AMICUS APPLICATIONS IN THE HIGH COURT – OBSERVATIONS ON CONTEMPORARY PRACTICE

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Introduction

Much has been written about the practice of the High Court of Australia in dealing with amicus applications.[3] Many of the papers contend that the test applied by the High Court for a grant of leave[4] is too restrictive and present cogent arguments why the 'bar' should be lowered.[5] Comparisons are often made with other final appellate courts where it seems comparatively easy to present submissions (at least in writing) as a friend of the court.[6]

It is not the purpose of this presentation to go over the arguments (with which we agree) in favour of a more liberal approach, as this is already well covered. Rather, in this paper, we approach the topic from a practical perspective and cover, broadly, three matters:

- First, we provide some information about amicus applications in the last three years.
- Secondly, we address some of the practical issues confronting an applicant for leave to appear as amicus, including referring to the positive impact of some recent rule changes and changes in practice of the High Court.

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[3] See, in particular, Kenny, "Interveners and Amici Curiae in the High Court" (1998) 20 Adel L Rev 159 (***Kenny***); Mason, "Interveners and Amici Curiae in the High Court: A Comment" (1998) 20 Adel L Rev 173; Williams, :The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 Fed L Rev 365 (***Williams***); Willheim, "An Amicus experience in the High Court: Wurridjal v Commonwealth" (2009) 20 PLR 95 (***Willheim 2009***); Kirby, "Deconstructing the law's hostility to public interest litigation" (2011) 127 LQR 537; Walker, "Amici Curiae and access to constitutional justice: A practical perspective" (2011) 22 Bond L Rev 111 (***Walker***); Willheim, "Amici Curiae and access to constitutional justice in the High Court of Australia (2011) 22 Bond L Rev 126 (***Willheim 2011***).

[4] See *Wurridjal v Commonwealth* (2009) 237 CLR 309 at 312-313 (French CJ, for the majority); *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205; [2011] HCA 54 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). See also *Levy v Victoria* (1997) 189 CLR 579 at 602-605 (Brennan CJ). Cf *Wurridjal v Commonwealth* at 313 (Kirby J, for himself and Crennan J); *Levy v Victoria* at 651-652 (Kirby J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at 134-137 (Kirby J).

[5] See, eg, Willheim, pp 134-135, 139-145; Walker, pp 112-113.

[6] See, in particulars, Williams.

- Thirdly, we suggest that a special Part be introduced into the High Court Rules dealing with amicus applications (and applications for leave to intervene).[7]

In making these observations, we draw upon our experiences in relation to three amicus applications,[8] as well as conversations with colleagues who have appeared for amicus applicants.

Applications in recent years

On the basis of searches performed of transcripts of High Court hearings for the last three years,[9] it appears that, in matters before a Full Court of the High Court, the number of amicus applications and their disposition are as follows:

Calendar year	Number of amicus applications made[10]	Number of cases where leave was granted	Number of cases where leave was granted to make oral submissions
2010	2	1	1
2011	11	7	7
2012	4	3	1

These figures do not include applications to intervene as a party; only applications to appear as amicus curiae.

As these figures reveal, in most cases where leave was granted, the amicus was also permitted to make oral submissions. However, in a number of cases there was an indication to the effect that such submissions should only be made if necessary.[11]

[7] Generally, this paper is confined to amicus applications, as distinct from applications for leave to intervene as a party. However, in respect of our proposal for special rules, it is logical for the two types of application to be dealt with together (as they are presently for written submissions, discussed below).
[8] Professor Rubenstein, together with Ernst Willheim, sought leave to appear as amici in *Wurridjal v Commonwealth* (2009) 237 CLR 309 (leave to appear was refused). Mark Moshinsky appeared as senior counsel for the Human Rights Law Centre in *Momcilovic v The Queen* (in which leave to appear as amicus was granted) and for Cancer Council Australia in *JTI International SA v Commonwealth* (20012) 86 ALJR 1297; [2012] HCA 43 (in which leave to appear as amicus was refused).
[9] See Appendix.
[10] In some cases a single application was made on behalf of two or more bodies. In such a case, we have treated this as one application.
[11] See, eg, *Maloney v The Queen* [2012] HCATrans 342 (11 December 2012).

The number of applications does not appear to be very different from figures that have been prepared for earlier periods.[12]

In all the cases we reviewed, the application for leave to appear as amicus was decided at the beginning of the hearing before the Full Court, immediately after appearances were announced.

Except in one case, the party seeking leave did not present any oral argument as to why leave should be granted. This would have been covered already in written submissions filed before the hearing.

The Court does not usually give detailed reasons for either granting or refusing leave.[13] Where leave is granted, the Court usually does not give any reasons. Where leave is refused, the presiding judge usually make a brief statement to the effect that the Court does not consider that it would be assisted by the proposed submissions of the amicus.[14] (We are not suggesting that any more detailed reasons should be given.)

Practical issues

What are some of the practical issues facing an applicant (or potential applicant) for leave to appear as amicus in the High Court?

Saying something different

In light of the current test,[15] one of the foremost considerations in deciding whether to seek leave to appear as an amicus is whether the potential applicant has something different to say – that is, whether the submissions that the person would make, if granted leave, are different to those of the parties.[16] Unless this is the case, it is unlikely that the High Court will be "assisted" by the submissions of the applicant, and leave is likely to be refused.

This presents something of a conundrum. If the applicant presents submissions (or proposed submissions) which cover more or less the same ground as one of the parties, although expressed in a different way and perhaps with a different emphasis, the application is unlikely to succeed. But these are the submissions which, in many cases, the applicant

[12] See A Price, "Contemporary Amicus Curiae Applications in the High Court of Australia" (unpublished), Internship paper for Centre for International and Public law, ANU, 2008, http://law.anu.edu.au/cipl/internship-reports on file with authors, p 29.
[13] An exception was *Wurridjal v Commonwealth* (2009) 237 CLR 309.
[14] See, eg, *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 86 ALJR 205; [2011] HCA 54 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).
[15] See footnote 4 above.
[16] This point is not new – see Willheim 2009, pp 108-110.

really wants to make. In many cases, the proposed applicant has an 'interest' in the proceeding in a loose sense, although not a sufficient interest to intervene.[17] For example, the proposed applicant may be an industry group or association in circumstances where a proceeding before the High Court will have important implications for the industry. In those cases, the submissions the proposed applicant often wants to make are about the issues already raised by the parties and often to the same overall effect as one of the parties. But the proposed applicant wants to express the submissions in its own way and perhaps with a different emphasis. However, if it does this, it is unlikely to obtain leave. Accordingly, the proposed applicant searches for something different to say – a new issue, or a new argument - in order to bolster its prospects of obtaining leave. But those submissions do not cover the main points that the amicus wants to make, and may suffer from the vice of being esoteric or weak.

One of the challenges is how to find out what submissions the parties are going to make, so as to ensure that the proposed amicus submissions say something different.

In cases in the High Court's appellate jurisdiction, there will be judgments from the courts below which will usually expose the arguments of the parties, and there will be the transcript of the special leave application which will usually indicate the lines of argument.

Further, as a result of relatively recent changes to the High Court rules and practice there is now earlier and greater access to the written submissions of the parties. The relevant changes to the High Court Rules took effect on 1 January 2011. Previously, the timetable for the filing of written submissions by parties provided that these were to be filed a certain number of days before the hearing before the Full Court of the High Court. The dates were relatively close to the date of the hearing.[18] However, since 1 January 2011, written submissions of parties have to be filed a certain number of days after the grant of special leave.[19]

The second significant change is that the written submissions of the parties are now generally made available on the High Court's website, which means that they are available to

[17] To be granted leave to intervene it may be necessary for the applicant to show that the applicant's legal interests are likely to be substantially affected: see *Levy v Victoria* at 603 (Brennan CJ). At least prior to that decision, it may have been arguable that a person who could establish some "special interest" in the subject of the proceeding might be entitled to be joined as an intervener, even though he or she could show no private legal right: see Kenny, at p 160.

[18] See Williams, p 390, where the previous practice directions concerning the filing of written submissions are summarised.

[19] See Part 44 of the High Court Rules. Eg, under rule 44.02, the appellant's written submissions are due within 35 days after the grant of special leave; under rule 44.03, the respondent's written submissions are due within 21 days after service of the appellant's submissions.

the general public, the legal profession and academics. It is a very valuable resource. The submissions are located under the "Cases" heading across the top of the website, and all of the submissions (and some other documents) filed in a particular matter are arranged under that matter.

The combined effect of the changes to the rules and the practice of making submissions available on the website is that a person considering making an application to appear as amicus – at least in a case in the appellate jurisdiction of the Court – now is able to obtain a much clearer picture of the submissions that the parties will be making in the High Court, which is highly relevant to forming a view about whether to make an application.

In cases in the High Court's original jurisdiction, however, much depends on how the particular case is dealt with procedurally.

In some cases, the matter has proceeded to a hearing before a Full Court very quickly, and the dates for the filing of submissions have been quite close to the hearing itself. (In such cases, the rules do not provide dates for the filing of submissions, and the dates are determined at a directions hearing.) The written submissions are still usually made available on the High Court's website, but there may not be much time between the date when the submissions are made available and the date of the hearing.

In these circumstances, the potential applicant for leave to appear as amicus may need to make the application and file proposed submissions without knowing precisely what the parties will submit. If it transpires that the submissions of a party are to the same effect, the application for leave is likely to fail.

Appearing

We now turn to another practical difficulty for an amicus applicant. Applications for leave to appear as amicus are almost always heard at the commencement of the hearing before the Full Court of the High Court. Assuming that the amicus applicant instructs counsel to appear, counsel will need to be briefed for the entire hearing before the Full Court (which may go for more than a day) and will need to prepare to make oral submissions (in a case where the amicus seeks leave to make oral as well as written submissions). This imposes a significant cost on the person seeking leave to appear as amicus, in circumstances where it is often very difficult to predict whether the application for leave will be successful and, even if successful, whether leave will be given to make oral submissions (in addition to the Court receiving the written submissions). (Even where the lawyers are acting pro bono, the applicant will often incur expenses for flights and accommodation.)

In circumstances where the application is refused, significant costs are unnecessarily incurred under the current process. Similarly, where the application for leave is successful, but the applicant is confined to written submissions, the time, effort and costs of preparing to make oral submissions in the High Court are wasted.

These points are not new. A number of the articles on this subject have pointed to these difficulties,[20] also noting that it is not ideal, from the point of view of the parties to the proceeding, not to known until the commencement of the hearing whether leave will be granted to the amicus. It means that they do not know, in advance of the hearing, whether the submissions of the amicus will be received, and therefore whether they need to deal with them.

It seems to us that it would be preferable for applications for leave to appear as amicus to be determined in advance of the hearing before the Full Court, if this were feasible.

We do not suggest that an additional hearing be scheduled for the purpose of dealing with an amicus application. We do not think this would be justified given the extra costs that it would impose on the parties and the additional burden that it would place on the court. Rather, we suggest that, at least in some cases, amicus applications could be determined "on the papers". As has been noted, applicants for leave to appear as amicus usually do not present oral submissions as to why leave should be granted. This is covered in written submissions. Special leave applications can now be determined "on the papers". It is difficult to see why an applicant to appear as amicus should have a greater claim to be heard orally. Therefore, depriving the applicant of the opportunity to present oral argument on whether leave should be granted does not appear to be a good argument against such a change.

No doubt, such a change would impose some burden on the Court, as it would need to consider the application in advance of the Full Court hearing. But there would appear to be significant benefits, both to the person seeking leave and the parties to the proceeding, in having the application determined in advance of the hearing. These have already been indicated.

If an application were to be determined on the papers, it would of course be necessary to have a process whereby the parties to the proceeding had the opportunity to communicate their views to the Court in advance of the decision on the application.

In cases where there is a directions hearing, it may be feasible for any applications for leave to appear as amicus to be determined at the directions hearing. However, whether this is

[20] See, eg, Williams, p 389, 391; Willheim 2011, p 138-139.

feasible may depend on the timing of the directions hearing. As already indicated, it is necessary to know what the parties are submitting before the amicus application can be determined.

In cases where it is not clear to the Court, in advance of the Full Court hearing, whether leave should be granted, the application could of course be referred to the hearing before the Full Court. However, where the matter is clear cut, there would seem to be significant advantages in earlier determination.

High Court Rules

We have referred already to the changes to the High Court Rules regarding the filing of written submissions by the parties, which commenced on 1 January 2011.

In addition to setting new time frames, the new rules regarding written submissions[21] specifically provide for written submissions by "interveners". The word "intervener" is defined to include an intervener *or* an applicant for leave to intervene *or to be heard as amicus curiae* before the Full Court.[22]

The rules provide that an intervener (as defined) must file its written submissions within 7 days after the written submissions of the party in support of whom the intervention is to be made.[23] Where an intervener does not support any particular party, the submissions are to be filed within 7 days after the respondent's submissions.[24] The rules provide a specific form for an intervener's submissions.[25] This sets out the headings for what must be covered in an intervener's written submissions.

These changes to the Rules directly address some of the suggestions made in previous articles on this subject. In particular, it has been suggested that there should be a specific form for submissions for persons seeking leave to appear as amicus, so that they were aware of what matters they should cover.[26]

[21] High Court Rules, Part 44.
[22] High Court Rules, rule 44.01.2.
[23] High Court Rules, rule 44.04.2.
[24] High Court Rules, rule 44.04.3.
[25] High Court Rules, rule 44.04.4, Form 27C.
[26] See, eg, Walker, p 118 and Willheim 2009 and 2011.

Although the High Court Rules do now provide for written submissions by amicus applicants, there is still no specific set of rules dealing with the making of an application for leave to appear as amicus (or, for that matter, leave to intervene).[27]

An application for leave is made pursuant to the general applications rules contained in Part 13. These require a summons to be filed and served at least 3 days before the return date and an affidavit in support. The rules are brief and general. The 3 day period is inapposite for an application for leave to be heard as amicus in a Full Court matter. It would be reasonable to expect a much greater period of notice to the parties.

In our view, there would be merit in having a special Part of the High Court Rules dealing with applications for leave to intervene or to be heard as amicus curiae. (It would be appropriate to deal with both types of application together, as has been done for written submissions.) A dedicated Part would contain tailor-made rules, appropriate for such applications, including as to time frames. [28]

If the proposal outlined above – namely the determination of amicus applications on the papers in advance of a hearing before the Full Court – were adopted, the new Part would deal with this. This would include the time by which the application would need to be filed and served. For reasons already indicated, this should be a time *after* the submissions of the parties have been filed (or, in a case where the amicus applicant proposes to support a party, that party's submissions have been filed). Accordingly, it would be appropriate to provide that the application must be filed on or before the date on which the applicant's written submissions are due under the rules already referred to.[29]

It would also be necessary to provide for the parties to the proceeding to file a document indicating their position on the amicus application, and to provide a form for this.

In addition, if the earlier proposal were to be adopted, the rules could provide that any such application could be determined by any two Justices without a hearing (as for special leave applications).[30] Alternatively, a greater number of Justices could be specified for continuity with the current process whereby all the Justices hearing the case participate in the decision.

[27] See Willheim 2011, p 146.
[28] It could be located after Part 13, as a new Part 14, thus forming part of the General Rules in Chapter 1.
[29] That is, under rule 44.04, discussed above.
[30] High Court Rules, rule 41.11.

Conclusion

The recent changes in the rules and practice of the High Court are of considerable assistance to potential applicants considering seeking leave to appear as amicus. They provide much earlier and better access to the submissions made by the parties to the proceeding, enabling the potential applicant to consider whether the submissions that it would make are likely to assist the Court in ways that the Court would not otherwise be assisted by the parties. We have raised in this paper some possibilities for further reform which we think would sit comfortably with existing procedures and further improve the process.

Appendix

List of amicus/amici applications before a Full Court of the High Court during the calendar years 2010, 2011 and 2012 based on searches of the High Court transcripts database on austlii:

2010

Lehman Brothers Holdings v City of Swan [2010] HCATrans 6 (9 February 2010) [one application; leave granted; leave to make oral submissions granted]

Hogan v Hinch [2010] HCATrans 284 (2 November 2010) [one application; leave not granted]

2011

Momcilovic v The Queen [2011] HCATrans 15 (8 February 2011) [one application; leave granted; leave to make oral submissions granted]

Westport v Gordian Runoff [2011] HCATrans 12 (3 February 2011) [two applications; leave granted in both; leave to make oral submissions granted in both]

Cumerlong Holdings v Dalcross [2011] HCATrans 143 (1 June 2011) [one application; leave granted; leave to make oral submissions granted]

Williams v The Commonwealth [2011] HCATrans 198 (9 August 2011) [one application; leave granted; leave to make oral submissions granted]

Roadshow Films v iiNet Ltd [2011] HCATrans 323 (30 November 2011) [six applications; two granted; leave to make oral submissions granted in both]

2012

JTI International SA v Commonwealth [2012] HCATrans 91 (17 April 2012) [one application; refused]

A-G (SA) v Corporation of City of Adelaide [2012] HCATrans 233 (2 October 2012) [one application; leave granted; limited to written submissions]

TCL Air Conditioning v Judges of Federal Court [2012] HCATrans 277 (6 November 2012) [one application; leave granted; limited to written submissions]

Maloney v The Queen [2012] HCATrans 342 (11 December 2012) [one application; leave granted; leave to make oral submissions granted]