an examination and public inquiry into any proposal for changes to the areas for which councils are constituted;*

¹ *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54 at [25].

(c) the examination is to be conducted by reference to specified mandatory considerations which must be hampered if the body responsible for examining the proposal cannot have access to the written documents upon which the Minister relied in preparing the proposal;

(d) the party seeking disclosure is itself a statutory authority which will be dissolved if the proposal is implemented, and

(e) the interests and wishes of many thousands of residents and ratepayers will be affected by implementation of the proposal.

95. Once the specific circumstances relating to the document are articulated, the broad policy based on candour is significantly diminished. The public interest in preserving secrecy or confidentiality must be seen as so qualified that it carries little weight. It is quite inadequate to outweigh the public interest in the production of the documents for the purposes of the litigation.

As a consequence of the finding regarding the public interest immunity claim relating to the KPMG material, Ku-ring-gai Council successfully argued in the Court of Appeal that there was a constructive failure by the delegate to properly examine and consider the financial advantages and disadvantages of the proposal under s 263(3)(a) of the LG Act. The Court of Appeal highlighted at [100] that “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” and further stated that “the Council was right to assert that the delegate could not properly carry out his function of examination without having access to that material.” On this issue Justice Basten concluded by saying:

“The fact that the delegate did not have access to such material, in the absence of any legal justification for that situation, and objection to its absence having been squarely and repeatedly raised by the appellant, leads to the conclusion that the delegate constructively failed to fulfil the statutory function of examining the Minister’s proposal.”

The grounds of appeal to the Court of Appeal in the case of ***Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380** (the “Woollahra case”) were different to the grounds in the Ku-ring-gai case. In the Woollahra case the grounds of appeal were:

1. Whether there had been compliance with the processes required by the LG Act. In particular, the following questions were raised:
 - a. what constituted the “proposal” within the meaning of s 218E of the Act;
 - b. whether a public inquiry of the nature and type required by the Act was held by the delegate; and

- c. **whether the delegate exercised the function of examination and report on the proposal in accordance with ss 218F and 263(3)(a)-(f)**

2. Whether Woollahra Council was **denied procedural fairness** in relation to:

- a. **the delegate’s reliance on a report prepared by SGS Consulting;**
 b. the Boundary Commission’s review of the delegate’s report; and

3. Whether the statutory process was impugned because of a misleading and deceptive representation concerning the independence of analysis and modelling undertaken by accounting firm KPMG.

All grounds of appeal were dismissed by the Court of Appeal in the Woollahra case.

Whilst the grounds of appeal raised in the Woollahra case were different to the grounds raised in the Ku-ring-gai case it would seem that some of the grounds have common elements.

Firstly, Woollahra Council claimed the delegate had failed to carry out his statutory function under the LG Act in respect of his examination of and report on the proposal. In particular, Woollahra Council contended that the delegate’s consideration of the financial advantages and disadvantages was deficient in that the delegate:

(a) made no examination of the grounds or assumptions that underlay the KPMG or SGS reports;

(b) made no examination or assessment of the strength or weight that ought to be given to the conclusions of those reports;

(c) made no examination or assessment of the likelihood of the asserted financial benefits being achieved other than simply to treat the two profit figures as arithmetical endpoints;[and]

(d) did not pay regard to the fact that the KPMG report was not an independent report but had been propounded to support the ministerial proposal.²

The Court of Appeal disposed of this argument by concluding that the delegate did examine the financial advantages and disadvantages as required by s 263(3)(a) of the LG Act. The Court analysed the obligation imposed under s 263(3) of the LG Act and dissected the phrase “*have regard to*”. Justice Beazley stated at [106] that the phrase “*have regard to*” required the delegate “*to consider*” or “*to give attention to*” the factors that are listed and stated:

² *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380 at [91].

"A question might arise in a given case whether the Delegate has sufficient information to comply with the obligation under s 263(3)(a). Should that occur, there is nothing in the Act which would prevent the Delegate from seeking further information from whatever source the Delegate considered appropriate. However, the Delegate does not have any investigative function or any powers that permit a compulsory interrogation or inquiry.

...

109. *The Delegate's function to examine the proposal requires an examination of all of the material that is provided and in doing so, to have regard to the matters specified in s 263(3), insofar as they are relevant. In my opinion, it has not been established that the Delegate did not do so.*³

The second common element in the grounds of appeal raised in the Woollahra case was the contention that the Council had been denied procedural fairness in relation to the delegate's reliance on certain documents (in particular a report formulated by chartered accountants SGS Consulting).

Similar to the Ku-ring-gai case Woollahra had contended in the Land and Environment Court proceedings that the delegate was required to give Woollahra Council the opportunity to deal with information that was credible, relevant and significant to the decision being made. Information identified as falling into this category included:

*"... the KPMG analysis and all documents underpinning the KPMG analysis as well as the submissions of Waverley and Randwick Councils and the SGS Economics and Planning report relied on by those councils advocating the financial benefits of the amalgamation proposal."*⁴

Woollahra Council argued in the Land and Environment Court that there had been a denial of procedural fairness in the delegate's failure *"to make Woollahra Council aware of his intention to rely upon the SGS Economics and Planning material in preparing his report on the proposal"*. Justice Preston in the Land and Environment Court found against this assertion determining that there was no denial of procedural fairness in the delegate not disclosing to Woollahra Council, or giving it an opportunity to respond to, the submissions that Waverley and Randwick Councils had made or the SGS Economics and Planning report on which those councils relied. His Honour also concluded that there was no denial of procedural fairness in relation to certain non-public documents described as *"KPMG modelling and analysis"*.

Significantly, on appeal to the Court of Appeal the challenge under this ground in the Woollahra case was confined to the SGS report in contending that the primary judge had erred in failing to find as a matter of procedural fairness that it was entitled to be notified of the key material upon which the

³ *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380 at [107] and [109].

delegate proposed to rely for the purposes of recommending the proposed merger. Woollahra contended that it was entitled to be put on notice of the delegate's proposed reliance on the conclusions in the report. Importantly, Woollahra Council did not contend that it was required to be notified of the contents of the SGS report.⁵

Ultimately, this ground on appeal was rejected by the Court of Appeal stating there was no absence or loss of opportunity to make submissions in relation to the SGS report as "*its existence was known and its relevance was obvious on its face.*"⁶

Distinctions between the Ku-ring-gai decision and the Woollahra decision

Broadly speaking, the differences between the Ku-ring-gai case and the Woollahra case can be divided into factual differences and differences as to judicial findings

The major distinction can be identified in the grounds of appeal that were raised. Notably, in the Woollahra case there was no specific ground of appeal challenging the public interest immunity claim findings made by the Land and Environment Court in relation to the KPMG material.

This is significant as ultimately it was this initial finding that led the Court of Appeal in the Ku-ring-gai case to conclude that the delegate had failed in his statutory duty to examine and report on the financial advantages and disadvantages given that he did not have access to the critical KPMG material. Further, a corollary of that finding was that Ku-ring-gai Council was denied procedural fairness having not had access to the KPMG material and therefore being denied an opportunity to challenge the figures on which the financial advantages proposed by the Minister were based.

In relation to the question of procedural unfairness, the finding of the Court of Appeal in the Ku-ring-gai case that the Council was denied procedural fairness also stemmed from the ground that was not argued in the Woollahra case, namely that there was no legal justification for withholding the KPMG material.

However, there is an apparent inconsistency between the Court of Appeal decisions in the judicial dicta concerning the relevance of the KPMG material and the role of the delegate in relation to examining and reporting on the proposal. In the Woollahra case it was stated by Justice Beazely at [107] to [109] that:

"the Delegate does not have any investigative function or any powers that permit a compulsory interrogation or inquiry. Accordingly, the Delegate could not compel the provision of further information."

⁴ *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380 at [125].

⁵ *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380 at [144].

⁶ *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380 at [149].

...

[and] The Delegate's function to examine the proposal requires an examination of all of the material that is provided..."

This is to be contrasted with comments made by Justice Macfarlane in the *Ku-ring-gai* case who stated at [117]:

"...it can at least be concluded that an administrative decision-maker in a position analogous to that of the Delegate, who is required to "examine" a proposal, has a duty to form his or her own view about the matter to be examined and not adopt uncritically the view propounded in the document accompanying the referral of the matter to him or her."

Woollahra Council's Special Leave Application to the High Court of Australia

It is noted that Woollahra Council has filed a special leave application to appeal the Court of Appeal decision in the High Court of Australia. Section 35A of the *Judiciary Act 1903* requires "special leave" to appeal and provides that such leave is granted only where:

1. A question of law is raised that is of public importance; or
2. The matter involves a conflict between courts; or
3. It is in the interests of the administration of justice.

Put simply, the legal implication of the decision of the Court of Appeal in the *Ku-ring-gai* case is that Woollahra's prospects of being granted special leave to appeal to the High Court under the *Judiciary Act 1903* are improved.

It is plain that there are factual differences between the *Ku-ring-gai* decision and the Woollahra decision and differences in the grounds of appeal raised.

The critical element of the *Ku-ring-gai* decision is with respect to the findings regarding the public interest immunity claim, specifically that the KPMG material should have been made available. This was not challenged in the Woollahra case and one must consider whether an issue that was not pleaded in the grounds of appeal before the Court of Appeal can be considered by the High Court. In that regard there is case law which indicates that the High Court **may** allow new grounds to be raised that were not specifically argued before the Court of Appeal or trial Court. In *Giannarelli v The Queen* (1983) 154 CLR 212 at 221 Gibbs CJ stated:

"It is of course only in an exceptional case that this Court will give special leave to appeal from a decision of a Court of Criminal Appeal affirming a conviction when the point that

the applicant seeks to raise in attacking the conviction was not taken either at the trial or in the Court of Criminal Appeal. However, the present case is exceptional, in that under the law the charge laid could never be proved.”

However it must be emphasised that raising a new point before the High Court will only be permitted in exceptional circumstances. This position was emphasised in the High Court decision of *Re Culleton* [2017] HCA 3 where the appellant sought to raise “a wholly new argument”⁷ Justice Gageler referred to the decision in *University of Wollongong v Metwally (No. 2)* [1985] HCA 28 where six judges of the High Court stated:

*“It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.”*⁸

In *Re Culleton*, Justice Gageler stated that reopening to raise a new argument is not lightly to be done, even if the new argument is constitutional and that exceptional circumstances must be shown. Further, his Honour stated that orderly conduct of any proceeding in the Court require that all substantial issues be identified in advance of any hearing before the full court and if jurisdictional issue is to be raise, it is of the utmost importance that it be raised at the earliest available opportunity.⁹

As noted above, there is also some divergence between the two decisions in relation to the role of the delegate and this is likely to be relevant in determining whether special leave should be given to appeal to the High Court given that such leave may be granted where there is conflict between the Courts.

Conclusion

In summary, there are clear distinctions between the decisions of the Court of Appeal in the Woollahra case and the Ku-ring-gai case in relation to the grounds of appeal that were raised and with respect to the judicial findings.

In relation to the question of procedural unfairness, the finding of the Court of Appeal in the Ku-ring-gai case that the Council was denied procedural fairness stemmed from a ground that was not argued in the Woollahra case, namely that there was no legal justification for withholding the KPMG material.

⁷ *Re Culleton* [2017] HCA 3 at [20].

⁸ *University of Wollongong v Metwally (No. 2)* [1985] HCA 28; 59 ALJR 481 at 483

⁹ *Re Culleton* [2017] HCA 3 at [20], [23].

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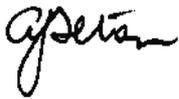
It is not clear that Woollahra will be allowed to raise new grounds or arguments in the appeal to the High Court that it did not raise in the Court of Appeal proceedings.

However, there is an apparent inconsistency between the Court of Appeal decisions in the judicial dicta concerning the relevance of the KPMG material and the role of the delegate in relation to examining and reporting on the proposal which is likely to be relevant in determining whether special leave should be given to Woollahra Council to appeal to the High Court given that such leave may be granted where there is conflict between the Courts.

We trust the above advice is of assistance. If you have any questions about the advice or require further advice please do not hesitate to contact Adam Seton at our Campbelltown Office.

Yours faithfully

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