SHOULD THE HIGH COURT OF AUSTRALIA LIBERALISE ITS APPROACH TO AMICI CURIAE?

HARRY YOUS [*]

The High Court of Australia's decisions have wide-ranging consequences and implications that extend beyond the interests of the parties immediately involved. Generally, an amicus curiae possesses unique knowledge and expertise in the relevant subject matter and can contribute arguments the parties to the proceeding may have failed to consider. Through the examination of recent case studies, this article argues for more liberal admission of amici in the High Court. The article analyses the current criteria for the admission of amici and concludes that if a potential amicus were to satisfy all relevant criteria, the disadvantages of admission would be minimised, and the overwhelming benefits would call into question the reluctance of the High Court to admit them. Therefore, this article's central argument is that the High Court should liberalise its approach to amici curiae. The article also reviews the relationship between amici and the High Court through an empirical survey of case law from 2010 to 2022.

CONTENTS

[*] LLB (Hons I) (Adel), Associate to a Justice of the Supreme Court of Western Australia. I am grateful to Dr Anna Olijnyk and the reviewers for their feedback. Errors remain my own.

I INTRODUCTION

Parties to a proceeding do not exclusively own their case, as non-parties can intervene for a variety of purposes. There are two ways that a non-party can intervene in any litigation in Australia: as amicus curiae, or as an intervener.[1] An intervener has the same rights and obligations as a party to a case,[2] while an amicus curiae (Latin for a friend of the court) does not. An amicus curiae is a non-party individual or entity whose goal is to assist the court in the resolution of a case[3] by offering information, expertise, or insight that has a bearing on the relevant issues to prevent errors in judgments.[4] They often provide the court with different factual, conceptual or legal perspectives.[5] Amici curiae ('amici', or 'amicus' in the singular) can offer assistance through oral submissions, written submissions, or both.[6] They have existed as far back as the 14th century and even in Roman law.[7]

---

[1] Dorne J Boniface, 'More Changes Proposed in Addition to the Changes Already Proposed: The Human Rights and Responsibility Commission: A Friend in Need?' (1999) 5(1) *Australian Journal of Human Rights* 235, 237, 248; Patrick Keyzer, 'Participation of Non-Party Interveners and *Amici Curiae* in Constitutional Cases in Canadian Provincial Courts: Guidance for Australia?' in Linda Cardinal and David Headon (eds), *Shaping Nations: Constitutionalism and Society in Australia and Canada* (University of Ottawa Press, 2002) 273, 274–81; Macy Mirsane, 'The Roles of Amicus Curiae (Friend of the Court) in Judicial Systems with Emphasis on Canada and Alberta' (2022) 59(3) *Alberta Law Review* 669, 670–7; Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20(1) *Adelaide Law Review* 159, 159.

[2] Boniface (n 1) 237–8; Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 159; Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22(3) *Bond Law Review* 126, 135 ('Amici Curiae and Access to Constitutional Justice'); Angel Aleksov, 'Intervention in Constitutional Cases' (2012) 86(8) *Australian Law Journal* 555, 556, citing *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184. See also *Corporate Affairs Commission v Bradley; Commonwealth of Australia (Intervener)* [1974] 1 NSWLR 391, 396; *United States Tobacco Co v Minister for Consumer Affairs* (1998) 20 FCR 520, 534–5.

[3] Frank M Covey Jr, 'Amicus Curiae: Friend of the Court' (1959) 9(1) *DePaul Law Review* 30, 30.

[4] *The Protector v Geering* [1656] 145 All ER 394 (Counsel) (during argument). See also *Hamlin v Particular Baptist Meeting House*, 103 Me 343, 69 Ad 315 (1907).

[5] Paul M Collins Jr, 'The Use of Amicus Briefs' (2018) 14(1) *Annual Review of Law and Social Science* 219. See also Paul M Collins Jr, *Friends of the Supreme Court: Interest Groups and Judicial Decision Making* (Oxford University Press, 2008); *Bropho v Tickner* (1993) 40 FCR 165, 172 ('*Bropho*'). See Covey (n 3) 30.

[6] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 159.

[7] Michael K Lowman, 'The Litigating Amicus Curiae: When Does the Party Begin After the Friends Leave?' (1992) 41(4) *American University Law Review* 1243, 1243–4, 1248–50.

In Australia, amici can appear to protect governmental interests,[8] individual interests,[9] and general public interests.[10]

Traditionally, as a non-party, an amicus does not have to show a 'proprietary, material or financial interest in the proceeding'.[11] Consequently, an amicus generally bears their own costs and is not subject to costs orders.[12] Amici can intervene at any level of the proceeding but often do so at the appellate level. The scope of this article is limited to the intervention of amici in the High Court of Australia. The article argues that the High Court should exercise its discretion in favour of the admission of amici, provided that they meet the existing eligibility criteria, to ensure that the full benefits that amici have to offer are realised.

The topic of amici is under-examined in Australian jurisprudence. This is further exacerbated by the lack of empirical study in this area.[13] There has been some scholarship on amici in the High Court, but the leading article is over 25 years old.[14] This article aims to provide a modest empirical contribution to the limited existing studies on the topic by examining amici applications to the High Court from 2010 to 2022. This article also contributes to the jurisprudence on amici by analysing recent High Court cases with respect to the existing eligibility criteria for amici.

This article is divided into five substantive sections. Section II argues that law-making is part of the High Court's functions and that amici's utility is best seen through that law-making function. Section II also provides an analysis of the High Court's historical and contemporary approach to amici and includes statistical data sets that have been compiled for this article. As Section II will demonstrate, although amici are becoming more frequent in proceedings, they are still relatively rare—highlighting the relevance and importance of this topic. Section III analyses the benefits of amici, while Section IV examines their disadvantages. Section V analyses the existing criteria for admission. As Section V will demonstrate, so long as amici meet the existing admission criteria, the benefits of using them often outweigh the limitations. The High Court's current approach is that even when an

---

[8] *R v Cook; Ex parte Twigg* (1980) 147 CLR 15 ('*Cook*'); *Parramatta City Council v Brickworks Ltd* (1970) 72 SR (NSW) 642; *Parramatta City Council v Brickworks Ltd* (1970) 18 LGRA 395.
[9] *Johnson and Satnmon* (1984) 53 ALR 283.
[10] *SCI Operations Pty Ltd v Trade Practices Commission* (1984) 53 ALR 283.
[11] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 160. See also Andrea Durbach, Isabelle Reinecke and Louise Dargan, 'Enabling Democracy: The Role of Public Interest Litigation in Sustaining and Preserving the Separation of Powers' (2020) 26(2) *Australian Journal of Human Rights* 195, 203.
[12] *Blackwood Foodland Pty Ltd v Milne* [1971] SASR 403, 411. See also *Bropho* (n 5) 172.
[13] There have been only six empirical studies capturing data on non-party intervention in Australia to date. See, eg, Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13(3) *Monash University Law Review* 149, 156–8; Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 139–43; Benjamin Robert Hopper, 'Amici Curiae in the United States Supreme Court and the Australian High Court: A Lesson in Balancing Amicability' (2017) 51(1) *John Marshall Law Review* 81, 82.
[14] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1).

applicant meets these criteria, the Court retains the discretion whether to admit them as amicus. This discretion is rarely exercised at present.[15] That reality is critical to this article's argument that the High Court should exercise its discretionary power liberally, provided that each amicus meets the existing admission criteria. Finally, Section VI examines recent cases where qualifying amici should have been admitted and cases where the High Court was right to refuse admission.

II THE RELATIONSHIP BETWEEN AMICI CURIAE AND THE HIGH COURT

When the High Court ('the Court') adjudicates disputes, its decisions have implications for not only the parties to the proceeding, but also the rest of society.[16] The Court's law-making function and process is complex and often involves the balancing of competing interests that go beyond the interests of the parties involved.[17] Fuller described such cases as 'polycentric'.[18] In such instances, the parties' submissions alone may not be sufficient for the Court to reach its decision. This is when amici should play a part. This section examines the historical and contemporary approach towards amici through an empirical consideration of recent case law. Essentially, it aims to provide two main pieces of contextual information: first, that the utility and benefits of amici are best illustrated through the Court's law-making function because amici curiae can potentially bring a range of perspectives to the attention of the High Court in polycentric disputes; and second, that while amicus intervention is becoming more common, statistical data demonstrates that the number still remains relatively low, which warrants the Court reconsidering its approach.

A The High Court and its Law-Making Power

This article assumes that the Court is both a legal and political institution. Notwithstanding that, the Australian legal system is still grappling with the reality that the Court actively makes law.[19] In 1984, the special leave requirement was

---

[15] *Levy v Victoria* (1997) 189 CLR 579, 650 (Kirby J) ('*Levy*'); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 135–6 [106] (Kirby J) ('*Breckler*').

[16] See, eg, Justice Michelle Gordon, 'Taking Judging and Judges Seriously: Facts, Framework and Function in Australian Constitutional Law' (2023) 49(1) *Monash University Law Review* 1, 32; Susan Kenny, 'Constitutional Fact Ascertainment: With Reference to the Practice of the Supreme Court of the United States and the High Court of Australia' (1990) 1(2) *Public Law Review* 134, 135.

[17] Michael Polanyi, *The Logic of Liberty: Reflections and Rejoinders* (Routledge, 1951).

[18] Lon L Fuller, 'The Forms and Limits of Adjudication' (1978) 92(2) *Harvard Law Review* 353.

[19] *Levy* (n 15) 604 (Brennan CJ), 650–1 (Kirby J); *Superclinics Australia Pty Ltd v CES* [1996] HCATrans 277, 14–15 (McHugh J) ('*Superclinics*'). See Stephen Gageler, 'Fact and Law' (2008) 11(1) *Newcastle Law Review* 1, 18.

introduced as a hurdle to the hearing of the Full Court.[20] Despite the Court's notion that special leave is a mere procedural mechanism,[21] the introduction of special leave as a ticket to a hearing before the Full Court demonstrates the law-making aspect of the Court's power.[22] This is because the special leave requirement of the Court places great weight on the 'public importance' element of the case[23]—a prerequisite that does not exist for intermediate appellate courts.[24] Further, it can be argued that the Court makes law because of its role as the final interpreter of constitutional and statutory provisions.[25]

However, it has long been held that public policy is the province of the legislature and should not be encroached upon by the judiciary.[26] Some academics question the authority of judges to make law in a democratic society.[27] Sir Owen Dixon expressed the same concern in cautioning that '[i]mpatience at the pace with which legal developments proceed … [and courts exercising] an unregulated authority over the fate of men and their affairs' could place the justice system at risk.[28] The question of whether the Court should make law has yielded much debate and has produced valid and logical reasons for both sides of the argument. However, this article argues that it is more beneficial to the justice system for the judiciary to openly engage with value judgements.[29] In this article, law-making function refers to the Court's role in steering legislative-like policy in the process of reaching its dispute-specific decisions. The law-making function is further

---

[20] Pam Stewart and Anita Stuhmcke, 'Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia' (2019) 41(1) *Sydney Law Review* 35, 36 n 1, citing *Judiciary Amendment Act (No 2) 1984* (Cth) s 3; David F Jackson, 'The Australian Judicial System: Judicial Power of the Commonwealth' (2001) 24(3) *University of New South Wales Law Journal* 737; *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 205–6 ('*Smith Kline*').

[21] *Smith Kline* (n 20) 217–8. See *Coulter v The Queen* (1988) 164 CLR 350, 359 (Mason CJ, Wilson and Brennan JJ).

[22] Sir Anthony Mason, 'Interveners and Amici Curiae in the High Court: A Comment' (1998) 20(1) *Adelaide Law Review* 173, 173 ('Interveners and Amici Curiae in the High Court'). See also *State Government Insurance Commission (SA) v Trigwell* (1979) 142 CLR 617, 633 (Mason J) ('*Trigwell*').

[23] *Judiciary Act 1903* (Cth) s 35A; Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 14.

[24] See, eg, *Federal Court Rules 2011* (Cth) ch 4; *Supreme Court Act 1970* (NSW) pt 7; *Supreme Court Act 1986* (Vic) pt 2 div 2; *Uniform Civil Procedure Rules 1999* (Qld) ch 18 pt 1; *Uniform Civil Rules 2020* (SA) ch 18 pt 3; *Supreme Court Act 1935* (WA) pt IV div 6; *Supreme Court Rules 2000* (Tas) pt 27; *Supreme Court Rules 1987* (NT) ch 2; *Court Procedures Rules 2006* (ACT) ch 5 pt 5.3.

[25] See, eg, Jason L Pierce, 'The Road Less Travelled: Non-Party Intervention and the Public Litigation Model in the High Court' (2003) 28(2) *Alternative Law Journal* 69, 69.

[26] See, eg, *Pettitt v Pettitt* [1970] AC 777, 795 (Lord Reid); *Trigwell* (n 22) 633 (Mason J).

[27] Martin P Golding, 'Realism and Functionalism in the Legal Thought of Felix S Cohen' (1981) 66(5) *Cornell Law Review* 1032, 1055.

[28] Sir Owen Dixon, 'Concerning Judicial Method' (Speech, Yale University, 19 September 1955) 11.

[29] See Felix S Cohen, 'Field Theory and Judicial Logic' (1950) 59(2) *Yale Law Journal* 238, 260–1; Oliver Wendell Holmes Jr, *The Common Law* (Little Brown and Company, 1881) 35–6; Felix S Cohen, 'Judicial Ethics' (1951) 12(1) *Ohio State Law Journal* 3, 12–13.

evident in constitutional cases when the Court's judgments shape societal expectations, political doctrines, and the bounds of governance power.[30]

To take the law as absolute is to ignore the important role that the Court plays in a democratic society. It is crucial to recognize that judicial officers' personal values have an impact on their decision-making, and the Court should openly engage with these values.[31] For instance, the final appellate courts in other democratic societies such as Canada, the United States, and South Africa have been relatively receptive to intervening submissions (amici included) on important issues of public policy, which demonstrates how they have embraced their roles as 'law-maker and interpreter of an ambiguous constitution'.[32] In contrast, our Court 'frequently denies the amicus curiae and intervener any meaningful function'.[33]

Sir Anthony Mason is open about the influence of morals and values in constitutional cases. He argues that '[c]onstitutions are documents framed in general terms to accommodate the changing course of events, so that courts interpreting them must take account of community values'.[34] No doubt, the Court's position as the final arbiter of the *Australian Constitution* reinforces its law-making role, as it bears the onus of protecting, granting, and revoking legal rights which may exceed the explicit foresight of the *Constitution* as it was first written in the 1800s.[35]

Amici can be useful in proceedings where important questions of law are concerned. Important questions of law often affect the community generally or disadvantaged non-party individuals,[36] because of the public interest element in those cases.[37] For instance, in *Mapp v Ohio*,[38] the amicus brief assisted the United States Supreme Court in deciding whether to extend an evidence rule to State

---

[30] See Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000).

[31] See Cohen, 'Field Theory and Judicial Logic' (n 29) 247, 260–2; Cohen, 'Judicial Ethics' (n 29) 9–13; Edward Clark, 'The Needs of the Many and the Needs of the Few: A New System of Public Interest Intervention for New Zealand' (2005) 36(1) *Victoria University of Wellington Law Review* 71, 72; Omari Scott Simmons, 'Picking Friends from the Crowd: Amicus Participation as Political Symbolism' (2009) 42(1) *Connecticut Law Review* 185, 197.

[32] George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 365 ('The Amicus Curiae and Intervener').

[33] Ibid. See also *Australian Railways Union v Victorian Railways Commissioners* (1930) 44 CLR 319, 331 (Dixon J) ('*Australian Railways Union*'); *Bropho* (n 5) 172; Mason, 'Future Directions in Australian Law' (n 12) 156–8; Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 139–43; Hopper (n 12) 82.

[34] Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1, 5.

[35] *Levy* (n 15) 603 (Brennan CJ).

[36] Simone Cusack and Cecilia Riebl, 'International Human Rights Law in Australian Courts: A Role for Amici Curiae and Interveners' (2006) 31(3) *Alternative Law Journal* 122, 124. See also George Williams, 'The Amicus Curiae and Intervener' (n 32) 370, quoting Brian A Crane and Henry S Brown, *Supreme Court of Canada Practice 2000* (Carswell, 1999) 204.

[37] *Brandy v Human Rights and Equal Opportunity Commission* [1994] HCATrans 51 ('*Brandy [No 1]*').

[38] 367 US 643 (1961).

courts, a rule which has wide-ranging implications for individuals' rights in State criminal trials.[39] Further, one primary constraint associated with sole reliance on private parties' submissions is that their 'interests are seen as multiple and irreconcilable', and self-serving.[40] By contrast, public interests of the community at large are often more 'unified … and able to embrace a perspective which takes account of all'.[41] Sections III and VI provide examples of cases in which amici were (or could have been) useful in cases that involved the public interest.

B The Historical and Contemporary Approach to Amici Curiae

Having introduced the significant role that amici can play in assisting the Court with its law-making function, the article will now examine the Court's use of amici in recent times. The main objective of this section is to demonstrate that, although amici have increased in number—which supports the perception that the Court is more liberal in its admission decisions—the proportion of amicus appearances is still relatively low when considering the total number of cases. Thus, it is worthwhile for the Court to revisit its approach to the admission of amici. The article will demonstrate this by comparing historical figures with contemporary data.

1 Historical and Current Figures

From the 1940s through to the 1990s, the appearances of amici before the Court in any form (whether written or oral) were nearly non-existent.[42] The last effort to quantify and measure the use of amici in the Court occurred in the 1990s.[43] To bring this information up to date, the author compiled a new set of data on the admission of amici between 2010 and 2022. This time span reflects the availability of case files on the Court's online portal.[44]

---

[39] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 168.
[40] Rosemary J Owens, 'Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy' (1998) 20(1) *Adelaide Law Review* 193, 197.
[41] Ibid.
[42] Pierce (n 25) 70.
[43] George Williams, 'The Amicus Curiae and Intervener' (n 32) 387–9.
[44] 'Cases Decided', *High Court of Australia* (Web Page) <https://www.hcourt.gov.au/cases/cases-heard>.

Year	Cases filed for the year	Number of cases where amici were admitted	Percentage of amici / cases filed for the year	Total number of amici admitted for the year
2010	25	3	12.00%	4
2011	65	2	3.08%	2
2012	50	4	8.00%	4
2013	61	5	8.20%	5
2014	45	2	4.44%	2
2015	64	3	4.69%	3
2016	74	5	6.76%	5
2017	72	2	2.78%	2
2018	50	7	14.00%	8
2019	50	5	10.00%	5
2020	45	1	2.22%	1
2021	42	4	9.52%	5
2022	29	4	13.79%	5
Total	672	47	6.99%	51

Table 1: Statistical figures with respect to amici curiae between 2010 and 2022

Between 1947 and 1997, the Court granted leave for amici to appear in only 15 cases.[45] In 12 cases, the amicus was the Solicitor-General for the Commonwealth or a State or Territory. Since the amendment of the *Judiciary Act 1903* (Cth) in 1976, Attorneys-General have been granted the statutory right to

[45] *Main v Main* (1949) 78 CLR 636; *Blundell v Musgrave* (1956) 96 CLR 73; *Armstrong v Victoria* [No 2] (1957) 99 CLR 28; *Russell v Walters* (1957) 96 CLR 177; *Lamshed v Lake* (1958) 99 CLR 132*; James v Robinson* (1963) 109 CLR 593; *R v Public Vehicles Licensing Appeal Tribunal (Tas)*; *Ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207; *Cook* (n 8); *Victoria v Australian Building Construction Employees' and Labourers' Federation* [No 2] (1982) 152 CLR 179; *Commonwealth v Tasmania* (1983) 158 CLR 1 (*'Tasmanian Dam Case'*); *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239*; David Grant & Co Pty Ltd (rec apptd) v Westpac Banking Corporation* (1995) 184 CLR 265 (*'David Grant'*); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 (*'Lange'*); *Levy* (n 15) 650-651 (Kirby J*); Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*'Project Blue Sky'*).

intervene in constitutional cases.[46] Thus, there were arguably only three 'real' amici before the Court during this period. In contrast, the United States Supreme Court admitted 3389 amici during a similar period.[47] Of course, the situation in Australia has evolved, as evidenced by the statistical data in Table 1. Table 1 demonstrates that between 2010 and 2022, there were 51 'real' amici curiae appearances across 47 cases. These numbers indicate that amici have become more common compared to the number in any given decade between the 1940s and 1980s. However, the percentage of amici appearances before the Court remains low, with an average of approximately 7% of total cases filed in the last decade.

As demonstrated above, the relevance of amici is best seen through the law-making function of the Court. This section has also illustrated, through empirical data, that although amicus appearances are higher in quantity, they remain relatively low compared to the total cases filed before the Court that have been granted special leave.[48] This underscores the potential for the Court to revisit its approach and maximise the utility of amici, thereby reaping significant benefits for the Court's law-making function.[49] Section III will discuss the benefits of amici to further illuminate their utility.

III THE BENEFITS OF AMICI

This section will demonstrate that amicus intervention has three main benefits to the Court's law-making function: first, in preventing a failure of justice; second, in underpinning the legitimacy of the Court; and third, in balancing non-governmental interests against governmental interests. The benefits of amici are not mutually exclusive, and they can operate as complements to each other. The benefits presented in this section provide critical context for the article's argument that the Court should exercise its discretion in favour of amici, provided that they meet the established criteria.

---

[46] *The Judiciary Amendment Act 1976* (Cth) introduced s 78A to the *Judiciary Act 1903* (Cth).

[47] Charles R Epp, *The Rights Revolution: Lawyers, Activists and Supreme Courts in Comparative Perspective* (University of Chicago Press, 1998); George Williams, 'The Amicus Curiae and Intervener' (n 32); Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada* (State University of New York Press, 2002).

[48] Enid Campbell, 'Intervention in Constitutional Cases' (1998) 9(4) *Public Law Review* 255, 258; George Williams, 'The Amicus Curiae and Intervener' (n 32) 386–7; Pierce (n 25) 71; Jason L Pierce, David L Weiden and Rebecca D Wood, 'The Changing Role of the High Court of Australia' (Conference Paper, IPSA RC09 Interim Meeting, 16 January 2011) 29; Ruth Parsons and Darren R Halpin, 'Organised Interests and the Courts: Non-Party Access to the High Court of Australia Between 2012 and 2017' (2022) 68(4) *Australian Journal of Politics and History* 544, 552.

[49] See, eg, Michael Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (2011) 127 (October*) Law Quarterly Review* 537.

A Preventing Failure of Justice

One benefit and purpose of amicus submissions is to 'prevent a "failure of justice"'.[50] Generally, it is a difficult task 'to assess the effect of an alteration of the law which responds to [social] change'.[51] As such, '[t]he courts are largely dependent on litigants, interveners and amici curiae to provide relevant information for the determination of the issues in dispute'.[52] As discussed in Section II, the Court's function goes beyond adjudicating the dispute between the parties[53] and amicus submissions may assist in allowing the Court to be 'adequately informed about the matters which come before them'.[54]

Amici may prevent a 'failure of justice' by bringing public interest perspectives to the Court.[55] Generally, the Court does not possess knowledge or information in relation to 'relevant non-legal material'.[56] In *Australian Railways Union v Victorian Railways Commissioners* ('*Australian Railways Union*'), Dixon J stated that amici should only be allowed to participate in the proceedings if they 'wish to maintain some particular right, power or immunity in which they are concerned'.[57] Sir Anthony Mason has subsequently indicated extra-curially that Dixon J's restrictive approach is only appropriate for the Court's adjudicative function and not its law-making function.[58]

Amici may also prevent a 'failure of justice' by assisting the Court in its fact-finding process. As Davis puts it, the Court's fact-finding process involves two separate categories.[59] The first category of facts is defined as 'adjudicative', whereas the second category of facts is defined as 'legislative'. Adjudicative facts

---

[50] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 168, quoting *Krippendorf v Hyde*, 110 US 276, 285 (1883) ('*Krippendorf*').

[51] Justice MH McHugh, 'The Judicial Method' (1999) 73(1) *Australian Law Journal* 37, 44.

[52] Ibid. See also Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 168; Andrea Durbach, 'Interveners in High Court Litigation: A Comment' (1998) 20(1) *Adelaide Law Review* 177, 179 ('Interveners in High Court Litigation').

[53] See Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 167. See also Warwick Neville, 'Abortion before the High Court: What Next? Caveat Interventus: A Note on *Superclinics Australia Pty Ltd v CES*' (1998) 20(1) *Adelaide Law Review* 183, 189–90, quoting *Superclinics* (n 19) 14–15.

[54] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 168. See also Durbach, 'Interveners in High Court Litigation' (n 52) 177; Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 126; McHugh (n 51) 44; George Williams, 'The Amicus Curiae and Intervener' (n 32) 399.

[55] Durbach, 'Interveners in High Court Litigation' (n 52) 177.

[56] McHugh (n 51) 44.

[57] *Australian Railways Union* (n 33) 331 (Dixon J).

[58] Mason, 'Interveners and Amici Curiae in the High Court' (n 22) 173. See *Australian Railways Union* (n 33) 331 (Dixon J); Durbach, 'Interveners in High Court Litigation' (n 52) 178, quoting *Breen v Williams* (1994) 35 NSWLR 522, 533 (Kirby P) ('*Breen [No 1]*'). See also Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 126–7. Ernst Willheim argues that the Australian approach is 'fundamentally flawed' because it fails to recognise the High Court's 'role as Australia's final appellate court and…constitutional court'.

[59] Kenneth Culp Davis, 'An Approach to Problems of Evidence in the Administrative Process' (1942) 55(3) *Harvard Law Review* 364; Kenneth Culp Davis, 'Official Notice' (1949) 62(4) *Harvard Law Review* 537; Kenneth Culp Davis, 'Judicial Notice' (1955) 55(7) *Columbia Law Review* 945.

are facts that are directly relevant to the litigants: their interests, properties, affairs, and 'who did what, where, when, how and with what motive or intent'.[60] In a common law context, this category consists of the facts that are considered by the jury in a jury trial. On the other hand, legislative facts are the factual content of law or policy rationales behind the law. Due to the doctrine of precedent,[61] the legislative facts found by the Court have implications beyond the parties' interests.[62] Thus, amicus can prevent a failure of justice by providing 'the full range of available arguments', including legislative facts that the parties themselves would not have otherwise presented for various reasons.[63]

In addition, amici may prevent a 'failure of justice' by giving an 'authentic voice [to] those affected' by the Court's decisions.[64] This is crucial because the Court often has to resolve complex issues of legal principle and policy involving social, political and economic considerations that affect non-parties.[65] Further, the Court needs to adapt itself, particularly in 'constitutional cases and those where large issues of legal principle and legal policy are at stake',[66] to consider the wide-ranging societal and practical implications of its decision.[67] The importance of

---

[60] Davis, 'Judicial Notice' (n 59) 952.

[61] Durbach, 'Interveners in High Court Litigation' (n 52) 177. See also Durbach, 'Interveners in High Court Litigation' (n 52) 178, quoting *Breen [No 1]* (n 58) 533 (Kirby P); *Superclinics* (n 19) 15. In *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that '[i]t is recognised by the courts that the resolution of disputes serves the public as a whole, not merely the parties to the proceedings': at 217 [113].

[62] Durbach, 'Interveners in High Court Litigation' (n 52) 177, 180. See George Williams, 'The Amicus Curiae and Intervener' (n 32) 392–3, citing *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218; *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*'); *Leeth v Commonwealth* (1992) 174 CLR 455; *Polyukhovich v Commonwealth* (1991) 172 CLR 501 and other cases examined in George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 1999) chs 5–8.

[63] See Mason, 'Interveners and Amici Curiae in the High Court' (n 22) 173–4. See also *Bropho* (n 5) 172; *Wurridjal v Commonwealth* (2009) 237 CLR 309, 312–3 (French CJ) ('*Wurridjal*'); Durbach, 'Interveners in High Court Litigation' (n 52) 180; Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 143; Neville (n 53) 185, 189–90, quoting *Superclinics* (n 19) 14–15. Owens (n 40) 195, citing *Levy* (n 15) 604–5 (Brennan CJ).

[64] Durbach, 'Interveners in High Court Litigation' (n 52) 178, 180. See also Kathryn Chan and Howard Kislowicz, 'Divine Intervention, Part I: A Study of the Operation and Impact of Non-Governmental Interveners in Canadian Religious Freedom Litigation' (2019) 90 *Supreme Court Law Review* (forthcoming, available at <https://ssrn.com/abstract=3320843>) 4–9; Benjamin R D Alarie and Andrew J Green, 'Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance' (2010) 48(3–4) *Osgoode Hall Law Journal* 381, 386–7.

[65] Durbach, 'Interveners in High Court Litigation' (n 52) 177, 181–2, quoting Peter Waters, *Five Years in the Ring: An Account of the First Five Years of the Public Interest Advocacy Centre 1982–87* (Report, 31 Dec 1987) 4. See also Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 140, quoting Michael Coper, Fiona Wheeler and John Williams, 'The Private life of a Public Institution: Oral History and the High Court of Australia' (Paper, VXI International Oral History Conference, 7–11 July 2010).

[66] *Breckler* (n 15) 134–5 [104]–[105] (Kirby J). See Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 126, 140.

[67] Ernst Willheim, 'An Amicus Experience in the High Court: *Wurridjal v Commonwealth*' (2009) 20(2) *Public Law Review* 104, 105 ('An Amicus Experience in the High Court').

amici is demonstrated in the decision of *Dobbs v Jackson Women's Health Organization*[68] (a case that overruled *Roe v Wade*[69]) where the United States Supreme Court considered amici submissions at least fourteen times in its reasoning.[70] This reflected the wide-ranging considerations that the Court should have regard to on such highly contested questions. This proposition is also supported by the case of *Superclinics Australia Pty Ltd v CES* ('*Superclinics*').[71] *Superclinics* concerned a woman seeking damages for 'loss of the opportunity to terminate a pregnancy' after several medical practitioners repeatedly failed to detect her pregnancy.[72] In *Superclinics*, it became evident that by focusing on the legality of abortion, judges might inadvertently condone medical negligence. The Catholic Church and the Australian Health Care Association ('AHCA') filed for leave to appear as amici. If the AHCA, which represents a large proportion of the health care economy, had not been admitted as amicus in *Superclinics*, then a large part of the 'public interest' or the 'interest of those affected', would not have been represented in the proceeding at all.[73]

Liberalisation of the Court's approach to amici may also help prevent a 'failure of justice' for marginalised communities and individuals. For instance, in the United States, one of the most notable amici is the National Association for the Advancement of Coloured People ('NAACP'), which regularly files amicus briefs on behalf of African Americans to represent their interests. Abraham argues that the NAACP has a 'pervasive influence' on the judgments of the United States Supreme Court.[74] As such, although amici can be used as strategic tools to advance political objectives and to 'participate in policy debate',[75] they can also be powerful advocates for groups that have 'little political power, such as [I]ndigenous people [who] have viewed the High Court rather than parliament as more likely to advance their aims'.[76]

---

[68] 597 US 215 (2022) ('*Dobbs*').
[69] 410 US 113 (1973).
[70] See, eg, *Dobbs* (n 68) 10, 25–6, 28, 30, 47, 55, 65, 73.
[71] *Superclinics* (n 19).
[72] Ibid.
[73] Neville (n 53) 191.
[74] Henry J Abraham, *The Judicial Process* (Oxford University Press, 7th ed, 1998) 261.
[75] George Williams, 'The Amicus Curiae and Intervener' (n 32) 387–8.
[76] Ibid 388, citing *Kruger* (n 62).

1 Nguyen

Nguyen v The Queen ('*Nguyen*')[77] is an example of where the amicus attempted to advocate for broader rights to prevent a 'failure of justice'. *Nguyen* concerned whether the prosecution's obligation to put its case 'fully and fairly before the jury'[78] in a criminal trial ordinarily requires it to tender the record of an interview that contains 'both inculpatory and exculpatory statements'[79] ('mixed statements') between the accused and police. The Court held that this obligation does require the prosecution to tender a record of interview containing mixed statements, 'unless there is good reason not to do so'.[80]

In *Nguyen*, the North Australian Aboriginal Justice Agency ('the amicus') raised an issue which was 'unlikely to receive adequate treatment' by the parties,[81] despite the issue being of considerable public importance.[82] The amicus attempted to demonstrate that prosecutorial practices, where the prosecutor could occasionally decline playing 'mixed statement' records of interview, meant that legal clinics were unable to provide clear advice to suspects as to whether the interview they participated in would later be played at a trial.[83]

Justice Edelman stated that 'as the [amicus] submitted in its intervention, the prima facie requirement of the duty of fairness was further enhanced by Mr Nguyen's linguistic and cultural disadvantages and his expectation at the time of giving the interview that it would be tendered in court'.[84] Mr Nguyen's interview record was taken after the police cautioned him, thereby 'following the general approach described in the *Anunga* rules, in an attempt to ensure fairness'[85] to vulnerable or disadvantaged people. Justice Edelman held that counsel for the Director of Public Prosecution had informed the Court that it was a 'tactical decision' not to tender the video interview.[86] Justice Edelman held that:

> It was a decision taken not to adduce evidence of admissions which would otherwise be part of the prosecution case in order to require the accused man, with cultural and

[77] (2020) 269 CLR 299 ('*Nguyen*').
[78] Ibid 311–12 [26] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ), 318 [48] (Nettle J).
[79] Ibid 306 [2] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).
[80] Ibid 306 [5] , 316 [41] (Kiefel CJ, Bell, Gageler, Keane and Gordon JJ).
[81] North Australian Aboriginal Justice Agency, 'Submissions of North Australian Aboriginal Justice Agency Seeking Leave to be Heard as Amicus Curiae', Submission in *Nguyen v The Queen*, D15/2019, 18 October 2019, 3 [7] (emphasis omitted).
[82] Ibid.
[83] Ibid 7–8 [20].
[84] *Nguyen* (n 77) 330–1 [76].
[85] Ibid 331 [76], citing *R v Anunga* (1976) 11 ALR 412.
[86] *Nguyen* (n 77) 331 [77].

> linguistic disadvantages that are plainly evident from the interview, to expose himself to cross-examination in order to put his account of events before the jury.[87]

As such, his Honour held that:

> This reasoning process was not consistent with the prosecutor's duty of fairness [and in] the absence of any compelling reason…, the maintenance of [refusal to tender the interview was] extremely likely to have been productive of an unfair trial … [involving] a miscarriage of justice.[88]

Parties may choose not to present additional relevant information if it does not serve their immediate interests, or because such considerations are not central to the established legal principle needed to win their case. As such, an amicus is entitled to assist the Court and persuade it to see things from a perspective that would otherwise be overlooked. In *Nguyen*, the amicus was able to demonstrate to the Court that young people facing language barriers, disability, and cultural differences were unfairly disadvantaged by the prosecution's existing practice, demonstrating the extended implications for marginalised communities. In this way, the amicus in *Nguyen* tried to protect the marginalised community from a 'failure of justice'.[89]

2 BDO

BDO v The Queen ('*BDO*')[90] was an appeal from the Queensland Court of Appeal.[91] The principal issue on appeal was BDO's criminal responsibility for acts which occurred when he was over 10 years old, but under 14 years old. The submissions of the Aboriginal Legal Service of Western Australia Ltd ('the amicus') aimed to assist the Court on broader issues, including the workability of principles for trial courts from the perspective of marginalised groups. The amicus also addressed the interpretation of the phrase 'capacity to know that he ought not to do the act or make the omission' as it appears in s 29 of the *Criminal Code 1913* (WA) ('*Code*'). The Court set aside the decision of the Court of Appeal and entered a verdict of acquittal.

In *BDO*, the amicus tried to ensure that the Court was provided with relevant underlying facts for the purpose of interpreting the Queensland statutory text.[92] It is hard to say how the amicus influenced the Court's conclusion, as its submissions

---

[87] Ibid, citing Diana Eades, 'The Social Consequences of Language Ideologies in Courtroom Cross-Examination' (2012) 41(4) *Language in Society* 471, 474–9.
[88] *Nguyen* (n 77) 331 [77].
[89] See Elisa Arcioni, 'Some Comments on Amici Curiae and "The People" of the Australian Constitution' (2011) 22(3) *Bond Law Review* 148, 148.
[90] (2023) 409 ALR 152 ('*BDO*').
[91] See *R v BDO* [2021] QCA 220.
[92] See Aboriginal Legal Service Western Australia Ltd, 'Aboriginal Legal Service Western Australia Ltd Submissions Seeking Leave to be Heard as Amicus Curiae', Submission in *BDO v The Queen*, B52/2022, 22 December 2022, 2 [3].

were not referred to in either the special leave hearing or the judgment. Nevertheless, the author has inferred from wording comparisons that the amicus submissions influenced the following passage in the judgment:

> In the first place, wrongness is expressed by reference to the standard of reasonable adults, from which it takes its moral dimension. It is not what is adjudged to be wrong by the law or by a child's standard of naughtiness. The capacity of a child to know what is morally wrong will usually *depend upon an inference drawn from evidence as to the child's intellectual and moral development* …[93]

This passage is similar to the amicus' submission that s 29 of the *Code* requires the Court to have regard to 'an accused child's social, cultural, linguistic and/or developmental characteristics'[94] in determining whether the presumption has been rebutted. The amicus' submission accounted for Australia's multiracial and multicultural society, where children's social, cultural and linguistic development may differ between households. As such, a universal rule for all cases would prevent trial courts from considering the totality of the picture, making the legal system unduly harsh on marginalised communities. In this way, the amicus in *BDO* tried to protect the marginalised community from a 'failure of justice'.[95]

B Legitimacy of the Court

As well as preventing injustice in individual cases, amici can contribute to upholding the legitimacy of the Court more generally.[96] Further, in litigation that involves morally contested questions, the idea of litigation as a mode of dispute resolution between two parties has been categorised as 'naïve and obsolete', given the wide-ranging impact that the judicial decision can have on the public at large.[97] The potential impact of the Court's decision is further reinforced through its apex position in our judicial system.[98] In complex cases requiring the balance of competing individual rights and community objectives, amicus submissions can help the Court to make an informed decision and assist lower courts by having its binding rules and principles account for broader community interests.[99] This permits the Court 'to be confident of the social consequences' of its judgments.[100]

---

[93] *BDO* (n 90) [23] (emphasis added).
[94] Aboriginal Legal Service Western Australia Ltd (n 92) 2 [3].
[95] See Arcioni (n 89) 148.
[96] Andrea Durbach, 'Amicus Curiae: Still Stinging From the Rebuff' in Public Interest Advocacy Centre (ed), *Hearing the People: Amicus Curiae in Our Courts* (Public Interest Advocacy Centre, Paper No 95/16, 1995) 6, 9 ('Amicus Curiae').
[97] John Koch, 'Making Room: New Directions in Third Party Intervention' (1990) 48(1) *University of Toronto Faculty of Law Review* 151, 151. See also Willheim, 'An Amicus Experience in the High Court' (n 67) 105.
[98] See *Levy* (n 15) 601–2 (Brennan CJ). See Section II.
[99] George Williams, 'The Amicus Curiae and Intervener' (n 32) 367, 394. See also Willheim, 'An Amicus Experience in the High Court' (n 67) 105.
[100] Durbach, 'Amicus Curiae' (n 96) 9.

This is not a merely theoretical argument. Indeed, the liberal approach to the admission of amici has been shown to enhance the legitimacy of courts in other jurisdictions. The Supreme Court of Canada is described as 'having an open and participatory decision-making process' where non-party submissions are 'invaluable in most cases'.[101] In the United States, parties in cases of public importance are accepting of amici.[102] This reflects the reality that the courts do determine 'the social, economic and political direction of the nation'.[103] As such, constitutional cases or cases of significant public importance may require broader inputs and should not 'be confined to executive governments and private adversarial parties'.[104] One other way that amici can further the Court's legitimacy is by playing an 'educative role' and promoting public understanding and acceptance of the Court's decisions.[105]

The potential role that amici can play in enhancing the legitimacy of the Court is another main reason why the Court should favour amici's appearance. The caveat to this proposition is that amici should meet the eligibility requirements, which minimise the disadvantages that come with amici as discussed in Section IV. This section now turns to recent case law to demonstrate how amici can enhance the legitimacy of the Court by facilitating the Court's consideration of broad rights.

1 Citta

In rights-based cases such as *Citta Hobart Pty Ltd v Cawthorn* ('*Citta*'),[106] amici can raise new issues which the Court can elect to determine alongside the legal questions raised by the parties themselves. *Citta* concerned 'the entitlement of the respondent to an order under the State Act on the basis that the appellants discriminated on the ground of disability'.[107] The Australian Human Rights Commission ('AHRC') filed an application to appear as amicus. The AHRC tried to assist paraplegic people, such as Mr Cawthorn (the respondent on appeal), by

---

[101] George Williams, 'The Amicus Curiae and Intervener' (n 32) 372, quoting Women's Legal Education and Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Emond Montgomery, 1996) ix ('*Equality and the Charter*').

[102] KP Swann, 'Intervention and Amicus Curiae Status in Charter Litigation' in GA Beaudoin (ed), *Charter Cases 1986–1987* (Les Editions Yvon Blais, 1987) 107.

[103] Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 140, quoting Coper, Wheeler and Williams (n 65).

[104] Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 140, 143. See also *Wurridjal* (n 63) 312 (French CJ).

[105] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 169. See also Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 144; Alarie and Green (n 64) 385–6.

[106] [2022] HCA 16; 276 CLR 216 ('*Citta*').

[107] Ibid 233 [33] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See *Anti-Discrimination Act 1998* (Tas).

explaining how discrimination complaints in state tribunals are more effective and cheaper than any other alternate dispute resolution avenue.[108]

The AHRC also raised an argument about 'whether the jurisdiction conferred on the Tribunal by the State Act … involves the exercise of judicial power'.[109] This was 'taken up by the respondent by way of a notice of contention'.[110] The Court (by majority) held that the AHRC's argument was incorrect in confusing the Tribunal's order 'with the mechanism for enforcement of that order'.[111] Justice Edelman (writing separately) held that contrary to the AHRC's submission, the orders of the Tribunal sought by Mr Cawthorn 'are not merely "recommendations"'.[112] In this context, the Court's decision is legitimised because while the Court rejected the AHRC's argument, it did engage with the arguments and considered alternate perspectives.[113] By refuting alternate perspectives in its judgment, the Court was better able to legitimise the final decision it made.

Irrespective of the Court's conclusion, *Citta* demonstrates that amici can be of substantial influence in raising issues that the parties previously did not raise themselves, which also underpins the 'prevention of failure of justice' rationale. In such instances, an amicus' objective is to assist the Court in ruling in a way that favours broader 'rights' as opposed to the narrower rights raised by the parties themselves.

2 Comcare

In *Comcare v Banerji* ('*Comcare*'),[114] the AHRC was also granted leave as amicus. *Comcare* is a case where an employee claimed for compensation under s 14 of the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('*SRCA*'), alleging that the termination of her employment by the Australian Public Service ('APS') caused her mental injury. The employee had made communications on social media including criticisms of 'departmental policies and administration, Government and Opposition immigration policies, [as well as] Government and Opposition members of Parliament'.[115] Consequently, her employment was terminated for breach of the APS Code of Conduct. The case mainly concerned the

---

[108] Stephen McDonald, '"I'm sorry, I can't hear you … my jurisdiction keeps dropping out": *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16', *Australian Public Law* (Blog Post, 20 May 2022) <https://www.auspublaw.org/blog/2022/05/im-sorry-i-cant-hear-you-my-jurisdiction-keeps-dropping-out-citta-hobart-pty-ltd-v-cawthorn>.
[109] *Citta* (n 106) 226–7 [11] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).
[110] Ibid.
[111] Ibid 228 [15].
[112] Ibid 240 [56].
[113] Ibid, citing *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 256 (Mason CJ, Brennan and Toohey JJ) ('*Brandy [No 2]*').
[114] (2019) 267 CLR 373.
[115] Ibid 389 [2] (Kiefel CJ, Bell, Keane and Nettle JJ).

employee's claim under the *SRCA*. Still, the Court also had to decide whether the termination trespassed the employee's implied freedom of political communication.

Justice Gageler engaged with the AHRC's submission in relation to the implied freedom of political communication by stating that 'the proceeding raises no distinct question concerning the application of the implied freedom of political communication to an exercise of executive power'.[116] This demonstrates how an amicus can raise new issues which may (or may not) warrant consideration by members of the Court. This is critical because appellate litigation involves broader rights and interests. Of course, systemic change may be better achieved through other avenues that are more proactive and 'do not depend on the incrementalism of individual claims'.[117] Even so, courts are still an avenue where 'arguments … are listened to, accorded authority, transcribed and deliberated on'.[118]

C Balancing Non-Governmental Interests Against Governmental Interests

One other main benefit of amici is their assistance in addressing the imbalance of power between government and non-governmental interests.[119] Under s 78A of the *Judiciary Act 1903* (Cth), as noted above, the Commonwealth and State Attorneys-General ('Attorneys-General') are granted the right to appear as amicus.[120] This gives rise to the proposition that it is unnecessary for non-government groups to represent the public's interest because the Attorneys-General fill this function,[121] given that 'it has traditionally been the duty of the Attorney-General to "protect public rights and to complain of excesses of a power bestowed by law"'.[122]

However, the protection of the public's interests should not be 'the sole responsibility of the Attorney[s]-General' because the public interest as represented by Attorneys-Generals of States and Territories are simply not 'ascertainable'.[123] This is because Attorneys-General tend to be representatives of executive

---

[116] Ibid 408 [51].
[117] Ronnit Redman, 'Litigating for Gender Equality: The Amicus Curiae Role of the Sex Discrimination Commissioner' (2004) 27(3) *University of New South Wales Law Journal* 849, 849.
[118] Ibid.
[119] Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 141–3. See also George Williams, 'The Amicus Curiae and Intervener' (n 32) 396, 399, quoting *Reference re Workers' Compensation Act, 1983 (Nfld) (Application to Intervene)* [1989] 2 SCR 335, 340 (Sopinka J).
[120] LJ King, 'The Attorney-General, Politics and the Judiciary' (2000) 74(7) *Australian Law Journal* 444, 446. See Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 140, citing *Judiciary Act 1903* (Cth) s 78A.
[121] George Williams, 'The Amicus Curiae and Intervener' (n 32) 397.
[122] Ibid, quoting *A-G (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237, 272 (Dixon J). See also Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 160.
[123] George Williams, 'The Amicus Curiae and Intervener' (n 32) (n 33) 397–8, citing Kent Roach, 'The Attorney General and the Charter Revisited' (2000) 50(1) *University of Toronto Law Journal* 1, 26–7; Daryl Williams, 'Who Speaks for the Judges?' (Speech, Australian Judicial Conference, 3 November 1996).

government rather than of the people governed.[124] Indeed, an Attorney-General's role as a defender of the public interest is often in 'conflict with the political or economic priorities of the government'.[125] For similar reasons, the Attorneys-General have been refused leave to participate as non-parties in criminal proceedings.[126] Besides, s 78A of the *Judiciary Act 1903* (Cth) does not prevent Attorneys-General from intervening in non-constitutional matters.[127] This reality places 'public resources in favour of government interests, leaving the individual with the heavy burden of contradicting each and every argument'.[128]

The imbalance between government and non-government interests is further illustrated by the Court's seeming tendency to refuse to grant non-government groups leave to intervene [129] while readily granting leave to statutory bodies such as the AHRC.[130] This imbalance is not always present: in *Palmer v Western Australia*, an exceptionally wealthy individual was able to use his resources to sue the State of Western Australia persistently.[131] However, Williams has conducted a study suggesting that intervention rates of non-government amici are particularly low,[132] arguing that this

> reveals a strong distrust by … the Court of the role that might be played by non-government interests [and a view of] such interventions as more likely to waste the Court's time than to assist in any meaningful way.[133]

---

[124] Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 141, citing *Levy* (n 15) 650–651 (Kirby J) as an example where the government was seeking to intervene in order to protect their regulations rather than to protect the citizen's implied constitutional right to freedom of political communication. See also King (n 120) 446.

[125] George Williams, 'The Amicus Curiae and Intervener' (n 32) 398.

[126] Ibid, citing *R v Elliot* (1996) 185 CLR 250; *Papakosmas v The Queen* (1999) 196 CLR 297.

[127] Aleksov (n 2) 561, citing *DJL v Central Authority* (2000) 201 CLR 226; *Yanner v Eaton* (1999) 201 CLR 351; cf *Levy* (n 15) 603 (Brennan CJ).

[128] George Williams, 'The Amicus Curiae and Intervener' (n 32) 398–9, citing *Reference re Workers' Compensation Act, 1983 (Nfld) (Application to Intervene)* [1989] 2 SCR 335, 340 (Sopinka J).

[129] Clark (n 31) 89.

[130] George Williams, 'The Amicus Curiae and Intervener' (n 32) 395. See also Commonwealth, State and Territory Attorneys-General: *Judiciary Act 1903* (Cth) s 78A(1); *Australian Human Rights Commission Act 1986* (Cth) ss 11(1)(o), 46PV.

[131] See *Palmer v Western Australia* [2020] HCATrans 62; *Palmer v Western Australia* [2020] HCATrans 87; *Palmer v Western Australia* [2020] HCATrans 88; *Palmer v Western Australia* [2020] HCATrans 108; *Palmer v Western Australia* [2020] HCATrans 138; *Palmer v Western Australia* [2020] HCATrans 147; *Palmer v Western Australia* [2020] HCATrans 148; *Palmer v Western Australia* [2020] HCATrans 152; *Palmer v Western Australia* [2020] HCATrans 174; *Palmer v Western Australia* [2020] HCATrans 178; *Palmer v Western Australia* [2020] HCATrans 179; *Palmer v Western Australia* [2020] HCATrans 180; *Palmer v Western Australia* [2020] HCATrans 197; *Palmer v Western Australia* [2020] HCATrans 223; *Palmer v Western Australia* (2021) 272 CLR 505; *Palmer v Western Australia* [2021] HCATrans 2; *Palmer v Western Australia* [2021] HCATrans 33; *Palmer v Western Australia* [2021] HCATrans 48; *Palmer v Western Australia* [2021] HCATrans 56; *Palmer v Western Australia* [2021] HCATrans 87; *Palmer v Western Australia* [2021] HCATrans 104; *Palmer v Western Australia* [2021] HCATrans 106; *Palmer v Western Australia* [2021] HCATrans 107; *Palmer v Western Australia* [2021] HCATrans 108; *Palmer v Western Australia* (2021) 274 CLR 286.

[132] George Williams, 'The Amicus Curiae and Intervener' (n 32) 386.

[133] Ibid 395.

In cases involving a balancing act between 'individual rights and government interests, this entrenched preference in favour of government intervention may, [in substance and appearance], adversely affect' the Court's decisions.[134]

Turning now to the case of *Garlett v Western Australia* ('*Garlett*').[135] *Garlett* is a case that can assist in demonstrating how amici can balance non-governmental interests against governmental interests.

3 Garlett

Garlett[136] concerned the question of whether the inclusion of 'the offences of robbery and assault with intent to rob as "serious offences"'[137] under the *High Risk Serious Offenders Act 2020* (WA) ('*HRSO Act*') breached the principle in *Kable v Director of Public Prosecutions (NSW)*.[138] The *HRSO Act* permits continued detention of certain high-risk serious offenders in anticipation of their crime.[139] As such, the legal question was whether the *HRSO Act* impaired the institutional integrity of the Western Australian Supreme Court in a way which made it unsuitable to exercise federal judicial power as outlined in Chapter III of the *Australian Constitution*.[140] The case also raised morally contested questions of how long one can be subjected to a post-sentence preventive detention and supervision regime before having a 'fresh start' in life.

The amicus in this case was Mr Derek Ryan. Similar to Mr Garlett, Mr Ryan was 'subject to a supervision order under the *HRSO Act* [and] was convicted of the "serious offence" of robbery'.[141] The Court granted Mr Ryan 'leave to provide written submissions on the basis that he sought to make submissions "which the Court should have to assist it to reach a correct determination" and which had not yet been presented'.[142]

Garlett is an example where the amicus tried to prevent a 'failure of justice' by levelling the playing field in litigation where the government was the opposing party. This is also an instance where the various benefits of amicus intervention can complement one another. In his submissions, Mr Ryan provided the Court with 'legislative facts', which are often critical materials for the Court in its deliberation

---

[134] Ibid 396.
[135] (2022) 404 ALR 182 ('*Garlett*').
[136] Ibid.
[137] Ibid.
[138] (1996) 189 CLR 51 ('*Kable'*).
[139] *Garlett* (n 135) 233 [204] (Edelman J).
[140] See *Kable* (n 138). See also *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCA 49, (2009) 240 CLR 319; *South Australia v Totani* [2010] HCA 39, (2010) 242 CLR 1 ('*Totani*'); *Wainohu v New South Wales* [2011] HCA 24, (2011) 243 CLR 181.
[141] Ibid 204 [93] (Kiefel CJ, Keane and Steward JJ).
[142] Ibid, citing *Roadshow Films Pty Ltd v iiNet Ltd [No 1]* (2011) 248 CLR 37, 39 [3] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) ('*Roadshow Films*').

on the constitutionality of legislation. Specifically, Mr Ryan presented jurisprudence on the practical operation of the *HRSO Act*. Justice Edelman stated that '[a]lthough this Court had no legislative facts before it on the subject, one potentially significant issue in the practical operation of the *HRSO Act* was referred to in the written submissions for Mr Ryan.'[143] The examples of the 'practical operation' of the *HRSO Act* were not otherwise available before the Court despite their importance.

Mr Ryan's submissions were heavily mentioned and considered in the judgments in *Garlett*.[144] For instance, Kiefel CJ, Keane and Steward JJ held that

> the legislative removal of procedural safeguards of fairness, characteristic of the exercise of judicial power, has been significant in subsequent decisions where legislation has been successfully challenged as infringing the *Kable* principle. These cases may conveniently be discussed by reference to the submissions made by Mr Ryan.[145]

Their Honours further held that the 'thrust of Mr Ryan's submissions … was that the *HRSO Act* enlists the Court to give effect to legislative policy'.[146] The majority appreciated that Mr Ryan relied particularly upon the Court's decision in *South Australia v Totani*.[147] Justice Edelman separately held '[a]nd, despite the detailed submissions of Mr Ryan, as amicus curiae in support of the contrary conclusion, the Supreme Court of Western Australia is not invalidly enlisted to give effect to legislative and executive policy'.[148]

Garlett shows that amici can influence the Court's judgment by trying to prevent a 'failure of justice' and by trying to even out the playing field in litigation where the government is the opposing party. This also applies to cases where the government's submissions are not well contradicted.

D Conclusion

This section examined how amici allow for unheard voices to have a say in the law-making process of the Court.[149] As such, the admission of amici submissions can enhance the Court's legitimacy.[150] This is achieved in part by

---

[143] *Garlett* (n 135) 249 [271] (Edelman J). See Derek Ryan, 'Proposed Submissions of Derek Ryan', Submission in *Garlett v Western Australia*, P54/2021, 31 January 2022, [28].
[144] See, eg, *Garlett* (n 135) 205 [102] (Kiefel CJ, Keane and Steward JJ).
[145] Ibid 204 [92].
[146] Ibid, citing *Kuczborski v Queensland* [2014] HCA 46, [140] (Crennan, Kiefel, Gageler, and Keane JJ).
[147] *Garlett* (n 135) 204 [96], citing *Totani* (n 140) 21 [3]–[4] (French CJ).
[148] *Garlett* (n 135) 247 [261].
[149] Ruben J Garcia, 'A Democratic Theory of Amicus Advocacy' (2008) 35(2) *Florida State University Law Review* 315, 319–20; Ryan Salzman, Christopher J Williams and Bryan T Calvin, 'The Determinants of the Number of Amicus Briefs Filed Before the US Supreme Court: 1953–2001' (2011) 32(3) *Justice System Journal* 293, 294–5; Simmons (n 31) 190.
[150] Garcia (n 149) 319–320. See also Simmons (n 31) 199–202.

contributing to general public understanding and acceptance of the Court's decisions.[151] The section also examined how adjudication at the final appellate level is a difficult task which requires the Court to resolve complex issues of legal principle and policy.[152] Amici may be more able at aiding the Court in finding and declaring the law than the parties themselves.[153] In such circumstances, they may help to prevent a 'failure of justice'.[154] Further, the analysis also demonstrated how amici can help balance governmental interests with non-governmental interests.

These benefits provide essential context for my argument that the Court should liberalise its approach to amici. However, these benefits also come with certain disadvantages.

IV DISADVANTAGES OF AMICI CURIAE

Amici curiae's main disadvantages include the workload and costs that amici can impose on the Court and on the parties, inequitable amici appearances, the potential for amici to be unfair or prejudicial to a certain party, and the challenge that amici may pose to the Court's role in a democratic society.

A Workload and Costs

Amicus intervention can lead to an expansion of the issues in dispute[155] which lengthens the hearing and increases costs for the parties.[156] As such, costs associated with intervention from these 'uninvited guests' can be unfair to the parties involved.[157] From the Court's perspective, the admission of amici poses the risk of unnecessary additional work imposed on 'an over-worked court already submerged in an ocean of materials, [that are not] relevant and illuminating'.[158] Sir Anthony Mason emphasises the importance of maintaining the Court's efficiency and preventing an abuse of process with pointless or time-consuming amici submissions.[159] It is accepted that the time and costs caused by amici should not outweigh any anticipated assistance they would provide.[160]

---

[151] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 169.
[152] *Levy* (n 15) 651 (Kirby J). See also Durbach, 'Interveners in High Court Litigation' (n 52) 177.
[153] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 168; *Levy* (n 15) 650–1 (Kirby J).
[154] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 168, quoting *Krippendorf* (n 50) 285.
[155] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 167.
[156] Ibid. See also Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 139. Willheim admits that '[i]n the majority of trials, intervention by [amicus curiae] is likely to impede speedy resolution of disputes'. However, this cost is one a party must bear when they choose to litigate in the High Court: at 143. Further, any increase in the length of the hearings 'is not likely to be significant': at 145.
[157] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 167.
[158] Mason, 'Interveners and Amici Curiae in the High Court' (n 22) 174; Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20(1) *Adelaide Law Review* 49, 55 ('Constitutional Interpretation').
[159] Mason, 'Interveners and Amici Curiae in the High Court' (n 22) 175.
[160] *Breckler* (n 15) 134 [103] (Kirby J), citing *Levy* (n 15) 604–5 (Brennan CJ), 650–2 (Kirby J).

There are four counterarguments against this disadvantage, especially in the Australian context. First, the liberalisation of amici admission is unlikely to lead to an influx of amicus applications because those applications are 'complex, time-consuming and costly, particularly as legal aid is generally unavailable'.[161] The limited funding for legal aid means that amicus applications will only be filed by parties who consolidate enough resources, and not by any individual with mere intellectual curiosity. Secondly, notwithstanding the existence of a statutory bill of rights in some jurisdictions, Australia does not have a constitutional bill of rights.[162] The absence of a bill of rights means that courts are not conferred with the power to invalidate laws that might be inconsistent with rights that are not expressly or impliedly stated in the *Australian Constitution*.[163] As such, amici will balance the utility of participating in the proceedings against the significant resource required, even if the prospect of success is high. Thirdly, intervention requires a potential amicus to satisfy a relatively stringent test for a grant of leave.[164] Section V will argue that amici who satisfy this test will be those whose value to the proceedings outweighs their costs. Fourthly, the Court can safeguard against any abuse of this process because it has procedural control over amici.[165] For instance, the Court can decide 'the receipt, duration and mode of reception of [amicus] submissions [and] impose conditions as to any additional costs incurred … [to] protect the parties and the process from dangers of abuse'.[166] Furthermore, as Ernst Willheim argues, the Court has a relatively small volume of cases and 'speedy resolution' is less of a concern in comparison to lower courts.[167]

This article argues that the additional burden upon the Court is 'modest' in comparison to the potential range of relevant arguments made available to the Court, the increased avenue for public input in Court decisions, and consequently, the legitimisation of the Court 'in the eyes of the wider community'.[168] The workload and costs of amicus intervention do not appear to be a hurdle in the

---

[161] Durbach, 'Interveners in High Court Litigation' (n 52) 181. See also Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 144.

[162] Lisa Taylor, 'Should Australia Have a Bill of Rights?', *Go To Court* (Web Page, 3 August 2018) <https://www.gotocourt.com.au/legal-news/australia-bill-of-rights/>.

[163] *Breen v Williams* (1996) 186 CLR 71 at 115 (Gaudron and McHugh JJ). See also George Williams, 'The Amicus Curiae and Intervener' (n 32) 401; Rosalind Dixon and Gabrielle Appleby, 'Constitutional Implications in Australia: Explaining the Structure–Rights Dualism' in Rosalind Dixon and Adrienne Stone (eds), *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 343, 361.

[164] Cusack and Riebl (n 36) 126.

[165] *Breckler* (n 15) 135 [105] (Kirby J).

[166] Ibid. See Cusack and Riebl (n 36) 124, citing *Breen [No 1]* (n 58) 533 (Kirby P). See also George Williams, 'The Amicus Curiae and Intervener' (n 32) 402. Williams further argues that with appropriate Court rules and procedures, amicus intervention would not 'unduly [burden] the Court or the parties' and that '[i]n any event, the benefits of intervention for the Court and the public far outweigh the costs'.

[167] Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 139, 145.

[168] Ibid.

American context, or at least the potential benefits of amici prevail as a priority. The practical reality in the United States is that the Supreme Court automatically grants leave for amicus to appear.[169]

B Inequitable Amici Appearances

Traditionally, an amicus had a non-partisan role and provided 'disinterested advice to a court on a point of law'.[170] Now, it has become more accepted that the amicus can become a 'partisan [advocate]', often attempting to advance 'a particular policy position or … a defined goal'.[171] Unclear rules regarding whether a special interest group has sufficient interest in the proceedings to be admitted as an amicus may be detrimental to the public perception of the rule of law.[172] For instance, if the only groups capable of joining these proceedings are 'well-funded', this can lead to the perception that justice only serves the rich and powerful.[173] Furthermore, special interest groups can be motivated by the public attention that litigation would bring to their political cause.[174] Amici with self-serving interests (e.g. political interests) can lead to an expansion of the issues in dispute.[175] Furthermore, giving special interest groups a chance to be heard in the Court in cases where these groups have not addressed 'the relevant legal question' or the relevant facts will lead to an abuse of the justice system.[176] As such, amici have been viewed as 'undesirable busybod[ies]'.[177]

C Unfair or Prejudicial to a Party

Amici can be seen as problematic when motivated to support a particular party 'rather than [seeking] to influence the general development of the law or to bring a fresh perspective before the Court'.[178] Amici may side with one of the parties,

---

[169] Joseph D Kearney and Thomas W Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148(3) *University of Pennsylvania Law Review* 743, 762.
[170] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 160, citing *Bropho* (n 5) 172. See also Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 135; George Williams, 'The Amicus Curiae and Intervener' (n 32) 368.
[171] George Williams, 'The Amicus Curiae and Intervener' (n 32) 368. See also Mason, 'Interveners and Amici Curiae in the High Court' (n 22) 174; Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 161.
[172] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 168.
[173] Ibid.
[174] Ibid.
[175] Ibid 167.
[176] Mason, 'Constitutional Interpretation' (n 158) 55.
[177] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 159–61, quoting *Australian Railways Union* (n 33) 331 (Dixon J) referred to in *Re Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513, 522 (Mason J), 530 (Deane J) ('*Ludeke*'). See also *Ludeke* at 520–1 (Gibbs CJ, Dawson J agreeing at 532); *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177, 182 (argument); Durbach, 'Interveners in High Court Litigation' (n 52) 178; George Williams, 'The Amicus Curiae and Intervener' (n 32) 365.
[178] George Williams, 'The Amicus Curiae and Intervener' (n 32) 372.

effectively extending the time and space allocated to that party's argument.[179] This can result in an imbalance where various amici support one party, while the other party has none.[180] Those partisan submissions tend to provide 'no value' to the Court and only serve to lengthen the hearing and increase costs.[181] In such context, the amicus becomes a tool to circumvent the adversarial process of the Australian legal system.[182]

Furthermore, interference from 'uninvited guests'[183] is also both unfair to the parties in the case and contradictory to the public interest of the just, efficient, timely, and cost-effective resolution of real issues in dispute.[184] In the words of Sir Anthony Mason, 'the support of a party by a number of interveners can advance the presentation of one party's case' through 'tactical collusion between a party and supporting interveners'.[185] Furthermore, the amicus may 'hijack' a party's case. One example is *Romer v Evans*[186] where the United States Supreme Court made its decision based on amicus submissions rather than the submissions of the parties.[187]

For trial courts, this argument is reasonable. However, the High Court cannot simply ignore the fact that its judgments can significantly influence broad rights and interests. For instance, in Canada, 'interveners have appeared in non-constitutional cases in order to take advantage of another forum in which to debate and develop [constitutional] values'.[188] Australian amici can play a similar role in constitutional cases. In the United States, amici play an important and useful role in situations where 'matters of national interest or of public importance are litigated in suits between private parties.[189] Again, this article argues that Australian amici play a similarly important role.

In addition, the Court rules and procedures also address this issue by requiring that amici 'state precisely the point in the intervention that is likely to be different from those likely to be made by parties or other interveners'.[190] A study has shown that an imbalance in amicus support for one party has not increased that party's

---

[179] See *Ryan v Commodity Futures Trading Commission*, 125 F 3d 1062, 1063 (Richard Posner J) (7th Cir, 1997).
[180] Ibid.
[181] Ibid.
[182] See Kylie Burns, 'The Australian High Court and Social Facts: A Content Analysis Study' (2012) 40(3) *Federal Law Review* 317, 333. See also Clark (n 31).
[183] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 167.
[184] See, eg, *Uniform Civil Rules 2020* (SA) s 1.5.
[185] Mason, 'Interveners and Amici Curiae in the High Court' (n 22) 175.
[186] 517 US 620 (1996).
[187] Mason, 'Interveners and Amici Curiae in the High Court' (n 22) 174.
[188] George Williams, 'The Amicus Curiae and Intervener' (n 32) 388, citing *Equality and the Charter* (n 101) xxv; *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 603 (McIntyre J).
[189] Christina Murray, 'Litigating in the Public Interest: Intervention and the Amicus Curiae' (1994) 10(2) *South African Journal on Human Rights* 240, 245.
[190] George Williams, 'The Amicus Curiae and Intervener' (n 32) 372.

likelihood of success in the proceedings.[191] Partisanship seems to be of less concern given that the effectiveness and perhaps, more relevantly, the success of amici are measured against the 'valuable new information' that they can offer to the Court.[192]

D Overstepping the Court's Role in Society

Some scholars argue that the Court's role in a modern democratic society is limited to adjudicating disputes between parties in accordance with existing law.[193] As such, the Court is not the solution 'for every social, political or economic problem'.[194] Instead, it is the role of Parliament and to an extent, the executive to decide which policy direction to pursue.[195] In the words of McHugh J, 'judicial law-making operates retrospectively[;] the rule of law would be seriously threatened if law-making was a routine function of courts'.[196] In essence, there is a limit on judicial law-making which is very different from law made 'by a popular elected legislature'.[197] Furthermore, the legitimacy of the adversarial judicial system could be at risk when actual parties' interests are substituted for broader rights and interests.[198] It is further argued that it is unconstitutional and undemocratic for the judiciary to '[encroach] into the legislative sphere'.[199]

However, the reality is not so black and white, and the boundaries between the judiciary and legislature can blur.[200] As mentioned in Section II, law-making is part of the Court's role and responsibility. Thus, the Court needs to take into consideration the views of people who will be indirectly affected by its decisions, even if such people are not parties to the proceeding.[201] This is best highlighted through the case of *Superclinics*.[202] As mentioned, *Superclinics* concerned a woman seeking damages for the 'loss of the opportunity to terminate a pregnancy' after a number of medical practitioners repeatedly failed to detect the pregnancy

---

[191] Ibid 376, quoting Kearney and Merrill (n 169) 750.
[192] Ibid.
[193] Owens (n 40) 195, citing *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374 (Kitto J). See also Shireen Morris, 'The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples When Making Laws for Indigenous Affairs' (2015) 26(3) *Public Law Review* 166, 167.
[194] Owens (n 40) 193, quoting *Breen v Williams* (1996) 186 CLR 71, 115 (Gaudron and McHugh JJ). See also *Breen v Williams* at *98*–9 (Dawson and Toohey JJ).
[195] Owens (n 40) 193–4. See also *Garcia v National Australia Bank Limited S18/1997* [1998] HCATrans 50, 39.
[196] McHugh (n 51) 43.
[197] Ibid.
[198] Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 167.
[199] Ibid.
[200] Ibid, citing Justice Michael Kirby, 'Judicial Activism' (1997) 16(2) *Australian Bar Review* 10, 13. 'Clearly, the law-making process was not (and is not) confined to parliament': George Williams, 'The Amicus Curiae and Intervener' (n 32) 394. See also Clark (n 31) 72; Simmons (n 31) 197.
[201] See Chan and Kislowicz (n 64) 4–9; Alarie and Green (n 64) 386–7.
[202] *Superclinics* (n 19).

properly.[203] The Catholic Church and the AHCA both filed for leave to appear as amicus. If the voice of the Catholic Church was the only one to be considered, then 'there is a serious risk that [the Court's image] would be damaged by the perception that its justice is partial'.[204]

This article argues that the law-making power of the Court, as mentioned in Section II, can help legitimise the Court's role in society.[205] While the legislature can delay things until the democratic electorate forces them to act, the Court, on occasion, must make the first move because it has no choice but to arbitrate the case that appears before it.

E Conclusion

The four main disadvantages of amici are workload and costs, inequitable appearances, unfair or prejudicial effects on actual parties, and the possible overstepping of the Court's function in a democratic society. While those disadvantages are legitimate and real, they can be minimised. In the next section, this article will demonstrate that the rigorous criteria of admission will filter out submissions where the advantages are outweighed by the disadvantages, allowing the Court to maximise the utility of amici.

V CRITERIA OF ADMISSION

This section analyses the Court's jurisprudence on the general eligibility criteria for amici applications. The satisfaction of these criteria is a prerequisite for the Court to entertain the amicus application, but it is not a guarantee that leave to appear will be granted.[206] The criteria introduced in this section are: first, that the amicus can provide unique assistance to the Court; second, that the amicus should have a certain degree of 'interest' in the proceedings; and third, that the potential costs from amicus intervention should not outweigh any potential assistance that they can provide to the Court.[207] This section demonstrates that when an amicus meets the eligibility criteria, the advantages generally outweigh the disadvantages by a considerable margin.[208]

---

[203] Ibid.
[204] Owens (n 40) 196.
[205] McHugh (n 51) 43.
[206] Hopper (n 13) 85; Clark (n 31) 89. See also Henry Burmester, 'Interveners and Amici Curiae' in Michael Coper, Tony Blackshield and George Williams, *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 357; Pierce (n 25) 70; Christopher Goff-Gray, 'The Solicitor-General in Context: A Tri-Jurisdictional Study' (2011) 23(2) *Bond Law Review* 48, 79; Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (n 49).
[207] *Wurridjal* (n 63) 312 (French CJ).
[208] See Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 137.

A Unique Assistance to the Court

One critical and influential criterion is the amicus' ability to provide the Court with unique and relevant assistance otherwise not offered by the parties.[209] There is a sufficient historical trend that indicates that leave is usually granted when the amicus can show that their submission is capable of providing a specialised viewpoint, or industry perspective.[210] Persuasive as it may be, this criterion is not a guarantee of leave for the amicus. In *Brandy*,[211] the Court refused to grant leave for intervention as an amicus, because counsel conceded that there was no gap for them to fill in between parties' submissions.[212] As the Full Federal Court of Australia rightly observed in *United States Tobacco Co v Minister for Consumer Affairs*,[213] 'a court has an inherent or implied power, exercised occasionally, to ensure that it is adequately informed of matters which it ought to take into account in reaching its decision'.[214] This notion can also improve the efficiency of the Court by ensuring that accurate adjudications are reached quickly.[215]

B 'Interest' in the Proceedings

The Court considers the 'interest' that an amicus may have in the proceeding to be influential and important in its admission consideration. [216] The term 'interest' in this instance is broader than the interests of the parties to the proceedings as often understood in lower courts especially trial courts. The term 'interest' here refers to any kind of interest (which is not limited to financial and legal interests) of non-parties that would be affected by the outcome of the litigation. As Ernst Willheim argues, 'material interests' should not be the primary or sole consideration in constitutional cases.[217] The examination in this article demonstrates that the 'interest' requirements are not inflexible, meaning that the interest can be either direct or indirect. Similarly to the first criterion, this 'interest'

---

[209] *Breckler* (n 15) 134–5 [104] (Kirby J), citing Mason, 'Interveners and Amici Curiae in the High Court' (n 22); Redman (n 117) 851; Christopher Staker, 'Application to Intervene as Amicus Curiae in the High Court' (1996) 70(5) *Australian Law Journal* 387, 387–9. See also *Levy* (n 15) 604–5 (Brennan CJ), quoted in Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 166.

[210] *Breckler* (n 15) 134 [103] (Kirby J), citing *Tasmanian Dam Case* (n 45); *David Grant* (n 45); *Lange* (n 45); *Levy* (n 15) 650–651 (Kirby J); *Project Blue Sky* (n 45); Kenny, 'Interveners and Amici Curiae in the High Court' (n 1).

[211] *Brandy [No 2]* (n 113).

[212] Staker (n 209) 387, citing *Brandy [No 2]* (n 113) 248; *Brandy [No 1]* (n 37) 3.

[213] (1988) 20 FCR 520.

[214] Ibid 534.

[215] See Neville (n 53) 192.

[216] *Breckler* (n 15) 134 [103] (Kirby J), citing *Tasmanian Dam Case* (n 45); *David Grant* (n 45); *Lange* (n 45); *Levy* (n 15) 650–651 (Kirby J); *Project Blue Sky* (n 45); Kenny, 'Interveners and Amici Curiae in the High Court' (n 1).

[217] Willheim, 'Amici Curiae and Access to Constitutional Justice' (n 2) 142, citing *Levy* (n 15) 650 (Kirby J).

criterion is not a guarantee for leave. Again, there is sufficient historical precedent to demonstrate that when parties have a broad 'interest' in the proceeding, they are eligible to obtain leave to appear before the Court.[218]

The level of 'interest' required seems to be varied. On one hand, the Court drew an analogy for such 'interest' to be as high as an '[interest] in other pending litigation'[219] and stated that an amicus will not be admitted if it only has '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'.[220] This level of 'interest' is similar to that of an 'intervener,' where one is required to have a direct interest in the proceedings. On the other hand, the Court has also said that the 'interest' requirement for amici should not be as high as that for an 'intervener'.[221] This indicates that amici do not need to show they have a direct or substantial interest.

Yet this higher threshold has been evident in many instances. For instance, in *A-G (Cth) v Breckler* ('*Breckler*'),[222] the Association of Superannuation Funds of Australia Limited ('the Association') applied for leave to appear as amicus in a proceeding that concerned the validity of the creation of a Superannuation Complaints Tribunal by the *Superannuation (Resolution) of Complaints Act* (1993) (Cth). For context, the body 'represents all segments of the industry' and holds approximately '80 percent of the total superannuation funds under management in Australia'.[223] The Court rejected the Association's application to appear as amicus. This is despite many, if not most, of its members having a vested interest in the Court's decision.[224]

Conversely, the low threshold can be demonstrated in *Nguyen*[225] and *BDO*.[226] *Nguyen* concerned whether the prosecution had an obligation to tender a record containing mixed statements.[227] The amicus in *Nguyen* was the North Australian Aboriginal Justice Agency. In *Nguyen*, the amicus made submissions on legal advice regarding the mixed statements.[228] Turning now to *BDO*, the case concerned an accused's criminal responsibility for acts done when he was 10 years old, but under 14 years old. The amicus in *BDO* was the Aboriginal Legal Service of

---

[218] See, eg, *Tasmanian Dam Case* (n 45); *David Grant* (n 45); *Lange* (n 45); *Levy* (n 15) 650–651 (Kirby J); *Project Blue Sky* (n 45); *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395.
[219] *Roadshow Films* (n 142) 39 [2] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also Goff-Gray (n 206) 79; Burmester (n 206) 357.
[220] *Roadshow Films* (n 142) 39 [2].
[221] Ibid 39 [4].
[222] *Breckler* (n 15).
[223] Ibid 136 [104] (Kirby J).
[224] Ibid 136 [107].
[225] *Nguyen* (n 77).
[226] *BDO* (n 90).
[227] *Nguyen* (n 77).
[228] See North Australian Aboriginal Justice Agency (n 81) 7–8 [20].

Western Australia Ltd. In *BDO*, the amicus made submissions on the relevant underlying facts for the purpose of interpreting the Queensland statutory text.[229] In both of these cases, the amicus was granted leave even though they essentially had no direct interest in the proceeding. This is evident in the amicus submissions regarding why leave should be granted, which focused entirely on their knowledge and expertise as opposed to any interest they may have.[230] At most, the decision would have impacted the amount of certainty with which they could give advice to potential clients.[231] But this level of interest is no more than that of the next person who could potentially be impacted by a decision due to its precedential value. This level of interest is akin to the interest of the Association in *Breckler*.

In *Levy v Victoria* ('*Levy*'),[232] Brennan CJ said that 'the hearing of an amicus curiae is entirely in the Court's discretion'.[233] That discretion is exercised based on the principle of natural justice.[234] This article accepts that the question of granting leave is guided by discretion, but as demonstrated, there are times where such discretion is exercised liberally, and times when such discretion is exercised conservatively. Despite the mixed expectations imposed by the Court, it seems that the Court requires that a potential amicus have an indirect but substantial affection of interest.[235]

C Costs Do Not Outweigh Utility

The third and last eligibility criterion is that the cost of having an amicus should not outweigh the utility. In *Breckler*,[236] the Court held that 'one important constraint which limits [the discretionary] power [to grant leave to amici] is that time and cost caused by the intervention should not outweigh any anticipated assistance it would provide'.[237] Indeed, as held in *Levy*, 'the grant may be limited, if appropriate, to particular issues and subject to such conditions, as to costs or otherwise, as will do justice as between all parties'.[238] Brennan CJ held that 'all that can be said is that an amicus will be heard…provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not

---

[229] See Aboriginal Legal Service Western Australia Ltd (n 92) 2 [3].
[230] See North Australian Aboriginal Justice Agency (n 81) 2–6 [4]–[20] for *Nguyen*; Aboriginal Legal Service Western Australia Ltd (n 92) 3–7 [6]–[14] for *BDO*.
[231] See North Australian Aboriginal Justice Agency (n 81) 7–8 [20].
[232] *Levy* (n 15) (Kirby J). See also *Roadshow Films* (n 142) 39 [2].
[233] *Levy* (n 15) 604 (Brennan CJ).
[234] Ibid 601–4 (Brennan CJ). See also *Ludeke* (n 177) 522 (Mason J).
[235] See *Roadshow Films* (n 142) 39 [5] (for high threshold) and *BDO* (n 90); *Nguyen* (n 77) (for low threshold).
[236] *Breckler* (n 15).
[237] Ibid 134 [103] (Kirby J), citing *Levy* (n 15) 604–5 (Brennan CJ), 650–2 (Kirby J).
[238] *Levy* (n 15) 603 (Brennan CJ).

disproportionate to the assistance that is expected'.[239] The Court has since accepted Brennan CJ's principle.[240] Again, although this is a persuasive factor, it is not a guarantee of leave for a potential amicus.

D Conclusion

The three established criteria are meant to ensure that the utility of amici is maximised and any flaws are minimised. Thus, rather than approaching the grant of leave to amicus in a conservative manner,[241] the Court should liberalise its approach to amici applications provided that the applicant meets the established criteria.[242] This is a departure from the current status quo whereby satisfaction of the criteria is only the first hurdle for amici to overcome, as they still have to persuade the Court to exercise its discretion in favour of the application. The next section will analyse cases where, with due respect, certain parties should have been admitted as amicus.

VI THEORY IN PRACTICE

This section will examine cases where amici should have been admitted because they met all of the three eligibility criteria, illustrating the Court's conservative approach. The following cases have been selected for this purpose: *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* ('*Kingdom of Spain*');[243] *D'Arcy v Myriad Genetics Inc* ('*D'Arcy*');[244] and *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* ('*Australian Communications*').[245] These cases illustrate the main argument of this article, namely, that the Court should take a more liberal approach to the admission of amici provided that they meet the three eligibility criteria. This section will also examine cases where amici were rightfully denied leave due to the eligibility criteria not being met, focusing on *Unions NSW v New South Wales* ('*Unions*')[246] and *JT International SA v Commonwealth* ('*JT International*').[247]

---

[239] Ibid 604–5.
[240] *Roadshow Films* (n 142) 38–9 [2].
[241] Clark (n 31) 89; MG Sexton, 'Intervention' in Graeme Blank and Hugh Selby (eds), *Appellate Practice* (Federation Press, 2008) 107.
[242] Kirby, 'Deconstructing the Law's Hostility to Public Interest Litigation' (n 49) 547–8.
[243] (2023) 408 ALR 658 ('*Kingdom of Spain*').
[244] (2015) 258 CLR 334 ('*D'Arcy*').
[245] (2015) 255 CLR 352 ('*Australian Communications*').
[246] (2019) 264 CLR 595 ('*Unions*').
[247] (2012) 250 CLR 1 ('*JT International*').

A Cases Where Amici Should Have Been Admitted

1 Kingdom of Spain[248]

This case relates to the interpretation of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ('*ICSID Convention*').[249] The issues before the Court concerned whether, and to what degree, entry by a foreign state into the *ICSID Convention* constitutes a waiver of foreign State immunity according to the *Foreign States Immunities Act 1985* (Cth), and the scope of the Australian courts' recognition and enforcement of arbitral awards. The European Commission ('EC') sought leave to intervene as an amicus. For the following reasons, the EC arguably satisfied the three established eligibility criteria, and the exercise of discretion upon such satisfaction should with respect, have been in favour of the EC.

First, the EC arguably satisfied the indirect interest criterion. In its submissions, the EC explained that it

> is an institution of the European Union and acts on behalf of the EU as its external representative. The EC is charged with the duty to present the official position of the EU and speaks on behalf of the EU before international courts and arbitral tribunals.[250]

First, all the parties to the proceeding were either members of the EU or were incorporated in EU member states.[251] Second, the subject of the appeal raises an important issue of EU law. Thirdly, the EC is also the 'Guardian of the Treaties' for EU members and advocates for the EU before international courts and arbitral tribunals.[252] Fourthly, the EC argued that it 'ought to be heard, not only as a matter of international comity, but to assist the Court in understanding the relevant principles of EU law at stake'.[253] Finally, this case carried implications for the rights and obligations of EU Member States and citizens with respect to subsequent enforcement actions in Australia involving intra-EU arbitral awards. [254] Together, these factors demonstrated that the EC had considerable indirect but substantial interest in the proceeding.

---

[248] *Kingdom of Spain* (n 243).
[249] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).
[250] European Commission, 'Submissions of the European Commission Seeking Leave to be Heard as Amicus Curiae', Submission in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl*, S43/2022, 20 May 2022, 3 [3].
[251] Ibid 3 [4].
[252] Ibid 4 [9].
[253] Ibid.
[254] Ibid.

The EC also demonstrated unique expertise and the capacity to assist without imposing an undue workload nor additional burden on actual parties to the proceeding. The EC submissions addressed the rules of EU law and international law, which made the EC position different to that advanced by Spain, 'which focus on the ambiguity of any waiver as opposed to its necessary absence as a matter of applicable law'.[255]

With respect to the issue of costs and workload, the EC submissions raised discrete and distinct points within the proceeding and would not have imposed undue costs nor workload on parties.[256] This is because the EU was content to consume no more than ten minutes of the Court's time.[257] On balance, the EC satisfied the established eligibility criteria for admission.

Having arguably satisfied the three eligibility criteria, the Court should, with respect, have exercised its discretion in favour of the EC.[258] Furthermore, the admission of the EC could have played a crucial role in preventing a failure of justice. The EC, as the representative voice of its members, is able to defend their interests, thereby ensuring justice.[259] With its expertise in EU law,[260] the EC's contribution would have added to the range of arguments made before the Court thereby enhancing its legitimacy.

2 D'Arcy

The second case is *D'Arcy*,[261] which concerns the interpretation of the term 'patentable invention' in s 18(1)(a) of the *Patents Act 1990* (Cth) ('the Act'). Here, the Institute of Patent and Trademark Attorneys of Australia ('IPTA') sought leave to be heard as amicus. For the following reasons, this article argues that the IPTA met the eligibility criteria of having an indirect but substantial interest in the proceeding, offering assistance to the Court in ways that the parties were not able to, and not imposing undue workload or costs on either the Court or parties.

First, IPTA 'represents the interests of patent attorneys in Australia, who act on behalf of clients in research and industry in Australia and overseas'.[262] The IPTA's interest lay in the implications that this case had for its members who are patent attorneys—specifically, the ability and scope of their members to advise clients regarding their research and innovation 'especially in the biotechnology

---

[255] Ibid 3–4 [7].
[256] Ibid 4 [8].
[257] Ibid 13 [41].
[258] *Breckler* (n 15) 134–7 [103]–[104], [107]–[108] (Kirby J).
[259] See European Commission (n 250) 3 [3], 4 [9].
[260] See ibid 4 [9].
[261] *D'Arcy* (n 244).
[262] Institute of Patent and Trade Mark Attorneys of Australia, 'Intervener's Submissions', Submission in *D'Arcy v Myriad Genetics Inc*, S28/2015, 31 March 2015, 1 [3].

industry'.[263] Secondly, the IPTA submissions consisted of technical, legal, and factual information not dealt with by parties to the proceeding.[264] For instance, the IPTA provided information on the operation of the Act and whether it excludes materials concerned from patentability in Australia.[265] The IPTA also highlighted the potential 'impact on the research and industry in Australia if isolated genetic material and other materials isolated from nature were to be held as unpatentable subject matter'.[266] Thirdly, the IPTA's unique expertise would not have caused an undue burden for parties or the Court. Despite the estimated half hour required for an oral argument,[267] the Court could have limited its appearance to written submissions which were only 14 pages long.

Having arguably met the established criteria for admission, the Court should, with respect, have exercised its discretion in favour of IPTA.[268] The admission of IPTA could have also helped prevent a failure of justice, as the IPTA was the representative voice of a large group of patent attorneys and could have helped to defend their interests.[269] Further, by allowing the Court to consider the perspective of the patent attorneys and their clients, the IPTA could enhanced the legitimacy of the Court's decision.

3 Australian Communications

The third and final case is *Australian Communications*,[270] which concerns the Australian Communications and Media Authority ('ACMA')'s scope of power regarding radio broadcasting licensees. In this case, the interpretation of the relevant provision of the *Broadcasting Services Act 1992* (Cth) ('*BSA*') implicated the scope of administrative findings or opinions expressed by the ACMA on whether the holder of a commercial radio broadcasting licence ('licensee') has breached the licence condition prescribed under the *BSA*.

Free TV was denied leave as amicus despite having, on balance, satisfied all of the established eligibility criteria. First, Free TV is a national representative of commercial TV licensees. The co-regulatory scheme under the *BSA* means that peak industry bodies such as Free TV would be impacted by the Court's decision with respect to its counterpart's scope of power under the *BSA*. This is because commercial television licensees are subject to a licence condition that contains terms substantially similar in both form and substance to those considered in

---

[263] Ibid 1–2 [4].
[264] Ibid 2 [5].
[265] Ibid 6–7 [24]–[25], 8 [33].
[266] Ibid 2 [5], 9 [36].
[267] Ibid 9 [37].
[268] *Breckler* (n 15) 134–7 [103]–[104], [107]–[108] (Kirby J).
[269] See Institute of Patent and Trade Mark Attorneys of Australia (n 262) 1 [3].
[270] *Australian Communications* (n 245).

Australian Communications.[271] As a result, the Court decision impacted their 'role in developing codes of practice that set standards of conduct to which their respective members must adhere in the provision of their respective broadcasting services'.[272] Thus, Free TV's interest would have satisfied the 'interest' criterion.

Secondly, Free TV's experiences could have provided unique assistance to the Court. Free TV's extensive regulatory landscape experience and knowledge of the *BSA* as well as the 'day-to-day operation of commercial television licenses'[273] can provide a unique practical perspective to the Court. This satisfies the unique assistance criterion. Thirdly, Free TV's unique expertise would not have caused an undue burden for the parties or the Court because Free TV was content with appearing only through its written submissions.[274] Thus, Free TV had, arguably satisfied the established eligibility criteria.

As a result, this article argues that the Court should, with respect, have exercised its discretion in favour of Free TV.[275] Additionally, the admission of Free TV could have helped prevent a failure of justice as Free TV was a representative voice of those in the communications industry who were directly impacted by the Court's decision.[276] Further, by allowing the Court to consider the perspective of the communications industry, consideration of Free TV's submissions could have enhanced the legitimacy of the Court's decision.

B Comments

The prospective amici in the above cases were associations that could provide some form of industry perspective. The author appreciates that, on one view, they could be categorised as industry lobby groups. However, as mentioned in Section V, the strict eligibility criteria mean that the industry lobby group must be there to assist the Court and only protect its members' interests—which the Court's decision must impact. George Williams indicates that in some cases, the Court may have refused leave to intervene due to its 'concern that industry associations do not have a sufficient interest to intervene in a matter on behalf of their members and that one of their members ought to intervene directly'.[277] Respectfully, this article disagrees with the idea that members ought to intervene directly.[278] It is more cost-effective for a representative of a group to appear as an amicus rather than for

---

[271] *Broadcasting Services Act 1992* (Cth) cl 8(l)(g). See also sch 2, cl 7(l)(h).
[272] Free TV Australia Limited, 'Intervener's Submissions', Submission in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd*, S225/2014, 17 October 2014, 1–2 [5].
[273] Ibid 2 [6].
[274] Ibid 6 [28].
[275] *Breckler* (n 15) 134–7 [103]–[104], [107]–[108] (Kirby J).
[276] See Free TV Australia Limited (n 272) 1–2 [5].
[277] George Williams, 'The Amicus Curiae and Intervener' (n 32) 383, citing *Lange* (n 45); *Levy* (n 15) 650– 651 (Kirby J).
[278] George Williams, 'The Amicus Curiae and Intervener' (n 32) 383.

members to appear individually, 'where [they] can bring a new and useful perspective to a case'.[279] This also prevents a failure of justice, which is why the Court should exercise the discretion to admit amici liberally, provided that the eligibility criteria are met. The following section will examine cases where the Court rightfully denied leave.

C Cases Where an Amicus was Rightfully Denied Leave

This section demonstrates that the Court was correct to deny leave for the respective applicants to appear as amicus because they did not satisfy the established eligibility criteria for admission.

1 Unions

The case of *Unions*[280] considers the validity of s 29(10) and s 35 of the *Electoral Funding Act 2018* (NSW) ('*EFA*'). The case concerned whether the *EFA* impermissibly burdens the implied freedom of communication on governmental and political matters. The *EFA* replaced the *Election Funding, Expenditure and Disclosures Act 1981* (NSW) and reduced the expenditure that third-party campaigners were permitted to spend in election campaigns. There were two prospective amicus submissions, from the University of New South Wales Grand Challenges Program ('UNSW GC')[281] and the NSW Liberal Party. For the following reasons, this article argues that the Court was correct to deny leave for them to appear as amici.[282]

Firstly, the UNSW GC did not have sufficient interest. While the political interests at stake were of 'general importance',[283] and could have had an impact on many individuals, Gageler J indicated that the UNSW GC submissions would be unlikely to offer any additional assistance[284] and that the manner in which the UNSW GC advanced the case was unnecessary.[285] Whether that is true is somewhat speculative. Still, having reviewed the balance of the submissions, Gageler J concluded that the constitutional facts introduced by UNSW GC were irrelevant.

---

[279] Ibid 394; Simmons (n 31) 198.
[280] *Unions* (n 246).
[281] UNSW GCI is a University of New South Wales think tank.
[282] See *Unions* (n 246) 619 [55] (Gageler J).
[283] University of New South Wales Grand Challenge on Inequality, 'Submissions of the University of New South Wales Grand Challenge on Inequality Seeking Leave to Appear as Amicus', Submission in *Unions NSW v New South Wales*, S204/2018, 20 November 2018, 2 [6].
[284] *Unions* (n 246) 619 [55] (Gageler J). See, eg, *Levy* (n 15) 604 (Brennan CJ). See also *Kruger v Commonwealth* (1996) 3 Leg Rep 14; Transcript of 12 February 1996 at 12; *Wurridjal* (n 63) 312 (French CJ).
[285] University of New South Wales Grand Challenge on Inequality (n 283) 2 [5]–[6]. See *Unions* (n 246) 619 [57] (Gageler J).

[286] This means that the UNSW GC submissions failed to satisfy the 'assistance' eligibility criterion.

The second amicus application came from the NSW Liberal Party, which had an interest in the proceeding because it receives political donations and endorse candidates for election to the NSW Parliament. It would have suffered an immediate and substantial impact by the 'removal of expenditure caps on Third Party Campaigners and the allowance of them engaging in agreements under s 35 of the [*EFA*]'.[287] However, the NSW Liberal Party also failed to demonstrate that it was able to offer any assistance to the court as a 'friend of the court' which prevented it from satisfying the 'assistance' criterion.[288] Without any assistance, admission would only increase the costs of litigation and would be unfair to the parties involved.[289]

In this instance, the balancing exercise between party and non-party rights favoured the denial of leave. However, that is often because the amicus still needs to demonstrate that they met the established criteria. This article aims to encourage the Court to liberalise its approach to amici that have satisfied the established criteria and not to those that do not.

2 JT International

This case concerned the validity of the *Tobacco Plain Packaging Act 2011* (Cth) ('*TPPA*'). The *TPPA* prohibited the sale or supply of tobacco products if the products did not satisfy a 'tobacco product requirement'.[290] Further, it imposed various restrictions including restrictions on 'the use of trademarks on packaging'.[291] The question before the Court was whether the *TPPA* acquired property insofar as to engage s 51(xxxi) of the *Australian Constitution*, which requires any acquisition of property effected by a Commonwealth law to be on just terms. The Cancer Council sought leave to appear as amicus. For the following reasons, the Court was right to refuse leave.

The Cancer Council's interest lay in it being a public health organisation is to prevent, manage, and treat cancers. In this case, its interest would specifically be

---

[286] *Unions* (n 246) 619 [55] (Gageler J). See, eg, *Levy* (n 15) 604 (Brennan CJ). See also *Kruger v Commonwealth* (1996) 3 Leg Rep 14; Transcript of 12 February 1996 at 12; *Wurridjal* (n 63) 312 (French CJ).

[287] Liberal Party of Australia (NSW Division), 'Submissions by the Liberal Party of Australia (NSW Division) ("NSW Liberal Party")', Submission in *Unions NSW v New South Wales*, S204/2018, 21 November 2018, 2 [6].

[288] See *Unions* (n 246) 619 [56] (Gageler J).

[289] See, eg, *Roadshow Films* (n 142) 39 [4]; *Levy* (n 15) 603–5 (Brennan CJ); *Breckler* (n 15) 134 [103] (Kirby J), citing *Levy* (n 15) 604–5 (Brennan CJ), 650–2 (Kirby J). See also Kenny, 'Interveners and Amici Curiae in the High Court' (n 1) 167.

[290] *JT International* (n 247).

[291] Ibid.

to prevent cancer caused by tobacco products.[292] The expertise that the Cancer Council offered related to jurisprudence on the United States constitutional provision similar to s 51(xxxi) of the *Australian Constitution*.[293] One noticeable element in this submission was that the expertise of the Cancer Council could provide the Court with legal information rather than unique expertise on factual matters within its industry, as demonstrated by the cases above. Furthermore, the Cancer Council's intervention as amicus curiae was unlikely to add to the proceedings' costs unduly.[294] However, the main issue perceived by the Court was that the Council's submissions were 'adequately canvassed in the Commonwealth submissions'.[295] The fact that the Commonwealth covered the Cancer Council's submission negates its satisfaction of the 'assistance' eligibility criterion.

D Conclusion

This section demonstrated that while there are instances where amici were rightfully refused leave, there are instances also where they arguably satisfied the eligibility criteria but were not successful in obtaining leave to appear. As explained in Section V, given that the strict eligibility criteria already minimise the disadvantages of amici, there are compelling reasons to maximise the utility of amici by liberalising the Court's approach to admission provided that the eligibility criteria are satisfied.

VII CONCLUSION

This article reviewed the relationship between amici and the High Court through an empirical survey of case law from 2010 to 2022. The study showed that although amicus intervention is becoming more common, it remains limited to a handful of cases each year. As such, revisiting the Court's approach is warranted. This article also examined the relationship between amici and the Court's law-making function, given that such function illuminates the utility of amici in assisting the Court.

The main benefits of amici that were analysed were the prevention of failure of justice, the underpinning of the Court's legitimacy, and the creation of a more even playing field between non-governmental interests and governmental interests. The disadvantages of amici considered were workload and costs, inequitable amici appearances, unfair or prejudicial effects for parties, and the possible overstepping of the Court's role in society. The disadvantages can, however, be minimised

---

[292] Cancer Council Australia, 'Submissions of Cancer Council Australia', Submission in *JT International SA v Commonwealth*, S409/2011, 26 March 2012, 2 [3]–[4].
[293] Ibid 5–6 [19], citing *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397, 413.
[294] *JT International SA v Commonwealth* [2012] HCATrans 91, [35].
[295] Ibid.

through strict criteria of admission, which have already been developed through the Court's jurisprudence. The criteria for admission include the ability to provide unique assistance to the Court, having sufficient interest in the proceeding, and the cost of the amicus appearance being outweighed by its utility. The strict admission criteria ensure that the advantages of amici intervention outweigh the disadvantages.

With the above in context, this article argued that the Court should liberalise its approach by exercising its discretion in favour of amici provided that they meet the existing eligibility criteria, to ensure that the full benefits that amici have to offer are realised. This argument was reinforced through the analysis of cases where certain amici should have been admitted due to the potential benefits that they could have brought to the Court.