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Kristen Walker

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Amici Curiae and Access To Constitutional Justice: A Practical Perspective

Abstract

There is no doubt that access to constitutional justice in Australia is limited. A combination of relatively restrictive standing rules and financial constraints means many people who have an interest (but perhaps not a 'special interest') in ensuring compliance with the Constitution are precluded from bringing legal proceedings to do so. Expanding the ability of persons or groups to participate in constitutional litigation as amici (as opposed to broadening standing rules) is one way to expand access to constitutional justice. But we need to bear in mind that an amicus cannot institute litigation – an amicus can only seek to join existing litigation.

Nonetheless, allowing more participation in existing constitutional matters would go some way to redressing the problem of access to justice. Certainly there are interested persons and groups who are shut out of existing constitutional litigation because they are not a party and do not have standing (or the financial ability) to intervene.

Keywords

Access To Constitutional Justice, Amici Curiae, Amici Participation in Litigation, Oral Versus Written Participation, APLA Amici, Wurridjal Amici

AMICI CURIAE AND ACCESS TO CONSTITUTIONAL JUSTICE: A PRACTICAL PERSPECTIVE

KRISTEN WALKER*

Introduction

There is no doubt that access to constitutional justice in Australia is limited. A combination of relatively restrictive standing rules and financial constraints means many people who have an interest (but perhaps not a ‘special interest’) in ensuring compliance with the Constitution are precluded from bringing legal proceedings to do so.

In addition, of course, there are many aspects of the Constitution that are of limited interest to those outside government and academia — that is, there are many aspects of the Constitution that do not raise issues we traditionally regard as ‘justice’ issues, save that they involve the law. This is principally because the Constitution has no Bill of Rights, and because issues of federalism, which dominate, often do not raise typical ‘justice’ issues, except as between the States and the Commonwealth. But even federalism issues can be vehicles for pursuing justice issues; the *Kable* doctrine is one example,¹ freedom of political communication another,² and the *placita* of s 51 offer still others.³ Even if one might say that access to constitutional justice is only relevant to a minority of constitutional cases that might come before the courts, the fact that some, rather than all, constitutional cases raise traditional ‘access to justice’ issues is no reason not to expand access to justice in relation to those cases.

* Barrister, Victorian Bar and Associate Professor of Law, University of Melbourne.

¹ *Kable v Director of Public Prosecutions for NSW* (1996) 189 CLR 51, recently barking again in *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 261 ALR 220 and most recently invoked in *State of South Australia v Totani* [2010] HCA 39.

² Indeed *APLA Ltd v Legal Services Commissioner of NSW* (2005) 224 CLR 322 (‘APLA’) was a case where amici played a significant role; which is discussed further below.

³ Section 51(xxix) is an obvious example, as it permits implementation of Australia’s treaty obligations, including human rights treaties: see, eg, *Croome v Tasmania* (1997) 191 CLR 119; *R v Tang* (2008) 237 CLR 1; *XYZ v Commonwealth* (2006) 227 CLR 532. See also s 51(xxvi) – *Kartinyeri v Commonwealth* (1998) 195 CLR 337; s 51(xx) – *New South Wales v Commonwealth (Work Choices)* (2006) 229 CLR 1; s 51(xxxi) – acquisition of property; s 51(ii) – taxation; s 51(xviii) – intellectual property; s 51(xxvii) – immigration.

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Expanding the ability of persons or groups to participate in constitutional litigation as amici (as opposed to broadening standing rules) is one way to expand access to constitutional justice. But we need to bear in mind that an amicus cannot institute litigation – an amicus can only seek to join existing litigation. Nor, if participating in a lower court, can an amicus appeal an adverse decision, as the *McBain IVF* litigation reminded us.⁴ In that sense, adopting a broader approach to the participation of amici is not a complete answer to concerns about access to constitutional justice.

Nonetheless, allowing more participation in existing constitutional matters would go some way to redressing the problem of access to justice. Certainly there are interested persons and groups who are shut out of existing constitutional litigation because they are not a party and do not have standing (or the financial ability) to intervene.

Should the High Court expand its willingness to hear from amici?

I agree with Ernst Willheim that it is desirable to increase the willingness of the High Court, in particular, to permit the participation of amicus curiae in constitutional cases (and, indeed, in other cases that raise broad public interest issues as well,⁵ but that is beyond the scope of this conference).

The High Court is the ultimate voice in relation to the meaning of the Constitution. The text changes rarely; to the extent that the Constitution evolves, it does so principally through judicial decisions. And while the various Attorneys-General, with their right to intervene in constitutional cases,⁶ provide one version of the public interest, they do not necessarily provide the only version.

Further, when the Court decides issues of constitutional law, it is a participant in the development of our national constitutional structures. This is a task that in a democratic society is generally regarded as one in which the people should be involved. Indeed, one of the reasons commonly given for opposing ‘judicial activism’

⁴ *McBain v Victoria* (2000) 99 FCR 116; *Re McBain; Ex parte Catholic Bishops Conference* (2002) 209 CLR 372.

⁵ For example, the *Superclinics case*, where the Catholic Bishops Conference was given leave to intervene on the lawfulness of abortion: *Superclinics Australia Pty Ltd v CES* S88/1996 [1996] HCATrans 357 (11 September 1996), discussed in Susan Kenny, ‘Interveners and Amici Curiae in the High Court’ (1998) 20 *Adelaide Law Review* 159. Other cases that fall into this category (but that have not necessarily to date involved amici) include cases involving race and sex discrimination that reach the High Court; cases involving indigenous land rights, such as *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1; and migration cases raising broader social issues (eg *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 210 CLR 1).

⁶ Pursuant to s 78A of the *Judiciary Act 1903* (Cth).

in constitutional law is that it subverts the role of the people for which s 128 provides. Thus there is a democratic argument that supports a wider range of voices in the determination of constitutional cases.⁷ Of course not all constitutional cases will attract people who wish to participate; but the fact that some cases will, because they are regarded as sufficiently important to a particular group, or perhaps to many, is sufficient to justify an expanded role for amici. Indeed, the fact that there will **not** be dozens of amici seeking to be heard in every constitutional case is a positive, as it means that arguments that the court (and the parties) will be overwhelmed by an expanded amicus role are unlikely to be incorrect. The myth of the floodgates is, once again, likely to be a myth.

Finally, in support of an argument that amici ought to be permitted to participate I note that amici have, in other jurisdictions, played a significant role in some of the cases in which they have participated. There is certainly evidence in the United States and Canada that amici can be quite influential.⁸ While adding to the burden of litigation on the parties and the Court would not be justifiable if amici participation was simply a nuisance with no value, in my view if amici can assist the Court in determining constitutional cases then the additional burden on the parties and the Court.

There are, of course, quite valid arguments against expanding amici participation in litigation. Some relate to the impact on the time and cost of litigation for the parties and the courts; others to the likely nature of the amici — will they simply be powerful and well-funded ‘special interest groups’?⁹ Experience elsewhere, however, suggests that neither of these concerns is a sufficient justification for the narrow approach to amici participation currently adopted in the High Court. In other jurisdictions, court processes have not foundered under the weight of (sometimes extensive) amici participation; and a variety of groups on all sides of the political

⁷ This argument has been developed in the United States: see, eg, Ruben J Garcia, ‘A Democratic Theory of Amicus Advocacy’ (2008) 35 *Florida State University Law Review* 315.

⁸ See, eg, Joseph D Kearney and Thomas W Merrill, ‘The Influence of Amicus Curiae Briefs on the Supreme Court’ (2000) 148 *University of Pennsylvania Law Review* 743; and see Kenny, above n 5, 168, referring to *Mapp v Ohio*, 367 US 643 (1961) where the American Civil Liberties Union filed an amicus brief that was adopted by the Court. In relation to Canada, see the discussion in George Williams, ‘The Amicus Curiae and Intervener in the High Court’ (2000) 28 *Federal Law Review* 365, 369-72; and 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* (University of Ottawa Press, 2002) 273.

⁹ See, eg, Kenny, above n 5, 168; Garcia, above n 7, 331.

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spectrum have participated as amici¹⁰ – thus while they may be well-funded, they are, generally, representative of a range of different interests.

Ultimately, however, in my view the arguments for allowing expanded participation of amici curiae outweigh the arguments against. I agree with Ernst Willheim that there should be a presumption of amici participation in constitutional cases, requiring a reason not to permit participation, rather than *vice versa*.

I also agree with Willheim that if amici are to participate in a meaningful way, the Court needs to develop rules and practices to facilitate their timely participation. It is undesirable for all concerned for a decision as to amici participation to be made on the day of the hearing, for the reasons Willheim gives. Others have written previously on this,¹¹ and there is no need for me to repeat what they have said. Suffice it to say that if an expanded role for amici is to be adopted, express provision in the Rules is essential; and even if an expanded role is not adopted, express provision in the Rules is desirable.

Oral versus written participation

Assuming one accepts that an expanded approach to amici curiae is appropriate, the question that then arises is ‘what form should such participation take?’ In particular, is participation in oral argument necessary or desirable, or would the filing of written submissions be sufficient?

In the United States Supreme Court, amici participate only through the filing of written briefs except with leave of the Court, which will be granted only in extraordinary circumstances.¹² In contrast, in Australia to date and in Canada and the UK amici often participate by oral argument as well as by filing written submissions.

¹⁰ For example in gay rights cases in the US, such as *Lawrence v Texas*, 539 US 558 (2003), amici filed briefs both for and against the validity of the Texas ‘sodomy law’ there in issue. They included religious organisations, academics in the disciplines of law, history and medicine, ‘mainstream’ civil rights organisations and gay and lesbian rights organisations.

¹¹ See, eg, Kenny, above n 5, 169-71; her Honour’s remarks were supported by Sir Anthony Mason: see Sir Anthony Mason ‘Interveners and Amici Curiae in the High Court: A Comment’ (1998) 20 *Adelaide Law Review* 173, 175; Williams, above n 8, 389-92; Kristen Walker and Nicola Roxon, ‘Female Friends: Amica Curiae as a Vehicle for Women’s Participation in Litigation’ (1994) 19 *Alternative Law Journal* 111,113. Cf Andrea Durbach ‘Interveners in High Court Litigation: A Comment’ (1998) 20 *Adelaide Law Review* 177, 179-81, where Durbach cautions against a faith in rules as the solution to the ‘inconsistent, uncertain and curious’ judicial response to amicus applications.

¹² Rule 28(7) of the Rules of the Supreme Court.

In part the difference can be explained by the quite different procedures in the US for oral hearings before the Supreme Court: there, the parties themselves have only half an hour each to present oral argument, and in those circumstances allowing amici time to present oral argument would dramatically increase the time allocated to the case. Relatedly, in the United States in many cases, there will be multiple amici – potentially dozens.¹³ Clearly, oral argument for each of them is simply impossible; and choosing some for oral argument over others would be difficult.

In contrast, in Australia hearings in the High Court for constitutional matters typically run for 1-3 days; and adding one amicus for say an hour would not make a huge difference. But what if there is more than one amicus? Should they each be permitted to present oral argument? Certainly, if one anticipates, indeed wants to encourage, more amici to reflect more voices in the process of constitutional deliberation, then oral argument begins to look more difficult. If the numbers were to reach the kind of numbers one sees in the US, oral participation by all would be impossible.

In the UK, there have been arguments that amici should continue to participate by oral argument. Michael Fordham QC, for example, has advocated oral participation by amici, rather than simply participation by way of written submissions, for several reasons:¹⁴

- a) written submissions can be overlooked and buried among the papers;
- b) written submissions cannot anticipate matters to be put in later submissions or in oral argument, nor the materials that will be put before the Court, nor, most importantly, questions from the bench;
- c) oral submissions “can bring argument or materials to life; they can react, reinforce, reassure”.

However, retaining oral participation will, in my view, come at the expense of any meaningful expansion of the amicus role. If there is a presumption in favour of amici being permitted to participate, as Willheim suggests and I support, then in my view participation will likely need to be limited to the filing of written submissions. For while in the early days after adoption of an expanded approach to amici we might expect not too many amici to seek to participate, I would expect and hope that, over

¹³ For example, 54 amicus briefs were filed in *Regents of the University of California v Bakke*, 438 US 265 (1978); 78 were filed in *Webster v Reproductive Health Services*, 492 US 490 (1989); see Williams, above n 8, 375.

¹⁴ Michael Fordham, ‘Public Interventions in the Supreme Court: Ten Virtues’ (2010) 15(1) *Judicial Review* 18, 20.

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time, a greater number of amici would seek to participate in constitutional matters. I have in mind the following examples:

- a) public interest NGOs such as Amnesty International, the International Commission of Jurists, the Wilderness Society;
- b) religious organisations such as the Catholic Bishops Conference; and
- c) academics with particular expertise in the issues involved.

It is also possible that members of the public might seek to participate as amici, and the argument based on democratic decision-making would support such interventions. On the other hand, interventions by a lay member of the public without legal representation is likely not to be of assistance to the Court; and this might be one instance where the presumption in favour of participation might be rebutted.

Retention of oral argument also raises questions of costs. At present, parties and interveners are at risk of a costs order if they are unsuccessful in litigation. One might ask why amici should be immune from a costs order. On the other hand, if we wish to encourage amici participation (as I do), then the possibility of exposure to a costs order will obviously be a significant deterrent. If participation is limited to written submissions, the costs issues, I contend, are mitigated. If oral participation is permitted, in my view there should be a presumption against costs order being made against an amicus, save in exceptional circumstances (such as where the amicus causes significant and unnecessary delay or costs to other parties).

A further question that arises concerns the nature of the amicus participation — that is, whether it ought to be restricted to legal argument, or whether it can permissibly extend to factual matters as well. Willheim touches on this issue in his paper, suggesting that amicus submissions in relation to ‘legislative facts’ might be desirable, but without developing the point. In the US, of course, the ‘Brandeis brief’, which provides what might broadly be described as ‘extra-legal material’ to the Court,¹⁵ has been a particular feature of amicus participation.

¹⁵ The Brandeis brief is named after Louis D. Brandeis, who represented Oregon in *Muller v Oregon*, 208 US 412 (1908), a case concerning the constitutional validity of legislation that limited hours of work for female workers. Brandeis (with the help of Goldmark, his sister-in-law) compiled statistics from medical and sociological journals in support of his argument and listed citations to the articles in his brief. The brief was the first submitted to the Supreme Court that relied primarily on extra-legal data to prove its argument: see <<http://www.law.louisville.edu/library/collections/brandeis/node/235>>.

The presentation of evidentiary or factual material by way of submissions (whether written or oral) raises quite distinct and difficult issues. On the one hand, the provision of broader factual material than is contained in an Agreed Statement of Facts or in the judgment of a lower court might appear to be desirable, to ensure that the Court has a broader picture of the facts than simply apply to the parties in question. However, to permit an amicus to put factual material before the court raises difficulties. If such factual material is put by way of submissions, how is it to be dealt with — and, in particular, tested — by the parties? To the extent that the factual material involves ‘social science material’ of the kind often found in Brandeis briefs, through the discussion and provision of academic articles, how can the quality of such articles and the correctness of their methodology be, realistically, assessed and dealt with? Without a witness to give evidence, there will be no room for cross-examination; there will simply be competing assertions from the bar table. This, in my view, is not a satisfactory method for proceeding if the factual material proffered by an amicus is contested. There are certainly instances in the United States of the Supreme Court referring to and relying upon factual material provided by amici that was of dubious legitimacy.¹⁶ Thus while I would not wish to rule out, in advance and categorically, provision of factual material in the style of a Brandeis brief, I think that caution needs to be exercised in relation to the uncritical adoption of this aspect of amici participation from the US.

Performance of the amici role

Finally, let me turn to the way in which an amicus performs their role. First, the amicus must bear in mind that they are participating in existing litigation between parties, who have interests in how the case is run, strategically, and often in keeping their costs to a reasonable level. Willheim suggests that additional costs may simply be a feature of constitutional litigation that the parties will need to bear. While to some extent I accept that is correct (just as the parties already bear the costs and strategic effects of Attorney interventions), this in itself has its own access to justice implications at least for a non-government, non-corporate party in a case who may have limited resources and are already exposed to a possible costs order against them if unsuccessful. And there will often be such a party. Even interventions that are, broadly speaking, in support of such a party, may in fact operate as a burden for that

¹⁶ For example, the discussion in Garcia, above n 7, 352-3 in relation to the Supreme Court’s reliance, in *Gonzales v Carhart*, 127 S Ct 1610 (2007), on a brief filed by the Justice Foundation, a conservative group, suggesting that women who obtained an abortion may suffer from ‘abortion trauma syndrome’, a disorder not recognised by the American Psychiatric Association.

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party. So while this is not a basis for refusing amicus participation, it is not, I suggest, irrelevant.

These issues add further support to the argument that amici participation ought to be confined to written submissions, which are less likely to extend the hearing time (though they will still have costs implications, as the parties will need to digest and possibly respond to the written submissions of the amici).

In addition, I suggest that an amicus needs to be sensitive to the parties' positions in the litigation. The parties will have developed their own strategic approach to the litigation and the arguments that ought to be run. They may, understandably, be troubled by 'uninvited guests'¹⁷ bringing up new issues or taking a position that is at odds with their own position. Again, this is not a reason to exclude amici from the process. I do not advocate exclusion. But it is a reason why amici ought not expect unqualified support or enthusiasm from the parties about the amici participation, even when the amici perceive themselves as intervening in support of a particular party or parties.

Further, the development of court rules and procedures to ensure the provision of relevant documentation to amici will to some extent minimise the need for amici to seek the assistance of the parties in obtaining documents and thus potentially remove some of the areas where friction has occurred in the past. In this regard, it should again be remembered that requiring a non-government, non-corporate party to serve and file documents on potentially several amici again adds to the burden of litigation and does not improve access to constitutional justice in an unqualified way. That is not to say it should not happen; just that we need to bear in mind the consequences for the people directly affected by the litigation in question.

Perhaps most importantly, there is a need for amici to file useful submissions if they are to play a meaningful role. By useful, I do not mean submissions that address issues not addressed by the parties; I consider this requirement unduly narrows the ability of amici to participate. Rather, I mean submissions that take the form of legal submissions of the kind already filed by the parties that will assist the court in resolving the matter, rather than hindering the court and the parties. Again, the Rules and Practice Directions of the High Court could usefully set out the format of amici submissions so as to provide some guidance for amici as to how to structure submissions and what to include.

In this regard, one may contrast two cases where amici were and were not successful in participating in litigation: *APLA* and *Wurridjal*.

¹⁷ Kenny, above n 5, 167.

APLA Limited v Legal Services Commissioner (NSW)¹⁸

APLA was a case concerning the freedom of political communication in the context of a State prohibition on certain advertisements by barristers and solicitors in relation to personal injuries. The first plaintiff was APLA Limited (APLA being an acronym for ‘Australian Plaintiff Lawyers Association’); the second plaintiff was an incorporated law firm; the third plaintiff was a solicitor. One might think that enough lawyers were represented in the proceeding; nonetheless, the Combined Community Legal Centres Group NSW Inc and Redfern Legal Centre Inc (together, the **APLA amici**) were granted leave to appear as amici curiae. Leave was granted at the commencement of the hearing of the matter, after brief oral submissions by Mr Basten QC:¹⁹

GLEESON CJ: Do you want to add anything to the written submissions you have made in support of that application [for leave to appear as amicus]?

MR BASTEN: Only if the Court would wish to hear me in response to the State’s written submissions. The main argument, as we understand it, put by the State against our being heard is that we are not affected by the regulation. Whether or not that is so is one of the construction issues which we wish to address.

GLEESON CJ: I thought the main argument they put was based on the test that was stated by Sir Gerard Brennan.

MR BASTEN: In Levy?

GLEESON CJ: Yes.

MR BASTEN: I am happy to address that, your Honour, if that is the appropriate issue. In relation to that, the test has two limbs. If one is seeking to be heard as an intervener, arguably one must establish an interest. If one is seeking to be heard as amicus, the test, as we would understand it, is simply that we have something to offer which other parties do not. We say that we do have interests in a strict sense and that we would be affected by the outcome but we do not seek to be heard as interveners. We do not seek to be joined as interveners in the proceedings. We merely seek to be heard as amici. We say we satisfy the test. The particular issues which we seek to address which other parties, certainly in their written submissions, do not address are the construction issues.

In part that is a matter of importance because, if our construction of the regulation is correct, then we have gone a long way to establishing the second limb of our argument, which is that in terms of the second limb of section 92, there is a significant overreaching of the legitimate purposes of the government of New

¹⁸ (2005) 224 CLR 322.

¹⁹ *APLA Limited v Legal Services Commissioner (NSW)* [2004] HCATrans 373.

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South Wales involved in the regulation. Those are the points that we wish to address, may it please the Court.

No reasons for permitting the amici to intervene were given by the Court.

The APLA amici appeared together, by way of counsel, briefing senior and junior counsel,²⁰ as well as an academic.²¹ They made written and oral submissions. It is difficult to know the time taken in oral submissions by the amici, but one can judge from the transcript that it was not terribly long.

In the judgment, Gummow J explained the position of the amici as follows:²²

The amici's arguments were, in general terms, in support of those raised by the plaintiffs and favoured the relief sought by them.

What follows is drawn from the unchallenged evidence in support of the application for leave. CCLCG is the "peak organisation" for community legal centres ("CLC") in New South Wales. It has 41 members, which include [Redfern Legal Centre]. They are independent community organisations which provide free legal advice and information, as well as legal education for organisations and community groups in that State.

CLC do not ordinarily act in personal injury cases, but do so where they consider that the litigation is in the public interest. In that capacity, CLC have acted in cases on behalf of indigenous clients, clients with physical and mental disabilities, and prisoners and asylum seekers who claimed that they suffered mistreatment while in care or custody. CLC also provide advice in areas touching on personal injury; for example, in relation to victims' compensation cases and social security cases.

The amici apprehend that several publications published by them or their members may breach Pt 14 of the Regulation.

...

In oral submissions, and without opposition by the parties and interveners, counsel for the amici skillfully sought to draw the above material respecting the particular circumstances of the amici into the general consideration of the issues of validity presented by the amended special case. But no application was made (and, absent the status at least of an intervener, it is not apparent how it could have been made by the amici) further to amend the amended special case.

Later in his reasons, Gummow J made reference to the substantive arguments of the amici.²³ To give one example, he said as follows:²⁴

²⁰ John Basten QC and Rachel Pepper, as they then were.

²¹ George Williams, Anthony Mason Professor, University of New South Wales.

²² *APLA* (2005) 224 CLR 322, 379-80 (reference omitted).

There is nothing in the definition of “advertising” in Pt 14 which limits to services for reward the provision of legal services by a barrister or solicitor and excludes the provision of gratuitous services by such persons or by non-profit organisations employing them. In those circumstances, counsel for the amici emphasised that the prohibition imposed in Pt 14 may apply to activities outside the potential operation of the first limb of s 92; that being so, those non-trading and non-commercial activities might nevertheless, given the necessary interstate element, attract the operation of the second limb of s 92 as involving ‘intercourse’.

That Pt 14 may have such an operation should be accepted. The amici are, as has been indicated, not parties and cannot and do not seek any declaratory relief in respect of proposed communications. Nevertheless, having regard to the detailed arguments that were presented without objection, it is convenient to consider the bearing of the ‘intercourse’ limb of s 92 upon interstate communications advertising or promoting the provision without charge of legal services in New South Wales by non-profit bodies. This is on the assumption, which it is unnecessary to test, that such communications are not in trade or commerce.

Justice Kirby, too, made reference to the submissions of the amici:²⁵

... I would not myself draw a distinction between the essential way in which the amici curiae expressed their arguments on the suggested constitutional invalidity of Pt 14 of the Regulation and the way in which the plaintiffs presented their arguments. The amici were concerned to illustrate the extraordinary reach of the challenged law. They did so, amongst other ways, by reference to some of their own activities. However, this was by way of elaboration and submission. It did not necessitate amendment of the special case, beyond the amendment which the plaintiffs had sought, and which was granted by the Court.

The detailed way in which others have described the respective ‘communications’ of APLA and MBC, both in print and in electronic media, ... means that there is no need for me to set them out again. It is enough that these descriptions demonstrate the ways in which, if it be valid, the Regulation reaches into communication amongst many persons in the Australian community. It impinges on hard copy, letters, informative articles and communications in electronic form. It operates in New South Wales and in other States, indeed world-wide. It purports to restrict the entitlement of the plaintiffs and many others (such as the amici) to inform people who have, or may have, entitlements to various legal rights that they might enjoy and to tell these people of the steps which they might take to investigate, clarify, consider and (if so desired) pursue those rights in the courts of the Australian Judicature, including federal courts, and also before

²³ Ibid [225]-[226], [237].

²⁴ Ibid [126]-[127].

²⁵ Ibid [260]-[261].

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federal tribunals. Subject to the terms of the Regulation, all affected communications are, and are intended to be, swept up into its extensive ambit.

And later, Kirby J said:

The amici curiae would also have enjoyed standing, had they brought proceedings or wished to intervene or to be added as plaintiffs. Doubtless in order to minimise their exposure to risks of a costs order, the amici confined their submissions to those designed to assist the Court. Like Gummow J, I pay tribute to the assistance provided by their submissions. Such assistance bears out the need, in large and complex legal (and especially constitutional) concerns, for this Court to be ready to receive submissions from non-parties that have substantive arguments to the issues which fall for decision.

Interestingly, at the hearing the plaintiffs chose to leave one argument, the s 92 argument, entirely to the amici.²⁶ This suggests a high degree of cooperation between the amici and the plaintiffs.

APLA is thus a case where the amici were permitted to participate and where the participation was a success in the sense that reference is made to the amici's contribution in the judgments.

Wurridjal

Wurridjal stands in stark contrast to *APLA*. In *Wurridjal*, the amici were academics²⁷ (the **Wurridjal amici**) with no interest of their own in the outcome of the case. They wished to offer expert assistance to the Court in relation to the impact of international law on one issue in the case, namely whether rights to traditional Aboriginal usage of land might constitute 'property' within the meaning of s 51(xxxi). They did not brief or involve counsel, but sought to appear on their own behalf.

The *Wurridjal* amici were in relatively early contact with the parties in relation to their wish to participate in the proceedings. Neither party objected to their participation (though the amici appeared to have some expectation that the plaintiffs would not simply object, but would actively consent to that participation. In that expectation, they were disappointed). Notwithstanding their relatively early contact with the parties, the *Wurridjal* amici were not present at various directions hearings; though it is unlikely, in my view, that their presence would have made any difference.

²⁶ *APLA Limited v Legal Services Commissioner (NSW)* [2004] HCATrans 373.

²⁷ Mr Ernst Willheim and Professor Kim Rubenstein of the Australian National University Law School.

The *Wurridjal* amici sought leave to participate by the fielding of written submissions and not by way of oral submissions (other than in relation to the question of whether leave should be granted).²⁸

The application was refused by majority (Kirby and Crennan JJ dissenting). In dismissing the application, French CJ said as follows:

In relation to the summons by Professor Rubenstein and Mr Willheim, a majority of the Court is of the opinion that this is not a case in which the submissions and material offered to the Court by those who would intervene as friends of the Court are likely to be of any assistance.

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

In some cases it may be in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer. In the present case, the Court has received a large volume of material said to support the proposition that the rights claimed by the plaintiffs constitute property for the purposes of section 51(xxxi) of the Constitution. The material consists of what are said to be relevant international law instruments and international jurisprudence. The submissions do not travel significantly beyond that contention and some general statements about the wide meaning to be given to the word “property” in section 51(xxxi). They do not show how, having regard to the particular statutory framework in which the plaintiff’s property rights arise and the operation of the impugned laws, the material is of any relevance.

Before the Court will accept the offer of assistance of an amicus curiae it must be satisfied that it will be assisted. The tender of a large amount of material, supported by what is little more than an assertion about its utility, is not sufficient to give to the tenderer a voice in these proceedings.

As Ernst Willheim has noted in his paper, some aspects of this statement may represent a broader view of when amici may be permitted to participate than has previously been articulated.

In this case, it was clear that the *Wurridjal* amici did wish to put material before the Court that was not being put or relied upon by the parties. Nonetheless the application was refused. Why was this? As is apparent from the quotations from French CJ, above, the reasons were as follows:

²⁸ *Wurridjal v Commonwealth of Australia* [2008] HCATrans 348.

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- a) the contention put by the amici was “that the rights claimed by the plaintiffs constitute property for the purposes of section 51(xxxi) of the Constitution”; but the amici’s submissions made no reference to the statutory regime in question and very limited reference to s 51(xxxi), thus diminishing the utility of their submissions on this issue. Rather, the submissions quoted from a series of international instruments and cases that reflected recognition of the importance of indigenous rights to culture. This was of limited relevance to the issues in the case.
- b) The amici delivered to the court a very large volume of material in support of their claim that was seen by the court as largely undigested. Receipt of (literally) a full box of material was, I suggest, unlikely to endear the *Wurridjal* amici to the Court. It would have been impossible, in any realistic sense, for the judges to read that material; and very costly for the parties’ counsel to do so. While Willheim has suggested elsewhere that delivery of such material was required by High Court Practice Direction 1 of 2000, in my view this is a misreading of the Practice Direction.

In addition to the reasons given by the Court, one might surmise that the underlying basis for the proposition that the *Wurridjal* amici wished to advance — that international and comparative law is relevant to the construction of the Constitution — was not a proposition to which a majority of the Court was receptive.²⁹ In that regard, it is perhaps not surprising that Kirby J dissented; and more surprising that Crennan J dissented.

To the extent that the form of the submissions was problematic, in my view the *Wurridjal* amici would have been better served had they involved counsel interested in participating on a pro bono basis. As an academic, I can attest to the quite different nature of writing submissions, as opposed to writing journal articles or books. Had counsel been involved, it is possible that the submissions would have engaged more directly with the statutory and constitutional issues; and, perhaps more simply, that they would have been recognised by the Court as the kind of submissions the Court is accustomed to receiving. Engaging counsel might also have made the court receptive to an application for the making of oral submissions; and might have smoothed the communications between the *Wurridjal* amici and the plaintiff’s legal advisers. All of this is, of course, speculation; but the utilisation of counsel to represent amici is, I suggest, a sensible step where possible. Counsel are expert in preparing submissions and in oral argument; many counsel, both senior and junior,

²⁹ See, for example, the debate in *Al-Kateb v Godwin* (2004) 219 CLR 562. See also Kristen Walker, ‘International Law as a Tool of Constitutional Interpretation’ (2002) 28 *Monash University Law Review* 77.

would be prepared to be involved in High Court constitutional litigation on a pro bono basis; so why not use that resource? While it is understandable that academics might wish to appear themselves, it may not always be the most successful strategy for academics to appear alone.

Conclusion

In my view, the ability of amici curiae to participate in constitutional cases should be expanded. Such participation should, however, in most cases be limited to the filing of written submissions, so as to accommodate a variety of amici and not simply one or two 'well funded and powerful' organisations. The High Court Rules and Practice Directions should, in my view, be modified to achieve this.

Generally it will be desirable for amici to involve practitioners, and ideally counsel, in the preparation of their submissions in order to ensure that the submissions are in fact likely to assist the Court.

Finally, the amici need to engage in a very direct way with the issues before the court. They can be bold, and offer a fresh perspective,³⁰ they can provide expertise and address the wider consequences of the case, but they need to be relevant, and manifestly so. In addition, they need to be concise and relevant. Ideally, all those filing submissions in the High Court should be concise and relevant; but this injunction is particularly relevant to interveners, who are there at the Court's discretion.

³⁰ See Fordham, above n 14, 22-3.