Closing Remarks to the 2004 CQLA Conference

Rydges Capricorn Resort

24 October 2004.

It is with pleasure that I accepted this opportunity of presenting the closing remarks for this year's conference. Because of family commitments I have not been able to spend the whole weekend here this year but I have attended the important bits - the welcoming drinks and the dinner. But then, I don't need CPD points.

It seems to be the case that every year I am asked to address the ubiquitous topic of "Closing remarks". Because of my position I get the feeling that the organisers think I will be offended if I don't get the opportunity to say something but keep it short and nothing too substantial. A few inane ramblings on disconnected topics should keep me quiet for another year.

Speaking of inane or rambling or both, I was reading recently about a survey conducted within British Universities by *The Independent* newspaper. It revealed these interesting statistics: 4% of lecturers trip or stumble when mounting the rostrum; 24% of lecturers are so quiet as to be inaudible; 34% are so prolix as to be incomprehensible; 4% are so small as to be invisible; 92% of lecturers insert at least 3 slides upside down; 45% of lecturers are frightened by the very idea of Power Point; 86% of lecturers would rather be doing something else and 92% of students agree with them.

I do not intend to use any slides or power point presentation so those statistics are irrelevant. I will try to be brief, I will not use long word and

I will speak up. Whether I prefer to be here or elsewhere is something I intend to keep to myself and whether you agree is likewise a very private matter about which I will not enquire.

I am left therefore with the stumblers. While I didn't stumble as I approached the rostrum and thus placed myself within the more agile 94%, the fact that there was a step at all might demonstrate the subtle shift in emphasis within a litigation neurosis.

Apropo of nothing except perhaps litigation neurosis, one of the traditional pastimes of English children has always been playing conkers. Conkers, as you know, are horse-chestnuts attached to a string. The object of the game is to strike your opponents conker and shatter it. The game is taken so seriously that there is an annual world championship contested by grown ups who really should be doing something more useful.

The Times of 8 October records that Cummersdale Primary school in England has taken the step of providing its infants with eye goggles to prevent injury while playing conkers. Unbeknown to the school authorities, however, they have barely scratched the surface in relation to risk. In Norwich horse-chestnut trees are being removed to prevent children suffering the dreadful fate of having a chestnut fall on them. While I can understand the concern about coconuts expressed by the Burnett Shire while I was in Bundaberg recently, I should think the odd chestnut wouldn't do the kiddies any harm at all, especially now that teachers are banned from giving then the old fashioned "crow peck" on the scone with a knuckle – very popular in my primary days.

Alas, even Norwich hasn't seen the real danger. The Stirling Royal Infirmary in Scotland has discovered that the skin of a conker, if hit by another and thereby breached, might – just possibly – release moisture which, if breathed in by a child with a nut allergy might cause a reaction, even if not eaten. Yes! Conkers kill! Poor old Cummersdale Primary. Not only have they failed to alleviate the real risk of conkers they have in their well intentioned incompetence even put the children at risk by giving them goggles. The Hertfordshire County Council tried goggles as a way of helping nervous children get used to swimming. Its health and safety advisers were appalled. They pointed out that goggles, when removed, can "spring back and hit children in the face" – and banned them altogether.

Grown men drawing public salaries plainly believe that unless conkers are banned children will collapse in playgrounds all over the United Kingdom, clutching their throats, their heads bruised and faces lacerated from retaliatory goggle strikes.

I was talking about a subtle shift in emphasis within litigation neurosis. Last year I spoke from floor level. This year the conference facility has reinstated the dais. It shows that on this occasion the risk of a speaker being in that clumsy 4% who trip over the step could be accepted. After all Rydge's could argue that tripping over the step might be an obvious risk of a dangerous recreational activity under s 19 of the *Civil Liability Act*. Of course Rydge's would have to satisfy the judge that addressing the CQLA conference was an activity engaged in for "enjoyment, relaxation or leisure", but how could anyone doubt that? More worrying to Rydge's though was the fear that without the step speakers might fall into the missing 4%; those whose height disadvantage renders them

invisible to all but the front row of seats unless they are elevated to artificial heights - the fear that the shame of their disability would cause short speakers to decompensate and suffer massive but foreseeable psychological injury. When delivering the state of the nation address on Friday afternoon, Glen Ferguson addressed the need for solicitors to be innovative in seeking out new areas of work. It was sound advice and the fact that I remember it shows I was not only there but listening. Perhaps it was just such a case of unfair discrimination on the basis of physical impairment that he had in mind

Last year the conference programme on the Friday included what I thought was a very useful segment on advocacy for young practitioners. The topic was missing from this year's programme so I thought I might venture a few trepidatious remarks on the subject. As you can see I am trying to pursue a consistent theme from last night's address. It is driven by a fraternal concern to educate young practitioners in relation to what might be in store for them.

The most daunting prospect many young lawyers face is representing the client with no arguable case. This year has seen the ingenuity of counsel and the patience of judges strained by a number of novel submissions.

One noted example involved Italian footballer Francesco Totti who was charged with spitting at an opponent in a Euro 2004 match against Denmark. His lawyer, Giulia Bongiorno, said that Totti had told her that the unsporting conduct had been committed by "another personality". She argued that the Totti she was representing "is a sensible and socially responsible person who has helped people in difficulties". Both of the Tottis were suspended for three matches. It sounds very like the defence

of post traumatic amnesia run by an NRL player during the season to justify a king hit on an opposing player. That plea achieved a similar level of success.

In January this year, the Court of Appeal in Hong Kong dismissed the appeal of a man convicted of murdering his mother by hitting her with a hammer 30 times. His contention was that because he was provoked he should only have been convicted of the lesser offence of manslaughter. Counsel argued that after the mother had been felled by the original hammer blows she provoked her son to inflict further and fatal blows by staring at him in a "scary" way while she was lying prostrate on the ground.

Stock JA was not persuaded. He commented that it was "scarcely believable" that any member of the bar would advance such an argument. Had the matter not been so tragic, the court "might have wondered whether it was advanced as a serious proposition". But "rather than let it go", counsel had "assured us that he was indeed being serious".

David Pannick QC who writes a regular column for the Times newspaper commenting on esoteric legal matters, after reciting the above facts, offered this advice to young advocates:

"Based on some years experience, I have always found it to be a useful rule of advocacy that if a judge asks you if your submission is a "serious" one it is normally sensible to move on to the next point."

This concept was apparently foreign to the counsel in the matricide case. Justice Stock was moved to comment that a court had no obligation "to

absorb and suffer in silence the articulation by counsel of whatever notion, regardless of merit, comes to counsel's mind".

David Pannick comments that such annecdotes perform a valuable role. They remind us that whatever our own inadequacies in court, however disappointed we might be with the judge's rejection of our submissions, it could have been worse.

Indeed it may not even be what you <u>say</u> that gets you into trouble.

A Sri Lankan judge, Judge A.K.M. Patabendige recently jailed a man, the defendant in a criminal case, for contempt in the face of the court for yawning in a manner the good judge found offensive. Jailing for contempt seems an extreme reaction to a yawn. A quick witted jurist can usually achieve the same ends by other means. A Canadian magistrate, A.B. MacGillivray, once sentenced a man for a drinking offence. "I'm fining you $25 …," he commenced. "No problem, your worship," chipped in the offender, "I've got that in my arse pocket." Without blinking his worship went on, "…And sentencing you to 30 days in the county jail. Have you got that in your arse pocket?"

A Kenyan High Court judge, Onesimus Mutungi has just been asked to retire for sentencing a lawyer to write a 3 page essay on the law of contempt. The penalty was unusual but no more so that Judge Jeffrey Schwarz in Miami Beach this year who sentenced Michael Carreras for playing rap music too loudly and violating a noise law to listen to the whole of Verdi's *La Traviata.*

Legal ingenuity is not always granted the rewards the ingenious author might wish. In *re Horvath (Senior)* [2004] VSC 332, Mr Horvath sought to get around his declaration as a vexatious litigant by arguing that it only prevented him instituting civil proceedings. It did not stop him bringing a criminal prosecution against the Commonwealth Bank and the Commonwealth Government for treason. Justice Osborne disagreed noting that it would be interesting to hear his argument as to how the Commonwealth could commit treason against itself. Mr Horvath's complaint was that the Commonwealth Bank had made him bankrupt under the Commonwealth bankruptcy laws.

As has become my custom on these occasions I would like to say something about the year past.

Since we last met here the Rockhampton lawyers have been soundly thrashed at cricket by the doctors. We did not go down without a fight. Blood was spilt in defence of the honour of the local lawyers. By the time I arrived at the ground (about half an hour before the start of play) Gerard O'Driscoll was already sporting a bloodied and broken nose. When I discovered the injury had been suffered while he was trying to hit catches to the fieldsman as part of the warm up I became concerned at our prospects. Rennie Anderson's enthusiasm in the outfield came to an abrupt halt when he tore the webbing in his hand trying to catch a well hit ball. The assembled medicos were appalled when Rennie asked if one of them could drive him over to the hospital to get it seen to. Since there were about 15 doctors in attendance at the ground, Rennie's request was seen as a professional insult. Nonetheless he persisted and went to the hospital. I think it was just as well. Some of the suggested treatments the doctors discussed after his departure would have curdled his blood.

Leaving aside social matters, the most significant event in Rockhampton legal circles this year will be the retirement of Tom Bradshaw next Friday. While a formal valedictory will be held on Tuesday 2 November next I would like to take this opportunity to say something about Tom.

Tom will be sorely missed. As a magistrate Tom is hard working, fair and competent. I would feel well satisfied if the same could be said about me when I hang up the gavel. In addition, Tom has a wonderful rapport with ordinary people. I was in Bundaberg for three weeks recently as many of you know. I spoke about Tom's retirement with Barry Barrett, the Bundaberg magistrate. Barry's comment to me was that he loved having Tom circuit to Bundaberg. He would do whatever volume and type of work was asked of him. In Barry's words, "If I asked him to go across the road and pull weeds out of the railway tracks Tom would be down there doing it without ever asking why." This is despite Tom telling me that he considers he effectively retired when he left Mackay about 5 or 6 years ago. He must have been a ferocious worker then.

The general consensus of Rockhampton lawyers when I came here was that Allan Demack would be a hard act to follow. I think the same could be fairly said to Tom's replacement. Next year we will know more about how that gap has been filled. For the present we are privileged that Tom will be staying in Rockhampton in his retirement and enjoying his new role as a grandfather.

From the Court's perspective the volume of work in Rockhampton is largely unchanged. Few civil cases run to trial and crime rates are modest. Much more civil work is done in Mackay and much more crime

is done in Bundaberg which, for whatever reason, seems to me to have a very serious drug related crime problem at present. In civil my impression is that more of the work is being done by local counsel now than at any other time since I came here. I think the solicitors should be commended for their support of the local bar. Of course, the onus is now on the bar to justify that support. One of the downsides of such low rates of trial work in Rockhampton is that I am spending more time away on circuit. That was most apparent recently when I was away for 11 out of 13 weeks since mid July. I must say that I would rather be at home and I regret not being available to the local profession as much as I would like. I will try to better organise my calendar next year.

This conference is the only occasion I have the pleasure of catching up with out of town personalities like Rodney Boyce. I should mention that some of the books Rodney donated to the Supreme Court library via Kay de Jersey at last year's conference dinner were a source of some excitement for the librarian, Aladin Rahemtula and featured during the year on the library's list of important acquisitions. Aladin and Michael White QC from the library's historical programme were in Rockhampton recently and a most successful meeting was held in the court. It was gratifying to see that Rees Jones have offered to take a lead role in helping to establish permanent display facilities at the court building to house displays of particular interest to the legal profession in this region as well as visiting displays. Sue Smith from the Art Gallery has also shown interest, particularly in the Art Gallery and the Court jointly hosting an exhibition. I am looking forward to exciting developments in that area. Because of my absences recently I have not been able to follow those matters up and I intend to do so over the next couple of weeks.

I strongly believe that as a public building with some excellent facilities, we should be looking at ways to make more use of the courthouse. Apart from the Supreme, District and Magistrates court, a number of tribunals make use of the court for hearings. Rooms are regularly made available to solicitors for settlement conferences and mediations. In September I hosted a successful dinner for over 40 on the roof top for the Beefsteak and Burgundy club. Next June the Justices of the Peace association have been offered the use of the court facilities for their state conference. I am sure there are many other uses to which the facilities can be put which are not inconsistent with the building's primary purpose and which will lead to a greater community involvement with the administration of justice in this region.

The Chief Justice and Kay de Jersey again honoured us with their presence. Year after year they make the effort to join us at this conference. As I said last year we are very grateful to the Chief Justice for making us feel part of the wider legal community in Queensland and particularly grateful to Kay who has supported us continuously. Unfortunately, because of vice regal responsibilities they were only able to stay on Friday evening this year, but the fact that they came at all in those circumstances is evidence of their commitment.

Having avoided either of the dreaded 4%'s you will be pleased to note that I intend to be part of the 27% of lecturers who finish more than 5 minutes early.

This conference has come to an end. I doubt that any of you want me to delay things by waffling on. Once again I believe the conference has been a success and we owe thanks to John Siganto and Stephanie

Nicholas as president and secretary respectively for organising it. Over the last 5 years I have come to regard this event as an annual highlight which I am reluctant to miss. Would you join with me in expressing your appreciation for their effort.

The conference is now at a close. Thank you all for your attendance. I look forward to seeing you again next year and I wish each of you a safe journey home.