

ATTACHMENT 3

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12 September 2019

**BY EMAIL
CONFIDENTIAL**

Auckland Transport
20 Viaduct Harbour Ave, Westhaven
Auckland 1010 NEW ZEALAND



Dear Sirs and Mesdames

Australian legal opinion in relation to the City Rail Link - C3 project

We have acted as legal advisers to Downer EDI Limited ACN 003872848 (**the Company**) in its capacity as the ultimate parent company of Downer New Zealand Limited (**the Maintenance Contractor**) in relation to the City Rail Link – C3 project.

This opinion relates to the Deed of Guarantee and Indemnity made by and between Auckland Transport (as Principal) the Company (as Guarantor) and the Maintenance Contractor dated 29 August 2019 (the **Relevant Document**).

Terms and references used in this letter have the meaning given in Schedule 1.

1.1 Scope of opinion

This opinion:

- (a) relates solely to Australian law in force on the date of this opinion;
- (b) is given on the basis that it will be construed in accordance with Australian law;
- (c) relates solely to matters of Australian law. We express no opinion on whether the Relevant Document satisfies the commercial requirements of any party; and
- (d) is provided subject to the assumptions and qualifications set out in paragraphs 1.4 and 1.5.

1.2 Documents reviewed and searches conducted

In providing this opinion, we have reviewed:

- (a) a scanned copy of the Relevant Document, as executed by the Company and the Maintenance Contractor;
- (b) a scanned copy of the Contract, as executed by the Maintenance Contractor;
- (c) the report by the agent who carried out the search described at paragraph 1.3(a);

- (d) a copy of the National Companies and Securities Commission Certificate of Incorporation of Proprietary Company for Verube Pty Ltd dated 21 September 1989 and subsequent change of details including:
 - (i) National Companies and Securities Commission Certificate of Incorporation on Conversion and Change of Name of International Pacific Investments Limited dated 23 April 1990;
 - (ii) ASIC Certificate of Registration on Change of Name of Downer Group Limited dated 26 May 1998; and
 - (iii) ASIC Certificate of Registration on Change of Name of Downer EDI Limited dated 17 May 2001,

(collectively called the **Incorporation Information**);
- (e) a copy of the New Zealand Companies Office Company Extract for Downer New Zealand Limited 478804 dated 12 September 2019;
- (f) a copy of the Company's constitution as announced to ASX Limited ACN 008 624 691 on 5 November 2010 and a copy of ASIC Document 0286663449 "Notification of resolution" dated 19 November 2013 in respect of an amendment to the Company's constitution;
- (g) a copy of minutes of a meeting of the board of directors of the Company held on 21 August 2019 delegating authority to a subcommittee to approve the entry into the Relevant Document (**Subcommittee**); and
- (h) a copy of minutes of a meeting of the Subcommittee held on 28 August 2019 approving the Company's entry into the Relevant Document and authorising two directors of the Company to execute the Relevant Document on behalf of the Company.

We have not conducted any other searches or investigations for the purpose of this opinion.

1.3 Legal opinion

In our opinion:

- (a) (**Incorporation and Status**): The Company has been duly incorporated under the *Corporations Act 2001* (Cth) and is validly existing and organised under the laws of Australia.

We instructed our agent to carry out a search on 12 September 2019 to obtain from ASIC a 'Current Organisation Extract' in respect of the Company (**ASIC Search**). The ASIC Search records the details of the Company's incorporation (i.e. the date of incorporation, status of incorporation and officeholder details) and contains a list of all documents lodged with ASIC, including any insolvency and external administration-related notices required to be published under the *Corporations Act 2001* (Cth) (**Act**) and *Corporations Regulations 2001* (Cth) which include notices that an application to wind up the company in liquidation has been filed in any Australian jurisdiction.

Our agents have advised us that the ASIC Search:

- (i) returned no external administration documents for the Company;
- (ii) identified that the Company was incorporated on 21 September 1989 and, as at the date of the ASIC Search, registered with ASIC as an Australian

- public company limited by shares, this is consistent with the Incorporation Information;
- (iii) returned no changes to the Company's constitution other than as noted in paragraph 1.2(f) above; and
 - (iv) discloses no change of directors between the date on which the Relevant Document was signed by the Company and the date of this opinion.
- (b) **(Corporate power and capacity):** The Company has the necessary corporate power and capacity to enter into the Relevant Document, and to perform its obligations thereunder.
- (c) **(Authorisation):** The Company has taken all necessary corporate action to authorise the execution, delivery and performance of its obligations under the Relevant Document.
- (d) **(Execution):** The Relevant Document has been duly executed as a deed by the Company in accordance with:
- (i) the law of Australia (as such law applies in cases where the proper law of the contract is the law of Australia and execution occurs within Australia); and
 - (ii) without limiting the foregoing, the law of the State or Territory within Australia in which the Company is taken to be registered (as such law applies in cases where the proper law of the contract is the law of that State or Territory and execution occurs within that State or Territory).
- (e) **(No Violation):** The execution, delivery and performance by the Company of the Relevant Document will not violate:
- (i) any existing law or regulation of Australia that is applicable to companies generally or to companies in the design and construction industry generally; and
 - (ii) its constitutional documents.
- (f) **(Authorisations and Consents):** No authorisation, approval, consent, licence, exemption, adjudication, order or other requirement of any governmental, judicial or public bodies and authorities of or in Australia are required to be obtained by the Company in connection with the execution, delivery and performance of the Relevant Document or to make the Company's obligations under the Relevant Document enforceable against it in competent Courts of Australia.
- (g) **(Registration):** It is not necessary to ensure the legality, enforceability or admissibility in evidence of the Relevant Document that it or any other document be notarised, filed, recorded, registered or enrolled in any court, public office, governmental authority or elsewhere in Australia.
- (h) **(Immunity):** The Company is not entitled to claim immunity from suit, execution, attachment or other legal process for itself or its assets in Australia.
- (i) **(Ranking of Claims):** The claims of Auckland Transport under the Relevant Document will rank at least *pari passu* with the claims of all other unsecured and unsubordinated creditors of the Company other than those claims which are mandatorily preferred by law.
- (j) **(Governing Law):** The Courts of Australia will give effect to the choice of New Zealand law as the governing law specified in the Relevant Document.

- (k) **(Jurisdiction):** The Courts of Australia will give effect to the Company's submission to the jurisdiction of the New Zealand courts specified in the Relevant Document.
- (l) **(Recognition of Judgments):** A judgment of a New Zealand court against the Company in relation to the Relevant Document that is:
- (i) enforceable in New Zealand; and
 - (ii) a final and conclusive judgment,
- will be enforceable in Australia by registration under the *Trans-Tasman Proceedings Act 2010* (Cth) (and, if denominated in a currency other than Australian currency, may be registered and then enforced in that currency).
- (m) **(Arbitration):** The Courts of Australia will:
- (i) give effect to the arbitration agreement contained in the Relevant Document and to any referral to arbitration made in accordance with it;
 - (ii) upon application duly made by Auckland Transport, stay or dismiss any court proceedings brought by the Company in a matter which is the subject of such arbitration agreement; and
 - (iii) recognise and enforce any award made by an arbitral tribunal against the Company pursuant to such referral, without retrial or re-examination of merits.
- (n) **(No Stamp Duty):** No ad valorem stamp duty or other documentary tax is payable in Australia in respect of the execution and delivery of the Relevant Document in order to ensure that any obligations under the Relevant Document are enforceable against the Company or admissible in evidence in the Courts of Australia.

1.4 Assumptions

For the purposes of our opinion, we assume:

- (a) the authenticity of all dates, signatures and markings on, and the authenticity, completeness and conformity to the original of, any copy and counterpart documents examined by us;
- (b) each party to the Relevant Document (other than the Company):
 - (i) has the capacity to enter into, and perform its obligations under, the Relevant Document; and
 - (ii) has authorised its entry into and its performance of, the Relevant Document,
 and that the Relevant Document constitutes the valid, binding and enforceable obligations of each such party;
- (c) in so far as any obligation under the Relevant Document is to be performed in any jurisdiction outside Australia, its performance will be legal and enforceable in that jurisdiction;
- (d) to the extent it is necessary, in order to ensure the validity, perfection or enforceability of the Relevant Document, that the Relevant Document, details of it or another instrument relating to it have been (or will be) filed, registered or otherwise perfected in any jurisdiction outside Australia;

- (e) to the extent any stamp or similar tax on the Relevant Document is payable in any jurisdiction other than Australia, such stamp duty or similar tax has been (or will be) paid;
- (f) all information provided to us by or on behalf of the Company, or any of its directors, shareholders, officers or employees was and remains complete, accurate and up to date in all respects;
- (g) the resolutions noted in the minutes referred to in paragraphs 1.2(g) and 1.2(h) were duly passed and that such resolutions remain in full force and effect;
- (h) the directors of the Company have acted for a proper purpose in approving the Relevant Document and the transactions to which they relate;
- (i) the Company's entry into and performance of the Relevant Document and the transactions to which they relate are in the best interests of the Company;
- (j) there are no liquidation proceedings that have been commenced by any person against the Company, or that are intended or anticipated by the Company;
- (k) the transactions to which the Relevant Document relates do not include or involve any provision by the Company (directly or indirectly) of financial assistance in connection with the purchase of a share issued or to be issued by the Company or the Company's holding company;
- (l) immediately before and after execution of the Relevant Document the Company was able to pay its debts (due and otherwise) and was solvent in all respects;
- (m) the information obtained from the search referred to in paragraph 1.2(c) and the information obtained from the publicly available information referred to in paragraph 1.2(e) and 1.2(f) are complete, accurate and up-to-date;
- (n) none of the parties to the Relevant Document:
 - (i) has engaged or will engage in unconscionable, misleading or deceptive conduct (by act or omission) that might make any part of this opinion incorrect; or
 - (ii) is, or will be, seeking to conduct any transaction to which the Relevant Document relates, or any associated activity, in a manner or for a purpose not evident on the face of the Relevant Document or that might render the Relevant Document or the transactions to which it relates, or any associated activity, illegal, void or voidable;
- (o) the Company enters into the Relevant Document in its personal capacity and not as trustee or agent or in any other capacity;
- (p) each person who executes the Relevant Document on behalf of the Company held the position they purported to hold; and
- (q) based on the instructions provided by the Company, there is no shareholders agreement in place in respect of the Company.

We have not taken steps to verify these assumptions. However, the person signing this opinion does not personally have actual knowledge of any fact or circumstance that makes any of these assumptions false.

1.5 **Qualifications**

Our opinion is given subject to the following qualifications:

- (a) our opinion on the enforceability or binding nature of the Relevant Document means that the obligations assumed by the respective parties to the Relevant Document are of a type that Courts of Australia generally enforces or recognises. It does not mean that those obligations will be enforced or recognised in all circumstances or that a particular remedy will be available;
- (b) enforcement of the Relevant Document may be limited by general principles of equity; for example:
 - (i) equitable remedies are discretionary, subject to equitable defences and are not available where damages are considered to be an adequate remedy, nor will specific performance normally be ordered in respect of a monetary obligation;
 - (ii) a provision that purports to excuse or protect a party for, or apply regardless of, that party's negligence, default or breach of duty may not be enforceable;
 - (iii) enforcement of the Relevant Document may be affected by general law doctrines or statutory relief in relation to matters such as fraud, misrepresentation, mistake, duress, unconscionable conduct, frustration, estoppels, waiver, lapse of time, penalties, courts retaining their ability to adjudicate, public policy or illegality or any other acts or omissions of any party that may preclude, limit or affect the ability of that party to enforce another party's obligations; and
 - (iv) an obligation to pay an amount (for example, default interest) may not be enforceable if the amount is held by Courts of Australia to constitute a penalty;
- (c) we express no opinion on any provision of the Relevant Document that requires a person to do or not do something that is not clearly identified in the provision, or to comply with another document or agreement that is not the Relevant Document (other than with the Contract, to the extent that the Relevant Document requires the Company to perform those obligations);
- (d) the obligations of the Company under the Relevant Document are subject to all insolvency, moratorium, receivership, reorganisation and similar laws and defences generally affecting creditors' rights;
- (e) claims may be or become:
 - (i) time-barred under the statutory limitations in Australia;
 - (ii) subject to guarantors' rights of subrogation; and
 - (iii) subject to the defences of set-off, abatement or to counterclaim;
- (f) Australian law may require that:
 - (i) discretions are exercised reasonably; and
 - (ii) opinions are based on reasonable grounds;
- (g) a Court of Australia may not enforce a provision of the Relevant Document:
 - (i) relating to the severability of an illegal, invalid or unenforceable provision, because it may reserve to itself the decision whether that provision is severable; or

- (ii) if to do so would conflict with public policy; or
 - (iii) limiting, restricting or otherwise relating to amendments or waivers if it determines the intentions of the parties to be contrary in any case; or
 - (iv) relating to the payment of costs or expenses of unsuccessful litigation brought before it or where it has itself made an order for costs; or
 - (v) relating to the binding or conclusive effect of a calculation, determination, certification or opinion, because it may review the grounds on which the calculation, determination, certification or opinion is made or given; and
- (h) proceedings brought before a Court of Australia may be stayed if:
- (i) the subject matter of the proceedings has previously been considered by, or is concurrently before, another court in another jurisdiction; or
 - (ii) that forum is a clearly inappropriate forum for those proceedings.

1.6 Addressees and responsibilities

This opinion is addressed to you personally and is provided solely in connection with the Relevant Document. It may not be relied upon by (or disclosed to) any other entity or person without our prior written consent, save that it may be disclosed (on a no-reliance basis):

- (a) to any Sponsor (as defined in the Contract);
- (b) to any proposed assignee, transferee, or novatee of your rights (or any of them) under the Relevant Document, on the basis that that person will make no further disclosure;
- (c) as required by law, or the rules of a recognised stock exchange, whether in Australia or elsewhere;
- (d) to any regulator having jurisdiction over your affairs, whether in Australia or elsewhere;
- (e) to your professional advisers;
- (f) to any person who in the ordinary course of your business has access to your papers and records, on the basis that that person will make no further disclosure; or
- (g) as required in connection with any actual or contemplated legal proceedings relating to the Relevant Document or this opinion.

The delivery of this opinion to you does not evidence the existence of any relationship of solicitor and client as between us and you.

This opinion is given by Ashurst which assumes liability for and is responsible for it. No individual owes or shall owe any duty of care to you in this opinion.

Yours faithfully



Ashurst

Schedule 1 – Definitions and references**Definitions**

Terms used in this letter have the following meanings:

Company means Downer EDI Limited.

Contract has the meaning given to that term in the Relevant Document.

Courts of Australia means Australia's federal courts, courts of competent jurisdiction of any Australian State or Territory, and all courts able to hear appeals from any of the foregoing.

References

A reference to "Australia" includes the Commonwealth of Australia, and any State or Territory in it.

A reference to "Australian law" or the "law(s) of Australia" includes all applicable Australian Commonwealth, State, and Territory laws, whether statutory or otherwise (and a reference to a "regulation of Australia" has a correspondingly broad meaning).