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INTERVENERS IN HIGH COURT LITIGATION: A COMMENT

OVER the last five years, the Public Interest Advocacy Centre (PIAC) has embarked upon a small and somewhat difficult journey along the amicus curiae track: treading gently, welcomed at times and snubbed at others. It has done so in the belief that as an organisation with the stated objective of promoting or advancing the public interest, amicus curiae seemed a neat, contained mechanism for bringing public interest perspectives to the attention of the courts, particularly in litigation which has the potential to travel beyond the interests of the parties in dispute.

Allied to our own internal considerations, is perhaps the more significant factor that, increasingly, courts are being asked to analyse and decide legal questions in the context of complex social, political and economic issues. With the emergence of political activism and public interest groups which have sought to redress public harm, enforce public duties and protect hard-won political and social rights, the traditional view of litigation as a process of resolving individual disputes has had to shift to accommodate the ripples of social and political transformation. Indeed many matters of public and/or constitutional interest are litigated in suits between private parties and, with the changing nature of litigation, frequently implicating many individuals or organisations, corporations and governments, often not party to the dispute, courts are becoming more aware of the need to expand the information available to them.

PIAC'S HISTORY AS A PUBLIC INTEREST AMICUS CURIAE

PIAC's history as a public interest amicus curiae has been brief and chequered:

(1) 1992 *Human Rights and Equal Opportunity Commission v Mt Isa Mines*[1]: PIAC in conjunction with the Responsible Employment Practices Coalition argued for the implementation of a new lead standard designed by Worksafe which sought to integrate non-discriminatory employment practices and occupational health and safety standards. The intervention highlighted benefits by reference to domestic and international developments.

The Full Federal Court allowed oral and written submissions from PIAC.

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1 (1993) 46 FCR 301.

(2) 1994 *Brandy v Human Rights and Equal Opportunity Commission*[2]: PIAC in conjunction with/representing the Women's Electoral Lobby, Australian Federation of AIDS Organisations, Association of Non-English Speaking Background Women of Australia, and Ethnic Communities Council sought to demonstrate the import of and broad public support for legislation which efficiently and effectively redressed social inequities which took the form of discrimination.

The High Court refused the application (as is pointed out by Justice Kenny) after being persuaded that the Commonwealth Solicitor-General would cover the ground to be presented by the amici, despite the fact that they could speak with an authentic voice of those affected by the potential emasculation of the legislation. What was also apparent from a minority of the Court was a fear that our intervention might trigger a floodgate of "busybodies".

(3) In that same year, still stinging from our earlier rebuff, PIAC (in conjunction with/representing the Consumers Health Forum of Australia and the Health Issues Centre) was reluctantly granted leave by the NSW Supreme Court to intervene as amicus in the *Breen v Williams*[3] access to medical records case, the Court commenting that:

> notwithstanding its name, it [PIAC] is not a public body, but a private company limited by guarantee whose members have power to decide whom they admit to membership and what causes they espouse. [In granting leave] I should not be taken as supporting any claim of PIAC to be heard in the public interest.[4]

And if those were not harsh enough words, having got in as amicus at first instance, we were curiously "denied a similar privilege on appeal"[5] (in the words of Justice Kirby). The President of the Court of Appeal (as he then was) continued in his dissenting judgment:

> to exclude the assistance of the Public Interest Advocacy Centre evidences (in my respectful view) the procedural formalism and rigidity which limits the utility of the courts to modern dispute resolution.[6]

(4) In 1996, PIAC, representing the Consumers Federation of Australia as amicus, avoided characterisation as an "uninvited guest" when the NSW Court of Appeal, in *National Australia Bank v Hokit*,[7] welcomed our assistance and allowed our intervention, accepting written submissions and "a limited expansion by oral argument"[8] within strict and

2 (1995) 183 CLR 245.
3 (Unreported, NSW Supreme Court, Bryson J, 10 October 1994).
4 At 71.
5 (1994) 35 NSWLR 522 at 533.
6 As above.
7 (1996) 39 NSWLR 377.
8 At 382 per Mahoney P.

acceptable time limits. It was in this case that the President of the Court, Justice Mahoney, elucidated some important principles and distinctions relevant to leave being granted to amicus applicants and what form the intervention should take and under what conditions. He concluded that the CFA was "a body apt to assist the Court"[9] in its decision because of its involvement with the issues raised and that the "intervention should be limited to matters of public interest not already dealt with by the parties".[10]

(5) And in early 1997, in the *Levy v Victoria*[11] constitutional freedom of political expression challenge, PIAC, representing the Media Entertainment and Arts Alliance, an industrial organisation representing journalists directly affected by the decision, was not permitted leave to intervene as an intervener but only as amicus curiae by way of written submissions - this despite the fact that countless media proprietors seeking intervention, many of them on duplicate grounds and with replica arguments, were granted leave as interveners.

A CAUTION AWAY FROM RULES

While I welcome Justice Kenny's proposal for established procedures governing interventions as a sign of a growing acceptance of the amicus curiae intervener as part of our judicial geography, I wonder whether their implementation may not be premature and hamper the emergence of an Australian approach to amicus curiae interventions.

I will comment briefly on some of the rules envisaged by Justice Kenny, but remain of the view that before procedures and rules are cast the more recent cases of *NAB v Hokit*, of *Breen* and *Levy*, suggest that a body of principles is emerging, that approaches to amicus curiae are being clarified and refined beyond the comprehensive discursus of amicus curiae in the *United States Tobacco Case*[12] (per Einfeld J in 1988), and that ad hoc procedures are being devised to accommodate amicus curiae interveners without too much disruption to the parties. With this incremental approach, it may be that the rules and procedures devised down the track can be better informed and reflect tested and tried approaches, understandings and accumulated wisdom. In this regard, there needs to be clarity and distinctions made between different interveners and the rules applicable to each: for example, the distinction between interveners who attract the rights and obligations of parties to the proceedings and amicus curiae interveners with limited rights; within the category of amicus curiae intervener, a distinction needs to be considered between an amicus in a matter which is simply a dispute between two parties in the traditional sense, often commercial, and the amicus curiae in the public interest, as referred to by Justice Kenny.

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9 As above.
10 As above.
11 (1997) 189 CLR 579.
12 *United States Tobacco v Minister for Consumer Affairs* (1988) 19 FCR 184.

In the case of the amicus curiae intervener, our law, relying primarily on the American and Canadian example, demands that the attributes of an amicus curiae are that the applicant:

i) is genuinely interested in the issue raised and possesses special knowledge and expertise relevant to the disputed issue;

ii) has the ability to represent or protect an interest relevant to the subject of the litigation otherwise omitted or overlooked by the parties (or the parties are unable or reluctant to raise the interest);

iii) offers a unique or novel perspective not raised by either party which is likely to assist the court in its determination.

Importantly and additionally, in the case of a public interest amicus, the applicant must demonstrate that the determination of the dispute has ramifications beyond the actual parties and that it can speak with an authentic voice as a representative of those wider interests. With a public interest amicus curiae who provides the court with a fresh perspective on important public or constitutional issues, consideration needs to be given as to whether the costs occasioned by such a public interest intervention should in fact be borne by the amicus, as is suggested by Justice Kenny. The High Court decision in *Oshlack v Richmond River Council*[13] regarding the usual application of the costs rule to a public interest litigant, may provide some useful pointers in this regard.

In relation to the manner of participation, I would suggest that written submissions expanded by limited oral argument is a preferable approach as it facilitates the ventilation of matters of public importance in a public forum and allows the veracity of propositions to be tested and scrutinised. Even the American tendency to file amicus curiae briefs as a rule, came under recent attack when Chief Judge Posner of the United States Court of Appeal, in considering an application for a review of a denial of leave to file a an amicus curiae brief, stated:

> The tendency of many judges of this court, including myself, has been to grant motions for leave to file amicus curiae briefs without careful consideration of the reasons why a brief of amicus curiae is desirable. After 16 years of reading amicus curiae briefs the vast majority of which have not assisted the judges, I have decided that it would be good to scrutinise these motions in a more careful, indeed a fish-eyed, fashion.[14]

Lastly, in relation to the view that "procedures could go a long way to diminish the very real risks of permitting non-party intervention"[15] (Kenny J), there is no doubt that the

13 (1998) 152 ALR 83; 72 ALJR 578.

14 Judge of the Seventh Circuit, Chambers Opinion, 16 September 1997.

15 Kenny, "Interveners and Amici Curiae in the High Court" (1998) 20 *Adel LR* 159 at 171.

courts have and continue to devise very effective ways of managing and controlling interventions simply based on the circumstances thrown up by each particular case, in the absence of rules. But it should also be noted that applications for amicus intervention are complex, time-consuming and costly, particularly as legal aid is generally unavailable. It is unlikely that the courts will see a rush of amicus interventions in the public interest given the restraints and risks which attach to the procedure. But as Sir Anthony Mason has suggested in a lecture entitled "Future Directions in Australian Law":

> Maybe meddlesome interference by a busybody is a price that we should be willing to pay. After all in other areas of the law the "floodgates" argument has invariably proved to be an ineffectual menace.[16]

In conclusion, Justice Kenny is correct in stating that there has been a sea change in the reception of the courts to public interest amicus curiae. I also agree with her view that the role of amicus curiae however remains unclear, their required attributes uncertain, and an unhelpful confusion pervades as to the proper status of a person seeking to intervene in the public interest.

TOWARDS A DEVELOPED PRINCIPLE ON PARTICIPATION

In response, I would argue that the inconsistent, uncertain and curious judicial response to amicus interventions over the years stems not from a lack of rules, although they may offer some comfort, but is rather indicative of a confusion over what may be considered a desired level of public interest litigation in Australia and the absence of a developed principle on participation. The oft-quoted dicta of Justice O'Connor of the US Supreme Court in the 1989 abortion case, *Webster v Reproductive Health Services,* is insightful in this regard:

> [T]he willingness of courts to listen to interveners is a reflection of the value that judges attach to people. Our commitment to a right to a hearing and public participation in government-decision making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self-respect.[17]

Linked to this observation is the critical question of how judges perceive their role. Justice Kirby, in a report of PIAC's first five years of operation entitled *Five Years in the Ring*, wrote:

> The dis-inclination of judges to conceive their role, even partly as social engineers, is itself the consequence of an unfamiliarity with public interest

16 (1987) 13 *Mon LR* 149 at 162.

17 492 US 490 at 522 (1989).

test cases. To some extent at least, the willingness and ability of courts to consider relevant social phenomena and to articulate general legal principles depends upon the stimulus and assistance they receive from counsel.[18]

As Justice Kirby noted in *Levy*:

> [W]here large issues of legal principle and legal policy are at stake, [courts may be required to adapt their procedures] to ensure that its eventual opinions on contested legal questions are informed by relevant submissions and enlivened by appropriate materials.[19]

In this regard, perhaps the words of counsel, Rabindah Singh, at a conference of the Public Law Project in London last year, are apposite when he drew on the famous words of President Kennedy and asked:

> When considering an amicus curiae intervention in the public interest ... perhaps one should ask not what the courts can do for you but what you can do for the courts.[20]

18 Quoted in Waters, *Five Years in the Ring: An Account of the First Five Years of the Public Interest Advocacy Centre* (Redfern Legal Centre, Redfern 1987) p4.

19 (1997) 146 ALR 248 at 297.

20 Singh, presentation at "Litigating in the Public Interest", Public Law Project Conference, London, 27 June 1996.