More changes proposed in addition to the changes already proposed: The Human Rights and Responsibility Commission — a friend in need?

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The Human Rights and Equal Opportunity Commission (HREOC) seem to have been sustaining attacks on a number of different fronts. Much of what a 'real' Human Rights Commission does has significant political implications. This is not only because of the decisions it makes, but also the lobby groups it offends. One does not have to look far to have this point illustrated. For example in *The Sydney Morning Herald* on Saturday 23 May 1998, a report of a new book entitled *Among The Barbarians* by Paul Sheehan suggests that the former Federal Government used immigration and tax-support to increase its electoral appeal. The 'race card' was said to have been used to distract scrutiny, and:

> [t]he ability to accuse people of racism was the final, crucial element in Labor's race strategy. Under Australia's plethora of anti-discrimination laws, a large bureaucratic machinery exists to process accusations of racism. Unlike the court system, there are no cost penalties for vexatious or paranoid complaints.
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> The existence of this large bureaucratic machinery, coupled with the politicised culture of these bureaucracies, has created a climate of insidious inhibition and censorship ... The key watchdog is the Human Rights and Equal Opportunity Commission, whose annual reports read like political manifestos.[1]

Less emphatic attacks seem to be centred around perceived, real or otherwise, conflict between the HREOC's advocacy and conciliation roles and on the partiality of the HREOC and or the Commissioners. It would seem that the vocal lobby groups that believe things have gone too far are in the ascendancy.

Important changes to the HREOC were proposed by the Human Rights Legislation Amendment Bill 1996 (No 1) (HRLAB No 1) and at this writing, The Human Rights Legislation Amendment Bill 1998 (No 2) (HRLAB No 2) is about to be debated in the Federal Senate.

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1 *Sydney Morning Herald* 23 May 1998 p 5.

HRLAB No 2 confirms the name for a Commission which is described as 'new' in the Explanatory Memorandum. The Human Rights and Equal Opportunity Commission (HREOC) will be the Human Rights and Responsibility Commission (HRRC) and the *HREOC Act* has accordingly been renamed the *HRRC Act*. HRLAB No 2 creates a President and three Deputy Presidents who have responsibility, respectively, for human rights, and disability discrimination, racial and social justice, sex discrimination and equal opportunity. The positions of the Human Rights, Sex Discrimination, Race Discrimination, Disability Discrimination and Aboriginal and Torres Strait Islander Social Justice Commissioners have been abolished.

The HRRC's functions have been 'refocused' to promoting understanding, acceptance and public discussion of human rights and responsibilities, undertaking research and education programs and other programs for the purpose of promoting human rights, and a new function of disseminating information on human rights and responsibilities to respect those rights.

HRLAB No.1 proposed to centralise all responsibility for complaint handling in the President. Effect was given to this policy by prohibiting the President from delegating his/her powers concerning complaint handling of unlawful discrimination complaints under the *Disability Discrimination Act* 1992 (*DDA*), the *Racial Discrimination Act* 1975 (*RDA*), and the *Sex Discrimination Act* 1884 (*SDA*) as well as the referral of discriminatory awards and determinations to other bodies. HRLAB No.1 however, permitted the President to delegate his/her powers in respect of complaints dealing with breaches of human rights and discrimination in employment or occupation to the Human Rights Commissioner. HRLAB No 2 now proposes to 'remove this anomaly'[2] so that *all* complaint handling is to be undertaken by the President who has no power to delegate any such matters to another member of the HRRC.

Neither HRLAB No1 nor No 2 gives any indication whether the President is to be full or part-time. The newly appointed President is part-time. One would expect that a full-time President would be very busy, and so it must be of considerable reassurance that HRLAB No 2 proposes that the designated areas of responsibilities of the particular Deputy Presidents identified in s 8(1) of the *HRRC Act* do not preclude the President or the Commission from delegating powers (ostensibly other powers than those prohibited) to a member of the Commission.

The Attorney General advised the Senate Legal and Constitutional Legislation

2 *Human Rights Legislation Amendment Bill* 1998 (No. 2) Explanatory Memorandum p 9 para 44.

Committee in relation to HRLAB No 1 that the reason for separating the inquiry and conciliation functions to be performed by the President from the education and *amicus curiae* functions to be performed by the discrimination Commissioners (now under HRLAB No 2 the Deputy Presidents) was to avoid any perception, real or otherwise, that there is a conflict between the roles of advocacy and conciliation.

HREOC has been an authority with very different attributes to many other authorities. It is obliged to attempt to conciliate discrimination complaints and, if conciliation fails, to hold an inquiry as a kind of tribunal and make (albeit unenforceable) determinations, and to become a respondent in de novo hearings and appeals of those matters. It also has power, by leave of the court, to intervene in matters where the HREOC considers it appropriate to do so.

HREOC could therefore become a party as of right in some matters or by virtue of being granted intervention status.

Intervention

Sections 11(1)(o) and 31(j) of the *HREOC Act* provides power for the Commission, where it considers appropriate, to intervene in proceedings that involved human rights and equal opportunity issues (with the leave of the court).

A non-party whose interests would be affected directly in the proceedings, that is, one who would be bound by the decision albeit not a party, is entitled to intervene to protect the interest liable to be affected. *Sym Choon & Co Ltd v Gordon Choon Nuts Ltd*[3] suggests that the interests of the repository of statutory powers in the scope or manner of exercise of those powers may suffice:

> However, where a person having the necessary legal interest to apply for leave to intervene can show that the parties to the particular proceeding may not present fully the submissions on a particular issue, being submissions which the Court should have to assist it to reach a correct determination, the Court may exercise its jurisdiction to granting leave to intervene. The grant may be limited, if appropriate, to particular issues and subject to such conditions, as costs or otherwise, as will do justice as between all parties. In that situation, the intervention may prevent an error that would affect the interests of the intervener. Of course, if the intervener's submission is merely repetitive of the submission of one or other of the parties, efficiency would require that the intervention be denied.[4]

3 (1949) 80 CLR 65 at 77.

4 *Levy v The State of Victoria & Ors* (1997) 146 ALR 248 per Brennan CJ at 259.

If accepted as an intervener by the court the intervener becomes a party, with all the privileges of a party, who may tender evidence and participate fully in all aspects of the argument[5] as well as be subject to orders for costs. The intervener consequently is bound by the court's decision but could appeal such decisions.

In *Aldridge v Booth*[6] the Commission sought and was granted leave to intervene in a case concerning sexual harassment. Spender J noted the expressed interest and intervention powers given to the Commission by the *SDA* s 48(1)(gb). His Honour referred to *Union v Victorian Railways Commissioners,*[7] *The Queen v The Commonwealth Court of Conciliation and Arbitration; Ex parte Ellis*[8] (where it was said that an intervention should not be 'a general licence to discuss every interesting question in the case but should be acknowledged as limited to the submission of an argument *pro interesse suo'*), *Corporate Affairs Commission v Bradley*[9] and *The Queen v Australian Broadcasting Tribunal; Ex parte Hardiman* in which the High Court said:

> Mr Hughes was instructed by the Tribunal to take the unusual course of contesting the prosecutor's case for relief and this he did by presenting a substantive argument. In cases of this kind the usual course is for a tribunal to submit to such order as the court might make. The course which was adopted by the Tribunal in this Court is not one which we would wish to encourage. If a tribunal becomes a protagonists in this Court there is the risk that by so doing it endangers the impartiality which it is expected to maintain in subsequent proceedings which take place if and when relief is granted. The presentation of a case in this Court by a tribunal should be regarded as exceptional and, where it occurs should, in general, be limited to submissions going to *the powers and procedures* of the tribunal.[10] (my emphasis)

The Court in *Alridge v Booth* granted leave to intervene after Counsel for HREOC indicted that it was not sought by the intervention to become a protagonist in the matter, but to enable submissions to be put concerning the practice and procedures to be adopted and on *any questions of law* raised in the application. It was indicated that, subject to a reservation to resist any attacks made on the integrity of the former Commission and its procedures, it did not seek to be in any way involved in the merits of the matter nor to seek orders for costs. The Attorney General for the

5 *Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391.

6 (1988) EOC 92-222.

7 (1930) 44 CLR 319 at 331 per Dixon J.

8 (1954) 90 CLR 55, at 69 per Webb J.

9 (1974) 1 NSWLR 391.

10 (1980) 144 CLR 13 at 35,36 per Gibbs CJ, Stephen, Mason, Aickin and Wilson JJ.

Commonwealth of Australia also sought and was granted leave to intervene. However, after Spender J indicated that his view was that the *SDA* was within the power of the Commonwealth Parliament, the Attorney General was granted leave to withdraw.

In cases where HREOC is a party as of right,[11] the intervention power is not relevant to its party status. However the intervention power has been considered relevant as providing some indication as to the part that the Commission should play in such litigation.

The *Commonwealth of Australia v Human Rights and Equal Opportunity Commission & Anor*,[12] concerned an unmarried member of the Royal Australian Air Force who alleged that he had been unlawfully discriminated against on the ground of marital status because he was not eligible for a relocation allowance which was allowed to a 'member with a family'. Lockhart J (Sheppard J in 'entire agreement') while acknowledging that the HREOC had become a party as of right, took the view that the relevant provisions empowering the HREOC to seek leave to intervene together with *Hardiman's* case 'shed some light on the extent of the role which the Parliament perceived as appropriate for the Commission'.[13]

In *Commonwealth of Australia v Human Rights & Equal Opportunity Commission & Anor*,[14] a case concerning a HIV positive soldier in the Australian Army who was discharged, the Full Federal Court were generally scathing of the participation of the HREOC in the proceedings. Burchett J cited the critical passage from *Hardiman* and referred to the case with the same name discussed in the last paragraph, in which Lockhart and Sheppard JJ had deplored the Commission adopting what was described as an 'adversarial role'. Burchett J held that he could see nothing in the general provisions of s 67(1(l) of the *DDA* nor s 11(1)(o) of the *HREOC Act* which affected the application of the strictures concerning the powers and procedures of the Tribunal identified in *Hardiman* which could apply to the present case. Mansfield J (Drummond J agreeing) referred to *Fagan v Crimes Compensation Tribunal*[15] in which Brennan J said that the position is different where the proceedings before the Tribunal in question are not interparties and the Attorney General cannot or does not intervene to represent the public interest, and where neither a law officer nor a public

11 For example proceeding under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth).

12 (1995) 133 ALR 629.

13 *Ibid* at 640.

14 [1998] 3 FCA (13 January 1998).

15 (1982) 150 CLR 666 at 681-682 per Brennan J.

official is heard by the Court. In such cases he said that it may be desirable that the tribunal should appear by counsel to make such submissions as may assist the Court and in an appropriate case argue against the applicant's case. But Mansfield J held that those circumstances did not apply to the present case and concluded that there was no question of the powers and procedures of the HREOC raised. Instead there were adversarial parties and no suggestion that the complainant was in any way impeded in the presentation of his case, including as to the proper construction of 'inherent requirement' pursuant to s 15(4) of the *DDA*.

It would seem that unlike *Alridge v Booth*, both Courts in each of the cases having the same name (*Commonwealth of Australia v Human Rights and Equal Opportunity Commission & Anor*) were not prepared to extend the application of *Hardiman* to 'questions of law' which were raised in the matter. In the 1998 case of *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* the HREOC sought to participate in the appeal to the extent of making written submissions limited to the proper construction of s 15 of the *DDA*. It sought to restore the Commissioner's ruling as to the narrow construction of 'inherent requirements', but treated the provisions of s 15(4)(b) more widely than counsel for the complainant. The difficulty however in this case was the fact that one possible outcome of the appeal was that the matter might be remitted to the HREOC for consideration according to law determined by the Federal Court.

Mansfield J alluded to this when he made reference to *BTR plc v Westinghouse Brake and Signal Company (Australia) Ltd*,[16] where the Full Court of the Federal Court addressed the proper role of the Australian Securities Commission (ASC) including when it might assume the role of an active party on an appeal. That appeal to the Full Court was brought from a decision of the Administrative Appeals Tribunal. Lockhart and Hill JJ in a joint judgment approved the ASC's role in advancing arguments relating to the Court's jurisdiction and powers, and as to the proper construction of certain sections of the *Corporations Law*. Their Honours noted that the ASC is a body with substantially different functions and powers to many other statutory bodies, including the Australian Broadcasting Tribunal, which was the subject of *Hardiman*. Their Honours said:

> The court expressed the view to counsel for the Commission that, where the proceedings under the Law involve issues of a purely commercial nature and where the other parties are well able properly to adduce evidence and make submissions on all relevant facts to the court, the Commission should not assume the role of an active party and present substantive arguments with respect to those issues. The position is different where a commercial issue arises but is not fully or properly canvassed by the other parties. The

16 (1992) 34 FCR 246.

> position is also different where cases raise issues of national significance, *questions of construction of the Law* or the procedures the Commission should follow under the Law. Plainly the Commission has a vital role to play with respect to those questions. This is not intended to be an exhaustive statement of the circumstances in which the Commission should or should not assume the role of an active party ...[17] (my emphasis)

The Court made these observations having regard to the national significance of the ASC, its responsibility for the enforcement of the law, and its entitlement to intervene in proceedings relating to a matter arising under s 1330 of the *Corporations Law*. It is arguable that such attributes have parity with the HREOC.[18] Mansfield J acknowledged that HREOC's functions and responsibilities are national and pervasive and it is specifically empowered where it considers it appropriate, but with leave of the Court, to intervene pursuant to s 11(1)(o) in proceedings that involve human rights issues.[19]

The HREOC and the second respondent were ordered to pay the appellant's costs of and incidental to the proceedings before the primary judge and the appeal, though no costs orders were sought by the Commonwealth. The Full Court of the Federal Court decision of *Commonwealth of Australia v Human Rights and Equal Opportunity Commission* was handed down on 13 January 1998 and leave to appeal to the High Court is being sought.

In April 1998 HRLAB No 2 was presented to the House of Representatives. It proposes to make the HRRC's intervention power conditional on the Attorney General's approval. The Explanatory Memorandum of HRLAB No 2 explains that:

> when the new Commission is given leave to intervene in court proceedings, it effectively becomes a party to those proceedings, advocating and/or defending a particular position, or a particular interpretation of any legislation in issue in the proceedings. Requiring the new Commission to seek the Attorney General's approval for such an intervention will ensure that the power is always exercised with the broader interests of the community in mind.

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17 *Ibid* at 265.

18 For an interesting discussion concerning the unevenness in the application of the *Hardiman* principle to the HREOC and the ASC, see Allars M, *Reputation, Power and Fairness: A Review of the Impact of Judicial Review upon Investigative Tribunals* (1996) 24 FLR 237 at 242-245.

19 This is consistent with His Honours view in *Elekwachi v Human Rights and Equal Opportunity Commission* (1997) 149 ALR 557 where the HREOC took steps to ensure that the complainant had access to all material which might have been relevant to his application and to ensure that the issues for determination by the court were properly identified and that relevant material on the hearing was brought to the court's attention. Mansfield J said 'In my view that was an entirely proper role for the Commission to take.'

Perhaps this last sentence is a reference to the concern that the Commission not be the subject, real or otherwise, of a perception that there is a conflict between advocacy and conciliation. However, this problem seems to be largely solved by all complaint handling being vested with the President and the Commission no longer having responsibility for holding inquiries into discrimination complaints where conciliation has been attempted but not been successful. The circumstances in which the Commission would become a party as of right in such matters would be very much reduced. In the event of the President, the Commission or a Deputy President becoming a respondent to a complaint s 46PCA(4) allows the President to delegate his/her powers in relation to the complaint to 'any other person or body of persons'.

The HREOC has intervened in a relatively small number of cases. Such interventions have taken place in cases, in the main, where the HREOC has had no other involvement. For example in *Tarumi v Bankstown City Council*[20] a council refused a development consent for the construction of a Muslim primary school and the matter was heard in the Land and Environment Court. The HREOC sought leave to intervene on the basis of freedom of religion and multicultural freedom of minorities (Articles 18 and 27 of the *International Covenant on Civil and Political Rights*). Cripps J found that the Court did not have power to make the Commission a party but granted leave because there was no opposition to it by the parties. His Honour was concerned 'that the court did not become a forum for the sniffing out of heresy'. His Honour thought that 'it is of fundamental importance to the working of this Court that members of the public be permitted to express opinions freely and without fear of being held up to public ridicule or obloquy'. The HREOC was permitted to present submissions and undertake limited cross-examination.

In the Family Law Court the HREOC sought and were granted leave to intervene in *Re Jane*[21] and in *Re Marion*.[22] The latter case concerned a 14 year old child with an intellectual disability whose parents wanted to have the child sterilised (that is, give her a hysterectomy and an ovariotomy). The NSW Government, the Commonwealth and the HREOC all sought and were granted leave to intervene. The matter went to the Full Court of the Family Court and to the High Court on the question of whether the parents as joint guardians of the child could lawfully authorise the carrying out in the Northern Territory of a sterilisation procedure without an order of a Court. Australian authorities were evenly divided on the question whether the court authorisation was a mandatory requirement.

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20 (1987) EOC 92-214.

21 (1988) 94 FLR 1.

22 (1990) 14 Fam L R 427.

The HREOC argued that an invasive surgical procedure which results in the removal of the healthy reproductive organs of a young woman, incapable of giving her own consent because of intellectual disability and minority, cannot be carried out lawfully without the authority of the appropriate judicial body. This requirement, the HREOC said, represents a proper exercise of the *parens patriae* or statutory welfare jurisdiction of the Family Court and as such is sufficient safeguard of the rights of mentally retarded and disabled persons recognised in the international conventions and declarations incorporated in schedules to the *HREOC Act*. The Commonwealth as intervener supported the appellant, arguing that the guardian of a child has no power to authorise the sterilisation of a child and that application to a court for authorisation of such an operation is mandatory. The High Court held that court authorisation was required for non-therapeutic procedures.

P v P[23] was another case concerning an application for a medical procedure which would render an intellectual disabled female child infertile. The procedure proposed was a hysterectomy. At the invitation of the Family Law Court the HREOC sought and obtained leave to intervene, both at trial and on the hearing of the appeal. The HREOC confined itself to submissions as to legal principles and procedures for the determination of applications of this kind and did not address any arguments to the particular facts of the case or its outcome. The HREOC and the separate representative of the child made additional submissions as to matters of general principle concerning the role and nature of decision making in the Family Court's welfare jurisdiction in relation to the separate representative and also submitted that the Court should give guidelines generally in relation to matters of this nature and made submissions as to what the guidelines should be.

In *Minister of State for Immigration and Ethnic Affairs v Teoh*[24] the respondent was a Malaysian citizen who upon entering Australia received a temporary entry permit. He married an Australian citizen who had four children. The respondent obtained an extension of his entry permit and thereafter three children were born of his marriage. The respondent lodged an application for a grant of resident status with the appellant. While the respondent's application for resident status was pending he was charged and convicted on nine counts concerning heroin importation and received a sentence of six years imprisonment with a non-parole period of two years and eight months. The appellant advised the respondent that his application for a grant of resident status had been refused and gave the reason that he could not meet the policy requirement of 'good character'. The respondent and his wife completed an

23 (1994) 181 CLR 583.

24 (1994-1995) 183 CLR 273.

application for reconsideration of his application for resident status by the Immigration Review Panel (the Panel) but was later advised that the Panel had recommended rejection of the application because though Mrs Teoh, the applicant's sponsor (who had a serious drug addition) and a former employer had made claims on compassionate grounds stating that five children would suffer great financial and emotional hardship if the applicant was deported and it was acknowledged that Mrs Teoh and family would face 'a very bleak and difficult future' and would be deprived of a possible breadwinner as well as a father and husband, the applicant, having committed a very serious crime, had failed to meet the character requirements for the grant of permanent residency.

The Minister accepted the Panel's recommendation and made an order for the respondent's deportation. The respondent made an application to the Federal Court for a review of the decision and it was dismissed. An appeal to the Full Federal Court (Black CJ, Lee and Carr JJ) was allowed and the Minister appealed to the High Court by special leave.

The HREOC sought and was granted leave to intervene and argued that when the *Convention on the Rights of the Child* was ratified by Australia it became an important influence on the development of the common law of Australia. Australian courts were then obliged to favour a construction of an ambiguous Commonwealth statute which accorded with Australia's obligation under an international treaty. By ratifying the Convention the Commonwealth Executive engendered in persons potentially adversely affected by Commonwealth administrative decisions concerning children an expectation that such decisions would not bring Australia into breach of its international obligations under the Convention. This expectation pursuant to Article 3(1) included that all actions concerning children undertaken by Commonwealth administrative authorities would take the best interests of the child as a primary consideration. Such an expectation was reasonably based and therefore legitimate for the purposes of procedural fairness. It followed that if a Commonwealth decision-maker proposed to make an administrative decision concerning children in which the best interests of the child were not to be a primary consideration, procedural fairness required that the decision-maker give notice of and reasons for such a decision. An opportunity to be heard as to whether the decision should be made without the best interest of the child a primary consideration should then be given.

Mason CJ and Deane J said at 290-292 (footnotes omitted) Toohey and Gaudron JJ agreeing, McHugh J dissenting:

> Junior counsel for the appellant contended that a convention ratified by Australia but not incorporated into our law could never give rise to a legitimate expectation. No persuasive

> reason was offered to support this far-reaching proposition. The fact that the provisions of the Convention do not form part of our law is a less than compelling reason — legitimate expectations are not equated to rule or principles of law. Moreover, ratification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention and treat the best interests of the children as 'a primary consideration' ...
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> The existence of a legitimate expectation that a decision-maker will act in a particular way does not necessarily compel him or her to act in that way ...
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> But, if a decision-maker proposes to make a decision inconsistent with a legitimate expectation, procedural fairness requires that the persons affected should be given notice and an adequate opportunity of presenting a case against the taking of such a course ...

On 25 February 1997 the Minister for Foreign Affairs, the Attorney General and the Minister for Justice made a joint statement entitled *The Effect of Treaties in Administrative Decision Making*. It addressed the consequences of the 7 April 1995 decision of the Court in *Teoh's* case. The government was of the view that the development in *Teoh* is 'not consistent with the proper role of Parliament in implementing treaties in Australia and it is for the Australian parliaments to change Australian law to implement treaty obligations'. The purpose of the statement was to 'ensure that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law'. The statement indicated on behalf of the Government 'that the act of entering into a treaty does not give rise to legitimate expectations in administrative law which could form the basis for challenging any administrative decision made from today'. The statement also indicated that legislation would be introduced to provide 'that the executive act of entering into a treaty does not give rise to legitimate expectations in administrative law'. To date such legislation has not been introduced.

The decision of *B v B*[25] in the Full Court of the Family Court of Australia was brought down on 9 July 1997. It concerned an application for the wife to relocate her residence

25 (1997) FLC 92-755, (1997) 21 Fam LR 676.

and that of the parties' two children. The Attorney General and the HREOC each sought and were granted leave to intervene. Neither the Attorney General nor HREOC made submissions as to the merits of the appeal or its outcome.

The Attorney General made submissions in regard to sections of the *Family Law Reform Act 1995* and objected to reliance by the HREOC, the wife and the husband upon the *UN Convention on the Rights of the Child* (*UNCROC*) and by the wife and the HREOC upon the *International Covenant on Civil and Political Rights* and the *Convention on the Elimination of All Forms of Discrimination against Women*, on the basis that that material did not fall within s 15AB of the *Acts Interpretation Act*. The Attorney General submitted that they had no relevance because the statute was comprehensive, stands alone and does not need assistance of anything that was only of general origin.

The HREOC principally contended that there was a constitutional right of each person to freedom of movement supported by, amongst other important sources, Article 12(1) of the *International Covenant on Civil and Political Rights*. The Commission further submitted that the *Reform Act* had clearly drawn upon *UNCROC*. To the extent that there is any inconsistency or ambiguity in the operation of the Act, it should be resolved in a way that is consistent with international law. HREOC submitted that the relevance of *UNCROC* was substantial.

This selection of case is useful and relevant for the present discussion for two main reasons. Firstly, the HREOC has used its intervention power in cases where the Commonwealth is a party as of right, in cases where the Commonwealth has also been an intervener or a party as of right and in cases where the Commonwealth has played no part in the proceedings. Second, the HREOC has at times as intervener presented arguments in substantial disagreement or conflict with those of the Commonwealth. *Teoh* was particularly notable because the High Court majority seems to have in the main accepted the HREOC's submission.

How would applications in cases where the HRRC thinks it appropriate to seek leave to intervene be affected by the necessity to obtain Attorney General approval?

The non-exhaustive list of considerations to assist the Attorney General to decide if consent to the HRRC's application to intervene will be allowed are proposed to be (s 11(5)) whether:

(a) there has been an intervention in the proceedings by or on behalf of the Commonwealth;

(b) in the Attorney General's opinion the proceedings may affect to a 'significant extent' the human rights of, or involve to a significant extent issues of discrimination against, persons who are not parties to the proceedings;

(c) in the Attorney General's opinion the proceedings have significant implications for the administration of the *HRRC Act 1986*, the *DDA*, the *RDA* and the *SDA*;

(d) in the Attorney General's opinion there are special circumstances such that it would be in the public interest for the HRRC to intervene.[26]

Will subs 5(a) mean where the Commonwealth has intervened the HRRC will not receive approval to intervene? Or will subs 5(b) and (d) outweigh 5(a)? Will cases such as *Teoh* and *P v P* be seen again?

HREOC's power to apply to the court for leave to intervene in proceedings which involve human rights issues never extended to being notified of the human rights implications in a case. There was no obligation on anyone to notify the HREOC of such cases. It had to find out about them as best it could and then seek leave to intervene. If the proposal to necessitate approval from the Attorney General before the HREOC can seek leave to intervene is passed, additional lead time will be required to make the request and have the request processed.

Some confidence that the consequences of amending ss 11(1)(o) and 31(j) will not be severe might be obtained from the proposal in HRLAB No 1 that special-purpose Commissioners (now under HRLAB No 2, the Deputy Presidents) may assist the Court as *amicus curiae.*

Amicus Curiae

Section 46PS of HRLAB No 1 proposed that the special-purpose Commissioners have the function of assisting the court as *amicus curiae,* only by leave of the court, in the following proceedings:

(a) proceedings in which the special-purpose Commissioner thinks that the orders sought, or likely to be sought, may affect to a significant extent the human rights of persons who are not parties to the proceedings;

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26 HRLAB No.2 Item 22 : Add s 11(5)(a)-(d).

(b) proceedings that have significant implications for the administration of the relevant Act or Acts;[27] and

(c) proceedings that involve special circumstances that satisfy the special-purpose Commissioner that it would be in the public interest for the special-purpose Commissioner to assist the Court as *amicus curiae*.

An *amicus curiae* (or friend of the court) is not a party to proceedings and usually may not file pleadings, demand service of papers, lead evidence, examine witnesses or lodge an appeal. A friend of the court is traditionally limited to assisting the court on points of law which may not otherwise have been brought to its attention.[28] A friend might only appear when there is good reason for doing so and the court considers it appropriate.[29]

The Australian adversarial legal system has not shown itself to be readily susceptible to the use of *amicus curiae*. The Full Court of the Federal Court in *United States Tobacco Co v Minister for Consumer Affairs*[30] noted when discussing the role of an *amicus curiae*:

> [the court's] task is to determine disputes that are brought before it by the parties who appear before it, adduce evidence and make submissions. Nevertheless, a court has an inherent or implied power, exercised occasionally, to ensure that it is properly informed of matters which it ought to take into account in reaching its decision ... Counsel appearing as *amicus curiae* have been heard where the interests of an infant or other disadvantaged person might not otherwise have been protected. Counsel for the Attorney General appearing as *amicus curiae* have often been heard to make submissions in the public interest. But there is no prescription of the circumstances in which it may or may not be proper for a court to heard an amicus.

Indeed Wilcox J observed in *Bropho v Tickner*[31] that in Australia 'intervention of an *amicus curiae* is a relatively rare event; the *amicus'* role normally being confined to assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked'.

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27 The Senate Committee recommended (Recommendation 3) that in order to achieve consistency and good policy, this provisions should be amended like (a) and (c) to be conditional on the opinion of the special-purpose Commissioner.

28 *Bropho v Tickner* (1993) 40 FCR 165, 172.

29 *United States Tobacco v Minister for Consumer Affairs* (1988) 20 FLR 520.

30 *Ibid.*

31 (1993) 40 FCR 165 at 172.

In *Levy v State of Victoria & Ors*[32] Brennan CJ said in regard to the difference between an intervener and an *amicus curiae*:

> 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 Commonwealth*[33] speaking for the Court, I said in refusing counsel's application to appear as *amicus curiae*:
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> 'As to his application to be heard as *amicus curiae,* he failed to show that the parties whose cause he would support are unable or unwilling to protect their own interest 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.'
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> 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 not 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.

By contrast to the cautious attitude to friends of the court in Australia, the courts in the United States have expanded the procedure to enable appearances of all interested parties, particularly in appellate courts. Statutory recognition has been given to friends of the Court[34] and an *amicus* brief may be filed in the United States Supreme Court without court leave if all parties consent. Leave of the court is required if one or more parties do not consent. *Amicus* briefs usually present either public interest or special interest arguments in written submissions, however in some jurisdictions the role of friends of the court has expanded to include oral argument, production of physical evidence, examination of witnesses and discovery.[35] In 1983 K O'Connor

32 (1997) 146 ALR 248 per Brennan CJ at 259.

33 Transcript of 12 February 1996 at 12.

34 The Federal Supreme Court Rules rule 36 and Federal Rules of Appellate Procedure rule 29.

35 see Lowman M 'The litigating amicus curiae: When does the party begin after the friends leave?' 41 *American University Law Review* 1243.

and L Epstein undertook a study of the use of the *amicus* brief[36] and found that the Court rarely denied an interest group leave to participate in proceedings.

In *Levy's* case Kirby J appeared to advocate a broader approach to interventions and *amicas curiae* when His Honour said:

> For good reason, this Court should maintain a tight rein on interventions. When they are allowed, the Court should impose terms which protect the parties from the costs and other burdens which interventions may occasion. However, some of the rigidities of earlier procedural restrictions are not now appropriate. This is especially so because of this Court's function of finally declaring the law of Australia in a *particular* case for application to *all* such cases. The acknowledgment of the fact that courts, especially this Court, have unavoidable choices to make in finding and declaring the law, makes it appropriate, in some cases at least, to hear from a broader range of interveners and *amicus curiae* than would have appeared proper when the declaratory theory of the function was unquestionably accepted. The opinion of Dixon J, a committed proponent of that theory, was stated in *Australian Railways Union v Victoria Railways Commissioners*.[37] It is cited by Brennan CJ in this case. However, since those words were written, this Court has become the final court of appeal for Australia. There has also developed a growing appreciation that finding the law in a particular case is far from a mechanical task. It often involves the elucidation of complex questions of legal principle and legal policy as well as of decided authority. This appreciation has inevitable consequences for the methodology for the Court. Those consequences remain to be fully worked out.
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> In the United States of America and Canada, the practice of hearing submissions from interveners and *amicus curiae* is well established. It is particularly common where matters of general public interest are being heard in the higher appellate courts. In recent years, some Australian courts have also favoured a more liberal approach to permitting interveners and *amici*. So far that course has not recommended itself to this Court.[38]

Kirby J cited two cases to support a more liberal approach to permitting interveners and *amici* being adopted by some Australian courts. *National Australia v Hokit*[39] concerned a bank which was seeking a ruling of principle in the NSW Court of

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36 'Court rules and workload: a case study of rules governing amicus curiae participation' (1983) 8 *The Justice System Journal* 35.

37 (1930) 44 CLR 319.

38 (1997) 146 ALR 248 per Kirby J at 296-297.

39 (1996) 39 NSWLR 377 at 380-382.

Appeal which could be applied generally in its business. The Court permitted the Consumers Federation of Australia (the Federation) to address arguments to the Court as *amicus curiae.* When the Federation sought leave it was opposed by the bank and supported by the customers of the bank. Mahoney P addressed the issue of intervention by an *amicus curiae* indicating that there were in principle at least three questions to be addressed:

1. Whether the court has power to grant the application. His Honour was of the view that there is 'nothing in the *Supreme Court Act* 1970 or in other legislation governing the powers of this Court inconsistent with the Court inviting and/or receiving submissions from persons who are not parties in this instant proceedings. ... Properly exercised, such a power can be of significant assistance to a court which, as this Court is, the final court of appeal in a State of the Commonwealth, subject only to the grant of leave to appeal to the High Court of Australia'.[40]

2. If it has the power, whether it should grant the application in the particular case. His Honour indicated that at least five matters required consideration: whether the intervention is apt to assist the Court in deciding the instant case and for appellate courts, whether the arguments likely to be addressed on the intervention will assist in both deciding the instant case and in formulating the principle of law; whether it is in the parties' interest to allow the intervention; whether the intervention will occupy time unnecessarily; and whether it will add inappropriately to the costs of the proceeding. Parties might argue that they have the right not to have raised in their proceedings issues with which they do not wish to be concerned. His Honour took the view that their wishes are relevant, though not conclusive, in deciding whether intervention should be allowed.

3. If the intervention is allowed, what form of intervention should be permitted and under what conditions.

The Court granted the Federation's application for leave to intervene as an *amicus curiae* and confined its participation to 'matters of public interest broadly to the extent that the relevant matters had not been dealt with by the parties'.

Re Boulton; Ex parte State of Victoria[41] is not so relevant to this discussion because it concerned the Industrial Relations Court of Australia considering s 470 of the *Industrial Relations Act 1988* (Cth), a section providing the Court with power to grant

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40 *Ibid* 381.

41 (1994) 126 ALR 620 at 626-628.

applications for leave to intervene made by 'organisation, persons or bodies'.[42]

If in fact a more liberal approach to allowing interveners and *amici* is evidenced by these two cases and it is an approach which is likely to be broadly adopted, the work of the HRRC will not be severely curtailed by the amendment to ss 11(1)(o) and 31(j). However, it is to be noted that Kirby J also said that this approach had not recommended itself to the High Court. In this event it would seem that subject to the court's discretion cases like *Teoh* will only occur where the court considers that the parties who the HRRC seek to support are unable or unwilling adequately to protect their own interests, or where the HRRC seek to offer the Court a submission on law which would assist the Court in a way the Court would not otherwise be assisted. This may not always be the case. For example in *Kartinyeri and Anor v Commonwealth of Australia*[43] HREOC sought and were granted leave to intervene. When asked by Gummow J whether the HREOC was seeking to appear as *amicus*, Counsel for the HREOC replied that its submission took a 'slightly more unbalanced view ... than that of the traditional role of the amicus, which is of a more independent and neutral party. They do tend in favour of the plaintiff's submission as to the construction of s 51(xxvi) of the Constitution ... while it is the case that my learned friend Mr Spigelman's (plaintiff's) submissions touch on the issue of international human rights obligations, they do not, we would submit with respect, explore them to the extent that we have sought to do in our written submissions ... '[44]

If such factors do severely impede the HRRC's access to the Court it is to be remembered that the HRRC's functions concerning the promotion of human rights by education and the proliferation of information on human rights will also be reduced. This would be a great pity in view of the matters which Kirby J pointed out in *Levy's* case:

> 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

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42 The Court (Wilcox CJ, Keely and Ryan JJ) held that considerations relevant to an application for leave to intervene under s 470 included the nature of the applicant's interest in the subject matter of the proceedings and the assistance the court is likely to derive from the intervention as well as the likely effect of the intervention on the existing parties.

43 (1998) 152 ALR 540.

44 Transcript 5 February 1998 p 4 & 5 of 73.

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.[45] ●

45 (1997)146 ALR 248 at 297.