

## Clubs Legal Update: In Brief May 2011

### Public access to the Club's Register of Members – the new rules!

#### Background

Up until the end of 2010, Clubs incorporated as companies\* were required by law to allow any person to inspect the register of members, and to give any person a copy of the register (or any part of it) within 7 days of receiving a request to do so. That person was then prohibited from misusing the information by contacting or sending material to the Club's members (or disclosing the information to someone else for that purpose), unless the contact or material related to a member's membership interest in the Club or was approved by the Club.

Industry groups and others in the corporate sector expressed concerns that this regime allowed unscrupulous operators to get access to membership registers too easily for the wrong reasons, and the law was changed at the end of 2010.

#### The new rules

##### Inspecting the register

Clubs must still allow any person to inspect the register at an appropriate time. If the register is in hard copy then the person must be allowed to inspect the hard copy. If the register is held on computer, the person must be allowed to view it on computer. Club members are entitled to inspect the register for free. A person who is not a Club member may be charged \$5 each time they inspect the register if it is in hard copy, or, if it is held on computer they may be charged a reasonable amount that is no greater than the marginal cost to the Club of giving them access to the computer.

##### Getting copies of the register

If any person wants a copy of the register (or part of it), they must make an application to the Club which sets out their name, address and each purpose for which they want the copy. A Club may refuse to provide it if that purpose falls into any of the following categories:

- asking for donations from Club members (e.g. a charity is not entitled to get a copy of the register and then contact the members for donations)
- contact by a stockbroker or sharebroker
- gathering information about a member's personal wealth
- making an unsolicited offer to purchase financial products off market (this is unlikely to apply to Clubs)

Otherwise, the Club must provide the copy within 7 days and if the register is held on computer it can be electronic copy. An electronic copy must be a delimited text file produced by a commercially available spreadsheet/database application, and be provided on CD ROM or a portable USB memory device. The Club is entitled to charge a fee for each copy set by the regulations on a sliding scale, depending on the number of members listed in the register.

##### Using the information

A person who is given a copy of the register must not use the information, or disclose the information to someone else, in order to contact any member or send any member any

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material, unless it relates to the member's membership interest in the Club. Also, the information must not be used for any of the purposes outlined above. For example, the information cannot be used to put a member on an advertising mailing list. Of course, the person may use the information to contact or send material to members for an appropriate purpose that is approved by the Club.

It is an offence for a person to misuse a copy of the register. Also, they may be liable for damages if someone suffers loss as a result, or be required to account for any profits they make from misusing the information.

## Tips for Clubs

1. It is recommended that each Club has a proper process for handling requests by members and the public to inspect, or obtain copies of, the register. Clubs are generally right to be concerned about protecting the personal information of their members, but, it is an offence if the Club fails to allow a person to inspect the register or fails to give a person a copy of the register in breach of the Corporations Act.
2. Each application to obtain a copy of the register should be carefully checked to ensure it sets out the applicant's details and the purpose for which they want the copy. If the purpose falls into one of the prohibited categories, the Club should refuse to provide the copy and tell the person why.
3. Some members, or the public, might want the information for a legitimate purpose but not have a full understanding of the limits on how the information can be used. When providing a copy of the register, Clubs can remind the person of the restrictions on how the information can be used. This can reduce the risk of an inadvertent breach, and also help protect the members' information.

\*There are different rules for Clubs which are co-operatives as they are subject to different legislation.

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## Property Development Series

### Article No. 3: Project Delivery Methods – Tips and Traps

In the first two articles on property development we looked at the initial commercial steps that Clubs need to take when considering a development and the legal and regulatory requirements a Club must comply with when undertaking a development.

In this article we will be looking at project delivery methods and the issues to consider when deciding upon which method is best for your Club.

#### Introduction

Most Clubs will have on their agenda plans to undertake major re-development of their facilities at some point in time. This will often be the most significant expenditure a Club undertakes. Re-development is also often necessary to maintain member satisfaction and for Clubs to remain competitive within their local market. However Clubs are not in the design and construction business, so they will not necessarily be aware of the processes and procedures to be followed to ensure a successful project. This paper sets out a few tips and traps for Clubs considering re-development work.

#### Determine Club's Development Objectives

There are many different ways in which re-development projects can be delivered. You may well have heard of terminology such as 'construct only', 'design and construct' and other acronyms, touted around.

All options may be appropriate but certainly, as a pre-condition to any option it is important that the Club actually ascertains its objectives for any re-development, and knows clearly what it wants to achieve. The Club is in the best position to know this. It will also be able to ascertain what budget or expenditure it can reasonably make available for such re-development.

Even before the Club approaches the 'design and construction' market, it should actually take steps to work through its objectives and seek to document these in some shape or form. Do your own research on what the Club requires, consider what has worked well in similar Clubs and talk to other Clubs about their experience. Look at your competitors. The Club should also start talking to its financier about a potential budget for any re-development and what loan funds may ultimately be able to be sourced.

#### Appointing Appropriate Construction Consultants to Assist the Club in Determining Appropriate Delivery Method

When the Club is ready to approach appropriate construction professionals, consideration needs to be given to how it does this.

It may be best to engage the services of a competent project management consultant to manage the process. A project manager will be able to advise the Club on the appropriate project delivery method. For example, whether the Club should engage architectural and engineering consultants to prepare designs and drawings of the proposed re-development and to what level of detail this should be done, or whether to go straight to a design and construct contractor. This will depend upon whether the Club intends to subsequently engage a contractor on a 'construct only basis' (ie, the detailed design is complete) or a design and construct basis, where the successful contractor will take over the design and document it to meet the Club's stated requirements.

#### Appropriate Due Diligence on Construction Consultants

Whichever delivery method the Club ultimately chooses, it is important that the Club does its due diligence on the construction professionals it approaches.

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Many contractors and consultants in the industry will profess skill and expertise, but it may be found wanting. The hospitality and Club industry is a highly specialised area and you need to ensure that those you are dealing with have the necessary level of experience and expertise to ensure your project is a success.

Undertake reference checks, talk to their past clients and visit their completed projects. You need to ensure you are in safe hands.

## Construction Contracts

Once you have approached the design and construction market, you may be encouraged to sign a contractors standard terms to 'get the project going'. Ideally, the Club should be controlling the agenda here, and putting to the construction professionals the type of construction contract which has been prepared on behalf of the Club, which adequately protects the Club.

Otherwise, if the Club does not want to prepare the proposed construction contract, Clubs should carefully review any agreements proposed by the construction professionals before entering into them, and where appropriate seek advice. Most construction lawyers will be able to quickly review any proposed construction contract and advise the Club on its key terms, including those affecting the time for performance, and the liability to pay and recommend changes.

For a couple of hours work, this will likely prove a good investment to ensure that any proposed construction contract embodies the Club's requirements and understanding. Remember, do not sign anything without obtaining advice.

## Key Issues

### (a) Time, Cost & Quality

The key criteria to understand clearly in any re-development will be Time, Cost & Quality. The construction process is affected by many variables: things which the Club can control, things which your contractor can control, and other neutral events, such as inclement weather, industrial action, changes in law and other things which no one can control.

All these events will impact on the time and cost of performance and may affect quality. In any construction contract you will need to understand the mechanisms affecting these critical criteria, and ensure the risk is adequately managed and deal with these issues before you sign.

### (b) Payments

The most significant trap for Clubs is linking an obligation to pay a contractor or consultant where the Club has not received a tangible benefit for the particular service performed.

Some contractors will attempt to link their remuneration to a percentage based fee calculated against the 'budget for construction', with various milestone payments throughout (for example for pre construction phases).

The problem with such a payment method is that depending upon whether the budget has been (or can be) agreed the remuneration for the contractor or consultant can possibly be quite high, without the contractor or consultant having to do much work for the agreed remuneration. Therefore, the Club needs to ensure that the Club receives the benefit of the work and services commensurate to the payment due to the contractor or consultant.

The Club also needs certainty in the amount of payment (and timing for it) whether or not the fees are calculated on an hourly basis or a percentage basis.

### (c) Legislation

Finally, Clubs need to be aware that any contractors or consultants performing construction work or providing related goods and services, have the benefit of legislation in NSW (as with all states and territories) known as the *Building and Construction Industry Security of Payment Act NSW 1999*.

This legislation entitles contractors and consultants to a statutory right to make a payment claim and disputed claims need to be challenged within specific (and very tight) time frames.

Disputed claims can be referred to a fast tracked adjudication scheme which may result in Clubs having to pay disputed claims on an interim basis and seek to sue their contractors or consultants to get the money back.

Again, a construction lawyer will be able to advise Clubs on the impact of this legislation and methods to manage the risk associated with it.

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## Tips for Clubs

When undertaking any major re-development or refurbishment of Club facilities it is important that Clubs:

- ascertain their objectives for any development or refurbishment of their facilities, and know clearly the outcome they want to achieve;
- appoint a project manager to assist the Club in managing the development process and to advise on the appropriate delivery method;
- appoint other construction contractors and consultants with the necessary level of experience and expertise to carry out the project to the standard required by the Club (and to this end, it is important that the Club does its due diligence on the contractors and consultants it is considering appointing); and
- obtain appropriate legal advice on the form of construction contract required for the delivery method chosen by the Club, especially on its key terms such as time, cost and quality to ensure that the contract adequately deals with those issues before the contract is signed.

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