Credits Where More than Credit is Due¹

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Introduction

It is well established that a ‘justice gap’ exists in Australia. While foreshadowed cuts to government funding were recently alleviated in the budget, concerns remain². In the absence of an adequately funded legal assistance sector³, the Australian legal profession continues to provide commendable levels of pro bono work⁴. Nevertheless, more can be done. The introduction of a Pro Bono Trading Scheme in which credits are awarded for pro bono work – which can then be traded or used to purchase billable work – would be a transformational change to the response to legal need in this country and would allow for greater pro bono work to be offered by even small firms and solo practitioners with more limited resources. Such a scheme would not be the catalyst for an increased burden on the profession - as the refrain goes, pro bono work is no substitute for a properly funded legal aid sector – but would work hand in hand with an increase in government funding that is long overdue.

1. The Justice Gap

In 2014, the Productivity Commission recommended that $200 million in additional legal funding was required to:

- relax the means test of legal aid commissions⁵;
- maintain Community Legal Centre services; and
- continue to provide broad support in areas of law overlooked by other funding⁶.

The failure of government to fix this gap is manifest in the reporting of Community Legal Centres. According to the National Census of Community Legal Centres, 159,220⁷ enquirers were turned away from community legal centres in 2015-2016, with 67.3% of CLC’s stating that they did not have adequate resources to assist the enquirer.

¹Title inspired by: Chris Sanders, ‘Credit Where Credit Is Due’ (2007) 70(2) Tennessee Law Review, 241
³Legal Aid Commissions, Community Legal Centres, Aboriginal and Torres Strait Islander Legal Services and Family Violence Prevention Legal Services.
⁵This did not include a consideration of criminal law matters.
2. Pro Bono Trading Scheme ("PBTS")

2.1 Pro Bono Credits ("PBC’s")

PBC’s would be the currency of the PBTS. PBC’s would be awarded to solicitors upon completion of a variety of works of legal assistance, including, but not limited to:

- attending to pro bono tasks;
- attending to low bono tasks;
- participating at Community Legal Centres; and
- producing current e-resources, including precedents, templates and fact sheets.

The value of an activity, how many PBC’s it is worth, would be set by a scale which would be drafted and overseen by a body of relevant stakeholders. "Low bono" work would relate to severely discounted assistance to persons who otherwise may not be able to afford legal assistance and cannot be covered by Legal Aid’s strict means test. In such instances, PBC’s would be awarded at a reduced rate, relative to comparable pro bono matters.

2.2 The PBTS Marketplace

Work that can be bid on with PBC’s, as well as each participating firm’s balance of PBC’s, would be maintained by a national online register with input from the legal assistance sector. This register would approve the awarding of PBC’s upon notification by the relevant legal assistance body of an activities completion.

2.3 Purchasing Work with PBC’s

PBC’s would then be used to bid on billable work at auction. Work to be auctioned would include:

- government work, including tenders;
- an expanded range of legal aid referral matters brought on by relaxed grant criteria; and
- other work as may be applicable.

Practitioners would only be able to purchase work in areas that they have been pre-approved to work in by the regulatory body.

2.4 A Trading Market

Highly profitable items (i.e. a tender to act for the Commonwealth in relation to Immigration matters) would be bid on aggressively by firms with high capacity. This will force interested firms to compete for as much pro bono work as possible. It is imagined that these firms will also seek to purchase PBC’s from smaller firms and sole practitioners to successfully outbid competitors for work, thus, a trading market would emerge. Allowing PBC’s to be traded will allow for all firms and sole practitioners to be incentivised by pro bono. While smaller entities may not be able to compete for all the available work, they will be able to:

- sell their PBC’s to larger firms so that those firms may bid on their desired matters;
- purchase discrete tasks as available; and
- save and purchase tasks for themselves that they have demonstrated capacity in.

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8 Including, but not limited to: Law Council of Australia; National Legal Aid; National Association of Community Legal Centres; National Aboriginal and Torres Strait Islander Legal Services; National Family Violence Prevention Legal Services Forum; and Respective Federal and State Government Departments relevant to each area of law.
While smaller firms traditionally, and understandably given their more limited resources, have not been able to provide the same amount of pro bono work per capita than their larger counterparts, a PBTS incentivises them to pursue pro bono work, secure in the knowledge that resources spent on same can lead to future work. They can compete for and provide pro bono work in areas of law that larger firms do not have the capacity or inclination to assist in. Large firms surveyed in 2017 confirmed that Criminal and Family Law enquires continue to be their two most rejected areas of law, which is not surprising given that both these areas are generally outside the expertise of larger firms orientated towards general civil law. Thus, family and criminal law, in addition to other pro bono work, offers a vast opportunity for smaller entities to gain PBC’s for use in the PBTS.

3. Supporting the Scheme

At first blush, limitations on the PBTS would seem to include the availability of government work and legal aid referrals to private providers. While Commonwealth private legal expenditure is increasing, legal aid work must be funded as has been advocated by stakeholders. An increase in funding, resulting in the relaxation of strict means testing, can allow for more legal aid and, proportionally, more legal aid referrals to private solicitors.

Support through Untapped Resources

An increased focus on pro bono work, particularly by smaller firms incentivised by the PBTS, would be balanced by the legal service providers being able to choose which matters they take on and when. Additionally, it is suggested that:

- the assistance of law graduates; and
- streamlined and uniform technical support, including the production of uniform pro bono precedents and templates in conjunction with the courts and state law societies;

can support even smaller firms and sole practitioners in rising to meet this demand.

Conclusion

Opening the inaugural National Access to Justice and Pro Bono Conference, the Honourable Murray Gleeson lamented, “particular forms of need that have been identified and selected, probably without any grand design… I cannot imagine what kind of grand design would work; or who would be an acceptable designer”. A PBTS scheme allows for the legal assistance sector to market matters and a legal profession, with its diverse expertise, to respond

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12 Pro bono admission requirements would be one way of achieving graduate involvement, see: ‘New York State Bar Pro Bono Admission Requirement’, University of Virginia Law School, accessed 30 May 2017 <http://www.law.virginia.edu/html/publicserv/newyork_probono.htm>

13 As has been the case in the United States, where law students and court staff have collaborated to provide self-represented litigants with cloud-based documents: <http://www.a2jauthor.org/7`

to unmet legal need driven on by the incentive of future work, in addition to its established altruistic tendencies.