

## PETER JOHNSTON'S CONTRIBUTION TO PUBLIC LAW IN WESTERN AUSTRALIA

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Peter Johnston wanted to have his cake and eat it too. He loved teaching law and he loved litigating about the principles he was teaching. His legendary and typically hyperbolic observation at the beginning of a lecture — we don't just teach Constitutional Law here, we make it! — echoes down the years. They were the years of a life given to the service of legal education and to the advancement of human rights and social justice through his involvement as adviser and sometimes but not always quixotic advocate.

In 2013, Peter Johnston published an article entitled 'Litigating human rights in Western Australia: lessons from the past'.<sup>1</sup> He set out an 'essentially descriptive' account of Western Australian public law cases with a human rights flavour in the last quarter of the 20<sup>th</sup> century. He had been involved in a significant number of them. He posed the question whether principles and presumptions available under constitutional provisions, the common law and statute during that period in Western Australia were adequate to protect individual human rights. He showed that, forced to rely on existing prevailing interpretive principles, counsel had to deploy novel arguments which tended to 'push the envelope' and embrace alternative constructional models.<sup>2</sup> He located his selected cases in the context of emerging human rights principles derived from international instruments that were beginning to play a role in Australian jurisprudence from 1975 onwards.<sup>3</sup> In a State with no Charter of Human Rights and 'a difficult and unpromising judicial climate', he had delighted in finding in the tools at hand, ways of engaging with human rights and civil liberties issues of the time. While, as he observed, most of the rights-focussed arguments advanced in the period he described were legally ineffectual at the time, appropriate variations to them could be more sympathetically received in contemporary proceedings.<sup>4</sup> He placed particular emphasis on the development of the interpretive 'principle of legality' favouring constructional choices in statutes avoiding or mitigating their adverse impact upon fundamental common law rights and freedoms. He looked also, in two

<sup>1</sup> (2013) 15 *University of Notre Dame Australia Law Review* 111.

<sup>2</sup> *Ibid* 112.

<sup>3</sup> *Ibid* 113.

<sup>4</sup> *Ibid* 112–13.

important cases discussed later in this article, to Imperial and colonial statutes of the 19<sup>th</sup> century as foundations of judicial review of legislation affecting voting and indigenous rights.

One of his early battles was with s 54B of the *Police Act 1892* (WA), which prohibited meetings of more than three people in a public place to discuss matters of public interest unless authorised by a permit from the Commissioner of Police issued at least seven days before the meeting. The section had been enacted in 1976. Not surprisingly, it engendered public meetings without benefit of a permit as a way of protesting against it. There were a number of prosecutions. All manner of arguments were deployed by legal representatives, including Peter Johnston, for the defence. In 1980, he represented a Uniting Church Minister charged in the Roebourne Court of Petty Sessions. He submitted that s 54B be interpreted in the light of Art 19 of the *International Covenant on Civil and Political Rights*, arguing that police officers when deciding to intervene in political meetings should only give directions to disperse a crowd if there were some threat to public safety.<sup>5</sup> The magistrate hearing the charge avoided the difficult question of the interface between the State law and an international covenant. He dismissed the charge on the basis that he was not satisfied, having regard to the noise at the meeting that the prosecution had established beyond reasonable doubt that the defendant had heard the police inspector's direction to desist from addressing the meeting. That might seem an almost trivial basis for decision. No doubt, however, the defendant was satisfied with the outcome.

Another celebrated case of a prosecution for an offence against s 54B involved the late Robert Riley, a prominent and highly respected Aboriginal leader who was alleged to have addressed an unlawful meeting from the steps of the General Post Office (GPO) in Forrest Place in Perth. Peter ran an argument that the defendant's position on the steps of the GPO placed him on the property of a Commonwealth Department that had been transferred from the Colony of Western Australia at Federation. He argued that it was, by virtue of s 52(ii) of the Commonwealth Constitution, an area in which Commonwealth law applied to the exclusion of State law. Alternatively, he submitted that any disturbance within the precincts of the GPO had to be dealt with under the *Public Order (Protection of Persons and Property) Act 1971* (Cth), which covered the field so that, by virtue of s 109 of the Constitution, the State law was not

<sup>5</sup> *Colin De La Ru and Section 54B of the Police Act* (Unreported, Roebourne Police Court Prosecution, May 1980).

validly applicable on the steps of the GPO. The Supreme Court held that because the sound waves had reached members of the public in Forrest Place, the offence had been committed where the audience was located.<sup>6</sup> The enactment of s 54B was not one of Western Australia's proudest legislative moments and it deserved all the adverse attention it received from defence lawyers.

In addition to representing the interests of political protestors, Peter was engaged, from an early stage, in assisting Aboriginal interests in relation to highly contentious oil drilling operations authorised by the State Government on the Noonkanbah pastoral property. He represented members of the Yungngora Community in obtaining an interlocutory injunction to prevent the drilling. The relevant minister had directed the Trustees of the Western Australian Museum under the *Aboriginal Heritage Act 1972* (WA) not to oppose drilling on the station even though they had recommended against it. His key submission was that the decision under the *Aboriginal Heritage Act* consenting to drilling entailed racial discrimination contrary to the *Racial Discrimination Act 1975* (Cth). This, as he pointed out in his *Review* paper 'was a somewhat adventurous proposition'<sup>7</sup> when it is remembered that it was advanced two years before a similar proposition was upheld in *Koowarta v Bjelke-Petersen*.<sup>8</sup>

A judge of the Supreme Court dissolved the interlocutory injunction.<sup>9</sup> A drilling convoy supported by an extensive police escort was obstructed, as it approached the pastoral lease, by 20 Aboriginal men and a number of non-indigenous clergymen. The protestors were forcibly removed from the road by police and charged with a number of offences, including obstructing traffic on a public road contrary to the *Road Traffic Act 1974* (WA). Peter represented the clergymen. Evidence as to the public status of the track on which they had been sitting to obstruct the convoy was tendered in the form of a Government Gazette. Peter pointed out that the prosecution had not produced a surveyor who could connect the map shown in the Gazette with the bush track on which the protestors had sat. The point was upheld and the charges dismissed, although the magistrate, evidently gratuitously, told the defendants they had only got off on a technicality and had done 'a very bad

<sup>6</sup> *Riley v Hall* (Unreported, Supreme Court of Western Australia, 4 June 1981).

<sup>7</sup> Johnston, above n 1, 122.

<sup>8</sup> (1982) 153 CLR 168.

<sup>9</sup> *Yungngora Association Inc v Amax Iron Ore Corp* (Unreported, Supreme Court of Western Australia, Wallace J, 7 March 1980).

thing'.<sup>10</sup>

Many years later it was my pleasure as a Federal Court Judge to make a consent determination recognising the native title of the indigenous people of that land.<sup>11</sup>

Peter Johnston was also involved in representing environmental organisations concerned about the development of the alumina industry in the South West of Western Australia and their effect on the native forests in the same region. *Margetts v Campbell-Foulkes*<sup>12</sup> was a case in which we appeared together. Twenty three defendants were prosecuted under s 67 of the *Police Act 1892* (WA) which made it an offence to cause a person to abstain from carrying out an activity pursuant to a law of the State that the person was empowered to do 'by virtue of a licence, permit or authorisation' issued under that law. They were convicted in the Court of Petty Sessions. They had obstructed Alcoa of Australia Ltd in the construction of its Wagerup Refinery. There were two defences. The first was that the activities of Alcoa were not authorised by virtue of a licence, permit or authorisation issued under a law. The relevant approval had been given pursuant to a provision of an agreement between the State of Western Australia and Alcoa, the Wagerup Agreement, which was ratified by an Agreement Act. Mere ratification, however, did not confer on the agreement the force of law.<sup>13</sup> The second line of defence was that the alleged licence, permit or authorisation issued to Alcoa upon which the prosecution relied, was no more than a letter written by the State Premier to the company advising that its environmental management program was 'approved'. In the event, the Full Court of the Supreme Court of Western Australia, on appeal against the convictions of the defendants, ruled that the letter merely furnished advice of government approval and otherwise had no legal effect. It neither permitted nor authorised anything. The primary argument, which it was unnecessary for the Court to address, was of far greater significance to the State. It was supported by solid High Court authority. It resulted in the enactment of the *Government Agreements Act 1979* (WA). That Act did not globally confer on State Agreements the force of law, but provided that they were to take effect according to their tenor. That would seem to have had the effect that if, for example, a minister agreed to exercise a statutory discretion in a particular way

<sup>10</sup> Ibid.

<sup>11</sup> *Cox on behalf of the Yungngora People v State of Western Australia* [2007] FCA 588

<sup>12</sup> (Unreported, Full Court of the Supreme Court of Western Australia, 29 November 1979).

<sup>13</sup> See *Sankey v Whitlam* (1978) 142 CLR 1.

the *Government Agreements Act* authorised the exercise of that discretion in that way.

Another public law case in which Peter and I appeared together, although some would say not on the side of the angels, was one in which we represented a private corporation operating a pine plantation investment scheme in Western Australia. The company was the recipient of a notice issued by the Chairman of the Trade Practices Commission, the late and formidable Ronald Bannerman, Australia's foundational national competition and consumer law regulator. The notice required production by the company of information and documents relating to its marketing of the scheme. On behalf of the company we sought a declaration of the invalidity of the notice on the basis that the Chairman lacked the requisite state of mind to enliven the coercive power conferred upon under s 155. The challenge depended upon characterising his recitation of the requisite 'reason to believe' as purely formulaic, following the words of s 155 and indicating at best two inconsistent states of mind. That contention was based upon his statement in the notice that he believed the company to be capable of providing information and producing documents relating to a matter 'that constitutes, or may constitute, a contravention of the Act'. The argument was courteously characterised by Brennan J (as he then was) on the Full Court of the Federal Court as asserting a 'schizophrenia in credence' on the part of the Chairman.<sup>14</sup> The challenge was unsuccessful, but yielded a comprehensive judgment both at first instance before Toohey J<sup>15</sup> and in the Full Court before Bowen CJ, Brennan and Lockhart JJ.<sup>16</sup> The judgments canvassed, inter alia, the criteria for the exercise of a statutory power conditioned upon the repository's 'reason to believe' certain matters. The judgment by Lockhart J is still a useful reference on the question and particularly his Honour's observation that:

Words such as these are found frequently in legislation or regulations conferring powers on Ministers of the Crown or public servants. They must be read as limiting otherwise arbitrary powers. If they are to be read as empowering the person in whom the power is vested to determine conclusively whether the limitation has been satisfied, the value of the intended limitation is nugatory.<sup>17</sup>

<sup>14</sup> *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175, 179.

<sup>15</sup> *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 169.

<sup>16</sup> *WA Pines Pty Ltd v Bannerman* (1980) 41 FLR 175.

<sup>17</sup> *Ibid* 186.

That approach had the consequence that the words 'has reason to believe' appearing in s 155 meant not only that the Chairman of the Commission must believe that the subject of the interrogatory was capable of furnishing the requisite information but there must be reasonable grounds or cause for that belief before the powers conferred by the section could be exercised.<sup>18</sup> While the challenge was not successful it may, having regard to the judgments it produced, be counted as a contribution to public law in which Peter Johnston played an important part.

Each of the cases mentioned so far involved the central question in most judicial review of administrative action namely, what is the construction of the relevant statute and how does it apply? The highest profile case in which Peter Johnston and I appeared together was a case in which we sought judicial review of legislative action. It concerned a prisoner's voting rights and the interpretation and application of Imperial and State constitutional statutes. On 22 September 1981, we appeared together before the High Court, sitting all seven Justices in Perth for the first time in its history. We represented Peter Wilsmore, the respondent to an appeal by the State of Western Australia against a decision of the Full Court of the Supreme Court of Western Australia.

In 1974 Wilsmore had been acquitted of a charge of wilful murder on the ground of unsoundness of mind. By reason of that verdict, and pursuant to s 653 of the Criminal Code (WA), he was detained at the Governor's pleasure. In July 1979, he enrolled as an elector for the Legislative Assembly District of Fremantle and the South Metropolitan Province of the Legislative Council. He was not a person of unsound mind at that time, although his acquittal on that ground in 1974 had led to an initial refusal to enrol him.

On 23 November 1979, the *Electoral Act Amendment Act (No 2) 1979* (WA) came into operation. It amended s 18 of the *Electoral Act 1907* (WA) by disqualifying from voting any person detained in custody under s 653 of the Criminal Code. This had the effect of disqualifying Wilsmore from voting in State elections while he continued to be detained.

Peter and I commenced proceedings in the Supreme Court of Western Australia seeking a declaration that the provision of the amending Act which disqualified Wilsmore, was invalid. The basis of the challenge was that by its alteration to the franchise, the amending legislation effected a change in the Constitution of the Legislative Council and of the Legislative Assembly within

<sup>18</sup> Ibid 186.

the meaning of s 73 of the *Constitution Act 1889* (WA). That characterisation, we argued, attracted the 'manner and form requirement' of s 73 for an absolute majority of the Legislative Assembly and the Legislative Council in favour of the Bill that became the amending Act. The third reading of the Bill had been passed in the Legislative Assembly without an absolute majority of its members. The numbers voting appeared on the Hansard Record because a division had been called in relation to the amending legislation.

The challenge was about State constitutional law which sometimes seems to be located in the outer suburbs of Australian constitutional law, the Commonwealth Constitution being found in the CBD. It is nevertheless an area with which public law practitioners generally must be familiar. It rests upon the legacy of Australia's pre-federation colonial history which takes its place in the larger history of the evolution of British colonies to self-government. It intersects with the Commonwealth Constitution which, by ss 106, 107 and 108, continued the colonial constitutions, legislative powers and laws in force at federation. State Constitutions are also indirectly protected by the implied limitation on Commonwealth power to make laws placing special burdens on the States or destroying or impairing their governmental capacities.<sup>19</sup> State constitutional law is affected by the *Australia Acts 1986*, mentioned later in this article, which cut the remaining legislative links between the United Kingdom and Australia.

The *Wilsmore* case involved the application of Imperial statutes from the 19th century affecting the legislative powers of the Western Australian Parliament. It also involved s 106 of the Commonwealth Constitution. To understand the case and other State constitutional litigation in which Peter Johnston was later involved, it is necessary to say something about the constitutional setting.

The challenge to the validity of the State law depended upon an argument that the legislative power of the State was constrained by the requirement to observe manner and form restrictions contained in the *Constitution Act 1889* (WA). The binding force of that requirement derived from s 5 of the *Colonial Laws Validity Act 1865* (UK). That statute widened the power of legislatures of the British Colonies, but provided for the procedural limitation in a way that

<sup>19</sup> *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188, 231 referring in fn 211 to *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 217 (Mason J); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31; *Austin v Commonwealth* (2003) 215 CLR 185; *Clarke v Commissioner of Taxation* (2009) 240 CLR 272.

rendered the laws amenable to judicial review if they did not comply with those limitations. It applied to the Australian Colonies before Federation and continued to apply to them when they became States after Federation. Arguably, it formed part of the State Constitutions.

The idea of judicial review of legislation for repugnancy to Imperial legislation was alive and well in Australia before Federation. Imperial statutes had historically provided more than one occasion for its exercise. In one early example, the Supreme Court of New South Wales, in 1861, held that it had the power and was under the obligation to decide whether an act of the colonial legislature contravened an act of the Imperial Parliament and was invalid on that basis. Stephen CJ referred, by way of analogy, to the Constitution of the United States and the Constitutions of the States of the Union and the limits they placed on legislative powers.<sup>20</sup> He and Wise J both referred to Chancellor Kent's famous commentaries on American law. Wise J founded his judgment upon Kent's proposition that:

The attempt to impose restraints upon the Acts of the legislative power would be fruitless, if the constitutional provisions were left without any power in the Government to guard and enforce them.<sup>21</sup>

Not surprisingly, the appropriate candidate for the exercise of that power in New South Wales was the Supreme Court of that State.

Direct repugnancy to English law defined limits upon the legislative powers of the Australian colonies from the early 19th century.<sup>22</sup> The *Australian Colonies Government Act 1850 (Imp)*<sup>23</sup> provided for the establishment of self-government in the Australian colonies. Legislative power, however, was limited by the requirement that 'no such Law shall be repugnant to the Law of England, or interfere in any Manner with the Sale or other appropriation of the Lands belonging to the Crown within any of the said Colonies.' The Imperial Statutes, which gave legal force to the *Constitution Acts 1855* of New South Wales and Victoria imposed manner and form restrictions relating to the procedures for the amendment of those Constitutions. However, those requirements could

<sup>20</sup> *Rusden v Weekes* (1861) 2 Legge 1406, 1414.

<sup>21</sup> *Ibid* 1420.

<sup>22</sup> *New South Wales Act 1823*, 4 Geo IV c 96; *Australian Courts Act 1828*, 9 Geo IV c 83; *Australian Constitutions Act 1842*, 5 & 6 Vict c 76, s 29. See generally Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 107–15.

<sup>23</sup> 13 & 14 Vict c59.



themselves be amended by simple majority at that time.<sup>24</sup>

The enactment of the *Colonial Laws Validity Act 1865*, which underpinned the arguments which Peter Johnston and I advanced in *Wilsmore*, was made necessary by a number of decisions of the Supreme Court of South Australia invalidating laws of the colony, particularly decisions by Boothby J. Boothby J held that a number of the laws of that colony were invalid for repugnancy to the laws of England. His decisions led to the enactment of three Imperial Statutes to remove doubts about colonial legislative powers. The third of those became the *Colonial Laws Validity Act 1865*. Section 5 of that Act, which was central to the *Wilsmore* argument, provided inter alia:

every representative legislature shall, in respect to the Colony under its Jurisdiction, have, and be deemed at all Times to have had, full power to make Laws respecting the constitution powers and procedure of such legislature; provided that such laws shall have been passed in such manner and form as may from time to time be required by any Act of Parliament, letters patent, Order in Council or colonial Law for the time being in force in the said colony.

Although described by Professor A V Dicey as 'the charter of colonial legislative independence',<sup>25</sup> s 5 allowed for the creation by colonial legislatures of procedural requirements affecting changes to the Constitution, powers and procedures of the legislature, which could bind their successors. Indeed, it was arguable that, by the process of double entrenchment, the means of altering a law on any topic could be prescribed and the prescription itself protected from amendment by a manner and form requirement.<sup>26</sup>

Following the establishment of a Legislative Council in Western Australia, pursuant to *Australian Colonies Government Act 1850* (WA), responsible government came to the colony with the enactment of the Imperial Statute, known as the *Western Australia Constitution Act 1890* (Imp). The *Constitution Act 1889* (WA), to which it gave effect, was scheduled to it.

Before *Wilsmore* there had been very few challenges to Western Australian legislation on the basis of the *Colonial Laws Validity Act* or repugnancy to Imperial Statutes expressly extending to the colony. A challenge in 1906 to

<sup>24</sup> *New South Wales Constitution Act 1855* (18 & 19 Vict c 54), s 4; *Victoria Constitution Act 1855* (18 & 19 Vict c 55), s 4.

<sup>25</sup> W G McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979) 82.

<sup>26</sup> *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 414 (Zelling J).

racially discriminatory legislation in *Vincent v Ah Yeng*<sup>27</sup> was rejected on the basis that it was not repugnant to any Imperial Statute expressly extending to Western Australia. Magna Carta and Imperial statute law and common law brought to the colony by the original colonists could be the subject of repeal by inconsistent laws.

Two cases decided in 1935, one in the High Court and one in the Supreme Court of Western Australia, involved attempts to invoke the absolute majorities required by s 73 of the *Constitution Act 1889* (WA). In *Clydesdale v Hughes*<sup>28</sup>, the challenged law was an amendment to the *Constitution Act 1889* to provide that no disqualification or penalty should be incurred by a member of parliament that accepted or held the office of a member of the Lotteries Commission. The High Court rejected the argument that the amending Act was invalid for failure to comply with s 73 of the *Constitution Act 1889*. The Court did not agree that the amendment effected a change in the Constitution of the Legislative Council and, in any event, held that the requisite majorities had been obtained.<sup>29</sup> In *Burt v The Crown*<sup>30</sup> the petitioner had been the recipient of a superannuation allowance from the Crown which was reduced by the *Financial Emergency Act 1931* (WA). He argued that the Act had not been reserved by the Governor for signification of His Majesty's pleasure, pursuant to s 73. The Crown relied on the *Australian States Constitution Act 1907*, a further statute of the Imperial Parliament, to assert that the particular Bill was not required to be reserved and was valid simply on the basis that the Governor's consent had been obtained. Dwyer J held that s 73 did not affect the *Financial Emergency Act 1931*.<sup>31</sup>

At first instance in *Wilsmore*, Brinsden J dismissed the claim.<sup>32</sup> His Honour applied *Clydesdale v Hughes*<sup>33</sup> and held in any event, that the amending legislation did not effect a change in the Constitution of the Houses of the Western Australian Parliament. *Wilsmore*, however, succeeded on an appeal from that decision to the Full Court of the Supreme Court of Western Australia.<sup>34</sup> The State then applied to the Full Court of the Supreme Court for

<sup>27</sup> (1906) 8 WAR 145.

<sup>28</sup> (1934) 51 CLR 518.

<sup>29</sup> *Ibid* 528.

<sup>30</sup> (1935) 37 WALR 68.

<sup>31</sup> *Ibid* 71.

<sup>32</sup> *Wilsmore v Western Australia* (Unreported, Supreme Court of Western Australia, Brinsden J, 15 February 1980).

<sup>33</sup> (1934) 51 CLR 518.

<sup>34</sup> *Wilsmore v Western Australia* [1982] WAR 159.

conditional leave to appeal to the Privy Council. That leave was refused on the basis that the case concerned a matter arising under the Commonwealth Constitution or involving its interpretation. Burt CJ said:

s[ection] 106 of the Commonwealth Constitution by its own force and for its own purposes is a law which requires that such manner and form provisions as are to be found in the State Constitution conditioning the power to amend the Constitution be observed.<sup>35</sup>

That was perhaps one of the more important propositions to emerge from the litigation.

To understand the outcome in *Wilsmore*, it is necessary to have regard to the *Constitution Amendment Act 1893* (WA) which took out of the *Constitution Act 1889* the provisions which related to the composition of the Legislative Assembly and Legislative Council. The 1893 Act also dealt with franchise and qualifications for membership of the two Chambers. This was the beginning of a process of cell-like division of the Constitution which led to the contents of the *Constitution Act 1889* being distributed across the 1893 Act, the *Constitution Acts Amendment Act 1899* (WA) and the *Electoral Act 1907* (WA). The central question in *Wilsmore* was whether s 73 of the 1893 Act which embodied the manner and form requirement for absolute majorities only applied to so much of the Constitution as was to be found in the original 1889 Act. The High Court so held on the basis that s 73 related to the repeal or alteration of the provisions of 'this Act'. Gibbs CJ accepted that the limitation on that construction, was 'curiously weak and ineffectual' but held that that result was intended by the framers of the statute.<sup>36</sup> Interestingly, the original manner and form provisions which had been proposed in a draft Constitution transmitted to the Imperial authorities by the Colonial Governor, had not been limited by reference to 'this Act'. The absolute majority provisions would have applied to defined subject matters. *Wilsmore* may have been the victim of an Imperial draftsman's sleight of hand.

Manner and form, in relation to the Western Australian Constitution, surfaced many years later in *Yougarla v Western Australia*.<sup>37</sup> Peter Johnston, with Stephen Churches, led by David Jackson QC, argued that s 65 of the *Aborigines Act 1905* (WA) was invalid. That section had repealed s 70 of the

<sup>35</sup> *Western Australia v Wilsmore* [1981] 179, 184 (Lavan SPJ and Jones J concurring).

<sup>36</sup> *Western Australia v Wilsmore* (1982) 149 CLR 79, 83.

<sup>37</sup> (2001) 207 CLR 344.

*Constitution Act 1889*, which provided for the appropriation of one per cent each year of the gross revenue of the colony 'for the welfare of the Aboriginal natives'. One of the arguments they advanced relied upon the failure to table the 1905 amendment in the Houses of the United Kingdom Parliament for 30 days before assent. That requirement was said to derive from s 32 of the *Australian Colonies Governments Act 1850* in relation to Bills affecting the powers and functions of the Legislative Councils of the colonies. The argument was unsuccessful. The High Court held that the tabling requirement had been effectively repealed once a bicameral legislature was established under the Western Australian Constitution. There were several references in the joint judgment to the *Wilsmore* decision.

Four years after the decision in *Wilsmore*, the United Kingdom Parliament enacted the *Australia Act 1986* (UK) which provided in s 3(1) that the *Colonial Laws Validity Act 1865* would not apply 'to any law made after the commencement of this Act by the Parliament of a State'. It also provided in s 6 that laws made by a parliament of the State after the commencement of the Act respecting the constitutional procedures of the Parliament of the State, would be of no force and effect unless made in such manner and form as may from time to time be required by a law made by that Parliament. The same provisions appeared in the corresponding Commonwealth Statute, the *Australia Act 1986* (Cth).

The manner and form provision of the *Australia Acts* was in play in *Attorney-General (WA) v Marquet*,<sup>38</sup> decided just over 20 years after *Wilsmore*. The High Court held that amendments to electoral distribution laws in Western Australia could not lawfully be presented to the Governor for assent as they had not complied with the manner and form requirement for absolute majorities in each House. Sadly *Wilsmore* merited only a few footnotes — *sic transit gloria mundi*. I mention the case for completeness. Peter was not involved, although he wished he had been.

Peter Johnston appeared in the High Court on at least 12 occasions. His earliest recorded appearance was with Ronald Wilson QC, then Solicitor-General of Western Australia, intervening on behalf of the State in *Attorney-General (NSW); Ex rel McKellar v Commonwealth*.<sup>39</sup> They intervened in support of the successful defence of the validity of provisions of the *Representation Act 1905* (Cth) relating to the number of members of the House

<sup>38</sup> (2003) 217 CLR 545.

<sup>39</sup> (1977) 139 CLR 527.

of Representatives to be chosen from each State. He appeared in cases concerning legal professional privilege<sup>40</sup>, the corporations power and the jurisdiction of the Federal Court<sup>41</sup>, the validity of Commonwealth and State native title legislation<sup>42</sup> and inequality of voting power within the State of Western Australia.<sup>43</sup> He appeared in a case concerning the constitutionality of the forfeiture of a foreign fishing vessel<sup>44</sup> and, on two occasions, in long-running extradition litigation.<sup>45</sup> The last case in which he appeared before the High Court concerned the application of the *Kable* principle to the constitutional validity of confiscation of property laws in the Northern Territory.<sup>46</sup> He also appeared in a number of cases in the Federal Court and in the Supreme Court of Western Australia, which were for the most part concerned with constitutional or administrative law. In three cases in which he appeared in the High Court I was presiding as Chief Justice. He did not have a speaking part in any of them, but his presence led me to reflect upon old and fondly remembered personal history.

In addition to his work as an advocate, Peter had direct experience with the administration of regulatory law as Deputy Chairman of the Environmental Protection Authority (WA) and as a member of the Dental Board of Western Australia. He served as an Inquiry Commissioner with the Human Rights and Equal Opportunity Commission for four years<sup>47</sup> and as a Deputy President of the Administrative Appeals Tribunal for three years.<sup>48</sup> He also served as a member of the Student Assistance Review Tribunal. He was a member of the Western Australian Law Reform Commission from 1984 to 1987 and served as its Chairman in 1986.

Peter Johnston had a long teaching association with the University of Western Australia. His involvement was as a visiting tutor between 1965 and 1967. He returned as a Senior Lecturer in 1974 and continued in that role until 1990. He then became a part-time Visiting Fellow for three years and returned as a Senior Fellow between 1993 and 2004. He took up a Senior Fellowship at

<sup>40</sup> *Baker v Campbell* (1983) 153 CLR 52.

<sup>41</sup> *Fencott v Muller* (1983) 152 CLR 570.

<sup>42</sup> *Biljabu v Western Australia* (1995) 183 CLR 373.

<sup>43</sup> *McGinty v Western Australia* (1996) 186 CLR 140.

<sup>44</sup> *Ravenor Overseas Inc v Readhead* (1998) 72 ALJR 671; 152 ALR 416.

<sup>45</sup> *Zentai v Republic of Hungary* (2008) 234 CLR 599; *Minister for Home Affairs (Cth) v Zentai* (2012) 246 CLR 213.

<sup>46</sup> *Attorney-General (NT) v Emmerson* (2014) 88 ALJR 522; 307 ALR 174.

<sup>47</sup> 1996–2000.

<sup>48</sup> 1990–1993.

Monash University in 2005, a position he held until 2014. He retained an Honorary Senior Research Fellowship and Visiting Lectureship at UWA until 2011 when he was appointed as an Adjunct Professorial Fellow.

It is perhaps as a teacher of public law that Peter Johnston will be longest remembered by his many admiring former students. As an adjunct to his teaching, he played a major part in ensuring that students from the Law School at the University of Western Australia had the opportunity to participate and excel in the Jessup International Law Mooting Competition. As a Faculty Advisor to the UWA teams he saw them through to the World Finals in Washington in 2001, to success as runners-up in the World Finals in 2002 and to ultimate success as World Champions in 2003.

His publications are too numerous to recount. They reflect his interest in all aspects of constitutional and public law. On the topic of manner and form provisions, on which he and I worked together in 1982, he published an article in this *Law Review* in 2013 with Peter Congdon, under a typically Johnstonian title: 'Stirring the Hornet's Nest: Further Constitutional Conundrums and Unintended Consequences arising from the Application of Manner and Form Provisions in the Western Australian Constitution to Financial Legislation'.<sup>49</sup> His most recent publication before his death was in the *Bond Law Review* under the title: 'The High Court, *Kable* and the Constitutional Validity of Criminal Property Confiscation Laws: *Attorney General (Northern Territory) v Emmerson*'.<sup>50</sup> The article, as with all of Peter Johnston's writing, was careful, comprehensive and eminently readable.

#### CONCLUSION

Peter Johnston contributed to public law as a teacher, an academic writer, a practitioner, an administrator and as a tribunal member. He was not afraid to push at the boundaries of conventional wisdom and to imagine unimagined possibilities in the development of the law. Some might say that some of his endeavours were quixotic. But without the imaginative and the occasionally quixotic in teaching, in advocacy and in academic writing, the law may be far less responsive than it should be to the needs of contemporary society. Peter Johnston helped it to look forward.

<sup>49</sup> (2013) 36 *University of Western Australia Law Review* 297.

<sup>50</sup> (2014) 26 *Bond Law Review* 3.