

Clubs Legal Update: In Brief June 2011

Property Development Series

Article No. 4: Appointment of Project Consultants

In our last article on property development we looked at the different types of project delivery methods.

Generally speaking the following two methods are used to deliver a property development project.

- The first delivery method involves the club itself engaging specialist consultants and contractors to design, obtain the necessary approvals for and construct the development. This method needs to be considered carefully by clubs as there is no single point of accountability or responsibility for the outcome of a project. It is therefore important to ensure that the consultants engaged for the project are properly accountable when there are variations, delays or the club's requirements aren't met because of something the consultant may or may not have done.
- The second delivery method involves the club engaging a builder on a design and construct basis where the builder is responsible for designing, obtaining the approvals for and constructing the development. With this method, clubs need to be certain they are kept involved in the project at all times with proper approval processes to ensure that their requirements are achieved.

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In this article we will be looking at the first delivery method where the club is intending to carry out the project by way of engagement of specialist design consultants (other than the builder).

In our next article we will look at the second delivery method known as design and construct.

Types of Project Consultants

There are number of specialist consultants a club will need to engage to carry out a development project. Depending on the type of project, those consultants might include:

- a project manager;
- an architect;
- a quantity surveyor;
- a town planner;
- structural, mechanical, civil, electrical and hydraulic engineers;
- a fire engineering consultant;
- a lift services consultant;
- a BCA consultant;
- a landscape designer;
- an interior designer; and
- a geotechnical consultant.

Please note that the above list is not exhaustive and that a number of other specialist design consultants might be required depending on the nature and complexity of the project.

Consultants Standard Terms and Conditions of Engagement

Based on the brief provided by the club, each project consultant will normally submit a fee proposal for the project setting out the scope of their services and their fee for those services. The proposals will normally include the consultant's standard terms and conditions of engagement, which are accepted by the party engaging the consultant by signing and returning the fee proposal to the relevant consultant.

Those terms and conditions are generally the standard terms and conditions developed by the consultant's relevant industry association. For instance, an architect's standard terms and conditions may have been developed by the Australian Institute of Architects.

In our experience, it is not unusual for standard industry terms and conditions to be weighted heavily in favour of the consultant while offering less than adequate protection to the party appointing the consultant.

Given that a club appointing the consultant could be paying the consultant tens if not hundreds of thousands of dollars to provide services to the club, the exact opposite should be the case. That is, the terms and conditions upon which a consultant is engaged should benefit and properly protect the club rather than the consultant.

Appropriate Terms and Conditions of Engagement

The terms and conditions upon which a club engages the major project consultants (such as architects, project managers and structural and services engineers) should at a minimum include the following conditions to protect the club against the greater degree of design risk associated with the services being provided by those consultants:

- a right for the club to terminate the consultant's engagement without cause at any time;
- a right for the club to suspend the project or the carrying out of the services at any time and without cause;
- a right for the club to reduce or expand the scope of the project and/or the services being provided by the consultant (with a corresponding adjustment to the fee being paid to the consultant);

- all designs produced by the consultant must comply with relevant development controls and building standards;
- a requirement for the consultant to co-ordinate its activities and services with all of the other project consultants, to keep itself properly informed of the work of all other project consultants and to attend all appropriate meetings of those consultants and the club;
- the consultant must have appropriate levels of public liability and professional indemnity insurance in place;
- all intellectual property (i.e. copyright and the like) in the designs, reports and other documentation produced by the consultant in connection with the project vests in the club (or at a minimum, the consultant grants to the club an unconditional and irrevocable licence to use the intellectual property for the club's project); and
- the consultant indemnifying the club against any liabilities the club suffers as a result of the consultant not providing the services in accordance with the agreement.

In the club development projects in which we act, most of our clients require all of the major project consultants to enter into comprehensive project management, architectural services and consultancy agreements which include all of the significant conditions described above as well as other conditions such as key personnel, confidentiality and standard of service requirements.

For the more minor project consultants, a shorter and less comprehensive form of agreement is usually all that is required as there is generally less design risk associated with the services being provided by those consultants.

Unless the club has obtained legal advice...the club should not simply accept a consultant's fee proposal by signing and returning that fee proposal to the consultant.

Process of Engaging Project Consultants on the Club's Terms and Conditions

Unless the club has obtained legal advice that a consultant's fee proposal does not contain terms and conditions which are prejudicial to the club, the club should not simply accept a consultant's fee proposal by signing and returning that fee proposal to the consultant.

Simply accepting a consultant's fee proposal will mean that not only has the club accepted the consultant's fee,

but that the club has also accepted the consultant's standard terms and conditions (which as we said above might not be that favourable to the club).

If the club is happy with the fee being proposed by a consultant, but the standard terms and conditions are not acceptable to the club, we would suggest that the consultant be engaged on the club's terms and conditions. That can be achieved in the following two ways.

- Firstly, if the Club requires the consultant to commence work immediately, although a formal agreement hasn't been entered into, the club should issue a letter of intent to the consultant which:
 - notifies the consultant that the club accepts the fee being proposed by the consultant;
 - attaches a copy of a standard form of consultant agreement;
 - allows the consultant to commence the services on the terms and conditions of an attached consultancy agreement subject to the consultant accepting the terms of the letter of intent and the club and the consultant agreeing on the final terms and conditions of the agreement within, say, 30 days of the consultant agreeing to the terms of the letter of intent (and if that agreement is not entered into then the club can terminate the consultant's engagement).

This process allows the consultant to get on with the job on the terms and conditions of the attached agreement whilst allowing time for the parties to agree and sign the formal agreement.

- Secondly, if there is no overriding need for a consultant to commence work immediately on the project, then the club can simply notify the consultant that it accepts the consultant's fee but that it wishes to engage the consultant on the terms and conditions of a formal consultancy agreement (which is issued by the club rather than consultant). The parties can then simply negotiate and agree on the terms and conditions of that agreement and the consultant can commence work on the project at an agreed time.

For further information or a confidential discussion, please contact our team.

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Memorandum of Understanding with the NSW Club Industry

As clubs will be aware, the Coalition signed an historic Memorandum of Understanding (MOU) with the NSW Club Industry prior to the last state election.

The MOU contained reductions in Gaming Machines Taxes and a restructured ClubGRANTS system (formerly CDSE) in recognition of the substantial and unique economic and social contribution that clubs make to NSW.

What may be not as well known is that the MOU also contained other important matters which should come into law in the near future to:

- change the planning system to encourage the establishment of Clubs on greenfield sites reserving central locations for Club purposes;
- facilitate Club amalgamations (and de-amalgamations), streamline processes and encourage proactive Club mergers;
- remove the requirement to forfeit gaming machine entitlements on transfer between premises of amalgamated Clubs regardless of location;
- introduce a defence against prosecutions of Club managers where reasonable steps have been taken to comply with the *Liquor Act* and special conditions;
- limit rent increases for Clubs on Crown Land to CPI only, and review recent significant rent increases;
- remove the ability of government to hold royal commission style investigations and immediately rescind section 41X of the *Registered Clubs Act*;
- review 'accountability' provisions; and
- take action to prevent Clubs and community assets falling into the hands of private interests and entrepreneurs.

Clubs who may wish to be proactive in relation to any of the above matters or have any questions as to how these measures may affect their club are welcome to contact one of our team who will be happy to assist.

For further information or a confidential discussion, please contact our team.

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