Council Amalgamations in NSW: A Study in How Not to Tackle Hard Policy

AUSPUBLAW 13/11/2017

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On 27 July 2017, after an 18-month long battle fought on various fronts, including through the courts, the NSW Premier, the Hon Gladys Berejiklian, announced that the government would not proceed with all remaining proposed amalgamations of metropolitan councils.

A few days later, on 31 July, the NSW Court of Appeal handed down a decision upholding, on certain grounds, the challenges of several metropolitan councils to their forced amalgamations. This followed a similar decision of the Court in March. In May, the High Court granted special leave to a third metropolitan council, which had been unsuccessful in the Court of Appeal.

Proposals for amalgamations of regional councils had already been abandoned in February this year.

The government announced its intention to amalgamate or redraw the boundaries of many NSW councils, and reduce their overall number from 152 to 112, in December 2015.

This announcement came after a lengthy process of inquiry and consultation, which had included an 18-month long review by an independent panel of experts in 2012/13, an inquiry by a Legislative Council Committee in 2015, and a review by the Independent Pricing and Regulatory Tribunal (IPART), also in 2015.

However, the December announcement appeared to ignore many of the recommendations and submissions that had been made as part of these processes, seemingly relying instead upon a report from consultancy firm KPMG, commissioned by the government, regarding potential savings to be made from amalgamating councils.

This report was not made public in its entirety, meaning that the rationale for decisions regarding particular councils seemed opaque to many affected by them.

The 'confusing and politically fraught' approach ultimately taken to the amalgamation process by the NSW Government severely damaged its standing with voters in many regions.

The loss of the seat of Orange, previously held comfortably by the Nationals and their predecessors, the Country Party, since 1947, was in part attributed to strength of community feeling over the proposal to amalgamate the Cabonne, Blayney and Orange local government areas.

Not only this, communities and council employees were left in limbo and local government elections in the areas covered by the proposals were delayed by a year.

This episode raises several important questions about the importance of open and accountable decision-making procedures and the outsourcing of policy-making to consultants. At heart, these are questions about policy process, not content.

Report of the Independent Panel on Local Government

Before his landslide victory at the March 2011 state election, then leader of the Opposition, the Hon Barry O'Farrell, made a commitment that there would be no forced council amalgamations in NSW.

It had long been recognised, however, including by the peak local government body, Local Government NSW, that there was a need for reform to the delivery of local government in NSW.

In March 2012, the Local Government Minister, the Hon Don Page, appointed an Independent Local Government Review Panel, at the request of Local Government NSW (then the Local Government and Shires Association).

The Panel was chaired by Professor Graham Sansom, former director of the UTS Centre for Local Government, and was asked to 'formulate options for governance models, structures and boundary changes' for local government areas in NSW.

The Panel consulted widely, including by carrying out a 'listening tour' of the state. It received more than 1800 submissions in total. It delivered its final report to the Government in October 2013, making 65 recommendations aimed at the creation of 'a revitalised system of local government' that would be sustainable and effective in the long-term.

These recommendations related to a range of matters, such as governance and funding, however some were concerned with 'structural reform', meaning the need for amalgamations and boundary changes. In the panel's view, the current number of 152 councils was not sustainable.

The Panel noted that '[m]ost councils are strongly, often vehemently opposed' to proposals for amalgamations, and will embark on robust campaigns 'to stave off any perceived threat.' However, the consultations and polling it undertook suggested to the Panel that while there was strong opposition to the idea of council mergers amongst a 'significant minority' of people, there was also 'a widespread view that amalgamations could lead to cost-savings and better services.' It was possible to

persuade the community of benefits where they existed. Given this, the Panel took the view that '[A]chieving majority community support for amalgamations is by no means an impossible task'.

Panel's recognition of the need for a better amalgamations process

The Panel acknowledged, however, that the issue needed to be approached with some sensitivity. It proposed that the process for amalgamating councils in NSW should be improved to encompass the following features:

- That the State government's currently unfettered right to impose amalgamations and major boundary changes more or less at will should be limited;
- That any amalgamation or major boundary change should be preceded by careful analysis of the issues to be addressed and all of the options available;
- That there should be full community consultation;
- That the process should be handled by an expert, independent body; and
- That the government should not be able to over-rule the findings and recommendations of that body without good cause.

The panel considered that proper planning of proposed mergers would ensure that risks were reduced and benefits realised more quickly. Once merger decisions had been made, planning for their implementation had to be detailed and their implementation managed in accordance with an agreed plan, with 'ongoing monitoring and evaluation.'

As part of the better amalgamations process, the panel recommended changes to the role of the Local Government Boundaries Commission, which is established by Section 260 of the *Local Government Act 1993* (NSW) (LGA). In accordance with s 263(1) of the LGA, the Commission is to 'examine and report on any matter with respect to the boundaries' of councils that may be referred to it by the Minister.

Section 218F, added to the LGA in 1999, provides that the Minister can opt to refer proposals to the Chief Executive of the Office of Local Government, who is given the same functions and powers as the Commission.

The Panel recommended that the powers of the Commission be strengthened, including by removing the option to refer matters about boundaries to the Chief Executive, and that the Commission be provided with its own secretariat and funding for research. It also recommended that the criteria to be considered by the Commission when evaluating an amalgamation proposal, currently set out in s 263(3), should be made more 'outcomes focused' to cover matters such as future sustainability and planning. These recommended changes were designed to assure councils and communities that proposed boundary alterations or mergers would 'be examined independently, impartially and on the merits of the case.'

Government response to the Panel's recommendations

The Panel's final report was not publicly released until January 2014, at which time Premier O'Farrell and Minister Page reiterated the pre-election promise that there would be no forced amalgamations. However, the Premier resigned in April 2014, and was replaced by the Hon Mike Baird.

The government's response to the report was released in September 2014. The response was called 'Fit for the Future', and it was part of a broader package of local government reform with the same name. In it, the government expressed its support for council mergers, but not the recommended legislative changes designed to strengthen and enhance the independence of the Boundaries Commission.

The process set in train by Fit for the Future required all local councils to submit proposals to the government by 30 June 2015 'demonstrating how they intended to become 'fit for the future'', including by merging with nearby councils if necessary. On 22 April 2015, the government appointed IPART to assess the Fit for the Future proposals, rather than appointing a stand-alone independent panel.

IPART made its own report to the NSW Government in October 2015. It did not make any recommendations regarding amalgamations, but rather assessed whether councils were 'fit' or 'unfit' assessed against certain criteria. In findings that the Legislative Council Committee inquiry into local government described as 'unfair and misleading', 71 per cent of metropolitan councils and 56 per cent of regional councils were declared 'unfit'. Councils were asked to respond to the IPART report by 18 November 2015.

Up until late 2015, therefore, councils and community members had been given several opportunities to provide feedback on proposals for local government reform in NSW, including through the Legislative Council Committee review, which also reported in October 2015. There had been some criticism of the Fit For the Future process, including from the Legislative Council Committee, which had recommended that the government:

> implement the Independent Local Government Review Panel's recommendations to strengthen the independence of the Boundaries Commission and ensure a robust and consultative process is in place to consider council amalgamation proposals before any further steps are taken by the government in relation to council amalgamations.

Although resistance to forced mergers clearly remained, there was broad support for the idea that reform of some kind was needed, which might include voluntary amalgamations.

The engagement of KPMG and the December announcement

It is somewhat difficult to piece together what occurred next from the public record. At some point, the government engaged the consultancy firm KPMG to conduct an analysis of the financial benefits of council amalgamations. In June 2016, the *Sydney Morning Herald* reported that leaked Cabinet documents showed that this had been done as early as June 2015, quoting one as follows:

> OLG [Office of Local Government] has commissioned KPMG to support development of a robust evidence base to support the NSW government's Fit for the Future agenda.

The *Herald* report observed '[t]his was well before the government announced the results of the Fit for the Future review' conducted by IPART 'and several months prior to the announcement of the forced merger plans.'

On 18 December 2015, then Local Government Minister, the Hon Paul Toole, made the announcement about proposed mergers and boundary changes. According to the government, these changes would save NSW ratepayers $2 billion over 20 years. While the IPART report stated that the possible savings of implementing the Independent Panel's suggested changes to metropolitan council structures could be in the range of $1.8-2 billion, by January 2016 it was reported that the source of the savings figure for the amalgamations actually being proposed was KPMG.

Also by January, Mr Toole had written to the Acting Chief Executive of the Office of Local Government attaching a list of 35 'merger proposals' designed to rationalise the number of local government areas by either amalgamating councils or redrawing their boundaries. Fifteen of the proposals related to metropolitan councils, while the remaining 20 covered regional councils. Delegates of the Acting Chief Executive were then appointed to assess the proposals against the criteria in s 263(3) of the LGA. Councils once again had to provide submissions, this time to the relevant delegate.

On 12 May 2016, the Governor issued a proclamation giving effect to the creation of 17 new councils. Previously foreshadowed amalgamations that had proven especially controversial, and those involving councils that had initiated legal proceedings were not included in the proclamation.

One thing that seems clear is that delegates and councils were given some, but not all, of the information contained in the reports provided to the government by KPMG. Several councils, individuals and the Greens MLC David Shoebridge requested

documents from the Department of Premier and Cabinet, and they were refused access to them on the basis that they had been considered by Cabinet and were covered by public interest immunity.

In at least three matters, involving Walcha Council, Woollahra Council and Ku-ring-gai Council, the NSW Land and Environment Court refused to order the disclosure of the documents subject to the public interest immunity claim.

Questions raised by the amalgamations episode

It was most likely inevitable that amalgamation proposals would be controversial in many local government areas. However, it is difficult to escape the conclusion that the process employed by the government in its attempt to secure amalgamations exacerbated the backlash against them. The episode raises a number of important questions about policy design and implementation.

a) ***Suitability of means used to make the case for reform***

The first is to do with the way the government tried to make its case on the need for forced amalgamations. The Independent Panel made detailed recommendations, later endorsed by the Legislative Council Committee, about steps that might be taken to ensure amalgamations were achieved in a way that would facilitate more community participation and support, as well as ensure that any resulting benefits were maximised. However, the government rejected these recommendations, instead adopting an apparently 'crash or crash through' means of achieving the reform.

As part of this, the government sought to rely primarily on the savings that would be achieved through the reform as its primary justification for seeking to implement its policy, and it seemingly derived the relevant figures from advice it received from KPMG. Whether or not the claimed amount of savings would have been achieved has been disputed.

According to Professors Graham Sansom and Roberta Ryan, this reliance on possible financial savings as opposed to other benefits of amalgamations such as better service delivery, was one reason why the government was unable to sell the reforms to the community.

The heavy dependence on advice that came from outside government also raises its own questions. It seems that both federal and state governments are increasingly relying upon the services of consultants in the formulation of policy. While there may sometimes be good reasons for the engagement of consultants, and in some circumstances it might be appropriate, in others it may not be. Given the complexities of amalgamation proposals, it is questionable whether this was a policy challenge suitable for outsourcing.

An additional issue is whether hired consultants have the capacity to tell governments what they might not want to hear. There is already a well-developed critique of the capacity of the contemporary public service to deliver the kind of 'frank and fearless advice' necessary for effective government. Owing to the commercial nature of the relationship between consultants and the government, there is a risk that consultants will respond in a narrow way to the brief they are given. Where policy-making is out-sourced to consultants, consideration must be given to the potential limitations of any advice provided.

KPMG rejected claims that it was not 'independent' from the government. However, the *Sydney Morning Herald* has reported that in the case of one merger, KPMG provided advice to the NSW Government that was contrary to earlier advice it had provided to the relevant councils when they had commissioned the firm to do economic modelling on the question of whether they should merge.

b) ***Transparency***

The second question is to do with transparency and openness in government. Doctrines of cabinet secrecy and public interest immunity, developed over long

periods of time, are justified on the basis that they are necessary for efficient and stable government. However, consultants fall outside many of the accountability measures that apply to the public service, for example the traditional idea of the chain of accountability arising from ministerial responsibility and more modern ones such as codes of conduct.

Consultants are in a commercial relationship with the government. There might be commercial-style arguments about why the advice they provide should remain confidential. But in a case such as this one, where the advice had such widespread ramifications for citizens in NSW, is it really acceptable that what seemed to have been crucial aspects of the case for reform were withheld and kept secret, even from the delegates charged with making the relevant decisions, and even, extraordinarily, according to some reports, copies of which were not materials held by the relevant minister or their department?

When the Ku-ring-gai Council's challenge to its proposed boundary changes reached the Court of Appeal, Basten JA did not agree with Moore J of the Land and Environment Court that the NSW Government could claim public interest immunity in connection with the KPMG documents withheld from the delegate or council. His Honour summarised the factors going against immunity as follows:

> (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.

In His Honour's opinion, these considerably outweighed any claimed reduction in candour that might ensue from the release of the documents. Justice Basten took the view that, in this case at least, the absence of this key information when the delegate was reviewing the proposal required by the LGA meant not only that the delegate had 'constructively failed to fulfil the statutory function of examining the Minister's proposal', but also that there had been a denial of procedural fairness to Ku-ring-gai Council, as it could not respond to the claimed financial advantages of the merger.

Many accountability red flags stand out here. How can important policy decisions be reached without all of the evidence for them being provided to relevant statutory office holders such as the delegates of the Chief Executive charged with assessing proposals in accordance with the LGA, and even, if reports are correct, the responsible minister and their agency?

c) *Th**e importance of ordinary process for effective government***

The third question is closely related to the previous two. Although the Independent Panel found it wanting, there is a statutory process for the consideration of merger proposals in the LGA. For reasons of accountability, fidelity had to be given to the process already in place, however slow and inconvenient it may have seemed.

The government's defeats in the Court of Appeal, first in the Ku-ring-gai matter and in the later one involving Hunter's Hill, Lane Cove, Mosman, North Sydney and Strathfield Councils, indicate that it didn't conform properly to administrative process in its pursuit of forced amalgamations.

In the Ku-ring-gai matter, Basten and Macfarlan JJA agreed that the delegate had required access to the KPMG material to fulfil his function properly. In obiter, Basten JA raised the further issue as to whether the LGA actually could be said to authorise the appointment of a delegate who was not employed in the public service to fulfil the

functions of the Chief Executive of Local Government, as had been done in connection with some amalgamation proposals.

In the later case, while Basten JA maintained his view that the failure to adequately disclose the KPMG material to the delegates in the challenge by Mosman and North Sydney Councils gave rise to a denial of procedural fairness, Macfarlan and Sackville JJA did not agree. In the matter of Strathfield, however, they found that the delegate had simply 'adopted uncritically' the findings of KPMG. For all three judges, this amounted to a constructive failure to exercise discretion. In the matter of Hunters Hill, the court found that certain provisions of the LGA had been wrongly interpreted, meaning that the new local government area amalgamating Hunters Hill, Lane Cove and Ryde Councils was not in conformance with the Act.

Each of these judicial review challenges was complex, and different views were taken in the various judgments as to the requirements of the law. The government's decision not to proceed with the amalgamations means they will not be considered by the High Court. It is worth considering whether, if the recommendations of the Independent Panel regarding better process had been adopted, so many amalgamation decisions would have ended up being challenged in judicial review proceedings.

Conclusion: competent policy process and trust in government

The ANU's long-running Australian Election Survey has been recording a decrease in the level of faith Australians place in our democracy over the past decade, which seems to be gathering pace. This is just one amongst several surveys that are registering disaffection and disengagement with democratic governments, not only in Australia, but also around the world.

There are many possible explanations for this. One of the most routine, but nevertheless significant, is the way in which policy is designed and implemented by governments.

As the former Dean of the Australia and New Zealand School of Government, Professor Gary Banks, has stated, policy development and delivery 'are integral to how government is perceived by the public', including the level of trust placed in it. Professor Banks added that public trust is more dependent upon the institutions of government themselves, rather than upon politicians or even so much the government of the day. For this reason, '[i]t is crucially important . . . that the public service is doing, and is judged to be doing, a solid job in advising and informing government policy decisions', and this might in turn mean that 'a 'responsive public service should be providing what is *needed* by the government of the day, as well as what may be wanted.'

Sometimes, faced with a complex policy challenge, governments must be told what they do not want to hear, and be prepared to listen to this. Sometimes too, particularly faced with the need for a reform that is desirable for efficiency or some other valid reason, but is likely to be unpopular with large sections, perhaps even a majority, of the community, such as in the case of council amalgamations, rather than attempting the most expedient course, time will need to be spent laying the appropriate groundwork for any change by finding credible means to persuade a big enough section of the community of the reasons why it is needed, and then following a clear and publicly accountable path towards the desired reform. Where the challenge is a difficult one, there will be no 'quick wins'. Pursuit of such must not be endlessly prioritised over process in administrative decision-making.

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Suggested citation: Lynsey Blayden 'Council Amalgamations in NSW: A Study in How Not to Tackle Hard Policy on AUSPUBLAW (13 November 2017) https://auspublaw.org/2017/11/council-amalgamations-in-nsw/