

The Business Case for Pro Bono 2022

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“We are not given in our lifetime as lawyers to cure every wrong, but neither are we free from the obligation to try.”

— Justice Michael Kirby

Foreword

Last year marked the 20th anniversary of the publication of ‘The Business Case for Pro Bono’ a seminal piece by the late, great Esther F Lardent, then President of the Pro Bono Institute, architect of the modern institutional pro bono movement, revered pro bono leader, and a dear friend.

The ‘business case for pro bono’ was the foundation upon which many law firms (my own included) constructed their pro bono practice over the past 2 decades; but after 20 years, has the business case for pro bono changed? Do law firms with mature pro bono practices still benefit from having a clear business case? Is a business case necessary or useful for law firms starting out on their pro bono journey?

As I commenced the process of reviewing and updating the business case for pro bono, these were some of the questions weighing on my mind.

I also recalled a conversation that I had with one of the leaders of my own firm in 2004. Shortly after the pro bono policy I had written was approved by our board, a senior partner at my firm asked me to merge the business case and the pro bono policy into a single document for publication. Even though I had authored both documents, I ‘strenuously’ objected and told this senior partner I could not, in good conscience incorporate the business case into the pro bono policy, and certainly not if the document was intended for external or internal consumption. He chuckled and asked if I had a Jesuit education. I had no idea what that meant at the time but I had won the day, and in the years that followed I came to take his remark as a compliment.

The concept of a business case still doesn’t sit particularly comfortably with me. I much prefer the approach adopted by the leading Australian law firm, Gilbert + Tobin, whose founder and Managing Partner, Danny Gilbert has explained “we didn’t write a business case, we knew it was the right thing to do”. But good pro bono lawyers are pragmatists and recognise the importance of demonstrating return on investment – it is the very best way of achieving an initial allocation of funding and the best way to unlock further resource and budget for pro-social initiatives.



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The business case for pro bono



Values

Pro bono is a meaningful, measurable, visible expression of a firm's values. Through the size, scale and ambition of the firm's pro bono practice, the business is able to affirm a strong and demonstrable commitment to its core values.

Purpose

Over the next decade an increasing number of law firms will follow other sectors and begin to explore and adopt a corporate purpose, which will in turn give employees a clearer sense of individual purpose and provide a framework within which decisions concerning client strategy can be made more effectively. Firms with a strong pro bono practice (reflecting a pro-social purpose) will have an advantage as the positive social impacts already achieved through pro bono will provide a solid foundation upon which to build a purpose-driven and socially aware business fit for the future. Pro bono lawyers will play a role in bringing deep moral thinking to decision making.

Brand

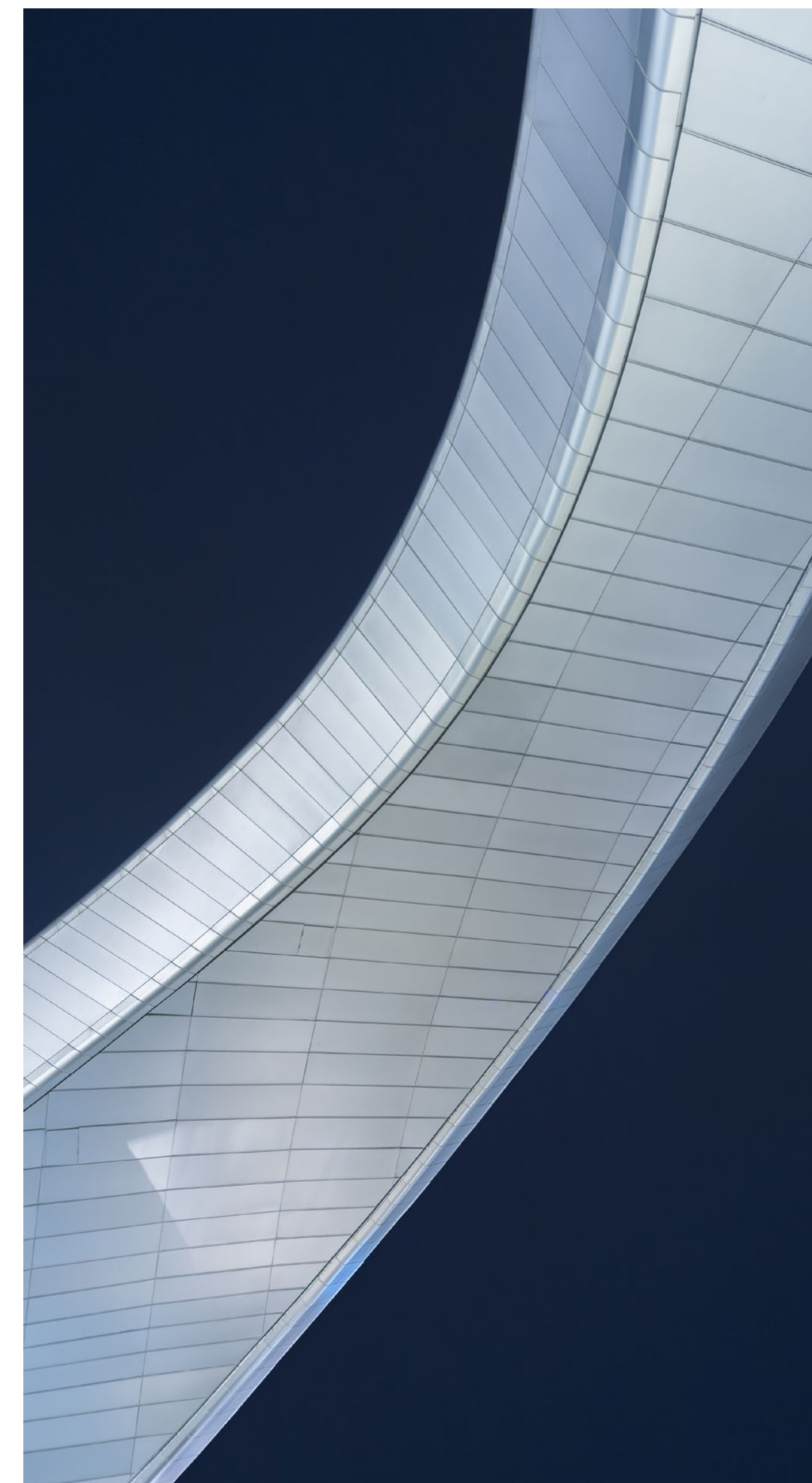
Most of the law firms that have developed large, professionally managed pro bono practices are among the most well-respected and profitable law firms in the world. The presence of a sophisticated pro bono offering, headed by one or more dedicated pro bono partners has come to be associated with leading law firm brands, simultaneously signaling success, compassion and prestige. In many key markets around the world the presence of a top tier pro bono practice has become an important precondition to recognition as a leading law firm. Just as you might expect a leading law firm to have a top tier corporate practice, and a top tier litigation practice, so too must it have a top tier pro bono practice if it is to have any credible claim to being one of the leading law firms in most key markets. Despite the fact that many firms now have large professionally managed pro bono practices, the opportunity for pro bono to be a differentiator still exists, but this opportunity is only available to firms prepared to invest and innovate.

Professional responsibility/maintaining status as a profession

At an individual level pro bono work is one of the ways lawyers fulfil their professional responsibility to uphold the rule of law and act as guardians of the justice system, ensuring that justice is accessible to all, not just those with the means to pay. At a corporate level firms that support pro bono work by lawyers are contributing to the maintenance of the professional status of lawyers, the high ethical standards expected within the profession, and the paramount responsibility to the court and the justice system. This is a critical counter-balance to the drift away from professionalism towards a purely business-oriented approach to the law where the pursuit of profit would eclipse professional obligations and duties.

Stakeholder expectations

When the original business case for pro bono was written 20 years ago, pro bono was identified as a potential differentiator which could be used to support recruitment and Lawyer retention. With institutional pro bono now ubiquitous in many key markets, particularly within the group of leading law firms, pro bono is rarely viewed as a differentiator. It has become (as one colleague so neatly put it) 'like computers on desks – everyone just expects it to be there when they start working in a leading law firm'. Although pro bono is rarely seen as a differentiator today and is probably not a pull-factor for most potential recruits, it is nevertheless important if law firms are to meet the expectations of employees and other key stakeholders. Just like technology, employees expect to have access to pro bono opportunities and the absence of suitable pro bono opportunities may become a push-factor for employees (and clients) expecting to be able to engage in pro bono activities through the firm.



Societal concerns

Pro bono is a vehicle for firms to make a positive contribution to some of the most significant challenges of the day, eg:

***Climate Change** – Law firm employees, clients and a range of other key stakeholders increasingly expect law firms to actively contribute to the business sector response to the climate crisis. In addition to removing carbon emissions from their own operations and value chains, law firms will be expected to show a demonstrable commitment to supporting the transition to a low carbon future. One of the most obvious ways that law firms can discharge this duty is through pro bono support to the organisations working in this space and to the communities most impacted. The Australian Pro Bono Centre has published a guide for law firms seeking to identify opportunities for engagement on climate change and ensuring a just transition.

***A fair society** – Increasing inequality within communities, nations and at a global level is a root cause of conflict, human displacement, civil and political unrest and a raft of other issues which destabilise business. Extreme poverty and global inequality will come to be viewed as core social challenges with a causal and consequential relationship to business activity/profitability. Law firms will have a key role to play in addressing inequality by reflecting on their role in the transfer and concentration of wealth and by ensuring pro bono resources are benefiting the roughly 1 billion people living in extreme poverty and supporting structural reforms to support equality of opportunity.

***Racism** – When the Black Lives Matter movement swept around the globe in 2020 there were calls for both individuals and businesses to urgently respond to unacceptable and endemic levels of racism by starting to become actively anti-racist. There was growing recognition that it was no longer sufficient to ‘not be racist’, and calls for businesses to commit to be anti-racist and take concrete action to combat racism in our communities. In the legal sector, there was a collective recognition of the need to do more to progress and accelerate the diversity and inclusion agenda, but several law firms went even further

by committing to be a force for change in the wider society many cases that commitment was delivered through pro bono contributions, often delivered in concert with commercial clients, civil society groups and other stakeholders.

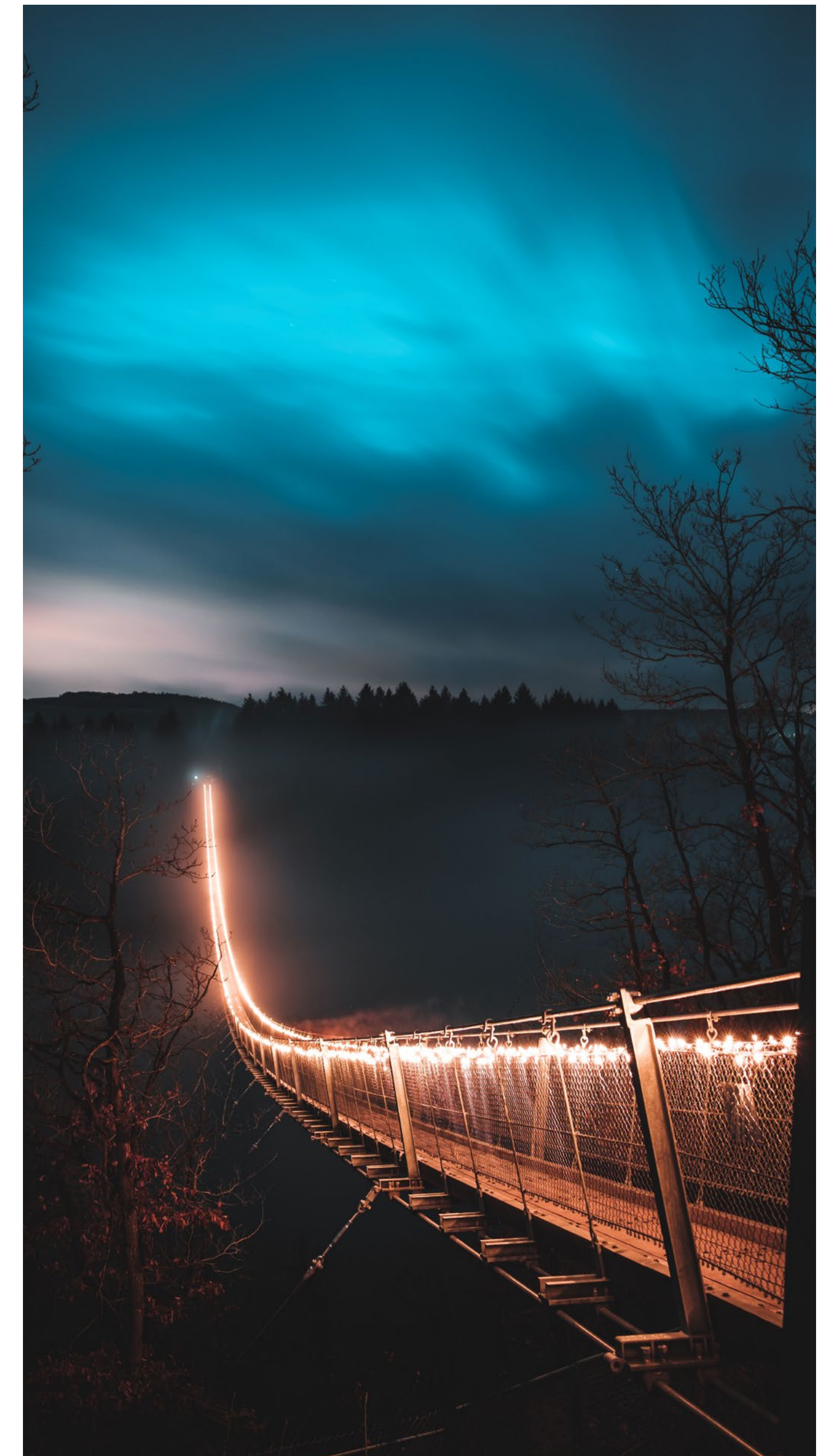
***Emergencies and natural disasters** – The demand for pro bono opportunities has grown substantially over the past 2 years as lawyers in private practice, whose jobs have been largely unaffected by the COVID pandemic, have sought ways to make a contribution to the community and in particular to provide support to those who are vulnerable, unemployed, impacted by rolling lock-downs and/or experiencing health or other challenges. Whenever a natural disaster strikes, or some other emergency impacts on a community, it is a natural human desire to offer help. Many of the established pro bono practices have systems and processes in place that allow a firm’s legal resources to be deployed as part of coordinated response efforts.

ESG

With ESG risks now understood to link directly to wider business performance and sustainability, law firms are seeking to position themselves as business advisers capable of identifying and mitigating a wide range of ESG risks. A pro bono practice can of course build and broaden the expertise of any law firm, and when aligned to a range of salient ESG risks (eg climate and conservation, business and human rights, responsible tax policy, transparency and accountability) will improve a firm’s credibility and enable the firm to develop credentials and grow client revenue. In a recent podcast on the growing number of pro bono partner roles in law firms, all but one of the most recent cohort of pro bono partners referred to ‘ESG credentials’ as being a key plank of the business case for their promotion to partnership.

New service offerings

Over the past decade several law firms have used insights gained through the pro bono practice to predict future client needs and develop and launch new products and services – for example in areas such as business & human rights, modern slavery, impact investing and climate.



Client relationships

Many law firms with established pro bono practices have successfully collaborated with commercial clients on a wide variety of pro bono projects. Many large businesses request details of pro bono partnering opportunities as part of the RFT process. Some pro bono collaborations between law firms and clients have existed over many years and have allowed the firm to build relationships with a large number of the in-house team spread across many office locations. There are also numerous examples of in-house legal teams delivering pro bono in partnership with law firms which are not members of the business' legal panel. These collaborations have provided opportunities for the in-house team and the firm to get to know each other leading to new panel appointments and commercial opportunities for the firm.

Winning government contracts

In Australia it is a corollary of being part of a government legal services panel that law firms commit to deliver a certain level of pro bono service. Various schemes are in place at both the state and federal level. Data published by the Australian Pro Bono Centre shows widespread support for the schemes, and links the introduction of these schemes to a significant increase in pro bono in Australia since the schemes were introduced. In the UK the Labour Party (currently in opposition) recently announced it would introduce a similar scheme if it wins government. With a number of private sector clients also considering a law firm's pro bono commitment as a relevant factor when awarding work, investment in pro bono may be seen as an important strategy to preserve existing client relationships or win new opportunities and to mitigate the risk of losing client mandates as client expectations and requirements continue to evolve.

Sustainable development goals

When the sustainable development goals succeeded the millennium development goals in 2015 they introduced the principle of universality. Relevantly, universality had 3 components – the SDGs had been produced

through a consultative process which engaged a wide range of actors including governments and inter-governmental organisations, civil society and the private sector (universal consultation and ownership). Second the SDGs contained targets that applied to all countries, not just developing countries, recognising there were developmental needs and opportunities in every nation (universal application). Finally the principle of universality recognised the SDGs could not be achieved without active engagement and contributions from all actors including the private sector (universal responsibility and participation). Like every business, law firms (particularly global business law firms) have a duty to contribute to the achievement of the SDGs. Some of the targets, such as those contained within SDG16 (which pertain to peace, justice and strong institutions) will require the legal sector to play a central role while many others provide a clear opportunity for law firms to support delivery. In many firms the pro bono team leads engagement on the SDGs and investment into the pro bono practice will allow law firms to effectively participate in the global effort to achieve the SDGs by 2030.

Diversity

The growing numbers of dedicated pro bono lawyers in large firms undoubtedly delivers improved diversity of thought, experience and perspective to the business (and in some cases has added substantial colour and texture in the fashion department). As pro bono management roles are increasingly filled by individuals who reflect the diversity of the communities the pro bono practice seeks to serve, there is enormous potential for the pro bono teams in law firms to begin to employ people from communities historically excluded from access to careers in the private profession. Pro bono lawyers are often agents of change within law firms. As pro bono teams grow they have an opportunity to challenge the status quo and make a significant impact on law firm diversity by: experimenting with new recruitment techniques, placing a greater value on lived experiences over legal experience, focussing on a candidate's future potential above historical achievement, and demonstrating the benefits associated with building diverse teams.



Learning & Development

Particularly in the case of lawyers working in very specialised areas in large law firms, pro bono work helps to expose lawyers to different clients, new challenges and develop new skills. Some large law firms have developed skills based progression frameworks and the pro bono practice is aligned to that framework so that a lawyer seeking promotion to Senior Associate, for example, who must demonstrate experience making an oral argument in court, may gain that experience through the pro bono practice where it hasn't been possible to do so through the commercial practice. Even in firms without highly engineered L&D frameworks, the developmental benefits associated with pro bono will accrue to lawyers who participate in pro bono work and will benefit the business with high rates of lawyer participation.

Health & well-being

Enlightened employers are now (more than ever before) proactively promoting the health and well-being of employees. Law firms have had to grapple with the challenge of balancing the competing priorities associated with meeting client demands and maintaining high levels of profitability on the one hand and managing employee stress and burn-out on the other. Managed properly, a pro bono practice can support positive health and well-being outcomes by giving lawyers the opportunity to work on matters they believe to be meaningful/impactful, to engage with people and organisations they would not typically interact with on commercial transactions, to build connections into the community, to develop a new sense of perspective and gain insights into the challenges faced by vulnerable people, and to engage in work which imbues a sense of pride. It is common for pro bono managers to hear lawyers express the view that "I took on this pro bono matter to help the client, but I think I got more out of it than the client did" or, "I always talk to my family about my pro bono work, my kids love hearing about it – but I rarely tell them about my work for our commercial clients". It should be noted that when law firms fail to give billable credit to lawyers undertaking pro bono work, it raises the risk that health and well-being can be negatively impacted – because the firm is effectively asking already busy lawyers to take on additional responsibilities without recognising any additional time required to undertake that work.

Profitability

The original business case for pro bono referred to data which suggested a positive correlation between pro bono and law firm profitability. I have already referred to the fact that a majority of the most profitable law firms have large professionally managed pro bono practices. At an anecdotal level I have observed over 20 years that the highest pro bono contributions are often made by the busiest and most profitable teams, by the offices that achieve the highest utilisation, by the partners who generate the largest commercial practices, and by the individual fee earners who achieve the highest billable hours. While this might seem counter-intuitive to those who assume pro bono is dilutive to law firm profitability, it is unsurprising to anyone who understands the link between performance and employee engagement. When lawyers enjoy their work, and feel connected to their work through a sense of purpose, they experience higher levels of motivation. When employees hold a positive view of the firm they work for, they are prepared to give more of their time. Several surveys have revealed that most lawyers pursued a career in the law in order to help others and/or 'make a difference', reinforcing that the pursuit of money is not a motivating factor.

Integration of merged practices

With the number of law firm mergers reaching historic highs over the past two decades firms have leveraged pro bono to create opportunities for collaboration between offices, practice groups and sectors in order to break down structural barriers and create stronger internal networks. Collaboration in the context of a pro bono project encourages and promotes collegiality by providing a positive platform for early interactions, with few opportunities for competitive disagreements.



Reflections

When the original 'Business Case for Pro Bono' was published in 2001 there was something very modern about law firm pro bono. Many other business sectors at that time had been swept up by the CSR movement and were actively involving their own employees in all manner of volunteering activities with varying levels of success. There had been several missteps – some businesses were involved in 'pay to play' schemes, where the company would pay handsomely for the opportunity to send a group of employees on one-day volunteering missions – painting the local children's hospice (sometimes for the third time in a single month); tidying up the garden at a local nursing home; and serving soup to homeless people (sometimes while the paid staff stood and watched!).

Law firms were ahead of the curve at the turn of the millennium. They were doing what later become popularised as 'skilled volunteering' – using the professional skills of the workforce to address unmet need in the community.

Fast forward twenty years and the pro bono movement is strong and still growing and the business case has evolved, but today law firm pro bono represents a model of corporate philanthropy that is declining in popularity as the most progressive, enlightened businesses have shifted focus away from skilled volunteering and bolt-on social impact programmes and now seek to achieve positive social impact through their core products and services, and through their mainstream business operations.

There is a growing recognition of risks associated with separating social impact strategies from the core business. In particular it has been said that such an approach may seek to off-set negative societal impacts caused by the business with positive social programmes, or alternatively that businesses can be distracted by social impact programmes and fail to understand the need to identify and mitigate the harmful consequences of certain mainstream business processes. Law firms with great pro bono practices have been criticised for their support of the fossil fuel industry and for failing to ensure cleaning staff in their value chain were being paid a living wage. There is growing recognition of the opportunities and benefits that can be realised through 'shared-value' creation – that is, by aligning profit and positive social/environmental impact (purpose). Achieving this alignment will ensure high levels of stakeholder support, and delivery of durable solutions to societal challenges that are fully scalable and are not reliant on or constrained by finite donor resources.

Pro bono work is not inconsistent with modern concepts of shared value creation. The pro bono expertise developed by some law firms over the past 20 years raises the potential for those law firms to proactively seek opportunities to generate both positive social/environmental impacts and revenue by being more proactive, conscious and intentional in their pursuit of billable work, by for example aligning with and advising businesses also committed to the creation of social value. But pro bono leaders will have to evolve and innovate, and support new generations of leaders who can begin to articulate a more ambitious business case for purpose-driven law firms, differentiated from their competitors both by the work they do, and what they won't do, and respected for the value they create for society.

Thank you

Special thanks to my friends and colleagues Claire Donse and Jilly Field who generously reviewed and provided comments on the first draft of this paper.

This paper was presented at the Pro Bono Institute Annual Conference on Wednesday 6 April 2022 during the session titled “Will ESG serve as a driver for greater pro bono?”.

I would also like to thank and acknowledge my co-panellists Chris Owen, Matt Sparkes, and Erik Swenson.



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