Review Essay: Why (Re)Write Judgments?

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

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Abstract

Australian Feminist Judgments is a collection of fictional judgments for real Australian cases that have been rewritten by Australian scholars from the perspective of a feminist judge. Each judgment is introduced by a commentary, written by a different scholar, explaining the legal and historical context of the original decision and the choices made by the feminist judge. This review essay locates the collection within more general debates surrounding judgment writing, particularly leading Australian extra-judicial commentary on how and why judgments are written. Against this larger plane, we consider a number of the key issues raised by the collection about judgment writing, including the significance of recounting the facts of a case, the uses of formalist judicial method and the capacity of judgments to effect change. Drawing on a number of examples from the collection, this review essay contends that *Australian Feminist Judgments* makes a valuable contribution not only to contemporary feminist debates, but also to issues going to the heart of judicial practices and judgment.

I Introduction

December 2011 to January 2012 was an exciting period for theorising about Australian judicial decision-making. In December 2011, the Australian Research Council ('ARC') announced that the Australian Feminist Judgments Project had been awarded a Discovery Grant. The project, of which *Australian Feminist Judgments*[1] is but one key component, was devised to 'investigate relationships between feminist theory and practice in Australian judicial decision-making'.[2]

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[1] Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014).
[2] Research Data Australia, *Australian Feminist Judgments Project: Jurisprudence as Praxis* <https://researchdata.ands.org.au/australian-feminist-judgments-jurisprudence-praxis/535833>.

Inspired by the 2007 *Women's Court of Canada* ('*WCC*'),[3] and the 2010 United Kingdom (UK) project *Feminist Judgments* ('*UKFJ*'),[4] the objective of *Australian Feminist Judgments* is to demonstrate that a judgment in a real case could be feminist, 'authentic' and 'legally plausible'.[5] To achieve this objective, most — but not all — of the feminist 'judges' have written their judgments applying the 'same constraints'[6] as the original decision-maker, that is, the original facts as found by the lower courts and the academic critique the parties could have drawn on at the time.[7]

Like its UK predecessor, *Australian Feminist Judgments* adopts Hunter's seven-point checklist of 'feminist judging'.[8] Importantly, 'identifying as a woman' is not on this list,[9] and so, for the first time in the feminist judgment-writing genre, one of the feminist 'judges' in the Australian collection is male.[10] This aspect of the collection alone ensures that it provides a distinctive lens through which to examine preconceptions regarding the connections between feminism, gender and judging.[11] According to Hunter, the key attributes of feminist judging include traditional feminist concerns such as 'ask the woman question', 'include women' and 'challenge gender bias', as well as requiring judges to be 'open and accountable about [their] choices' and to reason from context to 'contextualise and particularise' their reasoning.[12] The resulting fictional judgments in *Australian Feminist Judgments* encompass decisions from

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3 Special Issue: Rewriting Equality (2006) 18(1) *Canadian Journal of Women and the Law* contains the 'Women's Court of Canada' decisions.

4 Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010).

5 Heather Douglas et al, 'Introduction: Righting Australian Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1.

6 Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010), 13. See also Diana Majury, 'Introducing the Women's Court of Canada' (2006) 18(1) *Canadian Journal of Women and the Law* 1, 6.

7 Hunter, McGlynn and Rackley, 'Feminist Judgments', above n 6, 13. The *Australian Feminist Judgments* contributors not following these 'same constraints' are Irene Watson (Chapter 3); Heron Loban (Chapter 11); and Nicole Watson (Chapter 27).

8 Douglas et al, 'Introduction', above n 5, 8; Rosemary Hunter, 'An Account of Feminist Judging' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing, 2010), 35.

9 Although indicating a 'tentative' view that a 'feminist judge' must be a woman, this question is left open in Rosemary Hunter, 'Can Feminist Judges Make a Difference?' (2008) 15(1–2) *International Journal of the Legal Profession* 7, 8. As the *Australian Feminist Judgments* editors note, the project's interest is in feminist judging methods (not the attributes of feminist judges): Douglas et al, 'Introduction', above n 5, 2.

10 Jonathan Crowe, 'Judgment: *U v U*' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 365.

11 The fact that approximately half of the original decisions were by female judges, including one all-female bench (*Goode v Goode*), allows *Australian Feminist Judgments* readers to explore further components of the feminism, gender and judging question: that is, that women judges speak in the 'same' voice; that all women judges are feminists; or that all feminists speak in the 'same' voice. Unfortunately, the editors do not explicitly explore these unique contributions of their collection, although they discuss the gender and judging question in Douglas et al, 'Introduction', above n 5, 4–6. See further Heather Roberts, 'Book Review: *Australian Feminist Judgments*' (2015) 35(3) *Legal Studies* 558.

12 Douglas et al, 'Introduction', above n 5, 8.

courts throughout the judicial hierarchy,[13] and on a broad variety of legal topics, such as family law and discrimination law, as well as areas less traditionally associated with 'feminist' concern, including environmental law and constitutional law.[14] Each judgment is introduced by a commentary, written by a different scholar, which typically explains the legal and historical context of the original decision and highlights some of the choices made by the feminist judge. As the commentators and editors explain, some feminist 'judges' provide dissenting decisions, while others reach the same conclusion as the original judge.[15] These approaches challenge perceptions that feminist judgments will necessarily result in different, and radical, outcomes.

In the UK, less than a month after the ARC announced the Australian Feminist Judgment Project's funding, Justice Heydon presented his famous speech 'Judicial Independence: The Enemy Within'.[16] Heydon's 'enemy' is the threat to judicial independence posed by judges themselves: 'excessively dominant' judicial personalities, exerting influence on their colleagues to conform to joint reasons; the judicial 'herd' willing to bow to majority opinion.[17] For Heydon, the independent judgment-writing process is essential to guarantee judicial independence, as the only way for judges to ensure true application of the law and fidelity to the judicial oath.[18] Heydon's speech set off a flurry of responses from current and former judges,[19] particularly on the topic of collective judgment writing. More broadly, however, these debates enlivened familiar questions: why, and how, should judges write judgments?

This review essay submits that *Australian Feminist Judgments* should be read as part of this broader conversation about judgment writing in Australia. In doing so, it seeks to demonstrate *Australian Feminist Judgments*' value both to those readers predisposed to feminist theory, and to readers to whom the 'F word' in the book's title might not ordinarily appeal. In addition to making valuable contributions to contemporary feminist debates, *Australian Feminist Judgments* presents readers with an opportunity to engage with issues of the style, methods and importance of written reasons for judgment. Part II of this review essay considers these questions. Part III concludes with a discussion of how the collection engages with debates regarding one of the key elements of judgment writing beyond the text: the influence of judges' backgrounds, personalities and identities on judgment writing.

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13 On the novelty, and, significance of this editorial choice, see further, Roberts, above n 11, 56–1.

14 Margaret Thornton, 'The Development of Feminist Jurisprudence' (1998) 9(2) *Legal Education Review* 171, 183.

15 Heather Douglas et al, 'Reflections on Rewriting the Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 19, 21.

16 The speech was later published as J D Heydon, 'Threats to Judicial Independence: The Enemy Within' (2013) 129 (April) *Law Quarterly Review* 205.

17 Ibid 215–6.

18 Ibid.

19 See, eg, Justice Stephen Gageler, 'Why Write Judgments?' (2014) 36(2) *Sydney Law Review* 189; Justice P A Keane, 'The Idea of the Professional Judge: The Challenges of Communication' (Speech delivered at the Judicial Conference of Australia Colloquium, Noosa, 11 October 2014) <http://www.jca.asn.au/wp-content/uploads/2013/11/P01_14_02_28_1-Justice-P-A-Keane.pdf>; Justice Susan Kiefel, 'The Individual Judge' (2014) 88(8) *Australian Law Journal* 554; Sir Anthony Mason, 'Reflections on the High Court: Its Judges and Judgments' (2013) 37(2) *Australian Bar Review* 102.

II *Australian Feminist Judgments* and the Conversation about Judgment Writing

The style, methods and importance of judgment writing are recurring themes in the extra-judicial writings of Australian judges, featuring most famously in Sir Frank Kitto's 1973 paper 'Why Write Judgments?', later published in 1992 in the *Australian Law Journal*.[20] The following section considers the ways in which two themes of *Australian Feminist Judgments*' rewritten judgments — feminist fact-telling and feminist formalism — contribute to this broader conversation about judgment writing in Australia.

Style of a Judgment: Fact-telling

Fact-telling is an integral component of written judgments and Australian judges have recognised its difficulty and significance to the outcome of disputes and to the legal system's 'professional credibility'.[21] Judges have also reflected on the diversity of judicial approaches to how facts are interpreted and told.[22] For example, Heydon observed in his 'Enemy Within' paper that

> individual perceptions of the material facts can differ subtly but crucially. So can perceptions of the *real* issues, the *relevant* authorities, and the *significant* arguments. More fundamentally … attempts to state ideas in particular sets of words can alter the ideas as the words change.[23]

Heydon's comments were made in the context of judgment-writing practices by multi-member appellate benches. It is, perhaps, unlikely that Heydon also had feminist legal theories in mind. However, his comments resonate strongly with *Australian Feminist Judgments*' emphasis on the importance of language and material facts in written judgments.[24] Two of the seven attributes of Hunter's 'feminist judging' checklist correspond directly to the fact-finding and fact-telling process: reasoning from context to 'contextualise and particularise'; and 'include women' and women's experiences in the judgments' narratives and reasoning.[25] Although illustrated to varying degrees across the collection, the rewritten decision of *R v Webster*[26] demonstrates strikingly the difference these methods make.

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[20] Sir Frank Kitto, 'Why Write Judgments?' (1992) 66(12) *Australian Law Journal* 787. See also Michael Kirby, 'On the Writing of Judgments' (1990) 64(11) *Australian Law Journal* 691; Sir Harry Gibbs, 'Judgment Writing' (1993) 67(7) *Australian Law Journal* 494; Sir Anthony Mason, 'The Art of Judging' (2008) 12 *Southern Cross University Law Review* 33; Justice Susan Kiefel, 'Reasons for Judgment: Objects and Observations' (speech delivered at the Sir Harry Gibbs Law Dinner, Emmanuel College, University of Queensland, 18 May 2012); Gaegler, above n 19.

[21] Bryan Beaumont, 'Contemporary Judgment Writing: The Problem Restated' (1999) 73(10) *Australian Law Journal* 743, 746.

[22] See, eg, Justice Roslyn Atkinson, 'Judgment Writing' (Speech delivered at the Australian Institute of Judicial Administration Conference, Brisbane, 13 September 2002) 4.

[23] Heydon, above n 16, 220–1 (emphasis in original).

[24] Douglas et al, 'Reflections', above n 15, 28–30.

[25] Douglas et al, 'Introduction', above n 5, 8.

[26] (Unreported, Supreme Court of New South Wales, Wood J, 24 October 1990).

In *R v Webster*, Wood J sentenced Matthew Webster to 14 years' imprisonment for the murder of 14-year-old Leigh Leigh. Feminist 'judges' van Rijswik and Townsley do not change this sentence. However, the perspective and narrative differences between the original and the feminist judgment are profound, and carefully outlined in Duncanson's excellent commentary.[27] For example, as Duncanson notes, Woods J's original judgment detaches agency from Leigh's assailants by referring to 'the tragic killing of Leigh Leigh', and explaining that prior to her death sexual intercourse '[took] place with a fifteen year old person'.[28] This narration of events is consistent with Woods J's attribution of responsibility to the parents for their lack of supervision.[29] By contrast, the feminist 'judge' addresses Webster directly, stating, 'You [Webster] murdered Leigh at a sixteenth birthday party'.[30] Then, regarding the sexual assault, the feminist judge observes that '[Leigh's] vulnerability was firstly taken advantage of *by* [another, unidentified] fifteen year-old youth'.[31] In the feminist retelling of the facts, liability is clearly and directly sited with the perpetrators.

By contextualising and particularising the crimes against Leigh, and the roles of her attackers, the feminist judgment underlines the difference that feminist reasoning can make to how legal 'truths' are perceived. In addition, the feminist judgment in *R v Webster* begins to overcome one of the key criticisms levelled at the deployment of personal narrative in third-wave feminism: that '[n]arrative collections do not translate easily into political strategies or legal theories'.[32] At the same time, this judgment and others in the collection adopting feminist fact-telling[33] raise important considerations outside the feminist context about the way judges do and should tell facts, and more generally the implications of fact-telling outside courts.

Judicial Methods: Formalism as Feminist Method

The alternative approaches to fact-telling by the feminist judges highlight the distinctiveness, particularly in form and tone, of some feminist judgments compared to the original decisions. By contrast, other feminist judgments in the collection use what the editors term 'formal legal methods' and 'black letter' approaches to rewrite the decisions.

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27 Kirsty Duncanson, 'Truth in Sentencing: The Narration of Judgment' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 309, 314–15.

28 Ibid 313–14.

29 Ibid 312–13.

30 Ibid 316.

31 Ibid 317 (emphasis added).

32 Bridget J Crawford, 'Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure' (2007) 14(1) *Michigan Journal of Gender & Law* 99, 126.

33 See also, eg, in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014): Heron Loban, 'Judgment: *ACCC v Keshow* [2005] FCA 558' (ch 11); Kate Fitz-Gibbon, Danielle Tyson and Jude McCulloch, 'Judgment: *R v Middendorp* [2010] VSC 202' (ch 20); Penny Crofts and Isabella Alexander, 'Judgment: *Taikato v R* [1996] HCA 28' (ch 15); Elena Marchetti and Janet Ransley, 'Judgment: *R v Morgan* [2010] VSCA 15' (ch 21).

Much judicial (and academic) energy has been expended on defining the attributes of 'formal legal methods'.[34] Included in this discussion are debates regarding the boundaries of a variety of '-isms'[35] (particularly, legalism, literalism, and competing virtues of 'progressivism'), and whether particular judges can be held up as true and consistent exemplars of particular approaches.[36] In Australian extra-judicial writings, such debates peaked particularly strongly in response to the Mason Court era, with labels of 'traditionalist' and 'legalist' set against 'activist' and 'progressivist'; each label used differently by commentators, as a term of either praise or critique.[37] Broadly speaking, however, in these debates, 'form' (for example, the language of statutes, the fabled 'criterion of liability') is contrasted with 'substance' (for example, the practical operation of legal rules, read in light of contemporary circumstances and policy considerations).[38] This broad demarcation is consistent with the definitional approach taken by the editors, who emphasise that the feminist-formalism chapters are marked out by methods encompassing strict approaches to statutory interpretation, close adherence to precedent and/or the exercise of 'judicial restraint'.[39]

Australian Feminist Judgments' three discrimination law judgments provide perhaps the best illustration of this feminist-formalist approach.[40] In *New South Wales v Amery*, for example, feminist judge Gaze changes the case's outcome to find in favour of 13 female casual high school teachers who had alleged sex discrimination on the basis that they performed the same work as the permanent staff, but received up to 20% less pay.[41] Gaze's judgment uses none of the narrative techniques of *R v Webster* to evoke the plight of the casual workers in the narrative. Rather, she draws closely on established precedent, legislative intention and the distinction between errors of law and errors of fact to apply discrimination law to protect the female workers.

Through judgments such as that written by Gaze, *Australian Feminist Judgments* demands that readers question their own understanding of, and assumptions about, formalist legal reasoning. For example, Sir Anthony Mason has suggested that the

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34 See, eg, Michael Coper, 'Concern about Judicial Method' (2006) 30(2) *Melbourne University Law Review* 554; Justice Michael Kirby, *Judicial Activism* (The Hamlyn Lectures, 2003) (Sweet & Maxwell, 2004); Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 13.

35 On '-isms', and the see Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 290.

36 See, eg, on the question whether Sir Owen Dixon applied a legalist approach consistently in his contract law jurisprudence: John Gava, 'When Dixon Nodded: Further Studies of Sir Owen Dixon's Contracts Jurisprudence' (2011) 33 *Sydney Law Review* 157.

37 See further Coper, above n 34, 554.

38 See further Martin Stone, 'Formalism' in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002) 166, 170–2.

39 Douglas et al, 'Reflections', above n 15, 32.

40 See in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014): Anita Stuhmcke, 'Judgment: *JM v QFG and GK* [1998] QCA 228 (ch 24); Jennifer Nielsen, 'Judgment: *McLeod v Power* [2003] FMCA 2' (ch 25); Beth Gaze, 'Judgment: *The State of New South Wales v Amery* [2006] HCA 14' (ch 26).

41 See further Margaret Thornton, 'The Indirection of Sex Discrimination: *State of New South Wales v Amery*' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 420.

virtues that underpin legal formalism are 'continuity, objectivity and absence of controversy'.[42] He also explained that 'in its most extreme form', legal formalism requires 'a complete separation of law from politics and policy'.[43] Feminist judge Gaze's decision in *New South Wales v Amery* illustrates, however, that use of feminist-formalist methods can confound these expectations about formalism. On the one hand, Gaze's feminist judgment reflected a marked departure from established judicial approaches to discrimination law, and for this reason may have invited controversy had it been delivered in the 'real' legal sphere. On the other hand, the use of formalist methods *for feminist objectives* necessarily challenges the perception that formalism is antithetical to achieving legal and social reform. More broadly, the emphasis on the use of formalist methods indicates that feminist judges are not necessarily radical in form — the 'bra burners' of the bench — 'pushing the boundaries'[44] of accepted legal reasoning. Given the tendency of the judicial appointments process to favour homogeneity,[45] this is good news for those seeking greater feminist appointments to the bench.

The Importance of Judgments and their Capacity to Effect Change

Collections of rewritten judgments naturally invite questions about the importance of judgments in the legal realm and beyond. Judges such as Sir Frank Kitto locate the importance of judgments within the administration of the legal system.[46] However, Chief Justice Doyle has questioned the significance of judgment writing even within the legal sphere, suggesting that 'the efficiency and fairness' of judicial hearings and the manner in which judges conduct themselves are the true 'essentials of justice'.[47] By contrast, the worldwide feminist judgment-writing projects reflect a broader vision for why judgments matter. As the *UKFJ* editors explained, had the feminist judgments in their collection been delivered in place of the originals, they would have had the capacity to alter the outcomes between parties, legal doctrine and discourse, and broader policy and socio-economic outcomes.[48] This sentiment is echoed in the *Australian Feminist Judgments* editors' focus on the law reform capacity of the rewritten judgments.[49] This broader, reformist vision for judgments is also supported by the work of scholars such as Barak-Erez, now a judge on the Israeli Supreme Court, who has highlighted the normative consequences of judicial decisions as institutional histories justifying the legitimacy of the State and the courts as an institution of the State.[50]

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42 Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 156.

43 Ibid.

44 Douglas et al, 'Reflections', above n 15, 34.

45 See, eg, Erika Rackley, *Women, Judging and the Judiciary: From Difference to Diversity* (Routledge, 2013) 69; Kate Malleson, 'White, Male and Middle Class — Is a Diverse Judiciary a Pipe Dream?' (Paper presented at Mansfield College, Oxford, 1 June 2012) 1.

46 Kitto, above n 20, 788, 790.

47 Chief Justice John Doyle, 'Judgment Writing: Are There Needs for Change?' (1999) 73(10) *Australian Law Journal* 737, 737.

48 Hunter, McGlynn and Rackley, 'Feminist Judgments', above n 6, 27–8.

49 Douglas et al, 'Introduction', above n 5, 17.

50 See, eg, Daphne Barak-Erez, 'Collective Memory and Judicial Legitimacy: The Historical Narrative of the Israeli Supreme Court' (2001) 16(1) *Canadian Journal of Law and Society* 93.

At the same time, the Australian editors' decision to permit some contributors to work outside the 'same constraints' as the original decisions forces readers to interrogate the limits of the judgment form and, more broadly, the limits of judgments to effect law reform. For example, in *Australian Feminist Judgments*' first 'judgment', Watson elects not to rewrite a judgment in *Kartinyeri*,[51] because in her view a judgment '*would not prise open places for Nunga women*' unless it was 'done from "another space", outside Australian common law and the sovereignty of the Australian state'.[52] Instead, her essay argues powerfully that Anglo-Australian judgment writing cannot accommodate these women's voices, even if feminist reasoning were applied, because of the linguistic, procedural and substantive conventions of judgments. In this way, the non-conformist feminist 'judgments' ensure that readers are constantly questioning the potential significance of judgments and the limits on their capacity to effect change.

III *Australian Feminist Judgments'* Contribution to Debates about Who Judges Are and Why It Matters

The Indigenous contributions also engage directly in conversations about the relevance and influence of aspects of a judges' personal identities to the judgments they produce. Watson's essay on *Kartinyeri*, for example, self-consciously and overtly draws on her identity as an Indigenous Nunga woman to inform her critique.[53] Loban's judgment in *ACCC v Keshow* incorporates an Indigenous judge sitting alongside another Federal Court Judge, which emphasises the links between judges' identities and the judgments they produce.[54]

The proposition that aspects of personal identity matter in judgment writing is, in one sense, a manifestation of one of the most explicit aims of *Australian Feminist Judgments* as a whole: to explore what reasoning might have been adopted if 'a feminist judge'[55] had heard the case. Significantly, however, apart from the Indigenous contributions, the editors observe that the feminist 'judges' instead typically 'avoid explicit acknowledgement of background factors'[56] and how they influence their judging.

Australian judges (except perhaps Michael Kirby[57]) have tended to be similarly circumspect in both their judgments and extra-judicial commentaries about the intersections between their own identities, backgrounds and values and the form and substance of judgment writing. The surge in the publication of

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51 *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Kartinyeri*').

52 Irene Watson, 'First Nations Stories, Grandmother's Law: Too Many Stories to Tell' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 46, 53 (emphasis added).

53 Ibid 46.

54 Loban, above n 33, 180.

55 Douglas et al, 'Introduction', above n 5, 1 fn 2, 5–6. The editors acknowledge the debates surrounding gender and judging, and more particularly the question whether women judges would decide in a 'different voice' questions necessarily raising issues of identity and judging.

56 Douglas et al, 'Reflections', above n 15, 25.

57 See, eg, Justice Michael Kirby, 'Julius Stone and the High Court of Australia' (1997) 20 *University of New South Wales Law Journal* 239.

judicial biographies in Australia has in part attempted to relocate legal reasoning as an aspect of, and informed by, the broader life experiences of judges. Of these biographies, the most detailed assessment of the mechanics of judgment writing, and the interiority of the 'moment of decision',[58] is A J Brown's *Michael Kirby: Paradoxes and Principles*,[59] which takes readers inside Kirby J's chambers during the writing of key decisions.[60] In Australia, however, book-length judicial biographies remain rare, and few biographers have had access to such a range of personal documents.[61] In some circumstances, biographical and autobiographical reflections at swearing-in ceremonies can also provide insights into judges' life experiences and their judicial philosophy, but the brevity of the form ensures that these remain fleeting glimpses.[62]

In *Australian Feminist Judgments*, insights into the feminist judges' life experiences are derived primarily from the interviews conducted with the feminist judges and the commentaries accompanying the judgments. In the interviews, for example, the editors note that

> the writers [of the feminist judgments] agreed that their background and experiences had influenced their judgment. For example, many of the judgment-writers said that it was their scholarship in an area of law and feminist jurisprudence which largely informed their approach. … In a few cases, the judgment-writer commented on personal connections to the facts of the case.[63]

The absence of further autobiographical reflections by the Australian feminist judges contrasts with the approach taken in the *WCC*, where the feminist judges each introduce their judgments with an 'author's note'.[64] Unfortunately, the *Australian Feminist Judgments* editors did not explain their decision to depart from the *WCC* model. However, the editors of the *UKFJ* made the same decision, on the basis of time constraints and the fact that '[j]udgments in the real world do not come accompanied by exegeses'.[65] The *Australian Feminist Judgments* editors may well have been influenced by similar considerations; however, we suggest that

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58 Justice Michael Kirby, 'Judging: Reflections on the Moment of Decision' (1999) 18(1) *Australian Bar Review* 4.

59 A J Brown, *Michael Kirby: Paradoxes and Principles* (The Federation Press, 2011).

60 Ibid 390–1 on *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices*'); 395–6 on *Thomas v Mowbray* (2007) 233 CLR 307, 442–3 [386]–[387].

61 For insights from Sir Owen Dixon's diaries into his judgment writing, see Philip Ayres, *Owen Dixon* (The Miegunyah Press, 2003) 78–80, 262–3, 320 fn 53.

62 See further Heather Roberts, '"Swearing Mary": The Significance of the Speeches Made at Mary Gaudron's Swearing-in as a Justice of the High Court of Australia' (2012) 34(3) *Sydney Law Review* 493; Heather Roberts, 'Telling a History of Australian Women Judges through Courts' Ceremonial Archives' (2014) 40(1) *Australian Feminist Law Journal* 147.

63 Douglas et al, 'Reflections', above n 15, 25. One of the editors has published additional commentary on these interviews, and interviews conducted with sitting and retired judges self-identifying as feminists, in Rosemary Hunter, 'More Than Just a Different Face? Judicial Diversity and Decision-making' (2015) *Current Legal Problems* (forthcoming) <http://clp.oxfordjournals.org/content/early/2015/04/27/clp.cuv001.full>.

64 See, eg, Pothier's explanation of the 'very personal relevance' of her case, because of the disability she shared with the applicant: Dianne Pothier, '*Eaton v Brant County Board of Education*' (2006) 18(1) *Canadian Journal of Women & the Law* 121, 121.

65 Hunter, McGlynn and Rackley, 'Feminist Judgments', above n 6, 3, 26–7.

individual authorial notes could have further developed the aims of the project in a number of ways.[66] For example, the inclusion of biographical insights into the feminist judgments would have provided readers with opportunities to re-engage with questions of how the 'law' is made; to be confronted with the diversity of feminist choices available to the 'judge'; and to 'hear' women's voices not only in the written judgment, but also during the judging process. Importantly, as the project has obvious potential for application in the classroom,[67] 'authors' notes' would also have provided valuable instruction for future 'judges' on the complexities and challenges of writing judgments.

IV Conclusion

This review essay submits that while questions of identity and judging present opportunities for further extension, *Australian Feminist Judgments* ably and engagingly achieves its stated objective: to 'highlight [the] possibilities, limits and implications of a feminist approach to judging' by rewriting existing decisions as 'feminist judgments'.[68] In particular, the editors' innovations from the pre-existing models of feminist judgments — by extending the range of judgments to lower courts, and by provocatively allowing Indigenous contributors to stretch the boundaries of the original judgments' form and content — ensures that *Australian Feminist Judgments* provides rich material through which to consider feminist judging's nature, purpose and impact. In doing so, it also demonstrates how debates surrounding the 'possibilities, limits and implications' of judging more generally are enriched by critical evaluations of imagined feminist judgments.

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66 Douglas et al, 'Introduction', above n 5, 8.
67 Ibid 15–17.
68 Research Data Australia, above n 2.