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Mark Smith
Chairperson
DBCT User Group

Dear Mark

Enforceability of DBCT Management Deed Poll

1 Context

During the DBCT declaration review process, the DBCT User Group provided the Queensland Competition Authority (***QCA***) with an advice from Brian O'Donnell QC of 18 April 2019 (the ***O'Donnell Advice***) regarding the legal ineffectiveness of the deed poll executed by DBCT Management Pty Ltd (***DBCTM***) on 11 March 2019 (the ***Deed Poll***).

DBCTM has now provided the QCA, by way of a late submission, an advice from DLA Piper which comments on aspects of the O'Donnell Advice (the ***DLA Advice***).

On behalf of the DBCT User Group you have asked us to provide legal advice in relation to the analysis in the DLA Advice.

2 Requirements for Delivery of the Deed Poll

2.1 Overview

We agree with the initial starting point in the DLA Advice that:

(a) to be legally binding on DBCTM the Deed Poll must have been delivered;

(b) whether the Deed Poll has been delivered falls to be determined under the law of Queensland; and

(c) section 47 *Property Law Act 1974* (Qld) (***PLA***) applies and relevantly provides that execution of a deed does not of itself constitute 'delivery' unless 'execution of the document was intended to constitute delivery'.

However, consistent with the O'Donnell Advice and contrary to the DLA Advice, we strongly consider that a Queensland court would consider itself bound to follow the decision of *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*[1] (***Burns Philp***) as the only Australian Court of Appeal decision in relation to how delivery would be determined in the context of a *deed poll* – such that there would need to be 'acceptance or reliance' by a covenantee before the Deed Poll was effective and binding.

[1] (1987) 8 NSWLR 642

We understand that, to the DBCT User Group's knowledge, there has been no such acceptance or reliance and DBCTM and DLA Piper have not provided any evidence of such acceptance or reliance.

2.2 Burns Philp is precedent authority that will be followed by a Queensland Court

The fact that the reasoning from Burns Philp regarding delivery of a deed poll has not been applied subsequently is unsurprising given the unusual nature of a deed poll conferring rights that trigger adverse commercial outcomes for the notional beneficiary.

The decision of Burns Philip is recognised as the authority for what delivery requires in the context of a deed poll. It does not 'go against years of settled law' as the DLA Advice suggests, rather it is recognised as making a distinction between the requirements for delivery of a *deed poll* and those of a *deed inter partes* (i.e. a deed with two or more parties).

The seminal text, *Seddon on Deeds* (Seddon, 2015) (as referred to in the O'Donnell Advice) is not alone in recognising Burns Philp as the authority for the position that a deed poll must be accepted or relied on in order to be delivered.

By way of examples:

(a) In paragraph [5.19], note 3 *Modern Legal Drafting: A Guide to Using Clearer Language* (Butt, 2013) Burns Philp is referred to as authority for the proposition that 'Exceptionally a deed poll is not 'delivered' until the non-party 'accepts' the deed or relies on it in some way'.

(b) In notes to paragraph [17-030] in *Carter on Contract* Burns Philp is referred to as follows: 'On whether the deed poll must be 'accepted' by the beneficiary see *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*'

(c) In notes to paragraph [110-570] in Halsbury's Laws of Australia, Burns Philp is referred to as follows: 'On delivery of deed poll see *Burns Philp Hardware Ltd v Howard Chia Pty Ltd*'

Those references are not consistent with the view expressed in the DLA Advice that Burns Philp should be narrowly confined to its facts – rather the references reflect general acceptance in legal commentary that Burns Philp provides the law relating to delivery of deeds poll.

The statement in *400 George Street (QLD) Pty Ltd v BG International Limited*[2] (***400 George Street***) on which the DLA Advice heavily relies that *'the intention of the executing party is the critical matter'* needs to be understood in the context of the far more conventional deed inter partes which that case (and all of the cases it referred to in that passage) concerned and how intention is determined in the context of documents exchanged in escrow.

We agree that 400 George Street correctly states the law in Queensland in relation to deeds inter partes. However, 400 George Street is clearly not precedent for the intention of the grantor being sufficient in respect of a deed poll, and properly understood is not inconsistent with the decision of Burns Philp.

2.3 Section 47 Property Law Act has not altered the position under Queensland law from Burns Philp

The purpose of section 47 PLA was described in the Queensland Law Reform Commission report which proposed it as follows:[3]

The proposed clause is therefore designed to remove the common law presumption of delivery which arises from mere sealing or execution of a document as a deed and to permit the matter to be

[2] [2012] 2 Qd R 302

[3] Queensland Law Reform Commission, A Bill to consolidate, amend and reform the law relating to conveyancing property, and contract and to terminate the application of certain imperial statutes (Report No. 16), February 1973 at 34.

determined according to whether there is evidence indicative of delivery, "delivery" hear bearing its common law meaning of intention to be legally bound.

The outcomes of the section have also clearly been explained in subsequent decisions, such as *Interchase Corporation Ltd (in liq) v Commissioner of Stamp Duties* (Qld)[4]:

Formerly "delivery" meant an act done evincing an intention to be bound. Now by s. 47(3) of the Property Law Act 1974 delivery is defined to mean the intention to be legally bound either immediately or subject to fulfilment of a condition; and sub-s. (2) provides that delivery may be inferred from any fact or circumstance, including words or conduct, indicative of delivery. Section 47(1) displaces a common law presumption that execution of an instrument in the form of a deed imports delivery

In other words, section 47 PLA is intended to make delivery harder to achieve via execution alone (noting that that issue is of little relevance here given the Deed Poll was not executed by DBCTM using wording which suggested an intent to provide delivery like 'signed, sealed and delivered' but merely 'executed as a deed'[5]). Otherwise, section 47 PLA merely provides a statutory foundation to the common law meaning of delivery.

That leads to two important conclusions:

(a) leaving aside any presumption that might arise by execution alone under common law, delivery actually means the same under both Queensland law and the New South Wales law that Burns Philp was decided under (where delivery is not the subject of any legislative provision), such that there is no reason arising from section 47 PLA to suggest that Burns Philip is not good law in Queensland; and

(b) the interpretation in the DLA Advice is an anomalous one that interprets a provision intended to, if anything, make delivery harder to establish than at common law, so as to actually reduce the requirements for delivery of a deed poll from those which have been determined by an appellate court to exist at common law.

To apply the wording of section 47 PLA, we consider that in the context of a unilateral deed poll that has not been the subject of any invitation or agreement by the covenantee, and has material adverse consequences for the covenantee, a court would be highly likely to infer from the circumstances that the intention was that it would not have been delivered until it was accepted or relied upon – consistent with Burns Philp. Seeking to infer delivery from the intention of the grantor alone in those circumstances would not take account of the nature of a deed poll and the common law's clear recognition that the intention of the covenantee is also relevant in those circumstances.

That is not a particularly surprising result. It would align the position in respect of rights conferred by a deed poll with the position under contract for the benefit of a third party beneficiary under section 55 PLA – namely that acceptance of the third party beneficiary is required. It avoids the problem of the counter-deed referred to by Priestly JA in Burns Philp[6] where covenantees can effectively reverse any 'rights' granted to them against their will. It also avoids the difficulty with the interpretation in the DLA Advice that, taken to its logical conclusion, provides a channel for entities to unilaterally improve their legal and commercial position by the granting of uninvited limited rights which trigger consequences that provide commercial benefits to the grantor.

For the reasons set out above we consider that Burns Philp properly states the requirements for delivery of deed poll of the nature provided by DBCTM in Queensland and that section 47 PLA has not modified that position.

[4] (1993) 27 ATR 154 at 156
[5] See for example the commentary in Ex parte; Ryrie [1983] 2 Qd R 194
[6] (1987) 8 NSWLR 642 at 660

2.4 Burns Philip is highly analogous to DBCTM's Deed Poll and not distinguishable on the facts

Contrary to the DLA Advice, we consider that the facts in Burns Philp are highly analogous to the circumstances concerning the Deed Poll and not distinguishable.

In Burns Philp a deed poll was sought to be used by the lessor to unilaterally confer rights on the lessee (a wider permitted use of the tenancy) with the intended consequence that the lessor could seek a high rent at the subsequent market rent review.

Here, DBCTM has sought to use the Deed Poll to unilaterally confer rights on the covenantees (in relation to limited methods of enforcement of obligations by DBCTM, including to comply with an Access Framework less favourable than the existing regulatory framework) with the intended consequences that DBCTM could seek a higher price at the subsequent price reviews under the existing User Agreement (and in access negotiations with access seekers) due to the absence of a QCA determined Terminal Infrastructure Charge.

The factual circumstances are nearly identical – they both involve providing contractual rights, unilaterally by deed poll and without the covenantees prior invitation or agreement as to those rights, with the conferring of those rights having material adverse consequences for the specified covenantees.

To the extent the DLA Advice asserts that it is the declaration decision that changes the outcome of the price review, equally in Burns Philp it was the market rates that determined the new rental – but it was the asserted outcomes of the deed poll that in both circumstances were said to trigger the change.

The assertion in paragraph 34 of the DLA Advice that the Deed Poll does not cause any commercial disadvantage or affect the operation of the existing User Agreements is clearly wrong (or assumes, consistent with the DBCT User Group submissions and contrary to DBCTM's own submissions, that criterion (a) would be satisfied even if the Deed Poll was effective, such that the Deed Poll would never come into effect). While the impact on the User Agreements would (consistent with the DBCT User Group's submissions) be less than on access seekers due to the existence of the contractual right to commercial arbitration which existing access holders have, the removal of the reference tariff and the QCA as arbitrator will clearly create greater uncertainty and likely some degree of different outcome in the next pricing review. The circumstances are exactly akin to what occurred in Burns Philp, where the unilaterally conferred rights directly impacted on the application of a subsequent price review clause.

The DLA Advice tries to distinguish Burns Philip based on a series of speculative assertions (see particularly paragraphs 30 and 45) about why the decision was made that have no basis to support them in the reasoning of the decision itself.

Rather, the reasoning of Priestly JA[7] is very clear and did not rely in any way on the right conferred being a permission under an existing contract as the DLA Advice speculates (or confine the analysis to such circumstances), noting:

The fact however that delivery is necessary for the effectiveness of a deed shows that something more is necessary for the effectiveness of a deed poll than its execution; the present case requires identification of what that something more is when it is not only effectiveness, but irrevocable effectiveness that is claimed for the deed. I think it must be something more than mere notification but acceptance or reliance of some kind of or upon it by the person to whom it is delivered. (our emphasis added)

[7] (1987) 8 NSWLR 642 at 659

For completeness we note that we do not agree with the analogy the DLA Advice seeks to draw between the Deed Poll and a deed poll provided in a scheme of arrangement. We consider that while it may be true that such a scheme will not be favoured by all shareholders, shareholders have, in that context, bound themselves to make a decision on approval as a whole as a consequence of the company's constitution and the *Corporations Act 2001* (Cth) (such that shareholder approval is sufficient rather than requiring acceptances of each individual shareholder). Even the DLA Advice accepts that there are 'many limits to the scheme of arrangement analogy'.

3 Practical Consequences of the Deed Poll Being Disclaimed

The DLA Advice correctly accepts that as a matter of law a covenantee can disclaim any benefits conferred by a deed.

Where we consider the DLA Advice falls into error is in assessing the practical implications of a disclaimer by some of the covenantees.

As the DLA Advice expressly acknowledges in paragraph 55 *'The Covenantee [which has disclaimed the benefit] would lose, for example, the right to sue DBCT Management for breach of the Deed Poll'*. That is not a *'limited practical consequence'* as the DLA Advice asserts. Rather it makes the Deed Poll completely unenforceable by such a covenantee – resulting in DBCTM having no incentive to comply with the Deed Poll (and therefore the Access Framework) in respect of that covenantee.

The key assertions in this section of the DLA Advice rest on the assumption that the Deed Poll will remain enforceable by covenantees who do not disclaim it, such that DBCTM will be required to continue to comply with it and therefore all covenantees will continue to have the benefit of that compliance.

However:

(a) as a practical matter, there is no indication that any covenantee will not disclaim it, and no covenantee will have any incentive to fail to disclaim it given the potential consequences; and

(b) as a legal matter it will clearly be possible for DBCTM to not comply with it in relation to one covenantee who has disclaimed it (for example by charging a price higher than the price cap) while complying in relation to another covenantee.

To the extent that sitting 'ill in the mouth' (to use the colourful language of the DLA Advice) is relevant, we consider it will sit extremely 'ill in the mouth' of any judge asked to consider the delivery and legal effectiveness of the Deed Poll to suggest that DBCTM can change the position in a declaration review (and thereby alter the anticipated outcomes of the price review mechanism in existing User Agreements) by unilaterally proposing less favourable terms than would exist with declaration, which all current users and many potential future users have expressly rejected. A court will strive for an interpretation that prevents that absurdity.

4 Is the Alleged Price Cap Capable of Specific Performance

4.1 Why the price cap is impossible of proof

Consistent with the O'Donnell Advice, and contrary to the DLA Advice, we agree that the price cap is 'impossible of proof' and therefore not capable of an order for specific performance.

The DLA Advice fails to acknowledge that the declaration period considered by the QCA in the declaration review is 10 years (assuming that position is retained from the Draft Decision). Even if it is assumed that the price is calculable for the remainder of the term of the current undertaking based on the QCA's previous decisions, that only barely extends into the declaration period under consideration.

From 1 July 2020 it will cease to be possible to demonstrate with precision the level of the price cap the Deed Poll theoretically provides.

That follows because, while past decisions of the QCA might provide guidance, the QCA is required by section 138 of the *Queensland Competition Authority Act 1997* (Qld) to consider the appropriateness of each draft access undertaking afresh on its merits and is not bound by its past approach. Accordingly, it would be impossible to determine with the required precision what the QCA's future Terminal Infrastructure Charge level in respect of the DBCT service would be.

The truth of that position is aptly demonstrated by the QCA's decision in its recent final decision in respect of Aurizon Network's 'UT5' draft access undertaking to increase the tariffs from those that would have applied based on a 'bottom up' analysis. That type of discretionary judgment which forms part of the QCA's statutory role cannot be foreshadowed with the precision required for an order of specific performance.

4.2 Why this is not a problem under the User Agreement

Finally, the point the DLA Advice seeks to make about the wording under the existing User Agreement fails to appreciate the legal differences between seeking specific performance of the Deed Poll price cap and seeking an arbitrated determination under the existing User Agreement price review clause.

Under the existing User Agreements, there is no obligation that is based on determining with precision a hypothetical. Rather, there is a right for DBCTM to charge a Terminal Infrastructure Charge that is either agreed or determined by the arbitrator under clause 7. An arbitrator is not bound by the requirements of proof in the same way a court is in the context of a party seeking specific performance, such that while the arbitrator may not be able to determine the price the QCA would have applied with the precision a court would require, it could still have regard to its view about the range in which that price might fall in seeking to determine the price to apply under the User Agreement.

Accordingly, it is beyond any doubt that, contrary to the DLA Advice, the same issue does not arise.

5 Limited Utility of the Amendment Provisions

5.1 There are numerous grounds which lead to the limited utility of the amendment regime

The O'Donnell Advice refers to the limited utility of the notional restrictions on amendment provided in clause 8 of the Deed Poll based on a number of grounds.

The DLA Advice only addresses one of those grounds and does not challenge the O'Donnell Advice's analysis in relation to the conditions in clause 8.2 of the Deed Poll that:

Asserting in Court proceedings that there has been non-compliance with the conditions in (a) and (b) above would, in practice, be very difficult. The conditions are stated in very general terms and represents a very low hurdle to be met. It would be extremely difficult to satisfy a Court, on the balance of probabilities, that a particular amendment did not meet the conditions.

…

The test of what is "appropriate" is close to the limit of what is justiciable in a Court. That is, it does not present an objective standard against which a Court could assess the validity of an amendment. Whether an amendment is "appropriate" involves matters more of policy and balancing of competing considerations, rather than an objective measure against which an amendment can be tested in Court proceedings. In practice, I would expect that unless an amendment was of an extreme kind, a Court would find it difficult to ever conclude that an amendment either did not promote the Framework objective, or was not appropriate having regard to the six considerations. In my view, this

substantially reduces the practical ability of an access holder or access seeker to effectively challenge a unilateral amendment to the Framework made by DBCT Management.

We completely agree with that analysis from the O'Donnell Advice. Similarly, the DBCT User Group submissions raise other related weaknesses, such as DBCTM's ability to push this threshold to its limits by DBCTM continuing to propose a series of amendments until one is accepted, not challenged or challenged unsuccessfully.

Accordingly it is clear that, irrespective of the legal position in relation to the availability of declaratory relief (which is the matter the DLA Advice addresses), the amendment regime provided in the Deed Poll is of limited utility or protection for the covenantees for other reasons.

5.2 Availability of Declaratory Relief

The DLA Advice appears to suggest that a court would be willing to grant a declaration for a failure to comply with the process for amendments in clause 8 as, where it did so and DBCTM then sought to only observe the amended provisions, there would then be remedies available for a failure to comply with clause 4.2 of the Deed Poll (which contains a covenant from DBCTM that it will comply with the Access Framework).

It is difficult to reconcile that reasoning with the express limitation on the relief available for a breach of clause 8 to only include declaratory relief (clause 9.2.4 Deed Poll). If the method of enforcement for such conduct was supposed to be wider, it begs the question what the purpose of the limitation for breaches of clause 8 (in clause 9.2.4) is. We consider it is far from clear that a court would exercise its discretion to grant declaratory relief in these circumstances.

Declaratory relief is, of course, a discretionary remedy and there can be no guarantee that it will be available for all amendments made in breach of clause 8 of the Deed Poll (and even the DLA Advice does not purport to indicate the likelihood or prospects of that occurring). Enforcement by a covenantee in this case would also require the covenantee to convince the court that declaratory relief should be granted despite the equitable maxim that equity does not assist a volunteer.

Even if the Deed Poll was assumed to operate exactly as the DLA Advice contends, that itself demonstrates the limited utility of the notional protections in clause 8, including by:

(a) showing that to actually prevent the implementation of amendments in breach of clause 8 a covenantee would need to:

  (i) prove to a court that clause 8 was contravened (a task that O'Donnell Advice correctly describes as extremely difficult and requiring a determination close to the limit of what is justiciable in a Court such that it is only likely to be possible for amendments of an extreme kind);

  (ii) having the court exercise its discretion in favour of granting declaratory relief;

  (iii) providing notice of a dispute under clause 16 of the Access Framework; and

  (iv) having the decision maker under clause 16 of the Access Framework order that DBCTM was in breach of the Access Framework by acting in accordance with the purported amendments,

  (with the costs, delays and practical difficulties of succeeding in all such steps being anticipated to be significant for the challenging covenantee); and

(b) not demonstrating how the chain of reasoning in the DLA Advice works where the amendment limits rights that a covenantee would notionally have under the Access Framework – such that the same position of DBCTM potentially being in breach of clause 4.2 of the Deed Poll would not naturally apply in the way that DLA asserts it would in the circumstances of removing obligations that DBCTM initially had.

6 Conclusions

If follows from the analysis above that we consider that, consistent with the O'Donnell Advice, and contrary to the DLA Advice:

(a) The Deed Poll has not been delivered and remains legally ineffective;

(b) The practical consequence of the ability to disclaim is that the Deed Poll will effectively be unenforceable and DBCTM is likely to have no compulsion or incentive to comply with the Deed Poll in respect of all covenantees (given that no covenantee will have incentives to not disclaim the Deed Poll);

(c) The price cap in the Deed Poll is impossible of proof and not capable of an order of specific performance; and

(d) There is limited if any practical protections provided by the amendment regime in the Deed Poll.

For completeness, we also note that what is relevant to the assessment of criterion (a) in the declaration review is not just the legal position in relation to the operation of the Deed Poll (including the matters discussed above), but also how any uncertainty as to that legal position and challenges in enforcement impacts on the environment and opportunities for competition and investment decisions of participants in the relevant dependent market(s).

Yours sincerely

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