

INQUIRY INTO BARANGAROO SIGHT LINES

Organisation: Infrastructure NSW

Date Received: 7 October 2022

SELECT COMMITTEE ON BARANGAROO SIGHT LINES
SUBMISSIONS OF INFRASTRUCTURE NSW

1 Introduction

- 1.1 The Barangaroo Delivery Authority (**the Authority**) was established in 2009 upon the commencement of the *Barangaroo Delivery Authority Act 2009 No 2* (NSW).
- 1.2 On 1 July 2019, the Authority was dissolved and its assets, rights and liabilities transferred to Infrastructure NSW (**INSW**) under the *Barangaroo Act 2009* (NSW).
- 1.3 INSW's submissions are intended to provide an overview of key events relating to the matters the subject of the Terms of Reference which are extracted in **Annexure A**. As some of the events described below touch on matters which are currently the subject of civil litigation, these submissions have been prepared consistently with the sub judice convention.¹

2 Barangaroo Concept Plan

- 2.1 Barangaroo is an area located on the western side of Sydney's CBD foreshore. It is split into three development zones referred to as Barangaroo South, Central Barangaroo and Barangaroo Reserve.
- 2.2 Central Barangaroo comprises a foreshore area, public space and development areas called Block 5, Block 6 and Block 7, as illustrated in **Annexure B**.
- 2.3 Since 9 February 2007, development at Barangaroo has been governed by the Barangaroo Concept Plan. The Concept Plan prescribes the extent and nature of all development works in the area, including the permissible building envelopes and heights, and floor space.
- 2.4 Since February 2007, the Concept Plan has been modified a number of times under the *Environmental Planning and Assessment Act 1979*, with each modification referred to as a numbered "Mod".

¹ New South Wales Supreme Court proceedings no. 2020/37937 commenced in 2020 by Grocon Group Holdings Pty Ltd and others against INSW.

3 The Barangaroo sight lines

3.1 The Barangaroo sight lines are the lines of sight (or views) across Central Barangaroo, from Crown's Integrated Hotel Resort and Lendlease's One Sydney Harbour residential towers, to the Harbour Bridge and Opera House.

3.2 Crown and Lendlease each have contractual rights in relation to the Barangaroo sight lines. In the case of Lendlease, those contractual rights are contained in the Barangaroo South Project Development Agreement.² In the case of Crown, those contractual rights are contained in the Crown Development Agreement.³

3.3 Crown and Lendlease's contractual rights are practically identical.⁴ They provide that:

Prior to considering or approving any application which provides for development different to that provided for in the Concept Plan Approval ... as it relates (in part or in whole) to Central Barangaroo, the [Barangaroo Delivery Authority] will discuss and negotiate in good faith with [Lendlease and Crown] equally to agree any changes to that application so as to retain the sight lines ... while at the same time optimising development opportunities.

3.4 The sight lines provisions in Crown and Lendlease's respective development agreements came into existence on 27 May 2015. The provisions were introduced as part of a resolution of various issues between the Authority and Lendlease concerning the development of Barangaroo South. At all relevant times since May 2015, copies of the development agreements have been publicly available on the Authority's website.

3.5 Under the Concept Plan that was in place in 2015, development on Central Barangaroo was permitted within the following parameters:

- (a) total above-ground developable gross floor area (**GFA**) of 59,225 sqm; and
- (b) maximum building heights equal to reduced level 34.0 on Block 5, 29.0 on Block 6, and 35.0 on Block 7.

² Originally dated 5 March 2010, and subsequently amended by various amending deeds, including the fifth deed of amendment dated 27 May 2015

³ Dated 27 May 2015

⁴ See clause 2.5(b) of Lendlease's Barangaroo South Project Development Agreement and clause 5.5(b) of the Crown Development Agreement.

- 3.6 On 28 June 2016, the Department of Planning approved a modification to the Concept Plan known as Mod 8. Mod 8 enlarged the public space at Central Barangaroo by reducing the above-ground developable GFA of Block 5 by 11,537 sqm. Condition C1 of Mod 8 requires that any future Development Application for Block 5 demonstrate that views will be retained from:
- (a) the site of the Crown Hotel Resort at Barangaroo South across to the Harbour Bridge and Opera House; and
 - (b) Millers Point and Observatory Hill to the western part of Sydney Harbour.

4 The development of Central Barangaroo

- 4.1 In April 2014, the Authority commenced a tender process to identify a developer for Central Barangaroo. In about May 2015, that process was terminated following the announcement by the NSW Government that a Sydney Metro station would be constructed at Barangaroo. A new tender process for Central Barangaroo commenced in December 2015.
- 4.2 Tenderers were told that the Authority had obligations to consult with Lendlease and Crown in relation to sight lines that may be affected by the development at Central Barangaroo, and copies of the sight lines provisions were released on the publicly accessible RFI Register. Tenderers were also told that the preferred bidder's development proposal would be refined following consultation by the Authority with Lendlease and Crown in relation to sight lines that may be affected by development at Central Barangaroo.
- 4.3 In early 2016, several parties submitted bids for the Central Barangaroo development rights. In June 2016, Grocon's bid was selected as the preferred bid. Grocon's bid proposed a development that had more above-ground GFA and higher building heights than permitted in the existing Concept Plan Approval.
- 4.4 In December 2016, the Authority and Grocon as developer entered into a conditional development agreement (known as the Central Barangaroo Development Agreement, or **CENDA**) which was placed in escrow pending Ministerial consent, amongst other things.
- 4.5 The CENDA was conditional in that the developer's development rights only became effective upon the resolution of the Authority's sight lines negotiations

with Crown and Lendlease. If that condition was not satisfied or waived by the “Condition Target Date” (which either party could extend to as late as 1 January 2020) the Authority had a right to terminate the conditional CENDA by notice in writing.

- 4.6 In 2017, while the conditional CENDA was in escrow, the developer and the Authority negotiated amendments to it. On 17 November 2017, the escrow period ended, and an amended CENDA came into effect.
- 4.7 The amended CENDA provided that if the sight lines negotiations had not resolved by the Condition Target Date, the developer would design and carry out the development within the parameters of Mod 6. The building heights in Mod 6 (which were the same as those existing in 2015 as referred to in paragraph 3.5 above) did not impact on the sight lines.
- 4.8 The CENDA also:
- (a) stated that the resolution of the sight lines negotiations may require that the GFA is reduced or that the design of the buildings on Blocks 5 and/or 6 are amended to minimise the impact of the development on the sight lines; and
 - (b) contained a mechanism whereby the fee payable by the developer to the Authority for the development rights fluctuated according to the GFA which could ultimately be achieved following the sight lines negotiations.

5 Sight lines negotiations

- 5.1 In late March 2016 the Authority, Lendlease and Crown commenced negotiations in relation to the sight lines. The negotiations continued through 2017 and 2018. As part of those negotiations, the parties traded various ‘envelopes’ which set out the permissible outer boundaries (including building heights) of any development on Blocks 5, 6 and 7 in Central Barangaroo.
- 5.2 By August 2018, the Authority was in dispute with Crown and Lendlease about the Authority’s contractual obligations regarding the sight lines negotiations, and Crown and Lendlease commenced proceedings in the New South Wales Supreme Court.
- 5.3 In December 2018, the Supreme Court found that the Authority had breached its contractual obligations to Lendlease and Crown in relation to the sight lines

because the Authority had considered Grocon's bid without first engaging in discussions and negotiations with Lendlease and Crown to agree changes to that bid so as to retain the sight lines.

- 5.4 On 15 February 2019, the Authority filed an application for leave to appeal the judgment (the **Appeal**). The hearing of the Appeal was listed for August 2019.
- 5.5 Throughout 2019, the Authority (and from 1 July 2019, INSW), Crown and Lendlease negotiated about the height of development on Central Barangaroo and the resolution of their dispute. From 1 July 2019, INSW assumed the Authority's functions.
- 5.6 On 19 August 2019, before the hearing of the Appeal, INSW, Crown and Lendlease reached a settlement and entered into a settlement deed, called the Deed of Sight Lines Resolution. The Deed of Sight Lines Resolution contained an agreed envelope for development at Central Barangaroo and thereby concluded the sight lines negotiations. On the same day, INSW published a media statement on its website advising of the settlement.

6 Change of developer

- 6.1 At all relevant times, Grocon was part of a consortium of parties involved in the development of Central Barangaroo. Grocon's consortium parties were Scentre and Aqualand. Once built, Scentre would own the retail component of Central Barangaroo, Aqualand would own the residential component and Grocon would own the office component.
- 6.2 In June 2018, Grocon entered into an agreement for the sale of its office rights to Oxford Properties. However, the agreement never completed.
- 6.3 In early 2019, Grocon proposed to transfer of its interests as developer to Aqualand. However, Scentre did not consent to the proposed transfer and Aqualand terminated negotiations.
- 6.4 In July 2019, Grocon entered into a further transaction to sell its development rights to Aqualand. The July 2019 transaction was reported in the Australian Financial Review on 25 July 2019.
- 6.5 As part of the July 2019 Aqualand transaction, Grocon asked INSW to provide a waiver letter. The purpose of the waiver letter was to protect Aqualand, as the purchaser of Grocon's development rights, from the consequences of a

possible default under the development agreement. INSW agreed, and provided the waiver letter on 29 August 2019, shortly after reaching a resolution of the sight lines dispute.

- 6.6 The sale of Grocon's development rights to Aqualand completed on 26 September 2019, and from this time Aqualand has been the developer of Central Barangaroo.
- 6.7 On 27 September 2019, INSW issued a notice under the CENDA regarding the resolution of the sight lines negotiations, and provided the developer with the agreed envelope for development at Central Barangaroo. The provision of that notice immediately triggered the developer's obligation to re-design the project to fit within the agreed development envelope.
- 6.8 Since 2019, an application to further amend the Concept Plan (**Mod 9**) has been lodged with the Department of Planning and Environment and is awaiting approval. If approved, Mod 9 will amend the permissible development envelopes of Blocks 5, 6 and 7 in Central Barangaroo, including by increasing the maximum permissible development heights to those agreed with Lendlease and Crown as part of the resolution of the sight lines negotiations.

7 Litigation commenced by Grocon

- 7.1 In 2020, Grocon commenced proceedings against Infrastructure NSW in the New South Wales Supreme Court in relation to Central Barangaroo. The proceedings are awaiting trial, and many former INSW personnel are witnesses in the proceedings. In those circumstances, there are limits on what INSW can say in relation to the matters awaiting adjudication by the Court. However, an interlocutory decision of the New South Wales Supreme Court published on 4 September 2020⁵ records that:
 - (a) Grocon claims that their decisions to participate in the competitive bid process for Central Barangaroo and to enter into the CENDA were made on the basis of INSW's misleading and deceptive conduct;
 - (b) the alleged misleading and deceptive conduct concerned:

⁵ Grocon Group Holdings Pty Ltd v Infrastructure NSW (2020) 149 ACSR 112

- (i) the nature of INSW's sight lines obligations vis-à-vis Lendlease and Crown;
 - (ii) the amount of above ground GFA that could be achieved at Central Barangaroo; and
 - (iii) the height of the permissible development on Central Barangaroo;
- (c) Grocon was paid \$73 million by Aqualand for Grocon's development rights at Central Barangaroo; and
- (d) Grocon's claim against INSW is one for loss of profits or lost opportunity.

7.2 Grocon's claim has changed over time. Some original claims have been dropped, and other new claims have been made. However, all claims are denied by INSW, including that it made any of the alleged representations or that it was obliged to issue a sight lines resolution notice to Grocon or that Grocon suffered any loss.

7.3 The interlocutory decision records that INSW says it provided the terms of the sight lines clauses to Grocon during the 2015 tender process and made it clear to Grocon that the height and GFA of the development would ultimately be subject to the outcome of the negotiations contemplated under the sight lines clauses. The interlocutory decision also records that the question of whether INSW was obliged to issue a sight lines resolution notice, and if so when, is a significant issue in dispute that raises issues of fact and law which will need to be determined at the final hearing.

8 The role of the INSW Board

8.1 The Terms of Reference specifically refer to the CEO and Board of Infrastructure NSW. This section addresses the role of the INSW Board.

8.2 The INSW Board did not play a role in approving the terms of settlement of the Barangaroo sight lines dispute. There are three reasons: (a) the role of the Board is to advise on strategic policy matters and organisational planning; (b) the INSW Board did not have any responsibility for Barangaroo until very advanced stages of negotiations; and (c) the negotiations and settlement were being overseen by other formal decision-making processes within Government. This is further set out below.

- 8.3 INSW's governance model was established by the *Infrastructure NSW Act 2011* (NSW). It comprises a Board and Chief Executive Officer.
- 8.4 The Board of INSW fulfills an advisory function, providing strategic policy direction and oversight for organisational planning, management and performance where required. The Board meets on a monthly basis.
- 8.5 The transfer to INSW of the work of the Authority was announced in April 2019 and took effect 1 July 2019. This included responsibility for the Court of Appeal sight lines matter at Barangaroo, that had been initiated by the Authority.
- 8.6 From July 2019 to September 2019 the Chief Executive Officer provided updates to the Board. The Board was advised that in late 2018 the Authority had lost a court case over the rights of Lendlease and Crown Resorts to retain sight lines to the Sydney Harbour Bridge for their developments at Barangaroo, and that an appeal was scheduled for August 2019, and both Crown Resorts and Lendlease had foreshadowed damages claims.
- 8.7 INSW was in without prejudice negotiations with Lendlease and Crown, to obtain an agreed building envelope for Central Barangaroo and a settlement of any future claims or court action. INSW was working with other parts of NSW Government on how to proceed with the matter and approval of the Government was required for any settlement. The Court matter proceeded rapidly to settlement and in August 2019 the Board was advised that the NSW Government had reached a settlement with Crown Resorts and Lendlease and the proposed appeal of the Supreme Court decision would not proceed. The Board was advised that the terms of the settlement were confidential and the Board was not therefore made aware of the terms.
- 8.8 There was no bias in the settlement of the Barangaroo Sight Lines and no basis for believing that any party was afforded preferential treatment. This is doubly so for the Board of INSW which, in line with its function to provide strategic advice, was not involved in the negotiations leading to the Deed of Sight Line Resolution, nor a party to that agreement.

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