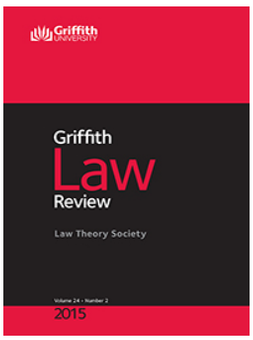

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Australian feminist judgments: righting and rewriting law

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Australian feminist judgments: righting and rewriting law, edited by Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter, Hart Publishing, United Kingdom, 2014, 462 pp., ISBN 978-1-84946-521-2, Paperback £35.00; ePub and Adobe PDF ebook £34.99

How would a feminist judge have approached the High Court case of *Dietrich v R*?[1] Or *R v Pearson; Ex parte Sipka*?[2] How would a feminist judge have sentenced Matthew Grant Webster for murdering 14-year-old Leigh Leigh? What finding would a feminist judge have made in *Louth v Diprose*?[3] These answers, along with many more, can be found in *Australian Feminist Judgments: Righting and Rewriting Law.* This book offers alternative feminist judgments, written by feminist academics and lawyers, to 24 significant Australian cases, and one essay written by Irene Watson. The Honourable Sally Brown AM, former Family Court judge, describes the alternative feminist judgments in the foreword to the book as 'a rewriting of a published judgment, informed by feminist scholarship and reflection'.[4]

The Australian Feminist Judgments Project was primarily inspired by feminist judgment projects that took place in Canada and England and Wales.[5] The book demonstrates feminist approaches to a wide-range of legal contexts, covering topics such as criminal law, family law and constitutional law, but also more specialised areas like environmental law, consumer protection and tax law. Many of the analysed cases will be immediately recognisable to Australian legal practitioners, judges, law students and scholars alike.

The book follows a logical and easy-to-read structure. Each judgment is structured in two parts – the preceding chapter serves as commentary, providing necessary context and background to the case; while the following chapter sets out the feminist judgment itself. Unless the reader has sound knowledge of a particular case, it is recommended that they commence with each commentary chapter prior to reading the feminist judgment.

The commentaries are informative and greatly assist in understanding each of the judgments. They situate the feminist judgment and familiarise the reader with the case before they read the judgment. Each commentary introduces the reader to the case and provides a narrative for the following chapter by supplying background information, the facts of the case, the main issues and the relevant court's decision. Each commentary concludes with a discussion of the feminist judgment and how it approaches the case. Some of the commentaries also discuss subsequent law reform and developments. Setting the scene in each initial chapter allows the reader to identify with, and understand, the case, which allows them to develop their own views and opinions as to how a feminist judgment might approach the matter. This critically engages the reader and, by the end, the reader may find they are also starting to formulate a feminist judgment before reading the judgment.

[1][1992] HCA 57.
[2][1983] HCA 6.
[3][1992] HCA 61.
[4]Sally Brown (2014) 'Foreword' in Douglas et al (2014).
[5]Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (2014) 'Introduction: Righting Australian Law' in Douglas et al (2014), p 2.

The judgments are eloquent, well-reasoned, realistic, and above all, interesting. They refer to statute and draw on authority to assist in their decisions. From using the honorific of 'judge' for each feminist judge, to using the original judgment's styles and fonts, the judgments appear authentic. Many of the feminist judges make an opposite finding to the one the relevant court made in the decision and suggest an alternative approach to the matter. A number of the judges ultimately agree with the court's decision, albeit they consider different facts or apply different legal principles.[6] For example, one feminist judge agreed with the orders, but 'differ[ed] as to the appropriate trusts principles that govern this important area'.[7]

The book commences with an introduction, which includes an overview of the Australian Feminist Judgments Project and the concept of feminist judging; while the second chapter presents reflections of the feminist judgment authors. This provides insight into the strategies the feminist judges employed to write their judgments and the challenges that they faced.

The first part of the book discusses public law and covers several constitutional law cases, a tax law case, two immigration law cases and an environmental law case. This part is likely to appeal to the majority of readers given the inclusion of well-known cases such as *R v Pearson; Ex parte Sipka*[8] and Roqia Bakhtiyari and her children's applications for protection visas. Irene Watson's essay excellently explains that she cannot rewrite a feminist judgment of *Kartinyeri v Commonwealth of Australia*[9] because it 'would not prise open places for Nunga women because the rewriting needs to be done from 'another space', outside the jurisdiction of the Australian common law and the sovereignty of the Australian state'.[10]

The next part considers four private law cases, covering torts, consumer protection and equity cases. This part offers alternative judgments to, for example, a case where a failed sterilisation resulted in a child, and another case where a lawyer sought to recover a house he had given a woman. Part two of the book is significant not only because of the important impacts that the alternative judgments would have on the specific women involved in these private law cases, but because of the potential precedent they would establish, which could be relied on by people in similar situations in the future.

Part three deals with crime and evidence and is composed of alternative judgments to three High Court criminal law cases, two High Court evidence cases and three sentencing cases that will almost certainly captivate and intrigue readers. The feminist judgment of *PGA v R*[11] is likely to be of specific interest to many people, as it decides that marital immunity for rape, with some exceptions, was part of the Australian common law until legislative reform took place.[12] The sentencing cases offer

[6]Heather Douglas, Francesca Bartlett, Trish Luker and Rosemary Hunter (2014) 'Reflections on Rewriting the law' in Douglas et al (2014), p 21.
[7]Lisa Sarmas (2014) 'Judgment: *Trustees of the Property of John Daniel Cummins, a Bankrupt v Cummins* [2006] HCA 6' in Douglas et al (2014), p 212.
[8][1983] HCA 6.
[9][1998] HCA 22.
[10]Irene Watson (2014) 'First Nations Stories, Grandmother's Law: Too Many Stories to Tell' in Douglas et al (2014), p 53.
[11][2012] HCA 21.
[12]Wendy Larcombe and Mary Heath (2014) 'Judgment: *PGA v R* [2012] HCA 21' in Douglas et al (2014), p 271.

alternative sentences to three cases – one for murder, another for defensive homicide and the last regarding a sentence of an Indigenous sentencing court.

The final part of the book looks at interpreting equality through the inclusion of two family law cases, three discrimination law cases and a treaty law case. This part rewrites cases such as where a mother was unable to relocate to her home country of India with her child, and a case where a self-identifying lesbian was not provided with assisted reproductive technology. The book aptly concludes with the treaty law judgment, set in 2035, that 'envisions a future society where a Treaty Act governs relations between Indigenous and non-Indigenous Australians and an Indigenous court has jurisdiction over Indigenous matters'.[13]

Unsurprisingly, as a collection with 58 contributors, there are differences in style and approach, but these are severely minimised by the uniform structure throughout. In fact, the differences create a sense of legitimacy, as each actual judge has their own distinct style, and it allows a wide range of topics to be covered. Like any similar collection, certain topics and judgments are sure to appeal to some people over others, but the high standard throughout results in an excellent collection.

There are numerous quotable statements throughout the judgments, which one could envisage, if they were real judgments, would be quoted by legal practitioners in their submissions, law students in their assessments and, of course, judges in their judgments. Outstanding quotes, in my view, include '[w]hen provocation succeeds on slender or spurious evidence justice miscarries',[14] '[m]ost importantly, we find that justice for married women is better served by recognising the history of the marital immunity than by erasing it'[15] and the statement that '[t]he question in relocation matters then becomes: "Will the child's best interests be affected by relocation to such an extent as to justify limiting the residential parent's freedom of movement?"'[16]

Australian Feminist Judgments: Righting and Rewriting Law will appeal to a wide audience – particularly judges, academics, legal practitioners, law students and people who are interested in feminism or legal jurisprudence. This book offers, in my view, vastly superior alternatives to 24 Australian judgments and a thought-provoking essay. While it has unfortunately not been possible to mention each of the contributions individually, all are of a high quality. Readers will surely finish the book firmly believing that it is not only highly desirable, but necessary, for Australia to have more feminist judgments.

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[14]Adrian Howe (2014) 'Judgment: *Parker v R* [1963] HCA 14' in Douglas et al (2014), p 240.
[15]Wendy Larcombe and Mary Heath (2014) 'Judgment: *PGA v R* [2012] HCA 21' in Douglas et al (2014), p 268.
[16]Jonathan Crowe (2014) 'Judgment: *U v U* [2002] HCA 36' in Douglas et al (2014), p 370.

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