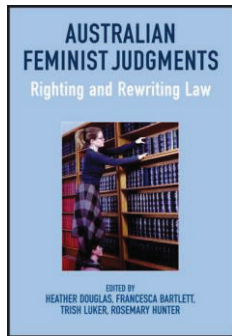

BOOK REVIEW

AUSTRALIAN FEMINIST JUDGMENTS: RIGHTING AND REWRITING LAW

Australian Feminist Judgments: Righting and Rewriting Law edited by Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (Hart Publishing, 2014) ISBN: 9781849465212, pages 382.



No young lawyer has ever sat in a courtroom and not thought “Gee, this could be done better, this doesn’t reflect me or my experience of life” or “What’s that fusty smell from two centuries ago, oh that’s right, it’s what we’re stuck with because no-one has thought to try a different approach”. Of course, lawyers wrongly think that they have an interest in maintaining the status quo and its modus operandi, because they got admitted into the club with “the secret handshake”. And yet, ask many advocates and they will tell you that they started out as Bolshie young men and women with change or revolution on their minds. That is why they would say that they chose the law in the first place, as a tool to effect change.

So it is with some delight that finally a brilliant group of some 56 women and two men – all good feminists – decided that it is not something you just bitch about over drinks or fantasise about, staring out the window avoiding your chargeable hours time sheet. They picked a representative sample of 25 important Australian legal decisions from every field, but mostly from the High Court. They put on the metaphorical judicial robes and rewrote them like they “should” have been through the lens of the feminist psyche. It is an outrageous and presumptuous premise which does not disappoint.

Women, as 52% of the population, also have an interest in the practical application of the law to their lives and a need for the law to reflect them and their experience – they are not “the man” on the Clapham omnibus, the Bondi tram, or indeed the Balmain New Ferry.

Australian Feminist Judgments: Righting and Rewriting Law is a marvellous sweep through all aspects of contemporary Australian judgments through these rewritten decisions. They range from the shared parenting defining decision of *Goode v Goode*¹ to *U v U*² about contested relocation of children in the Family Court. Other cases include: *R v Morgan*,³ a sentencing appeal from an Indigenous Court for domestic violence; the High Court in *Phillips v The Queen*,⁴ which concerned evidence of coincidence in rape cases; provocation and murder in *Parker v The Queen*;⁵ rape in marriage in *PGA v The Queen*;⁶ systemic economic disadvantage in *Trustees of Property of Cummins (a bankrupt) v Cummins*;⁷ *Louth v Diprose*⁸ about unconscionable conduct; and *Australian Competition and Consumer Commission v Keshow*⁹ where Aboriginal women in remote areas were preyed upon to enter “agreements” to purchase educational materials.

Most lawyers will think that they know the High Court in *Cattanach v Melchior*¹⁰ and damages for birth after a negligent ligation, but tort law is at the coal face of feminist jurisprudence. Then there

¹ *Goode v Goode* [2006] FamCA 1346.

² *U v U* (2002) 211 CLR 238; [2002] HCA 36.

³ *R v Morgan* (2010) 24 VR 230; [2010] VSCA 15.

⁴ *Phillips v The Queen* (2006) 225 CLR 303; [2006] HCA 4.

⁵ *Parker v The Queen* (1963) 111 CLR 610.

⁶ *PGA v The Queen* (2012) 245 CLR 355; [2012] HCA 21.

⁷ *Trustees of Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278; [2006] HCA 6.

⁸ *Louth v Diprose* (1992) 175 CLR 621.

⁹ *Australian Competition and Consumer Commission v Keshow* [2005] FCA 558.

¹⁰ *Cattanach v Melchior* (2003) 215 CLR 1; [2003] HCA 38.

is climate change in *Wildlife Preservation of Queensland v Minister for Environment & Heritage*,¹¹ sexuality and immigration in *S395 v Minister for Immigration and Multicultural Affairs*,¹² and the constitutional challenge of *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134*¹³ and under s 41 of the *Constitution* in *R v Pearson*.¹⁴

The re-working of the High Court in *RPS v The Queen*¹⁵ and the right to silence is an absolute corker which answers the question juries have asked since trials began: “why can’t we take into account whether it’s reasonable to expect the accused to give evidence whilst we assess his or her guilt”. And *R v Taikato*¹⁶ decides the right to carry an implement of self-defence against a non-specific generic threat, by simply being a woman who has previously had bad things happen to her.

Even tax gets a look in with *Lodge v Federal Commissioner of Taxation*¹⁷ regarding the tax deductibility of childcare and then there is *Dietrich v The Queen*¹⁸ standing for the right to legal representation. To top it off there is a review of the sex discrimination case *JM v QFG*,¹⁹ anti-vilification in *McLeod v Power*,²⁰ and the plight of the casual teachers in *New South Wales v Amery*.²¹ Then way back to the High Court’s 1934 case of *Tuckiar v The King*²² where the killing of a constable by an Aboriginal man is re-examined through a very different lens as a Treaty case (albeit their Honours put themselves into the year 2035), it makes for a splendid if optimistic read. But it is the non-rewriting of *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)*²³ where the authors despair that “rewriting the judgment ... still could not prise open places for Nunga women” that really makes you think about what you think you know about systems of law and why they exist.

Interestingly, some of the rewriting “judges” come to the same conclusion as the genuine court, if for different reasons, some simply join the dissenting minority but adding a wealth of jurisprudence and sensible feminist-informed thinking, some are masterfully overturned. None are dull – even the feisty introduction from former Judge of the Family Court, Sally Brown AM, and the terrific cover photograph by Madeleine Donovan complete the package.

The book is not just the extraordinary rewritten judgments. In passing through the commentary that precedes each rewritten decision, so much tangential information and social history of Australia is included. It makes for fascinating reading – particularly *R v Middendorp*,²⁴ dealing with provocation and homicide. It takes us through the historical background of Victoria introducing the *Crimes (Homicide) Act 2005* (Vic) which tried to level the playing field for battered women who killed their abusive spouse but could not avail themselves of the traditional “immediate” provocation defence. Unfortunately, and perhaps unsurprisingly, this new legislation was used primarily by men against men – against the original intentions of the legislators – which just shows that we cannot legislate our way to justice equality in the courts, it must fall to the jurists, the advocates, and the judges.

¹¹ *Wildlife Preservation of Queensland v Minister for Environment & Heritage* [2006] FCA 736.

¹² *S395 v Minister for Immigration and Multicultural Affairs* (2003) 216 CLR 473; [2003] HCA 71.

¹³ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Applicants S134* (2003) 211 CLR 441; [2003] HCA 1.

¹⁴ *R v Pearson* (1983) 152 CLR 254.

¹⁵ *RPS v The Queen* (2000) 199 CLR 620; [2000] HCA 3.

¹⁶ *Taikato v The Queen* (1996) 186 CLR 454.

¹⁷ *Lodge v Federal Commissioner of Taxation* (1972) 128 CLR 171.

¹⁸ *Dietrich v The Queen* (1992) 177 CLR 292.

¹⁹ *JM v QFG* [1998] QCA 228.

²⁰ *McLeod v Power* [2003] FMCA 2.

²¹ *New South Wales v Amery* (2006) 230 CLR 174; [2006] HCA 14.

²² *Tuckiar v The King* (1934) 52 CLR 335.

²³ *Kartinyeri v Commonwealth (Hindmarsh Island Bridge Case)* (1998) 195 CLR 337; [1998] HCA 22.

²⁴ *R v Middendorp* [2010] VSC 202.

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The joy comes from reading about cases one knows or has worked with, but the book is perfectly arranged to be dipped in and out of. It introduces you to cases you do not know and would not have read, but that is no bad thing to venture beyond one's normal practice.

This is, to steal John Berger's title, all about *Ways of Seeing*.²⁵ You will never look at a judgment the same way again, not for what it is saying but for what it is assuming and what is unsaid. It will certainly change the way you draft your own pleadings. Think about how important that is. Laws do not change in vacuums, and judges cannot just create a 21st century judgment out of thin air, but guided by contemporary mores and perhaps the common sense of feminist jurisprudence and thinking.

After reading this book, the dull, flat black and white two dimensional world of the law suddenly folds out into colourful 3D in a most thrilling and engaging way.



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²⁵ Berger J, *Ways of Seeing* (Penguin UK, 1972).