

2010

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Abstract

I begin with the deliberately provocative proposition that the approach of the High Court of Australia to amicus applications in constitutional cases is fundamentally flawed. Why? Because the Court determines amicus applications from the narrow perspective of adversarial litigation. This perspective fails to give adequate and necessary recognition to the Court's role as Australia's final appellate court and Australia's constitutional court. It fails adequately to recognise the Court's lawmaking function. Most importantly, it fails adequately to recognise the broader dimensions of constitutional litigation as public interest litigation affecting the wider community.

On this basis, the questions the Court should properly address are whether it is in the public interest that the proposed amicus submissions be heard, in particular, whether they are relevant and important and whether there is any good reason why the amicus application should not be allowed. *The High Court Rules and the Court's procedures should be adapted to facilitate rather than obstruct amicus applications.*

Keywords

Access To Constitutional Justice, Amici Curiae, High Court of Australia, Amicus Applications, Amicus and Interveners, Procedural Reform for Amicus Applications

AMICI CURIAE AND ACCESS TO CONSTITUTIONAL JUSTICE IN THE HIGH COURT OF AUSTRALIA

ERNST WILLHEIM*

I begin with the deliberately provocative proposition that the approach of the High Court of Australia to amicus applications in constitutional cases is fundamentally flawed. Why? Because the Court determines amicus applications from the narrow perspective of adversarial litigation. This perspective fails to give adequate and necessary recognition to the Court's role as Australia's final appellate court and Australia's constitutional court. It fails adequately to recognise the Court's law-making function. Most importantly, it fails adequately to recognise the broader dimensions of constitutional litigation as public interest litigation affecting the wider community.

In this paper I put forward an alternative approach. When an amicus application is made to the High Court of Australia in a matter involving the Australian Constitution, why should the Court not approach the application on the basis that the Constitution belongs to us all? On this basis, the questions the Court should properly address are whether it is in the public interest that the proposed amicus submissions be heard, in particular, whether they are relevant and important and whether there is any good reason why the amicus application should not be allowed. The *High Court Rules* and the Court's procedures should be adapted to facilitate rather than obstruct amicus applications.

Why do I put the issue this way? Simply put, the reason is that in a matter involving the Constitution, the Court, as the judicial arm of government, determines the meaning of Australia's basic law, how Australians are to be governed. The Court's determination is therefore relevant to the Australian community as a whole. It follows that, once litigating parties put the meaning of the Constitution in issue, the matter is no longer the exclusive concern of the litigating parties.

I shall return to my proposed new approach to amicus applications in constitutional litigation and to the need for new procedures later. First, I will briefly outline:

- The High Court's current approach to amicus applications
- The High Court's current procedures for dealing with amicus applications

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- The distinction between an amicus and an intervener.

Then, I will briefly outline:

- A suggested new approach: why amicus applications should be allowed in constitutional cases
- Elements of proposed new procedures for amicus applications.

The High Court's current approach to amicus applications

With the notable exception of one recently retired member of the Court, Kirby J,¹ the Australian High Court has taken a conservative approach to amicus applications. In a frequently cited passage, Dixon J, one of Australia's most distinguished judges, put the issue this way:

Normally parties, and parties alone, appear in litigation....The discretion to admit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned...²

His Honour rejected the notion that intervention might be granted to enable interveners 'to contend for what they consider to be a desirable state of the general law under the Constitution'.³

This passage in Dixon J's judgment established two of the three key elements in the High Court's amicus jurisprudence, first, the focus on the parties, and, secondly, the unqualified rejection of the view that interveners should be permitted to argue 'for what they consider to be the desirable state of the general law under the Constitution'. It followed that broader public interest considerations had no bearing on the Court's consideration of amicus applications. Dixon J has been cited with approval on numerous occasions.

Because reasons for rejecting amicus applications have been given only rarely, the approach the High Court has taken to amicus applications is to a large extent hidden in the Court's transcripts. In a case involving a dispute between a woman and her bank over a guarantee in respect of the business of the woman's former husband, where a community consumer credit organisation sought to appear as amicus,

¹ Justice Michael Kirby retired on 2 February 2008.

² *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331 (Dixon J). The Court, by majority, refused an application by the States of Victoria and South Australia for leave to appear.

³ *Ibid.*

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McHugh J put the two elements of the traditional view forcefully to counsel in the course of argument:

Yes, but we are deciding cases between parties. Now, people may not like to hear it but our essential function is to decide cases between parties. We are not here to reform the law generally. If that notion is about, which it seems to be, it ought to be dispelled. As an incident in deciding cases we may have to develop the law, but our primary function is to decide cases between parties.⁴

Similar views have been expressed in the Federal Court.

In *United States Tobacco Co v Minister for Consumer Affairs and Others*⁵ the Full Federal Court said:

The general principle is that the parties are entitled to carry on their litigation free from the interference of persons who are strangers to the litigation.⁶

In that case the Full Court actually set aside the trial judge's order that the Australian Federation of Consumer Organisations Incorporated be given leave to appear as amicus curiae and ordered that the Federation be joined as a party.

As the Honourable Murray Wilcox QC is to provide concluding comments at this conference, it is relevant to record that Wilcox J in *Bropho v Tickner*⁷ said:

In Australia, as distinct from the position in the United States, the intervention of an amicus curiae is a relatively rare event; the amicus' role normally being confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked.⁸

This passage identifies the third of the three key elements of the amicus test, that the intending amicus will add something which might otherwise be overlooked.

The development of an amicus test

In a series of recent significant cases, the High Court has developed an authoritative test for allowing amicus applications. Before coming to the leading cases, it is relevant to note that most amicus applications have been determined without the

⁴ *Garcia v National Australia Bank Limited* S18/1997, HCA Transcript, 4 March 1998, 39. Counsel was seeking leave to appear as amicus curiae on behalf of the Consumer Credit Legal Centre (NSW) Incorporated.

⁵ (1988) ('*United States Tobacco*') 20 FCR 520.

⁶ *Ibid* 536.

⁷ (1993) 40 FCR 165.

⁸ *Ibid* 172.

giving of reasons, the Court simply announcing that the application was granted or that it was refused. In the course of argument, the Court has repeatedly rejected notions of community or public interest as a basis for allowing amicus. Indeed, until *Wurridjal v The Commonwealth*,⁹ decisions have repeatedly addressed the issue from the perspective of adversarial litigation rather than from a wider public interest perspective.

*Kruger v Commonwealth*¹⁰ was an action by an Australian Aboriginal claiming damages in respect of his alleged wrongful removal from his family as a child. The case raised important constitutional and public law issues relating to the validity of the legal regime under which the plaintiff was removed. Public interest in the proceedings was high. Senior counsel representing the Australian Section of the International Commission of Jurists sought leave to make 14 pages of written submissions as amicus. Counsel submitted the discretionary factors to which the Court should have regard were, first, whether it was a test case, public interest litigation and, secondly, whether the Australian Section of the International Commission of Jurists had a particular interest and expertise.¹¹ In effect, the test counsel proposed was the importance of the case and the competence of the proposed amicus. In support of this approach, counsel cited O'Connor J of the United States Supreme Court in *Webster v Reproductive Health Service*:¹²

The willingness of courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and public participation in government decision making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.¹³

If ever there was a case raising important constitutional and public law issues, a high level of public interest and an experienced and expert amicus applicant, surely this was it. The Court was not persuaded. Chief Justice Brennan, delivering the brief reasons of the majority,¹⁴ wrote:

Applicants for leave to intervene must ordinarily show an interest in the subject of the litigation greater than a mere desire to have the law declared in

⁹ (2008) 237 CLR 309, dealt with below.

¹⁰ (1997) 190 CLR 1.

¹¹ HCA Transcript, 12 February 1996.

¹² 492 US 490 (1988).

¹³ *Ibid* 522.

¹⁴ The composition of the majority and the dissenting minority was not disclosed. The minority did not deliver separate reasons.

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particular terms... As to his application to be heard as *amicus curiae*, he fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests ...The Court must be cautious in considering applications to be heard by persons who would be *amicus curiae* lest the efficient operation of the Court be prejudiced. Where the Court has parties before it who are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application....The application is refused.¹⁵

The applicant's focus on the wider public interest and the importance of the subject-matter was rejected. The two key elements identified by the Court were, for an intervener, 'an interest' which must apparently be some kind of material interest and, for an *amicus*, some deficiency in the submissions of the parties.

The following year saw another major public interest case, *Levy v Victoria*,¹⁶ a constitutional case involving freedom of political expression. The union representing journalists, the Media Entertainment and Arts Alliance, was refused leave to intervene *as intervener* but was granted leave to make written submissions *as amicus*. Chief Justice Brennan said:

The hearing of an *amicus curiae* is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. The footing on which an *amicus curiae* is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted.

It is not possible to identify in advance the situations in which the Court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an *amicus* who is willing to offer assistance. All that can be said is that an *amicus* will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the *amicus* is not disproportionate to the assistance that is expected.¹⁷

This was the first in a line of cases in which Kirby J developed a wider view. In a separate judgment, Kirby J gave weight to the law-making function of the High Court as Australia's final court of appeal:

...this court's function of finally declaring the law of Australia in a *particular* case for application to *all* such cases. The acknowledgment of the fact that

¹⁵ HCA Transcript, 12 February 1996.

¹⁶ (1997) 189 CLR 579.

¹⁷ *Ibid* 604.

courts, especially this court, have unavoidable choices to make in finding and declaring the law, makes it appropriate, in some cases at least, to hear from a broader range of interveners and amici curiae than would have appeared proper when the declaratory theory of the judicial function was unquestionably accepted.¹⁸

Two years later, in a constitutional challenge to the jurisdiction of the Superannuation Complaints Tribunal (on the ground that the Tribunal was invalidly invested with judicial power) the Court rejected an amicus application by the Association of Superannuation Funds of Australia Limited. Justice Kirby would have granted the application. This time he put his views more forcefully. He also went beyond emphasising the Court's law-making function. Justice Kirby emphasised the need for development of procedures, and he drew comparisons with the practice of other common law courts:

This Court should adapt its procedures. It should particularly do so in constitutional cases and those where large issues of legal principle and legal policy are at stake. It should do this to ensure that its eventual opinions are informed by relevant submissions of law and by the provision of any relevant facts, not otherwise called to notice, which can be made available without procedural unfairness to a party. According to the evidence in support of its application, the Association is the main industry body of the superannuation industry in Australia.

Once this Court became the final court of appeal for Australia and recognised that its function involved more than the declaration of indisputable, pre-ordained law, it was necessary to adapt the Court's procedures to permit assistance to be had in some cases from a wider range of interests than those conventionally received. It has not yet found full acceptance in the general procedures of this Court. But in due course it must.

The potential utility of such assistance is recognised by other ultimate courts. Even if the practice in the United States of America is considered disharmonious with our legal tradition in this regard, the practice in England and Canada should not be. In the House of Lords, there is a developing trend towards receiving assistance from interveners and *amici curiae*, as in immigration cases. Moreover, in Canada, interventions are allowed in all classes of case, including criminal, and are available to a broad range of interested persons. The Supreme Court of Canada can also itself appoint an *amicus curiae* in special circumstances. In *Reference Re Workers' Compensation Act, 1983 (NFLD) (Application to Intervene)*, Sopinka J summarised the two criteria for intervention: (1) the proposed intervener has "an interest" in the proceedings; and (2) the proposed intervener is able to make "submissions

¹⁸ Ibid 650-1 (emphasis in the original).

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which will be useful and different from those of the other parties". The adoption of this approach has proved beneficial in Canada. In my view, this Court should, harmoniously with its own decisions, adopt a similar approach.

At present, the Court's practice may seem to an outsider to be unpredictable and inconsistent.¹⁹

Justice Kirby's strongly expressed support for amicus applications did not persuade the other members of the Court.

The position remained unchanged for almost ten years. Chief Justice Brennan's judgment in *Levy v Victoria*²⁰ established at High Court level the third and arguably the most important of the three elements in the amicus test, that the amicus applicant will add something in a way in which the Court would not otherwise be assisted.²¹ Although Brennan CJ's reasons in *Levy* were only the reasons of a single judge, for the next eleven years amicus applicants relied on what he said in that case as the authoritative test for amicus applications. Justice Kirby continued to take a broader approach.

At the end of 2008, in *Wurridjal v The Commonwealth*²² (in which the writer was one of the two amici applicants²³), criteria for amicus applications were further elaborated. The plaintiffs, two Aboriginal 'traditional owners', claimed the acquisition provisions of the *Northern Territory National Emergency Response Act 2007* and associated

¹⁹ *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 135-6; [1999] HCA 28, [104], [105] (references omitted).

²⁰ (1997) 189 CLR 579, 604.

²¹ This requirement may have an unfortunate influence on the attitude of substantive parties to amicus applications, including applications that support their interests: They may see an amicus application as an attack on their own competence. In *Wurridjal v The Commonwealth* (2009) 237 CLR 309, the plaintiffs legal team informed the amici applicants on the morning of the hearing (2 October 2008) that they would not support the application 'because it might be seen as reflecting on the adequacy of the plaintiffs' submissions'.

²² *Ibid.* Curiously, the Court's decision refusing the amici application is not published by the Court as a decision of the Court but it is reported in the Commonwealth Law Reports at 237 CLR 309, 312-4. For a more detailed consideration of the amici intervention, see Ernst Willheim, 'An Amicus Experience in the High Court: *Wurridjal v Commonwealth*' (2009) 20 *Public Law Review* 104.

²³ Professor Kim Rubenstein and Ernst Willheim. Professor Walker describes the *Wurridjal* amici as academics. Ernst Willheim has appeared as lead counsel in the High Court, the Federal Court, the Family Court, the Australian Industrial Court and State Courts of Appeal. He has appeared in every State and Territory except Tasmania. He does not hold and has never held a paid academic appointment. Kim Rubenstein has conducted cases, as counsel, in the High Court and Tribunals.

legislation gave rise to an unlawful acquisition of their right to participate in ceremony, particularly on identified sacred sites. The Commonwealth, by demurrer, claimed that the species of property relied upon by the plaintiffs, the right to participate in ceremony on identified sacred sites, did not constitute property for the purposes of s 51(xxxi) of the Constitution. The amici applicants sought to provide to the Court international law instruments and authorities relating to the rights of indigenous people to practice their religion and culture which, the amici submitted, would assist the Court in determining whether the rights claimed by the plaintiffs constituted property for the purposes of s 51(xxxi).²⁴

The amici application was refused, by majority. Chief Justice French, speaking for the majority of the Court, said:

The Court may be assisted where a prospective amicus curiae can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties because, (a) it is not in the interests of the parties to present argument on those aspects, or (b) one of other of the parties lacks the resources to present full argument to the Court on them.

In some cases it may be in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer.²⁵

In dissent, Kirby J, with whom Crennan agreed, said:

The practice of this Court in recent years has moved in the direction of widening the circumstances in which amici curiae will be heard, or at least permitted them to tender written submissions and materials. ...In taking this course, the Court has simply, if somewhat belatedly, followed the practice of

²⁴ Professor Walker notes, correctly, that the amici submissions made no reference to the statutory regime. She argues this diminished the utility of the submissions. Amici will usually focus on a particular aspect of a case – in this case the constitutional issues raised by demurrer. In this case also, Ernst Willheim informed senior counsel for the plaintiffs, on the first occasion contact was made, that in his view the plaintiffs' case would fail on the statutory regime. The amici submissions were directed at strengthening the case of the Aboriginal plaintiffs on the constitutional issue by introducing new material not being put to the Court by the parties. The amici had no interest in submitting that, on the construction of the legislation, the plaintiffs' case was flawed. In any event, the construction arguments were ably put by both defendants and the amici would not have been able to satisfy the Court that they were adding anything new to the construction arguments. As it turned out, the plaintiffs lost on a statutory construction point, with the Court finding that there was no acquisition.

²⁵ *Wurridjal v Commonwealth* (2009) 237 CLR 309, 312-3.

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other final national courts in common law countries. It has done so out of recognition of the special role played by such courts, including this Court, in expressing the law, especially in constitutional cases, in a way that necessarily goes beyond the interests and submissions of the particular parties to litigation. The present is a case involving such issues.

... the actual submission of the proposed amici is quite brief, being but twenty pages. It refers to new materials that are not referred to in the submissions of the parties and in particular materials on international law and the practice and decisions of foreign and international courts and bodies relevant to the treatment of indigenous peoples. Such materials may be relevant to this Court's deliberations...²⁶

The reasons of the majority in this case now represent the authoritative exposition of the circumstances where an amicus application will be allowed. Ironically, the majority was not persuaded that the submissions of the amici applicants satisfied the test (although Kirby J in his later substantive reasons focused extensively on the international law materials submitted by the amici). Curiously, also, those reasons have not been separately published by the Court itself as a decision of the Court. They are of course reproduced in the Commonwealth Law Reports.²⁷

The first part of the test, 'argument on aspects of the matter ...which are otherwise unlikely to receive full or adequate treatment', is along traditional lines. Later elements of the test appear to break new ground. The Court recognises that it may not be 'in the interests of the parties to present argument on those aspects'. Thus the Court has now formally recognised that the issues raised may go beyond the immediate interests of the parties. These few words arguably constitute a giant break with the past. The following paragraph, 'in some cases it may be in the interests of the administration of justice that the Court have the benefit of a larger view', may be ambiguous. Is the reference to 'the administration of justice' a reference to resolution of the dispute between the parties? That is, does the test focus solely on resolution of adversarial litigation? Or is it to be read in light of what was said before? Is the Court recognising the importance of an outcome that is just to the wider community? Does this test now create opportunities for submissions on wider public interest grounds? Whether the exposition of an authoritative and potentially more liberal test will encourage more amicus applications and a more favourable approach by the Court to amicus applications remains to be seen.

Later in this paper I offer some tentative suggestions on a new approach. I contend that a test, which focuses solely or primarily on whether an intending amicus can

²⁶ Ibid 313.

²⁷ Ibid 312-3.

correct omissions or deficiencies in the submissions of the parties, is fundamentally flawed. Rather, the focus should be directed to whether it is in the public interest to 'have the benefit of a larger view', in particular, the focus should be on the relevance and importance of the matters proposed to be raised by the intending amicus, not on the quality or otherwise of the submissions of the substantive litigants. The Court's Rules and procedures should be amended to facilitate this approach. But first, some comments on the distinction between amicus and interveners and on procedural deficiencies.

Amicus and intervener distinguished

Australian law distinguishes between an amicus and an intervener. The traditional view is that an applicant seeking to be joined as intervener must normally establish some legal interest.²⁸ If the application to intervene is successful, the intervener becomes a full party and enjoys the benefits and burdens that entails, including the right to file pleadings, adduce evidence, call and cross-examine witnesses, and to appeal. As a party, an intervener is also exposed to costs orders.²⁹ An intervener usually seeks to intervene in the interests of one or other of the principal parties. Indeed, the Court will commonly ask an applicant for leave to intervene to identify in whose interests the application is made. An amicus curiae, on the other hand, traditionally seeks to make submissions as a 'friend of the court' rather than in support of any particular party. The amicus seeks to be heard but is not technically a party to the proceedings. Traditionally, the amicus does not take a partisan position. Not being a party, an amicus has no right to file pleadings, lead evidence,³⁰ examine witnesses or to appeal and is not normally subject to costs orders.³¹

²⁸ *Levy v Victoria* (1997) 189 CLR 579, 603; under s 78A of the *Judiciary Act 1903* (Cth), the Commonwealth, State and Territory Attorneys-General may intervene, as of right, in constitutional matters.

²⁹ *Corporate Affairs Commission v Bradley* [1974] NSWLR 391, 396; *United States Tobacco* (1998) 20 FCR 520, 534-5.

³⁰ *Bropho v Tickner* (1993) 40 FCR 165, 172. While it is generally thought that an amicus cannot adduce evidence, 'legislative facts' may constitute an exception, for example, the famous submission by Michael Black QC representing the Tasmanian Wilderness Society in *Commonwealth v Tasmania* (1983) 158 CLR 1, 50, on the value of the Tasmanian wilderness area that would have been flooded by the proposed dam.

³¹ The distinction between intervener and amicus is discussed in *Levy v Victoria* (1997) 189 CLR 579 at 600-5 (Brennan CJ) and 650-2 (Kirby J); and in *McBain, Re; Ex parte Australian Catholic Bishops Conference* 209 CLR 372 ('*Re McBain*').

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The distinction may have significant practical and legal consequences. *Levy v Victoria*³² is a good illustration of the practical consequences. The interveners, being the Commonwealth, four States and the media proprietors, were able to make extensive oral submissions. They were also ordered to pay to both the plaintiff and to the defendants a proportion of the costs incurred by reference to the time by which the hearing was extended by their submissions. The journalists' union, which was refused leave to intervene but was granted amicus status, was confined to written submissions and was not made the subject of a costs order.

The *legal* importance of the distinction can be illustrated by a case concerning access by single women to in vitro fertilisation treatment.³³ The Australian Catholic Bishops Conference and the Australian Episcopal Conference of the Roman Catholic Church sought and were given leave to be heard as amicus in the Federal Court.³⁴ The parties to the proceedings in the Federal Court were content to accept the decision of the Court. The Bishops, however, were unhappy with the Federal Court's decision. As amicus, they were not a party to the Federal Court proceedings and had no right to appeal. They sought to bring certiorari to challenge the decision in the High Court but failed on a number of grounds including the lack of any justiciable issue between the Bishops and the parties or the judge and the Bishops' lack of legal interest.³⁵ Had they sought and been given leave to make submissions in the Federal Court as interveners instead of as amicus, they would have had a right to appeal against the decision of that Court. The outcome may be contrasted with *Attorney-General (Cth) v Breckler*,³⁶ where the Commonwealth Attorney-General, having intervened in the Federal Court, was able to appeal to the High Court (where he was ultimately successful). In *APLA Limited v Legal Services Commissioner (NSW)*,³⁷ Gummow J held that community organisations which sought and were given leave to make submissions as amici rather than as interveners were not parties and were therefore unable to seek declaratory relief.³⁸

Whether the High Court applies a consistent distinction between amicus and intervention applications before that Court may, however, be open to doubt. In *Ice TV Pty Limited & Anor v Nine Network Australia Pty Limited*,³⁹ Telstra Corporation Limited (Australia's largest telephone carrier) and Australian Digital Alliance Limited sought

³² (1997) 189 CLR 579.

³³ *McBain v State of Victoria* (2000) 99 FCR 116.

³⁴ *Ibid.*

³⁵ *Re McBain* (2002) 209 CLR 372.

³⁶ (1999) 197 CLR 83.

³⁷ (2005) 224 CLR 322.

³⁸ *Ibid* [172].

³⁹ [2009] HCA 14 (22 April 2009).

leave to intervene. Each applicant in its written submissions sought to establish a legal interest and to argue for a substantive position. On a traditional view, these applications were arguably more relevant to intervener status than to amicus status. Both applications were opposed by the appellant. Speaking for the Court, French CJ said 'The Court is of the view that it may be assisted by giving leave to Telstra and the Australian Digital Alliance to appear as amicus'.⁴⁰ No further reasons were given.

Procedural deficiencies

The Court's procedures (or lack of procedures) relating to amici applications are so bad they are almost unworkable. Not only does the absence of proper procedures place formidable obstacles in the way of amicus applications, the deficiency also seriously disadvantages the substantive parties.

The High Court's litigation procedures are based on a well established system of rules and court orders relating to filing and service of initiating processes, defences, motions, pleadings and written submissions. The rules and procedures focus on the adversarial parties. Unlike the *Federal Court Rules*,⁴¹ the *High Court Rules* do not make provision for early determination of amicus applications.⁴² Because an intending amicus applicant is not a party, the intending amicus applicant has no right to service of any of the preparatory documents and no right to notice of directions hearings. In practice an intending amicus is therefore dependant on the willingness of the substantive parties to provide documentation. The amicus experience in *Wurridjal v The Commonwealth*⁴³ provides a good illustration. Notwithstanding that the intending amici had informed senior counsel orally⁴⁴ and by e-mail⁴⁵ that they were working on an amicus submission and that correspondence had been exchanged with the plaintiffs' solicitors, the plaintiffs' counsel informed the Court at a directions hearing:

⁴⁰ [2008] HCA Transcript 356 (16 October 2008).

⁴¹ *Federal Court Rules*, O 6, r 17 provides that the Court may 'at any stage of a proceeding' give leave to a person to intervene.

⁴² Practice Direction No 1 of 2000 provides that 'intervener' includes any person seeking leave to be heard as amicus curiae. Notice of intention to intervene is to be given not less than 15 days before the hearing and written submissions are to be filed and served not less than 5 days before the hearing.

⁴³ (2009) 237 CLR 309.

⁴⁴ 10 November 1997, at the Centre for International and Public Law's 1997 Public Law Weekend.

⁴⁵ E-mail to Ron Merkel QC, 19 December 2007.

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The only foreshadowed intervention we understood was likely to occur was the Northern Territory...⁴⁶

The amici received from the first defendant, the Commonwealth, the Commonwealth's demurrer and the Commonwealth's defence. The amici also received the second defendant's defence.⁴⁷ They found themselves in the extraordinary position where they had the defences but not the pleadings of the plaintiffs to which those defences related. In response to successive requests to the plaintiffs, the plaintiffs replied:

The Plaintiffs Second Further Amended Statement of Claim has been filed with the High Court and is a public document. You are free to obtain a copy from the Registry.⁴⁸

I make no criticism of the plaintiffs. Counsel must act according to their instructions and what they see as the best interests of their clients. The plaintiffs were perfectly entitled to respond in this way. The response in this case illustrates the practical difficulties intending amici may face.

There are further practical difficulties. So long as an essential element of the Court's approach to amici applications is to consider whether they add anything new, an amicus application cannot formally be made to the Court until all the substantive parties have completed and filed their submissions. Only at that stage is the intending amicus able to make the necessary submission that it is adding something new. In practice, this means that the amicus application is not able to be made until very shortly before the date fixed for hearing. And the practice of the Court is to determine the amicus application on the first day of the hearing. This procedure creates practical problems for both the intending amicus and the substantive parties. Neither the parties nor the amicus applicant knows until the first day of hearing whether the amicus application will be allowed. The intending amicus must complete its full preparation including its full substantive submissions and

⁴⁶ HCA Transcript, 11 March 2008. As there were no relevant Court Rules enabling the intending amici to file notice of their intention, the intending amici were not able formally to appear at that directions hearing. In light of what transpired at the directions hearing, they wrote to the Court on 25 March 2008 informing the Court that on the basis of information then available they intended to make application to be heard as amici and that they had so informed the parties.

⁴⁷ Professor Walker points out that requiring parties to serve documents on amici adds to the burden of litigation. The burden can be minimised by electronic service, the procedure adopted by both defendants.

⁴⁸ E-mail, 6 May 2008, from Holding Redlich, solicitors for the plaintiffs, to Professor Kim Rubenstein.

supporting documentation even though that may prove futile. Nor is the procedure satisfactory for the substantive parties. Since they also do not find out until the first day of hearing whether the amicus submissions will be allowed, they do not know whether they need to address and respond to those submissions. In one case, McHugh J commented on this dilemma, saying that the mere fact that an intervener has indicated an intention to seek leave to intervene 'is no reason why the plaintiff or the defendants should spend their money preparing a case that they may not have to make'.⁴⁹ If out of abundant caution they do prepare responses and, as so often happens, the amicus application is refused, the costs of that preparation are thrown away. This is hardly an exemplary approach to management by the Court of its proceedings.

Towards a new approach: Why amicus applications should be allowed in constitutional cases

The traditional approach to an amicus application is of course to begin with the question, why amicus should be allowed at all. Litigation is a mechanism, a complex and costly mechanism, for the resolution of disputes between parties. Why should outsiders have the opportunity to participate in the resolution of legal disputes?

The traditional narrow approach may well be appropriate for the vast majority of trial litigation. To adapt the words of McHugh J in the passage cited above, the 'essential function' of a trial court is indeed 'to decide cases between parties'. Trial courts should seek to decide cases expeditiously and without unnecessary costs to the parties. In the overwhelming majority of trials, intervention by outsiders is likely to impede speedy resolution of disputes. Similar considerations generally apply also to intermediate courts. Views differ as to the extent to which it is appropriate for intermediate courts actively to develop new legal principles. Even activist intermediate courts have busy lists and the occasions for significant innovation will be rare.

Do these considerations apply equally to the High Court? In my view, no. First, the volume of cases is of a different order. Indeed, by comparison with trial and intermediate courts, the volume of decided cases is miniscule: 53 in 2009, of them 10 were constitutional.⁵⁰ In the first part of this year, from January 2010 to 20 May 2010, the Court handed down 15 decisions, only 2 of them involving the Constitution.

⁴⁹ *Superclinics Australia Pty Ltd v CES* (HCA Transcript, 11 September 1996).

⁵⁰ Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2009 Statistics', paper presented at Gilbert + Tobin 2010 Constitutional Law Conference.

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Secondly, the role of the High Court, as Australia's constitutional court and the highest court of appeal, is qualitatively different from the roles of trial and intermediate courts. Appellate matters come to the Court only by grant of special leave, and in considering whether to grant special leave the Court must have regard to whether the proceedings involve a question of law of 'that is of public importance'.⁵¹ In its appellate role the Court establishes legal principles and its decisions are of importance for the whole of the community.

Thirdly, constitutional cases, whether in the Court's original jurisdiction or in its appellate jurisdiction, are, by their very nature, *sui generis*. In a constitutional case, the Court is in substance interpreting the basic law as to how Australia is to be governed. Seen in this light, it is apparent that, while constitutional cases come before the Court through the processes of adversarial litigation, resolution of constitutional litigation has implications beyond the narrow interests of the parties. While ordinary civil litigation may often be viewed as a private controversy between private parties, once the interpretation of the Constitution is in issue, the proceedings have a dimension beyond the immediate private interests of the disputing parties.

As three distinguished academics put it, the Court 'decides legal controversies that shape the social, economic and political direction of the nation'.⁵² Why should submissions as to the direction the nation is to be shaped be confined to executive governments and private adversarial parties? Is so limited a process a legitimate process for determining the meaning of our Constitution? This indeed is the key point I wish to make. The Court has not given adequate recognition to the special character of public interest litigation, particularly constitutional litigation. Principles, practices and procedures developed in the context of adversarial litigation over private rights should not automatically be applied to constitutional litigation.

In contrast to the Court's approach, the legislature has given statutory recognition to the special character of constitutional litigation. Section 78B of the *Judiciary Act 1903* (Cth) requires notice of matters arising under the Constitution or involving its interpretation to be given to each of the Commonwealth, State and Territory Attorneys-General. Each of the Attorneys-General has a statutory right to intervene.⁵³ In major constitutional matters, it is not unusual to see the High Court's bar table literally overcrowded with Commonwealth, State and sometimes Territory Solicitors-

⁵¹ *Judiciary Act 1903* (Cth) s 35A.

⁵² Michael Coper, Fiona Wheeler and John Williams, 'The Private Life of a Public Institution: Oral History and the High Court of Australia', paper delivered at the VXI International Oral History Conference, 7-11 July 2010, Prague.

⁵³ *Judiciary Act 1903* (Cth) s 78A.

General and their juniors and only a single team of lawyers representing a private litigant. In any event, the private litigant will frequently be a powerful corporation.

One conceptual basis for intervention by the Attorneys-General was explained by Hutley JA in *Corporate Affairs Commission v Bradley*:⁵⁴

[The] constitutional practice is based upon the concept of legislative trespass and the right of the Attorney-General of a State in the case of legislative trespass by the Commonwealth to protect its citizens from such trespass.

Today, intervention by Commonwealth and State Attorneys-General is in substance intervention on behalf of executive governments and is more likely to be in support of governmental powers than in support of citizens' rights. *Levy v Victoria*,⁵⁵ provides a good illustration.

The plaintiff was charged with entering a hunting area without a game licence. He alleged he entered the hunting area to engage in acts of political protest, namely, to protest against the gaming laws. He sought to attract maximum attention and publicity to his cause, including being seen on television as publicly protesting and collecting injured and killed game birds. The regulations which purported to prevent him from entering the hunting area prevented him from making effective protests that attract media attention and effectively silenced him. He claimed his right to protest in this way on an issue of political significance was protected by implied constitutional freedoms.⁵⁶

The Victorian Solicitor-General applied for leave to reopen the two cases which were said to establish the implied constitutional freedom, *Theophanous v Herald and Weekly Times Ltd*⁵⁷ and *Stephens v West Australian Newspapers Ltd*.⁵⁸ The Commonwealth and several State Attorneys-General intervened as of right. They did not do so to oppose legislative trespass on the rights of citizens. To the contrary, the Governments were concerned to oppose challenges to their regulatory laws. They therefore opposed the argument that the implied constitutional freedom of political communication provided protection against the operation of hunting laws. Several media organisations, both print media and television, were given leave to intervene. The union representing journalists was refused leave to intervene but was given leave to make written submissions as amicus, as was the Australian Press Council.

⁵⁴ [1974] 1 NSWLR 391, 399-400.

⁵⁵ (1997) 189 CLR 579.

⁵⁶ The argument is summarised in the HCA Transcript, 6 August 1996.

⁵⁷ (1994) 182 CLR 104.

⁵⁸ (1994) 182 CLR 211.

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This is a classic example of litigation that affects the wider community, well beyond the immediate parties. Many in the community wish to engage in political protest. Protesters frequently test regulatory laws. Whether and to what extent an implied constitutional freedom of political discourse can provide protection against regulatory laws is therefore a matter of general interest. I do not argue against the statutory right of governments to intervene. They have legitimate interests to protect. Frequently as in *Levy*, they will be arguing in support of government powers. On the other hand, the cumulative effect of many Attorneys-General each making submissions in support of governmental powers creates an imbalance. It may be observed that at the time Dixon J made his cautious observations,⁵⁹ Attorneys-General had not yet been given the statutory right to intervene. I suggest conferral of that right carries with it an obligation on the Court to ensure that those with other views also have the opportunity to put their views to the Court.

In *Levy*, large media proprietors were given leave to intervene and to address the Court, seemingly on the basis that they had a commercial interest because they were at risk of being sued for defamation. The union representing journalists, the people who actually write the media content and who had an obvious interest in the scope of the implied freedom, was refused leave to intervene and to make oral submissions but was granted leave to make written submissions as amicus. Only Kirby J argued that the union should have had the same rights as the interveners.⁶⁰

Surely the traditional emphasis on property or material interests is entirely misplaced in relation to interpretation of the Constitution. Where the nature and scope of a major constitutional principle, such as the freedom of political discourse, is in issue before the Court, why should the interests of, say, journalists or even academic writers seeking freedom from oppressive defamation laws or 'green' protest groups intending to chain themselves to trees to protest against logging be given any less weight than the commercial interests of media proprietors? As Kirby J wrote in *Levy v Victoria*:⁶¹

Financial and property interests are not, or should not be, the only interests to which this Court pays heed when determining the existence and scope of a constitutional freedom of communication.⁶²

Clearly the statutory right of Attorneys-General to intervene can no longer be seen as adequate protection of the rights of individuals. Executive governments have a

⁵⁹ See above n 2.

⁶⁰ *Levy v Victoria* (1997) 189 CLR 579, 650.

⁶¹ *Ibid.*

⁶² *Ibid.*

legitimate interest in addressing the Court on constitutional matters. But theirs is not the only legitimate perspective. Interpretation of the Constitution is relevant to the whole of the community. A corporate litigant may not have a legal interest in exploring all relevant considerations. An individual private litigant may not have the necessary resources. The Court, in its consideration of arguments relating to the interpretation of the Constitution, should not be confined to the submissions of the parties to the litigation. Since the Court's interpretation of the Constitution will have long term implications for the community as a whole, the Court should welcome the wider and different perspectives amici submissions can provide.

Submissions from one or more amici may well prolong the hearing and increase the burden on the parties. That is a burden those who choose to litigate in the High Court must accept. Whether amici submissions advantage or disadvantage public and private litigants is irrelevant. At this level, litigants are well aware of the significance for the wider community of the High Court's role in interpreting the Constitution.

These are some of the reasons why I submit that in constitutional cases in the High Court the traditional approach to amicus applications should be turned on its head. Once the interpretation of the Constitution is in issue, why should submissions as to what the Constitution means be limited to private litigating parties and executive governments. When the future operation of the Constitution is in issue, the matter has moved beyond resolution of a private dispute. Now the Court is adjudicating on public rights and obligations. The procedures of the Court should be directed at encouraging wider contributions and eliciting all relevant views. It follows that when an amicus application is made to the High Court in a constitutional matter, the Court's approach should be facilitative rather than negative. The issue the Court should address is not why an amicus application should be allowed but why it should not be allowed.

I would add that judges and former judges appear slowly to be changing their views and to acknowledge the wider role of the High Court. Writing after his retirement from the Court, Sir Anthony Mason has suggested that the reluctance to allow amicus applications may be traced to the Court's perception of its adjudicative function in determining litigation between parties in a system of adversarial litigation.⁶³ In contrast to the view McHugh J put to counsel in *Garcia v National Australia Bank Limited*,⁶⁴ rejecting an amicus application by a consumer credit organisation, when the Australian Catholic Bishops' Conference sought amicus status McHugh J put to counsel for the respondent opposing the application:

⁶³ Sir Anthony Mason, *Interveners and Amici Curiae in the High Court: A Comment* (1998) 20 *Adelaide Law Review* 173, 173.

⁶⁴ HCA Transcript, 4 March 1998, 39.

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(One) factor that you have got to face up to on this application is this, that although this is litigation between parties, part of this Court's function is to declare the law for the nation and that means the Court has got to look at issues that go beyond, or sometimes, the particular parties...⁶⁵

More recently, in *Aon Risk Services Australia Ltd v Australian National University*,⁶⁶ Gummow, Hayne, Crennan, Kiefel and Bell JJ wrote:

It is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings.⁶⁷

Yet these remarks are but cracks in what remains a rather solid edifice. The Court as a whole remains unwilling to recognise that in the exercise of its function of determining the meaning of the Constitution its role goes beyond adjudication of the rights of the immediate litigants, that it is serving the nation as a whole and that in consequence its practices and procedures must be adapted to secure the legitimacy and acceptability of its work.

I add, as an aside, that one area where amici may have a particularly useful contribution to make is in the relatively unexplored area of 'legislative facts'.⁶⁸

Greater flexibility in allowing amicus applications would of course have consequences for the management of litigation. The number of interventions may need to be controlled. But I doubt that there is much risk of a massive flood of unmeritorious amicus applications. Amicus applications require technical expertise. They are time consuming and expensive. Again I turn to Sir Anthony Mason:

Maybe meddlesome interference by a busybody is a price that we should be willing to pay. After all in other areas of the law the "floodgates" argument has proved to be an ineffectual menace.⁶⁹

A separate but related consideration is that community and public interest groups seeking to make submissions may in substance have substantially similar views. There is nothing novel about that. Commonwealth and State Attorneys-General exercising their statutory right to intervene frequently make similar submissions. So

⁶⁵ *Superclinics v CES* HCA Transcript, 11 September 1996, 15. A cynic may ask whether the Catholic hierarchy has more influence on the Court than a community organisation.

⁶⁶ [2009] HCA 27.

⁶⁷ *Ibid* [113].

⁶⁸ *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460, [63]-[71] (McHugh J); Cf Callinan J at [163].

⁶⁹ Sir Anthony Mason, *Future Directions in Australian Law* (1987) 13 *Monash University Law Review*, 149, 162.

did the many media proprietors in *Levy v Victoria*.⁷⁰ The Court is accustomed to managing this issue, for example by encouraging those with similar positions to confer and by setting strict limits on the size of written submissions and the duration of oral submissions. There is no good reason why submissions by several amici cannot be managed along similar lines.

Even if strictly managed by the Court, increased acceptance of amici may increase the length of hearings. That is surely not a reason to reject amici. Any increase is not likely to be significant. If the average number of constitutional cases each year is around 10, if amici are become involved in say half of these, and the extra time required by amici is, say, 2 hours, the extra hearing time would be 10 hours per annum. These very rough estimates are put forward merely to show that any additional burden on the Court is likely to be modest and manageable. A modest increase is surely a small price to pay for enlarging the range of views available to the Court, enhancing public opportunities to influence the Court and enhancing the status of the Court in the eyes of the wider community.

Procedural reform

Finally some brief comments on procedural reform.

Court procedures may hold little interest for the academic scholar. I hope to have shown that the High Court's current Rules and current procedures completely frustrate the development of a serious amicus role. I do not propose complex or major changes. Minimal reforms to the *High Court Rules* and to the Court's procedures are essential. To date, the Court has been unresponsive to reform proposals.

Proposal 1: Notice of constitutional cases and availability of pleadings

Public awareness of forthcoming constitutional cases, of the issues raised in those cases and of the progress of cases are obvious and necessary prerequisites for facilitation of amicus applications.

I therefore propose clear identification on the High Court's website of forthcoming constitutional cases, of the issues in those cases and their progress. The excellent High Court Bulletin goes some way to meeting this proposal. But the identification of the issues is currently limited to the 'catchwords' prepared by the Court's staff. 'Catchwords' are helpful for the general High Court observer but serious consideration of a potential amicus application and preparation of the documentation necessary for an amicus application cannot be undertaken on the basis of

⁷⁰ (1997) 189 CLR 579.

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‘catchwords’ alone. Access to the pleadings is necessary. There is no good reason why the pleadings in constitutional cases should not be publicly available. I therefore propose that the pleadings in constitutional cases be made available on the High Court’s website. This should not give rise to any practical difficulty or expense. Pleadings could be included directly in the High Court Bulletin or made accessible by way of an appropriate electronic link. Inclusion in the Bulletin of details of directions hearings, or of a link to directions hearings, would enable the progress of cases to be understood and followed. As a case progresses and submissions are filed, those submissions should be similarly accessible.

Proposal 2: New Rules and procedures for the making and determination of amicus applications

There is an obvious need for new Rules for the making of amicus applications and new procedures for determining amicus applications.

I propose, first, provision in the *High Court Rules* for an amicus application to be able to be made at an early stage of the proceedings. The Court may find it convenient to draw on the existing *Federal Court Rules*.⁷¹ Provision could be made in the Forms for an amicus application briefly to indicate supporting material including any special expertise or interest the intending amicus believes it can bring to the Court, a brief indication of the matters the applicant seeks to address in its submissions and why these should be allowed. So as not to restrict further development over time of principles for allowing amici applications, I suggest the Rules and Forms should not set out any particular test and should not be too prescriptive.

Secondly, once new Rules are in place, the Court will be able to adapt its procedures appropriately. Assuming my proposal for inclusion in the Bulletin of details of directions hearings is implemented, it will be open to the Court at an early directions hearing to set time limits for lodging any amicus applications. Any amicus applications can then be heard and determined at a further directions hearing. If approved, appropriate orders can be made for filing submissions, service of documents, whether submissions are to be oral or in writing or both and so on. Directions can also impose conditions, for example, as to the legal issues an amicus is given leave to address⁷² and the length of submissions. Removal of the present

⁷¹ *Federal Court Rules*, Statutory Rules 1979 No 140 as amended, O 6, r 17.

⁷² Limiting the matters to be addressed may itself raise difficult issues. In the appeal to the High Court from the New South Wales Court of Appeal decision in *CES v Superclinics Australia Pty Ltd* (1995) 38 NSWLR 47, a wrongful birth case, the Australian Catholic Bishops’ Conference as amicus raised an issue not raised by either of the substantive parties at trial or in the Court of Appeal, namely the correctness of a long-standing line of

draconian requirement for filing and serving hard copies of all 'unusual' materials would remove an unnecessary administrative burden.⁷³ In practice most sources are nowadays likely to be publicly available electronically and electronic citations should suffice for both the Court and the parties. Provision could be made for the Registrar to direct provision of materials that cannot readily be accessed from the internet. In those rare instances, provision in compact disc or other electronic format should be an acceptable alternative to hard copies.

These modest reforms, together with development of a new approach to allowing amicus applications, would do much to enhance public understanding of and confidence in the work of the Court and in the Court's decisions.

authorities on abortion (High Court of Australia, No S88 of 1996, HCA Trans 357 (11 September 1996). On one view, the Bishops 'hijacked' the case. By statutory majority, the Bishops were given leave to appear as amicus.

⁷³ Professor Waker refers to delivery by the amici of a full box of materials. The Court required the amici to provide hard copies of all materials that were not readily available. Where the amici submissions cited short passages from decisions of international tribunals and international treaties, the Court required the full text of the decisions and the treaties to be provided in hard copy. Copies had to be provided for each member of the Court and to be served on each of the parties, a major expense for the amici. The printer used by the amici was able to include all the material in the box of materials in a single compact disk but this format was not acceptable to the Court.