

SIR GERARD BRENNAN (1928-2022) - A MEMORY

There have been many obituaries and articles concerning the life of Sir Gerard Brennan, former Justice and later Chief Justice of the High Court of Australia. His work on that Court, and as first President of the Administrative Appeals Tribunal, has been much discussed. There is no doubt that he was an outstanding member of the Courts and tribunals of which he was a member. This note looks principally to his career at the Queensland Bar in the years before he accepted judicial appointment in 1976.

“Gerry”, as he was always known, was called to the Bar in Queensland in 1951 and practised there, and from there, until 1976. I met him personally¹ in 1963 and 1964 when I was Associate to Gibbs J., then a relatively recent appointment to the Supreme Court of Queensland. The Queensland Bar was then small in numbers, still under a hundred members in private practice, when I joined it at the end of my term with Gibbs J. Gerry was of an age group which had been too young to see service in World War II. This was at a time when most of the “leaders” of the Bar had seen service in that war, but the younger, like Gerry, were asserting their position.

At that point he had a particular reputation in criminal matters, both in trials and in the Court of Criminal Appeal. But in reality his practice was much wider, and “across the board”. He was a very good advocate, able and precise and with an understanding of how laws, and the rule of law, should cohabit.

¹ I had earlier seen him in action in the High Court during its then annual peregrination to Brisbane, when law students were allowed to sit in the jury box during the Court’s hearings. I also knew *of* him through an older sister, who attended Queensland University at the same time as Gerry, and an older brother, who had been a few years ahead of Gerry at Downlands College, but whose entry to Queensland University had been delayed because of service overseas in the RAAF. As you will have gathered from the above, I was in a family spread over nearly 20 years, and the last of seven (the “war effort”, some said).

His practice, and influence on the legal profession, grew rather dramatically after he took silk in 1963. I was one of a group of young barristers² who all saw a lot of Gerry. We appeared with him, and against him, in a wide range of tribunals and courts. Gerry and Pat Brennan were hospitable people, and sometimes it would be necessary to go to their home on weekends to settle a document or something of that kind – no faxes, no emails then. They lived on 2½ acres at Chapel Hill. There was a driveway which had a “CHILDREN” sign – I trust acquired legally and non-corruptly – but the sign *was* necessary. There were seven children and they were everywhere – up the trees, behind a bush, and you had to make sure none was hiding in your car, or in the boot, before you left.

It will be appreciated that unlike today there was no Federal Court during all of Gerry’s time at the Bar, and the Family Court only commenced near the end of that period. The Supreme Courts of the States thus exercised much invested federal jurisdiction. But Gerry could see beyond the boundaries of Queensland and appeared in important cases elsewhere. His reputation was much enhanced by his retainer in 1969 to appear for the Fijian sugar cane growers in an arbitration in Fiji before Lord Denning about the future of the Fijian sugar industry.

His status was reflected by his retainer to appear for the State of Queensland in *Cudgen Rutile (No 2) Pty Ltd v. Chalk* [1975] A.C. 520 where in 1974 he led

² Glen Williams, Geoffrey Davies, Tony Fitzgerald, Martin Moynihan, Ian Callinan, Douglas Drummond amongst others. Leading juniors, above us in seniority, were John Macrossan, Cedric Hampson and Bill Pincus. And in 1965 Naida Haxton came to lead the vanguard of women.

Tom Shepherdson of the Queensland Bar³ and Nicholas Phillips⁴ in the Privy Council in an important case of the day.⁵

He was also much involved in the administration of the legal profession being President of the Bar Association of Queensland 1974-1976⁶ and of the Australian Bar Association 1975-1976 and a member of the Executive Council of the Law Council of Australia 1974-1976.

But then came public office. He was appointed to the Industrial Court and as an Additional Judge of the Supreme Court of the Australian Capital Territory and, importantly, as the first President of the Administrative Appeals Tribunal. With the establishment of the Federal Court in 1977 he became a Judge of that Court. For a short period in the latter part of his term on the Federal Court, he sat only in that court.

The period was short because of his appointment in 1981 to the High Court. He was a Justice of that Court until his appointment as Chief Justice in 1995. During that period he participated in the hearing of many important cases. They included, of course, the two *Mabo* cases⁷, and the restatement of the effect of s. 92 of the Constitution⁸. A useful summary of the important cases, constitutional and non-constitutional, in which Gerry participated can be seen in the entry under his name in *The Oxford Companion to the High Court of*

³ Later QC and later again a member of the Supreme Court of Queensland.

⁴ Later Lord Phillips of Worth Matravers and first President of the Supreme Court of the United Kingdom

⁵ His arguments prevailed, notwithstanding the great cogency and force of counsel's arguments to the contrary

⁶ His Presidency of the Bar Association was not made easier by the fact that the Committee, whose meetings were usually held in the President's chambers after court, now included some "young Turks" (of whom the writer was one) who were well and truly ready to move that "the motion be put" by 7.00pm when Gerry was inclined to say "Isn't there a rather deeper issue which we haven't considered?"

⁷ *Mabo v. Queensland* (1988) 166 CLR 186 and *Mabo v. Queensland (No. 2)* (1992) 175 CLR 1.

⁸ *Cole v. Whitfield* (1988) 165 CLR 360; *Bath v. Alston Holdings Pty Ltd* (1988) 165 CLR 411.

Australia (2001) by Belinda Baker and Stephen Gageler⁹. The entry is also a very accurate description of his approach to the judicial function.

I had the privilege to write the entry on the “Brennan Court” in the same work.¹⁰ The entry deals, of course, with the important cases dealt with by the High Court in the just over three years when Brennan was Chief Justice. I shall not repeat the detail of what is there, but simply note the commencing and concluding observations. The commencing observation was that Brennan’s occupancy of the office was always going to be relatively brief, but the “continuity of membership” implied in the term “Brennan Court” was not present because of the early retirements of Deane, Dawson and Toohey and their replacement by Kirby, Hayne and Callinan. It led to a conclusion that it was “difficult to classify the Brennan Court”, it being “a time of transition” for the High Court, but “one in which it handled a great deal of business, much of it of great significance”.

Gerry Brennan was a large presence in the Australian legal world for a considerable period. He performed at a high standard and required that others should do the same. He was a willing giver of time and advice to the younger members of the legal profession and was a credit to it.

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⁹ See at 66-88.

¹⁰ See at 68-70.