

BOOK REVIEW

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**W Prest and S R Anleu (eds), *Litigation: Past and Present*,
(University of New South Wales Press 2004) 209 pp**

Litigation: Past and Present, edited by Wilfrid Prest and Sharyn Roach Anleu, is based on a collection of papers delivered at an Academy of Social Sciences workshop held at the University of Adelaide on 21 and 22 September 2001. The stated aim of the workshop was ‘to bring together legal practitioners, judicial officers and academics from a variety of disciplines to discuss, from their different vantage points, the nature, causes and consequences of litigation in contemporary and past societies.’¹

The book is divided into ten chapters, each chapter being based on a separate workshop paper. Chapter 1, ‘Litigation: historical and contemporary dimensions’ by Sharyn Anleu and Wilfrid Prest sets out to provide ‘a background and context for what follows by setting out some of the ways in which sociologists, lawyers and historians have approached the phenomenon of litigation in Western societies, past and present.’² This chapter seeks to define ‘litigation’ and to highlight some of its distinctive characteristics and some of its advantages and disadvantages over other forms of dispute resolution. It summarises the content of the remaining chapters, which contain: an historical account of litigation through the centuries, with a particular focus on England; an examination of whether there is quantitative data to support assertions that there has been a litigation explosion in the last few decades and a comparison with litigation rates in past centuries; some motives for pursuing litigation; an examination of the Australian civil justice system; and an exploration of some issues surrounding litigation, in the context of both women and indigenous Australians. This initial chapter also introduces themes that resonate throughout the book, for example, the changing face of our Australian civil courts, particularly in relation to case management, litigation as a political strategy, and changing trends in judicial outcomes, particularly linked to our tradition of democratic liberalism.

Chapters 2 to 4, step back into history and examine litigation, in England, New Zealand and Australia over the course of many centuries. For example, Chapter 2 examines the use of the courts, the role of lawyers, and statistics on court usage in England from 1200-1996. It also contains an analysis of the various factors that caused fluctuations in litigation rates, for example the Black Death, which perhaps for obvious reasons, accounted for a short-term decrease in court business in the mid-14th century.³

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¹ W Prest and S R Anleu (eds), *Litigation: Past and Present* (University of New South Wales Press, 2004) preface.

² Ibid 1.

³ Ibid 32.

Chapter 5, authored by Hilary Golder, Rosemary Hunter and Diane Kirkby, explores issues for women in civil litigation in colonial to contemporary Australia, particularly in the context of family law disputes, from a feminist perspective. It examines the challenges that women have faced to assert their rights through the litigation process and contains some interesting real life case studies of Australian women and their civil actions. It also traces the gradual evolution of married women's rights to separate property and argues that strong social norms assuming women's dependence were reinforced in the civil courts.⁴ This chapter also contains an interesting account of the divorce laws before the introduction of 'no fault' divorce in the *Family Law Act 1975* (Cth).

The authors of this chapter then analyse several Family Court property cases, discussing the claim made by the wife in her original application and then comparing this with the resultant judicial award.⁵ The cases examined occurred before the relatively recent super-splitting provisions were inserted into the *Family Law Act 1975* (Cth) in December 2002 and are therefore interesting from a historical perspective.⁶ However, an updated analysis of some specific cases since the introduction of these provisions would now be more relevant to practitioners. The authors conclude with a compelling discussion of the tensions that have arisen between the concept of autonomy of the individual in our democratic liberal society and the economic dependence that many women still encounter within marriage. The underlying question being, whether courts have been prepared to recognise non-financial and homemaker/parent contributions in an equal light to financial contributions in family law property adjustment cases.

The following chapters then discuss the civil justice system in more detail. For example, the chapter "Litigation and the Federal civil justice system" by David Weisbrot and Ian Davis contains an analysis of the Australian contemporary civil justice system in the context of the Australian Law Reform Commission Report, *Managing Justice: A Review of the Federal Civil Justice System* (the Report).⁷ As the Report is now four years old, many of the recommendations have since been adopted. Further, much of the content of this Chapter has been available for some time and is in some respects, outdated.⁸ A theme of the Report and the ensuing workshop paper was validation for the case management practices of the Federal Court of Australia and criticism of the practices of the Family Court of Australia. Subsequent to the release of the Report, the Family Court has significantly developed and improved its case management practices and has moved forward in dispute resolution management in general with the introduction of pre-action procedures.⁹

Chapter seven highlights the issue of currency with this publication, *Litigation: past and present*. As it is based on a collection of papers presented at a workshop in September 2001, some of the issues discussed at that time have evolved considerably and as a result, some parts of the book are not as current as one would expect. In particular, the

⁴ Ibid 76-80.

⁵ Ibid 88-89.

⁶ Contained in the *Family Law Act 1975* (Cth) pt VIII B.

⁷ Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000).

⁸ For example, D Weisbrot, 'Reform of the Civil Justice System and Economic Growth: Australian Experience' (Paper presented at the ICO Conference, Madrid, 19 October 2000) 1, being a previous paper delivered on this theme.

⁹ *Family Law Rules 2004* (Cth), sch 1.

discussion of federal civil justice and case management has developed significantly and the issues raised in the *Federal Civil Justice System Strategy Paper* released by the Federal Government in late 2003 are now far more topical than those raised in the Report released five years ago.¹⁰

The last two chapters of the book focus on indigenous issues, and contain some interesting reading. The issues raised, the use of litigation as a political strategy and the importance of public international law in arguments to assert indigenous rights, are particularly thought provoking.

Litigation: past and present is a collection of academic writings which would interest someone researching in the area of the history of litigation and its place in our society. It contains some interesting concepts that raise awareness as to the way in which litigation can be best utilised, how it relates to our democratic liberal society, and how it can be used both to reinforce social norms in some instances and to create significant social change in other respects. However, the book is not one for the practitioner, as it does not contain practical information on litigation, and the primary reservation is that, in some areas, the law and court procedures have evolved considerably since the subject papers were delivered. Consequently, certain aspects of the associated discussion and analysis is now of historical interest only.

¹⁰ The Federal Attorney-General's Department, *Federal Civil Justice System Strategy Paper* (December 2003) at: http://www.ag.gov.au/agd/WWW/civiljusticehome.nsf/Page/Justice_and_Administrative_Law at 4 February 2005.