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Abstract
Amici curiae ('amici') are generally understood as being 'friends of the court'. They provide submissions to the court but are not parties to the dispute. They have never been a significant feature of constitutional litigation in the High Court of Australia. Amici involvement has been the exception rather than the rule in the High Court, in any type of litigation before it. Should they appear more frequently? Yes.

In the context of constitutional justice, amici should play a greater role. Constitutional justice can be understood as many things. For some, constitutional justice is a reference to the attainment of substantive rights protection through the application of the Constitution to a particular set of circumstances. For the purpose of this discussion, however, it is simply another way of saying 'access to constitutional litigation' in the sense of being able to participate in that litigation.

Keywords
Access To Constitutional Justice, Amici Curiae, Greater Amici Involvement Before the High Court, Access Supported by ss 7 and 24 of the Constitution

SOME COMMENTS ON AMICI CURIAE AND 'THE PEOPLE' OF THE AUSTRALIAN CONSTITUTION

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Introduction

Amici curiae ('amici') are generally understood as being 'friends of the court'. They provide submissions to the court but are not parties to the dispute. They have never been a significant feature of constitutional litigation in the High Court of Australia. The earliest mention of amici in a High Court judgment was in 1906, where Griffith CJ noted that argument regarding the jurisdiction of the Court may be made by an amicus.[1] In 1916, Mitchell KC appeared as amicus, arguing about the appellate jurisdiction of the Court.[2] That was not the beginning of a trend of amici appearing in constitutional litigation. Rather, amici involvement has been the exception rather than the rule in the High Court, in any type of litigation before it. Should they appear more frequently? Yes.

In the context of constitutional justice, amici should play a greater role. Constitutional justice can be understood as many things. For some, constitutional justice is a reference to the attainment of substantive rights protection through the application of the Constitution to a particular set of circumstances.[3] For the purpose of this discussion, however, it is simply another way of saying 'access to constitutional litigation' in the sense of being able to participate in that litigation.

Ernst Willheim and Kristen Walker have contributed the two chapters addressing amici in this collection. They are both supportive of increased participation of amici in constitutional litigation before the High Court.[4] Below I address each of their reasons for such participation and add a consideration of the role of 'the people' of the Constitution.

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1 *Federated Amalgamated Government Railway & Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488, 494-5.

2 *R v Murray & Cormie* (1916) 22 CLR 437, 440.

3 The obvious limitation of this view is the lack of explicitly rights-protective sections of the Constitution.

4 In fact, both seem supportive of amici involvement more generally in High Court litigation.

Willheim and Walker's three reasons for greater amici involvement

The distinct role of the High Court, the significance of constitutional litigation, and the potential contribution amici can make are all factors which support greater amici involvement before the Court.

The High Court, as the ultimate judicial arbiter in the country, has a role in making law and developing the meaning of the Constitution.[5] Appellate cases only reach the High Court when there is something special about them, extending beyond the interests of the parties to the litigation. The *Judiciary Act 1903* (Cth) expressly requires that the Court considers whether a matter 'is of public importance, whether because of its general application or otherwise' in determining whether or not to grant special leave to appeal to that Court.[6] Therefore, to a greater extent than in proceedings before other Australian courts, there should be more scope for amici involvement in order to reflect the High Court's role.

The centrality of the Constitution to the laws which govern all Australians provides another reason for the involvement of amici in matters concerning the Constitution's interpretation and application. The Constitution is the foundation of the Australian legal system and as such affects the whole community. As Willheim characterises it, constitutional litigation is a form of public interest litigation.

Amici submissions can be significant. As Walker identifies with respect to cases in Australia,[7] and in cases abroad, when amici submissions are done well, they can encourage the Court to consider alternative arguments and materials that may have an impact on the final outcome.

I agree that these factors support greater amici involvement in litigation before the High Court, particularly constitutional litigation. The function of the Court, the nature of the litigation and the potentially meaningful contribution of amici all come

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5 See s 72 of the Constitution regarding the final nature of High Court appeals and *Judiciary Act 1903* (Cth) s 30(a), made under s 76 of the Constitution, which confers original jurisdiction on the Court with respect to "all matters arising under the Constitution or involving its interpretation".

6 See s 35A(a)(i). Special leave is required for appeals from State Supreme Courts and the Full Court of the Federal Court: *Federal Court of Australia Act 1976* (Cth), s 33(3) and *Judiciary Act 1903* (Cth), s 35(2): upheld in *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194.

7 See, eg, *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322. The submissions of the amici were referred to by the judges at 356 (McHugh J), 381, 392-3, 405, 408 (Gummow J), 413-7 (Kirby J) especially at 417 where he states "Like Gummow J, I pay tribute to the assistance provided by [the amici] submissions", 463 (Hayne J).

together to say that amici should be part of the picture when discussing access to constitutional justice.

Adding a consideration of 'the people'

Another way of putting the argument for amici participation is to consider it as one way for 'the people' of the Constitution to obtain access to the Court and to be involved in the development of the meaning of the Constitution. 'The people' that I refer to are 'the people' who are recognised by the Constitution. The phrase 'the people' appears in the preamble, where the people of the colonies agreed to unite in one indissoluble federal Commonwealth. 'The people' then appear in the text of the Constitution, in ss 7 and 24, where the people of the States and Commonwealth directly choose the members of Parliament. Those same electors then vote in referenda under s 128, in order to amend the text of the Constitution.

As a group, 'the people' can be understood as the constitutional community who agreed to the Constitution, to whom the Constitution applies and through whom the constitutional systems of government operate. 'The people' form the bedrock of our system of representative government[8] and are central to the authority of the Constitution through the idea of popular sovereignty.[9]

When understood in that way, the significance of 'the people' in the constitutional text, history and structures means that they should have access to the High Court and a role in developing the Constitution's meaning. The people already have a role in changing the text of the Constitution by voting in referenda under s 128. However,

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[8] For the importance of representative government and the role of 'the people' within it, see *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 (Gleeson CJ); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 557-8; *Langer v The Commonwealth* (1996) 186 CLR 302, 340-3, 350 (McHugh J); *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, 35-7 (McTiernan and Jacobs JJ), 50-1 (Gibbs J), 68-71 (Murphy J).

[9] This is an argument that the authority of the Constitution rests with 'the people' rather than the force of the Imperial Act within which the Constitution is found. See Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1; Geoffrey Lindell, 'Why is Australia's Constitution Binding? The reasons in 1900 and now, and the effect of independence' (1988) 16(1) (March) *Federal Law Review* 29. Deane J was a great proponent of this idea: *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171-3, 180; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70-2 (Deane and Toohey JJ). See also *McGinty v Western Australia* (1996) 186 CLR 140, 237 (McHugh J); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 137-8 (Mason CJ); Cf 180-1 (Dawson J).

greater access to constitutional litigation means that the people can also be involved in the development of the meaning of that text.[10]

While I argue for greater access to the Court for 'the people', the suggestion of completely open standing to any individual who is a member of 'the people' may take things too far.[11] Amici are an alternative avenue for increased participation of the constitutional 'people'. Amici applications, both in Australia and overseas, are often made by special interest groups.[12] These groups represent segments of the community. By allowing more amici involvement, at least some of the voices of 'the people' can be more easily heard and potentially influence the meaning of the Constitution.[13]

Giving 'the people' a greater say through amici involvement is an example of a more democratic dialogue or conversation[14] between 'the people' and the Constitution, mediated through the High Court. In some ways this may alleviate concerns raised in the United States regarding the counter-majoritarian difficulty of judicial review. The counter-majoritarian difficulty is a reference to the fact that giving the judiciary the ultimate say in the meaning of legislation and the Constitution goes against democracy. However, by having more of 'the people' participating in constitutional litigation, the centrepiece of representative democracy is involved together with the unelected judiciary.

Adding a consideration of 'the people' to the mix of arguments presented by Willheim and Walker adds force to why amici should appear more frequently in the High Court. If this is to occur, a number of issues arise. They are how amici can be most effective, what changes should be made to facilitate their involvement, and, when considering the theme of this book, their relationship with access to constitutional justice.

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10 See Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010), Chapters 3, 5 and 6.

11 See Simon Evans, in this volume.

12 For example, the Australian Health Care Association and the Australian Episcopal Conference in *Superclinics Australia Pty Ltd v CES & Ors* S88/1996 [1996] HCATrans 357 (11 September 1996) – this case was settled before a judgment was handed down. See also the Australian Catholic Bishops Conference in *McBain v Victoria* (2000) 99 FCR 116. Regarding the position overseas, see Walker, in this volume.

13 I acknowledge the potential of 'lawyer capture' in which lawyers representing a community group may disregard the aims or views of the group. This shows that greater amici involvement does not guarantee that all voices of 'the people' are heard. It is therefore a limited tool for 'the people' to have access to constitutional justice. Evans touches on this in this volume, referring to work of Levinson and Bell.

14 I acknowledge Kristen Walker in helping to develop this idea.

Manner and content of amici submissions

The manner in which amici arguments are presented and the content of them will have an impact on their effectiveness. Amici submissions can be either oral or written. Having submissions dealt with on the papers would allow a greater number of them without affecting the hearing times. However, eliminating oral argument altogether goes too far as it may have a greater impact on the Court than written submissions. As noted by HW Perry, one problem with written submissions is that judges may simply not read them, thereby eliminating any influence they may have on the Court.[15] I adopt the view expressed by the Honourable Murray Wilcox that a general presumption against oral submissions is reasonable. If the amici wish to be heard then the Court should exercise its discretion in determining whether it is of use to the Court for oral submissions to be allowed, and if so, limit the time which can be taken.[16]

Amici submissions are generally understood to be useful when they present arguments to the Court that would not otherwise be made.[17] Those arguments can give a different perspective to the case at hand, make additional materials available to the Court and could allow more community voices to be heard. But how far from the issues raised by the parties can those additional arguments go? And what limits are there on the source and quantity of additional materials?

Constitutional litigation outside the private-law paradigm

If amici are to be supported in their role of adding to the arguments heard by the Court, a number of changes need to be made. First, a stronger recognition that constitutional litigation is not merely adversarial. Second is the flow-on effect of having to re-work procedures and deal with practicalities.

All litigation in Australia is adversarial. The focus is on the parties, the way they frame the issues and present their arguments. This has been called the 'private-law paradigm'.[18] However, it seems that the High Court is becoming more open to the idea of amici taking a case beyond those issues. This is seen in the words of the

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15 HW Perry, in this volume.

16 Ibid.

17 This may occur when there is no contradictor: see for example the Australian Catholic Bishops Conference appearing as amicus before the Federal Court in *McBain v Victoria* (2000) 99 FCR 116.

18 See Patrick Keyzer, in this volume and, more generally, Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010).

majority in *Wurridjal*, despite having rejected the amicus application in that case. The majority stated:[19]

> 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.

This goes some way towards the view of Kirby J, with whom Crennan J agreed, that the High Court, especially in constitutional cases, has a special role "that necessarily goes beyond the interests and submissions of the particular parties to litigation."[20]

Willheim wants the Court to take that suggestion to its outer limit, to focus more on the substance of the issues raised by any amici rather than the quality of the submissions of the parties, when determining any amicus application. He suggests a presumption in favour of amici involvement. That would be somewhat consistent with these comments in *Wurridjal*, but would also challenge the adversarial nature of the litigation.

Practicalities – rules and style

If the Court is willing to adopt this view, we are left with determining how to manage the practicalities. The first hurdle is the lack of clarity in the rules surrounding involvement of amici, in terms of the bases upon which leave will be granted or refused and the procedural rules for involvement. There are no express rules in the Constitution, the *Judiciary Act 1903* (Cth) or the High Court Rules. The Court often simply states that leave is refused or granted, with little discussion of the basis for that decision. The discussion in *Wurridjal*[21] was therefore somewhat out of the ordinary, but provides a foundation for future clarification of the Court's position regarding amici applications.

The other practical issue is, for want of better words, the style and quality of the presentation. It is obvious that greater amici involvement will have some impact on the Court and the parties, and the decision will have to be made: how much of an impact in terms of additional time and resources is acceptable? And how can the experience of the parties, and any amici, be improved? A number of suggestions have

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19 *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 312 ('*Wurridjal*') (French CJ for the majority).

20 Ibid 313. It is not clear whether the 'administration of justice' is a reference to the resolution of the dispute between the parties before the Court, or to a broader notion. We await further development by the Court of the test regarding leave to appear as amicus.

21 See *Wurridjal* (2009) 237 CLR 309, 312-3 for the full reasoning of both the majority and minority regarding the amicus application in that case.

been made by Willheim and Walker, to which I add the discretionary powers of the Court to control proceedings.

Willheim outlines changes which would take advantage of technology in order to allow access to pre-hearing documents, so potential amici are aware of upcoming litigation. Making materials such as submissions available online, through the High Court website, seems to be the easiest of his suggested changes. It is already done in other jurisdictions.[22] It would be surprising if the High Court and practitioners before it would resist such a development.

The more difficult suggestion made by Willheim is in having amici involved from an early point in the directions stage. This would assist amici in being aware of the positions of the parties, and prevent ambushing of the parties by arguments amici may make. However, the timetable of the lead-up to the final hearing would have to accommodate the provision of submissions and the additional voices at the directions-hearing stage. As Walker has noted, parties make strategic decisions about how to present their case and may not want to have their position compromised, or amount of preparation increased, by additional participants such as amici.

While rules may be changed to facilitate greater involvement of amici with minimal impact on the parties, the remaining issue is a question of style of delivery. Effective amici must be able to present material and arguments to the Court in a form and manner that is acceptable to the Court. Without appropriate advocacy, amici contributions, even if allowed to be put to the Court, may be ineffective. This is a question of tailoring amici applications to a style with which the Court is comfortable.

In order to overcome some of the current difficulties, and lack of consistent success of amici having a substantial impact on the Court, Walker suggests a greater involvement of experienced advocates in presenting the arguments for amici.

Amici not the sole answer

Even if these issues are overcome, amici can never be the sole answer to the problem of access to constitutional justice. Amici can provide one form of access to constitutional litigation, which could allow the voices of 'the people' to be better heard in that litigation. Amici should be a more common feature in the High Court because of the role of that court, the distinct nature of constitutional litigation and the potential for them to make a difference. Their ability to bring 'the people' and the

[22] For example, the Supreme Court of the United States provides free public online access to briefs filed with that Court via a website maintained by the American Bar Association: <http://www.abanet.org/publiced/preview/briefs/home.html>.

Court together in shaping the meaning of the Constitution should be developed. However, amici will never commence litigation or draft the pleadings. They will only ever add to a case once a dispute is already on foot, with the issues already established. For a complete answer to the problem of constitutional justice, amici can only play a part.