

IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: COR 2008 / 004363

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 60(1)

Section 67 of the Coroners Act 2008

Inquest into the Death of: LAUREN KAYLEY HARRIS

Delivered On: 14 October 2014

Delivered At: Coroners Court of Victoria
65 Kavanagh Street, Southbank

Hearing Dates: 14 – 18 November 2011
19 – 22 March 2012
8 – 20 June 2012
7 – 9 November 2012

Findings of: IAIN WEST, DEPUTY STATE CORONER

Representation: Mr R. Stanley appeared on behalf of the Family
Ms A. Magee appeared on behalf of Donna and Mark Harvey
Ms F. Ellis appeared on behalf of Brad Teal Real Estate and Ms Laura Teal
Mr S. O'Bryan appeared on behalf of Maroondah City Council
Mr D. Pumpa appeared on behalf of Moonee Valley City Council
Mr S. Stafford appeared on behalf of the Building Commission
Mr Willis/Mr R Lawson appeared on behalf of Dennis

Campana

Ms R. Sofroniou appeared on behalf of Arthur Smith

Mr J Willee appeared on behalf of Mr Michael Mayo, Mr
Brian Kilworth, Mr John Tyzzer and Mr John Constance

Police Coronial Support Unit

Acting Sergeant Cristiano, assisted the Coroner

I, IAIN WEST, Deputy State Coroner, having investigated the death of LAUREN KAYLEY HARRIS

AND having held an inquest in relation to this death on 14-18 November 2011; 19-22 March 2012; 18-20 June 2012' 7-9 November 12 and Submissions received in 2013

at MELBOURNE

find that the identity of the deceased was LAUREN KAYLEY HARRIS

born on 18th March 2005

and the death occurred on 26th September 2008

at Royal Children's Hospital, 50 Flemington Road, Parkville 3052

from:

I (a) DROWNING

in the following circumstances:

1. On the 26th September 2008 at approximately 2:15 pm, Lauren Harris was found unresponsive in the swimming pool at 45 Roberts Street, Essendon ('Roberts Street property'). Lauren was found by her mother, Mrs Monica Harris. After removing Lauren from the water, she took her into the house and called emergency services before commencing Cardio Pulmonary Resuscitation (CPR). The Metropolitan Fire Brigade arrived at 2:26 pm immediately followed by the Metropolitan Ambulance Service and MICA paramedics. Emergency personnel continued with resuscitation attempts until 3:25 pm. Soon after resuscitation was ceased Lauren was seen to take multiple breaths and resuscitation was recommenced. At 4:00 pm Lauren was transported to the Royal Children's Hospital, where she arrived at 4:10 pm and was subsequently pronounced deceased at 4:20 pm.
2. No autopsy was performed as the coroner, in consultation with forensic pathologist, Dr. David Ranson, determined that a cause of death was evident from the surrounding circumstances, the post mortem CT scan and external examination. Toxicology was non contributory.

Purposes of the Coronial Investigation

3. The primary purpose of the coronial investigation of a reportable death is to ascertain, if possible, the identity of the deceased person, the cause of death (interpreted as the medical cause of death) and the circumstances in which the death occurred. An investigation is conducted pursuant to the *Coroners Act 2008* (the Act). The practice is to refer to the

medical cause of death incorporating, where appropriate, the mode or mechanism of death, and to limit investigation to circumstances sufficiently proximate and causally relevant to the death.

4. Coroners are also empowered to report to the Attorney-General on a death they have investigated; to comment on any matter connected with the death, including matters relating to public health and safety or the administration of justice; and to make recommendations to any Minister, public authority or entity on any matter connected with the death, including recommendations relating to public health and safety or the administration of justice. This is referred to as the prevention role of the coroner.

The Evidence

5. This finding is based on the entirety of the investigation material comprising the coronial brief of evidence compiled by Senior Constable Steven Taylor, including material obtained after the provision of the brief, the statements and testimony of the witnesses who gave evidence at the Inquest and any documents tendered through them, other documents tendered through their Counsel (including Counsel assisting), written submissions of Counsel and their replies following the conclusion of the Inquest. All this material, together with the inquest transcript, will remain on the coronial file and comprises my investigation into Lauren's death. I do not purport to summarise all the material/evidence in this finding, but refer to it only in such detail as is warranted by its forensic significance and where otherwise appropriate.
6. I have been greatly assisted by the submissions filed by Counsel and note that there is little variance in the summaries of evidence provided by the parties, including where evidence of witness accounts varied. I considered those summaries both comprehensive and accurate and have adopted where appropriate, relevant parts in my finding.
7. At the completion of the police investigations and prior to the commencement of the Inquest, it was apparent that most of the facts about Lauren's death, were known and were uncontentious. These include identity, the medical cause of death and aspects of the circumstances, including the place and time of her death.

The Harris Family

8. Lauren was born in Brisbane on the 18th March 2005 and was 3 years of age at the time of her death. She was the eldest child of Cameron and Monica Harris, sister to Samantha, aged 9 months and half-sister of Blake Mathe, Mrs Harris's teenage son from a previous

relationship. The family resided together at the rented Roberts Street property from 30 March 2008. The owners of the property were Mr and Mrs Mark Harvey. Lauren's paternal grandmother, Mrs Annette Harris, also resided at the address. The Harris family, including Mrs Harris Snr, moved from Queensland to Melbourne in March 2008.

9. Lauren was described by her parents and grandmother as an inquisitive and adventurous child, who loved being outside and who had shown a propensity for climbing in the months leading up to the 26 September 2008. She would climb trees at home and at the playground but had not been seen to climb, or attempt to climb, the pool fence or its abutting bluestone barbeque. The Harris family had not swum in the pool from the time of commencing occupation of the premises in March 2008 to the 26 September 2008, due to cooler weather conditions. Lauren had, however, entered the pool enclosure during that period under supervision. Mr and Mrs Harris gave evidence of Lauren's love of water, but stated she had shown little interest in the pool, unless taken inside the enclosure. Each member of the Harris family would use the words 'danger, danger' when Lauren was in close proximity to the pool.
10. Both parents were aware of the dangers associated with swimming pools and the necessity for children to be supervised. In 2007, whilst still residing in Queensland, Lauren had participated in six water familiarisation lessons. The lessons involved Lauren being accompanied in the pool by one or other parent who supported her body weight. She was incapable of floating, swimming or paddling unaided.

Events of 26 September 2008

11. On Friday the 26 September 2008, Mr Harris left for work soon after 8:00 am. Lauren and Samantha remained in the care of their mother at the Roberts Street property. Blake and Lauren's grandmother were also present during the morning.
12. Blake gave evidence at the Inquest and stated that he woke up around 8:30 am. Following waking he used the computer before going to clean the pool at 10:30 am, after multiple requests to do so from his mother. The cleaning process involved skimming the leaves from the water and clearing the filters. It was usual for Blake, or his father to clean the pool every two to four weeks. The chemical levels were maintained by Pool Rescue, an external service provider who was contracted by the Harveys to attend on a monthly basis. Blake gave evidence that after cleaning the filter he left the pool enclosure via the same gate through which he entered, being the gate nearest to the house ('the front gate'). Blake left for work around 11:30 am.

13. The Roberts Street property included a separate self-contained outhouse ('the bungalow') in which Lauren's grandmother resided. She gave evidence of her movements on the 26 September 2008. Mrs Harris Senior spent time in the bungalow before entering the main house during the course of the morning to do her washing. She spoke and played with Lauren before returning to the bungalow.
14. Lauren and Samantha had lunch between 11:00 am and 11:30 am, with Mrs Harris then putting Samantha down for a sleep. Lauren played in her 'cubby house' on the rear deck with Mrs Harris giving evidence that she set Lauren up on the deck with her tea set and teddy bears, so she could then mop the kitchen floor. She recalled pulling down the canvas blind on the decking to shield Lauren from the sun. When completely drawn, as it was on the afternoon of the 26 September 2008, the blind blocked the view of the pool and fence barrier from the rear deck and family room. As Mrs Harris mopped the kitchen floor she could hear Lauren playing and moving around on the deck as the kitchen window and one of the glass sliding doors between the family room and deck, were open.
15. Lauren's grandmother had a medical appointment at 2:00 pm and upon exiting the bungalow she noticed Lauren playing in her 'cubby house' on the deck outside the back door. She played with Lauren for 5 minutes before leaving the Roberts Street property at approximately 1:45 pm.
16. Samantha woke around 2:00 pm and by that time Mrs Harris had finished mopping and had commenced using the computer located in the family room. Immediately prior to Samantha waking Mrs Harris had noticed that 'it had gone quiet outside'. Knowing that Lauren liked to go to the aviary at the rear of the yard, outside the pool barrier, she was not concerned and attended to Samantha. After changing Samantha she called out to Lauren and on getting no response, went outside to locate her. Mrs Harris estimated that five to ten minutes elapsed between the time she last recalled hearing Lauren and going outside to check on her.
17. Mrs Harris walked out the back door, off the deck and towards the barbeque with Samantha in her arms. She observed Lauren floating down the far end of the pool near the filter hose. Mrs Harris put Samantha down, ran to the pool by entering the pool enclosure through the front gate, removed her shoes, took hold of Lauren's arm and leg and pulled her from the pool. She then ran back into the house with Lauren, observing that she was blue in colour and 'completely floppy'. Lauren was placed on the kitchen floor and Mrs Harris cleared her mouth whilst also dialling 000 for emergency services.

18. Mrs Harris had a basic knowledge of first aid and commenced administering CPR as she waited for 000 to answer her call. Initially water and vomit was expelled from Lauren's mouth and nose. Upon reaching 000 she received clear instructions on how to provide CPR. Mrs Harris remained on the phone to 000 and continued to undertake resuscitation measures at the instruction of the operator until assistance arrived. Lauren was subsequently transferred to hospital.

Police Attendance and Investigation

19. On the afternoon of the 26 September 2008, Senior Constable Taylor and Constable Wakelin were on divisional van duties in the Moonee Ponds response zone. At approximately 2:50 pm they received a call to attend the Roberts Street property. They arrived at 3:05 pm. Sergeant MacLeod met them at the scene. Senior Constable Taylor and Sergeant MacLeod entered the house whilst Constable Wakelin remained outside.
20. All three police members made notes of their attendance and observations at the scene. Constable Wakelin sketched the rear yard area, which included a bluestone barbeque incorporated into the pool fence barrier. Senior Constable Taylor took measurements and Constable Wakelin recorded the measurements on his sketch. Senior Constable Taylor's notes did not make reference to the gates in the pool enclosure.
21. The bluestone block barbeque was located under the pergola area and in the north east corner of the fence. It was partially built into the pool area with the pool fence butting up against either side of the bluestone, and not passing behind it as a barrier between the barbeque and pool. In addition, the side of the barbeque/bluestone was lower than the abutting fence. On the left front side of the barbeque was a gas pipe and tap which was connected to the mains gas. The gas pipe and tap were approximately 'two foot' (61 cm) from the ground.
22. Constable Wakelin checked the fence line of the swimming pool for possible points of entry. His evidence at the Inquest was that both gates into the pool enclosure were secured. Constable Wakelin also gave evidence that he did not identify any gaps under the fence big enough for a child to fit through or any possible entry points around the bungalow. Constable Wakelin formed the view that the barbeque was the access point and speculated that Lauren may have used the gas pipe to assist in climbing onto and over the barbeque.
23. In his evidence at the Inquest Senior Constable Taylor drew the conclusion that the two gates to the pool enclosure were closed, otherwise it was more than likely he would have noted same.

24. Photographs produced at the Inquest included those taken of the fence near the bungalow soon after Lauren's death. They show a disconnect between the horizontal strut and the right hand vertical pole, as well as the bottom of the fence near the bungalow, being disengaged. Constable Wakelin's evidence was that he put pressure on the fence, and whilst there was some movement, he did not believe it was sufficient to enable a child to push through.
25. From the statements and evidence of the attending police members it can be concluded that the initial assumption made by police was that the barbeque was the likely entry point and the investigation proceeded on that basis.
26. Whilst at the scene, Sergeant McLeod telephoned Mr Tom Vasilopolous, Municipal Building Surveyor of Moonee Valley City Council and requested that he attend the Roberts Street property. Mr Vasilopolous attended with Mr Jim Delianov, another Building Surveyor with the Council. Upon their arrival they were shown to the backyard and asked to examine the fencing surrounding the swimming pool to determine whether it complied with the relevant Regulations and Standards. The position of the barbeque and its failure to comply immediately caught the attention of Mr Vasilopolous and Mr Delinov. They also noticed that parts of the fence and gate did not appear to comply with the relevant standards. With the ambulance and a large number of police still in attendance, Mr Vasilopolous made arrangements with Sergeant McLeod to re-attend on a later date for the purposes of carrying out a full inspection.
27. On the 30 September 2008, Mr Vasilopolous re-attended at the Roberts Street property with two other officers from the Moonee Valley City Council. They conducted a full inspection of the pool enclosure. They detected multiple sites where the barrier failed to comply with the relevant Standards and Regulations. Mr Vasilopolous detailed the deficiencies in his final report. On the 1 October 2008 the Moonee Valley City Council issued an Emergency Order to the owner of the Roberts Street property. The Order outlined what was required to bring the safety barriers into compliance with the Building Regulations.
28. The Report made recommendations. The Emergency Order was accompanied by a swimming pool barrier checklist and report. The report contained two major recommendations. The primary recommendation was to construct a completely new barrier within the confines of the pool area; a completely new safety barrier. The second, or alternative recommendation set out, in extensive detail, what works needed to be

undertaken for the pool enclosure to comply with the relevant standards.

PRE INCIDENT CHRONOLOGY

Engagement of Pool Builder: Lodgement of Building Plans: Issue of Building Permit

29. Mr and Mrs Harvey purchased the Roberts Street property in 1995. Soon after settlement the Harvey's engaged 21st Century Pools Pty Ltd to install the in-ground swimming pool and spa at the property. On the 20 November 1995 Mr Harvey signed an owner's consent form authorising 21st Century Pool Pty Ltd to apply for "permission" to construct a swimming pool at the property in accordance with the "attached plans and specifications". The same day Mr Harvey completed the document titled "Swimming Pool Safety" addressed to the City Building Surveyor, City of Maroondah, which stated in part that "*all safety requirements including doors, windows and safety fences with self closing self locking gates, will be erected at the above property in accordance with the Australian Standards 1926.1/1993 and Victorian Building (Building Code of Australia) Regulations 1991, prior to the swimming pool being filled with water*".
30. Plans for the construction of the pool and safety barrier were prepared and submitted by 21st Century Pools and the application dated 24 November 1995 was lodged with Maroondah City Council.
31. The Roberts Street property fell within the jurisdiction of the Moonee Valley City Council, however, the plans were submitted to and approved by Mr Arthur Smith, the Municipal Building Surveyor at Maroondah City Council. Mr Smith was not only the relevant Building Surveyor for the project but was also fulfilling the functions of a Private Building Surveyor for the purposes of the Building Permit. This dual role was permitted under regulatory provisions at the time and accordingly, when acting as Building Surveyor in respect of properties within the council, the Building Surveyor was acting as Municipal Building Surveyor. In providing such services at Maroondah Municipality, Mr Smith was acting in the capacity of a Private Building Surveyor. (In 1994 the Victorian Government legislated to allow a deregulated Building Permit process which allowed Private Building Surveyors to provide surveying services to the public. Consequently councils employed building surveying staff to provide these services, on a fee for service basis, outside their municipalities).
32. Mr Smith's practice as Private Building Surveyor was to decline to grant a Building Permit for a swimming pool without first obtaining from the owner a signed statement to the effect the owner would erect all safety items including doors, windows and safety fences

with self closing self locking gates, in accordance with the applicable Australian Standard Building Code, prior to filling the swimming pool with water. This practice was implemented to ensure that the owner was aware of their requirements as to erecting a safety fence around their swimming pools. Such certification by the owner was not required pursuant to the existing legislation, but Mr Smith implemented the practice in order to ensure that owners were actually aware of the requirements for the safety barriers.

33. Building Permit no. 1955005 was issued on the 29th November 1995 and a copy of the Building Permit was forwarded to the Moonee Valley City Council, which was received on or about 8 December 1995. The Permit specified that the construction of the pool was required to be commenced by 29 November 1996. Failure to commence by that date would see the permit lapse and any work commenced would be in contravention of the Building Act. The Permit included notification of the requirements to inform the Council once steel work was completed and again once construction was complete.
34. The first of the mandatory inspections pursuant to the Building Permit and relating to the steel structure of the swimming pool was carried out by council Building Surveyor, Mr Brian Doherty on 15 December 1995.
35. 21st Century Pools assisted with the Harvey's engagement of a fencing contractor, Mr Dennis Campana, who completed the safety fence barrier on or about 17 January 1996. The pool was subsequently filled with water.
36. At the completion of construction and before the swimming pool could be filled with water, a mandatory final inspection in accordance with the Building Permit was required to be carried out. Neither builder nor owner notified Council that the construction work had been completed and no mandatory final inspection was ever conducted. The Building Permit expired on 29th November 1997 and no Certificate of Final Inspection was ever issued by the relevant Council or Private Building Surveyor in respect of the pool and/or pool fence at the property.
37. While Council's records recorded the mandatory steel inspection taking place, they do not show any other further step occurring in respect of the pool at the property until 2004. At that time, there was no provision in Council's systems for flagging an alert in respect of any outstanding Building Permit for a swimming pool so as to trigger any chase up from Council. Further, it appears work load or staffing did not permit a paper diary system to perform this function.

38. In the course of 2004 it came to the attention of Mr Smith that 21st Century Pools had ceased to trade. This was a concern to Mr Smith as he realised it was possible that the company had ceased to trade in circumstances where swimming pool construction permits that had been issued were incomplete, with no safety barriers around the pools and no final inspections carried out. He sent Reminder Notices to all property owners who had had permits issued to 21st Century Pools and Council records indicated permits had not been finalised. A Reminder Notice was sent to Mr Harvey on the 20 August 2004. On the 24 August 2004, in response to the Notice, Mr Harvey telephone Mr Smith, and left a message for him to call him back. Mr Smith returned Mr Harvey's call on the same day and "*arranged for a final inspection of the pool and safety barriers to occur*".
39. On the 28 August 2004, Mr Dean Ramus a Building Surveyor from the Maroondah City Council attended the Roberts Street property to carry out the final inspection of the pool and fencing. Following his attendance he reported to Mr Smith that the safety barriers did not comply with the relevant Building Regulations and Australian Standards.
40. On the 1 September 2004, as a direct result of the inspection undertaken by Mr Ramus, Mr Smith issued a Building Order for Minor Work ('the Order;') under section 113 of the *Building Act 1993 (Vic)*. The Order stated that "*the swimming pool safety barriers are a danger to life and safety of any member of the public or of any person occupying the dwelling*". It detailed that the pool enclosure failed to meet Australian Standards due to deficiencies in the height of the fence, closing mechanism of gate, the height of the latch on the gate and the existence of horizontal rails on boundary fences. The sketch of the rear yard completed by Mr Ramus on the 28 August 2004 was attached to the Order and noted the following concerns:
- i. Latch on front gate –
 - o latch must be at least 1500 mm above ground level (it was 1200 mm)
 - o gate must be self closing and self latching
 - o gate must swing away from the pool
 - ii. Fence above barbecue area and around barbecue must comply with AS196.1
 - iii. Pool fence must be at least 1.2 metres higher than landing step
 - iv. Cover horizontal rails with palings with no gaps between (relates to southern part of fence).

41. The Order stated that the compliance issues were to be rectified by the 4 October 2004 with a re-inspection to be arranged. Mr Smith's evidence was that the Building Order was sent to Mr Harvey by ordinary post and a copy forwarded to Moonee Valley Council for the attention of their Municipal Building Surveyor. (Receipt of this Order was disputed by the Harvey's and Moonee Valley Council had no record of it).
42. Mr Smith followed up the Building Order of the 21st October by calling Mr Harvey and leaving a message on a message service for Mr Harvey to call him back. It is an agreed fact that a telephone call was made from the Council to Mr Harvey's mobile phone number however, Mr Harvey did not return the call. This is the last contact Mr Smith had with Mr Harvey.
43. Due to ongoing serious health problems, Mr Smith took leave as Municipal Building Surveyor from the 3 March 2006. Subsequently, by letter dated 5 March 2007, he informed the Building Commission that he had resigned and asked the Commission to terminate his appointment as the relevant Building Surveyor on the list of all outstanding external building permits issued by him as a Private Building Surveyor.
44. Mr Smith was replaced by Mr Cleaves as Maroondah's Municipal Building Surveyor, however, he did not replace him in his capacity as Private Building Surveyor in respect of the Harvey pool and informed the Building Commission that he would not act as the relevant Building Surveyor for permits issued by Mr Smith.
45. The deficiencies set out in the Building Order for Minor Works remained unrectified.

The Lease of the Roberts Street Property and Concerns Raised by Mrs Harris

46. Mr Harvey moved to Perth in November 2005 to take a football coaching position. Mrs Harvey and their children followed in January 2006. The Roberts Street property was initially tenanted to friends of the Harvey's through a private arrangement. In late 2007 the Harvey's made the decision to sell the Roberts Street property. Brad Teal Real Estate was engaged to handle the sale. To assist the Harvey's in preparing the property Brad Teal Real Estate provided a list of recommended works. The list referred to the pool only so far as recommending that it should be cleaned and made no reference to the pool fence.
47. In order to prepare the Disclosure Statement (Section 32 Vendors Statement) in anticipation of the property being sold particulars of any outstanding orders per notices under the *Building Act* were sought from the Moonee Valley City Council. In response, Moonee Valley City Council declared "*council records indicate that there are no*

outstanding orders, notices issued by the relevant Building Surveyor under the Building Act 1993”.

48. The property was passed in at auction on the 23 February 2008 following which the Harvey's instructed Brad Teal Real Estate to seek suitable tenants for the property. A Leasing and Managing Authority was executed on the 25th February 2008. Following an inspection of the property, Mr and Mrs Harris submitted a rental application which was subsequently accepted. A Pre-Tenancy Condition Report was completed by Ms Laura Teal of Brad Teal Real Estate on the 11 March 2008. In completing the Condition Report Ms Teal used the standard Real Estate Institute of Victoria (REIV) form. The form made general reference to the condition of fences but did not specifically address pool fences or pool/spa areas. No alterations were made to the standard form to detail the condition of the pool and fences at the Roberts Street property.
49. Ms Teal had not at that time completed her licensed estate agents course, but nevertheless, was qualified to work as a property manager with the firm having completed the Agents Representative course at the REIV. During her training with the REIV, Ms Teal did not receive any training as to what were the industry requirements for Australian Standards in respect to swimming pools and/or swimming pool fences.
50. Mr Harris collected the keys and the Condition Report from Brad Teal Real Estate on the 17th March 2008. Mr Harris returned a copy of the Report with his comments to Brad Teal Real Estate. No comments or concerns were added in relation to the pool or the surrounding fencing.
51. As maintenance issues were raised about the property, but not touching upon the pool or pool fence, Mr Schranz, a handyman, was arranged by Brad Teal Real Estate to attend the property and undertake repairs. Mr Schranz was an independent handyman who from time to time was contracted by Brad Teal Real Estate to attend properties managed by them for the purpose of maintenance.
52. He stated that he had been to the property at least five or six times prior to the Harris tenancy and in December 2007 he had paid specific attention to the barbeque in preparing the property for sale. He described the property as being in "ship shape" condition as of March/April 2008 and assumed that the barbeque and pool fence were as they were designed to be and accordingly it was fair to assume that it had been "passed". However, when speaking to Mrs Harris he apparently suggested to her that the pool fencing around the barbeque may not be up to safety standards after Mrs Harris had drawn his attention to it.

53. The Harris family moved into the premises on the 30 March 2008. On the 18 June 2008 Ms Teal attended the property for the purpose of conducting a routine inspection pursuant to the Exclusive Leasing and Managing Authority. The Inquest heard that routine inspections and subsequent reports can be undertaken to ensure that the real estate agent had in fact selected the right tenants and secondly to allow the tenants to raise any maintenance issues. In this case Ms Teal gave evidence that the routine inspection was required to be conducted three months into the tenancy, due to Mrs Harvey's concern about her garden
54. The issue of the sides of the barbeque was raised at this inspection by Mrs Harris with the concern being that a toddler may be able to access the pool from the sides of the barbeque. Ms Teal and Mrs Harris discussed how the concerns could be addressed, including the placement of trellis behind the barbeque with the cost of it being met by Mr and Mrs Harris. In her evidence before the Inquest, Mrs Harris conceded that whilst she held a 'strong concern' in relation to the pool enclosure, it was a low priority as it was winter and the family were not spending time outside. She, however, maintained the installation of trellis was one 'of last resort.'
55. Ms Teal did not detail the concerns raised by Mrs Harris in the Post-Inspection Report of the 2 July 2008. Separately from the Post-Inspection Report she emailed Mrs Harvey. Her email included the following:
- "Secondly, they are concerned about their three year old getting into the pool enclosure from the sides of the barbecue. Apparently they feel she will be able to climb up on this easy enough and they want your permission to install some trellis at their expense. Could you please let me know if this is OK."*
56. In responding to the email Mrs Harvey noted their consent to trellis being installed at the expense of the Mr and Mrs Harris. Ms Teal gave evidence of subsequently emailing Mrs Harris to advise that they could proceed to install the trellis. (Whilst the email could not be located, and accordingly was not produced before the Inquest, I accept Ms Teal's evidence of having communicated the agreement of Mrs Harvey.)
57. The trellis was not installed at the time of Lauren's death.

POST INCIDENT INVESTIGATION AND EVIDENCE

Pool access scenarios

58. How Lauren gained access to the pool occupied the substantial part of the Inquest hearing. The possible entry points concern a question of the adequacy of construction and/or

maintenance of the pool safety fence including the pool fence, timber fence, gates and barbecue.

59. A number of possible ways of breaching the pool barrier was considered:

- a) via one or other of the pool gates, one being nearest the house and barbecue and the other in the northwest corner of the pool fence behind the bungalow;
- b) the parts of the pool fence near the bungalow where the horizontal struts were not connected to the vertical supports;
- c) where the bluestone barbecue and decking step met the pool fence;
- d) the parts of the pool fence adjacent to which there were climbable objects present such as pot plants; and
- e) where the pool fence met the southern wooden paling fence on the border of the property (by reason of the 210 mm gap beneath the pool barrier fence and by reason of the horizontal rails on the paling fence presenting a possible climbing opportunity).
- f) the timber picket fence abutting the barbecue on its northern side had a ground clearance of 210 mm (Australian Standard 1926.1 required less than 100 mm)

The Pool Gates

60. Shortly after the incident, Mr Vasilopolous failed both gates in terms of their capacity to properly self close and considered that they needed replacement. Clause 2.11 of the Building Standards requires gates to be self-locking and self-latching. His Report noted that *"both gates are self-locking and self-latching but do not self-close properly at all times contrary to Clause 2.11"*. Mr Vasilopolous elaborated on this in his evidence. In referring to his notes his recollection was that both gates failed to self-close when tested from a stationary start without the application of manual force. The gates were tested at 90 degrees and 45 degrees, and there were times when they didn't self-latch and self-close. In addition, the safety latches were not high enough on either gate.

61. Nevertheless, I accept the evidence of Blake Mathe that after attending to pool maintenance within the enclosure by the front gate (eastern side of the pool area) closest to the house, he exited via that gate and closed it behind him, making sure he heard the locking 'click' when it closed. Despite the gate being self closing, checking that the gate

was properly shut was a habit of Blake's, or as he put it, 'sort of second nature'. The closing was observed by his mother who also heard the click of the closing mechanism.

62. Mrs Harris was on the rear deck of the house with Samantha and Lauren when Blake entered the pool enclosure. I accept that Mrs Harris had a clear view of the pool and observed Blake as he cleaned the pool. She recalled Blake entering and exiting the pool enclosure through the front gate and the gate closing behind him as they both looked at the gate and waited for 'the click'. There is no evidence that after Blake Mathe exited through the gate anyone else entered the pool enclosure via that gate. On balance, I therefore find that the front gate was shut and was not the point at which Lauren later gained entry to the pool.
63. The rear gate (north facing) of the pool barrier in the northwest corner of the property was not used on a regular basis. On attending the property after the incident, Senior Constable Taylor said that he went to the rear gate from inside the pool enclosure and found that it was closed and upon opening it, went out with the gate closing behind him. However, there is no evidence of the position - opened or closed - of the northwest gate on 26 September, prior to Lauren's entry into the area. Unlike the evidence provided by Mrs Harris and her son of the front gate being properly closed, there is no such evidence in relation to the gate in the northwest side of the pool area.
64. Mr Vasilopolous found that this gate when tested from a stationary start, without the application of manual force, would not always close, as was the case with the gate on the eastern side. Mr Vasilopolous' evidence that from time-to-time the pool gates required manual pressure to close appears to be supported by Blake Mathe who said that the gates usually closed by themselves but that he always made sure that they were closed by giving them "a push just to make sure it would actually go in". In these circumstances Senior Constable Taylor's evidence cannot be considered conclusive that the northwest gate had properly closed and latched itself when last opened prior to Lauren's possible entry. Whilst Senior Constable Taylor found on the day that it was closed and was capable of closing behind him, this does not rule out the gate resting against its latch, without locking, when last used, enabling Lauren to enter through it.
65. Mr Vasilopolous is a person properly trained in the Australian Standards relating to pool fence safety and qualified to inspect pool fences. I accept his evidence in respect to his findings regarding this gate and find that it remains a potential access point by which Lauren may have breached the pool barrier. Senior Constable Taylor could not recall

whether he had to apply any manual force for the gates to close. In addition, he could not say how Lauren entered the pool enclosure nor did he proffer any one potential point of entry over another.

Damaged Fence Near Bungalow

66. Lauren's grandmother gave evidence that within a few days of moving into the property she noticed that there was movement of a couple of inches at the top section of the pool fence near her bungalow, which she subsequently reported to her daughter-in-law. Mrs Harris senior stated that she did not recall prior to the incident ever having seen the gap depicted in the photographs subsequently taken by Senior Constable Taylor.
67. Mr Vasilopolous in his examination found *'the metal barrier on the north side of the pool area adjoining the granny flat is loose and part of the metal frame in the middle section has been dislodged'*. Upon testing, opening of the pool fence reached between 130mm and 150mm when pressure was applied to it. Whilst Senior Constable Taylor never dismissed this defect as a possible and feasible point of entry into the pool area by Lauren, he did not do any testing of the structure regarding pressure required to be applied to it, or any measurements of the gap that was created by the misalignment. Senior Constable Wakelin did apply pressure to the fence in order to determine how much movement there was in the structure and concluded that in his belief there was not sufficient gap for a three-year-old child to pass through.

Southern Paling Fence and Surroundings

68. The evidence indicates that where the pool fence met the southern paling fence in a 'T' junction it did not comply with the Australian Standards. This was because the three horizontal railings that support the palings constituting the fence, were on the side of the Harvey's property, not on their neighbour's side. The juncture between the southern paling fence and the pool fence was raised by Senior Constable Taylor as a further possible point of entry.
69. In addition, there was the presence of terracotta plants on the tiling step of the pool area in the corner near the southern fence and what appears to be a garden chair positioned on the pool side of the fence, as depicted in photographs taken by Senior Constable Taylor. Whilst Senior Constable Taylor never dismissed this area as being a possible and feasible point of entry, (hence the reason for him taking the photographs) his colleague, Senior Constable Wakelin did not give it great consideration. He did not believe it was plausible for a three-year-old girl to climb over the metal pool fence by first of all climbing up the

horizontal railings of the paling fence. He gave an example of an experiment he conducted with his two boys, one aged seven and one aged five, both of whom he described as "quite strong" and stating that whilst his seven-year-old was able to climb a three horizontal railing paling fence, his five-year-old could not.

Barbeque Area

70. In his evidence before the Inquest, Mr Vasilopolous stated that the barbeque forming part of the safety barrier was the most obvious point of non-compliance with which he was confronted when he attended at the Roberts Street property. When questioned why this was so he referred to the deficiency in height as well as the fact that the base was constructed from bluestone blocks and it was climbable and didn't comply with the relevant Australian Standard.
71. It was submitted on behalf of Lauren's family that the most obvious means of access to the pool by Lauren, was via the barbeque. The submissions rely on Lauren having been 107cm tall, and there being a 76cm differential between the adjacent terracotta step and the top of the bluestone, with it also being noted that there was a 65cm distance between the bluestone plinth on which the barbeque sat to an exposed gas tap. As a further aide to climbing, the family point to the significant mortar recesses between each of the four bluestone blocks making up the height of the barbeque.
72. Senior Constable Taylor stated in his evidence, on being asked as to his thoughts about the ability of a child to climb over the barbeque, "*yes I thought with the height that it was at, and the nature of the bluestones themselves, yes, and with the gas tap there, I did automatically think that that would be easily climbable and accessible to a child*". He was of the belief that a child having small hands and small feet and the nature of the bluestone and mortar between them, made the structure climbable and that a child could further be assisted by using the gas fitting to pull its self up onto the structure.
73. Whilst Senior Constable Taylor considered that the barbeque was a probable point of entry for Lauren, Senior Constable Wakelin believed that it was the obvious point of entry, due to the large gap between the pool fence and the rear of the barbeque having no fence around it.
74. Initially no fingerprint examination was undertaken of the barbeque or surrounding fence in order to assist identifying the point of entry. Whilst such an attempt to lift prints should have been made, it cannot be concluded that had it been done, it would have resolved the issues as to where Lauren gained entry through the barrier to the pool.

75. Mr Cameron Harris was of the view that Lauren had gained access to the pool via the barbeque. His opinion came from his finding after the death of broken plant tendrils near the base of a terracotta pot which was positioned close by. This resulted in police attendance on 30 September 2008 during which time fingerprint examination of the stainless steel hood of the barbeque and the vertical steel support of the pool fence beside the barbeque, was undertaken. The examination was unremarkable.
76. No other possible entry point and more specifically neither of the pool gates, were subject to fingerprint analysis either on 26 September or 30 September, or 7 October 2008. However, had fingerprint examination been undertaken and a positive identification made, it would be inconclusive as to when the print was left.
77. The attendance on 7 October 2008 followed Mr Harris again contacting police as he believed he could see a child's handprint on the pole behind the bluestone barbeque. Attending police found that the pole had been previously examined but no latent prints were located nor any evidence to suggest the mark was a child's handprint.
78. Not only is there no forensic evidence to support the finding that Lauren gained access by climbing over the barbeque structure, it has not been established that she was physically capable of doing so. There is no evidence that she previously attempted to or had climbed over the barbeque into the pool area. Mr Vasilopolous agreed that the barbeque could not be elevated above any other possible point of entry to the pool area. Whilst it remains a possibility that she did breach the pool barrier in this way it would be speculation and therefore inappropriate to conclude that Lauren accessed the pool by climbing up and then down the sides of the barbeque.
79. The evidence does not support a finding that Lauren could have entered the enclosure via the gap under the abutting picket fence to the northern side of the barbeque.

Fence Construction

80. In their evidence at the Inquest, Mr and Mrs Harvey claimed that their knowledge of the fence contractor was limited to him being known as 'Denis'. They both stated that the arrangements for the construction of the fence were initiated by 21st Century Pools; that the contractor was paid in cash and that they were unable to locate any documentation relating to the construction of the fence. During the course of the Inquest, however, it was established that the fencing contractor was Mr Denis Campana.
81. Mr Campana subsequently made statements and gave evidence at the Inquest. Mr

Campana had been a self-employed fencing contractor for over five (5) years at the time of undertaking the work for Mr and Mrs Harvey.

82. He stated he recalled being contracted by Mr and Mrs Harvey and subsequently constructing the fence. He further stated that at the time he had an arrangement with 21st Century Pools whereby, if a property owner engaged him to construct the fence following 21st Century Pools completing the installation of a pool, the owner would receive 10 metres of free fencing. Mr Campana gave evidence that the offer formed part of an advertisement that 21st Century Pools placed in the Herald Sun.
83. I do not accept this evidence as a review of advertisements placed in the Herald Sun by 21st Century Pools between 5 November 1995 and 28 January 1996 did not locate any reference to such an offer. A single advertisement was located by the police Investigating Member, offering 'Free Pool Enclosures to the FIRST 10 Buyers.' The advertisement appeared in the Herald Sun on the 5 September 1996.
84. Mr Campana stated that at the time of constructing the fence, the pool had been excavated and had a 'copa' tile rim, however, the remainder of the rear yard had no other landscaping or improvements. He told the Inquest that the bungalow had rotting boards and the barbeque with its bluestone base was not present, nor was there a pergola extending from the rear of the house into the yard. He said that he saw the barbeque for the first time when Lauren's death was reported on the news and immediately identified it as a 'blatant' breach of pool safety standards.
85. While Mr Campana's initial evidence was that there was no barbecue in existence when he attended the property, this assertion was subsequently changed to the existence of two different barbecues. In addition, Mr Campana stated he built a southern boundary section to the pool fence, thereby completing a "horseshoe" or U shape around the pool.
86. Following Mr Campana providing two statements and giving the evidence as outlined in the proceeding paragraphs, Mr Darryl Hulls and Ms Fran Merrington made statements and gave evidence at the Inquest. Mr Hulls stated that he and his 'then-wife,' Pamela Hulls, purchased the Roberts Street property in 1986 and lived there until selling it to Mr and Mrs Harvey.
87. Mr Hulls stated, and I accept, that the bluestone barbeque was in existence when he purchased the property, and remained in situ at the time of the property being sold to Mr and Mrs Harvey. Mr Hulls produced photographs which showed the barbeque whilst he was residing at the property and his evidence was supported by that of Ms Merrington.

88. Ms Merrington, a long time friend of the Mr and Mrs Harvey was engaged by them to maintain the gardens at the Roberts Street property and continued to do so until the property was again sold in 2009. Ms Merrington stated that she began looking after the gardens prior to the installation of the swimming pool and that the barbeque, with its bluestone base, was already in place when she commenced her role. In addition, she told the Inquest that there was no steel pool fence between the southern paling fence and the swimming pool before September 2008.
89. Mr and Mrs Harvey were adamant that they had not altered the pool fence built by Mr Campana. Whilst Mr Campana told the Inquest that he had built the fence in a U shape, a photograph taken over the summer period of 1995-1996 shows no internal steel fence close to the swimming pool on the southern boundary of the property. I do not accept the assertion by Mr Campana that the fence was removed and replaced with another pool fence shortly thereafter he had completed his fence.
90. Mr and Mrs Harvey were also adamant that they had not relocated the barbeque. I accept that they modified it by inserting a cooking top in or about 1995, however I am satisfied they did not dismantle and relocate the barbecue at any time. The weight of evidence supports a finding that Mr Campana is mistaken as to this issue and I find that he built the fence which was in place at the time of Lauren's death. Accordingly, I do not accept his assertion that there were in fact two pool fences built prior to September 2008 or that the barbeque was not integrated into the fence when he erected it.
91. Mr Campana is further mistaken as to the existence of the pergola at the Roberts Street when he undertook his work there. Mr Campana told the hearing that there was no pergola at the premises when he attended to build the pool fence. The evidence, however, from Mr and Mrs Harvey, Mr Hulls, Ms Merrington, and other witnesses, including Mr Tyszyer (21st Century Pools; who recalled sitting under a pergola near a bluestone barbecue when the pool contract was signed in December 1995), satisfies me that the pergola was in existence prior to the fence being constructed. Their evidence was supported by an advertisement in the local paper dated the 14 February 1995 that included a photograph of the back garden, prior to the sale of the property to the Harveys, showing a pergola in the same position in the rear yard.
92. I am further satisfied that it was reasonable for Mr and Mrs Harvey to rely upon the expertise of Mr Campana to build a pool fence which complied with the Australian Standards. The evidence is clear that the pool fence did not comply with the Australian

Standards and the court was told by Mr Vasilopolous that the question of compliance was complex and whilst he would not expect a normal homeowner to be familiar with the standards, he would expect a pool fence builder to understand and comply with them. Mr Vasilopolous further stated that he would not expect a home owner to be aware of the height requirements set out in the Australian Standards or to be able to ascertain from a visual inspection whether a gate latch was located in accordance with the standards.

Final Inspection on 28 August 2004

93. The evidence as to the purpose of the inspection and matters raised during the inspection varied significantly between Mr Harvey and those associated with the Council.
94. Mr Harvey gave evidence that he was told that the inspection was occurring as 21st Century Pools had ceased trading and the Council had been made aware of issues with pools they had installed including the formation of cracks and leaks.
95. Mr Smith and Mr Ramus stated that the inspection was initiated after Mr Smith become aware that 21st Century Pools had ceased trading. Mr Smith reviewed permits issued to the pool company and it was during that process he became aware that a final inspection had not been undertaken in relation to the Roberts Street property.
96. Mr Harvey stated that during the inspection Mr Ramus focused on the need for the installation of deadlocks on all doors from which access to the rear yard could be gained. When questioned at the Inquest he denied that Mr Ramus raised any concerns surrounding the construction and/or condition of the pool fence. He stated that discussion of the barbeque was limited to it needing to be reset at the front. Further, he gave evidence that he was told by Mr Ramus that he would return in 6 to 8 weeks to check that the issues raised during the inspection had been rectified.
97. On the other hand, Mr Ramus denied stating he would return in 6 to 8 weeks. Whilst he was frank in that he could not necessarily recall the entire exchange with Mr Harvey, it was not his usual practice to arrange re-inspection at time of inspection, as the time was contingent on the owner undertaking prescribed works.
98. Mr Ramus gave evidence that his normal practice when conducting inspections had been to walk around the property with the owner, describing non-compliance issues and how they could be resolved. He does not recall departing from this practice when inspecting the pool and enclosure at the Roberts Street property. He recalls that Mr Harvey accompanied him throughout the entire inspection and a second male was also present at times. He informed Mr Harvey of each specific point where he found that the pool enclosure did not comply

with the Standards and he made contemporaneous notes of the meeting. He stated Mr Harvey was told that the barbeque being built into the enclosure was a significant point of non-compliance. He had no recollection of being concerned in relation to the doors, as the fence separated the pool from the house, and he did not state that deadlocks were required as they were irrelevant to the non compliance of the pool barrier.

99. Mr Ramus said he explained that the Council would send out written advice of the rectification work required to be completed for the enclosure to comply with necessary Building Standards. He further stated that Mr Harvey was not receptive to advice and indicated disbelief that fencing standards were such that rectification work would be required. He formed the view that Mr Harvey was not going to undertake any further works. This is why he subsequently made a hand written note on Council's copy of the Building Order which stated: 'Owner said he would not do any work!' (Notwithstanding Mr Ramus' notation, Mr Smith's general past experience as a Council Building Surveyor led him to believe likely compliance with such an order was a different matter).
100. Mr Arthur Sofas was also present when Mr Ramus attended the Roberts Street property on the 28 August 2004. Mr Sofas gave evidence at the Inquest. His evidence was in part consistent with that of Mr Harvey, but he recalled Mr Ramus telling Mr Harvey that he would receive correspondence from the Council confirming compliance issues. Whilst conceding he was not present for all discussions between Mr Ramus and Mr Harvey, he did not recall any mention of the barbeque area, or of the fence generally. He too stated that the emphasis was on the need for deadlocks.
101. Mr Sofas described Mr Harvey as a 'close friend' whom he visited twice weekly when the Harveys resided at the Roberts Street property. He also gave evidence that he continued to speak with Mr Harvey regularly by phone after the Harvey family relocated to Perth. In his evidence Mr Harvey described his relationship to Arthur Sofas as a mere acquaintance who visited from time to time. They both denied any discussion of the Inquest until the Sunday night, prior to its commencement.
102. I do not accept the evidence of Mr Harvey that he and Mr Sofas were mere acquaintances at the time the inspection was undertaken. Further, I do not accept from the time of Lauren's death until the weekend immediately prior to the commencement of the Inquest the two did not discuss the events surrounding Lauren's death, the visit by Mr Ramus or the Inquest itself. Accordingly, I attach less weight to the evidence of Mr Sofas than I would to the evidence of an impartial, independent witness. I accept the evidence of Mr

Ramus as to the events and discussions of the 28 August 2004.

103. Mr and Mrs Harvey gave evidence that they made the following modifications to the Roberts Street property at a time following the inspection (I note there is no record to verify the timing of the works, or the identity of persons who carried out the works);
- a. The southern fence was replaced by a new 6 foot high fence,
 - b. Double deadlocks were put on all doors that lead to the pool area and
 - c. An additional gate was erected.

Building Order for Minor Works

104. Mr and Mrs Harvey denied receiving the Building Order for Minor Works.
105. Evidence was given by Mr Smith as to the system in place to affect service of the Building Order. His usual procedure was that, after signing the Building Order, his administrative staff would make necessary copies and send them to the mailroom. He noted that the administration staff he had at that time were very professional and knew exactly what was required and he would be very surprised if that did not take place. However, Mr Tom Vasilopolous of the Moonee Valley City Council gave evidence that the Moonee Valley City Council only became aware of the existence of the Order following notification of Lauren's drowning. Mr Vasilopolous telephoned Mr Smith on the 1 October 2008 to enquire in relation to the status of the Building Permit. In particular, Mr Vasilopolous was enquiring as to whether a Certificate of Final Inspection had been issued for the swimming pool and safety barriers.
106. While Mr Vasilopoulos gave evidence that the Council had no record of receiving a copy of the Building Order, he acknowledged that it was still possible that it could have "*slipped through the cracks for some reason*". He conceded that it is possible that some documents could have mistakenly be caught up with other documents and end up on a building file they do not relate to. He acknowledged that this type of event had happened before.
107. It was submitted on behalf of the family, however, that the same mailing procedure at the Council was successful in effecting delivery of Mr Smith's 20th August 2004 letter to the Harveys, only two weeks prior to the sending of the Building Order. Hence, there is no reason why the mailing of the Order in the same manner was not similarly effectual. It was further submitted that the fact that the Moonee Valley City Council had no record of receiving the Building Order, cannot support a finding that the Harveys did not receive a copy of the order, particularly when Mr Harvey also did not recall receiving a copy of the

20th August 2004 letter from Mr Smith.

108. I do not accept either of these submissions, as in the absence of evidence of receipt, it is speculative whether Mr and Mrs Harvey received it. In light of the Harveys' denial and the evidence of Mr Vasilopolous, I am not satisfied that either Mr and Mrs Harvey or the Moonee Valley City Council received a copy of the Order.
109. As I prefer the evidence of Mr Ramus, however, I note that even in the absence of receipt of the Order, Mr Harvey was aware of the deficiencies with the pool enclosure and did not take necessary steps to ensure the enclosure complied with relevant Standards.
110. From the date for compliance of the Order, namely the 4 October 2004, there was a fourteen day period in which Mr Smith was required to report the non-compliance to the Building Commission (*'the Commission'*) pursuant to s 115 (1) of the Building Act. Reporting was mandatory as the language of s 115 stated that non-compliance *'must'* be reported. As Mr Smith was acting as a Private Building Surveyor his only option was to report non-compliance to the Commission. However, there is no evidence that Mr Smith ever became aware of non-compliance by the Harveys with the Building Order. Whilst Mr Smith agreed that he was never informed of compliance with the Order, he does not agree that he ever actually formed the view that the notice had in fact not been complied with.
111. Notwithstanding that both the time for compliance with the Order and the time for reporting non-compliance with the Commission had lapsed, Mr Smith gave evidence that he phoned Mr Harvey on the 21 October 2004 to follow up on compliance with the Order. I accept his evidence that he left a message on Mr Harvey's mobile phone message bank service to which he did not receive a response. Mr Smith made no further attempts to contact Mr Harvey.
112. Maroondah Council had no statutory power to follow up the Building Order. It also had no statutory power to refer any non-compliance with a Building Order to the Building Commission, with the appropriate legislation placing a statutory obligation on a Private Building Surveyor in respect of Building Orders with which compliance has not been achieved.

Inspection of Building Work under the Building Act

113. The specific issue of mandatory inspections is dealt with under Part 4 of the *Building Act 1993*, Section 33(1).

114. It is not clear having regard to the Act or evidence at the Inquest, upon whom the responsibility falls to arrange for the final inspection to be carried out. Further, it is not clear from the evidence to whom the Certificate of Final Inspection is to be issued.
115. 21st Century Pools was recorded on the Building Permit as the builder and agent of the owner and Mr Harvey was recorded as the owner.
116. The relevant provisions of the *Building Act* place an obligation upon the person “*in charge of the building work*” to notify the relevant building surveyor upon the building work reaching a mandatory notification stage. There are two stages: steel and final. The final inspection was to take place upon the completion of the building work under the Building Permit. Completion of the building work included completion of the pool fence.
117. Mr Kilworth gave evidence that there was no system in place at 21st Century Pools to ensure that a final inspection had taken place, let alone whether a Certification of Final Inspection had been issued, prior to the handover of the pool to the owner, or otherwise. The Harveys maintained that it was their view that they were not allowed to fill the pool until the pool fence had been inspected and approved. However, Mr and Mrs Harvey gave evidence that they believe that the necessary approval had been obtained to fill the pool.
118. Mr and Mrs Harvey believe that they received authority to fill the pool by a representative of 21st Century Pools, however, neither could recall the identity of the person who informed them. By necessity, a pool had to be filled with water before 21st Century’s handover process took place. The Harvey’s support their view that it was alright to fill the pool by giving evidence that a representative of 21st Century Pools attended at the address at a handover and instructed Mrs Harvey how to operate filters and cleaners for the pool and that 21st Century Pools accepted the Harveys’ cheque and final payment under the contract. Not one of the 21st Century Pools witnesses (Brian Kilworth, John Tyzzer, Michael Mayo, John Constance) could identify who was involved in the handover at 45 Roberts Street. Contradictory evidence was given as to who it may have been.

Responsibilities Regarding Final Mandatory Inspection under the Building Permit

119. Section 33(1) of the *Building Act*, states “*a person who is in charge of the carrying out of building work for which a permit has been issued under Part III, must notify the relevant building surveyor without delay after completion of each mandatory notification stage of that work*”. It was argued on behalf of the Harveys that 21st Century Pools was “a person in charge of the carrying out of the building work” at the premises. It was also argued that the Harveys, as the owners, could be described as ‘a person’ in charge and that both parties

were under an obligation to call for a final inspection. 21st Century Pools did make the notification as to the steel works which were subsequently inspected by Mr Doherty from Maroondah City Council on 15 December 1995. However, it was submitted it was their responsibility for the second mandatory notification identified in the Building Permit as "final" notification.

120. Mr Campana stated that he reiterated the need for the fence and pool to be inspected by a Building Surveyor. Both Mr and Mrs Harvey acknowledged being aware of the requirement for approval to be obtained before the pool was filled. On the 20th November 1995 Mr Harvey signed a document prepared by the Maroondah City Council acknowledging the requirement for doors, windows and safety fences to be erected in accordance with the relevant standards and regulations before filling the pool. Mr Harvey gave evidence that he relied upon 21st Century Pools to attend to regulatory requirements and provide a competent contractor to construct the fence. He was of the belief that such requirements had been met following the attendance of a representative from 21st Century Pools and proceeded to fill the pool.
121. Mr Smith's evidence was that the obligation for final notification under a Building Permit arose on completion of all the building work which included the pool fence. He said that he would normally expect the pool company to make the notification on completion and that the owners may notify regarding the pool safety barrier. There is no evidence that 21st Century Pools verbally told the Harveys of any distinction between their interpretation of the respective responsibilities for the two notification stages. It was not asserted that the Harveys had been told verbally by 21st Century Pools that they would attend to the first notification, but that the Harveys had to attend to the second notification stage.
122. The evidence given by Mr Kilworth of 21st Century Pools supports the view that it was the general practice of 21st Century to notify the owner of the completion of work and for the owner to arrange a suitable date for final inspection.
123. The Harveys said that they did not receive any verbal advice from 21st Century Pools that they were to arrange the final inspection. In addition, they gave evidence that they did not receive a letter from 21st Century Pools in similar terms to other correspondence that had been sent to other pool owners indicating that they should seek final inspection from the Council. Mrs Harvey said that had she received such a letter, she would have acted upon it by calling the council to make sure everything was inspected. It was submitted on behalf of the Harveys that given that 21st Century Pools were professional swimming pools builders,

it was reasonable for the Harveys to rely upon their expertise to provide them with a pool in accordance with the contract. Accordingly it was reasonable for Mr and Mrs Harvey to expect that 21st Century Pools had complied with all aspects of the Building Permit.

124. 21st Century Pools was “a person in charge” of the building work to its completion for the purposes of calling for final inspections. 21st Century Pools applied for the Building Permit as the agent of the owner and is listed as both the builder and the agent of the owner on the Building Permit. The evidence given by Mr Kilworth supports the view that it was 21st Century Pool’s general practice to notify the owner of the completion of work and for the owner to arrange a suitable date for final inspection. Mr Harvey denies having received such a notification. Further, the Harveys as the owners, are also persons who may be regarded as being in charge of the building work, including the fencing, following construction of the pool by 21st Century Pools. According, they were also under an obligation to call for a final inspection. Mr Smith stated that in circumstances where the construction of a fence had been carried out by someone other than the builder, he would expect either the builder or the owner to notify him of the completion of the building work.

Brad Teal Real Estate.

125. The *Residential Tenancies Act 1997* does not define the responsibilities of Real Estate Agents to either the tenant or the landlord. Similarly, the *Estate Agents Act 1980* does not define any duty or responsibility of Agents to tenants or other parties, nor does the Code of Conduct available to member agents of the Real Estate Institute of Victoria.
126. I accept the submission made on behalf of Brad Teal Real Estate that the firm was entitled to rely on information contained in the Section 32 Vendors Statement, immediately prior to the execution of the Exclusive Leasing and Managing Authority. Brad Teal Real Estate had held the property for the purpose of sale. Ms Teal gave evidence that the Sales Division at the firm would have alerted her to any matter revealed in the Section 32 Vendors Statement that would have had an affect on the safety of the property she was to manage. The Harveys warranted to Brad Teal Real Estate at the time the Exclusive Managing and Leasing Authority was executed, that the property was not in a dangerous condition..
127. The evidence is disputed that Mrs Harris asked Ms Teal for the landlords to fix the fence, failing which she requested permission to put trellis or something temporary up. Ms Teal denies that she was requested to ask the Harveys to fix the fence and her email to the Harvey’s on the 19 June 2008, makes it clear that a request was made to put trellis up or

something temporary to remedy the problem. Mrs Harris stated in her evidence whilst the issue she raised with Ms Teal was a strong concern, it was not a matter of urgency or safety, because it was winter time and they were not outside.

128. I accept the evidence of Ms Laura Teal that she considered the pool fence was compliant. It is difficult to accept that Mrs Harris had a strong belief that her toddler daughter could access the swimming pool by climbing the sides of the barbeque as she did not;

- a) erect a trellis on gaining permission to do so or
- b) pursue the landlords through Ms Teal to attempt to "fix" the pool fence or
- c) treat the deficiency in the pool fence as a urgent repair and in addition,
- d) supervise Lauren in the backyard.

Further Mrs Harris gave evidence that whilst she was permitted by the owners to put up trellis she nonetheless chose not to as she deemed the issue low risk at the time "*because we just didn't go out doors and if we did the girls were never on their own. As the weather warmed up we were going to address this issue*".

FINDINGS

1. On the 26 September 2008, Lauren died from drowning in the swimming pool at rented premises occupied by her family and located at 45 Roberts Street, Essendon. She was unsupervised at the time.
2. The pool enclosure gate used by Blake Mathe to access the pool was locked after leaving and not the means by which Lauren gained entry.
3. The manner by which Lauren gained entry into the swimming pool enclosure cannot be determined. I am satisfied there were two possible entry points; by climbing up and over the bluestone barbeque, or via the gate in the pool safety fence at the north west corner of the property. Speculation as to the access point is not a basis for making a finding of fact.
4. The pool safety fence did not comply with Australian Standards, for the reasons set out in paragraph 40. All the considered entry points concern a question of the construction and/or maintenance of the pool safety barrier including the pool fence, timber fence, gates and barbeque.
5. In preparing the property for sale in 2008, Moonee Valley City Council declared; "*Council records indicate that there are no outstanding orders, notices issued by the relevant building surveyor under the Building Act 1993.*"

6. Brad Teal Real Estate was entitled to rely on the s32 Vendor's Statement to the Purchaser in which it was stated there were no outstanding orders or notices relating to the property.
7. Mr and Mrs Harvey warranted at the time the Exclusive Managing and Leasing Authority was executed that the property was not in a dangerous condition. This warranty is consistent with their evidence that they believed the swimming pool fence had been inspected at the relevant time and found to be compliant.
8. Ms Laura Teal would not be expected to have an understanding of the industry requirements for Australian Standards in respect to swimming pools and or swimming pool fences.
9. Ms Teal was entitled to assume there were no outstanding orders or notices relating to the property as she had not been advised to the contrary by those responsible in the agency for checking compliance.
10. Ms Teal had no prior knowledge of the pool fence construction, the Building Permit, the attendance at the property in 2004 by Mr Ramus or the Building Order for Minor Works.
11. Ms Teal passed on to Mrs Harvey the critical substance of the concerns raised by Mrs Harris on the 18 June 2008; that is, feeling Lauren could breach the pool safety fence.
12. The pool safety fence in situ on the 26 September 2008 was constructed by Mr Denis Campana and was completed on or about the 17 January 1996. Between completion and the date of death, no pool safety fence was removed and/or replaced.
13. The barbeque was never relocated although it was modified.
14. Mr and Mrs Harvey were entitled to rely on Mr Campagna's expertise in believing the fence complied with the Australian Standards.
15. The Building Surveyor did not receive notification of completion of work for the issue of a Certificate of Final Inspection.
16. 21st Century Pools should have notified the Building Surveyor regarding the final mandatory inspection following completion of all the building work. They had lodged the application for permit and notified the Building Surveyor of the completion of the steel work.
17. Mr and Mrs Harvey did not receive any verbal or written advice from 21st Century Pools stating that they were responsible for notifying the Building Surveyor.
18. Mr and Mrs Harvey believed the necessary approval had been obtained to permit the pool

to be filled.

19. Mr Harvey received the reminder notice sent on 20 August 2004.
20. The purpose for attendance on the 28 August 2004 was that final inspection had not taken place and not, as claim by Mr Harvey, for Council to check the build quality (e.g. cracks and leaks) knowing that 21st Pools had ceased to trade.
21. In discussions between Mr Harvey and Mr Ramus the focus was non compliance issues regarding the construction and/or condition of the pool fence and that rectification work was required.
22. I am not satisfied that Mr and Mrs Harvey received the Building Order for Minor Works notice, however, I am satisfied that Mr Harvey was aware that the fence failed to comply with Australian Standards through his discussions with Mr Ramus and that he failed to rectify it.
23. The work relating to the southern fence, deadlocks and erection of an additional gate, was not an appropriate response to the matters discussed between Mr Harvey and Mr Ramus and the date this work was undertaken cannot be determined.
24. There was an obligation on Mr and Mrs Harvey to take reasonable steps, as owners and occupiers of the property, to ensure that the existing safety barriers were maintained and were operating effectively at all times as required by the Building Regulations. Mr Harvey signed the personal undertaking to ensure safety fence compliance and was not pro-active in doing so.
25. Moonee Valley City Council received a copy of the Building Permit from Mr Smith for construction of a swimming pool at 45 Roberts Street, Essendon.
26. Moonee Valley City Council had no record of receiving a copy of the Building Order for Minor Works.
27. Moonee Valley City Council had no statutory role in overseeing the completion of the building work, or enforcement of Orders as the permit had not been issued by their Municipal Building Surveyor.
28. Maroondah City Council had no statutory power to follow up the Building Order, nor did it have statutory power to refer any non-compliance with a Building Order to the Building Commission.

COMMENT

Pursuant to section 67 (3) of the Coroners Act 2008, I make the following comment connected with the death:

1. The evidence is clear that when Lauren was outside the house she was not visible to her mother who remained inside. Mrs Harris had pulled down an outside blind which blocked her view of Lauren and the pool, with no adult being present with Lauren for a period in excess of 20 minutes. I am satisfied that had Lauren been under proper supervision then this tragedy would not have occurred. A pool fence should not be used as a substitute for supervision, with active adult supervision of young children when in the vicinity of a pool, being the first line of defence against accidental drowning.
2. Maroondah City Council has revised its practices and procedures regarding applications for Building Permits and compliance control, including the implementation of a swimming pool/spa audit procedure, complaints database and creation of a separate database for Permits relating to pools/spas ('Pool Register'). Since 2001 it has been the unwritten policy of the Council not to accept Permits for properties outside of the municipality of Maroondah.
3. Maroondah City Council has implemented the following practices when it receives an application for Building Permit for a pool or spa:
 - a) Council's Building Permit database enables Council to record all inspections, correspondence, issues and key data in relation to each Building Permit.
 - b) Council runs a monthly Permit report on Council Building Permits to identify any Building Permits that have or are about to lapse, including where Council has not received notification of commencement of works or notification of completion of works.
 - c) Lapsed Permits are reported to the Building Commission by electronic mail.
 - d) If the lapsed Building Permit relates to a swimming pool or spa, the property is added to Council's swimming pool/spa audit program.
4. Since the death of Lauren, Brad Teal Real Estate has introduced a system whereby every property they manage that has a pool or a spa must provide a current Certificate of compliance or written notice that the pool or spa is compliant. Where such certificate or notice is not supplied Brad Teal Real Estate surrenders the management of the property.

PREAMBLE TO RECOMMENDATIONS

a) The circumstances of Lauren Harris's death discloses the existing regulatory checks and balances designed to ensure that pool barriers are constructed in a compliant manner and maintained in that manner may be enhanced by further regulation. The current checks and balances include, in summary:

- A Building Permit cannot be issued for the construction of a pool unless the relevant Building Surveyor is satisfied that the proposed building work, which must include a compliant pool barrier, complies with the Building Act and Regulations.
- The obligations of builders and owners under Section 33 (1) of the Building Act to notify the relevant Building Surveyor at the completion of the mandatory stage of building work under a Building Permit so that the building may be inspected.
- The obligation of the relevant Building Surveyor to file a copy of any notice or order with Municipal Building Surveyor in the relevant Municipal district pursuant to Section 125 of the Building Act.
- The obligation of the relevant Building Surveyor if he/she is a Private Building Surveyor to refer any non compliance with any order to the Building Commission within fourteen (14) days under Section 115 of the Building Act.
- In relation to maintenance, Regulation 1220 of the Building Regulations 2006 states:
 - i) The occupier of an allotment or building containing a swimming pool or spa must take all reasonable steps to ensure that any fence or other barrier, door, gate, lock, latch, catch, bolt or fly screen restricting access to the swimming pool or spa is maintained and operating effectively at all times. Penalty: 50 penalty units.
 - ii) The occupier of an allotment or building containing a swimming pool or spa must take all reasonable steps to ensure that any gate or door forming part of a swimming pool or spa barrier or fence that provides access to the swimming pool or spa is in the closed position except when a person is in the act of entering or leaving the part of the allotment or building containing the swimming pool or

spa. Penalty: 50 penalty units.

iii) A person who enters or leaves the part of an allotment or building containing a swimming pool or spa must ensure that any gate or door forming part of the swimming pool or spa barrier or fence that provides access to the swimming pool or spa is in the closed position at all times, except when that person or another person is in the act of entering or leaving that part of the allotment or building. Penalty: 50 penalty units.

b) The key issues of continuing concern regarding pool safety relate to ongoing public awareness and compliance and enforcement of home pool/spa barrier legislation. Awareness campaigns such as the Victorian Government's, 'Play it Safe by the Water'; Life Saving Victoria's, 'Keep Watch Program' and Aquatic and Recreational Victoria's, 'Watch Around Water' are essential in promoting the need for vigilance in supervising children around water. Promotional material must also cater for those from culturally and linguistically diverse communities.

c) The Victorian Water Safety Master Plan 2012-2015, (Master Plan), acknowledges the achievements of these educational programs and others involved in drowning prevention, in dramatically reducing toddler drowning deaths in Victoria over the past decade. Nevertheless children aged 0-4 years still have the highest drowning rate of any age group in Victoria (1.9 per 100,000 population). Infants are also over represented in hospital emergency departments; for every toddler drowning another six are hospitalised from non-fatal incidents, often suffering adverse long-term effects.

d) The Master Plan identifies an estimated 139,000 backyard swimming pools in Victoria and approximately 450 public and commercial swimming pools attracting over 60 million visitations each year. The number of spas, and dams on rural properties, is not identified.

e) The Inquest has highlighted the need for routine mandatory assessment of pool barriers in Victoria, as occurs elsewhere. Barrier inspection, at least four yearly, was introduced in Western Australia in 1991 and is credited in playing a key role in reducing the number of toddler drownings in home pools. Legislation for mandatory assessment along with a home pool/spa register will bring Victoria in line with other States and work towards a nationally consistent approach to help reduce confusion and improve compliance and safety.

RECOMMENDATIONS

Pursuant to section 72(2) of the **Coroners Act 2008**, I make the following recommendations connected with the death:

1. That the relevant legislation be amended to make clear that if the pool builder contracts with the property owner to only construct a swimming pool (and not also the pool safety barriers) then the responsibility to construct the mandatory safety barriers will be imposed on the owner.
2. That the relevant legislation be amended to impose a clear obligation on the Building Permit holder to inform the relevant Building Surveyor when they have commenced building work as most other time based obligations under the Act flow from that commencement date.
3. That the relevant legislation be amended to impose a mandatory obligation on the relevant Building Surveyor to inspect any swimming pool Building Permit site within two (2) months of the relevant Building Permit lapsing.
4. That the Building Commission review the existing information it makes available for property owners building a swimming pool and prepares a summary brochure specifically targeting the responsibilities of Building Permit holders and property owners for swimming pools. This targeted information should highlight mandatory reporting and inspection obligations, focusing in particular on commencement of building work and final inspection and the provision of a compliant safety barrier for the swimming pool before it is filled with water.
5. That the relevant legislation be amended to impose a mandatory obligation on the relevant Building Surveyor that the information prepared under Recommendation 4 be sent to the Building Permit holder (and the property owner if they are not the Building Permit holder) with the Building Permit each time one is issued for a swimming pool.
6. That the relevant legislation be amended to extend the powers of a Municipal Building Surveyor to issue infringement notices for breaches of the legislation in relation to swimming pools, such as failures to have a mandatory inspection conducted, failure to cease work when a mandatory inspection has not been conducted and failure to have a compliant swimming pool barrier.
7. That the legislation be amended to enable authorised officers to enter private properties upon reasonable written notice for the specific purpose of investigating or monitoring compliance with the legislation and any Building Permit relating to a swimming pool.
8. That swimming pool owners be required to obtain a mandatory inspection of their swimming pool safety barriers every three (3) years by licensed pool safety inspectors, with

the results to be recorded on the Statewide swimming pool register (see recommendation 11 below). A new offence should be established for failing to have a mandatory inspection of the swimming pool conducted with a suggested penalty of at least 20 penalty units to reinforce the gravity of the obligation given the importance of public safety.

9. That the relevant legislation be amended to make it a mandatory pre-condition to the sale or rental or house sitting of any property that has a swimming pool, that pool safety barriers be inspected and where necessary brought into compliance and a certificate of compliance be received from a registered pool inspector, before occupation by the purchaser, tenant or house sitter can occur.
10. That the Real Estate Institute of Victoria and Law Institute of Victoria alter the standing contract of sale or rental agreement to reflect the amended legislation in Recommendation 9 of above.
11. That pool owners be required to self register free of charge on a Statewide, online register and provide certification that their pool barrier complies with the legislation. Pool owners should have twelve months to register and provide the necessary certifications. A new offence should be established for failing to register a swimming pool with a suggested penalty of at least 20 penalty units to reinforce the gravity of the obligation given the importance of public safety.
12. That the Victorian Parliament consider providing a single piece of legislation containing a uniformed set of rules and requirements relating to the construction and fencing of pools, irrespective of their date of construction. The post May 2010 requirements relating to the use of boundary fences should be applied regardless of the construction date, so that the requirements are consistent and pool owners can ensure that the barrier remains compliant. Pool owners should be given a reasonable period of time within which to obtain compliance with these requirements or risk penalty/fines.
13. That the Real Estate Institute of Victoria educates its members about the importance of swimming pool surrounds forming part of property inspection from a duty of care prospective to ensure the health and wellbeing of tenants.
14. That Consumer Affairs Victoria amends its residential tenancy forms and publications created for tenants and landlords to include regulatory information about swimming pools safety barrier fencing.
15. That the Building Commission improves the dissemination and availability of information

about the construction and maintenance of swimming pools and their safety barriers and the relevant Building Permit process including by ensuring that all relevant Community Information Sheets, Practice Notes and other Building Commission publications are linked to the Commission's webpage for the public on swimming pools and spas.

16. That the Building Commission publish a laminated cardiopulmonary resuscitation guide, which also includes the simple reminder as to maintaining pool barriers, to be distributed through the Council network and also be made available to Building Surveyors who issue swimming pool permits, so that they could be provided to pool owners at final inspection or final certificate stage.

I direct that a copy of this finding be provided to the following:

Family of Lauren Harris

Mr and Mrs Harvey

Maroondah City Council

Mr Arthur Smith

Moonee Valley City Council

Brad Teal Real Estate

Mr Dennis Campana

Building Commission

Mr Peter Ryan, Minister for Police and Emergency Services

Department of Justice-Emergency Services Policy and Support

Real Estate Institute of Victoria

Law Institute of Victoria

Consumer Affairs Victoria

Senior Constable Steven Taylor

Hannah's Foundation

Kids Safe Victoria

Life Saving Victoria

Swimming Victoria Inc

Swimming Pool and Spa Association of Victoria

Municipal Association of Victoria

Signature:

Iain West



IAIN WEST
DEPUTY STATE CORONER
Date: 14 October 2014