Submission No 10

INQUIRY INTO BARANGAROO SIGHT LINES

Organisation: Grocon

Date Received: 10 October 2022

Grocon Group Holdings Pty Ltd ACN 148 964 890

Grocon (CB) Developments Pty Ltd ACN 614 118 642

Level 1, 577 Little Bourke Street
Me bourne VIC 3000

9 October 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 submission to the Select Committee on Barangaroo sight lines

I. INTRODUCTION

1. These are the submissions of the Grocon Group (**Grocon**) to 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**).

2. Grocon welcomes the Committee's inquiry into the Barangaroo sight lines, and is grateful for the opportunity to provide these submissions, which describe Grocon's involvement between 2015 and 2019 in the development of the site at Central Barangaroo (**CB Development**), and the circumstances of Grocon's forced exit which resulted in a severe and unrecoverable financial position leading to 87 of its entities being placed into voluntary administration, and its loss of opportunity to continue as developer of the CB Development. Grocon considers that the NSW Government and public scrutiny of the actions of the responsible NSW Government agencies, the Barangaroo Delivery Authority (**BDA**) and its successor Infrastructure NSW (**INSW**), is timely and merited.

3. By terms of Reference dated 19 August 2022, the Committee is established to inquire into and report on Barangaroo sight lines, including:

   2(a) any actual or perceived biases of the following parties involved in negotiations between the NSW Government, Lendlease, and Crown concerning Barangaroo sight lines:

   i. the Office of the Premier,

   ii. the offices of all responsible government ministers,

   iii. the Chief Executive and Board of Infrastructure NSW,

iv. the Chief Executive and Board of the Barangaroo Delivery Authority,

v. any other person engaged in the negotiations on behalf of the NSW Government,

2(b) the probity of negotiations between the NSW Government, Lendlease, and Crown concerning the Barangaroo sight lines,

2(c) the integrity, efficacy and value for money of 'unsolicited proposals', including the 'unsolicited proposal' initiated by Crown Resorts Limited in relation to the Barangaroo development project,

2(d) any potential biases resulting in the preferential treatment of the commercial interests of one party over the other,

2(e) measures necessary to ensure the integrity of the Barangaroo redevelopment project and similar projects in the future, and

2(f) any other related matters.

4. These submissions seek to assist the Committee by providing facts and circumstances relevant to paragraphs 2(b) and 2(d) of the Terms of Reference. Grocon is uniquely placed to provide a submission on these matters due to its successful acquisition of the CB Development rights in 2016 through the competitive tender process commenced in May 2015, the development contract it had with the BDA/INSW pursuant to the terms of the Central Barangaroo Development Agreement (**CENDA**), and the forced sale of Grocon's the CB Development rights to its former consortium partner, Aqualand, at a substantially undervalued price (the **Aqualand Transaction**) in September 2019.

5. In support of these submissions, Grocon has prepared a chronology of relevant events which is annexed to these submissions and marked "A" and compiled an Exhibit of relevant documents (the **Exhibit**).

6. The central issue between Grocon, the BDA/INSW, Lendlease and Crown has been on the one hand, Lendlease and Crown's contractual entitlement to the retention of the sight lines from Crown and Lendlease's towers on Barangaroo South to the Harbour Bridge and Opera House (**Sight Lines**), and on the other, the terms of the Conditional Central Barangaroo Development Agreement (**Conditional CENDA**) and the Central Barangaroo Development Agreement (**CENDA**) entered into between the BDA and Grocon from 20 December 2016 which provided for a development at Central Barangaroo that would have interfered with those Sight Lines. As the Committee is aware, this issue has already been

the subject of proceedings in the Supreme Court of NSW and a judgment of Justice McDougall dated 14 December 2018 (the **Sight Lines Judgment**).[1]

7. Grocon's position is that the BDA/INSW demonstrated a sustained absence of good faith, transparency and fairness towards Grocon throughout the entire tender, negotiation and development process. In 2015, the BDA requested bids for the CB Development that were bound to interfere with the Sight Lines. However, at the time, the BDA did not fully disclose that the BDA had a contractual obligation with Lendlease and Crown that gave what the Supreme Court of NSW has described as "a seat at the table", enabling them to negotiate with the BDA about the form of development of Central Barangaroo and requiring that the BDA/INSW "… discuss and negotiate ways in which the sight lines can be retained and, subject to that, the development opportunities for Central Barangaroo may be optimised."[2] This was the evident purpose of the contractual entitlement that Crown and Lendlease had, essentially allowing Lendlease and Crown to dictate to the BDA/INSW as to the size and nature of the CB Development, which meant that, despite the representations that were made to Grocon, there was in fact no certainty as to the nature and size of the development that the BDA/INSW could ultimately agree to at Central Barangaroo because, as subsequently observed by the media, the BDA had sold the views of Sydney Harbour twice: once to Crown and Lendlease, and then again to Grocon.

8. In 2016, Grocon won the rights to develop Central Barangaroo, and worked tirelessly with the BDA and later INSW, for over three years, at a cost of approximately $37 million, to support the BDA/INSW in negotiations with Crown and Lendlease and get the development off the ground. The terms of the Conditional CENDA and the CENDA both required the BDA/INSW to issue a Sight Lines Resolution Notice (otherwise known as a 1.10 notice) which indicated that the Sight Lines negotiations between the BDA/INSW, Crown and Lendlease had resolved or concluded (**SLRN**). The SLRN was required to include the "envelope" for the development, effectively mandating the permissible above and below-ground floor area and the maximum heights for each block. Without the SLRN, the development could not proceed. When those negotiations were finally concluded on or around 18 August 2019, INSW (which had by then assumed the rights and obligations of the BDA) deliberately chose to withhold from Grocon the SLRN that it was required to issue. Grocon knows that the SLRN would have provided certainty as to the size and shape of the development and would have dramatically increased the value of its development rights. However, from at least the middle of June 2019, INSW facilitated the sale of Grocon's development rights to another developer, Aqualand, which was one of Grocon's

---

[1] Crown Sydney Property v Barangaroo Delivery Authority; Lendlease (Millers Point) v Barangaroo Delivery Authority [2018] NSWSC 1931.
[2] Sight Lines Judgment, [105]; [121].

consortium partners and had by then become the Government's preferred option. INSW did this in a manner and through methods which were not disclosed to Grocon at any stage prior to its sale and transfer to Aqualand on 26 September 2019 or after it. Grocon did not become aware until approximately two years later, after it commenced the Proceedings and filed a Notice of Motion seeking early discovery that INSW had issued the SLRN to Aqualand on 27 September 2019, the *day after* the sale to Aqualand completed. It must be asked: why did INSW keep that fact quiet for so long?

9. As will be explored in these submissions, Grocon's position is that this has occurred due to the following circumstances:

   (a) Negotiations between the Chief Executives and Boards of the BDA (prior to 1 July 2019) and INSW (from 1 July 2019) with Crown and Lendlease were impacted by the following probity issues:

      i. The BDA/INSW failed to be transparent and misled Grocon as to the progress of the negotiations with Crown and Lendlease in relation to the Sight Lines from the time that Grocon became the preferred bidder,

      ii. In August of 2019, INSW entered into a confidential settlement with Crown and Lendlease which conferred benefits including (1) settlement of the appeal; (2) 8,000 square metres of additional developable area; and (3) an indemnity against claims by Grocon (see paragraph 50 below) on those developers without any auditable, transparent or accountable tender process having been undertaken in respect of that revised deal; and

      iii. INSW failed to be transparent and misled Grocon in relation to the nature of the settlement reached with Crown and Lendlease as to the Sight Lines, and then provided its consent to Grocon entering a transaction with Aqualand that favoured Crown, Lendlease and INSW to the significant expense of Grocon; and

   (b) INSW improperly preferred its own commercial interests, as well as the commercial interests of Aqualand, over Grocon's commercial interests.

10. As a result of the above conduct, Grocon believes that the NSW public have been subjected to:

   (a) The loss of a mixed used precinct on the last remaining piece of public land on Sydney harbour that was best in class for carbon neutral property development and would have included prestigious residential accommodation, world-class office spaces, a Westfield shopping centre delivered by Grocon's consortium partner, Scentre Group (**Scentre**,

owner of Westfield in Australia), and an iconic and innovative digital cultural and arts institution;

(b) A significant delay in the commencement of the development, construction and completion of Central Barangaroo which has further delayed the completion of the last remaining harbour side land in Sydney. At the time of the bid and tender process in 2015, the project time line was for the CB development to be completed by November 2019. It is now not due to commence construction until at the earliest 2025;

(c) The extra 8,000 sqm of developable area given to Lend Lease (presumably in addition to an undisclosed settlement payment), which was not necessary in order to ensure that the CB Development did not impede the Sight Lines;

(d) The use of public funds to develop a Sydney Metro station which was intended to provide access to the mixed use precinct but now amounts to a “train to nowhere”; and

(e) The CB Development being delivered by a developer that is far inferior to the industry-leading team that Grocon had established, headed up by Mr Christopher Carolan, who is broadly acknowledged in the industry to be one of the best in Australia at what he does. Due to its team and experience, Grocon was uniquely capable of overcoming the complexities and delivering the CB Development for the benefit of NSW.

11. These matters are the subject of current proceedings in the NSW Supreme Court brought by Grocon against INSW (**Proceedings**) in early 2020. Grocon is bound by the implied undertaking not to disclose documents or information produced by INSW in the Proceedings and is therefore restricted in these submissions to matters known to Grocon outside of the Proceedings and/or that are in the public domain. In addition, Grocon is restricted by Confidentiality Undertakings from disclosing certain documents including the Deed of Settlement entered into by INSW, Crown and Lendlease dated 18 August 2019. However, the matters the subject of these submissions are more fully described in the affidavit of Daniel Grollo filed in the Proceeding on 25 September 2020, and Grocon invites the Committee to request that affidavit and the pleadings to obtain a more detailed understanding of the issues.

II. RELEVANT FACTS

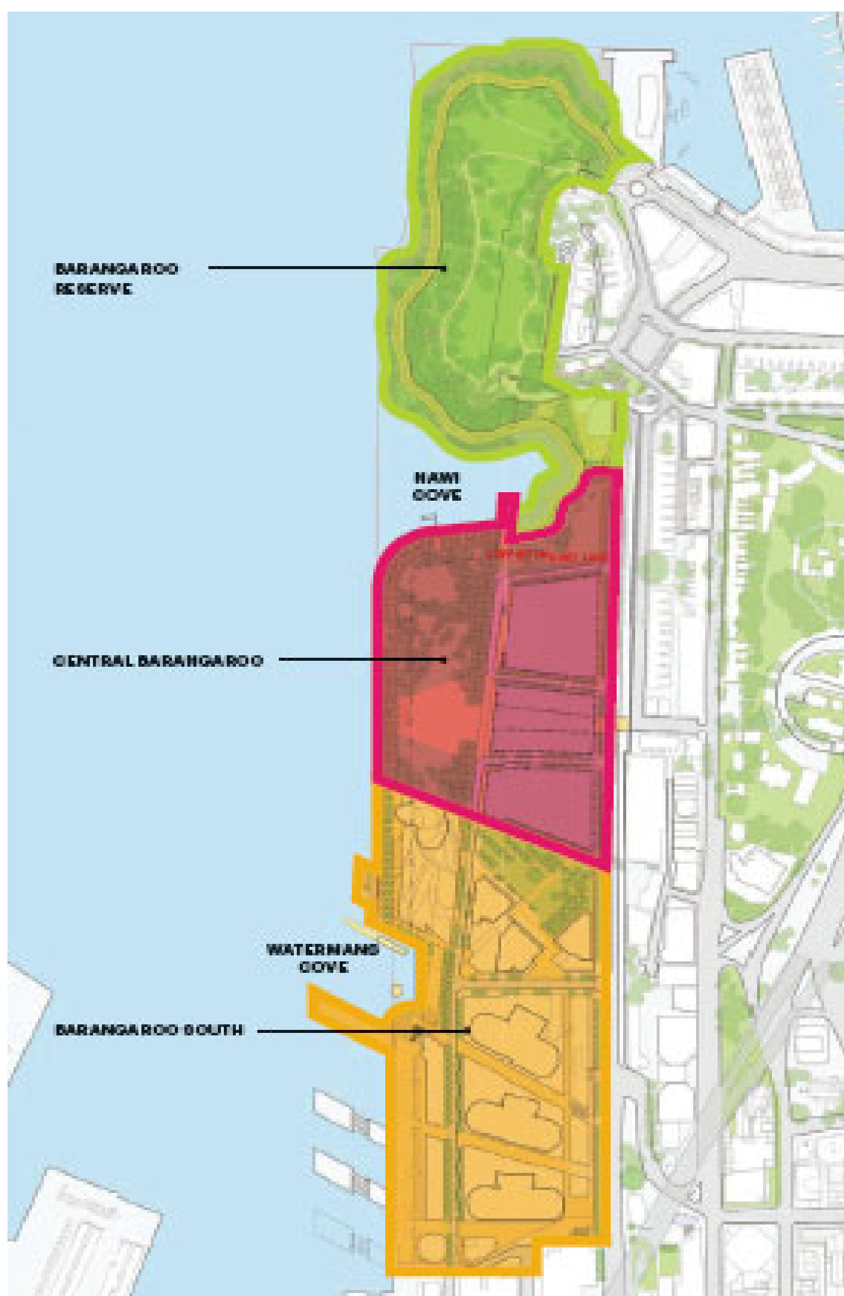
12. Grocon sets out in the following paragraphs facts that it considers may be relevant to the Committee’s assessment of the issues at paragraphs 2(b) and (2d) of the Terms of Reference.

a. Grocon, INSW and Central Barangaroo

13. Prior to entering voluntary administration, Grocon was one of Australia’s largest and best known privately owned construction and development group of companies. During the events the subject of these submissions, Daniel Grollo was the Chair of Grocon, and he was also the CEO of Grocon prior to February 2014 and from July 2018 onwards. Throughout most of the relevant period, Mr Carolan was Grocon’s Head of Development NSW.

14. The BDA was a NSW Government entity constituted under and regulated by the *Barangaroo Act 2009* (NSW). On and from 1 July 2019, the BDA was dissolved and the assets, rights and liabilities of the BDA were transferred to INSW. At or around that time the CEO, Craig van der Laan, and several other BDA/INSW personnel involved in the CB Development including its lead negotiator Ron Finlay, ceased employment with, or consulting to, INSW. It appeared to Grocon that a “cleaning house” process had been undertaken.

15. INSW is a NSW Government entity constituted under the *Infrastructure NSW Act 2011* (NSW) as a body corporate. The BDA was, and INSW is now, the owner of the site at Barangaroo, on Sydney Harbour. The Central Barangaroo site is on Sydney Harbour between Barangaroo South and Barangaroo reserve, as can be seen in the following image:



16. The BDA and INSW were and are subject to the control and direction of the Minister in the exercise of its functions.

17. The website for INSW also states that INSW reports directly to NSW Cabinet and the Minister for Instructure. A copy of the relevant page of the INSW website as at **Pages 1-4** of the Exhibit.

18. The leader of the NSW Cabinet, the Premier, from 23 January 2017 – 5 October 2021, was the Hon. Gladys Berejiklian MP.

19. The relevant Minister during the period in which Grocon held the Central Barangaroo development rights were as follows

(a) The Honourable Andrew Constance from 2 April 2015 to 2 April 2019; and

(b) The Honourable Rob Stokes from 2 April 2019 to 21 December 2021.

20. The BDA and INSW also had and have a board. The CEOs were as follows:

(a) Craig Van der Laan from 26 June 2015 to 2 April 2019; and

(b) Mr Simon Draper from 3 April 2019 onwards.

21. Since 1 July 2019, the Board of INSW has also consisted of:

(a) the Secretary of the Department of Premier and Cabinet;

(b) the Secretary of the Treasury;

(c) the Secretary of the Department of Industry, Skills and Regional Development;

(d) the Secretary of the Department of Planning and the Environment; and

(e) Mr Simon Draper, the CEO of INSW (among others).

22. In addition to the CEOs Mr Van der Laan and Mr Draper, throughout the period in which it held the CB Development rights, Grocon communicated with the following members of the BDA/INSW team:

(a) Mr David McCracken, Development Advisor of BDA/INSW through Voda Management Pty Ltd from November 2015 to date;

(b) Mr Ronald Arthur Finlay AM, lead negotiator and consultant to the BDA/INSW through Finlay Consulting from 28 March 2014 to around April 2019;

(c) Mr Timothy Robertson, Executive Director, Strategy and Operations of the BDA/INSW from 9 January 2017 to 30 November 2019, when Mr Robertson ceased employment with INSW. Prior to that, Mr Robertson was a senior advisor to the Premier of NSW, situated in the Department of Premier and Cabinet (**DPC**);

(d) Mr Peter Funder, Development Director, Central and Barangaroo Reserve from May 2016 to April 2018, when Mr Funder ceased employment with INSW; and

(e) Mr Philip Paris, Executive Director, Development for the Barangaroo precinct from February 2019 to January 2022.

b. Aqualand

23. Aqualand is the Australian development arm of a Chinese company primarily engaged in property development but expanding into private equity investment, through AL Capital.

24. Aqualand and Grocon had agreed to be consortium partners prior to Grocon submitting its initial bid for the CB Development rights in 2016 (see paragraph X below). If Grocon were successful in acquiring the CB Development rights, Aqualand agreed to provide funding to Grocon for the development rights fee (**DRF**) that must be paid to the BDA in return for the sub-development rights to the residential component of the CB Development.

25. Aqualand's leadership team was (and presumably still is) headed up by an enigmatic figure known to Grocon only as "the Chairman" (formerly a high-ranking officer in the Chinese People's Liberation Army) and his son, Jin Lin, who is now the Group Managing Director. In mid-2018, Aqualand appointed an Advisory Board. A copy of Aqualand's announcement concerning appointment of the Advisory Board is at **Page 5** of the Exhibit. The Advisory Board included:

(a) The Hon. Warwick Smith AM was appointed as the Executive Chairman of Aqualand and AL Capital (Aqualand's then newly established investment business). Notably, Mr Smith was an Australian Federal Government Minister with a parliamentary career as a Liberal Party politician spanning 15 years. He was also Australia's first Telecommunications Ombudsman and has received a Centenary Medal, and has twice been awarded an Order of Australia. At the time of his appointment to the Aqualand Advisory Board, Mr Smith was (and as far as Grocon knows still is) Chairman of the Australia China Council, Chair of the National Foundation for Australia-China Relations, and Chair of the China Leadership Group of the Business Council of Australia. In addition, he was Global Trustee of the Asia Society and Chairman Emeritus of the Asia Society in Australia; Special Envoy – Trade and Investment Trade and Investment, New South Wales Government - Department of Industry NSW Trade & Investment. In addition, he has maintained many high directorships of high profile banks, financial services and property development entities. Grocon understand that he is also a close personal friend of the former Premier of NSW, the Hon. Gladys Berejiklian MP;

(b) Mr. John Carfi was appointed as Aqualand's CEO. Mr Carfi is an Australian property development industry veteran who formerly worked at Lendlease and Mirvac.. A copy of Mr Carfi's LinkedIn profile is at **Pages 6-9** of the Exhibit;

(c) Gabrielle Trainor AO was appointed as an independent non-executive director. Ms Trainor is a non-executive director and advisor whose experience covers over 25 years on boards in the public and private sectors including infrastructure, financial services, transport and urban development. Notably, Ms Trainor chaired the arts and culture panels of the Docklands Authority and INSW, and was in December 2014 appointed to the Board of Infrastructure Australia for a three year term; and

(d) Mr Ross McDiven was appointed as a director. Mr McDiven is a long-term member of the Australian and UK property sectors and the former Chairman and Chief Executive at Brookfield Multiplex Group as well as Chief Executive Officer at Brookfield Multiplex Funds Management Limited.

c. The Tender Process for the Central Barangaroo Development rights

26. Between 11 November 2015 and June 2016, Grocon was involved in a second competitive tender for the CB Development (the first tender having been terminated by the BDA when the decision was made to include a Sydney Metro station at Central Barangaroo). Grocon's decision to participate in this competitive tender process was made on the basis of ongoing misrepresentations made by the BDA including in the tender documents, public statements and private assurances, to the effect that:

(a) The BDA had only a general obligation to negotiate with Crown and Lendlease, as the developers of the South Barangaroo site, with respect to maintaining the Sight Lines;

(b) The BDA was not obliged to accept any position being put to it by Crown and Lendlease in the negotiation process and it had an entitlement to terminate the consultation process if agreement could not be reached; and

(c) The CB Development would have around 120,000 to 150,000 square metres of above ground developable gross floor area (**AGDFA**) and a high-rise tower on Block 5, at the South end of the CB Development.

27. Consistent with the misrepresentations made by the BDA prior to the second tender commencing, on 26 November 2015, the then Premier of New South Wales (and responsible Minister for the Barangaroo site), the Hon. Mike Baird, made an announcement, a copy of which is **Page 10 of the Exhibit**, stated that the new tender would consider world-class proposals for the development of no more than 150,000 sqm of AGDFA.

28. Then, on 2 December 2015, the BDA issued a Request for Development Bids (**RFP Document**). A copy of parts A, B, C and D of the RFP Document is at pages 11-457 of the Exhibit. Several of the misrepresentations referred to in paragraph 26, above, are conveyed by the RFP Document as follows:

(a) At section 3.2 of Part A, that one of the objectives of the BDA for Central Barangaroo was to deliver diversity of products and uses integrating commercial, residential, retail, community, education, civic, cultural and entertainment activities which contribute to a vibrant and active identity;

(b) At sections 1.3 and 4.2 of Part A, that the **BDA would consider bids of up to 150,000 sqm of AGDFA** [emphasis added, noting that this scale of development was not compatible with the Sight Lines];

(c) At section 3.3 of Part A, that the Central Barangaroo precinct should "step down in height step down in height from the south to the north. Taller buildings should be in block 5, respecting the Highgate Line, lowest buildings in block 7. Solar access, waterfront views, and views from Millers Point and Observatory Hill should all be considered";

(d) At section 6.3 of Part A, that the BDA would use the period between the selection of a preferred bidder(s) and entry into a development agreement, to refine the preferred bidder's proposal in response to the consultation with Lendlease and Crown in relation to Sight Lines that may be affected by development at Central Barangaroo;

(e) At sections 1.3, 2.10, 4.3 and 4.5, that bidders would be responsible for preparing and submitting any modifications to the Barangaroo Concept Plan and Major Development State Environmental Planning Policy as a result of GFA and envelope changes; and

(f) At section 6.3 of Part A, that within 30 days of contract execution, the successful bidder would be in a position to lodge a request for Secretary's Environmental Assessment Requirements or SEARS for any required modification to the Barangaroo Concept Plan and development of Block 7.

29. In May 2016, after it had submitted three options for the CB Development design, Grocon received a letter from the BDA informing Grocon that the BDA was considering naming Grocon the preferred bidder, subject to several conditions being satisfied. A copy of the BDA's letter appears at **Pages 458-459** of the Exhibit. The letter stated that of the options submitted by Grocon, the focus would be Grocon's proposal for 120,000 square metres of AGDFA. This design did not retain the Sight Lines.

30. In June 2016, Grocon was selected as the preferred bidder on the CB Development.

d. The Central Barangaroo Development Agreement

31. On 20 December 2016, Grocon and the BDA entered into the Conditional CENDA which was placed in escrow until 15 November 2017, when it was made unconditional. The CENDA included the following obligations once it came out of escrow:

(a) subject to the BDA's contractual obligations under its agreements with Crown and Lendlease in relation to the Sight Lines negotiations, the BDA was obliged to use all its reasonable endeavours to procure the satisfaction of a Condition Precedent, which was the issuance of SLRN, with as little impact as possible on the provisions of the CENDA as soon as reasonable practicable after the date of the CENDA;

(b) Grocon was to pay the BDA a DRF of **$422,584,261** which was calculated by reference to an reflected an AGDFA of 124,208 square metres; and

(c) the DRF would increase or decrease depending upon the outcome of the Sight Lines negotiations, a modification to the Barangaroo Concept Plan and planning approval in relation to any application to amend the Barangaroo Concept Plan.

32. Grocon made the $420 million DRF payment on 15 November 2017, when the CENDA was signed. The BDA/INSW retained those funds (less a $100 million DRF refund which occurred in 2019 and was returned to Aqualand) for over two years, throughout the events described in the following pages.

e. The Sight Lines negotiations with Crown and Lendlease

33. Between around 10 March 2016 and 13 December 2018, the BDA engaged in negotiations with Crown and Lendlease concerning the Sight Lines. In the same period, and afterwards until mid-2019, relying on the representations that the BDA was making to Grocon, Grocon:

(a) Prepared dozens of schemes for the CB Development, each time at the BDA's instruction and at considerable expense, none of which were for less than 120,000 square metres of AGDFA and which Grocon now understands, but did not at the time, partially interfered with the Sight Lines. Indeed, the BDA agreed to a development that formed the basis of the contractual terms in the CENDA that proposed a size and height for Central Barangaroo that directly impacted with the Sight Lines. After the CENDA was signed in November 2017, the BDA continued to request that Grocon prepare further schemes which were provided to Lendlease and Crown for their feedback and approval. Grocon was not informed as to which of the schemes, if any, were provided to Crown and Lendlease for "consultation", what format they were provided in, or what the response was;

(b) Entered into contracts with Aqualand for the residential component of the CB Development and Scentre (owners of Westfield) for the retail component of the CB Development; and

(c) Entered into an agreement with OMERS Asia Pty Ltd (**Oxford**) by which Oxford agreed to pay Grocon over $140 million for the purchase of the office development rights component of Blocks 5 and 6 of Central Barangaroo ($116 million plus fees was due on financial close); and form joint venture for the entire CB Development (**Oxford Transaction**).

34. During that period, the BDA provided Grocon with selective updates concerning the progress of the Sight Lines negotiations with Crown and Lendlease, but significant aspects

were omitted. For example, on or about 8 December 2017, Grocon was provided with the sixth and seventh proposals made by Crown to the BDA seeking to settle the Sight Lines negotiations. That was shocking because the BDA had not disclosed or informed Grocon concerning any of proposals 1 to 5.

35. On 9 August 2018, Crown and Lendlease commenced proceedings against the BDA in the Supreme Court of NSW seeking to preserve the Sight Lines.

36. On 20 August 2018, in association with the Oxford Transaction, the BDA provided a binding Letter of Comfort to Grocon to provide to Oxford (**Comfort Letter**). In the Comfort Letter, the BDA undertook not to approve, lodge or permit the lodgment of any planning application for the CB Development which had less than 59,692 square metres of GFA available for use as offices, whether as part of the resolution or finalisation of the Sight Lines negotiations or otherwise. When combined with the residential and retail components of the development, as agreed in Grocon's consortium agreements with Aqualand and Scentre, respectively, of which the BDA was aware, the total development exceeded 120,000 sqm and necessarily involved a partial obstruction of the Sight Lines. Grocon's position is that the Comfort Letter was assignable, meaning the BDA/INSW was required to comply with it even if the Oxford Transaction did not complete and Grocon sold the office development rights to another developer. This meant that as long as Grocon remained the developer of the CB Development, the BDA/INSW was required not to approve, lodge or permit the lodgment of any planning application for the CB Development which had less than 59,692 square metres of office GFA.

37. On 21 September 2018, Grocon and Oxford executed the Amended Implementation Agreement to account for an agreement by Oxford to step into Grocon's then existing finance facility (the **MaxCap Facility**), which was then due for payment. The financial terms of the Oxford Transaction did not change.

38. The Oxford Transaction contained the following provisions:

(a) It was conditional on the SLRN being issued, and Oxford could terminate if the notice was not issued by 31 January 2019, which it could extend at its discretion to 30 June 2019 at the latest;

(b) Approximately $116 million was due to Grocon on financial close of the Oxford Transaction in addition to fees due during the CB Development; and

(c) Grocon had to apply the $116 million and any other proceeds towards to the MaxCap Facility (actually owed to Oxford) and repay certain other debts.

39. Throughout 2017 to 2018, the BDA assured Grocon that the SLRN would be issued imminently. For example, in March 2018, Mr Tim Reardon, who was then the Secretary of NSW Department of Premier and Cabinet and who also sat on the board of the BDA, informed Mr Grollo that there were "*no issues on heights and uses*" and that the Authority "*will issue a Sight-Lines notice for* [around 135,000 square metres] *by June 2018*" (or words to that effect). Grocon therefore reasonably expected to receive the $116 million in revenue payable on financial close of the Oxford Transaction before December 2018.

40. Grocon's expectation is recorded in Grocon's September 2018 rolling 2 year cash flow forecast, which included an assumption that the second tranche of value from the CB Development, approximately, $48.6 million of net cash (comprising the purchase price after repayment of the finance facility), would be received by December 2018 from the Oxford Transaction.

41. At that time, due to the extensive delay impacting the CB Development and the high costs expended by Grocon on the bid and the project to date, Grocon's cash flow was problematic and Grocon heavily depended on the upcoming revenue from the Oxford Transaction.

42. On 14 December 2018, the Supreme Court Judgment was delivered, a copy of which is at **pages 460-498** of the Exhibit. The Court found that:

(a) the BDA's obligations under the Crown and Lendlease development agreements were triggered, at the latest, when the BDA selected Grocon as the preferred bidder;

(b) the BDA's obligations under the Crown and Lendlease development agreements were to start the discussions with each of Crown and Lendlease, respectively, from the proposition that the Sight Lines were to be retained; and

(c) the obligations the BDA, Crown and Lendlease had under the "Sight Lines Clauses" were intended to give Crown and Lendlease a seat at the table, enabling them to negotiate with the BDA about the form of development of Central Barangaroo.

43. The effect of the Supreme Court Judgment was that the CB Development proposed by Grocon could not have 120,000 square metres or more of gross floor area, or a tower on Block 5. The BDA assured Grocon that it would appeal the judgment, and on 15 February 2019, it did so.

44. From around mid-2019 onwards, and unbeknownst to Grocon, the BDA, Aqualand and Oxford orchestrated an arrangement whereby Grocon would exit the CB Development, the key components of which involved the following:

(a) INSW settling the proceedings with Crown and Lendlease to enable an SLRN to be issued, but on a timeline and in a manner that would ensure the SLRN would not be issued to Grocon;

(b) INSW withholding the SLRN from Grocon (despite INSW's contractual obligation to issue it, and contrary to representations through this period that it would do so), for so long as was required to enable the scheme to be put into effect, so as to avoid Grocon being able to refinance its debt (which would keep it as developer and provide it with funds to sue INSW);

(c) INSW facilitating Aqualand's acquisition of Grocon's rights for $73 million (after fees) which:

   i. was less than half of which Aqualand had offered Grocon for the same rights some 12 months prior;

   ii. enabled Grocon to repay its debt to Oxford, on the basis that Oxford would then release INSW from its commitments under the Comfort Letter;

   iii. contained a small amount above Oxford's debt, such that it would have no option but to accept in order to stave off insolvency for a period of time; and

(d) INSW extracting a release from Grocon from all of its claims against INSW as the price for INSW providing its "consent" to the transaction.

45. Throughout this period, INSW repeatedly assured Grocon that the SLRN would be issued. For example, in May 2019, Mr Robertson repeatedly assured Mr Grollo in person and by telephone that the SLRN would be issued by August 2019. However, those assurances were completely false, as to which see paragraph 48 below, and INSW did not issue the SLRN to Grocon.

46. On or around 18 August 2019, INSW settled the appeal and on 19 August INSW announced via media release that the appeal against Crown and Lendlease had been settled. A copy of the announcement is at **Page 499** of the Exhibit. Despite this being the event that triggered INSW's obligation to issue the SLRN, INSW did not issue the SLRN to Grocon.

f. INSW's deliberate withholding of the SLRN and Grocon's exit from the project

47. INSW's conduct after this at the very least continued to act with a complete absence of good faith and cooperation, and Grocon alleges in the Proceedings that it was contrary to INSW's obligations under the CENDA and at law.

48. Of primary concern to Grocon, INSW engaged in negotiations with Aqualand and Oxford (neither of whom had direct relationships with INSW) in relation to the CB Development, without informing Grocon. By doing so, INSW effectively rendered Grocon a bystander in relation to the future of its development rights. While the implied undertaking prevents Grocon from revealing much of INSW's conduct of that nature, the following examples were referred to in open court, during a hearing on 18 November 2021. A copy of the transcript of the hearing is at **Pages 500-536** of the Exhibit:

(a) In 2019, Mr Robertson of INSW sends a WhatsApp message to Mr Mathieson of Oxford where he says:

> "Re Government Stakeholders. We have had a green light to proceed in engaging with Crown and Lendlease a very important step. I'm not keen to disclose to Daniel [Grollo, of Grocon] yet because I'm not keen to hand him more leverage. We will be moving quickly on the negotiation. No interest in a long, drawn out process." [T28:47-29:5]

(b) Here, it can be seen that Mr Robertson of INSW is deliberately withholding information from Grocon concerning the status of the Sight Lines negotiations with Crown and Lendlease because conclusion of those negotiations and issuance of the SLRN (which must be issued when they were concluded) would provide Mr Grollo and Grocon with "more leverage" to resist selling its rights to Aqualand, or insist upon a higher price for those rights due to the certainty as to the envelope and timeline for the development. INSW would also not obtain its release from Grocon in that event. Mr Robertson made these comments to Oxford because Oxford was using its leverage as lender under the MaxCap Facility to encourage Grocon to complete the transaction with Aqualand.

(c) Also in 2019, Mr Robertson of INSW engages in further WhatsApp communications with Mr Mathieson in which Mr Mathieson is talking about what they are trying to persuade Grocon to do, and Mr Robertson says:

> "The only fact to consider is that we have commenced negotiations with Crown and Lendlease on sight lines. I hope these to be wrapped up by end June. Critical that the other process is completed beforehand." [T29:19-22]

(d) "The other process" being, of course, the process by which Grocon was being forced out and Aqualand was going to come in and take over as the developer. Mr Robertson is

emphasising that Oxford should ensure that the Aqualand Transaction completed prior to the negotiations with Crown and Lendlease being settled, at which time the SLRN was required to be issued to the developer of the CB Development.

(e) Mr Mathieson responds to that message and says that INSW were looking for INSW to provide:

> "Comfort that you will activate the step in rights once we place Grocon into administration… [and] acknowledgement that under this deal structure we may not be able to get Daniel to agree to a release waiver." [T29:30-34]

(f) The latter sentence refers to the condition that INSW was seeking to apply to Grocon's exit from the CB Development, being the grant by Grocon of a release or waiver to INSW of all claims to do with the CB Development. Grocon was understandably resisting the condition, as Mr Mathieson observes, and so a "work around" (involving Aqualand exercising step-in rights under its development agreement via a receivership appointment) had to be used.

(g) Also in 2019, Mr Robertson sends Mr Mathieson the following further WhatsApp:

> "Re Timing. Not for broader distribution but we met with Crown and Lendlease twice last week. There is a lot of impetus to resolve the sight lines negotiations pre 30 June. The parties are closer on terms than we might have expected so I can't see this dragging into July. Important for Central parties re timing of issue of 1.10 notice to Central developer." [T29:50-30:5]

(h) At the time of that message, Grocon was still the developer of the CB Development. Aqualand has not yet, as it ultimately will when the transaction with Grocon completes, stepped in as the developer. Mr Robertson is emphasising again that Oxford should ensure that the Aqualand Transaction was completed prior to the negotiations with Crown and Lendlease being settled, because otherwise the SLRN would have to be issued to Grocon.

(i) On 19 and 20 August 2019 messages were exchanged on the CB WhatsApp (which included Mr Robertson of INSW and Mr Mathieson and Mr Smart of Oxford), including one from Mr Robertson as follows:

> "Hi David [Mathieson, of Oxford], I spoke with Daniel this morning and told him we'd be in touch re next steps. I'm hesitant to give him the 1.10 notice knowing that what he may do with it will just further complicate the project." [T30:23-26]

(j) Here, Mr Robertson is stating outright that although INSW *could* issue the SLRN to Grocon (as Grocon alleges it was obligated to do), he is *hesitant* to do so (i.e. deliberately

choosing not to do so) because of the benefit that it will confer on Grocon and the complications that would cause for the above scheme and INSW.

(k) Mr Smart responds and says:

> "One thing you might offer in your negotiations is a waiver and release that is contingent and only goes on foot if Grocon completes the AQL. You could in theory sign that tomorrow given it won't be effective until the Aqualand deal closes. This would allow us to more easily close our escrow as the release/BDA waiver are still conditions precedent to that escrow closing. You might also insist that the release get executed in advance of any section 1.10 notice." [T30:30-37]

49. The upshot is that despite the resolution of the Sight Lines negotiations with Crown and Lendlease, INSW did not work with Grocon to progress the CB Development, but was instead secretly working with Oxford and Aqualand to deny Grocon its rights under the CENDA and force it to exit the CB Development. INSW engaged with Aqualand and Oxford in relation to the timing of the issue of the SLRN; and the content of the SLRN, including disclosing the content of the proposed SLRN to Aqualand, and concealed from Grocon its dealings with Aqualand and Oxford.

50. As a result:

(a) The Oxford Transaction failed and Grocon did not receive the funds it so desperately needed and was expecting to receive in late 2018;

(b) On 18 August 2019, INSW entered into a Deed of Sight Lines Resolution with Crown and Lendlease that INSW and Lendlease have been at great pains to keep confidential. Grocon is bound by confidentiality undertakings not to disclose the contents of the Deed. However, during a hearing in open court on 25 November 2020, the following features of the Deed were revealed. A copy of the transcript of that hearing is at **Pages 537-582** of the Exhibit:

i. It was entered into on or around 19 August 2019 and effected the settlement of the Sight Lines negotiations: [T8:18-20];

ii. It contains a clause 5.3 which both INSW and Lendlease were very keen to keep confidential, which concerns INSW's indemnification of Lendlease and Crown in respect of claims which Grocon might bring against Lendlease and Crown: [T20:47-48; T22:31-39];

iii. Clause 5.3 contains "specific" information which might assist Grocon to formulate and bring claims against third parties presumably including Crown and Lendlease: [T23:12-18];

iv. It contains "dollar figures" which INSW sought to keep confidential: [T26:12-14]; and

v. It annexed an envelope for the CB Development that was the same as that annexed to the SLRN, which would be issued much later, after Grocon had been forced to exit the project (see paragraph 50(f), below): [T17:7-14].

(c) It can also be inferred from INSW's Modification Application 10, which was filed on 7 April 2020, and the NSW Department of Planning, Industry and Environment's Section 75W Modification Assessment dated 2 September 2020 which determines in favour of the Modification (copies of which are at **Pages 583-692** of the Exhibit), that Lendlease was granted an additional 8,000 square metres of AGDFA, primarily in the form of an increase in the permissible height of its residential tower R4B by 25 metres from RL 210 to RL 235: *see* page 6 of the Assessment document. Based on a publicly available floorplan, a copy of which is at **Page 693** of the Exhibit, Grocon estimates that this increase will yield valuable residential real estate worth in excess of AUD$300 million in revenue;

(d) On 10 September 2019, Grocon became bound to complete the sale of the CB Development rights to Aqualand;

(e) On 26 September 2019, the sale of the CB Development rights to Aqualand completed, and Grocon was paid $73 million for rights that were worth approximately double that. Aqualand had itself made an offer of $150 million for the rights in the first half of 2018; and

(f) On 27 September 2019, the day after completion of the Aqualand Transaction, INSW issued the SLRN to Aqualand, enabling Aqualand to proceed with the development with certainty as to the permissible envelope and their ability to move forward. INSW withheld the date and fact of issue of the SLRN from Grocon (and the public) – it only became known when INSW was ordered by the Supreme Court of NSW to disclose the SLRN to Grocon in the proceedings.

51. On or about 30 November 2019, Mr Robertson ceased his employment with INSW and established a consultancy business Tim Robertson Advisory Pty Ltd (**Robertson Advisory**). Grocon understands that Robertson Advisory was then engaged (directly or indirectly) by Aqualand to provide consulting services on the CB Development, and that Aqualand paid Robertson Advisory a substantial sum for those services.

52. On 20 February 2020, following without prejudice negotiations with INSW, Grocon filed the Proceedings in the Supreme Court of NSW seeking compensation for its loss of the opportunity to remain as the developer of the CB Development. The Proceedings have now been on foot for over 2.5 years and Grocon and its creditors are yet to receive any compensation or to see INSW's conduct made public.

g. Administrators are appointed to 80+ Grocon entities

53. Due to INSW's conduct which caused the Oxford transaction to fail and forced Grocon to complete the Aqualand Transaction at an undervalued price, Grocon did not receive the revenue it was expecting and was forced to place 87 entities in the Grocon Group into voluntary administration, commencing on 27 November 2020 and concluding on 26 February 2021.

54. On 31 May 2021, a Pooled Deed of Company Arrangement was agreed by which any proceeds of the Proceedings, after deduction of funding and other costs, will be used to satisfy the outstanding debts to Grocon's creditors.

III. FACTS RELEVANT TO PARAGRAPH 2(B) OF THE TERMS OF REFERENCE

55. Paragraph 2(b) of the Terms of Reference concerns the probity (or otherwise) of negotiations between the NSW Government, Lendlease, and Crown concerning the Barangaroo Sight Lines.

56. Grocon considers that the negotiations between the BDA/INSW and Crown and Lendlease were impacted by probity issues. In particular, Grocon refers to:

(a) The BDA's failure to properly disclose to tender participants the scope of its obligation to Crown and Lendlease: paragraphs 26 to 28, above;

(b) The BDA/INSW's failure to disclose material aspects of the negotiations with Crown and Lendlease to Grocon, despite its contractual relationship with Grocon: paragraph 34, above;

(c) INSW's failure to disclose—and legal action to keep confidential—the terms of the settlement with Crown and Lendlease to Grocon or the public: paragraph 50(b) & (c), above;

(d) INSW's conferral of benefits upon Crown and Lendlease in the settlement without any auditable transparent or accountable tender process having been undertaken: paragraph 50(c), above

IV. FACTS RELEVANT TO PARAGRAPH 2(D) OF THE TERMS OF REFERENCE

57. Paragraph 2(d) of the Terms of Reference concerns any potential biases resulting in the preferential treatment of the commercial interests of one party over the other.

58. Grocon considers that on the foregoing facts INSW improperly preferred its own commercial interests, as well as the commercial interests of Aqualand, over Grocon's commercial interests. In particular, Grocon refers to:

    (a) The clear preference given to Aqualand in INSW's secret correspondence with Oxford concerning the timing and content of the SLRN and the need to ensure that the sale to Aqualand was completed prior to the SLRN being issued: paragraph 48, above;

    (b) INSW's attempts to condition Grocon's exit from the CB Development on receipt of a release of INSW by Grocon of all claims concerning the CB Development: paragraph 44(d), above;

    (c) The personal relationship between the then-Premier of NSW, the Hon. Gladys Berejiklian, and Aqualand's Chair, the Hon. Warwick Smith AM: paragraph (a), above;

    (d) The subsequent professional relationship between Aqualand and Mr Robertson, following his departure from INSW: paragraph 51, above; and

    (e) INSW's conferral of benefits upon Crown and Lendlease in the settlement without any auditable transparent or accountable tender process having been undertaken: paragraph 50(c), above.

V. CONCLUSION

59. As outlined in these submissions, on the facts, Grocon considers that :

    (a) Negotiations between the Chief Executives and Boards of the BDA (prior to 1 July 2019) and INSW (from 1 July 2019) with Crown and Lendlease were impacted by the following probity issues:

        i. The BDA/INSW failed to be transparent and misled Grocon as to the progress of the negotiations with Crown and Lendlease in relation to the Sight Lines from the time that Grocon became the preferred bidder,

        ii. In August of 2019, INSW entered into a confidential settlement with Crown and Lendlease which conferred benefits including (1) settlement of the appeal; (2) 8,000 square metres of additional developable area; and (3) an indemnity against claims by Grocon (see paragraph 50 above) on those developers without any auditable,

transparent or accountable tender process having been undertaken in respect of that revised deal; and

iii. INSW failed to be transparent and misled Grocon in relation to the nature of the settlement reached with Crown and Lendlease as to the Sight Lines, and then provided its consent to Grocon entering a transaction with Aqualand that favoured Crown, Lendlease and INSW to the significant expense of Grocon; and

(a) INSW improperly preferred its own commercial interests, as well as the commercial interests of Aqualand, over Grocon's commercial interests (noting that there is nothing improper in good faith conduct which involves a Government entity acting in its own commercial interests).

60. Grocon would be happy to provide any further assistance, information or documents that the Committee requests.

Yours faithfully

Daniel Grollo, CEO

Grocon Group