



DOING BUSINESS IN AUSTRALIA

2019 Guide

Why do business in Australia

The Australian economy is characterised by stability, competition and flexibility, making us an ideal location for foreign investment. Its proximity to Asia attracts multinational companies and sees many businesses setting up their regional headquarters here.

The Australian legal system is a mixture of common law and statute, similar to legal systems in the UK, other Commonwealth countries and some European countries.

This brochure provides an overview of what you need to know about doing business in Australia from corporate, commercial, property, taxation and employment perspectives. It is designed to support you in making the most of the opportunity of investing in Australia.

We can guide and advise you on setting up your business in Australia and can assist with any legal issues you may come across in the future. Our team at Bartier Perry are experienced, commercially-orientated lawyers who work together with small, medium and multinational businesses to guide them through the Australian legal framework and help businesses achieve their strategy targets and goals.

Starting up in Australia

A foreign company wishing to operate in Australia must register with the Australian Securities and Investment Commission (ASIC).

Structuring your business

The main ways foreigners do business in Australia are to:

- Trade directly (with the public) through a registered branch office
- Have a legal entity or presence in Australia, either by establishing or acquiring a subsidiary company or trust structure
- Collaborate with a local Australian business via a joint venture or partnership.

Here are the main points of each structure:

Registered Branch Office	
In summary	A foreign company can carry on business through a registered branch office.
Decision making	The head office is responsible for decision-making.
Stakeholder liability	The branch office is not separate from its foreign company, meaning they are responsible for any debt or liability owed by the branch.
Requirements	The branch must have a registered office in Australia and appoint a local agent.
Other	The branch office cannot sign contracts as it is not a separate legal entity. Only the foreign company can sign contracts.

Subsidiary Company	
In summary	A foreign entity wishing to trade in Australia can establish an Australian subsidiary. A company is a separate legal entity from its shareholders. A company can, in its own right, own assets, owe liabilities and be sued.
Decision making	Although shareholders can make decisions regarding the company, directors of the subsidiary have primary management responsibility of the subsidiary company.
Stakeholder liability	The liability of shareholders in respect of the company is generally limited to the unpaid amount on the shares issued to the shareholder.
Requirements	Typically, there must be at least one director, who resides in Australia.
Other	A subsidiary cannot contractually bind the head office as it is a separate legal entity.



Trust Structure	
In summary	A trust is a relationship where a (corporate or individual) trustee carries on business for the benefit of the trust beneficiaries.
Decision making	The trustee manages the trust assets and business for the benefit of the beneficiaries. The nature and extent of the trustee's powers are set out by the trust deed.
Stakeholder liability	Beneficiaries of a trust are generally not liable for the trust debts.
Requirements	There must be a trust deed which sets out the trust's purpose and the rights and obligations of the trustee and beneficiaries.
Other	The trustee is normally indemnified out of trust assets for liabilities incurred on behalf of the trust. Beneficiaries are not normally entitled to trust assets until they are distributed by the trustee.

Joint Venture	
In summary	A joint venture involves two or more parties carrying on business jointly while remaining separate parties.
Decision making	Decision making will depend on the nature of the joint venture agreement.
Stakeholder liability	The extent of liability will usually be set out in a joint venture agreement. Generally, the agreement will provide for liability to be several and separate, rather than joint.
Requirements	There must be an agreement between the joint venture participants. The agreement will typically cover decision making, responsibilities, the liabilities of the parties, the distribution of profits or product of the joint venture and the terms of exit.
Other	Assets are normally owned by participants individually, and obligations are usually assumed severally.



Partnership	
In summary	A partnership is a relationship between persons carrying on a business together with a view to profit.
Decision making	Each partner may make contracts, undertake obligations and dispose of partnership property in the ordinary course of the business. If there is a partnership agreement, the rights and obligations of the partners may be limited by the terms of the agreement.
Stakeholder liability	Normally, a partner is liable for the debts and liabilities incurred by other partners in the course of the partnership. The liability of each partner is unlimited, and is both joint and several. The partnership agreement may provide for liability to be limited to some extent. A limited partnership consists of at least one partner with limited liability, and at least one with unlimited liability.
Requirements	The partnership must be established by a valid agreement. Partnerships are usually limited to 20 partners.
Other	Each partner, except in a limited partnership, is an agent of the others. Therefore, every partner is bound by contracts entered into by any one of the partners carrying on the business.

There are variations and subcategories, with each quite unique in terms of characteristics and practical involvement, as well as how they are regulated. Depending on your goals and objectives, the business may need to be in a specific form or structure, such as if you are intending to list on the ASX. Our team at Bartier Perry are experienced practitioners who can advise you on what is most suitable for you and guide you on what you need to do to meet your current and future goals.

Regulations

There are some key regulatory issues you should consider when entering the Australian market:

1. Foreign Investment Review Board (FIRB) approval

Approval from FIRB may be required before a foreign investor contracts to buy or invest in some types of assets or business in Australia. Foreign investors include businesses where a non-Australian has a 20% or more interest, or a group of non-Australians collectively have a 40% or more interest. What you need to do will depend on:

- (a) Who the foreign investor is
- (b) What the asset or business being acquired is
- (c) The value of the asset being acquired
- (d) Whether the acquisition involves a sector considered to be sensitive, such as media or security technology.

If a foreign investor wants to invest in Australia, but has not identified the type of asset or business it wants to acquire or invest in, it may be possible to obtain FIRB pre-approval.

As the law around FIRB and obtaining FIRB approval can be quite complicated and confusing, we recommend that you speak to a Bartier Perry FIRB expert before making a strategic investment decisions in Australia to work out what you need to do to comply with Australian foreign investment regulation.

2. Anti-money laundering and counter-terrorism financing (AML/CTF) and Know Your Customer (KYC) processes

Australian banks administer Know Your Customer controls stringently. In opening accounts, banks will confirm a client's identity by various means, including collecting and verifying information about its beneficial owners.



They will also perform ongoing customer due diligence and report certain types of transactions and suspicious activity to the Australian Transaction Reports and Analysis Centre (AUSTRAC).

3. Work visas

All foreign workers must have a valid working visa. Australian businesses meeting certain criteria may sponsor workers to fill their staffing needs.

Issues specific to a particular industry, such as licensing and approvals, may also need to be considered. Examples include:

- Therapeutic Goods Administration (TGA) licensing to manufacture therapeutic goods
- ASIC licensing to provide financial services and conduct lending businesses, also known as an Australian financial services license (AFSL)
- Australian Prudential Regulation Authority (APRA) authority to be a bank.

Running a business in Australia

As part of operating any business, you may want to keep in mind some of the following:

Funding

Most businesses require start-up capital, and may also need capital until they become self-sufficient. Depending on long term plans, injections may be made via equity (e.g share placements and capital injections), debt (e.g loans), or instruments with characteristics of both (e.g convertible notes).

If debt funding is appropriate, consider whether it should be secured to protect against other creditors. This security may be subject to the Personal Property Securities (PPS) regime and require registration on the PPS Register to ensure you retain priority over other creditors.

Depending on how mature the business is, alternative sources of capital raising, such as crowd sourced funding or listing, may also be appropriate.

Intellectual Property (IP)

IP, including trade marks, patents, copyright, designs, domain names and trade secrets, is essential to many businesses and needs to be managed and protected. Ensure your IP is registered and maintained on the relevant registers, and take any enforcement action needed to ensure your rights do not lapse.

Competition Law and Unfair Business Practices

Anticompetitive behaviours are prohibited in Australia. They include cartel conduct, exclusive dealing, abuse of market power and other arrangements with the purpose or effect of substantially lessening competition. Approval to undertake certain activities however can be sought from the Australian Competition and Consumer Commission.

Australia also offers protection for small businesses against unfair business practices. In particular, activities such as misleading conduct and unconscionable conduct against businesses are normally prohibited. Any terms judged unfair in a standard form contract with a small business may be voided.

Consumer Law

Australian consumers have various rights and remedies when buying domestic goods and services. Protection includes implied warranties (such as that goods are of merchantable quality and are reasonably fit for the purpose intended), and the meeting of certain industry standards.

Privacy Law

The *Privacy Act 1988 (Cth)* (Privacy Act) regulates the collection, use, disclosure and storage of personal information by organisations. Organisations subject to the Privacy Act must publish a privacy policy. Depending on who the organisation does business with, this may need to also comply with the EU's General Data Protection Regulation (or GDPR) and other non-Australian laws.

We regularly advise clients that are subject to Freedom of Information (FOI) legislation and the Privacy Act on how to comply with the requirements of these Acts, how to respond to access to information requests and how to design and implement efficient and effective systems for managing their obligations under the various Acts.





Property law in Australia

Foreign investors typically look to either buy or lease property in Australia. Buying property confers all the rights of ownership, whereas leasing confers the right of exclusive possession for a specified period. Buying or leasing Australian property may require the approval of the Federal government. This is the first issue to examine when looking at Australian property transactions.

Buying real estate

Property buyers must undertake due diligence to confirm they can use the land for its intended purpose and whether it is subject to any issues. Zoning is especially important: if you want to develop the property for residential purposes, for example, and the land is in a commercial or industrial zone, you may have a serious problem.

Likewise, if you are buying property in an industrial zone for a residential development, always find out if it is contaminated or subject to any environmental pollution. If so, the local council or Environment Protection Authority may require it to be remediated before development begins, the cost of which can be prohibitive.

Property purchase throughout Australia is governed by contract for sale. The contract usually contains standard terms governing the process of the sale and purchase. Vendors must disclose certain issues, such as whether the property is subject to any proposal for acquisition by the roads authority for road widening purposes. The contract also contains terms specific to the property.

Always review the contract and its terms carefully and negotiate any terms you require before entering into the contract. Ensure you are buying the property on terms acceptable to you, your finances and your goals. We recommend speaking to a lawyer to ensure you do not miss out on any opportunities and all risks are covered.

Once signed counterpart contracts are exchanged, a binding contract is formed and the buyer and seller are bound to perform the contract and complete the sale and purchase according to the terms of the contract. Either party is free to end negotiations before this point.

Leasing

Leasing enables you to occupy a property for a particular purpose for a fixed period. The nature of the lease will vary depending on whether the property is commercial (such as an office space), retail (such as a shop) or residential (such as a house or apartment).

Retail and residential leases are highly regulated by statute and more tenant friendly than commercial leases. As with contracts for the sale and purchase of land, lease documents must be reviewed carefully to ensure the terms of the lease are acceptable to you. They may require negotiation to ensure you receive the lease incentive or fit-out that the landlord has promised, or that you can sublet or assign the property to another tenant, or that the obligations to make good the property at the end of the lease are not unduly onerous or expensive. The time to negotiate these and other important terms is before you enter into the lease.

Tax

Property ownership in Australia carries obligations to pay various Local, State and Federal government taxes, including council rates and State government levied stamp duty and land tax.

Property purchase may be subject to Federal government-levied goods and services tax (GST) and capital gains tax (CGT). You should consider the taxation consequences of purchasing property carefully before entering into a contract.

Likewise, tenants typically accrue obligations to pay various taxes under the lease, and the lease itself may also attract GST. As these taxes significantly add to the transaction, it is critical to consider them in detail and negotiate your position with the landlord before entering the lease.



Taxation Law in Australia

Australia's tax system is inherently complex and the tax laws are constantly changing. There are certain taxes which are levied at the Federal level and other taxes which are levied by each State and Territory Government. It is important to obtain tax advice prior to conducting business or entering into a transaction in Australia to ensure that you comply with your tax obligations. Below is an overview of some of the main taxes.

Federal Taxes

Income Tax

Application to Residents and Non-residents

Residency is central to Australian income tax. There are certain tests for determining whether an individual or entity is an Australian resident for income tax purposes. Broadly, Australian resident individuals and entities pay Australian income tax on all their income, regardless of where the income is sourced. Australian residents who also pay tax on income sourced in another country may receive a tax offset for the tax paid to prevent double taxation.

In contrast, non-resident individuals and entities (including branch offices of non-resident companies) generally only pay Australian income tax on income sourced in Australia.

Tax Administration and the Taxation of Individuals and Entities

Australia's income tax system is based on self-assessment. This means that taxpayers lodge income tax returns each income year (1 July to 30 June) to disclose their taxable income and determine their income tax liability.

Individuals pay income tax at progressive marginal rates. 45% is the highest marginal rate of taxation for an individual. Companies and branch offices generally pay income tax of 30%.

Partnerships do not pay tax on their income but must lodge an income tax return. Each partner then declares their share of the partnership's net income or loss in their individual tax return.

Trusts also do not pay tax on their income but must also lodge an income tax return. Generally, the trust's beneficiaries declare and pay tax on their entitlement to the trust's net income (even if it is not actually to them). The trustees are taxed at the highest marginal rate on net income to which no beneficiary is entitled.

Joint venturers are taxed separately and do not need to file an income tax return in relation to the joint venture.

Repatriation of Profits of Branches and Australian Subsidiaries

Provided that a branch office has already paid income tax in Australia on its profits, then there is no further income tax payable in Australia when profits are paid from the branch to a foreign parent company.

When an Australian subsidiary pays dividends to a foreign parent company, dividend withholding tax of 30% (or the rate specified in a tax treaty if the foreign country has one with Australia) will be payable to the extent to which the subsidiary has not 'franked' the dividend.

Franking a dividend involves allocating a credit for income tax paid by the company to the dividend so that the shareholder is treated as having paid that amount of income tax itself. The maximum franking credit which a company can allocate to a dividend is 3/7ths of the dividend. A dividend which has the maximum franking credit is known as a 'fully franked' dividend.

What is Taxable Income?

Income tax is levied on taxable income. Taxable income is assessable income less allowable deductions.



Assessable income consists of:

- Income according to ordinary principles, which includes income from property such as rent, income from personal exertion such as wages, and business income such as business profits
- Statutory income (for example, capital gains).

Certain types of income are exempt from income tax and are not included in assessable income. Allowable deductions are expenses and outgoings which are:

- Incurred in gaining or producing assessable income or
- Incurred in running a business for the purpose of gaining or producing assessable income.

Expenses and outgoings of a private or capital nature or which relate to the derivation of exempt income are not allowable deductions.

Capital Gains Tax

Capital gains tax is a statutory regime for taxing net gains from the sale of capital assets by including them in a taxpayer's assessable income. Whilst capital gains tax often results from the sale of an asset, there are many types of events which can also trigger capital gains tax.

Australian residents generally pay income tax on gains from the sale of capital assets regardless of where those assets are located. Australian resident individuals get a 50% discount on the capital gain if they have owned the asset for more than 12 months. There are various other concessions and exemptions from capital gains tax which can apply if specific conditions are satisfied.

Non-residents pay Australian income tax on capital gains from the sale of:

- Australian real property
- Business assets used in a branch office and
- Certain interests in entities which mainly hold Australian real property.

Fringe Benefits Tax (FBT)

Employers must pay FBT on certain non-cash benefits (that is, fringe benefits) they provide to employees in respect of employment, for example company cars and meals. There are certain exemptions and concessions from FBT that can apply to some fringe benefits.

Broadly, the value of the benefits are grossed up to reflect the gross salary employees would have to earn (on the assumption they pay tax at the highest marginal tax rate) to buy the benefits after paying tax. FBT is then payable on the grossed up amount at the FBT rate. The FBT rate is 47% for the current FBT year ended 31 March 2019.

Goods and Services Tax (GST)

GST is levied on the supply of most goods and services provided in Australia. The GST is generally 1/11th of the price of the supply.

If you carry on a business, you must register for GST if your turnover is \$75,000 or more. Registering for GST means that:

- You must pay GST on taxable supplies of goods and services and
- You are entitled to credits for the GST embedded in the price of inputs (unless the inputs are used for a private purpose or are used to make input taxed supplies).

Businesses do not need to pay GST on:

- GST-free supplies, such as basic foods, some education courses and medical products
- Input taxed supplies, such as lending money, or selling and renting out existing residential premises.

Businesses and consumers both pay GST for goods and services. However, because GST is generally refunded to businesses (through credits) consumers ultimately bear the burden of the GST.



Superannuation guarantee charge

Superannuation is a system for funding the retirement of Australians. Superannuation contributions are held in superannuation funds which are concessional tax and highly regulated. Businesses must pay superannuation to workers who earn \$450 or more (before tax) each month. These payments are in addition to workers' normal wages and are paid into the workers' respective superannuation funds.

Businesses must pay superannuation of at least 9.5% (the "superannuation guarantee") of a worker's ordinary time earnings at least on a quarterly basis. A "superannuation guarantee charge" is imposed where superannuation entitlements are unpaid or are paid late. The government collects this charge and in turn pays superannuation entitlements to the workers concerned.

Failing to pay the appropriate level of superannuation entitlements to workers can result in severe penalties being imposed. In addition, the Australian Taxation Office can issue directors of companies with director penalty notices which make them personally liable to pay the superannuation guarantee charge of the company.

PAYG withholding

Businesses must register for Pay As You Go (PAYG) withholding to withhold tax from payments they make to employees, to certain contractors and to businesses which do not quote an Australian Business Number. PAYG withholding is not a tax, it is a system for collecting income tax. The directors of a company can be made personally liable for PAYG withholding amounts if the company fails to meet its PAYG withholding obligations.

Customs and excise duty

Customs duty is payable in respect of goods imported into Australia. Different rates apply, depending on the classification of goods imported.

Excise duty is a tax on certain goods, mainly, alcohol, tobacco and fuel. Businesses, which produce, store or manufacture these goods in Australia need to have an excise licence and may need to pay excise duty based on the amount of the goods.

State and Territory Taxes

Stamp Duty

Stamp duty is imposed on certain transactions (such as transfers and agreements for sale) in relation to certain 'dutiable property' (for example, real property). Stamp duty is calculated on the dutiable value which is the greater of the unencumbered value or consideration paid for the dutiable property. It is paid by the transferee/purchaser of the dutiable property.



Stamp duty is charged at progressive rates based on the dutiable value of the dutiable property. Many States impose additional stamp duty surcharge on the purchase of residential property by foreign persons.

Land Tax

Land tax is an annual tax on the unimproved value of real property usually determined with reference to valuations of the Valuer General in the particular State or Territory. Certain individuals and entities will qualify for a land tax threshold, meaning they will not have to pay land tax until a certain value is exceeded.

There are various land tax exemptions and concessions. Exemptions can apply to land used as an individual's principal place of residence, boarding houses, farms and primary production land, or land owned by charities.

Many States have imposed additional land tax surcharges on residential land owned by foreign persons.

Individuals and entities who own land in Australia must generally register for land tax with the relevant State or Territory revenue authority.

Payroll tax

Payroll tax is a self-assessed tax paid on the wages a business pays if those wages exceed a threshold amount.

Payroll tax rates and thresholds vary between States and Territories. In New South Wales the payroll tax rate is 5.5% and the threshold amount is \$850,000 for the 2018/19 income year.

Individual and Business Succession Planning

Individual Succession Planning

Every Australian State and Territory has complex succession laws. Therefore, anyone who owns real property or other substantial assets in Australia should consider preparing an Australian Will. The laws specify:

- Certain formal requirements for Wills to be recognised by the Court
- The process by which a Will is proven before a Court and a grant of Probate/Administration is obtained. Generally, unless an estate is of little value, a grant of Probate or Administration must be obtained from the Court before an estate can be administered
- Procedures for certain eligible persons to challenge a Will and make a claim for further provision from an estate.

Business Succession Planning

Business succession planning is crucial to ensure continuity and minimise the risk of disputes.

If a business is owned by people who are not related, a business succession plan may involve putting in place a buy sell agreement. This will ensure that ownership is passed to the continuing owners if one owner retires, dies, becomes critically ill, or can no longer work. The agreement should fairly compensate the exiting owner and their family.

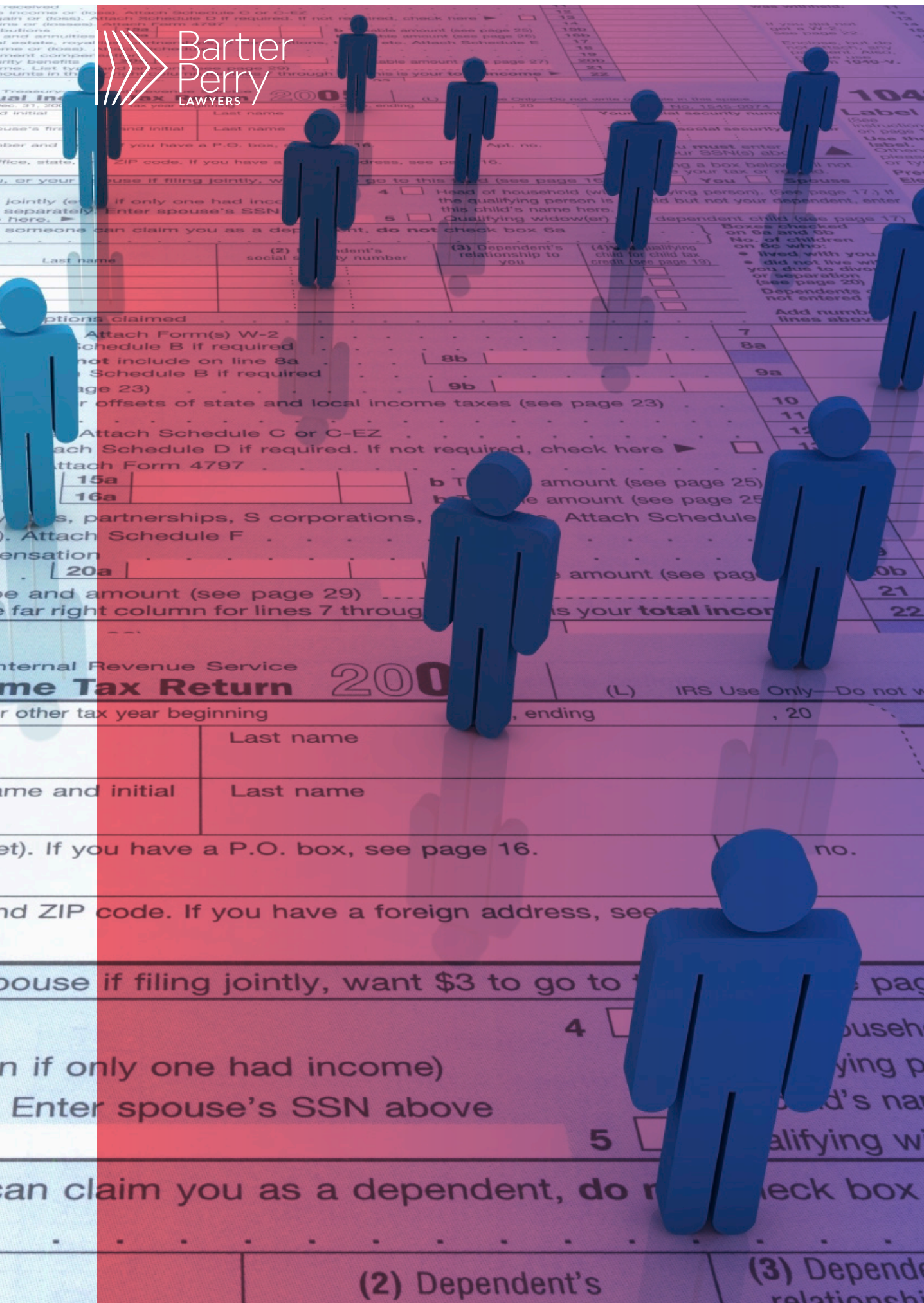
In a family business context, succession planning might mean transitioning ownership to the next generation through a Will or deed of family arrangement in a way that minimises conflict within the family.

For trust structures, it is critical to ensure that control of the trust is passed on to the right person and that the trust is structured to benefit the intended people if the controller of the trust dies.

If you have any questions about taxation, superannuation, deceased estates, trusts or personal and family business succession please contact the Private Clients team at Bartier Perry.

Details for this section are current as at 16 November 2018





Bartier
Perry
LAWYERS

Australian employment and labour law

Australia is a federation. Each jurisdiction has different laws. It is necessary to comply with a number of Federal and State laws relevant to employment.

For corporations, the Federal *Fair Work Act 2009* (a Federal law) is the overarching law of employment. Each State and Territory has legislation which can also apply. There are also Federal anti-discrimination, superannuation (pension) and privacy laws.

The employment relationship and contract

There are recognised types of employment relationships in Australia:

- Permanent part-time or full-time
- Casual
- Temporary or fixed term.

Employment relationships are governed by an employment contract (written or oral). It is prudent for the employment relationship to be carefully documented.

Awards, enterprise agreements and unions

Awards set minimum standards and conditions that apply across industry and occupational sectors. Awards cover certain classes of employees. They apply as a matter of law.

Enterprise agreements may apply to an employer and cover all its employees in certain categories. An employer collectively negotiates an enterprise agreement with its workforce.

Unions have rights to represent employees and may have a presence in certain workplaces. Employees covered by an Award or enterprise agreement are often members of a Union.

Leave

Permanent and temporary employees in Australia are entitled as a matter of law to certain types of leave, including:

- Annual leave (20 days a year)
- Public holidays (approximately 12 days a year)
- Personal/carer's leave (10 days a year)
- Long service leave (approximately two months after 7-10 years' service)
- Parental leave (one year unpaid per child, including adopted children)
- Compassionate leave (2 days per occasion, for example a death of an immediate family member).

Employment contracts, employer policies and awards and enterprise agreements may provide for more generous leave entitlements.

Casual employees are also entitled to certain leave benefits, some unpaid and some paid.

Workplace surveillance and privacy

Some States and Territories regulate employer surveillance of telecommunications, computers, internet, email use, GPS and video surveillance.

Privacy laws apply to prospective employees, but an exception applies in relation to employee records for current or former employees.



Work safety

Each State and Territory has its own work health and safety laws; however, most have adopted harmonised laws.

These laws require that an employer, as far as is reasonably practicable, ensures the safety of its workers. They also impose other obligations on employers, such as consulting with workers.

Workers are also obliged under work health and safety laws to take reasonable care and comply and cooperate with their employer.

Workers' compensation

Australian employers must have workers compensation insurance to cover employees for expenses in relation to work-related injuries (e.g lost wages or medical).

Anti-discrimination laws

The Commonwealth and each State and Territory has its own laws prohibiting sexual harassment and discrimination in employment. Employers are required to comply with both laws.

An employer will breach anti-discrimination laws where it treats an employee unfavourably because they have a protected attribute. Protected attributes include race, sex, disability, age, religion, family responsibilities, sexual orientation and pregnancy.

Victimisation is also prohibited, which occurs when an employer takes detrimental action against an employee because the employee has been involved in a complaint of discrimination or in proceedings alleging discrimination.

General Protections

The *Fair Work Act* also protects the workplace rights of employees in Australia. It prohibits an employer taking adverse action (that is, some detrimental treatment) against an employee due to that employee exercising (or not exercising) a workplace right. A "workplace right" is broadly defined.

Termination of employment

If an employee commits serious misconduct, an employer may dismiss them immediately without notice or payment in lieu of notice.

The employment contract usually stipulates how much notice is required to be given for employers to terminate an employee's employment. Generally, an employment contract will provide for 4 weeks' notice.

At a minimum, the *Fair Work Act* prescribes notice of termination, on a scale with a maximum of 5 weeks. If a contract does not specify a notice length, the employer risks being obligated to give much longer than five weeks, if such longer notice is reasonable in the circumstances.



An employer may pay an employee in lieu of having them work out their notice period.
An employer may not terminate employment for a prohibited reason (e.g a discriminatory reason).
Where an employee is employed for a fixed term or specified project, their employment may terminate automatically at that specified time or on completion of the project. Their employment may also be terminated early if provided in the employment contract or if they commit an act of serious misconduct.
Except in certain circumstances, casual employment can be terminated simply by not offering another shift to that employee (that is, by removing them from the roster).

Redundancy

If an employer no longer needs an employee's job to be done by anyone, the employment will terminate due to redundancy.

Reasonable redeployment within an employer's organisation may need to be considered.

Awards and enterprise agreements have consultation provisions which must also be followed in a redundancy process, if applicable.

In addition to notice of termination, redundant employees are entitled to additional payments on termination of up to 16 weeks' pay.

Employee claims after termination

If an employee believes their employment was terminated for a prohibited reason, they may make a claim under anti-discrimination legislation or in the general protection's jurisdiction under the *Fair Work Act 2009*. Compensation and other awards can be sought.

An employee may also be able to pursue an unfair dismissal claim if they are eligible.

When an employee lodges an unfair dismissal claim, the Fair Work Commission considers whether there was a valid reason for the dismissal and that a fair process was followed in the termination of employment.

The main remedy for unfair dismissal is reinstatement or up to 6 months' pay.

Protecting your business after termination of employment

Australian businesses often include provisions in employment contracts to protect their interests after an employee leaves. Provisions typically cover:

- Restraints of trade and non-solicitation
- Confidential information
- Inventions, discoveries and intellectual property.

If an employee breaches any of their ongoing obligations, an employer may write to them or their new employer, or institute proceedings against them. The right approach will depend on the circumstances.

Transfer of employment in business acquisitions

When a business changes owners, collective industrial instruments that covered the workforce may automatically transfer to the new owner.

In business acquisitions, the incoming employer usually has to recognise entitlements of the existing workforce, including sick and carers' leave, flexible working arrangements and parental leave.

In some circumstances, it is possible in the commercial terms of acquisition to exclude continuity of some entitlements, such as annual leave. However, the old employer will be required to pay out certain entitlements where they are not recognised by the new owner.

If the new owner is not able to offer the same or similar employment terms and conditions, redundancy may arise. Employees have a right not to accept employment with the new owner.



Commercial Disputes

Commercial and contractual disputes are a fact of life in business and can often be time consuming and complex.

Australian legal disputes are governed by a mix of statute and Common Law principles, and different courts and tribunals to handle cases, depending on whether the matter is Federal (or Commonwealth) related, and State or Territory related. Non-court matters may be resolved by various panels, ombudsmen and other bodies.

To minimise time and costs on legal issues, choose lawyers with a specialised understanding of the avenues available for resolving commercial disputes. That way, you can focus your time and energy where they should be – on the business.

In our experience, rushing to court is not always a good idea. If we are involved early, we can identify and deploy strategies, such as mediation and arbitration, to bring about early resolution.

If you find yourself facing a dispute, try first to negotiate a workable solution that minimises disruption, maintains relationships and lets you get on with business.

How to minimise commercial and contractual disputes

Commercial and contractual disputes can arise in all aspects of commercial activities including manufacturing, distribution, licensing, finance, property acquisition and leasing. Five steps you can take to minimise disputes are:

1. Manage contracts so that the other party keeps their end of the bargain.
2. Be aware of false, misleading or deceptive conduct and misrepresentation, both alone and in conjunction with a contract claim.
3. Terminate contracts when you need to or enforce a breach of contract if it is in your commercial interests to do so.
4. Enforce your property rights, such as establishing rights of access and easement, avoid or enforce mortgages or guarantees, maintain or remove caveats, and manage conflicts in commercial and retail leases.
5. Protect your confidential information, including client lists and company or trade secrets, and enforce restraints and non-competition clauses.

Shareholder, partnership and joint venture issues

Issues that can arise between co-shareholders/directors, partners and joint venture participants include:

- **Between shareholders:** if a stakeholder believes the company's direction and finances have been managed oppressively, they can apply to the courts for an oppression claim seeking that shares be purchased or the company wound up. Such claims often involve potential breaches of directors' duties that in some circumstances may impose a personal liability on a director
- **Between partners:** on the basis that trust and confidence have been lost, and the partnership should be dissolved or one or more partners removed. Such claims are governed by State based Partnership Acts, and can result in orders for account of profits, or buying out of interests
- **Between joint venture partners:** where the venture is not being managed or progressed in line with the agreement between the parties, causing loss to a party or failure of the venture itself.

Family-related business disputes

Many Australian businesses are run by families, or supported by family funding or other assistance. They often leverage personal assets and may be family members' primary source of funding for personal expenses and asset creation.





Disputes in this context are often highly emotional and difficult to navigate. Thanks to rising property and business values, significant assets may be at stake.

Our commercial disputes team has a discrete focus on this area, and is experienced at sensitively unravelling complex personal and business structures. This work requires deep knowledge of company and trust law, and options for dealing with family disputes effectively while also providing advice to protect assets and minimise risk.

Securities enforcement and finance issues

Businesses must have appropriate financial arrangements in place with banks and third party lenders. But satisfying lenders' covenants can be challenging, particularly in the early stages of new ventures or in changing market conditions.

Our lawyers are adept at navigating finance and security related issues, and can move quickly and effectively when disputes arise. Our experience extends to:

- Advising on and assisting restructuring, finance and security arrangements
- Enforcing loan agreements, mortgages, guarantees and other finance-related obligations, and defending such claims
- Recovering debts and managing personal and corporate insolvencies

We are also experienced with disputes in which a business may hold an Australian Financial Services Licence, and may be subject to operating conditions as a result. We routinely represent clients when the Australian Securities and Investment Commission (the regulatory body for this type of licence) is gathering information about a business' activities, seeking to impose conditions on licences, or intending to suspend or ban licence holders and their directors in respect of financial services activities.

Intellectual Property (IP) disputes

It is important to develop IP protection strategies to protect your business if disputes arise. Our IP experience extends to:

- **Trade marks:** claims that a registered trade mark is being breached, possibly involving parallel importation or breaches of an exclusive licence arrangement, requiring factual investigations, cease and desist letters, and court action to enforce or defend, sometimes in very short time frames. Where a trade mark is unregistered, claims for passing off and misleading or deceptive conduct may also be available
- **Patents:** claims that a registered patent is being breached, requiring factual investigations, cease and desist letters, and court action to enforce or defend, sometimes in very short time frames
- **Copyright:** claims that copyright, and possibly also moral rights and authorship (all of which are unregistered rights in Australia) are being breached, requiring factual investigations, cease and desist letters, and court action to enforce or defend, sometimes in very short time frames
- **Breach of confidence and trade secrets:** claims against a supplier, employee or other person to prevent misuse of inside knowledge of your business, whether protected by an agreement or simply by confidentiality conveyed at the time the information was supplied.

Consumer disputes

Competition and consumer law regulates and limits how businesses of all sizes can behave when selling products or services, whether in-store or online. It applies to every stage of a transaction – from drafting terms and conditions through to advertising of a product or service.

The Australian Competition and Consumer Commission (ACCC), which is the Federal regulatory body for these laws, investigates suspected anti-competitive practices including cartel behaviour. It is supplemented by State-based fair trading laws.



The many laws that apply to engaging with consumers can give rise to disputes in such areas as:

- Product liability and safety, including product recalls
- Breach of consumer guarantees
- Misleading or deceptive conduct
- Restraint of trade
- Franchise arrangements.

Personal Property Securities Act

The *Personal Property Securities Act 2009* (PPSA) has rewritten how businesses need to record their interest in personal property – other than land, fixtures and a handful of statutory rights – in many common transactions.

That leaves financial assets, goods and equipment, intellectual property and other property, which must be registered on the Personal Properties Security Register (PPSR). If they're not, a business may lose them in an insolvency to a liquidator, administrator or bank receiver.

Our commercial disputes team are experts in PPSA law, and routinely help businesses manage their PPSR registrations and exercise their rights in this area.

Debt recovery and insolvency

Insolvency and being owed money are facts of commercial life. How we deal with them can have a profound effect on both our business success and individual wealth.

Our commercial disputes team has developed a debt recovery process that leads the market in effectiveness and cost competitiveness. We pursue debts of all sizes, guiding clients through the recovery process, including enforcement of any judgments obtained.

A company facing financial distress in Australia has many processes and options available, as shown here.

Debt recovery	For multiple debt portfolios. There are both formal and informal processes, including a Letter of Demand; or enforcement of judgment in the Local Court, District Court, Supreme Court and Federal Court.
Voluntary administration	Restructuring a business' finances through an administrator. There is no court involvement in this process; the administrator will take control of the company's business, property and affairs. The objective is to investigate and maximise the chances of the company continuing to trade.
Liquidation	Involves the assets and property of the business being dissolved. The business may be wound up voluntarily or by a court order.
Receivership	A creditor or the court will put a business into receivership to take control of some or all of its assets.

Many duties are imposed on company directors in Australia by the Corporations Act and at Common Law. One of the most important is to prevent the company from trading while insolvent. If found to have done this, a director can be personally liable for relevant debts incurred.



Newly introduced 'safe harbour' provisions provide a mechanism to avoid this potential liability, provided a particular process is applied.

Our commercial disputes lawyers are experts in this area and can provide pragmatic and effective advice and guidance.

Building and Construction law

The Australian building and construction industry is subject to more laws and regulations than any other industry. As well as planning and environment law and workplace health and safety matters, a multitude of Acts and regulations dealing specifically with building and construction are constantly being developed and revised by Local, State and Federal government.

A business must manage contractors, developers, sub-contractors, joint venture partners and other parties involved with building and construction law. Issues may arise in front-end contract preparation and negotiation, risk allocation and administration of the contract during a project. Because claims often arise, negotiation and alternative dispute resolution techniques will minimise lost time and costs for your business.

When handling commercial buildings, public infrastructure and/or industrial buildings, a business must consider:

- Documentation for construction and development projects
- The drafting and negotiating of a suite of consultant and builder construct only, and design and construct, contracts
- The *Environmental Planning and Assessment Act 1979*, the *Local Government Act 1993*, the *Home Building Act 1989* and related legislation
- Its rights under construction contracts and construction-related insurance policies
- Defending and prosecuting *Building and Construction Industry Security of Payment Act 1999* claims.



Why Bartier Perry?

Bartier Perry is a firm of 80 lawyers based in a single office in the heart of Sydney, Australia.

With over 80 years of operations, we are proud of our reputation as one of Sydney's best established and respected law firms. We are also proud of being a modern professional services firm.

Our clients fall into four broad categories:

- Businesses of all shapes and sizes
- Government (including all tiers, as well as agencies and public bodies)
- Insurance (including employers, self-insurers and specialised insurers)
- Private clients (such as entrepreneurs and investors).

Our focus areas include:

- Commercial Disputes
- Corporate and Commercial
- Property, Planning and Environment
- Superannuation
- Taxation
- Wills, Estates and Trusts
- Insurance
- Workplace Law and Culture.

We are collaborative in the way we work – not only with our clients, but with each other. Collaboration ensures our clients receive the highest-quality legal advice that the firm can offer.

Our culture of hiring people who demonstrate integrity and respect, and work well in teams, means we work in an environment that is high achieving and honest.

Most importantly, we grow and recruit lawyers who are the best and the brightest in their fields. Within our areas of focus, we encourage our lawyers to become specialists, and to collaborate whenever appropriate to obtain the best results for our clients.

For more information, or if you have a question not answered here, please don't hesitate to contact us.

REBECCA HEGARTY

Partner
Corporate & Commercial Law

P + 61 2 8281 7941
rhegarty@bartier.com.au



GAVIN STUART

Partner
Commercial Disputes Law

P + 61 2 8281 7878
gstuart@bartier.com.au



GREG BLEWITT

Partner
Corporate & Commercial Law

P +61 2 8281 7914
gblewitt@bartier.com.au



LISA TO

Partner
Taxation Law

P +61 2 8281 7917
lto@bartier.com.au



MELISSA POTTER

Partner
Property Law

P +61 2 8281 7952
mpotter@bartier.com.au



CHRIS TSOVOLOS

Partner
Taxation Law

P + 61 2 8281 7821
ctsovolos@bartier.com.au



DARREN GARDNER

Partner
Employment Law

P +61 2 8281 7806
dgardner@bartier.com.au



FIONA HOAD

Partner
Family Law

P + 61 2 8281 7872
fhoad@bartier.com.au





Bartier Perry Pty Ltd
Level 25, 161 Castlereagh St
Sydney NSW 2000 Australia

PO Box 2631
Sydney NSW 2001
T +61 2 8281 7800

ABN 30 124 690 053
bartier.com.au