

INQUIRY INTO BARANGAROO SIGHT LINES

Organisation: Lendlease Group

Date Received: 9 October 2022

SELECT COMMITTEE ON BARANGAROO SIGHT LINES

Submission by the Lendlease Group

Lendlease notes the establishment of the Select Committee and its terms of reference (ToR) and provides the following submission in the hope that it assists the Committee.

Given the ToR, we provide a brief factual and chronological summary of our involvement in the Barangaroo South project.

EXECUTIVE SUMMARY

1. Lendlease (Millers Point) Pty Ltd (LLMP or Lendlease) is the developer of Barangaroo South, one of the three project areas that form Barangaroo. Annexure A sets out a map of Barangaroo South, Central Barangaroo and Barangaroo Reserve.
2. The development of Barangaroo South was originally proposed to include office towers, high rise residential towers, a high-rise luxury hotel building and public open space. The overarching planning document for Barangaroo is a Concept Plan which has, since it was first determined in 2007, provided for low-rise development at Central Barangaroo and substantially higher development at Barangaroo South.
3. LLMP was appointed to the role of developer for Barangaroo South in December 2009 by the Barangaroo Delivery Authority (BDA) following a competitive public tender process. Pursuant to that appointment, the BDA, LLMP and Lendlease Corporation Limited (as guarantor of LLMP) entered into the Project Development Agreement (PDA) in March 2010.
4. Following a NSW Government review in 2011, changes were made to the project plan and transport services for the Barangaroo site. As a result of this review, Lendlease agreed to modify the proposal it had bid (which had been included in the PDA) to relocate the hotel and apartment building from a pier over the water to another location within Barangaroo South. Subsequently Lendlease agreed for the hotel and apartment building to be developed and operated as an integrated casino and hotel by Crown Sydney Property Pty Ltd (Crown). An impact of these changes was that the open views to the north west from the residential towers were impeded which meant the views to the north east became significantly more important. The core concept of high-rise residential towers, and a high-rise luxury hotel building, has remained at all times a critical part of the Barangaroo South project concept.

5. Lendlease's high-rise residential towers for Barangaroo South were designed by world-renowned architect, Renzo Piano Building Workshop. They are intended to be world class structures with the express design goal of maximizing the views of the "icons" - the Sydney Harbour Bridge and Opera House. The design was approved by the BDA and the importance of the views from these towers was also expressly referenced in the BDA-approved Barangaroo South Master Plan 2015 (Barangaroo South Master Plan). The Barangaroo South Master Plan stated, amongst other things, that:
 - a. the design of Lendlease's residential towers had "*adopted the recommendations of the studies undertaken by RSH+P [Rogers Stirk Harbour + Partners, being an international architectural practice] for the massing, distribution, height and available views*" resulting in "*taller, more slender towers*" that "*capitalis[ed] on premium views of the Opera House and of the Harbour Bridge that become available*"; and
 - b. Lendlease's residential towers had been positioned "*in locations which will best benefit from their relationship to Sydney's iconic landmarks; the Harbour, The Bridge and the Opera House*" and work had been done developing "*taller and slimmer towers to maximise prime views of the Opera House and the Sydney Harbour Bridge*".
6. The preservation of the sightlines of these structures is of obvious commercial significance to Lendlease's investment in Barangaroo South (as it is for Crown in respect of the preservation of its sightlines from its casino/hotel).
7. In April 2014, the BDA issued a "Call for Expressions of Interest" (CEOI) for the development of Central Barangaroo and in October 2014 it issued a request for development bids (2014 RDB) and a Master Plan for Central Barangaroo (2014 Master Plan). The CEOI stated: *While the block footprints have been modified, it is the intention [of the BDA] to maintain the approved height limits in their current location relative to the surrounding context. This will ensure a development height consistent with the approved vision for Barangaroo.*
8. Lendlease's dealings with the BDA were professional and proper, but there were from time-to-time legal disputes between the BDA/State of NSW and Lendlease over issues relating to Barangaroo South. One of these was the 'value share payment litigation' commenced at the end of 2012 – which resulted in proceedings in the NSW Supreme

Court and the NSW Court of Appeal that were ultimately decided by both courts in Lendlease's favour with the Court of Appeal decision handed down in August 2014.

9. In May 2015, to give effect to arrangements to resolve disputes and issues between the BDA/State of NSW and Lendlease (and Crown) in relation to Barangaroo South – including the value share payment litigation, the arrangements for the Crown development of the casino/hotel (in lieu of a hotel development originally planned to be executed by Lendlease) mentioned above, and the preservation of sightlines for the Lendlease residential towers and Crown casino/hotel development – a package of three interrelated agreements was entered into. The package comprised:
 - a. the Deed of Settlement between the BDA, State of NSW and the Lendlease entities (which included obligations on Lendlease to make further significant payments);
 - b. the Fifth Deed of Amendment to the PDA between the BDA and the Lendlease entities (which included the Sightlines clause – see cl 2.5); and
 - c. the Crown Development Agreement (CDA) between the BDA, the Lendlease entities and the Crown entities in relation to the development of the Crown casino/hotel (which also included a Sightlines clause in similar terms at cl 5.5).

The interrelatedness of the Deed of Settlement and the Fifth Deed of Amendment to the PDA is illustrated by the express acknowledgment in Recital C (of the Deed of Settlement) that the parties entered into that agreement in consideration of both agreements being entered into by the other parties.

10. Given the additional amounts to be paid by Lendlease and the changes to the development as bid by Lendlease it became important to Lendlease to ensure that the previously published heights for development on Central Barangaroo would be maintained going forward and the sightlines of the Lendlease residential towers would therefore be preserved. These were matters that Lendlease (and Crown) engaged with the BDA in discussions over many months. The sightlines expressly protected by the relevant clauses relate to the specific “sight lines across Central Barangaroo from the Harbour Bridge to the Sydney Opera House” from residential towers being constructed by Lendlease on stage 1B (known as “Building R4A” and “Building R4B”) and another tower (the Hotel) now constructed by Crown on Barangaroo South. They are delineated by reference to the existing built landscape and the approved building height limits in the Concept Plan for Barangaroo. The Sightlines clauses in the PDA and

CDA are in substance the same and were specifically included in both agreements given their commercial importance to Lendlease (and Crown).

11. Shortly after these agreements were made, Lendlease observed that the planning for Central Barangaroo by the BDA underwent a wholesale re-conceptualisation of the scale of development, involving, at various points, proposals to significantly increase the current height limits in Central Barangaroo adversely impacting the views from Lendlease's residential towers sought to be preserved by the Sightlines clauses. For example:

- a. On 23 June 2015, the NSW Government announced that there would be a metro station at Barangaroo. This led to the termination of the tender process for Central Barangaroo that was commenced in April 2014.
- b. On 26 November 2015, the NSW Government announced a new tender process for Central Barangaroo that would include a process of considering proposals for development up to 150,000 m² and without any reference to height limits.
- c. On 2 December 2015, the BDA issued a second Request for Development Bids (2015 RDB) and a revised Central Barangaroo Master Plan (2015 Master Plan). The 2015 Master Plan removed the references to maintenance of existing height limits being a "*core principle*" and instead invited development proposals that substantially exceeded heights in the Concept Plan.
- d. In practice, the proposed height limits in the area closest to Lendlease's towers increased by a multiple of seven (from RL 34 to RL 245) and by at least a multiple of four (from RL 34 to RL 128.5).
- e. Lendlease requested on a number of occasions after June 2016 more information from the BDA on the applications it had received in response to the 2015 RDB. Granting this request would allow Lendlease to examine, and then negotiate in good faith, changes to the application to retain the sightlines while at the same time optimising development opportunities for Central Barangaroo. The BDA, taking a different view of its legal obligations under the Sightlines clauses, declined to provide such information beyond the indicative development envelopes.

12. These actions by the BDA, in Lendlease's view, did not accord with the BDA's legal obligations under the Sightlines clauses. The BDA took a different view on the

requirements of these clauses. Despite many attempts over a long period to resolve the differences of opinion and positions as to the application of the Sightlines clauses and the consequential commercial impact on Lendlease (and Crown), it ultimately became necessary for Lendlease to commence legal proceedings in August 2018 to obtain a court ruling in relation to the operation of the Sightlines clauses. (Crown also filed suit). These proceedings were commenced against the BDA in the NSW Supreme Court after all reasonable avenues and attempts at good faith negotiations were undertaken by Lendlease. In December 2018, the NSW Supreme Court ruled again in favour of Lendlease (and Crown – who had taken a similar position on interpretation of the Sightlines clauses as Lendlease).

13. Following the conclusion of that litigation, and with the benefit of the Court’s judgment on the proper interpretation of the Sightlines clauses, a period of negotiations then occurred over a number of months between the BDA (and subsequently Infrastructure NSW, or iNSW, following the dissolution of the BDA by the NSW Government), Lendlease and Crown directed to giving proper effect to the BDA’s obligations under the Sightlines clauses.
14. Those discussions ultimately resulted in the Deed of Sightlines Resolution, which was executed on 18 August 2019.
15. In light of the above, Lendlease does not consider itself to have been the subject of any inappropriate biases resulting in preferential treatment of its commercial interests (ToR 2(d)). Nor does it consider it acted without due probity in relation to its negotiations with the BDA, iNSW or the NSW Government concerning the Barangaroo sightlines (ToR 2(b)).

FURTHER DETAIL

16. The overarching planning document for Barangaroo is a Concept Plan which has, since it was first determined in 2007, provided for low-rise development at Central Barangaroo and substantially higher development at Barangaroo South. Apart from imposing height limits, the Concept Plan prescribes the mix of permissible land uses and maximum gross floor area (GFA) for each development block and sets out design principles and indicative layouts of buildings.

17. The concept bid by Lendlease for Barangaroo South (included in the PDA) was originally to include, as well as office towers and the proposed residential towers, a high-rise luxury hotel and apartment building on a pier projecting over the water, to be developed by Lendlease. The proposed development for Barangaroo South was initially incorporated into the Concept Plan by Mod 4 in December 2010.
18. In 2011, following a review commissioned by the NSW Government, Lendlease agreed to relocate the hotel and apartment building from the pier to another location within Barangaroo South.
19. During 2012, Crown and Lendlease entered into an agreement giving Crown the rights over the site on which the completed Crown integrated casino and hotel is now located. Following approvals being obtained, that agreement came to be reflected in revised planning documents which the BDA approved from September 2013 through to March 2015 and in the CDA between the BDA, Crown and Lendlease in May 2015.
20. An impact of these changes was that the open views to the north west from the residential towers were impeded which meant the views to the north east became significantly more important.

The Value Share Payment Litigation

21. During the course of the development of Barangaroo South, disputes have arisen between the BDA and Lendlease. One of these – as noted in the Executive Summary – was the value share payment litigation.
22. In the PDA for Barangaroo Stage 1, Lendlease (a) agreed to develop the land and (b) was granted, via its nominee, a 99 year lease over the land. In return, Lendlease agreed to pay the BDA substantial fixed amounts but also an amount (the “Value Sharing Payment”) calculated by reference to 50% of the “Premises Land Value” (in each case as defined in the PDA). The Premises Land Value was to be determined by reference to, among other things, “Current Market Value”.
23. One element of how the “Current Market Value” was to be determined was a discounted cash flow analysis in respect of which the project internal rate of return (IRR) was, in turn, relevant.
24. A dispute arose between Lendlease and the BDA about the amounts to be included in determining the project’s IRR and, in turn, the discounted cash flow analysis informing the calculation of the Current Market Value.

25. The NSW Supreme Court concluded that, on the proper interpretation of the PDA, the approach taken by Lendlease was correct. The BDA appealed.
26. The NSW Court of Appeal dismissed the BDA's appeal. Lendlease's argument as to the proper interpretation of the PDA was upheld.
27. Legal proceedings taken in aid of disputes like this one, and the Sightlines litigation discussed earlier and below, are indicative of the arms-length basis on which the Lendlease entities and the BDA were dealing.

The Fifth Deed of Amendment to the PDA and the Sightlines clauses

28. On 4 March 2015, the BDA approved the Barangaroo South Master Plan. The Barangaroo South Master Plan stated, amongst other things, that:
 - a. the design of Lendlease's residential towers had "*adopted the recommendations of the studies undertaken by RSH+P [Rogers Stirk Harbour + Partners, being an international architectural practice] for the massing, distribution, height and available views*" resulting in "*taller, more slender towers*" that "*capitalis[ed] on premium views of the Opera House and of the Harbour Bridge that become available*"; and
 - b. Lendlease's residential towers had been positioned "*in locations which will best benefit from their relationship to Sydney's iconic landmarks; the Harbour, The Bridge and the Opera House*" and work had been done developing "*taller and slimmer towers to maximise prime views of the Opera House and the Sydney Harbour Bridge*".
29. As indicated above, the Fifth Deed of Amendment to the PDA, was entered into in May 2015 to give effect to arrangements to resolve various disputes and issues between Lendlease and the BDA. The Fifth Deed of Amendment to the PDA was one of three documents executed together. The other two agreements were:
 - a. a deed of settlement between the BDA, the State of NSW and Lendlease entities; and
 - b. the CDA, being an agreement between the BDA, Lendlease entities, and Crown Sydney entities, relating to the development of the Crown Hotel.
30. The Sightlines clauses included in the PDA and the CDA are properly regarded as part of a wider settlement between Lendlease, the BDA and the NSW Government.

31. The Sightlines clause in clause 2.5 of the PDA states:
- 2.5 Central Barangaroo Sight Lines
- (a) The Developer acknowledges that the optimisation of development at Central Barangaroo is of critical importance to the Authority;
 - (b) The Authority acknowledges that retention of sight lines across Central Barangaroo from the Harbour Bridge to the Sydney Opera House (and including the Harbour Bridge and the Sydney Opera House):
 - (i) in the case of the Developer, from the residential towers to be constructed on Stage 1B; and
 - (ii) in the case of Crown, from the Hotel Resort to be constructed on Stage 1C,is of critical importance to the Developer and Crown.
 - (c) Prior to considering or approving any application which provides for development different to that provided for in the Concept Plan Approval (as at the date of this deed) as it relates (in part or in whole) to Central Barangaroo, the Authority will discuss and negotiate in good faith with the Developer and Crown equally to agree any changes to that application so as to retain the sight lines referred to in clause 2.5(b), while at the same time optimising the development opportunities for Central Barangaroo.
 - (d) The Authority confirms that any agreement between the NSW Government, the Authority or any other Public Authority and Crown on height restrictions and/or Sight Lines across Central Barangaroo must be offered to the Developer on an equivalent basis.
32. The “sight lines referred to in clause 2.5(b)” are “sight lines across Central Barangaroo from the Harbour Bridge to the Sydney Opera House (and including the Harbour Bridge and the Sydney Opera House): ... in the case of the Developer, from the residential towers to be constructed on Stage 1B; and ... in the case of Crown, from the Hotel Resort to be constructed on Stage 1C”.
33. By 27 May 2015, a detailed design for the Lendlease towers had been approved by the BDA which included the locations and designs of the Lendlease towers. It was commercially important for Lendlease (and Crown) to have those sightlines protected and the parties agreed the inclusion of the Sightlines clauses in the PDA and CDA.
34. As noted earlier, following the entry into Fifth Amendment to the PDA and the CDA containing the Sightlines clauses, the BDA’s development intentions for Central Barangaroo changed and the BDA promoted a wholesale re-conceptualisation of the scale of development at Central Barangaroo involving increasing the current height limits in the area closest to Lendlease’s towers by up to a multiple of seven (from RL 34 to RL 245) and by at least a multiple of four (from RL 34 to RL 128.5). These

outcomes and the way the BDA went about seeking to put them into place did not accord with Lendlease's views of the BDA's obligations under the Sightlines clauses. As a result, after much negotiation which led to no resolution, it ultimately became necessary for Lendlease to commence court proceedings against the BDA to obtain rulings in relation to the operation of the Sightlines clauses and the obligations they created. The court ruled in Lendlease's favour. This is discussed further below.

Development of Central Barangaroo – the first tender process for Central Barangaroo - 2014 Call for Expressions of Interest and Request for Development Bids

35. Following the BDA's CEOI in April 2014 for the development of Central Barangaroo, in October 2014 it issued the 2014 RDB to Lendlease and other developers and the 2014 Master Plan, within which bidders were expected to work. The CEOI, the 2014 RDB and the 2014 Master Plan contemplated a maximum GFA for Central Barangaroo of 120,000 m² (higher than the maximum GFA prescribed by the Concept Plan) but, importantly, stressed the importance of bids generally complying with the existing Concept Plan height limits.
36. The CEOI stated: *While the block footprints have been modified, it is the intention [of the BDA] to maintain the approved height limits in their current location relative to the surrounding context. This will ensure a development height consistent with the approved vision for Barangaroo.*
37. The 2014 Master Plan, like the CEOI, provided for a maximum developable GFA for Central Barangaroo of 120,000m² for Central Barangaroo, but specified that development was to conform to the Concept Plan Height Limits (namely RL 34, 29 and 35 on Blocks 5, 6 and 7 respectively). In particular, it identified as a "core principle" that development was to occur "generally within existing development zones, footprints and height controls" and stated that it was an "attribute of the Master Plan framework" that development would occur "within the approved development footprint and height controls". It included building envelopes within the Concept Plan Height Limits, which were said to "ensure a development height consistent with the approved vision for Barangaroo."
38. The first tender for development of Central Barangaroo, which was underway when the Sightlines clauses were agreed upon in May 2015, thus contemplated that the Concept Plan would be amended so as to modify the maximum GFA figures but that the Concept Plan Height Limits would stay in place.

Termination of first tender process for Central Barangaroo

39. On 23 June 2015, the NSW Government announced that there would be a metro station at Barangaroo.
40. 24 June 2015, about a month after the entry in the PDA, the BDA wrote to Lendlease Developments Pty Limited (a wholly-owned subsidiary of Lendlease Corporation) stating that “[a]s a result of the NSW Government’s decision to include a Barangaroo station in the base case for the proposed Sydney Metro project, the Authority is terminating the current Central Barangaroo Request for Development Bid Process”. The letter also stated that:

“In addition to the station, the government also announced the formation of a working group to consider issues such as station location, design and configuration, aligning the timing of Sydney Metro and Central Barangaroo construction and the optimal scale of Central Barangaroo in light of the increased transport capacity.

Subsequent to Government consideration of the outputs of the working group, the Authority will commence a new bid process for the development of Central Barangaroo.”

41. That letter concluded the first tender for development of Central Barangaroo. The BDA then undertook a review of the scale of development at Central Barangaroo in light of the new metro station.

New tender process for Central Barangaroo and the 2015 Request for Development Bids

42. On 26 November 2015 the NSW Premier announced a new tender process for Central Barangaroo that would include a process of considering proposals for development up to 150,000 m² and without any reference to height limits.
43. The announcement of greater GFA and the absence of height restrictions caused LLMP to write in November to the BDA to express its concern as to whether the BDA would be in a position to comply with the Sightlines clauses. The BDA responded on 1 December 2015, stating that it had not yet considered or approved any application under those clauses and any negotiation process under the clauses would be premature.
44. On 2 December 2015, the BDA issued the 2015 RDB and the revised 2015 Master Plan. The 2015 Master Plan removed the references to maintenance of existing height limits being a “*core principle*” and instead invited development proposals that substantially exceeded the heights in the Concept Plan and the 2015 RDB envisaged

that bidders would need to prepare and submit modifications to the Concept Plan “*as a result of development envelope changes*”. Height on Block 5 in Barangaroo Central was, and is, particularly significant for Lendlease because it is immediately adjacent to its towers and directly blocks the sightlines.

45. The 2015 RDB provided that the BDA would consider bids to a maximum above-ground GFA of 150,000m² and, unlike the first tender process, did not specify any height limits for development proposals.

Selection of the Grocon Consortium as preferred bidder for Central Barangaroo

46. In response to the 2015 RDB, the BDA received proposals from three bidders: a subsidiary of Lendlease, the Grocon Consortium and Mirvac.
47. On 29 February 2016, the Grocon Consortium submitted its proposal, which included a high-rise tower on the southern part of Block 5 (Block 5 Tower), adjacent to Buildings R4A and R4B, at a height of RL 188.3 (the “Grocon RL 188.3 Bid”).
48. On 31 March 2016, the BDA invited bidders to issue binding responses to alternative development proposals with above-ground GFA limits of 120,000m² and 90,000m² respectively.
49. The Grocon Consortium responded on 29 April 2016 with two further binding proposals, one which included a Block 5 Tower with a height of RL 125 for the 90,000m² above-ground GFA limit (Grocon RL 125 Bid), and the other which included a Block 5 Tower with a height of RL 165.3 for the 120,000m² above-ground GFA limit (Grocon RL 165.3 Bid). At the same time, the Grocon Consortium included a further alternative bid for 127,000m² above-ground GFA limit, which included a Block 5 Tower with a height of RL 187 (Grocon RL 187 Bid).
50. On 23 June 2016, the BDA selected the Grocon Consortium as the preferred bidder.
51. On 20 December 2016, the Grocon Consortium submitted the Grocon Final Bid into Escrow which left a number of the details of the development proposal unspecified, including the height and architectural drawings of the Block 5 Tower.

Execution of the CENDA and the Grocon RL 170 Final Bid

52. On or before 15 November 2017 the BDA received from the Grocon Consortium its “Final Bid” (Grocon RL 170 Final Bid). The Grocon RL 170 Final Bid was similar to the Grocon Final Bid into Escrow, but with various additional details, including a Block 5 Tower at a height of RL 170 together with detailed architectural drawings,

suggesting it was the product of a process of refining the Grocon Final Bid into Escrow as envisaged in the 2015 RDB.

53. Also on 15 November 2017, the BDA and the Grocon Consortium executed the CENDA. The Grocon RL 170 Final Bid was Annexure AAA to the CENDA.
54. Lendlease requested on a number of occasions after June 2016 more information from the BDA on the applications it had received, including so that Lendlease could examine, and then negotiate in good faith, changes to the application so as to retain the sightlines while at the same time optimising development opportunities for Central Barangaroo. The BDA, taking a different view of its legal obligations under the Sightlines clause, declined to provide such information beyond the indicative development envelopes.

Sightlines litigation

55. As all reasonable avenues had been taken by Lendlease to seek compliance by the BDA - over the course of events described above - with the BDA's obligations under the Sightlines clauses, and the BDA had refused consistently to do so, on 9 August 2018, Lendlease commenced proceedings against the BDA in the NSW Supreme Court. In the proceedings, it sought orders including declaratory relief on the proper construction of the Sightlines clauses and that the BDA had acted in a manner inconsistently with those obligations. Crown also brought parallel litigation.
56. On 14 December 2018, the Supreme Court published its judgment and ruled in favour of Lendlease and Crown. The Court found that the interpretation of the Sightlines clauses asserted by Lendlease was the correct one and that the BDA had breached its obligations under those clauses by considering Grocon's applications over Central Barangaroo without first discussing and negotiating with Lendlease and Crown changes to those applications so as to retain Lendlease's and Crown's sightlines.
57. The NSW Supreme Court ruled, in the Lendlease and Crown litigation against the BDA, that the BDA had breached its obligations under the Sightlines clauses because it did not, at any stage, put forward to Lendlease and/or Crown an application that came close to retaining the sightlines, in the sense of not impeding them. Rather, the BDA provided Lendlease with what it described as "indicative development envelopes" from March 2016 to September 2018 that grossly impeded the sightlines – they ranged between a Block 5 Tower of RL 245 (over seven times the existing height limit for Block 5 of RL 34) and RL 128.5 (over three times the height limit).

58. As noted earlier, following the conclusion of the litigation, and with the benefit of the NSW Supreme Court ruling, a period of negotiations then ensued between the BDA, Lendlease and Crown for the resolution of issues to do with sightlines and related claims.
59. Those discussions ultimately resulted in the Deed of Sightlines Resolution, which was executed on 18 August 2019.

Further attachment

60. In the hope it assists the Committee, Annexure B to this submission sets out a summary timeline of key points in the Barangaroo project history.

Submitted for and on behalf of Lendlease

9 October 2022