Bond Law Review

Volume 22 | Issue 3 Article 2

8-18-2011

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Abstract
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Keywords
Access To Constitutional Justice, Standing, Locus Standi, Constitutional Litigation, Pape v Commissioner of Taxation

PAPE'S CASE: WHAT DOES IT SAY ABOUT STANDING AS AN ATTRIBUTE OF 'ACCESS TO JUSTICE'?

PETER JOHNSTON*

Introduction

This chapter presents an historic survey of developments in the High Court's jurisprudence concerning standing to sue as an inhibition on deserving claims involving constitutional challenges. It concludes that although standing currently does not present a substantial barrier to access to a constitutional court in a proper case it is still not based on any convincing and coherent basis in principle; rather it is largely a matter of pragmatism and, arguably, discretion.

In the beginning

Dr Graham Taylor and I were among the earliest Australian constitutional scholars to undertake a theoretical analysis of problems regarding standing as a constraint upon one's ability to engage in constitutional litigation[1] In reviewing whatever 'progress' has since been made this chapter may be seen as an exercise in constitutional archaeology. In it I shall adopt something of an empirical approach based on particular case studies that I shall excavate or exhume.

Dr Taylor and I contributed two chapters to a volume of studies on *locus standi* in public law litigation edited by Leslie Stein that was published just over 30 years ago.[2] Taylor addressed individual standing and I was concerned with that of governments. It is interesting, in retrospect, to think that each was considered to be of a separate nature to the other, each operating in its own universe, with apparently no coherent linking constitutional tissue of principle. Neither of us was the first to write about the topic: Geoffrey Lindell, for one, in his ground-breaking masters thesis on

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1 I refrain from using the term 'the freedom to engage' which might be taken to suggest that there is a constitutionally implied right to have the constitution enforced. That might be arguable on the basis of the 'representative government' cases such as *Australian Capital Television Pty v Commonwealth* (1992) 177 CLR 106 but that is certainly open to debate.

2 Graham Taylor, Standing to Challenge the Constitutionality of Legislation, Chapter 6, in Leslie Stein (ed), *Locus Standi* (Lawbook, 1979) 143; Peter Johnston, Government Standing under the Constitution, Chapter 7, ibid, 173.

justiciability[3] had commented upon standing as an aspect of constitutional litigation, including his comparison with US Supreme Court cases. Since Taylor and I published our contributions there have been other more refined and systematic analyses of standing issues, most notably in 1997 by Burmester,[4] Fisher and Kirk,[5] and more recently the comprehensive studies by Evans and Donaghue,[6] and Keyzer.[7] To this body of theory must be added the two studies made by the Australian Law Reform Commission.[8]

The impetus for my 1979 study was the spectacular outburst of constitutional litigation in the High Court involving challenges to legislation and executive action of the Whitlam government.[9] Predominantly it was of the traditional *federal* kind involving suits between the states or their attorneys-general, and the Commonwealth. These were essentially based on the distribution of powers between the Commonwealth and States or the extent to which the Commonwealth was required to follow constitutionally mandated legislative procedures such as s 57 of the Constitution.[10]

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3 Geoffrey Lindell, *Justiciability of Political Questions under the Australian and United States Constitutions*, LLM thesis, University of Adelaide, 1972 which still has resonance particularly regarding the comparative constitutional issue of the 'political question' doctrine developed by the United States Supreme Court.

4 Henry Burmester, 'Standing To Sue For Public Remedies' (1997) 8 *Public Law Review* 3.

5 Elizabeth Fisher and Jeremy Kirk, 'Still Standing: An Argument for Open Standing in Australia and England' (1997) 71 *Australian Law Journal* 370.

6 Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Gabriël Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century: An Australian Approach* (Copyright Publishing, 2002) 53. On open standing see also Peter Cane, 'Open Standing and The Role of Courts in a Democratic Society' (1999) 20 *Singapore Law Review* 23.

7 Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010).

8 Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No 27, 1985); Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue For Public Remedies* (Report No 78, 1996).

9 These included *Cormack v Cope; Queensland v Whitlam* (*Joint Sittings* case) (1974) 131 CLR 432; *Victoria v Commonwealth* (*PMA* case) (1975) 134 CLR 81; *Victoria v The Commonwealth and Hayden* (*AAP* case) (1975) 134 CLR 338; *Western Australia v The Commonwealth* (*Territorial Senators* case) (1975) 134 CLR 201; *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1 and *Attorney-General (NSW); Ex rel McKellar v Commonwealth* (1977) 139 CLR 527.

10 Section 57 requires certain procedural steps to be taken such as resubmitting a failed bill to the opposing house of parliament at least three months after an initial failure to pass it and,

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The question I addressed was whether the High Court had settled on any consistent *constitutionally derived principles* with respect to governmental standing and whether standing should be approached by courts permissively or restrictively. This assumed that standing could be analysed on some basis capable of rational articulation. The question remains today: Can it?

Necessarily, because Attorney-Generals were involved in some of those challenges it was also appropriate to question whether the interests of the attorneys were to be identified separately from those of the Commonwealth or states whom they represented. The separate and diverse roles that attorneys perform (including as protector of the public interest and *parens patriae*, as well as a minister and the law officer historically representing state and Commonwealth governments) obscure the various kinds of constitutional interests for which they stand champion.[11] This confusion is exacerbated by the fact that the Commonwealth Constitution, in Ch III,[12] designates the relevant juristic entities as the 'Commonwealth' and 'states'. These expressions are themselves ambiguous in terms of whether they refer to single polities or the relevant legislatures or executives (or both)[13] and even possibly the political communities constituting 'the people of the [relevant] state/Commonwealth'.[14] Again we can ask if in recent decisions any clarity has emerged regarding confusion (literally) among the various categories of governmental parties.

The *AAP* case was particularly relevant in that respect since both the State of Victoria and the Victorian Attorney-General, foreshadowing Brian Pape's latter-day sally,[15] sought to challenge Commonwealth appropriations that purportedly authorised expenditure of Commonwealth monies under s 61 of the Constitution. These

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if necessary, dissolution of both houses and a subsequent joint sitting of the houses following an election.

11 See Christos Mantziaris, 'The Federal Division of Public Interest Suits by an Attorney–General' (2004) 25(2) *Adelaide Law Review* 211.

12 For example, in ss 75(iii) and (iv).

13 The distinction between the separate interests of state governments and state parliaments was raised recently in *O'Donoghue v Ireland and Zentai v Hungary* (2008) 234 CLR 599 but not determined.

14 As proposed by Deane and Toohey JJ in *Leeth v Commonwealth* (1992) 174 CLR 455, 484, although disapproved in *Kruger v Commonwealth* (1997) 190 CLR 1. Confusion is also engendered by reference to governments as 'the Crown', an entity that has a persistent and continuing existence in state constitutions although displaced by the constitutional terms, 'the Commonwealth' and 'State' in Ch III and elsewhere in the Commonwealth Constitution.

15 *Pape v Commissioner of Taxation ('Pape')* (2009) 238 CLR 1.

payments were directed to projects considered by the Commonwealth government desirable to be funded directly without engaging the process under s 96 of the Constitution of first granting revenue to the states for them to administer according to Commonwealth-determined programs. Importantly, standing was regarded as a *threshold* condition and a contrary finding precluded the suit proceeding.[16]

In 1975 there was a relatively clear distinction between the constitutional interests of governmental parties, such as the states and their attorneys, and those of individuals and corporations who sought to challenge state or Commonwealth laws on constitutional grounds. It is reasonably accurate to say that, as Taylor demonstrated, individual standing was conceived largely in traditional *private* common law terms.[17] The focus was upon some special interest or entitlement that affected the particular individual to a greater degree than other members of the public.

At that time the Canadian Supreme Court had developed a more robust concept of public interest standing in *Thorson v Attorney-General of Canada*.[18] As summarised in *Canadian Council of Churches v Canada*[19] to establish public interest standing it is necessary to consider first, whether there is a *serious issue* raised as to the invalidity of legislation in question; second, whether the plaintiff has been directly affected by the legislation or if not does he or she have a genuine interest in its validity; and thirdly, whether there is another reasonable and effective way to bring the issue before the court.

In my analysis of governmental standing I sought to identify some equivalent *constitutional* notion of specific *injury, harm or interest* that a state or the Commonwealth could indicate as entitling it to seek the intervention of a Ch III court to prevent a constitutional violation. It was relatively easy to identify the states as deriving standing from any Commonwealth action or law that affected their financial

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16 *Victoria v The Commonwealth and Hayden* (*AAP* case) (1975) 134 CLR 338. By treating standing as a threshold issue Stephen J's finding of lack of standing precluded further consideration of the suit. Standing was thus treated as a 'stand alone' issue in its own right and proved potentially determinative. By way of contrast in *Combet v Commonwealth* (2005) 224 CLR 494 the High Court, by addressing issues of statutory construction directly, avoided determining whether the secretary of the peak union body and an Opposition member of parliament had standing to challenge Commonwealth appropriations. This illustrates the *pragmatic* approach to constitutional adjudication.

17 Taylor, above n 2, 160-70. A classic illustration of that era is *Robinson v Western Australian Museum* (1977) 138 CLR 283 where, to establish standing to challenge a State law protecting historic maritime wrecks, the plaintiff relied on his material financial interest in continuing with his commercial diving activities on such wrecks.

18 [1975] 1 SCR 138, followed in *Nova Scotia Board of Censors v McNeil* [1976] 2 SCR 265.

19 [1992] 1 SCR 236.

entitlements or arrangements, or where they sought to ensure that Parliamentary procedures, such as those under s 57 of the Constitution, were observed. Standing was also relatively clear where Commonwealth laws or executive action interfered with a state's legislative, executive or judicial powers or their corresponding institutions, and where enforcement of a state's representation in the Commonwealth Parliament was engaged.[20] However, stepping beyond constitutional challenges involving a *specific kind* of constitutional violation or deprivation or entitlement, I proposed that the states and the Commonwealth had a primary interest in having the Constitution complied with. It should not be necessary to point to any substantive constitutional harm beyond a purported constitutional violation or breach *in se*.

Apart from the ironic fact that, by reason of Stephen J's somewhat idiosyncratic view in *AAP*[21] (not shared with any of his fellow Justices) that the State of Victoria and its Attorney-General did not have standing to challenge the Commonwealth appropriation, the standing of governmental parties has not presented a substantial problem in the last 35 years. Rather, it has been in relation to individual plaintiffs and applicants that standing has continued to be an occasionally vexed problem.

What *Pape* in particular presents for contemporary consideration is whether, by analogy, a mere claim of *constitutional violation* unsupported by any notion of detrimental injury to an interest or entitlement should be a sufficient basis for any Australian citizen to seek Ch III intervention.

Restrictive or expanded standing: a matter of principle, pragmatism or policy?

Of particular concern 35 years ago, as it is now, was the possibility that constitutional breaches could go unrestrained if challenges were denied on the basis that a party was not competent to seek even a declaration of invalidity. Certainly there were *policy* considerations, as had been recognised explicitly in earlier US Supreme Court cases that, as a matter of curial economy and management, the judicial power vested in constitutional courts should not be squandered on inappropriate or 'undeserving' cases which did not present a disputed constitutional issue with sufficient particularity or 'sharpness'.[22] To say that begs the question, however: How does one determine whether a constitutional challenge is of a *deserving* kind that warrants adjudication and award of remedy, and when not? To anticipate a question I pose

[20] As in the case where a state's equal entitlement to the number of senators was diluted by the addition of senators elected for the territories; see *Western Australia v The Commonwealth Territorial Senators* case) (1975) 134 CLR 201.

[21] *Victoria v The Commonwealth and Hayden* (*AAP* case) (1975) 134 CLR 338.

[22] *Baker v Carr*, 369 US 186 (1992); *Flast v Cohen*, 392 US 99 (1968).

later: Is there a role for the serious constitutional gadfly, who may have little or no material interest in the outcome, as well as adversely affected individuals?

But going beyond whether such underlying policy concerns can justify a refusal to concede standing, the emerging issue posed by the constitutional litigation in the mid-1970s was whether standing could be approached as a matter of *constitutional principle* or *entitlement to sue*, provided certain conditions relating to the purpose of the challenge were satisfied. This notion of the 'entitlement' to sue has, as noted by Simon Evans, been developed by Patrick Keyzer in *Open Constitutional Courts*.

Foremost among these was the identification that breach of a *specific* constitutional provision may attract a particular constitutional protection or entitlement implicit in that provision. Thus s 117 of the Commonwealth Constitution clearly establishes a mantle of protection around residents of another state against the imposition of disability or discrimination arising from a state law.[23] One could perhaps also have argued then that s 116 likewise afforded standing to challenge Commonwealth laws to persons concerned about Commonwealth expenditures effecting a possible establishment of religion on the basis of a constitutionally recognised 'separation of religion' interest, rather than having to rely on the discretionary device of a relator action.[24] The inquiry in such cases would have sought to distil a *constitutionally-provided* basis for standing to challenge irrespective of any special effect on the challenger. One can ask, in light of *Pape* and other cases, whether the High Court has moved in more recent times closer to such a text-based approach founded on the notion of a 'matter'.[25]

Beyond considerations of policy and principle there also lurked the possibility that judicial holdings on standing were essentially based on variable *pragmatic factors* and turned on the particular circumstances of the litigation and the nature of the right

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[23] *Street v Queensland Bar Association* (1989) 168 CLR 4.

[24] As was the case in *Attorney-General (Vic); Ex Rel Black v Commonweal*th ('*DOGS* case') (1981) 146 CLR 559. See with respect to the US political question doctrine in a contemporaneous case, *Valley Forge Christian College v Americans United for Separation of Church and State*, 454 US 464 (1982). The problematic role of Attorney-Generals as protectors of the public interest was recognised in *Truth About Motorways v Macquarie Infrastructure Investment Management Ltd* ('*Truth About Motorways*') (2000) 200 CLR 591.

[25] See *Pape* (2009) 238 CLR 1, [49]-[51] (French CJ), [150] (Gummow, Crennan and Bell JJ), and cases there cited. The merger or 'subsumption' of standing into matter presents a paradox: if standing is part of a matter how can it be separately identified? The conceptual difficulties of using 'matter' as a constitutional criterion are developed by Simon Evans, in this volume.

asserted. Was standing in the end simply a matter of *practical discretionary determination*?[26]

It is therefore relevant to ask whether, over the last three decades, High Court decisions on standing have been guided to a more explicit extent by one of these three considerations above the other two.

Preliminary qualifications: for whom does the bell toll? What kind of bell?

Two preliminary qualifications need to be made before we engage the pertinent theoretical issues. First, having regard to the overall theme of this symposium based on 'access to justice' one needs to identify the *categories* of constitutional litigants for whom access may prove to be a problem, and secondly, the *range* of 'constitutional' litigation that is envisaged.

Regarding *classes* of constitutional plaintiffs, standing arguably presents no great impediment for the Commonwealth and states, and the law officers who represent them, although any developed theory of standing should be able to accommodate these governmental entities with logical consistency.

Similarly, constitutional suits brought by most corporations usually are directed to some financial or commercial interest, or the possibility of criminal or regulatory sanction, that would ordinarily suffice to establish standing. It is the non-governmental and individual parties, arguably, whose access to constitutional courts needs to be reasonably secure. But even with respect to the latter category, how are courts to distinguish between those individuals who have a *proper* constitutional interest to vindicate and the *mere busybody* who really has no vested interest other than an intellectual or political one based on curiosity in the outcome?[27] As foreshadowed earlier, occupying the ground between the individual plaintiff with a clear substantive objection and the constitutional dilettante is the vexed and often

[26] The scope for discretion in these older cases was clearly enunciated by Gibbs CJ in cases such as *Davis v Commonwealth* (1986) 61 ALJR 32, [10]; *Robinson v Western Australian Museum* (1977) 138 CLR 283, 302-3; and *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, 38-9, where he emphasised that issues of standing were not to be decided in the abstract but rather in relation to the nature of the statute whose validity was questioned. In some cases it therefore would be convenient for the court, in its discretion, to defer questions of standing until the merits of the case had been considered.

[27] In *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493 an intellectual interest in a possible public law breach was held not to amount to a sufficient special interest to furnish standing. Query whether that view accords with current the High Court approach that seeks to ensure that unlawful governmental action does not go unsanctioned: see, eg, *Truth About Motorways* (2000) 200 CLR 591, discussed further below.

irritating figure of the gadfly who is motivated by a genuine, even if somewhat eccentric, interest in a particular constitutional issue. I shall return to this borderline figure later in this paper as she/he seems to present the paradigm case for study.

Concerning, secondly, the *kind* of constitutional litigation engaged in this analysis I do not propose to limit my remarks to those cases arising purely under the Commonwealth Constitution. Some of the major constitutional issues in the last three decades have had their genesis in state *Constitution Acts* although they often, as in *Kable*,[28] entail elements of federal jurisdiction. Lurking in that particular background is the contentious question of the relationship of state constitutions to the Commonwealth Constitution and whether the latter constitutes a *grundnorm* for the others. In this survey, without entering on that conundrum, I use examples of state constitutional claims to illustrate how standing objections have been treated in the High Court.

Access to 'justice'?

This constitutional symposium is intended to assess whether standing, along with other issues such as non-justiciability and the general inhibition of parties' costs, requires reconsideration in terms of whether adherence to existing principles and practices still imposes undesirable inhibitions and restraints on access to justice.

For historic reasons to which I now turn, I should indicate my agreement with the proposition that rules of standing should not be used by state or Commonwealth parties to prevent or obstruct well-founded constitutional claims.[29] However, it is not the 'accessibility' aspect of the equation that I question. Somewhat conservatively, however, I have misgivings about what is entailed in the concept of constitutional 'justice.' It is a term that I think requires closer analysis before one can propose moving to eliminating standing as a threshold consideration entirely and I shall conclude this analysis with some reflections on that factor.

The bad old days

For those of us who were involved in constitutional litigation three decades ago our views were conditioned by our experience of the ways in which courts often reacted restrictively to procedural issues. Having been involved in a number of constitutional challenges in Western Australia in the last quarter of the 20th century, most of which were based on breaches of antique 'manner and form' provisions of the Western

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[28] *Kable v Director of Public Prosecutions (NSW)* ('*Kable*') (1996) 189 CLR 51.

[29] This is consistent with the view of Murphy J in *Robinson v Western Australian Museum* (1977) 138 CLR 283, and *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, that restrictive rules of standing should not deny citizens *access to justice* in the courts.

Australian Constitution, I became aware of the degree to which threshold objections concerning standing and non-justiciability could throttle or imperil such litigation at birth. Perhaps more than in any other state, in the then prevailing culture Crown authorities in Western Australia raised standing, non-justiciability, statutory limitations, laches and other procedural barriers almost automatically as preliminary defences.[30]

An early example of this was *Western Australia v Wilsmore*.[31] In that case a prisoner in Fremantle jail, Peter Wilsmore, attacked State legislation enacted in 1979 that sought to deprive prisoners of their right to vote in state elections.[32] The Crown argued the preliminary point that his claim to standing based on an existing entitlement to vote was insufficient to challenge amendments to 'the constitution of the state Houses of Parliament.'[33] This was not accepted in the WA Supreme Court and while mentioned in passing in the High Court was not upheld in that forum.[34] Rather, the High Court unanimously overruled the Full Court of Western Australian Supreme Court on the substantive constitutional issue[35] and did not find it necessary to determine the standing question.

A later and unquestionably more egregious example of the use of standing and like objections to obstruct constitutional litigation is that of *Yougarla v Western Australia*.[36]

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30 An earlier instance of this was *Tonkin v Brand* (1962) WAR 2 discussed in Peter Johnston, '*Tonkin v Brand*: Triumph for the Rule of Law', Chapter 8, in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 211, 224-6. A more recent example of this is *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 involving resort to limitations under s 6 of the *Crown Suits Act 1947* (WA). In both cases the State's procedural objections were overruled.

31 (1982) 149 CLR 79, in which I was involved as counsel.

32 Though based on a state constitutional claim this was in some ways similar to the applicant's objection to deprivation of a prisoner's right to vote in *Roach v Electoral Commissioner* (2007) 233 CLR 162.

33 Section 73(1) of the *Constitution Act 1889* (WA) required such changes to be passed by absolute majorities in each house. As it happens s 73(6) of that Act now confers *statutory standing* on any person entitled to vote in a WA election to challenge a breach of s 73 in the Supreme Court, eliminating any need to establish a specific interest.

34 See *Western Australia v Wilsmore* (1982) 149 CLR 79, 102-3, where Wilson J mentions that in its grounds of appeal the State raised questions of Mr Wilsmore's standing to bring the action. But the Solicitor-General had not pursued the question of standing.

35 Namely, that it was not necessary for the relevant bill to be passed, in accordance with s 73(1) of the *Constitution Act 1889* (WA), in each House by an absolute majority.

36 (2001) 207 CLR 344; the writer was also counsel in that case. For a study of similar obstructive conduct by an Australian government see *North Australian Aboriginal Legal Aid v Bradley* (2004) 218 CLR 146 discussed by Patrick Keyzer, 'Judicial Independence in the

In litigation stretching over more than a decade and which came before the High Court on two occasions, once in 1996 under the name of *Judamia v Western Australia*[37] and in 2001 as *Yougarla v Western Australia*, a group of aboriginal elders, several of whom had been born before 1905, sought declarations that as aboriginal inhabitants of Western Australia they were entitled to receive payments of assistance towards their maintenance and advancement from a fund derived from the accumulated annual sums of 1% of State revenue. This was based on s 70 of the *Constitution Act 1889* (WA) which provided for the payment of such a percentage of annual state revenue for the benefit of aboriginal inhabitants of the then colony. This had been a condition that the Imperial government and parliament had imposed on the colonial legislature as the basis on which Imperial authorities were prepared to grant full responsible government to Western Australia. However, following strong criticism and negotiations by the new colonial government elected after self-government in 1890 led by John Forrest the provision was quickly repealed, initially in 1897, and following allegations that this had been ineffective, by retrospectively validating that repeal in 1905.[38] The plaintiffs contended that the 1905 repeal had been ineffective.

As the WA Crown was then wont to do, the full panoply of objections were raised to the action, including not just standing but others such as that under the *Crown Suits Act 1947* (WA) notice of the action, which was commenced in 1992, should retrospectively have been given to the Crown within six months of the passage of the legislation in 1905. It was further objected that the action should not have been bought against 'the State of Western Australia' but separately against the State Attorney-General. To meet the latter objection the plaintiffs sought to join the Attorney-General as a respondent but the Supreme Court held that as this had not been done at the outset of the litigation it could not be remedied thereafter. In *Judamia* the High Court, by majority, thoroughly rejected that proposition and remitted the matter to the Supreme Court for further determination.

Again all the constitutional and statutory objections, other than that concerning the Attorney-General, were litigated before the Supreme Court and the Full Supreme Court.[39] A remarkable feature of the case was that whilst many obiter views were

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Northern Territory: Are Undisclosed Remuneration Arrangements Repugnant to Chapter III of the Constitution?' (2004) 32 *University of Western Australia Law Review* 30.

37 P40/1996 [1996] HCATrans 408.

38 See Peter Johnston, 'Section 70 of the Western Australian Constitution Act 1889: Aborigines and Governmental Breach of Trust' (1989) 19 *University of Western Australia Law Review* 318.

39 Regarding the issue of statutory limitation, the Full Supreme Court refused to hear argument that the matter was not barred by *Crown Suits Act* because it involved a constitutional issue arising in Federal jurisdiction, so that the time limitation under the

expressed at first instance and on appeal in support of all the State's objections the case was only actually decided on the narrow basis of the plaintiffs' *lack of standing*.[40] In essence, employing what were arguably already outdated notions of individual standing, the Full Supreme Court held that since the plaintiffs were only seeking a *declaration* as to their entitlement to an appropriation[41] and did not seek orders mandating any specific payment to them they had no special or pecuniary interest to support their claim for relief.[42] This was notwithstanding that the plaintiffs argued that they were members of a *constitutionally designated* group for whom the relevant constitutional provision, s 70, afforded a special protection.[43]

The irony is that although the plaintiffs' lack of standing was the only one issue actually determined by the Supreme Court, when the matter reached the High Court, Gummow J directed that the substantive argument based on manner and form of objections should be the sole issue to be determined, in the first instance, by the High Court. All other issues, including that of standing, were only to be addressed if the constitutional issue was found in favour of the plaintiffs. Hence *Yougarla* stands as a rather notable example of the High Court's willingness to by-pass standing as a threshold issue in order to decide the core constitutional issue agitating the plaintiffs.[44] In the result (the Court held the 1905 repeal was effective) nothing turned on the standing issue.

State Act was not applicable. This jurisdictional objection was clearly rejected in the later case of *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

40 *Crow Yougarla v Western Australia* [1998] WASC 221; *Yougarla v Western Australia* (1999) 21 WAR 488.

41 Ironically, this can be seen as the obverse of Mr Pape's claim. He was seeking in effect a declaration that it was unlawful for him to receive a cheque paid under an invalid appropriation.

42 *Yougarla v Western Australia* (2001) 207 CLR 344 (judgment of the Full Court).

43 The concept of a statutory objective of special protection arguably underpins the High Court's recognition of the standing of aboriginal custodians under state cultural heritage legislation in *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, and is not dissimilar to the 'zone of injury' test of standing applied by the US Supreme Court in *Federal Election Commission v Akins*, 524 US 11 (1998) (whether the injury is the kind that is addressed by the statute). *Yougarla* is discussed in Peter Johnston, 'Waiting for the Other Shoe to Fall: The Unresolved Issues in Yougarla v Western Australia' <http://www.gtcentre.unsw.edu.au/publications/papers/docs/2002/87_PeterJohnston.pdf>.

44 The Court in reality was only purporting to deal with an issue that had received attention as *obiter dictum* in the lower courts. Was it therefore hypothetical? One can ask what would have been the case if the Court had upheld the plaintiffs' constitutional claim. Could it then have decided nevertheless that they lacked standing?

While *Yougarla* may illustrate a pragmatic approach to determining constitutional issues in which standing was deferred for later consideration, *Attorney-General for Western Australia v Marquet* [45] illustrates another phenomenon where arguably important issues of standing and justiciability were ignored, or at least not addressed, in the interest of determining the substantive constitutional claim. The issue at stake was whether two bills that had been passed by both houses of the Western Australian Parliament, but not, as ostensibly required by s 13 of the *Electoral Distribution Act 1947* (WA), by absolute majorities in each case, could be presented to the Governor for assent. The Clerk of the Legislative Council, the late Mr Marquet, instituted a claim for a declaration about whether it is lawful for him to present the bills or not. His claim to standing was that he could be acting unlawfully if he were to present the bills to the Governor and they had not been passed in accordance with the prescribed procedures; accordingly, he could be liable for punishment for an offence against state law.[46]

The main reason why neither standing or justiciability were addressed was because in both the Western Australian Supreme Court and in due course the High Court the West Australian government as defendant/respondent did not seek to question the way the litigation came before each court. This was dictated largely by considerations of the convenience of the parties (or at least the parliamentary interests that sought to have the constitutional issues judicially determined).[47] I have analysed elsewhere, the very unusual way in which the litigation came about and the manoeuvrings of the respective interests to get the matter before the Supreme Court.[48]

The scenario that the Clerk stood in peril of being charged with a criminal offence was hardly credible,[49] and in fact, he was really seeking an advisory opinion from the Supreme Court. In that respect, the President of the Legislative Council affirmed that the Clerk's action was taken to inform the houses of parliament about whether their action in passing the bills was legally effective.

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45 (2003) 217 CLR 545.

46 A short answer to this contention is that the reference to 'unlawful' in s 13 refers to a lack of legislative power to make the law in question: it does not refer to the personal liability of the officer presenting the bill for assent.

47 Jurisdiction however cannot be conferred by agreement of the parties if it does not otherwise exist.

48 See Peter Johnston, 'Method or madness: constitutional perturbations and *Marquet's* case' (2004) 7 *Constitutional Law and Policy Review* 25.

49 This is in contrast to the plaintiff in *Croome v Tasmania* (1997) 191 CLR 119. Impeachment of the Clerk in any event would have engaged parliamentary privilege under article 9 of the *Bill of Rights 1689* (Imp) as applicable in WA by s 1 of the *Parliamentary Privileges Act 1891* (WA).

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At a directions hearing, a Justice of the Supreme Court expressed concern that the actual plaintiff, Marquet, was not intending to present arguments against the lawfulness of his action, but was merely seeking an opinion from the court. To remedy the lack of contradictor, orders were made that certain Opposition members of Parliament and other rural groups such as the Farmers Federation and the Local Government Association could appear jointly as *amici curiae*. The case proceeded on that basis, both in the Supreme Court and the High Court. In effect, the *amici* were the actual plaintiffs, going well beyond the normal role of assisting the Court in a secondary manner, and the plaintiff merely participated in the High Court in order to submit to the Court's declaratory determination.

At no stage were objections expressed by the respondent, the Attorney-General of Western Australia, and the litigation proceeded as if properly constituted. There are a number of objections to the course adopted[50] but as was pointed out to me by the late Professor George Winterton, such fine-print objections really are of no enduring significance because, in the alternative, it would have been possible to follow the more usual practice of allowing the bills to be presented to the Governor and assented to and *then* any member of Parliament who contested the validity of the purported legislation would quite clearly have been able to institute proceedings invoking the constitutional challenge.[51] It was just a matter of timing. The fact that the Supreme Court and the High Court were prepared to deal with the constitutional issues irrespective of the way that they came before the courts again exemplifies a certain pragmatic approach that elevates the substantive issues above standing and justiciability.

There is a second lesson that can be learnt from *Marquet's* case. What was the point behind the extraordinary way in which the litigation was conceived and executed? This goes back to an earlier imbroglio where Labor members of the Western Australian Opposition, namely Jim McGinty and Geoff Gallop, had instituted a claim in the High Court in 1994-1995, challenging gross malapportionment of state electorates.[52] The High Court by majority dismissed the challenge. The then Liberal Attorney-General in the state government, Mr Foss, subsequently vigorously pursued the plaintiffs for payment of a considerable sum by way of legal costs. The

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50 See Johnston, above n 48.

51 See especially *McDonald v Cain* (1953) VLR 411 and *Clayton v Heffron* (1960) 105 CLR 214. Another example where a successful challenge was instituted *after enactment* of legislation is *Victoria v Commonwealth* (*PMA* case) (1975) 134 CLR 81, although the High Court in *Cormack v Cope; Queensland v Whitlam* (*Joint Sittings* case) (1974) 131 CLR 432 had denied a declaration *before* its presentation for assent.

52 *McGinty v Western Australia* (1996) 186 CLR 140.

tables appeared to be reversed in *Marquet*. Mr McGinty was the Attorney-General and Mr Foss, the Opposition Leader in the Legislative Council. Although wanting to contest the Labor government's electoral legislation in the Supreme Court, the conservative opponents of the bills, including Mr Foss, were concerned about financial retribution if they were to lose their constitutional challenge. Accordingly, they collaborated with the Clerk of the Legislative Council in having the latter act as a stalking horse for testing the legislation, leaving them free to be involved as *amici* and therefore able to avoid any financial responsibility for costs.[53]

This further illustrates the point made in other chapters about the inhibiting effect that costs orders may have in chilling constitutional challenges. Costs in the end may be a greater deterrent than standing. In *Marquet* that effect was avoided but arguably at the cost of distorting the courts' normal processes.

Dissolving the standing/justiciability dichotomy: the emergence of 'matter' as the controlling factor

When I addressed standing in 1979 there was a clearly articulated conceptual distinction between standing as something relating to an interest that a party had in the litigation and justiciability, which went to whether the particular issue raised in a suit was appropriate and suitable for judicial determination. The prevailing judicial approach at that time was arguably coloured by traditional common law principles that emphasised the necessity for some peculiar and special interest in having the constitutional dispute adjudicated. Looking back from a vantage point 35 years later we can see how other developments in constitutional theory have reshaped the debate. While implications underlying Ch III had received some recognition in the separation of powers context, it was not until the early 1990s that other notions of implied constitutional limitations came to the fore in the representative democracy era. Other implications inhering in Ch III also emerged in cases such as *Kable*,[54] *Grollo*[55] and *Wilson*.[56] These sources of revised constitutional interpretation were augmented by the emergence of 'matter' as the primary juridical constitutional notion. In the transformation from approaching constitutional disputes as a pastiche of isolated elements to a matter-based jurisprudence, individuated dissection of separate procedural issues including standing and justiciability merged (or segued?)

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53 Of course the plaintiff in *Pape* (2009) 238 CLR 1 was relieved of this potential burden by the Commonwealth intimating that it would not pursue costs. One wonders on what grounds of principle governments waive costs in one case but not another.

54 *Kable* (1996) 189 CLR 51.

55 *Grollo v Palmer* (1995) 184 CLR 348.

56 *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (*Hindmarsh Island Bridge* case) (1996) 189 CLR 1.

into a more comprehensive calculus supplemented by discretion to grant or withhold remedies. Their separate consideration largely went by the board. The latter trend was particularly evident in cases such as *Truth About Motorways*[57] and *McBain* (*Catholic Bishops* case).[58]

The insular divisions between standing and justiciability, for example, had obviously become more porous by the time of the *Catholic Bishops* litigation.[59] In my view *Catholic Bishops*, to the extent one can corral some of the divergent Justices' views, is a classic example of judicial pragmatism above principle.

A more generous approach to standing in public interest litigation was also evident in the *Bateman's Bay* case[60] although there it was still conceived in terms of a special financial detriment.

A further contribution to a more nuanced theoretical analysis of problems such as standing and justiciability comes from the notion that public law breaches should not go without remedy, whether founded on greater availability of constitutional or prerogative writs or principles of equity.[61] This has been against a backdrop of greater respect for the rule of law and its currently more fashionable twin, the principle of legality.[62]

As other commentators will doubtless suggest, these factors have resulted in a fundamental shaking of the foundations of constitutional litigation. In the process, over the last three decades restrictive impediments to constitutional litigation such as standing have largely become curial fossils occupying an inherently 'suspect

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[57] *Truth About Motorways* (2000) 200 CLR 591, 624-36, where the private/public dichotomy was modified to the extent that notions of private standing in common law were aligned with the availability of other writs in the public domain such as mandamus which are not conditioned on standing. While a plaintiff's standing may continue to be a *consideration* in identifying a constitutional 'matter' it was not to be an *essential component*.

[58] *Re McBain; Ex parte Australian Catholic Bishops Conference* ('*Catholic Bishops*') (2002) 209 CLR 372.

[59] Ibid. The notional divisions between standing, justiciability and discretion to grant relief have become somewhat fudged, most notably in the judgment of McHugh J at 426. See also Mantziaris, above n 11; and Peter Johnston, 'The Constitution as Physics: A Commentary on Papers by Professor Saunders and Dr Mantziaris' (2004) 25 *Adelaide Law Review* 257.

[60] *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247.

[61] *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135. A similar concern that a state privative clause should not shield state tribunals acting unlawfully from judicial review is evident in *Kirk v Industrial Relations Commission* (2010) 239 CLR 531.

[62] *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501, [47] (French CJ).

category'. Even if not yet eliminated to the point of open standing, it is possible to discern out of the constitutional mists some emerging factors supporting a right to be heard. I leave it to others in this symposium, however, to identify those features of the contemporary scene.

Forward to the present: does standing still seriously inhibit access to constitutional review today? Does it matter?

It will be evident from my analysis of *Yougarla* and *Marquet* that despite attempts by the High Court to approach standing flexibly as one element of a justiciable 'matter' I consider standing determinations are still not resolved by principled assessment as much as they are by pragmatic evaluations of whether a court should, on more general discretionary grounds, decide the constitutional issue.[63] One aspect of this calculus is, undoubtedly, whether the particular issue is of a *significant kind*, either in terms of affecting one of the primary constitutional polities (state or Commonwealth), a specific segment of the general community in a material way, or has a real and substantial adverse impact upon an individual or corporation.[64]

A more contentious question concerns whether regard should be had to the *reason or purpose* motivating a person to instigate a constitutional challenge. Here we confront the problem of what I have affectionately term the 'constitutional gadfly'. We must here distinguish between the genuine though sometimes annoying gadfly and the offensive meddler or busybody.[65] To illustrate whether standing now seriously represents a potential threshold barrier to determining constitutional issues, I turn to consider the recent litigation involving such an individual, Brian Pape himself.[66]

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[63] In that respect my conclusion is that constitutional standing still continues to be a constitutional wasteland.

[64] The different nature of plaintiffs, governmental, official and individual, makes it unlikely that a single test comprehending all kinds of 'interests' can be used to establish standing.

[65] This paper does not deal with challenges by third-parties whose interests are not immediately engaged with the particular statutory scheme but who claims some personal connection to the controversy, as in *Allan v Transurban City Link Ltd* (2001) 208 CLR 167. Similarly it does not discuss 'strangers' some of whom, as Hayne J points out in *Catholic Bishops* 209 CLR 372, 464, can institute proceedings for prerogative writs though not affected.

[66] In passing I should like to refer for purposes of comparison/contrast to another example of another serious 'gadfly', one Dieter Horn. In a series of cases in the Federal and Western Australian courts (*Horn v Australian Electoral Commission* [2006] FCA 1778; *Horn v Australian Electoral Commission* [2007] FCA 1827; *Horn v Australian Electoral Commission* [2008] FCA 43; and *Horn v Butcher* [2009] WASC 267) he has sought to vindicate his quasi-constitutional claim to be 'screened from observation' according to s 206 of the *Commonwealth Electoral Act*

PAPE'S CASE: WHAT DOES IT SAY ABOUT STANDING AS AN ATTRIBUTE OF 'ACCESS TO JUSTICE'?

Pape's standing to challenge the Commonwealth stimulus expenditure

In *Pape*[67] the plaintiff sought an order that the relevant Commonwealth legislation was invalid not just in relation to its application to him but in its general operation. He relied on the *Auckland Harbour Board* case[68] to establish that the Commonwealth's payment to him, if unlawful, would result in a liability on his part to repay the amount to the Commonwealth. This, he argued, conferred a personal standing to invoke the Jurisdiction of the High Court to determine the legality of the payment. Ironically, his claim to standing was adverse to his financial interest in receiving the tax bonus since he would be materially worse off if his suit succeeded. His claim to standing was aided by the fact that the defendants conceded that he had standing in his own right to seek an injunction to restrain the Commissioner of Taxation paying him the Commonwealth contribution. The question was whether he could also seek a declaration that the law was invalid thus establishing its invalidity for all the eight million Australians to whom payments would be made. This exemplifies the more modern approach where standing, justiciability and discretion to award relief are seen to be different facets of the same diamond; namely, the existence of a 'matter'.

While the Commonwealth perhaps too generously conceded that Mr Pape had standing to challenge the payment to himself it maintained that the relief should be particularised to him, and while the Act might be invalid with respect to him on one basis it was open to the Court to find that the invalid element applicable to him was capable of severance so that it did not necessarily entail invalidity in respect of other recipients. This was in reality an appeal to pragmatism calling on the Court to have regard to the practical outworking of its decision. The Court rejected that appeal and accepted the plaintiff's submission that the issue of invalidity of his individual payments was not severable. A declaration of invalidity if granted would go to the general operation of the Act.

1918 (Cth) when marking his ballot papers (voting) at Commonwealth elections. He seeks, in effect, the security of the originally Australian-created institution of the 'secret ballot' which he, as someone brought up under a repressive communist regime in East Germany, values as a fundamental democratic right. He has incurred and paid to the Australian Electoral Commission large amounts of court costs and endured derogatory public criticisms for his as yet unsuccessful endeavours. His case stands in contrast to the kind of arguably vexatious litigant exemplified in cases such as *McKewins Hairdressing & Beauty Supplies v Deputy Commissioner of Taxation* [2000] HCATrans 210 and *Joosse v Australian Securities and Investment Commission* [1998] HCATrans 492.

67 *Pape* (2009) 238 CLR 1.

68 *Auckland Harbour Board v The King* [1924] AC 318.

French CJ delivered the only judgment that analysed the plaintiff's standing at any length.[69] His Honour noted the long history of judicial caution, specifically in the US, requiring some particular or special interest to advance a constitutional challenge[70] and that further, the question of standing in federal jurisdiction could not be detached from that of jurisdiction and the existence of a 'matter'.[71] He treated the Commonwealth's concession that the plaintiff had standing to seek a declaration regarding his own situation as concluding the issue of standing overall.

Justices Gummow, Crennan and Bell accepted that standing is now an issue that is subsumed within the requirement of a constitutional matter and in recognising the plaintiff's standing to seek the declarations in contention, placed weight on the fact that the relevance and ambit of his challenge were not confined uniquely to his own circumstances.[72] Justices Hayne and Kiefel likewise were not prepared to accept that the plaintiff had standing only to seek an injunction or declaration in relation to himself[73] while Heydon J also denied that proposition. Having found that the plaintiff had a sufficient basis to sue, however, he was not prepared to consider whether the existing rules of standing were too narrow.[74]

Sed quaere

I have three points to make about the issue of the plaintiff's standing to invoke the High Court's jurisdiction regarding what was undoubtedly a major exercise of the Commonwealth's executive power. The first is positive, but the other two are more qualified and even possibly negative.

In the first place, standing in the event presented no serious impediment to having the issues determined. In part this arose from the Commonwealth's concession that, at least in respect of his own situation, the plaintiff had standing to seek a determination that the relevant legislation could involve him in unlawfully receiving unlawfully authorised Commonwealth monies. Leaving aside the Commonwealth's objection about whether it was possible to deny a declaration of invalidity an application to the wider community it is evident that the Court had no reservations about the plaintiff's competence to seek a declaration concerning a possible

69 *Pape* (2009) 238 CLR 1, [45]-[52] (French CJ).
70 *Massachusetts v Mellon*, 262 US 447, 487 (1923).
71 *Croome v Tasmania* (1997) 191 CLR 119.
72 *Pape* (2009) 238 CLR 1, [150]-[159] (Gummow, Crennan and Bell JJ).
73 Ibid [271]-[274] (Hayne and Kiefel JJ).
74 Ibid [399]-[402] (Heydon J).

substantive constitutional violation. This is a welcome advance from what I have described as 'the bad old days'.[75]

However, secondly, in making that concession, I have reservations about whether, as a matter of deploying the judicial power of the Commonwealth, the High Court should have proceeded to determine issues that really posed no great threat to the plaintiff and were not otherwise opposed by the states or other persons.

One can ask whether, if Mr Pape accepted the Commonwealth's cheque he seriously faced the prospect of having later to reimburse the Commonwealth for what might have been an unlawful payment. How would such a situation arise? Further, what was his substantive objection? Was it that personally he did not desire to receive the cheque at all? Or was it that he was prepared to accept the Commonwealth financial contribution provided that it was routed through the states? A strong case can be made out, it seems to me, that even if accepting he had a proper interest in the case the High Court in its general discretion should have declined to entertain the suit given its limited concern to one individual alone over an amount of about $250. Again this involves pragmatic considerations and an evaluation about whether constitutional violations should be sanctioned in every case on a *per se* basis.

Another way of exploring this aspect is to pose the arguably unresolved theoretical issue: what was the 'harm', 'mischief' or 'injury' involved in the payments and who stood to be detrimentally affected?[76] After all, there are significant constitutional issues that are relatively well known but no one is sufficiently motivated to litigate them.[77] There is no constitutional imperative that a constitutional court should strike down the offending laws.

That brings me to my third point. If Pape's objection was that the Commonwealth was evading a *constitutionally prescribed* means of providing financial assistance which should have been directed through the states under s 96 of the Constitution, it seems to me that was an issue that should only be properly raised by one of the states or not at all. Here one can make a distinction between the primary federal interest of the states in the distribution of Commonwealth revenue and the right of an individual not to receive an amount as a payment that would be valid if it was paid

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[75] Arguably, in *Pape* the High Court has come close to the concept of public interest standing recognised in Canada in *Thorson* [1975] 1 SCR 138, or perhaps advanced to an even more liberal standard.

[76] Other than Mr Pape by reason of a claim based on the *Auckland Harbour Board* principle.

[77] Currently, for example, there is a strongly arguable case that state stamp duty imposts on sales of motor vehicles contravene s 90 of the Constitution but apparently no one is sufficiently troubled to take proceedings to determine the issue. Should not sleeping dogs be allowed to lie in peace?

via a state but not if received directly from the Commonwealth. Linking this to the previous point, it was not the case that the plaintiff was being denied something to which he was entitled. He was, positively, receiving something to which there might attach some doubt but which, in reality, he would in all likelihood not have to repay. In that respect, the older notion of being *adversely affected* by liability to detriment could still provide a relevant touchstone.

Here I return to another query I posed earlier. One can rejoice that the issue of standing did not in itself artificially deny Mr Pape access to the High Court in a way that narrower holdings concerning an individual's standing may have done in the past.[78] Conspicuously, standing no longer exists as a stand-alone, preclusive issue that presents a lion at the door of litigation. But what is the nature of the correlative '*Justice*' that was afforded to him? Was it that the Court released him, as a person, from a theoretical threat of a potential and possibly unwanted financial liability? Or was it his right as an individual taxpayer to vindicate the Constitution and have it upheld?

In *Pape*, perhaps because of the celerity with which the Court heard the challenge the implications of proceeding to determine the suit were not in my view subjected to sufficient judicial consideration. In that regard it would have been interesting to see how the Court would have reacted to an application by a person who stood to receive the 'tax refund' to intervene to argue that the case was not necessary or appropriate for adjudication.

Reconciling the competing elements

If justice is concerned with more than just the individual's interest it seems to me that the existence of grounds for challenging a possible constitutional violation need to go beyond that mere possibility of prescriptive invalidity. In *Pape* this would have entailed a *comparative exercise* about whose interests were most affected by the particular kind of violation alleged and whether they, the states, were concerned to have the matter determined. Similarly, if clarification of constitutionally disputed principles is a 'public good' one can ask: what benefit actually accrued as a result of the decision? It seems to me rather to have made measures that may be needed for Australia's national economic welfare more vulnerable to constitutional challenge unless an immediate or urgent necessity can be proven as a constitutional fact. And surely that is likely to embroil the High Court in political controversy and separation of powers issues entailing a fudging of the merits/review boundaries.

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[78] *Robinson v Western Australian Museum* (1977) 138 CLR 283; *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

PAPE'S CASE: WHAT DOES IT SAY ABOUT STANDING AS AN ATTRIBUTE OF 'ACCESS TO JUSTICE'?

The decision in *Pape* also resurrected without solving wider constitutional controversies arising from the incomplete and ill-fitting structure of federal finance originally provided in the Constitution.[79] The lack of clarity that has resulted can hardly be seen as a *benefit* of adjudication, if exposition of the constitutional text is an element of constitutional 'Justice'. Arguably some more nuanced doctrine equivalent to the US 'political question' doctrine needs to be developed centred on the elusive constitutional concept of 'matter'. This would involve a multi-factorial evaluation of elements something along the line of the US political question doctrine[80] that would include standing as one aspect of justiciability but within the parameters of a polycentric calculus where even if standing were established it could be outweighed by other considerations of disutility and unsuitability for adjudication that provide countervailing reasons for deference or deferral.[81] The persistence of standing as a litigious element in Australia indicates, however, that despite invocations of open standing the Court is not yet willing to treat the adjudication of constitutional disputes as purely discretionary.[82]

A functional analysis should more clearly identify the conservative policy factors which should incline a court not to entertain a constitutional challenge, as against those that favour determination. This should not be based simply on assessing the public interest in the broad sense. Attempting to draw a line by reference to whether a case should be heard in the 'public interest' runs into the problem that the public interest as Sir Anthony Mason indicated in *Sankey v Whitlam*[83] usually comprises a

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79 These include whether s 96, in addition to providing, *positively*, a conduit through which the Commonwealth using the states can distribute monies, impliedly has *a constraining function* with respect to Commonwealth expenditures. The role of s 96 has also arisen recently in the context of intergovernmental agreements and is a live issue: see *ICM Agriculture Pty Ltd v The Commonwealth* (2009) 240 CLR 140.

80 This could run counter to the view of Gummow J in *Truth About Motorways* (2000) 200 CLR 591, where he questioned the relevance of the American approach based as it was textually on the existence of a 'controversy' or 'case' within Article III of the US Constitution.

81 The inclusive/exclusive relationship between contending factors in a polycentric litigation context was originally explored by Lon Fuller (see, eg, his latter-day study, 'The Forms and Limits of Adjudication' (1978) *Harvard Law Review* 353). Regarding multifactorial consideration in constitutional adjudication: see *Clarke v Commissioner of Taxation* (2009) 258 ALR 623, [20] (French CJ).

82 The issue here is not whether the discretion is to be exercised on subjective grounds; it is whether objective criteria can be articulated as a basis for hearing a constitutional suit.

83 (1978) 142 CLR 1, 95-100 (Mason J). Justice Stephen at 60-1 also held that a criterion based on public interest is of variable application and not a closed category. In contemporary terms it could be described as a 'category of indeterminate reference'; *Roach v Electoral Commissioner* (2007) 233 CLR 162, [82] (Gummow, Kirby and Crennan JJ).

number of competing factors or separate public interests. In balancing the contending factors the question remains whether the need to enforce compliance with constitutional principles should be accorded such weight that it 'trumps' individual considerations.[84]

The two reports by the Australian Law Reform Commission have offered proposals for dealing with these difficulties. Its suggestion in its first report in 1985[85] was to approach the problem as one of eliminating carriages from the rear end of the train. It did this by recommending that courts should have discretion to refuse standing to a mere meddler. That of course raises the issue: on what basis can one say a person falls within the latter category. It also recommended that standing should not be decided first as a preclusive issue. In like manner the second report in 1996[86] proposed extending standing to members of the public generally except where there was some restriction imposed by the specific statute involved. Both recommendations envisaged widening standing to an almost automatic degree. But in falling short of adopting open standing they highlight the problem of where to draw the line in order to spare courts engaging in fruitless suits. In the event successive Commonwealth governments have accepted neither report to date.

Conclusion

In the end, my prognostication is that until replaced by a more holistic principle entailing a balancing of all relevant considerations standing will continue to perform an occasionally useful filter function although one downgraded from its past status. In that calculus standing should not be considered in isolation but as part of the court deciding whether the kind of challenge and the remedy to be provided are truly justiciable.

In the event, the High Court in *Pape* did not uphold the plaintiff's substantive contentions so that the wide-ranging ramifications of a successful challenge were avoided. The case certainly went some way to resolving a number of the conundrums left in the air after *AAP*. Yet we may ask: In what way has the Australian community benefited? It would now appear open to virtually any *recipient of* a Commonwealth or state *benefit* to challenge, on a near universal basis, the constitutional validity of Commonwealth and state legislation. Is that 'just'? In the end I find that a little odd.

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84 Obviously I have yet to be persuaded let alone convinced that a sufficient basis for reviewing a constitutional breach is simply to say that 'because (like Everest) it's there.'

85 Australian Law Reform Commission, *Standing in Public Interest Litigation* (Report No 27, 1985).

86 Australian Law Reform Commission, *Beyond the Door-Keeper: Standing to Sue For Public Remedies* (Report No 78, 1996).