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19 December 2022

The Hon. Mark Latham MLC
Chair, Select Committee on Barangaroo sight lines
NSW Parliament House
6 Macquarie Street
Sydney NSW 2000

Dear Mr Latham

Grocon supplementary submissions to the Select Committee on Barangaroo sight lines

1. We refer to:

   a. the email dated 23 November 2022 inviting the Grocon Group (**Grocon**) to respond to supplementary questions from the Select Committee on Barangaroo Sight Lines established on 10 August 2022 by the NSW Legislative Council to inquire into and report on the matters set out in the Terms of Reference (the **Committee**); and

   b. Grocon's submissions to the Committee dated 10 October 2022 (**Submissions**); and

   c. Grocon's responses dated 5 December 2022 to the Committee's supplementary questions.

2. The Committee's 23 November email invited Grocon to provide any further information Grocon wishes to provide to the Committee. This supplementary submission responds to that invitation. Capitalised terms not defined in these supplementary submissions have the definitions given to them in the Submissions.

INSW was obligated to issue the SLRN when the Sight Lines Negotiations with Crown and Lendlease were resolved or concluded

3. On 11 November 2022, both Mr Simon Draper, the current Chief Executive Officer of INSW, and Mr Timothy Robertson, a former employee of INSW, gave evidence that INSW had no obligation under the Central Barangaroo Development Agreement dated 15 November 2017 (**CENDA**) to issue a Sight Lines Resolution Notice (**SLRN**). That

evidence was incorrect: when the Sight Lines Negotiations were resolved or concluded, the BDA (and later INSW) was obligated to issue the SLRN to the Developer of Central Barangaroo.

4. The SLRN was the instrument by which Grocon was to be informed of the development envelope for the Central Barangaroo development, and without it Grocon (and its consortium partners, financiers, and potential financiers) could not know what size and shape the project would be, and therefore could not know how profitable it would be. The terms of the CENDA (and the Conditional CENDA before it) were premised on the SLRN being issued. In particular:

   a. Clause 1.9(g) of the CENDA provided that subject to the BDA's obligations under the Barangaroo South PDA and the Crown Development Agreement in relation to the Sight Lines Negotiations, the BDA must use all its reasonable endeavours to procure the satisfaction of the Condition Precedent with as little impact as possible on the provisions of the CENDA as soon as reasonable practicable after the date of the CENDA. The Condition Precedent was defined in clause 1.1 as the BDA notifying Grocon that the Sight Lines Negotiations and Amendments to the CENDA contemplated by clause 1.10 had been resolved to its satisfaction or concluded. The Condition Precedent was waived by the BDA in the Deed of Waiver, as to which see paragraph 5, below, but that merely rendered the CENDA unconditional. It did not remove the obligation on the BDA to issue the SLRN.

   b. Clause 1.10 of the CENDA concerned the development envelope for the Central Barangaroo Development. Each of its subclauses assumed that a SLRN must be issued by the BDA. Specifically, it provided as follows (emphasis added):

      i. The Development Rights Fees would be reduced in accordance with the provisions of clause 5.2 **if the BDA notified Grocon that as a result of the Sight Lines Negotiations**, the total above ground Developable GFA (**ADGFA**) for Central Barangaroo was reduced to an amount which was:

         1. greater than the Minimum GFA (90,000 sqm); but

         2. less than the Base GFA (120,000 sqm).

      ii. Within 60 Business Days **after the BDA notifies Grocon of the resolution of the Sight Lines Negotiations**, Grocon must submit a refined design of the

Central Barangaroo development, incorporating the resolution of the Sight Lines Negotiations, to the BDA for its approval.

iii. Where, **as a result of the resolution of the Sight Lines Negotiations**, the ADGFA was between the Minimum GFA and the aggregate of the Base GFA plus 2,500 sqm of GFA, the BDA must act reasonably in approving or not approving that refined design, but the BDA would be entitled to withhold its approval where the design would give the Retail Investor the right to terminate the Retail Sub-Development Agreement.

iv. Where, **as a result of the resolution of the Sight Lines Negotiations**, the ADGFA was more than the aggregate of the Base GFA plus 2,500 sqm of GFA, the BDA and Grocon must use all reasonable endeavours and act in good faith to agree a refined design of the Central Barangaroo development incorporating the resolution of the Sight Lines Negotiations which resulted in the development remaining commercially feasible (including using all reasonable endeavours to ensure that such refined design does not lead to the Retail Investor having the right to terminate the Retail Sub-Development Agreement).

v. Following the approval by the BDA of the refined design:

    1. that refined design would form the basis of the Design Documentation to be provided by Grocon; and

    2. Grocon must amend the project brief attached to the relevant Consortium Documents so that it was consistent with the refined design so approved.

vi. If the BDA **notified Grocon that as a result of the resolution of the Sight Lines Negotiations**:

    1. The CENDA was required to be amended (other than as contemplated by clause 1.10(b)); or

    2. the total ADGFA for Central Barangaroo was required to be reduced to an amount which was less than the Minimum GFA,

the BDA and Grocon must meet within 10 Business Days after the date of service of the BDA's notice to negotiate the appropriate way to address the impact of any required amendment to the CENDA or the reduction to the Developable GFA to

an amount which is less than the Minimum GFA including a reduction to the Development Rights Fee payable for the Minimum GFA.

5. If the BDA was not obligated to issue the SLRN, then clause 1.10 of the CENDA, which is fundamental to its operation, would be ineffective and the BDA could simply abandon the project by failing to issue the SLRN. That is not what the parties agreed to. The claim by INSW's current and former representatives that INSW was not obligated to issue the SLRN when the Sight Lines Negotiations were resolved is obviously based on a convenient revisionist interpretation of the terms of the CENDA.

6. As stated previously, Grocon is restrained from referring to documents produced by INSW or in subpoena in the current Supreme Court proceedings. However, Grocon considers that INSW's own evidence makes it clear that INSW's own personnel considered that INSW was obligated to issue the SLRN when the Sight Lines Negotiations were resolved or concluded. Two examples have been made public by the Committee:

   a. The WhatsApp message from Mr Robertson where he said on 10 May 2019 that if the Sight Lines negotiations were resolved before the Aqualand sale completed "*we'll be forced to give a 1.10 sightlines notice to Daniel Grollo and then we'll all be fucked*"; and

   b. The briefing note to the DPC dated August 2019 prepared by Mr Timothy Robertson of INSW, which includes the statement "*Obligation on INSW to provide Sight Lines Resolution Notice to Central Developer – confirmation of development envelope*".

Grocon's Financial Position

7. In their evidence before the Committee, both Mr Draper and Mr Robertson made statements to the effect that Grocon was insolvent before its exit from the Central Barangaroo project, which Mr Draper relied on in denying that INSW's conduct caused Grocon to enter administration, and which Mr Robertson relied upon in seeking to justify INSW's failure to issue the SLRN to Grocon. This evidence is misconceived.

8. Grocon had been working on the Central Barangaroo project for 4 years by 2019 and had spent more than $38 million on the tender and design process. Grocon's business model did not include high capital reserves, and the Central Barangaroo development was the largest project Grocon had ever undertaken, so the outflow was

significant to Grocon's balance sheet. Then in late 2018, the Oxford transaction fell over, leaving Grocon without an expected immediate payment of $116 million and ongoing revenue flows from Oxford and its other consortium partners. For those reasons, by 2019, Grocon was facing increasing financial pressure.

9. Importantly, the Developer under the CENDA, Grocon (CB) Developments Pty Ltd, was and still is solvent. It is not in administration and is the primary plaintiff in Grocon's Supreme Court proceedings. Nor are several other entities involved in the Central Barangaroo project insolvent. Had INSW provided the SLRN to Grocon, then there would have been no legal impediment to Grocon continuing to develop the project.

10. Similarly, whether there was an Insolvency Event is not a justification that INSW can rely on to justify a breach of the CENDA. In fact, as Mr Grollo stated during his evidence, at the very time INSW is now saying that Grocon was insolvent, another branch of the NSW Government was selecting Grocon as preferred bidder for the Pitt Street Over-station development, including on the basis of financial criteria.

11. Finally, had INSW issued the SLRN to Grocon in 2019, Grocon would have needed only a modest amount of capital to continue in the project. The next steps under the CENDA was the submission of the "refined design" referred to in paragraph 4, above. Given that it had prepared "sight lines compliant" schemes in late 2018 and early 2019, Grocon had already prepared several possible "refined designs" and would only have needed to tweak them to fit the envelope attached to the SLRN.

12. In addition, with the benefit of the SLRN (and associated certainty as to the size and shape of the Central Barangaroo development and the office component in particular), Grocon would have run a second sale process for the office development rights using the same service providers as it had used to secure Oxford, Macquarie Capital and Jones Lang Lasalle, and the resulting transaction would have alleviated Grocon's financial difficulties.

13. Finally, Grocon's role as Developer under the CENDA did not require Grocon to finance the construction of the project. All construction costs were to flow-through to the consortium partners under the consortium agreements.

14. Grocon is disgusted at INSW's attempts before the Committee to justify its breach of the CENDA and other unconscionable conduct on Grocon's financial difficulties –

which INSW caused, or at the very least materially contributed to such that Grocon would not have entered administration had it not been for INSW's conduct.

The Aqualand Transaction was not binding until 10 September 2019

15. Mr Robertson stated several times in his evidence before the Committee that at various times during 2019 including May 2019 and August 2019, Grocon was bound to complete the sale of the Central Barangaroo development rights to Aqualand.

16. The true position is that Grocon was not bound to complete the Aqualand transaction until 10 September 2019 when certain conditions were met. The only documentation in place until then was a series of term sheets which, variously, had sunset dates that had expired.

17. Consistent with its position that it was not bound to complete the Aqualand transaction, in mid-2019 Grocon was pursuing "Plan B" which was a process run by Deloitte to obtain alternative finance to reject the Aqualand transaction, which was at a drastic undervalue. INSW, Aqualand and Oxford were all well aware of Grocon's pursuit of Plan B in mid-2019 and were concerned that Grocon would succeed in obtaining alternative finance – they would not have been concerned had Grocon been bound to complete the Aqualand transaction. Again, Grocon is restrained by the implied undertaking from using documents produced by INSW and Aqualand in the Supreme Court proceedings to prove the foregoing statements.

18. Grocon notes that in his evidence before the Committee on 1 December 2022, Aqualand's Executive Chair, Mr Warwick Smith, did not allege at any point that Grocon was bound to complete the sale to Aqualand, despite multiple questions on the subject. Again, that assertion is a convenient revisionist approach to history by INSW in an attempt to justify its unjustifiable conduct.

The Indemnity in the Deed of Sight Lines Resolution

19. In clause 5.3 of the Deed of Sight Lines Resolution, which INSW and Lendlease fervently tried to keep confidential but the Committee has now made public, INSW indemnifies Crown and Lendlease in circumstances where Grocon (or, later, Aqualand) seeks to recover "damages for tortious interference due to the participation of Crown or Lendlease in the negotiations between them and the BDA, referred to by the project name of Grand Bargain or which took place during the period from 14 July 2018 to 14 August 2018."

20. As Mr Grollo stated during his evidence, Grocon was aware of and participated in one set of negotiations with INSW, Crown, Lendlease, Aqualand and Scentre to attempt to "collectively find a way through the deadlock that was sightlines". However, to Grocon's knowledge, and as stated by Mr Grollo, project Grand Bargain was inconclusive. Grocon is not aware of any conduct of Crown or Lendlease during those negotiations that could possibly found a claim of tortious interference as contemplated by clause 5.3 of the Deed of Sight Lines Resolution. The ineluctable conclusion to be drawn from clause 5.3 is that there were a *second* set of Grand Bargain negotiations from which Grocon was excluded, in which the participants agreed to force Grocon to exit the Central Barangaroo project by way of a sale to Aqualand at a bargain price. Crown and Lendlease would only have insisted upon the indemnity being included if that were the case, because that would likely have exposed them to claims of interference with (Grocon's) contractual rights, and it is ultimately what has come to pass.

21. Grocon would be happy to provide any further assistance, information or documents that the Committee requests, subject to the restrictions associated with the Supreme Court proceedings.

Yours faithfully

Daniel Grollo, CEO

Grocon Group