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Non-party participation in human rights and public interest litigation

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Research Paper 10. Non-party participation in human rights and public interest litigation

Contents

Amicus curiae occupy a unique place in the courts: non-parties who are nevertheless advocates, who are not bound by rules of standing and justiciability, and who can present the court with new information and arguments. Amicus participation has increased dramatically in recent years, and threatens to alter the adversarial process.[1]

1. Introduction

Opportunities to initiate legal proceedings designed to ventilate human rights or public interest concerns are liable to be limited, not only by rules relating to standing, but also by practical constraints associated with the expense and difficulty of litigating in one's own right and by the risk of an adverse costs order. An alternative is to seek to participate and be heard in proceedings which others have commenced. This may be to provide impartial assistance to the court or with a view to influencing the outcome. In certain circumstances, a court may be amenable to allowing a non-party a voice, if not more substantial participation.

In the human rights context, the conferral of a right on the Australian Human Rights Commission to intervene, with leave of the court, serves as an important mechanism for facilitating independent input into proceedings that involve issues of race, sex, age and disability discrimination and human rights. The Commission has published guidelines on applications for intervention in court proceedings[2] and guidelines for the exercise of the Commissioners' amicus curiae role.[3] The role of the Commission is considered in detail in research paper 4. Similar functions of state and territory human rights bodies are discussed in research paper 5. On occasions, other bodies with an interest in human rights, including the Human Rights Law Centre, the Public Interest Advocacy Centre and community legal centres, have participated as amicus curiae in significant public interest cases.[4] Some of these cases are discussed below.

In recent years, in class action litigation, increasing use has been made of amici, contradictors and court appointed referees to assist the court, particularly in determining applications for approval of settlements agreed between the parties. This is discussed further below.

2. Participation by non-parties in civil litigation

In this paper, we examine the scope for participation by non-parties in civil litigation generally and human rights and public interest cases in particular. A number of the legal and other impediments to such participation are examined.

A non-party permitted to involve itself in litigation has traditionally been classified as either an 'intervener' or an 'amicus curiae', and the two are quite distinct.[5]

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[1] Helen Anderson, 'Frenemies of the Court: The Many Faces of Amicus Curiae' (2015) 49 *University of Richmond Law Review* 361.

[2] Australian Human Rights Commission, 'Intervention in court proceedings The Australian Human Rights Commission Guidelines' <https://humanrights.gov.au/our-work/legal/intervention-court-proceedings-australian-human-rights-commission-guidelines>.

[3] Australian Human Rights Commission, 'Amicus guidelines' <https://humanrights.gov.au/our-work/legal/amicus-guidelines>. See *Australian Human Rights Commission Act 1986* (Cth) s 46PV. The Commission publishes a list of cases in which it has been involved and in which written submissions were filed: Australian Human Rights Commission, 'Submission to Court as intervener and Amicus Curiae' <https://humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae?_ga=2.232511258.463580803.1609984497-957059352.1607987859>.

[4] As Perry and Keyzer note, the Human Rights Law Centre has become a 'repeat player' and has persuaded the High Court to allow it to participate in numerous case: H W Perry and Patrick Keyzer, 'Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia can Learn from the U.S. Experience', 37(1) *Law in Context* (2020) 91-92.

[5] However, the lines between them have often been blurred: see, e.g. *Re McBain; ex parte Catholic Bishops Conference* (2002) 209 CLR 373, 393 [14] (Gleeson CJ). In *Levy v the State of Victoria* (1997) 189 CLR 579 an issue arose as to the constitutional implied freedom of communication concerning government and political matters. In considering the applications of a number of media organisations for leave to intervene or appear as amicus curiae, Brenna CJ elaborated on the distinction between the two, at [49]-[50]. See also *Priest v West* (2011) 35 VR 225.

In the period 2020 to 2022, over 100 judgments have been handed down by Australian courts in cases and tribunals in which an amicus curiae or other non-party has participated or sought to do so.

The diversity in the types of cases is apparent from matters determined in early 2022, which include:

- family law proceedings and disputes between parents[6]
- proceedings for possession of land[7]
- mental health proceedings[8]
- discrimination proceedings[9]
- proceedings arising out of criminal proceedings[10]
- extradition proceedings[11]
- applications for judicial review[12]
- proceedings arising out of an application by a solicitor for leave to withdraw representation[13]
- an appeal in respect of criminal injuries compensation[14]
- a dispute involving an owner's corporation[15]
- liquidation and insolvency proceedings[16]
- criminal proceedings[17]
- proceedings in respect of superannuation[18]
- a dispute as to the construction of the constitution of a political party[19]
- an employment dispute as to whether persons were employees or independent contractors[20]
- a dispute in relation to residential tenancies[21]
- a dispute as to the forum in which proceedings should be brought[22]
- immigration proceedings[23]
- proceedings in respect of the national disability insurance scheme[24]
- patent proceedings[25]
- miscellaneous other cases.

[6] *Hernandez & Cranage* [2022] FedCFamC1A 68; *QAX v LUB* [2022] SACAT 21.
[7] *Misthold Pty Ltd v NSW Historic Sites and Railway Heritage Company Pty Ltd (No 2)* [2022] NSWSC 561.
[8] *JL v Mental Health Tribunal (No 2)* [2022] VSC 222.
[9] *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16; *Hamzy v Commissioner of Corrective Services NSW* [2022] NSWCA 16.
[10] *Marium v Registrar Local Court Blacktown* [2022] NSWSC 528.
[11] *Matson v Attorney-General (Cth)* [2022] FCA 461; *Matson v Attorney-General (No 1)* [2022] FCA 212.
[12] *Nyoni v Bird* [2022] FCAFC 61 (14 April 2022).
[13] *Sukkar v Haoui (No.2)* [2022] NSWDC 115.
[14] *Bennetts v Smith* [2022] WADC 32; *Stumpagee v Sampi* [2022] WADC 28; *Harris v Sycamore* [2022] WADC 4.
[15] *Owners Corporation 1 Plan No. PS735439F v Singh (Owners Corporations)* [2022] VCAT 389.
[16] *Bridging Capital Holdings Pty Ltd v Self Directed Super Funds Pty Ltd (Costs)* [2022] FCA 361; *Jahani, in the matter of Ralan Group Pty Ltd (in liquidation)* [2022] FCA 107; *Fidelity Capital (Australia) Pty Ltd v Delic* [2022] FCA 41.
[17] *The Queen v Hoffmann* (No 3)[2022] NTSC 24.
[18] *Construction, Forestry, Mining and Energy Industrial Union of Employees, Queensland v Queensland Master Builders Association, Industrial Organisation of Employees, in the matter of Buss (Queensland) Pty Ltd* [2022] FCA 283 (24 March 2022) (Greenwood J).
[19] *Camenzuli v Hawke* [2022] NSWSC 168.
[20] *ZG Operations Australia Pty Ltd v Jamsek* 96 ALJR 144; 398 ALR 603; 312 IR 74.
[21] *Chief Executive Officer (Housing) v Young and Anor* [2022] NTCA 1.
[22] *Epic Games, Inc v Google LLC (Stay Application)* [2022] FCA 66.
[23] *Lukasa and Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (Migration)* [2022] AATA 192.
[24] *JWVH and National Disability Insurance Agency* [2022] AATA 82; *GMVX and National Disability Insurance Agency* [2022] AATA 80.
[25] *Generic Partners Pty Ltd v Neurim Pharmaceuticals Ltd* [2022] APO 2.

In recent years there has been an increase in non-party intervention in coronial proceedings.[26]

In the following part of this paper we consider, amongst other things, the roles of intervenors and amicus curiae and the principles and procedures relevant to their intervention.

2.1 The role of an intervener

In *Roadshow Films Pty Ltd v iiNet Ltd,*[27] the High Court explained that intervention is only available to a person who can assert the possession of *interests* that have a particular character which are liable to be *affected* by the determination of the proceedings sought to be joined:[28]

> A non-party whose interests would be directly affected by a decision in the proceeding, that is one who would be bound by the decision, is entitled to intervene to protect the interest likely to be affected. A non-party whose legal interest, for example, in other pending litigation is likely to be affected substantially by the outcome of the proceedings in this Court will satisfy a precondition for leave to intervene. Intervention will not ordinarily be supported by an indirect or contingent affection of legal interests following from the extra curial operation of the principles enunciated in the decision of the Court or their effect upon future litigation.
>
> Where a person having the necessary legal interest can show that the parties to the particular proceedings may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction by granting leave to intervene, albeit subject to such limitations and conditions as to costs as between all parties as it sees fit to impose.[29]

Having been recognised as such, an intervener can conduct itself as a party would in seeking to protect the interest in question. The intervener 'can appeal, tender evidence and participate fully in all aspects of the argument'.[30] As a result of the restrictive character of the criteria for intervention, such a course is seldom open to a person motivated purely by public interest concerns.[31]

2.2 The role of an amicus curiae

By contrast, appearance as an amicus curiae,[32] or 'friend of the court',[33] is not contingent on demonstrating that one's interests are directly at stake[34]. However, such participation will often be motivated by concern about the indirect or broader implications of the proceeding. An amicus is afforded a much more limited role than an intervener. If permitted to appear, an amicus does not acquire anything resembling party status and has little control over the course of proceedings. Their function is ordinarily confined to the presentation of information or argument in relation to issues already in dispute between the parties, or at the very least

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[26] See e.g., the Veronica *Nelson* inquest in Victoria with multiple interveners including the Victorian Equal Opportunity and Human Rights Commission; the *Tanya Day* coronial inquest where the Victorian Equal Opportunity and Human Rights Commission also intervened; and the *Kumanjayi Walker* inquest to come in the NT with NAAJA intervening.

[27] (2011) 248 CLR 37.

[28] (2011) 248 CLR 37, [2]-[3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

[29] Recent cases in which these principles have been cited include*: James Cook University v Ridd* [2020] FCAFC 123; 298 IR 50, [38]; *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1872, [32] (Mortimer J).

[30] *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 396 (Hutley JA). See also e.g., *Owen v Madden (No 3)* [2012] FCA 313, [27] (Logan J).

[31] Although see *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452, 456 [8]-[9] (North J).

[32] Note that on one view, '[t]he amicus curiae is the barrister, solicitor or other person to whom the Court gives leave to speak, not some principal of that person' (*Breen v Williams* (unreported, Supreme Court of New South Wales, Bryson J, 10 October 1994)). However, the term is often used (and will be used in this paper) as though it has the broader connotation.

[33] In *Priest v West* (2011) 35 VR 225, the Victorian Court of Appeal declined to use the Latin phrase 'amicus curiae', preferring the more accessible 'friend of the court': 227 [1]; see also *Lewis v LG Electronics Australia Pty Ltd* [2014] VSC 644, [4] (Sifris J). Whilst there is no doubt merit to this approach, the overwhelming bulk of the case law and secondary literature is framed around the Latin expression.

[34] *Priest v West* (2011) 35 VR 225, 232 [29] (Maxwell P, Harper JA and Kyrou AJA).

incidental to the case as the parties have developed it. On rare occasions, amici have been permitted to adduce evidence.[35]

The basic purpose of hearing an amicus curiae is to ensure that a court is acquainted with relevant matters that might not otherwise be put to it. In its most traditional guise, the amicus curiae (at least so far as the common law was concerned) was a legal practitioner who, through happenstance, was present to draw a court's attention to some matter that the parties to a proceeding had overlooked.[36] Nowadays, however, the category of actors customarily referred to as 'amici curiae' is, in practice, rather amorphous. As noted by Einfeld J, 'the courts have always avoided a precise delimiting of the scope of the facility [in order to maximise] its flexibility'[37]. Whilst the following classification does not exhaust the range of persons who have been described as amici at one time or another,[38] most amici fall within one or more of the following groupings:

- Individuals disinterested in the outcome may seek to ensure that a court is provided with information, expertise and/or argument on issues that might otherwise escape an appropriate level of scrutiny. The objective is to assist the court to avoid falling into error, and also, at times, to ensure that the interests of parties who are inadequately represented, or non-parties liable to be affected by the court's determination, are not overlooked.[39] A legal practitioner might appear in this connection on the initiative of the court itself, particularly where the alternative would involve the court determining a contentious issue without hearing from an effective contradictor. For example, in *State of Queensland v B,*[40] the Supreme Court of Queensland was asked by the State (which conducted the hospital concerned) to exercise its *parens patriae* jurisdiction to enable the termination of the pregnancy of B, a twelve year old girl. B wished to undergo the termination procedure but was incompetent to consent to it because of her age and level of maturity. Both of her parents concurred in that course, but the nature of the procedure was such that parental approval would not suffice.[41] Because B's treating doctors also favoured termination, none of those involved were minded to canvass any considerations potentially militating against it. In light of 'the gravity of the application, its urgency' and the novelty of the circumstances presented, Wilson J

[35] *APLA Limited v Legal Services Commissioner* [2005] HCA 44; 224 CLR 322. See also *Re Medical Assessment Panel; Ex Parte Symons* (2003) 27 WAR 242 where the question of whether the Attorney-General, as amicus curiae, could adduce evidence was considered, [54]-[55]. See also 4.3.3 of this paper.

[36] As to the origins and early history of the amicus facility, see *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 199-200 (Einfeld J); S Chandra Mohan, 'The Amicus Curiae: Friends No More?' (2010) *Singapore Journal of Legal Studies* 352, 355-364.

[37] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 200 (Einfeld J). See also Australian Law Reform Commission *Standing in Public Interest Litigation* (Report No 27, 1985) [285] (noting that at the time of writing 'generally the role of an *amicus* has received little examination in English or Australian courts'); *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 535-536 (Davies, Wilcox and Gummow JJ).

[38] See further e.g., S Chandra Mohan, 'The Amicus Curiae: Friends No More?' (2010) *Singapore Journal of Legal Studies* 352, 364-373.

[39] See *Re Medical Assessment Panel; ex parte Symons* (2003) 27 WAR 242, 249 [18] (E M Heenan J). On the distinction arising between pro bono assistance of counsel and counsel acting as an amicus by way of a referral under s 7.26 of the *UCPR,* see e.g., *Clark v State of New South Wales* [2018] NSWSC 450, [17]: 'There is superficial attraction only in the distinction between a lawyer acting for a litigant pro bono, on the one hand, and a lawyer accepting a referral as amicus curiae on the other… Counsel appearing amicus may appear in a more limited capacity than counsel retained to appear on behalf of a litigant, but it does not follow from whatever differences there may be that the advocacy of the amicus is not pro bono assistance to the litigant. Counsel who appeared in the 2012 and 2016 appeals were appointed for the very purpose of putting what properly could be put on behalf of Mr Clark in contradiction of the arguments mounted by the State. Indeed, given that he was the appellant in each case, the role of counsel was to put all of the arguments that could properly be put in favour of the Court of Appeal allowing his appeal.'

[40] (2008) 2 Qd R 562. See also, e.g., *Guneser v The Magistrates' Court of Victoria* [2008] VSC 57, [21]-[24] (Habersberger J); *R v Gee* (2012) 113 SASR 372; *R v Wazczuk* [2012] NSWSC 1080; *ASIC v Ingleby* (2013) 39 VR 554; *Re Mowbray College (in liq)* [2013] VSC 565, [7]-[9] (Robson J); *Commonwealth Bank of Australia v Doggett* [2014] VSC 423, [107]-[108] (Hargrave J); *Wang v Farkas* (2014) 85 NSWLR 390, 393 [9] (Basten JA); cf *In the Will of Eva Orloff (dec'd) (No 2)* [2010] VSC 83, [19], [49] (Robson J).

[41] (2008) 2 Qd R 562, [17] referring to *Marion's Case* (1992) 175 CLR 218.

determined that it was 'desirable that there be a contradictor' and approached the President of the Bar Association of Queensland, seeking an advocate to fulfil that role.[42]

- Governmental actors sometimes seek be heard in legal proceedings concerning matters connected to their function or remit.[43] Such actors have frequently been permitted to advance submissions in the High Court in recent times,[44] and have also appeared in other courts.[45] In one sense, this might be regarded as an extension of the role historically played by Attorneys-General, who have often appeared amicus in legal proceedings raising issues of general public importance on which there was no effective contradictor.[46] Nowadays, it is recognised more generally that governmental actors are often well placed to provide a court with the benefit of expertise that the parties to proceedings might lack, particularly when it comes to, for example, the administration of specialised legislation. The *Australian Human Rights Commission Act 1986* (Cth) explicitly assigns certain officer-holders 'the function of assisting the Federal Court and Federal Circuit Court, as *amicus curiae*' in specified proceedings, although appearance in such proceedings remains by leave, rather than as of right.[47] The Australian Law Reform Commission has recommended that a similar statutory role be conferred on the Information Commissioner.[48]
- A third amicus group consists of private individuals or organisations who take the initiative to approach a court seeking to present submissions on the legal issues raised by legal proceedings and thereby urge that particular considerations be taken into account in their determination. The mere fact of seeking involvement will demonstrate that such a person has some form of 'interest' in the proceeding at hand, but not an interest of a kind sufficient to warrant involvement as an intervener. Rather, his or her interest will often derive from a conviction as to how the law ought to be shaped in some particular respect. This concern may flow from some representative function of the person or organisation concerned, from interests of a commercial nature, or simply from 'a defined, and no doubt emphatic, policy stance [or agenda] as regards the subject matter of the issue being

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[42] (2008) 2 Qd R 562, [25]. Wilson J commended the barrister who appeared 'for his careful and dispassionate exposing of issues for [the court's] determination', at [26].

[43] Note that the various Australian Attorneys-General have a right to intervene in certain constitutional proceedings, with power over the costs of such intervention reserved to the court: *Judiciary Act 1903* (Cth) s 78A.

[44] See e.g., *Lehman Brothers Holding Inc v City of Swan* (2010) 240 CLR 509 (Australian Securities & Investments Commission); *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239 (Attorney-General for the Commonwealth); *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492 (New South Wale Minister for Planning and Infrastructure); *Magaming v The Queen* (2013) 252 CLR 381 (Australian Human Rights Commission); *D'Amico v Director of Public Prosecutions* [2013] HCATrans 319 (Chief Examiner (Victoria)); *State of Western Australia v Brown* (2014) 253 CLR 507 (Attorney-General for South Australia); *Tajjour v New South Wales* (2014) 254 CLR 508 (Australian Human Rights Commission).

[45] See, e.g, *Capelli v Shepard* (2010) 29 VR 242 (Australian Securities & Investments Commission); *Re Bevillesta Pty Ltd* (2011) 84 ALR 215(Australian Securities & Investments Commission); *Owen v Madden (No 3)* (2012) 201 FCR 360 (Australian Securities & Investments Commission); *Karim v The Queen* (2013) 83 NSWLR 268 (Australian Human Rights Commission); *Lewis v LG Electronics Australia Pty Ltd* (2014) 291 FLR 407 (Director of Consumer Affairs Victoria). While government actors are often permitted to appear without any substantive explanation being published, they will not be heard as a matter of course. For example, in *Dale v The Queen* (2012) 44 VR 164, the Australian Crime Commission was refused leave to appear on the footing that its proposed submissions were in substance duplicative of those of the Crown, at [135] (Weinberg, Harper and Whelan JJA).

[46] See *R v Murphy* (1986) 5 NSWLR 18, 23 (Hunt J). See further, e.g., *Forestry Tasmania v Ombudsman (No 2)* [2010] TASSC 52.

[47] *Australian Human Rights Commission Act* 1986 (Cth), s 46PV ('AHRC Act'). In *Access for All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2006] FCA 1214, Collier J characterised the relevant provision as 'recognis[ing] the position, expertise and knowledge of the Commissioners', at [6]. The AHRC Act also envisages the Commission intervening in 'proceedings that involve human rights issues': s 11(1)(o). See also *Competition and Consumer Act 2010* (Cth) s 87CA (intervention by Australian Competition and Consumer Commission); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GO (intervention by Australian Securities and Investments Commission). *See also the Equal Opportunity Act 2010* (Vic) s 160.

[48] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No. 23, 2014) Recommendation 16–2.

considered'.[49] This encompasses those seeking to articulate or advance perceived public interest considerations. Although such an actor may be categorised as a 'political' amicus,[50] there is a clear delineation between (a) those seeking to advocate what may be a conservative position, which may be perceived to be in the interests of a certain sector of the public; (b) those seeking to promote what they consider to be a progressive or 'public interest' perspective and (c) those who are seeking to advance commercial interests. The Australian courts (and English courts, for that matter) were traditionally resistant to the notion that 'political' amici might have a useful role to play in adversarial litigation,[51] notwithstanding their long history in other jurisdictions like the United States and Canada. However, since the 1980s, this stance has been moderated and it is now recognised that there is value to their participation, albeit subject to judicially imposed conditions and limitations. Australian courts continue to regard the involvement of the 'political' amicus as a matter requiring close judicial control.

The 'ill-defined'[52] attributes of the contemporary amicus may provide useful flexibility to the courts, but it also leads to complications. The sheer variety of the actors apt to be described, in practice, as amici, and the ad hoc manner in which decisions about their appropriate role in particular proceedings is often made, mean that it is difficult to generalise as to the rules and principles that govern amicus appearances. It is sometimes unclear whether judicial pronouncements about the nature and parameters of the amicus function are intended to be taken as relevant across the categories identified above or confined to a particular context.

This part of the paper will focus primarily on the third variety of amicus described above, the so-called 'political' amicus. It is possible to question whether such a person should really be described as a 'friend of the court'[53], given that their motivations are rarely limited to an abstract interest in fidelity to law. In theory, at least, the amicus facility provides 'a neat, contained mechanism for bringing public interest perspectives to the attention of the courts'[54] without incurring the kind of costs, or confronting the barrier of standing rules, associated with litigating in one's own right.

However, as discussed below, opening the door to those who perceive themselves to be public interest advocates may also facilitate the participation of others with a purely commercial agenda. Moreover, seeking to appear as an amicus is not without drawbacks. An amicus must mould legal submissions to the circumstances of a particular case as disclosed in evidence. As such, finding proceedings that provide an appropriate context for the agitation of a particular legal argument presents a challenge. An amicus also lacks influence with respect to the procedural course of proceedings and if the proceedings settle, the work of an amicus will be rendered otiose. Significant uncertainties attend the process and criteria under which amici are granted (or refused) leave to make submissions, as well as the procedural aspects of amicus participation.

The breadth of judicial discretion in this regard may mask the application of differential standards when it comes to the reception of amici, as well as continuing hostility towards amicus participation on the part of some judges. Although presenting submissions as an amicus is less expensive than conducting proceedings in one's own right, it still involves costs. Moreover, the extent to which participation will deliver a return on investment might be unknowable. There would appear to be the potential for amici to be exposed to adverse costs orders.[55] In combination, such considerations act as a disincentive to amicus participation, particularly when it comes to private individuals or public interest organisations which typically have limited resources and good reason to be risk-averse in their allocation.

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[49] Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on Interventions on Public Interest Cases* (1996) 21. See further Paul Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision-Making* (Oxford University Press, 2008) 32.

[50] S Chandra Mohan, 'The Amicus Curiae: Friends No More?' (2010) *Singapore Journal of Legal Studies* 352, 370.

[51] Cf *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331 (Dixon J).

[52] S Chandra Mohan, 'The Amicus Curiae: Friends No More?' (2010) *Singapore Journal of Legal Studies* 352, 352.

[53] See, e.g., S Chandra Mohan, 'The Amicus Curiae: Friends No More?' (2010) *Singapore Journal of Legal Studies* 352, 372.

[54] Andrea Durbach, 'Interveners in High Court Litigation: A Comment' (1998) 20 *Adelaide Law Review* 177, 177.

[55] This is discussed further at part 4.3.6 of this paper.

In *National Australia Bank Ltd v Hokit Pty Ltd,*[56] Mahoney P stated:

> When application is made by a person to intervene as amicus curiae, there are, in principle, at least three questions to be addressed: — whether the court has power to grant the application; (if it has) whether it should grant the application in the particular case; and (if it should) what form of intervention should be permitted and under what conditions.

In part 4 of this paper, we look at how the courts have approached each of these questions, following discussion of arguments for and against the reception of submissions from non-parties, including public interest organisations and those with a commercial interest in the outcome. We also examine approaches taken to non-party and public interest participation in other jurisdictions.

2.3 The role of a 'McKenzie' friend

The role of an amicus or intervener is to be distinguished from a 'McKenzie' friend or advisor whose role in litigation is 'quite different'.[57] In *McKenzie v McKenzie,*[58] the Court of Appeal approved the following statement by Lord Tenderden CJ in *Collier v Hicks*[59]:

> Any person whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices.[60]

The High Court has noted that whether an accused in a criminal trial can have a 'McKenzie friend' present is a matter of practice and procedure at the discretion of the trial judge.[61] A McKenzie friend acts as a support person in court for a litigant who is unrepresented. A litigant is not permitted a McKenzie friend as a matter of course. The courts will exercise discretion to prevent such assistance where it will not serve the interests of justice or would produce unfairness.[62] The role of a McKenzie friend does not normally extend to addressing the court; rather, his or her 'usual role … is to take notes, quietly make suggestions and give advice'.[63] However, a McKenzie friend may address the court in some circumstances. For example, in *Gamage*,[64] a former lawyer who had been struck off was allowed to appear as a McKenzie friend and speak on behalf of a Sri Lankan plaintiff seeking leave to appeal to the High Court from a judicial order permitting his deportation and seeking an injunction to prevent his removal from Australia.

The discretion to allow participation by a McKenzie friend and their role has been considered in numerous recent cases, across a wide range of areas of law.[65] In its report into *Access to Justice,* the Productivity

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[56] (1996) 39 NSWLR 377, 380.

[57] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 201 (Einfeld J).

[58] (1970) 3 All ER 1034.

[59] [1831] Eng R 686; (1831) 2 B & Ad 663, 669.

[60] In *McKenzie*, the 'friend' was a qualified member of the bar in Australia who sat beside one of the parties at the bar table and gave him quiet advice or prompting.

[61] *Smith v R* (1985) 159 CLR 532, 534 (Gibbs CJ). In that case, the Court expressed the view that where the accused had been offered legal aid but had refused it, his application to have a barrister appear as a 'McKenzie friend', 'it would be understandable if the trial judge regarded his application with some scepticism'. As to whether the McKenzie friend can appear as an advocate: see *Portelli v Goh* [2002] NSWSC 417 (15 May 2002) [barrister without practising certificate sought to appear as advocate]; *KSM Transport Services v Gregorys Transport* [2003] NSWSC 901 (3 October 2003); *Damjanovic v Maley* (2002) 55 NSWLR 149 (19 July 2002) [party had poor English].

[62] *Satchithanantham v National Australia Bank Ltd* [2009] NSWCA 268, [61]; *Paragon Finance Plc v Noueiri* [2001] EWCA Civ 1402.

[63] *Rehu v* Western *Australia* [2012] WASCA 275, [6] (Mazza JA).

[64] *Gamage, In the matter of a proposed application* [2009] HCATrans 309 (24 November 2009).

[65] See: *ZPP v ZPO* [2020] NSWCATAP 288; *CM v Minister for Families, Communities and Disability Services* [2020] NSWCA 347; *Rich v Auswide Constructions Pty Ltd (No 2)* [2020] QDC 330; [2020] NSWCATAP 274; *Jovanovic v Australian Capital Territory* [2020] FCCA 3355; *Klewer v National Disability Insurance Agency (Revocation Application)* [2020] FCA 1830*; Re: The Adoption of "Z"* [2020] NSWSC 1725; [2020] NSWSC 1644; *CM v Secretary, New South Wales Department of Communities and Justice* [2020] NSWSC 1740; *Daniel Henry Resler Walton by his Tutor John Mann v*

Commission recommended that governments, courts, tribunals and the legal profession should work together to facilitate the assistance of self-represented litigants by McKenzie friends, including through the development and implementation of guidelines for courts and tribunals and a McKenzie friends' code of conduct.[66]

3. The value of third-party participation: competing views

There are differing views amongst commentators with regard to 'public interest' amici curiae. Some adhere to the belief that third parties lacking a direct interest in adversarial litigation should be regarded with suspicion and that opportunities for their participation in the hearing of legal disputes should be confined. Proponents of this view tend to emphasise that outsider involvement compromises the parties' ability to control the parameters of the dispute, occasioning inevitable detriment in terms of costs and delay.

Others, however, argue that the complexity of the judicial function justifies entertaining submissions from interested outsiders where the resolution of a legal dispute has potential consequences that transcend the interests of the immediate parties. The essence of this position is that it is in the interests of the administration of justice that courts retain and make use of a broad power to hear outsiders who wish to make a constructive contribution to the informational base on which their decisions will be founded. In the context of human rights litigation, where the adversarial nature of the judicial system appears often to be inappropriate, the contributions of outsiders may be of particular benefit to the administration of justice.

3.1 Arguments favouring an expansive role

3.1.1 *Improving the quality of judicial decision-making*

In our adversarial system, courts are primarily dependent upon litigants to develop the informational basis for decisions. A wide discretion to receive third-party submissions acknowledges that the immediate parties to a particular matter will not necessarily be inclined, or for that matter well-placed, to provide the court with a comprehensive picture of the legal context in which their dispute has arisen. The nature of the adversarial system means that there is ordinarily little incentive for an individual litigant to present the court with anything more than the arguments (and evidence) thought to be most capable of securing the immediate forensic ends sought. Indeed, there may be distinct tactical disadvantages in exposing particular lines of argument to judicial scrutiny, regardless of how relevant they might seem to a disinterested observer. Moreover, the sheer cost of litigation may compel the parties to limit the scope of their evidence and submissions.

By permitting third parties to be heard, a court may broaden, and enhance the quality of, the information by reference to which it will resolve the parties' dispute[67] and thus limit the prospect of falling into error.[68] It may also do something to mitigate the artificiality with which a case may be presented. Allowing a plurality of interested outsiders to contribute arguments may help to combat a false impression that a dispute is one-dimensional or self-contained. Obviously, a justification along these lines is defensible only in so far as outsiders offer arguments that are legally cognisable and non-duplicative. There is a danger in simply assuming that more information and more argument will necessarily lead to 'better' decision-making.[69] However, any such problems that might arise can theoretically be circumvented by limiting (either by means

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Terence George Hartmann as Executor of the Estate of Wanda Resler [2020] NSWSC 1628; *Rimac & Rimac (No.2)* [2020] FamCA 919; *Gadzikwa v Comcare* [2020] FCA 1560; *Cooper v Elia & Anor* [2020] SADC 147; *NWWJ v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCAFC 176; *Payne v Long* [2020] FCAFC 170*; Hii v Commissioner of Taxation* [2020] FCA 1452*; McCarthy v National Australia Bank* [2020] NSWSC 1355; *Vitale v The Queen* [2020] VSCA 237.

[66] Productivity Commission, *Access to Justice Arrangements* (5 September 2014), Recommendation 14.3

[67] Cf *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 201-202 (Einfeld J); Mona Arshi and Colm O'Cinneide, 'Third Party Interventions: The Public Interest Reaffirmed' [2004] *Public Law* 69, 69 (noting that third parties 'can inject otherwise marginalised or absent perspectives, expertise and data into the decision-making process').

[68] Cf Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14 *Melbourne University Law Review* 522, 533 (suggesting that 'the *major purpose* of the *amicus* brief is to ensure that a precedent is sound').

[69] Cf S Chandra Mohan, 'The Amicus Curiae: Friends No More?' (2010) *Singapore Journal of Legal Studies* 352, 373.

of general rules or ad hoc orders) the role that outsiders are permitted to play. The fact that poor management of third-party contributions may undermine their benefits for the decision-making process is not a valid argument for avoiding them altogether.

3.1.2 *Appreciating broader ramifications*

Clearly, the resolution of what is ostensibly a dispute between litigants may have practical consequences for persons who are not parties to the dispute. These need not be direct consequences. They might, for instance, flow from the establishment of a precedent as to the interpretation of a particular statutory provision or the legality of particular conduct.[70]

Some cases – especially in the field of public law – will by their very nature raise issues with manifest and unavoidable 'social–political dimensions',[71] or present what might be termed 'meta-individual rights and interests'[72] for judicial consideration. Thus, one sense in which amici may improve the quality of information available to a court is by enhancing that court's appreciation of the broader potential implications of determining a dispute one way or the other. If a third party is sufficiently interested in drawing a court's attention to the possible general effects of a decision and has the ability to do so economically by means of legally relevant submissions, then it is strongly arguable that it is in the court's interests to hear those submissions. However, in many contexts, whether or not a particular legal decision will have broader positive or negative impacts is not only a vexed question, but it will also usually be irrelevant to the determination of the substantive legal questions in issue.

Particular arguments have been advanced in favour of greater participation in human rights cases. Perry and Keizer 'argue that the High Court of Australia should hear the voices of people who have traditionally been denied standing, who were unable to access court due to the prohibitive costs of doing so, and, most importantly, have seriously arguable submissions to make about how the law can negatively impact the human rights of minority groups.'[73]

3.1.3 *Legitimacy*

Some commentators have argued that by hearing interested outsiders, courts enhance 'the legitimacy of [judicial] decision[s] particularly in those cases raising fundamental social and moral questions'.[74] In other words, the participatory aspect of amicus curiae intervention is said to enhance the democratic authority of the process by which such cases are resolved. However, this is a controversial justification.

First, the inclusionary potential of the amicus curiae device is easily overstated. Whilst in theory anyone might seek to be heard as a matter of public interest, there exist substantial practical impediments to doing so. It can be reasonably supposed that only relatively well-informed and well-resourced organisations are likely to be able usefully to avail themselves of the opportunities the mechanism offers.

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[70] Cf Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 271 (noting that that 'more and more frequently the complexity of modern societies generates situations in which a single human action can be beneficial or prejudicial to large numbers of people, thus making entirely inadequate the traditional scheme of litigation as merely a two-party affair').

[71] Lucius Barker, 'Third Parties in Litigation: A Systemic View of the Judicial Function' (1967) 29 *Journal of Politics* 41, 42.

[72] Mauro Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press, 1989) 271; cf Elisa Arcioni, 'Some Comments on Amici Curiae and "The People" of the Australian Constitution' (2010) 22 *Bond Law Review* 148, 152 (commenting that 'constitutional litigation is not merely adversarial').

[73] H W Perry and Patrick Keyzer, 'Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia can Learn from the U.S. Experience', 37(1) *Law in Context* (2020) 68.

[74] Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on Interventions on Public Interest Cases* (1996) 33; cf Elisa Arcioni, 'Some Comments on Amici Curiae and "The People" of the Australian Constitution' (2010) 22 *Bond Law Review* 148, 150-151. In *Webster v Reproductive Health Service,* 492 US 490 (1988) O'Connor J commented (at 522) that '[t]he willingness of courts to listen 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' (citing Ernst Willheim 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22 *Bond Law Review* 126, 129).

Second, the idea that amici will necessarily be meaningfully 'representative' of some sector of society, such that their participation has an appreciably 'democratic' value, is fraught with difficulty. Courts are well-placed to evaluate the legal cogency of arguments sought to be put by outsiders but have no capacity to examine the weight of public opinion that lies behind them, nor any real role in attempting such an inquiry.

Thirdly, 'legitimacy' is a relative and contestable concept and it is possible that hearing from a particular third party will enhance the authority of a subsequent decision in the eyes of some but diminish it in the perception of others.

At best, the amicus curiae mechanism affords an avenue by which outsiders, having both the interest and the inclination to do so, may be permitted limited input into the adjudicative process, if certain conditions are met. It does not guarantee that those outsiders will be meaningfully representative of any particular sector of society. There may be some intangible net benefit in terms of 'perceived legitimacy'[75], but this is largely theoretical.

3.2 Arguments against an expansive role

3.2.1 *Undermining the adversarial system*

As Re has pointed out, the notion that outsiders should be permitted to 'interfere' in what can be characterised as a bipolar dispute between competing parties is at odds with the ideological underpinning of adversarialism, which privileges 'self-interest' and 'individual initiative',[76] and does not have a tradition of accommodating collective participation. The tension is neatly encapsulated in the following comment of McHugh J:[77]

> [W]e are deciding a case 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.

Arguably, however, such a comment understates the significance of the courts' lawmaking role.[78] Whilst courts may not have a roving brief to 'reform the law generally', the judicial function (particularly in the higher courts) necessarily involves judges influencing the development of the law.[79] Thus, the judicial resolution of even private disputes may have an inescapably public dimension or impact.

A party may have good reason to feel aggrieved when an outsider successfully petitions the court for leave to intervene in litigation in which it is engaged. Doubtless, such intervention will almost inevitably be inconvenient to at least one of the existing parties, in the sense of rendering its task more difficult and costly. Indeed, a party which has no reason to welcome the intervention of an amicus may view the latter's behaviour as parasitic, particularly where such participation is driven by some collateral political or commercial agenda.

Courts can, however, act in a manner that is sensitive to such concerns without excluding outsiders altogether. Moreover, the limitations of the amicus' role serves as a practical check on its potential to divert the proceeding too far from the issues in dispute between the parties. Because an amicus must take the proceedings as it finds them[80] and will rarely be permitted to adduce evidence,[81] their role is essentially

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[75] Mona Arshi and Colm O'Cinneide, 'Third Party Interventions: The Public Interest Reaffirmed' [2004] *Public Law* 69, 75.

[76] See Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14 *Melbourne University Law Review* 522, 522-524.

[77] *Garcia v National Australia Bank Ltd* [1998] HCATrans 50.

[78] Cf *Levy v Victoria* (1997) 189 CLR 579, 651 (Kirby J).

[79] See, e.g. E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005) 3-4; Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 *Law Quarterly Review* 537, 562-563.

[80] Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No. 27, 1985) [292].

[81] *Priest v West* (2011) 35 VR 225, 233 [31] (Maxwell P, Harper JA and Kyrou AJA) ('Only in an exceptional case will a friend of the court be permitted to adduce evidence or to raise a new issue or special defence') citing *Australian*

reactive and has limited scope for 'hijacking' the proceedings. An amicus can do little more than contribute to a court's appreciation of the issues arising on the facts as the parties have developed them.[82]

3.2.2 *Blurring the boundaries of the judicial function/politicisation of the courts*

It is arguable that widespread recourse to amicus curiae submissions risks shifting the courts 'from an adjudicative to an expositive function'.[83] In other words, it may lead to the judicial role assuming at least an appearance of being concerned with the quasi-parliamentary task of canvassing viewpoints and political positions, rather than weighing competing legal arguments[84]. A related objection is that a permissive approach to amici risks 'politicising' the judicial process and licensing its use as a 'Trojan horse for political activism',[85] thus allowing interest groups to 'revisit political battles lost elsewhere'.[86]

One might reasonably question the logic of a system that stubbornly insists on treating disputes as bipolar despite their determination clearly having polyvalent consequences.[87] Cases will often have 'political' undertones regardless of the involvement of third parties.

In any event, claims that third party intervention threatens the integrity of the adversarial system are somewhat exaggerated. In our view, concerns about the 'politicisation' of the courts are misplaced. Amici are compelled to work within the narrow legal, procedural and evidentiary framework of the particular case.[88] If an amicus has a broad political agenda, it must be one capable of being subsumed within a relevant and compelling legal argument. If an amicus is able to present a relevant and compelling legal argument, and thereby 'assist' the court, it is difficult to defend the position that it should be shut out for the simple reason that its principal purpose is to achieve 'political' ends. A court should concern itself, not with the generalised viewpoint of the outsider, but with the practical contribution that the outsider can make to its understanding of the legal matrix of the case. The fact that the outsider can present legally relevant, appropriate material capable of influencing the court's disposition of a matter should be enough, it might be thought, to legitimise its participation. As Marshi and O'Cinniede note, '[t]he ideological colouring of an intervener need not automatically deprive [its] input of value'[89].

Moreover, judges are clearly cognisant of the constitutional issues that might arise if they were to stray too far from an orthodox understanding of the judicial function.[90] In short, judges will usually have both the inclination and the capacity to distinguish legally valuable applications for amicus curiae status from those which are of a blatantly polemical character.

3.2.3 *Contestability of the 'public interest' concept*

Hannett has argued that the concept of the 'public interest' is inherently contestable, and that the courts probably lack the capacity to distinguish prospective amici able to legitimately claim an affinity with some 'public interest' from those who are not. In the result, she suggests, it is inevitable that courts will derive an

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Medical Assessment Panel; Ex parte Symons (2003) 27 WAR 242, 250 [20] (E M Heenan J). On the issue of evidence, see further below at 4.3.3.

[82] Cf Andrew Serpell, *The Reception and Use of Social Policy Information in the High Court of Australia* (Law Book Co., 2006) 67.

[83] Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 129.

[84] Cf Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 139; Lorne Neudorf, 'Intervention at the UK Supreme Court' (2013) 2 *Cambridge Journal of International and Comparative Law* 16, 31-32 (referring to the 'risk of transforming the highest judicial institution into a forum for specialised interests').

[85] Mona Arshi and Colm O'Cinneide, 'Third Party Interventions: The Public Interest Reaffirmed' [2004] *Public Law* 69, 69.

[86] Cf Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 140.

[87] Cf Lucius Barker, 'Third Parties in Litigation: A Systemic View of the Judicial Function' (1967) 29 *Journal of Politics* 41, 41 arguing, from a United States perspective, that '[s]trict adherence to the adversary system is no longer possible or even desirable'.

[88] Cf Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14 *Melbourne University Law Review* 522, 531.

[89] Mona Arshi and Colm O'Cinneide, 'Third Party Interventions: The Public Interest Reaffirmed' [2004] *Public Law* 69, 75.

[90] See, e.g., Andrew Serpell, *The Reception and Use of Social Policy Information in the High Court of Australia* (Law Book Co., 2006) 59; see also the further judicial comments collected by Serpell at 58-60.

imperfect impression of where the 'public interest' lies in any given case, with bias entering the process as a natural consequence of courts' failure to do the impossible and canvass all relevant viewpoints.[91] She comments:[92]

> On permitting a public interest intervention, how can a court ensure that it has canvassed all of the 'public interests' at stake in any scenario? Should a court be required to accept interventions on either side of a controversial issue? … [E]ven wide rules of intervention cannot ensure that all of those with an interest in any given matter are represented.

This criticism is perhaps reasonable in so far as it is addressed to the questionable notion that amicus curiae participation renders judicial decisions more 'legitimate' as it permits different interests to be 'represented' before the court concerned.[93] However, it cannot be sustained as a more general condemnation of broadening the use of the amicus curiae mechanism.

There is little justification for the implicit suggestion that because a court cannot ensure that it is made cognisant of *all* relevant outsider views on a dispute, it should hear *none*. But more importantly, the criticism falls away if it is recognised that the approach of the courts, in so far as it can be discerned, has been to focus not on whether a prospective amicus seeks to make submissions that 'reflect' or 'represent' a genuine 'public interest', but rather on whether it would be *in* the 'public interest' that their submissions to be entertained.

Thus, the relevant criterion should relate not so much to whatever 'public interest' might be said to be embodied in the outsider's proposed submissions, but rather on a more general 'public interest' in the effective administration of justice. As Marshi and O'Cinneide have argued, if the purpose of allowing intervention is to facilitate 'the introduction of relevant perspectives and expertise into the judicial process in order to serve the public interest in good adjudication', then '[t]he court in granting or refusing leave is not … seeking a representative opinion in the democratic sense' but rather looking to the practical assistance to be derived from hearing the submissions of an outsider.[94] Marshi and O'Cinneide acknowledge that the motive for advancing amicus curiae submissions will often be derived from an overarching conviction as to where the public interest lies,[95] but the court need not examine whether such a belief is justified in order to evaluate the legal usefulness of an amicus' proposed submissions. There is simply no need for a court to entangle itself in divisive – and probably intractable – issues as to the outsiders' motivation in seeking to be heard.

Moreover, at least in the context of forensic debate about the relevance of public interest considerations in the exercise of judicial discretion in relation to costs, there are often conflicting judicial views as to what constitutes a matter of 'public interest'.[96] Furthermore, even within the relatively narrow confines of defamation law, the notion of public interest 'is not a concept susceptible to comprehensive definition, and may constitute an infinite variety of matters'.[97] In *Bellino v Australian Broadcasting Corporation,*[98] Brennan CJ and Gaudron J[99] referred to the observation by Lord Denning[100] that the concept of public interest should not be confined within narrow limits and that anything which is 'such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on' is a matter of public interest.[101]

3.2.4 *Failure of doctrine*

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[91] See Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 135-137.
[92] Ibid, 135-136.
[93] See above at 3.2.3 of this paper.
[94] Mona Arshi and Colm O'Cinneide, 'Third Party Interventions: The Public Interest Reaffirmed' [2004] *Public Law* 69, 72.
[95] Ibid, 72-73.
[96] See, e.g., the views (in dissent) of McHugh J in *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72; 72 ALJR 578; 152 ALR 83; 96 LGERA 173 [71-75].
[97] Lee J, *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 [141].
[98] (1996) 185 CLR 183
[99] At 193, 240-242.
[100] *London Artists Ltd v Littler* [1969] 2 QB 375 (at 391).
[101] Referred to by Lee J in *Stead v Fairfax Media Publications Pty Ltd* [2021] FCA 15 [141].

Hannett suggests, referring to the situation in England and Wales, that the 'justificatory vacuum'[102] lurking behind the courts' increasing recourse to the submissions of amici should of itself be a reason for reversion to a comparatively conservative approach. As will be seen, it is arguable that a similar 'vacuum' exists in Australia. Practical developments have taken place without a corresponding advancement of doctrine. A more permissive attitude towards amici seems to have been adopted without there being a proper articulation of its jurisprudential foundation or limits. At the heart of the problem, both in Australia and in England and Wales, is the pervasive practice of 'failing to articulate publicly the purpose for which the court has permitted an intervention'.[103]

There appears to have been a significant shift in the courts' attitude towards 'public interest' interventions despite the reasons for it remaining obscure. It may be that this problem can be cured simply by ensuring that a principled approach to amici is clearly laid out and consistently adhered to by judges who routinely provide reasons for their decisions. However, there are countervailing considerations as to why a stricter, approach might be neither necessary nor desirable.[104]

3.3 Comments

Implicit in all arguments against a wider role for 'public interest' amici is the idea that, on balance, the courts derive insufficient benefit from their participation to justify substantially departing from the traditional adversarial model of litigation. However, the courts' evident willingness to welcome (albeit cautiously and conditionally, and often without a great deal of explanation) 'public interest' amici in some proceedings suggests a perception that their potential benefit outweighs any such departure.

Under existing procedural and doctrinal constraints, outsiders are not given carte blanche to waste the time of the courts with unmeritorious submissions. Courts in Australia have both the power and the tendency to circumscribe third-party participation to prevent unnecessary or inappropriate participation.

4. Amici in Australia: principles and practice

4.1 Whether the court has power to grant the application?

In the absence of legislative specification to the contrary,[105] superior courts enjoy 'an inherent or implied power … to ensure that [they are] properly informed of matters which [they] ought to take into account in reaching ... decision[s]', and this power extends to allowing non-parties to make submissions or otherwise participate in an appropriate case.[106] The discretion to receive submissions from amici can also be seen as derived from legislative instruments establishing a court's jurisdiction and general procedural powers.[107]

In most Australian jurisdictions, the power to hear from amici curiae is not incorporated in particular rules of court. An exception is the Federal Court, which has regulated the involvement of third parties in the litigation of others through specific rules since 2002, albeit in a relatively minimal fashion.[108] The rules are expressed

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[102] Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 129.
[103] Ibid, 133.
[104] See, for example, the statement made in the Full Court of the Federal Court decision of *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, set out at part 4.2.2 of this paper.
[105] *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381.
[106] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ); see further *Hua Wang Bank v Commissioner of Taxation* [2013] FCAFC 28; 296 ALR 479, [49] (Logan, Jagot and Robertson JJ); Patrick Keyzer, *Open Constitutional Courts in Australia* (The Federation Press, 2010) 102-3; cf *Roe v Sheffield City Council* [2003] EWCA Civ 1, [85] (Sedley LJ); Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 142. Whether it would be legitimate for a court to itself approach an outsider with a known ideological interest to suggest that the latter seek to be heard as a matter of public interest is less than clear, but it possible that inhibitions of a constitutional nature would preclude this course: see Andrew Serpell, *The Reception and Use of Social Policy Information in the High Court of Australia* (Law Book Co., 2006) 61.
[107] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ). See also *Karim v The Queen* (2013) 83 NSWLR 268, 280 [36] (Allsop P) (referring to 'the authority implied within the *Criminal Appeal Act 1912* (NSW)').
[108] See now *Federal Court Rules 2011* (Cth), rr 9.12 and 36.32 (making provision for original and appellate proceedings respectively). The predecessors of these provisions were introduced into a prior incarnation of the *Rules* by the *Federal Court Amendment Rules* 2002 (No 2).

so as to deal with a unitary class of 'interveners', and it appears to be settled that their effect is to eliminate the traditional distinction between interveners and amici curiae.[109] In their operation, they 'regulate comprehensively the practice of the Court with respect to the intervention of non-lawyer parties in proceedings, both original and appellate'.[110] The rules deal with the role of an intervener; the circumstances in which an intervener might be heard from; the criteria to which the Court should have regard in assessing applications for leave to intervene; and the terms and conditions which can be imposed on an intervener. The *Federal Court Rules* are referred to in more detail below.

So far as the High Court is concerned, numerous proposals have been advanced to the effect that an attempt should be made to comprehensively structure the process (and set out the criteria) by which an amicus application will be granted or rejected.[111] However, these proposals have not been taken up. Indeed, until recently, the *High Court Rules* made no reference to the position of an amicus whatsoever. This changed at the beginning of 2011, when the *High Court Amendment Rules 2010 (No 1)* took effect. The amended rules make provision in respect of the filing and service of written submissions by a prospective intervener or amicus in appellate proceedings[112] and require those submissions to take a standard form.[113] Previously, the absence of a clearly specified procedure for seeking leave had been the subject of criticism.[114]

It is unclear why the High Court has declined to clarify the criteria associated with seeking leave to appear as an amicus. On one view, it can be inferred that the Court's reticence reflects trepidation about the value of the amicus mechanism. Alternatively, it may be that the existing jurisprudence on the subject is considered to provide sufficient guidance. Clearer rules might serve only to encourage unmeritorious applications.[115] On the other hand, it may be that the Court continues to regard an extemporised approach as attractive, with the retention of significant flexibility seen as the best means of judicial management. The following

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[109] The merger of the traditional categories accords with a 1996 recommendation of the Australian Law Reform Commission: ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.31]. The Full Court of the Federal Court has, however, rejected the idea that the rules were intended to implement the ALRC's recommendation (*Sharman Networks Ltd v Universal Music Australia Pty Ltd* (2006) 155 FCR 291, 294 [11]), notwithstanding that much of their language does mirror that of the ALRC report: see ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.36].

[110] (2006) 155 FCR 291, 294 [11] (Branson, Lindgren and Finkelstein JJ). The Court noted that 'it is only the legal practitioner who is invited by the Court to assist it, who stands outside the rule regime'. See also *Australian Automotive Repairers' Association (Political Action Committee) Inc v NRMA Insurance Ltd (No 2)* [2003] FCA 1301, [9] (Lindgren J) (noting that the rule there concerned 'seems to have the effect of assimilating the position of an intervener to that of an amicus curiae'); cf *Wilson v Manna Hill Mining Co Pty Ltd* [2004] FCA 1663; 51 ACSR 404, [105] (Lander J) (suggesting that the same rule 'points up the differences between an amicus curiae and an intervener').

[111] See e.g. Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14 *Melbourne University Law Review* 522, 532-533; the Hon Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 169-170; cf ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.36]; Public Law Project, *Third Party Interventions in Judicial Review: An Action Research Study* (2001) 26-27.

[112] *High Court Rules 2004* (Cth), rr 44.04, 44.06. See also r 44.08 (requiring interveners to provide outlines of oral submissions where appropriate).

[113] *High Court Rules 2004* (Cth), rr 44.04.4. Rule 42.08A provides that an application for leave to intervene or be heard as amicus curiae is to be made by filing and serving submissions in accordance with rule 44.04. For matters commenced after 1 January 2020 there are revised prescribed forms. Form 27C relates to Intervener's submissions. This requires specification of the asserted basis of intervention and the party in support of whom the intervention is made; why leave to intervene or be heard as an amicus should be granted; a statement addressing the issues in the appeal the intervener desires to make the subject of submissions and an estimate of the number of hours required for the presentation of the intervener's oral argument.

[114] See below at 4.11 of this paper. see also Mark Moschinsky and Kim Rubenstein, 'Amicus Applications in the High Court – Observations on Contemporary Practice' (Paper presented at the Gilbert + Tobin Constitutional Law Conference, 15 February 2013) 8.

[115] ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.34].

recollection of a former judge of the English Court of Appeal illustrates the issues which the increasing incidence of applications to intervene created for that Court:[116]

> I remember that we discussed interventions about eight years ago at one of the plenary meetings of the Court of Appeal that takes place at the start of every legal term. In those days the House of Lords had shown itself willing to accept interventions in appropriate cases, and the question arose whether we should permit them in the Court of Appeal. I had not at that time encountered the practice in the Court of Appeal, but it was not altogether unknown. We decided to let matters flow. We should neither encourage interventions nor discourage them. The last thing we wanted was for the procedure to be bound up in red tape. If we went down the formal route before we had had proper experience of the occasions when interventions might not be welcomed, we feared that we might either be unduly prescriptive or unduly relaxed in the rules we formulated.

4.1.1 *Application procedure*

In the High Court, the general practice is that applicants for amicus status file their application to be heard and material supporting the application at the same time as they file the substantive submissions they seek to make.[117] The application will then usually be dealt with at the beginning of the hearing of the case.[118]

This approach would not appear to be an efficient one.[119] If amicus applications are dealt with in the course of a substantive hearing, the parties must prepare their respective cases on the assumption that the application will be granted, even if its chances of success are slim. This leads to an escalation of costs which might be avoided through a different approach. It appears to contradict the courts' professed concern to avoid the proliferation of amici so as to ensure that the costs of the parties are not inflated without reason. It may be supposed that the participation or non-participation of the prospective amicus will make little difference to the parties' costs in preparing for the hearing if the issue is deferred to such a late stage. In addition, the procedure has clear potential to be oppressive to the applicant:[120]

> The amicus applicant is put to the expense of preparing its full case which, in the event that the application is unsuccessful, results in substantial resources, which could be used for other worthwhile purposes, being 'wasted'. Often, these will be the resources of a community or non-government organisation, or contributed on a pro bono basis.

Willheim's account of his unsuccessful attempt, in conjunction with Rubenstein, to be heard in the case of *Wurridjal v Commonwealth of Australia*[121] provides an illustration of the potential for the High Court's procedure to operate in manner that is burdensome for applicants. Willheim relates that:[122]

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[116] Sir Henry Brooke, 'Interventions in the Court of Appeal' [2007] *Public Law* 401, 401; cf Andrea Durbach, 'Interveners in High Court Litigation: A Comment' (1998) 20 *Adelaide Law Review* 177, 179; Jason Pierce, 'The Road Less Travelled: Non-party Intervention and the Public Litigation Model in the High Court' (2003) 28 *Alternative Law Journal* 69, 72 (noting the observation of a judge that '[t]he High Court is reticent because of the practical difficulties').

[117] See Henry Burmester, 'Interveners and *amici curiae*' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 356, 357.

[118] Cf Philip Lynch et al, 'Why are non-parties non-starters? A call for clearer procedures and guidelines for amicus curiae applications in Victoria' (Submission No. 26 to the Victorian Law Reform Commission *Civil Justice Review*, 2006) 10 [4.1].

[119] See Philip Lynch et al, 'Why are non-parties non-starters? A call for clearer procedures and guidelines for amicus curiae applications in Victoria' (Submission No. 26 to the Victorian Law Reform Commission *Civil Justice Review*, 2006) 14 [5.3].

[120] Ibid, 14-15 [5.3]-[5.4]. See also George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 389; Patrick Keyzer, *Open Constitutional Courts in Australia* (The Federation Press, 2010) 110-111; Mark Moschinsky and Kim Rubenstein, 'Amicus Applications in the High Court – Observations on Contemporary Practice' (Paper presented at the Gilbert + Tobin Constitutional Law Conference, 15 February 2013) 5-7.

[121] (2009) 237 CLR 309.

[122] Ernst Willheim, 'An Amicus Experience in the High Court' (Conference paper, Annual Public Law Weekend, 1 November 2008) 17-18; cf Kristen Walker, 'Amici Curiae and Access to Constitutional Justice: A Practical Perspective' (2010) 22 *Bond Law Review* 111, 124.

> Because we were referring to foreign materials which were 'unlikely to be readily available', we were required to provide the Court, and the parties, with hard copies of all these materials. Whilst our substantive submissions, including extracts from international law instruments and decisions, totalled 19 pages, the requirement to provide full hard copies of the materials to which we referred meant in our cases copying 12 sets of 1928 pages (9 for the Court, one for each of the parties), a substantial cost in terms of copying. The packages we posted to each of the parties weighed 10 kilograms. All this copying had to be undertaken in advance of the Court's consideration of our application for leave, that is, in advance of the Court's decision whether our proposed submissions would even be received.

Ultimately, the Court declined to grant the application to be heard,[123] meaning that the effort and expense invested in compliance with the Court's procedural requirements was to no avail.[124]

In the case of the High Court, the late stage at which amicus applications are considered has a further side effect. There is limited scope for an amicus curiae to be heard in connection with an application for special leave to appeal. It is not difficult to imagine circumstances in which an outsider might wish to argue, for instance, that the broad ramifications of a particular decision of an intermediate court are such as to warrant the Court's attention. Of course, whether the Court would be amenable to hearing from outsiders at such an initial stage, even were its procedures recast in such a manner as to make it feasible, is another matter altogether. The procedural rules governing applications for special leave are geared towards their quick and efficient disposition. Thus, the view could be taken that, the involvement of outsiders and the raising of side issues would be an unwelcome distraction. It also could be argued that it is incumbent on an applicant to draw the Court's notice to all relevant circumstances tending to favour a grant of leave – although this argument is less cogent where the applicant is unrepresented. Moreover, where the Court is conducting a brief, threshold evaluation of a particular matter for the purpose of deciding a leave application, the acceptance of submissions from outsiders may give rise to a perception that the Court is being 'lobbied'.

Nevertheless, it is interesting to note that amici curiae can, and are, permitted to be heard in the United States Supreme Court in connection with petitions for certiorari. A grant of certiorari in that Court serves the same purpose as a grant of special leave in the High Court.[125] Studies suggest that amici have had considerable success in influencing the Supreme Court's decisions on such petitions. Collins relates that:[126]

> At the certiorari stage, the goal of amici is to encourage the justices to either grant or deny full review to a case. Past research indicates that amicus briefs supporting a grant of review do indeed serve this function. In highlighting to the justices the potential policy significance of a case, organized interests provide the justices with reliable signals that the case warrants their attention. For example, Caldeira and Wright find that the presence of amicus briefs in favour of a certiorari petition is one of the three most important influences on the justices' case selection decisions.

Willheim observes that a strict application of the principal 'test' that seems to be used to determine amicus curiae applications, being whether the outsider proposes to raise some relevant argument or issue that the parties do not,[127] almost requires the adoption of a procedure under which the matter is not decided until the last minute. The outsider will not be in a position to determine whether its application would be

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[123] See *Wurridjal v Commonwealth of Australia* [2008] HCATrans 348.

[124] This was not Mr Willheim's only unsuccessful amicus effort – see https://courts.act.gov.au/__data/assets/pdf_file/0006/1437162/Collaery-No-2.pdf.

[125] In both cases, the grant is a prerequisite to a matter proceeding to full-scale appellate review, and the requirement of leave serves to prevent the respective Courts being flooded with unmeritorious appeals.

[126] Paul Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision-making* (Oxford University Press, 2008) 29 (citations omitted). The study to which Collins refers is Gregory Caldeira and John Wright, 'Organized Interests Before the Supreme Court: Setting the Agenda' (Paper Presented at the Annual Meeting of the American Political Science Association, Boston, 1998).

[127] See below at 4.2.2 of this paper.

appropriate, or craft submissions fitting into gaps that the parties have left, until the submissions of those parties have been finalised and filed.[128] The consequence is that:[129]

> the potential amicus is not in a position to approach the Court for leave, or to inform the Court [of its intention to do so], during the customary directions hearings. Rather, the amicus application, including the proposed substantive amicus submissions, are able to be filed only a few days before the substantive hearing.

There is, of course, something artificial in attempting to pre-judge the value of the 'assistance' that a person might offer. It is difficult to anticipate how litigation might unfold on the basis of written material alone, and as such it might not be possible to determine with any degree of certainty whether the submissions an amicus proposes to make will ultimately be relevant and non-duplicative. However, this need not be a bar to allowing an appearance on a provisional basis, if a court is prepared to be adaptable. Leave can be granted on the basis of the Court's expectation that it may derive assistance,[130] and the right to make proposed submissions can be made contingent upon their becoming relevant in the circumstances of the case, or otherwise made conditional. For instance, in the *Sony* proceedings, the ACCC wished to make submissions on the construction of a statute which would only become relevant if certain factual matters were made out. Sackville J did not consider uncertainty as to the extent to which the ACCC might assist the court to be an impediment to the grant of leave. As he noted:[131]

> [T]he nature or scope of the proceedings may change between now and the hearing. In particular, if the respondent chooses to engage his own legal representatives, the issues in the case may alter. Indeed, the Sony Companies may choose to confine the issues. The ACCC, as I understand its position, is prepared to accept the risk that it ultimately may have no useful role to play or, alternatively, may play a more limited role than it presently envisages.

In *Wurridjal*, Kirby J (along with Crennan J) dissented from the Court's decision to rebuff Willheim and Rubenstein, commenting that:[132]

> I agree with the other members of the Court that some of the materials proffered by the proposed amici appear somewhat undigested and lacking in demonstrated application to the issues in the proceedings. Nevertheless, the actual submission of the proposed amici is quite brief, being but 20 pages in length. It refers to new materials that are not referred to in the submissions of the parties … Such materials may be relevant to this Court's deliberations as the arguments develop. Therefore, I would feel inclined at this stage to receive the amici's written submissions and simply use those materials, with discretion, as they prove to be relevant as the argument advances.
>
> Alternatively, I would reserve the question of whether the amici should be heard or should be permitted to place their written materials before the Court for decision later in the proceedings.

Kirby J's comments suggest that where a court cannot be certain whether it will benefit from hearing from a prospective amicus (a situation which may arise in a large proportion of applications), the applicant should be given the benefit of the doubt, at least in cases involving no significant concerns about prejudice to the parties.[133] Such an approach seems eminently reasonable and pragmatic, particularly where an applicant

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[128] Indeed, in *Garcia v National Australia Bank Ltd* [1998] HCATrans 50, counsel for the Consumer Credit Legal Centre suggested that he should defer making his application to appear as an amicus curiae following the conclusion of the appellant's oral argument, in case those were such as to render his own submissions otiose.

[129] Ernst Willheim, 'An Amicus Experience in the High Court' (Conference paper, Annual Public Law Weekend, 1 November 2008) 17-18.

[130] *In re E (a child) (AP) (Appellant) (Northern Ireland)* [2008] UKHL 66, [3] (Lord Hoffmann).

[131] (2001) 116 FCR 490, 495 [17]; cf *United States Tobacco Co* (1988) 82 ALR 509, 528 (Einfeld J).

[132] [2008] HCATrans 348.

[133] cf John Basten QC, 'Amicus curiae in practice – a response' in Public Interest Advocacy Centre, *Hearing the people: amicus curiae in our courts – A collection of papers delivered to a PIAC Seminar on 8 August 1995* (1995) 11, 13 (commenting that ''there may be advantages in courts listening to amicus in cases where at the outset they will not necessarily be able to anticipate what may be said or what [the] benefits may be').

seeks to adduce written material only. If its submissions do not become relevant, then the Court need not expend any further time on them.

Other Australian courts have sometimes been amenable to settling the status of prospective amici well in advance of the substantive hearing, granting leave to appear notwithstanding that the parties' submissions have not assumed definitive shape. For example:

- in *United States Tobacco Co v Minister for Consumer Affairs*, Einfeld J of the Federal Court afforded the Australian Federation of Consumer Organisations Inc ('AFCO') amicus status at an interlocutory stage, but deferred consideration of 'the appropriate extent and form of the intervention';[134]
- in the *Adultshop.com* proceedings,[135] the Australian Family Association was granted leave by the Federal Court to make written submissions as an amicus curiae some five months in advance of the eventual hearing.[136] The New South Wales Council for Civil Liberties was granted leave over three months beforehand.[137] In each case, the decision on whether oral submissions would be permitted was reserved;
- in *Maslauskas v Queensland Nursing Council (No 2),* [138] the Acting Disability Discrimination Commissioner was afforded leave to appear in Federal Magistrates Court proceedings brought under the *Disability Discrimination Act* 1992 (Cth) at a preliminary stage, despite the respondent's objection and notwithstanding that it was unclear whether the matter would proceed to a substantive hearing (and what shape it might take if it did). Barnes FM considered that there were good reasons for supposing that the Commissioner's participation would be useful, and noted that it would be open to the respondent 'to object if it is felt that the [Commissioner's] submissions stray outside of what assistance an amicus curiae can appropriately offer the Court or if any significant cost or delay issues arise';[139]
- in *Christian Youth Camps ltd v Cobaw Community Health Services Ltd,*[140] the Victorian Court of Appeal dismissed an objection by one of the parties to the appearance as amicus of the International Commission of Jurists, commenting:[141]

> The application to intervene was made at an early stage of proceedings and, given the breadth and complexity of the issues raised on the appeal, it was not possible to determine with certainty whether and to what extent the intervention of the ICJ would be of additional assistance. Nor did we think it an appropriate use of the Court's time to fully investigate that question. We were quite satisfied that the ICJ had the specialist expertise which it asserted, and that the Court was likely to benefit from receiving the ICJ's submission on international human rights law. In the event, that expectation was fully borne out.

That said, there is danger in determining an application to appear before the role that one might play as amicus is tolerably clear. The appearance of a prospective amicus is liable to be resisted where they cannot point with any real specificity to the matters on which it is anticipated that assistance will be provided[142] and a person is unlikely to be granted leave to appear on the basis of pure speculation about the course that proceedings may take.

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[134] (1988) 19 FCR 184, 203. In the event, AFCO was subsequently permitted to join the proceedings as a party: see *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520.

[135] (2007) 243 ALR 752.

[136] Order of Jacobson J in *Adultshop.Com Ltd v Members of the Classification Review Board* (Federal Court, NSD 136 of 2007, 10 April 2007).

[137] Ibid.

[138] [2008] FMCA 216.

[139] [2008] FMCA 216, [12]. See also *R v Bow Street Magistrate, Ex p Pinochet* [2000] 1 AC 119, 126 (Lord Browne-Wilkinson) (noting that the House of Lords granted leave to intervene to Amnesty International and others in advance of the hearing date, 'subject to any protest being made by other parties at the start of the main hearing').

[140] [2014] VSCA 113.

[141] [2014] VSCA 113, [12] (Maxwell ACJ, Neave and Redlich JJA).

[142] See *Priest v West* (2011) 235 VR 225, 236 [45]-[47] (Maxwell P, Harper JA and Kyrou AJA).

A different approach to advance application for amicus status was taken in the *Sharman*[143] proceedings at first instance, where three applicants approached the Federal Court well in advance of the hearing.[144] Wilcox J was not prepared to grant their application at that stage, stating that, in his view, 'it would be preferable to defer a decision on the application until consideration of final submissions and having regard to the content of the submissions offered by the Amici'.[145] Having indicated that he would be prepared to accept a submission that was 'relevant, and not repetitive of points made by other parties', his Honour stood the notion of motion over until the end of the evidence at trial.[146]

Prospective amici may face considerable difficulty in reaching the point of seeking to be heard, depending on the practices of the court with carriage of the relevant proceedings and the attitudes of the parties towards the outsider(s) in question. One of the most significant barriers that a prospective amicus might face is informational.

There are two aspects to this barrier. First, the would-be amicus must have means of becoming aware of the existence of a case in which their intervention might be appropriate. Secondly, the would-be amicus must be able to procure access to the case documentation, so as to facilitate the planning of its application and the formulation of its proposed submissions. Developing an appreciation of the parties' planned arguments at an early stage is critical, because the ability to offer novel assistance is fundamental to success in an application for leave to appear. An outsider needs to be confident of adding something to the material to be presented by the parties.[147] On the basis of his experience as an applicant for amicus status in the High Court proceedings in *Wurridjal,*[148] Willheim writes of the considerable difficulties encountered in attempting to access documentation and remain apprised of procedural developments.[149] That said, the High Court has since amended its rules in order to oblige the parties to an appeal to lodge written submissions within a specified period following a grant of special leave (as opposed to shortly before the hearing of an appeal),[150] and adopted the general practice of publishing such submissions on its website.[151] These measures are likely to significantly assist a person contemplating appearing as an amicus in that Court.[152]

The extent of this barrier varies significantly between courts, given the diversity of practice in relation to case-information. The Federal Court and High Court, for example, have relatively accessible online databases about current cases and filings whereas some state courts have no equivalent.

4.2 Whether the court should grant the application in the particular case?

4.2.1 *A preliminary problem: The provision of reasons*

[143] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1.

[144] The Australian Consumers' Association, Electronic Frontiers Australia and the New South Wales Council for Civil Liberties.

[145] *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 220 ALR 1, [20].

[146] Order of Wilcox J in *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (Federal Court, NSD 110 of 2004, 1 November 2004).

[147] See also Ernst Willheim, 'An Amicus Experience in the High Court' (Conference paper, Annual Public Law Weekend, 1 November 2008) 17.

[148] *Wurridjal v Commonwealth of Australia* (2009) 237 CLR 209.

[149] See Ernst Willheim, 'An Amicus Experience in the High Court' (Conference paper, Annual Public Law Weekend, 1 November 2008) 13-17. It is interesting to note that Willheim reports that the plaintiff in *Wurridjal* was considerably less accommodating than either of the defendants (the Commonwealth and the Arnhem Land Aboriginal Land Trust) with respect to releasing information to the prospective amici, notwithstanding that it must have been clear enough to all involved that the latter hoped to put submissions that would bolster the case of the plaintiff.

[150] See *High Court Rules 2004* (Cth), Pt 44. The relevant changes were brought about by the *High Court Amendment Rules* 2010 (No 1) (Cth), which came into force on 1 January 2011.

[151] As envisaged by *High Court Rules 2004* (Cth), r 44.07.

[152] See generally Mark Moschinsky and Kim Rubenstein, 'Amicus Applications in the High Court – Observations on Contemporary Practice' (Paper presented at the Gilbert + Tobin Constitutional Law Conference, 15 February 2013) 3-5. Moschinsky and Rubenstein note that the rule changes in question do not cure problems that may arise in the Court's original jurisdiction, where 'much depends on how the particular case is dealt with procedurally', at 5.

A person purporting to act as an amicus curiae cannot present submissions as of right; he or she must seek the approval of the court concerned. However, it would appear that the courts (or at least some judges) do not see themselves as obliged to provide even cursory reasons for permitting, or refusing to permit, an outsider's appearance.[153]

Under Mason CJ, Brennan CJ and Gleeson CJ, the High Court was relatively reticent in this regard. The usual practice was for the presiding judge simply to announce the Court's decision on the application, sometimes following brief oral argument,[154] and on other occasions solely by reference to the parties' written submissions[155] (the latter course seems most often to have been taken when the Court determined to allow an amicus to appear). Very brief reasons were given orally for the Court's refusal, by majority, to hear from a prospective amicus in *Kruger v The Commonwealth;*[156] some brief dicta were offered by Brennan CJ and Kirby J in *Levy v State of Victoria;*[157] and Kirby J commented on the outcome of amicus applications in his reasons for decision in particular appeals (frequently due to disagreement with the exclusion of a would-be amicus[158]) – but generally speaking, it was comparatively rare for members of the Court to expose the reasoning behind their determination of specific applications.[159]

One consequence of this lack of jurisprudence was that it was impossible to know whether a consensus view as to when it might be appropriate to hear from an amicus existed, let alone establish its content, even taking account of comments made during oral argument (which, for obvious reasons, could not be taken as representing concluded views). The instances in which members of the Court provided even a partial explanation for their stance on a particular application were dwarfed by other cases in which the prevailing reasoning remained opaque. Nothing resembling a meaningful 'test'[160] could be derived from the Court's isolated and often perfunctory pronouncements, and it was difficult to guess at the reasons behind differential outcomes as between cases. It was unclear whether members of the Court were acting by reference to what was said in *Kruger* (or some other judicial dictum), or premising decisions on unarticulated criteria (which may or may not have varied markedly as between judges).[161]

The unhelpful state of High Court practice with regard to the disposition of amicus applications did not go unnoticed. In *Attorney-General (Cth) v Breckler*, Kirby J expressed concern that the Court's approach might

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[153] See e.g., *R v Pidoto and O'Dea* (2006) 14 VR 269, 285 [72] (Maxwell P, Buchanan, Vincent and Eames JJA). This attitude is not confined to Australia: see e.g. Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 142 (noting that 'English judges have provided virtually no reasons for their decisions to permit or refuse leave to intervene'). The Australian Law Reform Commission's 1996 recommendation that courts be obliged to give reasons for their decisions when exercising their discretion in this area appears to have had limited influence on judicial practice: see ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.36].

[154] See e.g. *Brandy v Human Rights and Equal Opportunity Commission* [1994] HCATrans 51; *Garcia v National Australia Bank Ltd* [1998] HCATrans 50; *Attorney-General (Cth) v Breckler* [1998] HCATrans 455; *Appellant S395 of 2002 v Minister for Immigration and Multicultural Affairs* [2003] HCATrans 664; *APLA Ltd v Legal Services Commissioner of NSW* [2004] HCATrans 373.

[155] See e.g., *Stevens v Kabushiki Kaisha Sony Computer Entertainment* [2005] HCATrans 30; *Campbells Cash & Carry Pty Ltd v Fostif Pty Ltd* [2006] HCATrans 130; *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* [2006] HCATrans 339; *Houghton v Arms* [2006] HCATrans 544.

[156] [1996] HCATrans 68.

[157] (1996) 189 CLR 579, 604-605 (Brennan CJ), 650-652 (Kirby J). Although these dicta were sometimes cited as though establishing something in the nature of general principle, it was presumptuous to suggest that the relevant comments were representative of anything beyond the views of individual judges. The opinions of the other judges in *Levy*, both as to the relevant considerations and their application in the instant case, necessarily remain opaque. As McHugh J pointed out in *Garcia v National Australia Bank Ltd* [1998] HCATrans 50: 'When you talk about the principles being laid down in cases like Levy, you have an expression of the Chief Justice and an expression of Justice Kirby, I think. It is not the decision of the Court.'

[158] See e.g., *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 134-137 [102]-[109]; *Minister for Immigration and Multicultural Affairs v QAAH of 2004* (2006) 231 CLR 1, 29 [77]-[78]; *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 557-559 [28]-[32].

[159] One notable exception was the unusual case of *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 [1] (Gleeson CJ), [65]-[68] (Hayne J), [104] (Heydon J), [149] (Crennan and Kiefel JJ).

[160] Patrick Keyzer, *Open Constitutional Courts in Australia* (The Federation Press, 2010) 115.

[161] Ibid, 115-117.

well 'seem to an outsider to be unpredictable and inconsistent'.[162] Burmester similarly commented that the Court's approach was 'largely ad hoc and pragmatic, giving rise to considerable uncertainty about what has to be shown to attract a grant of leave to appear'.[163] Writing extrajudicially, Justice Susan Kenny warned that '[a] system for controlling public interest intervention that is based on a seemingly unstructured judicial discretion is bound to create unnecessary expense and frustration'.[164]

Following the appointment of French CJ, the approach of the High Court appeared to change, with meaningful reasons in the course of dealing with amici in two matters. In 2008, the Court refused to allow two interested persons to appear as amici in *Wurridjal v Commonwealth of Australia.*[165] The position of the Court had clearly been resolved in advance of the hearing, and both French CJ, for the majority, and Kirby J, who dissented along with Crennan J, provided brief reasons for their conclusions on the leave issue.[166] In 2011, five interested organisations sought to be heard as amici in *Roadshow Films Pty Ltd v iiNet Ltd.*[167] In granting leave to two organisations and dismissing the other three, French CJ made a number of general comments about the approach to be taken to amicus applications which were later published as a short, standalone judgment of the Court in the Commonwealth Law Reports.[168]

Whilst the willingness of the Court to engage with the general principles relevant to amicus applications in *Wurridjal* and *Roadshow Films* should be welcomed, it has not been part of a clear, generalised pattern of greater transparency. A mere fortnight after leave was refused in *Wurridjal*, an almost identical High Court bench (Kirby J not sitting) permitted two amici to address the Court in *IceTV Pty Ltd v Nine Network Australia Pty Ltd,*[169] with no comment made aside from the Chief Justice noting that the Court was of the view that it might be assisted by hearing from them.[170] Indeed, in *Roadshow Films* itself, the Court's comments in respect of each particular applicant were perfunctory, involving more in the way of assertion than explanation.[171] In other proceedings, a number of prospective amici have seen their applications determined without any reasons being provided for the decision made, or with reasons noted only in a cursory manner.[172]

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[162] (1999) 197 CLR 83, 136 [107]. See also George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 389.

[163] Henry Burmester, 'Interveners and *amici curiae*' in Tony Blackshield, Michael Coper and George Williams (eds), *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 356, 357.

[164] The Hon Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 170-171**.**

[165] [2008] HCATrans 348.

[166] Writing in 2010, Keyzer considered that the approach of the majority provided, 'at last … a formal test which gives applicants some guidance' in relation to the admission of amicus in constitutional cases; Patrick Keyzer, *Open Constitutional Courts in Australia* (The Federation Press, 2010) 118. Some clarity was gained from the comments of Brennan CJ at 604, confirming that he spoke for the Court in *Kruger,* and stating that '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'. However, as the case law has developed, the decision in *Wurridjal* has, unfortunately, been ineffective to provide applicants with guidance.

[167] See [2011] HCATrans 323. In addition, the Australian Recording Industry Association Ltd (unsuccessfully) sought to intervene.

[168] *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37.

[169] [2008] HCATrans 356.

[170] Admittedly, in this case, the outsiders' application was granted rather than refused, and it could be argued that in such circumstances explanation of the Court's decision was a less pressing matter, but it should be noted that the appellants were provided with no real explanation as to why their written objections to the outsiders' appearance were swept aside.

[171] *Roadshow Films Pty Ltd v iiNet Ltd (No 1)* (2011) 248 CLR 37, 39-40 [7].

[172] See e.g., *Momcilovic v The Queen* [2011] HCATrans 15; *Williams v Commonwealth of Australia* [2011] HCATrans 198; *Attorney-General for the State of South Australia v The Corporation of the City of Adelaide* [2012] HCATrans 233; *Maloney v The Queen* [2012] HCATrans 342; *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCATrans 299; *State of Western Australia v Brown* [2014] HCATrans 14 (leave refused after prospective amicus declined invitation to supplement its written submissions on whether appearance should be permitted); *NSW Registrar Births, Deaths and Marriages v Norrie* [2014] HCATrans 36*; Tajjour v State of New South Wales* [2014] HCATrans 119.

A more expansive approach to the provision of reasons for decision on amicus applications has been adopted by other courts at various times. The Federal Court, in particular, has produced some instructive analyses of general principle.[173] On occasion, written reasons exclusively dedicated to systematically explaining a particular leave decision (along with any ancillary orders made) are delivered.[174] In state and territory courts, Kirby J's practice of revisiting leave decisions in the course of explaining his ultimate reasons for the substantive disposition of a matter has occasionally been followed,[175] yielding some useful insights into judicial approaches to the decision-making task. Combined with the High Court's various forays into substantive commentary, a reasonable insight can be gained into the kind of considerations to which Australian courts advert in making relevant decisions.

This does not, however, lessen the desirability of ensuring that such decisions are consistently explained on a case-by-case basis. Simply noting that the court has formed the view that it would not be assisted by hearing from an outsider, or that the outsider's proposed submissions would not add to those of the parties, is not particularly illuminating. When minimal reasoning is provided, even the parties involved are left to inference and speculation in attempting to understand why a particular amicus application has been accepted or rejected. Inevitably, this fosters uncertainty, which in turn creates significant practical difficulties for persons or organisations contemplating seeking leave to appear. Potential applicants and their advisors may find it very difficult to evaluate their chances of success with confidence.[176] In a practical sense, this is likely to discourage the making of amicus applications.

We suggest that there is a need to develop a more transparent and predictable approach that is particularly acute in the High Court for a number of reasons:

- The Court represents the apex of an integrated judicial structure. As such, it would be logical for the High Court to assume the leading role in the articulation and application of rational criteria to guide decisions of the lower courts on amicus applications. As things stand, an outsider could be dealt with by reference to quite different considerations at different levels of the appellate hierarchy in the same proceedings (and, moreover, the differential treatment would be impossible to detect). Unless such an outcome could be justified by reference to some material change of circumstances, it may reflect inconsistent approaches. Sir Anthony Mason has observed that '[i]t would make sense if High Court procedure were part of a uniform integrated pattern'.[177] The High Court, more than any other, has the potential to ensure that such a pattern takes shape.
- High Court appeals are, of their nature, liable to present questions of law of broad significance. Decisions will often have ramifications transcending the interests of the immediate parties to the dispute.[178] Such broader considerations may be relevant to the decision to grant special leave. Moreover, it is very difficult to overturn a decision of the High Court once made. It is, therefore, arguable that there is a real need for the Court to be made aware of legal arguments that are genuinely relevant to the dispute before it, whether the immediate parties are prepared to present

[173] See e.g., *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520.

[174] See e.g., *Kabushiki Kaisha Sony Entertainment v Stevens* (2001) 116 FCR 490; *Sharman Networks Ltd v Universal Music Australia Pty Ltd* (2006) 155 FCR 291. There are also examples of this practice in the Federal Magistrates Court (now the Federal Circuit Court): see e.g. *Maslaukas v Queensland Nursing Council (No 2)* [2008] FMCA 216; *Vijayakumar v Qantas Airways Limited* [2008] FMCA 339.

[175] See e.g., *National Australia Bank Pty Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 380-382 (Mahoney P); *R v GJ* [2005] NTCCA 20, [42]-[65] (Mildren J); *R v Thomas* (2006) 14 VR 475, 509-510 [121]-[126] (Maxwell P, Buchanan and Vincent JJA); *R v Pidoto and O'Dea* (2006) 14 VR 269, 284-285 [70]-[76] (Maxwell P, Buchanan, Vincent and Eames JJA).

[176] See George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 389.

[177] Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20 *Adelaide Law Review* 173, 175.

[178] So much is a consequence of the nature of the Court's jurisdiction: see *Judiciary Act 1903* (Cth). See also Ernst Willheim, 'An Amicus Experience in the High Court' (Conference paper, Annual Public Law Weekend, 1 November 2008) 3-4 (noting that '[m]atters coming before the High Court for decision are by definition matters of public importance'); Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22 *Bond Law Review* 126, 129-130.

them or not. The Australian Law Reform Commission has observed that '[i]n any case where a diverse range of interests is affected, it is beneficial to allow representatives of each interest in the litigation to participate in the argument'.[179]

- The nature of the process by which matters reach the High Court on appeal is such that cases turning on factual disputes or settled law are invariably filtered out. Thus, the Court is left with a remainder of almost uniformly 'difficult' cases.[180] It seems reasonable to suppose that the assistance which an outsider can provide will be all the more valuable where the competing arguments are likely to be delicately balanced, even if such 'assistance' may have the perhaps unwelcome effect of adding layers of complexity to the problem with which judges must engage.
- Decisions of the Court will, almost as a matter of course, have consequences for persons other than the immediate parties and will influence the disposition of similar cases in lower courts. Because of this, persons or organisations seeking to promote some public interest will see the Court as a sensible place to concentrate their efforts and resources where an appropriate matter arises. Appearing before the High Court is likely to provide a better 'return on investment', so to speak, than putting submissions to a subordinate court.[181] Accordingly, a higher proportion of High Court cases will involve amicus applications. Given this, and having opened the door to 'public interest' amici, it is arguable that it is incumbent on the Court to make its reasoning clearer on a case-by-case basis.

There are some similarities between the absence of clear principles here and the High Court's approach in relation to costs and conditional special leave.[182]

4.2.2 *General approach*

In *United States Tobacco Co v Minister for Consumer Affairs*, the Full Court of the Federal Court indicated that:[183]

> there is no prescription of the circumstances in which it may or may not be proper for a court to hear an amicus. … No strict rules have been developed, no doubt because no person has the right to address the court as an amicus, and it is for the court to accept the assistance of the amicus if it seems proper to the court to do so.

As Marshi and O'Cinneide have written, the 'core rationale' for third-party participation consists in 'utility to the court in determining the issues at stake'.[184] In *Wurridjal*, French CJ suggested that the overarching issue is whether hearing an outsider's arguments would be 'in the interests of the administration of justice'.[185] In line with this, determining whether or not a putative amicus ought to be permitted to appear would seem to require an expected benefit to be balanced against any detriment potentially flowing from outsider involvement.[186] So much was made clear by the High Court in the *Roadshow Films* case[187]:

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[179] Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No. 27, 1985) 158 [295].
[180] The Hon Murray Gleeson AC, *The Rule of Law and the Constitution* (Boyer Lectures, 2000) 78.
[181] Cf Paul Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision-making* (Oxford University Press, 2008) 32.
[182] See Kieran Pender, 'The Price of Justice? Costs-Conditional Special Leave in the High Court' (2018) 42(1) *Melbourne University Law Review* 17.
[183] (1988) 20 FCR 520, 535-536 (Davies, Wilcox and Gummow JJ).
[184] Mona Marshi and Colm O'Cinneide, 'Third Party Interventions: The Public Interest Reaffirmed' [2004] *Public Law* 69, 72.
[185] *Wurridjal v Commonwealth of Australia* [2008] HCATrans 348; cf *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ) (linking the hearing of an amicus curiae to 'an overriding right of the court to see that justice is done'). However, as Willheim has pointed out, statements along these lines are ambiguous: see Ernst Willheim 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22 *Bond Law Review* 126, 134.
[186] *In Re Northern Ireland Human Rights Commission* [2002] UKHL 25, [32] (Lord Woolf); cf *Giblet v Queensland* [2006] FCA 537, [2] (describing the exercise involved as a 'balancing act').
[187] *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, 39 [4].

> [Before an applicant will be heard as amicus,] [t]he Court will need to be satisfied … that it will be significantly assisted by the submissions [sought to be presented] and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance.

Similarly, the *Federal Court Rules 2011* (Cth) direct the Court's attention to whether 'the intervener's contribution will be useful and different from the contribution of the parties to the [proceeding or appeal]', and whether the proposed intervention is likely to 'unreasonably interfere with the ability of the parties to conduct the [proceeding or appeal]' as they wish – as well as 'any other matter the Court considers relevant'.[188]

Whilst balancing benefits and detriments seems reasonable enough as an abstract proposition, an approach of this nature raises a number of subsidiary issues. In particular, consideration is required as to what should be taken as a relevant benefit or detriment, and as to how benefits and detriments are to be weighed against one another. Any discussion of how courts have approached these issues cannot purport to be either definitive or exhaustive. The relative significance of the various factors to which courts have adverted at different times is difficult to assess because of the failure of some courts to systematically articulate their reasons.[189] Ultimately, any attempt to systematise the various considerations of which courts have taken account must come with the caveat that it is impossible to be sure that the decision-making exercise is approached with consistency as between different courts and judges. In practice, concealed attitudinal differences may be significant.[190] Moreover, the variety of factual, legal and policy issues arising out of different cases may preclude the formulation of general guiding 'principles'.

It has not been uncommon for judges to advert to a need for 'caution' in considering amicus applications.[191] The basis of this 'need' is presumably a concern that the relaxation of the criteria for the admission of amici curiae would lead to the courts being inundated with meritless or duplicative applications; the compromise of the adversarial model of litigation or the 'politicisation' of the courts. Whether such fears are well-founded is open to debate.[192] The practical barriers to amicus curiae participation (cost, lack of information and/or expertise), and the fact of wide judicial discretion to exclude would-be amici, are arguably sufficient to prevent the number of interventions and their scope from spiralling out of control.

As a general proposition, Australian courts still appear predisposed to conservatism in considering amicus curiae applications. An applicant ought not to be surprised if its attempt to intervene is met with scepticism from the bench, which may even take the form of a presumption against their involvement:[193]

> It is generally undesirable that the boundaries of litigation should be expanded by the incorporation of parties who are not engaged in the dispute which forms the substance of the proceedings. It is important not to lose sight of the fact that a plaintiff is, generally, entitled to lay out the playing field,

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[188] *Federal Court Rules 2011* (Cth), rr 9.12 and 36.32. Note that the provision directed to proceedings in the Court's original jurisdiction states that it 'may' have regard to the listed matters, whereas the provision directed to appellate proceedings (r 36.32) requires a would-be intervener to positively satisfy the court that a 'useful and different' contribution will be made without occasioning unreasonable interference, and of any other matter considered relevant.

[189] Philip Lynch et al, 'Why are non-parties non-starters? A call for clearer procedures and guidelines for amicus curiae applications in Victoria' (Submission No. 26 to the Victorian Law Reform Commission *Civil Justice Review*, 2006) 12 [4.2].

[190] Jeffrey W Shaw QC, 'Hearing the people – amicus curiae in our courts' in Public Interest Advocacy Centre, *Hearing the people: amicus curiae in our courts – A collection of papers delivered to a PIAC Seminar on 8 August 1995* (1995) 1, 2 (noting that it would seem clear enough that '[a]s it frequently appears with things legal, there are narrow and wide views on the question of when an amicus curiae may be allowed to play a role' in court proceedings').

[191] See e.g,. *Kruger v Commonwealth* [1996] HCATrans 68; *Karim v The Queen* (2013) 83 NSWLR 268, 280 [39] (Allsop P); Cf *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331 (Dixon J).

[192] Cf Public Law Project, *Third Party Interventions in Judicial Review: An Action Research Study* (2001) 23-24.

[193] *Yan Xie v Chen Shaoji* [2008] NSWSC 224, [29] (Simpson J) (discussing interveners, rather than amici as such); cf *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 536 (Davies, Wilcox and Gummow JJ); Sir Anthony Mason, 'Access to Constitutional Justice: Opening Address' (2010) 22 *Bond Law Review* 1, 14.

and the defendant to limit, or, occasionally, expand it. It is, generally, not for others to intrude upon that playing field.

Despite the opinion of Kirby J (in dissent) in *Wurridgal* that the High Court had 'relaxed somewhat its earlier reluctance to permit amici curiae to intervene in proceedings',[194] the majority of the Court in that case declined to allow the intervention sought.

In the five-year period following Kirby J's comment about increased amici participation in the High Court, there were at least 20 cases in which applications were made for leave to intervene or appear as amici. The applicants were successful in most cases, with the decisions usually made at the outset of the hearing without any reasoned explanation. Persons or entities permitted to appear as amicus included: Telstra Corporation Limited and the Australian Digital Alliance[195]; ASIC[196]; the Attorney-General for the Commonwealth[197]; Australian Centre for International Commercial Arbitration Ltd, Australian International Dispute Centre Ltd, Institute of Arbitrators and Mediators Australia Ltd, Chartered Institute of Arbitrators (Australia) Ltd[198]; the Human Rights Law Centre Ltd[199];the Minister for Planning & Infrastructure[200]; the Churches Commission on Education Incorporated[201]; the Australian Performing Rights Association Limited[202]; Communications Alliance Limited[203];; Australian Centre for International Commercial Arbitration Ltd, the Institute of Arbitrators and Mediators Australia Limited and the Chartered Institute of Arbitrators (Australia) Ltd[204]; National Congress

[194] *Wurridjal v The Commonwealth of Australia* [2009] HCA 2 ; 237 CLR 309 [262] citing: *Levy v Victoria* (1997) 189 CLR 579 at 600-605 per Brennan CJ, cf at 650-652 of his own reasons; and referring generally to the Hon Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159; Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment', (1998) 20 *Adelaide Law Review* 173; George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis', (2000) 28 *Federal Law Review* 365.

[195] *IceTV Pty Limited & Anor v Nine Network Australia Pty Limited* [2008] HCATrans 356 (16 October 2008). Infringement of copyright by an online service (IceTV) brought by the Nine Network in relation to their free-to-air program broadcasts.

[196] *Lehman Brothers Holdings Inc v City of Swan & Ors* [2010] HCATrans 6 (9 February 2010). Applicability of an executed deed providing for moratoria and release of claims against an Australian company, claims against the ultimate parent company and subsidiaries.

[197] *Westport Insurance Corporation & Ors v Gordian Runoff Limited* [2011] HCATrans 12 (3 February 2011). Interpretation of Model Laws given force by a Commonwealth Act, the *International Arbitration Act 1974* (Cth).

[198] *Westport Insurance Corporation & Ors v Gordian Runoff Limited* [2011] HCATrans 12 (3 February 2011).

[199] *Momcilovic v The Queen & Ors* [2011] HCATrans 15 (8 February 2011), 16 (9 February 2011) 145 (7 June 2011) validity and operation of the Victorian *Charter of Rights and Responsibilities; Attorney-General for the State of South Australia v Corporation of the City of Adelaide & Ors [2012] HCATrans 107 (11 May 2012)*, 233 (2 October 2012). Implied freedom of political communication in the context of a council by-law restricting preaching and the distribution of material on any road without the permission of the council; and *Clubb v Edwards* 267 CLR 171 defending Victoria's safe access zones, see https://www.hrlc.org.au/factsheets/2018/10/9/defending-victorias-safe-access-zones-in-the-high-court..See also the written submissions of the Human Rights Law Centre seeking leave to intervene in *Brown and Anor v The State of Tasmania*: https://cdn.hcourt.gov.au/assets/cases/h3-2016/Brown-Tasmania_HRLC-Subs.pdf. The Centre was advised that the High Court would not be further assisted by oral argument: *Brown & Anor v The State of Tasmania* [2017] HCATrans 93 (02 May 2017.

[200] *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd & Ors* [2011] HCATrans 56 (11 March 2011), 143 (1 June 2011). Interpretation of the *Environmental Planning and Assessment Act 1979* (NSW) and whether the operation of a restrictive covenant was suspended by the making of a local environment plan.

[201] *Williams v Commonwealth of Australia & Ors* [2011] HCATrans 198 (9 August 2011). Constitutional validity of the national school chaplaincy scheme.

[202] *Roadshow Films Pty Ltd & Ors v iiNet Limited* [2011] HCATrans 323 (30 November 2011).

[203] Ibid.

[204] *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia and Anor* [2012] HCATrans 277 (6 November 2012).

of Australia's First Peoples Limited[205]; Australian Human Rights Commission[206]; Australian Marriage Equality Inc [207]; the Chief Examiner[208]; Attorney-General for the State of South Australia[209]; A Gender Agenda Inc[210] and the Office of the United Nations High Commissioner for Refugees.[211]

Persons or entities who were refused leave to appear as amici in that period included: Australian German Lawyers' Association[212]; the Media, Entertainment and Arts Alliance jointly with the Screen Actors' Guild[213]; the Australian Privacy Foundation[214]; Australian Digital Alliance[215]; Cancer Council Australia[216] and Australian Lawyers for Human Rights.[217]

Similarly, as Perry and Keizer note[218], in *Clubb v Edwards* and *Preston v Avery*[219] the amici curiae had a very positive reception from the Court and set a new record for number of amici represented in a case (four).[220] The fact that these cases involved controversial attempts to de-criminalise abortion perhaps explains this. An application by an anti-choice group to appear as amicus was rejected.

4.2.3 *The offer of useful assistance*

The intention and ability to provide useful assistance to the court is clearly a precondition to the grant of leave.[221] To be useful, an outsider's proposed submissions must be non-duplicative; relevant; at least prima facie persuasive or plausible and able to be presented in a manner consistent with the amicus function.

4.2.4 *Requirement of a 'different' contribution*

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[205] *Maloney v The Queen* [2012] HCATrans 342 (11 December 2012). Validity of a state law creating a 'restricted area' for alcohol, leading to the conviction of an indigenous woman. The argument raised related to the law's possible inconsistency with the *Racial Discrimination Act 1975* (Cth).

[206] *Magaming v The Queen* [2013] HCATrans 200 (3 September 2013) Validity of provisions of the *Migration Act* relating to people smuggling; *Tajjour v State of New South Wales*; *Hawthorne v State of New South Wales; Forster v State of New South Wales* [2014] HCATrans 119 (10 June 2014) Constitutional validity of NSW anti-consorting law.

[207] *The Commonwealth of Australia v The Australian Capital Territory* [2013] HCATrans 299 (3 December 2013). Constitutional validity of ACT laws relating to marriage.

[208] *D'Amico v Director of Public Prosecutions* [2013] HCATrans 319 (13 December 2013). Application for removal to the High Court of an ongoing County Court criminal matter relating to the provision or disclosure of evidence to the defence.

[209] *State of Western Australia v Brown and Ors* [2014] HCATrans 14 (12 February 2014). Determination of native title over land subject to a prior mineral lease.

[210] *NSW Registrar Births, Deaths and Marriages v Norrie* [2014] HCATrans 36 (4 March 2014). Interpretation of the NSW *Births, Deaths and Marriages Act* and whether it required that a person who had undergone a sex affirmation procedure to register as one sex or the other.

[211] *CPCF v Minister for Immigration and Border Protection & Anor* [2014] HCATrans 227 (14 October 2014). Legality of an attempt to return people who had sought asylum to Sri Lanka.

[212] *Hogan v Hinch* [2010] HCATrans 284 (2 November 2010). Restriction on publishing material related to extended supervision orders by which persons convicted of certain sexual offences for which custodial sentences had been imposed could be subject to post-custodial supervision.

[213] *Roadshow Films Pty Ltd & Ors v iiNet Limited* [2011] HCATrans 323 (30 November 2011). Alleged infringement of copyright of films by an online service.

[214] *Roadshow Films Pty Ltd & Ors v iiNet Limited* [2011] HCATrans 323 (30 November 2011).

[215] Ibid.

[216] *JT International SA v Commonwealth of Australia; British American Tobacco Australasia Limited & Ors v The Commonwealth of Australia* [2012] HCATrans 91 (17 April 2012). Validity of plain packaging tobacco legislation.

[217] *State of Western Australia v Brown and Ors* [2014] HCATrans 14 (12 February 2014).

[218] H W Perry and Patrick Keyzer, 'Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia can Learn from the U.S. Experience', 37(1) *Law in Context* (2020) 90.

[219] (2019) 267 CLR 171.

[220] The Castan Centre for Human Rights, The Fertility Control Clinic, the Human Rights Law Centre and Liberty Works Inc.

[221] See e.g., *R v Thomas* (2006) 14 VR 475, 510 [126] (Maxwell P, Buchanan and Vincent JJA); *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37, 39 [6] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Priest v West* (2011) 235 VR 225, 232 [29] (Maxwell P, Harper JA and Kyrou AJA).

It may be difficult to ascertain whether assistance from the parties is not likely to be forthcoming in considering whether the submissions of an amicus curiae should be entertained. In *R v Thomas,*[222] the Human Rights Law Resource Centre (HRLRC, as it was then) and Amnesty International Australia (AIA) sought leave to appear as amici curiae in the Victorian Court of Appeal. Their purpose was to put before the Court certain submissions on international law. In refusing leave, the Court noted that:[223]

> we were not persuaded that hearing either proposed amicus would assist us in a way in which we would not otherwise have been assisted. Significantly, [counsel] for the applicant [Thomas] acknowledged that *there was nothing in the proposed amicus submissions which he could not advance in submissions on his client's behalf*.

There may be little scope left for the appearance of amici if the *theoretical* competence of the parties to adduce their proposed arguments is taken to be a determinative factor. It is hard to imagine a situation in which a prospective amicus would seek to advance an argument which one of the parties could not.

Of course, the parties might have forensic reasons for choosing not to pursue particular lines of argument. Such arguments might be inconsistent with or otherwise detract from the main thrust of their submissions. A lack of resources might require concentration on narrow or technical points.[224] Indeed, Harris, who appeared on behalf of the HRLRC and AIA in *Thomas*, suggests that it was 'unrealistic' to suppose that the defendant's (Legal Aid-funded) representatives could themselves have compiled submissions in the nature of those advanced for the prospective amici, given the breadth of the issues arising in the case.[225] If the question is conditioned upon whether one of the parties 'could' make those arguments, it is arguable that such practical considerations are moot: the arguments 'could', of course, be made – even if forensic or practical considerations militate against it.

However, *Thomas* need not be read as suggesting such a strict criterion. It could be that the point that the Court was seeking to make was that the proposed arguments of the prospective amici were in no sense inconsistent with, and were indeed complementary to, the submissions of one of the parties, specifically, the applicant. In such a case, there was no apparent forensic impediment to the applicant simply assimilating the proposed arguments of the amici to his own. Indeed, in the event, once the amici had been refused leave, the applicant filed supplementary written submissions incorporating much of the material that the amici had proposed to put before the Court.[226]

Yet, it is difficult to see why an outsider, which has employed its own resources and expertise to develop legal submissions said to represent broader interests than those of the immediate parties to a dispute, and has approached the court on its own initiative seeking to be heard, should be required to align itself with (or channel its arguments through) one of the parties in order to have a court take account of its perspective.[227] The outsider might not wish, for instance, publicly to adopt what looks like a partisan stance with respect to the particular proceeding. They might have no genuine identity of interest with the party whose position is supported. Furthermore, if the outsider is limited to providing the fruits of its work to one of the parties, then it loses the benefits that come with direct and independent participation in the proceedings. Even greater problems will arise where neither of the parties is receptive to, or prepared to facilitate, the outsider's

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[222] (2006) 14 VR 475.

[223] *R v Thomas* (2006) 14 VR 475, 510 [126] (Maxwell P, Buchanan and Vincent JJA) (emphasis added).

[224] These considerations were, in fact, expressly acknowledged by French CJ in his brief reasons for his decision in *Wurridjal v Commonwealth of Australia* [2008] HCATrans 348. See also Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No. 27, 1985) [294] (noting that the parties 'may fail to deal with some issues through inadvertence, ignorance, negligence, collusion or because they do not want a certain issue decided'); George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 366 (noting that there is often no incentive for parties to enliven issues of general principle).

[225] Claire Harris, 'The Role of Amicus as a Form of Public Leadership?' (Conference paper, Annual Public Law Weekend, 1 November 2008) 10-11.

[226] *R v Thomas* (2006) 14 VR 475 at 510 [127] (Maxwell P, Buchanan and Vincent JJA).

[227] See also Philip Lynch et al, 'Why are non-parties non-starters? A call for clearer procedures and guidelines for amicus curiae applications in Victoria' (Submission No. 26 to the Victorian Law Reform Commission *Civil Justice Review*, 2006), 7-8 [2.5].

involvement. The outsider's arguments need not be of particular assistance to either side.[228] Moreover, even where those arguments do resonate with the case of one of the parties, that party may not welcome either association with the outsider, or the specific assistance offered.

If the criterion in *Thomas* is applied in this way, it would seem to have the practical effect of leaving little space for intervention by amici wishing to raise matters in the public interest. Fortunately, in other cases, a less demanding threshold appears to have emerged. In general, in assessing whether a prospective amicus' proposed submissions are sufficiently novel to warrant their reception, Australian courts adhere to the principles expressed by Brennan CJ on behalf of the majority in *Kruger v The Commonwealth*, in refusing to permit the Secretary-General of the Australian Section of the International Commission of Jurists to appear before the High Court:[229]

> [The applicant] fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. … 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 question here is not whether the existing parties *could* make a particular argument, but whether they *will* do so as a matter of fact. A court need not inquire too deeply into *why* the parties have chosen to refrain from pursuing a particular line of argument but must instead satisfy itself that permitting a third party to step in and do so would 'assist' the Court. To put it another way, the initial question is simply whether the proposed submissions would do nothing more than duplicate or amplify contentions already before the court.[230]

This accords broadly with what the Victorian Court of Appeal said in *R v Pidoto and O'Dea*, in allowing the Fitzroy Legal Service to make submissions on the basis that they were 'not otherwise proposed to be advanced by the parties to these appeals'.[231] Likewise, in *Hokit*, the NSW Court of Appeal permitted an amicus to make submissions 'in relation to matters of public interest broadly to the extent that the relevant matters had not been dealt with by the parties'.[232] In *Wurridjal*, French CJ indicated that the Court might consider itself 'assisted' by an outsider offering submissions on 'aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties', thus providing 'the benefit of a larger view of the matter before it than the parties are able or willing to offer'.[233]

This understanding of the general principle is harmonious with the *Federal Court Rules*, which now direct judges of that Court to have regard to whether an intervener's proposed 'contribution' would be 'useful and different from the contribution of the parties to the proceeding,'[234] picking up language used elsewhere.[235]

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[228] Indeed, as Williams has pointed out, '[i]n rare cases, the parties may agree in their submissions on a point of law and there may not be a contradictor': George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 367.

[229] [1996] HCATrans 68 (Brennan CJ).

[230] See e.g,. *JT International SA v Commonwealth of Australia* [2012] HCATrans 91 (in which the Cancer Council of Australia was refused permission to appear, French CJ indicating to counsel 'the matters you seek to canvass are adequately canvassed in the Commonwealth submissions').

[231] (2006) 14 VR 269, 285 [74] (Maxwell P, Buchanan, Vincent and Eames JJA); cf *Priest v West* (2011) 35 VR 225, 233 [33] (Maxwell P, Harper JA and Kyrou AJA). In another Victorian Court of Appeal case the Victorian Aboriginal Legal Service was granted leave to assist the Court in making written and oral submissions: *Thompson v Minogue* [2021] VSCA 358,

[232] (1996) 39 NSWLR 377, 382.

[233] *Wurridjal v Commonwealth of Australia* [2008] HCATrans 348.

[234] See *Federal Court Rules 2011* (Cth), rr 9.12(2)(a), 36.32(2)(a). See also, e.g., *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* [2005] FCA 1242; 220 ALR 1, [20] (indicating that the Court would be prepared to consider submissions that were 'relevant, and not repetitive of points made by other parties'). The notion of 'usefulness', of course, raises a separate issue, which will be examined further below.

[235] *Reference Re Workers' Compensation Act, 1983 (NFLD) (Application to Intervene)* [1989] 2 SCR 335, 339 (Sopinka J) referenced in *Attorney-General of the Commonwealth v Breckler & Ors* (1999) 197 CLR 83, 136 [106] (Kirby J); see also ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.36]; *Rules of the Supreme Court of Canada*, r 57(2)(b).

An amicus does not necessarily have to offer a novel basis for the disposition of a case. French CJ's comment in *Wurridjal,* that a court would be amenable to hearing from an amicus on matters that would not 'receive full *or adequate* treatment' (emphasis added) if left in the hands of the parties, suggests that an amicus can provide an alternative perspective on issues that are live as between the protagonists, provided that the parties' treatment of them leaves lacunae which the amicus can fill. However, the courts will not allow a prospective amicus to be heard where it is evident that its proposed submissions will be directed to nothing more than the repetition or amplification of the contentions of one or other of the parties.[236] The courts' major concern is encapsulated in the following comment of Lord Hoffmann:[237]

> An intervention is … of no assistance if it merely repeats points which the appellant or respondent has already made. An intervener will have had sight of their printed cases and, if it has nothing to add, should not add anything. It is not the role of an intervener to be an additional counsel for one of the parties. This is particularly important in the case of an oral intervention. I am bound to say that in this appeal the oral submissions on behalf of the [Northern Ireland Human Rights Commission] only repeated in rather more emphatic terms the points which had already been quite adequately argued by counsel for the appellant. In future, I hope that interveners will avoid unnecessarily taking up the time of the House in this way.

4.2.5 *Requirement of a 'useful' contribution*

As noted above, the idea that an amicus curiae must propose to 'assist' the Court, or provide a 'useful' contribution as per the *Federal Court Rules*, requires some consideration to be given to the usefulness of proposed submissions. Clearly, where an applicant's proposed submissions are not on point, or disclose no relevant legal argument, a court is unlikely to grant leave.[238] The proposed submissions should fall within the scope of the appeal, but outside the ambit of what the parties intend to agitate.

The need to examine the nature and scope of the proposed intervention explains the usual requirement, in the High Court for example, for the application for leave to participate as *amicus* to be filed together with the substantive submissions of the parties.

A court is unlikely to allow submissions to be made that would significantly divert appellate proceedings from the facts found, and the issues ventilated, at first instance. In *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd,*[239] the Generic Medicines Industry Association Pty Ltd (GMIA) sought to be heard in an appeal against a finding that Apotex, a marketer of generic drugs, had breached the copyright subsisting in product information documentation supplied with Sanofi-Aventis' branded version of the relevant medication.[240] Its application was rejected on the ground that, although the Court accepted that its two proposed arguments were 'different' to those forthcoming from the parties, its contribution could not be considered 'useful', because 'there is no prospect that findings not sought or made below, which are essential steps in [the GMIA's] arguments, would be made on appeal'.[241] Having explained the reasoning behind this view in some detail,[242] the Court concluded:[243]

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[236] *Breen v Williams* (1994) 35 NSWLR 522, 532.

[237] *In re E (a child) (AP) (Appellant) (Northern Ireland)* [2008] UKHL 66, [4]; cf *Rules of the Supreme Court of the United States*, r 37.1 ('An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An amicus curiae brief that does not serve this purpose burdens the Court, and its filing is not favored').

[238] For example, a court will presumably refuse to accept the 'assistance' of an outsider proposing to put to it information of a social or political nature, unless it is plainly collateral to an arguable legal submission: cf Andrew Serpell, *The Reception and Use of Social Policy Information in the High Court of Australia* (Law Book Co., 2006) 58-60.

[239] [2012] FCAFC 62.

[240] See *Sanofi-Aventis Australia Pty Ltd v Apotex Pty Ltd (No 3)* (2011) 196 FCR 1.

[241] [2012] FCAFC 62, [2] (Keane CJ, Bennett and Yates JJ).

[242] [2012] FCAFC 62, [3]-[13] (Keane CJ, Bennett and Yates JJ).

[243] [2012] FCAFC 62, [14]-[16] (Keane CJ, Bennett and Yates JJ); cf *Toben v Jones (No 2)* [2009] FCA 807, [5]-[8] (Spender J); *Karam v Palmone Shoes Pty Ltd* [2010] VSCA 252, [15], [18] (Mandie and Harper JJA, Beach AJA); *McAlister v New South Wales* (2014) 223 FCR 1, 7 [29] (Edmonds J).

> There could be utility in granting the GMIA's application to intervene only if there were a real prospect that findings not sought or made below would be made on the appeal. To countenance a course whereby that might occur would be unfair to the first respondent who was not afforded the opportunity to meet such a case at trial. …
>
> To countenance the course involved in granting leave to the GMIA to intervene would go beyond any question of "intervention" in a pending appeal from the trial judge's resolution of the controversy tendered by the parties. That is because it would allow the presentation of a controversy outside the scope of the appeal by a person not party to the appeal. To allow the GMIA to pursue its point, having regard to the circumstance that the primary judge cannot be said to have made any error in failing to deal with the point that the GMIA now seeks to agitate, would be to allow it to present and pursue an argument which is not part of the appeal brought to correct error below.
>
> We doubt whether that state of affairs is contemplated by r 36.32 [of the *Federal Court Rules 2011* (Cth)]. Whether or not that is strictly the case, it is not a state of affairs which we would be disposed to bring about by the exercise of the discretion conferred by the rule to grant leave to intervene. The scope of the appeal has been circumscribed by the issues tendered for determination by the parties and the findings made, or not made, as to those issues by the primary judge. It is true that the rule expressly contemplates the making of submissions that are different from those to be advanced by the parties, but that does not mean that the Court should entertain submissions which are alien to the controversy resolved at first instance so as to facilitate a departure from the fundamental presupposition of r 36.32, namely, that the submissions by the intervener are to be germane to the appeal.

Similarly, in *Garcia v National Australia Bank Ltd*, some members of the bench appeared concerned that a prospective amicus intended to travel beyond the issues raised by the facts of the case.[244]

In *Wurridjal*, French CJ cast doubt on the relevance of the international law material that the applicants sought to adduce, suggesting that the applicants' submissions did not establish a sufficient or specific connection between that material and the case at hand. His Honour concluded that '[t]he tender of a large amount of material, supported by what is little more than an assertion about its utility, is not sufficient to give to the tenderer a voice in these proceedings'.[245] Similarly, in *NAGV v Minister for Immigration and Multicultural and Indigenous Affairs,*[246] the Court declined to hear from the Executive Council of Australian Jewry, Emmett J noting that its proposed arguments raised issues well outside the scope of the grounds of appeal relating to an immigration matter,[247] and were of such a nature as to be of 'marginal significance, if any, in the present proceeding'[248].

Thus, an amicus' proposed submissions must be relevant to the issues raised by a matter. If this basic threshold is met, the persuasiveness and cogency of those submissions appears to be influential in determining whether a particular application should, in fact, be granted.

It is clear that an amicus can be of no 'assistance' to a court if it proposes to act in a manner inconsistent with the amicus function. Such was the case in *Australian Automotive Repairers' Association (Political Action*

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[244] [1998] HCATrans 50.

[245] [2008] HCATrans 348. Kirby J (with whom Crennan J agreed) acknowledged that 'some of the materials proffered by the proposed amici appear somewhat undigested and lacking in demonstrated application to the issues in the proceeding', but would have allowed the appearance, nonetheless. Walker suggests that the applicants in *Wurridjal* might have had a better chance of obtaining leave to appear if they had engaged counsel to assist with the preparation of their written material and assist them in court: see Kristen Walker, 'Amici Curiae and Access to Constitutional Justice: A Practical Perspective' (2010) 22 *Bond Law Review* 111, 124.

[246] (2003) 130 FCR 46.

[247] (2003) 130 FCR 46, 67 [87].

[248] (2003) 130 FCR 46, 67 [90]; cf *R (On the application of Burke) v General Medical Council* [2006] QB 273, 308 [82] (noting that 'a great deal of [the] thoughtful and well-presented contributions [of some of the interveners] falls victim to our general view that this litigation expanded inappropriately to deal with issues which, whilst important, were not appropriately justiciable on the facts of the case').

Committee) Inc v NRMA Insurance Ltd (No 2),[249] where an applicant was denied amicus status on the basis that his principal intention was to adduce a significant amount of evidence.[250] Similarly, a putative amicus should not be heard if he or she is, in fact, closely aligned with one of the parties, and the real purpose of the application is to insulate both the advocate and the party from potential adverse costs consequences in respect of the proposed arguments.[251]

4.2.6 *Nature and general importance of the case*

If one of the purposes of permitting the appearance of amici is to ensure that the courts are well-informed in making decisions that have wide-ranging implications, then it stands to reason that the participation of amici will be of greatest value in cases dealing with questions that are novel or controversial, and/or cases from which a significant precedent is liable to arise. In such cases, the offer of additional 'assistance' will often be seen as valuable.[252] Conversely, where a dispute is narrow in ambit, exists within the confines of settled law, or is primarily fact-driven, the courts will be more reluctant to countenance the involvement of outsiders.

In *Breen v Williams*,[253] which concerned the rights of a patient to medical records in the possession of her treating doctor, Kirby P would have allowed the Public Interest Advocacy Centre to make oral submissions in the New South Wales Court of Appeal, although he was alone in this opinion. His Honour commented that:[254]

> The courts should not turn a blind eye or a deaf ear to the assistance that they might receive from amicus curiae on matters of general principle in test cases. This was avowedly a test case for both parties. Behind [the appellant] stood 2,000 litigants in a similar position. Behind [the respondent] stood the interests of medical practitioners of like opinion and the Medical Defence Union. In these circumstances, to exclude the assistance of [PIAC] evidences (in my respectful view) the procedural formalism and rigidity which limits the utility of the courts to modern dispute resolution. Had the Australian Medical Association sought to appear as amicus curiae I should have taken the same view and welcomed its assistance.

In *Re BWV; Ex parte Gardner,*[255] the novelty of certain issues arising under the *Medical Treatment Act 1988* (Vic) was said to be one factor which justified affording amicus status to Right to Life Australia Ltd, the Catholic Archbishop of Melbourne and Catholic Health Australia.[256] Similarly, in *Kabushika Kaisha Sony Entertainment v Stevens,*[257] Sackville J, in permitting the Australian Competition and Consumer Commission ('ACCC') to appear, stated[258]:

> It is quite clear that s 116A [of the *Copyright Act 1968* (Cth)] involves difficult questions of construction that have not been the subject of detailed consideration in this country. These questions may prove to be of general public significance.

On the other hand, in *R v GJ,*[259] the Human Rights and Equal Opportunity Commission ('HREOC') sought to be heard in a sentencing appeal. A question which arose was the degree to which the fact that GJ considered that his conduct was justified pursuant to Aboriginal customary law could operate as a mitigating factor in

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[249] [2003] FCA 1302.

[250] See 4.3.3 of this paper.

[251] See Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No. 27, 1985) [290] ('An advocate who has been briefed by a party entitled to be heard as of right on any topic cannot claim to be heard on that topic as amicus curiae so as to put the party in a more favourable position with regard to costs'); *Quinn v Law Institute of Victoria Ltd (No 2)* [2007] VSCA 132, [2]-[3].

[252] See *R v Murphy* (1986) 5 NSWLR 18, 23 (Hunt J); *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Davies, Wilcox and Gummow JJ).

[253] (1994) 35 NSWLR 522.

[254] (1994) 35 NSWLR 522, 533.

[255] (2003) 7 VR 487.

[256] (2003) 7 VR 487, 491 [17].

[257] (2001) 116 FCR 490.

[258] (2001) 116 FCR 490, 494 [16]. See also *WHW v Commissioner of Police* [2014] WASCA 153, [15] (Martin CJ, Buss and Murphy JJA).

[259] (2005) 16 NTLR 230.

the sentencing exercise, in particular when balanced against the protective function of the criminal law with respect to vulnerable persons (being, in this case, Aboriginal women and children).[260] In support of its application, HREOC cited its involvement 'in a wide range of activities relating to the recognition of Aboriginal customary law in Australia and the human rights of women and children'.[261]However, HREOC's application was rejected. Mildren J (with whom Riley J agreed, and in whose conclusions Southwood J concurred) recorded that[262]:

> The difficulty that faced [counsel for HREOC] in this case is that I was not satisfied that this Court would be significantly assisted by submissions from HREOC in arriving at the correct determination of this case. In my opinion, the sentencing principles to be applied in this case are well known and no new sentencing principle is involved. If there is a proper case to take into account in a sentencing matter international conventions to which Australia is a party, this is not that case.

Given that the presence of a significant question of law tends to favour the reception of submissions from amici, it should not be surprising that it is considered 'unusual' for such submissions to be accepted in first instance proceedings,[263] where factual issues tend to loom large. So much is commensurate with the broader role that appellate courts (and particularly the High Court[264]) assume with respect to the administration of justice in general.[265] This is not a firm rule.[266] In both *BWV* and *Sony v Stevens*, the circumstances were considered to afford adequate justification for hearing from outside parties at first instance.[267] However, in each case, a critical factor was that they involved relatively recent legislation about which arose significant questions of law.[268]

In the High Court, Kirby J has expressed the view that particular efforts should be made to accommodate amici curiae 'in constitutional cases and those where large issues of legal principle and legal policy are at stake'.[269] Similarly, Sir Anthony Mason has written, with reference to the High Court, that[270]:

> The formulation of a contested principle of law in a particular way may have adverse consequences for a range of persons beyond the parties to the particular litigation. Although those persons are not formally bound by the Court's decision because they are not parties, their prospect of challenging in a subsequent case the Court's formulation of principle in the instant case is virtually non-existent.

The role of amici curiae in human rights and constitutional cases in the United States, and the lessons that this may have for Australia has been analysed by Perry and Keyzer.[271] They propose that Australia should adopt the United States Supreme Court approach of allowing written submissions, or 'amicus briefs', as a

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[260] See e.g. (2005) 16 NTLR 230, 239-240 [30]-[33], 241 [36].

[261] (2005) 16 NTLR 230, 243 [46].

[262] (2005) 16 NTLR 230, 247 [65]; cf Claire Harris, 'The Role of Amicus as a Form of Public Leadership?' (Conference paper, Annual Public Law Weekend, 1 November 2008) 12 (noting that the Court's decision to disallow amicus curiae participation in *R v Thomas* (2006) 14 VR 475 may have been influenced by the fact that 'the matter had, in the view of the Court, a fairly obvious resolution based solely on Australian evidence law').

[263] *Re BWV; Ex parte Gardner* (2003) 7 VR 487, 491 [17]; see also *Breen v Williams* (unreported, Supreme Court of New South Wales, Bryson J, 10 October 1994) ('Submissions by an amicus curiae at first instance in this Court are rare, and that is appropriate').

[264] Ernst Willheim, 'An Amicus Experience in the High Court' (Conference paper, Annual Public Law Weekend, 1 November 2008) 3-4.

[265] See *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381.

[266] See *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 200 (Einfeld J) ('I have found no [significant] Australian authority which bears upon the permissibility or desirability in this country of the amicus curiae procedure at trial, or impedes or limits its use').

[267] See also e.g., *Breen v Williams*, unreported, Supreme Court of New South Wales, Bryson J, 10 October 1994 (Public Interest Advocacy Centre permitted to appear).

[268] In *Sony v Stevens*, it was also important that the self-represented respondent could offer limited assistance in this connection (see above at 4.2.7 of this paper).

[269] *Levy v Victoria* (1997) 189 CLR 579, 651 (Kirby J).

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

[271] H W Perry and Patrick Keyzer, 'Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia can Learn from the U.S. Experience', 37(1) *Law in Context* (2020) 66-98.

matter of course but only allowing applicants to make oral submissions if they have a serious and arguable point to make. As they note, in the United States Supreme Court, once a case is accepted for a decision on the merits, amicus briefs are almost invariably filed. In recent years there appears to have been an increase in the number of such briefs filed in each case.[272]

This is in marked contrast to the position in Australia, By way of example, and as Perry and Keyzer note, in *Brandy v Human Rights and Equal Opportunity Commission,*[273] which concerned the power of the Australian Human Rights Commission to enforce its own orders, the application by the Public Interest Advocacy Centre to contribute as an amicus curiae was unceremoniously rejected.[274]

Experience in overseas jurisdictions suggests that disputes as to justiciable human rights are particularly likely to attract applications by third-party interveners. In Canada,[275] the United Kingdom[276] and South Africa,[277] domestic human rights instruments have been a focus of such applications. Doubtless, this is attributable to a number of factors, including the existence of a substantial number of legally informed groups dedicated to advocacy on human rights issues[278]; the tendency of decisions made in respect of human rights instruments to have broad repercussions; the significant public interest in ensuring that disputes in this area are properly adjudicated; increased judicial willingness to accept outside assistance given the relative novelty of the issues likely to arise;[279] and the fact that, particularly in the years immediately following their enactment, the implications and proper interpretation of these instruments are likely to be the subject of debate and an ideal vehicle for test cases. In 2008, Harris suggested that the introduction in Victoria of the *Charter of Human Rights and Responsibilities* was likely to see increased use of the amicus curiae device in that State.[280] Notably, a number of interest groups have since successfully sought leave to appear in proceedings relating to the *Charter*'s interpretation.[281]

If the essential purpose of hearing from amici is to enhance the material on which a court will base its decision on a point having some degree of general significance, there would seem to be no reason in principle to treat private law cases as being distinct from those arising under public law for the purpose of determining applications to appear. Points of general importance are quite capable of arising in disputes between private parties,[282] although they may arise with less frequency than within the realm of public law.[283]

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[272] Page 71.
[273] (1995) 183 CLR 245.
[274] Pages 80-81.
[275] See George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365, 373, 384-385.
[276] Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 128.
[277] See John Mubangizi and Christopher Mbazira, 'Constructing the *Amicus* Curiae Procedure in Human Rights Litigation: What Can Uganda Learn From South Africa?' (2012) 16 *Law Democracy and* Development 199, 204-208.
[278] Ibid, 208.
[279] See *In Re Northern Ireland Human Rights Commission* [2002] UKHL 25, [25] (Lord Slynn of Hadley), [34] (Lord Woolf).
[280] Claire Harris, 'The Role of Amicus as a Form of Public Leadership?' (Conference paper, Annual Public Law Weekend, 1 November 2008) 13-14.
[281] For example: *Kracke v Mental Health Review Board* [2009] VCAT 646 (Human Rights Law Resource Centre); *R v Momcilovic* (2010) 25 VR 436 and *Momcilovic v The Queen* (2011) 245 CLR 1 (Human Rights Law Resource Centre); *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc (No 2)* [2011] VSC 153 and *Noone v Operation Smile* [2012] VSCA 91; 38 VR 569 (Public Interest Law Clearing House).
[282] John Basten QC, 'Amicus curiae in practice – a response' in Public Interest Advocacy Centre, *Hearing the people: amicus curiae in our courts – A collection of papers delivered to a PIAC Seminar on 8 August 1995* (1995) 11, 11.
[283] See *Roe v Sheffield City Council* [2003] EWCA Civ 1, [85]-[87] (Sedley LJ) (suggesting that the mere fact of economic 'knock on effects' of the resolution of private law issues may not be enough to justify the involvement of third parties), [104]-[105] (Hale LJ).

In *GJ,*[284] Mildren J expressed the view that whilst the Court had no express jurisdiction or power to allow intervention in criminal proceedings,[285] there was no impediment to permitting the appearance of amici in appropriate cases.[286] It seems safe to assume, however, that the qualitative difference between civil and criminal proceedings will be reflected in the kind of considerations that are relevant to the court's discretion to allow amici to appear.

If, for instance, an outsider sought leave to appear in order to argue for more severe sentencing in a specific field of crime, perhaps said to be representative of broader social concerns to which it was felt the courts had not adverted, the potential for distortion of the criminal process in the particular case would likely weigh against allowing the outsider's participation.[287] That said, in *R v Pidoto and O'Dea*, the Fitzroy Legal Service was permitted by the Court of Appeal of Victoria to appear as an amicus, notwithstanding the objection of the appellants, who were challenging the severity of their sentences for drug-related offences.[288] There is, perhaps, a perception that the prosecution will be more likely to present fully the issues to the court, given their resources and particular ethical duties arising from common law and statute. In practice, however, this may not always occur.

4.2.7 *Limitations of the parties*

The practical limitations or inadequacies of one of the parties to particular proceedings may highlight the desirability of amicus curiae involvement. It is clear that an outsider's contribution may be of heightened 'usefulness' in cases where the parties are mismatched. In particular, where one of the parties is self-represented, the desire to ensure that the court makes its decision on the basis of relevant, accurate and useful legal submissions will militate in favour of an amicus being permitted to advance arguments that would, if accepted, support that person's position.[289]

One of the factors which caused the ACCC to seek to involve itself in *Kabushiki Kaisha Sony Entertainment v Stevens* was the fact that the applicant companies were bringing novel proceedings against an unrepresented respondent and thereby attempting to procure a determination likely to be influential in terms of establishing legal principle. Professor Alan Fels, then Chairman of the ACCC, noted after the event that:[290]

> It [was] clear that Sony was in a much stronger position than the individual respondent to persuade the Court as to the correct interpretation of the *Copyright Act*. In such circumstances the ACCC felt it entirely appropriate to assist the Court by objectively putting to it alternative meanings.

Sackville J was clearly sensitive to the ACCC's concern that the unrepresented respondent would be unable to fulfil the role of an effective contradictor, particularly in so far as questions of law were concerned.[291] His Honour commented that:[292]

> While I have no doubt that counsel representing the [applicant companies] would act fairly and appropriately in the absence of the ACCC, it is unrealistic to expect the legal representatives for one

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[284] (2005) 16 NTLR 230, 248 [69] citing *R v Murphy* (1986) 5 NSWLR 18.

[285] *Karim v The Queen* (2013) 83 NSWLR 268, [36] (Allsop P) (declining to engage with the question of whether 'full intervention in a criminal matter' can be permitted). See also *Karim v R*; *Magaming v R*; *Bin Lahaiya v R*; *Bayu v R*; *Alomalu v R (No 2)* [2013] NSWCCA 43.

[286] See further, eg, *Karim v The Queen* (2013) 83 NSWLR 268, [35]-[39] (Allsop P).

[287] Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 141.

[288] See (2006) 14 VR 269, 285 [71] (Maxwell P, Buchanan, Vincent and Eames JJA); *R v A* [2001] 1 AC 45.

[289] To the extent that a 'public interest' amicus takes on the role of contradictor on certain issues, or is used to mitigate the forensic disadvantage of one of the parties, he or she will assume a function typically associated with more traditional species of amicus: see above at 2.2 of this paper.

[290] Australian Competition and Consumer Commission, 'Game over for Sony Playstation' (Media Release, 29 July 2002) <https://www.accc.gov.au/media-release/game-over-for-sony-playstation>. See also the comments of Mr Sitesh Bhojani, a Commissioner, in 'The World of Pirates, Playstations and Mod-Chips', *The Law Report* (ABC Radio National, 6 August 2002) <http://www.abc.net.au/rn/talks/8.30/lawrpt/stories/s639926.htm>.

[291] See *Priest v West* (2011) 35 VR 225, 234 [35] referring to *Re BWV; Ex parte Gardner* (2003) 7 VR 487, 490 [13] (Morris J) and *Domaszewicz v State Coroner* (2004) 11 VR 237, 242 [20] (Ashley J).

[292] (2001) 116 FCR 490, 495 [17].

> party, or a group of parties, to canvass fully the arguments that might be raised against its preferred position.

The applicant companies in *Sony* ultimately appealed against the decision of Sackville J on the merits. The respondent secured legal representation for the purposes of the Full Court hearing, and Lindgren J emphasised this in explaining the Court's decision to allow the ACCC a more limited role than it had been afforded at first instance.[293]

A further example is *Minogue v Human Rights and Equal Opportunity Commission,*[294] in which the applicant, a person in prison, brought proceedings in the Federal Court seeking to compel a reversal of the respondent's decision not to investigate his complaint of alleged breaches of his rights under the *ICCPR*.[295] He was unrepresented. Prior to the hearing, the Court granted leave to the Chairman of the International Commission of Jurists (Victoria Branch) (ICJ) to appear as an amicus and make brief oral submissions.[296] Marshall J, at first instance, did not explain the grant of leave in his eventual reasons for judgment, but the Full Court later noted that he had taken into account the fact that the applicant appeared in person and had no legal qualifications.[297]

The applicant's principal submission in *Minogue* was that a legislative provision upon which the respondent had relied was invalid. The ICJ did not support this contention but advanced an alternative argument to the effect that HREOC was obliged to investigate the applicant's complaint as a matter of law. Both claims were rejected. The applicant then appealed to the Full Court on the basis that, as a self-represented litigant, he had received insufficient assistance from the judge. In the course of rejecting this contention, the Full Court had occasion to comment on the role played by the ICJ at first instance, stating[298]:

> The primary judge specifically recognised the disadvantage under which the appellant laboured by reason of his lack of legal training. It was precisely for this reason that the primary judge granted leave to the chairman of the ICJ to appear at the hearing as amicus curiae.
>
> … The mere fact that an unrepresented party is forced to present legal arguments without the benefit of assistance from the Court does not constitute a basis for requiring a fresh hearing. In any event, the present case can hardly be placed in that category. The appellant had the benefit of carefully formulated and presented arguments that supported his principal claim for relief.

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[293] (2003) 132 FCR 21, 42 [33].

[294] (1998) 54 ALD 389.

[295] The same individual recently brought a case to the High Court concerning the validity of ss 74AAA and 74AB of the *Corrections Act 1986* (Vic), in which he unsuccessfully argued that he had been legislatively resentenced: *Minogue v Victoria* (2019) 372 ALR 623. Minogue was serving a life sentence for the murder of a police officer and his non-parole period had finished. The provisions had the effect that the Parole Board was prevented from ordering parole for Minogue unless it was satisfied that he was in imminent danger of dying or seriously incapacitated, did not have the physical ability to harm any person, and did not pose risk to the community. S 74AB named Minogue and applied specifically to him. The provisions had 'the purpose and practical effect of subjecting Dr Minogue to a life without meaningful prospect of parole', and would be in breach of the Victorian Human Rights *Charter*, were its application not specifically denied in the relevant provision (Gageler J at [30]). Minogue argued that the provisions were contrary to Ch III of the Constitution. The Court found that the case was indistinguishable from *Crump v NSW* (2012) 247 CLR 1 and *Knight v Victoria* (2017) 261 CLR 306; the provision did not impose any additional punishment and did not involve the exercise of judicial power, at [9]. In *Minogue v Victoria* (2019) 372 ALR 623, the Attorneys-General for NSW, South Australia and Western Australia intervened in support of the State of Victoria and the International Commission of Jurists (Victoria) was refused leave to intervene as amicus curiae in support of the plaintiff. The ICJ submissions concerned comparative perspectives on whether the rule of law was guaranteed by the Constitution, and the argument that the impugned provisions were invalid because they violated the rule of law. In the event, the High Court considered that it was not necessary to consider the rule of law question raised in the appeal.

[296] (1998) 54 ALD 389, 390 [3]; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 441 [10] (Sackville, Kenny and North JJ).

[297] (1999) 84 FCR 438, 441 [10] (Sackville, Kenny and North JJ).

[298] Ibid, [30]-[31] (Sackville, Kenny and North JJ).

If doubts about the capacity of one party to present adequate legal submissions may militate in favour of the involvement of an interested outsider, then courts will closely scrutinise the purpose of intervention in proceedings between parties who are well placed to deliver competent and comprehensive legal argument. In the *Roadshow Films* proceedings, the High Court commented that:[299]

> Ordinarily … in cases like the present where the parties are large organisations represented by experienced lawyers, applications to … make submissions as amicus curiae should seldom be necessary or appropriate and if such applications are made it would ordinarily be expected that the applicant will identify with particularity what it is that the applicant seeks to add to the arguments the parties will advance.

4.2.8 *A consistent approach?*

It is impossible to be sure how individual judges go about deciding whether a prospective amicus will add something useful and different to the material before the court. One might assume that the exercise would involve a close examination of an applicant's proposed submissions.[300] However, this assumption might not be safe in all cases.

In *Garcia v National Australia Bank Ltd,*[301] leave was granted to counsel appearing on behalf of the Consumer Credit Legal Centre (NSW) to advance oral argument, but with only five minutes to supplement written submissions. Extensive discussion had taken place between the bench and counsel as to whether the subject-matter of the proposed submissions was such as to render it appropriate to grant leave to appear, but McHugh J nonetheless at this point indicated to counsel:

> I have not read your submissions at all. I deliberately refrained from reading your submissions, so bear that in mind.

It is clear that such a practice is not universal. Indeed, in *Wurridjal*, it is apparent from the transcript that the court had examined the applicants' submissions in the course of making a decision on the application. However, McHugh J's comment illustrates the danger of assuming consistency in approaches to amicus applications in the absence of positive statements setting out the criteria to be applied and the procedures to be followed.

4.2.9 *The cost of amicus involvement/prejudice to the parties*

Even where the circumstances tend to suggest that hearing from a prospective amicus would be worthwhile, there may be countervailing factors. Courts are concerned to ensure that litigation is not unduly or inappropriately disrupted by an outsider. Insofar as it diverts proceedings from matters sought to be relied on by the parties, amicus participation is disruptive. Whether this disruption will be regarded as tolerable will depend upon its extent and the circumstances of the case.

In proposing a statutory framework for dealing with third party participation, the Australian Law Reform Commission recommended (in 1996) that '[w]hen deciding whether to grant leave the court should have regard to … whether the intervention will *unreasonably interfere* with the abilities of the parties having a private interest in the matter to deal with it differently'[302]. The *Federal Court Rules* now incorporate reference to a criterion of this general character. The Court may have regard to the potential for unreasonable interference with the parties' conduct of proceedings arising in its original jurisdiction.[303] When its appellate jurisdiction is engaged, the Court is required to be satisfied that the proposed intervener's

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[299] (2011) 248 CLR 37, 39 [6]. That the Court did not regard the fact of well-equipped parties as a firm barrier to intervention is illustrated by the fact that it permitted two amici to appear in *Roadshow Films* itself. See further *Hua Wang Bank v Commissioner of Taxation* [2013] FCAFC 28; 296 ALR 479, [63] (Logan, Jagot and Robertson JJ).

[300] An argument in favour of the practice of filing those submissions along with an application for leave to appear.

[301] See Transcript of Proceedings, High Court of Australia, 4 March 1998 (Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

[302] ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.36] (emphasis added).

[303] *Federal Court Rules 2011* (Cth), r 9.12.

contribution will be useful and different from that of the parties to the appeal and that the intervention will not unreasonably interfere with the ability of the parties to conduct the appeal as they wish.[304]

One critical consideration is the extent to which proposed outside involvement will prolong and/or add to the costs of the proceeding. Because costs orders are not generally made against an amicus as a matter of course, the parties to a proceeding bear whatever costs are involved in responding to the application and participation of the intervener or amicus.[305] However, it is not just the additional burden that amicus participation will place on the parties that must be considered. A court will also consider the drain on its own time, as a 'public resource'.[306] A prospective amicus will have a diminished chance of being heard where its proposed involvement carries a risk that 'the efficient operation of the [c]ourt [will] be prejudiced'.[307]

Courts appear to apply a rough proportionality criterion when it comes to assessing the costs implications of allowing an outsider to appear, with the relevant costs being weighed against the value of the assistance expected to be derived. In *National Australia Bank Ltd v Hokit Pty Ltd,*[308] Mahoney P formulated the relevant question in terms of whether or not amicus participation would add 'inappropriately' to the costs associated with a proceeding.[309] His Honour continued:[310]

> The Court must consider whether the benefit of intervention will justify the cost of, for example, an extra day's proceedings.

Mahoney P also commented on the temporal aspect:[311]

> The court will consider whether the benefit to be had from the intervention unnecessarily consumes its time. It may consider whether the delay which the intervention causes will unnecessarily prejudice the parties or other litigants who come before the court.

Concerns about the costs that might flow from the appearance of a prospective amicus need not result in the exclusion of that person altogether.[312] A court retains ultimate control over the nature and scope of

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[304] *Federal Court Rules 2011* (Cth), r 36.32.

[305] Moreover, the threat of such costs may affect the conduct of a party. For example, the prospect of dealing with expanded issues and thus incurring additional costs may increase the attractiveness to one party of a settlement offer otherwise thought inadequate.

[306] *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 382; see also Sir Anthony Mason, 'Access to Constitutional Justice: Opening Address' (2010) 22 *Bond Law Review* 1, 14.

[307] *Kruger v Commonwealth* [1996] HCATrans 68 (Brennan CJ).

[308] (1996) 39 NSWLR 377.

[309] (1996) 39 NSWLR 377, 381. See also e.g. *United States Tobacco Co* (1988) 19 FCR 184, 202 (Einfeld J) (suggesting that courts should be amenable to hearing from amici curiae in an appropriate cases in so far as it was '[c]onsistent with the need for maximum possible conservation of the costs and duration of all litigation'); *Kabushiki Kaisha Sony Entertainment v Stevens* (2001) 116 FCR 490, 495 [19] (Sackville J) (dismissing the applicant companies' complaint that the costs occasioned by hearing the Australian Competition and Consumer Commission as an amicus curiae in first instance proceedings would be 'disproportionate', and commenting that he expected any submissions of the Commission to be 'presented economically, and not to add substantial time to the hearing'); cf *Breen v Williams* (1994) 35 NSWLR 522, 569 (Mahoney JA) (referring to the need to take account of 'the right of a party to the litigation to have his litigation decided within the time and at the cost ordinarily incidental to it').

[310] (1996) 39 NSWLR 377, 382.

[311] (1996) 39 NSWLR 377, 382.

[312] Cf John Basten QC, 'Amicus curiae in practice – a response' in Public Interest Advocacy Centre, *Hearing the people: amicus curiae in our courts – A collection of papers delivered to a PIAC Seminar on 8 August 1995* (1995) 11, 13 (noting that the fear of ballooning costs and abusive intervention has not caused a great degree of consternation in the United States, where the Supreme Court's 'response [to such concerns] has been to establish a set of rules which provide [appropriate] controls rather than simply to shut the door in the face of all amici'). However, the United States Supreme Court framework allows arguments to be expounded by experts, such as academics or practitioners from other jurisdictions, providing the courts with information to inform their decision making which would not necessarily be provided by the parties. This ability to engage with the court process is readily taken up by public interest groups. See, for example, the international lawyers' amicus brief in the US Supreme Court case *Nestle Inc v John Doe et al.* (Nos. 19-416 & 19-453), of which the present author is a contributor <https://www.supremecourt.gov/docket/docketfiles/html/public/19-416.html>.

amicus curiae participation,[313] and may impose conditions to limit costs and participation through time constraints or by confining the submissions to specified issues. It is a relatively common practice in the High Court for the participation to be limited to written submissions.

Of course, prejudice to a litigant may arise other than by reason of additional costs or delay.[314] The intervention of one or more third parties could create at least the impression of unfairness to an existing party. A party may be confronted with obstacles that it would not otherwise have had to contend with in seeking to achieve its desired resolution of the litigation.[315] However, the mere fact that a litigant's task will be made more difficult as a result of amicus participation will not prevent the court hearing an outsider. It is inevitable that amicus involvement will complicate matters for at least one of the existing parties.

Moreover, it will not be fatal to an application to appear that the applicant's proposed submissions are hostile to one of the existing parties. In *Kabushiki Kaisha Sony Entertainment v Stevens*, the applicant companies attempted to resist the involvement of the ACCC on the basis that the arguments it had foreshadowed were 'entirely skewed in favour of the respondent'.[316] The fact that the ACCC's submissions were to be supportive of the respondent's case alone was not an impediment to receiving them, with Sackville J commenting that '[t]he ACCC will not be representing the respondent and it will play no part in the case other than advancing submissions on the correct construction of s 116A [of the *Copyright Act 1968* (Cth)]'.[317]

However, the degree to which equality of arms considerations may, or should, affect a court's perception of the potential prejudice entailed by an amicus appearance remains under-explored. As the Public Law Committee has pointed out, 'a well-resourced intervener may enter the proceedings so emphatically on one side that this may, at least, produce the appearance of unfairness to the party on the other side'.[318] Moreover, a situation in which a party confronted with a battery of amici, each seeking to raise points additional to those initially in dispute, may give rise to a compelling argument that their indiscriminate admission would be prejudicial. As Hannett has pointed out, '[p]arties may find themselves outnumbered and out-resourced by interveners opposed to their position'.[319]

In *Superclinics (Australia) Pty Ltd v CES*,[320] the Australian Catholic Health Care Association and the Australian Episcopal Conference of the Roman Catholic Church sought to be heard as amici curiae in the High Court. One of their proposed arguments was that one decision, in particular, which had influenced the New South Wales Court of Appeal in relation to the issue of abortion was erroneous and should be overruled. The parties had proceeded below on the shared assumption that the relevant decision reflected the law. When the Court, by majority, granted leave to the two organisations to appear as amici, counsel for the plaintiffs submitted that it 'change[d] the complexion of the whole case so far as we are concerned', and signalled an intention to seek an adjournment of the proceedings.[321] He indicated that the two days which had been set aside for the hearing were no longer likely to be adequate. In the circumstances of the case, the amici were prepared to cover the plaintiffs' costs thrown away as a result of any adjournment. The Court declined to

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[313] See *Breen v Williams* (1994) 35 NSWLR 522, 533 (Kirby P); *Levy* (1996) 189 CLR 579, 651 (Kirby J).

[314] For example, in *Hogan v Hinch* [2010] HCATrans 284, the High Court refused to entertain submissions from the Australian German Lawyers Association, partly due to 'the absence of any prior notice to the parties'. Note, however, that the Court also cited problems with 'the subject matter of the [proposed] submission'. In *Karam v Palmone Shoes Pty Ltd* [2010] VSCA 252, the court took account of the fact that an outsider's involvement in an appeal might be 'counter-productive' because of 'the highly emotional reaction of [the appellant] to [the outsider's] attempt to "intrude" upon his appeal as [the appellant] perceived it': at [16] (Mandie and Harper JJA, Beach AJA).

[315] Cf *McAlister v New South Wales* (2014) 223 FCR 1, 6 [26]-[27] (Edmonds J).

[316] (2001) 116 FCR 490, 493 [10].

[317] (2001) 116 FCR 490, 495 [21]. The applicant companies also objected to the ACCC's participation on the basis that its appearance followed a written request for assistance from the respondent; 493 [10]. However, this did not appear to concern Sackville J, perhaps because the ACCC's proposed involvement could not be characterised as 'partisan' in any problematic sense; 495 [21]. See also *Priest v West* (2011) 35 VR 225, 232 [29] (Maxwell P, Harper JA and Kyrou AJA).

[318] Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on Interventions on Public Interest Cases* (1996) 23.

[319] Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 141.

[320] *Superclinics Australia Pty Ltd v CES* [1996] HCATrans 357.

[321] Ibid.

grant an adjournment immediately and instead indicated that it would first hear from the defendant and those aligned with it. The following day, counsel appeared on behalf of the Abortion Providers Federation of Australasia, which was also granted leave to make submissions as an amicus.[322] The Women's Electoral Lobby also signalled its intention to become involved. As Justice Susan Kenny has written, '[p]resumably groups such as these perceived that the success of the application made by the Catholic bishops had altered the nature of the case'.[323]

After the defendant and others had put their submissions, the proceedings were adjourned, and subsequently settled. However, the *Superclinics* case is notable in so far as it suggests that the potential for serious inconvenience to the parties may not discourage a court from permitting the involvement of amici, if it is otherwise thought appropriate. Given the customary caution of the High Court with respect to the involvement of non-parties, it is somewhat surprising that it permitted third parties to become involved in order to agitate issues which were not previously in dispute and had not been fully explored in the courts below. In effect, three members of the Court (including the Chief Justice) showed themselves to be willing to countenance a significant expansion of the subject matter of the appeal, notwithstanding the plaintiffs' complaints of unfairness. Neither the reasons for their decision nor the reasons of those who dissented were published. No undertaking as to costs had been given when the decision to grant leave was made. Justice Susan Kenny, writing extrajudicially, surmises that the case may have been seen as an 'exceptional' one in which the outside parties sought to provide assistance which lay 'beyond the capacity of the parties themselves'.[324] However, it is difficult to see how this would distinguish it from some other cases in which leave to appear has been refused. Moreover, the issue appears not to have been capacity but forensic significance. The parties had hitherto evinced no interest in exploring the issues which the two Catholic entities wished to develop.

In general, one would expect appellate courts to exhibit reluctance to consider issues and arguments that have not been the subject of detailed consideration below. Sir Anthony Mason has written, in an extrajudicial context, that:[325]

> We should not encourage in High Court appeals the notion that a stranger to the litigation can present an argument not presented to the courts below. That may be justified in exceptional cases, but not as a general rule.

There are good reasons for circumspection in this regard. If premised on some novel basis, an appellate court's judgment becomes, in effect, a first instance decision on the particular issue concerned. If one of the parties wishes to contest that decision, his or her appeal rights will be distorted, and perhaps compromised. Indeed, if the decision has been made in the High Court, the aggrieved person will have no recourse whatsoever. On the other hand, it might be that the point on which an amicus wishes to make submissions does not emerge as a live, relevant or significant issue until the dispute reaches a certain point in the appellate process. Moreover, the courts might be reluctant to permit an amicus to be heard before a matter has metamorphosed into something more substantial than a factual dispute between contesting parties. Alternatively, the amicus might not have become aware of the existence of the dispute (or its significance) prior to its resolution at first instance. These are matters that appellate courts may endeavour to take into account where a prospective amicus proposes to raise what seems to be a novel point at an advanced stage of proceedings.[326]

4.2.10 *Other considerations*

4.2.10.1 *Attitude of the parties*

[322] Ibid, 359.

[323] The Hon Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 164.

[324] Ibid, 168.

[325] Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 173, 175; cf *Apotex Pty Ltd v Sanofi-Aventis Australia Pty Ltd* [2012] FCAFC 62, [14]-[15] (Keane CJ, Bennett and Yates JJ).

[326] Cf Sir Henry Brooke, 'Interventions in the Court of Appeal' [2007] *Public Law* 401, 406.

The degree to which the wishes of the parties will bear upon a court's decision on an amicus application cannot be established with any real precision. Courts do inquire as to the parties' attitudes. One would therefore assume that those attitudes have some significance, but their consequence is indeterminate.[327] In *National Australia Bank Ltd v Hokit Pty Ltd*, Mahoney P explained that[328]:

> Parties have the right – at least they may claim – not to have raised in their proceeding issues with which they do not wish to be concerned. Their wishes are relevant, though not conclusive, in deciding whether intervention should be allowed. It is not necessary to pursue the extent to which parties in a proceeding may have the court decide the dispute by reference only to the issues they choose and without reference to, for example, more general issues or matters of public interest. But their claim not to have intruded into their litigation questions which they do not wish to raise is or may be a matter to be taken into account on an application such as this.

The cases disclose no obvious pattern. Appearances are sometimes permitted over the objection of one or other of the parties.[329] Conversely, would-be amici have been rebuffed notwithstanding that there is no objection to their being heard.[330]

It seems likely that the courts do not regard an objection from one of the parties as bearing any real weight of itself. However, an inquiry into the parties' attitudes may elicit some more substantive consideration that would militate in favour of or against a grant of leave. For example, the objector might be able to demonstrate that the prospective amicus' submissions would be, in essence, duplicative of those of their opponent. It is doubtless proper to treat an objection as having nominal intrinsic significance because the attitudes of the parties towards an application to be heard may not reveal a great deal about the potential usefulness of the proposed submissions. The appearance of an amicus might be opposed for the simple reason that its proposed submissions are hostile to those of the opposer.[331] But even where a proposed submission is generally supportive of the position of a litigant, they might have reasons for withholding support for, or objecting to, the amicus' participation. Willheim relates that when he and Rubenstein sought leave to make submissions to the High Court in *Wurridjal*, the plaintiffs (whose position their proposed submissions favoured) declined to adopt a formal stance on their application, informing him that this was 'for strategic reasons: they did not wish their own submissions to be seen as incomplete'.[332] Other concerns might also come into play. It is not difficult, for instance, to imagine a situation in which a party would regard submissions sought to be put by an amicus curiae in 'support' of its position as liable to dilute, or otherwise distract from, the impact of its own case, particularly where the amicus is proposing to run a controversial or otherwise radical line of argument. The party may have considered (and rejected) the deployment of such an argument itself and may not welcome its pursuit by an outsider. Moreover, the party may object to the outsider's participation simply by reason of the additional costs they would incur.[333]

In the Supreme Court of the United States, the consent of all parties will suffice to allow a 'private' (non-governmental) amicus curiae to participate in particular litigation.[334] The effect of this rule is that the burden of considering the reasonableness of amicus participation is, at least initially, shifted from the Court to the

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[327] Cf *R v Bow Street Magistrate, Ex p Pinochet* [2000] 1 AC 119, 126 (Lord Browne-Wilkinson) ('Such leave was granted by a committee consisting of Lord Slynn, Lord Nicholls and Lord Steyn subject to any protest being made by other parties at the start of the main hearing').

[328] (1996) 39 NSWLR 377, 382; see also e.g. *Karam v Palmone Shoes Pty Ltd* [2010] VSCA 252, [16] (Mandie and Harper JJA, Beach AJA).

[329] See e.g., *Sony* **(**2001) 116 FCR 490, 495; *Ice TV Pty Ltd v Nine Network Australia Pty Ltd* [2008] HCATrans 356.

[330] See e.g., *Brandy v Human Rights and Equal Opportunity Commission* [1994] HCATrans 51; *Wurridjal v Commonwealth of Australia* [2008] HCATrans 348.

[331] Cf *Sony* (2001) 116 FCR 490, 495 [21].

[332] Ernst Willheim, 'An Amicus Experience in the High Court' (Conference paper, Annual Public Law Weekend, 1 November 2008) 19.

[333] Kristen Walker, 'Amici Curiae and Access to Constitutional Justice: A Practical Perspective' (2010) 22 *Bond Law Review* 111, 117-118.

[334] *Rules of the Supreme Court of the United States*, rr 37.2, 37.3.

litigants concerned.[335] Consent is often given, although this may reflect the fact that, under the current practice, a prospective amicus curiae will in most cases be able to obtain the Court's leave to file a brief regardless of what the parties' attitudes might be.[336]

4.2.10.2 *Character and motivations of the outsider*

It is not clear to what degree the courts are inclined to concern themselves with the character or motivations of a person or organisation seeking to be heard as an amicus. However, judges have sometimes alluded to such matters. For example, in *Hokit*, Mahoney J said[337]:

> the Court may know and take account of the fact that persons seek to intervene for various reasons. Some have the desire and the capacity to assist both the instant case and the public interest. Some may seek to intervene for reasons personal to themselves, for example, to establish a public position or a reputation or to achieve a purpose which to the instant case is collateral.

Moreover, a review of documentation presented in support of a number of applications to appear in the High Court demonstrates that it is common for prospective amici to explain the source of their interest in proceedings (as well as any relevant expertise) by reference to their ordinary activities.[338] Sometimes, it is suggested that the major concern of an amicus is to represent some group upon whom the decision could have a practical impact.

Precisely how far a court could and should inquire into the 'legitimacy' of an outsider's interest in proceedings is debatable. Attempts to inquire into whether an outsider represents an authentic voice of the 'public interest' or is genuinely representative of some broader constituency are likely to be fraught with difficulty.[339]

On one view, the presentation of non-duplicative and legally useful submissions should be enough – unless:[340] (a) doubts attend the question of whether it is better characterised as an intervener (and is, for example, endeavouring to be heard as an amicus in order to avoid, or diminish, the risk of an adverse costs order); or (b) there are other suggestions of abuse of process, for example, because the prospective amicus is nothing more than an agent of one of the parties, with no independent interest;[341] or (c) because it lacks a genuine interest in the issues in dispute at all (and its participation is directed to some illegitimate collateral purpose).[342]

To some extent, any further criteria as to the 'genuineness' or quality of the interest required on the part of a prospective amicus will be unnecessary. Without a serious interest in the outcome of the case and the issues at stake, there will rarely be any incentive for an outsider to expend the (often considerable) resources that any attempt to participate in litigation requires. This may explain why in Canada, for example, the courts have not been overly prescriptive when it comes to defining the kind of 'interest' that may support an

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[335] See *On Lee v United States* 343 US 924, 924-925 cited in Paul Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision-making* (Oxford University Press, 2008) 44.

[336] Paul Collins, *Friends of the Supreme Court: Interest Groups and Judicial Decision-making* (Oxford University Press, 2008) 42. The present policy has not always prevailed, see 42-45.

[337] (1996) 39 NSWLR 377, 381; cf *Giblet v Queensland* [2006] FCA 537, [2] (Collier J). See also the Hon Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159, 168 ('No court should overlook the fact that the value to an amicus of being accorded amicus status may be rather different from the value which the court hopes to derive').

[338] Claire Harris, 'The Role of Amicus as a Form of Public Leadership?' (Conference paper, Annual Public Law Weekend, 1 November 2008) 8.

[339] Cf Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 136 referring to P Cane, 'Standing up for the Public' [1995] *Public Law* 276, 278; *Breen v Williams*, unreported, NSWSC, Bryson J, 10 October 1994 (in which Bryson J commented, in permitting the Public Interest Advocacy Centre ('PIAC') to make submissions, that 'notwithstanding its name, [PIAC] is not a public body, but a private company limited by guarantee whose members have power to decide whom they admit to membership and what causes they espouse. [In granting leave] I should not be taken as supporting any claim of PIAC to be heard in the public interest').

[340] Cf Patrick Keyzer, *Open Constitutional Courts in Australia* (The Federation Press, 2010) 110.

[341] cf *Freehills, Re New Tel Ltd (in liq)* (2008) 66 ACSR 311, 322 [49] (McKerracher J).

[342] Quite how a court could conclude, however, that the fundamental purpose of an applicant's appearance was to 'establish a public position or reputation', such as to call into question the character of their interest in a proceeding, is difficult to know: *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 382 (Mahoney P).

outsider being heard as a matter of public interest. There, it has simply been said that a party may be permitted to appear on this basis if it 'is genuinely interested in the issues raised by the action and … possesses special knowledge and expertise related to the issues raised'.[343] The Victorian Court of Appeal has downplayed the significance of an amicus' motivations and alignment, commenting:[344]

> Typically, a friend of the court will be independent of the parties and neutral about the outcome of the proceeding, although neither independence nor neutrality is a prerequisite to the grant of leave.

4.2.10.3 *The existence of other amici*

It seems probable that if one person has been granted leave to appear in proceedings as an amicus curiae, the fact of their involvement could influence a court presented with further applications from outside parties. Two factors, in particular, might be important. First, where the court is presented with applications from persons who wish to make submissions in opposition to those of the existing amicus in a manner that the parties do not, it could be difficult to rationalise the exclusion of such persons without seeming to favour one interest group or perspective over another without the benefit of proper argument. Indeed, there might be cases in which the admission of one amicus curiae may weigh in favour of allowing the participation of others in order to ensure that the issues thus enlivened are explored and agitated to an appropriate extent. Second, where the court is presented with applications from persons whose views are in rough alignment with those of the existing amicus – albeit, perhaps, reflective of different interests – it will have to determine whether or not the earlier application should exclude the later application.

So far as the first problem is concerned, courts will no doubt be vigilant to ensure that the admission of groups representing particular interests, to the exclusion of other concerned groups, does not create the appearance of bias in the judicial process, particularly where the issues are such that amici can be said to be acting, in effect, as political lobbyists.[345] For instance, in the *Superclinics* proceedings, the admission of the Catholic interests seems to have both precipitated, and ensured the success of, the application to appear of the Abortion Providers Federation of Australia. The Federation argued that the shift in the law for which the Catholic interests were agitating would have 'financial and career consequences of a negative sort' for its members, and that its interests could be differentiated from those of the other parties.

Although some members of the bench seemed to doubt that the Federation would oppose the Catholic interests' submissions in a manner that the parties 'could' not, its exclusion would likely have exposed the court to justified criticism. In that case (a) the Catholic interests were proposing to attack a shared assumption of the parties rather than a position that had been contested, developed and resolved after argument below and abandoned as a live issue; (b) the respondent had signalled an intention to seek an adjournment so as to allow it to deal with the submissions of the Catholic interests and it could not be anticipated how it would do so; (c) the involvement of the Catholic interests was said to have altered the complexion of the case and, as those interests had been admitted at the commencement of the hearing less than 24 hours earlier, the Court could have had no basis for presuming that the Federation would add nothing to the parties' responses; and (d) the parties did not oppose the Federation's involvement.[346]

The concern that the selective admission of amici could have either the appearance or the effect of privileging one interest group over another was alluded to by McHugh J during argument in *Garcia v National Australia*

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[343] *Rothmans, Benson & Hedges Inc v Canada (Attorney-General) (No 1)* (1989) 29 FTR 267, 269 [10] (Rouleau J).

[344] *Priest v West* (2011) 35 VR 225, 232 [29] (Maxwell P, Harper JA and Kyrou AJA) referring to *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, 381-382 (Mahoney P). See also *MWSD v The State of Western Australia* [2017] WASC 125, in which an outsider was refused leave to appear as amicus in relation to an accused's request to change the venue of his trial for murder. The outsider was a legal practitioner, who made his application on behalf of family members of the deceased, to oppose the change in venue. One of the factors which influenced Jenkins J's decision to refuse leave was that the outsider was 'not a disinterested and impartial individual', but one whose position aligned with that of the State, at [22].

[345] Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No. 27, 1985) [296].

[346] *Superclinics Australia Pty Ltd v CES* [1996] HCATrans 359.

Bank.[347] Addressing counsel representing the Consumer Credit Legal Centre (NSW) Inc, a prospective amicus curiae, his Honour highlighted the dilemma this creates for courts:

> It seems to me that the present procedure when parties like yourself come along is the worst of all worlds, either interveners or amici should be put out of court altogether, or we ought to allow anybody to make submissions generally or, otherwise, we have to set up some sort of procedure by which we give notice to anybody who wants to come and put an opposite view to you. But you are here to put a view in favour of consumers. Unless [the respondent] does it – and he may not want to do it – we do not hear this general view of those who would oppose your view. You are here, in effect, wanting us to develop the law, not for this particular case, you want to go beyond what [the appellant] says.

Where the arrival of an amicus attracts the attention of other interested parties with opposing views, a court will need to achieve a balance between accepting useful submissions and ensuring that the issues raised are properly ventilated, on the one hand, and avoiding the uncontrolled proliferation of amici, as well as ensuring that the focus of the proceedings is not fundamentally shifted, on the other.

Different problems would arise if two amici, or prospective amici, wished to address a legal issue from substantially the same point of view. In such circumstances, there would be a significant element of arbitrariness in allowing or disallowing the relevant applications purely by reference to temporal precedence. If a party seeking to appear as amicus were allowed to do so, and this drew the attention of a second party who then sought permission to put arguments to the same general effect, it is not clear how a court should address the circumstance where the latter party had a far superior capacity to develop those arguments in a helpful (and persuasive) manner. Should the latter party be refused the chance to be heard on the sole basis that its proposed submissions are in general repetitive of those of an existing participant? On a pragmatic level, the two outsiders could be strongly encouraged to combine their resources and present joint submissions. However, there may be circumstances in which two such parties would not be amenable to this course. It may be that the second party could be allowed to make submissions on the footing that it might illuminate issues that would not otherwise be adequately addressed. However, such a determination might be difficult to reconcile with any earlier finding that the person originally admitted as amicus was capable of making a worthwhile contribution to the court's understanding of the issues in dispute.

4.3 What form of intervention should be permitted and under what conditions?

4.3.1 *General principles*

There would appear to be no general obligation on courts to afford non-parties such as amici (or indeed applicants for amicus status) the benefit of natural justice.[348] This has important consequences in terms of the range of actions available to amici curiae and the way in which courts may deal with them. Because an amicus appears at the court's pleasure, it has no right to be heard, as such, or to present evidence, or to take procedural points, or to appeal.[349] On the contrary, the role that an amicus will be permitted to play is essentially at the discretion of the court.

In the usual case, it would seem that an amicus from whom the court agrees to hear will be limited to the presentation of confined submissions on a relevant point of law. The parameters of that function may be further circumscribed as a result of the court restricting the amicus to written submissions or limiting the time available to it for oral argument. Nonetheless, there are sufficient apparent exceptions in the case law to suggest that there is no absolute rule in this regard. If the circumstances warrant an amicus curiae

[347] [1998] HCATrans 50; cf Sarah Hannett, 'Third Party Intervention: In the Public Interest' [2003] *Public Law* 128, 135-136; Mona Arshi and Colm O'Cinneide, 'Third Party Interventions: The Public Interest Reaffirmed' [2004] *Public Law* 69, 75.

[348] Andrew Serpell, *The Reception and Use of Social Policy Information by the High Court of Australia* (Law Book Co., 2006) 66-67.

[349] *Re Medical Assessment Panel; ex parte Symons* (2003) 27 WAR 424, 249 [18] (E M Heenan J); cf *Re Perry* (1925) 148 NE Rep 163, 165.

undertaking some unusual function, it is possible that a court will be amenable to it. In this connection, it has been said that:[350]

> no clear line appears to differentiate that which can never be included as part of the role of an amicus curiae from what in a given case, and as a permissible exercise of discretion, the court may require or permit of an amicus.

The *Federal Court Rules 2011* (Cth) provide that the function of an intervener in *appellate* proceedings is 'solely to assist the Court in resolving the issues raised by the parties'.[351] This would appear to limit an intervener's ability to take any steps involving the expansion of the issues in dispute. It is noteworthy that no such stipulation appears in the rule addressed to intervention in proceedings in the Court's original jurisdiction,[352] notwithstanding that words to the same effect featured in the corresponding provision in the pre-2011 Rules.[353] Indeed, the pre-2011 Rules went further, specifically providing that an intervener's role did not extend to 'filing pleadings, leading evidence or examining witnesses'.[354] The omission of these explicit words of limitation from the 2011 Rules is significant, for it suggests that such activities are no longer invariably out of the question.

However, the apparent restoration of flexibility to the intervention facility in this respect should not be taken to suggest that an intervener in the nature of an amicus will be entitled to participate in whatever manner it wishes or permitted an expansive forensic role as a matter of course. The *Rules* maintain that an intervener has only the 'rights, privileges and liabilities (including liabilities for costs)' determined by the Court.[355] Leave to appear may be made conditional.[356] The court is vested with extensive power to control the form of assistance to be given by the intervener and the manner of participation of the intervener'.[357] Although the relevant provisions of the Rules refer to 'interveners' as a unitary class, they are designed to address 'intervention' by a variety of different participants in different circumstances. Thus, the Court's attitude with regard to the role that a particular intervener should be permitted to play will depend on the context.

4.3.2 *Restricting participation*

In most cases where an outsider wishes to appear to agitate a particular legal issue there will be considerations militating both for and against allowing participation. Where the court feels that there would be value in the appearance but has reservations about the inconvenience it might occasion, the court may place explicit restrictions on the extent or the mode of participation that will be permitted.

There is, of course, a restriction implicit in the requirement that an amicus must, from the outset, demonstrate an intention to advance submissions that are useful to, or will assist, the court in disposing of the case at hand. The need to put forward submissions that are relevant, distinguishable from those of the parties, and confined to issues that arise from the dispute between the parties in itself constitutes a significant restriction on the scope of amicus participation. However, the courts have shown themselves willing to impose additional, specific, and often quite severe limitations in many cases. The driving concern appears to be that outsiders ought not to be allowed to 'hijack' litigation, or divert it towards side-issues, thus causing a significant increase in the parties' litigation costs and adding to the issues which the court is required to determine.

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[350] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 536 (Davies, Wilcox and Gummow JJ).
[351] *Federal Court Rules 2011* (Cth), r 36.32 (Note 1); cf *Federal Court Rules* (Cth), O 52 r 14AA(3) (ceased 1 August 2011).
[352] *Federal Court Rules 2011* (Cth), r 9.12.
[353] *Federal Court Rules* (Cth), O 6 r 17(3) (ceased 1 August 2011).
[354] *Federal Court Rules*, O 6 r 17(4) (ceased 1 August 2011). The corresponding rule addressed to appellate proceedings also originally contained this strict limitation (as introduced by SR 2002 No 22) but it was subsequently removed (by SR 2002 No 281). The relevant rule was O 52 r 14AA(4)).
[355] *Federal Court Rules 2011* (Cth), rr 9.12(1), 36.32 (Note 2).
[356] *Federal Court Rules 2011* (Cth), rr 9.12 (Note 1), 36.32 (Note 2).
[357] *Federal Court Rules 2011* (Cth), rr 9.12(3), 36.32 (Note 3).

In limiting the participation of amici, the courts will address two distinct matters: (a) the subject matter with which the amicus is permitted to deal and (b) the mode of presentation of the amicus' submissions. Both of these are adverted to in the *Federal Court Rules*, which provide that:[358]

> When giving leave, the Court may specify the form of assistance to be given by the intervener and the manner of participation of the intervener, including:
>
> (a) the matters that the intervener may raise; and
>
> (b) whether the intervener's submissions are to be oral, in writing, or both.

So far as restriction of subject-matter is concerned, the courts have often tied leave to appear to explicit parameters as to what might be addressed in argument. For example, in *Re BVW; Ex parte Gardner,*[359] Right to Life Australia Inc, the Catholic Archbishop of Melbourne and Catholic Health Australia Inc were limited to making submissions 'concerning the interpretation of the [*Medical Treatment Act 1988* (Vic)] in the context of the application for declarations in this case'. In *CPCF v Minister for Immigration & Border Protection,*[360] the High Court was prepared to receive written submissions from the United Nations High Commissioner for Refugees, but only in respect of certain of the matters the Commissioner had proposed to address.

With regard to mode of presentation, amici will often be limited to the provision of written submissions to the court.[361] A court might defer a decision as to whether oral submissions will be permitted at the time of giving leave to appear.[362] If an amicus is afforded the opportunity to make oral submissions, their duration might be limited. For example, in *BWV*, the amici were afforded an hour to make oral submissions concerning the material that had been put in writing.[363]

The use of written briefs circumvents a number of the criticisms often levelled at amicus participation in litigation.[364] The Australian Law Reform Commission has supported measures encouraging their use,[365] no doubt at least in part because the courts have shown themselves to be more amenable to receiving written briefs than to hearing oral argument.

Whilst amici often express themselves to be content with lodging written submissions, practical benefits are likely to be derived from the opportunity to address oral submissions to the court. Fordham has written that, in the English context:[366]

> Written submissions are apt in practice to be ignored or diluted in their impact. A party before the court may invite specific attention to particular points made by the absent intervener, but it will often stick to its own written case, particularly where there is divergence (in which case it may not wish to draw attention to what has been said). The written intervention will be trapped in time (at the point

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[358] *Federal Court Rules 2011* (Cth), rr 9.12(3), 36.32 (Note 3); cf *Supreme Court Rules 2009* (UK), r 26(2).

[359] (2003) 7 VR 487, 490 [15].

[360] [2014] HCATrans 227 (French CJ expressed the grant of leave to be limited 'to paragraphs 1 to 45, not including the submissions as to statutory construction and as to the Constitution').

[361] See e.g., *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia* [2012] HCATrans 277; *NSW Registrar Births, Deaths and Marriages v Norrie* [2014] HCATrans 36.

[362] See e.g., *Wesport Insurance Corporation v Gordian Runoff Ltd* [2011] HCATrans 12; *Momcilovic v The Queen* [2011] HCATrans 15; *Cumerlong Holdings Pty Ltd* [2011] HCATrans 56. In these cases, the written submissions of amici were accepted. The Court indicated in each case that there would be an opportunity to present brief oral submissions 'if necessary' (presumably the judgment as to necessity was ultimately one for the court); cf *Maloney v The Queen* [2012] HCATrans 342 (right of amicus to provide oral submissions made contingent on convincing the court that such submissions would be directed to a novel point).

[363] (2003) 7 VR 487, 490 [15] (Morris J). See also e.g. *Commonwealth v Australian Capital Territory* [2013] HCATrans 299 (Australian Marriage Equality Inc was permitted thirty minutes to expand on written submissions); *CPCF v Minister for Immigration & Border Protection* [2014] HCATrans 227.

[364] Jeffrey W Shaw QC, 'Hearing the people – amicus curiae in our courts' in Public Interest Advocacy Centre, *Hearing the people: amicus curiae in our courts – A collection of papers delivered to a PIAC Seminar on 8 August 1995* (1995) 1, 3.

[365] Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No. 27, 1985) 161 [304].

[366] Michael Fordham, 'Public Interest" Intervention: A Practitioner's Perspective' [2007] *Public Law* 410, 411.

when it was lodged), and non-responsive to what has since been submitted or provided to the court, including in oral submissions or ideas and questions from the bench.

On the other hand, an amicus might have good reasons for preferring to confine itself to the lodgement of written submissions, such as to avoid the need for representation at a long and complex hearing.[367]

4.3.3 *Evidence*

One consequence of the terms of the pre-2011 *Federal Court Rules* was illustrated by Lindgren J's decision to deny an individual applicant leave to appear as an amicus in *Australian Automotive Repairers' Association (Political Action Committee) Inc v NRMA Insurance Ltd (No 2)*.[368] The proceeding concerned an alleged contravention of the *Trade Practices Act 1974* (Cth). Leave was refused primarily because the applicant's expressed aim was to 'prove by evidence, and draw the Court's attention to, a consumer interest, which, [his counsel] suggests, may not adequately appear if the proceeding is allowed to continue only as between [the parties]'.[369] Lindgren J noted that the *Rules* did not countenance 'the granting of leave for [such a] purpose' and gave no reason to suppose that a different position might subsist under the general law.[370]

Similarly, in *Universal Music Australia Pty Ltd v Sharman Licence Holdings Ltd,*[371] the Australian Consumers' Association, Electronic Frontiers Australia and the New South Wales Council for Civil Liberties sought to appear to ventilate concerns about certain freedom of speech implications of the substantive proceedings. However, Wilcox J expressed concern that their proposed submissions sought to 'have the court consider documentary material that is not in evidence'. His Honour held that this course was 'not open' to the court and, presumably on the basis that the interveners had no means of adding to the record, determined that leave should be granted only in so far as the interveners' submissions did not depend upon reference to extrinsic material.[372]

Thus, the former *Federal Court Rules* left no real scope for an intervener to lead evidence, and the need or desire to do so was potentially fatal to a prospective intervener's application to appear. However, as noted above, the current *Federal Court Rules* omit any explicit reference to the making of evidentiary contributions, and the question of an intervener's competence to adduce evidence is essentially left for case-by-case determination.

The issue may well be approached in a similar manner in other Australian jurisdictions, where no specific rules have ever applied. In many proceedings the issue will be academic because amici will become involved at a point when factual matters are no longer in dispute. Even where that is not the case, an amicus will often have no interest in contributing to the evidentiary record. However, given that there seems to be no obstacle in principle to amici appearing in first instance proceedings, there are circumstances in which the scope for an amicus to adduce evidence might arise.

In 1974, in *Corporate Affairs Commission v Bradley*, it was stated flatly that 'there is no provision for an amicus curiae making any contribution to the record'.[373] This was, however, before the 'public interest' amicus had taken shape as a species of litigant.[374] In the *United States Tobacco Co* proceedings, Einfeld J at first instance

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[367] See Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14 *Melbourne University Law Review* 522, 528. Moreover, permitting amici to make oral submissions as a matter of course might risk deepening the reluctance of some judges to admit them at all: see Kristen Walker, 'Amici Curiae and Access to Constitutional Justice: A Practical Perspective' (2010) 22 *Bond Law Review* 111, 115.

[368] [2003] FCA 1301.

[369] [2003] FCA 1301, [6].

[370] [2003] FCA 1301, [8] (Lindgren J later acknowledged that the Rules seemed to assimilate 'the position of an intervener to that of an amicus curiae', at [9]).

[371] [2005] FCA 1242; 220 ALR 1.

[372] [2005] FCA 1242, 220 ALR 1 [21].

[373] *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 399 (Hutley JA).

[374] See *Breen v Williams* (1994) 35 NSWLR 522, 532 (Kirby P). Note, however, the finding of Jenkins J in *MWSD v The State of Western Australia* [2017] WASC 125, [20] that 'the court has no power to grant [the outsider] leave as an amicus curiae to adduce the evidence in his two affidavits'. The case in which the outsider sought leave concerned an application for the transfer of a criminal trial to a new location, citing as authority for this point the statement in *Bradley* and the description of the amicus role of Brennan CJ in *Levy v The State of Victoria* (1997) 189 CLR 579, 604.

appeared to envisage a potentially substantial evidentiary role for an amicus curiae.[375] However, on appeal, the Full Court seemed to doubt the appropriateness of this.[376] In *Bropho v Tickner*, a Federal Court case which arose before the introduction of the pre-2011 *Federal Court Rules* on interveners and evidence, Wilcox J suggested that the stance adopted by *Bradley* might be moderated in an appropriate case[377]:

> I do not dispute that it may sometimes be appropriate to allow an amicus curiae to complete the evidentiary mosaic by tendering an item of non-controversial evidence; although I would prefer to reserve my opinion whether this should be permitted to be done over the objection of one or more of the parties. But it is another matter where the proposed evidence would be complex and controversial. To allow the tender of that type of evidence may be to allow the amicus curiae effectively to hijack the parties' case, taking it off into new factual issues which may greatly extend its length and thereby impose significant additional costs and disadvantages upon the parties. Rarely, if ever, should this course be permitted.

Thus, where an amicus is in a position to put some 'non-controversial' item of evidence (whatever that might mean in a particular case) before the court, and this is incidental to its principal purpose in appearing, it might be permitted to do so.[378] However, it is doubtful that a court would allow an amicus to assume an expansive role in this respect. So much is consistent with the basic principle that it is for the parties to develop the factual material on which their legal arguments rest. Whilst an outsider might be permitted to make alternative arguments on the basis of that material as it stands, it will not be permitted to effect a fundamental shift in the factual substructure to the parties' dispute.[379]

The result reached in the *Australian Automotive Repairers' Association* proceedings, made by reference to the pre-2011 *Federal Court Rules,* may have been the same even had the *Rules* not applied[380]: an amicus will simply not be heard where the basic purpose sought to be achieved by them would involve or necessitate a substantial contribution to the evidentiary record. The courts' inhibitions about allowing outsiders to add to the record are likely to be all the more pronounced in respect of proceedings at appellate level.[381]

In *Kabushika Kaisha Sony Entertainment v Stevens*, Sackville J, in granting the ACCC leave to appear as an amicus over the objection of the applicants, emphasised that its role would 'not extend to adducing evidence, except, perhaps, with the permission of the parties'.[382] However, at the hearing, somewhat unusually, Sackville J granted leave to counsel for the ACCC to question a representative of one of the applicants who provided expert evidence, for the purpose of 'elucidating technical questions that otherwise would have remained unexplored and unexplained'.[383] This was said to be justifiable in the circumstances because the respondent was unrepresented and the applicants' expert evidence, on which the Court was necessarily heavily reliant, was not subject to the kind of 'detailed cross-examination' that one might have expected.[384] Nonetheless, Sackville J emphasised that the ACCC was not permitted 'to play the role of contradictor on evidentiary issues'.[385]

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[375] *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 203 ('I see no reason, by way of principle or authority, why AFCO's role [as amicus curiae] should not embrace a consideration by the Court of AFCO's presentation of evidence omitted or overlooked by the parties, so as to assist the Court in its resolution of those issues… If … AFCO has or wishes to proffer any such evidence, and the other parties have declined its offer that they present the material, AFCO may apply at a directions hearing or other appropriate stage to present the evidence').
[376] (1988) 20 FCR 520, 538.
[377] *Bropho v Tickner* (1993) 40 FCR 165, 172-173 (Wilcox J).
[378] See further *Priest v West* (2011) 35 VR 225, 233 [31], in which the Victorian Court of Appeal (Maxwell P, Harper JA and Kyrou AJA) suggested that an amicus should only be permitted to adduce evidence 'in an exceptional case'.
[379] cf *The Commonwealth v Tasmania* (1983) 158 CLR 1, 38 (Gibbs CJ).
[380] Indeed, Lindgren J seems to suggest as much in *Australian Automotive Repairers' Association (Political Action Committee) Inc v NRMA Insurance Ltd (No 2)* [2003] FCA 1301, at [9].
[381] See *Project Blue Sky Inc v Australian Broadcasting Authority* (1996) 71 FCR 465, 481.
[382] (2001) 116 FCR 490, 494 [18].
[383] (2002) 200 ALR 55, 57 [4].
[384] (2002) 200 ALR 55, 57-58 [5].
[385] (2002) 200 ALR 55, 78-79 [107].

In the constitutional challenge by the (then) Australian Plaintiff Lawyers Association (APLA) to certain NSW regulations prohibiting advertising in respect of personal injury matters,[386] Redfern Legal Centre and the Combined Community Legal Centres Group NSW Inc were permitted, not only to make written and oral submissions as amici curiae, but also to submit affidavit material.

In the proceedings in the High Court arising out of the challenge to the patenting of human genes,[387] an application was made by the Institute of Patent and Trade Mark Attorneys for leave to appear as amicus curiae. Considerable controversial and contested affidavit material was submitted to the Court by the Institute, which sought to uphold the patentability of the genetic material in issue and to raise numerous commercial and other policy contentions as to the desirability of patent protection. The application was opposed by the appellant, inter alia, on the grounds that the proposed amicus did not have a sufficient legal interest to give rise to a *right* to intervene,[388] and on the basis that the Court should not exercise its *discretion* to allow the proposed participation. This was said to be because:

- In determining threshold legal questions concerning patentability, broader questions of 'public interest' or 'social costs and public benefit' were irrelevant, and the court was not in a position to determine the balance between social cost and public benefit;[389]
- The proposed amicus had not shown how the Court would be significantly assisted by the proposed submissions and evidence;[390]
- None of the non-legal matters sought to be raised in the proposed submissions and evidence had been raised by the parties;
- The proposed amicus had failed to 'identify with some particularity' what was *of relevance* that the applicant sought to add to the arguments that the parties would advance;[391]
- The Court would not be assisted by the proposed contentions and evidence on the question(s) of law that arise in the appeal;
- The proposed amicus sought to rely upon numerous affidavits which referred to documents, other patents and extrinsic material that was not in evidence. Such material was complex, controversial, selective and encompassed extraneous allegedly 'factual' material which was disputed by the appellant;[392]
- Much of the proposed affidavit material was inadmissible in form (being hearsay or not constituting admissible opinion evidence within the meaning of s 79 of the *Evidence Act 1995* (Cth));
- There was a considerable body of empirical data, research and opinions among experts which was contrary to the 'policy' arguments sought to be advanced by the proposed amicus;

[386] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322.
[387] *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334.
[388] *Roadshow Films Pty Ltd v iiNet Limited* (2011) 248 CLR 37, [2]-[3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); see also *Levy v Victoria* (1997) 189 CLR 579 at 600-605 (Brennan CJ).
[389] *Grant v Commissioner of Patents* (2006) 154 FCR 62 at 72 (Heerey, Kiefel and Bennett JJ); see also *Mayo Collaborative Services et al v Prometheus Laboratories Inc.* 566 US 66 (2012) where the Supreme Court held that various competing policy contentions by amici as to the desirability of patenting a method of medical treatment were irrelevant. In United States proceedings on the patentability of human genes, 18 briefs by amici supporting the appellants were filed along with 13 briefs by amici supporting the respondent, Myriad: *Association for Molecular Pathology v. Myriad Genetics, Inc.,* 133 S. Ct. 2107, 186 L. Ed. 2d 124 (2013). Such briefs addressed broad policy, economic, and medical and scientific issues, in respect of the adverse and beneficial effects of patenting biological discoveries generally and isolated genomic DNA in particular. Neither the non-legal contentions in favour of patentability nor the non-legal contentions opposing patentability were considered by the US Supreme Court to be relevant to the legal issues that arose for determination in that case. Such non legal contentions (for and against patentability, including those sought to be advanced by the proposed amicus in the Australian appeal) were not relevant to the issues arising on the appeal.
[390] *Roadshow Films Pty Ltd v iiNet Limited* (2011) 248 CLR 37, [4].
[391] Ibid, [6].
[392] Wilcox J. *Bropho v Tickner* (1993) 40 FCR 165, 172-173.

- The *Federal Court Rules 2011* (Cth) noted that the function of an intervener in appellate proceedings is 'solely to assist the Court in resolving the issues raised by the parties'.[393] This had also usually been the position in the High Court;
- The proposed amicus sought to raise a (somewhat obscure) constitutional question that had not been raised by the parties or considered by the courts below;
- The Respondents were large organisations represented by experienced lawyers, such that leave to make submissions or adduce evidence as amicus was neither necessary nor appropriate;[394] and
- The proposed amicus participation would add to costs and delay disproportionate to the assistance proposed.[395]

The parties were notified by the High Court on the eve of the hearing that the application for leave to participate as amicus had been rejected. No reasons were given.

By way of contrast, in recent Federal Court proceedings (seeking a declaration that the applicant, an Aboriginal man with New Zealand citizenship who had resided in Australia since 2005, is not an alien for the purposes of s 51(xix) of the Constitution) Mortimer J granted an Aboriginal organisation (*Melythina Tiakana Warrana* (Heart of Country) Aboriginal Corporation) leave to appear and be heard at interlocutory hearings, to make oral and written submissions on all issues, to appear and be heard at the final hearing and to participate in any post hearing submissions. However, the grant of leave to intervene was subject to a number of conditions and the intervenor was not permitted to adduce evidence in the proceeding.[396]

4.3.4 *Agitation of a collateral matter*

In *Adultshop.com Ltd (ACN 009 147 924) v Members of the Classification Review Board,*[397] the New South Wales Council for Civil Liberties ('NSWCCL'), as amicus, was permitted to agitate a collateral point as against one of the parties. The proceedings concerned an application for judicial review of a decision of the Classification Review Board. The Australian Family Association was also granted leave to appear as amicus curiae. The primary proceedings were determined against the applicant.

At the commencement of the hearing, Jacobson J made orders restricting the publication of certain evidence in the proceedings at the request of the Commonwealth Attorney-General (the second respondent). The evidence related to minutes and papers of the Standing Committee of Attorneys-General ('SCAG'). To some extent, this material had been included in the applicant's written submissions. The applicant had not opposed the making of the orders. However, Jacobson J permitted the NSWCCL to 'file written submissions in opposition to the[ir] continuation'.[398] It did so, citing concern for open justice. The NSWCCL was unsuccessful in persuading Jacobson J that the orders should be revoked; however, it succeeded in having them varied so as to permit public access to part of the applicant's submissions hitherto suppressed.[399]

4.3.5 *Appeal rights*

Not being a party, an amicus has no obvious basis for claiming a right to appeal against a decision made in the proceedings in which it has participated.[400] The *Federal Court Rules* provide that an intervener shall be

[393] In its present form, r 36.32(2) provides that in an application for leave to intervene in an appeal the applicant must satisfy the Court: (a) that the intervener's contribution will be useful and different from the contribution of the parties to the appeal; and (b) that the intervention would not unreasonably interfere with the ability of the parties to conduct the appeal as they wish; and (c) of any other matter that the Court considers relevant.
[394] *Roadshow Films Pty Ltd v iiNet Limited* (2011) 248 CLR 37, [6].
[395] Ibid, [4].
[396] *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1872.
[397] (2007) 243 ALR 752.
[398] *Adultshop.com Ltd (ACN 009 147 924) v Members of the Classification Review Board* (2007) 243 ALR 776, 779 [22].
[399] (2007) 243 ALR 776, 782-783 [54]-[56]. No order was made against the NSWCCL with respect to costs.
[400] See *Re McBain; ex parte Catholic Bishops Conference* (2002) 209 CLR 373, 394 [21] (Gleeson CJ), 398 [36] (Gaudron and Gummow JJ), 455 [226] (Kirby J); *Re Medical Assessment Panel; ex parte Symons* (2003) 27 WAR 242, 249 [18] (E M Heenan J); *Wilson v Manna Hill Mining Co Pty Ltd* [2004] FCA 1663, [89] (Lander J); *Priest v West* (2011) 235 VR 225, 232 [30] (Maxwell P, Harper JA and Kyrou AJA); cf *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391, 396, 398-399 (Hutley JA).

accorded such 'rights [and] privileges' as the court sees fit,[401] but it is doubtful that this would extend to affording someone who remains a non-party a right of appeal. The tenor of the rules suggests the contrary position.[402]

It is also doubtful that a failed applicant for amicus status can seek review of a decision to exclude it from the proceedings. The Australian Law Reform Commission has commented:[403]

> Neither the parties nor a person seeking to intervene should have a right of appeal against an order granting or refusing the intervention or setting the terms and conditions it will be subject to. It would be counterproductive if intervention was allowed to become a substantive issue in dispute, adding to the complexity and total costs of the litigation rather than assisting in its resolution. An appeal against intervention orders may, however, be made with the leave of the appellate court. Leave to appeal should only be given if it can be shown that the discretion as to intervention miscarried at first instance either by reason of some manifest error or by consideration of irrelevant matters.

4.3.6 *Costs*

Superior courts generally enjoy expansive discretion with regard to the distribution of costs incurred in a civil proceeding.[404] This extends to the making of costs orders with respect to non-parties when it is considered appropriate.[405] Older cases contained conflicting statements about whether such orders can be made with respect to amici. In *Blackwood Foodland Pty Ltd v Milne,*[406] it was said that an amicus cannot recover costs. But in *Vine Pty Ltd v Hall,*[407] Kaye J commented, in passing, that 'it seems that an order may be made directing the payment by an unsuccessful party of the costs incurred by one appearing as amicus curiae'. In 1974, in *Re Forbes,*[408] the Court that '[i]t is not possible to order costs for or against amici curiae'. More recently the position is that, in the ordinary event, the amicus will bear their own costs and will not be awarded costs, with courts recognising and exercising their discretion to order otherwise.[409] The *Federal Court Rules* now explicitly provide than an intervener at first instance[410] or in an appeal[411] may be subject to liability for costs. Moreover, many earlier cases were decided before the amicus curiae device attained widespread recognition in Australia as a potentially valuable advocacy tool. It can be argued that different considerations should apply in circumstances where an amicus is more than a mere neutral provider of expertise.

Recently in Victoria,[412] the courts have requested the assistance of amici to assist with public interest immunity questions and awarded them costs. In one matter, the Court noted:[413]

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[401] *Federal Court Rules 2011* (Cth), rr 9.12(1), 36.32 (Note 2).

[402] Chapter 4 of the *Federal Court Rules 2011* is addressed to appeals to the Court, and is expressed in terms of the rights of 'parties' (which the Rules distinguish from 'interveners').

[403] ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.36].

[404] See e.g. *Civil Procedure Act 2005* (NSW) s 98.

[405] See *Forestry Tasmania v Ombudsman (No 2)* [2010] TASSC 52, [15]-[16] (Porter J) discussing the effect of *Supreme Court Civil Procedure Act 1932* (Tas) s 12. See also *Knight v FP Special Assets* (1992) 174 CLR 178 [186]-[190].

[406] [1971] SASR 403, 411 approved *Wilson v Manna Hill Mining Co Pty Ltd* [2004] FCA 1663, [88] (Lander J).

[407] [1973] VR 161, 175 citing *Atkin's Encyclopaedia of Court Forms in Civil Proceedings*, 2nd ed, 2004) vol 13, 143.

[408] (1974) 24 FLR 87, 95 (White J). See also Australian Law Reform Commission, *Standing in Public Interest Litigation*, (Report No. 27, 1985) [290].

[409] See e.g. *Forestry Tasmania v Ombudsman (No 2)* [2010] TASSC 52, [25] (Porter J); *Madafferi v The Queen (No. 2)* [2021] VSCA 4, [20] citing: *Campbelltown City Council v Vegan* (2006) 67 NSWLR 372, 374 [1], 384 [64]; *Riverina Wines Pty Ltd v Registrar of the Workers Compensation Commission (NSW)* [2007] NSWCA 149, [116], [118]; *Attorney-General (WA) v Marquet* (2003) 217 CLR 545, 576 [86], 638 [303].

[410] *Federal Court Rules 2011* (Cth) r 9.12.

[411] *Federal Court Rules 2011* (Cth) note 2 to r 36.32.

[412] *Zirilli v The Queen (No. 2)* [2021] VSCA 5 and *Madafferi v The Queen (No. 2)* [2021] VSCA 4, relating to appeals against convictions by individuals who were represented by Joe Acquaro, a 'gangland' lawyer who became a police informant.

[413] *Madafferi v The Queen (No. 2)* [2021] VSCA 4, [19]-[20]. Factors which are to be considered in whether to exercise a discretion to award costs to an amicus are set out at [20]. The fact that the amici appeared at the request of the Court was significant in that case.

> The Court's costs jurisdiction extends to making costs orders in favour of non-parties, including in criminal or quasi-criminal proceedings. Costs may be ordered in favour of (and against) amici curiae. However, a costs order in favour of amici curiae will only be made in an exceptional case, where it is appropriate to depart from the usual position that amici curiae bear their own costs
>
> … Whether a particular case is an exceptional case justifying a costs order in favour of amici curiae depends on the circumstances, including the nature of the case, and the nature of the amici curiae's involvement and contribution.

An unsuccessful party would not usually be ordered to pay the costs of an amicus.[414] The general position appears to be that costs incurred by an amicus will not ordinarily be treated as costs in the relevant proceedings.[415] That said, the Attorney-General of Tasmania was awarded costs in respect of an unsuccessful costs application against her following substantive proceedings in which she had appeared as amicus and presented submissions adverse to the applicant (who had been successful in those proceedings).[416]

From the above, it is clear that costs might be ordered *against* an amicus in an appropriate case. It can be supposed that such an order would seldom be made in circumstances where an amicus has primarily been heard in order to ensure that the court has the assistance of a contradictor on particular issues,[417] but beyond that context there would appear to be room for debate.

In *Breen v Williams,*[418] Kirby P touched on the issue of costs in commenting on the general concern that a liberal approach to amicus applications would leave the mechanism open to abuse. He suggested that the Court 'might impose conditions or burdens of costs [on an amicus] if the appearance were abused or unnecessarily protracted'.[419] Similarly, in *Hokit*, Mahoney P appeared to countenance requiring an amicus to be liable for 'some or all' of the costs occasioned as a result of its appearance, with particular reference to circumstances in which it had occasioned needless delay.[420]

In 1996, the Australian Law Reform Commission accepted that costs could not be awarded in favour of an amicus but expressed the view that it was 'unclear whether costs can be awarded against [an amicus]'.[421] In *Breckler*, Kirby J, in the course of arguing for a broader approach to amicus curiae applications, again referred to the capacity of the courts to 'impose conditions as to any additional costs incurred' as a safeguard against spurious interventions.[422]

On the other hand, in *MAV v ABA,*[423] the Queensland Court of Appeal was called upon to correct a slip. The State of Queensland had been ordered to pay the costs of the appellant in certain proceedings on the basis that it had appeared as an intervener. However, the State had, in fact, participated in the proceedings as an amicus. The Court held that this 'being the case, there was no basis upon which a cost order could be made against the State'.[424] The meaning of this brief statement is somewhat ambiguous. It is unclear whether or

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[414] cf *United States Tobacco Co* (1988) 19 FCR 184, 203 (Einfeld J).

[415] cf *Attorney-General (Western Australia) v Marquet* (2003) 217 CLR 545, 618 [219] (Kirby J); see also *Hoffmann v South African Airways* [2000] ZACC 17, [63] (Ngcobo J). In the *Sharman* proceedings, the Full Court of the Federal Court made an explicit order to the effect that the grant of leave to the interveners was conditional on their retaining no entitlement to seek costs in their favour (Order of Branson, Lindgren and Finkelstein JJ in *Sharman Networks Ltd v Universal Music Australia Ltd*, (Federal Court, NSD 110 of 2004, 20 February 2006), an order which may be explained by the fact that the *Federal Court Rules* did not definitively close off the possibility of recovering such costs.

[416] *Forestry Tasmania v Ombudsman (No 2)* [2010] TASSC 52, [27]-[31] (Porter J).

[417] See *Forestry Tasmania v Ombudsman (No 2)* [2010] TASSC 52, [26] (Porter J).

[418] (1994) 35 NSWLR 522.

[419] (1994) 35 NSWLR 522, 533. In the same appeal, Mahoney JA noted that the applicant for amicus curiae status was 'invited to indicate whether it would bear the costs of the intervention', but the invitation was not taken up, at 569.

[420] (1996) 39 NSWLR 377, 382.

[421] ALRC, *Beyond the Door-Keeper: Standing to Sue for Public Remedies* (Report No. 78, 1996) [6.47].

[422] (1999) 197 CLR 83, 135. See also *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 417 [275] (Kirby J).

[423] [2007] QCA 380.

[424] [2007] QCA 380, [4].

not it was intended to reflect some general principle that costs cannot be ordered against an amicus at all. Similarly, in *Priest v West,* the Victorian Court of Appeal suggested in passing that as a non-party, an amicus was not subject to 'the obligation to pay costs'.[425]

At the conclusion of the hearing in the *Project Blue Sky* proceedings in the High Court, where various persons connected with the Australian Film Industry made submissions as amici, there occurred the following exchange between the bench and Mr Ellicott, appearing for the applicants:

> KIRBY J: Do you seek costs against the amici?
>
> MR ELLICOTT: Yes, we do, your Honour.
>
> McHUGH J: I thought that was one of the problems about people being amici; that if they are interveners you could make orders for costs, although, I suppose under our jurisprudence we can make orders for costs against anybody, even somebody sitting in the back of the Court.
>
> Mr Gageler, appearing for the amici, was then asked about his position:
>
> BRENNAN CJ: … Mr Gageler, do you have anything to say about the question of costs if you should fail or, for that matter, if you are to succeed?
>
> MR GAGELER: I do not seek costs if I succeed; and on the same basis, I would urge your Honours not to exercise any discretion against me if I do not. If there is an order for costs against me, which I accept would be within the discretion of the Court, it would be one that would be limited to additional costs of today, occasioned by dealing with my submissions.

In the result, the applicants' appeal was allowed, but no costs order was made against the amici.

Keyzer suggests that 'amici are only likely to be liable for the costs of litigation if they engage in an abuse of process or if they offer lengthy oral submissions which delay the parties in advancing their cases'.[426] In other words, there would seem to be (at least) a de facto presumption against an amicus curiae being liable for any costs incurred by the parties as a result of its participation.[427] However, the possibility that a court might make orders in respect of such costs is apparently open, given the breadth of the courts' discretion in this regard. Thus, there is potential for this to deter prospective applicants from becoming involved at all.[428] Research conducted by the Public Law Project in the United Kingdom on this topic suggested that[429]:

> The risk of an adverse costs order should an intervention be unsuccessful was mentioned by most organisations included in this study as a significant barrier to making third party interventions. … Smaller organisations tended to describe the risk as 'frightening' or 'devastating' …
>
> Costs were not just an issue for the less well-resourced groups; all public interest groups have limited financial resources and must therefore justify their expenditure.

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[425] (2011) 235 VR 225, 232 [30] (Maxwell P, Harper JA and Kyrou AJA).

[426] Patrick Keyzer, *Open Constitutional Courts in Australia* (The Federation Press, 2010) 101; cf Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on Interventions on Public Interest Cases* (1996) 29.

[427] See e.g. *WHW v Commissioner of Police* [2014] WASCA 153, [13] (Martin CJ, Buss and Murphy JJA); Sir Henry Brooke, 'Interventions in the Court of Appeal' [2007] *Public Law* 401, 408 (writing, with reference to his experience as a judge of the Court of Appeal of England and Wales, that [t]here is no presumption that applying to intervene is risk-free in terms of costs [but i]n my experience, costs are never sought from an intervener, and an intervener never asks for costs'). Note, however, that the fact that amici are often regarded as insulated from costs may in practice deepen the reluctance of courts to admit them in the first place: *Breen v Williams* (1994) 35 NSWLR 522, 569 (Mahoney JA).

[428] Philip Lynch et al, 'Why are non-parties non-starters? A call for clearer procedures and guidelines for amicus curiae applications in Victoria' (Submission No. 26 to the Victorian Law Reform Commission *Civil Justice Review*, 2006) 15 [5.5]; Michael Fordham, '"Public Interest" Intervention: A Practitioner's Perspective' [2007] *Public Law* 410, 411-412; cf Public Law Project, *Third Party Interventions in Judicial Review: An Action Research Study* (2001) vi.

[429] Public Law Project, *A Matter of Public Interest: Reforming the Law and Practice on Interventions on Public Interest Cases* (1996) at 27-28; see also Alan Rose, 'The Australian Law Reform Commission's consideration of amici curiae' in Public Interest Advocacy Centre, *Hearing the people: amicus curiae in our courts – A collection of papers delivered to a PIAC Seminar on 8 August 1995* (1995) 15, 20.

In the case of the Federal Court, as noted above, the *Rules* now make it clear that the Court has absolute discretion as to the 'terms and conditions' upon which an 'intervener' can be permitted to appear in litigation. There is explicit recognition that this extends to the imposition of 'liabilities for costs'.[430] The rules contain no specific guidance as to when it might be appropriate to impose costs consequences on an 'intervener', which is perhaps unsurprising given that the relevant provision encompasses a wide range of different actors. However, this has meant that there continues to be uncertainty as to whether costs will be ordered against an amicus in the absence of some form of default. In the *Sharman* proceedings, where the same three organisations which had appeared at first instance renewed their application on appeal, the Full Federal Court related that:[431]

> We were not persuaded that the [organisations] would make any contributions that were useful and different from the contributions of the many parties to the appeals if they were allowed the liberty of moving from being friends of the court to being friends of particular parties to the appeals. We took the view that fairness to the parties to the appeals required that the question of whether [they] should assume any liability for any costs that their intervention might occasion a party should await their actual intervention.

In the result, no party sought costs orders against the interveners,[432] and no occasion arose for clarification of what was meant by these comments. However, the distinction drawn between 'friends of the court' and 'friends of particular parties' is somewhat unclear. As has been noted, it is not illegitimate for the submissions of an amicus to be entirely to the benefit of one of the parties to litigation, but this will ordinarily be a product of coincidence rather than any specific identity of interest. Whether the mere fact that the submissions of an amicus are substantially complementary to those of one of the parties will suffice to render the former a 'friend' of the latter is unclear.[433] It may be that the Court was simply seeking to use the spectre of a costs order to deter overtly partisan advocacy. Alternatively, the Court may have been prepared to countenance a larger role for the use of costs sanctions against public interest interveners than the general law has hitherto envisaged.

It is unclear whether an amicus might be able to avail itself of the special costs principles which can sometimes be invoked in connection with actions brought in the public interest in order to deflect any attempt to recover the costs occasioned by its intervention.[434] It can be assumed that such principles, as to the relevance of public interest considerations that have arisen in the context of the exercise of judicial discretion in relation to costs, would be invoked in any application for costs against a 'public interest' intervener or amicus.

Even if there is little reason for an amicus curiae to be unduly apprehensive about being required to contribute to the costs of other parties to the relevant proceedings, financial considerations will remain a factor of practical significance to those considering a possible application to appear. Even where the circumstances are such that pro bono representation can be secured, an amicus will still be required to meet whatever other costs are associated with its appearance, whether such costs manifest themselves in dollar terms or in terms of the drain on organisational resources. In a practical sense, where a number of persons and/or organisations have concurrent interests in the outcome of particular litigation, it might be preferable for them to develop joint submissions to put before the court, and thus share the financial burden involved.

5. **Non-party participation in class action litigation**

In recent years, there has been increased participation by non-parties in class action litigation in Australia**.** Where the interests of commercial funders are affected, or where approval is sought of payments to litigation funders in seeking settlement approval, funders with an interest may be permitted to intervene, to be heard

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[430] *Federal Court Rules 2011* (Cth), r 9.12(1), 36.32 (Note 2). In *Today Fm (Sydney) Pty Ltd v Australian Communications and Media Authority* [2014] FCAFC 22, for example, Commercial Radio Australia Ltd, an industry body, was permitted to intervene under r 36.32 'on condition that no order as to costs would be made in its favour or against it', at [67] (Allsopp CJ, Robertson and Griffiths JJ).

[431] (2006) 155 FCR 291, 294-295 [14] (Branson, Lindgren and Finkelstein JJ).

[432] Ibid, [15] (Branson, Lindgren and Finkelstein JJ).

[433] Cf *Kabushiki Kaisha Sony Entertainment v Stevens* (2001) 116 FCR 490, 495 [21].

[434] Cf Michael Fordham, '"Public Interest" Intervention: A Practitioner's Perspective' [2007] *Public Law* 410, 412.

or to make the application for approval of the payment.[435] Funders may also be permitted to intervene in appellate decisions of particular relevance to their commercial interests.[436]

Both federal and state courts have approved of, and sometimes proposed, the appointment of a contradictor or an amicus curiae in class action litigation, particularly in relation to whether a proposed settlement or payments to lawyers and/or litigation funders are reasonable.[437] In the protracted dispute as to the claims of both the lawyers and the litigation funder in the *Banksia* proceedings in Victoria, Dixon J appointed a contradictor to assist the court. In doing so, Dixon J elaborated on the distinction between amicus curiae, intervenors and contradictors.[438] As he noted:

> These roles are conceptually distinct, with distinct purposes. Whilst *amici curiae* are appointed to assist the court (usually impartially) and are very limited in the role they are permitted to play in proceedings, contradictors are generally appointed to ensure that there is a 'real conflict' in proceedings. This role bears closer relationship with, but is also distinct from, the position of interveners.[439]

The contradictor played a significant role in disclosing serious misconduct on the part of the lawyers, funder and counsel involved in the conduct of the case.[440]

Also, in an increasing number of cases, independent costs experts are being appointed as referees to examine and report to the court on the reasonableness of fees sought and compliance with obligations in respect of costs agreements.[441]

Independent persons may also be appointed to administer the settlement and facilitate payments to class members. Moreover, in a number of recent cases the Federal Court has ordered that there should be a tender process to elicit interest from persons seeking to implement a settlement and appointed independent persons to review the tenders and advise the Court on who should be selected.[442]

It has also been suggested that there should be greater use of contradictors in class action proceedings.[443] One difficulty is that this may add to the costs of the litigation and there may be vexed questions as to who should pay such costs. Costs will often be significant where separate solicitors and multiple counsel are appointed.[444]

6. **Commentary**

To seek to intervene or appear as amicus curiae in an attempt to persuade an Australian court to adopt a particular legal position is to enter a world of uncertainty. Discretionary considerations loom large and decisions are not reviewable. The relevant principles are indistinct and are applied according to a broad judicial discretion, often without explanation.

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[435] *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637.

[436] In *Fostif*, the commercial funder, IMF (Australia) Limited was granted leave to intervene and the Australian Consumers Association was granted leave to be heard as amicus curiae: *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386. In *BMW Australia Ltd v Brewster* (2019) 374 ALR 62, the funder was a party to the appeals in respect of the powers of the court(s) to make common fund orders, providing for a funder to receive a share of the amount of compensation or damages otherwise payable to class members.

[437] Murphy J appointed a contradictor in *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* (2016) 335 ALR 439. In *Bartlett v Commonwealth* [2019] FCA 571, Lee J appointed an amicus curiae. Cf the decision of Beach J in *Kuterba v Sirtex Medical Limited (No 3)* [2019] FCA 1374. In the Volkswagen class actions, the parties to the settlement agreed to the appointment of a contradictor in relation to the application of the funder of two of the five class actions for judicial approval of a funding commission: *Cantor v Audi Australia Pty Limited (No 5)* [2020] FCA 637.

[438] *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653.

[439] *Bolitho v Banksia Securities Ltd (No 6)* [2019] VSC 653 [78], [81]-[123].

[440] See *Bolitho v Banksia Securities Ltd (no 18) (remitter)* [2021] VSC 666.

[441] See the report by Vince Morabito, *The Role played by Costs Consultants at the Settlement Approval Stage of Federal Court Class Actions*, March 2022.

[442] See e.g., the decision of Lee J adopting the recommendation of the former Chief Justice of the Federal Court who had been appointed as a referee: *Gill v Ethicon Sàrl (No 13)* [2023] FCA 1131.

[443] Jeremy Kirk, 'The Case for Contradictors in Class Action Settlements' (2018) 92 *Australian Law Journal* 716.

[444] Such as in the *Banksia* case: *Bolitho v Banksia Securities Ltd (no 18) (remitter)* [2021] VSC 666.

The view that expansive discretion is a sensible way of managing non-party participation in adversarial litigation is not without merit. However, there is a risk of arbitrariness (or at least the appearance of it) if the parameters for the exercise of such discretion are vague and relevant decisions are not accompanied by reasons.

The relatively recent emergence of amici advocating particular policy or commercial perspectives may go some way towards explaining why aspects of the law remain problematic. This is in part due to the various types of amicus intervention. As we note above, and as Anderson has noted with reference to the United States,[445] amici curiae encompass very different types, ranging from court appointed advocates of a particular position, to friends of a party (who may be orchestrated or paid by the party) and to persons or groups who did not qualify as intervenors.

As she also perceptively notes, there has been a persistent myth that an amicus should be 'disinterested', with specialist expertise or knowledge that may assist the court. Increasingly, they may be more accurately characterised as partisans who, in effect, seek to lobby the court to come to a conclusion supportive of the adversarial position of one of the parties. Thus, she contends that the open door amicus policy of the United States Supreme Court should not be followed by other courts.

While pronouncements of the High Court have placed the legal test for amicus participation on a firmer footing, decisions are often made in a manner that is unclear or unarticulated. The provision of more extensive reasons in this regard may be desirable, particularly where a prospective amicus is either turned away or permitted to participate over the specific objection of a party.

As Perry and Keizer note:

> The choice of the Australian High Court to limit the role of amici is just that, a choice. Since the High Court has regard to community standards when it determines constitutional cases raising human rights issues, it is perfectly appropriate for amici curiae to be admitted to enlarge the normative horizon of the court. This is only fitting, since it is in these cases that value choices about the terms of our collective life are made.[446] (cross references omitted)

Establishing clear rules of court that are exclusively directed to regulating the procedural aspects of amicus participation (particularly as to the process of seeking leave to appear; the role of amici; and costs) would also go a long way towards demystifying the procedural mechanism.

It is clear that the artificial notion that the persons currently labelled 'amici' fall into a unitary class is no longer accurate, if it ever was. Delineating one or more sub-categories of amici may allow the development of rules and principles that distinguish different types of participants.

However, the introduction or adoption of more prescriptive requirements for the (early) determination of applications to participate, or the giving of reasons for the granting or refusal of such applications, may be unduly burdensome on courts and of limited utility in guiding future prospective amici, given the varying legal, factual and broader issues that arise in different cases.

It remains to be seen whether recent changes to the process of determining special leave applications to the High Court, whereby all applications will be initially considered by the Court on the basis of written material with oral argument only in 'rare cases', will impact on amicus applications.[447]

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[445] Helen Anderson, 'Frenemies of the Court: The Many Faces of Amicus Curiae' (2015) 49 *University of Richmond Law Review* 361.

[446] H W Perry and Patrick Keyzer, 'Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia can Learn from the U.S. Experience', 37(1) *Law in Context* (2020) 95.

[447] Introduced on 17 November 2023. See: https://www.hcourt.gov.au/assets/documents/HCA%20Notice%20Revised%20Special%20Leave%20Process%2017%20November%202023.pdf.