**The Supreme Court Library Seminar**

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***Queensland's Contribution to the High Court***

**Saturday, 29 March 2003**

## Commentary by The Honourable Justice R G Atkinson on Professor G Carney's paper on Sir Gerard Brennan

To provide a commentary on Professor Carney's paper is a daunting task in two ways. The first is the comprehensive and insightful nature of the paper which we have been fortunate enough to hear; and the second is because of the stature of the subject of Professor Carney's paper, Sir Gerard Brennan. Of course, neither Professor Carney nor myself are the first to have struggled with presenting a comprehensive picture of a person for whom one has so much respect.

In thinking about this problem, I was reminded of the life of an earlier member of the High Court, and of the writer who attempted to chronicle his illustrious career.

Henry Bournes Higgins was appointed along with Isaac Isaacs to a High Court whose members consisted of its original members Chief Justice Griffith, and Justices Barton and O'Connor. He was a fine man who had had an extraordinary, tumultuous and independent career both as a politician and as a Judge. Sir Isaac Isaacs said of him that his "was a thoroughly independent mind. He sought his own solution of every problem that was brought before him and, having reached his conclusion and considered it right, it mattered not to him whether it found favour or failed to find favour in the eyes of others".[1] Those words could equally describe the rectitude and independence of mind of Sir Gerard.

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[1] The Oxford Companion to the High Court of Australia, p 321.

Fortunately both for Australian letters and for Australian history, Higgins' niece was Nettie Palmer, herself a fine novelist and essayist. Indeed, the annuity that her uncle bequeathed to Nettie enabled her and her husband, Vance Palmer, to support themselves and encourage other writers during a period when Australian literature needed all the financial assistance it could get.

After her uncle's death in 1929, Nettie wrote in her private journal[2], "I felt moved to attempt some account of his life and work". She gathered together much of the accessible material. She then said,

> "Nothing remains but to write the book. Yet I'm finding it hard to capture the right attitude of detachment…Perhaps I'm the wrong person to do it. When I was four or so and they told me about God sitting on a cloud in the sky, I always saw Him with a face surprisingly like Uncle Henry's. On the other hand, as the only grand-daughter in the family, I heard any gossip that went around in what, I think, must have been an unusually restrained clan: that is, sometimes I saw HBH *en pantoufles* -
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> ('When you are trying to show a character,' says Louis Esson, 'don't leave out important things like the height and weight. And catch your subject as often as possible in slippers.')"

And so, inspired by Nettie and like her aware of the dangers both of hagiography and of unexpectedly (and perhaps improbably) finding Sir Gerard *en pantoufles*, I embark upon this commentary.

Unlike Henry Bournes Higgins who had no children to vindicate his memory, his only son Mervyn having died in the first World War, Sir Gerard is blessed with an abundance of children and grandchildren, at least two of whom have written an account of his life and work. His eldest daughter, Madeline, herself a member of the Queensland Bar, gave a warm and witty speech about her

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[2] Viviane Smith Ed *Nettie Palmer Her Private Journal 14 years, Poems, Reviews and Literary Essays*, University of Queensland Press p 45.

father at a Bar Association dinner which celebrated the life and career of Sir Gerard just prior to his retirement as Chief Justice in May 1998.

The Supreme Court Library also holds a two-page account kept under the sub-directory, Kateena's Documents, in which his granddaughter, Kateena O'Gorman, this year's Rhodes Scholar, has summarised her grandfather's extraordinary life and career. Ms O'Gorman completes her biographical notes of Sir Gerard by quoting from a speech he gave just prior to his retirement from the High Court in which he said:

> "The peace, order and freedom that we have experienced and take for granted is arguably unequalled in any other country. We must not forfeit those blessings by failing to take an informed, open and tolerant part in the political debates that contemporary reality demands."

Professor Carney has referred to many of the cases and extra-judicial writings which demonstrate Sir Gerard's contribution to the peace, order and freedom that we take for granted in this country, and where his respect for Parliament, individual Australians and his knowledge, openness and tolerance and understanding of contemporary reality has informed the well being of this nation.

Professor Carney did not however refer to the first time that Sir Gerard was mentioned in the Law Reports. Most counsel have to wait until they appear in a case worth reporting. However, even Sir Gerard's application for admission as a barrister was worthy of note[3]. It was heard on 21 December 1951. The recitation of the facts shows that his career had already displayed the diversity and learning which has long distinguished him.

> "Francis Gerard Brennan was duly admitted to the degree of Bachelor of Laws, University of Queensland, on 3rd December, 1951, and enrolled as a student-at-law on 9th February, 1951, although it was possible for him to have become a student at

[3] [1952] QWN 6.

> law before January, 1950. From January, 1950, until May, 1950, he was on the staff of the Australian National University, Canberra. From May, 1950, until December, 1950, he was attached to the War Crimes Section, Los Negros Island, New Guinea, where he acted as associate to the President of the War Crimes Tribunal. As soon as he returned to Brisbane in December, 1950, he applied for admission as a student-at-law.

Young Francis Gerard Brennan's absence from Queensland for this important work had meant that he had been unable to comply with r 16(7) of the Rules relating to the Admission of Barristers of the Supreme Court of Queensland which required an applicant who was a graduate in law from the University of Queensland to have been enrolled as a student-at-law for at least 15 months prior to graduation, and r22A which required every such student-at-law to attend each sittings of the Full Court between the date of his admission as a student-at-law and the date on which he obtained his degree. Sir Harry Gibbs for the Barristers' Board, displaying his usual perspicacity, raised no objection to the application to exempt the young Brennan from strict compliance with the rules[4]. The exemption was granted and the candidate admitted.

I doubt the judges who constituted the Full Court of the Supreme Court of Queensland on that day realised how significant that decision would be in the legal and judicial history of Australia.

Sir Gerard married Dr Patricia O'Hara in May 1953 and far from suffering the same lonely fate as Henry Bournes Higgins, the Brennans were blessed with seven bonny children. A *Courier-Mail* photograph of 21 June 1976 shows Brisbane barrister, Mr F G Brennan QC, described as the first Queenslander appointed to the Australian Industrial Court, with his wife Patricia and four of their children. The photo published in local and national newspapers on his retirement as Chief Justice twenty-two years later shows Sir Gerard and Lady Brennan with 15 of their many grandchildren.

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[4] Minutes of Meeting of Barristers' Board held on 18 December 1951.

Sir Gerard has made two irreplaceable contributions to public life in Australia. The first is found in the quality of his writing, both judicially and extra-judicially; and the second is found in the quality of the man as lawyer, as judge, and as Chief Justice.

He is a man and was a judge and Chief Justice of utter integrity and probity. Many are intelligent, brilliant, and display insight, know legal history, and have foresight and conviction as does Sir Gerard, but very few have the essential quality in which all of those qualities are combined in Sir Gerard, and that is that he is a person with wisdom.

Let me dwell on but one example, his Honour's reasoning in the watershed decision of *Mabo v Queensland*[5] which encapsulates his learning and wisdom. The judgment commences by narrating the story of the case, the history and geography of the Meriam people and the Murray Islands before and after European contact. As usual, those facts are told in a clear and engaging style capturing the essence of the lives affected by the legal decision. It also demonstrates exacting research to record precise facts.

He then posed the precise question to be answered in the case – whether annexation of the Murray Islands and their incorporation into Queensland had the effect of vesting in the Crown absolute ownership of, legal possession of and exclusive power to confer title to, all land in the Murray Islands. He noted that the arguments in favour of that proposition applied not just to the Murray Island but universally to all colonial territories "settled" by British subjects. Therein lay the wider significance of this case – it was, as his Honour observed, about the entitlement of indigenous inhabitants to the use and enjoyment of their traditional lands.

His Honour then referred to the formidable judicial precedent for the defendant's argument that, when the territory of a settled colony became part of the Crown's dominions, the law of England so far as applicable to colonial conditions became the law of the colony and, by that law, the Crown acquired the absolute beneficial ownership of all land in the territory and no right or

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5 [No 2] (1992) 175 CLR 1.

interest could be held in land unless granted by the Crown. Thus, as his Honour said:

> "According to the cases, the common law itself took from indigenous inhabitants any right to occupy their traditional land, exposed them to deprivation of the religious, cultural and economic sustenance which the land provides, vested the land effectively in the control of the Imperial authorities without any right to compensation and made the indigenous inhabitants intruders in their own homes and mendicants for a place to live."[6]

Could such an unjust proposition be part of the common law to be applied in contemporary Australia?

His Honour referred to the duty of the High Court to declare the common law of Australia while observing, as Professor Carney noted, that in discharging that duty the court was not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency.

His Honour then referred to the deeper question which had to be determined in that case in order to answer the precise question which the case threw up for determination. The deeper question was stated at page 30:

> "The peace and order of Australian society is built on the legal system. It can be modified to bring it into conformity with contemporary notions of justice and human rights, but it cannot be destroyed. It is not possible, a priori, to distinguish between cases that express a skeletal principle and those that do not, but no case can command unquestioning adherence if the rule it expresses seriously offends the values of justice and human rights (especially equality before the law) which are aspirations of the contemporary Australian legal system. If a postulated rule of the common law expressed in earlier cases seriously offends those contemporary values, the question arises whether the rule should be maintained and applied. Whenever such a question arises, it is necessary to assess whether the particular rule is an essential doctrine of our legal system and whether, if the rule were to be overturned, the disturbance to be

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[6] (supra) at 29.

> apprehended would be disproportionate to the benefit flowing from the overturning."

His Honour then engaged in a detailed legal, factual and theoretical analysis of the arguments of the State of Queensland to demonstrate that the bases claimed for the previous rule were flawed.

His Honour held that where the legal theory that was applied in the earlier cases was not supported by the evidence or the facts as we know them today, then there was no warrant for applying, in these times, rules of the English common law which were the product of that theory. As his Honour said at page 40:

> "The theory that the indigenous inhabitants of a "settled" colony had no proprietary interest in the land .. depended on a discriminatory denigration of indigenous inhabitants, their social organisation and customs."

The concept of terra nullius used to justify conquest and colonisation has been condemned in international law. The common law must, his Honour said, be kept in step with international law so that it could "neither be nor be seen to be frozen in an age of racial discrimination"[7].

His Honour held that even so, the recognition by our common law of the rights and interests in land of the indigenous inhabitants of a settled colony would be precluded if such recognition were to fracture a skeletal principle of our legal system. A basic doctrine of land law is the doctrine of tenure derived from feudal origins which could not be overturned "without fracturing the skeleton which gives our land law its shape and consistency".[8]

But the doctrine of tenure itself recognised that there might be rights and interests in land which do not owe their existence to a Crown grant. So it was that after the conquest of Ireland and of Wales, inhabitants left in possession

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[7] (supra) at 42.
[8] (supra) at 45.

of land needed no new grant from the Crown to support their possession under the common law. The acquisition of sovereignty did not extinguish beneficial ownership nor was it sufficient to extinguish usufructuary title or communal or individual rights, otherwise known as native title. "It is only the fallacy of equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty."[9] His Honour then gave careful consideration to the conflicting English authorities on colonial rule and the effect of the acquisition of sovereignty by the British crown on the rights of property of the inhabitants to conclude that "the preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land."[10]

Importantly those rights were said to able to claim the protection of the *Racial Discrimination Act* 1975; that is, the right to equality before the law regardless of race.

Sir Gerard then returned to the important and practical questions of the nature and incidents of native title and how it was extinguished, and listed in summary form the principles for which his judgment is authority, before answering the precise questions posed by the case.

The decision in this case changed the common law of Australia, in that it recognised for the first time in Australia that native title defined by his Honour as: "the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants."[11] It required the overruling of cases that had held to the contrary.

Yet the reasoning of Justice Brennan, who wrote the leading judgment, is strikingly conservative: drawing on academic and historical writings, cases from the national courts of many countries as well as international law. It is

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9 (supra) at 51.
10 (supra) at 57.
11 (supra) at 57.

rigorously and logically reasoned and clear in its meaning and expression. And its result ensured the equality of citizens before the law in Australia. The decision amply demonstrated two important principles of the rule of law; the authority of courts to dispense justice according to law, and the principle of separation of the judicial from the legislative and executive arms of government. Certainly there were many powerful interests including those in government who were discomforted and challenged by the decision.

His judgments were not written as an insight for the intellectual elite, but to elucidate the application of the law and to advance the democratic compact that has enabled Australia to be one of the most stable and tolerant societies during the whole of the 20th century, and the 21st century to date.

As a judge, he is an exemplar of wisdom and integrity. As a man, whether in shoes or slippers, he is an exemplar of generosity and humanity. Sir Gerard was a judicial leader when Australia needed a leader in the position of the Chief Justice. His stewardship as a judge and chief justice of our highest court maintained its integrity and reputation in safe hands for the next generation of its members and, more importantly, for the Australian people.