THE AMICUS CURIAE BRIEF: ACCESS TO THE COURTS FOR PUBLIC INTEREST ASSOCIATIONS*

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Introduction

A significant feature of twentieth century society is the increasing importance of large scale organization, particularly within western nations. This development is illustrated by the massive organisation of labour, the rise of the corporation and the spread of the mass media which occurred in the early years of the century. The tendency for human actions and relationships to assume a collective, rather than a merely individual character is also evident in activities at the grass-roots level in the nineteen sixties and seventies when citizens aggregated in less formal organisations, societies and groups. Notable among such associations are the consumer crusaders, the feminist movement and the environmentalists.

Consistently with this more recent development it may be argued that the group or social interests which are advanced by these associations, communities, and classes have become just as important as the traditional rights to property and individual liberty. They reflect a shift away from the individualist values paramount in the nineteenth century towards an emphasis on the interests of the community and the welfare of the public. These new social interests are collective or diffuse interests which are typified by the community's concern in consumer protection, sexual or racial equality, and environmental conservation.

The recent controversy over the decision of the Tasmanian Hydro Electric Commission to build the Gordon below Franklin dam appears to reflect a growing desire in the community to protect these social interests. Where a dispute of this type occurs, members of a conservation association or society will frequently wish to undertake legal proceedings to protect the wilderness. Environmental societies are now making attempts to use the courts in this way, but to a considerable extent their efforts are being frustrated by the requirements of our adversary legal system.

It may be said that, at least arguably, the adversary system reflects the political and economic ideology of classic English liberalism in three ways: by its emphasis upon self-interest, by the importance it places on individual initiative, and by the significance it attaches to the role of the parties in the legal action. Each of these factors creates a barrier to associations and societies wishing to participate in litigation on matters of public interest:

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- *Self Interest.* Self interest is an important aspect of the adversary system. Before a legal action may proceed there must be a personal nexus between the litigant and the subject matter of the litigation. This requirement presents no difficulty in cases where the litigant sues to protect private rights as, for example, where a person sues to protect his or her private property from a trespasser. A problem is likely to arise, however, where a conservationist wishes to protect a wilderness area from the unlawful activities of the Hydro Electric Commission or a private developer. Since the site which is to be protected is not owned by the conservationist, he or she will not be permitted to bring action unless able to show a close and particular interest in the land. This problem is well illustrated by the Australian Conservation Foundation Case.[1] In that case, the Foundation attempted to bring an action against the Commonwealth government and the Reserve Bank, challenging the validity of a ministerial decision to approve a proposal by a Japanese company to establish and operate a resort and tourist area in central Queensland, or alternatively, to approve exchange control transactions in relation to that proposal. The High Court held that the Foundation could not continue with the action because it had no special interest in the land which was to be developed. The Court was of the view that the Foundation's interest in bringing the action, which was based upon its concern for the conservation of the environment, was merely an emotional or ideological interest which was insufficient to give it a right of action. Thus the challenge failed and the proceedings were struck out.[2]

  Individual Initiative. The need for individual initiative is also evident in the requirements of the adversary system. Generally speaking, the legal procedures which Australia inherited from England are designed to permit one individual to sue alone to enforce his or her rights.[3] As a rule, it is considered undesirable for one or several persons to undertake a legal suit on behalf of others so as to bind those others without their permission. There are, therefore, stringent limitations placed upon the right of individuals or associations to commence an action as the representatives of others in the community who have a similar interest in having a particular right enforced.[4]

  Role of the Parties. Another vital feature of our adversary system is the fundamental role of the parties. It is the parties in a case who define the issue which is to be decided and present the facts which substantiate their arguments. Normally, the judge and other outsiders play little part in determining how the parties' case should be presented. A significant

[1] *Australian Conservation Foundation Inc. v. Commonwealth* (1980) 54 A.L.J.R. 176. Note that for present purposes an incorporated association is regarded by the law as the equivalent of a private individual.

[2] Contrast this decision with that in *Onus v. Alcoa of Australia Ltd.* (1981) 55 A.L.J.R. 631. In that case members of the Gourndítch-jmara people who had occupied the Portland area in Victoria since pre-historic times were permitted to seek an injunction restraining Alcoa from undertaking a development project which would interfere with the Aboriginal relics on the land.

[3] Note that Rules of Courts usually create an exception by permitting a small number of plaintiffs to join together as plaintiffs.

[4] See *Duke of Bedford v. Ellis* (1901) A.C. 1 and *Markt & Co. v. Knight Steamship Co.* (1910) 2 K.B. 1021.

drawback associated with this approach is that one or both parties may accidentally or deliberately withhold important legal precedents or relevant information from the court. Furthermore, the parties may ignore the impact which the court's decision is likely to have on the well-being of others in the community or upon the environment.

Amicus Curiae

The problems arising from the role of the parties in determining the scope of the action are now being recognised by conservation societies, many of which are taking steps to overcome them. Increasingly, such societies are drawing the courts' attention to the impact a particular decision may make on the environment. They are able to do so not by initiating their own litigation but by resorting to the technique known as *amicus curiae*, or friend of the court, a traditional device which allows for the interests of outsiders to be placed before the court during a legal action. The term is usually applied to a solicitor or barrister of the court who, being present during the proceedings, makes some suggestion to the court in regard to the matter before it. It also applies to persons who have no right to appear in a particular suit but are allowed to protect their own interest, and to a stranger present in the court who calls the court's attention to some error in the proceedings.

There is no formal qualification required to be an *amicus*, although in practice lawyers usually perform the role. On occasion, an *amicus* may be appointed by the judge who will either ask counsel not engaged in the case to argue a particular point of law, or ask a junior counsel who is representing a party to assist by arguing an issue that will not otherwise be raised. Sometimes, courts will ask the Solicitor-General to appear when they wish some matter of public importance to be argued during the proceedings. Examples of *amici curiae* being heard by the courts to argue environmental issues include the following:

- In one case in New South Wales counsel for the State Planning Authority was heard as *amicus curiae* to argue that the decision to be made in the case would have wide consequences beyond the actual parties and contended for the validity of a planning statute.[5]
- In the recent Dam Case before the High Court between the Commonwealth and the State of Tasmania[6], counsel acting for the Tasmanian Wilderness Society sought leave to intervene as a party in the case. The Court declined to rule on whether the Society should be permitted to intervene, but permitted counsel to tender oral submissions as *amicus curiae* on ecological issues, and to argue that the destruction of an area registered on the World Heritage List would impair Australia's relations with other countries.[7]

It is clear that in Australia, as in England, Canada and the United States, the *amicus* who assists the court is not an original party to the proceedings, and his position is also quite different from that of an intervening party. Unlike an

[5] *Parramatta City Council v. Brickworks Ltd.* (1970) 1 N.S.W. L.R. 574.

[6] *The Commonwealth of Australia and Another v. State of Tasmania and Others*. (1983) 46 A.L.R. 625.

[7] Information given by counsel.

intervening party, which has the same rights as an original party, an *amicus* does not possess the right to demand service of papers, to file pleadings or to cross-examine a witness, nor is he or she entitled to appeal against a decision or to apply for a rehearing. Whereas an intervening party is bound by the resulting judgment, an *amicus* will not be bound by the decision. Counsel who is briefed by a party entitled to be heard on any issue cannot claim to be heard on that issue as *amicus curiae* so that his or her client is not bound by that decision.

The traditional role of the *amicus curiae* is simply to assist in a detached, independent manner by placing oral arguments before the court. At present, however, the role of *amicus* appears to be developing in two important respects. First, the device is increasingly moving from that of neutral 'friend' of the court to one of partisanship: the submissions tendered are clearly in support of one or other of the contending parties, as illustrated by the Tasmanian Wilderness Society's support of the Commonwealth in the Dam Case. Secondly, in at least one Australian jurisdiction — the New South Wales Land and Environment Court — oral argument is being replaced by the submission to the court of a written brief by a society or association. For example, in a case involving an application for a permit to set up a motor cycle track an environmental society may submit a brief to the court which illustrates the effect that the project is likely to have on pollution in the immediate vicinity.

This developing practice of submitting *amicus* briefs which touch on environmental issues suggests that Australian public interest groups may be on the verge of adopting the procedure commonly used by public interest associations in the United States, where the *amicus* brief has had a long and robust tradition.

The role of amicus in the United States[8]

Soon after the federation of the States of America, it became obvious that not only state and national interests were potentially in conflict, but also that in private suits between citizens many public interests would be left unrepresented.

An important development of the *amicus curiae* role occurred when the Federal Attorney-General requested to be heard in the case of *Florida v. Georgia*.[9] Counsel appearing for these States opposed the petition, but the court permitted him to appear as *amicus curiae*. In the succeeding decades, the *amicus curiae* device was frequently used to protect government interests by the Federal Government and, thereafter, by State Governments. There were also cases in which government involvement was based not on the protection of its own interests but rather upon a sense of responsibility for the public interest. The use of the *amicus* brief gradually became a major means of effecting social changes through the courts and of implementing broad public policies as advocated either by government or private citizens.

[8] See generally Angell E. 'The Amicus Curiae: American Development of English Institutions' (1967) 16 *International and Comparative Law Quarterly*, 1017 and Krislov. 'The Amicus Curiae Brief: From Friendship to Advocacy.' (1963) 72 *Yale Law Journal* 694.

[9] 58 U.S. 463 (1908).

In the course of this development, the *amicus* role ceased to be that of an individual lawyer and began to be identified with the large community organisations and interest groups which proliferated in American society. The *amicus curiae* device in the 20th century came to be extensively used for the promotion of minority interests, particularly those of ethnic minorities. One commentator has identified three general categories of *amici*:

- *Representatives of the government and government agencies, particularly the Attorney-General representing the public interest.* As well as the Attorney-General representing the public interest as *parens patriae*, other agencies of government were also frequent users of the *amicus* strategy. The Securities and Exchange Commission, for example, was created to exercise broad regulatory powers in the field of securities and corporate finance, and was given specific statutory power to seek direct injunctive relief against misconduct in the management of mutual investment funds. Although in cases of mismanagement of funds no express right was given by the statute, for shareholders to claim damages, many actions were launched by shareholders claiming an implied right to damages, and this claim was usually supported by the Commission, in a number of cases, by means of an *amicus curiae* brief.
- *Professional and occupational groups such as commercial and industrial employers' associations, labour unions and bar associations.* For example, in an action involving the right of a trade union to offer legal services to its members, an *amicus* brief in opposition was filed, signed by more than 50 separate bar associations: *Brotherhood of Railroad Trainment v. Virginia*.[10]
- *Private voluntary organisations representng non-government and non-occupational interests, for example, civil liberties groups, religious and minority groups and consumer advocates.* The majority of *amicus curiae* briefs have emanated from this category. Public interest associations including the American Civil Liberties Union, the National Association for the Advancement of Colored People and the American Jewish Congress have all used the *amicus* device extensively in the 20th century to protect the interests of their members, and in so doing have achieved great success.
- One example, involved Meredith, a young negro, who was refused entry to the tax-supported State University of Mississippi because of his race. He brought an action in the Federal Court on constitutional grounds and succeeded in obtaining an order that he be admitted. The University, aided by the Governor, Barnett, evaded the order, and Meredith sought enforcement. The Federal government was permitted by the Court of Appeals to 'appear and participate as *amicus curiae* in all proceedings in this action' before the Court. The Federal government moved for an order in contempt, and the defendants demanded trial by jury. The question whether they were entitled to a jury trial went to the Supreme Court, where both the Attorney-General of

[10] 377 U.S. 1 (1964).

> Mississippi and the American Civil Liberties Union appeared as *amici curiae* supporting the defendants on the issue of the right to a trial by jury in a criminal contempt proceedings: *United States v. Barnett*.[11]

The development in the use of the *amicus* brief in the U.S.A has reflected the involvement of committed lawyers who wished to ensure that the decision handed down in court would recognise social interests and values touching on civil liberties. Shortly before the Second World War, a group of distinguished lawyers formed a Special Committee of the American Bar Association on the Bill of Rights which was to enter many *amicus curiae* appearances:

> The A.B.A. supported Jehovah's Witnesses in the famous flag cases. The witnesses claimed that the requirement that their children in public schools salute the American flag was an 'establishment of religion' in violation of the First Amendment, The A.B.A. committee appeared as a friend of the court to support the parents' assertion of the religious scruple as a constitutional privilege under that Amendment and offered the argument that the right to say whether such a scruple actually existed was subjectively personal to the individual and that neither the legislature nor any court had a right to deny the reality of that scruple which goes to the heart of religious liberty, at least in the absence of clearly shown public interest which had not been demonstrated here. Their contention was eventually accepted in *West Virginia State Board of Education v. Barnette*.[12]

Usually, an *amicus* brief which is placed before the Supreme Court will contain a collection of relevant statutes, precedents and legal arguments on some or all of the issues before the Court. It may also include reports from commissions and bureaux of statistics. It has been said of *amicus* briefs that 'the research and expertise that goes into writing of such briefs is second to none, in quality and quantity'.[13] The *amicus curiae* in the United States today is far from a casual bystander giving impromptu advice. He is experienced counsel representing an interest group which may number many millions. He participates in order to advance the cause of his clients rather than to assist the court as a friend.

The low cost of submitting a brief is a factor which has encouraged its use by public interest groups. The expenses incurred by a friend of the court in the United States are trifling. The *amicus* is under no obligation to pay a court fee for the filing of any motion or leave to appear or for actual appearance under the privilege accorded. Nor are any costs awarded against those who file an *amicus* brief in support of the losing side; the only cost is to pay for printing the brief. Unless special circumstances can be shown, a volunteer *amicus* does not usually receive compensation irrespective of whether the submissions contained in the brief are accepted. Thus there are significant financial advantages for public interest groups which use an *amicus* brief. They are not liable for the costs of either of the litigants. Their only costs are incurred in preparing the brief. As volunteer labour is often used in this preparation, it is possible for public interest groups to make an impact on the law at virtually no expense to their members.

[11] 376 U.S. 681 (1964).
[12] 319 U.S. 624 (1943).
[13] Krislov, *op. cit.*

In general, when determining whether a brief will be admitted, the Supreme Court will not permit an *amicus* to raise legal or factual issues not presented by the interested parties. Thus the usual rule is that the *amicus curiae* must take the case as he finds it and cannot inject new issues: the federal courts will normally restrict the *amicus* to arguing law on issues raised in the pleadings. However, the trend towards admitting *amicus curiae* briefs is far more liberal in certain State courts. Often, in these courts, the public interest does not have to be great for the *amicus* to gain permission to enter the arena and raise points outside the immediate issues. In the Supreme Court of South Dakota in *Ohlhausen v. Branaugh*[14] a very liberal attitude was indicated when it was held:

> *Amicus curiae* ordinarily implies the friendly intervention of counsel to all the court's attention to a legal matter which has escaped or might escape the court's consideration.

In this case, involving the contest of a will, the court expressed itself as being in agreement with the liberal belief that the *amicus curiae* may raise any issue that the court could have raised of its own accord. It is submitted that the approach adopted by the State courts reflects the better view. The line taken by the Supreme Court is basically illogical: because the friend of the court is not a party, an *amicus*, quite properly, is not permitted to direct or control the management of the case. Yet as the role of the *amicus* is not that of a party, the powers and privileges attaching to it should stem, logically, from its function as court adviser. Under the restrictive approach adopted by the Supreme Court the *amicus* is not permitted to delve into any area that the court, of its own accord, could raise, such as a legal issue not argued by the parties. Since the *amicus* brief is a means by which the rigours of the adversary procedure are alleviated and the attendant risk of precedent being ignored is avoided, then it is appropriate that a broad view should be taken of its functions. It should be permissible for the *amicus* brief to range over a wide range of topics, provided they are issues which the court itself has the power to raise.

Factors underlying the greater development in United States

Use of the *amicus* brief may have been a good strategy to employ in the Dam Case in the High Court. If the Tasmanian Wilderness Society had adopted this approach it may have been possible to submit its arguments at considerably less expense, since there would have been no need for counsel to appear in court every day during the eight day hearing. Given the evident superiority of the *amicus* brief over intervention or the oral *amicus* technique in these circumstances, it may be asked why the submission of such briefs is a far less frequent occurrence in Australian courts than in courts in the United States. Several reasons have been advanced by the commentators in an effort to explain why the *amicus curiae* brief should enjoy such popularity in the U.S. and to indicate why the *amicus* role developed beyond the non-partisan role which for the most part it continues to have in Australia.[15]

[14] 183 F. Supp. 128, 131 (D. Bell 1960).
[15] See in particular, Angell, *op. cit.* 1020 ff.

The most obvious factor appears to be the American legal habit of presenting printed or typed briefs to marshall the facts and cite the pertinent authorities of cases, statutes and texts. Such briefs may be presented at the conclusion of a trial or in support of a motion on evidence or for interlocutory remedy. They are used universally on appeal to the superior court.

In the absence of special leave granted to counsel for the *amicus* to make oral argument, the judges avoid the necessity of hearing the oral argument, but do have the advantage of being able to study his written argument which may range beyond the industry and legal knowledge of counsel for the parties. This readiness to accept the written brief significantly limits the cost of participation since it obviates the need for arguments to be put laboriously and expensively at an oral hearing.

The sheer volume and constitutional complexity of the American law, according to Angell, is another factor which creates an important role for the *amicus curiae*. He writes:

> No judge or lawyer can know or without immense labour pinpoint *ad hoc* anything more than a small fraction of the 'law' in America, compared with the wider familiarity of the English barrister with his own far more restricted volume of law. American counsel for a party of record may overlook what the court later finds to be the key point at issue and the available authorities. Our judges need more frequent and informed advice from the barristers before them; sometimes, perhaps frequently, this comes from the 'friend'.[16]

Furthermore, the development of the *amicus* device has been favoured in the United States by the proliferation in its society of the private non-profit organisations which exist to promote at the bar of courts, before legislatures, and in public opinion, the interests of a class or group and their conviction about the value of some social interest — whether it be the advancement of a minority race, or the advocacy of an environmental or consumer interest. Whereas the wealthy groups and associations were able to exercise considerable political control through political lobbies, the Civil Rights organisations, with few economic resources at their disposal, resorted instead to using the courts to achieve social change by means of the *amicus curiae*.

Another important difference between the United States, on the one hand, and England and Australia on the other, is that in America the courts have a far greater acceptance that their role is a political one. They recognise more explicitly that not only the law in general, but also the courts in particular, have a political function. This heightened political awareness gives them a greater respect for the interest and opinions of community organisations and for their desire to contribute their knowledge and expertise to the formulation of a legal precedent. This attitude is clearly influenced by the overtly political composition of the federal Supreme Court, and the fact that lower courts usually have judges sensitive to public considerations, because they are recruited or elected on a political basis.

Finally, the differences in the rules for the award of costs in the United States compared with England, Australia and Canada is a factor worthy of mention. In civil litigation, the costs factor may have had an effect outside the United States in

[16] Ibid. 1022.

inhibiting the practice of opening up judicial proceedings to a non-party acting as *amicus curiae*. Unlike Australian courts, United States courts have not adopted the English tradition of ordering an unsuccessful litigant to pay the costs properly incurred by the victor. In the U.S.A. if the winning party is assisted by the contribution of an *amicus*, the unsuccessful party is not liable in costs to the *amicus*. The position in Australia is quite different. If a partisan *amicus* contributed to an Australian case, it is likely that the losing party would be liable in costs to the *amicus*. If the use of the *amicus curiae* brief is to be developed in Australia, new principles on the award of costs may be necessary which, to that extent, would identify the trial procedure with that in the United States.

None of the above features of the American legal system is present to the same extent in Australia. There is no written brief system; both the volume of law and the complexities of the Constitution are less than in the U.S.A.; there are not as many public interest organisations and those that there are, do not engage in litigation as frequently; and Australian judges are on the whole not eager to consider the public interest in litigation. These differences from the U.S.A. legal system may well explain why the same developments in third party participation have hitherto not taken place here.

Nevertheless, the Australian legal system seems to be moving in the direction of the American system. Although the introduction of written briefs does not appear to be imminent, it has been suggested as an answer to the increasing congestion of the courts. As the amount of legislation governing all aspects of society grows, so it will become increasingly difficult for a judge or lawyer to feel confident that no relevant point of law has been overlooked. In Australia, as in the United States, it is a matter of public interest that decisions are made on the basis of accurate argument on the existing state of the law. The court's attention should be drawn to obvious error or facts that the parties have failed to present due to ineptitude or self interest. One function of the *amicus* is to take on this role.

Environmental, civil liberties and consumer groups in Australia have multiplied greatly in recent years and many of these groups are prepared to engage in litigation. Moreover, large public interest organisations such as environmental foundations or consumer groups may have the facilities for research and an expertise within their own area which counsel for the parties does not possess. Since the strategies of *amicus* are necessarily different from those of the interested parties, greater *amicus* particicipation, it may be argued, will help to inform the court and will ensure that court judgments are accurate and considered. It may also help to protect the public interest where there is insufficient interest to justify intervention in the legal proceedings. The particular interest may be quite dissimilar from that of either party, yet it might be fundamentally affected by the outcome of the litigation. These arguments could best be put as *amicus curiae*.

Criticisms of the amicus curiae brief in the United States

Notwithstanding the benefits which are likely to flow from the admission of *amicus* briefs, any judgment as to whether Australian courts should adopt a more

partisan *amicus* device should be deferred until the criticisms of the U.S. model are noted and assessed. It is sometimes argued by critics that the American practice

> smacks of a desire by counsel to flaunt their names before a court, uninvited in most instances, as a form of undignified self-advertising [17]

a reference, no doubt, to the high profile adopted by the American Bar Association during the development of the *amicus* device and to the participation of the self-styled Public Interest Lawyers in contemporary proceedings. Angell rejects this motive as 'improbable', pointing out that it is more likely that a non-profit organisation would request its usual counsel to do this work than that he would put his pen to paper for the narcissism of seeing his name in print, especially as many lawyers who do this work appear as leaders of the bar, ready to devote some part of their time to unpaid professional work regarded generally as quite on a par with 'legal aid' to the poor.

Some also argue in the United States that public interest groups which seek to put their arguments before the court are merely interfering busybodies. This contention rests on an acceptance of the traditional view that the parties should have the primary role in defining the scope of the litigation. It ignores, or at least underestimates, the impact the decision may have on other sections of the community and the legitimate interest those people have in protecting their own concerns.

The argument tends to ignore the myriad of interests, some in conflict with others, which exist in a pluralist society, and which should be recognised in the law-making process. The dam dispute in Tasmania is a good illustration of how competing interests may need to be balanced by a court when it formulates or interprets the law. For example, workmen employed by the Hydro Electric Commission may have wished to argue that their jobs would be lost if the scheme to build a dam were abandoned. It may be argued that any demonstrable effect on employment is a legitimate consideration, particularly in times of recession. An *amicus* brief tendered by a trade union in support of the State of Tasmania may have been of assistance to the court in arriving at a conclusion, and may have had a therapeutic effect on the workers by ensuring that their interest was brought to the attention of the court.

Another argument likely to be put forward, especially by lawyers in the Anglo-Australian tradition, is that the courts are, and should remain, independent of political pressures. An *amicus* appearance, this argument runs, is merely a form of political lobbying — a tactic which is rightly condemned for attempting to compromise judicial independence. While this argument may initially appear attractive, any resemblance between *amicus curiae* and lobbyist is in fact, quite superficial. Although motivated by similar ideals the methods of the *amicus* and the lobbyist diverge sharply. Whereas the latter employs, in most cases, economic persuasion and political support as his tools, the *amicus curiae* uses only the persuasion of his or her arguments before the court. In an effort to encourage the court to arrive at a solution which will take into account the wider public interest,

[17] *Ibid.* 1043.

the *amicus* employs precedent and legal argument, just as counsel for the parties do. Admittedly, it may be necessary to pass legistlation to ensure *amicus* briefs are restricted in content to legitimate legal argument and relevant data. At one time in the United States, soon after the Second World War, the proliferating use of *amicus curiae* was regarded as a problem by the courts. For these briefs, often presented by parties with few interests in common with the litigants, gave little or no assistance to the court, since they omitted any reference to the decisive issue on which the case turned or which divided the members of the court.[18] Mr Justice Jackson, dissenting in *Craig v. Harney*[19] noted with reproof that the thrust of the brief submitted by *amicus curiae* stressed only the size and importance of the group which would be affected by the litigation. In the words of one critic, Weiner:

> Certainly there were multiplying signs after 1947 that the brief *amicus curiae* had become essentially an instrument designed to exert extra-judicial pressure on judicial decisions, more decorous than but essentially similar to the picketing of court houses that Congress has since banned.[20]

The need for rules governing amicus briefs in Australia

An effective method of avoiding this problem may be to frame a rule which draws guidelines establishing the circumstances in which an *amicus* brief should be accepted by the court. One option would be to propose that a brief should be accepted only where both the parties consent to the admission of the brief. This was the rule at one time in the United States. The rule is attractive in that it acknowledges the primacy of the litigating parties in determining the scope of the action. On the other hand, it must be recognised that where any one particular litigant is a frequent party in public interest litigation, there is a possibility that it will adopt a tactic of automatically declining consent. Such was the experience in the United States in every case where the United States government was a party and had an effective right of veto. Consistently during the 1940's the Federal Solicitor-General refused his permission for the reception of *amicus* briefs — a practice which drew the criticism of the Supreme Court judiciary and eventually provoked a change in the rules of court governing admission of briefs.

As refusal to admit a brief is an inevitable risk where the Administration is the defendant, it is submitted that a preferable approach would be to provide for application to the court by any outsider wishing to submit a brief. In the United States Federal Courts, a rule of court provides that the presiding judge has a discretion to accept a brief if 'facts or questions of law will not be adequately presented by the parties'. This formulation might not, however, be desirable in the Australian context, as there is no long tradition in this country of submitting *amicus* briefs in the public interest, and the courts are less inclined to recognise the validity of balancing the public interest against the rights of the litigant. Australian courts are less likely to give a generous interpretation to a rule such as this and the result may be that few briefs would be accepted. In view of these considerations, a

[18] Krislov *op. cit.* 711.
[19] 331 U.S. 367, 397 (1947).
[20] Weiner, F. 'The Supreme Court's New Rules' (1954) 68 *Harvard Law Review*. 20, 80.

test should be devised which would have the effect of actively encouraging the tendency to submit an *amicus* brief which is presently developing. Further, the test should ensure that a third party cannot abuse the position *amicus curiae* by using it as a device which would allow him to participate in the proceedings, play an important part in the formulation of the precedent, yet leave him unbound by the appearance. In such a case it would be more appropriate for him to appear as an intervening party.

As the major purpose of the *amicus* brief is to ensure that a precedent is sound, the use of the brief is of particular importance in courts where a decision is likely to constitute a precedent. Since most such decisions are taken in or proceed to the Supreme Court or High Court, it is recommended that a special rule be devised in relation to these courts as well as the Land and Environment Court. Accordingly, it is proposed that a test be formulated which states that in a civil hearing in the High Court, Supreme Court or Land and Environment Court the court shall accept an *amicus curiae* brief, unless:

(a) it would not be in the public interest to receive it; or

(b) the court is of the opinion that the applicant should appear as an intervener and such permission is granted.

This test ensures that if intervention is more appropriate in the circumstances, then submission of an *amicus* brief will be denied. As a result, it will not be possible for a public interest group to participate in the proceedings, play an important part in the formulation of the precedent, yet remain unbound by the appearance.

On occasion, the submission of an *amicus* brief may also be of assistance to the lower courts and to other specialist courts, such as the Family Court.[21] It is therefore proposed that these courts have a discretion to accept an *amicus curiae* brief where the presiding judge is of the view that a brief may be of some assistance in determining the matter before him.

By establishing rules of this type added impetus will be given to the use of the brief *amicus curiae*, and a method of giving voice to the concerns of public interest associations will be achieved with a minimum of expense and delay, in a manner which is consonant with the rights of the litigating parties.

[21] In custody matters in particular, the submission of briefs which advance the interest of the child may be valuable in alleviating the rigours of the adversary system.