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By email only:
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Dear Anthony

Enforceability of DBCT Deed Poll

1. We refer to the submission of the DBCT User Group to the QCA dated 26 April 2019,[1] and, in particular, to the memorandum of advice of Mr Brian O'Donnell QC at Schedule 8 of that submission ("**O'Donnell Advice**"). In the O'Donnell Advice, Mr O'Donnell QC responds to four questions asked of him by his instructing solicitors, Allens Lawyers.

2. We understand that:

   a. DBCT Management will provide a copy of this advice to the QCA and the DBCT User Group; and
   b. in providing this advice to the QCA and the DBCT User Group, DBCT only waives privilege over the legal advice contained in this letter. It does not, and does not intend to, waive privilege over any other legal advice that it has obtained in relation to the matters raised in this letter or otherwise.

3. In summary, the O'Donnell Advice opined that:

   c. **Answer 1**: delivery of the deed poll dated 11 March 2019 ("**Deed Poll**") will "*only occur at the point where at least one covenantee accepts or relies upon the deed poll*".[2] If none of the Covenantees accept or rely upon the Deed Poll, then no "*delivery*" of the Deed Poll will have occurred and the Deed Poll "*would not be legally binding on DBCT Management*";[3]

[1] Available at http://www.qca.org.au/getattachment/a3a04fce-6d0b-4400-9f71-8e528aa6ddd9/DBCT-User-Group-Cross-Submission-redactions-revi.aspx.

[2] O'Donnell Advice, page 3.

[3] O'Donnell Advice, page 3.

d. **Answer 2**: any of the Covenantees may disclaim the benefits of the Deed Poll, from which time "*the deed has no legal effect as between DBCT Management and any covenantee who disclaims*";[4]

e. **Answer 3**: "*the difficulty of proving what price would have applied under a QCA administered pricing regime would make cl. 6 impossible of proof, such that it would not be susceptible to an order for specific performance*";[5]

f. **Answer 4:** "*the power given under the deed poll to enforce compliance with the restrictions imposed by cl.8 on DBCT Management making a unilateral amendment to the Framework are of minimal, if any, practical utility*".[6]

4. You have asked us to consider the O'Donnell Advice and advise you whether we agree.

5. In summary, we disagree with answers 1, 3 and 4 of the O'Donnell Advice. We agree with the basic proposition that Mr O'Donnell QC advances in relation to answer 2 (i.e. that a Covenantee has the legal right to disclaim benefits conferred by the Deed Poll) but do not agree with the conclusion as to the practical situation that would result.

6. We explain our reasons below.

7. Unless otherwise defined, capitalised terms in this advice will have the same meaning as given to them in the Deed Poll.

Question 1: has the Deed Poll been delivered such that it is binding on DBCT Management?

8. The O'Donnell Advice relies on *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* ("**Burns Philp**")[7] to conclude that the Deed Poll will not be binding until a Covenantee accepts or relies upon it.

9. The central question is whether the Deed Poll has been "*delivered*". "*Delivered*" in this context does not have its common meaning ("*provided*" or "*handed over*") but instead connotes an intention to be legally bound. The question is of central importance because a deed is binding immediately once it has been "*delivered*".[8] In *Burns Philp*, the New South Wales Court of Appeal found that the deed poll in that case had not been "*delivered*" because the covenantee had not accepted or relied upon it.

10. In our view, a Queensland court would not follow the reasoning in *Burns Philp*.

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[4] O'Donnell Advice, page 4.

[5] O'Donnell Advice, pages 5-6.

[6] O'Donnell Advice, page 8.

[7] (1987) 8 NSWLR 642.

[8] *Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties (Qld)* (1993) 27 ATR 154, 156, citing *Alan Estates Ltd v WG Stores Ltd* [1982] 1 Ch. 511 at 520-1, 523, 526-7.

Application of Section 47(3) of the *Property Law Act 1974* (Qld)

11. Any dispute about the Deed Poll will be decided in Queensland,[9] and in accordance with the laws of Queensland.[10] *Burns Philp* was decided in New South Wales. This is important because there is a critical difference between the laws of New South Wales and the laws of Queensland on the question of when a deed is "*delivered*". This issue is not dealt with in the O'Donnell Advice.

12. In New South Wales, the question of delivery has been left to the common law.[11] In Queensland, the *Property Law Act 1974* (Qld) (**QLD Act**) defines "*delivery*". It is defined in section 47 as:

> "*the intention to be legally bound either immediately or subject to fulfilment of a condition*".[12]

13. The intention is that of the party making the deed.[13] The party's intention must be objectively ascertained.[14]

14. In deciding that a deed was not delivered because it had not been accepted by a covenantee, the New South Wales Court of Appeal in *Burns Philp* considered a matter (acceptance or reliance by a covenantee) which because of section 47 of the QLD Act a Queensland court could not have regard to.

15. In Queensland, the court's inquiry would be limited to whether the person making the deed "[intended] *to be legally bound either immediately or subject to fulfilment of a condition*".

16. The central importance of the statutory definition of "*delivery*" in Queensland was highlighted in the landmark cases of *400 George Street (QLD) Pty Ltd v BG International Limited* ("**400 George Street**").[15] *400 George Street* makes it clear that the Court will examine the acts of the maker of the deed, and ascertain whether, objectively, that person intended "*to be legally bound immediately or subject to the fulfilment of a condition*": at [54] – [57].

17. Applying the statutory test in section 47(3) of the QLD Act, a Queensland court will examine the objective facts and ascertain whether they disclose an intention on the part of DBCT Management to be immediately bound by the Deed Poll. Here, the objective facts include:

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[9] Deed Poll, clause 11.

[10] Deed Poll, clause 10.

[11] Cf the question of signing and sealing: see section 38 of the *Conveyancing Act 1919* (NSW); see also Aitken, *"Delivery", "escrow", recitals and estoppel, and attestation: Current questions with deeds,* (2014) 88 ALJ 561.

[12] QLD Act, section 47(3).

[13] *400 George Street (QLD) Pty Ltd v BG International Limited* [2012] 2 Qd R 302 at [25], and cases cited there – for delivery "*Both under* [section 47 of the QLD Act] *and the common law, the intention of the executing party is the critical matter.*" See also *Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties (Qld)* (1993) 27 ATR 154.

[14] *400 George Street (QLD) Pty Ltd v BG International Limited* [2010] QCA 66*;* [2012] 2 Qd R 302 at [65] – albeit in obiter.

[15] [2010] QCA 245; [2012] 2 Qd R 302.

a. the Deed Poll has been signed by DBCT Management. While section 47(1) of the QLD Act displaced the common law presumption that execution imports delivery, it remains the case that delivery can still be inferred from execution of a deed;[16]

b. the Deed Poll is expressed as being "*irrevocable*": clause 3.1;

c. DBCT Management has given the covenants on the date of execution of the Deed Poll and then each day until the end of the Term: clause 2.3;

d. DBCT Management has given a signed copy of the Deed Poll to the QCA and invited the QCA to proceed on the assumption that the Deed Poll is binding on DBCT Management upon signing; and

e. DBCT Management's cover letter that accompanied the Deed Poll confirmed to the QCA that "*To put beyond doubt that DBCTM cannot act in any way that will adversely impact competition in relevant markets if the relevant service is not declared, DBCTM has executed an irrevocable Deed Poll. As a result, the Access Framework will automatically become operational and binding upon the relevant services not being declared*".

18. Having regard to these objective facts, it is difficult to understand an assertion that DBCT Management has not demonstrated an intention to be legally bound immediately by the Deed Poll. In our view, the Deed Poll has been "*delivered*" within the meaning of section 47(3) of the QLD Act and is now binding on DBCT Management.

Burns Philp is distinguishable on the facts

19. Even if (contrary to our view) the reasoning in *Burns Philp* was binding to a deed poll governed by Queensland law, we consider that a Queensland court would likely distinguish *Burns Philp* on the facts.

20. The O'Donnell Advice says that *Burns Philp* was a "*somewhat similar factual situation*" to that facing DBCT Management and the Covenantees and goes on to conclude that a Queensland Court would adopt the reasoning in *Burns Philp*. We disagree. There are some superficial similarities (both concern deeds poll) but a closer examination of the facts shows *Burns Philp* to be very different to the matter at hand, both in terms of the factual circumstances and the effect of the deeds poll in question.

21. In *Burns Philp*, a landlord and tenant were parties to a lease. The lease contained certain restrictions, including that the leased premises could only be used for the purpose of a "*hardware department store*" or any other business approved by the landlord,[17] and could not be sublet or licenced by the tenant without the landlord's consent.

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[16] *Monarch Petroleum NL v Citco Petroleum Ltd* [1986] WAR 310, 355-356; cited in *Netglory Pty Ltd v Caratti* [2013] WASC 364 per Edelman J; *Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties (Qld)* (1993) 27 ATR 154, 156.

[17] (1987) 8 NSWLR 642 at 647.

22. The rent payable under the lease was calculated having regard to "*annual market rent*" of the premises. The restrictions on the tenant's use and right to sublet the premises tended to depress the market rent.

23. Prior to a rent review and notwithstanding the terms of the lease, the landlord signed two deeds poll in which it pre-emptively consented to the tenant (and all of its successors and assigns):

    a. subletting or licencing all or any part of the premises, without requiring the consent of the landlord;[18] and

    b. using the premises for any lawful business or use, without requiring the consent of the landlord.[19]

24. In other words, the deeds poll attempted to unilaterally vary the terms of the lease that had already been agreed between the parties.

25. Having signed and given the deeds poll to the tenant, the landlord then increased the rent to $1,825,000 per annum – being an amount the landlord considered to be the annual market rent. The basis for the increase was that the restrictions on the assignment, subletting and use of the premises had been effectively removed by the deeds poll.

26. The tenant disputed that the execution of the deeds poll had any bearing on the question of the annual market rent. The dispute was litigated.

27. At first instance, the New South Wales Supreme Court held that the deeds poll had been "*delivered*", were therefore irrevocable, and were binding on the landlord.[20] The tenant appealed.

28. The New South Wales Court of Appeal decided that the deeds poll were not binding because they had not been "*delivered*". Priestly JA reasoned:[21]

    a. although the deeds poll were sent to the lessee, the facts show that delivery was not accomplished in the sense that they were not accepted by the lessee as documents having any legal effect or upon which the lessee would act;

    b. the fact that delivery is necessary for the effectiveness of a deed poll shows that something more is necessary for the effectiveness of a deed poll than its execution. That something more is acceptance or reliance by the person to whom it is delivered;

    c. a further reason why reliance is needed, is that the lessee could execute its own deed poll by which it irrevocably bound itself never to ask for consent to use the premises for any purpose other than a hardware store; and

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[18] (1987) 8 NSWLR 642 at 650 – the first deed poll.

[19] (1987) 8 NSWLR 642 at 651 – the second deed poll.

[20] (1986) 8 NSWLR 621.

[21] At 659-660.

d. the result is that the sending of the deeds poll were no more than an offer of consent which could be withdrawn at any time before it was accepted.

29. As we explain in paragraphs 42 - 45 below, this reasoning was novel and appears to go against years of settled law on the question of when a deed is delivered.

30. The facts of *Burns Philp* illustrated the use of a deed poll in a commercial context, in which the effect of the deeds poll was to unilaterally and immediately disturb a covenantee's pre-existing contractual rights. The deeds poll purported to give rights to a covenantee, but the rights were contrary to the terms of the contractual agreement between the parties. In our view, a key driver of the court's decision in *Burns Philp*, was that the deeds poll attempted to circumvent the requirements for variation of the agreement between the landlord and lessee, which requirements presumably included a requirement for the lessee's consent.

31. The O'Donnell Advice describes the scenario (we agree with the description) as one where *"the deed in form* [provided] *benefits to the covenantee, but being really for the commercial advantage of the maker of the deed and to the commercial disadvantage of the covenantee*".[22]

32. In our view, both the factual circumstances and legal effect of the Deed Poll are very different to that considered in *Burns Philp*.

33. The Deed Poll does not purport to give positive rights or obligations to the Covenantees, other than right to enforce the Deed Poll itself. Instead, the Deed Poll places obligations on DBCT Management (e.g., to comply with the Framework (clause 4), not to charge a TIC higher than a certain amount (clause 6), and not to amend the Framework other than in a certain way (clause 8)). By contrast, the *Burns Philp* deeds poll sought to unilaterally amend the contractual agreement between the parties and to grant unasked-for rights to the covenantee by consenting to an alteration in the use of the premises, subleases and licences such as to vary the content of the lessee's contractual obligation regarding the payment of rent to its detriment.

34. Nor does the execution of the Deed Poll cause any commercial disadvantage to the Covenantees: it does not disturb any of their pre-existing contractual rights and commercial interests. In particular, it does not alter the terms of any pre-existing User Agreements or affect their operation. Rather, the Deed Poll provides rights to existing users that supplement their contractual rights under the pre-existing User Agreements and which they would not otherwise have.

35. Any change to content or operation of pre-existing User Agreements arises by reason of the expiration of the declaration and termination of the 2017 Access Undertaking without replacement. Similarly, the event which may disturb the Covenantees' commercial interests is a decision by the Minister not to declare the use of the terminal under Part 5, Division 2 *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**).

[22] O'Donnell Advice, page 3.

36. It is an error to conflate the commercial disadvantage to the Covenantees caused by the Minister declining to make a declaration, and the effect of the Deed Poll on the Covenantees. The distinction is important.

37. In our view, the circumstances of the Deed Poll are more analogous to the use of a deed poll in a corporate re-organisation where it is necessary, to obtain approval for the re-organisation, to provide legal comfort to a wide or indeterminate class of covenantees, and it is not possible (or practical) to do so contractually. One example is schemes of arrangement effected under Part 5.1 of the *Corporations Act 2001*. There, it is common for the acquirer company to execute a deed poll in which it covenants to the members of the scheme company to perform its obligations under the scheme. See for example, *Toal v Aquarius Platinum Ltd*;[23] *Re Capilano Honey Ltd*.[24] These deeds poll are necessary to obtain the Court's approval for the scheme. There is no discussion in those matters of a requirement that shareholders accept or rely upon the deed poll for it to be binding on the maker.

38. Like the present situation, it is easy to conceive of a situation where a shareholder does not agree to a takeover by way of scheme of arrangement, which (in the shareholder's eyes) is to the benefit of the acquirer and to the shareholders' detriment. The fact that the scheme deed poll may be to the acquirer's benefit does not appear to import a requirement that a shareholder accept or rely upon it to be delivered. Also, like the present situation, the detriment to the shareholder (if there is any) will be worked by the Court's approval of the scheme, not the execution of the deed poll which is a preliminary to approval. There are of course many limits to the scheme of arrangement analogy.

Other observations

39. Below we make a number of other observations about the O'Donnell Advice which do not neatly fit into the matters discussed above.

40. The O'Donnell Advice says that *Seddon on Deeds* (2015) considers *Burns Philp* without disapproval. While the approval or otherwise of an academic text might be thought irrelevant, *Seddon on Deeds* is a seminal text dealing with the law of deeds. *Seddon* says this about the case:

> "*Priestly JA appeared to advance a novel theory that a deed poll must be accepted or relied on by the intended beneficiary before it can be considered to be delivered….Priestly JA's comments were made because of the peculiar nature of the deeds in this case…If a deed poll must be accepted or relied on for it to become binding on the party who executed it, it is no different from contract or estoppel, respectively.*"

41. These are not words of approval. The concluding sentence comes close to disapproval. Calling Priestly JA's reasoning "*a novel theory*" made "*because of the peculiar nature of the deeds*" at the very least conveys the author's opinion that Priestly JA's "*novel theory*" should be narrowly confined to like cases and not given wider application. This demonstrates that *Burns Philp* is not a universal rule.

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[23] [2004] FCA 550.

[24] (2018) 131 ACSR 9.

42. The O'Donnell Advice says that *Burns Philp* has not been disapproved by subsequent cases. While we agree that the decision has not been overturned or disapproved by a superior Court, we have not found an instance where the Court's reasoning in relation to the delivery of deeds poll has been applied in the decades since the decision.[25]

43. Conversely, in *Mirzikinian v Tom & Bill Waterhouse*[26] the New South Wales Court of Appeal considered whether a deed had been delivered. In its review of the law[27] the Court cited the well-settled common law test that "*delivery*" meant some conduct by the person who has executed the deed that evidences that person's intent to be bound by it. For a very recent case, see also *Realm Resources Ltd v Aurora Place Investments Pty Ltd.*[28]

44. "*Delivery*" at common law has long meant acts or words sufficient to show that the signing party intended it to be binding.[29] *Burns Philp* appeared to import an additional requirement into "*delivery*", namely that the covenantee had to accept or rely upon the deeds poll. It is difficult to square that requirement with the circumstance of a deed poll in favour of an unascertained class of covenantees: such as, the deeds poll in *Re A&K Holdings Pty Ltd, Wily as Liquidator of Anglican Insurance*, and the present Deed Poll.

45. While, it is not for us to say that *Burns Philp* was wrongly decided, the decision appears to be a radical development in well-established and settled law on the question of delivery. It seems to us that the case could have been decided without importing additional requirements for "*delivery*" (i.e. by taking a factor that was previously indicia of delivery and making it a mandatory element of delivery in NSW). Priestly JA was wrestling with the interaction between deeds poll, contract and estoppel, and might have concluded that the deeds poll were not operative because it affected the parties' pre-existing contract, without consent.

46. The O'Donnell Advice says that "*it is difficult to see how DBCT Management could be prevented from revoking the deed poll (notwithstanding that its terms purport to make it irrevocable) prior to one or more covenantees accepting or relying on it*".[30] This conclusion assumes that the Deed Poll has not been delivered. If the Deed Poll has been delivered, it cannot be revoked.[31]

47. Finally, we note that, if the proposition advanced in the O'Donnell Advice is correct (which we do not accept), all that is required for the Deed Poll to become binding on DBCT Management is <u>one</u> Covenantee's acceptance or reliance on the Deed Poll.

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[25] The Court's reasoning in *Burns Philps* on other topics has been cited. See for example, *Smeaton Grange Holdings Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1594 ("**Smeaton**"). There, the New South Wales Supreme Court referred to *Burns Philp* but on the topic of revocability of a deed poll. The question of delivery was not in issue in *Smeaton*.

[26] [2009] NSWCA 296.

[27] At [33] - [34].

[28] [2019] NSWSC 379 at [70] - [71].

[29] *Xenos v Wickham* (1867) LR 2 HL 296, 312.

[30] O'Donnell Advice, page 3.

[31] *Smeaton Grange Holdings Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1594; see also *Burns Philp Hardware Ltd v Howard Chia Pty Ltd* (1986) 9 NSWLR 621 at 639-640 and cases cited therein.

Question 2: can a Covenantee disclaim the benefits of the Deed Poll?

48. The O'Donnell Advice says that where the maker of a deed poll purports to confer benefits on a covenantee, the covenantee has a legal right to disclaim those benefits. Upon disclaimer the legal rights and obligations that purport to be conferred cease to have effect.[32]

49. We agree with these statements as a general expression of the law. Namely, a Covenantee may disclaim any benefits conferred by the Deed Poll. The disclaimer must be made before any benefits are accepted.

50. The issue identified by Mr O'Donnell QC concerns the practical ramifications of Covenantees disclaiming the Deed Poll. Essentially, he says that if some (but not all) Covenantees disclaim the Deed Poll, then the disclaiming Covenantees will be governed by one legal regime, and the Covenantees who did not disclaim will be governed by another. Mr O'Donnell QC says:

> "*The practical situation that would result would be one in which the legal relationship between DBCT Management and one or more access seekers/users would be governed by the deed poll and the Access Framework, while the legal relationship between DBCT Management and other access seekers/users would not be governed by the deed poll and the Access Framework.*"

51. We do not agree that the disclaimer of the Deed Poll by Covenantees will create this practical problem.

52. As to the Deed Poll itself, DBCT Management must comply with it whether or not an individual Covenantee (or group of Covenantees) has disclaimed it. In practical terms, this means that all Covenantees, whether or not they disclaim the Deed Poll, have the benefit of DBCT Management's compliance with it.

53. If and when the Minister declines to make a declaration, DBCT Management's current Access Undertaking will cease to have any effect, and DBCT Management will be bound to put the Framework into effect by the (now binding) Deed Poll.

54. The Deed Poll provides that DBCT Management must comply with the Framework for the Term. As a consequence of DBCT Management's obligation to comply with the Framework (including where it governs dealings with existing users and access seekers who have disclaimed the Deed Poll), any person seeking access will, in accordance with the terms of the Framework, have to agree to be bound by the Framework in order for DBCT Management to progress access discussions with them, such that the Framework will govern the relationship and interactions between DBCT Management and an access seeker even if the access seeker has disclaimed the benefits of the Deed Poll.

55. Additionally, a disclaimer by one or more Covenantees of the Deed Poll would have limited practical consequences given the nature of the obligations contained in the Deed Poll. The

[32] O'Donnell Advice, page 4.

Covenantee would lose, for example, the right to sue DBCT Management for breach of the Deed Poll, and to be consulted in relation to amendments under cl 8.4. The loss of those rights would be a consequence of the Covenantee's commercial decision to disclaim. It sits ill in the mouth of a Covenantee to complain about the lack of enforceability of the Deed Poll where they have themselves disclaimed it.

56. Other Covenantees who do not disclaim the Deed Poll (including the State) could still sue on it.

Question 3: are the obligations of DBCT Management under clause 6 of the Deed Poll (which require DBCT Management to charge below a ceiling) capable of specific performance?

57. By clause 6 of the Deed Poll, DBCT Management has covenanted that any TIC it imposes during the term will be lower than:

    a. for the Existing Terminal – the sum of the TIC that would apply under a QCA administered pricing regime, plus the Maximum Spread: clause 6.1.1; and

    b. for a Terminal Component other than the Existing Terminal – the greater of the TIC that would apply for the component under a QCA administered pricing regime, and the maximum TIC for the Existing Terminal specified in clause 6.1.1: clause 6.1.2.

58. The O'Donnell Advice asserts that there will be no QCA administered pricing regime from 9 September 2020, so the TIC that would apply is a hypothetical. The O'Donnell Advice says that the hypothetical is "*impossible of proof*", such that clause 6 is not disposed to an order for specific performance.

59. We do not agree that proof of the TIC under a QCA-administered pricing regime would be "*impossible*". Nor do we consider that a court would require the party to replicate, at trial, what the collective decision-making process of the QCA would have been by calling the relevant officers of the authority.

60. In our view, proving the TIC under a QCA-administered pricing regime on the balance of probabilities is possible with the benefit of evidence as to the QCA's approach to determining pricing / revenues for the Declared Services prior to the expiration of declaration and for other declared services, together with expert economic evidence.

61. We observe that:

    a. the TIC in the year immediately prior to the expiration of the existing declaration will be known;

    b. the TIC in the year in which the existing declaration expires will also be known, as this occurs part way through a year for which the TIC will have necessarily been determined at the outset (and potentially amended from time to time);

c. the method by which the QCA determined the initial TIC to apply under the 2017 AU and by which it would decide on any increase to that TIC is known.[33] It will no doubt be common ground that the QCA would not act arbitrarily in deciding the TIC;

d. to the extent the QCA issues a draft decision on the 2021 AU prior to the expiration of the declaration, the method by which the QCA determined the TIC in that decision will be known;

e. the method by which the QCA determined pricing in regulatory decisions that post-date the expiration of the existing declaration of the Declared Service and for other declared services will be known; and

f. the facts which will bear on how the QCA would have applied such methods will be known.

62. If, contrary to our view, the TIC is impossible of proof then for that same reason a key provision of the existing user agreements is also impossible of proof. Specifically section 7.2(e) of existing user agreements provides that when an arbitrator (who is not the QCA) is undertaking the periodic review of access charges under the agreement, the arbitrator must have regard to the various matters set out in that clause including "*the then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined it)*".

63. A further consideration is that clause 6 of the Deed Poll will become operative as a consequence of DBCT Management and an access seeker negotiating access charges in accordance with the terms of the Framework. If a dispute arises as a result of the negotiation, the Framework provides that the dispute is to be determined by an arbitrator. The effect of this is that a court being asked to consider an application for specific performance may already have the benefit of the arbitrator's consideration and determination of the access charge.

Question 4: the utility of the power given under the deed poll to enforce compliance with the restrictions imposed by clause 8 on DBCT Management making a unilateral amendment to the Framework

64. The O'Donnell Advice opines that the remedy available to Covenantees for breach of clause 8 of the Deed Poll is of minimal practical utility. We disagree.

65. The Framework may only be amended in accordance with clause 8 of the Deed Poll. The remedy for breach of clause 8 is declaratory relief: clause 9.2.4.

66. The O'Donnell Advice says that declaratory relief is of little practical utility, essentially because a mere declaration would not stop DBCT Management proceeding with an amendment which had been declared invalid. The point is illustrated by giving an example of DBCT Management amending the Framework to increase the charge for the use of the terminal. The court declares the amendment to be in breach of clause 8 and invalid. The O'Donnell Advice says that DBCT Management could nevertheless insist upon payment of the increased charge, and the user could

[33] Schedule C to the Access Undertaking.

not obtain a Court order compelling compliance with the Court's declaration that the amendment is invalid.

67. In those circumstances (the O'Donnell Advice says) there is a very real question of whether a court would grant a declaration at all, because courts will not grant orders that can be disobeyed with impunity.

68. We disagree with this chain of reasoning. It does not take account of the operation of other relevant provisions of the Deed Poll and the Framework.

69. Clause 4.2 of the Deed Poll requires DBCT Management to comply with the Framework. A court may declare an amendment of the Framework to be void and of no effect because it was not made in compliance with clause 8. If DBCT Management were to ignore the court's declaration and insist that users comply with the void amendment, DBCT Management will breach the Framework and clause 4.2 of the Deed Poll. Relevantly, any dispute concerning clause 4.2 of the Deed Poll is to be resolved in accordance with the dispute resolution provisions contained in the Framework.

70. In these circumstances, an affected user may seek relief pursuant to clause 16 of the Framework. Disputes are to be resolved by way of expert determination or arbitration, but a party may seek injunctive relief from a court in circumstances of urgency: Framework, clause 16.5. An expert, arbitrator or court would not find in favour of DBCT Management if it was seeking to enforce an amendment that the court had already declared void.

71. In summary, a declaration from a court that a purported amendment to the Framework was void because it did not comply with clause 8 will decisively quell that controversy. DBCT Management could not then act on the void amendment; doing so would breach the Framework and clause 4.2 of the Deed Poll. A user would then avail themselves of the dispute resolution provisions in clause 16 of the Framework.

Yours sincerely

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