

# A challenge to the legitimating rhetoric of legalism through *amicus curiae*: A comparative case study

RUTH PARSONS

## Abstract

This paper begins to address a gap in existing scholarship relating to the role of *amicus curiae* (meaning ‘friend of the court’) in Australian jurisprudence. Examining a court’s approach to *amicus* provides insight into judicial decision-making. I suggest that the High Court of Australia’s narrow and guarded approach to *amicus* reflects its allegiance to a doctrine of legalism. The Court’s approach can be contrasted to the approach of the Supreme Court of the United States, which allows essentially unlimited *amicus* participation. I explore two key case studies from Australia and the United States: the *Tasmanian Dam Case* and *Massachusetts v Environmental Protection Agency*. I suggest that the oral submissions from the Tasmanian Wilderness Society in the *Tasmanian Dam Case* challenge the High Court of Australia’s professed method of legalism. The High Court of Australia’s resistance to *amicus* is, I argue, related to the role of legalism as a political strategy to legitimate the Court’s exercise of power. Therefore, a challenge to legalism is consequently a challenge to the Court’s power.

## Introduction

The High Court of Australia’s approach to *amicus curiae* may be contrasted with that of the Supreme Court of the United States. *Amicus curiae*<sup>1</sup> (meaning ‘friend of the court’) are interested non-parties—who may be individuals or groups—who provide oral or written submissions to the court.<sup>2</sup> This essay contends that a court’s approach to *amicus* reflects its allegiance to a doctrine of legalism. The essay focuses on the High Court of Australia but uses the US Supreme Court as a counterpoint to elucidate the distinctive features of the Australian system.

The essay argues that legalism is a political strategy that the High Court of Australia adopts to legitimate its exercise of power.<sup>3</sup> Legalism is an approach to constitutional adjudication that holds that judges consider the natural or plain meaning of the law, and consequential or contextual factors are not considered.<sup>4</sup> This essay examines two key environmental case studies: *Commonwealth v Tasmania*<sup>5</sup> (the ‘*Tasmanian Dam Case*’) and *Massachusetts v Environmental Protection Agency*.<sup>6</sup> Both cases generated significant public attention and political activism, including participation from *amicus curiae*. They highlight the jurisdictional differences and the use and effect of *amicus* submissions. For the analysis of the *Tasmanian Dam Case*, this essay provides a novel perspective by using the transcript of

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<sup>1</sup> Non-party intervention in Australia can occur by two mechanisms: as an *amicus curiae*, or as an intervener. There are notable differences between the two types of intervention: an intervener has the same rights and obligations as a party to a case, while an *amicus* may simply assist the Court.

<sup>2</sup> Susan Kenny, ‘Interveners and Amici Curiae in the High Court’ (1998) 29 *Adelaide Law Review* 159, 159.

<sup>3</sup> Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 261; Ryan Turner, ‘The High Court of Australia and political science: A revised historiography and new research agenda’ (2015) 50(2) *Australian Journal of Political Science* 347, 355 <doi.org/10.1080/10361146.2015.1006165>.

<sup>4</sup> Galligan (n 3) 32.

<sup>5</sup> (1983) 158 CLR 1 (‘*Tasmanian Dam Case*’).

<sup>6</sup> 549 US 497 (2007) (‘*Massachusetts v EPA*’).

the hearing rather than the judgment. The essay argues that *amicus* submissions in the *Tasmanian Dam Case* challenge the High Court of Australia's legitimating rhetoric of legalism.

This essay comprises three parts. The first part provides necessary background by describing the approaches to *amicus* of both the High Court of Australia and the Supreme Court of the United States. It provides a brief overview of the existing scholarship in both jurisdictions, noting that the existing scholarship from the United States is plentiful while there is an obvious gap in Australia. The second part outlines the two case studies—the *Tasmanian Dam Case* and *Massachusetts v EPA*—and argues that the approaches of each Court to *amicus* reveal the extent of their allegiance to a doctrine of strict legalism. The third part examines how the *amicus* submissions in the *Tasmanian Dam Case* challenge the High Court of Australia's professed approach of legalism.

## *Amicus curiae* in the High Court of Australia and the US Supreme Court

There is a significant body of literature on *amicus curiae* in the US Supreme Court.<sup>7</sup> Generally, this literature finds that *amicus* submissions in the United States are common, and that litigants are able to influence judicial decision-making.<sup>8</sup> In contrast, there is sparse literature on *amicus* in the Australian context, with a few notable exceptions.<sup>9</sup> In Australia, *amicus* submissions are relatively rare. Literature tends to focus on relevant common law principles for granting leave to *amicus*, as well as providing recommendations for law reform.<sup>10</sup> This paper adopts a novel approach to examining and comparing the two jurisdictions, going some way towards filling the gap in the Australian literature.

The US Supreme Court and the High Court of Australia adopt very different approaches to *amicus*. The Australian High Court adopts a narrow approach, affording primacy to the parties and rarely granting leave to make submissions.<sup>11</sup> For example, in 2012 the High Court of Australia handed down 81 judgments. Of these, the Court only allowed *amicus* in two matters,<sup>12</sup> comprising only 2.5 per cent of judgments that year. In contrast, the US Supreme Court allows 'essentially unlimited' *amicus* participation,<sup>13</sup> with *amicus* briefs in over 80 per cent of cases in the US Supreme Court.<sup>14</sup> This striking

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<sup>7</sup> See, for example, Jonathan Alger and Marvin Krislov, 'You've Got to Have Friends: Lessons Learned from the Role of Amicus in the University of Michigan Cases' (2004) 30(3) *Journal of College and University Law* 503; Gregory Caldeira and John Wright, 'Amici Curiae before the Supreme Court: Who Participates, When, and How Much?' (1990) 52(3) *The Journal of Politics* 782 <doi.org/10.2307/2131827>.

<sup>8</sup> See, for example, Paul Chen, 'The Informational Role of Amici Curiae Briefs in *Gonzales v. Raich*' (2007) 31 *Southern Illinois University Law Journal* 217; Paul Collins, 'Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation' (2004) 38 *Law and Society Review* 807 <doi.org/10.1111/j.0023-9216.2004.00067.x>; Donald Songer and Reginald Sheehan, 'Interest Group Success in the Courts: Amicus Participation in the Supreme Court' (1993) 46(2) *Political Research Quarterly* 339 <doi.org/10.2307/448891>.

<sup>9</sup> Jason Pierce, 'The Road Less Travelled: Non-Party Intervention and the Public Litigation Model in the High Court' (2003) 28(2) *Alternative Law Journal* 69 <doi.org/10.1177/1037969X0302800204>; George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28 *Federal Law Review* 365 <doi.org/10.22145/flr.28.3.2>.

<sup>10</sup> See, for example, Angel Aleskov, 'Intervention in Constitutional Cases' (2012) 86 *Australian Law Journal* 555; Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20 *Adelaide Law Review* 159; Warwick Neville, 'Abortion before the High Court - What Next?' (1998) 20 *Adelaide Law Review* 183; Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22(3) *Bond Law Review* 126.

<sup>11</sup> Williams (n 9) 365.

<sup>12</sup> In Transcript of Proceedings, *Williams v The Commonwealth* [2011] HCATrans 198, there was one application from the Churches' Commission on Education Incorporated, and the Court granted leave for the group to make both oral and written submissions. In Transcript of Proceedings, *Roadshow Films v iiNet Ltd* [2011] HCATrans 323, there were six applications for intervention and two such applications were granted. The Australian Performing Rights Association Limited and Communications Alliance Limited were granted leave to make both oral and written submissions.

<sup>13</sup> Caldeira and Wright (n 7) 784.

<sup>14</sup> Paul Collins and Lisa Solowiej, 'Interest Group Participation, Competition, and Conflict in the U.S. Supreme Court' (2007) 34(2) *Law & Society Inquiry* 956 citing Joseph Kearney and Thomas Merrill, 'The Influence of Amicus Curiae Briefs on the Supreme Court' (2000) 148 *University of Pennsylvania Law Review* 743 <doi.org/10.2307/3312826>; Alexander Wohl, 'Friends with Agendas: Amicus Curiae Briefs May Be More Popular Than Persuasive' (1996) 82 *American Bar Association Journal* 46.

contrast warrants investigation, to identify the possible reasons behind these differences and what these can tell us about judicial decision-making in the respective jurisdictions.

The variation in *amicus* filing between the two Courts can in part be explained by the differences in leave requirements. In Australia, the High Court has complete discretion to grant or deny *amicus* leave to intervene.<sup>15</sup> Typically, *amicus* make an oral application for leave to intervene at the start of a hearing. The Court rarely (if ever) provides reasons for granting or refusing leave to intervene.<sup>16</sup> Furthermore, there is very little guidance in the Rules of the Court as to the processes and procedures of *amicus* filing.<sup>17</sup> It is, therefore, a high-risk strategy for interested individuals or groups.

In contrast, the US Supreme Court provides clear rules as to the types of briefs that may be filed (i.e. one that ‘brings to the attention of the Court relevant matters not already brought to the attention of the Court’).<sup>18</sup> Individuals or organisations that seek to appear as *amicus* must obtain permission from both parties to the litigation.<sup>19</sup> If either party refuses, the prospective *amicus* may present a motion for leave to file a brief to the Court, and this is rarely refused.<sup>20</sup>

## Case studies

### *Tasmanian Dam Case* and *Massachusetts v EPA*

By way of background, the *Tasmanian Dam Case* is a landmark constitutional and environmental decision.<sup>21</sup> It concerned a Commonwealth challenge to the Tasmanian Government’s proposed hydroelectric dam on the Gordon River in Tasmania. The case dealt with various constitutional issues, including the proper interpretation of the external affairs power in Section 51(xxix) of the *Constitution*. The Court found 4 to 3 in favour of the Federal Government, with each justice writing a separate opinion.<sup>22</sup>

*Massachusetts v EPA* was—and remains—a landmark environmental decision, as the first case where the US Supreme Court recognised climate change.<sup>23</sup> While it was a significant victory for environmentalists, the issues were narrow.<sup>24</sup> The Court was tasked to consider whether the Environmental Protection Authority (EPA) had the statutory power to regulate carbon dioxide and other greenhouse gases from motor vehicles. The Court found that the EPA did have statutory power to regulate pollution from motor vehicles, and that they were obligated to do this.

### Legalism as an approach to adjudication in the case studies

This section argues that the Australian High Court in the *Tasmanian Dam Case* assumed the rhetoric of strict legalism. By contrast, the US Supreme Court in *Massachusetts v EPA* did not adopt the same approach. The historical roots of the two Courts provide context to these approaches.

In the *Tasmanian Dam Case*, the justices staunchly affirmed their allegiance to legalism. This was particularly evident in the opening remarks in Gibbs CJ’s judgment. Chief Justice Gibbs started by

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<sup>15</sup> Williams (n 9) 381 citing *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan J).

<sup>16</sup> Mark Moshinsky and Kim Rubenstein, ‘Amicus Applications in the High Court – Observation and Contemporary Practice’ (Conference Paper, Gilbert + Tobin Constitutional Law Conference, 15 February 2013) 5.

<sup>17</sup> See, for example, *High Court Rules 2004* (Cth) r 44.04.

<sup>18</sup> See, for example, *Supreme Court of the United States Rules* USC r 37 (2017).

<sup>19</sup> Caldeira and Wright (n 7) 784.

<sup>20</sup> *Ibid.*

<sup>21</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.

<sup>22</sup> Justices Mason, Murphy, Brennan, and Deane were in the majority. Justices Wilson, Dawson, and Chief Justice Gibbs were in the minority.

<sup>23</sup> Jonathan Cannon, ‘The Significance of *Massachusetts v EPA*’ (2007) 93 *Virginia Law Review* 53, 53.

<sup>24</sup> *Ibid.*

asserting that the Court had adopted a methodology dictated by legalism, then pre-emptively refuted any potential allegation that the Court was undertaking policymaking. He said:

The questions concern the validity of certain Commonwealth Acts, regulations and proclamations ... They are *strictly legal questions*. The Court is in no way concerned with the question whether it is desirable or undesirable, either on the whole or from any particular point of view, that the construction of the dam should proceed.<sup>25</sup>

Other justices provided similar remarks qualifying the Court's role, affirming a doctrine of legalism. Justice Wilson emphasised that:

although the subject matter of the actions before the Court provides the occasion for much political controversy, *the role of the Court is wholly divorced from that controversy*. The questions which have been referred to it are strictly legal questions.<sup>26</sup>

Justice Deane also confirmed in his judgment that the Court's role was to decide 'questions of law' only and such questions were to be addressed 'in accordance with the legal method and legal principle'.<sup>27</sup> Even many years later, in 2015, former High Court Justice Sir Anthony Mason—writing extrajudicially—refuted 'as strongly as ... [he] can' any suggestion that the justices in the *Tasmanian Dam Case* were concerned with policy.<sup>28</sup> That Sir Anthony remained concerned with upholding the High Court's appearance of legalism 30 years after the case was decided indicates the strength of his conviction that this was the correct approach.

In contrast, in *Massachusetts v EPA* the US Supreme Court plainly considered 'non-legal' information and broader policy considerations. For example, Justice Stevens—who authored the majority judgment—relayed expert opinion in his opening remarks:

A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related.<sup>29</sup>

Justice Stevens then proceeded to cite concerns of states, local government, and private organisations in regards to global warming.<sup>30</sup> This shows that the US Supreme Court was—and presumably remains—less concerned with presenting an appearance of strict adherence to legalism.

## The reception of *amicus* in these case studies

Comparing the experience of the *amicus* in the respective Courts allows us to reflect on the Courts' approaches to adjudication.<sup>31</sup> This section examines how *amicus* participation in the *Tasmanian Dam Case* and *Massachusetts v EPA* indicated the Courts' allegiances (or otherwise) to their methods of legalism.

The number of *amicus* submissions made—and the ease of obtaining leave to make such submissions—can reflect a Court's acceptance or rejection of a methodology of legalism. On the one hand, a narrow approach to *amicus* indicates that a Court understands its role to be legalistic: that is, to adjudicate the dispute between the immediate parties according to the plain and natural meaning of the text. According to this approach, the perspective of external stakeholders would be an unnecessary distraction, undermining the Court's public image as an apolitical institution.<sup>32</sup> On the other hand, a broad approach to *amicus* submissions indicates that the Court perceives consideration of external stakeholders as

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<sup>25</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1 ('Gibbs CJ') (emphasis added).

<sup>26</sup> *Ibid* ('Wilson J') (emphasis added).

<sup>27</sup> Galligan (n 3) 242–243.

<sup>28</sup> Sir Anthony Mason, 'Reflections on Legal Issues in the Tasmanian Dam Case' (2015) 24(1) *Griffith Law Review* 16, 16 <doi.org/10.1080/10383441.2015.1026300>.

<sup>29</sup> 549 US 497, 497 (2007).

<sup>30</sup> *Ibid*.

<sup>31</sup> Williams (n 9) 365.

<sup>32</sup> *Ibid*.

intrinsic to its adjudicative role.<sup>33</sup> Arguably, a broad approach to *amicus* reflects an implicit rejection of legalism.

In the *Tasmanian Dam Case*, the Court was reluctant to grant leave to a single group applying for leave to be heard as *amicus*; in contrast, *amicus* submissions were filed almost routinely in *Massachusetts v EPA*. This indicated that the judges in the Australian High Court—certainly at that time—appeared to adopt a method of strict legalism, while their American counterparts did not.

### *Amicus in the Tasmanian Dam Case*

Examination of the transcript of the *Tasmanian Dam Case*—which has only recently become publicly available<sup>34</sup>—reveals much about the High Court’s approach to *amicus*. Focusing on the transcript rather than the judgment provides a new perspective on a heavily researched case.<sup>35</sup>

In the *Tasmanian Dam Case*, the Wilderness Society applied for leave to intervene as *amicus*. The Wilderness Society had been campaigning against the Franklin Dam for many years, vowing that they would ‘leave no stone unturned, including no legal stone’.<sup>36</sup> Consequently, the Wilderness Society leapt at the opportunity to be involved when the Commonwealth Government brought a case which could potentially halt the construction of the dam. The group briefed Michael Black QC—a well-known and respected barrister—to take carriage of their application.<sup>37</sup>

The Court affirmed its method of legalism in response to the Wilderness Society’s application for intervention, waiting until the parties had finished making submissions before hearing from Mr Black. On the first day of hearing, Mr Black announced his appearance and sought leave to make submissions as *amicus*. Chief Justice Gibbs asked, almost immediately, ‘On what grounds?’<sup>38</sup> Mr Black responded that the Wilderness Society could provide ‘a new perspective to the argument’.<sup>39</sup> To this, Gibbs CJ replied ‘[t]he only perspective we want is *the perspective which the Constitution requires*’ (emphasis added).<sup>40</sup> Thus, Gibbs CJ considered it important to preface any intervention with a statement of the Court’s fealty to legalism. This indicated concerns that *amicus* submissions providing a ‘new perspective’ could challenge the Court’s professed adjudicative method.

Consideration of the context and social meanings behind the Wilderness Society’s application further illuminates the Court’s approach and method. Judges do not only declare the law, but are the ‘exemplar of law’.<sup>41</sup> This role extends to the procedures and processes of the Court: the ceremony, performance, courtrooms, and costuming.<sup>42</sup> These tangential symbols and practices are all part of the legitimating process of judicial review, dictating a ‘right’ or proper process for the exercise of legal force. Consequently, examining more than just the words of the oral argument provides a complete analysis of the communicative process between the *amicus* and the Court.<sup>43</sup> This follows the approach of

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<sup>33</sup> Ibid.

<sup>34</sup> Rebecca LaForgia, ‘Limitlessness in Australian Constitutional Legal Narrative: The Memory of Black’s Address in the Tasmanian Dam Case’ (2015) 24(1) *Griffith Law Review* 41, 45 <doi.org/10.1080/10383441.2015.1021484>.

<sup>35</sup> Cf LaForgia (n 34).

<sup>36</sup> Martin Clark, ‘Experiences of Coming to Law: An Interview with Bob Brown on the Tasmanian Wilderness Society as a Client in the *Tasmanian Dam Case*’ (2015) 24(1) *Griffith Law Review* 58, 60 <doi.org/10.1080/10383441.2015.1035426>.

<sup>37</sup> Michael Black, ‘The Tasmanian Dam Case: An Advocate Memoir’ (2015) 24(1) *Griffith Law Review* 22 <doi.org/10.1080/10383441.2015.1047482>.

<sup>38</sup> Ibid 31.

<sup>39</sup> Transcript of Proceedings, *Commonwealth v Tasmania* (High Court of Australia, Gibbs CJ, Mason, Murphy, Wilson, Brennan, Deane and Dawson JJ, 31 May 1983) (*Tasmanian Dam Case Transcript*).

<sup>40</sup> Ibid.

<sup>41</sup> Milner Ball, ‘The Play’s the Thing: An Unscientific Reflection on Courts under the Rubric of Theatre’ (1975) 28(1) *Stanford Law Review* 81, 109 <doi.org/10.2307/1228228>.

<sup>42</sup> Ibid.

<sup>43</sup> Ryan Allen Malphurs, ‘Making Sense of Judicial Sensemaking: A Study of Rhetorical Discursive Interaction at the Supreme Court of the United States’ (PhD Thesis, Texas A&M University, 2010) 4.

LaForgia, who in her reading of the *Tasmanian Dam Case* transcript argues that court proceedings are a ‘performance imbued with symbolic socio-political meanings’.<sup>44</sup>

The physical setting of the Court and the presence of the *amicus* throughout the hearing is pertinent. After the initial interaction outlined above, the Court reserved its decision to grant or deny the Wilderness Society leave. Mr Black and his team were placed on a small table behind the main bar table, where they sat waiting, robed and ready for the next six days of hearing.<sup>45</sup> The physical presence of Counsel and their instructing solicitors waiting to apply for leave to intervene would be plain, as would the presence of the environmental protestors in Court.<sup>46</sup> This would have been a persistent physical reminder to the judges of the highly political nature of the matter, as well as the far-reaching consequences of their decision.

The Court addressed Mr Black on the second last day of hearing, when Gibbs CJ recalled his ‘existence’, saying ‘we have not forgotten your existence, Mr Black. We will deal with your application tomorrow’.<sup>47</sup> The following day, Mr Black finally made an oral application to be heard as *amicus* and was granted leave to intervene. The long delay was significant. Requiring the entire litigation team of the Wilderness Society to wait for so many days underscored to the parties and observers that the justices wield complete control over the courtroom: all submissions and interventions are allowed only at the discretion of the Court. This was evidence of the Court maintaining the appearance that black letter legalism was sustained throughout the proceedings.

### *Amicus Curiae* in *Massachusetts v EPA*

By contrast, in *Massachusetts v EPA*, there were many written *amicus* submissions but no oral submissions. As neither party objected to *amicus* filing, any interested individuals and groups could file without leave of the Court. In total, there were 34 written submissions from *amicus*, with a combined length of over a thousand pages. A wide range of interests were represented, including private companies,<sup>48</sup> environmental lobby groups,<sup>49</sup> and government interests.<sup>50</sup> Some *amicus* had a direct interest in the case,<sup>51</sup> while others had a more remote interest.<sup>52</sup> It is significant that there were no oral submissions from *amicus*. In an oral submission, an *amicus* has the opportunity to make more detailed arguments and to interact with the judges; judges have the opportunity to ask questions, and *amicus* have the opportunity to clarify or expand on arguments that the judges find compelling.

The approach of the US Supreme Court indicated that the Court was somewhat more at ease with its policymaking role. However, it is important to consider not only the volume of filing, but also the likelihood (or otherwise) that the justices will take into account the *amicus* submissions in their decision-making. Given the volume of material, it is unlikely that the judges were able to assess (or even read) all the submissions. This assertion is supported by qualitative research that indicates that justices rely on their clerks to sift through *certiorari* applications, which are applications for judicial

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<sup>44</sup> LaForgia (n 34) 47 citing James Boyd White, *Hercules’ Bow: Essays on the Rhetoric and Poetry of the Law* (University of Wisconsin Press, 1985) 117.

<sup>45</sup> Black (n 37) 31–32.

<sup>46</sup> *Ibid* 32.

<sup>47</sup> *Tasmanian Dam Case Transcript* (n 39).

<sup>48</sup> Aspen Skiing Company, ‘Brief of Aspen Skiing Company Amicus Curiae in Support of Petitioners’, Submission in *Massachusetts v Environmental Protection Agency*, No. 05-1120, 31 August 2006.

<sup>49</sup> See, for example, American Littoral Society et al, ‘Brief of Amici Curiae Ocean and Coastal Conservation Interests in Support of Petitioners’, Submission in *Massachusetts v Environmental Protection Agency*, No. 05-1120, 31 August 2006.

<sup>50</sup> See, for example, State of Arizona et al, ‘Brief of the States of Arizona, Iowa, Maryland, Minnesota, And Wisconsin, As Amici Curiae in Support of Petitioners’, Submission in *Massachusetts v Environmental Protection Agency*, No. 05-1120, 31 August 2006.

<sup>51</sup> See, for example, Carol M. Browner et al, ‘Brief of Former EPA Administrators Carol M. Browner, William K. Reilly, Douglas M. Costle and Russell E. Train as Amici Curiae in Support of Petitioners’, Submission in *Massachusetts v Environmental Protection Agency*, No. 05-1120, 31 August 2006.

<sup>52</sup> See, for example, National Council of the Churches of Christ in the U.S.A et al, ‘Brief of the National Council of the Churches of Christ in the U.S.A., Church World Service, and National Catholic Rural Life Conference as Amici Curiae in Support of Petitioners’, Submission in *Massachusetts v Environmental Protection Agency*, No. 05-1120, 31 August 2006.

review by a higher court.<sup>53</sup> It could be inferred that the justices would take a similar approach in examining *amicus* filings. Hence, the volume of filing may not correlate with the ability of *amicus* to challenge the Court, or at least inform it further.

## *Amicus*' challenge to the legitimating rhetoric of legalism in the Australian High Court

### Legitimacy and legalism

As judges are unelected—being appointed and tenured—and wield power to invalidate enactments of a democratically elected parliament, it is critical that the Court is perceived as legitimate.<sup>54</sup> At its most basic, the law and legal power can be understood as a 'force', which is proclaimed by judges.<sup>55</sup> Without a legitimating authority behind the exercise of this force, it becomes only illegitimate violence.<sup>56</sup>

The US Supreme Court and the Australian High Court have taken different paths to legitimacy. For the US Supreme Court, establishing legitimacy was not so difficult; it had a long history, strong constitutional roots, and a culture of support for judicial review more generally.<sup>57</sup> By contrast, when the High Court of Australia was established in 1903, it inherited a political culture from Britain which favoured parliamentary supremacy and a restricted role for the Courts.<sup>58</sup> Australia was also missing the 'higher law' background which was significant in legitimating judicial review in the United States.<sup>59</sup> The early Australian High Court needed to establish public prestige to ensure that its decisions were respected. It approached this challenge by adopting the public rhetoric of a strict and complete legalism.<sup>60</sup>

### *Amicus* as a challenge to the legitimating rhetoric of legalism

The legitimating rhetoric of legalism is powerful but remains open to challenge. This section argues that the *amicus* submissions from Michael Black QC in the *Tasmanian Dam Case* challenged the Court's professed method of legalism in two ways. First, Black's submission that 'words are inadequate' challenged legalistic method, which relied only on words. Second, Black advocated for a creative reinterpretation of words and concepts, which prompted the justices to look beyond the 'plain' and 'natural' meaning. Ultimately, Black's submissions chipped away at the Court's established practice and the foundation of the Court's authority.

The first insight is that Black made the submission that 'words are inadequate' to capture the truth and beauty of the Franklin River. This was a controversial submission in a legal context which, of course, relied solely on words.<sup>61</sup> As Black argued that words cannot adequately describe the beauty of the river, he requested leave to admit into evidence a set of photo albums containing pictures of the Franklin River taken by photographer Peter Dombrovskis.<sup>62</sup> Dombrovskis had travelled up the river on a raft, taking a series of photographs to showcase it to the justices. Black insisted that 'this is a very special

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<sup>53</sup> David Stras, 'The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process' (2007) 85 *Texas Law Review* 947.

<sup>54</sup> Sandra Bern, 'Constituting a Nation: Adjudication as Constitutive Rhetoric' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (The Federation Press, 1996) 84.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> Galligan (n 3) 71.

<sup>58</sup> See generally Galligan (n 3).

<sup>59</sup> *Ibid* 11.

<sup>60</sup> *Ibid* 71.

<sup>61</sup> LaForgia (n 34) 42.

<sup>62</sup> *Tasmanian Dam Case Transcript* (n 39).

part of Australia and, in the crudest way, only a photograph can perhaps tell more than words. And, Your Honours *only have words*'.<sup>63</sup>

In making this application, Black prompted the judges to focus their minds beyond the words of the law, to imagine the river which, he submitted, cannot be described, only experienced. Unfortunately for the Wilderness Society, Gibbs CJ rejected Black's request to have the photographs admitted as evidence, stating that the justice's minds would be 'inflamed with irrelevancies'.<sup>64</sup> The Court—by maintaining close control over what is relevant or irrelevant—was attempting to define what is 'legal' and 'non-legal' information, hence maintaining the appearance of strict legalism.

In the absence of photographs of the wilderness, Black attempted to evoke the idea of beauty through poetic description. LaForgia argues that the tone of Black's submission was 'one of limitation' which 'creates a humility in his address' and 'gives the address's tone a sense of groundedness'.<sup>65</sup> Black said:

the value of wilderness and of natural beauty to the whole of the world exists, not only because that thing exists, but because it exists as a living and enduring resource. Therein lies its value and therein is its specialty. There will be new painters, there will be new artists and architects and man can create, but only nature can create what is part of the world's natural heritage.<sup>66</sup>

Black attempted to create a sense of urgency and impending crisis if the justices did not take into account the Wilderness Society's submissions. Black created the impression that with 'only words' the judges would be unable to understand the true beauty of the river and the enormity of their decision.

The second insight is that Black's submissions focused on the protection of the Franklin River as a matter of 'international concern'. Black accepted that the external affairs power under s 51(xxix) of the *Constitution* only applied to treaties of 'international concern'; however, he provided a broad and evocative interpretation of what could be considered 'international'. He introduced the idea of an 'international community' to which we are all members and to which we all bear responsibility. Individuals are connected with nature, Black argued, and if nature is destroyed or damaged, the entire international community is affected.<sup>67</sup> LaForgia describes this as a 'limitless' connection between individuals and nature.<sup>68</sup>

Black used poetic and evocative language to suggest a connection between nature and 'mankind', challenging the justices to look beyond black letter interpretation of the law: 'May we paraphrase something that John Dunne [sic] said nearly 400 years ago? "Any loss of man's heritage diminishes me because I am involved in mankind"'.<sup>69</sup> Black prompted the justices to reimagine the 'external affairs' power as encompassing a matter of international concern: the connection between self and nature. This is a 'limitless, evocative and difficult concept to understand or comprehend',<sup>70</sup> a far cry from the 'plain' and 'natural' meaning of the text. In doing so, Black called upon the justices to reimagine the perceived limits of their role and depart from the Court's official doctrine of strict legalism.

## Conclusion

An examination of *amicus* intervention in the two Courts provides insight into the judicial decision-making process. This essay finds that the Australian High Court's narrow and guarded approach to *amicus* represented an effort to maintain its image as an apolitical institution and, in turn, legitimate its power. It argues that the *amicus* submissions in the *Tasmanian Dam Case* challenged the Court's

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<sup>63</sup> Ibid (emphasis added).

<sup>64</sup> Ibid.

<sup>65</sup> LaForgia (n 34) 42.

<sup>66</sup> *Tasmanian Dam Case Transcript* (n 39).

<sup>67</sup> LaForgia (n 34) 44.

<sup>68</sup> Ibid.

<sup>69</sup> *Tasmanian Dam Case Transcript* (n 39) 743.

<sup>70</sup> LaForgia (n 34) 45.

legitimacy by challenging its adherence to strict legalism. The High Court of Australia's approach is striking when compared to that of the US Supreme Court. This essay suggests that an insight into judicial decision-making can be gleaned from the behaviour and experience of *amicus*. As a relatively understudied area of judicial decision-making—particularly in the Australian context—there is scope for future research on *amicus curiae* at all levels of the Australian court hierarchy.

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