*The Hon Justice Susan Kenny**

INTERVENERS AND AMICI CURIAE IN THE HIGH COURT

SOME recent cases before the High Court have shown that the Court has gone quite some distance along the path of permitting non-parties to have a voice in proceedings before it. This paper examines this new practice, notes some of its benefits and disadvantages, and concludes with a proposal for procedural reform.

MODES OF NON-PARTY PARTICIPATION

Aside from joinder as a party by an existing party, non-party participation in existing proceedings may be secured in two different ways: by being joined as an intervener, or by being heard as amicus curiae. (In both types of case, the non-party must apply to the court for leave to be so joined or heard.)

If joined as an intervener, the intervener becomes a party to the proceedings with the benefits and burdens of that status.[1] Thus, in appropriate proceedings, an intervener may adduce evidence, call witnesses, cross-examine, and exercise any right of appeal enjoyed by other parties. Moreover, orders for costs can be made for and against an intervening party.

Courts have traditionally been most reluctant to permit a person to intervene in this way in common law proceedings, although a more generous approach was possibly adopted in courts of admiralty and equity.[2] A civil action in the common law tradition has usually been thought of as a private controversy between plaintiff and defendant. A person seeking to intervene has been regarded as an undesirable busybody, unless possessed of some actual legal interest. Some judges have taken the view that a court may have no jurisdiction with respect to persons with no legal interest in the proceeding, absent relevant statutory or constitutional provisions. This consideration recently affected the reasoning of the former Chief Justice, Sir Gerard Brennan, in *Levy v Victoria*[3] and *Lange v Australian Broadcasting Corporation*,[4] to be discussed below.

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1 See, eg, *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184.

2 See *Levy v Victoria* (1997) 189 CLR 579 at 601 per Brennan CJ.

3 (1997) 189 CLR 579.

4 (1997) 189 CLR 520.

For my own part, I had been inclined to think that, having regard to *Australian Conservation Foundation v Commonwealth*,[5] a person who could establish some "special interest" in the subject of the proceeding might be entitled to be joined as an intervener, even though he or she could show no private legal right. In this event, the "special interest" requirement would be satisfied if it were shown that the special interest was more than a "mere intellectual or emotional concern", even if it was not a legal or pecuniary right. Even on this test, however, many a public interest proponent would fail because the interest propounded was no more than an intellectual or emotional one. *Kruger v Commonwealth*[6] now provides a more generous test.

The courts' increasing willingness to admit "special interest" interveners has perhaps been partly in recognition of the fact that, though the Attorney-General has traditionally been regarded as the representative of the public interest, there is no accepted practice which permits the Attorney-General to intervene as of right in ordinary non-constitutional litigation on a matter of public policy: see *Corporate Affairs Commission v Bradley*.[7] The position of the Attorney-General in constitutional cases is, of course, quite different.[8]

With regard to the second mode of non-party participation, the term "amicus curiae" or "friend of the court" was traditionally intended to apply to a person who gave disinterested advice to a court on a point of law: see, for example, *Bropho v Tickner*.[9] An amicus curiae could not be a party and was not required to show any proprietary, material or financial interest in the proceeding. An amicus curiae was not entitled to file pleadings, adduce evidence, examine witnesses or bring an appeal.

Leaving aside intervention by the Attorneys-General of the Commonwealth or the States, intervention, whether as intervener or by way of amicus curiae, has been a relatively rare event in Australian courts. The cautious approach pursued by Australian courts has been encouraged by regular reference to the comments of Sir Owen Dixon in *Australian Railways Union v Victorian Railways Commissioners*:

> I think we should be careful to allow arguments only in support of some right, authority or other legal title set up by the party intervening. Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which arise under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain

5 (1980) 146 CLR 493.
6 (1997) 190 CLR 1.
7 [1974] 1 NSWLR 391 at 396.
8 See ss78A and 78B of the *Judiciary Act* 1903 (Cth).
9 (1993) 40 FCR 165 at 172.

> some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution without regard to the diminution or enlargement of the powers which as States or as Commonwealth they may exercise.[10]

Changes in the approach of the legal profession to the public interest and changes in the generosity with which the Bench will receive applications made on behalf of "public interest" groups have, however, been apparent over the past decade. The role of the amicus curiae has certainly changed and it is accepted that the amicus may enter into partisan advocacy. On the other hand, it also seems to be accepted that the amicus may not take over the management of the case. But uncertainties remain. These uncertainties can occasion real difficulties in circumstances where the admission of an amicus curiae is entirely a matter of discretion.

RECENT EXAMPLES OF A GREATER ROLE FOR INTERVENERS AND AMICI CURIAE

Kruger: An Initial Statement of Principle

In the past there had been considerable uncertainty about what had to be shown to attract a grant of leave to be heard as amicus curiae. Little had been said by the High Court as to what was required.

In the early 1980s counsel acting for the Tasmanian Wilderness Society had sought leave to intervene as a party in *Commonwealth v Tasmania*.[11] The Court declined to rule on whether the Society should be permitted to intervene but permitted counsel to make oral submissions as amicus curiae on ecological issues and to argue that the destruction of the area registered as a world heritage site would impair Australia's relations with other countries. An elegant submission made by the present Chief Justice of the Federal Court significantly reduced any procedural disadvantage suffered by the Society.

In *Broken Hill Pty Co Ltd v National Companies and Securities Commission*[12] the Court refused an application to be heard as amicus, upon the basis that the public interest was adequately served by the defendant. In *Brandy v Human Rights and Equal Opportunity*

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10 (1930) 44 CLR 319 at 331. Gavan Duffy, Rich and Starke JJ agreed that leave should be refused. Only Isaacs CJ was of a contrary view. The views expressed by Dixon J are referred to in *R v Ludeke; Ex parte Customs Officers' Association of Australia* (1985) 155 CLR 513 at 520-1 per Gibbs CJ (Dawson J agreeing), 522 per Mason J and 530 per Deane J. See also *R v Anderson; Ex parte Ipec-Air Pty Ltd* (1965) 113 CLR 177 at 182 and *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391.

11 (1983) 158 CLR 1 (*Tasmanian Dam Case*).

12 (1986) 160 CLR 492.

Commission[13] the Court refused an application by the Public Interest Advocacy Centre to be heard as amicus after counsel conceded that PIAC was not there to fill in the gaps left by other parties. So far, though, little in the way of principle had been articulated.

Then, in February 1996, in proceedings in *Kruger v Commonwealth*,[14] the Secretary-General of the Australian Section of the International Commission of Jurists (the ICJ) applied for leave to intervene as amicus curiae. The proceedings, it may be recalled, involved a challenge to the constitutional validity of the *Aboriginals Ordinance* 1918 (NT). As amicus curiae, the ICJ was proposing to argue in support of invalidity. It was submitted on its behalf that it might assist the Court by reason of the different emphasis that it would place upon the case for invalidity. The Solicitor-General for the Commonwealth, perhaps not surprisingly, opposed the application upon the basis that the ICJ had no interest of its own to agitate. He added that, in cases in which the Court had ordered full written submissions to be filed and the time for oral argument was limited, intervention by an amicus curiae would create difficulties for the parties, who would not know whether they would be required to address additional arguments. I return to these practical matters subsequently.

The application made by the ICJ was refused and in so doing the Chief Justice said:

> Applicants for leave to intervene must ordinarily show an interest in the subject of litigation greater than a mere desire to have a law declared in particular terms. Mr Masterman's application for leave to intervene fails this test. As to his application to be heard as amicus curiae, he fails to show that the parties whose cause he would support are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case. The Court must be cautious in considering applications to be heard by persons who would be amicus curiae lest the efficient operation of the Court would be prejudiced. Where the Court has parties before it who are willing and able to provide adequate assistance to the Court it is inappropriate to grant the application. That is the present situation. The application is refused.[15]

Superclinics: Further Along the Principled Path

Counsel sought to meet this test in *Superclinics (Australia) Pty Ltd v CES*. This case concerned an appeal to the High Court brought by Superclinics Australia Pty Ltd from a ruling made by the New South Wales Supreme Court on 22 September 1995. CES had brought proceedings in the Supreme Court of New South Wales in which it claimed to recover damages following the loss of an opportunity to terminate her pregnancy. The

13 (1995) 183 CLR 245.
14 (1997) 190 CLR 1, but for the amicus curiae application see (1996) 3 Leg Rep 14.
15 (1996) 3 Leg Rep 14.

defendants to the proceedings below were a medical clinic and several medical practitioners who CES alleged had failed to detect her pregnancy despite repeated consultations with them. The plaintiff failed at first instance. The trial judge held that, by reason of ss82 and 83 of the *Crimes Act* 1900 (NSW), any termination of her pregnancy would have been unlawful and that the plaintiff could not make out a cause of action.[16] On 22 September 1995, the New South Wales Court of Appeal upheld her appeal and ordered a new trial.[17] The majority, consisting of Kirby ACJ and Priestley JA held that the defendants had failed to establish that any termination of her pregnancy would necessarily have been unlawful. Meagher JA dissented. The High Court granted the defendants' application for special leave to appeal on 15 April 1996 and the hearing of the appeal began on 11 September 1996.

The Australian Catholic Health Care Association (which I shall call the ACHCA) and the Australian Episcopal Conference of the Roman Catholic Church (which I shall call the Catholic bishops) made application to be heard upon that date. Counsel for both ACHCA and the bishops made application to be heard first as amicus curiae and, secondly, as intervener. This led to the following exchange:

> Dawson J: Yes, but I just want to know the basis on which you make your application, to make sure.
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> Brennan CJ: But it is amicus curiae rather than intervention? I mean, if intervening, then there is all the status of the parties to be considered.
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> Mr McCarthy: Yes.
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> Brennan CJ: The question of costs and liability for them.
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> Mr McCarthy: Yes, we would seek the status of amicus curiae. If the Court was of the opinion that there was an appropriate position in this that was wider than that and that was an intervener, your Honour, we would accept that also as being the position and would accept any penalty or other arrangements in relation to costs concerning that.[18]

The exchange was not particularly illuminating.

The ACHCA and the Catholic bishops sought to be heard as amicus curiae in order to advance arguments which, it was submitted, would not otherwise be adequately laid before the Court. In particular they sought to place submissions before the Court that the tests for

16 *CES v Superclinics (Australia) Pty Ltd* (unreported, Supreme Court of NSW, 18 April 1994).

17 *CES v Superclinics (Australia) Pty Ltd* (1995) 38 NSWLR 47.

18 *Superclinics*, transcript, 11 September 1996, p10.

determining the legality of an abortion had misconceived the legislation which prohibited abortion, and that the establishment of a duty of care not to deprive a woman of the opportunity of an abortion would transform the legal and professional obligations owed by medical practitioners, health care professionals and health care facilities to pregnant women. It was submitted that a wrong turning would have a very grave impact on the delivery of health services in Australia. It was also submitted that the applicants had a substantial interest in the outcome of the litigation. In their submissions, counsel for the applicants, Mr JA McCarthy QC and Mr JG Santamaria QC said:

> Those interests include legal duties and responsibilities which are direct and immediate in terms of the functioning of Catholic health care facilities and the legal framework in which they operate. These facilities and centres include family counselling and advice centres throughout Australia, such as Centacare, sponsored by Catholic bishops.[19]

Counsel for the applicants said, in their written submissions, that they wished "to protect and to maintain a legal framework for their activities in which it is not a legal duty on providers of medical services to pregnant women to advise on the possibility of abortion."[20] In the result, the High Court decided, by statutory majority, to permit the applicants to appear as amicus curiae and file written submissions.

Following the success of this application, a successful application for leave to be heard as amicus curiae were made by the Abortion Providers' Federation. The Women's Electoral Lobby gave informal notice of a similar application, but it did not, in the end, proceed with it. (The case itself did not proceed to a determination on the merits, a notice of discontinuance being filed on 11 October 1996.) Presumably groups such as these perceived that the success of the application made by the Catholic bishops had altered the nature of the case. This, in any event, was the way Ms Jo Wainer, of the Women's Electoral Lobby, saw the matter. In her article "Abortion before the High Court", Ms Wainer wrote that the success of the Catholic bishops' application "radically transformed the case from one of medical negligence to *the* test case on abortion".[21] Ms Wainer described her response to the news that the Catholic bishops had been successful in the following terms:

> I became convinced that the Women's Electoral Lobby had to do everything possible to be present in the case, explicitly as a voice for women.

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19 Submissions filed with the Court on behalf of ACHCA and the Catholic bishops, p4.

20 At p4.

21 Wainer, "Abortion before the High Court" (1997) 8 *Aust Feminist LJ* 133 at 137 (emphasis original).

> Could we do it? We had no money, no campaign group on the issue, no legal team, no time. But we did have political smarts, media contacts, networks, information resources and friends.[22]

Levy and *Lange*: Return to Principle

It will be recalled that in *Lange v Australian Broadcasting Corporation*[23] the plaintiff, a former Prime Minister of New Zealand, brought an action for defamation in the Supreme Court of New South Wales. The defendant not only pleaded the defence of qualified privilege but also that the publication was made pursuant to a freedom guaranteed by the Constitution to publish material in furtherance of discussion of governmental and political matters. The matter was removed into the High Court pursuant to s40 of the *Judiciary Act* 1903 (Cth) and the plaintiff made application for leave to re-open *Theophanous v Herald & Weekly Times Ltd*[24] and *Stephens v West Australian Newspapers Ltd*,[25] the cases said to give rise to the relevant constitutional freedom. The same application to re-open these cases was made by the defendants in *Levy v Victoria*.[26] Levy, it may be recalled, had entered a duck shooting area to protest against duck shooting laws and had later been charged with summary offences under the Wildlife (Game) (Hunting Season) Regulations 1994 (Vic).

When the Solicitor-General for Victoria made the same application in *Levy* for leave to re-open *Theophanous* and *Stephens*, the Court adjourned the hearing so that it might be argued further with *Lange*. When *Levy* and *Lange* came on for hearing on 3 March 1997, the Attorney-General for the Commonwealth and each of the States (other than Victoria, already a party in *Levy*) intervened as of right pursuant to s78A of the *Judiciary Act* 1903 (Cth). In addition, major newspaper interests applied for leave to intervene. An alternative application to be heard as amicus curiae was made by the Media, Entertainment and Arts Alliance and also by the Australian Press Council.

The applications relied upon a number of matters. First, it was said that publications had been made in reliance on *Theophanous* and *Stephens* and that, if those cases were overruled, media interests and journalists would be deprived of a defence which had been properly open to them with respect to those publications. Further, it was said that the constitutional immunity from suit recognised in *Theophanous* and *Stephens* was of particular value to media proprietors and journalists who were in the business of publishing material relating to political matters. After considering the question of jurisdiction, the Chief Justice said:

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22 As above.
23 (1997) 189 CLR 520.
24 (1994) 182 CLR 104.
25 (1994) 182 CLR 211.
26 (1997) 189 CLR 579.

> Jurisdiction to grant leave to intervene to persons whose legal interests are likely to be substantially affected by a judgment exists in order to avoid a judicial affection of such a person's legal interests without that person being given an opportunity to be heard.[27]

The existence of this jurisdiction stemmed, so the Chief Justice said, from the nature of the Court's jurisdiction which obliged it to act in accordance with the rules of natural justice.[28] Accordingly, a non-party whose interests were to be directly affected by a decision in the proceedings had a right to intervene to protect that interest. No such right arose in the case of a non-party whose interests may be only affected indirectly and contingently. If, however, it were demonstrable or shown to be likely that there would be some substantial effect on a person's interest, the Court might as a matter of discretion grant leave to intervene, a pre-condition for leave having been satisfied.[29] The media proprietors and journalists satisfied the latter condition so that the Court might, in exercise of its discretion, grant their application for leave to intervene.[30] The Chief Justice went on to say:

> The footing on which an amicus curiae is heard is that that person is willing to offer the court a submission on law or relevant fact which will assist the court in a way in which the court would not otherwise have been assisted. ... It is not possible to identify in advance the situations in which the court will be assisted by submissions that will not or may not be presented by one of the parties nor to identify the requisite capacities of an amicus who is willing to offer assistance. All that can be said is that an amicus will be heard when the court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected.[31]

Project Blue Sky: Further Development of Principle

On 29 September 1997 the High Court granted leave to eleven persons to appear as amicus curiae in the hearing of *Project Blue Sky Inc v Australian Broadcasting Authority*.[32] The case concerned the proper exercise of power under s122 of the *Broadcasting Services Act* 1922 (Cth) to determine standards in relation to the Australian content of programs. The eleven amici included the Australian Film Commission, the Australian Film Finance

27 At 603.
28 At 601.
29 As above.
30 For an example of an occasion when a party can really show good reason to be admitted as an intervener, see *Walter Hammond & Associates Pty Ltd v New South Wales* (1997) 189 CLR 465.
31 (1997) 189 CLR 579 at 604-605.
32 (1998) 153 ALR 490. For the amicus curiae application, see transcript, 29 September 1997, pp1, 44-58, 64-65.

Corporation Ltd, the Australian Children's Television Foundation, the Screen Producers' Association of Australia, the Australian Writers' Guild Ltd, the Media, Entertainment and Arts Alliance and the Australian Screen Directors' Association. The case did not involve a constitutional question but a question of statutory construction. The grant of leave was significant for it showed just how far the High Court has gone along the path of accepting non-party involvement.

It is plain that the Chief Justice's observations in *Levy* identified the consideration which led the Court to grant leave to be heard as amici in *Project Blue Sky*. Having said that it would take the application after the appellant's submissions, the Court subsequently postponed hearing the application until after both appellant and respondent had been heard. By this stage it had become apparent that counsel for the amici desired to make submissions which had not been advanced by the parties and to make those submissions upon material not yet before the Court. The material consisted, it seems, of international instruments, and counsel relied upon s15AB of the *Acts Interpretation Act* 1901 (Cth) or upon principles of statutory interpretation enunciated in *Henderson v Collector of Customs*[33] to place this material before the Court. The outcome was that the Court received both the material and the arguments which counsel for the amici sought to advance. Counsel for the amici did not seek costs and said they should not be awarded against his interest. Counsel for the appellant sought costs against the amici, however, but the basis for this application was unstated.

FRIENDS FOR GOOD OR ILL? BENEFITS AND DANGERS OF INTERVENERS AND AMICI CURIAE

The *Superclinics Case*, in particular, demonstrated the arguments both for and against a more generous approach to amicus applications. It demonstrated that there was much to be said for the argument that participation as amicus curiae is incompatible, to some extent, with the traditional understanding of the operation of the system of adversary litigation and the judicial process. If the principal object of litigation is simply the resolution of a dispute between the various parties on the basis of the evidence and the arguments provided by the parties there was little place for the Catholic bishops, or the Abortion Providers' Federation. For this reason, courts have not, until recently, favoured the participation as amicus curiae of public interest groups.[34] The involvement of "uninvited guests" has the capacity to work considerable unfairness to the parties. Imagine how the parties in *Webster v Reproductive Health Services*[35] must have felt when the 60 amici briefs in that case were filed! The admission of amici plainly has the capacity to expand inappropriately the range of issues in dispute, lengthen the hearing unduly and impose an even greater costs burden.

33 (1974) 48 ALJR 132 at 135.

34 Cf *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 395-408 per Hutley JA with whom Reynolds and Glass JJA agreed.

35 492 US 490 (1989).

Further, the admission of special interest groups may diminish the perception that all citizens are equal before the law. Why should any one special interest group be heard? How does the court assess a special pleading which may threaten to hijack the litigation from the parties themselves? Is there a danger that it will appear that the court listens only to the powerful and well-funded?

To my mind, it is this last feature which is the most concerning. No court should overlook the fact that the value to an amicus of being accorded amicus status may be rather different from the value which the court hopes to derive. For the amici there is not only the value of putting the successful argument, there is the value of publicising the ramifications of the decision the court is asked to make.

Equally, of course, there are strong arguments in favour of providing non-parties with an opportunity to be heard. First, especially at an appellate level, it is desirable that the courts are adequately informed about the matters which come before them. As Lord Reid observed more than twenty years ago:

> [W]e must accept the fact that for better or for worse judges do make law, and tackle the question how do they approach their task and how should they approach it.[36]

Over 100 years ago, the Supreme Court of the United States said that the purpose of allowing non-parties to intervene in a proceeding is to prevent a "failure of justice".[37] An example of how useful the Supreme Court has found non-party intervention can be seen in *Mapp v Ohio*,[38] in which the argument of the American Civil Liberties Union filed in an amicus brief was adopted when the Court decided that the rule that improperly seized evidence should be excluded from criminal trials extended to State courts.

Although the primary duty of courts in the civil sphere is to resolve disputes brought before them, other duties may include a duty to elucidate the law and to do so as well as they are able. In the ordinary case the best assistance comes from those most directly affected, the parties themselves. In exceptional cases, however, others may provide assistance which lies beyond the capacity of the litigants themselves. It was, presumably, on this basis that the High Court decided to admit the Catholic bishops in the *Superclinics Case.*

Kirby J has indicated that he regards this last consideration as a most important one. In *Levy v Victoria*, his Honour said:

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36 Reid, "The Judge as Law Maker" (1970) 12 *JSPTL* 22 at 22.
37 Cf *Krippendorf v Hyde* 110 US 276 at 285 (1883).
38 367 US 643 (1961).

> For good reason, this court should maintain a tight rein on interventions. Where they are allowed, the court should impose terms which protect the parties from the costs and other burdens which interventions may occasion. However, some of the rigidities of earlier procedural restrictions are not now appropriate. This is especially so because of this court's function of finally declaring the law of Australia in a *particular* case for application to *all* such cases. The acknowledgment 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 the 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. This appreciation has inevitable consequences for the methodology of the court. Those consequences remain to be fully worked out. [39]

Further, it has been said that, in admitting public interest groups into court as amici curiae, the courts themselves promote a greater understanding and acceptance of their decisions in the community at large. By their participation in public interest litigation, it is said that such groups assume a moral obligation to respect the outcome of the litigation. Whether this is true or not (and I am not as yet persuaded that it is), at the very least it may be reasonable to expect that such involvement has an educative role. What weight the Court should give to this factor is another matter.

PROPOSAL

If those "earlier procedural restrictions" are not to govern, it would, in my opinion, be highly desirable to establish a suitable procedure to govern applications of the kind made in *Kruger*, *Superclinics*, *Levy*, *Lange* and *Project Blue Sky*. The acceptance of appropriate procedures could go a long way to diminish the very real risks of more readily permitting non-party intervention. My proposals would be:

(1) A clear statement in the Rules of Court of the forms in which a person may seek to intervene or otherwise participate in proceedings, and of the probable consequences of any successful application.

(2) A clear statement in the Rules of Court of the tests to be satisfied before an application for leave to intervene or to be heard as amicus curiae will be entertained. For interveners that test should be whether the "special interests" of the applicant are, or are likely to be, affected by a decision in the proceeding. For amici the test should be whether the

39 (1997) 189 CLR 579 at 650-651 (emphasis original).

applicant has some expertise, knowledge, information, or other insight which is not available to the parties and which is likely to assist the Court in arriving at a correct determination.

(3) Provision in the Rules of Court for procedures for applications for leave to be heard within established time limits before the hearing of the case (eg on the hearing of an application for special leave or at the first directions hearing). After the time limits have expired, the Court would then be in a position to deal with any applications for leave, having regard to the interests of the litigation as a whole. This would tend to avoid dealing with applications on a piecemeal basis. Those who would be amici should also be required first to seek the parties' consent.

(4) Provision in the Rules of Court for directions as to the conditions under which such an intervention may be permitted. Once the Court knows the number of potential applicants for leave and the nature of their submissions, it is in a position to make directions to ensure that litigation is kept within manageable limits. It may, for example, choose to direct the applicants to confine their presentations to appropriate legal issues (eg as in *Lange* and *Levy*) and not to trespass into the details of the relationships between the parties.

(5) Provision in the Rules for restricting the manner of participation. The Rules might provide that, in general, applicants for leave to be heard as amicus be restricted to making submissions in writing (eg as in *Lange* and *Levy*), save where the Court is of the view that oral submissions would be particularly helpful. Appropriate opportunity would then be given to the parties to the litigation to reply.

(6) Provision for limiting repetition and wasted effort, for example, by limiting the length of submissions or directing that several applicants should be required to combine in their efforts.

(7) Finally, provision in the Rules for the costs occasioned by an intervention to be borne by the interveners. (Orders to this effect were made in *Lange* and in *Levy*).

Under the proposed Rules, it should be made clear that the views of the parties are relevant and may carry considerable although not determinative weight. The object of a procedure of this kind would be to balance the rights of the parties against the interests of non-party interveners and other would-be participants in the litigation.

Whether particulars of this proposal are acceptable or not, it is, it seems to me, important that the position of public interest interveners be acknowledged expressly in appropriate Rules of Court and that the legal profession be made aware of the principles upon which decisions to grant or to deny intervener or amicus status are made, in order to enable counsel to advise and assist their clients. A system for controlling public interest

intervention that is based on a seemingly unstructured judicial discretion is bound to create unnecessary expense and frustration.