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City Rail Link – Guarantee and Indemnity from Downer EDI Limited

For decision: For noting:

Ngā tūtohunga / Recommendations

That the Auckland Transport Board (board)

- a) Approves the Deed of Guarantee and Indemnity between Auckland Transport (AT), Downer New Zealand Limited (the Company) and Downer EDI Limited (the Guarantor) dated 29 August 2019 (the Deed of Guarantee), which has been provided to AT under the City Rail Link (CRL) – Asset Management and Services Contract between AT and the Company dated 19 July 2019 (the CRL Stations Maintenance Agreement);
- b) Noting the provision of an enforceability opinion and certification by AT's legal advisers in this matter, Buddle Findlay dated 27 August 2020 (the Enforceability Opinion); and
- c) Authorisation of two directors to sign the Deed of Guarantee on behalf of AT.

Te whakarāpopototanga matua / Executive summary

1. The board resolved at its extraordinary meeting of 18 June 2019 that AT enter various project agreements relating to the CRL including the CRL Stations Maintenance Agreement under which the Guarantor, the Company and AT would enter the Deed of Guarantee under which the Guarantor would guarantee to AT, the Company's performance pursuant to the CRL Stations Maintenance Agreement.
2. AT has obtained an Enforceability Opinion in which AT's legal adviser Buddle Findlay has confirmed (subject to the assumptions and qualifications therein) the Guarantor's obligations under the Deed of Guarantee and Indemnity are valid, binding and enforceable and that document is, from a legal perspective, in order for execution by AT.
3. Entry into the Deed of Guarantee and Indemnity is required now as Downer New Zealand Limited will be required to start its maintenance services under the CRL Stations Maintenance Agreement in July 2022 when Porters Avenue Bridge will be handed over to AT for operational use and maintenance. The bulk of the assets to be maintained under the contract will be completed by CRL and handed over to AT in December 2024.

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Ngā tuhinga ō mua / Previous deliberations

Date	Report Title	Key Outcomes
May 2022 Finance and Assurance Committee	CRL – Guarantee and Indemnity from Downer EDI Limited	The Committee recommended that the board approve the deed and authorise two directors to sign it on its behalf..
June 2019 Board	CRL – AT Interface Arrangements Confidential	The board approved and authorised the signature by two directors of the various interface deeds between AT and CRL Limited.
March 2019 Board	CRL Stations Maintenance Agreement	The board delegated authority to the chief executive to oversee and execute a facilities maintenance contract for Aotea, Karangahape Road and Mt Eden train stations and associated systems with the overall winning tenderer for the C3 contract subject to satisfactory resolution of outstanding commercial issues

Te horopaki me te tīaroaro rautaki / Context and strategic alignment

- The CRL project (the Project) comprises for the construction of a 3.4 kilometre underground heavy rail link between Britomart and Mt Eden, new stations at Aotea and Karangahape Road, remodelling of Britomart and Mt Eden stations and works on the wider network at Otahuhu, Newmarket, Henderson and the Strand.
- The Project was identified in the 2012 Auckland Plan as Auckland’s highest priority transport project, critical to support Auckland’s growth. The CRL and its new stations were identified in the 2012 City Centre Masterplan as transformational initiatives. The Auckland Plan 2050 identifies the Project as a critical piece of enabling infrastructure required to unlock Auckland’s development areas.
- The 2015-25 Regional Land Transport Plan identified the Project as the top priority transport project in Auckland, and as Auckland’s biggest economic development project. The 2018-28 Regional Land Transport Plan assumes the completion of the Project by 2024, providing the fundamental underpinning of Auckland’s public transport system and providing the ability to cater for Auckland’s growth.
- The Project is being delivered by City Rail Link Limited (CRLL), which was established on 1 July 2017 following the transfer of the Project from AT. CRLL is a Crown entity owned 51% by the Crown and 49% by Auckland Council.
- The Project is governed by a Project Delivery Agreement (PDA) between CRLL, the Crown and Auckland Council pursuant to which AT and KiwiRail entered a Delivery Partner Agreement (DPA) to participate in, and support CRLL to deliver, the Project.

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9. The DPA provides the overarching framework for the Project generally, including AT's entry into various project agreements including the CRL Stations Maintenance Agreement. The Board resolved at its extraordinary meeting of 18 June 2019 that AT enter the DPA and various Project agreements including the CRL Stations Maintenance Agreement. Under the CRL Stations Maintenance Agreement the Guarantor, the Company and AT are to enter the Deed of Guarantee under which the Guarantor guarantees to AT, the Company's performance pursuant to the CRL Stations Maintenance Agreement.
10. In July 2019 AT and Downer New Zealand Limited entered into the CRL Stations Maintenance Agreement. Downer Ltd NZ will be responsible for all hard and soft maintenance services at the CRL Stations. It is anticipated that Downer will also undertake cleaning, graffiti removal and vandalism repair activities, together with pest control and the general care of the specified surrounding urban realm.
11. Downer New Zealand Limited will be required to start its maintenance services under the CRL Stations Maintenance Agreement in July 2022 when Porters Avenue Bridge will be handed over to AT for operational use and maintenance. The bulk of the assets to be maintained under the CRL Stations Maintenance Agreement will be completed by CRL and handed over to AT in December 2024.

Ngā matapakinga me ngā tātaritanga / Discussion and analysis

12. The Guarantor and the Company executed the Deed of Guarantee required under the CRL Stations Maintenance Agreement on 29 August 2019 and subsequently provided that document to AT for execution, together with a legal opinion in relation to the Deed of Guarantee dated 12 September 2019 from the Guarantor's Australian lawyers, Ashurst Australia, provided at Attachment 3 (the Ashurst Legal Opinion).
13. As alluded to in the AT procured Enforceability Opinion (Attachment 2), the Deed of Guarantee is governed by New Zealand law and consequently it is considered the Ashurst Legal Opinion does not extend to an opinion as to the binding and enforceable nature of the Deed of Guarantee against the Guarantor as required under the CRL Stations Maintenance Agreement. It is noted the Ashurst Opinion does not go so far as to say the Deed of Guarantee is enforceable against the Guarantor because the deed is governed by New Zealand law and Ashurst are not competent to provide an opinion on New Zealand law. The usual approach in such matters would be for the Company to obtain an enforceability opinion from a law firm in the jurisdiction of the applicable governing law of the deed (i.e. New Zealand) on which the guarantor's law firm would then rely in providing its opinion. Accordingly, in the situation, this would require the Company to obtain an enforceability legal opinion from a New Zealand law firm on which Ashurst would rely in providing its opinion. Despite repeated requests of the Company, it did not provide a satisfactory enforceability opinion to AT.
14. Ultimately, AT has obtained the Enforceability Opinion (Attachment 2) in which Buddle Findlay confirms, subject to the qualifications and assumptions therein, the Guarantor's obligations under the Deed of Guarantee are valid, binding and enforceable and that document is, from a legal perspective, in order for execution by AT.

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Ngā tūraru matua / Key risks and mitigations

15. There are no associated risks.

Ngā ritenga-ā-pūtea me ngā rauemi / Financial and resource impacts

16. There are no associated financial or resource impacts.

Ngā whaiwhakaaro ō te taiao me te panonitanga o te āhuarangi / Environment and climate change considerations

17. There are no associated environmental or climate change impacts.

Ngā whakaaweawe me ngā whakaaro / Impacts and perspectives

Mana whenua

18. Not applicable.

Ngā mema pōti / Elected members

19. Not applicable.

Ngā rōpū kei raro i te Kaunihera / Council Controlled Organisations

20. Not applicable.

Ngā kiritaki / Customers

21. There are no associated customer impacts.

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Ngā whaiwhakaaro haumarū me ngā whaiwhakaaro hauora / Health, safety and wellbeing considerations

22. There are no associated health, safety and wellbeing impacts.



Ā muri ake nei / Next steps

23. Assuming subsequent board approval, management will coordinate with two directors to execute the Deed of Guarantee on behalf of AT and for AT to provide copies of the fully executed deed to the Company and Guarantor.

Ngā whakapiringa / Attachments

Attachment number	Description
1	Deed of Guarantee and Indemnity between Auckland Transport, Downer New Zealand Limited and Downer EDI Limited dated 29 August 2019.
2	Enforceability Opinion and Certification from Buddle Findlay Lawyers dated 27 August 2020.
3	Legal Opinion from Ashurst Australia dated 12 September 2019.

Te pou whenua tuhinga / Document ownership

Submitted by	Christian Messelyn Portfolio Delivery Director (Alliances)	
Recommended by	Mark Lambert EGM Integrated Network	
Approved for submission	Shane Ellison Chief Executive	