PROPERTY AND PROJECT DEVELOPMENT LIFECYCLE



Bartier Perry LAWYERS

“Property development can be a minefield; let us guide you through it to maximise your investment.”

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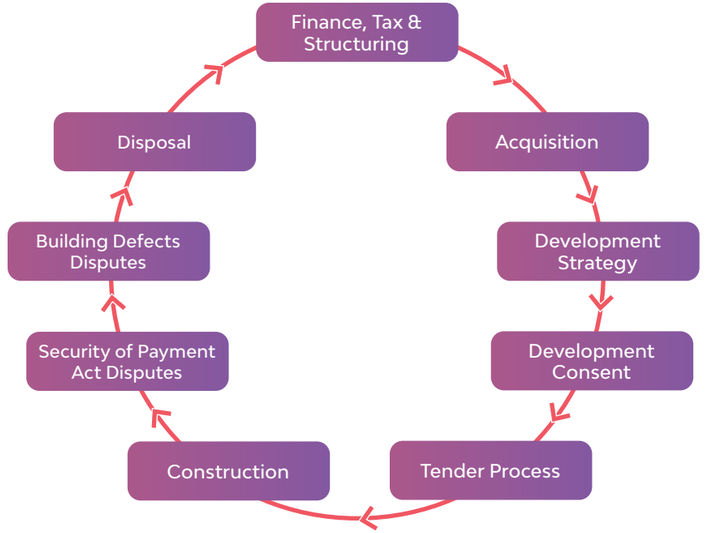
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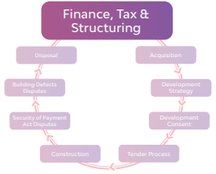
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FINANCE, TAX AND STRUCTURING



A property development without funding is like a carpenter without a hammer.



There are many ways to fund a development project and not one size fits all.

When funding a property development project you need to consider what type of funding is available and which will deliver the best return.

Here is a brief list of considerations when it comes to funding, tax and structuring for the life cycle of a property development.

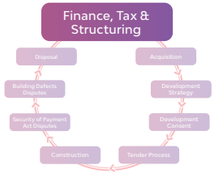
CONSIDERATIONS

- **What structure or vehicle do you use (and why) to undertake the development or what is your involvement in the development:**
  - unit trust
  - company
  - joint venture
  - discretionary trust

Often the answer will depend on the contributions expected by the participants as much as:

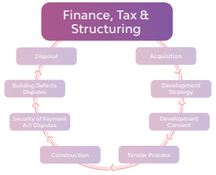
  - minimising risks
  - the capital and income tax implications
  - any duties involved including duty on the transfer of any property

- **Which form or combinations of funding will be suitable and why?**
  - senior debt
  - mezzanine debt
  - equity, including preferential equity

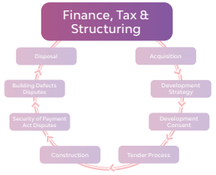


CONSIDERATIONS (CONT.)

- How do you structure your security and priority arrangements?
- What is the timing of stages, payments, completion and what constitutes completion?
- What are the conditions precedent of any funding arrangement, including are there minimum equity and pre-sales requirements?
- Does the development need a residential development stock loans facility?
- Will funding be coming from foreign sources and, if so what are the tax implications of such debt?
- Will the building contracts and the builder accommodate the requirements of the funder including any tie in deed arrangements?
- Should you, or do you have a development management arrangement?
- How will the interests of the various participant's in the property development be secured, including the interests of the joint venture partners, financiers and suppliers?
- When are development profits realised, and when is tax payable in relation to those profits? This could have significant cashflow consequences.
- How will the profit or revenue from the property development be distributed and in what priority to the various interested parties?



TO CONCLUDE



It may appear that each of these are separate and distinct but they are all interrelated and may have different considerations at different stages of the property development cycle.

A successful project's plan will address all the issues in advance, as well as structure the property development to minimise risks through the various stages of the project's life cycle

At the heart of all this is ensuring that all agreements appropriately address the issues and have been negotiated in a manner to optimise the profits and mitigate the risk

As the old saying goes "He who is his own lawyer has a fool for a client"

ACQUISITION

IMPORTANT CONSIDERATIONS

When assessing a property's potential for redevelopment it is important to consider:



- Existing **easements**, **covenants** and **restrictions** on use which may impact proposed development of the land
- Existence of **infrastructure** on the land which may give rise to statutory easements that are not disclosed on the title to property
- **Encroachments** by or on the land
- **Heritage listings** which may restrict redevelopment
- **Zoning** of the property and the impact on intended use
- **Development** prospects and strategy

ACQUISITION



DUE DILIGENCE



A rigorous due diligence process is necessary to examine all issues

EXPERT ADVICE



It is essential to understand any issues that may need to be dealt with and will help to refine the commercial terms of the acquisition

DOCUMENTATION



A well-documented transaction will ensure that the acquisition runs smoothly and will minimise the risk of costly disputes between the parties

DEVELOPMENT STRATEGY

UNLOCK YOUR PROPERTY'S POTENTIAL

A robust strategy is vital to realise the full potential of your property. We can help you:



Maximise your return through appropriate development

Understand your end goals and be strategic in your approach eg. concept developments and planning agreements

Avoid being restricted to what generic planning controls prescribe

Understand the planning controls that will dictate the type and scale of your development

The right strategy can allow you to vary or amend planning controls to facilitate a development that would otherwise be unattainable.

WHAT YOU NEED TO CONSIDER

ZONING
- Is the development permissible?
- Is the property located at a zone boundary?
- How do nearby developments affect your development?

DEVELOPMENT CONTROLS
- What are the potential restrictions – density, height, scale, amenity, design?



TIMING
- What is the anticipated delivery of the project?
- Are there likely to be delays in the assessment process?

APPROVALS
- What approvals and consents are required to deliver the project?

HERITAGE
- Is the property heritage listed?
- Is the property in a heritage conservation area?
- Is the property likely to be subject to an Interim Heritage Order?

DEVELOPMENT STRATEGY

GETTING STARTED

PLANNING PROPOSALS



For **rezoning** and **changes** to development standards under environmental planning instruments eg. **upzoning** to increase density yields

DEVELOPMENT APPLICATIONS



To **obtain consent** for development including concept developments, state significant developments and other permissible development



VOLUNTARY PLANNING AGREEMENTS



Negotiating development concessions with a consent authority in exchange for contributions for public benefit

CERTIFICATION OF DEVELOPMENT



Streamlining the approval process eg. complying development



DEVELOPMENT CONSENT

OBTAINING DEVELOPMENT CONSENT THROUGH LITIGATION AND DEALING WITH CONDITIONS

In certain circumstances, developers have no option other than to file an appeal in the Land and Environment Court against a consent authority's determination.

Otherwise, it's back to the drawing board!



70%

In 2022, **70%** of Class 1 and 2 appeals were finalised by alternative dispute resolution processes and negotiated settlement, without the need for a court hearing

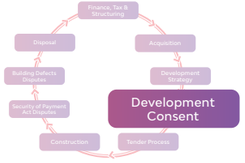
69%

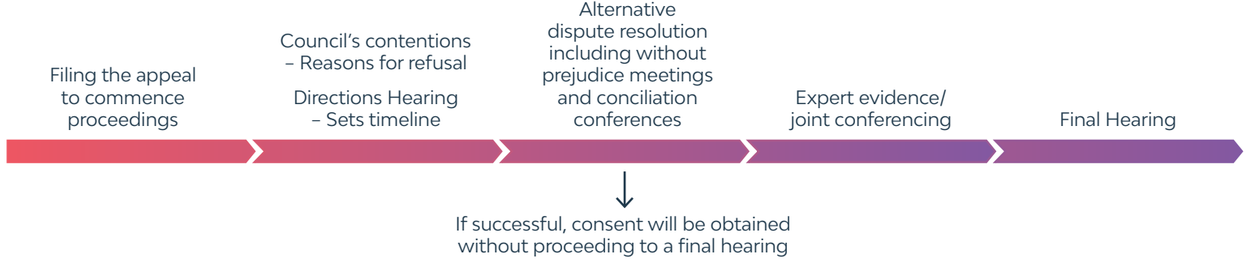
In 2022 1,010 Class 1 applications were filed, representing **66%** of all filings

34%

In 2022, **34%** of all Class 1 matters finalised were appeals under s 8.7 (formerly s 97) of the Environmental LEC Annual Review 2018 32 *Planning and Assessment Act 1979*

CLASS 1 APPEALS – THE PROCESS





At any stage of the court process an applicant can amend the application to respond to council's contentions.

The vast majority of our appeals are resolved through the Court's alternative dispute resolution process – saving costs and fast-tracking approvals.

DEVELOPMENT CONSENT

ACTING ON YOUR DEVELOPMENT CONSENT



CERTIFICATION → Principal Certifying Authority →
- Construction Certificate
- Subdivision Certificate
- Occupation Certificate

Where can things go wrong?

Problematic conditions

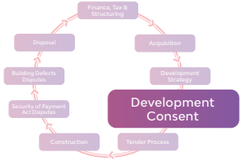
When you cannot build in accordance with the Construction Certificate

When you have not built in accordance with the Construction Certificate

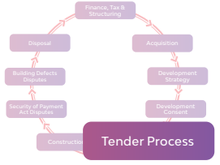
Being issued with an order

What options do you have?

Variations to development consent →
- Modification Applications — Tailor your consent as required; To delete problematic conditions
- Building Information Certificate — To legalise unauthorised works



TENDER PROCESS





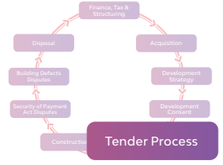
Once a development consent is obtained, it's time to go out to tender.

Tendering is a regularly utilised procurement process for obtaining competitive and comparable offers under which:

- the tender response is capable of being accepted or rejected by the the party inviting the tender
- there is no binding contract until the tenderer's offer is accepted by the party inviting the tender.

Unlike a simple request for quotation, tendering allows the party inviting the tender:

- to regulate the conduct of the participants of the tendering process
- to receive and assess offers that are easily comparable
- to control the contract terms governing the supply of the works or materials
- Caution – in certain circumstances, an invitation to tender can itself constitute a *'process contract'*.



A process contract will impose binding legal relationships between the party inviting tenders and a tenderer during the "pre-award period" which will regulate and protect the integrity of the bidding system.

Remedies for breach of a process contract include:

- Usually – damages for breach of process contract being the tenderer's costs of preparation of the tender
- Possibly – a Court order to re-tender or an injuction restraining the party inviting the tender from entering into a contract with the preferred tenderer.



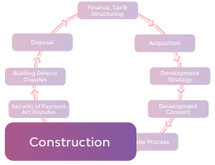
TIPS AND TRAPS

1.	use a clause excluding the creation of a process contract
2.	make sure the provisions and language used in the tender are consistent with any exclusion clause
3.	state there is no warranty as to the accuracy of information contained in RFT
4.	expressly reserve rights in relation to the tender process (for example, a right to reject any and all tenders, to change the tender process and enter into negotiations with any tenderer).

PRINCIPALS/ DEVELOPERS

DOES YOUR CONSTRUCTION CONTRACT REFLECT YOUR APPETITE FOR RISK?

waterproofing tops the list of the 10 most common defects in every Australian State and Territory*



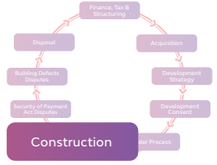
How does your construction contract deal with:

- Claims for an increase to the contract sum
- The provision of indemnities and warranties
- Disputes and alternative dispute resolution processes
- Termination, including for your convenience
- Extensions of time
- Site conditions
- Discrepancies in documents
- Back charges for defects

*Master Builders Association New South Wales Waterproofing Guides

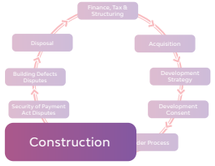
The Design and Building Practitioners Act 2020 imposes a statutory duty of care on those who carry out construction work.

Construction work includes commercial and residential building work, preparation of designs, supply of building products and supervision.



Home Building Act statutory warranties are enforceable against both the builder and the developer.

REGISTRATION AND COMPLIANCE CERTIFICATION



Registration and compliance certification provisions apply to building work for the construction, making of alterations or additions or the repair, renovation or protective treatment of class 2, 3 or 9c buildings.

Also applies if part of the building is a class 2, 3 or 9c building.

Registered practitioners also required to lodge documents at different stages throughout the construction process through the NSW Planning Portal.

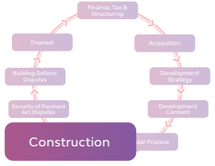
- Copies of the construction issued regulated designs for the building work
- Design compliance declarations
- Building compliance declaration
- "As built" designs

OBLIGATIONS



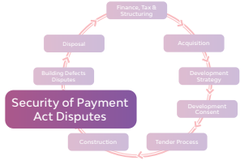
Obligations are imposed on contractors and consultants, but it is in a developer's interest that they are properly carried out if the project is to be successfully completed. Why?

1. A copy of each construction-issued regulated design and each design compliance declaration must be lodged before building work starts
2. Building compliance declaration must be lodged before a developer can apply for an occupation certificate
3. The certifier will only issue the occupation certificate if they have all the design compliance declarations and the building compliance declaration
4. Design and building practitioner compliance may be the subject of an audit



SECURITY OF PAYMENT ACT DISPUTES

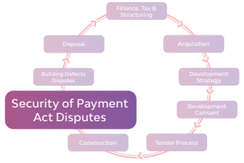
FACTS:



- Improved cash flow to contractors and faster resolution of disputes
- Can be used by consultants and suppliers of materials as well as contractors
- Contractors claiming under the Act must comply with its requirements
- Tight timeframes must be met to avoid liability by default
- Parties cannot contract out of the Act

Each Australian state is different – we are looking at NSW only here.

CHANGES

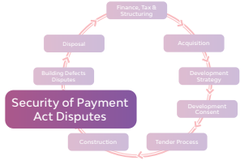


The NSW Act was significantly amended on 21 October 2019 – changes only apply to contracts executed after this date.

March 2021 – The Application of the Act widened to extend to previously exempt residential building contracts

- A payment claim must expressly state it is made under the Act
- Reference date requirements removed
- Time for payment of a payment claim to subcontractors and head contractors changed
- Mechanism for withdrawal of Adjudication Applications any time before the application is determined
- Wide enforcement powers for Department of Finance, Services and Innovation to fine and prosecute offenders for non-compliances

SOPA STATISTICS[1]



937

Adjudications under SOPA in FY23

501

determinations released to the parties

Q4

applications lodged relating to sites in the Sydney region = **74%** followed by Hunter region = **9%** and the Illawarra = **3.3%**

subcontractors claimants = **64.1%**
head contractor claimants = **21.9%**

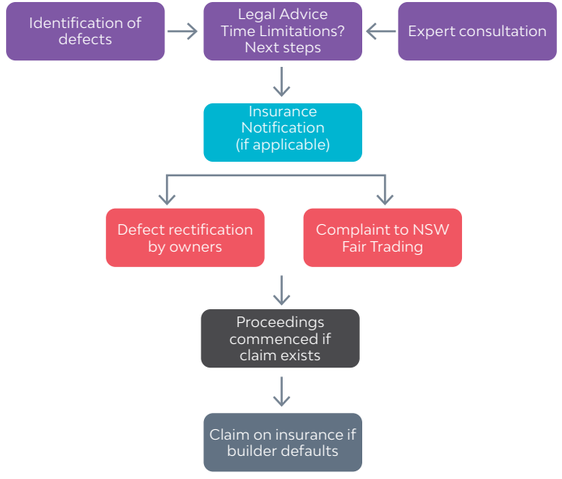
FY23 total value claimed amounts (determinations released) = **$683,851,171** while total value adjudicated amounts (determinations released) = **$329,741,377**

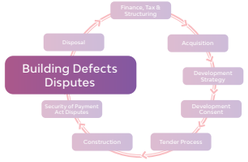
most frequent amount for claims adjudicated in FY23 Q3 = in the ranges of either **$10,000-$24,999** or **$40,000 – $99,999**

*NSW Fair Trading for period 1 July 2022 to 30 June 2023 (Q4 FY23)

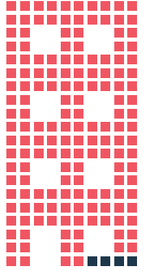
BUILDING DEFECTS DISPUTES

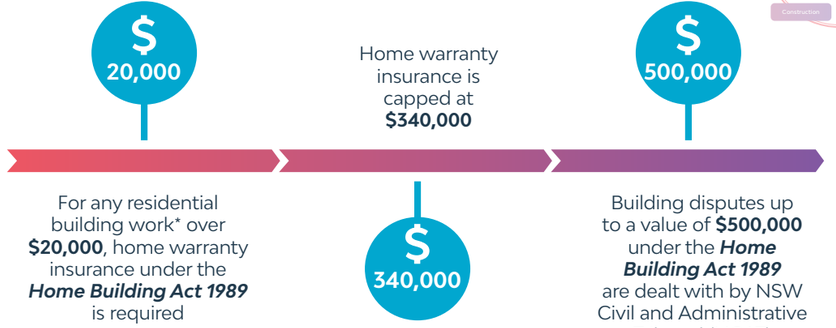
THE PROCESS OF DEFECTS DISPUTES AND RECTIFICATIONS UNDER THE HOME BUILDING ACT





HOME WARRANTY INSURANCE

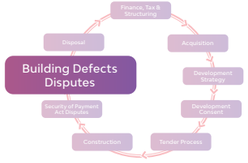






*Builders carrying out residential building work are not required to take out home warranty insurance for new buildings which are 4 or more storeys and contain 2 or more separate dwellings.

STATUTORY WARRANTIES UNDER THE HOME BUILDING ACT



Every building contract for residential work will contain the **statutory warranties** set out in **section 18B** of the ***Home Building Act 1989***

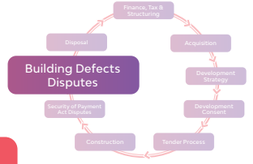
The statutory warranty period:
- for a **Major Defect** is 6 years from completion of the work; and
- for **Other Defects** is 2 years from completion of the work

Section 18B Statutory warranties include:

a) That work will be done:
   - with due care & skill
   - in accordance with plans & specifications
   - in accordance with and comply with all law
   - with due diligence
   - within the time stipulated in the contract

b) That work on a dwelling will result in a dwelling reasonably fit for occupation

STRATA BUILDING BOND



IMPOSES OBLIGATIONS ON PROPERTY DEVELOPERS IN NSW

Original property developer (not the builder) must pay a bond (3% of the contract value from 1 July 2024) to cover the cost of rectifying any defects before final occupation certificate issued

Buildings must be checked by independent building inspector to determine the existence of defects

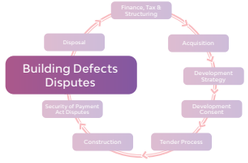
Contracts between developer and builder entered into after 1 January 2018

Buildings with four or more storeys

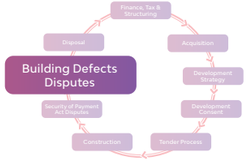
Buildings used for residential purposes (or a mix of residential and commercial purposes)

DECENNIAL LIABILITY INSURANCE

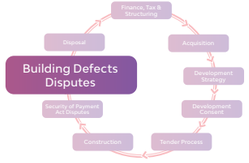
Changes to the Strata Schemes Management Act 2015 (NSW) introduced a decennial liability insurance scheme which is taken out by the developer of the strata scheme, for the benefit of the owner's corporation.



- Decennial liability insurance (DLI) operates as an insurance product which provides building owners with protection for a period of 10 years against certain types of defects.
- DLI is designed to operate as an alternative to the usual building bond provided to the Secretary of a strata scheme under the SSMA and will protect owners from delays and costs arising from defect rectification in their respective class 2 buildings.
- The DLI is taken out by the developer or builder of the class 2 building, and should the builder fail or refuse to undertake the remediation of the defects, the owners can lodge a claim with the respective insurer as insurance of first resort.
- The insurance policy is therefore taken out by the developer or builder of the strata scheme, for the benefit of the subsequent owners' corporation and operates as an alternative to the strata building bond, which would normally compel a developer to lodge a bond that is 2% of the relevant contract price (3% after 1 July 2024), to pay for rectification costs.



CLAIMS UNDER THE DBP ACT



DESIGN AND BUILDING PRACTITIONERS ACT 2020

The Design and Building Practitioners Act 2020 creates a statutory duty of care for all those working in the construction industry.

It means that every person who carries out construction work has a duty to exercise reasonable care to avoid economic loss caused by defects.

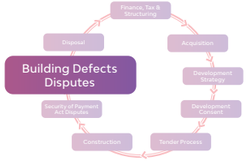
- in or related to a building for which the work is done, and

- arising from the construction work.

Construction Work not only includes building work, but also means supervising, coordinating, project managing or otherwise having substantive control over the carrying out of building work.

The statutory duty of care extends to all buildings, it is not limited to class 2 buildings and is owed to current and subsequent owners of buildings.

ANYWHERE, ANYTIME INSPECTION AND RECTIFICATION POWERS



RESIDENTIAL APARTMENT BUILDINGS (COMPLIANCE AND ENFORCEMENT POWERS) ACT 2020/HOME BUILDING ACT 1989



Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020/Home Building Act 1989



Applies to all residential building work (class 1 and 2 buildings).
Extends to the entirety of mixed-use buildings which include a residential component.



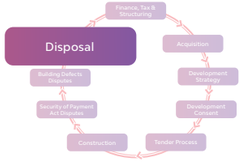
Empowers inspectors authorised by the Building Commissioner NSW to enter premises under construction or where construction work has been undertaken to inspect build quality and issue to developers and contractors:

1. Prohibition orders to block the issue of an occupation certificate (or strata plan)
2. Stop work orders and
3. Building work rectification orders (with the ability to recover costs associated with such orders).

DISPOSAL

SEAL THE DEAL WITH WATERTIGHT ADVICE

Once all the hard work has been done it will be time to dispose of the product. This may be by way of a sale or the grant of a leasehold interest depending upon the type of project, which may be:





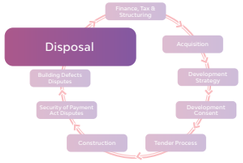
Build to lease

Retail, commercial and industrial leasing



Land subdivision and sale

We can assist with subdividing land for sale including securing ongoing property rights such as easements and rights of way





Off-the-plan contracts and sales

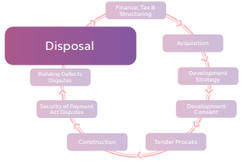


Selling brand new homes following construction

We can draft contracts to ensure compliance with the laws and regulations.

DISPOSAL

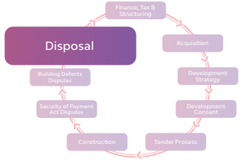
Documentation required may include:
Commercial or retail leases
Agreements for Lease
Contracts for sale of land
Master Contracts for off-the-plan developments
Put and Call Option Agreements.





It is imperative to get the documentation right to ensure efficient completion of the disposal of the assets and to minimise the risk of default and claims by purchasers.

DISPOSAL



The property sector is an important driver of the Australian Economy. Despite difficult economic conditions in 2021 there were:



76,104 lots released across capital city markets



46,406 multi-unit dwelling completions



An estimated 76,104 completions of detached houses in greenfield release areas



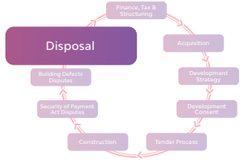
A combined total of 74,165 new homes completed in greenfield release areas and urban infill locations across major capital cities*



In the September quarter of 2023 there was $34.3 billion of total building work donewithin Australia (public and private sectors)**

*(Source: UDIA, CoreLogic, Research4)
**(Source: Australian Bureau of Statistics 8752.0, Building Activity, Australia Value of non-residential buildings approved https://www.abs.gov.au/statistics/industry/building-and-construction/building-activity-australia/latest-release.)

EMPLOYMENT, IR AND SAFETY CHECKLIST

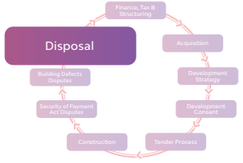


Does the business, and the subcontractors, have appropriate and current insurances, including workers compensation?

Are contractors properly engaged as independent contractors and not employees?

Does the business have robust practices and systems to ensure wage compliance, including by subcontractors?

Does the business and project have appropriate safe work policies and method statements in place, including addressing drug and alcohol, fall prevention and traffic management?



Does the site consult on safety with workers and other businesses on site, and have robust site induction practices?

Does the business have dispute resolution processes, and use them, for the prompt resolution of industrial and safety disputes?

Does the project and or site manager have a proper understanding of right of entry obligations and rights?

OUR TEAM

Our specialist team can guide you through the entire property and project development lifecycle to assist you achieve the best possible results.



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ABOUT BARTIER PERRY

Based in Sydney, we are a leading law firm with a proud 80 year history of providing expert legal services. Our clients benefit from our industry knowledge and holistic advice across every stage of the property and project development lifecycle. We go beyond the technicalities of the law and provide advice that gives our clients a competitive edge.

We have extensive experience in property law from conception through to realisation, assisting our clients to maximise their investments and to achieve their strategic objectives.

In delivering continuous value for our clients, we ensure you always have direct access to responsive Partners who balance deep technical expertise with providing clear, unambiguous and client-centric advice.

We provide tailored seminars for our clients. Presentations are also captured via webcast for our regional clients and available to view on our website. If you would like to subscribe to receive our bulletins and invitations, please visit **www.bartier.com.au/subscribe**

SUPPORT OF INDUSTRY

Educating and being involved with our relevant industries is important to us. It means together we are always current in an often-changing environment – not only with the law but with industry experts, current trends and broader industry information. We work with the various players in the industry to ensure we bring value back to clients.

Bartier Perry is a member and regularly sponsors, attends and hosts training events for the Master Builders Association, Urban Development Institute of Australia, Australian Property Institute and Planning Institute of Australia.

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