CLOSING ADDRESS

CENTRAL QUEENSLAND LAW ASSOCIATION CONFERENCE

9 NOVEMBER 2008

[1] The time has come once again to close the conference and bid farewell to our visitors from both near and far. The time-honoured tradition has this closing address delivered by the Central Judge. For those of you who are relative newcomers I might say that this tradition commenced some time in the reign of my immediate predecessor, Justice Dutney. It bears the hallmark of the time-honoured tradition that is now accepted in Mackay that on the first Monday of the sittings the Central Judge attends the Palace Hotel. I very much doubt that the tenth Central Judge, Justice Alan Demack and a teetotaller, ever heard of that tradition, let alone followed it.

[2] The year that was stirred some old memories. Justice Robert Somma is probably not known to many of you. He was a federal bankruptcy judge on Boston's first federal circuit. I mention him because of his manner of dress. He was arrested during the year after crashing his Mercedes into another vehicle whilst allegedly drunk. This was not so bad. Unfortunately at the time he was dressed in a cocktail dress, fishnet stockings and stylish pumps. This triggered some memories. When I left here to pursue a career at the Bar in Brisbane in 2003 the Bar were good enough to have a small function to see me off. It took the form of a murder party. As those of you who are familiar with the concept will appreciate, you are supposed to go in character. This was no difficulty for Justice Dutney. Whilst he has no Mercedes to crash

and would not of course drink and drive, he had no difficulty in retrieving from his closet the necessary accoutrements to come dressed as a prostitute. Like Justice Somma of Boston's first federal circuit, his Honour favoured a cocktail dress with fishnet stockings and stylish pumps.

[3] Justice Somma resigned in disgrace and as he had served only three years of a fourteen year term was left without a pension. Justice Dutney hasn't suffered that fate although some might think something like it. For those of you good enough to get up early today and hear his Honour's paper you will appreciate that he now heads the Mental Health Tribunal. I was reminded of Justice Dutney and his role in mental health when I saw the well-known actor, George Clooney, interviewed in relation to a recent film in which he performed, "Burn After Reading". Clooney reported that he was told by the writers, the Coen brothers, that the part had been especially written for him. Clooney somewhat glumly informed the interviewer that he felt a bit down as the part was of a poor hapless character, a moronic bumbler, one of life's perennial losers. I do not say that the Mental Health Tribunal was made for Justice Dutney but he does seem to fit in well there.

[4] So the first matter that I wish to note in reviewing the year that was is the change in guard – the eleventh Central Judge has been replaced by the twelfth. I wish to acknowledge the contribution that Justice Dutney made to the legal life of the region, and not only the legal life. Amongst many other attributes, including raconteur and semi professional golfer, he is, as many of you know, an enthusiastic cyclist

and by dint of his influence a clutch of lawyers took up the sport. As a result of his leaving Ross Lomonaco, Tom Polley, Geoff Clarke and John Shaw get to sleep in more often and if I'm not mistaken look the better for it.

[5] In case any of you are thinking that there has been a dramatic change in style between the eleventh and the twelfth Central Judges – and no reports have yet reached me of any comparisons – some of you will be aware that I too have been known to dress in fishnet stockings and a corset. Normally I would deny this but I am aware that photographic evidence exists and indeed is held by Judge Britton SC who I cannot trust not to use such evidence when it can do the most harm. I can only say that should the photograph ever emerge from Judge Britton's archives I have a photograph of him at the same function dressed in a nappy.

[6] It is but a short step from Justice Dutney's cross dressing as a prostitute to the High Court case of the of the brothel-keeper in Victoria, Wei Tang, whose conviction on a charge of intentionally possessing a slave and intentionally exercising a power of ownership over a slave resulted in a ten year prison term with a non-parole period of six years. The legal issue concerned distinguishing between slavery and other exploitative relationships. Chief Justice Gleeson spoke of the exercise of powers of control over movement which extend well beyond powers exercised even in the most exploitative of employment circumstances; and an absence or extreme inadequacy of payment for services.

[7] Perhaps surprisingly the president of Scarlet Alliance, an Australian sex workers' association, was critical of the High Court decision. She was concerned that there would be raids and forced rescue of sex workers.

[8] Perhaps unsurprisingly Jennifer Byrne, the director of the Anti-Slavery Project of the University of Technology in Sydney considered the decision to be a good one. She said 'For me the decision is really significant because it clearly applies to slavery across the board ... [the court] is looking to the condition of slavery, a constellation of facts that could be found in any kind of activity, including agriculture, cooking, hospitality, domestic servitude, or (and this is the part that concerns me) servile marriage.'

[9] I note that in my case my wife exercises considerable power of control over my movements, pays me nothing and was the one responsible for dressing me in black togs, a corset and fishnet stockings and putting on my face black lipstick, mascara and rouge. I will leave it to you to work out what sort of slave I am.

[10] Then again perhaps I am an example of the Stockholm syndrome. You will recall that that is when prisoners become loyal to their abusers and start justifying their actions in order to feel better about themselves.

[11] District Court Judges are of course experts on sex. Most of their lives are spent in running criminal trials involving allegations of indecent acts. With that background I will mention the case of *The Queen v Mills & Vig* which came on before Judge Clive Wall QC of Southport on 1 July.

[12] For those who came in late I should give you some background on Judge Wall QC. He is in a roundabout way connected with Central Queensland. Judge Bob Hall practiced at the Rockhampton Bar for some fourteen years before being appointed to the District Court in Townsville. He and Judge Wall QC were then brother judges on the District Court there. One day a cub reporter for the Townsville Bulletin doing her first court report accurately reported the comments of Judge Wall QC but wrongly attributed them to Judge Clive Hall QC. The cub reporter of course did not realise that there were two judges in town, one called Wall and the other called Hall. Judge Bob Hall took umbrage at the attribution, as he saw it to him, of comments made by his brother judge and promptly sued the Townsville newspaper for defamation. Bob Hall was not deterred by the fact that he was not named Clive and is not a QC, nor was he worried by the fact that the report was an accurate statement of what his brother judge had said. So far as I am aware it is the only case in which a judge has sued a newspaper for attributing to him the words which were accurately reported but used by another judge. I understand that eventually, after a number of visits to the courts, Judge Hall succeeded in his defamation action.

[13] But that is all past history. Back to the case of *Mills & Vig*. They were a 23 year old couple who came to court to plead guilty to a charge of doing an indecent act. The indecent act was to engage in sexual intercourse on the Miami State High School oval in the middle of the night. The only members of the public present were the two police officers who had been asked by a teacher to go and have a look at what was going on at the oval. Ms Wilson of counsel was doing her

first appearance in the District Court. She asked that the pair be arraigned on one count of doing an indecent act. The transcript then reads as follows:

> 'His Honour: And what's the indecent act?
> Ms Wilson: Sexual intercourse in a public place your Honour.
> His Honour: Is that an indecent act?
> Ms Wilson: Yes your Honour.
> His Honour: Why? Just because it's in a public place? I mean I would have thought that the offence requires that the act to be indecent per se and it then is found to be committed in a public place. I wouldn't have thought intercourse per se is an indecent act.
> Mr Rosser: If I can assist? It was seen by police your Honour.
> His Honour: I mean if anyone shouldn't be offended by it you'd think it would be the police ...'

After establishing that the alleged crime took place on a school oval his Honour said: 'Well I mean there but for the grace of God go a lot of people'. It is alleged by some unkind souls that his Honour altered the transcript as it originally read 'there but for the grace of God go I'. Judge Wall refused to have the couple arraigned, adjourned the matter and Ms Wilson lost her first plea of guilty.

[14] On 4 September last in the case of *Cesan and Rivadia v The Queen* the High Court ordered the retrial of two men convicted of drug trafficking. For present purposes the appeal had a number of interesting features. One was that between sentence and appeal one of the men wrote to the trial judge admitting his guilt and thanking him for conducting a fair trial. Despite this burst of misplaced honesty the appeal succeeded and on the grounds that the judge's conduct had led to a miscarriage

of justice. It took the two accused 3 years to realise how unfair the trial had been.

[15] The successful ground of appeal was that the presiding judge, Judge Dodd, had been asleep for periods during the trial.

[16] It was claimed that the judge had fallen asleep for up to 45 minutes at a time, that his snoring had been noticed by the jury and that he was awoken only by loud noises from the Bar table. Whilst the 45 minutes claimed is probably an exaggeration, it has now formally been held, contrary to the views that prevailed in the NSW Court of Appeal, that a trial judge must remain conscious throughout a trial. Judge Dodd could have done with the help of the three mystic dwarves that Justice Dutney mentioned last year – Armand, Luis and Angel – who helped a judicial officer in the Philippines to write judgements when in a trance.

[17] I note too that in the course of argument in the *Cesan* case Justice Heydon observed that judges are not supposed to read books or work on other judgments or conduct correspondence when they are supposed to be attending to a trial. All that I can say about this is that the practice in Central Queensland will not change following the High Court's judgment in *Cesan and Rivadia v The Queen*.

[18] The High Court was concerned in that case that there had been fundamentally a miscarriage of justice. On that note and a more serious one I wish to draw to your attention the comments of Sir Gerard Brennan concerning the anti-terrorism laws that have been introduced into this country. He was commenting on the case of Dr

Mohammed Haneef who, as I am sure you all know, was detained and interrogated for twelve days in July 2007 and charged with terrorism offences but these charges were later dropped. Sir Gerard, a former Chief Justice of the High Court, listed three areas of concern: 'unjustified discrimination which drives a wedge between elements of our society; excessive interference with human rights; an absence of judicial supervision which exposes individuals to oppressive exercises of power'. Sir Gerard asked: 'Is it possible to devise an effective pathway to legal advice and to accord exercising habeas corpus jurisdiction, casting on the Commonwealth authorities the burden of justifying detention, compulsory questioning and isolation of individuals from contact with family and friends?'

[19] When I was last a speaker at this conference I expressed my concerns about these anti-terrorism laws. At that time Dr Haneef's case was a year in the future. His case, in my view, is a stark reminder that these anti-terrorism laws can go badly wrong. There has never been a justification put forward for the need for these laws. There has never been a case mounted to demonstrate that the existing laws and processes were not sufficient to enable proper investigation and judicial processes to be implemented.

[20] Two events of great historical interest occurred this year. The election this week of Barrack Obama to the office of President of the United States was a momentous event. He has proved to be a magnificent orator, one of the finest I have seen. Lets hope that his judgment on the issues that lie ahead of him is every bit as good. At the very least he should eclipse George Dubya's efforts and we can only hope by a

long, long way. Let his example remind us too that race, religion, sexual orientation, disabilities of any kind, age and gender only divide us if we let it.

[21] The second matter of interest is the passing of the Criminal Code and Jury and Another Act Amendment Act 2008 (Act No.50 of 2008), assented to on 19 September. It introduced two things of interest - judge only criminal trials with an accused person's consent and majority verdicts in Queensland, doing away with a 1000 years of tradition. The A majority of 11 may now convict on charges other than murder or Commonwealth offences after at least 8 hours have passed since the jury retired to consider its verdict. Justice Cullinane reports that there has already been one majority verdict in a trial he conducted at Mt Isa. This presents a major shift in the approach of our society to the issue of our concern about avoiding the conviction of an innocent person. We are not the first to go down this path. But we would be foolish to think that it does not carry risks and risks that we might find unacceptable.

[22] Legal fees are a constant source of concern for the practitioner to try and get the balance right. One enterprising attorney in Chicago thought that he had stumbled upon a mutually agreeable way for a client to reduce legal fees. The client happened to be a professional stripper and so in part payment of legal fees the attorney accepted nude dances from her in his office. Whilst the details that I have do not indicate the hourly rate, the credit that he provided of $534 was not enough to avoid a complaint being made and the attorney receiving a fifteen month suspension for misconduct.

[23] On the subject of fees I note that on 7 October The Age in Melbourne reported the results of a national survey concerning Legal Aid. Legal Aid fees were described as 'poor', 'shocking' and 'absurdly low'. One Victorian barrister said that the fees were 'enforced poverty for lawyers' and stated that the barrister 'would prefer to do it for free than be so insulted by low fees'. Interestingly, according to the results of the survey, Victorian and Queensland barristers performed an average of between 51 and 70 hours of pro bono work during the year compared with a national of between 41 and 50 hours. I congratulate those here who donate their time and skill to those in need.

[24] Whilst you might be alarmed at news that in your own back yard two Supreme Court judges and one District Court judge have a penchant for dressing a little differently things are far more serious in England where the news is that civil court judges have abandoned the horse hair wig and donned what is described as a modern robe. The robe is dark blue in colour apparently gabardine with velvet facings and has been described as making judges look like warlords and the robes a cross between a Star Trek costume and a fascist storm trooper's uniform. No doubt we will follow suit in the fullness of time. And Justice Dutney, Judge Britton and I will feel right at home.

[25] Speaking of home the Deputy Chief Magistrate of South Australia is making some history of his own. Dr Canon held the interesting not to say novel idea that if he thought prisons were over crowded then he shouldn't send people there. On 23 May he sentenced Michael Patrick Bieg to a four year jail term for non-aggravated serious criminal trespass, theft and common assault but suspended the jail term wholly

on that ground warning that the courts 'must take into account the current conditions in the prisons'. Whilst this approach is unlikely to catch on the interesting point for us is that Dr Canon took considerable umbrage when the Attorney-General for South Australia, Mr Michael Atkinson responded that he doubted whether any competent Magistrate would pay attention to Dr Canon's 'daft' and 'delusional' views. This prompted Dr Canon to sue for defamation. This seems to be a first – the Deputy Chief Magistrate in court against the Attorney General in a defamation suit.

[26] Coming closer to home still, I had the task of presiding over a trial involving a Mr Wilkinson. One of the issues that interested counsel – not all that interests counsel interests the judge – was whether Mr Wilkinson limped. His good friend Mr Gleeson was questioned about it by the cross-examining counsel, Richard Morton as follows:

> 'Seen him walk without a limp; what's the story? -- Well, you know, when you look at your missus day after day and six years later someone says she's got fat but you really haven't noticed, well it's sort of the same thing when you see them all the time. I suppose see I don't know if he walks with a limp all the time or not because you get used to looking at it,"
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> Mr Gleeson finished his answer with the question "You know what I'm saying?'

[27] All that I can say is that neither Richard Morton, nor Graeme Crow who was appearing for the plaintiff, nor myself had a clue what he was talking about.

[28] We have at least two matters worth celebrating that I wish to comment on.

[29] On 22 September Anne Demack, as she once was, became her Honour Federal Magistrate Demack. Anne practised here for some eight years principally in the family law jurisdiction. And she was of course well known to the profession prior to that due to her work as Associate to her father, the tenth Central Judge. It goes without saying that her appointment was warmly received by the profession.

[30] I don't intend to let my old friend Hugh Grant off without a mention. In the New Year's Day honours list Hugh received the Order of Australia for services to the law and the community. I was his neighbour for some 20 years and can attest to the many hours of his own time that he put into working on numerous Boards and Committees. His lifetime of high ethical standards and outstanding achievement is a life that every lawyer can only hope to emulate.

[31] Hugh Grant joined his father's firm in 1964. He was the third generation of his family to become a solicitor and practice in the firm and his son Allan the fourth generation. Of course back in 1964 there were older clients who well remembered his grandfather, also named Hugh Grant. On one occasion an elderly client asked the receptionist if she could see Mr Grant and the receptionist inquired 'Which Mr Grant', to which the receptionist replied 'The young Mr Grant'. On being led into Hughie's room she exclaimed 'Not that young!'

[32] For a new judge it is quite daunting to take over the running of the Supreme Court in Central Queensland. There are many facets of the people and practice that I know nothing about and I am deeply grateful for the assistance I get from Ben Cooke, my Registrar, and his excellent team in the registry.

[33] For myself I have had a year full of novelty and interest. As most of you I hope know, the Central Judge's circuit encompasses as far south as Bundaberg and as far north as Mackay. I know that I am a relatively inexperienced judge but there cannot have been too many of my colleagues who have had to trek their way to court in bare feet dressed in footy shorts and a tee shirt when Mackay was hit with the biggest flood since Brian Harrison last knocked back a paying brief. Whilst I was ready to go at 9 o'clock for the application that was listed for that time, Harrison rang in with some limp excuse about being unable to open his garage door and so get his car out.

[34] And I was faced with a somewhat novel excuse in Bundaberg. In a trial concerning the production of a cannabis crop, the counsel and solicitor representing the defendant asked to be excused on the grounds that they had now become potential Crown witnesses against their own client as they had seen him attack a co-accused with his walking stick in the precincts of the court after he had been told that the co-accused had pleaded guilty and turned Queen's evidence.

[35] As many of you know I practised in Rockhampton for some 25 years before taking a short sabbatical in Brisbane for five years. In my five years away much changed here in Rockhampton. The mining boom occurred, causing asset prices to rise dramatically. Fortunately I had sold all my assets the year prior to the dramatic increase in value and so managed to preserve my unenviable reputation of having no financial skills whatsoever.

[36] So far as the profession is concerned the mining boom and consequent increased commercial and related activity brought with it new firms

and new faces. There are many in practice here now who were not here when I left. The young lawyers of Rockhampton were kind enough to invite me to drinks recently. I was astonished both at the number present and of the gender divide – out of 20-odd lawyers only three were males. And I do not count Cameron Press, Justin Houlihan or myself in the youngsters' category. I mentioned the dearth of females in practise in 1977 last night. Then there were 4 females in practice – two solicitors and two articled clerks. I make no complaint – far from it. The profession needs to renew and refresh and it was exciting to see so many new and young people in practice.

[37] Speaking of Cameron Press he and Cherie celebrated 25 years of marriage by travelling to Europe and travelling down the Rhine with the Dutney-Springers. They weren't the only ones to travel. The Grants were rewarded for their assistance to the Iwasaki family over three decades with a trip to Japan, have abandoned Bridge and now play mah-jong. Harrison now practises out of the Punjabi chambers after his visit to India where the Loanes, Jill and Paul, will soon be going. Judge Britton celebrates his 10th year in office and managed three weeks away in Europe in the mid year with wife Christine. And John and Deidre Shaw are celebrating Dee's 60th in a novel way. Shawy is going to Tasmania with the boys and Dee to London on her own.

[38] We had a new magistrate appointed during the year – Her Honour Magistrate Maxine Baldwin. Unfortunately her welcome to town function was barely over before she left for Gympie. A magistrate's life has its ups and downs. You never quite know what to do with some criminals. Along one of the main roads in the city of Rotherham the

daffodils coming into bloom spelt out the words “Shag” and “Bollocks”. The bulbs had been planted the previous Autumn by a gang of thieves doing community service. And I wonder what magistrates Hennessy, Springer and Judge Butler would make of the case of Mrs Julie Amiri, a 35 year old lady arrested for shoplifting in Oxford St London. Her defence was a novel one at least in my experience – she claimed that she was compelled to perform such illegal acts as were likely to lead to her arrest as only in such circumstances could she achieve orgasm. Doctors supported her contention and she was acquitted.

[39] Enough of the law. It is time to go home exhausted from our labours. I would like to thank the conference organisers. Nicci Schmidt is attending her first conference and has been prepared to do so as President and chief organiser. She deserves our warmest congratulations for a job well done. Thank you to all who have helped her.

[40] It is now my pleasant task to close this conference, wish you all a safe journey home and look forward to your company again next year.