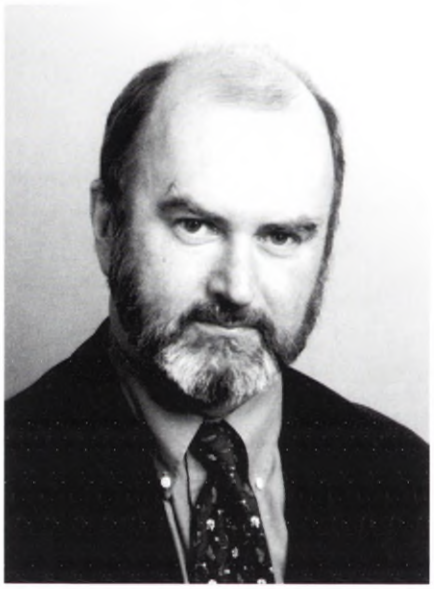
Pro Bono Law: *Who Benefits?*



"we need to look beyond traditional 'charitable' and 'salaried' models for legal service delivery to advance pro bono and public interest law in Australia."

Peter Cashman is the National President of APLA and a partner at Maurice Blackburn Cashman. PO Box A266 Sydney South NSW 1235 **PHONE** (02) 9261 1488 **FAX** (02) 9261 3318 **EMAIL** pcashman@cashmans.com.au

Commonwealth Attorney-General Daryl Williams AM QC MP convened the First National Pro Bono Law Conference in Canberra in August. The conference was for the purpose of honouring and promoting work done by all sections of the legal profession "for the public good". The conference was also intended to serve as a catalyst for the further development of pro bono law in Australia.

Interestingly, those members of the private profession in attendance were predominantly from commercial and "defence" firms with very few APLA members present.

There are of course obvious constraints on the nature and volume of "pro bono" work able to be undertaken by most large firms which act on the traditional pay-as-you-go basis. It is interesting to note, at least from the North American experience, that the enormous increase in the profitability of private law firms in recent years has corresponded with a decrease in the amount of pro bono work undertaken by such firms.

Recent data would tend to indicate that private firms in Australia, the United Kingdom and North America are achieving record levels of profitability. In the United States, there has been a 56% increase in gross revenue for major commercial law firms over the past decade. This amounts to a 34% increase in profits per partner, *after* adjustment for inflation. However, in the period since 1992, there has been a 35% decrease in pro bono hours worked by the top 100 commercial law firms. The average pro bono contribution, per lawyer, is 8 minutes a day. This stands in marked contrast to the average of 8-10 hours per day serving the commercial interests of fee paying, predominantly commercial, clients. In the United States, one large commercial law firm billed in excess of $US1 billion last year.

Whilst there has clearly been an increase in pro bono activity among large commercial law firms in Australia, it would also appear to be the case that these firms are achieving record levels of profitability. Similarly, in the United Kingdom, recent data indicates that most of the large commercial law firms, particularly in London, are making record profits with individual partners now receiving in excess of 1 million pounds per annum in some firms.

Although the Canberra conference provided an opportunity to highlight the important contribution being made by many commercial firms in Australia through the development of pro bono programs, such programs are relatively modest in terms of their operation and institutionally incapable of taking on contentious or complex litigious matters, particularly where there may be conflict of interest problems in relation to commercial clients of the firms.

The Canberra conference also addressed a number of concerns that the Federal Government was seeking to

rely on the "charity" and "goodwill" of the private legal profession as a substitute for the provision of adequately funded legal aid services in Australia. Although this was expressly rejected by the Attorney-General, no satisfactory explanation seems to have been given for the significant decline in federal funding for legal aid services in Australia in recent years.

The purpose of the present article is to contend that we need to look beyond traditional "charitable" and "salaried" models for legal service delivery to advance pro bono and public interest law in Australia.

There are a number of ways by which this could be achieved. Each involves the creation of additional financial incentives, and rewards, for lawyers *and clients* prepared to take on meritorious cases pursuant to a speculative or no-win-no-pay fee agreement. Although the prospect of recovery of fees provides an incentive for plaintiff law firms to act on behalf of clients with good cases, there are obvious shortcomings. The traditional disparity between "party party" and "solicitor client" costs usually means that either the lawyer does not get paid in full if the case is successful or alternatively the successful client is required to forgo a proportion of the damages or settlement in order to meet this shortfall.

These problems are compounded by the fact that in some jurisdictions, even where premium or "success fee" mark ups are recoverable at the conclusion of successful litigation, the premium component of the fee is not ordinarily recoverable from the unsuccessful party even where an order for costs on an indemnity basis is made.

There needs to be additional economic incentives and means of financing and facilitating pro bono and public interest legal service delivery in Australia. This can be done both by increasing the quantum of recoverable damages and by providing for alternative means of recovery of legal fees and expenses in appropriate cases.

Some disincentives to public interest litigation need to be removed. For example, consideration needs to be given to mechanisms to protect public interest and class action litigants, and their lawyers, from adverse costs orders in appropriate cases. Statutory provisions which achieve this objective in New South Wales (for example section 47 of the *New South Wales Legal Aid Commission Act*) have no application in Federal proceedings. Earlier draft federal legislation many years ago which sought to provide legally aided parties with protection from adverse costs orders was not promulgated following the demise of the Whitlam Labor Government.

Schemes for insuring against adverse costs orders, which are now common place in the United Kingdom, should be introduced in Australia. APLA is currently having discussions with a number of persons in the insurance industry with a view to the development of such a scheme in Australia.

In class action litigation there should be schemes for using uncollected damages for public interest purposes. Current federal class action legislation provides that where a defendant is liable and where the damages are not collected because all members of the affected class do not come forward, then the defendant is entitled to keep the ill gotten gains. The legislation should not foster unjust enrichment, it should facilitate public interest utilisation of damages in circumstances where adversely affected class members do not come forward to collect their entitlements personally.

Further consideration also needs to be given to the establishment of a class action fund in order to provide financing for class action litigation. Recommendations on this issue, made by the Australian Law Reform Commission in its report on class actions in Australia, have not been implemented.

Tax subsidies for unsuccessful defendants and insurers who unsuccessfully defend meritorious claims should be abolished. At a minimum allowable deductions should be restricted to expenses that are "reasonable".

There are a variety of other means whereby greater financial incentives could be provided for lawyers to conduct public interest and pro bono litigation without dependence on traditional "charitable" and "salaried" methods of legal service delivery.

At the conclusion of the recent conference on pro bono law an advisory group was appointed to consider recommendations for future developments. One recommendation adopted was for the establishment of a national task force.

Such a task force should adopt a broad perspective concerning mechanisms for enhancing legal service delivery "for the public good". "Charitable" models are unlikely to achieve even minimum expectations. In the United States, Model Rules of Professional Conduct have, since 1963, provided that lawyers should spend at least 50 hours a year on pro bono work. A recent study indicated that only 11 of the top 100 commercial firms in the United States met this standard.

Most participants at the Canberra conference opposed a 'minimum hour' requirement. Given that increasing profitability seems to be associated with a decreasing commitment to pro bono service delivery, 19th Century charitable models should be abandoned in favour of mechanisms which provide adequate financial incentives, for both litigants and their lawyers, to pursue public interest and pro bono goals. It seems quite clear that governments, at both state and federal level, are not prepared to make the necessary financial allocations out of consolidated revenue to provide proper funding for legal aid services in Australia. Greater financial incentives for private lawyers and their clients are needed to supplement both charitable and salaried legal service delivery models. PL