

**12<sup>TH</sup> BIENNIAL CLANT CONFERENCE**

**BALI 2009**

**CRIMINAL JUSTICE - DIAGNOSIS TERMINAL**

***SERVING IT UP IN COURT - VOLLEYS, LOBS AND SMASHES***

*A series of vignettes performed by the CLANT players, presented  
by Rex Wild QC, at the Rinjani Hall Bali Hyatt Sanur  
at 9.00 AM sharp on Thursday 2 July 2009*

**PROGRAMME & INTRODUCTION**

**[HERE TO BE INSERTED THE DINGO EMBLEM]**

## INTRODUCTION

This presentation is almost purely for entertainment. Having said that it does have relevance to the theme of the Conference. The criminal justice system only works when all the participants are in reasonable equilibrium with each other. If they are not then, in the worst excesses, the system collapses entirely. History is full of examples of such disasters. Having said that, it is not suggested that any of the pieces here presented are in that worst category such that the Rule of Law itself might be challenged.

The selection of the particular pieces is, in fact, somewhat haphazard. It does demonstrate that the adversarial system which we all practice has a long history, although I have only gone back as far as 1603 to demonstrate this. Previous play readings presented to the CLANT Conference all are replete with examples of the improper behaviour in Court by all participants over a long period.

We are all aware of the ethical standards under which we operate, with duties to the Court, the law and the client. But the desired personal satisfaction (gratification?) and individual idiosyncrasies often get in the way of complying with those standards.. It was originally intended to title this presentation as *Courtesy, Competence and Contempt*. It has a certain alliterative ring, does it not? However, I only found my draft of the material and its tentative title recently and too late to trouble the programmers. I hope the present title suggests the essence of the programme that will follow.

I provide below a statement of the *Duty to Maintain the Dignity of the Law* taken from *Hampel on Ethics and Etiquette for Advocates* which was conveniently to hand when I was penning these preliminary notes.

*To be effective in resolving disputes according to law, in protecting rights and enforcing obligations the courts must maintain their authority and public confidence.*

*The adversary system, by its very nature, tends to excite feelings of advocates and produce tension which may lead to inappropriate behaviour in the heat of battle. This can interfere with the impartial calm and orderly process that is conducive to justice being done and being seen to be done with dignity and decorum.*

*There is therefore an ethical obligation on advocates to assist in the administration of justice by maintaining the dignity of the court and its processes.*

*The difficulty lies in distinguishing between what amounts to a departure from the rules of etiquette and good manners and what involves a breach of ethics. The distinction may be a matter of degree, but it generally lies in the extent to which the conduct in question affects the Court's ability to perform its role properly, or to appear to be able to do so.*

*Arrogance, lack of punctuality, inappropriate forms of address, and discourtesy towards the court, the witness, or the opponent are examples of breaches of etiquette and are bad manners. All are unbecoming for a professional advocate. They also diminish the quality of advocacy and the advocate's standing and reputation in the profession.*

*Of even more concern is abusive or harassing behaviour, disregard for the court's rulings, and any interference with witnesses, jurors, or the court staff in a manner which may affect the process itself. Such conduct is unethical and, in extreme circumstances, may amount to contempt of court.*

It is the matters contained in the last two paragraphs of this excerpt with which we will be particularly concerned in the vignettes which follow.

They are all examples - some very well known ones - of humour and of misbehaviour in Court both on the Bench, at times, and more especially at the Bar table. Some are famous exchanges with which most of you will be familiar, but some are taken from my own experience (war stories over coffee in Bar Chambers). I have provided you with the antics of two North American attorneys. The behaviour of Owen W Crumpacker is beyond belief. His legal career is probably worth a play in its own right. There is also a very quaint exchange between a Canadian Judge and Counsel.

I have also included part of the famous cross-examination of Oscar Wilde (with an "e"! ) because it's wonderful to read).

Each scene will be introduced by your Narrator, but I now provide you with the staging details, and identify the players, for each scene to help you enjoy the experience.

As usual, I thank all the players for their contributions, and you as the audience, without which there would be no pleasure or point in preparing and making this presentation.

REX WILD  
Darwin and Bali  
June/July 2009

## CLANT BALI PLAYERS [BY SCENE]

1. Lord Chief Justice  
     Popham           Austin Asche       [AA]  
     Lord Cecil        Jenny Blokland   [JB]  
     Sir Edward Coke   Tom Percy  
     Sir Walter Raleigh Grant Algie
  
2. Justice Collins       AA  
     Edward Carson     John Lawrence  
     Oscar Wilde        Dean Mildren
  
3. Judges [various]    AA  
     F.E.Smith          Julian Burnside
  
4. Judge Mitchell       AA  
     Defence lawyer,  
     Harry O'Halloran John Prior  
     Accused            Peter Thomas
  
5. Harold Daly SM     AA  
     Denis[e] Smith       Fiona Hardy
  
6. Members of Indiana  
     Supreme Court     AA & JB  
     Owen Crumpacker Tom Berkeley  
     Harris             Michael Crawford-Fish  
     Abrahamson        John Neill
  
7. Vic County Court  
     Judge             JB  
     Peter Jones        Richard Coates
  
- Canadian Judge       JB  
     Canadian Counsel Anne Healey  
     Prosecutor         Glen Dooley
  
9. NSW District Court  
     Judge             JB  
     Defence Counsel   Beth Wild
  
10. WA DC Judge        JB  
     Defence Counsel   Belinda Lonsdale  
     Accused, Wilson   Russell Goldflam
  
11. NT Supreme Court  
     Judge             AA  
     Prosecutor         Libby Armitage  
     Mr. Davies         Scott Corish

12. WA Magistrate JB  
Burnside  
of Counsel Phil Urquhart  
Witness Spalvins Damien Jones
13. Vic Magistrate JB  
Defence Counsel Matthew White  
Witness Charlie Rozencwajg
14. NSW DC Judge AA  
Naughton Jack Karczewski  
Prosecutor Bower  
Defence Counsel Tom Pauling  
Caffery

## SCENE I

17 November 1603

The Courts of Justice sitting at Winchester presided over by the Lord Chief Justice of England Popham, five other Judges and five Commissioners including Lord Cecil. There was also a separate jury of twelve men comprising four Knights and eight *Esquires*.

Sir Walter Raleigh was charged with treason against James I. He was not entitled to counsel and represented himself. The prosecution was led by the Attorney-General, Sir Edward Coke [Cook] (later the famous Lord Chancellor). He prosecuted, to say the least, with vigour. The actual words taken from the original transcript (from *Cobbett's Complete Collections of State Trials*, Vol II at 1) have been modified only slightly for the modern audience. At this distance, Coke's performance looks overbearing and overzealous. Raleigh was found guilty at this trial following a 15 minute deliberation by the jury (all on the one day) and was sentenced reluctantly by Popham LCJ, it appears, to be hanged, drawn and quartered. In fact the sentence was not then carried out, nor was it for 15 years. Raleigh spent a lot of that time in the Tower but also was released to carry out a voyage of discovery and treasure-seeking on behalf of the King. For some reason, however, it was decided to execute the warrant for the original sentence and on 28 October 1618 he was brought to the King's Bar at Westminster where the Lord Chief Justice (now the same Sir Edward Coke) ordered a warrant for the execution. It was carried out the next day but he was, in deference to the King's high regard for this traitor, only beheaded!

### PLAYERS

Lord Chief Justice Popham:	Austin Asche
Lord Cecil:	Jenny Blokland
Sir Edward Coke:	Tom Percy
Sir Walter Raleigh:	Grant Algie

## SCENE II

The Old Bailey London, 3 and 4 April 1895

Before Justice Collins and Jury.

The accused, John Douglas - Marquis of Queensbury, was tried for publishing a malicious libel in respect of one Oscar Fingal O'flahertie Wills Wilde (with an *et*).

It was initially a private prosecution. Sir Edward Clarke appeared for the prosecution, (the complainant being Wilde) and Sir Edward Carson QC for the defence. It was Wilde's *friendship* with the accused's son, Lord Alfred Douglas that led to the issue of the libel.

After the cross-examination, which lasted many hours, Carson opened the defence's case in detail. Shortly after, the prosecution collapsed.

It is this writer's impression that one answer Wilde gave, which you will hear, effectively rescued Carson from what appeared otherwise an even intellectual match between the two men. The transcript is taken from *Irish Peacock and Scarlet Marquess* by Merlin Holland. It may be significant that the cross-examination by Carson is contained in pages 64 to 213 and the relevant question is asked at 207. It took a long time to get there!

Wilde was later charged with *infamous crimes*, found guilty and sentenced to imprisonment. It was the material gathered by the defence in the libel case, which was then handed to the authorities, which led to his downfall.

#### **PLAYERS**

**Justice Collins:**      **Austin Asche**  
**Oscar Wilde:**        **Dean Mildren**  
**Edward Carson:**    **John Lawrence**

#### **SCENE III**

FE Smith (1872-1930), later Lord Birkenhead, was a famous counsel who clashed regularly with the bench. What follows is a number of stories about him which have been compiled as if in one case. The separate cases actually involved Justices Ridley and Wills.

#### **PLAYERS:**

**The representative Judge(s):**    **Austin Asche**  
**FE Smith KC:**                      **Julian Burnside**

#### **SCENE IV**

Judge Mitchell was a judge of the County Court in Victoria. He had a reputation for getting to the nub of things. In this case in the 1960's he was dealing with an appeal from the Magistrates' Court. Harry O'Halloran was appearing for the appellant. The latter had a long string of prior convictions and had been convicted of stealing a pair of bathing togs from a store and sentenced to three months gaol. The store employees, store detectives and police had given evidence and Harry put his client in the witness box. He was almost half way through his story when the judge asked him a telling question.

#### **PLAYERS:**

**Judge Mitchell:**                      **Austin Asche**  
**The Appellant:**                      **Peter Thomas**  
**Harry O'Halloran**  
**of Counsel:**                          **John Prior**

## SCENE V

It is Brighton Magistrates' Court Victoria in 1976-77. Harold Daly SM is presiding. He was, unconsciously, a comedian. When summing up a case - prior to decision - he used his hands to balance justice. He tended to favour the prosecution side. The introductory words of what follows I have re-invented, but thereafter it is a true record. The Magistrates' Court that day was full of defendants, waiting hearing of their traffic offences.

### PLAYERS:

**Harold Daly SM:** Austin Asche  
**Denis[e] Smith for Counsel:** Fiona Hardy

## SCENE VI

The delightfully named Owen W Crumpacker had practised as a lawyer in Indiana USA for far too many years. In 1978 the Supreme Court of Indiana heard a disciplinary proceeding against him brought by the Indiana Supreme Court Disciplinary Commission. There were numerous violations including dishonesty, deceit, misconduct and the directing of discourteous and derogatory remarks towards opposing counsel, parties and the bench. He was found guilty of the 19 counts by a full bench and disbarred. The case makes entertaining, if somewhat sad, reading. His behaviour at the hearing effectively exemplified his unfitness for practice. An addendum to the judgment identifies many of the additional offences committed during the hearing itself. As he was to be disbarred, however, as a result of the disciplinary hearing, there was little point pursuing those further offences. I have rewritten the addendum to give the flavour of the man [see 383 *North Eastern Reporter*, 2d series at 36, 53-54]. Mr Hughes appeared on behalf of the Commission to prosecute the complaints. Mr. Abrahamson was a member of a firm which had made complaints against Crumpacker and he was present at some part of the hearing.

### PLAYERS:

**Members of the  
Indiana Supreme  
Court** Austin Asche & Jenny Blokland  
**OWC:** Tom Berkeley  
**Mr Hughes:** Michael Crawford-Fish  
**Mr. Abrahamson** John Neill

## SCENE VII

In the early 1980's the County Court of Victoria is sitting on circuit in the country. Each day a new short criminal trial starts. Evenings are often spent in good fellowship. There was a particular kind of robust prosecutor who went on these

circuits. He, and his colleagues, usually enjoyed red wine at evening get-togethers. They all smoked. Morning came with a particularly nasty rape case to be tried. Mr Jones, one such prosecutor, had a rich and gravelly voice. He was unfailingly courteous to the defence counsel. He would usually introduce him at the commencement of his opening. The jury was empanelled and in charge and the case started.

**PLAYERS:**

**Judge:** Jenny Blokland

**Mr Jones,**  
**the Prosecutor:** Richard Coates

**SCENE VIII**

An Ontario provincial court (criminal division) Canada in early 1987 (sourced from *Victorian Bar News* 1987 Summer Edition, 42). Defence counsel had been asking a Police Constable about his use of binoculars during surveillance of a suspect and the judge eventually asked him/her to explain the line of questioning.

**PLAYERS:**

**Judge:** Jenny Blokland

**Defence Counsel:** Anne Healey

**Prosecutor** Glen Dooley

**SCENE IX**

This was in the District Court in 1988 at Gosford, NSW (again reported in the *Victorian Bar News*). There are echoes of the Harold Daly method from the Judge in this case. Defence Counsel is making an application in a criminal trial, in the absence of the jury, for the Judge to disqualify him [her] self

**PLAYERS:**

**Judge:** Jenny Blokland

**Defence Counsel :** Beth Wild

**SCENE X**

This case was reported in NT Law Society's *Balance* of September 1991. It purports to be an extract of a transcript from the Supreme Court in Western Australia. This is another example of the client's instructions not being followed to the letter [As with other vignettes I have changed the gender of some of the protagonists. It

seems to me that without doing this there would be no female parts at all in this years' play readings [In my experience, Women lawyers cannot match men for inflated ego's rudeness and discourtesy].

**PLAYERS:**

**The Judge:** Jenny Blokland  
**Defence Counsel:** Belinda Lonsdale  
**The Accused,**  
**Wilson:** Russell Goldflam

**SCENE XI**

This was a trial in the Supreme Court of the Northern Territory (reported in *Fitzgerald v The Queen* (1992) 2 NTLR 200 at 213). The report is of the Court of Criminal Appeal decision in December 1991 with Martin BF, Angel and Mildren JJ on the bench. The following extract is from the trial itself. The name of the Judge need not be revealed! Near the end of the Summing Up, counsel for the accused, one Mr. Davies, invited the trial judge to put certain matters to the jury. His Honour did so. On the following morning, before His Honour continued with his Summing Up to the jury, counsel for the accused made a substantial submission about the lack of balance in the Summing Up. The CCA thought that submission without foundation but nevertheless His Honour the trial judge dealt with the matter somewhat more generously than either counsel had expected.

**PLAYERS:**

**Judge:** Austin Asche  
**Defence Counsel,**  
**Mr Davies:** Glen Dooley  
**Prosecutor:** Libby Armitage

**SCENE XII**

The Australian Securities Commission was prosecuting one Alan Bond in the Perth Magistrates' Court on 6 December 1995. Julian Burnside QC was cross-examining a Mr Spalvins. This is an amusing little piece of cross-examination.

**PLAYERS:**

**Burnside QC:** Phil Urquhart  
**Witness Mr Spalvin:** Damien Jones

### SCENE XIII

This and the previous piece are both reported in *Verbatim* from the *Victorian Bar News*. I cannot provide a citation but the particular case reported here involves a police prosecution of a Mr Hiddle heard before Mr McLean Magistrate at the Melbourne Magistrates' Court on 18 January 1996. Mr Sean Grant appeared for the defendant. The case is a good example of the axiom that you never ask questions to which you don't know the answer.

#### PLAYERS:

Magistrate: Jenny Blokland

Grant: Matthew White

Witness: Charlie Rozencwajg

### SCENE XIV

Stuart James McIntyre was prosecuted in the District Court in New South Wales in September 1988 for causing malicious damage to property by fire and stealing a motor vehicle. He was convicted. His eventual appeal was dealt with by the Court of Criminal Appeal in New South Wales on 21 October 1999 when the appeal was upheld [(2000) 111 A Crim R 211] mainly because of counsel's misconduct. This was described by the judges of the CCA as

*worse than anything experienced or heard about. Had it not been recorded in the transcript it would have been unbelievable that it had occurred? In a word it was appalling.*

This, then, is the piece de resistance of this presentation. Only a few examples of counsel's conduct are given in the judgment (at 215-217) but they suffice to indicate the flavour and nature of his conduct. The text has been altered a little. The behaviour continued over seven or eight separate days.

#### PLAYERS:

The Judge:

Naughton DCJ Austin Asche

Prosecutor Bowers: Jack Karczewski

Defence Counsel

Caffery: Tom Pauling