BLAKE DAWSON WALDRON

L A W Y E R S

WHY ARE NON-PARTIES NON-STARTERS?

A call for clearer procedures and guidelines for amicus curiae applications in Victoria

Submission to the Victorian Law Reform Commission Civil Justice Review

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1. Introduction

1.1 Overview and scope of the submission

This submission is made jointly by the Human Rights Law Resource Centre Ltd (**HRLRC**) and Blake Dawson Waldron (**BDW**). It responds to Question 21 of the Victorian Law Reform Commission (**VLRC**) Civil Justice Review, which asks:

> Is there a need for reform of the rules or procedures which allow non-parties to participate or intervene in civil proceedings? If so, what are the problems and what changes should be implemented?

The submission sets out:

(a) the distinction between amici curiae, interveners and other non-parties;

(b) the benefits of and potential disadvantages associated with amici curiae participating in proceedings;

(c) the current law in Australia and position in Victoria with respect to amicus curiae applications;

(d) problems with the current position in Victoria with respect to amicus curiae applications; and

(e) recommendations for reform.

This submission focuses on the rules and procedures for amicus curiae applications brought by public interest organisations (an area in which the HRLRC and BDW have had recent experience). However, many of the recommendations contained in the submission are also relevant to interveners.

The submission is also limited to a consideration of the procedures of the Supreme Court and the Court of Appeal, and does not extend to a consideration of procedures in the County Court or Magistrates Court. We note that, in line with the focus of the VLRC's inquiry, the submission focuses on the *Supreme Court (Civil Procedure) Rules 2005* (Vic) (referred to throughout the submission as the ***Supreme Court Rules***), however many of the recommendations would apply equally to the *Supreme Court (Criminal Procedure) Rules 1998* (Vic).

1.2 Impetus for reform

On 1 January 2007, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Charter***) will come into force. Based on the experience in Canada after the introduction of the *Canadian Charter of Rights and Freedoms 1982* and in the United Kingdom following the introduction of the *Human Rights Act 1998* (UK), this legislation is likely to have a significant impact on civil litigation and will almost certainly lead to

amicus curiae seeking an increased role in such litigation.[1] In order for the experience and expertise of legal practitioners and public interest organisations to be available to the court, and so that the law might gain the full benefit of the commitments made by the executive arm of government under the *Charter*, effective mechanisms for determining non-party participation in proceedings are important.

The commencement of the *Charter* provides an impetus for the timely introduction of rules and procedures to clarify the process for making amicus applications.

1.3 About the HRLRC

The HRLRC, a joint initiative of the Public Interest Law Clearing House (Vic) Inc and the Victorian Council for Civil Liberties Inc (Liberty Victoria), is an independent community legal centre.

The HRLRC aims to:

(a) contribute to the harmonisation of law, policy and practice in Victoria and Australia with international human rights norms and standards;

(b) support and enhance the capacity of the legal profession, judiciary, government and community sector to develop Australian law and policy consistently with international human rights standards; and

(c) empower people who are disadvantaged or living in poverty by operating within a human rights framework.

The Constitution of the HRLRC gives it power to:

> conduct, coordinate, resource and facilitate strategic litigation and provide other legal services in respect of human rights issues, including acting as instructing solicitor, amicus curiae, co-counsel or as a provider of technical and resource support to other legal service providers.[2]

1.4 Relevant experience of the HLRLC and BDW

In July 2006, the HRLRC applied to the Court of Appeal of the Supreme Court of Victoria for leave to appear as amicus curiae in the appeal against conviction and sentence of Jack Thomas in *R v Joseph Terrence Thomas*[3] (**Thomas case**). The HRLRC instructed BDW as its solicitors in the proceeding. BDW was engaged on a pro bono basis.

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[1] In Canada, commentators and the Courts have remarked upon the "highly significant role" played by interveners since the introduction of the Canadian Charter of Rights and Freedoms: See George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 373, quoting Iacobucci J as cited in K Makin, "Intervenors: How Many is Too Many?" *Globe and Mail* (10 March 2000); see also Jason Pierce, "The Road Less Travelled: Non-Party intervention and the public litigation model in the High Court" (2003) 28(2) *Alternative Law Journal* 69, 70.

[2] Constitution, Human Right Law Resource Centre Ltd clause 3(e).

[3] *R v Joseph Terrence Thomas* [2006] VSCA 165.

The HRLRC sought to make submissions in relation to the appellant's conviction and sentence in light of international human rights law instruments. An amicus application was also made by Amnesty International Australia (**AIA**) in the proceedings. The applications of the HRLRC and AIA were both refused.

In its joint judgment, the Court of Appeal indicated that

> In view of the extensive submissions filed on [the appellant's] behalf and on behalf of the Crown, as to the applicability of those principles to the present case, we were not persuaded that hearing either proposed amicus would assist us in a way in which we would not otherwise have been assisted. Significantly, Mr Lasry for the applicant acknowledged that there was nothing in the proposed amicus submissions which he could not advance in submissions on his client's behalf.[4]

This submission is informed by the research undertaken by BDW and the HRLRC in preparation for its amicus curiae application in the Thomas case, and its experience in that case. Although the Thomas case was heard in the criminal jurisdiction, BDW and the HRLRC consider that the issues that arose are directly applicable to the civil jurisdiction.

2. Interveners, amici curiae and other forms of non-party participation

2.1 Overview

In Australia, the courts distinguish between the position of an intervener and that of an amicus curiae. The distinction between the two is set out below, along with a brief discussion of the utility of maintaining that distinction. Other forms of non-party participation, not commonly utilised in Australia, are also discussed.

2.2 Definition and role of an intervener

An intervener becomes a party to the proceedings, with the benefits and burdens of that status.[5] To do so, it must show that its rights or interests (legal or financial) will be legitimately affected by the outcome of the case.[6]

An intervener can appeal, tender evidence and participate fully in all respects of the argument. It will be bound by the decision to which it becomes a party (so far as it applies to the intervener) and may have a costs order made against it or in its favour.

2.3 Definition and role of an amicus curiae

An amicus curiae is a "friend of the court" and is not a party to the proceedings. Its role has traditionally been limited to drawing the Court's attention to points of law or relevant

[4] *R v Joseph Terrence Thomas* [2006] VSCA 165 [126].

[5] See *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391; *United States Tobacco v Minister for Consumer Affairs* (1988) 83 ALR 79.

[6] *Australian Conservation Foundation v South Australia* (1988) 53 SASR 349, 352 (King CJ). See also *Onus v Alcoa* (1981) 149 CLR 27, 37 (Gibbs CJ); *Davis v Commonwealth* (1986) 68 ALR 18, 23 (Gibbs CJ).

fact which may assist the Court and may not otherwise have been brought to its attention. In particular, an amicus curiae is more likely to be heard where a case gives rise to an important question of law or matter of general public interest.[7]

The level of participation by an amicus curiae in proceedings is determined at the discretion of the Court. It will generally make written submissions, which are sometimes supplemented by oral submissions.[8] It may also tender non-controversial evidence with the consent of the parties.[9] In the past, amici have not been permitted to file pleadings or motions, reserve an exception to a ruling of the court, prosecute an appeal, tender controversial or complex evidence which may post costs and disadvantages on the parties, inspect documents discovered by the parties or participate in interrogatories.[10] While amici may be liable for the costs to the other parties of their intervention in proceedings, this is rarely the case, and they will not be liable for the broader costs of the proceedings.[11]

2.4 Maintaining a distinction between interveners and amici curiae

In other jurisdictions, in particular Canada and the United States, the rules of court do not distinguish between amici curiae and third party interveners.[12]

The Australian Law Reform Commission, along with a number of commentators, has recommended that the distinction between amici curiae and interveners should also be abandoned in Australia, and the process for third party intervention streamlined.[13]

In our view, amicus curiae is a useful mechanism for participation in court proceedings for non-parties who have a particular submission to put to the Court but neither need nor want to otherwise fully participate in the proceedings.

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[7] *US Tobacco v Minister for Consumer Affairs* (1988) 84 ALR 79.

[8] *Levy v Victoria* (1997) 189 CLR 579, 651 (Kirby J); *Garcia v National Australia Bank* (1998) 194 CLR 395, where the Consumer Credit Legal Centre (NSW) Inc made both written and oral submissions.

[9] *R v Pidoto and O'Dea* [2006] VSCA 185; *Bropho v Tickner* (1993) 40 FCR 165; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438; *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 382.

[10] *Bradley* at 396 (Huntley JA) and *US Tobacco* at [94] referring to *Re Perry* (1925) 148 NE Rep 163 at 165.

[11] See *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 382 where Mahoney P (Waddell AJA concurring) noted that amicus curiae may be required to pay some or all of the costs arising from their participation in proceedings; Australian Law Reform Commission, *Behind the Door Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [6.47] – [6.51].

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

[13] Australian Law Reform Commission, *Behind the Door Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [6.31] –[6.32]; George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 400 (recommendation 1); Susan Kenny, "Interveners and Amici Curiae" (1998) 20 *Adelaide Law Review* 159, who makes a number of proposals which appear to be intended to apply without distinction to interveners and amicus.

Merging the mechanisms of intervener and amicus may deter organisations who might be able to provide useful assistance to the Court on a particular point or issue from providing such assistance due to the costs implications that come with being a party to litigation. Certainly any proposal to remove the distinction between an amicus and an intervener should provide a mechanism for public interest, community or not-for profit organisations to be able to intervene without the risk of costs that usually accompany intervention.

Finally, removing the more restricted amicus mechanism may be seen to encourage, endorse or open the floodgates to a mechanism for more comprehensive participation for third party interveners. This is likely to fuel the criticisms of non-party participation.[14]

2.5 Other options for non-party intervention

In the face of criticism of third party intervention, the question arises as to what options exist for non-parties seeking to contribute their knowledge or expertise to a case.

One possibility, where the non-party's proposed submissions would be aligned with one of the parties to the proceedings, is to "co-counsel" with that party. Under a co-counselling arrangement, the non-party legal team would be briefed by the party to provide specialist support, assistance and representation on a particular issue or aspect of the case.

There are a number of issues or difficulties that are likely to arise in relation to co-counselling.

First, a co-counselling arrangement rests on the assumption that the non-party is aligned with a party to the proceeding. This will not always be the case with an amicus curiae.

Second, issues may arise in relation to the ethical obligations and duties of the co-counsel. If, for example the HRLRC briefs a pro bono team (lawyers and barristers) to investigate the options for making submissions as a non-party in a proceeding, and the team recommends that the most effective way to make those submissions is by co-counselling with the respondent (rather than, for example, as amicus), the question arises as to who is instructing the pro bono team: the HRLRC or the respondent?

Third, even if these ethical issues are overcome, co-counselling imposes a substantial burden on the party to the proceeding, which may present a strong disincentive to that party to enter into the arrangement.

A compromise position to co-counselling may be for a non-party to join a party as a "research aid" or "advisor" to counsel. The HRLRC considered co-counselling with the appellant in a matter which was recently heard by the Court of Appeal of the Supreme Court. Ultimately, the HRLRC opted to provide the draft submissions that it had prepared to Counsel for the appellant in the matter, and act as a "research aid" or "advisor" to

[14] See discussion below at 3.2.

Counsel, rather than to seek to co-counsel. Even in this limited role, a number of issues will arise. Counsel will need time to absorb and incorporate the non-party's submissions. There may also be a situation of conflict between the party, who has a strategic agenda for its client, and the non-party, who may wish to put the full breadth of the law in the area before the Court.

A non-party intervener may also take the form of an "expert witness".[15] This approach may be useful where a non-party is seeking to assist the Court by providing particular knowledge or expertise on an issue. However, it raises many of the same issues as those already mentioned, not least requiring counsel for the party who is calling the expert witness to be across the specialist material about which their witness will provide evidence.

In the view of BDW and the HRLRC, for the reasons set out above, forms of non-party intervention such as co-counselling or acting as an "expert witness" give rise to a range of difficulties which in many cases will make them an unsuitable option for a potential non-party wanting to intervene in a proceeding. Although in some cases these alternative forms of non-party intervention may provide an alternative to an amicus application, they do not displace the useful role that amicus curiae can play in proceedings.

3. Benefits and potential disadvantages of participation in proceedings by amici curiae

3.1 Benefits of amici curiae

Where an issue of public interest is at stake, amici may bring to the Court's attention issues which go beyond the immediate litigation between parties. This could include drawing the Court's attention to relevant values, standards and policy issues, or legal principles arising out of international law and foreign jurisdictions.

Amici curiae may also assist a Court to assess more fully the issues being litigated where one or both of the parties lack the time or resources explore them adequately.

In the course of proceedings in *Superclinics Australia Pty Ltd v CES*,[16] in response to submissions by counsel for CES arguing against an amicus application brought by the

[15] This approach has been adopted by the Public Law Project (a public interest organisation in the UK): see, eg *R v Lord Chancellor ex parte Witham* [1997] 2 All ER 779, a case which challenged the effective exclusion from the courts of people on low incomes in those cases where legal aid was unavailable. The Public Law Project provided an affidavit in support of the claimant which gave examples of the various categories of cases where individual on low incomes had been prevented from going to court: Public Law Project, "Third Party Interventions in Judicial Review: Information pack" (2001) available at <http://www.publiclawproject.org.uk/Downloads/ThirdPartyInterventions.pdf>. In South Africa, the Court has solicited submissions for strangers to the litigation (such as academics) in order to broaden its perspective on a case: George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 365.

[16] Unreported, High Court of Australia, S88/1996, 11 September 1996 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ).

Australian Catholic Health Care Association (**ACHCA**) and the Episcopal Conference (**Catholic Bishops**), McHugh J noted that:[17]

> Although this is litigation between the parties, part of the consequences of this Court's function is to declare the law for the nation and that means the Court has to look at issues that go beyond … the particular parties.[18]

This sentiment was reiterated by Kirby J in *Levy v Victoria*, where his Honour noted that:

> The acknowledgement of the fact that courts, especially this Court, have unavoidable choices to make in finding and declaring the law, makes it appropriate, in some cases at least, to hear from a broader range of interveners and amici curiae than would have appeared proper when the declaratory theory of judicial function was unquestionably accepted … There has also developed a growing appreciation that finding the law in a particular case is far from a mechanical task. It often involves the elucidation of complex questions of legal principle and legal policy as well as of decided authority.[19]

Allowing amici curiae and interveners in cases which are of particular import or deal with issues of broad public interest improves public perceptions of the Court (particularly in its role as a law *maker*) as engaging in an open, informed and participatory decision making process, and enhances the legitimacy of the Court's decisions.[20]

3.2 Criticisms of participation by amici curiae

A number of arguments have been posited in support of limiting the role of non-parties in litigation.

It has been argued that allowing amicus applications makes courts susceptible to "political" interventions. To the extent that this is true, Sir Anthony Mason, who considered this precise issue in a paper in 1998, has commented that public interest and test cases are "one of the areas where we cannot draw a sharp dividing line between legal and political interests."[21]

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[17] *Superclinics v CES*, Transcript of Proceedings, 11 September 1996, page 15 (McHugh J), cited in Rosemary Owens, "Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy" (1998) 20 *Adelaide Law Review* 193, 195.

[18] *Superclinics v CES*, Transcript of Proceedings, 11 September 1996, page 15 (McHugh J), cited in Rosemary Owens, "Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy" (1998) 20 *Adelaide Law Review* 193, 195.

[19] (1997) 146 ALR 248, 296.

[20] See Kenny, "Interveners and Amici Curiae in the High Court" (1998) 20 *Adelaide Law Review* 159, 169; George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 394.

[21] Sir Anthony Mason, "Interveners and Amici Curiae in the High Court: A comment" (1998) 20 *Adelaide Law Review* 173, 174 The Australian Law Reform Commission, in its 1996 Report entitled *Behind the Door Keeper: Standing to Sue for Public Remedies* noted that concerns that intervention could lead to parties losing control of issues in dispute and incurring additional costs were unlikely to eventuate given the "discretionary nature of the power and the court's power to manage the litigation process and to order costs".

It has also been argued that allowing greater participation in the court process by non-parties gives rise to a risk of the courts being flooded by applications, leading to inefficiencies and delays in the court process which unfairly prejudice the parties to a proceeding. However, the fact is that the court retains control over its proceedings and has the power to ensure that proceedings are run as efficiently and effectively as possible. It can be expected that courts will exercise their powers with particular care in relation to amicus curiae applications, to ensure that any prejudice or unfairness to the parties is minimised or avoided.[22] This finds support in the Canadian experience, where "[d]espite a willingness to hear from public interest organisations, the Court has been careful to retain control over its procedures by restricting or qualifying the grant of leave".[23]

4. Current rules or procedures in Victoria

4.1 Rules or procedures for making an amicus curiae application

There are no specific guidelines in the *Supreme Court Rules* or in a practice direction as to the time limits for making an application to appear as amicus. The practice for dealing with amicus applications in the Supreme Court seems to be to deal with them "on the day" of the hearing.

In relation to the form of the application, the relevant provision is order 65 of the *Supreme Court Rules*, which relates to applications to the Court of Appeal other than applications by way of appeal, or applications for a new trial or to set aside a judgment, order, verdict or finding. Applications under order 65 are to be made by way of summons and supported by an affidavit.[24]

Order 9 of the *Supreme Court Rules* sets out the procedure for "joinder of claims and parties", which applies to interveners but, strictly speaking, not amici. Order 9 rule 7 states that an application to be added as a party must be supported by "an affidavit showing the person's interest in the questions in the proceeding or the question to be determined as between that person and any party to the proceeding".

Although beyond the scope of the VLRC's inquiry, we note that the *Supreme Court (Criminal Procedure) Rules 1998* (Vic) provide *no* guidance as to the appropriate procedure or form for an amicus application. In the Thomas case (which was in the criminal division of the Court of Appeal), the Court of Appeal Registry indicated that an affidavit supporting an amicus application was sufficient, and did not accept a summons. The HRLRC's experience in that case also confirms that the practice of the Court of Appeal, at least in the criminal context, is to deal with amicus applications on the day of the hearing.

[22] See Kirby J's discussion of this issue in *Levy v Victoria* (1997) 189 CLR 579, 650-1.

[23] George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 371.

[24] The approach set out in order 65 was followed without objection in *Zanca v Tisher* [1999] VSC 349.

4.2 Rules or procedures for the granting of amicus

There is no guidance in the *Supreme Court Rules* or any relevant practice note or practice direction as to the considerations that should be taken into account by the Court when assessing an amicus curiae application. At common law, a court's power to grant an amicus application is discretionary. Factors that are taken into account include:

(a) whether the amicus application is made in the public interest[25] or in relation to a judgment that affects the community generally;[26]

(b) whether the Court will be assisted in formulating principles of law;[27]

(c) whether the person has some expertise, knowledge, information or insight that the parties are unable to provide;[28]

(d) whether the Court will be "significantly assisted" by the submission of the amicus curiae;[29]

(e) whether it is in the interests of justice that the amicus curiae be permitted to make its submissions, including:[30]

(i) whether it is in the parties' interests that the amicus curiae be permitted to make its submission (including whether any delay will unnecessarily prejudice the parties);[31]

(ii) whether the amicus will occupy time unnecessarily;[32] and

(iii) whether any costs associated with the submission are justified;[33] and

[25] *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 381, where the Court concluded that intervention should be allowed "in relation to matters of public interest broadly to the extent that the relevant matters had not been dealt with by the parties".

[26] *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

[27] *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 381; see also *Breen v Williams* [1994] 35 NSWLR 522, 533 (Kirby P).

[28] Numerous cases have indicated that an amicus applicant will be required to demonstrate that it can "assist" the court in some way. See in particular *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 538, referring to the trial judge's decision to allow the amicus application, noting that the applicant was a "specialised body with expertise and capacity to assist in the due administration of consumer protection laws in Australia". On appeal the trial judge's decision was varied and the amicus was ordered to appear as an intervener rather than an amicus, however the primary judge's discussion of the rules of amicus was not contradicted. See also Susan Kenny, "Interveners and Amici Curiae in the High Court" (1998) 20 *Adelaide Law Review* 159, 168 and 170, who notes that non-parties "may provide assistance which lies beyond the capacity of the litigants themselves"; Andrea Durbach, "Interveners in High Court Litigation: A Comment" (1998) 20 *Adelaide Law Review* 177, 180.

[29] *Levy v Victoria* (1997) 189 CLR 579, 605.

[30] *United States Tobacco Company v Minister for Consumer Affairs* (1988) 20 FCR 520, 534.

[31] *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 381-2.

[32] *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 381-2.

(f) the particular circumstances of the case.[34]

However, these factors have not always been applied by courts in a consistent manner. Further, in many cases clear reasons for granting or refusing an amicus application have not been provided and so it is not possible to identify the weight accorded to various considerations by the court in arriving at its conclusion.

5. Problems identified with the current position in Victoria

The HRLRC and BDW have identified a number of problems arising from the absence of clear rules or procedures with respect to amicus applications, including inconsistency and lack of clarity about procedures. As a result, potential amicus applicants are unable to predict with any level of certainty the outcome of an amicus application.[35]

5.1 Inconsistent approaches by the Court

The lack of clear guidelines for dealing with amicus applications has been a contributor to inconsistent approaches being taken by the Court.

This is illustrated by comparing the approach taken to amicus applications in two criminal appeals that were heard this year. In the first, the Thomas case, the HRLRC brought an amicus application that was refused. In its brief reasons for refusing the application, the Court of Appeal stated that:

> Significantly, Mr Lasry for the applicant acknowledged that there was nothing in the proposed amicus submissions which he could not advance in submissions on his client's behalf.[36]

This suggests that amicus applications may not be heard where the proposed submissions *could* be made by one of the parties to the litigation.

In the second case, the Court of Appeal in *R v Pidoto and O'Dea*[37] granted the Fitzroy Legal Service (**FLS**) leave to appear as amicus curiae, stating that:

> The matters which FLS wished to raise were, for the most part, not otherwise proposed to be advanced by the parties to the appeals.[38]

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[33] *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 381-2.

[34] *National Australia Bank v Hokit* (1996) 39 NSWLR 377, 381.

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

[36] *R v Joseph Terrence Thomas* [2006] VSCA 165 [126].

[37] [2006] VSCA 185.

[38] [2006] VSCA 185 [74] (Maxwell P, Callaway, Buchanan, Vincent and Eames JJA). Note that the Court's decision to grant amicus curiae statue to the FLS was made at the hearing in January 2006, but reasons for its decision on amicus were published with the decision on substantive matters in September 2006.

The Court did not ask whether one of the parties *could* have raised the matters. In that particular instance, the FLS proposed to submit a line of argument that was quite different to that being raised by either of the parties but which, arguably, one or both of the parties could have advanced.

These cases point to an inconsistency in the approach of courts considering amicus applications; namely, whether they will consider whether a party to the proceedings *could* have made the submissions proposed by the amicus, or whether the party *would* have made those submissions.[39]

In the view of BDW and the HRLRC, the former approach overlooks the utility of amicus curiae providing assistance to the court in an area in which the amicus applicant has particular knowledge or expertise, and in an area in which the parties do not otherwise have that knowledge or expertise, or lack the capacity and resources, including the financial resources to allow lawyers to spend considerable time on these points, to develop it in a manner that might assist the court.

5.2 Lack of clarity about relevant considerations

There is significant lack of clarity in relation to the factors that a court will take into account when considering an amicus application. The court's position with respect to the impact of multiple amicus applicants on its decision whether or not to grant amicus provides a useful example.

On the one hand, multiple interveners may be considered to reinforce to the Court the importance of a particular case or issue. On the other hand, they may point to the potential for non-party applicants to create inefficiencies and delays, or to seek to "hijack" or politicise proceedings.

There is precedent in Australia and the UK for permitting multiple interveners in a case.[40] A different approach has been taken in Canada, where multiple interveners are encouraged to combine their submissions.[41]

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[39] Earlier case law on this point does not clarify the issue. In *Kruger v Commonwealth* (1997) 190 CLR 1, the court said that it is necessary to consider whether parties are "unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination": cited in Kenny, "Interveners and Amici Curiae" (1998) 20 *Adelaide Law Review* 159, 162.

[40] Multiple interveners were permitted in (*Superclinics (Australia) Pty Ltd v CES*, where the Court granted an amicus to 3 parties, and *Project Blue Sky v Australian Broadcasting Authority*, where the High Court granted leave to 11 parties). In at least one instance, a "collective" amicus application was granted: in *Brandy v Human Rights and Equal Opportunity Commission*, PIAC's amicus application was in conjunction with/on behalf of the Women's Electoral Lobby, Australian Federation of AIDS Organisations, Association of Non-English Speaking Background Women of Australia and the Ethnic Communities Council (See Andrea Durbach, "Interveners in High Court Litigation: A Comment" (1998) 20 *Adelaide Law Review* 177, 178).

[41] Where multiple interveners have been permitted, the Court has been careful to limit the scope of each intervener to avoid repetitive submissions (See George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 372-3).

In the Thomas case there was speculation about whether the existence of two interveners (HRLRC and AIA) may have impacted on the decision to decline the amicus applications in that case. The absence of reasons on this point in the Thomas case mean that future amicus applicants are kept guessing about the impact of multiple applicants on the prospect of success of an amicus application.

5.3 Timing of the hearing of amicus curiae applications

The practice of dealing with an amicus application on the day of the substantive hearing gives rise to a number of concerns. A potential amicus applicant must attend court on the day of the hearing fully prepared to participate in the proceedings (with both written and oral submissions, if both are sought to be made), with no certainty about whether they will be granted leave. This situation is unsatisfactory for all involved for the following reasons:

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

(b) Parties to a proceeding are likely to have prepared their reply to the amicus submission. If the application is unsuccessful, or limited in its scope by the court, that preparation will have been unnecessary. Alternatively, parties may attend court on the day without having undertaken this preparation, and seek an adjournment of the proceedings in the event that the amicus application is granted. This then results in delay.[42]

(c) An additional burden is placed on the judiciary, which must be prepared to deal with the amicus application in full, rather than by way of outline prior to the substantive hearing, and to hear substantive submissions in the event that the application is granted.

Finally, hearing amicus applicants on the day of the substantive hearing is not consistent with the meeting the factors that are taken into account by the court in determining whether or not to grant amicus curiae (set out above at 4.2). It is difficult to argue that the delay or inconvenience to the court and the parties by an amicus application has been minimised when the application is heard on the same day as the substantive application.

5.4 Costs and ineffective allocation of resources

The cost of engaging in litigation, even as an amicus or intervener, is considerable. The HRLRC's application in the Thomas case was facilitated by very substantial work undertaken by BDW and barristers (Brian Walters SC and Michael Kingston) working on a

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

pro bono basis. The costs of running the litigation amounted to several hundred thousand dollars. Even if actual dollars weren't spent, the allocation of a significant proportion of BDW's annual pro bono budget toward the case, and the time and efforts of two barristers, means that other worthwhile causes were denied assistance.

Amicus applications are most often brought by community or not for profit organisations with limited resources. The absence of clear and effective procedures for considering amicus applications prior to the substantive hearing; guidelines setting out the considerations that will be taken into account by a court when assessing an amicus application; and transparent and consistent application of those guidelines, will continue to produce what has been described as "wasteful litigation" by potential amicus applicants.[43]

5.5 Costs orders

There is a risk that an amicus applicant could be the subject of a costs order against it. In some instances, this may deter potential amicus curiae from making an application. The introduction of pre-emptive costs orders, or some another mechanism to ensure that public interest litigants are not the subject of costs order against them, would provide certainty to potential applicants about the implications of an amicus intervention. This issue is discussed more fully in the submission of the Public Interest Law Clearing House (Vic) (**PILCH**), which we endorse.

5.6 Failure by courts to harness expertise of potential amici

As noted above, amici curiae can assist a court in new and complex areas of the law by providing specialised knowledge or expertise.

International human rights law provides a useful example. In *R v Togias*,[44] Spigelman J in the New South Wales Court of Criminal Appeal, when referring to the international law arguments that had been raised by one of the parties, noted that:

> the court has not received the kind of assistance required for the determination, for the first time, of the important principles involved. It is not appropriate to determine these matters on this occasion.

This statement implies that Spigelman J could have been assisted by non-party participation in the proceedings, and such participation may have facilitated the development of important principles of law.

In *Royal Women's Hospital v Medical Practitioners Board of Victoria*,[45] the President of the Court of Appeal recently called for "the development of an Australian jurisprudence drawing on international human rights law". Achieving this depends on "judges and

[43] George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 399.

[44] (2001) 127 A Crim R 23.

[45] [2006] VSCA 85 at [69].

practitioners working together to develop a common expertise". This statement has been interpreted as a call for the assistance of, and contributions from, potential amici.[46] However, while the approach of courts to this issue remains piecemeal, potential amici may be deterred from pursuing an application.

6. Recommendations

The recommendations set out below are not exhaustive but geared to the aims of the VLRC's Civil Justice Review (which mirror the aims of the Attorney General's Justice Statement), being:

(a) the modernisation, simplification and harmonisation of the rules of civil procedure within and across jurisdictions;

(b) the reduction of the cost of litigation; and

(c) the promotion of the principles of fairness, timeliness, proportionality, choice and transparency, quality, efficiency and accountability.

The Australian Law Reform Commission and a number of commentators have previously published quite extensive law reform proposals with respect to guidelines for interveners and amici curiae. Where applicable, we have referred back to those recommendations in the footnotes. The present recommendations aim to assist potential amici curiae to decide whether to apply for amicus, determine their likelihood of success, establish efficient court practices, minimise inconvenience to the parties to the proceeding, and define the scope of the role of the amicus.

6.2 Clear procedural guidelines

Recommendation 1: The *Supreme Court Rules* or a practice note should be amended to include clear guidelines as to the procedure for applying to appear as amicus curiae and the appropriate form of the application.[47]

The guidelines should provide that:

(a) amicus curiae applications be made by way of summons and affidavit annexing an outline of submissions.

(b) amicus curiae applications should be heard, where possible, at least two weeks before the substantive hearing in the matter.

[46] Simone Cusack and Cecilia Riebl, "International Human Rights Law in Australian Courts: A Role for Amici Curiae and Interveners", (2006) 31(3) AltLJ 122.

[47] A similar recommendation has been made by a number of commentators: see Susan Kenny "Interveners and Amici Curiae" (1998) 20 *Adelaide Law Review* 159, 169-70 (proposals 1 and 3); George Williams, "The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis" (2000) 28 *Federal Law Review* 365, 400 (recommendation 2).

6.3 Clear guidelines for substantive decision on amicus

Recommendation 2: The *Supreme Court Rules* or a practice note should establish clear guidelines as to the factors that the Court will take into account when considering whether to grant an amicus curiae application, including:

(a) whether or not the case raises issues of public importance, or formulates or elucidates principles of law;

(b) whether the applicant has some expertise, knowledge, information or insight that the parties are not able ("could") or willing to ("would") provide;

(c) whether the Court will be significantly assisted by the submission of the amicus curiae;

(d) whether it is in the interests of justice that the amicus curiae be permitted to make its submissions (taking into account issues of efficiency of the Court process, delay to the parties, cost to the other parties);[48]

(e) the particular circumstances of the case.

6.4 Provision of reasons

Recommendation 3: To assist with the ongoing development and clarification of jurisprudence in relation to the consideration of amicus curiae applications, the Court should be required to provide reasons for decisions on amicus applications.[49]

6.5 Scope and conditions of amicus

Recommendation 4: The *Supreme Court Rules* or a practice note should explicitly empower the Court to impose "conditions" when granting an amicus curiae application. These conditions may define the scope of the amicus' participation by, for example, limiting the amicus' participation to written submissions, or limiting the time that will be allowed for oral submissions.

6.6 Multiple amicus applications

Recommendation 5: The *Supreme Court Rules* or a practice note should provide guidance in relation to how the Court will deal with multiple amicus applications.

[48] In most instances at least one party will be inconvenienced by the amicus application to some extent. The inconvenience to the parties needs to be weighed against the assistance that will be brought to the Court.

[49] Australian Law Reform Commission, *Behind the Door Keeper: Standing to Sue for Public Remedies*, Report No 78 (1996) [6.37] (recommendation 7).

In the view of BDW and the HRLRC, the Court should have the flexibility to hear from multiple amicus applicants in the event that those applicants are able to assist the Court in different ways. The Court could ensure that it maintains control over this process by, for example, restricting amici to written submissions in the event that multiple applications are made (in line with Recommendation 3).

6.7 Costs

Recommendation 6: The *Supreme Court Rules* or a practice note should clearly state that:

(a) costs relating to the substantive proceedings will not be awarded against an amicus applicant;

(b) costs relating to the amicus application will not be awarded against an amicus applicant whose application is in the "public interest" unless it can be shown that the conduct of the non-party constitutes an abuse of the amicus process.

This recommendation aims to ensure that an amicus applicant who acts "in the public interest" is not required to pay the costs of an amicus application. An alternative mechanism for achieving this would be to introduce pre-emptive costs orders. As noted at part 5.5 above, this issue is discussed more fully in the submission of the PILCH, which we endorse.