

Foreword

The Hon Kenneth Hayne AC KC

Dr Tanya Josev, an Australian legal historian, has said¹ that “[t]aking on the project of a judicial biography is not for the faint-hearted”. As she said:

Judges work behind closed doors; and their output is extensive and complex. Making an assessment of a judge’s influences, their temperament and their impact on the legal landscape (and beyond) requires the biographer to act as scholar, lawyer, historian, political scientist and psychologist, even if not in the formal sense.²

Gerard Brennan was a judge whose life and work demands recording beyond the pages of the law reports. His impact on the Australian legal landscape (and Australian society more generally) was very large. It is important then that the influences upon him, and the temperament formed by those influences, be recorded, assessed and then related to the impact he had. And it is no less important that the task be undertaken before time dims the memories of those who knew, lived and worked with him. Jeffrey FitzGerald is therefore to be commended for having the courage to take on this project.

This book seeks to describe and explain the impact Gerard Brennan had on Australian law and Australian society. His judgment in *Mabo (No 2)* is the most prominent example of that impact. The Court’s decision in that case, and what Brennan wrote in his reasons, was a fundamental re-evaluation of the common law of Australia. By discarding the doctrine of *terra nullius* and confronting the fact that the dispossession of the First Peoples of this land “underwrote the development of the nation”, the decision started changes in Australian society that will continue for decades to come.

1 T Josev, “Judicial Biography in Australia: Current Obstacles and Opportunities” (2017) 40 *UNSW Law Journal* 842, 861.

2 *Ibid* 861.

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Even apart from the effects of *Mabo (No 2)*, Gerard Brennan's impact on the legal landscape was large and deep. The breadth (and the depth) of that impact was apparent at the time to all who were interested in the law.

Lawyers of the late 1970s saw him nurture and develop a wholly new element in the structure of the Commonwealth government – the Administrative Appeals Tribunal – a means by which individuals affected by decisions of the Executive could seek review of the merits of the decision that had been made. This was a revolutionary change demanding great care and skill to achieve what was promised without diminishing the responsibilities (and powers) of those appointed as “Ministers of State for the Commonwealth” under s 64 of the Constitution “to administer such departments of State of the Commonwealth as the Governor-General in Council may establish”. And achieve it he did.

At the same time, as a Judge of the (then only recently established) Federal Court of Australia, he made significant contributions to its development into a first-rate national court despite what this work describes as the “ill-disguised suspicion and hostility” of some parts of the legal profession and others. It was, then, unsurprising when he was appointed to the High Court of Australia in 1981.

For most in the Australian legal profession, Gerard Brennan's work as a judge came into closer focus as his contributions to the work of the High Court accumulated. This work records and analyses the contributions he made, as a Justice of the High Court, to many areas of the law and readers of this book will see for themselves how large Gerard Brennan's contribution was to the work of the Court.

Brennan's High Court judgments always reflected deep and careful thought founded in the basic principles he identified as underlying the subject matter of the decision. Often, he wrote separately and his views did not always command the assent of others. But the reader of his judgments could be in no doubt about why he reached the conclusions he did or what were the principles he identified as underpinning those conclusions. That is, to adopt and adapt what Sir Owen Dixon said in his essay *Concerning Judicial Method*, Brennan's judgments were not “subjective or personal to him but [were] the consequence of his best endeavour to apply an external standard”.

Astute observers of Brennan's judicial career often caught glimpses of the fact that he was a leader. How else could he have achieved what he did with the newly created Administrative Appeals Tribunal? And the profession responded to the qualities that made him the leader he was by respecting and admiring him. But only when I joined the Court, in September 1997, did I really see what a leader he was – calm, measured, thoughtful and respectful – in court and out of court. He set standards to follow. He expected every judge would do what he did – make up their own mind without deferring to the

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views of others. The desire for unanimity or consensus could not trump each judge's proper resolution of the issue at hand. And, as his own work showed, proper resolution demanded (and demands) so much more than assertion of, or agreement with, the outcome of the case; it demanded (and demands) identifying why the judge reaches the stated outcome and relating those reasons to the relevant underlying principles.

Yes, as Dr Josev wrote, "Judges work behind closed doors and their output is extensive and complex". And yes, this makes writing a judicial biography hard. But readers should come away from this book with a much better idea of this "judge's influences, their temperament and their impact on the legal landscape (and beyond)". And their knowing these matters will remind readers and the community more generally of not only Gerard Brennan's importance in Australian legal history but also how and why his work had the impact it has had and continues to have on the legal landscape and beyond.

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