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ABORTION BEFORE THE HIGH COURT - WHAT NEXT? CAVEAT INTERVENTUS: A NOTE ON *SUPERCLINICS AUSTRALIA PTY LTD v CES*

INTRODUCTION

UNLIKE Australia, where few cases concerning abortion come before the courts, the United States judiciary deals regularly with this profoundly difficult issue. In one of its less-publicised judgments, with considerable understatement, the Supreme Court referred to the abortion issue as "sensitive and earnestly contested".[1] The appeal to the High Court of Australia from the majority judgment in *CES v Superclinics Australia Pty Ltd*[2] ("*Superclinics*") provided, among other things, an opportunity for the full bench of the High Court to consider the "sensitive and earnestly contested" issue of abortion,[3] and for the first time also to consider a claim for "wrongful birth".

The majority judgment of the New South Wales Court of Appeal was recognised immediately as one of singular importance, especially by feminist writers interested in issues of women's health and reproductive rights. Its significance, in jurisprudential

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1 *Colautti v Franklin* 439 US 379 at 386 (1979) per Blackmun J. An overview of certain aspects of the law in Australia in relation to abortion is provided by Cica, "The Inadequacies of Australian Abortion Law" (1991) 5 *Aust J Fam Law* 37. A helpful overview of historical relevance to the law on abortion in Australia generally, modelled, as much of it is, on the *Offences Against the Person Act* 1861 (UK), and not otherwise discussed by Cica, is John Keown's *Abortion, Doctors and the Law: Some Aspects of the Legal Regulation of Abortion in England from 1803 to 1982* (Cambridge University Press, Cambridge 1988).

2 (1995) 38 NSWLR 47 per Kirby A-CJ & Priestley JA, Meagher JA dissenting.

3 On one earlier occasion, the High Court had briefly considered matters pertaining to abortion in an application for an injunction and for special leave to appeal from an unsuccessful application for injunctive relief sought by the father of a child to restrain the mother of the same child from having an abortion. Relying upon English authority which denied standing to a father, and to the unborn child acting through his or her father as "next friend" (*Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276), Gibbs CJ, in chambers, held that it was convenient for a single judge to dispose of the whole matter, and, in the event, refused the application for special leave and for injunctive relief: *Attorney-General (Qld) (Ex rel Kerr) v T* (1983) 46 ALR 275.

perspective, was founded in its more liberal interpretation of the Menhennitt and Levine rulings on abortion,[4] and in relation to accepting, for the first time at an appellate level in Australia, a claim for "wrongful birth". The case immediately generated a significant body of academic comment; a selection of that literature is noted below, most of which is directed to the novel "wrongful birth" cause of action. It may be noted, perhaps axiomatically, that the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference also recognised the importance of *Superclinics*, but it did so in a way which, inter alia, did not accord with the majority of academic commentators.[5]

The purpose of this note, however, is not to discuss the contortions of the law in relation to abortion or foetal rights, or in relation to the embryonic and important recognition of matters relating to women's health, except insofar as those rights arose in the context of intervention in proceedings in the *Superclinics* litigation by the Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference ("ACHCA/ACBC"). Rather it is to comment, in order, on the procedural point of reference for ACHCA/ACBC in the successful intervention as amicus curiae in that appeal and matters concerning the intervention itself, then to note points of convergence with remarks and suggestions of Justice Kenny in her paper "Interveners and Amici Curiae in the High Court."

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4 Menhennitt J in *R v Davidson* [1969] VR 667; Levine DCJ in *R v Wald* (1971) 3 NSWDCR 25..

5 On the claim for wrongful birth, see Weybury & Witting, "Wrongful Conception Actions in Australia" (1995) 3 *Torts LJ* 53; Graycar & Morgan, "'Unnatural Rejection of Womanhood and Motherhood': Pregnancy, Damages and the Law - A Note on *CES v Superclinics (Aust) Pty Ltd*" (1996) 18 *Syd LR* 323; Petersen, "Wrongful Conception and Birth: The Loss of Reproductive Freedom and Medical Irresponsibility" (1996) 18 *Syd LR* 503; Swanton, "Damages for 'Wrongful Birth' - *CES v Superclinics (Aust) Pty Ltd*" (1996) 4 *Torts LJ* 1; Crowley-Smith, "Therapeutic Abortions and the Emergence of Wrongful Birth Actions in Australia: A Serious Danger to Mental Health?" (1996) 3 *J Law & Med* 359; Grubb, "Wrongful Birth and Legality of Abortion" (1996) 4 *Med LR* 102; Devereaux, "Actions for Wrongful Birth" (1996) 4 *Torts L Rev* 107; Henderson, "The Confused Law of Abortion in NSW: *CES v Superclinics*" (1996) 7 *Polemic* 150; Devereaux, "Action for Wrongful Birth: *CES v Superclinics (Aust) Pty Ltd*" (1997) 4 *J Law & Med* 222. More generally, see also the following sample studies, O'Neill & Watson, "The Father and the Unborn Child" (1975) 38 *Mod LR* 174; Rhoden, "The New Neonatal Dilemma: Live Births from Late Abortions" (1984) 72 *Georgetown LJ* 1451; Symmons, "Policy Factors in Actions for Wrongful Birth" (1987) 50 *Mod LR* 269; Fortin, "Legal Protection for the Unborn Child" (1988) 51 *Mod LR* 54; Dickens, "Wrongful Birth and Life, Wrongful Death Before Birth, and Wrongful Law" in McLean (ed), *Legal Issues in Human Reproduction* (Gower Publishing Co, Aldershot 1989) pp80-112; Keown, "The Scope of the Offence of Child Destruction" (1988) 104 *LQR* 120; Strauss "'Wrongful Conception', 'Wrongful Birth' and 'Wrongful Life': The First South African Cases" (1996) 15 *Med & Law* 161; Seymour, *Fetal Welfare and the Law* (Report for the Australian Medical Association, 1995); Kennedy & Grubb, *Medical Law: Text with Materials* (Butterworths, London, 2nd ed 1994) Chapter 13 "Actions by children and parents arising from occurrences before birth" pp927-1006; and the recent decision of the House of Lords, *Attorney General's Reference (No 3 of 1994)* [1997] 3 WLR 421; [1997] 3 All ER 936.

A POINT OF REFERENCE: *KRUGER v COMMONWEALTH*[6]

The principal point of reference for ACHCA/ACBC was the "majority ruling" of Brennan CJ in the application by the International Commission of Jurists to intervene in *Kruger v Commonwealth* on 12th February, 1996. In that matter, the Chief Justice said:

> The decision and order of the Court which I am about to announce is by majority.
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> Applicants for leave to intervene must ordinarily show an interest in the subject of litigation greater than a mere desire to have the 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 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.[7]

From these remarks of the Chief Justice may be distilled two parts of a threshold test to be satisfied if one is to be permitted to intervene either as a full party to the proceedings or as an amicus curiae. The two parts of the test, both of which would seem to require satisfaction, are that (a) there be established a sufficient interest and (b) the applicant indicate the "gaps" in the legal argument which will not otherwise be put before the Court by any of the parties to the proceedings either because they are unable or unwilling to do so.

TESTS FOR INTERVENTION: INTEREST & LACUNAE

Interest: In affidavits, and in written submissions, filed on behalf of the applicants, ACHCA/ACBC, the following matters were put before the High Court. In relation to the relevant interest, it was shown that the applicants are responsible for the operation of more than thirty public and private health care facilities. It is also the fact that, in addition to the provision of health care to all women regardless of religious affiliation, various Church

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6 (1997) 190 CLR 1.

7 Transcript, 12 February 1996, p12. In the course of submissions in the application for leave to intervene in *Superclinics*, the High Court was referred to the NSW Court of Appeal decision in *National Australia Bank v Hokit* (1996) 39 NSWLR 377 in which the Consumers Federation of Australia was granted leave to intervene as amicus curiae. On the *Kruger* test, see the remarks of Justice Kenny in her paper at 166-167.

enterprises provide a large number of social welfare services. Those services include the provision of counselling and advice in relation to pregnancy. The formal submission continued:

> [Catholic] hospitals care for pregnant women. They diagnose pregnancy; they detect foetal abnormality. However, Catholic hospitals do not counsel terminations of pregnancy, do not carry out abortions, nor do they refer women to institutions where such terminations are carried out. To do so would violate the most basic beliefs of Catholics about human life, human dignity and the equality of persons. If the law in Australia recognises the existence of a cause of action arising out of the lost opportunity to provide an abortion, the law will imply the existence of a positive duty to advise every pregnant woman about the possibility of an abortion. Catholic hospitals may not be able to continue providing for the care of pregnant women.[8]

Lacunae in Legal Argument: Concerning the second limb of the admission test, ACHCA/ACBC indicated that the applicants would advance arguments which would not otherwise be put before the Court. The submission stated:

> The Court should not recognise a claim for the loss of an opportunity to terminate a pregnancy where it is not lawful to terminate. Statutes make terminations of pregnancy unlawful. By analysing the word "unlawfully", various judges have interpreted those statutes in such a way as to permit certain terminations. Those judges have interpreted the expression "unlawfully administers" to imply the existence of a category of lawful abortion. Those interpretations depended upon the so-called defence of "necessity."[9]

The submission continued:

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8 *Superclinics*, submission of ACHCA/ACBC, pp1-2. Copies of the formal submissions are available from the writer.

9 At p3. The various judges and interpretations referred to are the essentially unchallenged decisions of Macnaghten J in *R v Bourne* [1939] 1 KB 687, (1938) 3 All ER 615; Menhennitt J in *R v Davidson* [1969] VR 667; Levine DCJ in *R v Wald* (1971) 3 NSWDCR 25; Helsham CJ in *K v Minister for Youth & Community Services* [1982] 1 NSWLR 311; Judge Maguire in *R v Bayliss & Cullen* (1986) 9 Qld Lawyer Reps 8; and de Jersey J in *Vievers v Connolly* [1995] 2 Qd R 326. For a revealing account of the background to and circumstances surrounding the critical case of *R v Bourne*, see Brookes & Roth, "*Rex v Bourne* and the Medicalization of Abortion" in Clark & Crawford (eds), *Legal Medicine in History* (Cambridge University Press, Cambridge 1994) pp314-343.

(a) the status and ambit of the defence of necessity in the common law remains indeterminate but is certainly not a source of construction or interpretation of criminal statutes;

(b) final Appellate Courts in England, Canada and New Zealand have found the defence of necessity to be inconsistent with fundamental principles of the common law;[10]

(c) to the extent that Appellate Courts have given any recognition to the defence of necessity, the rulings of necessity in abortion cases are inconsistent with these judgments; and

(d) ... the judgment of Kirby A-CJ in the Court of Appeal propounds a different interpretation which seems entirely detached from that defence.[11]

In short, the applicants could point to various legal arguments which did not form part of the cases of any of the parties to the proceedings and which, therefore, would not be put before the Court. They were the basic unlawfulness of abortion and the likely impact of the proposed head of damages in relation to wrongful birth on a large part of the health care economy in Australia.[12] The submission also provided the Court with materials relating to the incoherent state of the law in relation to the status of the unborn child[13] and

10 See *Morgentaler v The Queen* [1975] 53 DLR (3d) 161 at 209 per Dickson J; *DPP for Northern Ireland v Lynch* [1975] AC 653 at 685 per Lord Simon; *R v Howe* [1987] 1 AC 417. See also *R v Dawson* [1978] VR 536 at 539 and *R v Loughnan* [1981] VR 443 at 447. Even the prominent Glanville Williams notes in his *Textbook of Criminal Law* (Stephens & Sons, London, 2nd ed 1983) Chapter 26 "Necessity" (at p600) that "[e]ven the modern authorities giving qualified support to the defence generally do so by way of *obiter dictum* only".

11 *Superclinics*, submission of ACHCA/ACBC, pp3-4.

12 In the course of his judgment in *Superclinics* (1995) 38 NSWLR 47 at 71, Kirby A-CJ referred to the useful article by Anne Reichman, "Damages in Tort for Wrongful Conception - Who Bears the Cost of Raising the Child?" (1985) 10 *Syd LR* 568 in the course of which she refers to a Canadian decision in a wrongful birth case which awarded damages of $1.146 million: *Wipfli v Britten* [1982] 22 CCLT 104.

13 The submission in relation to the unborn child was in three parts. First, it set out, as a matter of principle, the incoherent state of the law in relation to the unborn child and noted, for example, that in *R v Davidson*, no consideration had been given to the fact that the unborn child may also be the bearer of rights. Secondly, in the light of the incoherent approach of the law, a suggestion was made as to what would be the most consistent approach of the law to the question of rights and the legal personality of the unborn child. Thirdly, the submission set out a sample of cases and other materials to highlight the inconsistent approach of the law to the unborn child in which rights of the child in utero are recognised for some purposes but not for others. That section of the submission is reproduced below:

> *Sample of legal authorities on the status of the unborn child*: There is a growing body of law which recognise duties of care owed to the unborn child

and rights exercisable by it at or after birth. See *Watt v Rama* [1972] VR 353; *X and Y v PAL* (1991) 23 NSWLR 26; *Lynch v Lynch* (1991) 25 NSWLR 411; *Burton v Islington Health Authority* [1993] QB 204, (1992) 3 All ER 833. Moreover, it has been held that murder or manslaughter can be committed where unlawful injury is deliberately inflicted either to a child in utero or to a mother carrying a child in utero in certain circumstances. *Attorney General's Reference (No 3 of 1994)* [1996] 2 WLR 412 at 426-427, 2 All ER 10 at 22 (CA); see also *R v Martin* (Supreme Court of Western Australia, Owen J, 8 December, 1995, unreported); *R v Rinley* (Western Australian Court of Criminal Appeal, 4 April, 1996, unreported); *R v Lippiatt* (District Court of Queensland, Judge Hoath, 24 May, 1996, unreported). See also the judgment of Slicer J in *Re K, ex parte The Public Trustee of Tasmania* (1996) 5 Tas R 365 which contains many references to various decisions and statutory provisions which deal with the status (in various contexts) of the unborn child. These decisions are not coherent; the cause of their incoherence is described above. That same incoherence is reflected in those cases in which the standing of third parties to protect the interests of the unborn child is in issue. For example, see *Attorney-General (Qld) (Ex rel Kerr) v T* (1983) 46 ALR 275; *In the Marriage of F and F* (1989) FLC ¶92-031; *Paton v Trustees of British Pregnancy Advisory Services* [1979] QB 276, (1978) 2 All ER 987; *Tremblay v Daigle* (1989) 62 DLR (4th) 634 (a father has no standing to restrain the abortion of his unborn child); *Planned Parenthood of Central Missouri v Danforth* (1976) 428 US 52; *Planned Parenthood of Southeastern Pennsylvania v Casey* (1992) US 120 L Ed 2d 674, (1992) 112 S Ct 2791 (a father is not to be notified of the intended abortion of his unborn child); *C v S* [1988] QB 135, (1987) 1 All ER 1230 (when is a child "capable of being born alive"); *Re F In Utero* [1988] Fam 122, (1988) 2 All ER 193 (a court has no jurisdiction to make an unborn child a ward); *In re S (adult refusal of medical treatment)* [1993] Fam 123, (1992) 4 All ER 671 (a health authority is entitled to apply for declaratory relief to over-ride the refusal of a mother to consent to an operation to avert medical risk to herself and her child in utero); *Rance v Mid-Downs Health Authority* [1991] 1 QB 587 (parents not entitled to abort a child capable of being born alive nor are they entitled to recover the cost of raising and caring for a child born with spina bifida); *R v Tait* [1989] 3 All ER 682 (a threat to a mother to kill her child in utero by bringing about a miscarriage does not constitute the offence of making a threat to kill); *Whitner v State of South Carolina* (no 24468: Supreme Court of South Carolina, 15 July, 1996, unreported) (a mother who ingested crack cocaine during her pregnancy, and whose child was born with cocaine metabolites in the child's system, pleaded guilty to criminal child neglect); *Wall v Livingstone* [1982] 1 NZLR 734 (a doctor is not entitled to challenge the opinion of other medical practitioners to abort a child in utero); *Convention on the Rights of the Child*, 1989 (Preamble: "... the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"; *Article* 6 "1. States Parties recognise that every child has the inherent right to life. 2. States Parties shall ensure to the maximum extent possible the survival and development of the child.").

Superclinics, submission of ACHCA/ACBC, pp28-30.

with relevant statistics concerning abortion.[14] These matters, too, did not figure in the arguments of the parties to the proceedings.

THE RULING OF THE HIGH COURT IN *SUPERCLINICS*: TO ALLOW INTERVENERS OR NOT?

Following the formal oral submission by Counsel for the applicants (copies of their written submissions had been provided to the parties to the proceedings sometime prior to the hearing of the appeal) certain exchanges between the High Court and Counsel for the first respondent are instructive for potential interveners. For example, Justice Dawson commented to Senior Counsel for the first respondent:

> Mr Callaway: ... The question of the rightness of wrongness, for the want of a better description, of *Wald* was canvassed, it was looked it [sic], and all parties decided that it was the law and there was no point taken in relation to it.
>
> Dawson J: That means that in these proceedings there will be no submissions put as to the correctness of *Davidson* and *Wald*.

A little later, Justice Dawson observed:

> You are not obliged to question the decisions, but if you do not, or none of the other parties do, then it will mean that an argument which might be put will not be put.

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14 Statistics were provided from, inter alia, the Australian Institute of Health & Welfare which, in 1996, observed (*Australia's Health* (AGPS, Canberra 1996) p42) that:

> National information on fertility patterns and induced abortions is lacking because only South Australia and the Northern Territory collect population-based data on induced abortions. In South Australia in 1994, there were 5139 induced abortions and 19 519 confinements; thus about one in five (20.8%) of all pregnancies in which early foetal loss (spontaneous abortion or ectopic pregnancy) did not occur resulted in abortions. ... Half of all teenage pregnancies were terminated.

Not irrelevant to the issue of the defence of necessity, the submission quoted the following from a recent study on abortion in New South Wales: "Three quarters of respondents listed more than one factor as contributing to their decision to seek a termination. The most frequently listed factor, given by 60% of respondents, was financial concerns."

The submission noted further, from the same study, that the three next highest factors listed by respondents were "Having a baby would change my life in ways I don't want" (38%), "Don't want to be single mother" (29%), and "I feel I should establish my career before having a child" (27%): Adelson, Frommer & Weisberg, "A Survey of Women Seeking Termination of Pregnancy in New South Wales" (1995) 163 *Medical Journal of Australia* 419 at 421.

Justice McHugh developed these matters in the following way:

> [O]ne factor that you [Counsel for the first respondent] have got to face up to on this application is this, that although this is litigation between parties, part of this Court's function is to declare the law for the nation and that means the Court has got to look at issues that go beyond, or sometimes, the particular parties and here it is said that on the judgements in the court below there is a fundamental issue about the unlawfulness of the act which gives rise to the damages and we are going to hear no argument on it. ...
>
> Why should not the Court ... hear an argument which it is not going to hear otherwise?[15]

Justice Kenny rightly observes that there was discussion between the Bench and Senior Counsel for ACHCA/ACBC concerning the nature of the intervention: was it an application to intervene as amicus curiae or as an intervener qua a party to the proceedings.[16] The formal submission stated that intervention was sought as an amicus. In oral argument, the Court was advised that if the application to intervene as an amicus was unsuccessful, the applicants would seek to intervene as a full party to the proceedings. In the event, the applicants were given leave, by a statutory majority, to appear amicus curiae.

For the sake of completeness, it should be noted that two parties were granted leave to intervene in the *Superclinics* appeal. As indicated above, ACHCA/ACBC were granted leave to intervene as amicus curiae on 11 September 1996. On 12 September 1996, the Abortion Providers Federation of Australasia ("the Federation") (and its president, Dr Geoffrey Brodie), sought leave to intervene. Counsel for the Federation submitted to the Court that there are "financial and career consequences of a negative sort" which would flow from a ruling which "changed the law as it has stood in this country for some 25 years now so far as criminal responsibility for abortions is concerned". In short, the Federation claimed that its members had a relevant interest ("financial and career consequences"), although it acknowledged that it was an interest different only in kind from the appellant medical clinic and respondent medical practitioners. On the question of legal lacunae, Justice Dawson observed:

> Mr Temby, that is merely an argument that it would be inappropriate for this Court to disturb the decisions in *Wald* and *Davidson*. That may be an argument which has a great deal of support, but it is an argument which could be put by the parties. We do not need to hear an amicus on that.[17]

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15 *Superclinics*, transcript, 11 September 1996, pp14-15.
16 See remarks of Kenny J at 166-167.
17 *Superclinics*, transcript, 11 September 1996, p82.

Justice Toohey commented similarly:

> You [Counsel for the applicant Federation] are speaking of the interest of your client, and that is understandable but, it is not the interest that, in the end, determines whether someone should be given leave to appear as amicus curiae; it is the extent to which they can offer assistance to the Court on an issue which, it appears, will not be dealt with by the parties. Now, if you come along simply on the basis that you want to support *Wald* and *Davidson*, you are offering us no more than one of the parties to the appeal is already offering us or, all parties to the appeal, other than those who have been granted leave as amici curiae are offering us.[18]

Notwithstanding the fact that there were no lacunae left to be filled by the Federation, and thereby it failed at least one limb of the *Kruger* test of admission for interveners, the Court granted leave to the Federation to intervene.[19]

Following the grants of leave to intervene, the hearing of the appeal proceeded. Two further days for argument were listed for November 1996; the case settled in October.

COMMENT

Four observations may be made in the light of *Superclinics.*

First, the tests for intervention articulated in *Kruger* are consistent with the principles later formulated and applied in *Levy v Victoria*[20] and *Project Blue Sky Inc v Australian Broadcasting Authority*[21] to which Kenny J has referred. The application of those principles, at least in relation to the intervention by ACHCA/ACBC in *Superclinics,* was, therefore, unexceptional.

Secondly, the public interest may go unrepresented because it does not suit the parties to agitate it. This was the case in the *Superclinics* appeal. The failure of the litigants to raise certain threshold legal issues, such as the legitimacy of the defence of necessity and the status of the *Davidson* and *Wald* decisions, meant that the "public interest", represented at least by a large proportion of the health care economy, would not be represented. The "public interest" aspect and legal lacunae converged in the ACHCA/ACBC application.

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18 At p83.

19 A point of historical record only: in the application by the International Commission of Jurists to intervene in *Kruger v Commonwealth*, the Court adjourned for 11 minutes before refusing the application. In the *Superclinics* appeal following the application by ACHCA/ACBC, the Court adjourned for 48 minutes before granting leave to intervene. In the same case, the application by the Federation was granted without the Court adjourning at all.

20 (1997) 189 CLR 579.

21 (1998) 153 ALR 490.

Thirdly, Kenny J refers to the following remarks of Justice Kirby in *Levy v Victoria*:

> 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.[22]

These comments mirror, if not formalise, those quoted earlier by McHugh J in the *Superclinics* application for intervention by ACHCA/ACBC concerning the High Court "declaring the law" for the country. Such a course, however sensitive and earnestly contested the issue may be, is indeed part and parcel of the High Court's responsibilities.[23]

Fourthly, from a procedural point of view, the written submission to intervene from ACHCA/ACBC stated that the submission concerning the substantive legal issues to be raised by the interveners (ie the lacunae) had been provided to the parties to the proceedings prior to the hearing of the appeal. Also, the submission indicated that the applicant-interveners would not canvass issues to which the other parties would refer in their submissions. And of course, Counsel were available to assist the Court, orally or in writing, at the Court's pleasure. Such assistance would seem to be the least that a true amicus could offer and is consistent with the suggestions of Justice Kenny concerning amendments to the High Court Rules to provide greater efficacy, not to mention justice, in applications to intervene.

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22 (1997) 189 CLR 579 at 650-651. Also see the remarks of Brennan CJ at 604.

23 The written submission for ACHCA/ACBC also referred to *Mabo v Queensland (No 2)* (1992) 175 CLR 1 in the context of protection of fundamental human rights. Fortunately, in the light of argument from the Federation that "there would be financial and career consequences of a negative sort if 25 years of abortion law was altered" (at p80), the High Court was not swayed in *Mabo* by such considerations in abolishing the fiction, of much greater antiquity, of terra nullius.