

NEW DIRECTIONS
FOR LAW IN AUSTRALIA

ESSAYS IN CONTEMPORARY LAW REFORM

NEW DIRECTIONS FOR LAW IN AUSTRALIA

ESSAYS IN CONTEMPORARY LAW REFORM

EDITED BY RON LEVY, MOLLY O'BRIEN, SIMON RICE,
PAULINE RIDGE AND MARGARET THORNTON



Australian
National
University

P R E S S



Published by ANU Press
The Australian National University
Acton ACT 2601, Australia
Email: anupress@anu.edu.au
This title is also available online at press.anu.edu.au

National Library of Australia Cataloguing-in-Publication entry

Title: New directions for law in Australia : essays in contemporary law reform / edited by Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge, Margaret Thornton.

ISBN: 9781760461416 (paperback) 9781760461423 (ebook)

Subjects: Law reform--Australia.
Law--Australia.
Essays.

Other Creators/Contributors:
Levy, Ron, editor.
O'Brien, Molly Townes, editor.
Rice, Simon, editor.
Ridge, Pauline, editor.
Thornton, Margaret (Margaret Rose), editor.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying or otherwise, without the prior permission of the publisher.

Cover design and layout by ANU Press. Cover photograph by Kate Ogg.

This edition © 2017 ANU Press

Contents

Foreword	ix
The Hon Michael Kirby AC CMG	
Introduction	1
Ron Levy, Molly O'Brien, Simon Rice, Pauline Ridge and Margaret Thornton	
Keynote: Reforming Law – The Role of Theory	11
Margaret Davies	
Part I. Commercial and Corporate Law	
1. The Privatisation of Australian Corporate Law	27
Ross Grantham	
2. On the Road to Improved Social and Economic Welfare: The Contribution to Australian Competition and Consumer Law and Policy Law Reform	37
Russell Miller AM	
3. Tax, Inequality and Challenges for the Future.	49
John Passant	
4. Brand New 'Sharing' or Plain Old 'Sweating'? A Proposal for Regulating the New 'Gig Economy'	59
Joellen Riley	
5. Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer	71
Tess Hardy	
6. The Australian House Party Has Been Glorious – But the Hangover May Be Severe: Reforms to Mitigate Some of the Risks	83
Gill North	
7. Back to Basics: Reforming Australia's Private Sector Whistleblowing Laws.	93
Kath Hall and Heather Cork	
8. Lawyers as Whistleblowers: The Need for a Gatekeeper of Justice Whistleblowing Obligation/Exception.	103
Suzanne Le Mire and Christine Parker	

Part II. Criminal Law and Evidence

9. Criminal Justice Law Reform Challenges for the Future:
It's Time to Curb Australia's Prison Addiction.119
Lorana Bartels
10. Is Criminal Law Reform a Lost Cause?133
Simon Bronitt
11. Rethinking Rape Law Reform: Challenges and Possibilities.143
Wendy Larcombe
12. The Fraught Dichotomy between Context and Tendency Evidence
in Sexual Assault Cases – Suggestions for Reform153
John Anderson
13. Improving the Effectiveness of Corporate Criminal Liability:
Old Challenges in a Transnational World163
Jonathan Clough
14. Stereotypes in the Courtroom173
Blake M McKimmie
15. The Justice Motive: Psychological Research on Perceptions
of Justice in Criminal Law181
Diane Sivasubramaniam
16. How Interpretation of Indistinct Covert Recordings Can Lead
to Wrongful Conviction: A Case Study and Recommendations
for Reform.191
Helen Fraser
17. Australia's Lower-level Criminal Courts: Tackling 21st Century
Problems in a 19th Century Paradigm?201
Anne Wallace

Part III. Environmental Law

18. What is the Mainstream? The Laws of First Nations Peoples213
Irene Watson
19. Overturning *Aqua Nullius*: Pathways to National Law Reform221
Virginia Marshall
20. A Governance Framework for Indigenous Ecological Knowledge
Protection and Use231
Natalie P Stoianoff
21. Reforming Environmental Law for Responsiveness to Change243
Jan McDonald
22. Future Water: Improving Planning, Markets, Enforcement
and Learning.253
Cameron Holley

23. Effective Law for Rural Environmental Governance:
Meta-Governance Reform and Farm Stewardship.263
Paul Martin, Amanda Kennedy and Jacqueline Williams

Part IV. Private Law

24. Pitfalls of Statutory Reform in Private Law: Recipient Liability
for Breach of Trust275
Darryn Jensen
25. Recent Reforms to Australian Charity Law283
Matthew Harding
26. Consumer Protection, Recreational Activities and Personal
Injury Compensation: Inconsistency in Need of Reform291
Joachim Dietrich
27. Statutory Interpretation and the Critical Role of Soft Law Guidelines
in Developing a Coherent Law of Remedies in Australia301
Elise Bant and Jeannie Paterson
28. Meeting the Potential of Alternative Remedies in Australian
Defamation Law311
Robyn Carroll and Catherine Graville
29. Designing Reparation: Lessons from Private Law321
Simone Degeling and Kit Barker
30. Apologies, Liability and Civil Society: Where to from Here?329
Prue Vines
31. Renovating the Concept of Consent in Contract
and Property Law337
Robyn Honey
32. Nudging Charities to Balance the Needs of the Present against
Those of the Future.347
Ian Murray

Part V. Public Law

33. Voluntary Voting for Referendums in Australia: Old Wine,
New Bottle359
Graeme Orr
34. Reforming Constitutional Reform.369
Scott Stephenson
35. Does Australia Need a Popular Constitutional Culture?377
Lael K Weis
36. Constitutional Dimensions of Law Reform387
Gabrielle Appleby and Anna Olijnyk

37. The Parliamentary Joint Committee on Intelligence and Security: A Point of Increasing Influence in Australian Counter-Terrorism Law Reform?	397
Dominique Dalla-Pozza	
38. Rights Dialogue under the Victorian Charter: The Potential and the Pitfalls	407
Julie Debeljak	
39. Court Records as Archives: The Need for Law Reform to Ensure Access	419
Andrew Henderson and Kim Rubenstein	
40. A Positive Freedom of Public Speech? Australian Media Law Reform and Freedom of Political Communication	429
Andrew T Kenyon	
41. The Need for Reform of Australia's Birth Registration Systems	439
Melissa Castan and Paula Gerber	
42. Simplifying Government Secrecy?	449
Daniel Stewart	

Part VI. Legal Practice and Legal Education

43. Australian Legal Practice: Ethical Climate and Ethical Climate Change	461
Vivien Holmes, Stephen Tang, Tony Foley and Margie Rowe	
44. Strengthening Australian Legal Ethics and Professionalism	473
Adrian Evans	
45. Since Lawyers Work in Teams, We Must Focus on Team Ethics	483
Justine Rogers	
46. The Legal Roots of a Sustainable and Resilient Economy: New Kinds of Legal Entities, New Kinds of Lawyers?	495
Bronwen Morgan, Joanne McNeill and Isobel Blomfield	
47. Wearing Two Hats: Lawyers Acting as Mediators	505
Mary Anne Noone	
48. Enabling Marginalised Voices to Be Heard: The Challenge to Law Reform Bodies	517
Liz Curran	
49. The End of Ramism: And the Shape of Things To Come	529
Craig Collins	
50. Shared Space and the Regulation of Legal Education	539
Paul Maharg	
51. Dreaming of Diversity in Legal Education.	549
Margaret Thornton	
Bibliography	559