ASIC AS AMICUS CURIAE AND WHEN TO INTERVENE

A Paper Delivered by Mark A Robinson, Barrister,
To an ASIC Seminar in Sydney on 25 July 2007 - Revised

Introduction

The Australian Securities and Investments Commission ("ASIC") has long sought to intervene in legal proceedings as an *amicus curiae*, which is Latin for "*friend of the court*". It is ascribed to a person not a party to the litigation who volunteers or is invited by a court to give advice or make submissions to the court upon some matter pending before it.

An amicus seeks to assist the court, but never becomes a party to the proceedings.

ASIC and its predecessor has wide experience of both appearing as amicus under the general law and as an intervener party pursuant to section 1330 of the *Corporations Act 2001(Cth)* in a variety of proceedings. It normally seeks to appear in circumstances where there would otherwise be no contradictor or proper contradictor before the court to assist it or where the issues are of fundamental or central importance to the maintenance of the Corporations Act or the ASIC Act.

This paper does not cover the special position in the Federal Court of Australia as described in *Sharman Networks Ltd v Universal Music Australia Pty Limited* (2006) 155 FCR 291 ([2006] FCAFC 178) (Branson, Lindgren and Finkelstein JJ) which deals with the "intervener" provisions of Order 6 rule 17 and Order 52 r 14AA of the *Federal Court Rules* and which add another layer to considerations of whether to become amicus or a party to the proceedings. The Full Court there held that rather than seek to appear as amicus curiae, "non-lawyer entity" applicants (including public bodies acting in the public interest, such as ASIC, see [7]-[9]) should ordinarily apply to intervene under the new Federal Court rules which establishes a "comprehensive framework" (at [12]). The rules preserve the traditional amicus approach (of the court being assisted by a disinterested lawyer seeking to appear).

General Principles

Relevant principles relating to an application to intervene as amicus curiae may be summarised as follows:

a. An application for intervention as amicus curiae does not involve the exercise of statutory power or the contribution of the party seeking amicus to the official Court record at all (*Corporate Affairs Commission v Bradley* [1974] 1 NSWLR 391 at 398F to 399C (Reynolds, Hutley and Glass JJA).

b. There is nothing in the *Supreme Court Act* 1970 or the *Uniform Civil Procedure Rules 2005* or the various *Corporations Law Rules* inconsistent with the Court inviting and/or receiving submissions from

persons who are not parties to the instant proceeding. "The Court has invited and/or received submissions from relevant regulatory authorities in relation to, for example, the effect of the *Corporations Law*, the *Real Property Act* 1900 and other legislation. Properly exercised, such a power can be of significant assistance to [an appellate] court..." - *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 at 381B (per Mahoney P with Waddell AJA agreeing).

c. An amicus curiae may appear as a friend of the court, as an adviser of the court, and to make suggestions as to matters appearing on the record or in matters of practice. An amicus curiae has no rights in the matter at all and he or she can file no pleadings or motions of any kind and cannot prosecute an appeal - *CAC v Bradley, ibid*.

d. The hearing of an amicus curiae is "entirely in the Court's discretion" - *Levy v State of Victoria* (1997) 189 CLR 579 (per Brennan CJ at 604.3).

e. The footing upon which an amicus curiae is heard is that the person is willing to offer the Court a submission on law or relevant facts which will assist the Court in a way in which the Court would not otherwise have been assisted - *Levy v State of Victoria* (1997) 189 CLR 579 (per Brennan CJ at 604.4).

f. An amicus will be heard when the Court is of the opinion that it will be significantly assisted thereby, provided that any cost to the parties or any delay consequent on agreeing to hear the amicus is not disproportionate to the assistance that is expected - *Levy v State of Victoria* (1997) 189 CLR 579 (per Brennan CJ at 604.8 - 605.2)

g. An amicus is often granted when issues of public policy are involved - *R v Murphy* (1986) 5 NSWLR 18 (Hunt J) at 23G.

h. An example of a statutory corporation having responsibility for administration of the relevant legislative scheme being granted amicus curiae is *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265 at 268 (where the Australian Securities Commission was granted amicus leave on the question of the proper construction of the statutory demand procedure in section 459 of the then *Corporations Law*).

i. In *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377 at 381C-D (per Mahoney P with Waddell AJA agreeing), the Court of Appeal considered that whether leave to intervene should be granted must be decided having regard to all the circumstances of the instant case and that, ordinarily, four matters at least require consideration, namely:

    i. whether the intervention is apt to assist the Court in deciding

the instant case;

ii. whether it is in the parties' interest to allow the intervention;

iii. whether the intervention will occupy time unnecessarily; and,

iv. whether it will add inappropriately to the costs of the proceedings.

There is a most entertaining and illuminating discussion of some of these principles by the High Court of Australia in *Commonwealth of Australia v Alinta Limited* [2007] HCATrans 552 (2 October 2007) in the first half of the transcript on the first day. The Commonwealth Attorney General found himself an appellant in a Constitutional case but without an active contradictor as the underlying matter had settled. The High Court permitted (by majority) three barristers to appear as amicus curiae to put an opposing position before the Court.

The choice for ASIC is normally whether to seek to appear as amicus or whether to intervene and take the plunge, as it were and seek to appear as a party (with the costs and other exposure and burdens that this entails). The mere fact of the existence of section 1330 of the *Corporations Act 2001*(Cth) permitting intervention at any time as of right gives any Commission amicus application considerable force. Section 1330 provides:

1330 ASIC's power to intervene in proceedings

(1) ASIC may intervene in any proceeding relating to a matter arising under this Act.

(2) Where ASIC intervenes in a proceeding referred to in subsection (1), ASIC is taken to be a party to the proceeding and, subject to this Act, has all the rights, duties and liabilities of such a party.

(3) Without limiting the generality of subsection (2), ASIC may appear and be represented in any proceeding in which it wishes to intervene pursuant to subsection (1):

(a) by a staff member of ASIC; or

(b) by a natural person to whom, or by an officer or employee of a person or body to whom or to which, ASIC has delegated its functions and powers under this Act or such of those functions and powers as relate to a matter to which the proceeding relates; or

(c) by solicitor or counsel.

The scope of the intervention power is mainly limited by the nature and scope of the Commission's "wishes". The provision is unusual and extraordinarily wide. ASIC may participate in proceedings as a party anytime it wishes to. Any limits to this power might derive from a court's construction as to when and in what manner the Commission may participate as a party and as at what stage and to what extent the Commission might actually participate (see, for example, *Ian L Struthers, Liquidator of P.A.C.I. Pty Ltd (No. 3)* (2005) 64 NSWLR 392 at [18] (Brereton J) where the NSW Supreme Court expressed the view that the expression "*a proceeding*" in section 1330 relates to an entire litigation, rather than an interlocutory step in that litigation).

While the power of the Commission to "wish" to intervene as a party is very wide, it

remains a statutory power of the Commission that is not unfettered in that it must be exercised lawfully and within the principles and tenets of administrative law. Appropriate guidelines should be in existence as to the proper manner of the exercise of the power (if they are not already).

There are many published examples of the benefits of ASIC's appearances as amicus curiae (see for example, *Re Advance Bank Australia Ltd (No 2)* 1997) 136 FLR 281 at 286.3 (Santow J) (on a scheme of arrangement to effect a bank merger)) and in other capacities as a party.

The width of the role ASIC's predecessor had to play in the policy and administration of company and securities law was recognised and described by the High Court of Australia in *Broken Hill Proprietary Co Ltd v National Companies & Securities Commission* (1986) 160 CLR 492 at 508.2 and 509.6 (per Mason, Wilson, Brennan, Deane & Dawson JJ). ASIC's intervention is sometimes controversial and it sometimes changes its mind about what it wants to say to a court, see, for example, the estoppel arguments that were dismissed in *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 177 CLR 485 (Mason CJ, Brennan, Dawson, Toohey & Gaudron JJ) (on a scheme of arrangement to convert a company limited by shares to a no liability company). Appellate courts have long sought intervention in controversial proceedings by ASIC – for example, Kirby P invited ASIC to intervene in *Darvall v North Sydney Brick & Tile Co Ltd* (1989) 16 NSWLR 260 at 264F (Kirby P, Mahoney and Clarke JJA) (on directors' fiduciary duties in the context of a takeover offer).

From Here to The Black Stump

One recent example of where the NSW Court of Appeal sought the active appearance of ASIC as amicus curiae was in *Re The Black Stump Enterprises Pty Ltd and Associated Companies* (2005) 228 ALR 591 ([2005] NSWCA 480) (Santow & Bryson JJA & Young CJ in Eq) and in *Re The Black Stump Enterprises Pty Ltd and Associated Companies (No 2)* [2006] NSWCA 60.

In this litigation, professional liquidators of nine companies in a restaurant chain known as the Black Stump Restaurants sought a court approved "pooling" of the assets of the nine companies on their voluntary winding up. The affairs of the companies had been so intermingled that it was difficult for the liquidator to establish ownership of and entitlements to the remaining assets.

While pooling of asset cases are not rare, what was unusual about this case was that the liquidators sought court sanction of an entirely ***new*** method of pooling – one that did not involve an actual vote by the creditors at any stage. The creditors (many of them employees) were merely informed that the liquidator "intended" to ask for a court approved pooling arrangement in the future and he afforded them an opportunity to object. They were given some documents. However:

> "… none of those documents gave potential creditors or actual creditors much detail of the various possibilities that were open to them, apart from the possibility that: (a) there might have been a partnership between the nine companies; or (b) some of them; or (c) the companies could just have been a

> business name used by Mr Parsonage; or (d) that some of the companies may have no assets and others might be crammed full of assets so that some creditors would have been paid 100 cents in the dollar if they could establish their claim against one of the latter groups. There was also no specification as to how the distribution would be made. There was no indication of the difference between giving a pro rata distribution from pooled assets and a pro rata distribution from the company against which a creditor might have to chose to lodge a proof of debt.
>
> … it does not seem to me that there was any proper information given that a person could readily absorb which would enable him or her to be able to chose whether they would assent to a pooled arrangement or not" [2005] NSWCA 480 at [6] & [7].

The application had been made before Barrett J and he dismissed the proceedings. He held that there were five possible ways of approaching the problem. There could be:

(1) a scheme of arrangement under Part 5.1 of the *Corporations Act*;
(2) a compromise under s 477(1)(c) as reinforced by s 506(1)(b);
(3) an arrangement under s 510;
(4) resort to s 447A if applicable; and
(5) a deed of company arrangement where a Part 5.3A administration is in progress under Division 10 of Part 3 5.3A.

Outside this, there was no power in the Court to make a pooling of assets and as the application did not fall within any of those five heads, it was dismissed – [2005] NSWCA 480 at [11].

The liquidators appealed and, at the interlocutory hearings, in the absence of any contradictor and in the face of a novel but important matter, Justice Santow specifically invited ASIC to appear as amicus at the final hearing in the Court of Appeal. ASIC accepted the invitation and appeared.

ASIC took the position that the learned judge below was correct and that a pooling of assets could not be undertaken in this fashion as there was no power in the Court properly invoked. It was also put that the liquidator at all times had to power to effect a practical solution (first when they were administrators and now as liquidators) and they were in a bind entirely of their own creation.

Very detailed submissions were filed by ASIC analysing the procedure adopted by the liquidators, on other possible procedures and on the jurisdictional questions.

The Court of Appeal agreed.

It held that the five methods of pooling identified by the Courts so far were each "limited gateways" that been identified "by a sort of co-operation between the advocate for the liquidator and the judge as to finding a cheap and viable route through the maze of the provisions of the corporations law." [2005] NSWCA 480 at [15]. One cannot merely say that the Court has power to pool assets (at [16]) and the Court cannot ordinarily override individual rights of creditors (at [17]).

However, if one was to tackle the problem with the assistance of the Court, one must (at a minimum) obtain the positive consent of the creditors involved (at [18]). It was held that "consent is something more than mere acquiescence" (at [22]).

The Court then explored further possible means of achieving a court-sanctioned pooling of assets and held that the appellant liquidators could not adopt those means on the appeal and that the appeal was hopeless.

ASIC was thanked profusely by the Court for its contribution as amicus and for the assistance it provided. The Court was even minded to order that the appellant pay the costs of the amicus! As the appeal was considered a hopeless attempt at a test case, the Court ordered the appellant's solicitors to show cause as to why they should not be ordered to pay the liquidators' costs personally (pursuant to section 99 of the *Uniform Civil Procedure Act 2005* (NSW)).

In the second case ([2006] NSWCA 60), the Court was unable to establish as a matter of fact or inference whether it was the clients or the solicitors who were off on a frolic in the proceedings (at [11]). Since there were professional liquidators involved, the Court was prepared to infer that they "had some knowledge of the facts and circumstances surrounding the application and the appeal" and it was difficult to infer that the solicitors alone were off on a frolic.

If it had been an ***unsophisticated*** client, the costs matter would have been different. The Court sent up a "red light warning" in the following terms (at [14]):

> "The fact that this Court was sufficiently concerned about the matter to ask the solicitor to show cause should serve as a red light warning to the profession that this Court is very concerned about dividends to creditors in a winding up being whittled away by expensive legal proceedings which have little chance of success. If, in a future case, the facts clearly showed that a solicitor had given very bad advice to an unsophisticated client who had accepted it without question with the result that the company concerned had incurred substantial legal costs, that may well be a case where the Court would, after giving the solicitor due notice to explain, make an order that the solicitor pay the costs personally."

No order as to costs was made (see also David Topp "*Costs orders against solicitors: Beyond the Black Stump*" (May 2007) 45 *Law Society Journal* 62).

When to Argue, Intervene or Appear as Amicus for a Government Defendant or Respondent in Judicial Review Proceedings

A continuing and difficult issue for government or public sector defendants in civil litigation is to know when, and if so, to what extent, to oppose an applicant in judicial review proceedings as an active party.

In Court proceedings, if the defendant is a statutory decision-maker (whether independent from his or her employer in this regard or not) the choice is usually to file an ordinary appearance and to contest the proceedings (asserting that the decision was

valid or correct in law). That decision exposes the agency to full costs orders and, possibly, judicial criticism.

Other options might include:

1. To put on a submitting appearance (Rule 6.11(1) of the *Uniform Civil Procedure Rules 2005* (NSW)) and let another interested party play the role of the contradictor (only available if there are opposing applications before the original decision-maker and where both or some of them are also joined as parties). Leave can always be sought later to appear and play an active role if required (Rule 6.11(2) *UCPR*);

2. To examine the alleged grounds of review and accept them and agree or consent to orders setting aside the impugned decision (for those grounds pleaded or for other reasons); the applicant/plaintiff would expect an award of costs. However, if a government agency consents to vitiating orders without a hearing on the merits of the judicial review case taking place, the proper order is for each party to pay their own costs – provided the matter was effectively settled or was rendered futile and the agency acted reasonably up to that date (*Re Minister for Immigration and Ethnic Affairs; Ex parte Lai Qin* (1997) 186 CLR 622 esp at 624.5 and 625.6 (McHugh J)); or,

3. To accept that the decision is invalid (or affected by jurisdictional error) and re-make the decision (applying *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597) either before litigation has commenced or by consenting to the applicant discontinuing pending litigation (without any order as to costs);

4. To determine that a new decision may be made as an exercise of the *Interpretation Act* power to make a decision "from time to time as occasion requires" (provided there is no contrary intention in the Act – eg: *Kabourakis v Medical Practitioners Board of Victoria* [2005] VSC 493 (Gillard J)) and *Allianz Australia Insurance Limited v Crazzi* [2006] NSWSC 1090 (Johnson J) – again, either as a term of settlement of pending litigation or before proceedings have commenced.

In judicial review proceedings, the defendant may be a tribunal or a quasi-judicial body, particularly one that hears evidence or submissions from two or more parties, or undertakes or conducts hearings and makes an impartial and binding determination (such as the NSW Workers Compensation Commission and the NSW Motor Accidents Authority).

Ordinarily, the tribunal or entity would not seek to participate in Court as an active party where there is an active contradictor based on the principles in *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13 at 35 & 36. The rationale is that there is a risk that such participation might endanger the important perception of impartiality of the tribunal or its members if and when the subject matter of the impugned decision comes before it again upon remittal (*ibid* at page 36)

The options for an active role are:

1. If there is no or no adequate contradictor at the hearing, consider whether the Attorney-General should be joined as an active party (who can appeal if the Court makes the wrong decision) (See, eg, *Police Integrity Commission v Shaw* [2006] NSWCA 165 (per Basten JA) at [39]–[43]);

2. Appear at the hearing and make submissions only going to the tribunal's powers, functions guidelines and procedures (as permitted by *Hardiman*);

3. Maintain (or file, if not already filed) a submitting appearance and do not turn up (or appear once as a courtesy to the Court and seek to be excused from further attendance at the hearing); or

4. Put on a submitting appearance, do not appear but maintain a "watching brief" at court in order to monitor the progress of the hearing and, if necessary, speak to the solicitors and/or counsel for the relevant parties at a convenient juncture about particular issues or facts that might arise (perhaps, including implications of particular questions from the Bench).

In *Police Integrity Commission v Shaw* (2006) 46 MVR 257 ([2006] NSWCA 165) (per Basten JA) at [39]–[43], the Commission was roundly criticised for appearing, arguing a position as to its jurisdiction to continue to conduct a hearing and for appealing that decision to the Court of Appeal. Basten JA held that the active participation of both the Commission and the Commissioner in the proceedings was of "particular concern" and raised the question whether there could later be a "disinterested inquiry" in the particular matter then before it (at [42]). The Commission was undertaking an inquiry into a former Supreme Court judge as to whether there was any misconduct on the part of the NSW police force in relation to a particular alleged drink-driving incident and a missing blood sample.

See also, *Campbelltown City Council v Vegan* [2006] NSWCA 284 at [54]-[64](per Basten JA with McColl JA agreeing) where the Court held that NSW WorkCover should not have played an active role in the litigation (which should have been run inter-parties) and it should have confined its role to that of an amicus curiae. The Court refused to make any costs order in relation to the Authority.

These cases were recently considered in the context of *Hardiman* in *Ho v Professional Services Review Committee No 295* [2007] FCA 388 at [110]-[114](26 March 2007) (Rares J) and in *Ho v Professional Services Review Committee No 295(No 2)* [2007] FCA 603 (28 March 2007) (Rares J) (NB: these are on appeal to the Full Court of the Federal Court). In that case, the Court held that the Committee, a quasi-judicial tribunal, dealing with Medicare disciplinary matters, should not have appeared and played an active contradictor as by doing so, it gave the appearance of future apprehended bias were the matter to be remitted to it (as formerly constituted). It was held that in future, the Commonwealth should be joined as an active party of the Commonwealth Attorney General should appear to argue as the contradictor.

A creative approach to the issue was displayed in *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224 at [99]-[103] (per Sheller JA, with Priestly and Stern JJA agreeing) where the NSW Court of Appeal held in a solicitor's disciplinary

proceedings, a failure by the Commissioner (made before the commencement of disciplinary proceedings) to provide the solicitor with a copy of the original complaint and to permit him to respond vitiated the later disciplinary proceedings. In so holding, that Court found that the Commissioner's submissions as made in Court unintentionally suggested pre-judgment of the substantive matter (at [102]) and requested that, on remittal, the Commissioner refer the matter out to the Law Society Council for it to further deal with the original complaint (at [103]).

Harmonisation of Australian Administrative Law

In the near future, one might follow with interest the Commonwealth Attorney-General's new-found interest in both Federal ***and*** State administrative law and his proposed "harmonisation" project recently announced (see, his Media Release 113/2007 - 19 June 2007 and his paper given to the 2007 AIAL National Administrative Law Forum in Canberra on 14 June 2007). He is raising his project with the Standing Committee of Attorneys-General. From this we might see harmonising of:

- existing procedures across jurisdictions, for example by implementing a consistent approach to the availability of alternative dispute resolution and mediation;
- rules of standing;
- exemptions to application fees;
- the right to obtain reasons for decisions; and
- the level of assistance provided to unrepresented applicants.

The Attorney has had some success with defamation law and regulation of the legal profession. It is hoped that some gains can be made in administrative law as well.

Thank You