

**CONSTITUTING A  
‘CHRISTIAN COMMONWEALTH’:  
CHRISTIAN FOUNDATIONS OF AUSTRALIA’S  
CONSTITUTIONALISM**

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*‘The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth.’*

– Sir John Downer.<sup>1</sup>

**ABSTRACT**

*The purpose of this article is to trace and evaluate the Christian influences upon the Australian legal system. This is contrary to the growing trend of suppressing and denying the Christian heritage of law in Australia. There is however strong evidence of this religious influence in the interpretation of the Australian constitutional history, even though the inclusion of freedom of religion clause in the Commonwealth Constitution may be mistakenly argued as indicative of constitutional secularism. As this article intends to demonstrate, nothing could be further from the truth.*

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<sup>1</sup> Col Stringer, *Discovering Australia’s Christian Heritage* (Col Stringer Ministries, 2000) 103.

## I INTRODUCTION

While the Australian legal tradition cannot lay claim to the historical depth of America and England, it too was built on solid foundations derived from the Christian worldview. These foundations were largely inherited through Australia's reception of the English common law, as well as in addition to the adoption of the American system of federalism. As with the American and English examples, Christianity was embedded in Australian society during its major movement of legal reform – namely, Federation – and Christian ideology penetrates both the legal and governmental customs that were developed. As this article also indicates, many of these Christian legal traditions have endured till the present day.

## II AUSTRALIA'S COLONISATION

Australia has had Christian influences since its early colonization—starting with the first English fleet departing for Australia in 1787, when Captain Arthur Phillip was instructed to take such steps as were necessary for the celebration of public worship.<sup>2</sup> More substantively, Australia's governor from 1809 to 1821, Lachlan Macquarie, encouraged Christianity in a number of significant ways. Macquarie believed that New South Wales should be a land of redemption where “convicts would be transformed into citizens”.<sup>3</sup> He is said to have begun the nation's transformation from a ‘dumping ground for convicts into a model British colony’.<sup>4</sup> Because of his honest and efficient government, the objective

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<sup>2</sup> Charles Francis, ‘Why Australia's Christian Heritage Matters’, *News Weekly*, March 1 2008 <<http://www.newsweekly.com.au/articles/2008mar01a.html>>.

<sup>3</sup> Niall Ferguson, *Empire: How Britain Made the Modern World* (Penguin, 2003) 105.

<sup>4</sup> Macquarie's mausoleum in Mull, Scotland, describes him without exaggeration as ‘the Father of Australia’.

was considerably achieved and late in life, Macquarie could accurately claim: 'I found New South Wales a gaol and left it a colony.'<sup>5</sup>

Under Governor Macquarie's benign rule the Christian religion made considerable progress in Australia. In 1815, he personally appointed clergymen to every district of the new colony, ordering that all convicts attend Sunday church services.<sup>6</sup> On the first Sunday of compulsory church service, Macquarie himself made sure he was in attendance.<sup>7</sup> As Manning Clark<sup>8</sup> noted, he believed that Christian principles could render the next generation 'dutiful and obedient to their parents and superiors, honest, faithful and useful members of society'.<sup>9</sup> Further, Macquarie attempted to educate children in these principles through the schools he established.<sup>10</sup> He considered these principles 'indispensable both for liberty and for a high material civilisation',<sup>11</sup> and 'hoped to give satisfaction to all classes, and see them reconciled.'<sup>12</sup>

Christian traditions also came to this nation through the English legal system. At the time of English settlement in Australia, Christianity formed an integral part of the theory of English law and civil

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<sup>5</sup> Ferguson, above n 3, 105, 107.

<sup>6</sup> See Elizabeth Rogers Kotlowski, *Stories of Australia's Christian Heritage* (Strand Publishing, 2006) 42; Francis Nigel Lee, *The Christian Foundations of Australia* (August 2000) <<http://www.dr-fnlee.org/docs6/cfa/cfa.html>>.

<sup>7</sup> Lee, above n 6, 10.

<sup>8</sup> Manning Clark (1915-1991) was the author of *A History of Australia*, a six-volume work on the general history of Australia published between 1962 and 1987. Opinionated and prolific, Clark is broadly recognised as 'Australia's most famous historian.' See Graeme Davidson et al, *Oxford Companion to Australian History* (Oxford University Press, 1998) 128.

<sup>9</sup> Manning Clarke, *A History of Australia* (Melbourne University Press, 1997) 280-1.

<sup>10</sup> Ibid. See also Kotlowski, above n 6, 42.

<sup>11</sup> Ibid 16.

<sup>12</sup> Lee, above n 6, 10.

government.<sup>13</sup> Published between 1903 and 1966 and eventually comprising 17 volumes, in his seminal ‘A History of English Law’ Sir William Holdsworth expressed the traditional view of the close relationship between Christianity and English law:

Christianity is part and parcel of the common law of England, and therefore is to be protected by it; now whatever strikes at the very root of Christianity tends manifestly to dissolution of civil government.<sup>14</sup>

Holdsworth did not make his terminology up out of thin air. In a 1649 case, an English court declared that ‘the law of England is the law of God’ and ‘the law of God is the law of England.’<sup>15</sup> In a 1676 case, Chief Justice Lord Hale stated: ‘Christianity is parcel of the laws of England, therefore to reproach the Christian religion is to speak in subversion of the law.’<sup>16</sup> Lord Hale’s statement achieved an almost axiomatic status, and retained this status throughout the nineteenth century, so that Holdsworth contended that the ‘maxim would, from the earliest times, have been accepted as almost self-evident by English lawyers.’<sup>17</sup> Chief Justice Raymond, for instance, paraphrased Hale by arguing that ‘Christianity in general is parcel of the common law of England.’<sup>18</sup> And

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<sup>13</sup> David Mitchell, ‘Religious Tolerance Laws Are Not Only a Challenge to our Freedom of Speech but Also to the Under-Girding of our Historic Legal System’ (Paper presented at Religious Tolerance Laws: A Challenge to Our Freedom of Speech? Christian Legal Society of Victoria, Melbourne, June 2 2005).

<sup>14</sup> William Holdsworth, *History of English Law* (Methuen, 3<sup>rd</sup> ed, 1932) 410-6.

<sup>15</sup> John Lilburne’s treason trial [1649] Quoted in Stuart Banner, ‘When Christianity was Part of the Common Law’ (1998) 16 *Law and History Review* 27, 29.

<sup>16</sup> *Rex v. Taylor*. Vent 293. 3 Keb. 607 (K.B. 1676); Ibid; see also Steven B Epstein, ‘Rethinking the Constitutionality of Ceremonial Deism’ (1996) 96 *Columbia Law Review* 2083, 2102–3.

<sup>17</sup> Quoted in Banner, *supra* note 14, at 29–30.

<sup>18</sup> *Rex v. Woolston*, 64, 94 Eng. Rep. 655 (K.B. 1729), cited in Banner, above n 15, 29.

Sir William Blackstone matter-of-factly remarked that ‘the Christian religion ... is a part of the law of the land.’<sup>19</sup>

### III THE INHERITANCE OF ENGLISH LAW IN AUSTRALIA’S COLONIAL HISTORY

When the penal colony of New South Wales was established in 1788, the laws of England were transplanted into Australia in accordance with the doctrine of reception. The reception of English law into Australia was statutorily recognised by the *Australian Courts Act 1828* (Imp.). Section 24 of this Act stated that, upon enactment, all laws and statutes in force in England at that date were to be applied in the courts of New South Wales and Van Diemen’s Land, so far as they were applicable.<sup>20</sup> The supreme courts of the colonies were empowered to decide what English laws were applicable to the Australian situation, and to also develop the law thereafter.<sup>21</sup> This doctrine was authoritatively explained by Blackstone in his famous *Commentaries*:

...if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject, are immediately there in force. But this must be understood with very many and very great restrictions. Such colonies carry with them only so much of the English law, as is applicable to their own situation and the conditions of an infant colony...<sup>22</sup>

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<sup>19</sup> William Blackstone, *Commentaries on the Laws of England* (1765-1769), Ch

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<sup>20</sup> Patrick Parkinson, *Tradition and Change in Australian Law* (Thomson Reuters, 2<sup>nd</sup> ed, 2001) 119; Catriona Cook et al, *Laying Down the Law* (LexisNexis Butterworths, 6<sup>th</sup> ed, 2005) 29.

<sup>21</sup> Cook, above n 20, 29.

<sup>22</sup> Blackstone, above n 19, 106-8.

As a result, the legal socio-political institutions of Australia found their primary roots in the legal and socio-political traditions of England. Indeed, the reception of English law into Australia was explicitly re-affirmed by the Privy Council in the case of *Cooper v Stuart* (1889),<sup>23</sup> where Lord Watson stated:

The extent to which English law is introduced into a British Colony, and the manner of its introduction, must necessarily vary according to circumstances. There is a very great difference between the case of a Colony acquired by conquest or cession, in which there is an established system of law, and that of a Colony which consisted of a tract or territory practically unoccupied, without settled inhabitants or settled law, at the time when it was peacefully annexed to the British dominions. The Colony of New South Wales belongs to the latter class... In so far as it is reasonably applicable to the circumstances of the Colony, the law of England must prevail...<sup>24</sup>

When English law was transplanted to Australia according to the doctrine of reception,<sup>25</sup> the supreme courts of the colonies were empowered to decide which English laws were applicable to the Australian situation.<sup>26</sup> Christianity was included in the law of the land applicable to the situation of the colonists. This being so, the early disregard of Aboriginal customary law was based on a combination of established common-law principles and a traditional interpretation of the 'Divine Law'. This is evident in the Supreme Court of New South Wales decision of *R v Jack Congo Murrell* (1836), where Justice Burton expressed his view that Aborigines 'had no law but only lewd practices and irrational

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<sup>23</sup> (1889) 14 App Cas 286.

<sup>24</sup> *Cooper v Stuart* (1889) 14 App Cas 286, 291.

<sup>25</sup> See Blackstone, above n 19. The reception of English law into Australia was statutorily recognised by the Australian Courts Act of 1828: see Parkinson, above n 20, 119.

<sup>26</sup> Cook, above n 20, 29.

superstitions contrary to Divine Law and consistent only with the grossest darkness.’<sup>27</sup> This reception of Christian legal principles was perhaps best encapsulated in Justice Hargraves’s famous comment for the Supreme Court of New South Wales in *Ex Parte Thackeray* (1874):<sup>28</sup>

We, the colonists of New South Wales, “bring out with us” . . . this first great common law maxim distinctly handed down by Coke and Blackstone and every other English Judge long before any of our colonies were in existence or even thought of, that ‘Christianity is part and parcel of our general laws’; and that all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation, is part of our colonial law....<sup>29</sup>

As can be seen, Christianity’s embedment in the common law was not only acknowledged, but unconditionally adopted by the court in *Thackeray*. The pronouncement exemplifies the judicial recognition of the Christian heritage of the common law. The court took the major step of declaring the supremacy of Christian legal principles—namely, that the divine or revealed law is applicable, and superior, to colonial laws – and that ‘all the revealed or divine law, so far as enacted by the Holy Scripture to be of universal obligation’, are applicable, and superior, to colonial laws. Further, Justice Burton’s characterisation of Aboriginal laws as ‘irrational superstitions’ by virtue of their contradiction of ‘Divine Law’ constitutes a direct recognition of Christian legal doctrine as extending to Australian law. The colonial courts thus overtly recognised the Christian foundations of legal principles that were founded in the common-law system.

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<sup>27</sup> (1836) Legge 72; see also Parkinson, above n 20, 107.

<sup>28</sup> *Ex parte Thackeray* (1874) 13 SCR 1.

<sup>29</sup> *Ibid.*

#### IV CONSTITUTING A CHRISTIAN COMMONWEALTH

The Constitution of Australia Bill was passed by the Imperial (British) Parliament on 5 July 1900. Queen Victoria assented four days later, and in September proclaimed that the Commonwealth of Australia would come into existence on the first day of the twentieth century (1 January 1901). On the occasion, one of the Constitution's most distinguished co-authors, Sir John Downer, declared: 'The Commonwealth of Australia will be, from its first stage, a Christian Commonwealth'.<sup>30</sup>

Like Downer, many other leading writers of the Constitution had strong views on the importance of Christianity to the Australian Commonwealth. For instance, Sir Henry Parkes, known as 'the Father of Australia's Federation', believed that Christianity comprised an 'essential part' of Australia's common law.<sup>31</sup> In a column published in the *Sydney Morning Herald* (26 August 1885), Sir Henry stated: 'We are pre-eminently a Christian people—as our laws, our whole system of jurisprudence, our Constitution... are based upon and interwoven with our Christian belief.'<sup>32</sup>

Similar views were found among the drafters of the Constitution Bill in 1897. Among these were Edmund Barton, who entered politics under the influence of his Presbyterian Minister, as well as the leading federalist and statesman Alfred Deakin.<sup>33</sup> On the day following the referendum concerning the draft of the Constitution, which was held in New South Wales, Victoria and Tasmania on 3 June 1898, Deakin humbly offered a prayer of thanksgiving for all the progress that had been made, asking for

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<sup>30</sup> Stringer, above n 1, 103

<sup>31</sup> Lee, above n 6, 17.

<sup>32</sup> Ibid.

<sup>33</sup> Kotlowski, above n 6, 152.

Christ's blessing on the endeavour: 'Thy blessing has rested upon us here yesterday and we pray that it may be the means of creating and fostering throughout all Australia a Christlike citizenship.'<sup>34</sup>

All of these statements are far more than just rhetoric. Indeed, the Christian belief of the Australian Framers made its way directly into the preamble of the Commonwealth Constitution: 'Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, *humbly relying on the blessing of Almighty God*, have agreed to unite in one indissoluble Federal Commonwealth ...'<sup>35</sup> As Helen Irving points out, the preamble is that part of the constitution laying out 'the hopes and aspirations of the parties involved,'<sup>36</sup> and, indeed, the reference to God received the strongest popular support of *any* part of the Constitution. According to Professor Irving:

During the 1897 Convention delegates have been inundated with petitions . . . in which the recognition of God in the Constitution was demanded. The petitions, organized nationally . . . asked for the recognition of God as the 'supreme ruler of the universe'; for the declaration of national prayers and national days of thanksgiving and 'humiliation'. But, the essence of their petition was that the Constitution should include a statement of spiritual—specifically Christian—identity for the new nation.<sup>37</sup>

The insertion of an acknowledgment of God into the Preamble of the Australian Constitution occurred in response to overwhelming public support, which came, among other things, from countless petitions

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<sup>34</sup> Deakin's Prayer 223, 4 June 1898, quoted in Stringer, above n 1, 104.

<sup>35</sup> *Constitution of the Commonwealth of Australia 1900* (Cth) Preamble (emphasis added).

<sup>36</sup> Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 196.

<sup>37</sup> *Ibid* 166.

received from the citizens of every single colony in Australia. Overall, these petitions reflected the general sentiments of the people for ‘some outward recognition’ of the Divine Providence, so that the work of the Australian Framers should ‘fix in our Constitution the elements of reverence and strength, by expressing our share of the universal sense that a Divine idea animates all our higher objects, and that the guiding hand of Providence leads our wanderings towards the dawn.’<sup>38</sup>

In the same way, the Parliaments of Australia also demanded the inclusion of this acknowledgement of God into the Preamble. In the process of popular consultation, which took place during the constitutional drafting, the legislative assemblies of Western Australia, Tasmania, New South Wales, and South Australia, all submitted proposed wordings for the preamble acknowledging God.<sup>39</sup>

In this sense, the Legislative Assembly of Western Australia proposed that the preamble should declare that the Australians are ‘grateful to Almighty God for their freedom, and in order to secure and perpetuate its blessings.’<sup>40</sup> Similarly, the Legislative Assembly of Tasmania suggested that the constitution’s preamble should ‘duly acknowledge Almighty God as the Supreme Ruler of the Universe and the source of all true Government’.<sup>41</sup> Likewise, both the legislative assemblies of New South Wales and South Australia, as well as the Legislative Council of Western Australia, proposed a preamble ‘acknowledging Almighty God as the Supreme Ruler of the Universe’.<sup>42</sup> As such, John Quick (one of the drafters of the Constitution) and Robert Garran (who played a significant

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<sup>38</sup> Ibid.

<sup>39</sup> John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 283-4.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

role in the Australian Federation movement) wrote in their standard commentary on the Australian Constitution:

This appeal to the Deity was inserted in the Constitution at the suggestion of most of the Colonial Legislative Chambers, and in response to numerous and largely signed petitions received from the people of every colony represented in the Federal Convention.... In justification of the insertion of the words stress was laid on the great demonstration of public opinion in their favour, as expressed in the recommendations of the Legislative bodies and in the petitions presented.<sup>43</sup>

It may well be argued that the overwhelming public support for a reference to God in the Commonwealth Constitution reflected the view that the validity and success of an Australian Federation was dependent on the providence of God. Speaking at the constitutional convention, Patrick Glynn of South Australia explained this precisely to be so and that it was to Australia's credit that the new nation would have '[t]he stamp of religion ... fixed upon the front of our institutions.'<sup>44</sup>

## V SYMBOLIC ACKNOWLEDGEMENTS OF THE CHRISTIAN FAITH

Christian practices deeply permeate Australia's legal traditions. Religion is still taught in Australia's public schools, and the Bible is still present in every court of the land. Furthermore, prayers are conducted prior to opening proceedings at both state and federal Parliaments. Standing Orders for the House and Senate determine that the Speaker must read a

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<sup>43</sup> Ibid 287.

<sup>44</sup> 5 *Official Record of the Debates of the Australasian Federal Convention* 1733 (1898) (proceedings of March 2, 1898).

prayer for Parliament,<sup>45</sup> which is followed by the Lord's Prayer before calling for the first item of business.<sup>46</sup> With all Parliamentary members remaining standing, the Speaker concludes the opening proceedings with this prayer:

Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia.

The relevance of Christianity is likewise observed in the current legal system by reference to the powers of the Governor-General.<sup>47</sup> The Governor-General,<sup>48</sup> who is authorised to exercise the executive power given by the Australian Constitution as the Queen's representative,<sup>49</sup> swears allegiance to the Queen under section 42 of the Constitution, binding himself to the principles expressed in the Queen's oaths of office.<sup>50</sup> These oaths include significant Christian undertakings. The strong religious connotation of the coronation ceremony is explained by British historian Nick Spencer:

The coronation has its origins in a service first used in 973. Although modified greatly since then, it retains the same basic structure, being located in a Christian church, presided by a Christian minister and based on the service of the Eucharist.<sup>51</sup> According to the most recent precedent ... the service, which is held

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<sup>45</sup> 'Almighty God, we humbly beseech Thee to vouchsafe Thy blessing upon this Parliament. Direct and prosper our deliberations to the advancement of Thy glory, and the true welfare of the people of Australia.'

<sup>46</sup> Senate Standing Order 50, House Standing Order 38.

<sup>47</sup> Mitchell, above n 13.

<sup>48</sup> Ibid.

<sup>49</sup> Section 61 of the Australian Constitution gives the Queen executive power over Australia.

<sup>50</sup> Ibid.

<sup>51</sup> Nick Spencer, *Freedom & Order: History, Politics & the English Bible* (Hodder & Stoughton, 2011) 2.

in Westminster Abbey, begins with the choir singing an anthem based on Psalm 122. Once seated, the monarch promises, among other things, to ‘maintain the Laws of God and the true profession of the Gospel’ and to uphold the cause of law, justice and mercy. She is presented with a copy of the Bible (‘the most valuable thing that this world affords’) by the Moderator of the Church of Scotland, who says to her, ‘Here is Wisdom; this is Royal Law; these are the lively Oracles of God.’

The Communion Service then begins with the words of Psalm 84. It proceeds along familiar lines (prayer, readings, creed) but is interrupted by the anointing, at which the hymn ‘Veni, Creator Spiritus’ is sung. The queen is anointed with oil just as ‘Zadok the Priest, and Nathan the Prophet anointed Salomon the King’, in the words of Handel’s anthem ‘Zadok the Priest’, which has been sung at every coronation since 1727. She is presented with the orb, with the words, ‘Remember that the whole world is subject to the Power and Empire of Christ our Redeemer.’ She is invested with the coronation ring, with the words, ‘receive the ring of kingly dignity, and the seal of Catholic Faith ... may you continue steadfastly as the Defender of Christ’s Religion’. She receives the sceptre with the cross, the ensign of kingly power and justice’. And she is given the rod of ‘equity and mercy’, marked by the dove, the symbol of the Holy Spirit.

At the coronation itself the Archbishop of Canterbury says, ‘God crown you with a crown of glory and righteousness, that having a right faith and manifold fruit of good works, you may obtain the crown of an everlasting kingdom by the gift of him whose kingdom endureth forever’. Following this, there is the Benediction, Enthroning and Homage, after which the ceremony returns to the Communion Service, with the queen receiving the bread and wine,

the archbishop pronouncing a blessing and the choir singing ‘Gloria in Excelsis’ and finally, *Te Deum*.<sup>52</sup>

As can be seen, at her enthronement Queen Elizabeth II solemnly promised to ‘maintain the Laws of God and the true profession of the Gospel’ and to ‘continue steadfastly as the Defender of Christ’s religion’.<sup>53</sup> The monarch also committed herself ‘to the utmost of [her] power maintain the Laws of God and the true profession of the Gospel.’<sup>54</sup> Whatever one might think of all this, it is simply not possible to understand it without reference to Christianity. As the Governor-General is bound by the Queen’s oaths to ‘maintain biblical principles and Christianity as the law of Australia’,<sup>55</sup> it is, therefore, evident that Christianity continues to play a symbolic role in contemporary Australian law. Of course, this also demonstrates that, at least on a symbolic level, Australian law is still governed with regard to the advancement of the Christian religion.

## VI HISTORICAL BACKGROUND OF AUSTRALIA’S CONSTITUTIONALISM

Historians have highlighted the fact that the Australian Constitution originated at the Constitutional Conventions in the 1890s, which featured strong competition between different interests, including clashes ‘between free-traders and protectionists, nationalists and imperialists, and big and small colonies.’<sup>56</sup> These differences of perspective on nation-

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<sup>52</sup> Ibid 2-3.

<sup>53</sup> Ibid.

<sup>54</sup> Ibid.

<sup>55</sup> Mitchell, above n 13.

<sup>56</sup> John McMillan, Gareth Evans and Haddon Story, *Australia’s Constitution: Time for Change?* (George Allan & Unwin, 1983) 40.

building issues such as roads, rivers, railways, and revenue distribution fostered sharp disputes during the proceedings.

An overriding concern among the Australian framers was the implementation of a system that prevented monopolization of economic life by the new Commonwealth government.<sup>57</sup> Consequently, within the Constitution the principle that ‘government, and particularly the national government, should be modest and unobtrusive was clearly evident. The prevailing view of delegates to the 1890s Conventions . . . was that governments existed essentially to hold the ring for a laissez-faire economy: their job was to provide a stable and peaceful environment for the operation of free market forces.’<sup>58</sup>

This anti-monopolistic attitude also guided the founding fathers as they drafted section 116, the part of the Constitution that deals with Australian religious life. The Australian Constitution originated in a socio-political environment in which different branches of the Christian church competed strongly for cultural influence within the new nation. It is likely that a majority of the framers maintained at least a formal affiliation with major Protestant groups, although the views of Catholics and Jews were also included.<sup>59</sup> It is against this historical background that section 116 must be interpreted. This section, obviously inspired by the American First Amendment, states:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be

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<sup>57</sup> Ibid 47.

<sup>58</sup> Ibid 47.

<sup>59</sup> See Geoffrey Blainey, *A Shorter History of Australia* (Random House, 1994) Ch 11.

required as qualification for any office or public trust under the Commonwealth.<sup>60</sup>

This section has several elements. It prohibits: the establishment of any religion (in other words, the creation of an official religion); the imposition of any requirement to engage in religious observance; any law prohibiting the free exercise of religion; and the imposition of religious qualifications for public office.

While section 116 restricts only the federal Parliament with respect to religion, the areas of federal legislative power are listed in sections 51 and 52 of the Constitution. They grant legislative power over 39 specific areas ranging from areas such as marriage to quarantine to defence, but not over religion. So far as the application of the guarantee is concerned, section 116 binds *only* federal legislation which is enacted by the Commonwealth Parliament under sections 51 and 52.

In contrast to the American legal doctrine of incorporation, section 116 does not apply to the Australian states.<sup>61</sup> However, the High Court held in *Kruger v Commonwealth*<sup>62</sup> that section 116 applies to the territories when the Commonwealth exercises its section 122 'territories power'.<sup>63</sup> A bid

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<sup>60</sup> *Constitution of the Commonwealth of Australia 1900* (Cth) s 116.

<sup>61</sup> Gabriël A Moens, 'Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle' (1996) 4 *Brigham Young University Law Review* 787, 788.

<sup>62</sup> (1997) 190 CLR 1.

<sup>63</sup> *Australian Constitution* s 122: 'The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.'

to make section 116 applicable to the States was attempted (as one of the four questions presented) in the 1988 referendum, however this failed.<sup>64</sup>

The Australian Framers never intended to achieve a ‘true separation’ between religion and state at all levels of government. Instead, their intention was to reserve the power to make laws with respect to religion to the Australian states.<sup>65</sup> As evidence of this, during the 1898 convention debates, draft clause 109, which later became Section 116, provided: ‘A State shall not make any law prohibiting the free exercise of any religion’.<sup>66</sup> The draft provision came up for debate on 7 February 1898, when delegate Higgins who had drafted the clause proposed that the constitution should not interfere with the right of the states to do whatever wanted in regard to the matter.<sup>67</sup> He argued that it should be the Commonwealth, not the States, the specific tier of government to be prevented from enacting any laws to prohibit the free exercise of religion, or to establish religion, or to impose any religious observance. It is a point which Higgins made at several times during the convention debates. All he wanted therefore was a clause to prevent the Commonwealth from imposing religious laws and observations. Higgins explained:

The point is that we are not going to make the Commonwealth a kind of social and religious power over us. We are going into Federation for certain specific subjects. Each state at present has the power to impose religious laws. I want to leave that power with the state; I will not disturb that power. But I object to giving to the

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<sup>64</sup> Reid Mortensen, ‘The Unfinished Experiment: A Report on Religious Freedom in Australia’ (2007) 21 *Emory International Law Review* 167, 177.

<sup>65</sup> Jared Clements, ‘Section 116 of the Constitution and the jurisprudential pillars of neutrality and action-belief dichotomy’ (2008) 11 *International Trade and Business Law Review* 236, 239.

<sup>66</sup> Quoted in Quick and Garran, above n 39, 951.

<sup>67</sup> Richard George Ely, *Unto Caesar: Religious Issues in the Emerging Commonwealth, 1891-1906* (Melbourne University Press, 1976) 60.

Federation of Australia a tyrannous and overriding power over the whole of the people of Australia as to what day they shall observe for religious reasons and what day they shall not observe for that purpose.<sup>68</sup>

In this sense, the establishment clause in Section 116 does not apply to the six State-members of the Australian Federation. Indeed, the provision does not prohibit State governments from enacting laws either restricting or establishing a religion. Since section 116 operates only as a fetter upon the exercise of federal legislative power, this raises the question whether section 116 applies to executive and administrative acts of the federal government.<sup>69</sup> Commenting on the establishment clause, the then Chief Justice Garfield Barwick argued that although section 116 is directed only at the legislative power of the Commonwealth, if a federal executive act comes ‘within the ambit of the authority conferred by the statute, and does amount to the establishment of religion, the statute which supports it will most probably be a statute for establishing a religion and therefore void as offending s 116’.<sup>70</sup>

## VII ESTABLISHMENT CLAUSE IN AUSTRALIA

Section 116 of the Australian Constitution precludes federal Parliament from making laws for establishing any religion, imposing any religious observance, or prohibiting the free exercise of any religion. Section 116 also provides that no religious test shall be required as a qualification for any office or public trust under the Commonwealth. In their authoritative

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<sup>68</sup> Official Record of the Debates of the Australasian Federal Convention, vol 5 (March 2, 1898) 1736: quoted in Clements, above n 65, 239.

<sup>69</sup> Moens, above n 61, 788.

<sup>70</sup> *Attorney-General of Victoria ex rel. Black v Commonwealth* (1981) 146 CLR 559, 551 (‘*DOGS Case*’). Although this statement has been made in the context of the establishment clause, ‘there appears no reason why his observation should not equally apply to the free exercise guarantee of s 116’: Moens, above n 61, 788.

commentary on the Australian Constitution, Quick and Garran elucidated the purpose and effect of the nation's establishment clause:

By the establishment of religion is meant the erection and recognition of a State Church, or the concession of special favours, titles, and advantages to one church which are denied to others. It is not intended to prohibit the Federal Government from recognizing religion or religious worship.<sup>71</sup>

The statement entirely dispels any possible claims that the Australian Constitution established secularism by virtue of section 116. Rather, Quick and Garran further elaborated upon the implications of section 116 to Christianity:

The Christian religion is ... recognised as a part of the common law. There is abundant authority for saying that Christianity is part and parcel of the law of the land... Consequently the fundamental principles of the Christian religion will continue to be respected, although not enforced by Federal legislation. For example, the Federal Parliament will have to provide for the administration of oaths in legal proceedings, and there is nothing to prevent it from enabling an oath to be taken, as at common law, on the sanctity of the Holy Gospel.<sup>72</sup>

Section 116 was drafted with careful consideration of the American example. During the Australian constitutional conventions, it was noted that in America, Christianity continued to be a major influence in federal legislation regardless of the First Amendment. The example was given that federal legislation relating to Sunday observance had been enacted in

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<sup>71</sup> Quick and Garran, above n 39, 952.

<sup>72</sup> Ibid.

America simply on the basis that America was a Christian nation.<sup>73</sup> This enactment was in spite of the fact that there was no constitutional recognition of America as a Christian nation, with no mention of God, let alone Christianity, in the U.S. Constitution. The Australian framers feared that if ‘such Federal legislation could be founded on a Constitution which contained no reference whatever to the Almighty ... [it would be very likely] that the federal Parliament might, owing to the recital in the preamble, be held to possess power with respect to religion’<sup>74</sup> in the absence of a provision to the contrary.

Recognising the potential for exploitation of the new federal system by individual religious bodies, section 116 guards against a situation in which members of one denomination might dominate federal Parliament, thus introducing legislation to establish their own body as the National Church, or introducing religious tests to favour admission of individuals from their own body to the Commonwealth bureaucracy, etc. And yet, this does not amount to a complete rejection of the people’s religious sentiments, because the Australian Constitution itself expressly recognises the legitimacy of religion in the public square when, in its Preamble, it declares that the Australian people are ‘humbly relying on the blessings of Almighty God.’

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<sup>73</sup> Referring to the preamble of the Commonwealth Constitution, which recites that the people of the colonies who were about to form Federation, were ‘humbly relying on the blessings of Almighty God, have agreed to unite in one indissoluble Commonwealth’, ‘it was stated by Mr Higgins that, although the preamble to the Constitution of the United States contained no such words as these, it had been decided by the court in the year 1892 that the people of the United States were a Christian people; and although the Constitution gave no power to Congress to make laws relating to Sunday observance, that decision was shortly afterwards followed by a Federal enactment declaring that the Chicago Exhibition should be closed on Sundays. This law, he said, was passed simply on the ground that among Christian nations Christian observances should be enforced (Conv Deb, Melb, 1734)’: Quick and Garran, above n 39, 952.

<sup>74</sup> Ibid.

It is therefore erroneous, although increasingly popular, to assert that the establishment clause in the Australian Constitution was aimed at enshrining secularism. Far from seeking to banish religion from Australian government and society, its framers intended a laissez-faire environment that ensured no particular religious body would enjoy unfair advantage on account of federal government endorsement. An accompanying benefit is that section 116 also protects religious bodies in Australia against unwanted intrusions of the federal government. Thus the inclusion of section 116 was aimed at establishing a limitation only on the powers of the federal government to legislate with respect to religion. This was expressed by the High Court in the *Jehovah's Witnesses Case* in 1943, where Chief Justice Latham stated: 'The prohibition in § 116 operates not only to protect the freedom of religion, but also to protect the right of a man to have no religion. No *federal law* can impose any religious observance.'<sup>75</sup>

The main object of this guarantee is to preserve individual liberties, including religious freedom, from federal encroachment. This is quite different, for example, from expressly prohibiting the promotion of Christian values by the Australian government. Indeed, this section could not be used to prohibit federal laws to assist the practice of religion, or to provide financial support to religious schools. To fall afoul of section 116, the Commonwealth Parliament would have to go so far as to effectively establish an official religious denomination, or to value one denomination over the others. Indeed, what the guarantee really means is that the Commonwealth Parliament is not authorised to set up a state religion on the lines of the Church of England. This is after all an anti-

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<sup>75</sup> *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 123 (emphasis added).

establishment clause. But section 116 clearly does not inhibit the federal government from identifying itself with the religious impulse as such or from authorizing religious practices where all could agree on their desirability.

Unfortunately, the plain meaning of section 116 did not prevent Justice Dunford of the New South Wales Supreme Court to incorrectly argue in *Harkianakis v Skalkos* (1999)<sup>76</sup> that this provision makes religion ‘irrelevant’ to government and politics in Australia.<sup>77</sup> The case involved a defamation case in which defamatory matters had been published ‘pursuant to an implied or express right of freedom of speech concerning religious matters.’<sup>78</sup> Dunford J heard the application and assumed that the defence had ‘no prospect of success, ’because, among other things, section 116 would have ‘nothing to do with the essential nature’ of the system of representative government established by the Australian Constitution. Instead, he asserted that section 116 ‘excludes religion from the system of government’ so that any religious considerations would be irrelevant to our system of representative government, hence adopting the provision ‘a particular perspective about the relationship between religion and politics which would exclude religious speech entirely from political discussion – and in this sense, to privilege secularism over religion.’<sup>79</sup> Of course, such a position is entirely against the original intent or purpose behind the elaboration of the section. Indeed, the argument provided by

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<sup>76</sup> *Harkianakis v Skalkos* (1999) 47 NSWLR 302.

<sup>77</sup> Ibid.

<sup>78</sup> The controversy in *Harkinakis* involved actions for defamation and contempt of court initiated by the Archbishop of the Greek Orthodox Archdiocese of Australia, regarding articles published in two Greek language newspapers that contained imputations concerning the plaintiff’s personal conduct and fitness of ecclesiastical office.

<sup>79</sup> Nicholas Aroney, ‘The Constitutional (In)Validity of Religious Vilification Laws: Implications for their Interpretation’ (2006) 34 *Federal Law Review* 287, 302.

Dunford J is unsustainable on both legal and historical grounds. According to Nicholas Aroney, such an understanding has *never* been supported by the High Court and it directly contradicts all decisions provided by this court on the scope of section 116.<sup>80</sup> As a matter of fact, noted Professor Aroney:

[T]he High Court has very explicitly affirmed that the non-establishment clause does not prohibit governmental assistance being given to religious bodies, and it certainly has never held that s 116 somehow prohibits the enactment of federal laws or the execution of government policies that are supported, either in whole or in part, on the basis of religious considerations or reasons... In the United States, the equivalent provision contained in the First Amendment has been interpreted, at times, to prohibit virtually all forms of state assistance; but in Australia, state aid to religious schools has been upheld. To suggest that the non-establishment principle makes religious considerations entirely irrelevant to federal law-making and policy-formation is simply beyond the pale—particularly in Australia, but even in the United States.<sup>81</sup>

## VIII JUDICIAL INTERPRETATION OF THE ESTABLISHMENT CLAUSE

In 1981, the High Court offered its first significant decision construing Australia's establishment clause in the so-called *DOGS* case.<sup>82</sup> The case involved the validity of federal financial support for religious schools by means of a series of grants to the States. Most of the private schools benefiting from this aid were religious schools, and the Australian Council for the Defence of Government Schools (DOGS) challenged the

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<sup>80</sup> Ibid 301-2

<sup>81</sup> Ibid.

<sup>82</sup> *A-G (Vic) (ex rel Black) v Commonwealth* (1981) 146 CLR 559 ('*DOGS Case*').

grants, arguing that government funding of church schools amounted to an “establishment” of religion.

The argument was rejected in a six-to-one decision. First, the majority emphasized the differences between the U.S. and Australian establishment clauses and refused to follow the lead of the U.S. courts. The majority then held that section 116 does not prohibit federal laws to assist the practice of religion, or to provide financial support to religious schools on a non-discriminatory basis. The Court made it clear that the federal government can indirectly give benefits to religion as long as the purpose is not to establish an official state church. To fall afoul of section 116, the Court said, the Commonwealth would have to go so far as to effectively establish an official church or to value one particular Christian denomination over all the others.

In his majority ruling Wilson J contended that a “narrow notion of establishment” is necessary not only to preserve traditional practices and legal provisions, but also to make sense of other legal provisions that are contained in section 116.<sup>83</sup> As he put it, if the establishment clause were to be read so broadly as to require “strict separation” between church and state, then it is hard to see what room would be left for the operation of traditional practices such as the coronation oath and the opening prayers at the several of our nation’s State and Federal Parliaments, not to mention the explicit acknowledgment of “Almighty God” in the Preamble of the Constitution.

Justice Mason took a similar view. He argued that establishment required only ‘the concession to one church of favours, titles and advantages [that] must be of so special a kind that it enables us to say that by virtue of the

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<sup>83</sup>

Ibid 653 (Wilson J).

concession the religion has become established as a national institution, as, for example, by becoming the official religion of the State.’<sup>84</sup> Justice Stephen concurred with him, noticing that the precise language of section 116 precludes a wide interpretation of the word ‘establish.’ Justice Stephen said:

The very form of s 116, consisting of four distinct and express restrictions upon legislative power... cannot readily be viewed as the repository of some broad statement of principle concerning the separation of church and state... On the contrary by fixing upon four specific restrictions of legislative power, the form of the section gives no encouragement to the undertaking of any such distillation.<sup>85</sup>

Justice Gibbs concurred with the majority and explained that the establishment clause simply requires the Commonwealth to ‘not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.’<sup>86</sup> According to Gibbs J, ‘the natural meaning of the phrase *establish any religion* is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church.’<sup>87</sup> Chief-Justice Barwick agreed that the word *establishment* ‘involves the identification of the religion with the civil authority so as to involve the citizens in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronise, protect, and promote the established religion.’<sup>88</sup> Thus Barwick CJ concluded that

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<sup>84</sup> Ibid 612 (Mason J).

<sup>85</sup> Ibid 609 (Stephen J).

<sup>86</sup> Ibid 604 (Gibbs J).

<sup>87</sup> Ibid 597 (Gibbs J).

<sup>88</sup> Ibid 582 (Barwick CJ).

‘establishing religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth ‘establishment’.<sup>89</sup>

Justice Murphy was the only Justice to disagree in that six-to-one decision. He based his dissent on U.S. Supreme Court decisions which have required a “wall of separation” between church and state. In particular, he explicitly referred to the opinion of Justice Hugo Black in the landmark American Establishment Clause case, *Everson v. Board of Education*.<sup>90</sup> In that decision Black J stated: ‘No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.’<sup>91</sup> Such opinion was premised on Justice Black’s personal view that ‘the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.’<sup>92</sup>

Relying on Justice Black’s opinion in *Everson*, Murphy J argued that section 116 of the Australian Constitution should be interpreted accordingly so as to prohibit any financial assistance by the federal government to religious schools.<sup>93</sup> In contrast, the majority opted for disregarding such American precedent as irrelevant for Australia. Given the differences in wording between the American and Australian constitutional guarantees (“Congress shall make no law respecting an establishment of religion” as against “the Commonwealth shall not make any law for establishing any religion”), the majority held that only a law

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<sup>89</sup> Ibid.

<sup>90</sup> *Everson v. Board of Education*, 330 US 1 (1947).

<sup>91</sup> Ibid 16.

<sup>92</sup> Ibid 18.

<sup>93</sup> *DOGS Case* (1981) 146 CLR 559, 565 (Murphy, J)

for the establishment of religion violates section 116. As Chief Justice Barwick stated:

[B]ecause the whole expression is ‘for establishing any religion’, the law to satisfy the description must have that objective as its express and, as I think, single purpose. Indeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were constructively.<sup>94</sup>

The meaning and scope of church-state separation was again addressed by the High Court in a challenge to the constitutional validity of the National Schools Chaplaincy Program (NSCP).<sup>95</sup> The program had been created by the Commonwealth in 2006 as a voluntary program under which schools seek financial support from the Commonwealth to establish or enhance chaplaincy services for school communities.<sup>96</sup> Schools choose the chaplains best meeting their needs, with the position being supported by a funding agreement. In the course of handing over its decision in *Williams v Commonwealth* (2012), the High Court refused to do what the plaintiffs expected: to rely its decision on section 116 and to declare the chaplaincy program a violation of church-state separation. Instead, by a six-to-one majority the Court ruled that the executive power found in section 61 of the Constitution<sup>97</sup> does not authorize federal

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<sup>94</sup> Ibid 559 (Barwick CJ).

<sup>95</sup> See *Williams v Commonwealth* (2012) 288 ALR 410.

<sup>96</sup> Under NSCP, chaplains offered ‘general religious and personal advice to those seeking it;’ and would ‘[work] in a wider spiritual context to support students and staff of all religious affiliations and not [seek] to impose any religious beliefs or persuade an individual toward a particular set of religious beliefs.’: *Williams v Commonwealth (No 1)* (2012) 288 ALR 410, [305] (Heydon J, citing the NSCP guidelines).

<sup>97</sup> Section 61 reads: ‘The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative,

officials to enter into funding agreements, or to authorize payments for it from the Consolidated Revenue Fund.<sup>98</sup> In sum, the Court invalidated any funding for all such programs initiated by the Commonwealth government without explicit statutory authorization, and not because there is a violation of the establishment clause.<sup>99</sup>

As a result of this case, the federal government rushed through new legislation to ensure the program (and more than 400 programs that amount to as much \$37 billion, or up to 10 per cent of all federal expenditure) could continue. Still, the plaintiff in the first case further challenged the government's authority to draw money from consolidated revenue funds in relation to matters that are beyond the powers of the Commonwealth.<sup>100</sup> The matter now is not about church-state separation but a federalism case concerning the ability of the federal government to fund programs where they do not have the legislative power to do so.

As can be seen, the new challenge is not if the chaplaincy program had breached the establishment clause, in particular, section 116. Such argument failed when the chaplaincy scheme was first challenged in the High Court. Rather than dealing with church-state separation, this case is about the power of the federal government to fund programs under particular legislation. More specifically, the case involves the validity of

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and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth'.

<sup>98</sup> *Williams v Commonwealth* (2012) 288 ALR 410 ('*Williams*'). See also the case notes: Benjamin B Saunders, 'The Commonwealth and the Chaplains: Executive Power after *Williams v Commonwealth*.' (2012) 23 *Public Law Review* 153; Amanda Sapienza, 'Using Representative Government to Bypass Representative Government' (2012) 23 *Public Law Review* 161.

<sup>99</sup> In response to *Williams*, the Commonwealth enacted emergency legislation in the form of the *Financial Framework Legislation Amendment Act (No 3) 2012* (Cth), which purports to validate all such expenditures by it and which allows the NSCP to continue.

<sup>100</sup> See *Williams v Commonwealth (No 2)* (2014) 309 ALR 41.

a statutory law that was rushed through both houses of Parliament to give the stamp of approval to funding schemes in one piece of federal legislation.<sup>101</sup> In a unanimous decision, the Court held that certain aspects of the legislation are constitutionally invalid. Rather than striking it down as totally invalid, the Court opted for the invalidity of certain aspects of the funded programs which were not constitutionally attached to a Commonwealth head of power. Accordingly, the federal government can still continue the chaplaincy program by providing grants to the state governments rather than directly to the schools.

## IX CONCLUSION

This article has discussed the Christian roots of Australia's constitutionalism. As mentioned, the inclusion of the words 'humbly relying on the blessing of Almighty God' in the Australian Constitution exemplifies the country's religious, and specifically Christian, heritage. It can, at the very least, be said that Judeo-Christian values were so embedded in Australia so as to necessitate the recognition of God in the nation's founding document. When considered alongside the development of colonial laws, the adoption of the English common-law tradition and American system of federation, it is evident that the foundations of the Australian nation, and its laws, have discernible Christian-philosophical roots.

It has also been said that a people without historical memory can easily be deceived by the power of foolish and deceitful philosophies. Although undeniably diminished and rarely acknowledged, Christianity has an enduring role in the Australian legal system. Despite the best efforts of

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<sup>101</sup> The legislation allowed for funding of a wide range of programs that comprise up to 10 per cent of federal expenditure, including accommodation for asylum seekers offshore, the national counterterrorism committee.

radical secularists and historical revisionists, the Australian legal system has a distinct Judeo-Christian tradition that has prevailed till the present day. In these days of political correctness and moral relativism, it is always important for us to be reminded of the Judeo-Christian heritage of the Australian people, which still permeates most of the laws and socio-political institutions of Australia. To state this is not to be ‘intolerant’ but to stress an undeniable historical truth.