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Amici Curiae in the United States Supreme Court and the Australian High Court: A Lesson in Balancing Amicability, 51 J. Marshall L. Rev. 81 (2017)

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AMICI CURIAE IN THE UNITED STATES SUPREME COURT AND THE AUSTRALIAN HIGH COURT: A LESSON IN BALANCING AMICABILITY

BENJAMIN ROBERT HOPPER*

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I. INTRODUCTION

In the United States, the filing of *amicus curiae* briefs is at an all-time high, having risen 800% over 50 years,¹ with the Supreme Court of the United States (the “Supreme Court”) allowing for virtually unlimited amicus participation.² The filing of amicus briefs is a commonly used strategy by American public interest

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1. Allison Orr Larsen, *The Trouble with Amicus Facts*, 100 VA. REV. 1757, 1758 (2014).

2. Omari Scott Simmons, *Picking Friends From The Crowd: Amicus Participation as Political Symbolism*, 42 CONN. L. REV. 185, 195 (2009).

groups.³ In stark contrast, after a modest rise in filing amicus briefs in the 1990s,⁴ the filing of amicus briefs in proceedings before the High Court of Australia (the “High Court”) remains very rare.⁵

In this article, after explaining the concept of *amicus curiae* (Part II), I explore the different amicus filing trends in the United States and Australian supreme courts, finding that, notwithstanding a common legal heritage, the rates in the former greatly exceed the rates in the latter (Part III). I contend that the reasons for the difference largely have to do with the legal principle and policy governing amicus filings, as well as, importantly, with court procedure, legal history (the change from legal formalism to realism that took place in the early-mid twentieth century in the Supreme Court has simply not occurred in the High Court) and agitation by interest groups (Part IV). I then discern the issues with the Supreme Court’s open-door policy and the High Court’s closed-door policy, respectively (Part V). I draw on this analysis to construct a model designed to illustrate the ideal level of amicus participation that courts in both examined jurisdictions should aspire to (Part VI). This analysis leads me (i) to conclude that reform of the amicus device is required in the Supreme Court and the High Court, (ii) to outline the key elements of that reform, and (iii) to find that public interest organizations should take heed of suggested strategic implications (Part VII).

II. *AMICUS CURIAE*

Amicus curiae is Latin for “friend of the court”, being a person who is not a party to a case before the court, but who assists the court in some way. Its use was known in Roman courts,⁶ and, in limited form, in French courts.⁷

In the English common law, from which both American and Australian common law descend, the parties define the issues and the evidence, on the basis of which the court resolves a dispute. In this adversarial tradition, there is little room for non-party participants. Indeed, the task of the court is to:

. . . determine disputes that are brought before it by parties who

3. Simmons, *supra* note 2.

4. Susan Kenny, *Interveners and Amici Curiae in the High Court*, 20 ADEL. REV. 159 (1998).

5. Ernst Willheim, *Amici Curiae and Access to Constitutional Justice in the High Court of Australia*, 22 BOND REV. 126 (2010); Jason L. Pierce, David Weiden & Rebecca D. Gill, *The Changing Role of the High Court of Australia*, PAPERS.SSRN.COM (Jan. 16, 2011), papers.ssrn.com/sol3/papers/cfm?abstract_id=174.

6. Samuel Krislov, *The Amicus Curiae Brief: From Friendship to Advocacy*, 72 YALE L.J. 694, 694 (1963); S. Chandra Mohan, *The Amicus Curiae: Friends No More*, SING. J.L. STUD. 352, 355-56 (2010).

7. Ernest Angell, *The Amicus Curiae American Development of English Institutions*, 16 INT. COMP. L.Q. 1017-1044, 1017 (1967).

appear before it, adduce evidence and make submissions . . . The general principle is that the parties are entitled to carry on their litigation free from the interference of persons who are strangers to the litigation.⁸

Nevertheless, in an adversarial system, the parties may not provide the court with all the assistance required to render a decision or prevent a miscarriage of justice.⁹ Thus, early English law reports cite instances of *amici curiae* being permitted “to remind the Court of some matter of law which has escaped its notice and in regard of which it is in danger of going wrong.”¹⁰ The role of the amicus was to assist the court to fulfil the court’s duties of supplying the necessary knowledge of the law and of “such fact, generally accepted, as will be judicially noticed.”¹¹ The amicus might appear on request of the court or with permission.¹² This may be understood as an exercise of the inherent or implied power of a court “to ensure that it is properly informed of matters which it ought to take into account in reaching its decision”¹³ or to “control its own processes.”¹⁴ It may also be understood as an exercise of the court’s jurisdiction to act in accordance with the rules of natural justice by allowing a non-party whose interests may be affected by the case to be heard.¹⁵ The precise function of the amicus was never defined in English authority. As Samuel Krislov writes, “[i]n short, through lack of precise rules the English courts developed a highly adaptable instrument for dealing with many of the problems that arise in adversary proceedings.”¹⁶ From shared English common law origins, this “highly adaptable instrument” has evolved very differently in the United States and Australia.

8. *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 533-34 (Austl.).

9. *Amici Curiae*, 34 HARV. L. REV. 773-76, 773 (1921).

10. *Grice v R*, [1957] 11 D.L.R. 2nd 699, 702 (Can.). In like terms, Jowitt’s *Dictionary of English Law* defines *amicus curiae* as “[a] friend of the court, that is to say a person, whether a member of the Bar not engaged in the case or any other bystander, who calls the attention of the court to some decision, whether reported or unreported, or some point of law which would appear to have been overlooked” (cited in *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 535 (Austl.), at 535).

11. *Amici Curiae*, *supra* note 9, at 773.

12. *Id.* at 773.

13. *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 534 (Austl.).

14. *Krippendorf v. Hyde*, 110 U.S. 276, 283 (1884) (cited in Krislov, *supra* note 6, at 699).

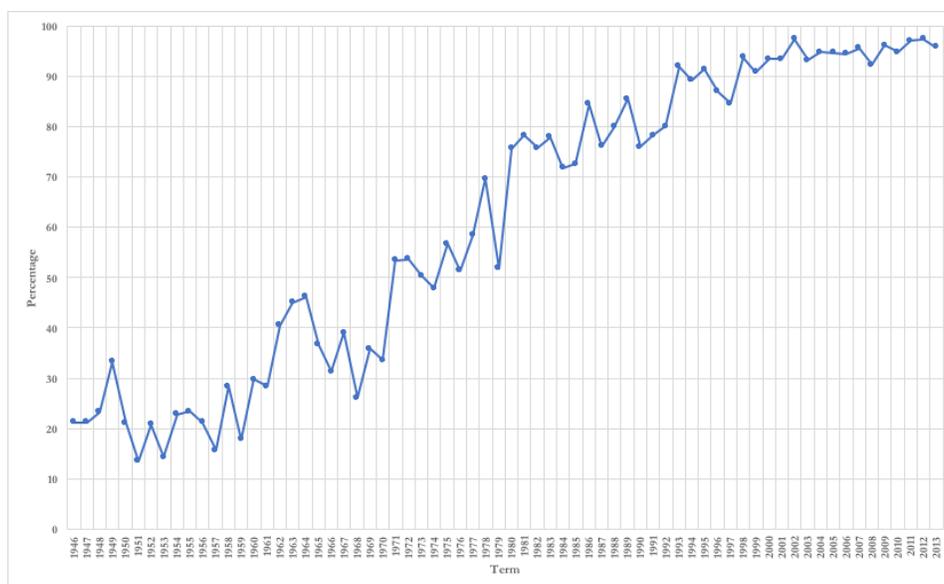
15. *Levy v Victoria* (1997) 189 CLR 579, 601 (Austl.).

16. Krislov, *supra* note 6, at 696.

III. AMICUS PARTICIPATION TRENDS IN THE SUPREME COURT AND HIGH COURT

Amicus filings in the Supreme Court have risen in leaps and bounds since the mid-twentieth century, as illustrated in Figure 1. In 1946, amicus briefs were filed in 21.2% of cases argued before the Supreme Court. That percentage peaked at 46.2% in 1964, dipped to 26.1% in 1968, and then rose sharply and steadily in the following decades. In 2013, the percentage of cases in which amicus briefs were filed was 95.7%. Over the decade of 2004 to 2013, amicus briefs were filed in an average of 95.2% of cases.¹⁷

FIGURE 1: Percentage of Supreme Court cases with at least one *amicus curiae*, 1946-2013¹⁸



Conversely, filings of amicus briefs in the High Court are conspicuous by their absence. Before the 1980s, amicus appearances were almost non-existent.¹⁹ In the 1980s, there were a total of eleven nongovernment interveners (including amici) in High Court cases, increasing to only thirty-six in the 1990s.²⁰

17. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* (6th ed. 2015) (providing data on percentages and number of amicus brief cases available in Table 7-22).

18. *Id.* at Table 7-22.

19. *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 201 (Austl.).

20. George Williams, *The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis*, 28 *FED. REV.* 365, 387 (2000).

Table 1 shows the number and percentage of High Court cases between 2010 and 2017 in which at least one *amicus curiae* appeared. In this period, *amicus curiae* appeared in only 5.5% of cases heard before the High Court, and non-government amici (i.e., neither an Attorney General nor some other government person) appeared in only 3.4% of cases. Thus, notwithstanding the apparent heightened receptivity to amici in the 1990s,²¹ amici remain largely unwelcome at the High Court.

TABLE 1: Number and percentage of High Court cases with at least one *amicus curiae*, 2010-2017²²

Year	2010	2011	2012	2013	2014	2015	2016	2017	Total
Amici (No.)	1	4	2	5	3	3	1	5	24
Amici (%)	2.0%	7.4%	3.3%	8.3%	5.8%	5.9%	1.9%	8.9%	5.5%
Non-gov (No.)	0	3	2	4	2	2	1	1	15
Non-gov (%)	0.0%	5.6%	3.3%	6.7%	3.8%	3.9%	1.9%	1.8%	3.4%
High Court Cases	49	54	61	60	52	51	53	56	436

IV. REASONS FOR AMERICAN AMICABILITY AND AUSTRALIAN DISINTEREST

These stark differences beg the question: why do two jurisdictions that share the same English common law heritage have such dissimilar approaches to *amicus curiae*? At one extreme is a welcome attitude in which too many friends are not enough and at the other extreme is what has been labelled “hostility.”²³ In this Part IV, I contend that the reasons for the difference largely have to do with the legal principle and policy governing amicus filings, as well as, importantly, with court procedure, legal history (the change from legal formalism to realism that took place in the early-mid

21. *Id.* at 387. *see also* Kenny, *supra* note 4, at 159 (examining a “new practice” in the 1990s of the High Court having “gone quite some distance along the path of permitting non-parties to have a voice in proceedings before it”).

22. *See* AUSTRALASIAN LEGAL INFORMATION INSTITUTE, www.austlii.edu.au (last visited Jan. 7, 2018). Figures were calculated from a review of search results in Austlii (www.austlii.edu.au/) for the period of 2010-2017. The search was of the “Commonwealth: High Court of Australia” database with the search operator “amicus”. The same categories of results were calculated in respect of interveners over the same period. These additional results are on file with the author and a copy can be made available upon request.

23. The Hon. Michael Kirby AC CMG, *Deconstructing the Law’s Hostility to Public Interest Litigation*, 127 L. Q. REV. 537 (2011).

twentieth century in the Supreme Court has simply not occurred in the High Court) and agitation by interest groups.

A. *History of Amici in the Supreme Court*

In his 1879 “Dictionary of Terms and Phrases used in American or English Jurisprudence,” American lawyer, Benjamin Abbott, defined an *amicus curiae* as:

A friend of the court. A term applied to a bystander, who *without having an interest in the cause*, of his own knowledge makes suggestion on a point of law or of fact for the information of the presiding judge.²⁴

This definition comports with that of early English jurisprudence and variations of it were repeated in American cases at least until the 1930s.²⁵ By the same time, however, the open identification of an amicus brief with an organizational sponsor was quite commonplace,²⁶ and “private organisations were appearing...no longer in an essentially professional relation to the court but openly as advocates on behalf of some group or class struggle desiring to support the contentions of a party to the litigation.”²⁷

Since the 1930s, amicus participation in Supreme Court cases has trended significantly upward, apart from a brief period in the late 1940s to 1950s, when the court sought to curb amicus filings (see Figure 1). In 1949, the court amended its rule on amicus briefs (historical Rule 27(9)) to place restrictions on the right to file such briefs,²⁸ including by stating that applications to file without consent of the parties “are not favored” (historical Rule 27(9)(b)).²⁹ In 1954, the court again amended its amicus rule with further minor restrictions.³⁰ The adoption of these rules gave rise to a significant dispute between Justice Frankfurter and Justice Black as to the proper role of amici. Justice Frankfurter favored the adoption of the rules, as it would return control over amicus briefs to the litigating parties, reflecting the traditional view of the amicus

24. BENJAMIN VAUGHAN ABBOTT, *DICTIONARY OF TERMS AND PHRASES USED IN AMERICAN OR ENGLISH JURISPRUDENCE* 62-63 (1879) (emphasis added).

25. *See, e.g.*, *Fort Worth & D.C. Ry. Co. v. Greathouse*, 41 S.W.2d 418, 422 (Tex. Civ. App. 1931), *writ granted* (July 22, 1931), *rev'd*, 65 S.W.2d 762 (Tex. Comm'n App. 1933) (adopting the following definition of an *amicus curiae*: “*Amicus curiae* has been defined as one who, as a standerby when a judge is doubtful, or mistaken in a matter of law, may inform the court.”).

26. Krislov, *supra* note 6, at 703.

27. Ernest Angell, *supra* note 7, at 1018.

28. Frederick Bernays Wiener, *The Supreme Court's New Rules*, 68 HARV. L. REV. 20, 80 (1954); Krislov, *supra* note 6, at 715.

29. AMENDMENT OF RULES OF THE SUPREME COURT OF THE UNITED STATES, 338 U.S. 959 (1949); Krislov, *supra* note 6, at 713.

30. SUP. CT. R. 42, 346 U.S. 943-1032, 993-94 (1954) (repealed 1967).

institution as a supplement to adversarial litigation.³¹ By contrast, Justice Black objected to the rules, saying:

I have never favored the almost insuperable obstacle of rules put in the way of briefs sought to be filed by persons other than the actual litigants. Most of the cases before this Court involve matters that affect far more than the immediate record parties. I think the public interest and judicial administration would be better served by relaxing rather than tightening the rule against *amicus curiae* briefs.³²

As Krislov writes, this view reflects support for “a broadening of the interests likely to come before the Court and the issues presented to it for resolution,” allowing the amicus brief to become “the judicial counterpart of lobbying and congressional hearings in the legislative process.”³³

Notwithstanding Justice Black’s concerns about the adopted rule, the rate of filing of amicus briefs in the Supreme Court has increased manifold. In significant part, this is due to the shift in the twentieth century from the dominant paradigm of legal formalism, where the court understands its role as declaring and not making law, to legal realism, where the law is acknowledged to be conditioned by its socioeconomic and political context. Under this new paradigm, the Supreme Court became more receptive to “extra-legal” facts and social science evidence, as well as to the perspectives of interest groups.³⁴ With the marked increase in the submission of extra-legal evidence in the form of amicus briefs,³⁵ “[t]oday, it can truly be said, the Supreme Court’s policy ‘is to allow essentially unlimited amicus participation.’”³⁶ For example, in the well-known Supreme Court case concerning Myriad Genetic’s patent covering isolated gene sequences associated with a predisposition to breast and ovarian cancer,³⁷ 111 briefs were filed.³⁸ The following definition of *amicus curiae* in the most recent edition of Black’s Law Dictionary confirms the shift of the amicus from disinterested friend to passionate advocate: “Someone who is not a party to a lawsuit

31. Krislov, *supra* note 6, at 717.

32. *Id.* at 714-15.

33. *Id.* at 717.

34. Simmons, *supra* note 2, at 194-95.

35. *Id.* at 195.

36. Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, UNIV. PA. L. REV. 743, 764 (2000) (citing Gregory A. Caldeira & John R. Wright, *Amici Curiae before the Supreme Court: Who Participates, When, and How Much?*, 52 J. POL. 782, 784 (1990)).

37. *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct 2107 (2013).

38. *Briefs as Amici Curiae, Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 133 S. Ct 2107 (2013) (the author calculated the number of amicus briefs filed through a search of the Westlaw US database: search “133 S.Ct 2107”; then select “Filings”; then narrow by “Appellate Court Documents”; and, finally, narrow by “Briefs”).

but who petitions the court or is requested by the court to file a brief in the action *because that person has a strong interest in the subject matter.*³⁹

B. History of Amici in the High Court

At least since Dixon J's influential High Court ruling in 1930, denying the States of Victoria and South Australia leave to intervene,⁴⁰ the High Court has displayed a lukewarm approach to amici:

Normally parties, and parties alone, appear in litigation. But, by a very special practice, the intervention of the States and the Commonwealth as persons interested has been permitted by the discretion of the Court in matters which arise under the Constitution. The discretion to permit appearances by counsel is a very wide one; but I think we would be wise to exercise it by allowing only those to be heard who wish to maintain some particular right, power or immunity in which they are concerned, and not merely to intervene to contend for what they consider to be a desirable state of the general law under the Constitution. . . .⁴¹

As the data in Part III illustrate, the High Court followed this approach with few very exceptions, the main one being *Commonwealth v Tasmania*⁴²—the celebrated 1983 Tasmanian dam case concerning the (ultimately defeated) construction of a hydro-electric dam on the Franklin River in Tasmania. In this case, the Tasmanian Wilderness Society made oral submissions as amicus on ecological issues.

The modest rise in actual, or attempts at, amicus participation in the 1990s included the following key cases:

- a. *Brandy v Human Rights and Equal Opportunity Commission*:⁴³ the High Court refused an amicus application by the Public Interest Advocacy Centre (“PIAC”). This followed counsel’s concession that PIAC was not there to fill in the gaps left by other parties. PIAC is one of Australia’s major public interest law organizations;⁴⁴

39. *Amicus Curiae*, BLACK’S LAW DICTIONARY (Bryan A. Garner ed., 10th ed. 2014) (emphasis added).

40. Sir Owen Dixon served as Chief Justice of the High Court of Australia and is widely regarded as one of Australia’s greatest jurists.

41. *Australian Railways Union v Victorian Railways Comm’r* (1930) 44 CLR 319, 331 (Austl.).

42. *Commonwealth v Tasmania* (1983) 158 CLR 1 (Austl.).

43. *Brandy v Human Rights and Equal Opportunity Comm’n* (1995) 183 CLR 245 (Austl.).

44. Public Interest Advocacy Centre, *Website of the Public Interest Advocacy Centre*, PUBLIC INTEREST ADVOCACY CENTER, www.piac.asn.au/ (last visited Jan. 7, 2018).

- b. *Kruger v Commonwealth*:⁴⁵ an Indigenous Australian claimed damages arising from his alleged wrongful removal from his family as a child. The Australian Section of the International Commission of Jurists sought leave to make a 14-page submission as amicus. As Willheim writes, “[i]f ever there was a case raising important constitutional and public law issues, a high level of public interest and an experienced and expert amicus applicant, surely this was it.”⁴⁶ However, the High Court refused leave on the basis that the litigating parties were able to provide adequate assistance to the court; and
- c. *Levy v Victoria*⁴⁷ and *Lange v Australian Broadcasting Corporation*⁴⁸ concerned the implied freedom of political communication under the Australian Constitution. In those cases, leave to appear as amici was granted to the Media, Entertainment and Arts Alliance and the Australian Press Council.⁴⁹

In the high-profile copyright case, *Roadshow Films Pty Ltd v iiNet Limited*,⁵⁰ the High Court granted amicus status to four out of six amicus applicants, but continued to evince an unwelcoming approach, saying “where the parties are large organisations represented by experienced lawyers, applications for leave to intervene or to make submissions as *amicus curiae* should seldom be necessary or appropriate.”⁵¹

45. *Kruger v Commonwealth* (1997) 190 CLR 1 (Austl.).

46. Willheim, *supra* note 5, at 129.

47. *Levy v Victoria* (1997) 189 CLR 579 (Austl.).

48. *Lange v Austl. Broad Corp.* (1997) 189 CLR 520 (Austl.).

49. *See also Bropho v Tickner* (1993) 40 FCR 165 (Austl.) (permitting an amicus to appear and file submissions in the Federal Court of Australia on the issue of the plaintiff’s standing, but not permitting the amicus to file evidence); and *Project Blue Sky Inc. v Austl. Broad Auth.* (1998) 194 CLR 355 (Austl.) (granting leave in the High Court to eleven participants in the Australian film and television industry to appear as *amici curiae* in a case relating to standards for the Australian content of programs).

50. *Roadshow Films Pty Ltd v iiNet Limited* (No. 1) (2011) 248 CLR 37 (Austl.).

51. *Id.* at 39.

C. Legal Principles and Policy for Amici

As others have concluded,⁵² the different rates of amicus participation in the Supreme Court and High Court largely have to do with the legal principles and policy of the courts. Rule 37 of the Supreme Court Rules (“SC Rules”),⁵³ which now governs amicus applications, may be taken as the legal principle for amicus participation before the Supreme Court. Rule 37.1 provides (in part):

An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

This is a relatively relaxed rule and, in any case, the Supreme Court’s policy is to admit amicus briefs.⁵⁴

By comparison, the legal principle governing amicus applications in the High Court is strict. The amicus applicant must satisfy the court “that it will be *significantly* assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the expected assistance.”⁵⁵ To “significantly assist” the court generally requires demonstrating that the amicus will add something different to the arguments already being advanced by the parties.⁵⁶

52. See, e.g., Willheim, *supra* note 5; Williams, *supra* note 20; Loretta Re, *The Amicus Curiae Brief: Access to the Courts for Public Interest Associations*, 14 MELB. U.L. REV. 522 (1983); Kenny, *supra* note 4; Rosemary J. Owens, *Interveners and Amicus Curiae: The Role of the Courts in a Modern Democracy*, 20 ADEL. REV. 193 (1998) (concluding that the different rates of amicus participation between the Supreme Court and the High Court have to do with the legal principles and policy of the courts).

53. RULES OF THE SUPREME COURT OF THE UNITED STATES (Effective Nov. 13, 2017) www.supremecourt.gov/filingandrules/2017RulesoftheCourt.pdf (last visited Jan. 7, 2018).

54. REAGAN W. SIMPSON & MARY R. VASALY, *THE AMICUS BRIEF: ANSWERING THE TEN MOST IMPORTANT QUESTIONS ABOUT AMICUS PRACTICE* 60 (4th ed. 2015).

55. *Roadshow Films Pty Ltd v iiNet Limited* (No. 1) (2011) 248 CLR 37, 39 (Austl.) (affirming *Levy v Victoria*, at 604-605 (Austl.)) (emphasis added).

56. *Levy v Victoria* (1997) 189 CLR 579, 604 (Austl.) (“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.”); see also *Bropho v Tickner* (1993) 40 FCR 165, 172 (Austl.):

In Australia, as distinct from the position in the United States, the 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.

Former High Court Justice, The Hon. Michael Kirby, who clearly supports an expanded role for amici in litigation before the High Court,⁵⁷ identifies four views underpinning the High Court’s “hostile” amicus policy: (1) intervention by non-parties otherwise than to maintain a particular right, power or immunity provided by law is an “evil” to be avoided; (2) if there is a choice in society, it should generally be resolved by enhancing political solutions to public interest conflicts, rather than by unelected judges; (3) the self-interest of parties to litigation means that they will generally advance the best possible arguments and thereby assist the court, but amici do not have a sufficient interest to “sharpen the controversy” in this manner; and (4) adopting a more open policy towards amici is a matter for the legislature, not the courts.⁵⁸

D. Amicus Procedures

Amicus procedures in the Supreme Court are much more straightforward than those in the High Court. SC Rule 37 requires amicus applicants to obtain the court’s leave to file an amicus brief, unless all parties have consented to the filing,⁵⁹ or the brief is filed by certain government entities (e.g., the Solicitor General of the United States).⁶⁰

The SC Rules do not stipulate time or manner requirements for responses to amicus briefs. However, the rule that an amicus brief in a case before the Supreme Court for oral argument be filed no

57. See, e.g., *Levy v Victoria* (1997) 189 CLR 579, 650–652 (Austl.) (stating, “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.”); *Attorney General (Cth) v Breckler* (1999) 197 CLR 83, 134–137 (Austl.) (opining in dissent that the main industry body of the superannuation industry in Australia ought to have been granted leave to appear as amicus, and stating, “[t]his Court should adapt its procedures...to ensure that its eventual opinions are informed by relevant submissions of law and by the provision of any relevant facts, not otherwise called to notice, which can be made available without procedural unfairness to a party.”); *Wurridjal v Commonwealth* (2009) 237 CLR 309, 313–314 (Austl.). Opining in dissent that the Court should reserve reception of proposed submissions of amici, and stating:

[t]he 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 . . . 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.

58. See also The Hon. Michael Kirby AC CMG, *supra* note 23, at 31–41.

59. SUP. CT. R. 37.2(a) and 37.3(a).

60. *Id.* at Rule 37.4.

later than 7 days after the brief it supports gives the opposing party time to respond in its own brief to the amicus brief.⁶¹ It also allows the amicus to review the brief it supports and avoid repetitive submissions.⁶² Thus, in general, under the SC Rules, the parties:

- a. are notified of amicus filings (through the consent process);
and
- b. have the opportunity to respond to amicus briefs in their submissions.

In contrast, it has been said that the “[t]he [High] Court’s procedures (or lack of procedures) relating to amicus applications are so bad they are almost unworkable.”⁶³ Even Justice Kirby opines that “the Court’s practice may seem to an outsider to be unpredictable and inconsistent.”⁶⁴ Under the Rules of the High Court of Australia (“HC Rules”),⁶⁵ other than in constitutional matters, there is no formal consent process (like under the SC Rules) and no notice provisions. Even though the application may ultimately be denied, the HC Rules require an amicus application to be filed together with written submissions in one form.⁶⁶

Similar to the SC Rules, under the HC Rules, intending amici’s submissions must be filed within 7 days after written submissions

61. *Id.* at Rule 37.3(a). For the sake of comparison with the Rules of the Australian High Court, in this section I focus on the SC Rules for amicus briefs filed in cases before the Supreme Court for oral argument. This is because, unlike the SC Rules, the High Court’s Rules do not specifically provide for amicus briefs to be filed in respect of special leave applications (which, broadly speaking, are equivalent to petitions for writs of certiorari). The High Court’s Rules only provide for amicus briefs (under the rule for intervener’s written submissions (Rule 44.04)) to be filed in respect of appeals (i.e., cases before the High Court for oral argument) (Parts 41, 42 and 44 of the Rules of the Australian High Court).

62. SIMPSON & VASALY, *supra* note 54, at 64. The rules for amicus briefs filed before the Supreme Court’s consideration of a petition for a writ of certiorari are less straightforward. An amicus brief in support of a petitioner must be filed at the same time as a brief in opposition (viz., within 30 days after the case is placed on the docket or such later time as is called for by the Supreme Court (SC Rule 37.2(a) read together with SC Rule 15.3)). This means that a respondent has no opportunity to respond to amicus briefs in support of a petitioner in its opposition brief. Nonetheless, a respondent may respond to new matter raised by such amicus briefs in a supplemental brief (SC Rule 15.8).

63. Willheim, *supra* note 5, at 137.

64. *Attorney General (Cth) v Breckler* (1999) 197 CLR 83, 136 (Austl.); see also Williams, *supra* note 20, at 389 (agreeing with Justice Kirby’s opinion expressed in *Attorney General (Cth) v Breckler* that the Court’s practice in relation to amici is “unpredictable and inconsistent”); and The Hon. Michael Kirby AC CMG, *supra* note 23, at 563 (stating “[m]any agree that the present law and practice on interventions is unsatisfactory, unpredictable and inconsistent.”).

65. HIGH COURT RULES 2004 (compilation date: January 1, 2017), www.legislation.gov.au/Details/F2017C00001 (last visited Jan. 7, 2018).

66. *Id.* at Rule 44.04.4.

by the party in support of whom the application is made are filed and, in any other case, within 7 days after the respondent's written submissions are filed.⁶⁷ However, as the High Court requires intending amici to demonstrate they have something new to add, amicus applications are not determined until the parties' submissions have been filed. In practice, the High Court determines amicus applications on the first day of the hearing or even after the parties' oral submissions (giving both parties the opportunity to respond to amicus submissions). This is obviously disadvantageous for all concerned. Intending amici must prepare substantive submissions and parties must prepare substantive responses, even if, ultimately, the intending amici's applications are denied.⁶⁸

It may be inferred that the Supreme Court's relatively straightforward procedure for amicus applications encourages amicus filings, while the uncertainty created by the High Court's relatively rigid procedure discourages them.

E. Amicus Advocacy by Public Interest Organizations

An important reason for the difference in amicus participation is the strategy of interest groups. Interest groups in the United States have actively used the amicus device to pursue their advocacy goals. This can be traced to the first quarter of the twentieth century, when interest groups, including labor unions and racial minority groups, started filing amicus briefs.⁶⁹ Subsequently, civil rights organizations increasingly relied on amicus briefs and litigation as a means of vindicating minority rights otherwise difficult to obtain through the political process.⁷⁰

Today, American interest groups, which are numerous,⁷¹ are active users of the amicus device. Examples include: the Electronic Frontier Foundation ("EFF"), "the leading non-profit organization defending civil liberties in the digital world,"⁷² whose Legal Cases webpages list over 300 cases in which the EFF has been involved, generally as amicus;⁷³ and the American Civil Liberties Union

67. *Id.* at Rules 44.04.2 and 44.04.3.

68. *Cf.* Willheim, *supra* note 5, at 138-39. It should be noted that this comment was made while Practice Direction No. 1 of 2000 was still in force. Nonetheless, the comment would appear applicable to the current procedure.

69. Krislov, *supra* note 6, at 707; *see also* Simmons, *supra* note 2, at 193-94 (adopting Krislov's history of private interest groups using the amicus device).

70. Krislov, *supra* note 6, at 710.

71. For example, the Vote Smart website, which gathers information about political candidates and elected officials, says that its sources include over 400 national and 1,300 state special interest groups. VOTE SMART, votesmart.org/about#.WIGV_1WWaUI (last visited Jan. 7, 2018).

72. *About EFF*, ELECTRONIC FRONTIER FOUNDATION, www.eff.org/about (last visited Jan. 7, 2018).

73. *Cases*, ELECTRONIC FRONTIER FOUNDATION, www.eff.org/cases (last

(“ACLU”), which works “to defend and preserve the rights and liberties that the Constitution and laws of the United States guarantee,”⁷⁴ and whose website lists hundreds of cases in which the ACLU has appeared as amicus. In 2016, the ACLU filed eleven amicus briefs, and, in 2017, the ACLU filed twenty-one amicus briefs.⁷⁵

Australia has a large number of rights advocacy organizations.⁷⁶ While a 1981 study identified thirty-four nongovernment organizations working to promote human rights,⁷⁷ by 1992, Cohen identified 462 organizations with a primary concern relating to the protection of civil liberties.⁷⁸ However, these organizations are not active users of the amicus device. Interest groups rely primarily on parliamentary and political processes to achieve rights protection, rather than engaging in “judicial lobbying.”⁷⁹ For example, PIAC’s amicus webpage mentions just three cases in which PIAC filed amicus briefs.⁸⁰

Galligan and Morton write, “[a]dvocacy groups’ choice not to use strategic litigation to advance rights claims is due in part to lack of resources...but also to the courts’ unreceptive stance.”⁸¹ Also significant may be the absence of a Bill of Rights in Australia, compared with the constitutive role of the Bill of Rights in the United States.⁸² While these are certainly relevant considerations, there would appear to be ample opportunity for Australian public

visited Jan. 7, 2018).

74. *Defending Our Rights*, AMERICAN CIVIL LIBERTIES UNION, www.aclu.org/defending-our-rights (last visited Jan. 7, 2018).

75. *Court Battles*, AMERICAN CIVIL LIBERTIES UNION, www.aclu.org/defending-our-rights/court-battles (last visited Jan. 7, 2018) (search conducted by author for “amicus”; then, under “date”, the years “2016” and “2017” were selected).

76. Brian Galligan & Ted Morton, *Australian Rights Protection, Paper presented to the Australasian Political Studies Association Conference, University of Adelaide, 29 September – 1 October 2004*, 10 (2004).

77. *Id.* at 11.

78. *Id.* at 11-12.

79. *Id.* at 16-17.

80. *Amicus Curiae: Lange v the ABA*, PUBLIC INTEREST ADVOCACY CENTRE (Feb. 14, 2013), www.piac.asn.au/2013/02/14/amicus-curiae-lange-v-the-aba/.

81. Galligan & Morton, *supra* note 76, at 14.

82. *Cf.* Galligan & Morton, *supra* note 76, at 13, 17-18 (suggesting that, due to the absence of a bill of rights in Australia, rather than relying on judicial means to safeguard human rights, rights advocacy organizations rely on “a range of conventional means of public advocacy and political representation including submissions and testimony to parliamentary committees, lobbying elected politicians and non-elected senior bureaucrats, issuing press releases, writing guest opinion columns for newspapers, and giving media interviews”); see also Jason L. Pierce, David Weiden & Rebecca D. Gill, *The Changing Role of the High Court of Australia* (Jan. 16, 2011), papers.ssrn.com/sol3/papers.cfm?abstract_id=1742024, at 3 (writing that, in the context of understanding why constitutional cases and cases with non-party participation might not be the most appropriate markers of case salience, it is important to note that the Australian Constitution does not contain a Bill of Rights).

interest organizations to increase their efforts to file amicus briefs in key High Court cases. For example, in the Myriad Genetics High Court case, a case with high public interest, no amicus briefs were filed (contrast this with the 111 (many amicus) briefs filed in the Supreme Court case concerning the equivalent American patent).⁸³

F. Conclusion Regarding Differences Between the Supreme Court and High Court

The relative absence of amici in the High Court compared with the Supreme Court arises from a different approach to resolving public interest issues. In Australia, the political and parliamentary process is seen as the predominant mode for resolving these issues. The High Court views itself, and is viewed, through the prism of legal formalism with its role confined to resolving justiciable matters. Conversely, the Supreme Court is a key forum for resolving public interest issues, in part because the Supreme Court views itself, and is viewed, through the prism of legal realism. The dominant position is that “strong (but fair) advocacy on behalf of opposing views promotes sound decision making”⁸⁴ and courts have a role to play in a deliberative democratic process.⁸⁵

V. ISSUES WITH THE SUPREME COURT AND HIGH COURT APPROACHES

Having elucidated the reasons for the differences in approach to amici, the next steps are to consider (i) the issues with each approach and (ii) the lessons that can be drawn from an analysis of the issues.

A. Issues with the US Approach

While the Supreme Court has a liberal amicus policy, judges in other American courts are less convinced of the virtues of amici. Judge Posner has referred to amicus briefs of allies of litigants as “an abuse” and criticized their exacerbating impact on “heavy judicial caseloads and public impatience with the delays and expense of litigation.”⁸⁶

Nonetheless, Judge Posner’s view has not found favor with most, who counter with the views that amicus filings (i) are part of the deliberative democratic process, (ii) reinforce the institutional

83. *D’Arcy v Myriad Genetics Inc.* (2015) 258 CLR 334 (Austl.).

84. *Neonatology Assocs., P.A. v. Comm’r of Internal Revenue*, 293 F.3d 128, 131 (3d Cir. 2002).

85. SIMPSON & VASALY, *supra* note 54, at 59–60.

86. *Ryan v. Commodity Futures Trading Comm’n*, 125 F.3d 1062, 1064 (3d Cir. 1997).

legitimacy of the Supreme Court and (iii) can be extremely helpful to generalist courts.⁸⁷ In a survey of former law clerks, Kelly Lynch concludes that the Supreme Court’s “open acceptance policy is a reflection of the net usefulness of the amicus brief,” and that a stricter approach could produce a “chilling effect”—“a risk that would exceed the costs imposed by the process of review [of amicus briefs].”⁸⁸

However, scrutiny of Lynch’s evidence reveals much higher costs than she suggests. First, 88% of the former law clerks reported that they would give closer attention to an amicus brief filed by a prominent Supreme Court practitioner or academic.⁸⁹ This means that less well-resourced public interest organizations might have difficulty filing an amicus brief that is considered. Second, “the most useful information was frequently factual and non-legal in nature,”⁹⁰ and clerks repeatedly commented, “[p]roviding social science data is one of the useful things that an amicus brief can do for the Court.”⁹¹

This reliance on facts not tested by the parties at trial raises especial concerns. A 1993 study by Michael Rustad and Thomas Koenig, “The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs,”⁹² revealed a worrying trend, including:

- a. reliance on studies funded by partisan sources with results presented in a manner that advances those sources’ purposes;⁹³
- b. misleading presentation of empirical research (e.g., quoting the mean but not the median of punitive damages awards and reporting percentages without reporting absolute numbers);⁹⁴ and
- c. unsupported assertions wrapped up as “social science fact.”⁹⁵

87. See, e.g., Andrew Frey, *Amici Curiae: Friends of the Court or Nuisances?*, 33 LITIG. 5, 66–68 (2006) (arguing, *inter alia*, that there are at least two important reasons why appellate courts should adopt a liberal attitude toward the filing of amicus submissions: (i) persons with an interest in the proceeding have a right under the US Constitution to petition the government, including the judiciary, to redress grievances; and (ii) amicus briefs can be extremely helpful to appellate courts); see also Ruben J. Garcia, *The Democratic Theory of Amicus Advocacy*, 35 FLA. ST. U.L. REV. 315 (2007) (arguing against stricter standards for amicus participation because of its value to democratic processes).

88. Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J.L. POL. 33, 72 (2004).

89. *Id.* at 52, 54, 71.

90. *Id.* at 42.

91. *Id.* at 67.

92. Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91 (1993).

93. *Id.* at 143-46.

94. *Id.* at 146-47.

95. *Id.* at 149-51.

Allison Larsen’s review of Supreme Court opinions from 2008-2013, “The Trouble with Amicus Facts,”⁹⁶ reveals that this trend has, if anything, worsened since 1993. She found:

- a. one in five citations to amicus briefs was used to support a factual claim (i.e., a theoretically falsifiable observation about the world) (e.g., in the 2012 challenge to the Affordable Care Act, Chief Justice Roberts relied on a brief from “American Health Insurance Plans” to assert that the new law “will lead insurers to significantly increase premiums on everyone”);⁹⁷
- b. more often than not (61% of the time), justices cite amicus briefs to support a factual claim relying on the amicus brief itself (and not the source relied on by the amicus), indicating a practice of justices treating amici themselves as experts;⁹⁸
- c. of the 124 factual claims identified by Larsen, only thirty-five were contested in the briefs by a party (28%) and only thirty-three were contested by another amicus (approximately 25%);⁹⁹ and
- d. multiple instances of unreliable factual claims, e.g., claims citing studies that the amicus funded itself.¹⁰⁰

In a comprehensive study of amicus filings data from 1946-2001, “Friends of the Supreme Court: Interest Groups and Judicial Decision Making,”¹⁰¹ Paul Collins reaches some fascinating conclusions, including:

- a. where access to the courts is open, diversity of interest group representation can flourish;¹⁰² and
- b. due to information overload, as the number of amicus filings in a case increases, so too does the variability in the justices’ decision making (defined in terms of deviation from a liberal or conservative vote). This is because, by presenting information that might not otherwise be available to the justices, organized interests expand the scope of the conflict causing the justices’ choices to become more variant than in cases with no (or less) amicus participation.¹⁰³ Indeed, Collins concludes, “amicus briefs are the single strongest predictor of increased variance in judicial decision

96. Allison Orr Larsen, *supra* note 1.

97. *Id.* at 1762, 1778.

98. *Id.* at 1762–1763, 1789.

99. *Id.* at 1762, 1801.

100. *Id.* at 1790–1791.

101. PAUL M. COLLINS, FRIENDS OF THE SUPREME COURT: INTEREST GROUPS AND JUDICIAL DECISION MAKING (2009).

102. *Id.* at 169.

103. *Id.* at 131–132.

making.”¹⁰⁴

It follows that increasing the number of voices in the Supreme Court, while increasing diversity, also has a number of serious drawbacks, in particular: increased reliance on untested “facts”; increased inconsistency in judicial decision-making; repetitiveness of submissions, and increased costs and delays.

B. Issues with the Australian Approach

The High Court’s restrictive approach is no less troubling and raises very real concerns, including:

- a. failure to recognise its role – a failure by the court to properly recognise its role as Australia’s final appellate court and Australia’s constitutional court,¹⁰⁵ with the “function of finally declaring the law of Australia in a *particular* case for application to *all* such cases”;¹⁰⁶
- b. lack of information – the High Court is not apprised of potentially very valuable opinions and matters and is deprived of “the benefit of a larger view of the matter before it than the parties are able or willing to offer.”¹⁰⁷ The traditional view that the Attorneys General can adequately represent the public interest is thoroughly outmoded in Australia’s present pluralistic society;¹⁰⁸
- c. exclusion – the voices of underrepresented and minority groups are less likely to be accorded weight in High Court decisions,¹⁰⁹ which decides cases of public importance yet has largely closed the door to public interest organizations;¹¹⁰ and
- d. procedural inconsistency – in contrast to the Supreme Court, where one can consistently expect that amicus briefs will be accepted, the amicus application process in the High Court is “unpredictable and inconsistent.”¹¹¹

Such considerations caused Justice Einfeld to opine that:

104. *Id.* at 173.

105. Willheim, *supra* note 5, at 126.

106. *Levy v Victoria* (1997) 189 CLR 579, 650–651 (Austl.) (emphasis in original).

107. *Wurridjal v Commonwealth* (2009) 237 CLR 309, 312–313 (Austl.).

108. Williams, *supra* note 20, at 397.

109. *See generally*, Loretta Re, *supra* note 52 (arguing that increased amicus participation by public interest associations will help ensure a broader range of affected interests is canvassed by the courts in Australia).

110. Williams, *supra* note 20, at 394.

111. *Attorney General (Cth) v Breckler* (1999) 197 CLR 83, 136 (Austl.). *Id.* at 389.

The variegated complexity of modern life and technology, increasing materialism and the possible risks to the public of otherwise lauded scientific advances, have brought consequent significant legal challenges. These have been amplified not minimally by the burgeoning of statutory law expressing vague general principles and requiring the exercise of broad undefined judicial discretions. For the just resolution of these issues, the resultant mix beckons, if not requires, whatever assistance and expertise the Courts can reasonably muster.¹¹²

These words, penned in 1988, are yet to resonate with the High Court in respect of its approach to amici.

VI. HOURGLASS MODEL – ACHIEVING THE RIGHT LEVEL OF AMICI

It would appear that there are *too many* voices in the Supreme Court such that the integrity of the judicial process, the rights of the actual litigating parties and even the aims of public interest organizations having recourse to the Supreme Court to advocate their causes, are being undermined. The situation in the High Court is, as would be expected, the converse: it would appear that there are *too few* voices in the High Court such that the court's ability to reach sound decisions that have broader social and political implications is being undermined.

There appears to be a roughly inverse relationship between the advantages and disadvantages of an open-door policy (with representativeness/diversity, but also with decision inconsistency, untested facts, costs and delay) and a closed-door policy (with decision consistency, tested facts and expedience, but also with unrepresentativeness). In other words, increased amicus participation may achieve certain goods, but only at the expense of certain other goods and the burden of certain bads.

These goods and bads may be more specifically analyzed in terms of five dependent variables suggested by the above analysis that are impacted by the independent variable of number of amici:

- a. decision consistency;
- b. tested factual claims;
- c. specific expedience;
- d. general expedience; and
- e. representativeness.

At its simplest, decision consistency means treating like cases alike. In other words, adherence to the doctrine of *stare decisis*, which, in common law systems, serves to preserve the predictability

112. *United States Tobacco Co v Minister for Consumer Affairs* (1988) 19 FCR 184, 201-202 (Austl.).

and certainty of the law. Operationalizing this variable would involve: (i) identifying all cases in which a given precedent is raised (e.g., the principle applying to when the state may constitutionally curtail the exercise of religious freedom); and (ii) assessing whether or not the principle is consistently applied to cases raising analogous facts (i.e., is the precedent from the earlier case applied in the same way to the latter case or is some exception/variance observed?). The more that the court departs from precedent, the less the consistency of the law. However, in certain circumstances, a departure may well be justified and necessary, and may arise from different points of view brought to the court's attention by amici.

The analysis in Part V suggests that, as the number of amici increases, decision consistency decreases. Conversely, as the number of amici decreases, decision consistency increases.

Tested factual claims means the number of factual claims (i.e., theoretically falsifiable observations about the world) that (i) are raised by the participants to the litigation (including parties, amici, and interveners) and (ii) are subjected to examination by the parties (through, for example, cross-examination or rebuttal) or which the parties are given the opportunity to examine. These factual claims may be divided between (i) those claims which are cited by the court and (ii) those claims which are not cited by the court. The more the court cites untested factual claims, the greater the potential for unfairness in terms of parties not being given the opportunity to respond to those claims. On the other hand, such factual claims may be highly pertinent to the resolution of the dispute in a manner that promotes justice not only for the parties, but also for other affected interests.

The analysis in Part V suggests that, as the number of amici increases, the number of tested factual claims decreases. Conversely, as the number of amici decreases, the number of tested factual claims increases.

Specific expedience refers to the speed and cost of resolution of disputes, considered in terms of each individual proceeding. There is a number of ways to operationalize these factors. Speed can be operationalized by measuring the time between institution of proceedings in the court and the handing down of the judgment. Cost can be operationalized by reference to one or more of (i) cost to the court; (ii) cost to the parties; and (iii) cost to all participants. Specific expedience could also be operationalized by reference to the repetitiveness of submissions. The higher the number of amici, the greater the expected costs and delay of the proceedings. However, that anticipated result may be mitigated by a more representative judgment that reduces the need for re-litigation of the same principle (considered under the rubric of "general expedience").

The analysis in Part V suggests that, as the number of amici increases, specific expedience decreases. Conversely, as the number of amici decreases, specific expedience increases.

General expedience refers to the speed and cost of resolution of disputes, considered in terms of the aggregate of all proceedings in the country. General expedience can be operationalized by reference to the extent of re-challenging of the same principle decided by the Supreme Court or High Court in subsequent proceedings in the country. The more that the principle and/or its application is challenged in subsequent litigation, the lower its “general expedience”.

The analysis in Part V suggests that, as the number of amici increases, so too does general expedience. Conversely, as the number of amici decreases, so too does general expedience.

Representativeness means the number and diversity of groups or individuals whose positions are considered by the court. More amici may indeed increase the number of positions considered by the court. However, as indicated by the statistic cited on page 96 above that 88% of former law clerks give closer attention to amicus briefs filed by prominent persons, this does not necessarily mean that more amici increase the diversity of positions considered by the court—at least, not in proportion to the number of amici. It may be that factors in addition to increasing the number of amici are important to ensuring diversity.

The analysis in Part V suggests that, as the number of amici increases, so too does representativeness. Conversely, as the number of amici decreases, so too does representativeness.

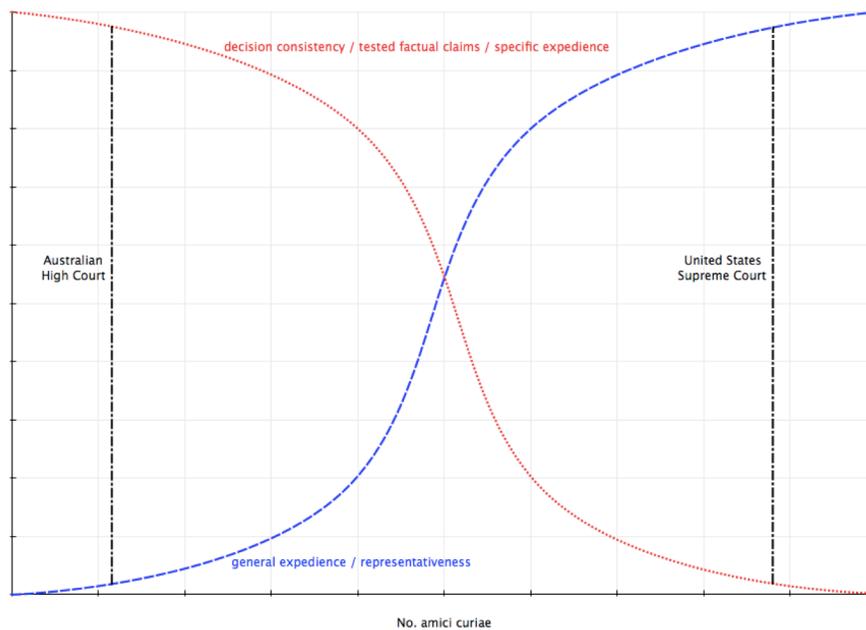
There may well not be a strictly monotonic relationship between number of amici and each of the identified dependent variables. In other words, if the relationship between number of amici and a given dependent variable were individually plotted, it may fluctuate non-monotonically. However, based on the foregoing analysis, I predict that, as the number of amici increase, overall, the advantages and disadvantages of the Australian “closed-door” approach decrease, while, overall, the advantages and disadvantages of the American “open-door” approach increase. That is, as the number of amici increase, I expect:

- a. a downward tendency in decision consistency, tested factual claims and specific expedience; and
- b. an upward tendency in general expedience and representativeness.

These posited relationships may be visually modelled in a graphed hourglass form, as illustrated in Figure 2 (wherein the dotted line represents decision consistency, tested factual claims and specific expedience; and the dashed line represents general expedience and representativeness). In this model, I have very roughly plotted where the Supreme Court and the High Court would sit for illustrative purposes. Testing the claims of this model is beyond the scope of this article. Suffice it to say that carrying out

empirical analysis of Supreme Court, High Court and lower court proceedings to test the predictions of the model would greatly assist in developing policies to reach the ideal level of amicus participation. The model in Figure 2 shows that a balance between the Supreme Court “open-door” and High Court “closed-door” approaches is reached at the “neck” of the hourglass. This neck represents the “ideal” to which I submit courts should aspire. Suggestions for policy reform to reach this ideal level of amicus participation are explored in the next section, together with suggestions for public interest organizations concerning their participation as amici.

FIGURE 2: Hourglass model of effect of number of *amici curiae*



VII. CONCLUSION – LEGAL AND STRATEGIC IMPLICATIONS

The analysis above leads to the following legal and strategic implications.

A. Legal Implications

In his study of Supreme Court amicus filings, Collins posits the following conundrum: either there are ideologically motivated judges who will ignore or not receive amicus briefs, but render consistent decisions or there are legalist judges who pay attention to and receive amicus briefs, but render varied decisions “due to the inherent indeterminacy of the law.” He calls this a “most unsettling

tradeoff.”¹¹³ Another way of expressing this is to say: either amicus filings are not considered (and a diversity of voices ignored) or else they are considered (and inconsistent decisions are rendered).

However, the “Gordian knot” tied by Collins is not impervious to cutting. Courts could, and as my analysis and model indicate, should, adopt a “Goldilocks” policy in which the competing claims of amici and litigants within an adversarial system are balanced. The aim of this balancing would be an approach that encourages the number of amici to reach the “neck” of the hourglass in Figure 2. The highest courts in the land are more than well equipped to engage in this balancing exercise. Thus, the approach to amicus filers should be adjusted to, in Kirby J’s words, be neither an open-door policy nor a closed-door policy, but a *screen-door* policy, “which will keep out the pests whilst allowing genuine litigants with arguable causes, invoking the rule of law, to engage and influence the legal process.”¹¹⁴

The legal policy and principles governing amicus participation in both the Supreme Court and High Court are clearly ripe for reform. The key elements of reform designed to reach the “ideal” level of amicus participation identified above include the following.

B. Reform of Amicus Rules at the Supreme Court

The Supreme Court should raise the bar for amicus participation, instituting policies and procedures designed to increase the quality, but decrease the quantity, of amicus participants. These could include:

- a. amending Rule 37.1 of the SC Rules (discussed on page 90 above) such that it emphasizes not only “relevant matter,” but also the *qualifications* of the amicus to present that relevant matter. For example, Rule 37.1 could be amended to read:

An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties **and which is filed by a person with suitable qualifications to give an opinion on that matter** may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored;

- b. a rule that amicus briefs not contain factual claims, with limited exceptions where full and complete disclosure of methodology and underlying data is made. This rule would reduce the incidence of untested facts;¹¹⁵

113. COLLINS, *supra* note 101, at 177.

114. The Hon. Michael Kirby AC CMG, *supra* note 23, at 3.

115. *Cf.* Allison Orr Larsen, *supra* note 1, at 1811–1812; Rustad & Koenig, *supra* note 92, at 157–158.

- c. a rule that amicus applicants, within a short time after a Supreme Court matter is set down for hearing, give notice to the court and all the parties of their intention to apply for amicus status, together with an indication of the matter they intend to bring to the court's attention.¹¹⁶ The notice would be publicly posted on the Supreme Court's website. This would allow the Court to better "control its own processes"¹¹⁷ by, for example, limiting the number of amicus briefs on the same matter or directing amici applicants to file a joint brief where their notices indicate an intention to bring the same matter to the court's attention;
- d. introducing a requirement that amicus applicants demonstrate that it is more likely than not that amicus participation will not increase the cost and delay of the proceeding or only do so to an extent commensurate with the expected assistance. This proposal borrows from the High Court principle first enunciated in *Levy v Victoria* (discussed on page 90 above); and
- e. to encourage representativeness, Rule 37.1 could be further amended to encourage the filings of amicus briefs on behalf of groups traditionally underrepresented in courts. For example, the following could be inserted after the first sentence of Rule 37.1 (as revised in paragraph (a) on page 103 above): "Such *amicus curiae* briefs filed on behalf of groups that generally have more limited access to the courts by reason of indigence or otherwise may be of especial help to the Court."

C. Reform of Amicus Rules at the High Court

The High Court should lower the bar for amicus participation, instituting policies and procedures designed to increase the diversity of amicus participants without an excessive increase in quantity (i.e., to stay within the hourglass "neck"). These could include:

- a. amending the rule on amicus participation first enunciated in *Levy v Victoria* (discussed on page 90 above) as follows:
An *amicus curiae* applicant must satisfy the court that **it is more likely than not that** it will be ~~significantly~~ assisted by the submissions of the amicus and that any costs to the parties or any delay consequent on agreeing to hear the amicus is not **excessively** disproportionate to the expected assistance;
- b. regulating and clarifying the procedure for making and

116. Cf. Allison Orr Larsen, *supra* note 1, at 1812–1813.

117. *Krippendorf v. Hyde*, 110 U.S. 276, 283 (1884); cited in Krislov, *supra* note 6, at 699.

determining amicus applications, including by:

- i. introducing a formal consent process for amicus applicants similar to that in the Supreme Court;
- ii. introducing an early notice provision like that discussed in paragraph (c) on page 104 above; and
- iii. providing for early directions hearings at which the High Court determines amicus applications that have not been consented to by all parties or which it has not accepted. The hearing of amicus applicants at these hearings would not be a matter of right, but a matter of the High Court's discretion. Early directions hearings would also allow the High Court to put a timetable in place for the filing of amicus briefs and, if required, replies;¹¹⁸
- c. introducing a rule like that discussed in paragraph (b) on page 103 above that amicus briefs not contain factual claims, with limited exceptions; and
- d. introducing a rule like that discussed in paragraph (e) on page 104 above that encourages the filings of amicus briefs on behalf of groups traditionally underrepresented in courts.

While these policy reform proposals for the Supreme Court and High Court are not comprehensive, and are subject to further empirical analysis of the impact of number of amici, it is submitted that they would ameliorate that impact by increasing decision consistency, the number of tested factual claims, specific expedience, general expedience and representativeness.

D. Strategic Implications

The key strategic implications for American public interest organizations are:

- a. exercise discernment in choosing when to file amicus briefs, for example, by not filing in cases whose subject matter do not directly relate to the organization's core concerns, to avoid developing a reputation for being a meddlesome amicus (and incurring criticism like that of Judge Posner),¹¹⁹ and

118. *Cf.* the various proposals for reform of the High Court rules in: The Hon. Michael Kirby AC CMG, *supra* note 23, at 46-48; Loretta Re, *supra* note 52, at 532-533; Kenny, *supra* note 4, at 169-171; Williams, *supra* note 20, at 399-402; Willheim, *supra* note 5, at 145-147; Owens, *supra* note 52. Note that Williams and Owens endorse, and build on, Justice Kenny's proposals.

119. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1064 (3d Cir. 1997).

- b. be careful about including factual claims in amicus briefs and, if factual claims are included, fully disclose methodology and underlying data – consistent application of this practice will assist in being perceived as a relatively impartial friend rather than a “pest”.

The key strategic implications for Australian public interest organizations are:

- a. actively push for amicus status in cases that affect the organization’s core concerns; and
- b. actively push for reform requiring courts to adopt a more open policy towards amicus applicants.

By taking the steps suggested above, including further research to test the claims of the hourglass model (see Part VI), progress can be made towards accommodating just the right number of *amici curiae* before the highest courts of the United States and Australia.