

IN THE COURT OF APPEAL OF THE SUPREME COURT OF VICTORIA

SITTING AT WARRNAMBOOL

TRANSCRIPT OF SPEECHES DELIVERED BY:

1. MR J.D. McARDLE, QC, on behalf of the Director of Public Prosecutions, Mr Paul Coghlan, QC.
2. MR O.P. HOLDENSON, QC, on behalf of the Victorian Bar.
3. MR NICOL, President of the Western District Law Association.
4. THE HONOURABLE CHIEF JUSTICE  
(Speech in Reply).

AT A GATHERING

On

MONDAY 27 MARCH 2006

TO WELCOME THE COURT

THE HONOURABLE CHIEF JUSTICE WARREN

THE HONOURABLE JUSTICE BUCHANAN

THE HONOURABLE JUSTICE ASHLEY

WARREN, C.J.: Mr McArdle.

MR McARDLE: Your Honours, I appear with my learned friend Ms Gardner for the Director of Public Prosecutions, and we at this stage welcome the Court to Warrnambool.

Since the inception of this Court in 1995 it has sat, on my calculation, 20 times in the major eight provincial cities of Victoria. This is the third time that it has visited Warrnambool. Over this circuit, which will conclude, we understand, on Thursday, the Court will hear argument in five criminal matters and I believe in one civil matter. The civil matter is a case about which I think I'm conspicuously unable to make any comment at all. Concerning the criminal matters, they consist of three Director's appeals against sentence and two applications for leave to appeal against conviction.

On the lengthy but interesting drive down here yesterday afternoon I ruminated, your Honours, on a number of matters. One was whether there was a pattern or significance in the nature of the criminal cases at least that are being presented for your consideration. Is there a profile to be adopted from these? For example, have we reached the stage where there are now more Director's appeals than applications for leave to appeal against conviction? Why is it that there is only one case as far as I can see that arises from Warrnambool or anywhere near Warrnambool? I am unable to present you with any conclusions in relation to that. Perhaps at the end of the circuit I will be a little better informed. Perhaps there are no conclusions to be drawn from the selection of cases. Perhaps the significance of the visit of this Court to Warrnambool lies elsewhere.

Your Honours, it is not at all unusual that courts go on circuit. It is probably as old as the establishment of central government, which in turn dates back to the reign of Henry II. The reason for circuits in those days was of course something different from as they presently exist. Of contemporary significance, it might be said - and this is often said on occasions such as this - that it demonstrates really two interconnected points: the first one, that this Court is about and for all Victorians, not just those who live in the metropolis or those who have easy access to the

metropolis, and that of course applies whether they are litigants or otherwise. The second matter, which is equally important, although it might not have impacted on the mediaevalists who commenced the practice of circuits, that it demonstrates that the proceedings are open and available to the public of this State; for the public who might be critical of the Courts, or might otherwise be of a view about the proceedings in the Courts, to come and look and to see and to examine the hearings and deliberations of the Courts. That is a matter of paramount importance, we say, and a matter that brings this Court to Warrnambool on this occasion, and the other circuits.

Your Honours, I have told you that I ruminated, as one has the opportunity on the trip down here. If I can have the indulgence of telling you something personal, when I was young - and I was once young, it was a long time ago - I lived here. I lived here exactly 50 years ago. I lived here I think for about three months. It was a glorious three months. When I left I felt as if I'd been expelled from the Garden of Eden, to go somewhere else. It was a marvellous three months. The extraordinary thing is, your Honours, that I have not to the best of my knowledge returned to Warrnambool. There is no reason for that, none whatsoever. I puzzled about it on the way down here. I've never been engaged to appear professionally down here, I've never had the wit to attend here for a holiday, so I'm very, very pleased to be back. I suppose I've wandered a little bit from what I intended to say. I've now just welcomed myself to Warrnambool. Perhaps I should now return to the task at hand, or, as my learned friend might say, back to the cause proper.

Your Honours, on behalf of the Director of Public Prosecutions, who will appear in all five of the criminal cases, we welcome the Court to Warrnambool. We hope the stay is enjoyable and the presence of the Court something of some considerable importance to the community. Thank you. If the Court pleases.

WARREN, C.J.: Thank you, Mr McArdle. Mr Holdenson.

MR HOLDENSON: May it please the Court. On behalf of the Victorian Bar, it is my pleasure to speak at this ceremonial sitting to mark the commencement of the Court's

sitting here in Warrnambool. As Mr McArdle said, this is the third time that the Court of Appeal has sat in Warrnambool. The Court previously sat here in August 1998 and again in March 2003. This therefore marks the third occasion that the members of this community can come and see and hear for themselves how the Court at the apex of this State's court hierarchy determines appeals and administers justice. As was said when this Court sat here in March 2003, the fact that this Court comes to this community for this purpose reflects an ethos in the highest court in our State hierarchy of openness and accessibility and of service to all the people in Victoria.

The City of Warrnambool is one of the State's major regional centres. Many industries are based in or near this city and, by reason of its location by the sea, Warrnambool also attracts many tourists. The tourists come to Logan's Beach to see the whale nursery and to Flagstaff Hill to see the Maritime Museum which displays many shipwreck relics and provides an insight into life from the 19th Century. Tourists and followers of thoroughbred racing also come to witness the Warrnambool May Racing Carnival conducted over three consecutive days at the beginning of May each year. The highlight of that carnival is undoubtedly the Grand Annual Steeplechase run on the third day of the carnival. That race, run over 5,500 metres, is the longest thoroughbred race in Australia. The race however is not confined to the green turf of the race track. The race leaves the racecourse and goes over several roads and into and through some nearby paddocks - Granter's Paddock and Brierley Paddock - and upon re-entering the racecourse for the first time, the horses travel clockwise, but upon re-entering the racecourse for the second time, the horses travel anti-clockwise. There are 33 jumps to be conquered, and it is truly a gruelling race for the participants - the horses and the jockeys. It is also a gruelling race for those who own one of the runners. Just three years ago I watched the race with a learned County Court judge who owned one of the runners, and at the end of the 5,500 metres he was doing it just as hard as his horse.

The Grand Annual Steeplechase is not, however, the only icon at or of the Warrnambool racecourse. The other icon is that the racecourse is the birthplace of

our national song, *Waltzing Matilda*. During the May Racing Carnival in 1894, a young lady from Camperdown, Christina McPherson, the daughter of a squatter, attended and listened to the local garrison artillery band play the Scottish march, *Craigalee*. Christina, an amateur musician, committed the tune to memory. In December that year, having travelled to the property of her uncle in Queensland, she met the young Andrew Barton "Banjo" Paterson at a place called Winton, and having been invited to stay with the McPhersons, Christina played *Craigalee* on a zither to Banjo. Some years later Banjo asked Christina to send him the music, saying that it would make a good bush tune. In due course, Banjo wrote what has become an Australian national anthem.

The Supreme Court constituted by his Honour Mr Justice Higginbotham first sat in this city on 3 May 1882. Although it is unclear as to why the Court sat here on 3 May, it is fair to assume that it was no mere coincidence, the Warrnambool Racing Carnival then conducting its 10th Grand Annual Steeplechase. Since then the Supreme Court has regularly sat here in Warrnambool, and on each and every one of those occasions the local practitioners make the justices of this Court, their staff and the members of the Victorian Bar particularly welcome. Indeed, about ten years ago, one of the local solicitors was so generous as to give some tips to one justice of the Court as to the location of the best nearby surf beach, and that judge, on the two or, I think, three occasions he has sat here since, brings his surf board.

The local solicitors have been very good to the Victorian Bar, and, as Justice Ashley has described now on several occasions, both the quality and quantity of the civil work which has been briefed by the local solicitors, for at least as long as he can recall, is something which has made many young junior barristers.

Before concluding, however, something should be expressly stated concerning the observations made by the Victorian Bar of this Court and its work. There is no doubt whatsoever that the work of this Court, as evidenced in and by its reasons for judgment, make this Court Australia's leading intermediate appellate court. That work comes, however, at a very heavy cost. The members of this Court work particularly long hours. Sadly, most justices work not only seven days per week but

also, often enough, late into the night. We get the benefit of that industry and dedication. We come to court knowing that each member of the Court has not only read but discussed and analysed the material: the appeal books, the summaries, the written submissions and the authorities.

There are also unacceptable delays. Too many appeals take too long to be listed and heard. Attempts have been made to reduce those delays. We are participating in those attempts. We co-operate as best we can with the learned Registrar, Master Cain. We comply with his directions. We accede to the requests made by his staff, Mr Bryant and Mr Wicking.

The Victorian Bar does not know the solution to these problems. The Court should be aware, however, that the Victorian Bar, and indeed all Victorian practitioners, are indebted to the justices and staff of this too busy court.

WARREN, C.J.: Thank you, Mr Holdenson. Mr Nicol.

MR NICOL: May it please the Court, the honourable members of the Court of Appeal: the Honourable the Chief Justice, the Honourable Justices Ashley and Buchanan. I appear today as President of the Western District Law Association to welcome your Honours to Warrnambool, which I am very pleased to do, on behalf of my members who are lawyers practising not only in Warrnambool but throughout the Western Districts of Victoria.

Having regard to the comments of my learned colleague, I will divert from my prepared text and claim that I was actually the chairman of the Warrnambool Racing Club in 1994 when there were celebrations for the centenary of Waltzing Matilda which he referred to. I must say in relation to the Grand Annual Steeplechase, I was also formerly the Mayor of Warrnambool and also a councillor representing Sherwood Ward, and the Warrnambool Racecourse is actually in the neighbouring ward, Botanic Ward, but during the course of the steeplechase horses jumped out of Botanic Ward into Sherwood Ward and then back into Botanic Ward to the finish. My former council colleague, Councillor David Atkinson, is here representing the Mayor

today, and he was very keen to see council wards abolished and he finally had his way when I retired from the council, and so that situation does not obtain any more.

The Court of Appeal came into existence on 7 June 1995 and has, as has been stated, sat in Warrnambool on two previous occasions, firstly on 3 August 1998 and secondly on 3 March 2003. Having attended the ceremonial openings of the Court on both of those occasions, I can tell you that the welcoming addresses contained two common themes. First, there was a thumbnail sketch of the history of the administration of justice in this area, and secondly, there were grumblings about the adequacy of the Courthouse building to meet the reasonable requirements of those engaged in the administration of justice. There was talk of a new courthouse building, which the then President, Justice Winneke, described as more of a hope than a confident expectation. Today's sittings are historic at least to the extent that they are the first to have occurred in this magnificent new courthouse building. The hope has become more than a confident expectation, it has become a reality, and I am sure that all of the users of the building are, and will continue to be, most grateful that the State Government has delivered this significant piece of community infrastructure for this significant region of Victoria.

Returning to the first theme, the thumbnail historical sketch, it has been asserted on previous occasions and no doubt after assiduous reference to Richard Osborn's *The History of Warrnambool*, that the first police magistrate, Mr L.W. Gillies, commenced duties in April 1854. The previous courthouse building was situated in the street named after him. Richard Osborn was also the proprietor of the first newspaper, *The Examiner*, and he noted that the newspaper had commenced 1854 with "a jubilant article congratulating its readers that at least some show of justice is to be meted out in Warrnambool, for they are to have a police magistrate". Prior to that, Port Fairy, or Belfast as it was then known, had been the larger and more important centre, and one of the local historians had observed that the magisterial bench at Belfast had looked upon Warrnambool with no favourable eye. The jaundiced view of the Belfast magisterial bench was probably the result of the fact that the first two applications for licences for public houses were refused on the grounds that they were

not required. In any event, the first General Sessions and County Court was held in Warrnambool on 9 November 1855 and the first Assize Court, as has been observed, was presided over by Mr Justice Higginbotham on 3 May 1882.

It is with particular pleasure that I welcome Chief Justice Warren to Warrnambool as the 11th Chief Justice of the Supreme Court of Victoria and as the first woman to head the Supreme Court, having been appointed to that position on 25 November 2003. The Attorney-General, Rob Hulls, described your appointment, your Honour, as historic, and you yourself observed that it was doubtless of significance that you are the first woman appointed to the office. Your Honour was in fact the first woman appointed as Chief Justice in Australia, having first been appointed to the Supreme Court Bench on 13 October 1998. In June 2005 her Honour received the highest award in the Queen's Birthday Honours List, becoming a Companion in the Order of Australia for her services to the judiciary and legal profession and delivery and administration of law in Victoria, to social and economic conditions of women and to forensic medicine internationally. I note that her Honour is also President of the Victorian Law Foundation, Chair of the Judicial College of Victoria and Chair of the Victorian Institute of Forensic Medicine and Patron of Victorian Women Lawyers. I am sure that we are all delighted to welcome her Honour to Warrnambool.

Justice Ashley was appointed to the Supreme Court on 21 August 1990 and was appointed to the Court of Appeal on 21 June 2005. He has visited Warrnambool on many previous occasions, not only as a circuit trial judge but in his practice as a barrister prior to that. He is also a breeder of cattle in the Cobden area and no doubt feels quite at home in this district.

Justice Buchanan was appointed to the Bench and to the Court of Appeal on 28 October 1997. In his youth he was a committed motor cycle rider, and my advice is that he was proposing to ride his Ducati to Warrnambool for these sittings. Incidentally, I note that at the ceremony welcoming the Chief Justice on 1 December 2003, the then Law Institute of Victoria President, Bill O'Shea, noted that, at the end of what had been an extremely hectic first week in office, one of her Honour's staff



enquired if she was planning to spend the weekend in bed, to which she is alleged to have replied, "No, I'm going surfing." Bill O'Shea observed, "We are all very glad the surf has dropped in time for your Honour to be here this morning." There is, of course, potential for your Honour to pursue this recreational activity here in Warrnambool if time permits.

On 4 March 2003, when I was not only a mild mannered probate solicitor by day but also a ruthless politician by night, I hosted, as Mayor of the Warrnambool City, a civic reception for the Court of Appeal. On that occasion the then President, Justice Winneke, had noted that the underlying reason for sitting in provincial cities was the belief that the administration of justice by the State's superior court is as significant to the people of regional Victoria as it is to the people of Melbourne. I observed that as the Mayor of a significant regional city, it was pleasing to not only hear these sentiments expressed but also to see them put into practice as evidenced by the circuit sitting of the Court of Appeal that week.

Warrnambool has over the years been very well served by way of circuit courts in both the Supreme and County Courts and a range of other tribunals, such as workers' compensation boards and VCAT tribunals. Warrnambool has, I think, always been regarded favourably by the judiciary and members of the Victorian Bar as a desirable circuit in which to participate. The people of this district are no doubt very pleased to have the administration of justice in an extensive range of jurisdictions available to them and to be able to witness the highest level of appeal processes administered by the Court of Appeal, it being very important, as has been observed, that members of the public are always able to observe first hand the administration of justice at all levels. The practitioners of this district are, of course, very pleased to see the Court's continuing commitment to circuit sittings at all levels.

In 1861, what was described as a great public meeting was held in the Temperance Hall at Warrnambool to receive a delegation from Portland from a league having for its object the separation of the Western District from the northern and eastern portions of Victoria. There was objection to the continual centralisation policy followed by the Melbourne authorities and their neglect of the western towns.

The visitors from Portland were courteously received, but Belfast and Warrnambool generally were not in favour of the movement, which eventually proved a failure. The appearance of the Court of Appeal in Warrnambool this week could perhaps be regarded as evidence, albeit belated, of the great judgment shown by the people of Warrnambool and Belfast in 1861 in rejecting that movement.

May it please the Court.

WARREN, C.J.: Thank you, Mr Nicol. Thank you, Mr McArdle and Mr Holdenson also, for your very, very kind words of welcome and your reflections on history.

I also acknowledge the traditional ownership of the lands of the region and the presence of the representatives of the Gunditj-mara and Kirrae Whurrong people in the Court this morning.

The Court is honoured by the attendance here today of Councillor Atkinson on behalf of the Mayor, and a welcome is also extended to members of the police who have been gracious enough to attend this morning, and also the staff of this magnificent court structure here in Warrnambool.

This is, as has been observed, the third sitting of the Court of Appeal in Warrnambool. Of course the Trial Division judges of the Supreme Court have been sitting here for far longer, since the later part of the 19th Century. Warrnambool is indeed a part of a larger region, which in turn is part of the oldest gazetted circuit in the State, with the first circuit in the region recorded as occurring as long ago as in 1851. In those days, the citizens of Warrnambool were, however, often forced to travel to neighbouring towns and cities in the region such as Belfast - now known as Port Fairy - to face trial, sit on juries or give evidence. Warrnambool agitated for many years for its own fully functional court. Eventually that goal was achieved, and later it was substituted by this marvellous architecture that we now have today.

Warrnambool is now recognised as one of the fastest-growing regional cities in the State of Victoria, with over 30,000 people now residing in the city alone. It sits at the centre of a large regional centre. The city has been called the cultural, social and economic capital of the Great South Coast. It is, therefore, fitting that the new

court complex we are currently sitting in reflects that fact. This facility has the latest in court technology, including remote witness video links, court recording, video conferencing and data network and communication services. It is one of the newest court complexes in this State, and indeed, with the proposed redevelopment of the Supreme Court back in Melbourne, it provides the judges sitting here at this time the opportunity to observe first-hand the provisions and facilities that are available if the Court has the opportunity.

Justice has come a long way since the first Supreme Court sittings in this region in the late 19th Century. For instance, in February 2005, Warrnambool became just the third regional Victorian centre, after Shepparton and Broadmeadows, to open a Koori Court. Speaking this morning to the local magistrate, Mr Stone, I have learned that the Koori Court itself at Warrnambool goes on circuit to local regional cities. The introduction of the Koori Court marked a huge improvement in the relationship between the legal community, the police and the aboriginal community. I had the privilege of observing the Koori Court in Mildura when we sat there last year, and I hope to have that opportunity whilst here in Warrnambool. Although this is the first time that I have had the privilege of sitting in Warrnambool, one of my colleagues sitting on the Bench today, Justice Ashley, is very familiar with Warrnambool, having worked here first as a barrister, a junior counsel and then a senior counsel, in the 1970s and the 1980s, on the workers' compensation circuit and the common law circuit, and then in the past having sat as a trial judge. Indeed, his Honour might be regarded as a local, having farming and prize-winning cattle interests in the region.

The presence of the Court of Appeal today is fulfilment of the Court's commitment to sitting in regional and rural areas, and Mr McArdle has eloquently set out the reasons why the Court should be here and continue to sit in regional Victoria. Ultimately it comes down to this. The courts themselves should be viewed as accessible to all people. Members of the Warrnambool community are therefore encouraged to come along to court and watch the Court perform its daily business. If members of the community are unable to come to court, then I encourage a visit to

the Supreme Court website. There the community can read about the history of this Court, the way it functions, speeches of judges, including this one, and, most importantly, the Court's decisions. They are available for the community to learn and understand what the Supreme Court does and why it does so. During the sittings this week the Court encourages the Warrnambool community to come into to court and see justice played out at its highest level in this State.

The Court thanks all present this morning, and in particular those who have expressed kind words of welcome. Indeed the words of Mr Holdenson in his welcome warrant some response from the Court. The President of the Court of Appeal, Justice Maxwell, and I have worked closely to address the unfortunate delays that lie with respect to the Court of Appeal's business. Tasks have been set in train, a mapping project of the Court of Appeal's work to try to track where the delays arise, and indeed that mapping project is being conducted across the whole of the Supreme Court. Arrangements have been made for two Trial Division judges to sit on a rotation basis through the Court of Appeal, and the President of the Court of Appeal and I are very much committed to providing expeditious justice in this State at the highest level. Ultimately it is not something that we can do on our own. It is becoming apparent, as Mr Holdenson indeed has highlighted, that the workload of judges is a burden, a very great burden. That is another matter that the President and I are working on and we are engaged in internal workings and assessments to try to assess what is really needed. In due course we will speak to Government. We hope that Government will listen.

It is very much appreciated this morning that those who are busy preparing for the actual hearings that start this afternoon and in the coming days have taken the time to prepare such elegant and eloquent statements to address the Court. The Court very much appreciates those generous efforts.

The Court is most grateful to the Registrar and his staff and our court and our personal staff for facilitating these marvellous sittings in Warrnambool. The Court will now shortly adjourn to resume its business this afternoon. Adjourn the Court until 2.15 this afternoon.