Australian Lawyers and Social Change

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When I was first invited to speak at the conference I was a little suspicious that I might have been invited as the token "black hat". Perhaps I'm a little paranoid. At the same time I am a partner in a major commercial law firm - Clayton Utz at that - and would appear to be the only speaker at the conference from my side of the street.

Of course, you may be surprised by what I have to say. I am, after all, a member of the first graduating class from Macquarie University Law School - the home of critical legal studies in Australia. As such, I was part of the cadre - one of that group of students whom Professor Gill Boehringer famously described in one of the more heated faculty debates as the students who are being trained to be the "shock troops to change the legal profession".

That having been said, I would not want to disappoint the organisers by not being at least a little bit provocative.

However, before I start being provocative, let me take a moment to make it clear where I, and I believe the vast majority of my colleagues, stand in relation to the role of lawyers and social change.

My position is a simple one.

First, lawyers and the legal system have a vital role to play in achieving social justice in the communities in which they live and work and in effecting real social change. We, as a profession, are uniquely equipped in terms of our education, our training experience and, perhaps most importantly, our access to the system to make a real difference.

Lawyers working within the legal system have been a catalyst for real social change in many parts of the world. Sometimes their actions have had a profound effect in terms of the way certain groups are treated - consider the impact of US Supreme Court's decision in *Brown v Board of Education* and the impact that has had on the US in the 50 years since that decision was delivered. An example, that is closer to home is the High Court's decision in *Mabo*. Of course, not everything we do will have the impact of *Brown* or *Mabo*. Indeed, these will be the exception rather than the rule and, yes, sometimes we'll lose.

Second, participation is not optional.

Lawyers at every level, and in every part, of the profession have a role and a duty - yes a duty - to play a part in creating and maintaining a just society.

When I say all lawyers I mean all lawyers. That includes those of us who practice in the commercial environment, who act for multi-nationals and for government. It includes graduate solicitors and partners in law firms. It includes both juniors and silks at the bar.
It has been suggested that lawyers "on day release from corporate law firms" who are acting on a pro bono basis can't or don't really make a contribution to the campaign for social justice or play a real part in bringing about social change.

That suggestion is quite simply wrong. It is short sighted. It is also insulting.

While the figures in Australia are difficult to obtain the last Australian Bureau of Statistics data suggested that something like 700,000 hours of pro bono work were undertaken by Australian lawyers. Now I acknowledge that one can argue about what this means and how it is calculated. Nevertheless, it is indicative a substantial commitment on the part of Australian lawyers to an ideal which clearly has a good degree of support. I also suspect that a significant part of the total comes from the commercial law sector.

In any event lets not argue about that number - rather, let me be more specific. While I don't know what happens in some firms I do now what happens in my own.

As you know, I am a partner in Clayton Utz - one of Australia's largest commercial firms. For us pro bono work is part of the culture of the firm. There is an expectation that everyone - both partners and non partners participate in the program in a meaningful way. A lawyers contribution to the pro bono program forms part of our internal evaluation scheme - once again for both partners and non partners. We take it seriously.

At Clayton Utz last year the firm's partners and solicitors undertook some 25,000 hours of pro bono work. That's the equivalent of something like 15 lawyers working full time.

The work that was done in the pro bono program was work that was done for the client on a "no fee" basis. Not on a "no win no fee" basis nor a "contingency" basis. There was no charge to the client in terms of either costs or disbursements.

The work that was recorded as pro bono does not include work that was done 'on the side' for friends nor work that was undertaken on behalf of organisations which, while they may have a community focus are, in truth, businesses in their own right which can well afford to pay for the legal services they require. Rather, these were legal services provided to individuals or organisations which would not otherwise have been able to obtain the assistance of a lawyer.

While a significant part of the work in the pro bono scheme was conducted on behalf of individuals it also includes a range of broader programs. Take, for example, our involvement in the Victorian Homeless Persons Legal Clinic. This is a program which we and others are supporting in Melbourne.

The project operates at two levels. First, it provides face to face legal advice to individuals. Second, it has achieved a degree of systemic change. For example:

- The projects' lawyers have worked with the Australian Electoral Office to make it possible for homeless persons to get on the Electoral Roll and vote - something which was virtually impossible in the past.

- Second, the lawyers working on the project have also succeeded in changing the way in which courts in Victoria deal with homeless persons.
It may not be *Mabo* but the project has made a real difference both in terms of helping individuals with their personal problems and in terms of how the community treats the homeless. And it was done by partners and solicitors on day release from the sweatshops.

Lawyers in private practice - particularly the larger commercial firms - do have something to offer. We have the ability to throw significant resources at a problem where that is appropriate. We also have real expertise in the conduct of complex litigation or negotiations - be that with government or the private sector.

The bottom line is that lawyers on day release have both the ability and a willingness to contribute to the cause of social justice. I have no doubt that as the concept of the pro bono obligation matures in Australia we will see those skills and resources being used to a greater extent in projects which have as their primary focus the aim of social change and social justice.

Let me turn now to something which may prove to be a little more controversial.

Over recent years there has been an increasing tendency amongst some who describe themselves as plaintiffs' lawyers to portray what is essentially a very profitable business as public interest litigation or part of the fight for social justice.

It is often said that those who are acting for plaintiffs in actions for compensation, for example, in product liability claims, are doing more than simply attempting to recover compensation for their client's loss or injury. Rather than just suing for damages, it is said that the lawyers are using the law, and in particular tort law, to promote social change and control.

Litigation is advanced as a universal panacea to ensure the achievement of social justice and a happier and safer world. Indeed, it has been suggested that the threat of litigation is all that stands between the consumer and chaos.

Mr Rod Davis, a former president of the Australian Plaintiffs Lawyers Association, is on the record as saying:

"The one thing that makes professionals pay attention to the detail of delivery of proper services is the risk of being sued ...[and the subsequent increases in insurance premiums]"

Frankly, I would have thought that most of you here today would vehemently disagree with that sentiment - at least in as far as your delivery of professional services is concerned.

Similarly, we are repeatedly told that product safety can only be ensured through the threat of product liability litigation or that corporations and those that manage them can only be kept honest by the spectre of litigation.

It is also argued that the civil justice system and litigation on behalf of individuals is needed to fill a void where government is either unwilling or unable to act to protect the community.

Another former president of the Australian Plaintiffs Lawyers Association, Dr Peter Cashman, has made some interesting observations in relation to this proposition. Speaking on the subject of corporate law enforcement Dr Cashman derided what he described as "bureaucratic enforcement and the policing model".
Rather, Dr Cashman suggested that Australia should move to the US model, using financial incentives such as treble damages to encourage what he described as

"entrepreneurial plaintiffs and entrepreneurial lawyers".

He went on to say:

"There is almost a system of bounty hunters that has developed in the US…they are private attorney generals seeking to advance the public good, albeit for private gain".

While I have no objection to their seeking to advance the public good it is the private gain which has, sadly, distorted the system.

The private enforcement model of course has its own problems.

First, imposing significant financial penalties on a corporation for the benefit of an individual or a class and their lawyer ignores the fact that it is usually the broad community that ends up bearing much if not all of that cost. Today most corporations are owned not by the robber barons of the 1920s but by a broad range of shareholders who include superannuation funds, pension funds and the so called mums and dads. Similarly, when a company is forced into liquidation it is not the senior executives or directors who end up on unemployment - rather, it’s the workers who just don’t have the same ability to move on to greener fields.

Second, the prospect of huge legal fees has the potential to cloud judgement and obscure the real issues. While contingency fees or conditional fee agreements have obvious benefits for plaintiffs who might not otherwise be able to have their day in court they also create a mechanism whereby those acting for a plaintiff can generate enormous fees from the litigation.

Class action litigation has become an extraordinarily profitable business in Australia. The concept of class action litigation as a business has its origins in the US where the fees that are being extracted by some plaintiffs lawyers are, quite simply, unconscionable.

Unfortunately, this is not something which is unique to the United States. There are now a number of corporate litigation funders operating in Australia which have found a way around the prohibition on true contingency fee agreements. These operators, one of which is listed on the ASX, are now entering into agreements which involve their taking 30 - 40 per cent of the verdict in addition to the benefit of any costs order the plaintiff may obtain. Little wonder Australian plaintiffs' lawyers are pushing for the so called prohibition on contingency fees to be removed.

Let me make it clear - I am not suggesting that there are not instances where litigation bought on behalf of an individual or a class has led to changes in the way in which companies and governments behave. Clearly, it has.

Unfortunately, there have also been many instances where speculative, lawyer driven litigation, has led to tragic consequences.

Perhaps the best examples of what is wrong with this model is the concept of the follow-on litigation. By that I mean litigation involving a particular class or category of product or activity which follows on behind successful litigation involving a supposedly similar target. Pharmaceuticals and medical devices provide some of the most outrageous examples of the problem.
Perhaps the best examples of what is wrong with this model is the concept of the follow-on litigation. By that I mean litigation involving a particular class or category of product or activity which follows on behind successful litigation involving a supposedly similar target. Pharmaceuticals and medical devices provide some of the most outrageous examples of the problem.

In the 1970s, the Dalkon Shield intra-uterine contraceptive device or IUD was marketed in various parts of the world including the US and Australia. It was, on any view, a bad product which caused enormous suffering. The conduct of the manufacturer was outrageous and the corporation was quite rightly brought to its knees through litigation.

The saga also led to significant changes to the way in which governments regulate medical devices. All of this was admirable.

Unfortunately, as soon as the manufacturer of the Dalkon Shield had been put into bankruptcy plaintiff's lawyers around the world turned their attention to the other IUDs which had nothing in common with the Dalkon Shield. The most prominent of these was the Copper-7 or Gravigard IUD. Almost immediately it found itself as the focus of a new wave litigation.

The same lawyers and the same experts from the Dalkon Shield litigation now turned on the Copper-7. Never mind the fact that it was the Copper-7 that had been used by those experts as the control in the experiments that had demonstrated the dangers of the Dalkon Shield. Never mind the fact that the overwhelming majority of medical opinion around the world supported the Copper 7 as a safe and efficacious. Never mind the fact that the manufacturer was winning the early cases.

Although the litigation against the Copper-7 ultimately failed the consequences were far more significant. First, the Copper 7 and then most other IUDs disappeared from the market. Not because a court had found against the product but simply because the insurers were not prepared to keep paying the cost of the litigation - even though they were winning.

As a consequence contraceptive choice was limited. A number of women in the United States died as a consequence of their having been forced to use contraceptive methods for which they were contraindicated. In addition, most of the world's major pharmaceutical companies, including GD Searle & Co which had brought both the first oral contraceptive and the first copper IUD to market, simply walked away from research and development in the area of contraception. Those companies were simply unwilling to participate in a sector of the industry which had been overrun by litigation.

And this whole saga was portrayed as public interest litigation being conducted by lawyers who were fighting for social justice and to change the system..

So why is this an issue?

It's an issue because it brings discredit on those who truly are in engaged in the fight for social justice.

It's an issue because it harms not helps the community.
Its an issue because it gives credibility to those who would seek to limit the ability of lawyers to bring proceedings in proper cases or who wish to extinguish the right to recover compensation where it should be provided.

At the end of the day is a question of balance and integrity.

The one thing that is clear is that it is sometimes harder in real life to work out who are truly the black hats than in the movies.