

Remarks on the launch of *Gerard Brennan's Articles and Speeches: Maintaining the Law's Skeleton of Principle*

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I commence with a *corrigendum* and a *mea culpa*. Three Latin words in a single sentence is a lot for me. The occasion warrants them. I am launching an important collection of papers. And the editor is a Jesuit.

In Volume 2 of *Gerard Brennan's Articles and Speeches: Maintaining the Law's Skeleton of Principle* edited by Father Frank Brennan SJ, at page 495, appears a material error. There is at that page a description of a portrait of Sir Gerard Brennan painted by Robert Hannaford a copy of which appears on the cover of Volume 1. The original hangs in Court Room No 3 of the High Court building in Canberra. The description was written by me. The description says that the painting depicts Sir Gerard holding a copy of volume 175 of the *Commonwealth Law Reports*. That was correct. The description says that inserted into the volume was a bookmark. That too was correct. The description then says that it is unclear whether the bookmark is to a passage in *Mabo* or to *Marion's Case*, which was reported immediately after *Mabo*. That too was correct when I wrote it in 2022, but the lack of clarity was soon resolved by a communication from Frank. My error was that I never got around to revising the text. As visitors to Court Room No 3 are now informed, the bookmark was in fact to the orders in *Mabo*. The bookmark was placed there by the subject of the painting, who we celebrate as the author of the principal judgment. Evidently, he took immense

* Chief Justice of Australia. These remarks were delivered on 21 August 2025 at the Banco Court of the Supreme Court of New South Wales for the launch of *Gerard Brennan's Articles and Speeches: Maintaining the Law's Skeleton of Principle (Volume 1: Justice According to Law)* and *Gerard Brennan's Articles and Speeches: Maintaining the Law's Skeleton of Principle (Volume 2: Law in Accord with Justice)* (Connor Court Publishing), each edited by Father Frank Brennan SJ.

satisfaction in having participated in the institutional accomplishment but was too modest to want to highlight his own contribution.

Referring to the painting of Sir Gerard leads me to recall the occasion of the Public Law Weekend held at the Australian National University in 1998 in honour of Sir Gerard. Sir Anthony Mason presented a paper on Sir Gerard's contribution to our understanding of judicial review of administrative action and I presented a commentary on the paper by Sir Anthony. Precociously, I commenced my commentary saying that reading Sir Anthony's analysis of Sir Gerard's contribution to administrative law was "like reading an analysis by Picasso of the contribution of Matisse to modern art".¹ There were mixed reactions to the analogy. Sir Anthony was rather chuffed. He liked being equated with Picasso, although I doubt that he had thought through the full implications. Sir Gerard was not at all happy. He did not like being equated with Matisse. He would rather have been seen as a Titian or a Vermeer. I defend the analogy now as I defended it then. Titian and Vermeer were masters of their art in the sixteenth and seventeenth centuries. Sir Gerard, like Matisse, was a master of his art in the twentieth century. The creative output of each of Brennan and Matisse was characterised by distinct forms and harmonious composition.

Distinct forms, harmonious composition and elegant prose characterise the thousand or so pages of Volumes 1 and 2 of *Gerard Brennan's Articles and Speeches* which reproduce Sir Gerard's pre-judicial, extra-judicial and post-judicial output. The remaining 50 or so pages of Volume 2 comprise the tributes of others, including mine to which I have referred.

More about the principal author in a moment. First a word about the editor. Father Frank Brennan is a priest, a lawyer and an academic who has for half a century combined those wholly compatible vocations in pursuit of the common good. He has been active in public affairs since

¹ Creyke and Keyzer (eds), *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (2002), 62.

his ministry began. This year is his jubilee. An article by Joe Higgins in *The Catholic Leader* earlier this year referred to Father Frank Brennan as someone who “has never shied away from calling things how he sees them”. It described him, in words which could equally have been used to describe Sir Gerard Brennan, as someone who has been known and respected as an “honest broker”: “someone who could listen to all the arguments, find the right balance and help create a solution”.²

My first professional encounter with Father Frank Brennan was in 2009. I was Solicitor-General of the Commonwealth. He was fulfilling precisely that kind of role as the balanced and moderate Chair of the National Human Rights Consultation Committee. Father Frank’s deeply reflective and beautifully crafted homilies are regularly published on the internet and many, including from time to time me, have found instruction and inspiration in them. In them and in his other writings, he does not shy away from grappling with morally fraught contemporary issues, always combining theological insight and intellectual rigour with courage and compassion.

Father Frank Brennan is the author of many books and essays. *Gerard Brennan’s Articles and Speeches* is not simply one more. Editing them has been for Frank, in his own words, “a labour of love”. That acknowledged, it must be said, and I say it, that no one has been more qualified than Frank to perform that labour.

The result of the labour is that we now have, barely three years after his death, a comprehensive collection of papers authored by one of Australia’s most eminent jurists. The editing has added value. More than 120 speeches given and articles and letters written over a period of more than 50 years have been collected together, thematically arranged into chapters and re-

² Higgins, “Fr Frank Brennan’s 50 years as a Jesuit”, *The Catholic Leader*, 3 April 2025.

presented in a standardised format. Each speech or article or letter is introduced by a concise “Editor’s note” explaining its provenance and context. There is a conceptual and biographical introduction by the Editor. There is a thoughtful “Foreword” by Sir Gerard’s namesake, one-time senior associate and long-time friend, Gerard Carney. The entirety of the collection has been usefully indexed.

There are even some photographs! One of my favourites appears at page 173 of Volume 1. The caption below it commences “Brennan, on the drum”. It shows a young Gerard in his last year of school participating in a spontaneous victory parade on 2 September 1945 to celebrate the end of World War II. Another of my favourites appears at page 215 of Volume 2. It shows the Brennan family gathered in Canberra on 21 April 1995 for Sir Gerard’s swearing in as Chief Justice. Lady Patricia is standing to his right, and Frank is standing to his left.

Amongst the speeches, articles and letters collected in the two volumes are some which contribute to our understanding of institutional histories. We read, for example, from the perspective of its inaugural President about the creation and starting up of the Administrative Appeals Tribunal and the Administrative Review Council. We read Sir Gerard’s reasons for eventually choosing to resign from those institutions. We read from the perspective of one of its first judges about the creation and starting up of the Federal Court of Australia. We read quite a lot about the High Court, including in Sir Gerard’s words about its “strengths and strains”. We read and feel his rather intense exchange of letters with the Deputy Prime Minister Tim Fischer that occurred in the wake of Fischer’s reported criticism of the High Court in relation to the *Wik* decision.

One of the speeches the Editor has chosen to include, within a chapter entitled “The High Court and the Constitution”, was a toast Sir Gerard made in 2002 to launch *The Oxford Companion*

to the High Court of Australia. In the speech Sir Gerard recounted an anecdote concerning a brief encounter between a young Gerard and an old Sir George Rich when the High Court was once on circuit in Brisbane. “Hello Brennan”, said old Sir George. “Hello Sir George”, said young Brennan, “are you enjoying your stay in Queensland?” “Oh”, said Sir George, “we’ve had a splendid morning striking down some more regulations!” I mention the anecdote not so much because it is mildly amusing and because it relates to a larger-than-life character from the High Court’s past. I mention it because it got as close as Sir Gerard ever got in any of the speeches and articles collected by Frank to anything that might be interpreted as criticism or humour at the expense of an individual. I am not here suggesting that Frank has edited such criticism or humour out. To the contrary, I am denying that it was to be found. In my observation of Sir Gerard, for all his companionableness and badinage, he never displayed the typical common lawyer’s penchant for gossip and for witticism at another’s expense.

Amongst the collected papers are also some which concern seminal moments in our national history in which Sir Gerard was intensely involved in a non-judicial capacity. Within a chapter entitled “Aboriginal rights”, they include his oral submissions, as counsel for the Northern Land Council, to the Woodward Royal Commission on Land Rights in 1974. Within a chapter entitled “The Republic”, they include a number of documents concerning the failed referendum in 1999. Their composition combined technical legal acumen with statesmanlike vision. Reproduced, for example, are not one but three letters clarifying legal issues which had arisen in the referendum campaign co-authored by Sir Gerard in company with Sir Zelman Cowen and Sir Anthony Mason, a triumvirate the Editor has chosen to call “the Three Knights”. Reproduced also is a very fine address Sir Gerard delivered at the “George Winterton Memorial Lecture” standing here at this spot in the Banco Court of the Supreme Court of New South Wales on 17 February 2011. I recall being in the audience when it was delivered. Entitled “A Detailed Pathway to a Republic”, it was then and remains exactly what Sir Gerard set out for it to be.

Though there are references to history, for the most part the subject-matter of the speeches and articles of Sir Gerard Brennan which Frank Brennan has collected is timeless. Tellingly, none is devoted to expounding black-letter legal doctrine. That was something Sir Gerard scrupulously disciplined himself to do only in a strictly judicial capacity. As Gerard Carney says in the Foreword, “he was acutely concerned to ensure that his extra judicial statements and activities could not be perceived in any way to undermine public confidence in his judicial independence”, “[n]or would he elaborate on his judgments or those of his fellow judges”; “[h]e always maintained that his written reasons for judgment ‘must speak for themselves’”.

There are chapters on “The Common Law, Liberty and Justice”, on “Enduring Community Values”, on “Law and Religion”, on “Religion and Life” on “Catholic Social Teaching” and on international human rights. All are instructive and edifying.

Betraying the influence that Sir Gerard has had on my formation as a lawyer and as a judge, however, to my mind it is the speeches and articles the Editor has chosen to arrange within the chapters entitled “The Legal Profession” and “The Role of Judges” that demand closest attention by those of us who are or aspire to be lawyers or judges. Amongst them are deep reflections, almost meditations, on the nature of professional responsibility and on the nature of the judicial function, which can without exaggeration be said to complement the writings of Sir Matthew Hale in the United Kingdom in the middle of the seventeenth century and those of Benjamin Cardozo in the United States in the early twentieth century. I am careful to say “complement”, not “rival”, because competition with those sages of the law would have been unthinkable to Sir Gerard.

Of the rules Sir Matthew Hale wrote down for his own professional discipline, which he labelled “Things necessary to be continually had in remembrance”, and which were published only after his death, Lord Campbell (one of Sir Matthew Hale’s successors in the role of Lord Chief

Justice) said that they “ought to be inscribed in letters of gold on the walls of Westminster Hall, as a lesson to those intrusted with the administration of justice”.³ In a similar vein, I am inclined to say that a series of four lectures given by Sir Gerard within the space of eighteen months during the early part of his term as Chief Justice in 1995 and 1996 ought to be studied and internalised by anyone who is or aspires to be an Australian judge. He labelled them: “Courts for the People – Not People’s Courts”, “Why be a Judge”, “Judicial Independence” and “The Role of the Judge”. They are reproduced back-to-back in that order in the chapter entitled “The Role of Judges”. I have myself read them many times, but never before consecutively. I did not know until I read Gerard Carney’s Foreword that he assisted in the research. My already high regard for him has gone up.

The significance of the lectures is that together they provide a deeply conceptual and integrated account of the connection between judicial competence and judicial integrity, on the one hand, and, on the other hand, the maintenance of public confidence in the rule of law and the welfare and stability of the society which it serves. The lectures are at once instructional and inspirational, distilling wisdom into language almost poetic in its style.

The last chapter in Volume 1 reproduces the speeches Sir Gerard gave on being sworn in and on retiring as Chief Justice, together with a lecture he gave as the “Hal Wootten Lecture” at the University of New South Wales on 23 August 2012. Sir Gerard called the lecture “Lessons from a life in the law”. He started by recalling that it was then nearly 70 years since he first entered a court room. He finished, quoting Cardozo, by saying that the “ennobling tradition ... [of] the profession of the law, is the bond between its members and ... the cause of justice upon earth”. The title Frank Brennan has chosen for the chapter is “I did it my way”. When I first read it, I was

³ Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest till the Death of Lord Mansfield* (1851), vol 1, 433.

a little sceptical about that editorial choice. Sir Gerard was not a showman. He was orthodox. He was moderate. He was modest. He was a hero, but in the classical sense of being a model of courage and of selflessness.

Then I realised that my scepticism about “I did it my way” stemmed from having conflated the song with the singer. I went back to the lyrics. I should never have doubted. They are a perfect fit. He lived a life that was full. He planned each charted course. He said the things he truly felt.

Holding the office Sir Gerard Brennan once held and standing in the place he once stood, it is truly my honour now to launch this collection of his papers.