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# Standing To Raise Constitutional Issues

## **Abstract**

In this chapter I argue that the law relating to standing in constitutional cases is complex, draws invidious distinctions, and produces unnecessary uncertainty. Reform is necessary. In this, I agree with Keyzer and others who have powerfully critiqued aspects of the Australian law of standing. However, I also argue that any reform proposals must pay close attention to, and work within, the Australian constitutional tradition. Accordingly, I focus on the potential for the rule of law to function as an organising principle for reform of the law of standing. I suggest that it is not likely to be fruitful to base arguments for reform on a principle of access to constitutional justice. Although arguments based on popular sovereignty and freedom of political communication draw on the Australian constitutional tradition, I find them unpersuasive. Finally, in arguing for reform of the law of standing, I resist the movement towards assimilating its content with the concept of a 'matter' under Ch III of the Australian *Constitution*

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## **Keywords**

Access To Constitutional Justice, Standing, Special Interest, Constitutionalism, Freedom of Political Communication, Popular Sovereignty, Constitutional Identity

## STANDING TO RAISE CONSTITUTIONAL ISSUES RECONSIDERED

SIMON EVANS\*

### Introduction

The recent decision of the High Court in *Pape's case*<sup>1</sup> is only the latest reminder in a long sequence that litigants seeking to challenge government action as unconstitutional must demonstrate that they have standing. The Commonwealth's concession that Mr Pape had standing in relation to some aspects of his claim was fortunate for his challenge, but the concession was neither inevitable nor without limitations. It is timely therefore to review the law of standing in the constitutional context in light of *Pape's case*; an additional impulse is provided by the recent publication of Patrick Keyzer's challenging study of the wider body of law that impedes 'access to constitutional justice'.<sup>2</sup>

In this chapter I argue that the law relating to standing in constitutional cases is complex, draws invidious distinctions, and produces unnecessary uncertainty. Reform is necessary. In this, I agree with Keyzer and others who have powerfully critiqued aspects of the Australian law of standing. However, I also argue that any reform proposals must pay close attention to, and work within, the Australian constitutional tradition. Accordingly, I focus on the potential for the rule of law to function as an organising principle for reform of the law of standing. I suggest that it is not likely to be fruitful to base arguments for reform on a principle of access to constitutional justice. Although arguments based on popular sovereignty and freedom of political communication draw on the Australian constitutional tradition, I find them unpersuasive. Finally, in arguing for reform of the law of standing, I resist the movement towards assimilating its content with the concept of a 'matter' under Ch III of the Australian *Constitution*.

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<sup>1</sup> *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*').

<sup>2</sup> Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010).

## The status quo

The Australian law of standing to raise constitutional issues is built on a private law paradigm,<sup>3</sup> one which sees 'administrative [and constitutional] review as concerned with the vindication of private and not public rights'.<sup>4</sup> It is reinforced by disparate elements of substantive and procedural law: the federal courts have jurisdiction only in relation to 'matters', a concept at whose core is the concrete dispute about the applicant's rights and duties on facts pertaining to their own situation; the requirement that in most cases an applicant have a special interest in the subject matter of the action; the limited role of interveners and *amici curiae*. It is also reinforced by structural features of the legal system: the integration of public law and private law litigation in the one system of courts; the shared common law methodology in public law and private law; and the lack of a specialised corps of public law judges. Australian courts have not embraced with any enthusiasm the idea that they might have a role in overtly and deliberately shaping the interpretation of the *Constitution* to meet the governmental needs of the Australian people.<sup>5</sup> Meaning is attributed to constitutional provisions, and that meaning changes over time, as a by-product of litigation between parties. That litigation takes place on a factual record whose scope is determined by those parties (and often whose precise content is determined by the agreement of those parties), usually without the perspective of non-governmental third parties, and certainly without any broader enquiry into social needs and the consequences of the possible outcomes. Law-making may occur – but it is not central to the *inter partes* model of constitutional adjudication.

Within that institutional context, standing is often (but not invariably) determined by asking whether the applicant has a special interest in the subject matter of the action

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<sup>3</sup> See Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Richard S Kay (ed), *Standing to Raise Constitutional Issues* (Bruylant, 2005) 115, 137; and at greater length, Simon Evans and Stephen Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Gabriël A Moens and Rodolphe Biffot (eds), *The Convergence of Legal Systems in the 21st Century: An Australian Approach* (CopyRight Publishing, 2002) 53, 97-8.

<sup>4</sup> *Bateman's Bay Local Aboriginal Land Council v The Aboriginal Community Benefit Fund Pty Limited* (1998) 194 CLR 247, 262 [37] (Gaudron, Gummow and Kirby JJ) ('*Bateman's Bay*') (noting the need for caution in extrapolating from that model in the development of public law review in Australia).

<sup>5</sup> But contrast *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 600 (Kirby J); *Eastman v R* (2000) 203 CLR 1, 79-80 [242] (Kirby J).

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over and above that enjoyed by the public generally.<sup>6</sup> The *Boyce* test<sup>7</sup> may have been attenuated by *Australian Conservation Foundation v Commonwealth*<sup>8</sup> and *Onus v Alcoa of Australia Ltd*<sup>9</sup> where the High Court accepted that a broader range of affected interests may establish standing. But the model remains essentially the same: injury to some individual interest, a special interest in the subject matter of the action that is distinct from the interest of the public generally, is a prerequisite to bringing a claim for an injunction or a declaration.<sup>10</sup>

The 'special interest' test calls for the making of fine and sometimes invidious distinctions between the kinds of affected interest that establish standing and those that do not. For example, the cases require that a distinction be drawn between a mere emotional interest (that is insufficient to establish standing) and a spiritual interest (that may be sufficient). As Keyzer points out, the distinction is elusive.<sup>11</sup> The requirement of a 'special interest in the subject matter of the action'<sup>12</sup> may be less stringent than the former requirement of 'special damage [to a pecuniary or proprietary interest] peculiar to [the applicant]'.<sup>13</sup> But its very breadth, and the flexibility and attentiveness to 'the exigencies of modern life' with which it must be applied,<sup>14</sup> mean that it is an elusive standard. Therefore, as a matter of principle,

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<sup>6</sup> A special interest is not invariably central because (1) it is not required in applications for some remedies (prohibition and habeas corpus in particular); (2) it is only notionally required when constitutional litigation is initiated by government; and (3) it is often conceded or assumed, as was the case in *Pape* (2009) 238 CLR 1.

<sup>7</sup> *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114 (Buckley J).

<sup>8</sup> (1980) 146 CLR 493 ('ACF').

<sup>9</sup> (1981) 149 CLR 27 ('Onus').

<sup>10</sup> Moreover, the standing of Attorneys-General is sometimes conceptualised as being predicated on injury to the interests of their polity, even if that only rarely functions as an impediment to their ability to commence litigation. See Evans and Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Moens and Biffot (eds), above n 3, 59-62.

<sup>11</sup> Above n 2, 53. Contrast *ACF* (1980) 146 CLR 493 with *Onus* (1981) 149 CLR 27. The United States cases on taxpayer standing to raise Establishment Clause claims present this issue also. See in particular Scalia J's caustic concurrence in *Hein v Freedom From Religion Foundation, Inc*, 551 US 587 (2007).

<sup>12</sup> *Bateman's Bay* (1998) 194 CLR 247, 256 (Gaudron, Gummow and Kirby JJ).

<sup>13</sup> *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114 (Buckley J).

<sup>14</sup> *Bateman's Bay* (1998) 194 CLR 247, 265 [46] (Gaudron, Gummow and Kirby JJ), referring to *Taff Vale Railway v Amalgamated Society of Railway Servants* [1901] AC 426, 443 (Lord Lindley).

there is much to be said for reforming the special (or sufficient) interest approach articulated in the Australian cases.<sup>15</sup>

Whether there is a strong empirical case for change is less clear; it is even less clear that the appropriate change is to abandon the special interest requirement entirely. It is probably not possible to determine empirically whether the special interest requirement operates *on its own* as a barrier to effective enforcement of constitutional norms. Clearly government respondents *can* mount vigorous standing arguments to resist judicial review of their actions. The uncertain content of the special interest requirement makes it difficult for the applicant's lawyers to advise with real confidence whether the applicant will succeed, and so the prospect of an adverse costs order against an unsuccessful applicant does have the potential to quell constitutional litigation.<sup>16</sup> Reform of the costs rules and a clearer reformulation of the standing requirements, rather than relaxing or abandoning them, could do a great deal to rebalance effective enforcement of constitutional norms.

One consequence of the current costs rules is that public interest claims are regularly brought by incorporated interest groups. Their incorporated status protects their members from the possibility of personal financial ruin should the claim fail. But it also means that the interest groups will often not have standing: no matter how seriously and consistently the group holds and advocates its view of the matter in dispute, they will not be directly affected by the challenged action and will lack the required special interest. This situation – in which individuals cannot afford to litigate and groups may well lack the standing necessary to do so<sup>17</sup> – could be seen as a deficiency of the standing rules *if one assumes that standing for interest groups is a good thing*;<sup>18</sup> but equally it could be seen as a deficiency of the costs rules. It certainly does

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<sup>15</sup> And as will be seen below, there have been some steps in this direction in the constitutional context in linking the existence of standing and the existence of a 'matter'.

<sup>16</sup> Keyzer, above n 2, 14-6.

<sup>17</sup> An additional difficulty is the uncertainty about whether an interest group will be accorded standing. Potential interest group applicants can have little confidence whether their claim to standing will succeed. A review of recent decisions reveals agreement on the test that is to be applied, but striking variation in outcome. *Environment East Gippsland Inc v VicForests* [2009] VSC 386 (14 September 2009) (Forrest J) is a strikingly relaxed approach (albeit at the interlocutory stage); contrast *Access For All Alliance (Hervey Bay) Inc v Hervey Bay City Council* [2007] FCA 615 (2 May 2007) (Collier J).

<sup>18</sup> Proponents of interest group litigation such as Keyzer, above n 2, raise arguments which reflect a preference, which I share, for a robust civil society constituted by networks of intermediate groups between individuals and the state, tempering some of the corrosive effects of pure liberal individualism. But that preference does not entail that those groups (as opposed to their members) should have standing to pursue constitutional claims. There

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not entail that, as a first step, the special interest requirement for standing be abandoned entirely for interest group applicants. The argument for doing so is strongest where there is no individual applicant who has a concrete interest in the outcome of the matter (for example in environmental litigation). However, where such a potential applicant exists, the desirability of conferring standing on interest groups instead is more debatable (at least if appropriate protection for costs in public interest litigation can be achieved).

In short, therefore, there is a strong case for reformulating the standing rules to provide greater certainty and to ensure that the interests that establish standing do not inappropriately preclude review of public action. How that should be done is the subject of the following sections.

### Constitutionalism and standing

In previous work, Stephen Donaghue and I observed that '[a] richer constitutionalism is needed to provide a context for the debate about standing'<sup>19</sup> than was then apparent in most of the relevant High Court decisions.<sup>20</sup> The High Court's decision in *Bateman's Bay* starts to explore how different ideas about Australian constitutionalism can shape the law of standing (albeit in that case the arguments were developed in an

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is an extensive United States literature that draws attention to the potential divergence between the interests of interest group lawyers and those of their nominal clients. See, eg, Derrick Bell, 'Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation' (1976) 85 *Yale Law Journal* 470; Michael Paris, *Framing Equal Opportunity: Law and the Politics of School Finance Reform* (Stanford Law Books, 2010), both drawn to my attention by Sanford Levinson in a talk at Melbourne Law School. At least as far as I have been able to determine, there has been no comparable work done in the Australian context. The point remains that there is a real risk that litigation by interest groups sometimes (and only sometimes) fails to represent individual interests.

<sup>19</sup> Evans and Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Kay (ed), above n 3, 141. In this article, I use 'constitutionalism' to refer to the cluster of theories and principles that shape the development of public law and practice, in particular those that provide a normative account of the proper relationship between branches of government and between citizens and government, including the extent to which public law norms are enforced by judicial or political institutions. Most accounts of Australian constitutionalism would include among those principles democracy, the rule of law, the significance of positive law, federalism and the separation of powers; however they would not necessarily agree on, for example, the content of each of those principles or their relative weight.

<sup>20</sup> Cf *Re McBain; Ex parte the Australian Catholic Bishops Conference* (2002) 209 CLR 372 ('*Catholic Bishops Case*'). See also David Feldman, 'Public Interest Litigation and Constitutional Theory in Comparative Perspective' (1992) 55 *Modern Law Review* 44.

administrative law context).<sup>21</sup> McHugh J argued that enforcement of the law is the preserve of the executive government. He said:

In most cases, it is for the executive government and not for the civil courts acting at the behest of disinterested private individuals to enforce the law. There are sometimes very good reasons why the public interest of a society is best served by not attempting to enforce a particular law. To enforce a particular law at a particular time or in particular circumstances may result in the undermining of the authority of the executive government or the courts of justice. In extreme cases, to enforce it may lead to civil unrest and bloodshed.<sup>22</sup>

Justice McHugh thus appears to be on the side of a constitutionalism where the political branches have some considerable autonomy to determine when and how legal limits on public action are enforced.<sup>23</sup>

On the other hand, the joint judgment in the same case supports a more robust legal constitutionalism through wider standing rules.<sup>24</sup> The judgment presages references to the rule of law in *Pape*.<sup>25</sup>

Nonetheless the cases retain an ambivalence about the application of the rule of law and legal constitutionalism in Australia:

One version of Australian constitutionalism involves a conception of the rule of law in which the courts sit at the centre and can be called on to rule on any or all constitutional disputes. This approach, which implicitly requires a generous approach to standing, is manifest in the High Court's strong commitment to ensuring that the validity of governmental action can be tested against constitutional (and, indeed, legislative) limits.<sup>26</sup>

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<sup>21</sup> *Bateman's Bay* (1998) 194 CLR 247. As will be apparent from the account given above, n 19, constitutionalism is not co-extensive with 'constitutional law' and underpins, or can be discerned in, much of 'administrative law' as well.

<sup>22</sup> *Ibid* 276-7 [83] (McHugh J) (footnote omitted).

<sup>23</sup> There is some work to be done investigating how this fits into McHugh J's broader constitutional vision.

<sup>24</sup> *Bateman's Bay* (1998) 194 CLR 247, 256-64, 267 (Gaudron, Gummow and Kirby JJ).

<sup>25</sup> *Pape* (2009) 238 CLR 1, 69 [155], [158] (Gummow, Crennan and Bell JJ), 99 [274] (Hayne and Kiefel JJ), not in establishing standing but in confirming the capacity of the court to make orders at the suit of Mr Pape in relation to provisions of the challenged Act that did not directly affect him.

<sup>26</sup> Evans and Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Kay (ed), above n 3, 142.



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This is the commitment that underpins, for example, *Plaintiff S157*.<sup>27</sup> It may explain, as Stephen Donaghue and I pointed out,

the Court's willingness to hear challenges to the validity of legislation that has yet to come into force, to determine appeals against answers given to questions of law reserved in the course of litigation in lower courts, to determine appeals against answers to questions of law given on a reference by the Attorney-General after an accused has been discharged, and to defer consideration of standing issues until after the merits of the case have been decided even if there are significant doubts as to the applicant's standing to bring the claim.<sup>28</sup>

However, just as the 2003 decision in *Plaintiff S157* reflected this strand of Australian constitutionalism, the majority judgments in *Combet v Commonwealth*<sup>29</sup> reflected another 'contrasting, more deferential, constitutionalism'.<sup>30</sup> That approach underpins limits to the judicial role in resolving constitutional disputes, including:

the application of a principle of justiciability; the application of a presumption of constitutionality; the refusal to assess the merits of Commonwealth legislation and the associated ambivalence about using a doctrine of proportionality in assessing the constitutionality of Commonwealth legislation; the limited scope for judicial 'rewriting' of statutes to avoid unconstitutionality; the rejection of prospective overruling and prospective invalidation of legislation as inconsistent with the exercise of judicial power; and the refusal to engage in review of the merits of administrative decisions and reluctance to expand the grounds of judicial review in a way that might blur the distinction between merits and judicial review.<sup>31</sup>

Above all, it underpins the limitation of the (federal) judicial role to the adjudication of 'matters' (discussed further below).

### **The rule of law: an entitlement to know the law**

Given the specific and fundamental commitments of Australian constitutionalism to a fairly thin conception of the rule of law, it is reasonable to suppose that the

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<sup>27</sup> *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476. See especially at 513-4 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

<sup>28</sup> Evans and Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Kay (ed), above n 3, 143 (footnotes omitted).

<sup>29</sup> (2005) 224 CLR 494.

<sup>30</sup> Evans and Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Kay (ed), above n 3, 143.

<sup>31</sup> *Ibid* 143-4 (footnotes omitted).

strongest arguments for relaxing the rules of standing might be framed around this ideal. In *Kartinyeri*, Gummow and Hayne JJ said:<sup>32</sup>

the occasion has yet to arise for consideration of all that may follow from Dixon J's statement that the Constitution: 'is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.'

Patrick Keyzer has recently argued, 'as a matter of constitutional law, that people are entitled to know whether the laws that govern them are valid'<sup>33</sup> and therefore 'ordinary citizen[s]' should have standing to obtain a binding declaration about the state of the law. In support of this claim, he refers<sup>34</sup> to the apparent plenitude of the language of s 75 of the *Constitution*, and the language of the judgment of Gaudron, McHugh and Gummow JJ in *Croome*.<sup>35</sup> The argument based on the language of s 75(v) (emphasising that the conferral of jurisdiction in 'all matters' of the enumerated kinds) overlooks the significance of the word 'matters' and the distinction between the existence of jurisdiction and the appropriateness of its exercise.<sup>36</sup> And the remarks in *Croome* are very much anchored in the fact that '[t]he conduct by the plaintiffs of their personal lives in significant respects is overshadowed by the presence' of the

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<sup>32</sup> (1998) 195 CLR 337, 381 (Gummow and Hayne JJ), referring to *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 193 (Dixon J).

<sup>33</sup> Keyzer, above n 2, 138.

<sup>34</sup> *Ibid* 138.

<sup>35</sup> *Ibid*, referring to *Croome* (1997) 191 CLR 119, 138-9 (Gaudron, McHugh and Gummow JJ). As a referee pointed out when reviewing this paper, Keyzer (above n 2, 138) argues further that '[i]n *Pape v Commissioner of Taxation* [(2009) 238 CLR 1, 69, 99], a majority of the Court held that government submissions that a citizen and taxpayer lacked standing to challenge the validity of a law granting him a tax bonus "proceed from erroneous assumptions as to the nature and incidents in the present case of the adjudication of matters arising under the Constitution or involving its interpretation, and thus give insufficient weight to the rule of law in the scheme of the Constitution"'. But the quoted passage from *Pape* is followed by this passage: 'It may be accepted ... that the plaintiff cannot "roam at large" over the Bonus Act and that he should be restricted to a declaration of invalidity with respect to those provisions applying to him, so far as they are unauthorised by the Constitution' (at 69 [156]). The plaintiff had competence to seek declarations of the invalidity of the whole Act if that arose 'as a step in the resolution of the controversy between him and the defendants' regarding his own entitlements under the Act (at 69 [157]). Nothing here suggests that the rule of law supports open standing or standing to raise issues that go beyond those required to resolve the controversy between the applicant and respondent.

<sup>36</sup> Below I argue that standing and matter should be decoupled.

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provisions whose validity they challenged; it is '[s]uch a person', not *any* person, who 'is ... "entitled to know" whether there continues a requirement to observe that ... law'.<sup>37</sup> It is a large step to cross the threshold and accept open standing in constitutional matters.

Of course, in one sense, '*people* are entitled to know whether the laws that govern *them* are valid'. *Toowoomba Foundry* supports that proposition:

It is now, I think, too late to contend that a person who is, or in the immediate future probably will be, affected in his person or property by Commonwealth legislation alleged to be unconstitutional has not a cause of action in this Court for a declaration that the legislation is invalid.<sup>38</sup>

But that is not the same as open standing: the law of standing currently insists on a more specific link between the challenger and the challenged law than that the challenger is a member of the polity in which the law operates. To accept open standing would obliterate the law of standing to raise constitutional issues, its place taken by the courts' residual powers to dismiss cases that are vexatious or an abuse of process.<sup>39</sup> Beyond those undemanding thresholds, a collectively-held entitlement to know the state of the law would entitle any member of the polity to seek guidance from the courts on the constitutional validity of any executive or legislative action. Apart from the role of the Attorneys-General (who Keyzer rightly discounts as a safeguard of legality)<sup>40</sup> I see nothing in the Australian tradition that supports this vision of constitutional adjudication as a general advisory function, open to all.

I suspect the stronger argument for wider standing rules based on the rule of law is the obverse one. Rather than '*everyone* has the right to know whether the law that governs *someone* is valid' it is 'there must be *someone* who can find out whether *every* government action is *lawful*'.<sup>41</sup> This foundation speaks to the major problem with the special interest test: its requirement of a 'special interest' may ensure that litigation has a concreteness that is apt for the judicial process but it also opens the possibility that some government action is effectively unrestrained by law because the action has no direct and special effect on anyone's rights and interests.

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<sup>37</sup> (1997) 191 CLR 119, 138.

<sup>38</sup> *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545, 570 (Latham CJ).

<sup>39</sup> It is impossible to know in the abstract whether open standing coupled with such a discretion would enhance or diminish access to the courts.

<sup>40</sup> A similar point is made in the Canadian context by Thomas Cromwell, *Locus Standi – A Commentary on the Law of Standing in Canada* (Carswell, 1986) 180-91.

<sup>41</sup> I use the language of lawfulness to emphasise that any such principle is only relevant where there are justiciable standards suitable for resolving the underlying dispute.

This concern that government action in a state governed by the rule of law be susceptible to effective legal challenge<sup>42</sup> animates much of the dicta in the joint judgment in *Bateman's Bay*,<sup>43</sup> albeit there in an administrative law context. The common law long ago recognised this concern in the context of incommunicado detention of individuals, hence the evolution of open standing for *habeas corpus* and the success of the applicants in the *Tampa* case in having their standing recognized in relation to the *habeas* claims.<sup>44</sup> Canadian law recognised this concern in a wider contemporary context in its trilogy of standing cases, starting with *Thorson*.<sup>45</sup> In limited circumstances the Canadian courts now allow a taxpayer 'public interest' standing:

where all members of the public are affected alike, as in the present case, and there is a justiciable issue respecting the validity of legislation, the court must be able to say that as between allowing a taxpayer's action and denying any standing at all when the Attorney General refuses to act, it may choose to hear the case upon the merits.<sup>46</sup>

The rationale for this change lay partly in an analogy to the wide standing in administrative law to challenge the executive's jurisdictional excesses.<sup>47</sup> The three-stage test for granting public interest standing was re-stated in *Canadian Council of Churches*:<sup>48</sup>

[W]hen public interest standing is sought, consideration must be given to three aspects. First, is there a serious issue raised as to the invalidity of legislation in question? Second, has it been established that the plaintiff is directly affected by the legislation or if not does the plaintiff have a genuine

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<sup>42</sup> Again, assuming that there are justiciable standards suitable for resolving the underlying dispute.

<sup>43</sup> *Bateman's Bay* (1998) 194 CLR 247, 256-68 (Gaudron, Gummow and Kirby JJ).

<sup>44</sup> *Ruddock v Vadarlis* (2001) 110 FCR 491; *Victorian Council for Civil Liberties Inc v Minister for Immigration and Multicultural Affairs* (2001) 110 FCR 452.

<sup>45</sup> *Thorson v Attorney General of Canada (No 2)* [1975] 1 SCR 138 ('*Thorson*'). The subsequent two cases in the trilogy are *Nova Scotia Board of Censors v McNeil* [1976] 2 SCR 265 and *Canada (Minister of Justice) v Borowski* [1981] 2 SCR 575.

<sup>46</sup> *Thorson* [1975] 1 SCR 138, [37] (Laskin J for Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ).

<sup>47</sup> In *Thorson*, Laskin J considered that the argument in favour of granting standing was 'fortified by analogy... to the cases on certiorari and prohibition which, even in a non-constitutional context, have admitted standing in a mere stranger to challenge jurisdictional excesses, although the granting of relief remains purely discretionary: *Thorson* [1975] 1 SCR 138, [37] (Laskin J for Martland, Ritchie, Spence, Pigeon, Laskin and Dickson JJ).

<sup>48</sup> *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236, [37] (Cory J for the Court) ('*Canadian Council of Churches*').

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interest in its validity? Third, is there another reasonable and effective way to bring the issue before the court?

The third criterion is crucial. Public interest standing may be granted where legislation would otherwise be ‘immunized from challenge’;<sup>49</sup> it will be refused ‘when, on a balance of probabilities, it can be shown that the measure will be subject to attack by a private litigant.’<sup>50</sup> The United States courts, despite generally denying standing to taxpayers to challenge public expenditure, do allow standing to challenge spending that is said to violate the Establishment Clause, partly on the ground that to do so is necessary in order to have effective review of government action against an important structural provision of the Constitution.<sup>51</sup>

The principle that unlawful public action should not be immune from challenge (at least where there are justiciable grounds for that challenge) runs through the Australian constitutional tradition.<sup>52</sup> It provides a solid basis for developing the common law of standing to recognise some form of public interest standing. In *Kirk*,<sup>53</sup> the High Court found a perhaps unconvincing textual basis for neutering state privative clauses that immunised unlawful decisions from challenge.<sup>54</sup> The Court had a rather more solid interpretive basis for a similar outcome in *Plaintiff S157* in relation to a federal privative clause.<sup>55</sup> Were it not for the Commonwealth’s concession, it may have been necessary to explore these ideas in *Pape*.<sup>56</sup>

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<sup>49</sup> *Ibid*, [42] (Cory J).

<sup>50</sup> *Ibid*, [35] (Cory J). Of course this approach has difficulties of its own: How is the court reliably to assess the likelihood of a future challenge by a litigant with standing in their own right or by a representative litigant who is better placed to pursue the case?

<sup>51</sup> *Flast v Cohen*, 392 US 83 (1968).

<sup>52</sup> See, eg, *R v Hickman; Ex parte Fox and Clinton* (1945) 70 CLR 598; *R v Murray; ex parte Proctor* (1949) 77 CLR 387; *R v Coldham; ex parte Australian Workers’ Union* (1982) 153 CLR 415; *O’Toole v Charles David Pty Ltd* (1990) 171 CLR 232; *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476.

<sup>53</sup> *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531 (*‘Kirk’*).

<sup>54</sup> The *Industrial Relations Act 1996* (NSW) s 179 provides that a decision of the Industrial Court ‘is final and may not be appealed against, reviewed, quashed or called into question by any court or tribunal’, including in ‘proceedings... for any relief or remedy, whether by order in the nature of prohibition, certiorari or mandamus, by injunction, declaration or otherwise.’ The High Court unanimously held that the word ‘decision’ in s 179 should be read as a decision made within the limits of its power, and therefore that s 179 be construed not to oust the grant of certiorari for jurisdictional error: *Kirk* (2010) 239 CLR 531, 581-3 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>55</sup> *Plaintiff S157 v Commonwealth* (2003) 211 CLR 476.

<sup>56</sup> *Pape* (2009) 238 CLR 1.

The common thread in *Bateman's Bay*, *Thorson* and *Pape* is a challenge to the expenditure of public funds, where it is difficult (but not impossible)<sup>57</sup> to isolate an injury to the applicant's interests sufficient to ground standing under the usual principles. In these cases it should be possible to hold that competent plaintiffs have standing to challenge unconstitutional expenditure, without the contortions of holding that the states have an interest in the return of a Commonwealth surplus or that the private applicant has suffered some personal injury.

It is appropriate to expand the scope of standing in this way and initially at least in this context, based on the rule of law grounds noted above. But it is particularly appropriate to do so given the changes in governance since the *Boyce* test<sup>58</sup> was formulated and translated to the Australian public law context. The special interest requirement is particularly apt for evaluating standing to challenge laws that regulate conduct by imposing duties. It should continue to apply in those contexts, ensuring that challenges are as concrete as possible. It is far less apt to keep modern federal government within its powers when it regulates conduct by expenditure, intergovernmental agreements, codes of conduct and licensing agreements,<sup>59</sup> which by their very nature are likely to lack the direct effect on rights and interests required by the traditional law of standing. When the choice is between more abstract review and no review of government action, the rule of law counsels in favour of the former.<sup>60</sup>

### **'Access to constitutional justice'**

A competing principle for reforming the law of standing to raise constitutional issues is the concept of 'access to constitutional justice'. This could be argued to require a

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<sup>57</sup> As in *Bateman's Bay* (1998) 194 CLR 247, 267-8 [52] (Gaudron, McHugh and Gummow JJ), 283-4 [102]-[105] (McHugh J), where the impact on the applicant's competitive position sufficed.

<sup>58</sup> *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114 (Buckley J).

<sup>59</sup> As early as 1932 the problems became apparent in *Anderson v Commonwealth* (1932) 47 CLR 50. The plaintiff sought a declaration that an agreement between the Commonwealth and Queensland governments to prohibit the importation of sugar was illegal and invalid. He contended that the Commonwealth lacked power to execute the agreement and/or prohibition, and that he would face higher sugar prices as a result. The High Court unanimously dismissed his claim for want of standing.

<sup>60</sup> This proposal does not directly confront the uncertainty in the special interest test. However I suspect that it would reduce sharply the number of cases in which that issue was critical to the determination of standing disputes.

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more liberal standing regime in order to make it easier for individuals to raise constitutional issues as a means of vindicating constitutional entitlements.<sup>61</sup>

But what is 'constitutional justice' in the Australian context?<sup>62</sup>

The constitutions of some countries contain great human rights guarantees and principles to guide state action. In such jurisdictions, 'constitutional justice' may denote the vindication of constitutionally-protected rights. The special status of these norms (functionally as substantively rights-protecting and symbolically as constitutionally-expressed) might be argued to justify broad standing rules facilitating their enforcement.<sup>63</sup>

However, the Australian *Constitution* is almost entirely silent in relation to substantive rights.<sup>64</sup> It is an unlikely vehicle for directly pursuing claims to substantive justice. Just about the only provision of the *Constitution* in which the High Court has discerned a substantive justice commitment (at least since the rejection of the individual rights view of s 92) is the power to acquire property on just terms in s 51(xxxi), which entrenches some aspects of the economic status quo. Chapter III as interpreted in the last two decades does give effect to some important aspects of procedural justice.<sup>65</sup> And of course the *Constitution* does contain limited protections for political equality and implicit limits on the ability of government to restrict free political communication and participation.<sup>66</sup> Beyond these few instances, however, it is difficult to see that the Australian *Constitution* expresses a commitment to a particular form of social justice – and therefore it is difficult to see what substantive content might be ascribed to 'constitutional justice' in the Australian context beyond the commitment to the rule of law discussed in the previous section.

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<sup>61</sup> See, eg, Keyzer, above n 2, especially 22-6. Keyzer does not directly argue for a substantive conception of constitutional justice. Cf Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008) 146-53.

<sup>62</sup> Of course, it might simply mean the vindication of constitutional norms through court proceedings. But that would have no normative implications for the law of standing.

<sup>63</sup> The United States is one obvious example where the argument has not been accepted.

<sup>64</sup> This is not to say that the *Constitution* and constitutional litigation do not pursue or evoke substantive values, including federal values: see Adrienne Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 *Oxford Journal of Legal Studies* 1. See also TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001).

<sup>65</sup> And for this reason it may be that the application in *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 was for a form of constitutional justice. But among the universe of constitutional claims, it may be an outlier and not a basis for a wider reconceptualisation of Australian constitutionalism.

<sup>66</sup> See most recently *Roach v Electoral Commissioner* (2007) 233 CLR 162.

The *Constitution* can certainly be used *instrumentally* to advance substantive justice commitments that find their source outside the *Constitution*. Thus, for example, s 109, operating in conjunction with Commonwealth anti-discrimination legislation, provides the constitutional means by which discriminatory state legislation is rendered invalid and inoperative. But neither s 109 nor the Commonwealth's legislative powers themselves contain a substantive justice commitment. Justice was delivered in *Croome v Tasmania*<sup>67</sup> and *Mabo (No 1)*<sup>68</sup> by constitutional means, but it is not particularly helpful to describe it as 'constitutional justice'.<sup>69</sup> Overall, therefore, Australian constitutionalism is not the kind that notions of 'constitutional justice' speak to. Indeed, I find this aspect of the Australian *Constitution* attractive for reasons expressed by Mark Tushnet: 'one advantage of the thin constitution is that it leaves a wide range open for resolution through principled political discussions'.<sup>70</sup> It mitigates the risks of democratic debilitation that arise if the courts become a primary forum for resolving substantive justice issues.

Moreover it is open to doubt whether the idea of *access* to justice (including 'constitutional justice') requires any more than that rights-holders be able to enforce their own rights. Keyzer quotes the Report of the Access to Justice Taskforce, which recommended that all Australians 'should have access to high quality legal services ... to protect their rights and interests'.<sup>71</sup> He draws attention to the links between this recommendation and Cappelletti and Garth's classic formulation of 'access to justice' as the means 'by which people may vindicate their rights and/or resolve their disputes'.<sup>72</sup> Few would disagree that an effective legal system should have those characteristics or that all subject to that system should have access 'to protect their rights and interests'. However, if one is asking what form should the law of standing take in order to satisfy these requirements, the critical question is *which* rights, interests and disputes are '*their*' rights, interests and disputes.<sup>73</sup> The concept of access to justice has nothing to say on this topic. It does not entail that *anyone* should be able

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<sup>67</sup> (1997) 191 CLR 119 ('*Croome*').

<sup>68</sup> *Mabo v Queensland (No 1)* (1988) 166 CLR 186 ('*Mabo (No 1)*').

<sup>69</sup> A point underscored by the contrast between *Mabo (No 1)* (1988) 166 CLR 186 and *Kartinyeri v Commonwealth*, (1998) 195 CLR 337 ('*Kartinyeri*'). Section 51(xxxvi) may be used to enact laws that adversely affect indigenous Australians: *Kartinyeri*, 361-8 especially at 367 [44] (Gaudron J), 378-83 (Gummow and Hayne JJ), 419 (Kirby J, *contra*).

<sup>70</sup> Mark Tushnet, *Taking the Constitution Away From the Courts* (Princeton University Press, 1999) 185.

<sup>71</sup> Access to Justice Advisory Committee, *Access to Justice: An Action Plan* (1994), [1.9].

<sup>72</sup> Mauro Cappelletti and Bryant Garth, 'Access to Justice: The Worldwide Movement to Make Rights Effective – A General Report – Introduction' in Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey*, vol I, Book 1 (Sijthoff and Noordhoff, 1978), 6.

<sup>73</sup> And which *types* of rights and interests are protected.



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to vindicate *another's* rights; the question of whose rights and interests can be pursued by whom must be resolved prior to determining how these people can access justice by pursuing them.

In summary, although access to constitutional justice is a desirable state of affairs, it has limited relevance to Australian constitutionalism and says very little in the specific context of the law of standing, beyond a bare minimum that a person has standing to protect their own rights and interests.

### Freedom of political communication

A third putative organising principle for reform of standing is based on the implied freedom of political communication.<sup>74</sup> Keyzer argues that an application for judicial review of legislative action is 'an expressive act' about government or political matters,<sup>75</sup> and that the constitutionally prescribed system of government upheld by the implied freedom of political communication includes judicial review of legislative action: '[e]lections, the exercise of legislative power, judicial review and referenda operate together to create the Australian system of government.'<sup>76</sup> In limiting the availability of judicial review, the rules of standing 'effectively burden freedom of communication about government or political matters',<sup>77</sup> and thus it is necessary to engage in the second stage proportionality enquiry.<sup>78</sup> Keyzer argues that they are not reasonably appropriate and adapted to a legitimate purpose, in part because '[t]here is *no real substitute* for judicial review of legislative action' as a form of political dissent.<sup>79</sup>

The difficulty with this argument is that the *Constitution* provides for judicial review within a particular institutional context.<sup>80</sup> It could equally be said that there is no real substitute' for full public participation in the making of legislation: just as only judicial review can lead to a declaration of constitutional validity, only performance of the legislature's constitutional function can make new laws. But few would regard this as a sound argument that legislation can only be approved by national plebiscite open to participation by all. The constitutional text and structure is inconsistent with such a requirement. Equally, the implied freedom of political communication does

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<sup>74</sup> Keyzer, above n 2, 124-5.

<sup>75</sup> *Ibid* 130.

<sup>76</sup> *Ibid* 135.

<sup>77</sup> *Ibid* 125.

<sup>78</sup> *Ibid* 132.

<sup>79</sup> *Ibid* 133 (emphasis in original).

<sup>80</sup> Moreover, even if the political discourse that arises out of the course of constitutional litigation is of a particular irreplaceable kind, that does not entail that any particular person (or every person) should be able to initiate that litigation.

not require open standing: the freedom operates in a constitutional context in which judicial power is exercised by courts only in 'matters'. The common law of standing must yield to constitutional imperatives (whether characterised as the implied freedom of political communication or as a separate set of implications drawn from Ch III requiring access to the courts to conduct constitutional litigation), but those imperatives are delimited by the *Constitution* itself and not by a free-standing concept of access to justice.

Moreover, the standing rules may well not be reasonably appropriate and adapted to protecting courts against baseless actions as Keyzer argues. But that is not their only or most important purpose. Alternative rationales include upholding 'the primacy of the political process as a constitutional constraint'<sup>81</sup> by diverting 'constitutional questions involving broad social rights or interests' to the legislative and political process,<sup>82</sup> deflecting the 'decision when and in what circumstances to enforce public law' to the Executive,<sup>83</sup> improving the quality of judicial decision-making by limiting it to situations where the legal situation of the parties will be affected,<sup>84</sup> and even preventing 'the diversion of the courts' limited resources to public interest actions [at the expense of] their ability to protect individuals and minority groups from oppressive or discriminatory government action.'<sup>85</sup> The fact that better rules might be found (or created) is not a reason for concluding that existing tools are inconsistent with the *Constitution*.

### Popular sovereignty and development of constitutional identity

The final organising principle for reform of the law of standing advanced by Keyzer is '[a] thick version of popular sovereignty [that] would require the removal of procedural restrictions that close courts from popular participation in their constitutional decisions'.<sup>86</sup> The High Court has recognised the importance of popular

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<sup>81</sup> Henry Burmester, 'Locus Standi in Constitutional Litigation' in HP Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Lawbook, 1992) 148.

<sup>82</sup> *Ibid* 177.

<sup>83</sup> *Bateman's Bay* (1998) 194 CLR 247, 278 [86] (McHugh J).

<sup>84</sup> *Mellifont v Attorney General (Qld)* (1991) 173 CLR 289, 318 (Brennan J).

<sup>85</sup> Sara Blake, 'Standing to Litigate Constitutional Rights and Freedoms in Canada and the United States' (1984) 16 *Ottawa Law Review* 66, 78, referring to *US v Richardson*, 418 US 166, 192 (1974) (Powell J), and noting that this 'floodgates' argument was rejected by Laskin J in *Thorson* [1975] 1 SCR 138, 145.

<sup>86</sup> Keyzer, above n 2, 144.

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sovereignty in Australian constitutionalism,<sup>87</sup> and it can readily be accepted that popular sovereignty 'should not be understated' as 'an ideal of government'.<sup>88</sup>

The version of popular sovereignty recognised in the early 1990s decisions of the High Court was decidedly thin – and inevitably so, given the constitutional materials and the strongly positivist constitutional tradition. It is most unclear that the constitutional materials, and the constitutional tradition in which they were developed, provide any basis for a thick account, let alone one with such specific and strong implications as Keyzer seeks to draw. As George Winterton noted in 1998:

In truth, popular sovereignty in itself tells us nothing regarding the rights of citizens... Whether or not the people intended to retain rights and freedoms and, if so, their content can be determined only through interpreting the instrument through which they have spoken – the Constitution – in the light of (among other things) the intention of its framers and our constitutional traditions, including the common law.<sup>89</sup>

Second, at least since 1995<sup>90</sup> the High Court has resisted drawing any strong normative implications from popular sovereignty. Subsequent decisions, including *Roach v Electoral Commissioner*,<sup>91</sup> have been narrowly drawn and anchored in the text and its requirements for a representative system of government, rather than in a thick account of popular sovereignty. To draw a normative implication from popular sovereignty that significantly relaxes the law of standing represent an abrupt departure from the High Court's constitutional jurisprudence and pose more questions than it answers. Therefore such a change seems not only unlikely (given the record of the current High Court) but also unwise.

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<sup>87</sup> *Kirmani v Captain Cook Cruises Pty Ltd (No 1)* (1985) 159 CLR 351, 383 (Murphy J), 442 (Deane J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70-1 (Deane and Toohey JJ); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) ('ACTV'); *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 171, 172-3, 180 (Deane J) ('Theophanous'); *McGinty v Western Australia* (1996) 186 CLR 140, 199 (Toohey J), 230 (McHugh J).

<sup>88</sup> Keyzer, above n 2, 143.

<sup>89</sup> George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1, 12. Keyzer cites this article for further consideration of the High Court's acceptance of popular sovereignty as an account of the foundation of Australian authority: above n 2, 84.

<sup>90</sup> *McGinty v Western Australia* (1998) 186 CLR 140, 199 (Toohey J) ('the people hold the ultimate sovereignty'), 230 (McHugh J) ('the political and legal sovereignty of Australia now resides in the people of Australia').

<sup>91</sup> *Roach v Electoral Commissioner* (2007) 233 CLR 162.

Third, it is unclear why an implication from popular sovereignty should entail relaxation of standing requirements specifically, rather than expansion of intervention rights and *amicus* procedures.<sup>92</sup>

Finally, Keyzer cites Jeremy Webber's argument that:

[O]ne should reinforce – not eliminate – the impact of society-at-large upon the institutions [of government]: one should actively foster the development of reflexive mechanisms within the system so that they can promote, over time, the very evolution of those institutions. In other words, one should support (to adopt Dicey's terminology) the political sovereignty of the populace over the formal institutions of the state, subjecting institutions to democratic control.<sup>93</sup>

This is a rich argument, characteristic of Webber's work. But it does not follow that the law of standing should be set aside in favour of open access for the populace to commence constitutional litigation. Webber went on to write:

We should never fall into the trap of thinking that the populace can, without the mediation of institutions, speak with a coherent voice ... Thus, elements ... such as ... the adoption by courts of a procedural conception of the rule of law, are all essential to meaningful and effectual participation.<sup>94</sup>

Although Webber explicitly extends his argument for reflexivity to the courts, his argument is entirely consistent with institutional differentiation and restrictions on access to constitutional litigation.<sup>95</sup> In summary, recognising that the ultimate sovereignty lies with the people provides no secure basis for reforming the Australian law of standing.

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<sup>92</sup> Cf Keyzer, above n 2, Chapter 5.

<sup>93</sup> Jeremy Webber, 'Democratic Decision Making as the First Principle of Contemporary Constitutionalism' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 411, 427, quoted in Keyzer, above n 2, 124, 144.

<sup>94</sup> Ibid 428.

<sup>95</sup> Keyzer, above n 2, 144-6, points to the democratic legitimacy and the epistemic benefits established by popular participation:

'The legitimacy of constitutional judgments would be enhanced if judges were available to hear the voices of people who are affected by their decisions.' (referring to Martha Minow and Elizabeth Spelman, 'Passion for Justice' (1988) 10 *Cardozo Law Review* 37, 44)

'[T]he expansion of access to people without standing and their associations regardless of their means would improve the capacity of the Court to tap community values.'

Both observations depend on controversial assumptions about authority and legitimacy and the nature of judicial decision-making.

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**Standing should not be constitutionalised**

In the previous sections I have canvassed four possibilities for reformulating the law of standing (drawing on arguments presented by Keyzer), preferring the first (grounded in the rule of law) to the other three.<sup>96</sup> In fact the High Court has taken a fifth approach: asserting that, at least in certain contexts in federal jurisdiction, standing questions are largely subsumed within the question of whether there is a matter in the constitutional sense. In this section I urge caution in following this approach. In my view the law of standing has a close relationship with ideas about Australian constitutionalism, and thus must be developed in light of Australian constitutional commitments, including the strong commitment to the separation of powers and the limitation of federal jurisdiction to ‘matters’. However, it is distinct from and not fully controlled by capital-C constitutional norms. The law of standing should not be put beyond ‘[o]rdinary legislative action’ determining ‘the constitution of the public voice’<sup>97</sup> nor beyond the creative capacities of the common law.

The constitutional dimension of standing can be traced back at least as far as *ACF*.<sup>98</sup> In *Bateman’s Bay*, the joint judgment developed what had been said there:

[I]n federal jurisdiction, questions of ‘standing’, when they arise, are subsumed within the constitutional requirement of a ‘matter’. This emphasises the general consideration that the principles by which standing is assessed are concerned to ‘mark out the boundaries of judicial power’ whether in federal jurisdiction or otherwise.<sup>99</sup>

In *Croome*, Gaudron, McHugh and Gummow JJ wrote, ‘Where the issue is whether federal jurisdiction has been invoked with respect to a “matter”, questions of standing are subsumed within that issue.’<sup>100</sup> That language has been cited in subsequent cases.<sup>101</sup> What it means is not clear. It cannot mean that there is no matter

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<sup>96</sup> Keyzer presents other intriguing arguments that I do not consider here. In particular he argues that constitutional litigation can be an important opportunity for people to realise their ‘constitutional identity’ and that standing rules should not impair the opportunity for self-realisation in this forum through rules that discriminate on the basis of identity: Keyzer, above n 2, Chapter 3.

<sup>97</sup> Webber, above n 92, 428.

<sup>98</sup> *ACF* (1980) 146 CLR 493, 550-1 (Mason J).

<sup>99</sup> *Bateman’s Bay* (1998) 194 CLR 247, 262 [37] (Gaudron, Gummow and Kirby JJ), citing *ACF* (1980) 146 CLR 493, 550-1 (Mason J).

<sup>100</sup> *Croome* (1997) 191 CLR 119, 132-3 (Gaudron, McHugh and Gummow JJ).

<sup>101</sup> *Pape* (2009) 238 CLR 1, 35 [50]-[51] (French CJ), 68 [152] (Gummow, Crennan and Bell JJ) (‘It is now well established that in federal jurisdiction, questions of ‘standing’ to seek equitable remedies such as those of declaration and injunction are subsumed within the constitutional requirement of a “matter”.’), 99 [273] (Hayne and Kiefel JJ, agreeing).

unless the applicant satisfies the direct or special interest test. As McHugh J wrote in *McBain*, with reference to the dictum of Gaudron J in *Truth About Motorways*:

In some cases, the existence of a matter may depend on the plaintiff or applicant having standing. But 'neither the concept of "judicial power" nor the constitutional meaning of "matter" dictates that a person who institutes proceedings must have a direct or special interest in the subject matter of those proceedings'.<sup>102</sup>

That proposition is central to the result in *Truth About Motorways*,<sup>103</sup> where the Court accepted that federal legislation could allow open-standing in its enforcement provisions. It is equally required by the fact that no direct or special interest is required if the applicant is seeking prohibition or mandamus.<sup>104</sup> Conversely, it cannot mean that if an applicant has a direct or special interest a matter is thereby constituted. The requirements for standing do not exhaust the myriad requirements or the existence of a matter, not least the requirement that the dispute be justiciable.

The link between matter and standing must therefore be looser than the language in *Croome*<sup>105</sup> and *Bateman's Bay*<sup>106</sup> suggests. I suggest that it will both often, but not invariably require, that there be a connection between the moving party and the subject matter of the litigation. To this extent, therefore, '[q]uestions of standing cannot be divorced from the notion of a "matter",'<sup>107</sup> because they raise closely related issues. But the kind of connection that is required to constitute a matter is not necessarily the same as the kind of connection that is required to establish standing.

To the extent that that language suggests that there is a tighter link, it risks constitutionalising the special interest requirement and conflating the potentially distinct functions of the constitutional requirement of a 'matter', which is a condition for the exercise of federal judicial power, and the common law requirements of the principles of standing, whatever form those requirements might take. To conflate

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<sup>102</sup> (2002) 209 CLR 372 at 414-5 (McHugh J), referring to *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd* (2000) 200 CLR 591, 611 [45] (Gaudron J) ('*Truth About Motorways*').

<sup>103</sup> (2000) 200 CLR 591.

<sup>104</sup> Evans and Donaghue, 'Standing to Raise Constitutional Issues in Australia' in Kay (ed), above n 3, 125-6.

<sup>105</sup> *Croome* (1997) 191 CLR 119.

<sup>106</sup> *Bateman's Bay* (1998) 194 CLR 247.

<sup>107</sup> *Abebe v Commonwealth* (1999) 197 CLR 510, 527-38 (Gleeson CJ and McHugh J). As Brennan CJ, Dawson and Toohey JJ wrote in *Croome*, 'a justiciable controversy does not arise unless the person who seeks to challenge the validity of the law has a sufficient interest to do so': (1997) 191 CLR 119, 126 (Brennan CJ, Dawson and Toohey JJ).

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these functions would sit oddly with Gibbs J's suggestion in *Robinson v WA Museum* that the court has a discretion to 'accord standing to the plaintiff on the ground that he asserts, not implausibly, that his interests are threatened by the operation of the legislation in question' rather than a duty to determine definitively that the plaintiff does indeed have standing before hearing the plaintiff.<sup>108</sup>

I would therefore resist Gummow J's suggestion in *Truth About Motorways*, that '[t]he notion of "standing" is an implicit or explicit element in the term "matter" throughout Ch III, identifying the sufficiency of the connection between the moving party and the subject matter of the litigation',<sup>109</sup> if it meant that the law of standing had acquired constitutional status. But the passage is better understood as suggesting only that *some* connection between the moving party and the subject matter of the litigation is required, and the *nature* of the connection differs in two dimensions: between the requirements for standing and those for a 'matter', and between different types of Ch III cases. Consistently with this interpretation, Gummow J went on to write in the same paragraph that, 'it would be an error to attribute to this notion a fixed and constitutionally mandated content across the spectrum of Ch III.'<sup>110</sup> The core idea of standing – the requirement that the moving party have a sufficient connection with the subject matter of the litigation – is constitutionalised as part of the 'matter' requirement, which calls for *inter alia* the adjudication of an immediate right, duty or liability of one of the parties.<sup>111</sup> However, the specific content of the law of standing is not constitutionalised, which leaves it open to judges to define and develop the prudential requirements of the law of standing free of constitutionally-imposed rigidity. Justice Kirby wrote to similar effect in *Truth About Motorways*, in a statutory context, that:

The doctrine of standing is itself 'a house of many rooms'. This Court should not accept the attempt to use the constitutional notion of 'matter' to erode significantly the legislative powers of the Federal Parliament and to import a serious and unnecessary inflexibility into the *Constitution*.<sup>112</sup>

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<sup>108</sup> *Robinson v WA Museum* (1976) 138 CLR 283, 302-3. Gibbs J emphasised that 'The court, in balancing the conflicting considerations, will remember that it cannot decide a question of validity as an abstract or hypothetical question.'

<sup>109</sup> *Truth About Motorways* (2000) 200 CLR 591, 637 (Gummow J).

<sup>110</sup> *Ibid.*

<sup>111</sup> *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

<sup>112</sup> *Truth About Motorways* (2000) 200 CLR 591, 638-9 (Kirby J) referring to *Bateman's Bay* (1998) 194 CLR 247, 280 (McHugh J). See also *Truth About Motorways* at 650-2 (Kirby J).

The 'matter' requirement then identifies the constitutional minimum connection between the moving party and the dispute; the law of standing identifies prudential requirements (and perhaps other requirements) that may be more stringent than the constitutional minima.

### **Conclusion**

I have argued that the current law relating to standing to raise constitutional issues is undesirably complex and uncertain and should be reformed. Future cases involving questions of standing to raise constitutional issues will present the High Court with a chance to achieve a principled reformulation of the law of standing. It should abandon unprincipled and unworkable distinctions in the kinds of interests that suffice to establish standing; and it should adapt the Canadian interest group standing rules to ensure that, whenever government conduct is constrained by justiciable legal standards, *some* litigant has standing to invoke the exercise of federal judicial power to determine the lawfulness of that action. This proposal will contribute to ensuring that where constitutional norms protect individual interests (including minority interests, whether material or not), those interests can be effectively vindicated in constitutional litigation.<sup>113</sup> Critically, however, it does not accept the need for open-standing in constitutional matters. Moreover, it pays due attention to the Australian constitutional tradition in which the rule of law has a central place as an organising and generative principle.

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<sup>113</sup> Subject to the impact of costs rules that other contributors to this symposium consider.