Appendix I:
Address Launching Volume 11 of *Upholding the Australian Constitution*

Hon Peter Walsh, AO

The principal theme of the Conference Proceedings being launched today, is the referenda on which the people will vote 22 days hence. Both content and timing are appropriate. In addition we have another excellent and alarming essay by Dr John Forbes on the arrogance of sections of the judiciary. I will return to that later.

Professor Craven's odd man out contribution says:

> "The Monarchy is not an end in itself. Rather it merely is one means towards the fundamental end of preserving our unique constitutional order".

For somewhat different reasons I have long held a similar view. Whether Australia calls itself a constitutional monarchy or republic is a matter of monumental unimportance. In recent decades, this country's fundamental problems have been foreign debt, unemployment and growing disparity in market incomes; more recently, ambulance chaser lawyers. (A current, but hopefully ephemeral, concern about politics in the Indonesian archipelago should be added.)

Not since 1930, at the latest, has a British Monarch tried to interfere in Australian politics. One Governor-General did in 1975. Another did this week. Wednesday's frolic in London by Messrs Yu, Dodson and others was arranged by the Governor-General. Whether Sir William's compliance in this attempt to have the Queen meddle in Australian politics was endorsed by the Government, I do not know. If not, will he please explain?

Lest this be interpreted as an attack on the Vice-Regal institution, let me say that Sir John and Sir William – both personal choices of Prime Ministers, Whitlam and Keating – would have been appointed President in an ARM republic. Indeed, Janet Holmes 'a Court and others are proclaiming Sir William to be a perfect potential President. In his dinner address (page xxv) Professor Flint does demonstrate – ironically by quoting Gough Whitlam – that the Prime Minister could more easily dismiss a President than a Governor-General.

None of the debate – if that is what it should be called – has convinced me that to be a republic, or not, is a matter of profound importance. The arrogance of the Turnbull republicans "debate by assertion" style, fudging of terms like "Head of State", and their attempts to fool the people by rigging the question to conceal the fact that politicians will elect their President, is not likely to have gained support.

Kerry Jones of ACM ensured the ARM would have no monopoly on intellectual distortion, beating up a scare campaign about the 57 constitutional amendments the ARM proposal will entail.

More important is the fatally flawed logic of the "Yes" argument. The Queen, they insist, is the Head of State. The Prime Minister certainly cannot sack the Queen, but would be able, alone, to sack the President. But they insist that the proposed change will not increase the Prime Minister's power! Again, please explain.

One contributor has profoundly changed his mind. Professor Craven has been a monarchist, a McGarvieite and is now a Turnbull republican. His long, and persuasively argued, defence of this change is that, due to time, ethnic compositional changes, the debauched House of Windsor and so on, the Monarchy is doomed. If we don't vote "Yes" this time we will inevitably get an elected President. To avoid this, even monarchists should vote "Yes". Leaving aside the fact that we will never have an elected President unless we vote for it, Professor Craven's argument has been somewhat derailed by Kim Beazley's recent assurance that the ARM proposal is merely a stepping stone to an elected people's President.

Long serving previous Governor-Generals' secretary Sir David Smith attacks both Craven's apostasy and Sir Anthony Mason's "robust" invention of a constitutional convention that "the Governor-General ceases to function whenever the Queen is in Australia". He has also told us that "a former Chief Justice of the High Court became a republican at the age of eight because he disapproved of body line bowling". Apparently the Chief Justice in question is Mason. The latter's greater sin is in being a judicial supremacist harbouring a platonic contempt for parliamentary democracy – who, moreover, got an opportunity to implement some of his doctrine.

Geoffrey Partington, though conceding that zeal for the Crown in 19th Century Australia was probably weaker among Irish Catholics, rejects as "crude and false" Thomas Kenneally's stereotype of Australian history as "continued cantankerous sectarian strife", and the conventional wisdom that hostility to the British Monarchy first took root in the bosom of the Irish Catholic church. He cites, among others, Cardinal Moran, first Irish-born Archbishop of Sydney, praising "...our Colonial Administration, linked as it is to the Crown of Great Britain, as the most perfect form of republican government".

Even if the inbuilt double barrier to constitutional change is disregarded, it seems likely that for now and the near future the Monarchy will survive, if only by default – that is, monarchists plus republicans who do not like the specific republic proposed will have the numbers. Unfair that outcome might be, but I do not believe it justifies Professor Craven's plea to vote for what you do not want. A preferential vote with three or more choices would defeat the monarchy but would have no legal relevance. Even if it did, I doubt that the ARM élitists would be willing to trust the people. And anyway, I still don't believe it matters much.

What *does* matter is the Preamble.

Many years ago a friend of mine moved, at a Labor Party conference in Western Australia, what he called the "All purpose Conference motion". I will read it. It says:

> "To enhance the viability and thrust of integrated social, political and cultural modes, Labor will undertake, where appropriate to:
>
> 1. Resource to the maximum extent feasible, having regard to the needs of the broader sectors of the community, all policies and programmes which possess attributes which encourage diversity and equality, irrespective of race, ethnicity, gender, gender preference, creed, age, impairment or social origin.
> 2. Progress the advent and closely monitor the development and evaluation of, necessary processes and procedures by which innovative linkages between multi- and bilingual consumer recipients are contributed to, having in mind the desirability of securing comprehensive and meaningful opportunities for all peoples".

The Preamble reminds me of that "all purpose Conference motion" – every feel-good cliché anyone can think of. Though some people failed to recognise it as such, the all purpose motion was a send up. The Preamble, by contrast, is supposed to be taken seriously. Michael Warby (p. 77) sent up the "paradoxes":

> "First there is something so important (it requires) the effort of a constitutional referendum to consider it.
>
> "Yet this is something so insignificant that we are gravely assured that it will have no legal effect on anything at all.
>
> "Yet this thing without legal effect is so important that the words of our unofficial poet laureate have to be amended for legal reasons.
>
> "Yet it is so unimportant that it need not bother with such elementary constraints as good English expression".

(Pedants might also question its factual rigour. The concept of "nation" did not exist in Australia until at least the 18th Century. Even if it did, it is unlikely that 18th Century Aborigines were "the nation's first people". Lest hard archaeological evidence put that beyond doubt, excavations at Kow Swamp in Victoria were stopped, and specimens already recovered have been

hidden).

Chief sponsors of the Preamble hope and expect legal significance will be "discovered". As well known preambulators McKenna and Winterton wrote recently:

> "A Preamble which declared all the things we believed but prevented the courts drawing on them is a grand exercise in window dressing".[1]

In his Issues paper on this matter Sir Harry Gibbs quoted s.125A of the enabling legislation, which states that the Preamble "...shall not be considered in interpreting this Constitution or the laws in force in the Commonwealth...".

I doubt however whether Sir Harry, among others, is absolutely convinced that a mere Statute will necessarily defer a High Court which has already overturned 150 years of legal precedent, probably got customary Melanesian land law wrong, and announced that its version of Melanesian land law also applied on the mainland – an answer the Court had not been asked to give and on which it heard no evidence – from doing whatever it chooses to do.

A subsequent Chief Justice was reported to have criticised the federal Government for its stated intention to cap the volume of appeals to the Federal Court judges who, as John Forbes says "... (seem to) fervently believe that they are the only true arbiters of illegal immigration and refugee status" – a conclusion the Court endorsed in the *Teoh Case.* Sir Gerard Brennan said:

> "If, in particular cases, it be thought that a judge of the Federal Court has overreached his or her jurisdiction in setting aside a decision made under the *Migration Act,* the remedy is to appeal, not to endeavour to immunise all decisions under that Act from operation of the *rule of law".*[2]

Judgespeak for judicial caprice and supremacy.

Chief Justice Brennan has gone, but Justice Kirby, whose views make Brennan seem like a parliamentary democrat, has arrived. Kirby was quoted last year by Pierpont as saying in 1993, *inter alia:*

> "It took a court decision *(Mabo)* to right a shocking failure of the democratic system. I have no doubt that history will judge kindly the decision of the High Court, contrasting the judges' sense of justice with the hypocrisy and neglect of 150 years of our parliamentary institutions".[3]

In Kirby's mind, unprovable conjecture about the view of future generations gives legitimacy to contemporary judicial decisions. Prior to last week and the *Yanner Case*, it seemed unlikely he would have the numbers on today's Court. Against that sort of judicial arrogance there can probably be no absolute defence. But avoid giving them excuses. "No" to the Preamble.

I have not mentioned Gary Johns or a couple of other thoughtful papers. Though I have gone on for long enough, I must especially commend John Forbes' exposure of class action scams and other judicial atrocities. Of the Family and Federal Courts he said:

> "There are now one hundred federal judges, and the Stalin Baroque court houses occupy prime sites in several capital cities, accommodating not only 'Justices' but also a miscellany of federal tribunals and instruments of social engineering".

Forbes notes that concentration of judicial power came about in just two decades. Lionel Murphy started it. No Government or Attorney-General has yet tried to curb it.

It is with the greatest pleasure that I launch this eleventh volume of the Society's Proceedings.

Endnotes:

1. *The Australian*, 22 April, 1999.

2. *The Australian Financial Review*, 26 November, 1998 (emphasis added).

3. *The Australian Financial Review*, 9 January, 1998.