

Annexure H

Exhibit D1 to the M2 Motorway Project Deed - Annexed M2 Upgrade Company Lease

M2 Motorway

**EXHIBIT D1 TO
PROJECT DEED
as at the date of the M2 Upgrade Project Deed**

**ANNEXED M2 UPGRADE COMPANY
LEASE**

This is Exhibit A to the M2 Motorway Project Deed between the Roads and Traffic Authority of New South Wales, The Minister for Roads for and on behalf of Her Majesty Queen Elizabeth the Second in right of the State of New South Wales, The Hills Motorway Limited and Hills Motorway Management Limited as trustee of the Trust.

M2 Motorway

M2 UPGRADE COMPANY LEASE
as at the date of the M2 Upgrade Project Deed

between

ROADS AND TRAFFIC AUTHORITY
OF NEW SOUTH WALES

and

THE HILLS MOTORWAY LIMITED

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THIS DEED OF LEASE is made on

between:

1. **ROADS AND TRAFFIC AUTHORITY OF NEW SOUTH WALES** of Level 8, 101 Miller Street, North Sydney, NSW 2060 (the **Lessor**); and
2. **THE HILLS MOTORWAY LIMITED** (ACN 062 329 828), of Level 3, 505 Little Collins Street, Melbourne, VIC 3000 (the **Lessee**).

RECITALS

- A Under the Project Deed, the Lessee agreed to finance, design and construct the Company Road on the Company Land and operate, maintain and repair the M2 Motorway.
- B Under the M2 Upgrade Project Deed, the Lessee agrees to finance, design and construct the M2 Upgrade on the M2 Upgrade Company Land.
- C The construction works comprising the M2 Upgrade will be completed in 3 stages.
- D In order to facilitate that agreement, the Lessor agrees to grant the Lessee a lease over the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land in accordance with this Lease.

1. DEFINITIONS AND INTERPRETATION

1.1 Definitions

Words and expressions not defined in this Lease shall have the same meaning as the words and expressions defined in the Project Deed except that:

Lease is this deed.

Lessee is Hills Motorway Limited (ACN 062 329 828); its successors and permitted assigns and transferees, agents, employees and invitees.

Lessor is the Roads and Traffic Authority of New South Wales and its successors authorised officers and includes its agents, employees and invitees.

[*Stage 1/Stage 2/ Stage 3 - delete as relevant*] **M2 Upgrade Company Land** is the land details of which are set out in Schedule A annexed to this Lease.

Project Deed is the M2 Motorway Project Deed dated on or about 26 August 1994 between the Lessor, the Minister, the Lessee and Perpetual as trustee of the Trust, as amended from time to time.

Rent is the amount of \$1.00 per year.

Term is the period beginning on [*insert relevant M2 Upgrade Date of Construction Completion of M2 Upgrade Stage*] and ending on 26 May 2046:

- (a) if the Company and the Trustee in aggregate derive an amount sufficient to give the Investors (treated as if they were all Notional Initial Investors) a real after tax internal rate of return from the Project in excess of 16.5 per cent per annum during the period

from 26 May 1997 to 26 May 2037, the term of this Lease will end (at the option of the Lessor) on 26 May 2037;

- (b) if paragraph (a) does not apply and the Company and the Trustee in aggregate derive an amount sufficient to give the Investors (treated as if they were all Notional Initial Investors) a real after tax internal rate of return from the Project in excess of 16 per cent per annum during the period from 26 May 1997 to 26 May 2040, the term of this Lease will end (at the option of the Lessor) on 26 May 2040; or
- (c) if neither paragraph (a) nor (b) apply and the Company and the Trustee in aggregate derive an amount sufficient to give the Investors (treated as if they were all Notional Initial Investors) a real after tax internal rate of return from the Project in excess of 16 per cent per annum during the period from 26 May 1997 to 26 May 2043, the term of this Lease will end (at the option of the Lessor) on 26 May 2043.

1.2 **Governing law**

This Lease is governed and must be construed in accordance with the laws of New South Wales.

1.3 **Inconsistency**

If there is any inconsistency between this Lease and the Project Deed, the Project Deed shall prevail.

1.4 **References**

- (a) References to clauses and schedules refer to those in this Lease.
- (b) A reference to including, includes, or include must be read as if it is followed by (without limitation).
- (c) A reference herein to this Lease or to any other deed, agreement, document or instrument includes, respectively, this Lease or such other deed, agreement, document or instrument as amended, novated, supplemented, varied or replaced from time to time.

1.5 **Exclusion of implied covenants and powers**

The covenants and powers implied by section 84, section 84A, section 85, section 132, section 133, section 133A and section 133B of the Conveyancing Act, 1919 do not apply to this Lease.

1.6 **Lessee's obligations**

No representation or approval given by any officer or employee of the Lessor in respect of the Lessee's obligations under this Lease lessens or otherwise affects the Lessee's obligations under this Lease and does not give rise to any waiver, variation or estoppel.

1.7 **Lessor's position as an Authority**

- (a) Subject to clause 1.7(b), this Lease does not unlawfully restrict or otherwise affect the Lessor's unfettered discretion to use its statutory powers as a public authority.

- (b) The Lessor acknowledges that clause 1.7(a) does not limit:
- (i) the Lessor's obligations under this Lease; or
 - (ii) the Lessor's liability to compensate the Lessee for breach of this Lease by the Lessor.

1.8 Severability of provisions

Any provision of this Lease which is prohibited or unenforceable is ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions of this Lease provided that if the effect of such lack of effectiveness would substantially alter the commercial efficacy and intent of the remaining provisions of this Lease such remaining provisions shall also be deemed to be ineffective.

2. LEASE

2.1 Grant of Lease

The Lessor leases the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land to the Lessee for the Term.

2.2 Rent

- (a) The Lessee must pay the Rent to the Lessor:
- (i) from the commencement of the Term, annually, in arrears, on the day before each anniversary of the M2 Motorway Commencement Date;
 - (ii) without demand from the Lessor; and
 - (iii) without any deduction whatsoever.
- (b) If any part of the M2 Motorway constructed on the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land is damaged or destroyed the Rent shall not abate and the Lessee will comply with its reinstatement obligations under clause 10.7 of the Project Deed.

3. NO AMENDMENTS TO THE M2 UPGRADE COMPANY LEASE

3.1 Lessee's acknowledgement

The Lessee acknowledges that when the [*Stage 1/Stage 2/Stage 3 - delete as relevant*] M2 Upgrade Trust Concurrent Lease is entered into, the immediate Lessor of the [*Stage 1/Stage 2/Stage 3 - delete as relevant*] M2 Upgrade Company Land will be the Trustee

3.2 No amendments to the M2 Upgrade Company Lease

The Lessee must not agree to any amendments or variations to this Lease or waiver of any of its rights or obligations under this Lease without the prior written consent of the Lessor.

4. USE

The Lessee will not without the consent in writing of the Lessor use, permit or suffer to be used any part of the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company

Land for any purpose other than as a tollway and in accordance with the Project Deed and the M2 Upgrade Project Deed.

5. LESSOR'S UNDERTAKINGS

5.1 Exclusive possession

Subject to this Lease, the Project Deed and the M2 Upgrade Project Deed, the Lessor must give the Lessee exclusive possession of the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land.

5.2 Lessor's inspection

The Lessor may enter the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land at reasonable times to determine whether the Lessee is complying with this Lease, the Project Deed and the M2 Upgrade Project Deed, but must not cause unnecessary inconvenience to the Lessee or M2 Motorway users.

6. MAINTENANCE AND REPAIR

The Lessee undertakes to maintain and repair the M2 Motorway in accordance with clause 9.1 of the Project Deed.

7. EASEMENTS

The Lessor may grant easements in respect of the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land, or enter into arrangements with any other person or with any Authority in respect of the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land to provide:

- (a) access over the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land;
- (b) support to structures on the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land; or
- (c) Services,

with the Lessee's consent, which may not be unreasonably withheld or delayed.

8. ASSIGNMENT OR MORTGAGE

8.1 Assignment by the Lessee

The Lessee must not:

- (a) assign or otherwise deal with its interest in or obligations under this Lease; or
- (b) sub-lease or licence the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land,

except in accordance with clause 12.2 of the Project Deed.

8.2 Mortgages

The Lessee must not give Security Interests over its interest in this Lease to secure its obligations to any person in respect of the Project Debt except in accordance with clause 12.3 of the Project Deed.

9. TERMINATION

9.1 Termination events

If the Project Deed is terminated, this Lease simultaneously terminates.

9.2 Essential terms

- (a) Each of the covenants by the Lessee which are specified in this paragraph are essential terms of this Lease:
 - (i) clause 3.2 - the covenant dealing with no amendments or variations to this Lease; and
 - (ii) clause 8.1 - the covenant dealing with assignment.
- (b) In respect of the Lessee's obligations to pay Rent, the acceptance by the Lessor of arrears or of any late payment of Rent shall not constitute a waiver of the essentiality of the Lessee's obligation to pay Rent in respect of those arrears or of the late payments or in respect of the Lessee's continuing obligation to pay Rent during the Term.
- (c) The Lessee covenants to compensate the Lessor in respect of any breach of an essential term of this Lease and the Lessor is entitled to recover damages from the Lessee in respect of such breaches. The Lessor's entitlement under this clause is in addition to any other remedy or entitlement to which the Lessor is entitled (including to terminate this Lease or to terminate the Project Deed under clause 14.2 of the Project Deed so effecting the simultaneous termination of this Lease).

9.3 Damages for breach

- (a) In the event that the Lessee's conduct (whether acts or omissions) constitutes a repudiation of this Lease (or of the Lessee's obligations under this Lease) or constitutes a breach of any lease covenants, the Lessee covenants to compensate the Lessor for the loss or damage suffered by reason of the repudiation or breach.
- (b) The Lessor shall be entitled to recover damages against the Lessee in respect of repudiation or breach of covenant for the damage suffered by the Lessor during the entire term of this Lease.
- (c) The Lessor's entitlement to recover damages shall not be affected or limited by any of the following:
 - (i) if the Lessee shall abandon or vacate the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land;
 - (ii) if the Lessor shall elect to re-enter or to terminate this Lease;

- (iii) if this Lease simultaneously terminates on the termination of the Project Deed under clause 14.2 of the Project Deed;
 - (iv) if the Lessor shall accept the Lessee's repudiation; or
 - (v) if the parties conduct shall constitute a surrender by operation of law.
- (d) The Lessor shall be entitled to institute legal proceedings claiming damages against the Lessee in respect of the entire Term, including the periods before and after the Lessee has vacated the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land, and before and after the abandonment, termination, repudiation, acceptance of repudiation or surrender by operation of law referred to in clause 9.3(c), whether the proceedings are instituted either before or after such conduct.
- (e) In the event of the Lessee vacating the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land, whether with or without the Lessor's consent, the Lessor shall be obliged to take reasonable steps to mitigate its damages. The Lessor's entitlement to damages shall be assessed on the basis that the Lessor has observed its obligation to mitigate damages contained in this paragraph. The Lessor's conduct taken in pursuance of its duty to mitigate damages shall not by itself constitute acceptance of the Lessee's breach or repudiation or a surrender by operation of law.

10. YIELDING UP

The Lessee must peaceably surrender and yield up the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land to the Lessor at the end of the Term in the state of repair and in the operating condition required by the Project Deed.

11. DISPUTE RESOLUTION

The Lessor and the Lessee must deal with any dispute in respect of this Lease in accordance with clause 15 of the Project Deed.

12. GENERAL

12.1 Notices

- (a) Any notice in respect of this Lease must be:
 - (i) in writing; and
 - (ii) delivered to the address, or sent to the facsimile number shown below:
 - (A) to the Lessor:

Roads and Traffic Authority of New South Wales

Level 1, Pod C, Octagon Building

99 Philip Street

Parramatta NSW 2150

Attention: General Manager, Motorway Management

Facsimile: (02) 8837 0098

(B) to the Lessee:

The Hills Motorway Limited
Level 5, 50 Pitt Street
Sydney NSW 2000
Attention: General Manager - Major Projects
Facsimile: (02) 9254 4990

with a copy to (provided that a failure to serve the copy will not itself be failure to serve notice):

Level 3, 505 Little Collins Street
Melbourne Victoria 3000
Attention: Company Secretary - Transurban Limited
Facsimile: (03) 9649 7380

- (b) A notice is given on the day that:
- (i) it is delivered to the addressee; or
 - (ii) it is received by the addressee's facsimile.

12.2 Costs

- (a) The Lessee must, within twenty eight (28) days from the date of notice from the Lessor requesting payment, pay all stamp duties, fees, fines, penalties for late payment and charges of or incidental to the stamping of this Lease.
- (b) All duties, fees, charges and expenses and legal costs (on a full indemnity basis) of or incidental to any and every breach or default by either party (the "Defaulting Party") under this Lease and in or incidental to the exercise of any remedy of the other party (the "Non-Defaulting Party") under or by virtue of this Lease and the fees of professional consultants properly incurred by the Non-Defaulting Party must be paid by the Defaulting Party to the Non-Defaulting Party.
- (c) Each party must bear its own costs, charges and expenses of or incidental to the negotiation, preparation, execution and completion of this Lease.

12.3 Interest

- (a) If the Lessor or the Lessee do not pay an amount under this Lease by the date that it is due, they must pay interest on that amount:
 - (i) at the rate provided in clause 12.3(b);
 - (ii) from the date the payment was due until the date the payment is made.
- (b) The Lessor and the Lessee must pay interest under clause 12.3(a) at the rate of 2 per cent (2%) per annum, plus:
 - (i) the Westpac Banking Corporation's reference rate for Australian Dollar denominated loans, available to prime commercial customers; or

- (ii) if there is no reference rate referred to in clause 12.3(b)(i), the Westpac Banking Corporation's rate for Australian Dollar overdraft accommodation in excess of \$100,000, available to prime commercial customers.

12.4 **Moratorium**

Unless application is mandatory by law, no statute, ordinance, proclamation, order, regulation or moratorium present or future applies to this Lease so as to abrogate, extinguish, impair, diminish, fetter, delay or otherwise prejudicially affect any rights, powers, remedies or discretions given or accruing to the Lessor or to the Lessee under this Lease.

12.5 **Services**

The Lessor is not responsible for any loss, injury or damage sustained by the Lessee or any other person at any time as a result of or arising in any way out of inability to obtain Services and the Lessee acknowledges that it is the responsibility of the Lessee to obtain all the Services.

12.6 **No agency**

The Lessee shall not (in connection with the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land or otherwise) directly or indirectly hold out nor permit to be held out to any person any statement, act, deed, matter or thing indicating that the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land or the business conducted or operated that the [*Stage 1/Stage 2/ Stage 3 - delete as relevant*] M2 Upgrade Company Land (or any part of them) are being carried on or managed or supervised by the Lessor, and the Lessee must not act as or represent itself to be the servant or agent of the Lessor.

12.7 **No waiver**

No failure or delay by the Lessor or the Lessee in exercising any rights under this Lease, and no course of dealing between the Lessee and the Lessor operates as a waiver of any breach or default by the other party. No single or partial exercise of any such right precludes any further or other exercise of that or of any other right.

12.8 **Waiver in writing**

No provision of this Lease may be varied or waived except in writing.

12.9 **Time for determining rights and obligations**

For the purpose of determining the rights and obligations of the parties, this Lease shall be construed as if it had been executed on the date from which the Term is expressed to run.

SCHEDULE A

[STAGE 1/STAGE 2/STAGE 3 - delete as relevant] M2 UPGRADE COMPANY LAND

EXECUTED by the parties as a deed.

I, #[INSERT NAME]# THE CHIEF EXECUTIVE OF THE ROADS AND TRAFFIC AUTHORITY OF NEW SOUGH WALES affix the official Seal of the Roads and Traffic Authority of New South Wales:

Executed by HILLS MOTORWAY LIMITED by :

Director

Name (please print)

Director / Secretary

Name (please print)