The man who made ‘saintly’ judge lose his cool

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It is fitting that the longest chapter in the longish biography of Sir Gerard Brennan, a former chief justice, is devoted to the cases that established a system of native title for Indigenous Australians.

Brennan, who died in 2022, wrote the leading judgment in Mabo (No 2) v Queensland, and it remains his principal legacy from 17 years on the High Court (1981-1998),

Sir Gerard Brennan, right, with son Frank after Frank received an honorary doctorate of law from UNSW in 2005. **Peter Morris**

He was lauded for other judgments – on free trade, the rights of an accused, judicial review and political free speech –but he knew the pecking order.

Author Jeff FitzGerald points, with a suspected nudge from Brennan, to a 2007 speech at Parliament House.

"While he hoped some of his other judgments 'were of the same calibre and ... developed the law in a satisfactory way', he also reflected that 'they probably haven't affected Australian life and Australian legal practice to the extent Mabo has'," FitzGerald writes.

Sir Gerard Brennan – The Law's Good Servant is one of only six biographies of Australian chief justices and it's been a long time coming. FitzGerald met Brennan when he was registrar at University of Technology and Brennan was vice chancellor. He took on the project after he retired in 2009.

He writes that Brennan eschewed the idea of a ghost-written autobiography, but read sections of the work for accuracy and agreed to be interviewed as long as he could review quotes. There were 50 hours of formal chats with Brennan, 62 interviews with others and a trove of papers and memorabilia for FitzGerald to draw on.

The work reveals the private and public life of a man who was humble, generous and unfailingly courteous. It also chronicles how fellow chief justice Michael Kirby tested his patience and saintly demeanour.

Some of the most engaging parts are about his family life, in particular Brennan's wife of 66 years, Patricia, who died in 2019.

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The couple met when he was studying arts/law at the University of Queensland, and she was doing medicine. The clincher for Brennan, was when he found out she was actually a year younger, not a year older as he had feared.

"That was it," Patricia told FitzGerald. "I think it was probably good luck he found someone who was a bit younger who was silly enough to listen to him ...

"He just told me [one day] that he was going to marry me, but he couldn't do it for five years." Patricia agreed, telling her beau she wanted eight children.

They had seven in eight years, and established one of Australia's more prominent legal families. Five family members are silks and eldest son Frank is a Jesuit priest and human rights lawyer.

Brennan with his wife, Lady Patricia, and some of their 21 grandchildren on the day he retired from the High Court. **Andrew Meares**

'I knew your father'

Frank Gerard Brennan was born in Rockhampton, Queensland in 1928, the first of Frank and Gertrude Brennan's three children.

Brennan senior was a lawyer and state MP for Labor from 1918-1925, and then a judge on the Queensland Supreme Court until his death in July 1949 from heart trouble, aged 64. He left behind financial chaos, since he hadn't lodged a tax return the entire time he was on the bench. The matter took some time to settle, and the family lost its "luxurious" lifestyle.

Brennan junior had already come to public prominence: in early 1949, he was elected president of the National Union of Students in 1949 – "much to the delight of his father who immediately released Gerard from serving as his associate". The person he succeeded, Peter Durack, went on to become a

long-serving Liberal senator and attorney-general in the Fraser government.

Brennan found his way to the bar in 1951, after first working at the new Australian National University in Canberra and then at the Manus Island War crimes hearings. He took silk in 1965 and took on range of commercial, criminal and public law work, which included being counsel assisting for the Woodward Royal Commission on Aboriginal land rights in 1973-74.

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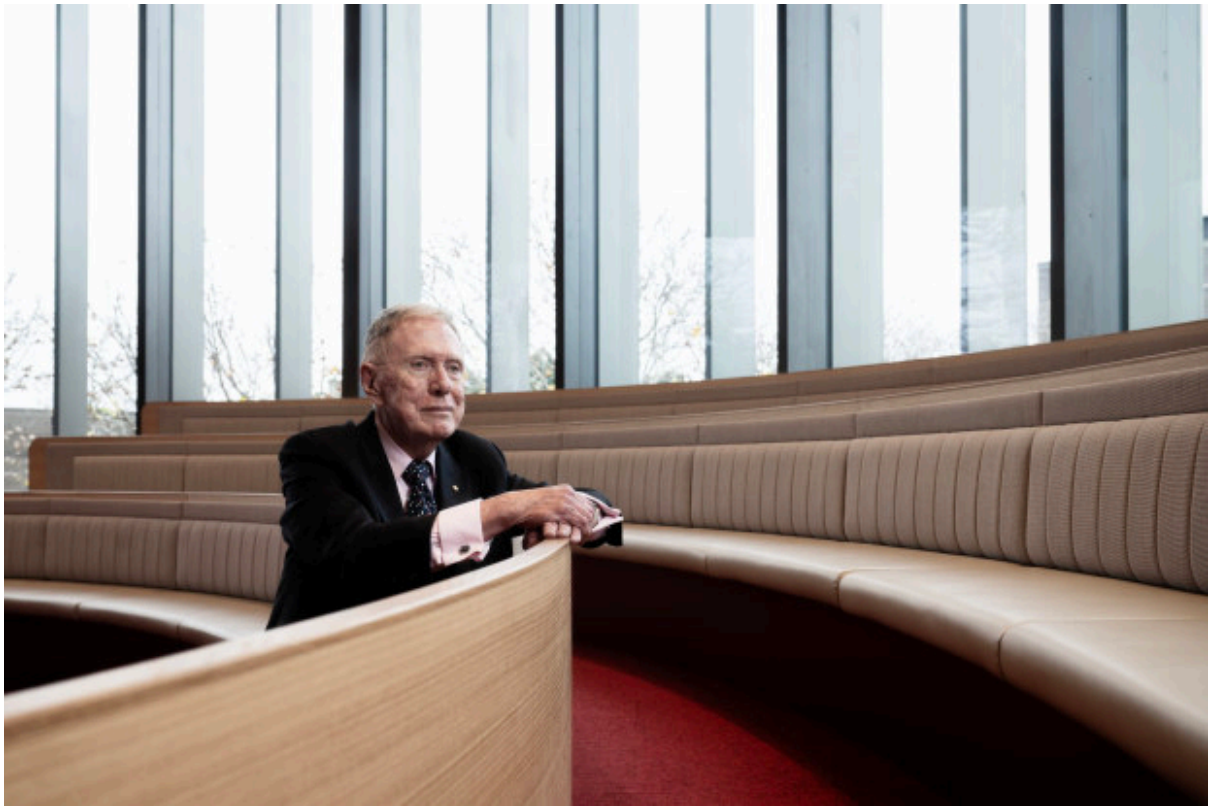
Many years later, in 2009, Brennan attended the Garma Festival in North Arnhem Land, Australia's largest annual Indigenous gathering, with his daughter, Bernadette.

FitzGerald relays how Brennan introduced himself to various groups as, "Gerard Brennan and I knew your father." He told Bernadette he was lucky to "be sitting with all these sons and daughters of people I knew [from the Woodward Royal Commission]" .

His son, Frank, said he heard that when his father saw a board displaying quotations from his judgment on Mabo, "He stood there feeling quite pleased with himself. For once, he let down his humble public reserve. He turned to the young people beside him and said, 'I wrote that.' They stood there in utter disbelief."

Brennan became president of the Queensland Bar Association (1974-76) and president of the Australian Bar Association (1975-76), and was tapped to be founding president of the Administrative Appeals Tribunal in 1976.



Michael Kirby was a High Court justice with Brennan. **Louie Douvis**

He was then appointed to the Federal Court by Durack in 1977, and the High Court four years later. In 1995, he succeeded Sir Anthony Mason as chief justice.

The book comes in at a hefty 505 pages and there are tracts that non-lawyers will find hard going. But it does – as the book sleeve says – provide "valuable insights into his judicial methodology".

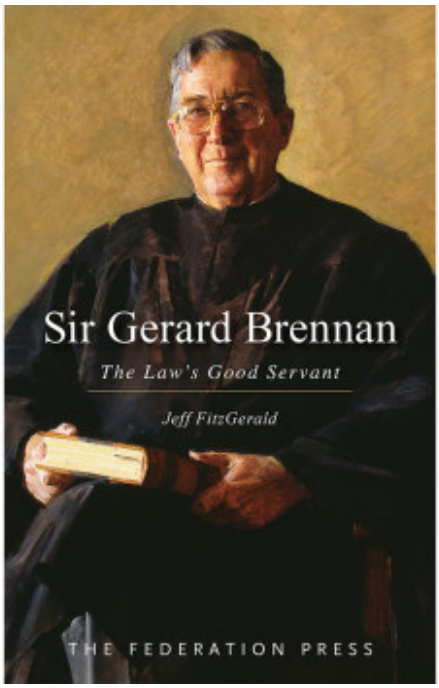
Current Chief Justice Stephen Gageler said Brennan "believed that it was a primary function of law to protect minorities and the disadvantaged, and his decisions struggled to achieve this result".

Nothing demonstrated that tension better than the native title cases. In Mabo, he rejected the common law doctrine of terra nullius as offensive to "the values of justice and human rights (especially equality before the law), which are aspirations of the contemporary Australian legal system".

However, in Wik (1996), he joined the minority in finding that pastoral leases extinguished native title. Gageler put this down to Brennan's belief "that a justice was limited in his or her ability to engage in judicial law-making".

Kirby did not sit on either case but provides one of the more interesting passages in FitzGerald's book.

In 1997, a year after Kirby joined the court, time limits were introduced for some hearings. When Brennan told Bob Ellicott, QC, that his time was up in one case and that he should sit down, Kirby – FitzGerald writes – "sought to mediate the situation".



Gageler, who also appeared in the case, told the author: "Brennan stood up, and he turned bright red; he was furious. And he said, 'I have made my ruling. You will sit down Mr Ellicott!'.

"Some of those present felt that Brennan's ire was at least partially triggered by Kirby's intervention. Bret Walker, another barrister in the case, observed that 'it was the most uncomfortable I ever saw [Brennan] in court as a judge'."

In his foreword to the book, former High Court justice Ken Hayne (1997-2015) wrote that "Brennan's impact on the legal landscape was large and deep. Astute observers of Brennan's judicial career often caught glimpses of the fact that he was a leader,

"But only when I joined the court did I really see what a leader he was – calm, measured, thoughtful and respectful – in court and court of court. He set standards to follow."

Sir Gerard Brennan: The Law's Good Servant by Jeff FitzGerald (Federation Press).

Footnote: There have been 57 justices appointed to the High Court since 1903, but on the count of legal historian Dr Tanya Josef, only 16 have been the subject of an "extended" biography. Six have been on chief justices: Sir Samuel Griffith, Sir Isaac Isaacs, Sir Garfield Barwick, Sir Harry Gibbs, Brennan and Murray Gleeson (by this author).