

NATIONAL PRO BONO PROFESSIONAL INDEMNITY INSURANCE SCHEME

GUIDELINES FOR CONSIDERING A PROPOSED PRO BONO PROJECT BY IN-HOUSE COUNSEL PROVIDING FREE LEGAL ADVICE AND/OR REPRESENTATION TO CHARITABLE AND COMMUNITY ORGANISATIONS

BACKGROUND

The Australian Pro Bono Centre (“Centre”) established the National Pro Bono Professional Indemnity Insurance Scheme (“Scheme”) in 2009 to encourage in-house, corporate and government lawyers to undertake pro bono legal work. The Centre has taken out an insurance policy with Lawcover Insurance Pty Limited (“Policy”) and provides free professional indemnity insurance for lawyers and paralegals carrying out or involved in a “Pro Bono Project” conducted with the prior approval of the Centre. The Policy premium and any excess due is payable by the Centre, with no application fee or other cost to any of the persons insured. Notably, the “safety net” Policy will only extend cover to circumstances where there is no other applicable professional indemnity insurance for the lawyers and paralegals working on the Project.

The intention of the Scheme is to facilitate as many lawyers as possible to be able to fulfill their professional and ethical duty to undertake pro bono legal work.¹ If there is no need for further information, applications for coverage under the Scheme will normally be considered and a decision notified to the applicant within 48 hours of receipt.

A “PRO BONO PROJECT”

The Centre receives and evaluates applications for professional indemnity insurance coverage for “Pro Bono Projects”. The Centre’s key consideration when assessing applications is whether the proposed Project meets the definition of “Pro Bono Legal Work” specified in the Centre’s Policy with Lawcover Pty Limited.

The following definition of “Pro Bono Legal Work” is set out in the Policy:

Pro Bono Legal Work² means work done or business transacted by:

1. (a) *a lawyer or paralegal, who without fee or expectation of a fee, advises and/or represents a client who has no other access to the courts and the legal system; and/or*
- (b) *the client's case raises a wider issue of public interest; or*
2. *A lawyer or paralegal is involved in free community legal education and/or law reform; or*
3. *A lawyer or paralegal is involved in the giving of free legal advice and/or*

¹ Not all work undertaken by a lawyer requires the lawyer to have professional indemnity insurance cover. For example, the provision of legal information and/or community legal education may not constitute the provision of legal advice and so not require a lawyer to have professional indemnity insurance cover for that work.

² This definition is the same as the Law Council of Australia’s 1992 definition varied only to make clear that the work must be done without fee or expectation of a fee.

representation to charitable and community organisations.

Where a proposed Pro Bono Project will provide advice or representation to a charitable or community organisation, the Centre will have regard to whether the legal matter raises an issue of public interest which would not otherwise be pursued, and whether the organisation works for the public good.

Raises an issue of public interest

An “issue of public interest” is best understood as one that is distinct from an issue of private interest, and must be an issue that:

- is likely to affect a significant number of people;
- raises a matter of broad public concern; and/or
- has an impact on disadvantaged or marginalised groups.

An organisation that works for the public good

Many organisations can be considered to work for the public good (e.g. charities, churches, schools, clubs) but not all will be eligible for pro bono legal services. The Centre draws on the framework of the Association of Pro Bono Counsel by using a “mission, matter, means” approach³, and applies these factors based on its experience of how Australian law firms decide on the eligibility for pro bono for not-for-profit organisations.

The Centre looks first to the mission of the organisation, then to the nature of the proposed matter and finally the means of the organisation to afford to pay for the proposed work. Other factors may also be relevant (see below). Any one of the mission, matter or means factors alone may be sufficient for the Centre to form the view that the proposed work is pro bono legal work, but in most cases all of these factors will need to be considered. The issue of whether an organisation has the funds that could be used to pay for the legal work will always be considered.⁴

If the sole mission of an organisation is compelling (i.e. to benefit low income or disadvantaged individuals), or clearly in the broad public interest (e.g. a homeless person’s support service, volunteer fire fighting, environmental protection, ending world blindness, or animal rescue) then any free legal work for that organisation will most likely be considered pro bono legal work.

If the mission is mixed or not particularly compelling, the Centre will then look to the nature of the proposed legal matter. If the matter is one that aims to benefit a low income, socially disadvantaged or a marginalised individual or group, or is clearly in the broader public interest, the matter is likely to be considered pro bono legal work.

³ This approach follows that developed by the Association of Pro Bono Counsel (APBCo) on the eligibility of non-profit entities for pro bono legal services. See <http://www.apbco.org/resource/mission-matter-means/>

⁴ The Centre follows the concept as used in the US Pro Bono Institute’s Law Firm Pro Bono Challenge™: “where the payment of standard legal fees would significantly deplete the organization’s economic resources or would be otherwise inappropriate.”

Where neither the mission or matter test provides a clear answer, a Project may still be approved if the organization cannot afford to pay for legal services,⁵ however, a lack of means alone is not sufficient to meet the criteria for pro bono legal work.

Others factors for consideration may include:

- the constituency ordinarily served by the organisation and their disadvantage (if any);
- the nature and extent of the legal services requested and the possible outcome if legal services are not obtained;
- whether the organisation has been referred by a pro bono legal referral agency; and
- the overall financial position of the organisation.

DESCRIPTION OF A PRO BONO PROJECT

Notably, a Pro Bono Project may be described broadly to minimize the need for multiple applications to be made to the Centre. For example, the Project could be simply described as legal work for a particular named charity or community organisation (if its mission is compelling), a certain type of work proposed to be referred from a pro bono clearing house, or work as part of a multi-partner project involving a law firm pro bono program.

Examples

The following examples may help to illustrate the application of the above criteria:

1. Legal work for a childcare centre.

The Centre considers that the mission of caring for children is not of itself compelling. Therefore, the proposed legal matter will be relevant, as will the means of the childcare centre to afford the proposed legal work. The outcome and the ultimate beneficiary of the work are also likely to be relevant in deciding whether it is a Pro Bono Project. For example, legal work for a locally owned childcare centre that seeks to advise about the establishment of a new not-for-profit foundation to support children with special needs would be approved.

2. Legal work for a local school.

The mission of providing education alone is unlikely to be determinative. For example, legal work for a remote community-owned school serving disadvantaged students would likely be approved, whilst general legal work for a government owned metropolitan primary school would be unlikely to be approved. However, the nature of the proposed legal matter may be relevant. The Centre would look to the ultimate beneficiary of the legal matter in considering the likely public good. For example, if the advice sought related to a school program to recycle computers and distribute them to children from low-income or disadvantaged families, the matter may be approved as a Pro Bono Project.

⁵ See footnote 2

3. Animal Rescue not-for-profit

A not-for-profit organisation with the sole mission of rescuing deserted and orphaned animals that is run by volunteers and funded by donations would likely be considered to have a mission that is for the public good. Therefore, any free legal work done for this organisation would likely be considered a Pro Bono Project.

4. Small business providing animal care

A small business operating for profit with the mission of providing an onsite pet-minding and dog-walking service is unlikely to be considered eligible for coverage by the Scheme. Work for a business operating for profit is not likely to be approved and nor is this business's mission compelling. Nevertheless there may be legal work done for this business that would still be considered a Pro Bono Project. For example, proposed legal advice about establishing an associated not-for-profit program that sought to provide pets as companions for elderly disabled persons (without charge to them) may be approved.

CONTACT INFORMATION

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