FOREWORD

Joseph Vining observed of "standing" that "[j]udges and lawyers found themselves using the term and did not ask why they did so or where it came from".[1] The term "standing" is probably a neologism, from *locus standi* (the location to stand), reflecting a concept concerned with those who may appear in court to be heard. For more than a century, public law has refined rules concerning those who have a power to appear in court in a public law action involving the existence or breach of public rights. The closest that the common law came to establishing an open rule of standing was the creation of the relator proceeding, which permits any person to bring a public law action by "relating" facts to the Attorney-General that tend to show the breach of a public right. But those proceedings are brought by the relator in the name of the Attorney-General and the proceedings remain those of the Attorney-General. Otherwise, at common law the standing requirement for a person to bring a public law action in their own name is one of a sufficiently special interest.

As Lord Wilberforce recognised, there is a distinction of "fundamental principle" between the assertion of private rights and the assertion of public rights.[2] It is usually taken for granted that a person with private rights, and only that person, has standing to enforce those private rights. Indeed, this notion is often so taken for granted that the existence of a power of standing is commonly forgotten. As Dr Liau observes in this remarkable book, the rules of standing in private law have become "hidden in plain sight".

Standing in Private Law is a ground-breaking work, shining a light upon the neglected private law standing rules and urging a clarity of thought from which the developed public law standing rules might also benefit. It is a work of deep theory, building upon the writing of some of the great legal theorists of the 20th and 21st centuries. Dr Liau is meticulous with his use of terminology to describe complex concepts, eschewing loose language that would generate ambiguity in this under-conceptualised field. Perhaps the largest single insight is the separation of, on the one hand, legal rights (claim-rights, powers, liberties, and immunities) and, on the other hand, the power to have a court adjudicate upon issues concerning those legal rights, being the subject-matters of enforcement. The understanding that Dr Liau encourages will have significant effects on private law legal doctrine. For example, as Dr Liau observes over the course of Chs 6 to 9, drawing a distinction between, on the one hand, the power of standing and, on the other hand, claim-rights that are the subject-matters of enforcement may explain, and reconcile, potentially conflicting authorities and misunderstandings in areas such as unjust enrichment, contract law, and trusts.

The separation of questions concerning whether a person has a power of standing from questions concerning whether the person has a claim-right, power, liberty or immunity might also assist in re-conceptualising a diverse range of issues where courts have easily given answers but have struggled with their explanation, or where courts have struggled with answers and explanation. One issue is whether private law duties can be owed to a person who does not yet exist. An affirmative answer is sometimes given easily by a court but rarely with adequate reasoning. It is easily said that a person can be a trustee for an unborn child, but it is rarely explained that this might involve the trustee owing duties that the child will only later have standing to enforce. Further, as Dr Liau observes in Ch 10, courts have struggled to explain whether or why a tortfeasor is liable for an alleged tort against an unborn child. Another issue is whether a person is liable for substantial damages for breach of

[1] Joseph Vining, *Legal Identity: The Coming of Age in Public Law* (Yale University Press 1978) 55.
[2] *Gouriet v Union of Post Office Workers* [1978] AC 435, 477.

contract for a loss that is not suffered by the counterparty to the contract. For example, a solicitor who negligently fails to amend a will might cause loss to the intended legatee but not to the deceased client or their estate.[3] Like a claim by a dependant under *Lord Campbell's Act*,[4] courts have not usually recognised that there are two elements involved: one is the recognition that the intended legatee has standing to enforce a claim-right, and the other is the creation of a claim-right of the intended legatee themself, permitting recovery by the intended legatee of their loss for breach of a (perhaps novel) common law duty owed either to the intended legatee or to the testator. By contrast, courts have been more comfortable, and there has been less controversy, where only the element of standing is involved: such as where a claimant is afforded standing, in exceptional circumstances, to obtain a declaration about the private rights of others.

The theory and many of the important doctrinal consequences coalesce in the final two chapters of this marvellous book. Standing, Dr Liau argues, might be exceptionally conferred on a person to enforce the rights of another in clusters of cases that focus upon the consent or incompetence of the right-holder, or the right being held for the benefit of the person seeking to enforce it. In some circumstances these exceptional situations at common law have been overtaken by detailed legislative schemes, such as those empowering, in limited circumstances, direct action against insurers by third parties to a contract, or group action litigation concerning the rights of others. But the intellectual and theoretical depth of *Standing in Private Law* makes it essential reading for those involved in legislative reform of standing in private law, no less than those who seek to understand at common law the power to enforce rights in a legal system.

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[3] See, eg, *White v Jones* [1995] 2 AC 207 (HL); *Hill v Van Erp* (1997) 188 CLR 159.
[4] *Fatal Accidents Act 1846*, 9 & 10 Vict, c.93, repealed by the *Fatal Accidents Act 1976*.