

# Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia Can Learn from the U.S. Experience

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## ABSTRACT

Unlike thirty years ago, human rights issues are now routinely raised in Australian constitutional cases. In this article, the authors examine the role of the amicus curiae in the United States Supreme Court and consider how far and to what extent the amicus curiae device has been accepted in decisions of the High Court of Australia. The authors analyse the High Court's treatment of applications for admissions as amici curiae, noting the divergent approaches taken by Chief Justice Brennan and Justice Kirby, and drawing attention to the practical difficulties faced by applicants who seek admission to make oral submissions. Human rights cases raise questions of minority rights that should not be adjudicated without input from those minorities. The authors recommend that Australia adopt the U.S. approach, to admit written submissions as a matter of course, and to allow applicants to make oral submissions when they have a serious and arguable point to make. This approach is consistent with the Court's significant role of establishing legal policy norms for the entire nation, including for the identity groups that increasingly occupy the Court's attention. The focus here is on Australia, but the argument for the role of amici is more general and might well apply to high courts elsewhere.

**Keywords** – *Amicus curiae, constitutional law, human rights, procedural law*

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**Disclosure statement** – *No potential conflict of interest was reported by the authors.*

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**Suggested citation:** Perry Jr, H.W. and Keyzer, P., "Human Rights Issues in Constitutional Courts: Why Amici Curiae are Important in the U.S., and What Australia Can Learn from the U.S. Experience" *Law in Context*, 37 (1): 66-98. DOI: <https://doi.org/10.26826/law-in-context.v37i1.127>

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## 1. INTRODUCTION

*There is hardly any political question in the United States that sooner or later does not turn into a judicial question.*

Alexis de Tocqueville, *Democracy in America*, 1835

What was considered a noteworthy observation in the 19th Century seems trite today not only because it is so often quoted, but also because even the most casual observer of the U.S. is aware of the important role played by the Supreme Court in addressing social and political issues. The Court rules on a wide range of human rights issues: abortion, affirmative action, gay marriage, health care, death with dignity, environmental protection, race and other forms of discrimination to name but a few. Only some have specific Constitutional guarantees. It is telling to see how constitutional interpretation is front and center in the midst of a presidential election, especially as it relates to these social and human rights issues. In a recent interview with the *New York Times*, when asked "What are you looking for in the Supreme Court?" Democratic presidential hopeful Vice-President Joe Biden responded, "They have to have an expansive view of the Constitution. Recognize the (implied) right, to privacy, to unenumerated rights that exist in the Constitution" (Editorial Board of the *New York Times*, "Joe Biden", 17 January 2020). On the other hand, President Donald Trump's nominee to replace the late Justice Ruth Bader Ginsburg, Judge Amy Coney Barrett, is a constitutional originalist who clerked for the late Justice Antonin Scalia and envisions a quite different perspective of what rights and whose rights are to be protected. However ask U.S. students why we need the U.S. Supreme Court to have the power of judicial review, and no matter their politics or theories about Constitutional interpretation, their first response is inevitably "to protect our rights."

Today an Australian law student might say the same thing. But not thirty years ago. The Australian Constitution does not contain a Bill of Rights, so historically, the types of human rights issues that have featured prominently in U.S. constitutional jurisprudence have not featured prominently in Australia. However in the last thirty years, the High Court has decided that the separation of judicial power effected by Chapter III of the Australian Constitution requires that Australian courts must act and be seen to have independence, autonomy, and integrity, and the creation of a system of representative government by that Constitution gives rise to an implied

freedom to discuss political and governmental affairs. These developments have been chronicled extensively by Australian constitutional scholars. Indeed, there is such a large volume of academic literature about this jurisprudence that it would be too time-consuming to list all of the articles about these cases. But the jurisprudence, which stems from the High Court's recognition in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 of the implied freedom to discuss political and governmental affairs, and its recognition in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 of the implication arising from Chapter III of the Constitution of the autonomy and integrity of Australian courts, has spawned many, many cases, and indeed, has transformed Australian constitutional law. The Australian implied rights and freedoms jurisprudence has provided opportunities for the development and expansion of human rights as an aspect of constitutional law (French 2019; O'Neill 1987). In addition, about forty years ago the High Court confirmed that the Commonwealth has wide power to use its power over "external affairs" to implement international treaty obligations, including human rights obligations, into domestic law (*Commonwealth v Tasmania (the Tasmanian Dam Case)* (1983) 158 CLR 1). These Commonwealth enactments can override State laws to the extent of their inconsistency, under s 109 of the Australian Constitution. This can mean that s 109 cases raise questions about the ambit of Federal protections of human rights (*Mabo v Queensland* (1988) 166 CLR 186). Finally, several Australian jurisdictions (the Australian Capital Territory, Victoria and Queensland) have implemented statutory charters of rights along the United Kingdom and New Zealand "dialogue" model (see e.g. *Momcilovic v The Queen* (2011) 245 CLR 1). These developments have also increased the likelihood that the High Court will be called upon to consider human rights questions raised in disputes under these statutes.

The net result of all of these developments is that today, human rights issues are now commonly raised in Australian constitutional cases. So Australian and U.S. jurisprudence in Australia's ultimate, appellate courts, is more similar than it once was. But can Australian lawyers learn anything from US lawyers about how litigation is utilized in order to advance human rights?

We think the answer is yes. Specifically, in this article we will focus on the role of amici curiae in constitutional litigation raising human rights issues. After summarizing the position in the United States, we will review the position in Australia and then offer some thoughts about

what steps could be considered to enlarge opportunities for the involvement of amici curiae in Australian litigation. In particular, we argue that the significant role that our ultimate courts play in establishing not only legal norms but individual and collective values, requires the type of broader input that can be provided by amici curiae. As Martha Minow has argued, “[i]magine the range of people who share the future requires some actual knowledge of people, and ideally, actual conversations with them” (Minow 2003, p.157). Or as Justice Kirby put it in *Levy v Victoria*, “I would have allowed them a voice” (*Levy v Victoria* (1997) 189 CLR 579, p.652). In this article we argue that the High Court of Australia should hear the voices of people who have traditionally been denied standing, who were unable to access court due to the prohibitive costs of doing so, and, most importantly, have seriously arguable submissions to make about how the law can negatively impact the human rights of minority groups.

A note about terminology. In the course of this article we use the expressions “minority groups” and “minority rights”. We use these phrases to refer to people and the organisations who represent them to seek admission to court as amici curiae to ensure recognition of *their* human rights in circumstances where it has been argued or is seriously arguable that the effect of legislation at issue in a constitutional case is to override those human rights (Keyzer 2010, pp.72-5).

Before we set off, though, we need to acknowledge the usual disclaimers about comparative work. It is challenging. It always faces the issue of how we make meaningful comparisons between different societies and regimes without either being too facile or suffering from such attention to the particular that comparison is stopped dead in its tracks. There is always a danger that a project of comparing access to courts and the role of amici will be too simplistic if we do not take seriously the significant differences in legal regimes, which requires detailed understanding of legal rules, procedures, and technicalities. As such, we delve into some of the nitty gritty, but we believe comparative work needs to be done because of the generally increasing importance of courts worldwide in addressing human rights issues.

This article focuses on Australia, and we hope that Australian lawyers and scholars will see some value in understanding how U.S. procedural rules operate, and

what they can tell us about the Australian approach to amici curiae. We also believe, however, that the role that amici can and should play as it relates to human rights and other broad societal concerns is more general and goes beyond Australia. Focus on Australia, however, seems especially appropriate and timely. We are emboldened in our choice of topic because the Australian High Court has recognised that U.S. precedents are directly relevant and persuasive when it comes to the significant topics of judicial power, judicial independence and judicial review (French 2017; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Austin v Commonwealth* (2003) 215 CLR 185, p.262). We believe our work might strengthen arguments in the future about U.S. judicial procedures being accepted in Australia.

## 2. HUMAN RIGHTS AND LEGAL PROCEDURES

*The role of procedure in the evolution and activity of political institutions has been little heeded by political scientists...the formalities and modes of doing business, which we characterize as procedure, though lacking in dramatic manifestations, may, like the subtle creeping of the tide, be a powerful force in dynamic process of government...*

*The story of...momentous political and economic issues lies concealed beneath the surface technicalities governing the jurisdiction of the Federal Courts.*

*Professor Felix Frankfurter* (Frankfurter and Landis 1928)

We agree with Professor (later Justice) Frankfurter’s assessment. Legal rules and procedures play a major role in how courts come to decide human rights issues or not. Obviously the most basic way human rights issues get before the Supreme Court of the United States and the High Court of Australia, is if they are raised by litigants with standing. (Much of what we say in this portion of the article applies to all federal courts in the U.S. and Australia, but our focus in this article is on the ultimate courts). Another way to get an issue before the courts is by intervention. A third way is by being admitted as an amicus curiae. Before getting to the amicus device, the primary focus of this article, we survey the other methods first.

Tocqueville may ultimately be right that in the U.S. virtually every political issue will eventually become a judicial one, but it is not as easy for issues to get to the Supreme Court as one might assume. Procedural barriers shape how access works, and, in turn, what outcomes are possible. In the United States, there are many procedural hurdles for litigants seeking to get a case into federal court (Perry 2010; Chemerinsky 2006). For those unfamiliar with the U.S. system we go over some of the basics.

There are only 94 federal district trial courts in the U.S. and only 13 courts of appeal. State courts can also rule on federal questions, but as a general matter, a case must make it all the way through the state's highest appellate court and then hope to be one of the very few cases that make it into the U.S. Supreme Court—and only then would the outcome serve as precedent for the nation. For a case to be decided in a federal court, which includes the U.S. Supreme Court, the court must have jurisdiction to hear the case. The basic contours for that jurisdiction are set out in Article III Sec. 2 of the Constitution. Essentially, the case must present a “justiciable federal question.” Despite the general openness of American courts to considering human rights issues, justiciability issues often prevent important issues from being resolved by the federal courts. The main obstacles are doctrines fashioned by the Supreme Court. The doctrines include: prohibitions against advisory opinions, standing, ripeness, mootness, the political question doctrine, and the constitutional avoidance canon. (Similar doctrines operate in Australia – so, for example, Australia has an equivalent to the constitutional avoidance canon of the US (*Attorney-General (NSW); Ex rel Tooth & Co v Brewery Employés Union (the Union Label Case)* (1908) 6 CLR 469).

The Supreme Court has distinguished between *constitutional* and *prudential* requirements for justiciability. If the source of the limitation is the Constitution, neither Congress nor the Supreme can alter it; if it is a prudential doctrine, Congress can override it as can the Court. The distinction between constitutional and prudential seems clear enough, but in reality, it is far more complicated. It depends, of course, on the Court's interpretation of Article III. Beyond some basic things such as the requirement of an actual “case or controversy” or the case arising under the “Constitution, the Laws of the United States, and

Treaties,” constitutional limitations often exist because judicial interpretations have said that they do. What is and is not constitutionally required is the subject of extensive debate among the justices and scholars.

One of the most complex courses in any U.S. law school is “Fed Courts” which, at base, wrestles with jurisdiction, justiciability, and procedure. The complexity prohibits us from much elaboration on procedural hurdles in this article. Suffice it to say that limitations such as justiciability can make it difficult to get issues into any federal court, especially the Supreme Court. Certain categories of cases, particularly within the political and societal realm, are particularly vulnerable to being blocked from judicial resolution because of jurisprudential barriers. One notable category is cases dealing with the environment (see, *Juliana v United States* 9th Circuit (2020) to be published; *Sierra Club v Morton* 405 US 727 (1972); *Lujan v Defenders of Wildlife* 504 US 555 (1992)), but even cases involving frequently adjudicated areas such as racial justice get blocked by jurisprudential barriers as well (*Allen v Wright* 466 US 737 (1984) or *City of Los Angeles v Lyons* 431 US 95, 115 (1983)).

One of the biggest justiciability hurdles is standing, and standing doctrine is a prime example of complexity and dispute. The Court's criteria for standing are often unclear and seem malleable when applied. (The same is true for other justiciability issues such as ripeness and mootness.) One need not take our word for it. The Court itself has acknowledged the problem:

“We need not mince words when we say that the concept of ‘Art. III standing’ has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it.”

*Valley Forge Christian College v Americans United for Separation of Church and State*, 454 US 464, p. 475 (1982).

Current doctrine holds that the Constitution requires that a plaintiff allege to have suffered or imminently will suffer an injury, that the injury is traceable to the defendant's conduct, and that a federal court decision is likely to redress the injury. The prudential reasons enunciated by the Court are related to the proper role and functioning of courts especially vis-a-vis other political institutions

particularly in relation to appropriate separation of powers (*Warth v. Seldin*, 422 US 498 (1975)).

The rules governing standing in Australia are in some ways similar to the U.S., but as a general matter, they are less formidable. In Australian constitutional cases, a person or organization will have standing to bring a case if they have a “special interest” (*Croome v Tasmania* (1997) 191 CLR 119; Evans 2011) or a “sufficient interest” in a matter. The test can be satisfied by having a proprietary or pecuniary interest, or an interest that is more than a merely intellectual or emotional interest, such as a desire to see the law decided in a particular way (*Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493, pp.508, 548). More recently, in *Kuczborski v Queensland*, Brennan, Kiefel, Gageler and Keane JJ said that a “person whose freedom of action is challenged can always come to a court to have his rights and position clarified” ((2014) 254 CLR 51, 106 [175] citing Lord Upjohn in *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403, p.433). This is liberal standing, but it is not open standing.

The more important thing, from the standpoint of the litigant, is the cost of a loss. Unlike the United States, the loser in an Australian constitutional case ordinarily pays the winner’s costs. This means that in some cases a government will simply oppose the case on the ground of standing, placing the would-be constitutional litigant in a position where they have to invest precious resources that they do not have in contesting that issue without even getting to the substantive points. Then there is the chilling effect of the potentially catastrophic financial impact of a loss. This casts a mighty shadow over the would-be constitutional litigant (Keyzer 2010a).

To sum up to this point: in both jurisdictions, courts avoid addressing constitutional questions where there is a non-constitutional pathway to the resolution of the matter. Second, standing rules are problematic in both the U.S. and in Australia (though for different reasons). Third, a key difference between the two jurisdictions is costs. The loser pays rule is a significant disincentive to bringing a constitutional case in Australia. This means that any procedural device that provides an Australian person or interest group with a cost-effective opportunity

to advance human rights issues in the High Court is worthy of close study. Having reviewed the procedural context in each country, we can now consider the topic of amici curiae.

### 3. AMICI CURIAE IN CONSTITUTIONAL CASES IN THE SUPREME COURT OF THE UNITED STATES

It is well-known that the expression “amicus curiae” is Latin for “friend of the court” (Keyzer 2010, pp 5, 19-20, 65-7; Wiggins 1976). In the English common law preceding the independence of the United States, amici curiae offered submissions on matters of fact or law to assist the courts to avoid errors of fact or law (*Lilburne’s Case* (1649) 4 State Tr 1270; *The Prince’s Case* (1606) 8 Coke 1 29a; Krislov 1963). Over time and particularly in the 20th century, the role of amici curiae expanded. They have ceased being merely independent sources of knowledge and have increasingly asserted themselves as advocates for a particular result (Krislov, p.708; Barker 1967; Caldeira and Wright 1988).

The amicus curiae device plays a highly significant role in the U.S. Supreme Court (Kearney and Merrill 2000; Orr and Devins 2016). Research on the role of amici is extensive in both political science and legal scholarship. Space restricts our ability even to begin to cite all who should be cited. The Orr and Devins article is a good place to get a sense of the breadth and depth of that research.

As with the early discussion, our focus here will be on the U.S. Supreme Court. But amici participate in lower courts as well. Many of the same considerations would apply except where we discuss the role of amici in the cert. process. For a discussion of amici in the Circuit Courts of Appeal, see Collins and Martinek 2011. Indeed, it would not be going too far to say that despite its peripheral role within constitutional litigation *per se*, the amicus brief has become one of the “basics” of U.S. constitutional adjudication. They often play an important role in what cases are selected for review, and they affect case outcomes and doctrine. In fact, the U.S. Solicitor General now appears more frequently in the U.S. Supreme Court as an amicus than as a litigant (Perry 2020; Cordray and Cordray 2010; Nicholson and Collins 2008). Amici have become such a common feature of U.S. constitutional litigation that it

is difficult to imagine constitutional law without them. Their influence is evident, and powerful (Collins 2004).

The U.S. Supreme Court's awareness of complexity of human rights issues is in large measure due to the admission of submissions from amici curiae. Justices, of course, are not monks removed from society, but the barrage of legal briefs asking the Court to be involved in these issues plays a very important role. Amici not only bring societal issues to their attention in ways that are not tied to the specific facts of the case being litigated, but also they help justices recognize and address the human rights issues in play in constitutional cases that might not be so obvious.

As mentioned earlier, the modern role of the amicus differs from its traditional function. Sam Krislov labeled the phenomenon "from friendship to advocacy" (Krislov 1963). Or as Caldeira and Wright said (1990):

...Contemporary amici are really friends of the parties, not necessarily friends of the Court, even though the original intent of amicus curiae briefs was, of course, to provide the Court with new information and to act in a neutral fashion.

Political scientists often refer to amici as lobbyists. The term is perhaps an unfortunate one—as the old saw goes, what parent wants his or her child to grow up to be a lobbyist? Yet political scientists often point to the necessity of linkage groups in democratic societies—two of the most prominent being political parties and interest groups. These "linkage groups" provide a crucial link between the public and those who govern. In our opinion, amici serve this function in the legal realm. However, this "lobbyist" role has, in some cases, created tensions (Wohl 1996; Susman 2006). In a dissent in *Jaffe v. Redmond*, in which there were 14 briefs on one side and none on the other, Justice Scalia complained (518 U.S. (1996) 1, pp.35-36):

... the Court was the beneficiary of no fewer than 14 *amicus* briefs supporting respondents, most of which came from such organizations as the American Psychiatric Association, the American Psychoanalytic Association, the American Association of State Social Work Boards.... Not a single *amicus* brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts.

The expectation is, however, that *this Court* will have that interest prominently—indeed, primarily—in mind. Today we have failed that expectation, and that responsibility.

Nevertheless, amici are generally welcomed. Unlike the many barriers faced by litigants, the Court has essentially an open-door policy when it comes to amicus briefs. The formal rule, Rule 37 of the Supreme Court Rules, urges restraint and sets some conditions, but in practice, the Court accepts virtually every motion for leave to file as an amicus curiae. Of course, that does not mean that all briefs are read or are taken seriously, but there is effectively no internal dam that stops the flow; and quite a flow there is.

Typically, there are two opportunities to file an amicus brief in the Supreme Court. The most well-known is a brief on the merits after a case has been accepted for a decision. Prior to that, however, when review is being sought, proponents and opponents can also submit an amicus brief supporting or opposing a grant of certiorari.

Once a case is accepted for a decision on the merits, the amici filings rush in. In October Term (hereafter OT) 2014, 781 briefs on the merits were filed. Over 98% of cases had an amicus curiae brief filed on the merits; only one case had none (Franze and Anderson 2015). In OT 2017 over 800 amicus briefs were filed on the merits for cases that had been selected for decision. Neither term was an aberration for modern times, but the number has been growing rapidly over the last several years as the number of argued cases has remained about the same. In OT 1995, 400 amicus briefs were filed (Collins and Solowiej 2007). The average number of briefs filed in the 1990s was about 5 briefs per case (Collins and McCarthy 2017). The average number for OT's 2012-2014 was 13 per case. In some blockbuster cases, the number can reach into the 100's. In the "Obama Care" cases there were 136 amicus briefs (Franze and Anderson 2015) and in the same sex marriage case, Nina Totenberg reported on National Public Radio that there was an all-time high of 148 (Franze and Anderson 2015).

The numbers are impressive, but this begs the issue whether or not amicus briefs have much of an effect. One way to document effectiveness is by citations to amicus briefs. In OT 2010-2014, citations to amicus briefs ranged

from 53-63 (Franze and Anderson 2015). The individual justices vary in how much they cite to amici in their opinions, but they all do it. They ranged from Justice Sotomayor, who averaged 45% over five terms, to Justice Scalia who averaged 22% (Franze and Anderson 2015). In one term, Justice Breyer cited amici in 63% of his opinions (Franze and Anderson 2015).

Obviously, all amici are not created equal. Special attention is always given to a brief by the U.S. Solicitor-General (S.G.) The S.G. is always allowed to file an amicus brief even if it is not a right. Indeed, the Court often calls for the views of the Solicitor-General even when the S.G. has not submitted a brief. We have chosen not to dwell on the role of the Solicitor-General because, in Australia, Solicitors-General from every jurisdiction have a statutory right to intervene, which means that an application for admission as amicus curiae is not needed (*Judiciary Act 1903* (Commonwealth of Australia), ss 78A and 78AA).

Another statistic to demonstrate the importance of amicus briefs is when justices mentioned them in oral argument. In the 2009-2014 Terms, the total number of oral arguments in which a justice mentions an amicus brief was 67 (Larsen and Devins 2016). Even more important than citations is evidence when a particular amicus brief is referenced prominently in an opinion. Justices often lift passages directly from amicus briefs. There is a particularly good and oft-cited example of the potential importance of an amicus brief. *Grutter v. Bollinger* 539 U.S. 306 (2003) was the very contentious and closely divided case about the use of racial criteria in university admission policies. Many predicted that the Court would put the final stake in the heart of affirmative action with this case. To the surprise of many, Justice O'Connor wrote the 5-4 majority opinion upholding the use of race in certain instances. She quoted extensively from some amicus briefs in doing so. Rumor has it that a brief from an unexpected source--the military-- played an especially important role in her decision. In her opinion she said (*Grutter v. Bollinger* 539 U.S. 306 (2003)):

[Student] body diversity promotes learning outcomes and “better prepares students for an increasingly diverse workforce and society, and “better prepares them as professionals.” These benefits

are not theoretical but real, as major American businesses have made clear [in their amicus brief in support of the university] that the skills needed in today’s increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high ranking retired officers and civilian leaders of the United States military assert [in their amicus brief] that, “[b]ased on [their] decades of experience,” a “highly qualified, racially diverse officer corps . . . is essential to the military’s ability to fulfill its principle mission to provide national security.” [At] present, “the military cannot achieve an officer corps that is both highly qualified and racially diverse unless the service academies and the ROTC used limited race-conscious recruiting and admissions policies.”

A phenomenon that is worthy of note is that of “repeat players” (McGuire 1995). Some organizations have become very experienced at developing and filing amicus curiae briefs (Songer, Kuersten and Kaheny 2000). Their knowledge and experience is valuable to interest groups hoping to be admitted and have their briefs read. In some cases, amicus briefs from repeat players have been remarkably influential (Smith and Terrell 1995). As stated above, the Solicitor-General, the quint essential repeat player, has always been very important in Court decisions. What is relatively new is that an elite group of private lawyers and law firms has emerged who routinely submit briefs that garner special attention. One of us has written about this (Perry 2020). Others have documented this phenomenon as well (McGuire 1994; Lazarus 2008). Some clever names have emerged: “Amicus Wranglers” or the “Amicus Machine” (Larsen and Devins 2016). Once a case is accepted in the Supreme Court, there is an extensive effort to recruit prominent attorneys to write amicus briefs and to recruit all sorts of organized groups to do so as well.

Another group has also emerged as important amici players—state solicitors general. This is a relatively new phenomenon. U.S. states traditionally did not have very good appellate lawyers, which was a frustration to the U.S. Supreme Court. Increasingly, states are adopting a solicitor-general model, and many of those state SG’s are top flight appellate lawyers (Perry 2020a). Unlike in

Australia, states in the U.S. do not have a general right of intervention in constitutional cases, though they can be admitted as intervenors at the discretion of the court. Traditionally, state attorneys general banded together when they were fighting with the federal government about questions of state power. They also banded together when they shared a cause such as litigation with tobacco companies (Nolette 2015; Lemos and Young 2018). More recently, however, they have been banding together to write amicus briefs over a wider range of social issues. This accelerated when, first, Republican state A.G.'s formed an association, and now the Democratic A.G.s have done the same. The amici that they file often have little to do with their interests as states, per se. They are often about issues such as abortion, gay rights, or religion (Perry 2020).

Much the same can be said with regard to amici in the cert process. To a certain extent, it makes some sense to wait until a case has been selected before going into the expensive process of "amicus wrangling," because so very few cases are accepted. But as was said earlier, the agenda setting stage is crucial. Amicus wranglers are increasingly at work at the cert stage, be they from private firms or state SGs. Returning to OT 2014, 403 amicus briefs were filed urging or opposing cert on 177 cases. Cert was granted in 31 of the cases that had an amicus brief filed. That is almost an 18% grant rate, which is a high percentage given the overall grant rate of fewer than 5% for paid cases (Feldman 2014).

Beginning where we started, it is hard to imagine the appellate process in the U.S. without amici. Historically, though, the contrast with Australia was stark.

#### 4. AMICUS CURIAE IN CONSTITUTIONAL CASES IN THE HIGH COURT OF AUSTRALIA

##### 4.1 INTRODUCTION

*The times they are a-changin'*

Bob Dylan, 1964

Having quoted Tocqueville and Frankfurter earlier, we have just quoted another eminent observer of politics. In contrast to the United States, the Australian High Court throughout its history has admitted amicus curiae relatively rarely (Keyzer 2010). Amici curiae remained on

the periphery until relatively recently (Willheim 2010). Things have changed. We now chronicle the history and the change.

It was not until 1997 that members of the High Court provided clear reasons in support of a decision to admit amici curiae in constitutional cases. In *Levy v Victoria*, the High Court was invited to consider the constitutional validity of regulations made by the Parliament of the State of Victoria that prohibited people from entering an area where duck shooting was taking place unless they had a permit ((1997) 189 CLR 579). Laurie Levy was an animal rights protestor who sought a declaration in the High Court that the Victorian regulations were constitutionally invalid on the ground that they infringed his (implied) freedom to discuss political and governmental affairs. Levy and other protestors had, in previous years, sought to rescue ducks that had been shot by duck hunters, and they courted the attention of local television stations to draw attention to the cruelty of hunting. Their objective was to draw attention to that cruelty, as part of a campaign to ban duck hunting. The case, however, concerned significant questions about freedom to protest, in addition to the significant issue of animal cruelty.

Is free speech impinged if the protestors cannot get sufficiently close to the situation they are protesting? A U.S. court considering a case such as this not only would have a rich history of First Amendment jurisprudence, but also a court would know that its ruling could have wide ranging consequences. As we write this article, in the context of a U.S. national election and nationwide protests in support of the Black Lives Matter movement, the case would obviously be important for the whole of society. Before ruling, it can be conjectured that a number of Justices of the U.S. Supreme Court might want to hear a variety of voices to help them think through the implications of their decision and any possibly unforeseen consequences of resolving the matters consistently with the submissions of the parties only. As we have demonstrated above, amici curiae participating in U.S. constitutional cases raising human rights issues would have clear procedures in place governing their involvement, and their involvement would be extensive with widely varying points of view.



When *Levy* arose, however, the High Court of Australia did not have a clear test governing whether amici curiae could be admitted in constitutional cases raising human rights issues. Indeed, it was still grappling with the question whether there was an implied freedom of communication in the Constitution in the first place. Yet wrestling with such important issues is typical in constitutional cases and seems to us to cry out for broader input than that provided by parties.

In the remainder of this article, we analyse the Australian law governing the admission of amici curiae. Firstly, we note that at common law, amici curiae were admitted in courts to perform many different roles. For example, one ground of appearance was to object to the jurisdiction of the court (as in the *Railways Servants* case, considered further below). This ground of appearance could provide an open door for amici curiae in constitutional cases, who could argue that they offer a different or unique perspective on whether an institution had exceeded its jurisdiction for constitutional reasons.

In the High Court, an initially broad approach to the admission of amici curiae appears to have been replaced by the rule, which was also part of the common law in the early 1900s, that Attorneys-General were the proper representative of the public in any public law case and should have a presumptive right of intervention. While this right of intervention was narrowed in 1930, it has been authorised by statute and without apparent limits for over forty years. Throughout Australia's federal constitutional history the Attorneys, represented by their Solicitors-General, have occupied a large role in the development of constitutional law. However, we argue that in the last thirty years, since the High Court has recognised implied rights and freedoms arising from the Constitution, the limitations of relying on the Attorneys-General to represent *minority* interests has become apparent. Attorneys-General can represent majorities, and are well-funded to do so, and enjoy special privileges when it comes to costs (costs are not awarded against Attorneys-General who intervene in constitutional cases). But why would Attorneys-General intervene in constitutional cases to support the development of new constitutional principles that would limit their legislative power? We demonstrate that they do not. This means that in implied rights and freedoms cases there can

be an array of interveners involved who are opposed to the further development of implied (human) rights and freedoms, and a relative absence of voices of minorities. This means that the Court is presented with a lopsided set of arguments in these cases. We argue that this result is inappropriate, and that procedural rules governing the admission of amici curiae need to be changed in order to enable the input that the courts need to undertake the new role that implied rights and freedoms jurisprudence contemplates.

In the 1960s, the Warren Court admitted the American Civil Liberties Union and the National Association for the Advancement of Colored People, among other organisations, to make submissions as amici curiae in civil rights cases (Barker 1967). Over time, as we set out above, the "amicus brief" became a way for diverse associations of people across the political spectrum to offer their perspectives on the proper resolution of cases before the Supreme Court. Often these briefs and cases involved human rights issues. From time to time, judges have lamented that parties are scarcely in control of litigation, but the advancing influence of amici curiae is a notable feature of U.S. jurisprudence.

We contend that once human rights are at stake, amici curiae who have a serious, arguable submission to make in a constitutional matter raising human rights issues should be admitted to do so. We do not argue that a matter should be taken out of the hands of the parties, but once it can be seriously contended that a case raises human rights issues, that legal matter is no longer *just about the parties*. If it can be seriously argued that the decision in question will or may affect human rights, then adjudicative procedures should enable the admission of amici curiae to provide the court with input relevant to the human rights issues.

We also contend that, for the reasons that follow, we argue that neither the test for amicus curiae admission developed by Chief Justice Brennan nor the one developed by Justice Kirby in *Levy v Victoria* address the unique role that an amicus curiae can perform in constitutional litigation raising human rights issues.

In our respectful opinion, the "Brennan test", which has since been adopted by the Court, places too much weight

on the role of the parties in constitutional cases raising human rights issues. The test defines the role of amici curiae negatively, by reference to submissions that might be raised by amici *after* the parties have said what they want to say. Of course it is accepted that the jurisdiction of the court is derived from the judicial remedy that is sought in a constitutional case (*Kuczborski v Queensland* (2014) 254 CLR 51, pp. 59-62). However once parties with standing have brought a properly constituted case or controversy (what Australians call a “matter”) to the High Court (Constitution, Chapter III; *In re Judiciary and Navigation Acts* (1921) 29 CLR 257), whether in its original jurisdiction or by way of an appeal (section 73), the role of amici curiae is concerned with something different—not the resolution of the matter, *per se* (although amici curiae are likely to prefer a particular outcome) — but, rather, adequate consideration of the human rights issues that may be raised or implicated by that dispute. This different role is *less* related to the resolution of the legal dispute, and *more* related to the Court’s role in making national and ultimate decisions of public importance. It could be argued that when human rights are concerned, everyone has an interest. However, for obvious reasons, the court cannot hear submissions from everyone. We argue below that Attorneys-General should not necessarily be seen as proxies for the public interest. But if, in constitutional cases raising human rights issues, the parties make submissions focusing on resolving the dispute, and the Attorneys (who have a statutory right to intervene) are characterised as having the function of representing the *majority* of the relevant public, then amici curiae can be admitted to represent minority interests. It is trite to point out that the High Court’s role is *broader* than the role of inferior courts in the Australian judicial system. We argue that as constitutional cases raising human rights issues involve broader value judgments and questions of legal policy that travel beyond the mere resolution of a legal dispute (Mason 1986), there should be mechanisms that enable the Court to receive input as to what those values should be. If amici curiae have seriously arguable points to make about the resolution of the human rights issues at stake, then their voices should be heard. Adopting the words of Martha Minow and Elizabeth Spelman, and applying them in the present circumstances, we argue that:

“[p]articipants in the legal system need to refocus their efforts on responsibility and inclusion. From within a rhetorical community, we are entitled to ask, ‘What place is there for me, and for others, in the universe defined by this discourse, in the community created by this text? What world does it assume? What world does it create?’”

We argue below that the Kirby test recognises these important functions of the High Court. Justice Kirby also recognises the inconvenience that the current approach poses to would-be amici curiae. However, we have two significant quibbles with the approach taken by Justice Kirby. In his judgments on the admission of amici curiae, Justice Kirby is critical of “busybodies” and contemplates the use of adverse costs orders to prevent abuse of the device. We argue below that these methods for limiting possible abuse of the amicus curiae device are unhelpful, as they tend to root the device within a “winners and losers” paradigm of litigation which is inappropriate given the different role of amici curiae.

For the reasons we develop below, we argue that the High Court should open its door to amici curiae in constitutional cases in the High Court, just as the U.S. Supreme Court has done, to ensure that its constitutional jurisprudence is properly cognisant of the diverse interests at play in these cases. What is needed is an approach that: recognises that human rights cases raise questions that may require wider input than that which can be provided by the parties, and that the proper source of constraint on use of the device should not be the parties, or inapt concepts like “busybodies” or inappropriate rules governing costs, but instead, any constraint should be based on the *issues*, and whether the contentions of the amici are seriously arguable.

#### 4.2 THE PERFECTLY GENERAL ROLE OF AMICI CURIAE AT COMMON LAW

At common law, amici curiae played a variety of different roles. Traditionally, the courts admitted amici curiae as volunteers or appointees to assist courts to avoid errors of fact or law. However in 1963, U.S. political scientist and Associate Professor Samuel Krislov published an important article in the *Yale Law Journal* that pointed out that in the common law there were also cases where an amicus curiae drew the attention of a court to matters

that *neither* party was willing to argue, for example, in suits where the parties had fraudulently colluded (Krislov 1963). The significance of this development was that the *amicus curiae* was no longer “a detached servant of the court” but, instead, the *amicus curiae* could “act directly and officially as counsel for one not formally a party to the case” (Krislov pp 696-7). By the 1930s *amicus* briefs were openly identified with their organizational sponsor, rather than maintaining the pretense of the independent “lawyer-like” *amicus curiae*, which Krislov argues “realistically embraces and ratifies the transformation of the actual pattern of behavior and its new function. The *amicus* is no longer a neutral, amorphous embodiment of justice, but an active participant in the interest group struggle” (Krislov p.703). Krislov is not critical of this development, nor should he be. In U.S. constitutional law the device serves a significant role, as we said earlier in this article.

In Australia the *amicus curiae* device came from the same common law heritage. It is a flexible device that has been recognised by the High Court as one that can provide additional input into the resolution of cases between parties. Early decisions of the High Court demonstrated its utility in constitutional cases. In 1906, only a few short years after the High Court started sitting, it held that an *amicus curiae* could appear to make an objection to jurisdiction on constitutional grounds in the *Railways Servants case (Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employés Association* (1906) 4 CLR 488). In this case the court had to determine whether New South Wales railway workers were subject to the jurisdiction of the Commonwealth Court of Conciliation and Arbitration. The New South Wales Railway Traffic Employés Association registered their association with the Commonwealth Court of Conciliation and Arbitration under federal legislation, and the President (the presiding judicial officer) of that Court upheld the registration. The Federated Amalgamated Government Railway and Tramway Service Association, a competing union, challenged the registration of the New South Wales association on the ground that the Commonwealth Court of Conciliation and Arbitration could not register a NSW association. Importantly, the submissions advanced by the Federated Association in aid of this argument did *not* raise constitutional issues.

The New South Wales Government sought leave to intervene, over the objection of the Federated Amalgamated Government Railway and Tramway Service Association. They argued that the Commonwealth Court was limited by a constitutional doctrine of “implied immunity”. Griffith CJ, Barton and O’Connor JJ, the three original members of the Court, granted admission to New South Wales and accepted its arguments. The headnote states:

*The rule ... that when a State attempts to give to its legislative or executive authority an operation, which, if valid, would fetter, control, or interfere with the free exercise of the legislative or executive power of the Commonwealth, the attempt, unless expressly authorized by the Constitution, is to that extent invalid and inoperative, is reciprocal. It is equally true of attempted interference by the Commonwealth with State instrumentalities. The application of the rule is not limited to taxation.*

The New South Wales association argued that there was no constitutional issue before the Court, that the matter could be determined on technical and non-constitutional grounds, and that the Court should not determine a constitutional question unless it was absolutely necessary to do so. But the Court, which at this point in its history believed that the doctrine of implied immunity as summarized above should be part of Australian constitutional law, allowed New South Wales to intervene to advance their constitutional argument. Griffith CJ, with whom Barton J concurred and O’Connor J agreed, held that the intervention of New South Wales could be justified on the basis that they objected to the jurisdiction of the court below, and such an objection “may with the sanction of the Court be made by any person, if only as *amicus curiae*” ((1906) 4 CLR 488, p.495). Furthermore, according to Griffith CJ and Barton J, the importance of an objection to jurisdiction (on constitutional grounds) occluded any objection to the argument that constitutional points should only be determined when a constitutional point has been raised by the parties themselves.

This decision has been considered in some detail because, when the current position is reviewed later in this article, it might seem remarkable today that the Court had ever allowed an *amicus curiae* to raise a constitutional point where the parties had not. It is all the more

remarkable when one considers the basis upon which the intervention as *amicus curiae* was made in the *Railways Servants case*, viz., as an “objection to jurisdiction” on constitutional grounds. It is difficult to think of a wider ground for raising a constitutional argument. This objection could be deployed in any case in order to advance a constitutional argument (where such an objection was otherwise arguable, ie., not doomed to fail).

Interestingly, the wide approach taken to *amici curiae* in the *Railway Servants case* did not last very long. In the *Union Label case* in 1908 (*Attorney-General (NSW); Ex rel Tooth & Co v Brewery Employés Union (NSW) (the Union Label case)* (1908) 6 CLR 469), the Court held that a State Attorney-General could not only intervene in any case where the jurisdiction of a Commonwealth body could be challenged on constitutional grounds (here, whether the Federal Registrar of Trade Marks could register a trade mark [or “union label”] on behalf of a State-registered trade union), but could initiate such a constitutional matter on its own motion. Griffith CJ was plainly sensitive to the argument put by the respondent trade union that the Attorney-General had no real interest in the matter. Near the start of his judgment, the Chief Justice wrote (p.491):

*The first condition of any litigation in a Court of Justice is that there should be a competent plaintiff, i.e., a person who has a direct material interest in the determination of the question sought to be decided. The Court will not decide abstract questions, nor will it decide any question except when raised by some person entitled by reason of his interest to claim a decision. This doctrine should certainly not be relaxed for the purpose of bringing in question the validity of Statutes passed either by the Commonwealth Parliament or by a State legislature. It is, therefore, material to consider and deal with this point before considering the substantial point of the validity ... For, if the plaintiffs are not entitled to ask for a decision, any opinion of the Court given at their instance would be extra-judicial.*

That said, the NSW Attorney-General had standing (pp.499-500):

*The ground of the Attorney-General's right to interfere is a common injury to the public, and it appears to me that, if a person claims to be authorized by law*

*to exercise some public function which is in fact not authorized by law and is injurious to the public of a State, the Attorney-General for the State may sue to protect the rights of the public of the State.*

The other members of the majority took a similar approach (pp. 520, 533). Isaacs J, one of the judges who dissented in the case, also agreed with the majority that Attorneys-General had a special interest in federal cases that justified their standing (pp.557-8). However this standing rested on the notion that State Attorneys-General could protect their citizens from a form of Commonwealth legislative trespass (*Australian Railways Union v Victorian Railways Commissioner* (1930) 44 CLR 319, p.330 (Isaacs CJ)), if indeed the Commonwealth had exceeded its jurisdiction. The use of the phrase “*amicus curiae*” in the *Railways Servants case* was abandoned in the *Union Label case*, and the new rule of standing for Attorneys-General appears to have closed down an argument that the “objection to jurisdiction on constitutional grounds” could be invoked by a future *amicus curiae*.

The significance of the *Union Label case* for the development of the *amicus curiae* rule appears to be that after 1908, Attorneys-General had their own special standing in the High Court and a clear majority of the court would grant the Attorneys standing on the grounds set out in the majority judgments (Keyzer 2010, p.93, footnote 71). Since Attorneys had their special rule, there was no need for them to apply for admission as *amici curiae*; correlatively, there was no need for them to advance arguments that might have given the justices of the High Court an opportunity to develop its thinking about that device. Notwithstanding this development, it was clear to the Court that *amici curiae* or interveners were needed in some (constitutional) cases. While the rule was tightened in 1930 in *Australian Railways Union v Victorian Railways Commissioner* (1930) 44 CLR 319, it was rarely invoked to prevent a State from intervening. In 1976 it was replaced by a statutory right of intervention for the States, and in 1983, for the self-governing territories (Keyzer, 2010, pp. 91-5).

Perhaps the need was less apparent after it became common practice for the Commonwealth and State Solicitors-General (and later Territory Solicitors-General)

to intervene in constitutional cases. Since the Australian Constitution is a federal Constitution with no Bill of Rights, many if not most constitutional cases raise federalism issues, not human rights issues. Obviously, the Commonwealth, States (and the Territories, once self-governing Territories emerged) have a direct interest in such disputes.

However once the High Court developed a jurisprudence of *implied* rights and freedoms (interestingly, mirroring their emergence in the *Railways Servants* case to offer the “*implied immunity*” argument that won the day then), it quickly became apparent that the human rights issues these cases raised would not necessarily be the subject of balanced submissions by the intervening Attorneys-General (via their Solicitors-General). At the outset, it needs to be borne in mind that their role is to represent the majorities in their polities (Keyzer 2010 Chapter 4; Keyzer 2014). This means that they cannot really be expected to represent the interests of minorities; in short, minority groups are not their clients. In earlier work (Keyzer 2010), one of us identified only two cases in a twenty year period in which the Court was offered submissions by a Solicitor-General that *favoured* the expansion of constitutional rights or freedoms (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and *Kartinyeri v The Commonwealth* (1998) 195 CLR 337); a period during which there were many decisions in which submissions were made that did not favour the expansion of those rights or freedoms. So who can represent minority rights in these cases?

We will take a detour now to describe the emergence of the High Court’s implied rights and freedoms jurisprudence. This detour is vital for our international audience, but also to underpin the argument we advance at the conclusion of this article that the public importance of High Court cases, particularly High Court cases that raise human rights issues, require the Court to take an open approach to the admission of *amici curiae*.

#### 4.3 THE DEVELOPMENT OF IMPLIED RIGHTS AND FREEDOMS IN AUSTRALIAN CONSTITUTIONAL LAW: DEVELOPMENTS THAT HAVE MADE AMICI CURIAE NEEDED

It is well known that *amici curiae* emerged strongly in the Warren Court to advance human rights arguments in U.S. constitutional cases (Krislov, pp.711-3). When the

Warren Court was active, some Australian constitutional lawyers were watching closely. One enthusiastic consumer of U.S. constitutional decisions was Justice Murphy, who sat on the High Court from 1975 to 1986. During this period, His Honour delivered a number of judgments establishing the foundations of an implied freedom of political communication. In a 1977 decision, Murphy J cited several decisions in the heyday of the Warren Court when he said (*Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, p.88):

In my opinion the concept of the Commonwealth and the freedom required for the proper operation of the legislative, executive and judicial branches in the democratic society contemplated by the Constitution necessitate the implication of such a guarantee (see *Crandall v. State of Nevada* (1867) 6 Wall 35 (18 Law Ed 745); *Slaughter-House Cases*; (1872) 16 Wall 36 (21 Law Ed 394); *R. v. Smithers*; *Ex parte Benson* (1912) 16 CLR 99; *Buck v. Bavone* (1976) 135 CLR, at p 136-137).

Elections of the federal Parliament provided for in the Constitution require freedom of movement, speech and other communication, not only between the States, but in and between every part of the Commonwealth. The proper operation of the system of representative government requires the same freedoms between elections. These are also necessary for the proper operation of the Constitutions of the States (which now derive their authority from Ch. V of the Constitution. From these provisions and from the concept of the Commonwealth arises an implication of a constitutional guarantee of such freedoms, freedoms so elementary that it was not necessary to mention them in the Constitution (see *United States v. Guest* (1965) 383 US 745, at pp 757-758 (16 Law Ed 239, at pp 248-249); *Shapiro, Commissioner Welfare of Connecticut v. Thompson* (1968) 394 US 618, at pp 632-633 (22 Law Ed 2d 600, at p 614)). The freedoms are not absolute, but nearly so. They are subject to necessary regulation (for example, freedom of movement is subject to regulation for purposes of quarantine and criminal justice; freedom of electronic media is subject to regulation

to the extent made necessary by physical limits upon the number of stations which can operate simultaneously). The freedoms may not be restricted by the Parliament or State Parliaments except for such compelling reasons.

We have set out the passages above in full to demonstrate how influential U.S. decisions were on Justice Murphy. At the time, Justice Murphy's judgments were regarded as radical and were criticized by other members of the court. His use of U.S. decisions to justify his conclusions was also regarded with disdain. In 1986, Sir Anthony Mason, a senior member of the High Court at that time, regarded Murphy J's judgment about the implied freedom of political communication to be tantamount to "implying a new s 92A into the Constitution" ((1986) 161 CLR 556, p. 579) (Section 92 protects freedom of trade, commerce and intercourse (movement across State borders, subject to reasonable limits) in Australia. There is no s 92A in the Constitution).

However, two short years and only five volumes of the Commonwealth Law Reports later (and sadly, after Justice Murphy's death) the High Court, led by now Chief Justice Mason, struck down a federal law on the basis that it infringed "freedom of expression". The case was *Davis v Commonwealth* (1988) 166 CLR 79. We cover it in a bit of detail for the benefit of our international readers because it is crucial to a genuine understanding of the new role that the High Court was starting to build for itself (a role that makes it more like the U.S. Supreme Court).

In 1980, the Commonwealth Parliament enacted the Australian Bicentennial Authority Act, creating an Australian Bicentennial Authority (ABA) which would prepare for the celebration of the 200th anniversary of the arrival of the "First Fleet" of British settlers in what later became Sydney on the 26th of January 1788. The ABA was granted exclusive use of particular trademarks, including the expression "200 years". The idea was that the ABA would license the use of this and other trademarks to people who would produce commemorative souvenirs for sale. Davis, an Aboriginal political activist who was actively opposed to celebrating the Bicentenary, sought and was refused permission by the ABA to print t-shirts that used these trademarked expressions within slogans

that protested the celebration of the beginning of the invasion and conquest of Australia, and the destruction of Aboriginal people and culture that ensued. He challenged the constitutional validity of the ABA, saying that there was no constitutional power that could be invoked to support its set-up, that therefore any appropriation of Commonwealth moneys to it was unconstitutional, and that the Commonwealth's legislative power over trademarks or indeed over any topic could "not authorize the prohibition of the use of common names".

Although the submissions advanced on behalf of Mr Davis on this last point summarised in the Commonwealth Law Reports were remarkably brief, the Court unanimously struck down the provisions purporting to grant trademark protection to the expression "200 years" in conjunction with "1788" and "1988", and on very wide grounds indeed. Mason CJ, Deane and Gaudron JJ with whom Wilson and Dawson JJ, and Toohey J agreed on this point) said that the regulation in question reached ((1988) 166 CLR 79, pp.100-1):

far beyond the legitimate objects sought to be achieved and impinges on freedom of expression by enabling the Authority to regulate the use of common expressions and by making unauthorized use a criminal offence. Although the statutory regime may be related to a constitutionally legitimate end, the provisions in question reach too far. This extraordinary intrusion into freedom of expression is not reasonably and appropriately adapted to achieve the ends that lie within the limits of constitutional power.

Brennan J agreed with the plurality that the relevant provisions restricting use of the symbols and phrases were invalid, and also said (p. 116):

The form of national commemorations of historical events usually reflects the significance which the majority of people place upon the event. But there may well be minority views which place a different significance on the same event, as the present case illustrates. It is of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights. Minorities are thus entitled to freedom in the peaceful expression of dissident views.

Now these opinions would be utterly unremarkable if the Australian Constitution protected freedom of speech. But in 1988, it did not. The Commonwealth Government and the other States that intervened in this case (invoking the statutory provision that succeeded the special standing rule upheld in the *Union Label case*) must have been very puzzled when they read this decision, and the plaintiffs' lawyers must have been very pleasantly surprised that their apparently thin submission relating to the regulation of common names was able to achieve so much. We are not saying the case was wrongly decided; we are both very fond of freedom of expression and it is, after all, a human right. It just must have been surprising to the Commonwealth because it was clear that the limitation on legislative power fashioned by the justices in the *Davis case* asserted "freedom of expression" and "freedom in the peaceful expression of dissident views" as a *ground* for the striking down of federal regulations under (among other powers) the trademarks power. This was a truly remarkable constitutional development.

Constitutional lawyers are like bloodhounds, and a faint scent can be enough to get them to give chase. Within a few short years one of Australia's finest constitutional lawyers, Sir Maurice Byers, argued in 1992 that there was an implied freedom of political communication that invalidated Commonwealth legislation that criminalized criticism of a government official, in *Nationwide News Pty Ltd v Wills* (1997) 177 CLR 1. Justice Murphy's judgments in the cases from the 1970s and 1980s did not need to be relied upon, because counsel had all the encouragement in the world to advance an argument that the implied freedom exists after the *Davis case* was decided. The 1992 High Court led by Sir Anthony Mason enthusiastically upheld the arguments, and the implied freedom of political communication, foreshadowed by Murphy J, was finally born.

This was but one of many cases of this variety. The most striking feature of the High Court's constitutional decisions in the late 1980s and early 1990s demonstrates that justices of the Court in this period listened carefully to arguments that the Constitution contains implied rights and freedoms. One visitor from the United States has even called this period *The Mason Court Revolution* (Pierce, 2006). For about eight years, roughly coinciding with the

period during which Sir Anthony Mason was Chief Justice of Australia, the High Court took an activist turn, and the implication of a bill of rights was entertained as a real possibility. In a series of judgments stretching from 1988 to 1996, High Court majorities held that the Constitution protects "freedom of expression" (later backtracking to an implied freedom of political communication) (*Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Levy v Victoria* (1997) 189 CLR 579), that there is an implication rising from the separation of judicial power in the Constitution that a law cannot authorize a court to enforce a bill of attainder or a bill of pains or penalties (*Polyukhovich v Commonwealth* (1991) 172 CLR 501, pp. 539, 612, 686, 706-7, 721), and that there is an implication arising from the separation of judicial power in the Constitution that prohibits legislation that purports to authorise a court to re-imprison a person who had already served their sentence without a fresh criminal trial and finding of guilt (later backtracking to an implication that the Constitution prohibited a bill of penalties that single out one person) (*Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, pp. 96-7, 106, 120, 125; *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575; Keyzer, 2008). Smaller pluralities held that there is an implied right to a fair trial (*Dietrich v The Queen* (1992) 177 CLR 292, p. 326 (Deane and Toohey JJ), p. 362 (Gaudron JJ)), that there is an implied right to legal equality (*Leeth v Commonwealth* (1992) 174 CLR 455, p. 492 (Deane and Toohey JJ), p. 502 (Gaudron JJ)), and that there is an implied prohibition on retrospective criminal legislation (*Polyukhovich v Commonwealth* (1991) 172 CLR 501 (Deane J dissenting)).

During the same period, amici curiae were applying for admission without luck. In *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, a case about the power of the Australian Human Rights Commission's power to enforce its own orders, the Public Interest Advocacy Centre made the following submission in support of its application to contribute as amicus curiae:

In public interest litigation such as this it is desirable that the Court should have the assistance of submissions from community organisations such as the Public Interest Advocacy Centre. Over the past twelve years the Centre's work has

developed in line with its charter of promoting the public interest and enhancing the quality of public policy-making through analyzing and seeking the reform of laws, policies and practices which are unjust and deficient.

Counsel for the Public Interest Advocacy Centre, John Basten QC, had an illuminating exchange with one member of the High Court, Justice McHugh:

Basten QC: We are not here to fill a gap in the sense that there would be nobody here to support the validity (of the provisions). We are here, in a sense, to fill a gap in that there are others interested beside the Commonwealth of Australia in maintaining the validity of the legislation and the legislative scheme.

McHugh J: There might be six million who are.

Basten QC: That might be so, Your Honour.

McHugh J: Why should you be given any special privilege?

Basten QC: We are not seeking any special privilege, Your Honour.

McHugh J: That is what it seems to me to be, Mr Basten.

Leave was refused.

Probably the most ambitious attempt to argue that there are a series of implied constitutional rights and freedoms in the Constitution was in *Kruger v Commonwealth* (1996) 190 CLR 1. This was a very sad case. Alec Kruger and several other Aboriginal people challenged the constitutional validity of the Northern Territory Aboriginals Ordinance 1918, a Commonwealth regulation that authorized an official called the “Chief Protector of Aborigines” to undertake the “care, custody and control” of Aboriginal people in the Northern Territory of Australia. The plaintiffs had been removed from their families when they were young children and detained in institutions, where many of them were physically and sexually abused. They were separated from the land, culture and traditions that are so central to Aboriginal identity. They were regarded to be members of a “Stolen Generation”,

and a federal inquiry was underway to tell their stories and lay the groundwork for reparations.

The plaintiffs launched an ambitious and wide ranging constitutional challenge to the Aboriginals Ordinance on a number of grounds, including that the Ordinance interfered with the plaintiffs’ freedom of religion, which is protected by s 116 of the Constitution (this is one of the very few express freedoms in the Australian Constitution), that the Ordinance infringed an implied right to equality before the law, that it infringed an implied freedom of movement and association, and that it usurped the judicial power of the Commonwealth by authorising the punishment of the plaintiffs without due process. Justice Murphy had previously opined that some of these rights and freedoms could be drawn by implication from the Constitution, and, as noted above, there were threads in some previous decisions justifying the advancement of some of these arguments. But by 1996, Mason CJ was gone, and the High Court had been castigated by jurists, scholars and politicians for its “judicial activism”. The tide was turning.

It was in this context that the International Commission of Jurists, a group of concerned lawyers, lodged an application to be heard as *amicus curiae* to advance arguments that were supportive of the arguments of the plaintiffs. Brennan CJ and Dawson J repeatedly asked counsel whether the Court had any reason to suppose that the issues raised in the case would not be fully and adequately argued by the parties (transcript of hearing, *Kruger v Commonwealth*, 12 February 1996, pp. 15-25). Dawson J was conscious of the possibility that their holding might create a precedent, remarking that “if leave were granted in this case it would be a principle which was established which would be brought up in later cases” (p.17).

The justices of the Court expressed sympathy for the plight of the plaintiffs but said that none of the constitutional arguments could hold and there was no constitutional remedy for what had happened. Chief Justice Brennan said the stories of the Stolen Generation had “profoundly distressed the nation”, and:

In retrospect, many would say that the risk of a child suffering mental harm by being kept away from its mother or family was too great to permit



even a well-intentioned policy of separation to be implemented, but the existence of that risk did not deny the legislative power to make laws which permitted the implementation of that policy.

As for the application by the would-be amicus curiae, Brennan CJ, speaking on behalf of the Court, was not encouraging:

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.

The Court appeared to have retreated from its willingness to consider new arguments that additional implied rights and freedoms might exist (and, indeed, some of these arguments were never raised again). But, importantly to our present focus, the Chief Justice's procedural ruling on the admission of the amicus curiae also signaled a retreat to litigation led by parties and for parties.

This was not welcome news to would-be amici curiae. As we observed earlier in this article, while standing in Australian constitutional cases is nowhere near as complicated, and considerably more open than U.S. standing, the rules governing costs in Australian constitutional cases make the advancement of constitutional cases as a party potentially very expensive. Also, as we noted earlier, amici curiae in the U.S. cases bring societal issues to the attention of justices in ways that are not tied to the specific facts of the case being litigated, and can thereby help justices recognize and address the human rights issues in play in constitutional cases. *Kruger* appeared to be a real setback.

#### 4.4 THE ENUNCIATION OF DISTINCTIVE TESTS IN *LEVY V VICTORIA*

One more contextual feature of the constitutional landscape needs description before we launch into a consideration of the principles relating to amicus curiae that were expounded in *Levy v Victoria* (1997) 189 CLR 579. A little earlier in this article, we drew attention to the High Court decision in 1992 that confirmed that there is an implied freedom of communication in the Australian Constitution. In 1994, a majority of 4:3 went even further in *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 and *Stephens v West Australian Newsarticles Ltd* (1994) 182 CLR 211 and held that the implied freedom of communication could be invoked as a defense to a defamation action against a publisher of material that was critical of a member of parliament or political candidate. A politician would only succeed in an action for defamation if they established that the defendant was aware of the falsity of the material, published the material recklessly, and the publication was reasonable in the circumstances. (To American ears, even the words sound very familiar using much of the same language that is in *New York Times Co. v. Sullivan* (1964), a landmark case that forever changed First Amendment jurisprudence. Not surprisingly, it was a case in which amici made the Court keenly aware of the broad implications of the danger of current libel law on freedom of the press). After changes to the composition of the bench (two members of the majority in these cases left – Mason CJ retired and Deane J was appointed Governor-General), the stage was set for a reversal of these decisions.

Arguments that *Theophanous* and *Stephens* should be rolled back were advanced by the applicant in *Lange v Australian Broadcasting Corporation* and by a number of government interveners in both *Lange* and *Levy*. In a remarkable act of judicial leadership, Brennan CJ was able to wrangle a unanimous judgment in *Lange*, which required Toohey and Gaudron JJ to recant the wider positions they had taken in *Theophanous* and *Stephens*. Importantly for our purposes though, while the implied freedom of communication was wound back a little, the Court allowed the Media, Entertainment and Arts Alliance (the MEAA) to appear as amicus curiae. In their submissions the MEAA advanced submissions supporting the

retention of the wider approach to freedom of speech in *Theophanous* and *Stephens*. The MEAA submission cited a number of U.S. cases in its text. The Australian Press Council, an organization that resolves complaints against media companies for breaches in journalistic standards, also filed an application to make written submissions as *amicus curiae*, and this submission was accepted.

So it is in this context that *Levy v Victoria* (the duck hunting case we mentioned earlier in the article) can be considered. We set out the facts earlier in this article. Applications were made, as noted above, by the union that represents journalists (the Media, Entertainment and Arts Alliance) and the body that resolves complaints against media organisations (the Australian Press Council). In *Levy*, the Chief Justice, Sir Gerard Brennan said ((1997) 189 CLR 579, p.604):

The hearing of an *amicus curiae* is entirely in the Court's discretion. That discretion is exercised on a different basis from that which governs the allowance of intervention. 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. In *Kruger v The Commonwealth*, speaking for the Court, I said in refusing counsel's application to appear for a person as *amicus curiae*:

"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."

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 (internal references omitted).

However Justice Kirby, in a separate judgment, favoured a much broader approach (1997) 189 CLR 579, p. 651):

In the United States of America and Canada, the practice of hearing submissions from interveners and *amici curiae* is well established. Such practice is particularly common where matters of general public interest are being heard in the higher appellate courts. ...

There is no need for undue concern about adopting a broader approach. The Court itself retains full control over its procedures. It will always protect and respect the primacy of the parties. Costs and other inhibitions and risks will, almost always, discourage officious busybodies. Those who persist can usually be recognised and easily rebuffed. The submissions of interveners and *amici curiae* will typically be conveyed, for the most part, in writing. But sometimes oral argument by them will be useful to the Court. Such interests may occasionally have perspectives which help the Court to see a problem in a context larger than that which the parties are willing, or able, to offer. That wider context is particularly appropriate to an ultimate national appellate court. It is especially relevant to a constitutional case.

Nothing in the Australian Constitution prevents such a procedural course. Conforming to the Constitution, this Court should adapt its procedures, particularly in constitutional cases or where large issues of legal principle and legal policy are at stake, to ensure that its eventual opinions on contested legal questions are informed by relevant submissions and enlivened by appropriate materials.

In the present matter, I would have allowed the Council for Civil Liberties and other relevant bodies,

had they applied, to make brief submissions on the constitutional controversy. Such submissions would have been subject to the same strict conditions as applied to other interveners and *amici*. If necessary, the relevant bodies could have been restricted to written submissions. But I would have allowed them a voice (internal references omitted).

Later, in *Roadshow Films Pty Ltd v iiNet Limited* [2011] HCA 54 five justices of the Court, in a unanimous judgment, upheld Chief Justice Brennan's approach and made no reference to Justice Kirby's approach at all. Notwithstanding that fact, there is always a possibility that, in time, the Kirby test will be preferred to the Brennan test. (After all, we have just observed that Justice Murphy's implied rights and freedoms jurisprudence of the late 1970s and early 1980s appears to have been influential in the late 1980s and early 1990s). What we will call the "Kirby test" will be considered at length, later in the article. Firstly we lay out what we call "the Brennan test".

Chief Justice Brennan said that the admission of *amici curiae* by the Court is:

- A matter of discretion;
- The *amicus curiae* must draw attention to a fact or law which will assist the Court in a way in which the Court would not otherwise have been assisted;
- The *amicus* must show that the parties are unable or unwilling adequately to protect their own interests or to assist the Court in arriving at the correct determination of the case;
- 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 (emphasis added).

Before we analyze the Brennan test and its aftermath, given our comparative framework, we pause briefly to point out some important differences between the U.S. Supreme Court and the Australian High Court that are relevant to the roles played by *amici*.

The High Court of Australia has retained, in large measure, the oral tradition of advocacy. While there is always pressure on the High Court's calendar, there does

not appear to have been any significant shift in the High Court's practice in constitutional cases since the mid-1980s (when the "special leave" procedure, much like the U.S. "cert" procedure, was introduced). In Australia, constitutional cases can take *days*. It has been more than a century since the U.S. Supreme Court allowed counsel to address that court for hours on end (Hayne 2004). In the U.S., oral argument for a typical case is only one hour. Oral argument remains important, and at times is determinative, but the justices rely much more on written briefs of counsel and *amici*. In Australia, being allowed to make oral arguments is of vastly greater importance. Or to borrow a phrase from the American musical "Hamilton" to be in the courtroom presenting oral argument is "to be in the room where it happens." Another difference is in the case selection process. In the U.S. the basic route to the Supreme Court is that losing parties petition the Supreme Court for a writ of certiorari, and it is either granted or denied without any oral argument. In Australia the path is much more complicated with many more touch points between counsel and the High Court.

Returning to the Brennan test, this test has resulted in the following procedure being adopted. First, if a person or group wants to file written submissions only, they need only invoke the discretion of the court, draw attention to the issue of fact or law they wish to raise, point out how their submissions travel beyond the submissions of the parties (that is, address the "unable or unwilling" criteria), and submit that the Court will be assisted. Since it is now common practice for parties to agree to allow their written submissions to be published on the High Court's website in advance of a plenary constitutional hearing, an *amicus curiae* can make their submission directly after the publication of submissions.

Alternatively, if a person wants to make oral submissions, then they would apply to the registry signaling their intention to do so, ordinarily accompanied by their written submissions. Since the Court will ordinarily convene a "directions hearing" inviting the parties to make submissions as to an appropriate timetable for the resolution of the matter, the Court can invite would-be *amici curiae* to make their argument for access at that point, or (more often) reserve the question whether the

amicus curiae should be admitted until the first day of the substantive hearing.

To aid our international readers, we pause to provide a few basics of the process in Australia. Unlike the process in the United States, in Australia, amici curiae do not seek admission at the time the Court decides that a constitutional matter should be heard in the High Court. Seeking admission before the High Court comes in various ways: as an appeal (a matter of discretion of the court, as in the United States, and determined as part of a procedure referred to as “special leave”; as a “case stated” or “question reserved” (a procedure which allows people to make an application before a single justice of the Court raising a constitutional question as a basis for commencing a dispute); as a “removal” (a case removed from another court so the constitutional point can be resolved, at the discretion of the court); or in a case where a person invokes the original jurisdiction of the court to seek remedies (remedies that may have been removed by federal legislation from other lower courts, such as the Federal Circuit Court).

It is important to consider why the Court would raise a higher bar for oral submissions. Two reasons can be posited.

First, as we have already said, oral argument is particularly important. The second reason is related to the first. As both Brennan CJ and Kirby J indicate, time is at a premium for the court and the lawyers. There is a possibility that the admission of a great many amici curiae to deliver oral submissions could place pressure on the court and the parties. This should be avoided. For these reasons, oral submissions can only be made when the Court expects *significant* assistance.

How has the Brennan test operated in the cases that followed? In the next section we analyse the relevant cases, before considering the Kirby test, we then conclude the article by considering what Australian constitutional lawyers might learn from US constitutional lawyers about how to deploy amicus curiae briefs to advance human rights outcomes in High Court cases. (A number of the post-*Levy* cases did not raise human rights issues so they will not be considered further: in chronological order *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395;

*Attorney-General (Cth) v Breckler* (1999) 197 CLR 83; *Stevens v Kabushiki Kaisha Sony Computer Entertainment* (2005) 224 CLR 193; *Campbells Cash and Carry Pty Ltd v Fostif Pty Limited* (2006) 229 CLR 386, 404-7; *Central Bayside General Practice Association Limited v Commissioner of State Revenue* (2006) 228 CLR 168; *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 68; *IceTV Pty Limited v Nine Network Australia Pty Limited* (2009) 239 CLR 458; *Lehman Brothers Holdings Inc v City of Swan* (2010) 240 CLR 509; *Cumerlong Holdings Pty Ltd v Dalcross Properties Pty Ltd* (2011) 243 CLR 492, 495-6; *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37; *Williams v Commonwealth of Australia* (2012) 248 CLR 156, 175; *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239; *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, 487-8; *Australian Competition and Consumer Commission v Flight Centre Travel Group Limited* (2016) 261 CLR 203, 210-1; *Forrest & Forrest Pty Ltd v Wilson* (2017) 262 CLR 510, 513-4; *Re Roberts* [2017] HCA 39; *Re Canavan Re Canavan; Re Ludlam; Re Waters; Re Roberts* [No 2]; *Re Joyce; Re Nash; Re Xenophon* (2017) 263 CLR 284; *Re Nash* [No 2] (2017) 263 CLR 443, 446-7; *Northern Territory v Sangare* [2019] HCA 25; *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13).

An example of how the Brennan test operates is *Maloney v The Queen* (2013) 252 CLR 168. Joan Maloney, an Indigenous woman and resident of Palm Island, Queensland, a predominantly Indigenous community, was charged with possession of more than a prescribed amount of alcohol contrary to the Queensland Liquor Act. Palm Island had been declared by State law to be a “dry” community; alcohol restrictions were in place. Maloney argued that the Queensland provisions were invalid to the extent of their inconsistency with the federal *Racial Discrimination Act*, which prohibits laws that are racially discriminatory (and, relevantly, implemented the Convention for the Elimination of All Forms of Racial Discrimination). Applications were made by the Australian Human Rights Commission (which has a statutory authority to intervene), and also by

the National Congress of Australia's First Peoples Limited, (instructed by the Human Rights Law Resource Centre Ltd) seeking leave to appear as amicus (*Maloney v The Queen* [2012] HCA Trans 342 (11 December 2012)). However Chief Justice French specifically applied the Brennan test, saying: "I should say that in the event that you seek to make any oral submission to supplement your written submissions we will want you to first state succinctly the point you would seek to make that differs from those of the appellant" ((2013) 252 CLR 168). The case report indicates that brief oral submissions by the National Congress of Australia's First Peoples were ultimately allowed (p. 172). The Australian Human Rights Commission also made brief oral submissions (pp.171-2). Kiefel J (as Her Honour then was) (p.230) and Bell J (pp. 249-250) referred extensively to the submissions of the Australian Human Rights Commission in their decisions (which concerned Article 7 of the Universal Declaration of Human Right and Article 26 of the International Covenant on Civil and Political Rights). Justice Gageler's judgment extensively canvasses relevant human rights principles, specifically accepting the submissions of Queensland (thereby rejecting the submission of the National Congress) (p. 291). It is not apparent from the judgments of the Court that the submissions made by the National Congress had any impact on the Court (that does not mean the submissions were not listened to, or read and considered, only that the judgments do not reflect any impact).

In *Maloney* the Chief Justice specifically applied the Brennan Test in determining whether oral submissions should be allowed. But the Court does not always provide reasons why it rejects or restricts amici. For example, in *Magaming v The Queen* (2013) 252 CLR 381, 385 the Australian Human Rights Commission (AHRC) sought leave to participate as amicus curiae in a case about whether mandatory minimum sentences under federal law usurped judicial power contrary to Chapter III of the Constitution. The case involved an Indonesian fisherman who had been convicted of an "aggravated offence" of people smuggling (people smuggling involving at least five people). The aggravated offence attracted a mandatory minimum sentence provision: five years with a minimum non-parole period of three years. The constitutional question was whether the mandatory minimum sentence was incompatible with

the independence, impartiality and integrity of the Ch III court called on to enforce it. The Court granted leave to the AHRC to participate as amicus curiae, but French CJ advised counsel for the AHRC that it would be limited to written submissions only (presumably the submissions passed the "assistance" threshold, but not the "significant assistance" threshold for oral submissions).

As noted, the Court did not explain why it made this ruling ([2013] HCA Trans 200). Although the Court is always very busy, failing to provide reasons why an amicus curiae's application to make oral or written submissions is rejected makes it difficult for other would-be amici to work out how they should mount their applications. If the Court does not explain why it allows amici in some cases and not in others, it is difficult to understand what the "significant assistance" or even the "assistance" test actually requires. (For example, in *Western Australia v Brown* (2014) 253 CLR 507 the Solicitor-General for the State of South Australia was granted leave to appear as amicus curiae in this Western Australian native title case. It is not clear why. Notably, Australian Lawyers for Human Rights were denied leave to appear as amicus curiae: [2014] HCA Trans 14. No reasons were provided). This uncertainty may well deter applications and could increase the expense of developing applications. Though we praise the U.S. Supreme Court for its openness to amicus participation, it is often criticized for not explaining why it denies certiorari. The rules of what makes a case certworthy are similarly vague. Even hidden is the vote for who did and did not agree to take the case unless there is a public dissent from the denial of certiorari (Perry 1991).

As noted above, there is a significant defect in the procedure adopted when amici curiae make applications to make oral submissions. Counsel representing a would-be amicus need to physically appear in court to do so. This can be very expensive for the client whether it takes place at a directions hearing or in the substantive hearing itself. These hearings are almost invariably heard in Court No 1 in Canberra. Sometimes the Court will empanel only five justices to hear a constitutional appeal, but this is very rare—the usual rule is that all available justices (seven, assuming none are ill or on sabbatical or leave) shall sit. Very few if any legal counsel who appear in the High Court reside in Canberra, so that means that they must fly or drive

to Canberra, typically from Sydney or Melbourne, to appear. Canberra Airport is often plagued by fog, particularly in the morning, and so the High Court requires counsel to travel to Canberra the day before any High Court hearing to ensure that counsel are in attendance and to avoid embarrassment to the Court when proceedings commence. Counsel therefore typically set aside a day and a half to do so: the travel back and forth to their home State and for the work. If admitted, they would stay for the hearing day in case the Court required their services further, or if they sought leave to respond to an oral submission from one or both or multiple parties. Sometimes cases last for more than one day. Counsel can ask to be excused, but in light of the travel and accommodation requirements, a charge to the client for one and a half days would not be unreasonable. There are also costs for preparation. Experienced senior counsel – and senior counsel ordinarily make these applications – reputedly charge between \$10,000 to \$15,000 per day for their services. Now it is very likely that counsel representing amici in cases raising human rights issues would only charge a nominal fee, or perhaps only a fee to cover their travel and accommodation expenses, but this could still amount to several thousands of dollars. This is plainly a drain on resources that might be used for other varieties of legal mobilization in support of human rights. It would be preferable if amici curiae were advised before the hearing, and preferably well before the hearing, if their application will be granted or not. It is well understood that the purpose of an oral hearing is to give parties every opportunity to advance their client’s case, and that means that a party or parties might object to an application by a would-be amicus on the day of the hearing. However, in our age of electronic communications, interactive audio-video conferencing, and bearing in mind the Court’s recently-adopted practice of publishing virtually all submissions made in High Court cases, surely there must be less expensive ways of making this decision? Could the decision be made by the Court in advance of the hearing? We think so.

In addition, it should be noted that while U.S. amici curiae are active in cert petitions, they are non-existent in the High Court’s equivalent special leave hearings. As far as we are aware, an application for amicus curiae status has never been made at a special leave hearing,

during a removal, or in any of the preliminary hearings that precede a directions hearing or a substantive hearing in a constitutional case. This contrasts sharply to U.S. practice, where amicus briefs provide important signals about the importance of cases. As “public importance” is one of the criteria for allowing an application for special leave to the High Court, it makes sense to enable amici to participate at this point. We are not sure why this does not take place, but believe it is worthy of further investigation, given the prominence of amici involvement in the United States “cert” process.

Another significant defect of the Brennan test is that even after considerable expense, the trip to Canberra may be futile. So, for example, in *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* ((2006) 231 CLR 1, pp. 4-5) the Gleeson Court rejected an application by the United Nations High Commissioner for Refugees (UNHCR) seeking leave to make oral submissions. QAAH was a man from Afghanistan who had received a temporary protection visa and then sought permanent residence. The Refugee Review Tribunal had determined that there had been a change in circumstances in Afghanistan since he had made his application, and this meant that it was no longer unsafe for him to return to that country. The Court declined to hear counsel for the Commissioner. Instead, the UNHCR was granted leave to make written submissions as amicus curiae, and argued that there “must be positive information demonstrating a settled and durable situation incompatible with a real chance of persecution arising from the circumstances in connection with which the person has been recognised as a refugee”. The majority of the Court allowed the appeal but did not refer to the submissions of the amicus curiae. This may be interpreted as an example of an applicant failing to exceed the “significant assistance” threshold set by the Brennan test.

Justice Kirby dissented from the procedural ruling. Kirby J said:

“this appeal, UNHCR exceptionally, and so far as I am aware, uniquely, sought to be heard as an *amicus curiae*. Counsel were retained for this purpose and travelled to the hearing to make the application. I would unhesitatingly have granted leave for UNHCR to be heard in these proceedings. However,

unrestricted leave for oral argument was withheld by the Court. The UNHCR's participation was confined to written submissions. ... The intervention of UNHCR is recorded in important proceedings in national courts overseas. In my view, it should be welcomed, not resisted. Decisions of national courts play an important role in expressing the meaning of the Convention and deciding the application of such treaty law. In effect, in deciding cases such as the present, national courts are exercising a species of international jurisdiction. The more assistance courts can receive from the relevant international agencies, in discharging such international functions, the better (internal references omitted)".

Perhaps chastened, the UNHCR chose to file written submissions in the later decision of *CPCF v Minister for Immigration and Border Protection* ((2015) 255 CLR 514). In this case, a number of Sri Lankan Tamils arrived in Australian waters in a boat carrying an Indian flag. The Australian Human Rights Commission filed written submissions. The Office of the United Nations High Commissioner for Refugees was also granted leave as *amicus curiae* to file written submissions on behalf of the Office other than on issues of statutory construction and the Constitution. Unfortunately, the case report provides no indication of the content of the submissions).

Dissent from a procedural ruling of the Chief Justice is an extraordinary step for a justice of the Court to take, so it was very clear that Justice Kirby was *making a point*. In some cases, the Court appears to have been not merely negative about an application by an *amicus curiae*, but positively hostile. *Wurridjal v The Commonwealth* (2009) 237 CLR 309 concerned the scope of s 51(xxxi) of the Constitution, which authorises the Commonwealth Parliament to make laws for the compulsory acquisition of property for a purpose of the Commonwealth. These acquisitions must be made on "just terms". In 1997, the Court had decided, in a split decision, that this constitutional guarantee did not apply in Commonwealth territories. The court was invited to reconsider this decision in the following circumstances: in August 2007, the Commonwealth enacted five pieces of legislation, including the Northern Territory National Emergency Response Act, which was said to address issues

raised in a report of the Northern Territory Government called *Little Children Are Sacred*. That report had said that there was widespread sexual abuse of children in remote communities in the Northern Territory. The Emergency Response Act authorized the provision of five-year leases in favour of the Commonwealth over land that was otherwise subject to native title, ostensibly to provide legal certainty to business owners that may be willing to invest in activities in these communities. Wurridjal challenged the constitutional validity of the law on the basis that it failed to provide just terms for the property acquisition.

Two academics from Australian National University together filed an application to be heard as *amicus curiae* in the case. The application was dismissed and the submissions were subjected to criticism by a majority of the Court ([260]-[263] (contrast 312-3)). Given the significance of the decision to would-be amici, the relevant passages of the judgments are set out at length:

FRENCH CJ. A majority of the Court is of the opinion that this is not a case in which the submissions and material offered by those who would intervene as friends of the Court are likely to be of any assistance. The Court may be assisted where a prospective *amicus curiae* can present arguments on aspects of a matter before the Court which are otherwise unlikely to receive full or adequate treatment by the parties because (a) it is not in the interests of the parties to present argument on those aspects or (b) one or other of the parties lacks the resources to present full argument to the Court on them. In some cases it may be in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer. In the present case, the Court has received a large volume of material said to support the proposition that the rights claimed by the plaintiffs constitute property for the purposes of s 51(xxxi) of the Constitution. The material consists of what are said to be relevant international law instruments and international jurisprudence. The submissions do not travel significantly beyond that contention and some general statements about the wide meaning to be given to the word

“property” in s 51(xxxi). *They do not show how, having regard to the particular statutory framework in which the plaintiff’s property rights arise and the operation of the impugned laws, the material is of any relevance.* Before the Court will accept the offer of assistance of an amicus curiae it must be satisfied that it will be assisted. The tender of a large amount of material, supported by what is little more than an assertion about its utility, is not sufficient to give to the tenderer a voice in these proceedings. The summons will therefore be dismissed (emphasis added).

KIRBY J. The practice of this Court in recent years has moved in the direction of widening the circumstances in which amici curiae will be heard, or at least permitted to tender written submissions and materials (1). In taking this course, the Court has simply, if somewhat belatedly, followed the practice of other final national courts in common law countries. It has done so out of recognition of the special role played by such courts, including this Court, in expressing the law, especially in constitutional cases in a way that necessarily goes beyond the interests and submissions of the particular parties to litigation. The present is a case involving such issues. Whether the Court would be assisted by the submissions of the proposed amici is difficult, or impossible, to decide at this stage before the Court has heard any argument.

I agree with the other members of the Court that some of the materials proffered by the proposed amici appear somewhat undigested and lacking in demonstrated application to the issues in the proceedings. Nevertheless, the actual submission of the proposed amici is quite brief, being but twenty pages. It refers to new materials that are not referred to in the submissions of the parties and, in particular, materials on international law and the practice and decisions of foreign and international courts and bodies relevant to the treatment of indigenous peoples. Such materials may be relevant to this Court’s deliberations as the arguments develop. Therefore, I would be inclined at this stage to receive the amici’s written

submissions and simply to use those materials, with discretion, as they prove to be relevant as the argument advances.

Alternatively, I would reserve the question of whether the amici should be heard or should be permitted to place their written materials before the Court for decision later in the proceedings. I would note that most of the written materials that were tendered with, and to support, the written submission are publicly available in any event. We are now on notice of them. Most of them could be used by the Court as background or contextual materials in any case.

The formal order that I would propose is that the reception of the submissions of the amici should be reserved by the Court until later in the hearing. I note that the parties to the proceedings have no objection to the Court’s receiving the written submissions of the amici. Nor, at this stage, should this Court.

CRENNAN J. I agree with Kirby J.

This decision sounds a cautionary note for would-be amici curiae. It will be necessary for an applicant to apply the law to the facts and reach conclusions, and not merely refer the Court to materials that may be relevant. An *argument* must be advanced.

Justice Kirby draws attention to a further problem with the contemporary approach to amici curiae: it may be that the utility of their submissions may not become apparent until the argument has advanced within the proceedings. If the court makes a decision to deny access at the commencement of the hearing then there is apparently no way to reconsider this decision later in the proceedings. This point plainly commended itself to Justice Crennan.

The experience of the unsuccessful applicants in *Wurridjal* can be contrasted to the experience of the Combined Community Legal Centres Group, who were granted admission to make oral and written submissions in *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 (pp.328-330). In this case, the Combined Community Legal Centres Group argued that a State regulation prohibiting the advertising of legal services for personal



injury matters materially affected their freedom of political communication, specifically, a freedom to obtain information to enable them to bring matters to court. They argued that their interest was different to APLA, a group of plaintiff lawyers that relied on advertising to increase their business. John Basten QC, a gifted lawyer (and former academic) with substantial experience in the High Court who has since been elevated to the New South Wales Court of Appeal (and who represented Mr Davis in *Davis v Commonwealth*), was even granted an opportunity to provide an oral reply to other submissions made (p.340). Their submissions were largely accepted by the dissentients, McHugh and Kirby JJ. Justice Kirby J remarked that the submissions underscored “the need, in large and complex legal (and especially constitutional) concerns, for this Court to be ready to receive submissions from non-parties that have substantive arguments to the issues that fall for decision” (p.309). Justice Gummow did not review the submissions of the amicus curiae extensively (pp.379-381).

Likewise, the amici curiae in *Clubb v Edwards* and *Preston v Avery* [2019] HCA 11 had a very positive reception from the Court. The case sets a new record for numbers of amici represented in a case (four). It concerned efforts by Victoria and Tasmania to decriminalise abortion. Each State had sought to provide that those seeking access to, or working in, premises where terminations are available, were protected from the hindrance of protests or other communications about abortions being made within 150 metres of such premises. The appellants challenged the constitutional validity of the statutory provisions reinforcing the safe access zones. They argued that the laws were not necessary, or rationally connected to a legitimate purpose, but instead infringed on the implied freedom of political communication, which includes a right to protest. The High Court rejected these arguments. Four organisations, the Castan Centre for Human Rights Law, the Fertility Control Clinic (A firm), the Human Rights Law Centre (appeared as amici curiae in *Clubb v Edwards* (written submissions)) and LibertyWorks Inc appeared as amicus curiae in *Preston v Avery* (written submissions)). The submissions made extensive reference to human rights issues ([2019] HCA 11. An application by Access Zone Action Group, an anti-choice group, for amicus status

was rejected by Gordon J (see *Clubb v Edwards & Anor* [2018] HCATrans 181).

Mind you, the record number of appearances in these cases were for written submissions, which only need cross the threshold of providing “assistance” to the Court, not the higher threshold requirement for oral submissions.

Still, via written submissions, amici curiae have advanced human rights principles by drawing the attention of the High Court to international human rights conventions that explain the meaning of particular words and phrases used in statutes, assisting the court to reach conclusions that are consistent with those human rights conventions. Amnesty International Australia addressed the question whether denial of freedom to express sexual preference could constitute persecution for the purposes of the refugee test (2003) (in *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473, two homosexual men from Bangladesh had sought protection in Australia as refugees, citing a well-founded fear of persecution in Bangladesh on the basis of their sexuality. The Refugee Tribunal decided that the men could return to Bangladesh and live safely, commenting that they might need to be “discreet”. Although the appeal was disposed of on other grounds, Amnesty International Australia was granted leave to file written submissions on the question whether denial of freedom to express sexual preference could constitute persecution). In another case, made submissions that the Family Court’s jurisdiction to protect the welfare of the child was, in part, implementing the United Nations Convention on the Rights of the Child, which significantly limited the immigration detention of children (*Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, pp. 373-4). People with Disabilities (NSW) Inc drew the Court’s attention to the definition of the word “disability” in international human rights law in a case about federal disability discrimination legislation, which in turn implemented international human rights principles (2003) (*Purvis v New South Wales* (2003) 217 CLR 92, p. 96).

The position of the Australian Human Rights Commission (AHRC) as an amicus curiae is a little bit different. While the High Court is under no obligation to accept its submissions, it does have the advantage of being a

publicly-funded agency, with its role confirmed in statute (the statutory provisions authorizing the AHRC to file amicus briefs in courts includes *Racial Discrimination Act 1975* (Cth), s 20(1)(e); *Sex Discrimination Act 1984* (Cth), s 48(1)(gb); *Disability Discrimination Act 1992* (Cth), s 67(1)(l); *Age Discrimination Act 2004* (Cth), s 53(1)(g) and under the *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(o) and s. 31(j)). Its policy regarding making submissions as amicus curiae is reflected on its website: “When a relevant human rights or discrimination issue arises in a case and the Commission could provide expert assistance that would otherwise not be available to the Court, the Commission may seek leave of the Court to intervene in the proceedings. The Commission will then make submissions on the issues that relate to the Commission’s powers”. The AHRC has made significant submissions in *Tajjour v New South Wales* (2014) 254 CLR 508, *North Australian Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 569 (p. 578) and *M47/2018 v Minister for Home Affairs* [2019] HCA 17.

In *Tajjour*, Tajjour and others challenged Queensland legislation that prohibited consorting with criminals. It was argued this was contrary to the implied freedom of political communication, and an implied freedom of association arising therefrom. Tajjour also argued that Art 22 of the ICCPR restricted the scope of the legislative power of NSW. The Court rejected this argument (French CJ [48], Hayne J [58],[98], Gageler J [136] and Keane J [249]). The Australian Human Rights Commission was given leave to appear as amicus curiae, and made submissions that were less ambitious than the submissions made by the applicants: “Habitual consorting ... is a subspecies of a larger genus of association within the meaning of Art 22 of the International Covenant on Civil and Political Rights. There is no human rights concern if habitual consorting fits within Art 22(2), which permits restrictions on the exercise of the freedom of association in the interests of the *ordre public*. ... Domestic legislation is not required to conform to international agreements ... if infringement of Art 22 would also be an infringement of the freedom of political communication, there will be invalidity”.

In *North Australian Aboriginal Justice Agency Limited v Northern Territory*, the Australian Human Rights Commission was granted leave to file written submissions as

amicus curiae. The submissions were not considered in any of the judgments.

In M47/2018, the plaintiff has been in immigration detention since 2010. The plaintiff said that he was stateless and that continuing his detention was unconstitutional and breached his human rights. The respondent said that his state of origin could not be established because he had failed to cooperate with authorities. The Australian Human Rights Commission made written submissions as an amicus curiae on the construction of relevant provisions of the *Migration Act 1958* (Cth).

To sum up to this point, notwithstanding the apparent narrowness of the Brennan approach, since *Levy v Victoria*, and at the time of writing, there has been a steady stream of decisions, over forty, in which the High Court heard applications for leave from amici curiae. This is a significant rise: indeed, based on calculations in previous work, we estimate that there have been twice as many applications for amicus status in the last 20 years than there were in the preceding century (Keyzer 2010, pp 102-18). Now this is a far cry from the over one hundred applications in the Obama Care case. But given that Australia has about the same population as Texas, four applications in an Australian case might be comparable to, say, fifty in the United States (after all, the population of the US is over 13 times the population of Australia). However, importantly, there was no indication from the justices deciding *Clubb v Edwards/Preston v Avery* that they felt inundated by the additional reading, or any indication from the parties, and the many Attorneys-General intervening, that they were concerned about this new record being set.

It is interesting to note that Amnesty International Australia and the Human Rights Law Centre have become “repeat players”, building knowledge about how to prepare submissions in future cases that are more likely to be accepted, which is of course the predicate to their consideration. The Human Rights Law Centre has managed to persuade the High Court to enable it to participate in six of the cases on the second list above: the *Human Rights Dialogue Model case* (*Momcilovic v The Queen*), the *Street Church Freedom of Speech case* (*Attorney-General (SA) v Corporation of the City of Adelaide*), the *Marriage Equality case* (*Australian Capital Territory v Commonwealth*), the

*Right to No Gender case (NSW Registrar of Births, Deaths and Marriages v Norrie)*, the *Freedom of Assembly case (Brown v Tasmania)* and the *Pro-Choice Safe Zones cases* (analysed elsewhere in this article).

*Momcilovic v The Queen* (2011) 245 CLR 1 was a test case on the “dialogue model” of human rights protection implemented by the *Victorian Charter of Human Rights and Responsibilities Act 2006*. Section 36 of that Act empowers the Supreme Court of Victoria to make a declaration that a statutory provision or provisions of the Victorian Parliament is incompatible with a human right. The declaration has no effect on the legality of the statutory provision; instead the declaration is provided to the Attorney-General and the Minister administering the statute in question, who must then prepare a written response for consideration by the Victorian Parliament. A constitutional question was raised whether such a declaration is incompatible with the Supreme Court’s constitutional position as a Chapter III court under the Commonwealth Constitution, as Chapter III courts can only make binding declarations of law. A majority of the Court declared that s 36 did not adversely affect the impartiality and independence of the court. The Human Rights Law Centre made submissions in support of s 36 and noted the similarity between the process it adopts and the legal position in Canada and South Africa.

In *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, the “*Street Church case*”, Caleb and Samuel Corneloup were members of an unincorporated association in Adelaide called Street Church. They wanted to preach and distribute religious pamphlets in the Rundle Mall in Adelaide. Council by-laws prohibited any person from preaching, canvassing, haranguing, etc. without permission. The Corneloups challenged the by-law. The Attorney-General for South Australia intervened. On appeal to the High Court, a question was raised whether the by-law infringed the implied freedom to discuss political and governmental affairs. The Human Rights Law Centre was granted leave to file written submissions as amicus curiae.

In *Commonwealth v Australian Capital Territory* (the “*Marriage Equality Case*”) (2013) 250 CLR 441, 449-52, Australian Marriage Equality Inc (solicitors, the Human

Rights Law Centre) delivered extensive submissions on the definition of “marriage”, and supporting the argument of the Australian Capital Territory that if the Commonwealth Marriage Act was restricted to heterosexual couples, then the ACT could pass valid legislation enabling same sex civil unions. The Court accepted their submission that the marriage power in s 51(xxi) of the Constitution could enable the Commonwealth to pass legislation authorizing same sex marriage (p. 452 [2]).

In *NSW Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, Norrie had applied for registration of her sex as “not stated” after a sex affirmation procedure. A Gender Agenda Inc, instructed by the Human Rights Law Centre, was granted admission as amicus curiae to tender written submissions that relied on analysis of State and federal human rights bodies (p. 492).

The *Freedom of Assembly case (Brown v Tasmania)* (2017) 261 CLR 328 concerned the constitutional validity of provisions of the *Workplaces (Protection from Protestors) Act 2014* (Tasmania) which provided police with move on and arrest powers that limited the scope of protest activity, on the facts, in an area of forest being logged. The Human Rights Law Centre filed written submissions as amicus curiae, including the submission that the Court “should recognise a limited form of freedom of assembly as indispensable to the system of representative government, not a wider free-standing principle of freedom of association or movement”. This submission appears to have been ignored.

#### 4.5 JUSTICE KIRBY’S BROADER APPROACH

The contemporary approach, what we have called the Brennan Test, has resulted in a steeply increasing number of amici curiae participating in constitutional cases to raise human rights issues. However it does create practical and costly obstacles for would-be applicants, and, as Justice Kirby pointed out in *Wurridjal*, denial of admission might deprive justices of access to materials that may become relevant as an argument progresses, or which may be available to the justices at any rate.

As noted in our review of the post-*Levy* decisions above, Kirby J has consistently maintained a more open approach than the majority of the Court. A summary of

his position, mosaiced from the public reasons he has delivered for admitting amici curiae in a number of cases above, is as follows:

1. Amici should be admitted “when matters of general public interest are being heard in the higher appellate courts” because “decisions of national courts play an important role” – that “wider context is particularly appropriate to an ultimate national appellate court. It is especially relevant to a constitutional case” and also “important” in cases about “the meaning of” international treaties.
2. Amici “may occasionally have perspectives which help the Court to see a problem in a context larger than that which the parties are willing, or able, to offer”.
3. The court can use costs and other inhibitions to discourage amici curiae who are “officious busybodies”.
4. One approach the Court could take would be to “receive the amici’s written submissions and simply to use those materials, with discretion, as they prove to be relevant as the argument advances” or, alternatively, to “reserve the question of whether the amici should be heard or should be permitted to place their written materials before the Court for decision later in the proceedings”.

It is difficult to disagree with Justice Kirby’s first proposition. After all, “public importance” is one of the criteria applied by the High Court when granting special leave to parties to appear in the High Court. That said, although individual constitutional cases may vary in their degree of importance, they are all important. The same can be said for High Court cases that raise issues of statutory interpretation requiring the consideration of the meaning of words or phrases in international human rights conventions. One could reasonably argue that *every* High Court case is important. Is this aspect of the “Kirby test” a sound basis for limiting access by amici curiae to raise arguments in the High Court? Probably not.

It is also difficult to argue with Justice Kirby’s final point. It may well be that the utility of the submissions of amici may not be clear until an argument has advanced. The High Court’s tradition is one of oral argument, and these arguments can and do evolve during the course of proceedings. That being so, reserving any decision on admission to the end of proceedings makes sense.

The second aspect of the Kirby test is that applicants “may occasionally have perspectives which help the Court to see a problem in a context larger than that which the parties are willing, or able, to offer”. This echoes the language of the Brennan Test but emphasizes the *context* within which the Court makes decision. This is an important word because it invites consideration of “policy” (another word used by Justice Kirby in his honour’s judgments about the admission of amici curiae, a word that is absent from the Brennan Test).

As we have argued in this article, we think that amici curiae have an important role to play in drawing the court’s attention to the impact of its decisions on the human rights of minorities. However we contend that the input of amici curiae should not be yoked to any consideration of what the parties “are willing, or able, to offer”. Instead, we think the High Court, when it is making (constitutional) decisions about human rights is doing important work that needs to be properly-informed and well-informed. It cannot be assumed that parties and solicitors-general will be able to represent the diversity of important views that should be taken into account. Australian rules governing the admission of amici curiae need to give interested people and interest groups a reasonable opportunity to register their views about the way that the law should be developed. Unfortunately, the current approach necessarily limits their preparation time and may narrow the submissions they could make. Again, to repeat a point made above, this is a far cry from the approach taken by Chief Justice Griffith in 1906. It is also considerably more narrow than the U.S. approach, which operates more like a presumption of access.

Our final quibble with what we call the Kirby Test is the use of the expression “officious busybodies”. This language is an unfortunate legacy from earlier common law decisions on standing that abjured the ideological plaintiff in public law cases. We are, hopefully, a long way past the point where serious amici curiae might be dismissed as mere meddlers.

We believe that a person or organisation that goes to the time and trouble of making an application to appear as amicus curiae will usually have a serious argument to make. The Court can certainly lay down expectations about

the quality of the submissions, as it did in *Wurridjal*. Any test of access should focus on the *issues*, rather than the people bringing the application to the court. Unlike the early High Court in the *Railway Servants case*, we do not endorse the principle that an amicus curiae can raise a constitutional argument in a case where the parties have not done so. However it seems to us that once the parties join issue in a constitutional case, the High Court should have input from people who can offer serious arguments about the proper resolution of the matter (the “seriously arguable” criterion provides a basis for rejecting an application that is *not seriously* advanced).

## 5. CONCLUSION

The relatively restrictive posture of the High Court is often justified by Justice Brennan’s position that “an amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby.” The problem is that we often don’t know what we don’t know. Starting from that self-awareness should be the default position when it relates to issues of human rights—especially those that burden minorities. Australian constitutional cases raise a broad range of human rights concerns—access to safe termination services, support for marriage equality, the right to protest, and other identity-based rights—and demonstrate that amici curiae have an important role in keeping the High Court informed. Since High Court cases raising human rights concern all Australians, access to court for amici curiae to make submissions on behalf of minority interests is vitally important (Keyzer 2010, Ch 4).

The question is of course how and when. The Brennan test, and also the Kirby test, ties the fortunes of amici curiae to the parties and the arguments that they advance. This is a far cry from the amicus curiae contemplated by Griffith CJ in 1906, who could raise a constitutional point in a non-constitutional case as part of an “objection to jurisdiction”. In a very real way, these tests yoke the would-be amicus curiae to the party-versus-party model of constitutional litigation. The amicus curiae must demonstrate to the court that they will 1. assist the court; 2. make a submission that the parties have not or will not make; and 3. any cost to *the parties* or any delay consequent on agreeing to hear the *amicus* must not be disproportionate to the assistance that is expected. Practically speaking, this means that the

amicus curiae must have significant foreknowledge of the parties’ arguments. Then, if the amicus curiae wants the opportunity to make oral submissions in a case, they may have to make those submissions at the commencement of the hearing, carrying the risk of incurring costs for counsel and having no assurance that they will have that opportunity. The Kirby test is not really different on this point: Justice Kirby would still require that a would-be amicus “have perspectives that can help the Court” (although it is unclear whether this is a threshold test of admission, *per se*)

Our review demonstrates that while the High Court has been prepared to listen to more oral submissions and to read many more written submissions from amici curiae since *Levy*, the test of admission remains problematic. The test creates uncertainty and unnecessary cost and inconvenience for the parties. Given the current test emphasises the need for amici curiae to add value in their submissions, we wonder whether litigants might be required to publish their submissions in advance of not only plenary hearings but special leave hearings, and then amici could be given some time, perhaps a week, to prepare and file written submissions, with oral submissions on the application to be admitted only being required should the Court decide to reject the written application? If the Court is concerned about its workload, applications for amicus curiae status could be resolved by a single judge, or as in special leave hearings, by two or three justices.

We also wonder whether the only really relevant criteria that should be applied to would-be amici curiae is that the submission be *serious* and *arguable*. Submissions that do not meet this standard could forfeit a nominal filing fee and be determined on the papers. Page limits could be set to discourage the prolix. Submissions that meet these threshold tests could then be available for consideration by the justices if they wish (as Justice Kirby observed in *Wurridjal*). The justices of the Court would have the benefit of opening up their normative horizons, without too much additional reading.

Ultimately, the treatment of submissions is a matter for the judges. Since justices can decide a matter having regard to their own opinion, there seems to be no harm, as Kirby and Crennan JJ noted in *Wurridjal*, having the

attention of the justices drawn to relevant materials, and then leaving it up to the individual justices to decide whether they have regard to them. If our recommendations are not satisfactory, perhaps relevant peak organisations such as the Law Council of Australia or the Australian Bar Association could write to the Rules Committee of the High Court to invite it to consider taking steps that would make the process more transparent and less costly for would-be applicants along these lines.

As we observed earlier in the article, there are many problems with the American amici system. For example, the growth of “Amicus Wranglers” has added vastly to the cost of litigation. Many a tree has died in the writing of amicus briefs that may never be taken very seriously by the Court. Perhaps more worrisome is that some of the Amicus Wranglers are very elite high-priced lawyers in the private bar who can orchestrate amici in a way that drowns out the voices of less powerful amici (Perry 2020). But we believe as a general matter, when it comes to constitutional decisions that involve human rights, erring on the side of bringing to the Court’s attention a wide range of views and understandings about problems that go beyond the parties is well worth any relatively modest inconvenience to the court.

We hope that our survey of the amicus cases decided by the High Court in recent decades will assist practitioners and researchers in devising strategies for their continuing and increased involvement in these cases. Our argument, however is about more than strategy. The U.S. practice belies the notion that allowing broad-based amici participation cannot work, and our two systems are no longer so different that drawing the comparison is inappropriate. The choice of the Australian High Court to limit the role of amici is just that, a choice. Since the High Court has regard to community standards when it determines constitutional cases raising human rights issues (Nedelsky 2000), it is perfectly appropriate for amici curiae to be admitted to enlarge the normative horizon of the court. This is only fitting, since it is in these cases that value choices about the terms of our collective life are made (*Cheatle v The Queen* (1993) 177 CLR 541).

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