

To
Auckland Transport
Private Bag 92 250
Auckland 1142

For
Mario Zambuto

Our reference
AUC106/30

By
Tom Bennett
Ed McGimpsey

Date
27 August 2020

Dear Mario

City Rail Link – C3 stations asset management and services contract – deed of guarantee and indemnity – legal certification

Introduction

1. We have acted as lawyers for Auckland Transport ("**AT**") in relation to the City Rail Link – Asset Management and Services Contract between AT and Downer New Zealand Limited (the "**Company**") dated 19 July 2019 (the "**C3 Stations Maintenance Contract**").
2. This opinion relates to the obligations of the Guarantor under the Deed of Guarantee and Indemnity between AT, the Company and Downer EDI Limited (the "**Guarantor**") dated 29 August 2019 (the "**Deed of Guarantee and Indemnity**"), which has been provided to AT under the C3 Stations Maintenance Contract (dated 29 August 2019 signed by the Guarantor and an undated version signed by the Company and provided to us by Marion Franks by email dated 4 November 2019).
3. Clause 12.7(b) of the C3 Stations Maintenance Contract provides, among other things, that the Company must provide to AT "a legal opinion ... from lawyers to the Guarantor, authorised to practice in the place of incorporation of the Guarantor, stating that the Deed of Guarantee and Indemnity is binding and enforceable against the Guarantor ...".
4. We have been provided by AT with a copy of a legal opinion from the Guarantor's Australian lawyers, Ashurst Australia, authored by Mark Disney (Partner) and Matthew Taylor (Senior Associate) dated 12 September 2019 (the "**Ashurst Legal Opinion**"), in relation to the Deed of Guarantee and Indemnity.

5. The Deed of Guarantee and Indemnity is governed by New Zealand law. We understand that, as a result, the Ashurst Legal Opinion does not extend to an opinion as to the binding and enforceable nature of the Deed of Guarantee and Indemnity against the Guarantor as required under clause 12.7(b). The Company has not provided such legal opinion to AT.
6. At the request of AT, we provide this opinion as to the binding and enforceable nature of the Deed of Guarantee and Indemnity against the Guarantor, which is provided in reliance on the Ashurst Legal Opinion together with the assumptions and qualifications stated in this opinion.

Jurisdiction

7. This opinion relates only to New Zealand laws in force on the date of this opinion and must be construed in accordance with those laws. We have not investigated, and do not express any opinion on, any other law.

Information reviewed

8. For the purposes of this opinion, we have reviewed and relied upon the following documents:
 - (a) a scanned signed copy of the C3 Stations Maintenance Contract;
 - (b) a scanned signed copy of the Deed of Guarantee and Indemnity; and
 - (c) a scanned signed copy of the Ashurst Legal Opinion.

Opinion documents

9. In this opinion, each of the C3 Stations Maintenance Contract and the Deed of Guarantee and Indemnity is a "**Document**" and are, together, the "**Documents**".

Assumptions

10. For the purposes of this opinion, we have made the following assumptions:
 - (a) The documents we have examined for the purposes of this opinion are complete and:
 - (i) where originals, are authentic; and
 - (ii) where copies, conform with the originals.
 - (b) No Document has been amended, released or terminated.
 - (c) All signatures on the documents we have examined for the purposes of this opinion are genuine.
 - (d) Except as otherwise covered in this opinion, all facts provided to us by or on behalf of any person, including those set out in any document upon which we have expressed reliance for the purposes of this opinion, are true, complete and accurate, and are not misleading, as at the date of this opinion.

- (e) Each Document:
 - (i) is within the capacity and powers of, and has been validly authorised, executed and delivered by, all parties to it; and
 - (ii) constitutes valid, binding and enforceable obligations of the parties to it under the governing law of the Document (other than the obligations of the Guarantor under the Deed of Guarantee and Indemnity).
 - (f) If any obligation under the Documents is to be performed in any jurisdiction other than New Zealand, then its performance will be legal and enforceable under the law of that jurisdiction.
 - (g) Each Document that is a deed has been properly delivered in accordance with section 9 of the Property Law Act 2007.
 - (h) None of the parties to the Documents has actual or constructive knowledge that any director of the Guarantor is in breach of his or her directors' duties.
 - (i) The parties who have completed the witnessing provisions of each Document in connection with execution of the Documents by the Guarantor were in fact present for execution by the Guarantor.
 - (j) No liquidator, receiver, receiver and manager, voluntary administrator or statutory manager has been appointed in respect of the Guarantor or any of its assets, nor has any application, order of the court or resolution been made, or other step taken, to appoint any such person.
11. We have not taken any step to investigate or otherwise verify whether the assumptions in this opinion are correct, except as expressly stated in this opinion. We note, however, that, without making any enquiries beyond the steps stated in this opinion, the people primarily responsible for the preparation of this opinion are not actually aware that any of the assumptions are incorrect.

Opinions

12. In our opinion, in reliance on the Ashurst Legal Opinion:
- (a) the Guarantor's obligations under the Deed of Guarantee and Indemnity are valid, binding and enforceable;
 - (b) the Guarantor's entry into, and the performance of its obligations under, the Deed of Guarantee and Indemnity does not breach any New Zealand law;
 - (c) no consent, licence, approval, authorisation or exemption of any New Zealand governmental agency is required under New Zealand law for the Guarantor to enter into, or perform its obligations under, the Deed of Guarantee and Indemnity or to ensure the enforceability of its obligations under the Deed of Guarantee and Indemnity; and
 - (d) in order for the Deed of Guarantee and Indemnity to be enforceable in New Zealand, New Zealand law does not require that:

- (i) the Deed of Guarantee and Indemnity be filed, registered or recorded; or
 - (ii) any stamp, registration, documentary or similar tax or duty be paid.
13. Subject to paragraphs 14 and 15, in our capacity as counsel for AT, we certify that the Deed of Guarantee and Indemnity fairly evidences the terms of the transaction to which it relates on the basis of the instructions given to us by the AT officers involved in the negotiation of that Document and, on that basis, the Deed of Guarantee and Indemnity is, from a legal perspective, in order for execution by AT.
14. For completeness, we note that we understand that, given the extensive negotiation of the C3 Stations Maintenance Contract, Clayton Utz (the law firm engaged by CRLL that has been primarily responsible for the legal aspects of the negotiation of that contract), has provided a certification to AT in relation to the C3 Stations Maintenance Contract, which included the prescribed form of the Deed of Guarantee and Indemnity.
15. We have not reviewed, and our certification does not include, any technical or financial matters and we have not provided any tax or financial advice in relation to any Document.

Qualifications

16. This opinion is subject to the following qualifications and any matter of fact not disclosed to us:
- (a) The term 'enforceable' as used in this opinion means that the obligations assumed by the relevant party under the Deed of Guarantee and Indemnity are of a type which the New Zealand courts enforce. It does not mean that those obligations will necessarily be enforced in all circumstances in accordance with their terms. Enforcement will be subject to general principles of law, equity and procedure. In particular:
 - (i) enforcement of the Deed of Guarantee and Indemnity may be limited by general principles of equity and the discretionary powers of the courts;
 - (ii) a New Zealand court may not enforce any provision of the Deed of Guarantee and Indemnity that it regards as contrary to public policy, such as a provision that constitutes a penalty and not a genuine and reasonable pre-estimate of the loss likely to be suffered in the relevant circumstances;
 - (iii) a New Zealand court may set aside the Deed of Guarantee and Indemnity on the application of the Guarantor if it has entered into that Deed of Guarantee and Indemnity as a result of fraud, duress or unconscionable conduct on the part of another party or under a mistake or misrepresentation;
 - (iv) claims may be or become time-barred or subject to set-off or counter claim; and
 - (v) a New Zealand court may stay proceedings brought before it if the matter has already been considered, or is being considered concurrently, by another court, or if another forum is more appropriate,-

and, as a result, the enforcement of Guarantor's obligations under the Deed of Guarantee and Indemnity would not be certain in every circumstance.

- (b) Insolvency, liquidation, receivership, voluntary administration, statutory management, reorganisation or other laws affecting creditors' rights generally may affect the Guarantor's obligations under the Deed of Guarantee and Indemnity, and the remedies available.
- (c) A New Zealand court may not enforce:
 - (i) a provision that purports to excuse or protect a party from, or apply regardless of, that party's negligence, default or breach of duty;
 - (ii) a provision limiting, restricting or otherwise relating to amendments or waivers if it determines the intentions of the parties to be contrary in any case;
 - (iii) a provision that purports to preclude reliance on anything not set out in the Deed of Guarantee and Indemnity; or
 - (iv) any severability provisions in the Deed of Guarantee and Indemnity.
- (d) A determination, calculation or certification may not be binding if the determination, calculation or certification was unreasonable or arbitrary.
- (e) New Zealand law may require that any discretion is exercised, or opinion formed, reasonably.
- (f) Any amount payable upon demand may only be payable upon giving reasonable notice.
- (g) Any indemnity for legal costs is subject to the discretion of the New Zealand courts and to statutory rights of review as to the reasonableness of such costs.
- (h) It is not settled whether the New Zealand courts would award a judgment in a foreign currency in respect of any action arising out of the Deed of Guarantee and Indemnity although we believe the courts would be likely to do so where that foreign currency is the currency in which the plaintiff's loss has been effectively suffered or borne.
- (i) We express no opinion as to:
 - (i) the enforceability of any obligations to negotiate in good faith (or similar); and
 - (ii) the enforceability of any currency indemnity provision.

Benefit of opinion

17. This opinion may only be relied upon by AT in connection with the Deed of Guarantee and Indemnity.
18. Without our prior written consent, neither its contents nor its existence may be disclosed to any other person except:

- (a) in connection with any proposed assignment or transfer of, or participation in, and in accordance with the terms of, a Document;
 - (b) to persons who in the ordinary course of the AT's business have access to the AT's papers and records, on the basis that they will make no further disclosure;
 - (c) in connection with any litigation or proposed litigation in relation to the Documents or this opinion; or
 - (d) if and to the extent that the AT is required to do so by law, in accordance with an official directive or a request with which, if not having the force of law, compliance is in accordance with good practice of entities similar in nature to AT.
19. The consent in paragraph 18 is expressly limited to any such disclosure and is not a consent to any other matter and is not an acknowledgement of any liability by us to any person to whom disclosure is made.
20. This opinion is strictly limited to the matters stated in it as at the date of this opinion.

Yours faithfully
Buddle Findlay



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