

## Guarantee and Indemnity

Date:

**Downer EDI Limited** a company registered in Australia (ACN 003 872 848) with a registered business address of Trinita Business Campus, 39 Delhi Road, North Ryde, NSW 2113 Australia (**Guarantor**)

**Auckland Transport** a council controlled organisation of the Auckland Council established under section 38 of the Local Government (Auckland Council) Act 2009 (**Principal**)

**Downer New Zealand Ltd** (company number 478804), a company incorporated in New Zealand and having its registered office at 130 Kerrs Road, Wiri, Auckland, 2104, New Zealand (**Contractor**)

## Background

- A. The Principal has agreed to enter into an Asset Management and Services Contract (**Contract**) with the Contractor on the condition that the Guarantor provide this guarantee.
- B. The Guarantor has agreed on the following terms and conditions to guarantee to the Principal the Contractor's Obligations and to provide indemnities in favour of the Principal.
- C. The Guarantor considers that by providing this guarantee there will be a commercial benefit flowing to it.

This deed provides

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## 1. Definitions and Interpretation

### 1.1 Definitions

In this deed:

**Business Day** means a day (not being a Saturday or Sunday) on which banks are generally open for business in Auckland.

**Contract** has the meaning given in the recital at paragraph A above.

**Dispute** has the meaning given in clause 10.3(a).

**Event of Default** means any event which constitutes a breach of, or is duly and properly declared to be an event of default (howsoever described) by, the Contract.

**Guaranteed Money** means all money the payment or repayment of which from time to time forms part of the Obligations.

**Insolvency Event** means, in relation to a person, any of the following events:

- (a) an application is made to a court for an order, or an order is made, that the person be liquidated;
- (b) entering into, or issuing any formal proposal or resolution to enter into, any compromise or scheme of arrangement with all or some of that person's creditors,

except as part of a solvent reconstruction or amalgamation previously approved by the Principal in writing;

- (c) the appointment of a liquidator, interim liquidator, receiver, statutory manager, administrator or similar official to that person;
- (d) the suspension or threatened suspension by that person of the payment of that person's debts generally;
- (e) the cessation by that person of its business in New Zealand;
- (f) the enforcement of any security against the whole or a substantial part of that person's assets; or
- (g) in relation to a limited partnership, a terminating event has occurred (as set out in section 86 of the *Limited Partnerships Act 2008* (NZ)).

**Insolvency Provision** means any law relating to insolvency, sequestration, liquidation or bankruptcy (including any law relating to the avoidance of conveyances in fraud of creditors or of preferences, and any law under which a liquidator or trustee in bankruptcy may set aside or avoid transactions), and any provision of any agreement, arrangement or scheme, formal or informal, relating to the administration of any of the assets of any person.

**Obligations** means all the liabilities and obligations of the Contractor to the Principal under or arising out of or in any way in connection with the Contract or the Services, and includes any liabilities or obligations which:

- (a) are liquidated or unliquidated;
- (b) are present, prospective or contingent;
- (c) are in existence before or come into existence on or after the date of this deed;
- (d) relate to the payment of money or the performance or omission of any act;
- (e) sound in damages only; or
- (f) accrue as a result of any default by the Contractor under the Contract (including those referred to in clause 26.2) or any Abatement Default,

and irrespective of:

- (g) whether the Contractor is liable or obligated solely, or jointly, or jointly and severally with another person;
- (h) the circumstances in which the Principal comes to be owed each liability or obligation and in which each liability or obligation comes to be secured by this deed, including any assignment of any liability or obligation or of this deed; or
- (i) the capacity in which the Contractor and the Principal comes to owe or be owed such liability or obligation.

and **Obligation** means any liability or obligation forming part of the Obligations.

**Power** means any right, power, authority, discretion, remedy or privilege whether conferred on the Principal by the Contract, this deed, by statute, by law, by equity or otherwise.

**Security** means a mortgage, charge, pledge, lien, hypothecation, guarantee (including this deed), indemnity, letter of credit, letter of comfort, performance bond, contractual right of set-off or combination or other assurance against loss which secures the Guaranteed Money or

the performance of any other Obligation, and whether existing at the date of this deed or at any time in the future.

**Specified Rate** in relation to an interest period referred to in clause 7.3 (**interest period**) means the rate determined by the Principal to be the sum of:

- (a) 5 % per annum; and
- (b) the rate per annum (rounded upwards to the nearest two decimal places) as determined by the Principal on the first day of that interest period to be the bank bill reference rate (bid) administered by the New Zealand Financial Markets Association (or any other person which takes over the administration of that rate) for a tenor approximately equal to that interest period as displayed at or about 10.45 am on that date on page BKBM of the Thomson Reuters screen (or any replacement Thomson Reuters page which displays that rate, or on the appropriate page of such other information service which publishes that rate from time to time in place of Thomson Reuters) (screen rate), provided that:
  - (i) if (but only if) no such screen rate is available, then the arithmetic mean (rounded upwards to the nearest two decimal places) of the rates quoted to the Principal on the relevant date by three registered banks (as defined in the Reserve Bank of New Zealand Act 1989) selected by the Principal as the rate at which the relevant bank could raise funds in the wholesale market for New Zealand Dollars for a period approximately equal to that interest period at or about that time on that date; and
  - (ii) if fewer than three registered banks quote rates, such rate as the Principal may reasonably determine to be the nearest practical equivalent,

provided always that if the rate described in paragraph (b) would be less than zero, the Specified Rate shall be 5% per annum.

## 1.2 Defined terms

Terms used in this deed which are not otherwise defined will have the meaning given to them in the Contract.

## 1.3 Interpretation

In this deed:

- (a) headings are for convenience only and do not affect interpretation;

and unless the context indicates a contrary intention:

- (b) "**person**" includes an individual, the estate of an individual, a corporation, an authority, an association or a joint venture (whether incorporated or unincorporated), a partnership and a trust;
- (c) a reference to a party includes that party's executors, administrators, successors and permitted substitutes and permitted assigns, including persons taking by way of novation and, in the case of a trustee, includes a substituted or an additional trustee;
- (a) a reference to a document (including this deed) is to that document as amended, varied, novated, ratified, supplemented or replaced from time to time;
- (d) a reference to any Authority, institute, association or body is:

- (i) if that Authority, institute, association or body is reconstituted, renamed or replaced or if the powers or functions of that Authority, institute, association or body are transferred to another organisation, deemed to refer to the reconstituted, renamed or replaced organisation or the organisation to which the powers or functions are transferred, as the case may be; and
  - (ii) if that Authority, institute, association or body ceases to exist, deemed to refer to the organisation which serves substantially the same purposes or objects as that Authority, institute, association or body;
- (e) a reference to a statute or delegated legislation or a provision of either includes consolidations, amendments, re-enactments and replacements;
  - (f) a reference to **law** includes common or customary law (including equity) and any constitution, decree, judgment, legislation, order, ordinance, regulation, by-law, statute, treaty or other legislative measure, in each case of any jurisdiction; and **lawful** and **unlawful** will be construed accordingly;
  - (g) for all purposes (other than where designated as a Business Day), "day" means calendar day;
  - (h) a word importing the singular includes the plural (and vice versa), and a word indicating a gender includes every other gender;
  - (i) a reference to a party, clause, schedule, exhibit, attachment or annexure is a reference to a party, clause, schedule, exhibit, attachment or annexure to or of this deed, and a reference to this deed includes all schedules, exhibits, attachments and annexures to it;
  - (j) where the day on or by which any sum is payable or any act, matter or thing is to be done is a day other than a Business Day, that sum will be paid or that act, matter or thing will be done on the next Business Day in the same calendar month (if there is one) or the preceding Business Day (if there is not);
  - (k) if a word or phrase is given a defined meaning, any other part of speech or grammatical form of that word or phrase has a corresponding meaning;
  - (l) "includes" in any form is not a word of limitation; and
  - (m) a reference to "\$" or "dollar" is to New Zealand currency.

#### **1.4 Principal Obligation**

Each obligation of the Guarantor under this deed constitutes a principal, not a secondary or ancillary obligation, to the intent that, without limiting in any way the operation of any of the other provisions of this deed, any limitation on the liability of the Guarantor which would otherwise arise by reason of its status as a guarantor, co-guarantor, indemnifier or co-indemnifier, is negated.

#### **1.5 No contra proferentem**

No term or provision of this deed will be construed against a party on the basis that the guarantee or the term or provision in question was put forward or drafted by that party.

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## 2. Guarantee

### 2.1 Guarantee

The Guarantor irrevocably and unconditionally guarantees to the Principal the due and punctual performance by the Contractor of all the Obligations.

### 2.2 Payment by Guarantor

If the Contractor does not pay the Guaranteed Money when due, the Guarantor must on demand pay to the Principal the Guaranteed Money which is then due and unpaid or which later becomes due, owing or payable.

### 2.3 Perform Obligations

- (a) If the Contractor defaults in the performance or observance of any of the Obligations, the Guarantor must, in addition to its obligations under clause 2.2 of this deed, on demand from time to time by the Principal, immediately perform any of the Obligations then required to be performed by the Contractor in the same manner as the Contractor is required to perform the Obligations.
- (b) Where the Guarantor performs or procures the performance of any Services under the Contract (as defined in the Contract) pursuant to performing or procuring the performance of any of the Obligations under this deed, the Guarantor shall be paid as provided in the Contract.

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## 3. Indemnity

Subject to clause 4.2, as a covenant separate and distinct from that contained in clause 2.1, the Guarantor irrevocably and unconditionally agrees to indemnify the Principal and at all times to keep the Principal indemnified against any loss or damage suffered by the Principal arising out of or in connection with:

- (a) any failure by the Contractor to perform the Obligations duly and punctually;
- (b) any obligation or liability that would otherwise form part of the Obligations being or becoming void, voidable or unenforceable against or irrecoverable from the Contractor for any reason, and whether or not the Principal knew or ought to have known of that reason; or
- (c) a disclaimer of any contract or property (including the Contract) made by a liquidator of the Contractor pursuant to sections 269-270 Companies Act 1993 (NZ) or other applicable laws.

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## 4. Liability as Guarantor and indemnifier

### 4.1 Liability of Guarantor

- (a) Any reference in this deed to the obligations or liabilities of the Guarantor will be construed as a reference to its obligations or liabilities, whether as a guarantor or an indemnifier or both, under this deed.
- (b) The use of the expression "Guarantor" in this deed in relation to a party is not to be construed as diminishing that party's obligations as an indemnifier under this deed.
- (c) The provisions of this deed which preserve the liability of the Guarantor as a guarantor apply, appropriately modified, to any liability which arises whether in regard to that party's guarantee or its indemnity under this deed.

## 4.2 Limitation of Guarantor's Liability

Notwithstanding any other provision of this deed (but subject to clause 5.2):

- (a) subject to the other provisions of this clause 4.2, the liability and obligations of the Guarantor under this deed are limited to and will not exceed the liability or obligations which the Guarantor would have had to the Principal arising out of or in connection with the Contract, or the Obligations if the Guarantor had been named in the Contract as being jointly and severally liable with the Contractor to the Principal;
- (b) where the Guarantor is performing any Obligation, the Guarantor will not be required to perform such Obligation in a manner any different than that required by the Contract;
- (c) the Guarantor has the benefit of all limitations on and exclusions of liability expressed for the benefit of the Contractor in the Contract; and
- (d) the Guarantor is entitled to assert any defence, set-off or counterclaim that the Contractor could assert had such a claim been made directly against the Contractor.

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## 5. Nature and preservation of liability

### 5.1 Absolute liability

- (a) The liability of the Guarantor under this deed is absolute and is not subject to the performance of any condition precedent or subsequent by the Contractor or the Guarantor.
- (b) This deed binds each person who has executed it, notwithstanding that:
  - (i) any person, whether named as a party or not, does not execute this deed;
  - (ii) the execution of this deed by any person that is a party to this deed being defective, invalid, forged or irregular in any way; or
  - (iii) any obligation or liability of any other party under this deed not being enforceable or binding against that person for any reason.

### 5.2 Unconditional liability

The liability of the Guarantor under this deed will not be affected by any act, omission, matter or thing which, but for this clause 5.2, might operate in law or in equity to release the Guarantor from that liability or to reduce the liability of the Guarantor, including any of the following:

- (a) **(Insolvency Event):** the occurrence before, on or at any time after the date of this deed, of any Insolvency Event in relation to the Contractor or the Guarantor;
- (b) **(Distribution):** the receipt by the Principal of any payment, dividend or distribution under any Insolvency Provision in relation to the Contractor or the Guarantor;
- (c) **(Event of Default):** the occurrence of any default or Abatement default under the Contract;
- (d) **(Invalidity etc.):** the Contract or any payment or other act, the making or doing of which would otherwise form part of the Obligations being or becoming or being

conceded to be frustrated, illegal, invalid, void, voidable, unenforceable or irrecoverable in whole or in part for any reason whether past, present or future;

- (e) (**Further Security**): the Principal accepting or declining to accept any Security from any person at any time;
- (f) (**Time or indulgence**): the Principal granting or agreeing with the Guarantor or the Contractor to grant, time, waiver or other indulgence or concession to, or making any composition or compromise with, the Contractor or the Guarantor;
- (g) (**Forbearance**): the Principal not exercising or delaying (whether deliberately, negligently, unreasonably or otherwise) in the exercise of any Power it has to enforce any Obligation or its rights under the Contract or this deed;
- (h) (**Acquiescence or other omission**): any laches, acquiescence or other act, neglect, default, omission or mistake by the Principal;
- (i) (**Repudiation**): the determination, rescission, repudiation or termination, or the acceptance of any of the foregoing, by the Principal or the Contractor or the Guarantor of the Contract or any Obligation;
- (j) (**Variation**): any variation to the Contract or any Obligation, whether or not that variation is substantial or material, or imposes any additional liability or Obligations on or disadvantages the Contractor or the Guarantor;
- (k) (**Release**): the full, partial or conditional release or discharge by the Principal or by operation of law, of the Contractor or the Guarantor from the Contract or any Obligation;
- (l) (**Change of constitution**): any change in membership (whether by death or retirement of an existing member, admission of a new member, or otherwise) or in the name of any partnership, firm or association in which the Contractor or the Guarantor is a member;
- (m) (**Transfer**): the transfer, assignment or novation by the Principal or the Contractor or the Guarantor of all or any of its rights or obligations under the Contract or under any other Obligation;
- (n) (**Change of Control**): any change of control (as defined in clause 9.2(b) of this deed), reconstruction or reorganisation of the Guarantor;
- (o) (**Disclosure**): any failure by the Principal to disclose to the Guarantor any material or unusual fact, circumstance, event or thing known to, or which ought to have been known by, the Principal relating to or affecting the Contractor or the Guarantor at any time before or during the currency of this deed, whether prejudicial or not to the rights and liabilities of the Guarantor and whether or not the Principal was under a duty to disclose that fact, circumstance, event or thing to the Guarantor or to the Contractor;
- (p) (**Covenant not to take action**): the Principal agreeing with the Contractor or the Guarantor not to sue, issue process, sign or execute judgment, commence proceedings for bankruptcy or liquidation, participate in any administration, scheme or deed of arrangement or reconstruction, prove in any bankruptcy or liquidation, or do anything else in respect of the liability of the Contractor or the Guarantor;
- (q) (**Death or incapacity**): (where the Guarantor is an individual) the death or mental incapacity of the Guarantor;
- (r) (**Administration**): the provisions of section 239ABJ Companies Act 1993 (NZ) or other applicable laws operating to prevent or delay;

- (i) the enforcement of this deed against any Guarantor; or
- (ii) any claim for contribution against any Guarantor; or
- (s) **(Disclaimer):** a disclaimer of any contract or property (including the Contract) made by a liquidator of the Contractor pursuant to sections 269-270 Companies Act 1993 (NZ) or other applicable laws.

### 5.3 No merger

- (a) This deed is in addition to and does not merge with, postpone, lessen or otherwise prejudicially affect the Contract or any other Power of the Principal.
- (b) The Principal will hold any judgment or order obtained by it against any person in respect of the Guaranteed Money or the Obligations collaterally with this deed, and this deed will not merge in that judgment or order.

### 5.4 No obligation to gain consent

No consent is required from the Guarantor to nor is it necessary for the Guarantor to be made aware of, any event referred to in clause 5.2, any transaction between the Principal and the Contractor, or any particulars concerning any Obligation.

### 5.5 Appropriation

- (a) The Principal is under no obligation to marshal or appropriate in favour of any Guarantor, or to exercise, apply, transfer or recover in favour of any Guarantor, any Security or any funds or assets that the Principal holds, has a claim on, or has received or is entitled to receive, but may do so in the manner and order as the Principal determines in its absolute discretion.
- (b) The Principal shall not be entitled to enforce its rights and claims under this deed for a breach of the Obligations to the extent that it has already received payment or discharge or has otherwise been compensated in respect of the same breach of Obligations including through insurance proceeds or as a result of a call of any other security that the Principal may hold under the Contract.

### 5.6 Void or voidable transactions

If:

- (a) the Principal has at any time released or discharged:
  - (i) the Guarantor from its obligations under this deed; or
  - (ii) any assets of the Guarantor from a Security,in either case in reliance on a payment, receipt or other transaction to or in favour of the Principal; or
- (b) any payment or other transaction to or in favour of the Principal has the effect of releasing or discharging:
  - (i) the Guarantor from its obligations under this deed; or
  - (ii) any assets of the Guarantor from a Security; and



- (c) that payment, receipt or other transaction is subsequently claimed by any person to be void, voidable or capable of being set aside for any reason, including under an Insolvency Provision or under the general law; and
  - (d) that claim is upheld or is conceded or compromised by the Principal,
- then:
- (e) **(Restitution of rights):** the Principal will immediately become entitled against the Guarantor to all rights (including under any Security) as it had immediately before that release or discharge;
  - (f) **(Restore Principal's position):** the Guarantor must immediately do all things and execute all documents as the Principal may reasonably require to restore to the Principal all those rights; and
  - (g) **(Indemnity):** the Guarantor must indemnify the Principal against costs, losses and expenses suffered or incurred by the Principal in or in connection with any negotiations or proceedings relating to the claim or as a result of the upholding, concession or compromise of the claim.

## 5.7 Other Securities

- (a) **Additional to other securities:** This deed is in addition to and not in substitution for any other security or right which the Principal may now or subsequently have in respect of the Guaranteed Money and/or the Obligations. The Principal may enforce this deed without first having recourse to any such securities or rights, and notwithstanding that any other security may be in whole or in part unenforceable by reason of any rule of law or equity and notwithstanding any laches, acts, omissions or delays on the part of the Principal.
- (b) **Collateral securities:** This deed shall not prejudicially affect or be prejudicially affected by any other security or guarantee now or at any subsequent time held by the Principal for any Guaranteed Money and/or any of the Obligations. Such other security or guarantee shall be deemed to be collateral with this deed and the Guarantor will not as against the Principal in any way claim the benefit of or seek the transfer of all or any part of any such security or any right of recourse.

## 5.8 Claim on the Guarantor

The Principal is not required to make any claim or demand on the Contractor, or to enforce the Contract, or any other right, power or remedy against the Contractor, before making any demand or claim on the Guarantor.

## 5.9 No representation by Principal etc.

The Guarantor acknowledges that it has not entered into this deed in reliance on any representation, promise, statement or inducement to the Guarantor by or on behalf of the Principal, the Contractor or any other person.

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# 6. Representations and Warranties

## 6.1 General representations and warranties

The Guarantor or, if there is more than one Guarantor, each Guarantor represents and warrants to the Principal that:

- (a) **(Legally binding obligation):** this deed constitutes a valid and legally binding obligation of the Guarantor in accordance with its terms;

- (b) **(Execution, delivery and performance):** the execution, delivery and performance of this deed by the Guarantor does not breach any law, or any document or agreement to which the Guarantor is a party or which is binding on it or any of its assets;
- (c) **(No material adverse effect):** no litigation, arbitration, mediation, conciliation, criminal or administrative proceedings are current, pending or, to the knowledge of the Guarantor, threatened, which, if adversely determined, may have a material adverse effect on the ability of the Guarantor to perform its obligations under this deed;
- (d) **(Information):** all information relating to the Guarantor provided to the Principal in connection with this deed is true in all material respects and is not, by omission or otherwise, misleading in any material respect;
- (e) **(No restructuring):** the Guarantor has not taken any corporate action nor have any other steps been taken, orders made or legal proceedings started or threatened against it for its restructuring or reorganisation;
- (f) **(Financial):** the Guarantor is solvent and able to pay its indebtedness as it falls due, and in particular, the Guarantor will not take any action or step that may adversely affect its financial position; and
- (g) **(No trusts):** the Guarantor has not entered into this deed as the trustee of any trust.

## 6.2 Corporate representations and warranties

The Guarantor, or if there is more than one Guarantor, each Guarantor, that is or purports to be a body corporate, further represents and warrants to the Principal that:

- (a) **(Due incorporation):** it is duly incorporated and has the corporate power to own its property and to carry on its business as is now being conducted;
- (b) **(Constitution):** the execution, delivery and performance of this deed does not breach the constitution of the Guarantor and, if the Guarantor or any of its subsidiaries is listed on the New Zealand Stock Exchange Limited or on any other stock exchange, those listing requirements or business rules;
- (c) **(Corporate power):** it has the power, and has taken all corporate and other action required, to enter into this deed and to authorise the execution and delivery of this deed and the performance of its obligations under this deed; and
- (d) **(Filings):** the Guarantor has filed all corporate notices and effected all registrations with the New Zealand Financial Markets Authority and all of those filings and registrations are current, complete and accurate to the extent they are material to the performance of the obligations of the Guarantor under this deed.

## 6.3 Representations and warranties repeated

Each representation and warranty in this deed will be repeated on each day whilst any of the Guaranteed Money remains outstanding (whether or not then due for payment) with reference to the facts and circumstances then subsisting, as if made on each such day.

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## **7. Payments**

### **7.1 On demand**

All money payable by the Guarantor under this deed must be paid by the Guarantor on demand by the Principal in immediately available funds to the account and in the manner notified by the Principal to the Guarantor.

### **7.2 Payment in gross**

All money received or recovered by the Principal on account of the Guaranteed Money will be treated as payments in gross without any right on the part of the Guarantor to claim the benefit of any money received or recovered by the Principal or any Security, until the Principal has been paid 100 cents in the dollar in respect of the Guaranteed Money.

### **7.3 Interest**

As a liability separate and distinct from the Guarantor's liability under clauses 2 and 3, the Guarantor must on demand by the Principal pay interest on all amounts due and payable by it and unpaid under or in respect of this deed. Interest will accrue on those amounts from day to day from the due date up to the date of actual payment, before and (as a separate and independent obligation) after judgment, at the Specified Rate for successive 90 day interest periods commencing on the date of default and, if not paid when due, will itself bear interest in accordance with this clause 7.3, provided that interest will not be payable under this clause to the extent that interest for late payment to the Principal is incorporated into the calculation of the amount payable under the Contract.

### **7.4 Merger**

If the liability of the Guarantor to pay to the Principal any money under this deed becomes merged in any judgment or order, then, as an independent obligation, the Guarantor will pay interest on the amount of that money at the rate which is the higher of that payable under clause 7.3 and that fixed by or payable under the judgment or order.

### **7.5 No deduction for Taxes**

- (a) All payments by the Guarantor under this deed will be without deduction or withholding for or on account of any present or future Taxes unless the Guarantor is compelled by law to deduct or withhold the same.
- (b) If the Guarantor is compelled by law to make any deduction or withholding for or on account of any present or future Taxes (not being Taxes on the overall net income of the Principal), then the Guarantor must:
  - (i) pay to the Principal any additional amounts necessary to enable the Principal to receive (after all deductions and withholdings for those Taxes) a net amount equal to the full amount which would otherwise be payable to the Principal if no deduction or withholding was required to be made;
  - (ii) promptly (and within the time prescribed by law) pay to the relevant taxing authority the amount of those Taxes which it is compelled by law to deduct or withhold, and indemnify the Principal for any Taxes and interest or penalties to which the Principal may become liable consequent on the failure of the Guarantor to pay those Taxes; and
  - (iii) deliver to the Principal, promptly on request from the Principal, a copy of any receipt issued by the relevant taxing authority on payment of those Taxes.

## 7.6 Currency indemnity

- (a) The New Zealand Dollar is the currency of payment by the Guarantor under or in connection with this deed, except that payment by the Guarantor of or in relation to any Obligation which is denominated in a foreign currency must be made in that foreign currency.
- (b) If for any reason any amount payable by the Guarantor under or in connection with this deed is received by the Principal in a currency (Payment Currency) other than the currency (**Agreed Currency**) in which that amount is required to be paid under this deed (whether as a result of any judgment or order, the liquidation of the Guarantor or otherwise), and the amount obtained (net of charges) by the Principal on its conversion of the amount of the Payment Currency received into the Agreed Currency is less than the amount payable under this deed in the Agreed Currency, then the Guarantor will, as an independent and additional obligation, indemnify the Principal for that deficiency and for any loss sustained as a result of that deficiency.

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## 8. Expenses and Goods and Services Tax

### 8.1 Expenses

The Guarantor must, on demand, reimburse the Principal for and keep the Principal indemnified against all expenses, including legal fees, costs and disbursements on a solicitor/own client basis (or on a full indemnity basis, whichever is the higher) assessed without the necessity of taxation, incurred by the Principal in connection with:

- (a) (**Amendment**): any consent, agreement, approval, waiver, amendment to or discharge of this deed; and
- (b) (**Enforcement**): any exercise, enforcement or preservation, or attempted exercise, enforcement or preservation, of any rights under this deed.

### 8.2 Goods and Services Tax

If the Principal is or becomes liable to pay any GST (including any related statutory interest or penalty) in respect of any supply it makes or is deemed to make under, or in connection with, the Contract or this deed (**GST Liability**) then:

- (a) to the extent that an amount is payable by the Guarantor to the Principal under this deed for that supply, the amount will be increased by the full amount of the GST Liability; and
- (b) otherwise, the Guarantor will indemnify and keep the Principal indemnified for the full amount of the GST Liability.

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## 9. Assignment

### 9.1 Restrictions on Principal's Assignment

- (a) The Principal must not assign, novate or otherwise transfer all or any part of its rights under this deed without the written consent of the Guarantor unless the assignment, novation or transfer is to a Rail Operator or third party to whom the Principal transfers, assigns, or otherwise disposes of or novates its rights and obligations under the Contract in accordance with the terms of the Contract.

## 9.2 Restrictions on Guarantor's Assignment

- (a) The Guarantor must not transfer, assign or novate ("transfer") all or any of its rights or obligations under this deed without the prior written consent of the Principal (which may be withheld or delayed at the Principal's absolute discretion). For the purposes of this deed any change in control of the Guarantor or any Holding Company of the Guarantor will be deemed to be a transfer by the Guarantor under this clause. For the avoidance of doubt, and without limitation, any amalgamation, restructure or reorganisation concerning or involving in any way the Guarantor is also deemed to be a transfer under this clause.
- (b) For the purposes of clause 9.2(a):
- (i) references to one person being controlled by another person mean that the other person (whether directly or indirectly and whether by the ownership of share capital, the possession of voting power, contract or otherwise) has the power:
- A. to appoint and/or remove the majority of the members of the governing body of that person;
- B. to appoint a member or members of the governing body of that person, with the power to exercise, or control the exercise of, more than 50% of the maximum number of votes that might be cast at a meeting of the governing body or the members of that person; or
- C. to control, by any other means, the affairs and policies of that person,
- and control and change in control have corresponding meanings; and
- (ii) references to a "Holding Company" in respect of a party, means any company or person that directly or indirectly beneficially holds 25% or more of the voting rights or equity share capital of that party or has the power to appoint or remove 25% or more of the members of the governing body of that party.

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## 10. Governing law, jurisdiction and arbitration

### 10.1 Governing law

This deed and where applicable, the arbitration reference contained in clause 10.3, is governed by and will be construed according to the laws of New Zealand.

### 10.2 Jurisdiction

- (a) This clause 10.2 applies subject to clause 10.3.
- (b) The Guarantor irrevocably submits to the non-exclusive jurisdiction of the courts and appellate courts of New Zealand, and the courts competent to determine appeals from those courts, with respect to any proceedings which may be brought relating in any way to this deed.
- (c) The Guarantor irrevocably waives any objection it may now or in the future have to the venue of any proceedings, and any claim it may now or in the future have that any proceeding has been brought in an inconvenient forum, where that venue falls within (b) of this clause.

### 10.3 Reference to arbitration

- (a) Any controversy, claim or dispute directly or indirectly based upon, arising out of, relating to or in connection with this deed (including but not limited to any question relating to the existence, validity or termination of this deed) (**Dispute**) shall be referred to and finally resolved by arbitration in accordance with the *Arbitration Act 1996* (NZ). The parties agree that the provisions of the Second Schedule of the *Arbitration Act 1996* (NZ) will apply, except for Articles 4 and 5 of the Second Schedule which will not apply.
- (b) The seat of the arbitration will be Auckland, New Zealand.
- (c) The number of arbitrators will be one. If the Parties cannot agree on a sole arbitrator within 10 Business Days of referral of the Dispute to arbitration, then either Party may request that the president (or like office) of the Arbitrators' and Mediators' Institute of New Zealand appoint an arbitrator.
- (d) The language of the arbitration will be English.
- (e) This arbitration agreement is governed by and must be construed according to the laws applying in New Zealand.

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## 11. Miscellaneous

### 11.1 Notices

Any communication under or in connection with this deed:

- (a) must be in writing;
- (b) must be addressed as shown below:

#### Principal

Name: Auckland Transport

Address: 20 Viaduct Harbour, Auckland 1010, Private Bag 9225

For the attention of: Stacey van der Putten

#### Guarantor

Name: Downer EDI Limited

Address: Trinita Business Campus, 39 Delhi Road, North Ryde, NSW 2113, Australia

For the attention of: Robert Regan – Group General Counsel and Company Secretary

(or as otherwise notified by that party to the other party from time to time);

- (c) must be signed by the party making the communication or (on its behalf) by the solicitor for, or by any attorney, director, secretary, or authorised agent of, that party;
- (d) must be delivered by hand or posted by prepaid post to the address of the addressee in accordance with clause 11.1(b); and
- (e) will be deemed to be received by the addressee:
  - (i) (in the case of prepaid post) on the third Business Day after the date of posting from an address in New Zealand to an address within New Zealand, and otherwise on the fifth Business Day after the date of posting; and
  - (ii) (in the case of delivery by hand) on delivery at the address of the addressee as provided in clause 11.1(b), unless that delivery is made on a non-Business Day, or after 5.00 pm (in the place of receipt) on a Business Day, when that communication will be deemed to be received at 9.00 am (in the place of receipt) on the next Business Day,

## 11.2 Continuing obligation

This deed is a continuing obligation notwithstanding any termination by the Guarantor, settlement of account, intervening payment, express or implied revocation or any other matter or thing, and the Principal will continue to be entitled to the benefit of this deed as regards the due and punctual performance of all the Obligations until 3 months after the expiry of the Term.

## 11.3 Further assurance

The Guarantor must immediately on the request of the Principal, and at the cost of the Guarantor, do and perform all further acts and things and execute and deliver all further documents as the Principal reasonably requires, or as are required by law, to perfect or to give effect to the rights and powers of the Principal created, or intended to be created, by this deed.

## 11.4 Form of demand

A demand on the Guarantor for payment under this deed may be in the form and contain any information as the Principal determines provided it includes particulars of the relevant default in the due and punctual performance of the Obligations.

## 11.5 Entire agreement

This deed constitute the entire agreement and understanding between the parties and will take effect according to its tenor despite, and supersede:

- (a) any prior agreement (whether in writing or not), negotiations and discussions between the parties in relation to the subject matter of this deed; or
- (b) any correspondence or other documents relating to the subject matter of this deed that may have passed between the parties prior to the date of this deed and that are not expressly included in this deed.

## 11.6 Severance

If at any time any provision of this deed is or becomes illegal, invalid or unenforceable in any respect under the law of any jurisdiction, that will not affect or impair the legality, validity or enforceability:

- (a) in that jurisdiction of any other provision of this deed; or
- (b) under the law of any other jurisdiction of that or any other provision of this deed.

### **11.7 Remedies cumulative**

The Powers conferred by this deed are cumulative and in addition to all other Powers available to the Principal by law.

### **11.8 Waiver**

- (a) Failure to exercise or enforce or a delay in exercising or enforcing or the partial exercise or enforcement of any Power by the Principal will not in any way preclude, or operate as a waiver of, any exercise or enforcement, or further exercise or enforcement of that, or any other Power.
- (b) Any waiver or consent given by the Principal under this deed will only be effective and binding on the Principal if it is given or confirmed in writing by the Principal.
- (c) No waiver by the Principal of a breach of any term of this deed or any other failure by the Guarantor to comply with a requirement of this deed will operate as a waiver of another breach of that term or failure to comply with that requirement or of a breach of any other term of this deed or failure to comply with any other requirement of this deed.

### **11.9 Consents**

A consent required under this deed from the Principal may be given or withheld, or may be given subject to any conditions, as the Principal (in its absolute discretion) thinks fit, unless this deed expressly provides otherwise.

### **11.10 Vienna Convention**

The United Nations Convention on Contracts for the International Sale of Goods does not apply to this deed.

### **11.11 Moratorium legislation**

To the fullest extent permitted by law, all laws which at any time operate directly or indirectly to:

- (a) lessen or affect in favour of the Guarantor any obligation under this deed; or
  - (b) delay or otherwise prevent or prejudicially affect the exercise of any Power,
- are expressly waived.

### **11.12 Variation**

This deed may only be varied by a document signed by or on behalf of both the Principal and the Guarantor.

### **11.13 Provisions limiting or excluding liability**

Any provision of this deed which seeks to limit or exclude a liability of the Principal or the Guarantor is to be construed as doing so only to the extent permitted by law.



## 11.14 Counterparts

This deed may be executed in any number of counterparts (including any facsimile, photocopied, or scanned copies of it). Each counterpart constitutes the deed of each party who has executed and delivered that counterpart, and all together constitute one document.

## 11.15 Delivery

- (a) For the purposes of section 9 of the Property Law Act 2007 (NZ), and without limiting any other mode of delivery, this deed will be delivered by one party (in this clause, **Delivering Party**) to another party (in this clause, **Receiving Party**) immediately on the earlier of:
  - (i) physical delivery of an original of this deed or of a counterpart of it, executed by the Delivering Party, into the custody of the Receiving Party or the Receiving Party's solicitors; and
  - (ii) transmission (including electronically) by the Delivering Party or its solicitors (or any other person authorised in writing by the Delivering Party) of a facsimile, photocopied, or scanned copy of an original of this deed or of a counterpart of it, executed by the Delivering Party, to the Receiving Party or the Receiving Party's solicitors.
- (b) If any party transmits a copy of this deed or of a counterpart of it to another party by way of delivery under this clause, then:
  - (i) the Receiving Party may rely on the copy so transmitted as though it were the original of that copy, executed and delivered by the Delivering Party; and
  - (ii) the Delivering Party will as soon as reasonably practicable deliver to the Receiving Party the original of this deed or of the counterpart so executed and transmitted by the Delivering Party.
- (c) Clause 11.1 does not apply to any letter, email or other communication from a party or its solicitors that effects or is intended to effect the delivery of this deed (whether as provided in this clause, or otherwise) by that party.

Executed and delivered as a deed.

Signed by Downer EDI Limited a company registered in Australia (ACN 003 872 848) by

\_\_\_\_\_  
Signature of director

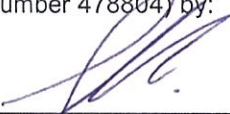
\_\_\_\_\_  
Full name of director

Signed by Auckland Transport:

\_\_\_\_\_  
Signature of Deputy Chair/director

\_\_\_\_\_  
Full name of Deputy Chair/director

Signed by Downer New Zealand Limited (company number 478804) by:

  
\_\_\_\_\_  
Signature of director


STEPHEN L. KILLEN  
\_\_\_\_\_  
Full name of director

\_\_\_\_\_  
Signature of director

\_\_\_\_\_  
Full name of director

\_\_\_\_\_  
Signature of director

\_\_\_\_\_  
Full name of director

  
\_\_\_\_\_  
Signature of director

Evan Charles Jensen  
\_\_\_\_\_  
Full name of director