

**DATED** \_\_\_\_\_ **2017**

**Cabinet Report Version  
23.06.2017**

**(1) [HDV]**

**(2) LENDLEASE CORPORATION LIMITED**

---

**GUARANTEE**

**relating to the Members' Agreement**

---



**Pinsent Masons**

**BETWEEN:-**

- (1) **[HDV]** (Company No. [xxxx]) whose registered office is at [ADDRESS] (the "**HDV**"); and
- (2) **LENLEASE CORPORATION LIMITED** (ACN 000 226 228 (a company registered in New South Wales) whose registered office is at Level 14, Tower Three, International Towers Sydney, Exchange Place, 300 Barangaroo Avenue, Barangaroo NSW 2000 (the "**Guarantor**").

**WHEREAS:-**

- (A) The Council has entered into a 50:50 joint venture partnership with [PSP] forming [INSERT NAME] (the "**HDV**").
- (B) The Council, the Subsidiary and the HDV entered into the Contract on or around the date hereof to regulate their respective rights and liabilities and the conduct of the business, management and the affairs of the HDV.
- (C) The Guarantor is [the ultimate holding company] of the Subsidiary.
- (D) The Guarantor has agreed to guarantee to the HDV (in accordance with the terms of this Guarantee) as a continuing guarantee, the due and proper performance by the Subsidiary of the Subsidiary's duties and obligations arising under the Contract upon the terms of this Guarantee.

**IT IS AGREED** as follows:-

1. **INTERPRETATION**

1.1 In this Guarantee:

"**Contract**" means the Members' Agreement

"**Members' Agreement**" means the Members' Agreement dated on or around the date of this Guarantee and entered into between (1) [the Council] (2) [PSP]; (3) [HDV]; (4) [InvLP]; (5) [DevLLP]; (6) [Nominee Co]; and (7) [PSP Guarantor] as such agreement may be varied or supplemented from time to time

"**Party**" means a party to this Guarantee and "**Parties**" shall mean both of them

"**Subsidiary**" means [PSP] incorporated in England and Wales (number [xxxx]) whose registered office is at [ADDRESS]

1.2 **Construction**

1.2.1 Words and expressions defined in the Contract shall have the same meanings in this Guarantee unless the context requires otherwise.

1.2.2 Words imparting the singular shall be construed as importing the plural and vice versa.

---

<sup>1</sup> Subject to final refinement.

Now, in consideration of the payment of £1.00 (one pound) (receipt of which is hereby acknowledged by the Guarantor), **THIS GUARANTEE WITNESSES** as follows:

## 2. **GUARANTEE**

- 2.1 Subject to the other provisions of this Guarantee, the Guarantor guarantees unconditionally and irrevocably the proper and punctual performance and observance by the Subsidiary of all its obligations, undertakings, warranties and responsibilities under the Contract (the "**Obligations**"). The Guarantor covenants, agrees and undertakes that it shall within ten (10) Business Days of receipt of a written demand from the HDV (providing reasonable details of any default and amount of money or performance being demanded) make good (or procure the Subsidiary or a third party makes good) any default of the Subsidiary under the Contract and it shall observe and perform the Obligations to the extent the Subsidiary fails to do so following receipt of such written demand from the HDV. The Guarantor shall, to the extent that the Subsidiary fails to do so, pay all sums, liabilities, awards, losses, damages, costs, charges and expenses (including any legal expenses) that may be or become due and payable by the Subsidiary pursuant to the Contract (including costs and expenses incurred by the HDV in connection with the enforcement of or preservation of its rights under this Guarantee) within ten (10) Business Days of receipt of such written demand by the HDV provided that the Guarantor shall be entitled to the same defences, right of set off, deduction or counterclaim as the Subsidiary may have pursuant to the Contract.
- 2.2 If the Guarantor fails to pay any amount due to the HDV pursuant to Clause 2.1 within ten (10) Business Days of receipt of a written demand by the HDV, the Guarantor shall pay to the HDV, in addition to the amount not paid, simple interest thereon for the period until such payment is made. The rate of interest payable shall be the Prescribed Rate calculated on a daily basis from the date on which the payment by the Guarantor became overdue. Nothing in this Guarantee is intended to render the Subsidiary and the Guarantor liable to pay interest twice for the same failure to pay an amount due and payable.
- 2.3 The obligations of the Guarantor under this Guarantee shall be those of a primary and independent obligor so that no liability or purported liability of the Subsidiary under or arising out of the Contract shall, as between the Guarantor and the HDV, be treated as discharged or in any way affected by any legal limitation, disability or incapacity relating to the Subsidiary or any other person whether or not known to the HDV by any invalidity in, irregularity affecting or unenforceability of the obligations of the Subsidiary or any other person under the Contract or by any liquidation, administration, merger, amalgamation, reorganisation or dissolution of the Subsidiary or any other person or by any other event or circumstance whatsoever other than the proper and punctual performance and observance of all the Obligations which are to be performed or observed under the Contract or which would be so to be performed or observed but for any such event or circumstance as is previously mentioned in this Clause 2.3.
- 2.4 As a separate and independent obligation, the Guarantor agrees to indemnify and keep the HDV indemnified within ten (10) Business Days of receipt of a written demand against all losses, damages, costs and expenses (including VAT thereon, and including, without limitation, all court fees and all reasonable legal fees, together with any disbursements) of whatever nature, whether arising under statute, contract or at common law, which the HDV may suffer or incur if any of the Obligations are or become unenforceable, invalid or illegal as if such Obligations had not become unenforceable, invalid or illegal provided that the Guarantor's liability shall be no greater than the Subsidiary's liability would have been under the Contract if the Obligation had not become unenforceable, invalid or illegal.

2.5 The Guarantor:

2.5.1 acknowledges and agrees that no variation of or alteration to the terms of the Contract or to the extent, nature or method of performance of the services therein referred to, and no allowance of time, waiver, forbearance, forgiveness, concession, indulgence compromise or other dealing under or in connection with the Contract or any right or remedy or security arising thereunder, and no invalidity, illegality, unenforceability termination or irregularity of the Contract or of any provision thereof, and no other act, omission or default which (but for this provision) might have operated to release, exonerate or discharge the Guarantor or otherwise reduce, extinguish or adversely affect any liability of the Guarantor under the terms of this Guarantee shall in any way release, exonerate or discharge the Guarantor from any liability under the terms of this Guarantee or otherwise reduce, extinguish or adversely affect any such liability, and the Guarantor hereby waives any requirement for notice to it of any such event.

2.5.2 confirms that it has full power and capacity to enter into this Guarantee and agrees that this Guarantee shall:

- (a) not be revocable by the Guarantor until the Obligations have been performed and all actual or contingent liabilities arising therefrom have expired;
- (b) be a continuing guarantee and shall be additional to and not in substitution for any rights or remedies that the HDV may have against the Subsidiary under the Contract or at law;
- (c) be additional to any other guarantee or security from time to time held by the HDV;
- (d) not be affected by any release or waiver of any such guarantee or security; and
- (e) remain in full force and effect,

notwithstanding the winding-up, liquidation, receivership, administration, voluntary arrangement or other composition with creditors (or any event analogous to any of them) of the Subsidiary or if the Subsidiary is unable to pay its debts (as defined by sections 123(1) and 268(1) of the Insolvency Act 1986, as amended);

2.5.3 agrees that all sums payable by the Guarantor under this Guarantee shall be paid to the HDV in full without set off or counterclaim (other than a set off or counterclaim available to the Subsidiary against the HDV), free of any present or future taxes, levies, duties, charges, fees, withholdings or deductions (together referred to as "**Deductions**") which would not have been imposed if such payments had been made by the Subsidiary, and if the Guarantor is compelled by law to make any Deduction, the Guarantor will gross up the payment so that the net sum received by the HDV is equal to the full amount which the HDV would have received had no such Deduction been made; and

2.5.4 agrees that the obligations of the Guarantor and the Subsidiary under this Guarantee and Contract respectively are independent and several obligations, and accordingly that the HDV shall not be obliged, before enforcing any of its rights or remedies under this Guarantee, to commence proceedings or take any other action against the Subsidiary or enforce any other guarantee or security from time to time held by the HDV in respect of the Obligations.

## 2.6 Reinstatement

- 2.6.1 Where any discharge (whether in respect of the Obligations of the Subsidiary or any security for those Obligations or otherwise) is made in whole or in part or any arrangement is made on the faith of any payment, security or other disposition which is avoided or must be restored on insolvency, liquidation or other similar event, without limitation, the liability of the Guarantor under this Guarantee shall continue as if the discharge or arrangement had not occurred.
- 2.6.2 The HDV may concede or compromise any valid claim that any payment, security or other disposition is liable to avoidance or restoration.

## 2.7 Non-competition

Until all amounts which may be or become payable by the Subsidiary under the Contract have been irrevocably paid in full, the Guarantor (in its capacity as Guarantor hereunder only and not in any other capacity) shall not, after a claim has been made, or by virtue of any payment or performance by it, under this Guarantee:

- 2.7.1 be subrogated to any rights, security or moneys held, received or receivable by the HDV or be entitled to any right of contribution or indemnity in respect of any payment made or moneys received on account of the Guarantor's liability under this Guarantee; or
- 2.7.2 claim rank, prove or vote as a creditor of the Subsidiary or its estate in competition with the HDV; or
- 2.7.3 receive, claim or have the benefits of any payment, distribution or security from or on account of the Subsidiary, or exercise any right of set-off as against the Subsidiary,

unless the HDV otherwise directs. The Guarantor shall hold in trust for and forthwith pay or transfer to the HDV any payment or distribution or benefit of security received by it contrary to this Clause 2.7. Nothing in this Clause 2.7 of this Guarantee shall prevent activities performed during the normal course of business between the Guarantor and the Subsidiary.

## 2.8 Place

All payments by the Guarantor under Clause 2.1 shall be made to the HDV to its account at such office as it may notify to the Guarantor in writing for this purpose.

## 2.9 Set off and counterclaim

All payments made by the Guarantor under this Guarantee shall be made without set off or counterclaim save where the right of set off, deduction or counterclaim arises out of the Contract.

## 3. ASSIGNMENT

The benefit of this Guarantee shall be freely assignable or otherwise transferable by the HDV to any person acquiring the benefit of the Contract and having the legal capacity, power and authority to become a Party to and perform the obligations of the HDV thereunder. Five Business Days prior notice of every such assignment under this Clause 3 shall be given to the Guarantor.

#### 4. REPRESENTATIONS AND WARRANTIES

4.1 Without prejudice to any warranties or conditions implied by law, the Guarantor represents and warrants to the HDV that:

##### 4.1.1 Corporate Power

it has the full power and capacity to enter into and to exercise its rights and perform its obligations under this Guarantee;

##### 4.1.2 Legal Validity

this Guarantee constitutes its legal, valid and binding obligation enforceable in accordance with its terms subject to all applicable laws relating to insolvency, bankruptcy, administration, liquidation or analogous circumstances;

##### 4.1.3 Due Authority

all necessary action to authorise the execution of and the performance of its obligations under this Guarantee has been taken;

##### 4.1.4 Pari Passu Ranking

the obligations of the Guarantor under this Guarantee rank and will rank at least *pari passu* with all of its other unsecured obligations;

##### 4.1.5 Obligations Binding

the obligations expressed to be assumed by the Guarantor under this Guarantee are legal, valid and enforceable in accordance with its terms;

##### 4.1.6 No Contravention

to the best of its knowledge, the execution, delivery and performance of this Guarantee does not contravene any provision of:

- (a) any applicable existing law, treaty or regulation either in force or enacted but not yet in force;
- (b) the memorandum or articles of association (or the equivalent in its jurisdiction of incorporation) of the Guarantor;
- (c) any order or decree of any Court or arbitrator existing as at the date of this Guarantee and binding on the Guarantor; or
- (d) any other material obligation pursuant to a material contract which is binding upon the Guarantor;

##### 4.1.7 Litigation

no material litigation, arbitration or administrative proceeding are presently in progress or to the best of the knowledge of the Guarantor pending or threatened against it or any of its assets which if adversely determined would be likely to have a material adverse effect on the ability of the Guarantor to perform its obligations under this Guarantee; and

#### 4.1.8 Insolvency Proceedings

no proceedings or other steps have been taken and not discharged (nor to the best of the knowledge of the Guarantor threatened) for its winding up or dissolution or for the appointment of a receiver, administrative receiver, administrator, liquidator, judicial factor manager, trustee or similar officer in relation to any of its material assets or revenues.

#### 4.2 Times for making representations and warranties

The representations and warranties set out in this Clause 4 (Representations and Warranties) are made by the Guarantor on the date of this Guarantee.

#### 5. LIABILITY

Notwithstanding anything to the contrary in this Guarantee (other than reasonable costs and expenses incurred by the HDV in connection with the enforcement of or preservation of its rights under this Guarantee or any interest payable by the Guarantor pursuant to Clause 2.2 or HDV's right to claim (and the Guarantor's obligation to indemnify HDV in respect of) any liability pursuant to Clause 2.4, the liability of the Guarantor under or in connection with this Guarantee shall be no greater than it would have been under the Contract if the Guarantor had been named as the PSP therein.

#### 6. RELEASE OF LIABILITY AND TERMINATION

The Guarantor shall be released from any and all liability pursuant to this Guarantee and this Guarantee shall terminate with effect from the assignment by the Subsidiary of its interest in the HDV provided the HDV has received an executed guarantee both in a form that is acceptable to the Council and the HDV (both acting reasonably) and from a party with a covenant strength that is acceptable to the Council and the HDV (both acting reasonably)

#### 7. CLAIMS PROCEDURE<sup>2</sup>

7.1 All notices under this Guarantee shall be in writing and all certificates, notices or written instructions to be given under the terms of this Guarantee shall be served by sending the same by first class post or by hand, or leaving the same at:

Guarantor	HDV
Lendlease Corporation Limited	[INSERT NAME]
[ADDRESS]	[ADDRESS]

7.2 A notice shall be deemed to be received in the case of:

7.2.1 registered post, on the day it is received; or

7.2.2 delivery by hand, when so delivered,

provided that, in the case of service in accordance with Clause 7.2.2, if the date of receipt of the notice is not a business day in the country of the recipient, or if the notice is received outside the hours of 9.00 am to 6.00 pm, it shall be deemed to have been received at 9.00 am on the next business day.

<sup>2</sup> Notice provisions to be updated – needs to reflect Australian process

8. **NO WAIVER AND PROVISIONS SEVERABLE**

8.1 No failure or delay by the HDV in exercising any right or remedy shall operate as a waiver, nor shall any single or partial exercise or waiver of any right or remedy preclude its further exercise or the exercise of any other right or remedy.

8.2 Each of the provisions of this Guarantee is severable and distinct from the others, and if for any reason any such provision is or becomes ineffective, inoperable, invalid or unenforceable it shall be severed and deemed to be deleted from this Guarantee, and in such event the remaining provisions of this Guarantee shall continue to have full force and effect.

9. **VARIATIONS**

No variations of this Guarantee shall be valid unless in writing and signed by or on behalf of each of the Parties.

10. **COUNTERPARTS**

This Guarantee may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this Guarantee.

11. **ENTIRE AGREEMENT**

This Guarantee contains or expressly refers to the entire agreement between the Parties with respect to the specific subject matter of this Guarantee and expressly excludes any warranty, condition or other undertaking implied at law or by custom and supersedes all previous agreements and understandings between the Parties with respect thereto and each of the Parties acknowledges and confirms that it does not enter into this Guarantee in reliance on any representation, warranty or other undertaking not fully reflected in the terms of this Guarantee.

12. **GOVERNING LAW AND JURISDICTION**

This Guarantee and any non-contractual obligations arising out of or in connection with it shall be governed by and construed in accordance with the laws of England, and shall be subject to the exclusive jurisdiction of the courts of England save that the HDV shall have the right to bring proceedings in the courts of any other jurisdictions in which any of the assets of the Guarantor may be situated.

13. **CONTRACTS (RIGHTS OF THIRD PARTIES) ACT 1999**

13.1 The Parties do not intend any term of this Guarantee to be enforceable by a third party pursuant to the Contracts (Rights of Third Parties) Act 1999.

13.2 The Guarantor shall not be entitled to contend that any person to whom this Guarantee is assigned in accordance with Clause 3 (Assignment) is precluded from recovering under this Guarantee any loss incurred by such assignee resulting from any breach of this Guarantee by reason that such person is an assignee and not a named person hereunder.

**EXECUTED AS A DEED** by the Parties on the date which first appears in this Guarantee.

**EXECUTED** as a Deed (but not delivered until dated) by **[HDV]** acting by two Directors or a Director and the Secretary:-

)  
)  
)  
)

Director

Director/Secretary

**EXECUTED** as a Deed (but not delivered until dated) by **LENLEASE CORPORATION LIMITED** acting by two Directors or a Director and the Secretary:-

)  
)  
)  
)

Director

Director/Secretary

DRAFT