

Lawyers, Causes and Passion

EDO NSW 30th Anniversary Dinner

Chief Justice Robert French AC
25 June 2015, Sydney

Justice Mathews, my colleague Justice Bell, Judges of the Land and Environment Court, members of the New South Wales Parliament, distinguished guests, ladies and gentlemen. Just over five years ago I addressed the 25th anniversary dinner of the Environmental Defender's Office of New South Wales. I was pleasantly surprised to be asked back to address the 30th anniversary dinner. In 2010, I speculated metaphorically about the classification of environmental lawyers as a species in the legal ecology which might be classed as entirely pestiferous, unattractively beneficial like the dung beetle, or perhaps as a truly wonderful new example of creative evolution. The jury, I suppose, is still out on the taxonomy, and like most taxonomical questions in the law and elsewhere, the response depends very much on whom you talk to. I predicted that the species would be durable. Five years later I can say of that prediction, to the extent that it rests upon the continuing existence of the Office — so far so good. One source of nutrient, namely Commonwealth funding, has been withdrawn but if that leads to adaptation to more diverse sources of sustenance through a greater level of community support and less dependence on government, that may not be such a bad thing. That, I suppose, is what this fundraising dinner is about as well as the justified celebration of a proud 30 year history.

It is an interesting feature of that history that initial funding for the Office came from an international property developer and a multi-national oil company. It is difficult in light of that fact and the objectives served by the Office to place its people in some simple frame as white knights of the environment doing battle with black knights of government and industry. Neither the objectives of the Office nor those of the Australian network of Environmental Defender's Offices, of which it is part, are consistent with that kind of crude adversarialism. Those objectives include:

- Protecting the environment through law.

- Ensuring that the community receives prompt advice and professional legal representation in public interest environmental matters.
- Identifying deficiencies in the law and working for reform of those areas.
- Empowering the wider community, including indigenous peoples, to understand the law and to participate in environmental decision-making.

The Annual Report of the Office for 2013/2014 spoke of three concepts defining its last twelve months and signalling its future —resilience, professionalism and passion. I am all for the first two in an organisation dedicated to providing legal services, enhanced community access to justice and working for law reform. I am not so sure about passion. There seems to be a lot of it about. Perhaps we should remember the message in *The New Yorker* cartoon which appeared in the edition of 26 May 1980. It showed two suited men in a bar one saying to the other:

I consider myself a passionate man, but, of course, a lawyer first.¹

Well maybe it wasn't really a message so much as a jibe directed at the profession, but it raised an important point about the nature of legal practice and particularly lawyers working for a cause or 'cause lawyering' as it is being called in some contemporary literature. It is in part what the Office is about. A brief glance at the Annual Report reveals an impressive array of activities going well beyond the provision of advisory and advocacy services to individual clients or client groups. The organisation is actively engaged in promoting policy and law reform in New South Wales, nationally and internationally. In 2013/2014 it made over 40 submissions to State and Federal governments. It has provided advice to the Productivity Commission, the COAG Taskforce for Regulatory Reform, and to State and national government, environment planning and natural resource management departments.

¹ Charles Barsotti, *The New Yorker Cartoon*, 26 May 1980, Item #8441633.

The Office has an outreach program designed to educate community groups to enhance their practical participation in environmental decisions. It conducts community workshops and seminars on key issues and publishes plain English educational books and other materials explaining environmental law and policy. The outreach program is focussed on rural and regional New South Wales. Feedback from it ensures that the Office is informed about environmental issues as they arise. In 2013 and 2014, it provided 21 environmental law workshops and seminars across seven regions.

The Office undertakes an indigenous engagement program headed up by indigenous solicitor, Mark Holden. It involves the delivery of Aboriginal heritage workshops and consultations, along with representational and advisory work.

The Office also has an international program and has provided legal assistance to organisations in the South Pacific. It participates in international networks including the Environmental Law Alliance Worldwide and the International Union for the Conservation of Nature. It has a Scientific Advisory Service which enables it to access in-house scientific advice, to call upon a Technical Advisory Panel made up of academic experts and an Expert Register which lists 140 scientists in a range of fields assisting the Office on a pro bono basis. The activities I have outlined are indicative of an organisation with deep roots in the community and, accordingly, a strong base for developing continuing community support independent of changes in governmental funding arrangements.

I said in 2010, that the proactive, creative and constructive role of the environmental lawyer in the development of public awareness, public policy and law reform is as important, if not more important, than signal victories in courts of law. Signal victories have their place although their long term effects may be overcome by legislative change. Signal defeats also have their place and sometimes lead to beneficial law reform. An important example, from a different field, of a failure in court which led to major legal change, both legislatively and at common law, was the dismissal of the proceedings brought by the Yolngu People of the Northern Territory seeking recognition of their customary title in opposition to the grant of alumina mining leases in the early 1970s. Following the judgment of Justice Blackburn in the Supreme Court of the Northern Territory,² the Federal Government established the Woodward Royal Commission, which in turn led to the enactment of the Northern Territory

² *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141.

land rights legislation. That in turn generated a tsunami of litigation in the High Court of Australia which undoubtedly set the scene for a more comprehending judicial approach towards indigenous land ownership and thereby a foundation for the historic common law recognition of native title in the *Mabo* decision in 1992.

Victories and defeats both in courts and in law reform endeavours, remind all of us, as lawyers, that whatever the cause in which we are engaged whether it be advisory, representative or in public advocacy, we pursue it within the framework of the rule of law in a representative democracy. Acceptance of that reality is part of the resilience upon which the Office prides itself. The concept of the rule of law, which is alive and well in the 800th year of Magna Carta and has a connection to that almost mystical document, involves the central proposition that nobody is above the law. That is to say all power, public or private, affecting the rights and liberties of others and, relevantly, the use and protection of the natural environment, is constrained by law. By law, I mean the Constitutions of the Commonwealth and of the States, the statutes made under them, the various by-laws and legislative instruments made under statutory authority and the common law of Australia. For lawyers, and particularly those involved in litigation, the rule of law provides a framework to which they are professionally and ethically committed. One manifestation of that professional and ethical commitment is the obligation of the legal practitioner, as an officer of the court, to support the integrity of the judicial process. That obligation may transcend the interests of the particular client. Some clients sometimes have difficulty in understanding that. Of course, if you follow the exploits of the legal practitioners depicted in some popular television series you might gain the impression that there are no ethical boundaries and that the client's interests will always trump the rule of law. I will name no names, but those who favour mindless soap opera dressed up as a depiction of legal practice at the high end of town will know of what I speak.

In a representative democracy our obligation as lawyers to honour the rule of law and work within it means that we may have to accept, at least pro tem, its limitations and imperfections. In litigation, the advocate seeks justice not according to his or her own concepts or the client's, but justice according to law. That is not perfect justice although perhaps Ambrose Bierce went too far when he defined it as:

A commodity which is a more or less adulterated condition the State sells to the citizen as a reward for his allegiance, taxes and personal service.³

One lawyer with a clear view of justice from a practitioner's point of view was the legendary Ross Mallam who, in 1911, represented one half of the total legal profession of the Northern Territory. He had a client who wanted justice. He told the client:

We will probably do better. I think we can win your case.

Passion in this context is not always helpful. The client needs critical judgment and legal skills more than the client needs passion. A salutary illustration of that truth appeared in a poem written by W S Gilbert about a lawyer called Baines Carew who had a tendency to disabling grief when taking instructions from his clients:

Whene'er he heard a tale of woe
 From client A or client B,
 His grief would overcome him so
 He'd scarce have strength to take his fee.

One client, Captain Baggs, consulted him on a family law matter complaining that his wife pretended to friends that he was a bird and required him to perform bird tricks in public. On hearing this sad story, Baines Carew broke into sobs:

Oh, dear, said weeping Baines Carew,
 This is the direst case I know

³ Ambrose Bierce, *The Devil's Dictionary*, ch 10.

The client was unimpressed by this display of emotion:

I'm grieved, said Bagg, at paining you --

To Cobb and Poltherthwaite I'll go --

To Cobb's cold, calculating ear,

My gruesome sorrows I'll impart --

No; stop, said Baines, I'll dry my tear,

And steel my sympathetic heart.

He failed to compose himself. The poem concluded:

But Baines lay flat upon the floor,

Convulsed with sympathetic sob; --

The Captain toddled off next door,

And gave the case to Mr Cobb.

Every client, for whom a lawyer acts, whether as adviser or advocate or both, and whether for a fee or pro bono, is entitled to expect first and foremost the best application of the lawyer's skills. It is not enough to believe in the client's cause. Indeed, that can be a distraction. Sometimes it can lead to a perhaps subconscious sense that the moral purity of the cause will win out in the end. That is not always so. At Gray's Inn in London a few years ago, I heard a sermon on the life of St Paul. It was erudite, worldly and witty and ended with this piece of advice to all the barristers and judges assembled for the service:

What the life of St Paul teaches us is that God helps the meek and the humble but also the articulate and the pushy and particularly the competent.

Professionalism is valued by the lawyer's client or client group. In that respect I was struck by the comment of the leader of one community group for whom the Office acted in relation to a proposal for the expansion of a marina at Soldiers Point. As quoted in the Annual Report, he said:

No matter how passionate community groups like ours feel, we need help with strong, focussed and professional advice and EDO NSW in the end, was our only hope.⁴

The interesting interaction, in the EDO NSW, of advice and traditional advocacy in judicial and non-judicial dispute resolution processes with extensive small 'p' political activity raises a question about how to harmonise or at least avoid conflicts between those different roles. It is trite legal ethics that a lawyer acting for a client or a client group in the provision of advice or in litigation or indeed any form of dispute resolution, must act in the interests of the client, subject to his or her duty as an officer of the court. The clients, of course, are not instruments of social change to be deployed by their lawyers. If they want to be instruments of social change that is a matter for them and they should have a full understanding of the risks associated with public interest litigation.

In an edited collection of essays on the topic of cause lawyering published in 2001, Professors Austin Sarat and Stuart Scheingold made the obvious point that:

cause lawyering stands in sharp and self-conscious contrast to traditional concepts of lawyering, according to which attorneys are expected to provide case-by-case, transaction-by-transaction service to particular clients without reference to either their own or their clients' values, policy preferences, and political and social commitments. In practice, however, cause and conventional lawyering overlap in a multiplicity of ways ... Individual lawyers frequently cross and recross the lines between cause and conventional legal practice.⁵

⁴ EDO NSW, *Annual Report 2013/14*, 27.

⁵ Austin Sarat and Stuart Scheingold, *Cause Lawyering and the State in a Global Era*, (Oxford University Press, 2001) 13.

The tension, of which I spoke earlier, was recognised in a more recent paper in 2013 in the *Social and Legal Studies Journal* in which the author, a post-doctorate research fellow at Lancaster University Law School, observes that:

Cause lawyers make their values regarding what is socially good and just the goal of their advocacy, rather than allowing the goals of the latter to be set out by another party (the client) that they serve independently of their personal value system. Serving their ethicopolitical commitments through their work constitutes cause lawyers as essentially political actors — albeit ones whose work involves doing law. The double nature of their activity is susceptible to tensions with their professional establishment and, possibly, political authorities.⁶

This is a topic about which there does not seem to be much literature in Australia. Nor have I heard it much discussed. It is an interesting and intellectually engaging issue, potentially affecting more than one legal service organisation, and an issue upon which perhaps the EDO NSW can offer some intellectual and ethical leadership. I am sorry to have inflicted it on you at the tail end of an address between entree and main course. You will be pleased to know, however, that I do not propose to speak further about the matter. I simply signal that as part of its long-term planning, the EDO NSW may consider what contribution it can make by setting out a framework within which it conducts its roles and thereby providing a model for other like organisations. I use the words 'long-term planning' advisedly, because I have no doubt that the EDO, characterised as it is by resilience, professionalism and, preferably, deep commitment on the part of its people, will be around for a long time to come.

I congratulate the EDO NSW on its 30th anniversary and wish it well in the decades ahead.

⁶ Christos Boukalas, 'Politics as Legal Actors — Lawyers as Political Actors: Towards a Reconceptualisation of Cause Lawyering (2013) 22(3) *Social and Legal Studies* 395, 396–97.