

*Paul T Babie**

AUSTRALIAN JURISTS AND CHRISTIANITY

EDITED BY GEOFF LINDSAY AND WAYNE HUDSON

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I INTRODUCTION: CONTEMPORARY LAW AND RELIGION IN AUSTRALIA

The relationship between law and religion in Australia continues to evolve, gaining increasing public visibility and importance as it does. The long overdue achievement of marriage equality in 2017¹ catalysed two high profile and polarising moments in the contemporary structure of that relationship. First, in a concession to the Australian Christian Lobby ('ACL'), the Coalition government led by then Prime Minister Malcolm Turnbull established the Religious Freedom Review, led by Philip Ruddock ('Ruddock Review').² Having realised too late that it had lost the opportunity for some substantive protections for religious freedom by opposing any strengthening whatsoever of human rights protections as a result of the National Human Rights Consultation Committee's 2008 final report ('Brennan Review'),³ the ACL found itself on the outside looking in following marriage equality, suddenly scrambling to retain even those protections which it did have

* BA (Calgary); BThSt (Flinders); LLB (Alberta); LLM (Melb); DPhil (Oxon); Bonython Professor of Law, Adelaide Law School, University of Adelaide.

¹ Marriage Amendment (Definition and Religious Freedoms) Bill 2017 (Cth) sch 1 pt 3, amending *Marriage Act 1961* (Cth) s 5(1) (definition of 'marriage'). See also Megan Lawson and Paul Babie, 'The Law of Marriage Equality in Australia: The Shortest Distance between Two Points?' in Hilary D Regan (ed), *Interface Theology* (ATF Press, 2017) 1.

² See: Philip Ruddock et al, *Religious Freedom Review: Report of the Expert Panel* (Report, 18 May 2018); Prime Minister of Australia, Attorney General, 'Government Response to Religious Freedom Review' (Media Release, 13 December 2018) <<https://www.pm.gov.au/media/government-response-religious-freedom-review>>.

³ Frank Brennan et al, *National Human Rights Consultation* (Report, Attorney General's Department, September 2009). See also Paul Babie and Neville Rochow, 'Feels Like Déjà Vu: An Australian Bill of Rights and Religious Freedom' (2010) (3) *Brigham Young University Law Review* 821, 855.

pursuant to state and territory anti-discrimination legislation.⁴ In response to the ACL demands for protection, and to the Ruddock Review, the Morrison government released the badly drafted — and discriminatory — Religious Freedom Bills⁵ (in the plural because they are now in their third iteration, following widespread public outcry about the discrimination that would eventuate through the enactment of this legislation). The Coalition government introduced the Bills at the end of 2021, which was met with widespread public concern.⁶

As the government attempted to placate the ACL with the Ruddock Review and its proposed legislation, controversy erupted in April 2018 following another, entirely unexpected, intervention. Purporting to be acting on genuine Christian faith and belief as an active member of an Assemblies of God fellowship,⁷ Australian rugby player Israel Folau posted deeply offensive and vitriolic statements concerning LGBTIQ+ communities. Following these posts, Rugby Australia — the body with which Folau was contracted to play — announced its intention to terminate his contract.⁸ A hearing on 16 May 2019 found Folau to have breached Rugby Australia's code of conduct,⁹ and on 17 May, his four-year employment contract was

⁴ On these protections, see generally Paul Babie, 'The Ethos of Protection for Freedom of Religion or Belief in Australian Law' (2020) 47(1) *University of Western Australia Law Review* 64.

⁵ See the religious discrimination legislative package, comprising: Religious Discrimination Bill 2021 (Cth); Religious Discrimination (Consequential Amendments) Bill 2021 (Cth); Human Rights Legislation Amendment Bill 2021 (Cth). See also 'Religious Discrimination Bill 2021 and Related Bills', *Parliament of Australia* (Web Page, 2021) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Human_Rights/ReligiousDiscrimination>.

⁶ See Michael Koziol, "'Right-Wing Backlash": Church Group to Make Religious Freedom an Election Issue', *The Sydney Morning Herald* (online, 6 June 2021) <<https://www.smh.com.au/politics/federal/right-wing-backlash-church-group-to-make-religious-freedom-an-election-issue-20210602-p57xce.html>>.

⁷ Rob Forsaith, 'Folau Content after Ditching Mormonism', *The Sydney Morning Herald* (online, 8 November 2011) <<https://www.smh.com.au/sport/folau-content-after-ditching-mormonism-20111108-1n597.html>>. Israel Folau, 'Israel Folau on Homosexuality and God', *PlayersVoice* (Web Page) <<https://www.playersvoice.com.au/israel-folau-im-a-sinner-too/>>.

⁸ Tom Decent, 'Rugby Australia Set to Sack Israel Folau for Anti-Gay Social Media Post', *The Sydney Morning Herald* (online, 11 April 2019) <<https://www.smh.com.au/sport/rugby-union/rugby-australia-set-to-sack-israel-folau-for-anti-gay-social-media-post-20190411-p51dar.html>>; Rugby Australia, 'Israel Folau Issued Sanction Directing Contract Termination for High-Level Code of Conduct Breach' (Media Release, 17 May 2019) <<https://australia.rugby/news/2019/05/17/folau-sanction-breach>>.

⁹ On the use of such contracts, see Jerome Doraisamy, 'Are Employment Contracts Increasingly Being Used to Control Employees' Lives?', *LawyersWeekly* (online, 11 June 2019) <<https://www.lawyersweekly.com.au/biglaw/25814-are-employment-contracts-being-used-to-control-employees-lives>>.

terminated.¹⁰ On 6 June 2019, Folau brought proceedings in the Fair Work Commission against Rugby Australia and the Waratahs claiming unlawful termination on the basis of religious discrimination in violation of the *Fair Work Act 2009* (Cth).¹¹

For many Australians, the suggestion that either the ACL broadly or individuals like Folau should have any protection to discriminate against others, or to vilify them on the basis of religious belief — to a large extent already protected by controversial exemptions from state and territory anti-discrimination provisions — represents an entirely unwarranted intrusion of what ought to be a personal matter into public life; of the sacred into the secular. For many commentators, the law is a justifiably secular space, hard-won and worth defending.¹² Frequently misunderstood, though, is a historical fact: the law we think to be secular today is in fact the product of a religious — largely Christian — influence. Harold J Berman first identified this fact¹³ and scholars are now beginning to recognise that the law we defend as secular may never have been so.¹⁴ A recent Australian book makes an important contribution to our understanding of the modern state of Australian law, demonstrating just how close the causal relationship of religion to law has been, not only historically, but even now, in our own time: *Australian Jurists and Christianity*¹⁵ explores the leading Christian jurists from European invasion of the Australian continent until now.

In this review, I briefly examine two important contributions made by this book. Of course, we can look back at Australia's history since European invasion to consider the Christian influence on law as it was received and developed. But, more importantly, and unusually for a volume of this type, the editors also ask us to look ahead, to subject our law to a searching critique in order to understand better not only what might be positive in its Christian sources, but also what might be a burden upon contemporary law and in need of redress.

¹⁰ Mike Hytner, 'Israel Folau Sacked over Social Media Posts after Panel Rules in Favour of Rugby Australia', *The Guardian* (online, 17 May 2019) <<https://www.theguardian.com/sport/2019/may/17/israel-folau-sacked-after-panel-rules-in-favour-of-rugby-australia>>.

¹¹ Georgina Robinson, 'Folau Set to Seek \$10 million in Damages from Rugby Australia', *The Sydney Morning Herald* (online, 7 June 2019) <<https://www.smh.com.au/sport/rugby-union/folau-takes-fight-against-rugby-australia-to-fair-work-commission-20190606-p51v53.html>>.

¹² See Ngaire Naffine, *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person*, (Bloomsbury, 2009).

¹³ See Harold J Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1985).

¹⁴ See Winnifred Fallers Sullivan, Robert A Yelle and Mateo Taussig-Rubbo (eds), *After Secular Law* (Stanford University Press, 2011).

¹⁵ Geoff Lindsay and Wayne Hudson (eds), *Australian Jurists and Christianity* (Federation Press, 2021).

II LOOKING BACK

Perhaps controversially, the ‘object of th[is] volume is to illustrate ... the influence of Christianity on the development of Australian law and society’.¹⁶ Although, in order not to offend ‘Australian sensibilities’, it is entitled *Australian Jurists and Christianity*, rather than that which the editors suggest it might have been called: ‘Great Christian Jurists in (Australian) History’, which might better have demonstrated its primary aim.¹⁷ The editors of the volume argue that ‘[the] lives and connection [of those examined] with the law provide an opportunity for the existence, nature and extent of Christianity’s influence to be exposed to view’.¹⁸ This is significant, for it is too easy to overlook that much of our modern western law finds its sources in Christianity: as I noted above, Harold Berman was the first to recognise this,¹⁹ but we in Australia too often forget — sometimes willfully — that our law carries the burden of Christianity, if only interstitially.²⁰

For the editors of this volume, then, a ‘conscience influenced by Christianity’ shaped ‘[t]he great advances in Australian legal history’,²¹ all of which fall into three broad categories: achieving national independence; providing a framework for a fair and just society; and reconciliation with Aboriginal and Torres Strait Islander peoples.²² This last category has proven, and continues to prove, most difficult. Australia, in an ongoing attempt to ‘fac[e] up to its racist history’,²³ still does not provide any recognition of First Peoples in the *Constitution* and has not been successful in efforts to remedy discrimination in education, employment and health that affect the cultural and physical survival of Indigenous peoples.²⁴ This has the problematic consequence that the first two major shifts — independence from the British Empire and the effort to create a fair and just society — still exclude the third.²⁵ For many Australians, though, the mere suggestion that Christianity and Christians once had and may continue to play a role in the development of law and society is, at best, inaccurate and, at worst, entirely inappropriate.²⁶ The editors acknowledge this, writing that ‘the

¹⁶ Geoff Lindsay and Wayne Hudson, ‘Introduction: Spirit in the Temporal’ in Geoff Lindsay and Wayne Hudson (eds) (n 15) 1, 1.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ Berman (n 13).

²⁰ Paul Babie, ‘Breaking the Silence: Law, Theology and Religion in Australia’ (2007) 31(1) *Melbourne University Law Review* 296, 305.

²¹ Lindsay and Hudson (n 16) 25 (emphasis omitted).

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Babie (n 20). See also Lindsay and Hudson (n 16) 4–25.

very concept of a “Christian jurist” might be an affront’.²⁷ Yet, it is undeniable that legal doctrine bears the imprint of Christianity:

Traces of the Christian Church’s contribution to Anglo-Australian jurisprudence on these topics can be found ... in the ongoing work of Australian State and Territory Supreme Courts exercising equity jurisdiction (formerly exercised by England’s Lord Chancellor) and probate jurisdiction (formerly exercised by England’s Ecclesiastical Courts). Those jurisdictions uncontroversially owe historical debts to the Christian clergy who once administered them.²⁸

And more than this, the choice of ‘law *and society*’ rather than merely ‘law’ means that the book seeks to encompass much more than legal doctrine alone.²⁹ For the contributors to this volume, the Christian influence is evident and pervasive. To demonstrate this, the editors provide both a substantial assessment of the role of Christianity in the development of English law, and its ongoing development as the received law of Australia, as well as its role within the wider sweep of Australian history.³⁰

The book is organised chronologically, with ‘representatives [drawn from] a variety of interests, and traditions, by reference to geography, denominational affiliation, gender and race’, whose contributions range from legal practice, to the bench, to politics, taking a broad, civilian stance towards the meaning of the word ‘jurist’.³¹ Thus, we find essays on significant judicial figures: George Higinbotham;³² Sir Samuel Griffith;³³ Lord Atkin³⁴ (it is little known that Lord Atkin, forever associated with *Donoghue v Stevenson*,³⁵ ginger beer, snails, and the tort of negligence, was born in Queensland); Sir Victor Windeyer;³⁶ Dame Roma Mitchell;³⁷ Sir Ronald Wilson;³⁸

²⁷ Lindsay and Hudson (n 16) 3–25.

²⁸ Ibid 2 (citation omitted).

²⁹ Ibid (emphasis in original).

³⁰ Ibid 4–25.

³¹ Ibid 1.

³² Marion Maddox, ‘George Higinbotham (1826–1892)’ in Lindsay and Hudson (eds) (n 15) 79.

³³ Simon Chapple, ‘Samuel Walker Griffith (1845–1920)’ in Lindsay and Hudson (eds) (n 15) 90.

³⁴ Peter Applegarth, ‘Lord Atkin (1867–1944)’ in Lindsay and Hudson (eds) (n 15) 145. [1932] AC 562.

³⁵ Carol Webster, ‘Victor Windeyer (1900–1987)’ in Lindsay and Hudson (eds) (n 15) 167.

³⁶ Susan Magarey, ‘Roma Flinders Mitchell (1913–2000)’ in Lindsay and Hudson (eds) (n 15) 180.

³⁷ Mandy Tibbey, ‘Ronald Wilson (1922–2005)’ in Lindsay and Hudson (eds) (n 15) 203.

Sir Gerard Brennan;³⁹ Sir William Deane;⁴⁰ Murray Gleeson;⁴¹ and Michael Kirby.⁴² Many of those were also leading members of the profession prior to their appointment, as well as political figures. But, we also find essays on those whose entire contribution to law and history came in the political arena: Lachlan Macquarie;⁴³ James Stephen;⁴⁴ Andrew Inglis Clark;⁴⁵ Alfred Deakin;⁴⁶ Sir Robert Menzies;⁴⁷ and Gough Whitlam.⁴⁸ And still, other essays demonstrate the role which prominent Christians might play without being formally involved in either the law or politics, most notably Eddie Mabo.⁴⁹

Taken together, the contextualising chapters written by the editors and the biographical essays combine to paint a portrait of Australia's post-European invasion history as being influenced — explicitly, but more often implicitly — by Christian thought and those who subscribe to some form of it. Yet, a portrait that stopped there would be incomplete, for as the book points out, the mark left by Christianity cannot be seen as an unmitigated success, or even one which we ought to accept. In other words, perhaps what this portrait most clearly reveals is the work still to be done to achieve full independence from the empire from which the nation emerged, forging a fair and just society for all its peoples, most notably for those dispossessed of the continent in its formation, the Aboriginal and Torres Strait Islander peoples.

III LOOKING AHEAD

Recognising the religious and Christian influence on our law is not to succumb to the view that it is somehow religious, beyond logic and reason. The common law and its legislative descendants conform to the strictures of logic and reason for ongoing development and adaptation to new and changing social, political and economic

³⁹ Patrick Keyzer, 'Francis Gerard Brennan (1928–)' in Lindsay and Hudson (eds) (n 15) 228.

⁴⁰ Arthur Emmett, 'William Patrick Deane (1931–)' in Lindsay and Hudson (eds) (n 15) 240.

⁴¹ Michael Pelly, 'Murray Gleeson (1938–)' in Lindsay and Hudson (eds) (n 15) 274.

⁴² Nicolas Kirby, 'Michael Kirby (1939–)' in Lindsay and Hudson (eds) (n 15) 285.

⁴³ Marie Bashir, 'Lachlan Macquarie (1761–1824)' in Lindsay and Hudson (eds) (n 15) 32.

⁴⁴ Stephen Tong and Robert Tong, 'James Stephen (1789–1859)' in Lindsay and Hudson (eds) (n 15) 43.

⁴⁵ Richard Ely, 'Andrew Inglis Clark (1848–1907)' in Lindsay and Hudson (eds) (n 15) 101.

⁴⁶ Stephen Free, 'Alfred Deakin (1856–1919)' in Lindsay and Hudson (eds) (n 15) 124.

⁴⁷ Anne Henderson, 'Robert Menzies (1894–1978)' in Lindsay and Hudson (eds) (n 15) 156.

⁴⁸ James McComish, 'Gough Whitlam (1916–2014)' in Lindsay and Hudson (eds) (n 15) 191.

⁴⁹ Kevin Smith, 'Eddie Mabo (1936–1992)' in Lindsay and Hudson (eds) (n 15) 262.

circumstances. While it has contributed to the potential for law to exist as a matter of logic and reason, religion remains, above all, a matter of reliance on faith, and for that reason has no ongoing, explicit place and no role to play in that adaptation. Yet, logic and reason may, surprisingly, be one of the legacies that the law has received from its Christian origins that we too easily forget when we overlook that history. This volume provides important insight into the processes by which that has occurred in Australia. This recognition, though, ought to exhort and admonish us to confront two consequences of the influence that our Christian forebears had on the law.

First, and significantly, we must remember the place of Aboriginal and Torres Strait Islander spirituality for at least 60,000 years prior to the arrival and invasion of Europeans, which was irreparably harmed — and in some cases obliterated — by those events.⁵⁰ Perhaps the most distressing parts of the book are those which recount the Myall Creek Massacre in New South Wales on 10 June 1838, in which ‘a group of white stockmen ... killed upwards of 30 Aboriginal men, women and children [in] ... “an act of coldblooded and deliberate atrocity”’.⁵¹ Following two trials prosecuted by the Attorney-General of New South Wales, John Hubert Plunkett,⁵² seven of the accused were ultimately convicted for some of the murders, most notably for those of the child victims. The Myall Creek Massacre serves to remind, if any reminder were needed, of the abhorrent treatment of Aboriginal and Torres Strait Islander peoples since European invasion.

Second, and perhaps only becoming apparent more recently, is the very significant role played by other religions in the history of Australian society since European invasion. Other religious traditions continue to play a role in the development of the law, if not in doctrine, then at least by implication in its practice and in the lives of a great many Australians.⁵³

In the light of these two contemporary dimensions of Australia’s history, the editors conclude that

[l]awyers interested in Australian legal history will need to be aware of the extent to which the histories of Indigenous peoples were left out of the older accounts, and of the extent to which ‘other histories’ now need to be included in any reliable history of Australia.⁵⁴

⁵⁰ Jeremy Beckett and Melinda Hinkson, “‘Going More Than Halfway to Meet Them’”: On the Life and Legacy of WEH Stanner’ in Melinda Hinkson and Jeremy Beckett (eds), *An Appreciation of Difference: WEH Stanner and Aboriginal Australia* (Aboriginal Studies Press, 2008) 1, 17–19.

⁵¹ John Kennedy McLaughlin, ‘John Hubert Plunkett (1802–1869)’ in Geoff Lindsay and Wayne Hudson (eds), *Australian Jurists and Christianity* (Federation Press, 2021) 69, 74.

⁵² *Ibid* 69–78.

⁵³ See Gary Bouma, *Australian Soul: Religion and Spirituality in the 21st Century* (Cambridge University Press, 2006).

⁵⁴ Geoff Lindsay and Wayne Hudson, ‘Rethinking “Religion” and “Law” in Australia’ in Lindsay and Hudson (eds) (n 15) 316.

A significant contribution of this volume, then, is not only in understanding the ways in which Christianity influenced the course, and continues to inhabit the interstices of Australian law, but also, and much more importantly, it admonishes us to think deeply about how we ought to understand that history.

Precisely because the relationship between law and religion is so fraught, the editors conclude with eight suggestions for further research: (i) the contemporary and critical study of Australian history and Australian legal history; (ii) the reconsideration of Australia as a ‘secular’ country; (iii) that the geography involved in Australian history needs to be deconstructed and rethought; (iv) the role of American Christianity in shaping the work of Australian jurists; (v) the need to know more about the personal belief systems of those jurists; (vi) the extent to which (iv) and (v) have been influenced by religious sectarianism; (vii) the way in which law has been conceived and implemented; and (viii) the examination of an Australian political theology, and the role of ‘religion and religious bodies in the development and operation of law and our legal system’.⁵⁵ But, what the editors and the contributors have found is

that the influence of Christianity on Australian law is often to be sought *in what law has been taken to be, and how it has been administered*, rather than cases in which the religious belief of some or another denomination has allegedly influenced a particular legal decision or statute.⁵⁶

There can be little doubt that law and religion continue to interact in both meaningful and troubling ways in modern Australia. Understanding how we got here from Australia’s past can tell us a lot about why that is so. A better understanding of the relationship between law and religion, and what we still need to learn, will tell us how we might begin to mediate that relationship in ways that are both rigorous and constructive, for all involved in Australia’s future. It is one thing to know history; quite another to accept it unthinkingly and uncritically.

⁵⁵ Ibid 315–18.

⁵⁶ Ibid 315 (emphasis in original).