

OFFICIAL

Infrastructure NSW

AON Tower, Level 27, 201 Kent Street
Sydney NSW 2000 Australia
ABN 85 031 302 516

The Hon Mark Latham MLC
Chairman, Select Committee on Barangaroo Sight Lines
NSW Parliament
6 Macquarie Street
SYDNEY NSW 2000

By email: barangaroo@parliament.nsw.gov.au

30/11/2022

Dear Mr Latham

Barangaroo Sight Lines Committee
Clarification Regarding Documents Handed Up and Other Matters

Thank you again for the opportunity to appear at the hearing on 11 November 2022.

Answers to the two questions I took on notice and to the supplementary questions will be provided separately.

The purpose of this letter is to clarify the contents and significance of the documents which I handed up during the hearing but which I did not get an opportunity to talk to, along with three other matters. I do this for the purpose of assisting the inquiry in its deliberations.

Documents Handed Up

The documents are attached here again, for convenience. They comprise four emails, three of which have at least one attachment.

First Document: Email from Grocon to Infrastructure NSW dated 24 July 2019

On 24 July 2019, Mr Grollo (for Grocon) wrote to Tim Robertson (for Infrastructure NSW) referring to:

- a discussion between them the previous day;
- Grocon's proposed sale of its development rights to Aqualand;
- Aqualand's request for a BDA confirmation of non-exercise of rights as a condition of proceeding; and
- Mr Robertson's advice that Infrastructure NSW would seek a release from Grocon against future claims and relief from the "Oxford Comfort Letter".

Mr Grollo sought a copy of the form of wording of the confirmation and proposed release.

OFFICIAL

Mr Robertson responded the same day to say Infrastructure NSW had not received any correspondence on the matter and the following morning Mr Grollo emailed Mr Robertson asking for clarification how to best progress the transaction and offering to have a telephone call.

Second Document: Email from Oxford to Infrastructure NSW (cc Grocon and Aqualand) dated 25 July 2019

On 25 July 2019, Oxford Properties wrote to Infrastructure NSW, copied to the General Counsels of Aqualand (Mr Blundell) and Grocon (Mr Easy). The letter includes relevant statements regarding the proposed "Transaction", being the managed "step in" of Aqualand under the Central Barangaroo development agreement, in accordance with arrangements within the consortium. Some statements are set out below with an explanation:

- "...Oxford as a secured creditor of Grocon is an interested party in the arranging and securing the completion of such Transaction".

This explains Oxford's role in arranging the Transaction on behalf of Grocon and Aqualand.

- "As you may know, the Transaction is scheduled to close at or after the end of this month and is expected to rationalize ownership at Central Barangaroo to allow the development to be unlocked and proceed as soon as a Sight Lines Resolution Notice has been issued by the BDA... The Parties have been working for many months to arrive at the foregoing agreement..." (**emphasis added**).

This shows that, as at July 2019, the consortium parties had been working together for months, without the involvement of Infrastructure NSW, and that the plan was to close the Transaction at the end of July, in advance of any prospect of resolution of the sight lines dispute or of any notice. The opportunity for the Transaction to resolve issues within the consortium prior to the issue of a sight lines resolution notice is actually being put forward in the letter as a specific benefit of the Transaction.

- "...the arrangement... Eliminates the uncertainty in the development caused by the disagreements between the existing consortium members and allows this state significant project to proceed once sightlines have been issued" (**emphasis added**).

This advised Infrastructure NSW that risks to the Central Barangaroo development caused by disagreements between consortium members would be resolved by the Transaction.

- "...the arrangement stabilizes Grocon financially".

This advised Infrastructure NSW that another benefit of the Transaction was that it would assist Grocon financially.

The correspondence of 25 July 2019 was issued the same day as an article in the Australian Financial Review announcing that the transaction had been entered into by all the parties. There is nothing in the correspondence seeking any form of notice in relation to sight lines.

Third Document: Email from Oxford to Infrastructure NSW (cc Grocon and Aqualand) dated 29 July 2019

By way of background to this email, on 26 July 2019 Tim Robertson emailed the parties (including Grocon) confirming receipt of the proposal of 25 July 2019 and asked them to provide a flow chart outlining the Transaction. Oxford responded that evening to say that it would provide it on the following Monday (Grocon copied in).

As shown in the tabled document, on 29 July 2019, Oxford emailed Infrastructure NSW, copying in Grocon and Aqualand, to provide a flow chart of the transaction. Under "Current Status", the flow chart referred to "binding arrangements" between the three parties (Oxford, Aqualand and Grocon). For the benefit of the Committee, "Exeter" refers to Oxford, "Kensington" refers to Aqualand and "Rome" refers to Grocon.

Fourth Document: Email from Infrastructure NSW to Oxford, Grocon and Aqualand dated 29 August 2019

The email of 29 August 2019 was sent by Infrastructure NSW to all of the consortium parties, including Mr Grollo and Grocon's solicitor, in response to Mr Grollo's email of 24 July 2019 (First Document) and the correspondence from Oxford dated 25 July 2019 (Second Document). The letter attached to the email provides a confirmation of the kind sought by the parties. The confirmation was subject to the receipt by Infrastructure NSW of an executed Deed of Release regarding the Oxford Comfort Letter, which was received by Infrastructure NSW at the time of the step in on 27 September 2019.

Subjudice Convention and Use of Materials Produced for the Court

In New South Wales, justice is administered by the Courts and that is recognised by Parliament.

As we said in our original submission and I confirmed to the Committee at the hearing on 11 November 2022, there are a number of matters being examined by the Committee that are before the Supreme Court for determination. The convention of the Courts is that parties should use affidavits, pleadings and other materials that are produced or discovered as part of litigation only for the purposes of those Court proceedings, unless the material has been formally admitted into evidence or the Court's express prior permission is obtained. Infrastructure NSW is in possession of materials, including documents obtained from third parties and affidavits of witnesses, that it is not able to provide to the Committee, and would not do so in honouring its duty to the Supreme Court. The more limited set of documents tabled to the Committee and summarised earlier in this letter have already been tabled in the House in response to an order for papers. They are direct communications to Infrastructure NSW at the time of the Transaction, and were not created for the purposes of, or obtained in, the litigation.

We are aware that Mr Grollo has encouraged the Committee to seek materials prepared for the Court, and that the Committee has taken up that offer. It is a matter for Mr Grollo and his legal counsel to explain his actions to the Court, and it is open to the Committee to address this matter in its report. However, the sub judice convention provides that Parliament should avoid prejudice to Court proceedings, both in the conduct of the Inquiry and in its report and findings. The risk of prejudice must be particularly high when the Parliament is in possession of only a part of the information that will be available to the Court, carefully curated by one party. That risk is great in this case as Grocon has selectively provided documents containing unfounded assertions and

Infrastructure NSW disputes those assertions in hundreds of pages of affidavit material filed with the Court.

The value of 8,000 square metres

During the hearing I answered questions about the value to Lendlease of the 8,000 square metres of GFA which Infrastructure NSW undertook to support in the Deed of Sight Lines Resolution. A dollar figure had been ascribed to the area by another witness, which I understand to have been a gross revenue figure.

For clarity, a speculative view of gross revenue is not the same as value, which must take account of planning risk, market risk and the costs of designing, constructing, marketing and selling the space. It is also subject to discounting back to present value (as we did with our own estimates of damages). Further, in any feasible transaction, the amount paid for development rights (in effect, the value of land) will always fall well below the final value of the development.

Most importantly, in mid-2019, Infrastructure NSW was seeking to negotiate an option for Government that involved a settlement in the context of Lendlease and Crown having won the first stage of their litigation and with damages pending. The relevant point to us was not what revenue Lendlease might achieve upon completion, but what damages we might otherwise have to pay and other losses we might incur. For the 8000 square metres, the process did not involve valuing the space based on past payments or final market value, noting Infrastructure NSW couldn't "sell" those rights to anyone else in an open market. The terms on which Lendlease and Crown were prepared to settle were then presented to the Expenditure Review Committee of Cabinet (**ERC**), alongside other options.

The Role of DPC and Treasury

During the hearing I answered a question about the members of the Steering Committee which had been established to oversee the resolution of the sight lines dispute. I confirm that the member for Department of Premier & Cabinet was Amy Brown and the members for NSW Treasury were initially Charlotte Alexander and then, from July 2019, Jenny Merkley.

For clarity, the involvement of DPC and Treasury extended beyond their involvement in the Steering Committee. Treasury provided accounting advice to inform Cabinet decision-making and advised on the clarity of the ERC submission. Other officers and senior executives reviewed and supported the analysis, including San Midha (Deputy Secretary at Treasury). Some matters were put directly to Tim Reardon (Secretary at DPC) and Mike Pratt (Secretary at Treasury) for consideration prior to responding to Lendlease and Crown, before ERC consideration and as part of proceeding with contractual steps.

I hope that this letter assists the Committee in its deliberations.

Yours sincerely

Simon Draper
Chief Executive

Attachments – First to Fourth Documents