

## ***Justice Richard O'Connor and Federation***

*By Anna Pejovic*

Decisions made on the eve of Federation played a pivotal role in shaping the political structure and constitutional boundaries which exist in Australia today. Indeed, decisions made and ideas expressed by former Attorney-General, Justice Richard O'Connor [1851-1912], have left a lasting and important impact on Australia's present day legal system. O'Connor exercised his influence as a drafter of the constitution, as an executive minister in Australia's first parliament, and in 1903 as a Judge in the High Court of Australia.<sup>1</sup> In each of these roles, O'Connor sought to contribute to the building of a political infrastructure which would cultivate democracy, ensure the rights of the citizen, and allow for an equal balance of powers.

Justice O'Connor's most commendable achievement was his contribution to the shaping of the Australian judicial system. When the constitution was being drafted, Justice O'Connor foresaw that inconsistencies might occur between state and federal law. He thus insisted that the main function of the Australian High Court be the adjudication process between the states and the federal parliament.<sup>2</sup> Indeed, the judicial power to determine whether certain legislation falls within parliament's constitutional authority has proven vital in maintaining the balance of power and preventing the federal and state governments from interfering with one another. This was especially apparent in 1983 when the federal government passed *The World Heritage Properties Conservation Act 1983* to prevent the Tasmanian

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<sup>1</sup> Rutledge, Martha, *Australian Dictionary of Biography* (Melbourne University Press, 1988) vol 11, 56-59.

<sup>2</sup> Galligan, Brian, *A federal republic: Australia's constitutional system of government* (Cambridge University Press, 1995) 169.

government from building a dam on the Franklin, a world heritage-listed river.<sup>3</sup> The Tasmanian government argued that in creating this act the government was surpassing their right to legislate in regards to external affairs. They also expressed concerns that allowing the federal government such broad power would affect the states' ability to legislate.<sup>4</sup> The High Court of Australia was able to determine which parts of the *World Heritage Act* were invalid through the process of constitutional interpretation. Through deciphering the constitution in such a way that parliament maintained the ability to exercise reasonable sovereignty, without usurping the role of the state governments, the High Court of Australia was able to uphold the balance of powers. This judicial function may be accredited to the foresight of Justice O'Connor, who was committed to ensuring that a balance of power existed between political institutions, as a means of preventing the exercise of arbitrary power.

Indeed, Justice O'Connor was also firmly committed to protecting the rights of the individual from the unchecked sovereignty of parliament. He believed that Australia should adopt an entrenched bill of rights, which would allow the judiciary power to render invalid any legislation that infringed on the rights of the citizen. At the Melbourne Convention of 1889 he gave reasons supporting his belief in a constitutional bill of rights:

'We are making a constitution which is to endure, practically speaking, for all time.

We do not know when some wave of popular feeling may lead to a majority in the

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<sup>3</sup> Peter Johnston, 'The Constitution and the Environment' in H. P. Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press 2009) 79, 91.

<sup>4</sup> Ibid.

parliament of a state to commit an injustice by depriving citizens of life, liberty or property without due process of law'.<sup>5</sup>

Indeed, the situation foreseen by Justice O'Connor came to pass when the Howard government implemented the *Northern Territory National Emergency Response Act 2007*. This act aimed to eliminate the alcoholism and abuse which existed in many indigenous communities in the Northern Territory through subjecting indigenous citizens to a number of sanctions; including the implementation of compulsory health checks and the quarantining of welfare payments.<sup>6</sup> These restrictions on the rights of Indigenous Australians were enabled because parliament was able to legislate that provisions of *The Racial Discrimination Act 1975* did not apply to the current legislation.<sup>7</sup> Had Justice O'Connor been successful in his fight for a constitutional bill of rights, this act would have been struck down by the judiciary for being inconsistent with the constitution. Hence, Justice O'Connor leaves the legacy of an unemployed solution to an unresolved situation: a possible means of protecting the rights of the individual from the discretion of the legislature.

In addition to the rights of the citizen, Justice O'Connor was thoroughly committed to the promotion of democracy. He sought to fashion institutional structures to stop the formation of obstacles which might prevent elected governments from legislating effectively. In 1897 he professed that the senate should not be equipped with the power to refuse or amend money bills for the reason that:

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<sup>5</sup> Williams, George, *A Bill of Rights for Australia* (University of New South Wales Press, 2000) 39.

<sup>6</sup> Larissa Y. Behrendt, 'Underlying legal issues in the NT intervention' (2008), *Bar News: The Journal of the NSW Bar Association*, Summer 2007-2008, 12-15, 12.

<sup>7</sup> *Northern Territory Emergency Response Act 2007*, (Cth) s 132.

‘...you are putting into the hands of the Second Chamber the power of dislocating the government of a country, and of absolutely stopping the machinery of a responsible government’<sup>8</sup>

Justice O’Connor means to imply that once a government has been democratically elected by the Australian people; such a government ought to be able to implement policies representing the will of the people without arbitrary interference. There is no doubt that in promoting this constitutional restriction, Justice O’Connor was seeking to avoid situations like the 1975 Australian constitutional crisis. In this instance, the opposition used their majority in the senate to block, rather than review, the budget of the Whitlam government, thus preventing the government from enacting the changes they had been elected to make and leading to their eventual dismissal.<sup>9</sup> This instance illustrates how the current legislative system does not allow for perfect democracy and presents a strong case for the structure originally recommended by Justice O’Connor: that the Senate should be able to critique and review, but not to refuse.

It is apparent that Justice Richard O’Connor was a man committed to creating a legal framework which would serve first and foremost to protect the interests of the people. His insistence that the High Court should function primarily to determine the constitutional boundaries of the federal and state governments has enabled efficient maintenance of the balance of power. Moreover, it has effectively prevented either level of government from exercising arbitrary power. Justice O’Connor’s belief in an entrenched bill of rights and a restriction of power in the senate paint him as a highly perceptive individual. Indeed, the

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<sup>8</sup> Twomey, Anne, *The Constitution of New South Wales* (Federation Press, 2004) 533.

<sup>9</sup> Brett, Judith, *Australian Liberals and the Moral Middle Class: from Alfred Deakin to John Howard* (Cambridge University Press, 2003) 148.

occurrence of the Whitlam dismissal and the Northern Territory Intervention illustrate obstacles to perfect democracy in our legal system which Justice O'Connor had foreseen prior to federation. Although these two principles were not incorporated in the constitution, there is legitimate argument that they ought to be, and Justice O'Connor holds the legacy as the first spokesperson for an entrenched bill of rights and restricted power in the senate. Therefore, the reputable Justice Richard O'Conner may be remembered as a man whose influence shaped our judicial system and whose ideas about democracy and human rights may yet shape the future legal infrastructure of Australia.

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