

Clubs Legal Update: In Brief October 2011

Property Development Series

Article No. 5: Design and Construction - Key Issues

In article four of our Property Development Series titled Appointment of Project Consultants, we examined the first of two common project delivery methods used in the development of a Club's facilities, that is, the direct appointment of project consultants by the Club (**Project Consultant Process**).

This, article five in our series, examines the second common method, namely, the design and construct process (**D&C Process**). Under this process a Club engages a builder to be responsible for designing and constructing the development. The builder usually also coordinates or performs the other functions which would otherwise be performed by the project consultants (if the Club used the Project Consultant Process), for example, obtaining the approvals for the development.

One point of contact & liability

The key difference between the Project Consultant Process and the D&C Process is that in the D&C Process the Club deals with one builder who performs a multitude of roles and obligations. This limits the risk that the Clubs' expectations might not be met because of a lack of clarity about who is responsible from both a practical and legal perspective.

In the D&C Process, the builder will act as the single point of contact for the Club, and is charged with the

responsibility of designing and constructing the Club's requirements for the development. If something goes wrong, the Club looks to the builder to resolve the problem, rather than one of the vast number of other contractors, consultants, suppliers etc that may have been involved.

Design & Construct advantages & shifting risks away from the Club

A properly implemented D&C Process, by a qualified and experienced design and construct builder, provides the following advantages to a Club:

1. One entity is responsible for achieving the Club's requirements thereby:
 - reducing disputes and the 'blame game' between various consultants, the builder and the Club;
 - reducing variation in cost as the builder usually takes on greater risk in connection with the Club's requirements, the site and the documentation;
 - creating far greater prospects of rectification of any problems which may occur as the Club can simply look to one entity to resolve the problem;
 - ensuring the Club's requirements for quality and fitness for purpose are clearly allocated to one entity.
2. It promotes an outcomes based system which allows the Club to specify the requirements or outcome it wants the D&C Process builder to achieve, without necessarily describing how the builder must get there. It's like specifying the destination, but not the route the builder has to take.
3. It shifts some financial and other delivery risks away from the Club (or its numerous consultants) to the D&C Process builder.

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4. Matters such as construction 'buildability', staging, safety and proper investigations of existing Club buildings and the site are carried out by the D&C Process builder well in advance of construction commencement thereby reducing delays, disruption and variation in costs during construction.

5. Time delay claims are reduced.

6. Thorough investigations of design proposals, systems and materials are able to be undertaken by the D&C Process builder balancing aesthetics, buildability, compliance and longevity. Decisions can be determined on value not just price earlier in the process.

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6. if a Club is seeking the lowest cost, lowest quality and space planning solution, this is often at the expense of optimal operational efficiencies.

As with any development method, risks associated with this form of project delivery can occur if the development is not established properly with an appropriately qualified and experienced D&C builder. Ways to reduce these risks include:

1. A proper selection process for the builder including non price criteria:
 - Club specific experience
 - Reference checks and examining past projects
 - Adequate accreditation including Federal Safety Commissioner accreditation and AS 4801 (safety) and AS 9001 (Quality)
 - Professional indemnity insurance to an appropriate level
 - Public liability and contract works insurances to an appropriate level
 - In house design expertise and qualifications
2. Do a staged appointment of the builder with appropriate milestones. For example, they could be engaged to ascertain and appropriately document the Club's requirements, proceed to preliminary designs, and then to DA phase.
3. Ensure the project brief is well thought through with various 'performance' requirements (refer below). The brief can be developed in conjunction with the builder.
4. Employ an independent cost expert (quantity surveyor) to independently assess estimated costs, proposed contract sum, and assess payment claims.
5. Employ other independent consultants to progressively inspect and check the work carried out by the builder
6. Clubs should be actively involved at regular meetings with the builder. A useful method is formal Project Control Group (**PCG**) meetings on a regular basis involving senior decision makers from the Club and the builder.
7. For probity reasons, ensure all component costs are transparent with a selection process which satisfies the Club's requirements (eg: trade tenders, consultant selections on credentials, etc).
8. Ensure the builder engages appropriate consultants required to properly and fully document the development and they give direct warranties in favour of the Club.

Potential disadvantages & solutions

The D&C Process can, however, have the following potential disadvantages:

1. it relies upon the D&C Process builder being experienced and competent, as often the Club is effectively putting all of its 'eggs in one basket' and relying upon one entity to deliver;
2. the Club can lose control of the design as it is only involved in, and can control, the design to a certain point. This means that the Club does not necessarily have the benefit of fully documented designs before construction commences;
3. it relies upon the Club's 'requirements' (or the outcomes) being fully explained by the Club to the D&C Process builder, so these can be adequately designed and constructed;
4. if the Club's requirements are not clearly specified, the D&C Process builder is only obliged to design and construct to the lowest acceptable standard. Therefore, what is constructed may not be what the Club had in mind;
5. less experienced D&C builders can find it hard to gain the most cost effective outcome. However, if used appropriately, design outcomes can reduce costs;

9. Ensure that the copyright on any documents developed by the builder is owned by the Club.
10. Ensure appropriate approval processes are implemented.

Formulating the project brief

Setting and documenting the Club's requirements and objectives for development projects is critical. A project brief is a formal document which describes not only the objectives for a proposed project, but also other detailed requirements or parameters.

Often Clubs can have difficulties agreeing internally what the priorities and the brief should be for a particular project. Internal decision making processes need to be clearly defined with a central contact and decision maker (a senior individual employee or a building committee).

Project briefs can be in a number of different forms and to various levels of detail.

In its simplest form, a project brief can be very much performance or outcome orientated, such as an outdoor gaming area which:

- contains a specified number of gaming machines;
- meets the legislative requirements; and
- has casual seating to be connected to an existing gaming area within a specified budget and timeframe.

The other extreme is a project brief which literally specifies the number of power points and data connections required, the look and feel of the Club and even benchmarks it against completed developments.

A very important issue which should not be overlooked is obtaining market research to establish a business case for any proposed development, that is, will the proposed development be profitable? The determination of this question is likely to impact and change the settled project brief.

Technical & legal requirements of the brief

It is essential that the project brief deals with the following fundamentals:

1. That the D&C Process builder complies with all relevant legislation.
2. The process for entering into formal written agreements.
3. That the D&C Process builder designs and constructs to deliver a project which is fit for the Club's intended purpose.
4. That the D&C Process builder is appointed the Principal Contractor for the purposes of the OH&S Regulation.

Existing information needs to be identified with a limitation as to how much reliance can be placed on it by the D&C Process builder.

Engaging a Design & Construct builder

It is important to ensure that the D&C Process obligations are properly documented, and that the Club takes control of preparing the proposed form of D&C Process contract.

Working with a Design and Construct builder

The success of this project delivery method relies on clear and open communication. This can be through regular meetings between the Club and the builder (e.g. PCG meetings) and regular status reports (which could include as a minimum costs, design, time and authority status information). The builder needs to be able to respond to the Club's enquiries and questions through its in-house resources.

Thomsons Lawyers wishes to thank Steve Alley of Paynter Dixon for his substantial input into this article.

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Changes to the Sex Discrimination Act

The *Sex Discrimination Act 1984 (Act)* has recently been amended, and now includes changes intended to:

- extend protection from discrimination on the grounds of 'family responsibilities' to both men and women in all areas of work;
- establish breastfeeding as a separate ground on which discrimination is unlawful; and
- provide greater protection from sexual harassment in the workplace for both men and women.

This update highlights some of the key changes that apply to employers generally, that will also affect Clubs. The amendments have extensive implications and it is recommended that Clubs take steps to be fully informed and seek legal advice where necessary.

Discrimination - family responsibilities

Previously, Clubs were required not to discriminate against an employee by terminating their employment because of their family responsibilities. 'Family responsibilities' means caring for, or supporting, a dependent child or other immediate family member who is in need of care and support.

In addition, it will now be unlawful to discriminate against a person on the grounds of their family responsibilities in their work, including:

- in the course of recruiting new staff; and
- in dealing with current Club employees.

For example, a Club must not discriminate against an employee because of their family responsibilities by denying them a promotion, or by subjecting them to any detriment. In summary, a Club must not treat an employee (or prospective employee) less favourably because of their family responsibilities than the Club would treat any other employee (or prospective employee) who does not have such family responsibilities in similar circumstances. The Act also includes similar prohibitions on discriminating against contract workers on this ground.

Breastfeeding

The Act previously gave indirect protection to women who were breastfeeding. However, it now specifically states that it is unlawful to discriminate against a person on the

grounds of breastfeeding (which includes expressing milk) in a range of areas, which include employment and Club membership. A Club must not discriminate against a person on the grounds of breastfeeding:

- in the course of recruiting new staff;
- in dealing with current Club employees; or
- when assessing membership applications or dealing with current Club members.

In relation to employment, a Club must not treat an employee less favourably than the Club would treat any other employee who is not breastfeeding, in similar circumstances. Also, a Club must not discriminate against an employee by imposing (or proposing to impose) a condition, requirement or practice that has or is likely to have the effect of disadvantaging the employee because they are breastfeeding. The Act also includes similar prohibitions on discriminating against contract workers on this ground.

Clubs also need to be aware that it is unlawful to discriminate against a person on these grounds when supplying goods or services, or in the way that the Club makes its facilities available. As a result Clubs must not discriminate against Club members or guests on these grounds.

Sexual harassment

The changes to the Act have introduced new factors in defining 'sexual harassment'. Previously sexual harassment occurred as a result of:

- an unwelcome sexual advance;
- an unwelcome request for sexual favours; or
- other unwelcome conduct of a sexual nature;

where a reasonable person would anticipate that the person harassed **would be** offended, humiliated or intimidated.

Under the new changes, such conduct will be sexual harassment where a reasonable person **would have anticipated the possibility** that the person would be offended, humiliated or intimidated.

In considering those circumstances, a range of factors need to be taken into account, including:

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- the sex, age, marital status, sexual preference, religious belief, race, colour, or national or ethnic origin of the person harassed;
- the relationship between the people involved; and
- whether the person harassed has any disability.

This introduces more subjective elements to the test, and is considered likely to widen the range of situations in which sexual harassment will be taken to have occurred.

It is well established that it is unlawful for an employer to sexually harass an employee, or for an employee to sexually harass another colleague. The Act now extends protections to other workplace situations, such as:

- It is unlawful for a workplace participant to sexually harass another workplace participant at a place that is a workplace of **either or both** of them. This will include contractors and others like sales representatives at the Club's premises.
- It is unlawful for a person to sexually harass another person in the course of seeking, or receiving, goods, services or facilities from that person. This means it would be unlawful for a Club member or guest to sexually harass a Club employee when using the Club's facilities.

Clubs are also reminded that there is a specific section of the Act which states that it is unlawful for a member of a Club's Board to sexually harass a Club member or applicant for Club membership.

Recommendations

It is recommended that:

1. Clubs review their HR policies regarding anti-discrimination and sexual harassment and update the policies where necessary to take account of these changes.
2. Clubs review the training they provide on anti-discrimination and sexual harassment and update the training where necessary to take account of these changes. Training will need to be provided to staff and Board members as appropriate.

As a part of that training it is recommended that staff be made aware that there are prohibitions on Club staff sexually harassing another person attending or working in their workplace (including contractors, sales representatives and suppliers), and conversely. Procedures on how any such incident can be reported and dealt with could be included in the Club's policies.

3. Clubs review the procedures for making facilities available to Club members and guests. For example, it would be a breach of the Act to discriminate against a person by refusing to serve them in a Club bistro or restaurant on the ground that the person is breastfeeding. All staff, and contractors on the Club's premises (e.g. caterers), should be made aware of the changes to the law and of the Club's requirements.
4. Clubs identify a procedure for handling any complaint from Club staff regarding sexual harassment by a Club member or guest, and how that may need to be integrated with any disciplinary procedures under the Club's Constitution.

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

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