



Monthly Information Newsletter – Tax & Super

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Briefing a barrister

When you're faced with a complex or high-risk question in tax or super, briefing a barrister can provide you with the expertise and perspective to help you move towards a solution with confidence.

Barristers (who are also referred to as "counsel") are independent specialists in court work and legal advice. There are specialist barristers across Australia in tax, super and associated areas of law. This includes "Queen's Counsel" or "Senior Counsel", who are barristers of seniority and eminence. The barristers who practice in tax and super will particularly be familiar with the ATO, and also the decision-making approaches of the Administrative Appeals Tribunal (AAT) and the Federal Court of Australia.

Why brief a barrister?

Although barristers are best known for their courtroom advocacy, that's only part of what they offer. Barristers, through their training, experience and networks, are intimately familiar with the decision-making processes and reasoning of courts and tribunals. When barristers address complex and high-risk legal questions, they provide precise advice and practical solutions guided by how laws are interpreted and applied by courts and tribunals in practice.

You may consider briefing a barrister to provide advice on high-risk or high-value matters, or when you have limited time to answer a complex question. In those situations, it's prudent to obtain specialist advice to ensure you fulfil your duties. A barrister's expertise and objectivity will provide you with confidence as to the best approach in the circumstances.

Who can brief a barrister?

Anyone can brief a barrister. There are broadly two ways you can do it:

- directly (where you brief a barrister without engaging a solicitor), or
- indirectly (where you engage a solicitor and instruct them to brief a barrister).

Directly briefing a barrister (which is also referred to as "direct access" briefing) can provide you with cost and efficiency benefits. Generally, barristers are less expensive than solicitors of equivalent experience.

Barristers are not obliged to take direct briefs, but many do.

Barristers may directly give legal advice and may prepare and advise on certain legal documents (in addition to their dispute related work). Importantly, barristers can be directly briefed to appear in the Administrative Appeals Tribunal (AAT).

There are slightly different rules in each Australian state and territory on the types of work that barristers can and can't do, and the circumstances in which you can directly brief a barrister. Generally, barristers are not permitted to undertake work traditionally performed only by solicitors, such as conducting general correspondence or other administrative tasks in relation to the client's legal affairs.

In some circumstances, barristers who have been directly briefed may later request that their client also engage a solicitor. This will occur where the absence of an instructing solicitor would seriously prejudice the client's interests (for example, where a solicitor is needed to help the client gather large amounts of evidence).

Who should you brief?

As a starting point, the bar associations of each state and territory maintain a website where you can view and search the profiles of every barrister in that jurisdiction. On those websites, you'll be able to identify the barristers who practice in tax and super and view their background, experience level and contact details. Just search for "bar association" in your state or territory.

If you've engaged a solicitor, they'll be able to recommend a good barrister. If you want to brief directly, but you don't know who to brief, you can obtain guidance from barristers' clerks. The clerks act like an agent for a large group of barristers. The clerks have familiarity with the expertise,

experience and availability of each barrister. The clerks' contact details are also on the bar association websites.

Preparing a brief

Historically, a "brief" was a comprehensive set of papers given to a barrister to enable them to appear, advise, or draft or settle documents (as the case may be). Today, barristers are more versatile in what they receive from clients (and how they receive it).

If you've directly briefed a barrister, you should first speak to them about the nature and form of documents and information they require you to provide. For example, where you require tax advice on a legal question, your barrister may (depending on the circumstances) ask you to provide the following types of documents and information:

- questions upon which you require legal advice
- timeframes for the provision of that advice
- identity of all parties involved in the subject matter of the advice
- chronology of key events, and
- key correspondence, contracts and other documents.

Barristers will also have their eye on ensuring their advice is commercially acceptable. For this reason, it is useful to also inform them about:

- your purpose for engaging in relevant activities, and
- any commercial issues likely to influence your preferred approach.

Some tips

If you're going to brief a barrister, you should keep these tips in mind:

- Brief early: This will give your barrister the opportunity to read the brief, understand your circumstances and seek out any further information.
- Brief clearly: Precisely communicating what you want from your barrister (and when, how and why you want it) will provide you with the best outcome.
- Brief orderly: Where you need to provide lots of documents, speak to your barrister about the form and categorisation in which they prefer to receive, store and use them.

Barristers offer you legal expertise from a practical perspective. You should visit the website for the bar association in your state or territory if you want further information about the role of barristers or if you want to find a barrister to help you.

DISCLAIMER

All information provided in this article is of a general nature only and is not personal financial or investment advice. Also, changes in legislation may occur frequently. We recommend that our formal advice be obtained before acting on the basis of this information.

Our liability may be limited by a scheme approved under Professional Standards Legislation.