



**The Brennan Legacy - Blowing the winds of legal orthodoxy**  
by Robin Creyke and Patrick Keyzer (eds)

The Federation Press 2002

This collection of essays commemorates the judicial contribution of Sir Gerard Brennan in the AAT and the High Court. The distinguished contributors include Sir Gerard himself, Sir Anthony Mason, Justices Murray Wilcox and Rosemary Balmford. There are also contributions from former Justice Daryl Davies, academic writers Gerard Carney and Robin Creyke, from Stephen Gageler SC and Stephen Skehill.

Sir Gerard contributes a short overview of the Federal administrative review system. It includes an interesting discussion on the extension of the prerogative writs to private bodies exercising public functions such as private prisons. He is critical of the limitation of the jurisdiction of the Federal Court by the present government. He describes this as a "charter of arbitrariness". He decries the resulting impossible caseload of the High Court.

Sir Anthony Mason describes Sir Gerard as a principled common lawyer with a particular concern for the interests and values protected by the common law, a readiness to use international law to develop the common law and a concern with protection of individual rights combined with recognition of legislative supremacy. In the context of Sir Gerard's judgments he discusses the theoretical basis of judicial review, the doctrine of legitimate expectations, procedural fairness, the doctrine of proportionality and the distinction between jurisdictional and

non-jurisdictional error of law.

Stephen Gageler SC discusses *Craig v South Australia* and expresses scepticism about the conventional distinction, apparently espoused by Sir Gerard, between jurisdictional and non-jurisdictional error. Stephen Skehill, a former senior bureaucrat, examines Sir Gerard's contribution to merits review of government decisions as the first president of the AAT. Justice Rosemary Balmford discusses Sir Gerard's role in the injection of legal orthodoxy into the administrative process (to which the book's otherwise obscure subtitle refers) and the creation of the AAT and its offshoots in the States and Territories.

Justice Murray Wilcox contributes a fine essay on Sir Gerard and human rights law in Australia. It describes Sir Gerard's firm view of the proper limits of the courts' power and the importance of political assessment. Notwithstanding, Sir Gerard strongly believes that the courts stand between government and the governed. Legislation affecting private rights should be "jealously construed". Gerard Carney also discusses Sir Gerard's human rights perspective in his judgments and extra-curial writings. He discusses the *Kable* doctrine, procedural fairness, a constitutional right to liberty, Sir Gerard's views on a bill of rights and the principles of statutory interpretation in relation to fundamental common law rights. He refers to Sir Gerard's search for the recognition of enduring values in the common law; "...the dignity and integrity of every person, substantive equality before the law, the absence of unjustified discrimination, the peaceful possession of one's property, the benefit of natural justice and immunity from retrospective and unreasonable operation of laws".

Robin Creyke's essay on Sir Gerard's extra-curial writings refers to Sir Gerard's spirited defence of the High Court and its independence against unremitting attack after the *Mabo* and *Wik* decisions and his identification of public opinion as a potential source of hostility to the independence of the Court.

My own recollection of Sir Gerard is from this time. He spoke at a dinner in a Darwin restaurant. He took as his text Sir Anthony Mason's reply to the "pissant" remarks made by some otherwise unmemorable politician and defiantly spoke of the courts' duty apply the law and to ignore uninformed public criticism. He was not arrogant but rather adamant about the central role of judicial independence in our democracy. Sir Gerard was an imposing and, indeed, charismatic figure. For all of that, he had a common touch. He and his wife arrived at the restaurant while I was at the bar buying drinks. I had never met him before and did not recognise the tall, grey gentleman talking to my circle. When I returned he reached out and shook my hand, introducing himself simply as "Gerry Brennan" and introduced his wife. I was impressed by his natural, unaffected courtesy and complete lack of condescension. A deeply imbued democratic sense informed his personality and his work. He was careful to accord the legislature its proper place but unwilling to accept the mighty at their own valuation.

This is an excellent collection of essays and deals with fundamental issues of human rights and administrative and constitutional law in a varied and thought provoking way. It is an appropriate tribute to the work of great judge.

- Tony Young, Barrister

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**Administrative Appeals Tribunals**  
by Dennis Pearce  
Butterworths 2003

Administrative law is an ever growing field of the law which exemplifies perhaps the only interaction that a citizen has with his or her government. The Administrative Appeals Tribunal has provided a cost effective means for anyone with a grievance to seek redress as the result of a Commonwealth governmental decision or action. As more and more agencies seem to give jurisdiction to the AAT and as its role continues to grow. *Administrative Appeals Tribunals* seeks to provide a much needed

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roadmap to the practice and procedure of the AAT.

At first glance, I had compared this work to several other books on the administrative law. Mr. Pearce's focus on the AAT as a benchmark institution and as a mechanism to provide a more responsive government limit the writer's focus and allow the writer to delve more deeply into the inner workings of the AAT as living creation it was intended to be. Where other books sought to impart a more general knowledge of administrative law as a whole, Mr Pearce's intent is geared more to those who have a desire to access the information needed to operate within the arena so to speak.

Though students will find the book useful in many areas such as decisions [2.16] and jurisdictional questions [Chapter 2], it is the legal practitioner who would appear to benefit most from this work. Chapter 7, Procedure at Hearing provides a practical guide to one lacking in extensive experience of the administrative appeals process. The lack of commentary would seem to preclude this work as a primary source for instruction on the administrative law but the clarity with which various legal concepts such as the definition of a decision or interests affected would make this an excellent secondary source in a university setting. This apparent shortcoming is the actual strength of the book as it clearly sets out the law surrounding the AAT concisely and authoritatively. The publishers claim that this book will become an invaluable resource for governmental departments and welfare organizations—it very much appears that Mr Pearce has succeeded.

- Juan Dominguez, articled clerk,  
Office of the Director of Public Prosecutions

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