



National **Pro Bono** Resource Centre

**SUBMISSION TO THE PARLIAMENTARY JOINT
COMMITTEE ON CORPORATIONS AND FINANCIAL
SERVICES
INQUIRY INTO CORPORATE RESPONSIBILITY**

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The well-being of the corporation cannot be separated from the well-being of the community.

Introduction

The National Pro Bono Resource Centre (**'The Centre'**) exists to support and promote the provision of pro bono legal services. Its role is to stimulate and encourage the development, expansion and coordination of pro bono services as well as offering practical assistance in this regard.

The Centre is an independent, non profit organisation that aims to:

- encourage pro bono legal services,
- support lawyers and law firms to make it easier for them to provide high quality pro bono legal services,
- and work with the profession and the community sector to match services with the clients and groups most in need of assistance.

The Centre receives financial assistance from the Commonwealth Attorney-General's Department and support from the Faculty of Law at the University of New South Wales.

The Centre has established an Advisory Council and consults widely with the legal profession, community sector, and other relevant people.

The Centre is well placed to comment on how the more modern notion of corporate social responsibility and the established idea of legal pro bono work interact in the legal sector.

The legal profession

Law firms are in a unique situation in relation to this inquiry because:

- The legal profession has a long and proud tradition of providing pro bono legal services. This is a form of social responsibility and may provide a useful example of the way in which an industry provides its services without charge for the interest of the broader community.
- Many law firms are structured as partnerships and therefore are technically outside the terms of reference of this inquiry because they are not incorporated entities but some are incorporated. (State and Territory based restrictions on a legal practice incorporating are set out in Attachment A)
- In terms of their behaviour in undertaking corporate social responsibility activities and having formal pro bono programs, the fact of their incorporation seems to make little difference to how they behave.

Terms of reference addressed in this submission

The specific terms of reference (TOR) the submission will address are as follows:

- a. The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders and the broader community.
- b. The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders and the broader community.
- e. Alternative mechanisms including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.
- f. The appropriateness of reporting mechanisms associated with these issues.

a. The extent to which organisational decision-makers have an existing regard for the interests of stakeholders other than shareholders and the broader community.

Within the legal profession, organizational decision makers, be they managing partners or boards of directors, as exist at some firms, endorse and support formal community involvement programs and pro bono legal programs. Firms will make a clear distinction between their pro bono activities and their broader corporate social responsibility activities. The firms expend considerable resources in implementing these programs.

For example Clayton Utz's Community Connect program consists of pro bono legal practice (26,000 hours in 2004/2005), people volunteering in the community (staff are permitted one Community Leave Day each year) and through a separate Clayton Utz foundation provides financial grants to charities (over \$300,000 in 2004/2005 to 28 charities).

Other large law firms make similar significant commitments.

What is pro bono?

Pro bono legal services are one way in which individuals, community organisations and social groups can increase their access to justice. Pro bono services support and extend the legal services provided by legal aid commissions and community legal centres.

The expression 'pro bono' comes from the Latin phrase '*pro bono publico*' meaning for the public good. While most lawyers who undertake pro bono in Australia contribute their time at no cost to the client, many definitions of pro bono include work which while not free is done at a substantially reduced fee.

Pro bono has long been a part of the professional practice of many Australian lawyers. The last decade, however, has seen a significant growth of pro bono through more structured and organised programs and through the creation and expansion of formalised pro bono schemes, including referral schemes. Pro bono is now being embraced not only by individual practitioners and smaller firms but by larger law firms and some

corporations at an institutional level. For example in-house lawyers from the National Australia Bank and TABCORP both participated in the Homeless Persons Legal Clinics in Victoria which are organised by the Public Interest Law Clearing House in Victoria.

Corporate pro bono is a burgeoning industry in the USA,¹ where it includes corporations forming partnerships with commercial law firms to undertake pro bono projects. It is however, relatively undeveloped in Australia although there are opportunities for Australia's in-house corporate legal teams to become involved in the context of 'corporate social responsibility' programs,

Why do it?

The main reason commonly cited for the legal profession's obligation to provide pro bono services is the 'service ideal' of the legal professional to help those that would otherwise not obtain access to legal services.

However, there are also good business reasons for a law firm undertaking pro bono work.

These include:

- Lower attrition rates for younger lawyers
- Enhanced reputation in the community for the firm which can then attract more fee paying clients
- Career and personal development for staff
- Pride and increased productivity

However the overriding motivation for lawyers to undertake pro bono work seems to be the desire to help socially disadvantaged and marginalised people who would not otherwise obtain access to legal services.

What types of assistance are provided?

The more common kinds of pro bono legal assistance include

- legal advice,
- court representation,
- legal assistance to non profit organisations,
- community legal education,
- submissions to government on matters of public interest (law reform),
- other legal work, including drafting documents.
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Who does legal pro bono work help?

Clients access pro bono in a number of ways. Some come via formal pro bono legal schemes such as those established by Public Interest Law Clearing Houses, professional associations, the courts and miscellaneous local or issue based organisations such as Spare Lawyers for Refugees. Others are offered by Community Legal Centres (CLCs),

¹ See, for example, Corporate Pro Bono.Org at www.cpbo.org

legal aid bodies and Indigenous legal services. There are also services offered by outreach organizations and community centres and general (non-legal) referral schemes such as Pro Bono Australia and Go Volunteer.

We know from the few available sources that the main recipients of pro bono are:

- individuals including asylum seekers, homeless people, Aboriginal people and others from lower socio-economic backgrounds.
- community organizations – either incorporated non-profit organisations or unincorporated groups
- CLCs
- charities.

b. The extent to which organisational decision-makers should have regard for the interests of stakeholders other than shareholders and the broader community.

The Centre would argue that all corporations should have regard for the interests of the broader community. The argument essentially is that the well-being of the corporation cannot be separated from the well-being of the community.

Pro bono providers in the legal profession benefit significantly in matters where other professions and organisations are willing to contribute their services on a pro bono basis and this encouraged by the Centre. For example through such services as Volunteer Match, Go Volunteer and Good Company, the Centre understands that accountants in particular volunteer their time to assist community organisations in need.

These services are vital to the well-being of the community.

e. Alternative mechanisms including voluntary measures that may enhance consideration of stakeholder interests by incorporated entities and/or their directors.

The Centre refers the Committee to two measures that are used in the legal profession context to enhance consideration of the broader community.

1. Governments making a specific form of social responsibility a condition of doing business with Government. This has occurred in Australia.
2. Professional bodies setting aspirational targets for firms to meet or be measured against.

In 2002, the Victorian Government used its bargaining power to encourage law firms to undertake pro bono by making it a condition of the Government Legal Services contract, that each firm be required to spend on ‘Approved Cause’ pro bono work, 10-15% of the amount of fees received for legal work for Government. In August 2005, 32 firms were reporting to Government for the first time on their compliance with this condition for the period 2002-2005.

The Australian Law Reform Commission recommended in 2000 that practitioners should consider themselves bound by an ethical duty to provide legal services free of charge for a significant number of hours per year, and this obligation should be set out in the professional conduct rules, perhaps subject to qualifications that make allowance for differing capacities of individual solicitors to achieve such a target.

These 'aspirational targets' have not yet been adopted in Australia but the Centre continues to advocate for their introduction.

f. The appropriateness of reporting mechanisms associated with these issues.

Both of the measures outlined above have some type of reporting mechanism. The Victorian Government initiative creates a contractual obligation to report on the amount of pro bono work done over a three (3) year period and the Government issued guidelines on what would count as pro bono work.

The aspirational targets initiative is less formal in the sense that it is unenforceable and is aspirational only. What is proposed for this initiative is a simple annual reporting of whether the aspirational target has been met and the Centre would publish a list of those firms that have met the target.

Pro bono legal work provides an interesting example of social responsibility because many who undertake it are driven solely by the 'Good Samaritan' ethic and do not seek recognition for it. However at a firm level, particularly large firms, they do want visibility of their program both internally and externally as it can be a source of pride within the firm and lift morale and externally can enhance the reputation of the firm as a good corporate citizen which may make it more attractive for clients to place their legal work with that firm. The experience of the legal profession is that once the activity is at a level higher than the individual then visibility of that activity is important to the firm. With visibility comes the need for good record keeping of these types of activities

Reporting mechanisms takes this process one step further because it usually involves reporting to a third party who usually sets the measures for these activities. Reporting mechanisms assist the comparison between entities as to these activities and provide greater transparency for stakeholders as to the nature of activities undertaken. However, if too rigorous or 'imposed from above' they can act as a disincentive for entities to truly embrace the spirit of giving and contributing to the community to which they belong. In the legal profession mandatory schemes have been considered contrary to the 'voluntarist' ethic of pro bono work and requirements to do certain amounts of pro bono work could discriminate against smaller firms which can lack the financial capacity to provide free services.

ATTACHMENT A

Restrictions on the incorporating a legal practice

The power to incorporate

There are various statutory restrictions on legal practitioners and firms incorporating. The restrictions have been imposed on the basis of concerns that practitioners will have additional responsibilities as directors of legal service companies and the need for these responsibilities to match and not conflict with their professional responsibilities as lawyers.

In NSW:

The New South Wales *Legal Profession Amendment (Incorporated Legal Practices) Act 2000* (LPA) permits solicitors to conduct business under a form of incorporation.

However, it is a requirement that a solicitor must be generally responsible for the management of legal services (s47E) and a solicitor director may be charged with professional misconduct for not having in place appropriate management systems.

To the extent that the provisions of the LPA or Regulations conflict with the Corporations Act, the provisions of the LPA will prevail.

It has been suggested that:

“the new requirement in respect to the implementation and maintaining of appropriate management systems is likely to present many firms with the greatest challenge”²

Victoria

The Legal Profession Practice Act (Vic) 1958, permits solicitors to incorporate. However, there are restrictions on the structure of the corporation. The Western Australian Law Society in a discussion paper about options in WA highlighted that one of the disadvantages of the Victorian system is that “the directors and shareholders of a solicitor corporation must all be current certified practitioners (or their family) which restricts the opportunities to establish multi-disciplinary practices.”

The Victorian Legal Ombudsman has recently released a discussion paper on multi-disciplinary practices. The paper recognises that incorporation should facilitate multi-disciplinary practices, the introduction of which has received significant support within the Victorian legal profession including from the Victorian Attorney-General.

Queensland

Queensland practitioners are currently unable to incorporate their practices. The only business structures permitted are sole practice or partnership.

² Purcell, T, *Legal Practice: Management systems for your incorporated legal practice*, Law Society Journal, March 2001 Page 46. Accessed: <http://www.lawsociety.com.au/page.asp?partid=4002>

South Australia

Solicitors in South Australia can incorporate, however, such corporations are subject to restrictions on ownership and management pursuant to provisions of the *Legal Practitioners Act 1981*. A competition review of the legal profession is currently being conducted including a review of the existing restrictions on legal business structures.

Nevertheless, the SA Law Society Council recently rejected the Law Council's initiative to support multi-disciplinary practices.

Tasmania

Incorporation of legal practices is permitted in Tasmania subject to restrictions imposed by the *Legal Profession Act 1993*. These restrictions are similar to those existing in South Australia, Victoria and New South Wales such that the shareholders and directors of solicitor corporations must be solicitors or their associated entities. There are no current initiatives in Tasmania to review legal business structures.