

## ESSAY 2

### EXPLORING THE CONCEPT OF PUBLIC INTEREST LAW

MEGAN PRICTOR

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#### INTRODUCTION

Arnold Bloch Leibler (ABL) is a boutique commercial and corporate law firm established in Melbourne in 1953.<sup>1</sup> As well as specialising in property, taxation, and litigation involving blue-chip companies and high-net-worth individuals, ABL has developed a leading reputation for its public interest law practice under the direction of partner Peter Seidel. Its work in this area has included representing the Yorta Yorta Aboriginal Nation in native title litigation, lodging a landmark complaint with the Australian Human Rights Commission on behalf of the Northern Territory's Wadeye people for prolonged under-resourcing of education, and acting for the estate of Rolah McCabe in proceedings brought by British American Tobacco.<sup>2</sup> With achievements including pro bono work to the value of \$2.5 million in 2008/09, and fee-earners contributing an average of 70 hours a year to these endeavours,<sup>3</sup> the firm rightly touts its public interest credentials. Yet a large proportion of ABL's public interest work takes the form of relatively mundane transactional lawyering, providing pro bono advice to not-for-profit organisations on corporate governance issues, including, in large part, making applications for tax exempt and deductible gift-recipient (DGR) status.<sup>4</sup>

In this essay, I will briefly outline the development of various branches of 'public interest law' and describe ABL's public interest taxation and corporate governance work. I will then consider in detail the extent to which ABL's involvement meets various definitions of the field, in terms of access to justice, systemic change, the

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<sup>1</sup> Arnold Bloch Leibler, 'Arnold Bloch Leibler celebrates 50 years' (2003).

<sup>2</sup> Arnold Bloch Leibler, 'Double the commitment to pro bono, public interest law [media release]' (16 September 2009).

<sup>3</sup> Ibid.

<sup>4</sup> Arnold Bloch Leibler, 'Native title and public interest law' (February 2010), 3.

‘public interest’ itself, and the new corporate philanthropy.<sup>5</sup> I will argue that whilst the work itself is traditional, and the clients are less disadvantaged than some, ABL’s contribution nonetheless epitomizes various aspects of public interest legal practice.

## CONTEXT

The definition of ‘public interest law’ is highly contested.<sup>6</sup> Dhavan and Noone have outlined how its roots lie in concerns for the poor and disadvantaged, initially utilising ‘prescribed solutions’ and institutional frameworks.<sup>7</sup> Today, one branch of public interest law continues this focus on improving access to justice and addressing unmet legal need through casework services provided by salaried lawyers (such as Legal Aid). However from the 1970s onwards in Australia and the US emerged more activist models of legal service provision such as Community Legal Centres (CLCs) which challenged the institutional status quo.<sup>8</sup> These models emphasised community involvement and legal education, law reform and progressive measures to address systemic legal problems.<sup>9</sup>

Into this diverse picture of public interest law we add the role of commercial lawyers at prestigious city firms<sup>10</sup> providing pro bono casework services to needy clients (often on referral from CLCs). Further, and perhaps more recently, these firms have adopted a ‘business model of corporate philanthropy and social partnership’<sup>11</sup> which encompasses older relationships with charitable organisations and new partnerships with a range of community bodies, university law schools, and shopfront legal services. Arup has pointed out how ‘such participation may pursue a law reform or

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<sup>5</sup> Peter Seidel, ‘Surveying the legislative landscape for doing good’, *Business Day, The Age* (Melbourne), 24 May 2007, 5; Arup, above n 10, 198.

<sup>6</sup> Chris Wheeler, ‘The public interest: we know it’s important but do we know what it means?’ (2006) 48 *AIAL Forum* 12, 14.

<sup>7</sup> Rajeev Dhavan, ‘Whose law? Whose interest?’ in J Cooper and R Dhavan (eds), *Public Interest Law* (1986); Mary Anne Noone and Stephen A Tomsen, *Lawyers in Conflict: Australian Lawyers and Legal Aid* (2006) 39, 53.

<sup>8</sup> Dhavan, above n 7, 22; Noone and Tomsen, above n 7, 66, 69; Jeff Giddings and Mary Anne Noone, ‘Australian community legal centres move into the twenty-first century’ (2004) 11(3) *International Journal of the Legal Profession* 257, 258-60.

<sup>9</sup> Giddings and Noone, above n 8, 259.

<sup>10</sup> David Weisbrot, *Australian Lawyers* (1990) 44.

<sup>11</sup> Christopher Arup, ‘Pro Bono in the post-professional spectrum of legal services’ (2001) 19 *Law in Context* 190, 198.

community development objective' rather than providing individual services.<sup>12</sup> ABL's public interest lawyering embodies this last category of both corporate partnership and individual services.

#### ABL AS CORPORATE TAX ADVISORS 'IN THE PUBLIC INTEREST'

In a brochure promoting its public interest practice, ABL identifies three main areas of public interest work, of which one is taxation: 'advising charitable and not-for-profit organisations on the most tax-effective corporate structures, [and] preparing submissions to the Australian Taxation Office (ATO), seeking charitable and not for profit status.'<sup>13</sup> In 2005/6, some 16% of ABL's public interest work was taxation related, and fully 62% concerned commercial and corporate governance matters.<sup>14</sup>

ABL's public interest clients span indigenous, Jewish, environmental, welfare, cultural, health and general not-for-profit organisations. In recent years, examples of organisations receiving tax advice include the Stephanie Alexander Kitchen Garden Foundation, AWU Beaconsfield Miners Relief Trust, the Jewish Holocaust Centre Foundation, the Public Interest Law Clearing House (PILCH) and Jewish Aid Australia.<sup>15</sup> ABL's assistance is designed to maximise the limited financial resources of organisations that are doing good work.

#### DEDUCTIBLE GIFT RECIPIENT STATUS

Achieving DGR status can be important to non-profit organisations since it improves their capacity to attract donations from the public and from certain grant makers.<sup>16</sup> Organisations can apply for endorsement in one of almost 50 DGR categories, each with its own eligibility criteria. The application process is onerous; the ATO scrutinises applicants' constitutional documents to ensure their objectives and other clauses meet the relevant criteria.<sup>17</sup> This often requires the revision of documents and

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<sup>12</sup> Ibid, 199.

<sup>13</sup> Arnold Bloch Leibler, above n 4, 3.

<sup>14</sup> Arnold Bloch Leibler, 'In the Public Interest' (2007), 6.

<sup>15</sup> Ibid; Arnold Bloch Leibler, 'Solutions 2008/09' (2009).

<sup>16</sup> Public Interest Law Clearing House, *Deductible Gift Recipient (DGR) status* (2010)

<<http://www.pilch.org.au/DGR/>> at 18 May 2010.

<sup>17</sup> Ibid.

even the establishment of new organisational structures before an application is made. As I will explore further below, organisations whose remit spans multiple categories may decide to establish multiple sub-entities, each of which is then submitted for DGR endorsement. The process can be complex and the need for legal advice in this context very real.

#### ACCESS TO JUSTICE?

One of the key planks of most definitions of public interest law is the promotion of access to justice; assisting disadvantaged or marginalised clients to engage with lawyers and legal procedures in a way that they could not otherwise afford to do.<sup>18</sup> While some have rejected this definition as too limited,<sup>19</sup> the provision of services for free (or at reduced rates) to allow people and organisations to pursue judicial remedies to their (individual) problems persists as a foundation of the public interest law movement, through programs such as Legal Aid and pro bono services by commercial practitioners.<sup>20</sup>

ABL's tax work for community organisations fulfils this definition of public interest law, although it also raises some questions. The work is provided for free or at reduced rates by salaried lawyers to meet clients' legal needs. ABL facilitates access to the legal system and to government bureaucracy for bodies that would otherwise face difficulty negotiating these systems. Legal Aid and CLCs do not provide these services.<sup>21</sup> However, the clients' disadvantage or 'poverty' – an element binding together the many strands of public interest lawyering<sup>22</sup> – is at issue here. ABL's clients do not always appear to be in critical need of pro bono support. Stringent eligibility tests such as those applied in the Legal Aid context,<sup>23</sup> for instance, are not used. Some of ABL's clients have substantial cash and property assets and could pay for legal advice. ABL argues, however, that these organisations' resources are finite,

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<sup>18</sup> Noone and Tomsen, above n 7, 24-6; Penny Martin, 'Defining and refining the concept of practising in 'the public interest'' (2003) 28(1) *Alternative Law Journal* 3, 4.

<sup>19</sup> Martin, above n 18, 3.

<sup>20</sup> Samantha Burchell and Emma Hunt, 'From conservatism to activism: the evolution of the Public Interest Law Clearinghouse' (2003) 28(1) *Alternative Law Journal* 8, 10.

<sup>21</sup> *Ibid.*

<sup>22</sup> Dhavan, above n 7, 17.

<sup>23</sup> Noone and Tomsen, above n 7, 57.

and are better expended on their central work. In a 2007 report, the firm states ‘By focusing our resources on creating the appropriate structures and operating environment, and on protecting our clients’ interests, we free them to focus on their core activities.’<sup>24</sup>

There is another argument to be made here. The community organisations which ABL takes on may not be needy in a strict financial sense, but they lack the expertise in financial, taxation and legal matters necessary to secure their interests (in this case, DGR status which improves their financial viability). ABL has developed extensive expertise and a strong reputation in the taxation issues of not-for-profit groups. The firm’s status as a ‘repeat player’ is shared with the client (who is otherwise a ‘one-shotter’).<sup>25</sup> Even clients who could purchase legal advice may find their interests better served by utilising ABL’s particular capability in this area. The firm thus ensures access to justice for clients who are disadvantaged, resource-poor and lack access in an experiential and skill sense, rather than necessarily in dollar terms.

#### PURSUING SYSTEMIC CHANGE

Many theorists have indicated that public interest law goes well beyond the mere provision of individual services to needy clients.<sup>26</sup> Dhavan insists that the field is concerned not only with applying standard solutions to facilitate access, but also with creating ‘a new range of political and legal arenas in which the struggle of the disadvantaged would be most advantageously placed.’<sup>27</sup> Extrapolating from individual problems ‘issues of broader public concern’<sup>28</sup> affecting groups of people is arguably central to lawyering in the public interest, and is an approach regularly adopted by Australian CLCs and Legal Aid.<sup>29</sup>

Superficially, ABL’s tax services for community organisations appear not to tackle systematic problems nor move beyond prescribed solutions; the work seems ‘non-

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<sup>24</sup> Arnold Bloch Leibler, above n 14, 22.

<sup>25</sup> Marc Galanter, ‘Why the ‘haves’ come out ahead: speculations on the limits of legal change’ (1974) 9 *Law and Society Review* 95, 97.

<sup>26</sup> Martin, above n 18, 3; Dhavan, above n 7, 26.

<sup>27</sup> Dhavan, above n 7, 26.

<sup>28</sup> Martin, above n 18, 4.

<sup>29</sup> Giddings and Noone, above n 8, 258-9.

controversial...predictable...containable.’<sup>30</sup> Clients are advised how to meet governmental requirements for admission to particular registers (such as the Register of Environmental Organisations) bestowing DGR status. Yet a closer inspection reveals that the firm draws upon its solid experience in this field to challenge the administrative status quo concerning the DGR application process for indigenous organisations in particular.

As indicated earlier, there are many discrete DGR categories under which organisations can seek ATO endorsement. Indigenous organisations often take a holistic approach to ‘address numerous issues in their communities, including education, health, abuse, unemployment, cultural education, suicide and substance abuse.’<sup>31</sup> This can work against them obtaining DGR status, which relies on numerous discrete categories such as harm prevention, cultural preservation and environmental protection. There is no general ‘indigenous’ category. The ATO adopts a strict approach to interpretation of categories, so that organisations having, say, two purposes – one endorsable and the other not – cannot be granted DGR status unless they set up a separate entity for the endorsable work. ABL has been forced to establish complex and unintuitive corporate structures with multiple sub-entities simply to meet DGR requirements for indigenous groups.

Importantly, ABL has not adhered uncomplainingly to this unwieldy system. Instead, Peter Seidel, and senior partner Mark Leibler AC have called for a simpler ‘Aboriginal Development Corporation’ category to be established.<sup>32</sup> Removing barriers faced by indigenous groups in pursuing DGR status would promote indigenous economic development and sustainability, allowing them to utilise more appropriate and straightforward commercial structures on a similar footing to those non-profit organisations that are, say, plainly environmental or cultural in focus. ABL’s attempt to redress inequality through systemic reform clearly aligns with

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<sup>30</sup> Burchell and Hunt, above n 20, 10.

<sup>31</sup> Alice MacDougall and Anna Lyons, 'Indigenous organisations - DGR and philanthropic funding' (2008) <[www.vcross.org.au/clearinghouse](http://www.vcross.org.au/clearinghouse)> at 18 May 2010, 1.

<sup>32</sup> Lisa Strelein, 'Taxation of Native Title Agreements' (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2008) 62.

contemporary conceptions of public interest law, seeking to challenge systems which perpetuate injustice, and ensure 'equality under the law'.<sup>33</sup>

#### THE 'PUBLIC INTEREST'

Identifying what is in the 'public interest' has proved challenging for theorists and practitioners alike.<sup>34</sup> So elusive and value-laden is its meaning,<sup>35</sup> that to assess ABL's taxation work against it is difficult. Some approaches may prove instructive, however. One defining element, outlined by Wheeler, is that a matter is in the interests of a group, or society as a whole, contrasted with private, partisan or parochial concerns.<sup>36</sup> Even here there are different 'publics' that may be considered legitimate, depending on the issue at hand. Wheeler then describes a hierarchy of interests belonging to these different publics, with the 'high level shared *values* of a society' at the top and private interests at the bottom.<sup>37</sup>

The key public interest that is apparent in ABL's tax law services to non-profit organisations is in fact expressed through the work of its clients.<sup>38</sup> These organisations do work that many people in Australia consider valuable, because it supports people and groups who are disadvantaged, marginalised or who have limited capacity to help themselves, whether because of disability, illness, poverty, social status or age. Examples of these types of ABL clients include Make-A-Wish Foundation which assists terminally-ill children, community-care provider Jewish Care Victoria, and Yachad Accelerated Learning Project which aims to improve the literacy and numeracy skills of low-achieving indigenous students. Protection of animals and the environment is also a prominent theme for ABL, with clients including Greening Australia, the Australian Conservation Foundation, and Voiceless. Finally, intertwining with the causes outlined above, indigenous client groups

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<sup>33</sup> Alysia Debowski, 'Old dogs, new tricks: public interest lawyering in an 'Age of Terror'' (2009) 34(1) *Alternative Law Journal* 15, 15; Fiona McLeay, 'Comment: Pro bono lawyering in the 21st century' (2001) 19 *Law in Context* 16, 19.

<sup>34</sup> *Ibid*, 15; Wheeler, above n 6, 14. Martin above n 18, 4.

<sup>35</sup> Pascoe Pleasance and Sarah Maclean, 'The Public Interest' (Legal Aid Board Research Unit, 1998), 2.

<sup>36</sup> Wheeler, above n 6, 14.

<sup>37</sup> *Ibid*, 18.

<sup>38</sup> Similarly, see Burchell and Hunt, above n 20, 10.

comprise a substantial part of ABL's public interest work (some 30% in 2005-6<sup>39</sup>). Although these may not always be popular causes – native title litigation, for instance, has been hotly contested – they reflect what many Australians aspire to, namely a 'society that promotes fairness and human dignity.'<sup>40</sup>

The public interest in ABL's tax services is intertwined with the nature of their clients' work, but also derives from the fact that the clients themselves are (as mentioned earlier) disadvantaged by limited resources. Coupled with this, they have latent rights to improve their financial position and sustainability through the acquisition of DGR status. In a sense, Australian society as a whole, through elected officials, has already determined that the work of these *types* of community organisations is in the public interest, because it has legislated to provide DGR status. ABL is merely asserting their client's status in this category, using their status, skills and experience in the non-profit sector to put their clients on a level playing field with government.<sup>41</sup>

#### CULTURE AND CONNECTEDNESS

ABL's lawyers are what Weisbrot describes as 'the leaders of the profession, both formally in the legal professional associations and in terms of status and income.'<sup>42</sup> Their offices, high in the corporate skyscrapers of Melbourne and Sydney (Arup evocatively describes the 'rarefied atmosphere in city citadels'<sup>43</sup>), replete with catering manager and corporate gym, are, on the face of it, far removed from the 'shopfront' model of community lawyering envisaged by Murphy and others in the 1970s.<sup>44</sup> Nonetheless, ABL's tax work is a prime example of a different type of community connectedness, outlined by Arup.<sup>45</sup> First, the firm draws upon student volunteers and cadets from a foundation for disadvantaged youth, amongst its public interest personnel. Second, it adopts a whole-of-firm approach rather than quarantining this work in a particular division. Third and most importantly, the firm

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<sup>39</sup> Arnold Bloch Leibler, above n 4, 6.

<sup>40</sup> Martin, above n 18, 4.

<sup>41</sup> Martin, above n 18, 5.

<sup>42</sup> Weisbrot, above n 10, 44.

<sup>43</sup> Arup, above n 11, 198.

<sup>44</sup> Noone and Tomsen, above n 7, 52-3, 66-9.

<sup>45</sup> Arup, above n 11, 197-9.

has adopted a model of philanthropic partnership, linking with community legal centres (particularly PILCH), La Trobe University law school, and a range of charities and community foundations.

These partnerships extend beyond a single instance of legal advice, as ABL's public interest capability statement indicates:

Many of our public interest law clients are tackling deeply ingrained social problems that they seek to overcome through implementation of long-term visions. It is only through a long-term commitment to building the relationship, rather than giving one-off legal services, that we have been able to earn each of our clients' trust, and work with them to find real solutions.<sup>46</sup>

Thus, having assisted an organisation to achieve DGR endorsement, ABL is also available to provide advice on other corporate governance matters, business dealings, and legal challenges to the organisation (such as defamation actions). Further, it adopts a holistic supportive approach which sees clients encouraged by the firm, and connected up with other like-minded clients. One client is Charcoal Lane, a restaurant in Fitzroy which trains young indigenous people in hospitality. The firm promotes the restaurant on its intranet and seeks ways to utilise its services, such as function catering. ABL's approach exemplifies McLeay's 21<sup>st</sup>-century ideals of pro bono lawyering; they are 'community builders...dialogue facilitators... social entrepreneur[s]'.<sup>47</sup> This idea of relationships, of social partnership, is central to ABL's vision as a 'social justice law firm'<sup>48</sup> and a good corporate citizen.

## CONCLUSION

ABL's taxation work for non-profit organisations might, outwardly, sit at the safe, conservative end of the public interest law spectrum. Yet there is no doubt that it offers a robust example of several diverse facets of the public interest law paradigm. Pursuing DGR status and advising on corporate governance matters not only facilitates access to justice, but is also the basis for ABL's attempts to refashion more equitably the DGR endorsement categories. Further, the nature of its clients'

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<sup>46</sup> Arnold Bloch Leibler, 'Native title and public interest law' (February 2010).

<sup>47</sup> McLeay, above n 33, 18.

<sup>48</sup> Louise Trubeck, 'Embedded practices: lawyers, justice and social change' (1996) 31 *Harvard Civil Rights - Civil Liberties Law Review* 415, 419.

objectives ensures that ‘the public interest’ continues to be met through ABL’s work. Finally, ABL’s contribution demonstrates an ingrained commitment to building alliances both with and amongst the community,<sup>49</sup> rather than merely filling gaps. This, I would argue, is indicative not of Arup’s post-professionalism, but rather of a new legal professionalism, which recognises explicitly that corporate success is built upon, and owes a debt of service to, the community.<sup>50</sup> ABL’s DGR work, as a substantial element of their public interest lawyering, embodies this spirit of mutuality and service.

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<sup>49</sup> Gary Bellow, 'Steady work: a practitioner's reflections on political lawyering' (1996) 31 *Harvard Civil Rights - Civil Liberties Law Review* 297, 302.

<sup>50</sup> Mark Leibler, 'Response by Mark Leibler AC, Co-Chair of Reconciliation Australia' (Paper presented at the VII International Abraham Conference, Fitzroy, Australia, 19 October 2008).

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