

IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: COR 2016 0059

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 60(1)

Section 67 of the Coroners Act 2008

Findings of: **MR DARREN J. BRACKEN, CORONER**

Deceased: **MAX EDWARD LOWEKE**

Delivered On: **8 December 2021**

Delivered At: **THE CORONERS COURT OF VICTORIA,
65 KAVANAGH STREET, SOUTHBANK**

Hearing Dates: 28 May 2019 - 3 June 2019 and 9 September 2019 – 13
September 2019

Coroner's Assistant: Mr R Paoletti, Counsel

Representation: Mr S Stafford, Counsel for Victorian State Emergency
Services

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Telecommunications Authority

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HIS HONOUR

INTRODUCTION

1. Max Edward Loweke was 63 years old when he died in the early hours of 4 January 2016 shortly after flood water swept the motor car that he was driving off Delatite Road Seymour, at the Whiteheads Creek Ford ("the Ford").
2. On 5 January 2016 Dr S. Parsons, a forensic pathologist practising at the Victorian Institute of Forensic Medicine, conducted a post-mortem examination of Mr Loweke's body. In a report dated 14 January 2016, Dr S. Parsons opined that the cause of Mr Loweke's death was 'Drowning'.
3. There is no controversy surrounding Mr Loweke's medical cause of death. However, it is important to note that Mr Loweke's agility was affected by spinal surgery and bilateral knee prostheses, which may have inhibited his ability to extricate himself from his car after he drove it into the Ford. There is some controversy surrounding the circumstances of Mr Loweke's death, in particular the manner in which police, the State Emergency Service and Mitchell Shire Council ("the Council") dealt with the flooding of the Ford.

CORONERS ACT (2008)

4. Relevantly, a coroner investigating a death must find, if possible, the identity of the deceased, the cause of death and the circumstances in which the death occurred.
5. In the context of much evidence having been led in relation to the intricacies of the *Emergency Management Act (2013)*, the Mitchell Shire Council Flood Plan and associated documents, I keep my statutory obligations in mind.

CIRCUMSTANCES & EVIDENCE

6. At about 6.00pm on 3 January 2016 heavy rain fell on Seymour causing local flooding.

7. For the afternoon shift at the Seymour Police Station, Sergeant Warren Taylor, a divisional van crew consisting of Constables Bortolotto and Howell, and a Watch-House Keeper, Senior Constable Fuhrmann, started at 3.00pm and were to finish their shifts at 11.00pm.
8. Two Seymour highway patrol units, one staffed by Leading Senior Constable Pezzimenti and Senior Constable Morton, and the other by Acting Sergeant Wright, were also on duty, having started at 1.00pm and were due to finish work at 9.00pm. Senior Sergeant Donovan was the Divisional Response Supervisor.
9. Units from the Victorian State Emergency Service, staff from VicRoads and from the Council were also working in Seymour that night attending to reports of flooding.
10. Driving along Delatite Road from Wimble Street towards the Ford, the direction driven by Mr Loweke, there were signs beside the road encountered in the order here set-out.
 - (a) "Water Over Road Due to Flooding" (Yellow and Black Oblong).
 - (b) "Road Subject to Flooding Indicators Show Depth" (Black and White Oblong).
 - (c) "One Lane" (Yellow and Black Diamond and Oblong).
 - (d) "Ford" (Yellow and Black Diamond).
 - (e) "Water Over Road" (Yellow and Black Oblong).
11. Signs (a) and (e) ("the Signs") are made-up of two parts which are kept folded closed horizontally and locked with padlocks. The Signs are intended to be unlocked and deployed when the road is flooded. As at January 2019, the keys to the padlocks were held by the ("the Council"). Throughout 3 and 4 January, despite efforts by Sergeant Shaw, these signs were not deployed.

Witness Accounts of the Flooded Ford

12. In the statement he gave to the Coronial Investigator Mr Michael Stead described driving down to the Ford at about 8:30 PM on 3 January and seeing that the water level indicators beside the road showed 1.5 or 1.6 metres. The Ford was, he said, "...*completely underwater*". In his statement Mr Stead referred to the Mitchell Shire

Council normally putting "...signs out to say that the road is closed... The shire puts signs about 3 metres back from the water....and if you want to pass the signs you have to physically get out of your car and move the signs to get past."¹

13. In the statements she gave to the Coronal Investigator Ms Madalin Duna described driving over the Ford at about 8.30pm on 3 January and seeing, "...nothing at all in the creek. Nothing at all pretty much...just a twinkle." Sometime before 10.25pm. Ms Duna re-visited the Ford and saw that the depth measures on the Ford were at 1.6 metres. Ms Duna explained that the water flowing over the Ford was running smoothly but fast and described it as looking like "...glass." Such, she said, that she could not tell apart the flowing water from the asphalt.

Emergency Services Knowledge of Conditions at the Ford and Resultant Action

Emergency Services Telecommunications Authority

14. Ms Duna telephoned the Emergency Services Telecommunications Authority ("ESTA") on '000' at about 10.27pm on 3 January and told the telephone operator that the Ford was flooded. Ms Duna offered to sit in her car at the Ford and block the road until emergency services attended. The operator told Ms Duna that there was no need for that and tried to dispatch Constables Bortolotto and Howell to the Ford only to find that they were occupied dealing with flooding across the Hume Freeway at Locksley. The operator spoke to Sergeant Hopper, the Divisional Supervisor of the Seymour area, only to discover that because of other flooding in and around Seymour there were no police available to attend to the Ford. Sergeant Hopper directed the operator to contact VicRoads or the Council to seek assistance, otherwise, said Sergeant Hopper, the job of going to the Ford could be held over for the night shift due to start at 11.00pm.

State Emergency Service - Mr Rawlinson

15. At approximately 10.30pm. Mr Rawlinson then a volunteer 'SES team leader', was working with Mr Cummings, another SES volunteer, when they drove along Delatite Road and were stopped by water over the road at the Ford.

¹ Mr Stead's observations of the Ford are inconsistent, at least to some degree with those of Ms Hard and Ms Duna said to have been made at about the same time. I note that in his written statement Mr Stead estimated the time of his observations.

In his statement to police and by reference to the depth markers adjacent to the Ford, Mr Rawlinson described the water flowing over the Ford as being approximately 1.8 metres deep. At this time the Signs were folded-up and locked. Mr Rawlinson contacted Ms Welsh, the then SES Duty Officer (also a volunteer) and told her that Delatite road was flooded at the Ford and asked her to contact the Council and request that the road be closed and the Signs unlocked and deployed.

16. After speaking to Ms Welsh, Mr Rawlinson and Mr Cummings left the Ford and attended to other duties. They put no immediate warning in place of the dangers posed by the flooded Ford. The amount of water flowing over the Ford was a serious danger to road users. Ms Duna's description of not being able to tell the water from the asphalt clearly as she approached the Ford, and her offer to sit in her parked car by the Ford until the Council arrived, makes clear that Ms Duna saw the danger posed by the Ford.
17. Mr Rawlinson also gave evidence of a second visit to the Ford; of having travelled to the Ford with a policeman, whom he could not name, at approximately 12.30am and recalled that the water over the Ford was then at about 1.7 metres. Mr Rawlinson recalled that the policeman contacted someone to close the road but was unsure of whom was contacted. Mr Rawlinson recalled that he returned to the flooding over the Goulburn Valley Highway from the Ford.²

State Emergency Service – Ms Welsh

18. In her statements to police Ms Welsh described herself as the 'controller of the Seymour Unit' (of Seymour SES) and being in charge of 12-13 people. She referred to starting work on 3 January with Mr Parker and Mr Stephenson at about 6.25pm and attending to various tasks caused by the rain in and around Seymour. Whilst Ms Welsh made no reference to Mr Rawlinson's telephone call in the statement that she provided for the Inquest Brief, Mr Parker does in one of his statements.

² Mr Rawlinson went to the Ford with Sergeant Shaw. More detail of what they did and saw is set out below.

State Emergency Service – Mr Parker

19. Mr Parker made two statements in relation to this matter.³ In his statement dated 15 January 2016 he referred to being seated next to Ms Welsh in an SES vehicle when Mr Rawlinson telephoned her and told her that the Ford was flooded and that there were no warning signs "...put out...".
20. Mr Parker's statement refers to thinking that Mr Rawlinson told Ms Welsh that the water was at 1.7 metres over the Ford, and of telephoning the Seymour Police Station between 10.30pm and 10.50pm telling them,⁴ that the Ford was overflowing with water and asking that someone close the road or deploy warning signs. Mr Parker says that police told him that they would contact VicRoads "...and see what they could do...".
21. Mr Parker gave viva voce evidence about regretting not having left '...somewhere [sic?] there...' ⁵ and of his distress at Mr Loweke's death. He made clear that with the benefit of hindsight it would have been appropriate to close the road and that the SES could have done so. Mr Parker made clear that he (and the SES) had relied on police effecting closures of the roads in the past. ⁶
22. Shortly after Mr Rawlinson's call Ms Welsh was notified of flooding of the Goulburn Valley Highway. Ms Welsh and Mr Parker returned to SES headquarters, changed vehicles, picked up the 'Rescue Truck', and headed to the Goulburn Valley Highway flood.

Victoria Police - Sergeant Shaw

23. Sergeant Shaw provided a statement for the Inquest Brief⁷ and gave viva-voce evidence that he became aware of the water over the Ford shortly before he came on duty at 11.00pm on 3 January 2016. He gave evidence that he sent Senior Constable Brown and Constable O'Neill to assess the Ford, instructing them to contact ESTA en-route and request that the Council attend at the Ford to close the road.

³ Dated 4 January 2019 and 15 January 2019. Exhibit 13.

⁴ In his statement for the Inquest Brief Constable Erdeljac recalled this telephone call in similar terms to Mr Parker.

⁵ Possibly meaning 'something'.

⁶ T.446. In context Ms Parker was referring to leaving something at the Ford to warn road users of the flooding.

⁷ Statement of Sergeant G Shaw Dated 8 January 2016. Exhibit 8.

He gave evidence of speaking to Senior Constable Brown over the police radio at about 11.45pm and of shortly there-after hearing Senior Constable Brown request that the Council attend at the Ford with signs. Sergeant Shaw also gave evidence of hearing the ESTA operator tell Senior Constable Brown that the Council had earlier twice refused to attend at the Ford.⁸

24. Sergeant Shaw took keys from the police station that he thought might unlock the Signs, and after attending to other flooded areas in and around Seymour he arrived at the Ford at some time after 12.22am, 4 January. There, Sergeant Shaw saw that the water flowing over the Ford was approximately 1.6 metres deep and found that the keys from the police station would not open the padlocks on the Signs. He was also unable to cut the locks off the Signs; the Signs remained folded up and locked. Sergeant Shaw also unsuccessfully tried to open padlocks on other signs in Wimble Street.⁹ Unable to open the Signs, Sergeant Shaw returned to the flooding over the Goulburn Valley Highway leaving the Ford unguarded.
25. Sergeant Shaw gave evidence that he considered that the flooding over the Goulburn Valley Highway “...was a greater priority”¹⁰ than flooding over the Ford because the Goulburn Valley Highway carried more vehicles.¹¹ In his statement Sergeant Shaw set out his belief that the likelihood of vehicles or pedestrians using Delatite Road and the Ford at that time of night was “...minimal, if at all.”. Sergeant Shaw’s statement refers to him considering that those likely to use Delatite Road at that time of night were local people whom, he thought, would know that the Ford flooded after heavy rain. Sergeant Shaw explained that even when there was no water over the Ford, drivers needed to slow before crossing it because it was a single lane with steep access on each side. In such circumstances he considered that anyone who knew the Ford also knew, that regardless of the possibility of it being flooded, they had to slow down to cross it, and if they slowed they would have been able to see the water flowing over it. Sergeant Shaw considered that road users approaching the Ford would have been able to see the water flowing over the Ford in their car headlights and that the signs beside the road were clear.

⁸ Statement of Sergeant G Shaw p.2.

⁹ Statement of Sergeant G Shaw p.p.4 – 5.

¹⁰ T.314.

¹¹ Statement of Sergeant G Shaw p.4.

26. At the Goulburn Valley Highway flooding Sergeant Shaw spoke to Mr Parker whom he believed to be the 'SES Incident Controller'¹² and told him of what he had seen at the Ford. Mr Parker told Sergeant Shaw that he believed that the worst of the flooding had passed and at approximately 1.05am Sergeant Shaw and Mr Rawlinson returned to the Ford.¹³ Sergeant Shaw noted that the water was still at 1.5 metres, that the Signs had not been unlocked and that the road was not closed. Sergeant Shaw and Mr Rawlinson returned to the flooding over the Goulburn Valley Highway, and then Sergeant Shaw returned to the Seymour Police Station¹⁴ once again leaving the Ford unguarded. The earlier request for assistance to the Council was not reiterated.

Victoria Police - Senior Constable Brown

27. Senior Constable Brown provided a statement for the Inquest Brief,¹⁵ and gave evidence of having attended the Ford as instructed by Sergeant Shaw, and of making a request through ESTA at about 11.54pm for someone from the Council to “...*come out and put some signage up...*” The ESTA operator told Senior Constable Brown that the Council had told her earlier that they didn't have anyone to “...*head out there*” but said that she would call them again.¹⁶
28. Senior Constable Brown gave evidence that he assumed that his request for the signs to be unlocked by the Council would be actioned and that he left the Ford unguarded despite there being “...*quite a bit of water on it...*” because “...*it's not a very main road...*”. He gave evidence that there were other signs beside the road near the Ford referring to the road being subject to flooding and that the water was 'obvious', as it was some 30 metres wide and car lights shined off it.¹⁷ Senior Constable Brown gave evidence of there being no street-lights right at the Ford but of one being some 20 or 30 metres along the road, toward Wimble Street from the Ford.¹⁸ Senior Constable Brown went back to deal with the flooding on the Goulburn Valley Highway, which he considered to be a more serious matter.

¹² I deal with such designations subsequently.

¹³ Statement of Sergeant G Shaw p.6.

¹⁴ Statement Sergeant G Shaw dated 8 January 2016 p.5 - 6. (Exhibit 8).

¹⁵ Statement of Senior Constable P Brown dated 13 January 2016.

¹⁶ T.195.

¹⁷ T.204.

¹⁸ T.203-206.

Senior Constable Brown gave evidence that he did not think it was appropriate to cut the padlocks on the Signs to deploy them because he would have had to explain to the council why he had “...*damaged their property*”. Senior Constable Brown gave evidence that the flooding across the road was “...*fairly obvious...*” and that the road was used mainly by local people who would have known that the Ford flooded after heavy rainfall.¹⁹

29. Senior Constable Brown gave evidence that at about 11.00pm, while he was still at the police station, he used the radio to request someone from the Council to attend at the Ford and set-up ‘road closed’ signs. He further gave evidence of making a second radio request to ESTA at about 11.50pm, when he got to the Ford, for ESTA to contact the Council regarding flood closure at the Ford.²⁰

Victoria Police - Senior Constable Furhmann

30. Senior Constable Furhmann provided a statement for the Inquest Brief in which she referred to working at the Seymour Police Station on the evening of 3 January 2016 and receiving a telephone call from ESTA asking for Constable Bortolotto regarding Delatite Road. In her statement Senior Constable Furhmann referred to telling the ESTA telephone operator that Constable Bortolotto had “...*gone out to another job and that I believed that it had been taken care of.*”

Mitchell Shire Council - Oracle CMS Pty. Ltd.

31. As at January 2016 Oracle CMS Pty. Ltd. (“Oracle”) provided an after-hours telephone answering service for the Council.
32. At 10.33pm on 3 January an ESTA operator telephoned the Council ‘after hours’ telephone number and spoke to ‘Ben’, (“the First Call to Oracle”). The ESTA operator told Ben that:
- There was water over the road on Delatite Road blocking both lanes of traffic.
 - Police have asked that the Council deal with the matter.

¹⁹ T.206-207.

²⁰ T.209-210.

- Another person has ‘called it in’ and she has a contact number for that person if Ben wants it.
 - The only contact telephone number for her was ‘000’. The operator also told Ben her name.
33. The ESTA operator asked Ben to call her back and let her know what happens or she said she can try to get someone else to deal with the matter if Ben cannot.
34. Ben told the ESTA Operator that the system would not let him ‘move forward’ with her request unless she provided a ten digit ‘call-back’ telephone number; he could not use ‘000’. The ESTA operator told Ben that the police don’t have anyone else to deal with the matter and that she will go back to the Sergeant and let him know that the Council cannot help and see if someone else can.²¹

Contact with the Council ‘After Hours Duty Officer’ Ms Liepa

35. The ESTA operator called Oracle again at 11.55pm. (“the Second Call to Oracle”) and again spoke to ‘Ben’ telling him that:
- Police have been out to Delatite Road and that the water is ‘quite significant’ and signs are needed.
 - If anyone needs to speak to her to call ‘000’ and ask for her.
36. This time Ben dealt with the ESTA operator’s request despite not being provided with a ten-digit call-back telephone number.²² Putting to one side Ben’s expression he told the ESTA operator that he would call the ‘Duty Officer’.

Ms N Liepa - Seymour Council ‘After Hours Duty Officer’

37. Ms Liepa provided a written statement to police dated 12 January 2016, but on the basis of medical assessment, was unable to give viva voce evidence. In her statement Ms Liepa recalled receiving a number of calls for assistance as a result of flooding in and around Seymour on 3 January 2016, the first at about 6.30pm.

²¹ Exhibit 23 Statement of Mr T. Richards - Annexure 2. “First Triple Zero Call Regarding Delatite Road (22.25).” Inquest Brief p.923.

²² I deal with the issue of Oracle’s need for a 10-digit telephone number later in this finding.

Her statement refers to her arranging assistance in relation to those requests. Mr Liepa referred to having spoken to Ms Johnson her ‘supervisor²³, during the night and of Ms Johnson explaining to her that if serious matters arose that the police would ‘...escalate it and they will advise us or contact the MERO...’. Ms Liepa’s statement records that she first went to sleep on this night between 10.00pm and 11.00pm and refers to being woken-up at some point and replying to a text message.

38. Ms Liepa’s statement describes her being woken-up again by her telephone at “...around midnight.”. In her statement Ms Liepa described the call as “...a request for signage in Delatite Road....it was another basic request.” Ms Liepa referred to being told to call ‘000’ and “...they gave me the name of the officer to ask for”. First, they said that I had to call ‘000’ and ask for - some term I can’t recall at the moment.” Ms Liepa’s statement refers to her making a telephone call as requested, but the account of that telephone call contained in her statement is at odds with the transcript of the call.
39. I here set-out the transcript of the recording of Ms Liepa’s conversation with the ESTA operator.

ESTA: Hello Narelle. How are you?”

Ms Liepa: Hi, Good. Who am I speaking with?

ESTA: Paul now, [the first ESTA operator]’s gone.

M Liepa: Okay. Sorry. I just got the message to give you a call. To give [...] a call.

ESTA: Okay. She was trying to do a job for signs needed for water over the road.

Ms Liepa: Right.

ESTA: That’s 190 Delatite Road in Seymour.

Ms Liepa: 190 Delatite Road. Okay.

ESTA: They’re out at a job on the freeway so they’ve said to call through to the council for signage

Ms Liepa: Okay. We did send someone out earlier. They came up but I don’t know if they have already done that or not.

ESTA: Okay. This call came through at 10.30.

²³ The Council MERO albeit that on this night Mr Adams was fulfilling role.

Ms Liepa: Ah. Okay. They would have been up there around 10.30. They went to Avenal Road and also Highlands Road.

ESTA: Okay. Well, if you're happy it's dealt then. They haven't been – the van hasn't been there yet. That's all. They're at another job.

Ms Liepa Okay. 190 Delatite Road. Alright I'll see what we can do.

ESTA: Alright, no worries.

Ms Liepa: Alright thanks. Bye.

40. The transcript does not record the ESTA operator telling Ms Liepa of the content of the First Call to Oracle. It is likely that Ms Liepa called ESTA as a result of the Second Call to Oracle.
41. Ms Liepa's statement refers to her being told that "...they had gone back out and she said it looked like the job was about 10.30pm."
42. The terms of her statement indicate that Ms Liepa believed that she was speaking to someone at the Seymour Police Station when she was speaking to an ESTA operator. The content of Ms Liepa's statement suggests that she was confused about what was discussed during the call and did not consider the request urgent because it was an hour and a half old – she initially referred to it as a "...basic request." Ms Liepa seems not to have clearly understood the request as set-out in the transcript. In any case, according to her statement, after hanging up Ms Liepa sent a message to the Council's Road Maintenance Co-ordinator, Mr Simpson, asking who to contact for assistance. Mr Simpson apparently provided her with names. Again, according to her statement, Ms Liepa intended to put her son to bed and "...call someone from the list." Unfortunately, while Ms Liepa was putting her son to bed, she fell asleep herself without having sent anyone to the Ford.
43. Ms Liepa's statement recounts her waking-up at "*It might have been 2.00am.*" and finding that "*I hadn't received any more calls. Rightly or wrongly, I assumed that it mustn't have been an emergency or anything urgent as no one had followed up requesting the signs.*" The 'it' to which Ms Liepa refers to is the request made to her at about midnight, as a result of the Second Call to ESTA, for someone from the Council to be sent out to the Ford.

44. Mr Loweke drove into the Ford at approximately 1.55am., some:

- Three and a half hours after the First Call to Oracle requesting signs be placed on Delatite Road;
- Nearly two hours after the Second Call to Oracle;
- A little less than two hours after ESTA asked Ms Liepa to have some signs put out on Delatite Road; and
- As set-out below, about 45 minutes²⁴ hours after Sergeant Shaw and Mr Rawlinson were last at the Ford.

Ms T. Johnson Manager Operations - Mitchell Shire Council

45. Ms Johnson made two written statements for the Inquest, dated 11 January 2016 and 15 February 2019 and gave viva voce evidence.

46. In her first statement Ms Johnson explained that as at January 2016 she was the Council Municipal Emergency Resource Officer (“MERO”), albeit that on 3 and 4 January 2016 a Mr Adams was performing that role.

47. Ms Johnson’s statements go on to recount the Council having received a number of ‘after hours’ requests for assistance on 3 January 2016 in relation to flash flooding in and around Seymour, including for signs warning of water over various roads, and of the Council’s ‘After Hours Duty Officer’, Ms Liepa, dealing with those requests. Ms Johnson gave evidence that no requests were made of the Council MERO.

48. Ms Johnson’s first statement refers to the First Call to Oracle as concluding with the ESTA caller declining to leave a message and resources not being required. A simple reading of the transcript of the call makes clear that this description is inaccurate.

²⁴ By reference to evidence of what time other events occurred for example, when Sergeant Shaw and Mr Rawlinson were last at the Ford or what Mr Parker drove the ESSS rescue truck out of their base just before he saw Mr Loweke drive into the Ford there is some uncertainty about precisely what time Mr Loweke drove into the Ford. The most reliable event is Ms Welsh reported the event to ESTA by radio, 1.57am. See Exhibit 23 Statement of Mr T. Richards - Annexure 2. Page 932 of the Inquest Brief.

Ms Johnson's first statement also refers to the Second Call to Oracle and that during that call "...no further detail regarding the nature of the request. However, the call out officer returned the call to '000' and was put through to the Seymour Police Station to try to resolve what the request was for".²⁵ This account too is inaccurate.

49. In the course of her viva voce evidence Ms Johnson agreed, contrary to her first statement, that during the First Call to Oracle the ESTA operator told the call taker of a flood on Delatite Road. Ms Johnson conceded that the call taker asked the ESTA operator for a return telephone number other than 000 and told her that he could not register or action her call because she was unable to give him a 10-digit telephone number. When giving evidence Ms Johnson also conceded that the Second Call to Oracle requested assistance with signage in Delatite Road because of water over the road.²⁶
50. I note that Ms Johnson gave evidence of having prepared her first statement by reference to reports provided by Oracle to the Council rather than from original documents, and that her first statement was made more than a week after Mr Loweke's death.²⁷
51. Ms Johnson agreed with Mr Paoletti that despite what the Oracle Operator told the ESTA Operator, as at 3 January 2016, Oracle had a process to receive reports of events and calls for assistance and to convey them to Council staff for action without the need for a '10 digit 'call-back' telephone number' being provided by the caller.²⁸ Ms Johnson gave evidence that she became aware of this process after having made her first statement.²⁹
52. Ms Johnson gave evidence of speaking to Ms Liepa during the evening of 3 January and of Ms Liepa updating her on requests that she, Ms Liepa, had received and satisfied. Ms Johnson gave evidence that she thought that she had advised Ms Liepa that if there was any "...escalation to the event, there would potentially be requests through the – MERO or there might be some additional requests through the after-hours."³⁰

²⁵ Statement of Tamara Jane Johnson dated 11 January 2016.

²⁶ T.569.

²⁷ T.570.

²⁸ T.571.

²⁹ T.572.

³⁰ T.593.

Ms Johnson gave evidence that she understood from this telephone call that Ms Liepa was managing the requests and that if requests “...continued escalating...” Ms Liepa would call her again to seek advice.³¹

53. In her first statement Ms Johnson referred to the ‘Council After Hours Duty Officer’ role performed by Ms Liepa on 3 and 4 January as being straight-forward and not requiring any specialist knowledge or significant training. In her evidence Ms Johnson conceded that the role required: good judgement, an ability to ‘multi-task’ and to co-ordinate multiple council resources, problem solving, and experience with how the Council operated and how the Council’s resources are brought to bear in an emergency.³² Ms Johnson’s evidence was to the effect that those allocated this role, including Ms Liepa, exercised many of these skills in their ‘day-to-day’ roles as council employees, albeit that she conceded that Ms Liepa had no experience in co-ordinating council resources to respond to an emergency.³³ Ms Johnson did not agree with Ms Gardiner’s proposition that Ms Liepa being confused about to whom she was speaking to when she called 000 at approximately midnight on 3 January 2016, indicated that she, Ms Liepa, lacked understanding of the process required by her role.³⁴

Mr M.T. McIntosh – Director Infrastructure Mitchell Shire Council

54. Mr McIntosh adopted the statement of Mr D.A. Turnbull, who was excused from giving evidence. In his statement Mr Turnbull³⁵ referred to the flooding on 3 and 4 January 2016 as “...not being declared an emergency event...no resources were requested by the MERC.”³⁶ Mr McIntosh explained that while the Council did receive requests for assistance, including in relation to the flooding of the Ford on 3 January 2016, those requests were not made to the MERO.

Mr M. Needham Operations Manager Oracle CMS Pty. Ltd.

55. Mr Needham drew a statement and gave viva voce evidence that as at 3 and 4 January 2016, Oracle was not prevented from passing along requests to the Council if the caller did not provide a 10 digit ‘call back number’.

³¹ T.594-595.

³² T.613-614.

³³ T.614-615.

³⁴ T.661-662.

³⁵ Statement of Mr D.A. Turnbull. Exhibit 19

³⁶ T742.

Mr Needham explained that if a telephone number of less than ten digits is entered by an Oracle operator as a 'call-back' number the system prompted the operator to check the number. Mr Needham explained that Oracle's systems and training of call takers has, since 2016 been altered so that if '000' is nominated as the 'call-back number that the Oracle operator is not prompted to check the telephone number'.³⁷

Emergency Management in Victoria

56. *The Emergency Management Act* (2013) and the Emergency Management Manual Victoria, together ("the EMMV") provide the principal policy and planning documents for emergency management in Victoria,³⁸ setting-out a somewhat formal system by which emergency services and other organisations including councils manage emergencies, such as the flooding that Seymour experienced on 3 and 4 January 2016. The structure of the EMMV is founded on emergency services and individual members of such services taking on designated roles such as "Incident Controller" ("IC"), "Municipal Emergency Resource Officer" ("MERO"), "Municipal Emergency Resource Co-ordinator" ("MERC"), "Emergency Management Team" ("EMT") et al.
57. The Michell Shire Council Flood Plan ("the Council Flood Plan") is a Sub-Plan of the Michel Shire Council Emergency Management Plan which operates in conjunction with the EMMV. The Council Flood Plan was not implemented on 3 and 4 January 2016.
58. It is tolerably clear that police, SES and council staff did not explicitly utilise the EMMV structure to manage the flooding around Seymour on 3 and 4 January 2016 by amongst other measures allocating MERC's, MERO's, EMT's IC's and the like, but simply managed the flooding as a part of their respective 'businesses as usual' response. Despite various witnesses at one time or another making references to terms, titles and positions to which the EMMV refers,³⁹ there is no convincing evidence of the formal structure having been explicitly adopted and of personnel from the various emergency services taking up designated roles and functions.

³⁷ T.826-827,832.

³⁸ Statement of Superintendent Nigel Howard dated 14 December 2018 Exhibit 32 [13].

³⁹ Including when operated in conjunction with the Council Flood Plan.

Victoria Police Senior Sergeant Donovan

59. On 3 January 2016 Senior Sergeant Donovan was the Divisional Response Supervisor for Eastern Regions – Divisions 3 and 4, which he was ultimately responsible for the management of police in and around Seymour.
60. Senior Sergeant Donovan gave evidence that the EMMV deals with emergencies on three levels, ‘incident’, ‘regional’ and ‘State’ and that in so far as the floods in Seymour on 3 and 4 January 2016 were concerned, “*From a police response we would - we were dealing with it as a local incident.*” Although he conceded the aggregation of separate flood instances could constitute a ‘regional emergency’.⁴⁰ Senior Sergeant Donovan gave evidence that the provisions of the EMMV would have been applicable to the incidents of flash flooding in and around Seymour on 3 January 2016 and that pursuant to those provisions the control agency would have been the State Emergency Service.⁴¹
61. Senior Sergeant Donovan gave evidence that an IC, pursuant to the EMMV, is the person who is in control of an incident and he recalled that during the course of his shift on 3 January he was not told that any person had been appointed as the IC of the flooding in and around Seymour. He gave evidence that had an IC been appointed he would have expected to be notified by one of the police supervisors who reported to him.⁴²
62. Senior Sergeant Donovan gave evidence that a MERC is a “*...role within the Council. That’s if we are seeking resources from the Council, we go through that person.*”. Senior Sergeant Donovan almost immediately corrected himself explaining that the MERC is a ‘police role’ and at 3 and 4 January, it was held by the Officer in Charge of the Seymour Police Station⁴³ if the police on the ground dealing with an incident want council resources, they can make requests to the MERC who makes the request of the Council through the MERO.⁴⁴

⁴⁰ T.27.

⁴¹ T.26.

⁴² T 28-29.

⁴³ T.29.-30.

⁴⁴ T.30.

63. Senior Sergeant Donovan gave evidence that on 3 January he would have been the Incident Emergency Response Coordinator (“IERC”) for the Seymour Flood Incident, such that police on the ground could make request for council resources through him. Having given that evidence Senior Sergeant Donovan corrected himself and explained that he would not have been the IERC – but rather that the IERC was Senior Sergeant Hopper. Senior Sergeant Donovan did not clearly explain the difference in the roles of a MERC and an IERC but nominated himself in the circumstances of flooding in and around Seymour as the ‘Police Commander’.⁴⁵
64. Senior Sergeant Donovan gave evidence that the Municipal Emergency Resource Officer (“MERO”) is a Council person (employee) to whom “...*the members of the IO or the MERC can make requests...*” for council resources – he had “...*no idea...*” who that person was in relation to the Seymour Flood Incident.⁴⁶
65. Senior Sergeant Donovan explained that an Incident Management Team’ (“IMT”) is “...*an internal group of people that may have a meeting or discussion about an incident*”. When asked if he was aware of any IMT meetings that occurred in relation to the Seymour Flood Incident he responded that a discussion between him and Sergeant Hopper “...*could be interpreted as...*” an IMT.⁴⁷ Senior Sergeant Donovan explained that if a similar meeting occurred including a person from an ‘external agency’ the meeting would be called an Emergency Management Team (EMT) meeting. Senior Sergeant Donovan gave evidence that he and Sergeant Hopper did not speak about forming such a team and that he had no communication from any other agency during his shift about forming an EMT.⁴⁸
66. When asked if he thought that it may have been of some assistance if an EMT had been formally convened to assist in identifying risks, seeking resources, deploying assets, providing assistance and auditing provision of assistance sought, he responded that his notes did not refer to flash flooding in Seymour but only to ‘heavy rain’ and said that “...*so my position was it wasn’t flooding as such, there was just water on the road. As soon as the rain had stopped, the water started dissipating*”.

⁴⁵ T.31.

⁴⁶ T.32. What ‘IO’ means is unclear. Senior Sergeant Donovan may have meant the IC – Incident Controller.

⁴⁷ T.32.

⁴⁸ T.33.

67. Senior Sergeant Donovan gave evidence that he received no requests from the SES for assistance⁴⁹ and that he was not aware of anyone ‘under his purview’ having received any such call.⁵⁰ Senior Sergeant Donovan gave evidence that he did not have any discussion with other police, or anyone else about implementing the structure set-out in the EMMV and that he did not think about it because, “...*As I said, I had no forewarning that it was going to be a significant rain event and it rained heavy. These events have occurred often in the area. It rained, it was heavy, ah then it stopped, and the water dissipated*”.⁵¹
68. Senior Sergeant Donovan gave evidence that he did not think it was necessary to consider implementing any of the EMMV management processes.⁵² He said that he did not know ‘enough’, he did not know what roads were flooded or how flooded they were, he did not know the extent of the problem and he considered that if it would have been an issue that the supervisors who reported to him would have brought it to his attention.

Victoria Police Sergeant Hopper

69. Sergeant Hopper gave evidence that he was familiar with the Manual.⁵³ He gave evidence that he was the ‘forward commander’ (term now adopted by police in place of Incident Controller)⁵⁴ and was dealing with incidents of water over the road at various locations in and around Seymour. He gave evidence that he took control of those incidents and that in a flood emergency, the SES is generally the Control Agency. However, when Sergeant Hopper was asked, “*Would they at any level to your understanding be the control agency with respect to the water over the road events during your shift?...*”⁵⁵ he responded that “... *I – I had no um - I had no contact or I certainly wasn’t contacted by the State Emergency Service, no.*”⁵⁶ Sergeant Hopper gave evidence that throughout his shift he made requests of SES and he ‘lent out’ police units to go to incidents.⁵⁷

⁴⁹ T.34.

⁵⁰ T.35.

⁵¹ T.43.-44.

⁵² T.44.-45.

⁵³ T.75.-78.

⁵⁴ Exhibit 32 [33].

⁵⁵ T.80.

⁵⁶ T.79.

⁵⁷ T.80.

70. When asked if there was an Incident Controller overseeing the response to the various ‘water over the road incidents in Seymour’, Sergeant Hopper said that both he and Senior Sergeant Donovan were supervising police units but “...as far as a control agency perspective, I can’t say that there was one”,⁵⁸ and that he was not given any notice of an Incident Controller.⁵⁹ When asked questions about the MERC, Sergeant Hopper gave evidence that “I wore many hats on that - shift. Um, I was the forward commander; um, to say there was, um, on - scene I would say that I was wearing that hat.... I acted as the - um, well, yes, yeah, I would have - I would have been the MERC, um without putting a label on oneself. Yeah, I would have been the MERC in that situation being that I was the - person closest to the incident and that I was managing the police units at the time”.⁶⁰ When asked about the differences between a MERC and an IERC Sergeant Hopper gave evidence that “...in the regional area you - you could say you need to be wearing multiple hats. Um and I say from a, ah - a middle management level. Um Senior Sergeant Donovan could have been the MERC, but he also had you know, um, other jobs going further north, sir. As so from a local point of view I was closest to the incident and I was managing the police units at the time”⁶¹, “- I - in hindsight I suppose I was the MERC on the night. I was the one that was making the decision of where the units were best utilised. So, ah, in - in saying that, I’d say that I - I did presume the right of the MERC.”⁶² Sergeant Hopper was not very clear about his role ‘as the MERC’ nor did he make clear that on that night he understood himself to be the MERC or that he told others that he was.
71. Sergeant Hopper gave evidence that no one contacted him and announced the he or she was the Incident Controller, and that he had no contact with any person whom he understood to be the MERO.
72. Sergeant Hopper gave evidence that no IMT or EMT was convened at any time during his shift but that with the benefit of hindsight an IMT or an EMT would have been ideal.⁶³

⁵⁸ T.81.

⁵⁹ T.80.

⁶⁰ T.82.

⁶¹ T.82.

⁶² T.83.

⁶³ T.82.-84.

Victoria State Emergency Service Mr K. Parker

73. Mr Parker gave evidence that he was not aware of an incident controller being appointed to the ‘flash flooding event at Delatite Road on 3 and 4 January 2016’ but that he was sure that there were a few incident controllers put in place in relation to the flash flood events that occurred.⁶⁴ Mr Parker did not know of any person occupying the role of MERC on 3 or 4 January 2016.⁶⁵ In his evidence Mr Parker identified people whom he assumed occupied roles set-out in the EMMV, albeit he made no reference to any clear identification of any person with any specific role or being told that any person occupied any particular role. Mr Parker does however nominate himself as the IC in relation to the attempt to rescue Mr Loweke from his submerging car.⁶⁶ Further when taken to Mr Payne’s statement,⁶⁷ Mr Parker agrees with the assertion in that statement⁶⁸ that he, adopted the role as the IC in relation to each flood related request for assistance received by his SES crew on 3 and 4 January 2016, but goes on to say that he believed that Mr Payne’s reference was only in relation to Mr Loweke’s attempted rescue. When put to him that Mr Payne’s statement makes no reference to the attempted rescue, Mr Parker says that this issue will have to be taken up with Mr Payne.

Mr N.B. Payne – Operations Manager (Emergency Management)
Victoria State Emergency Service

74. Mr Payne made two statements, the first dated 20 February 2019 and the second 18 April 2019.⁶⁹ Mr Payne gave evidence about whether more than a metre and half of water flowing across Delatite Road at the Ford was a ‘water over the road issue’, in which case, he said, it was effectively a traffic issue for which the police were the CA,⁷⁰ or whether it was a flood in which case the SES was the CA.⁷¹ Mr Payne said that he was raising this issue then for the first time as he gave evidence.⁷²

⁶⁴ T.434.

⁶⁵ T.435.

⁶⁶ T.441.

⁶⁷ Statement of Neil Bernard Payne Victorian SES Operations Manager (Emergency Management) dated 20 February 2019. Exhibit 24 [26-27].

⁶⁸ Dated 20 February 2019.

⁶⁹ The second statement is Exhibit 25.

⁷⁰ Control Agency.

⁷¹ T.1105.

⁷² T.1107.

Mr Payne conceded that the 'After Action Review' indicated that the SES should be seen to have been the CA, and that that there was no suggestion that a Victoria Police member was the IC in relation to the Ford.

75. Mr Payne canvassed the issue of whether all the flood instances in and around Seymour was the one 'incident' or whether each instance of flooding was a 'separate incident' in which there would have been separate IC's. In his statement dated 20 February 2019, Mr Payne stated that on the basis of the material provided to him it appeared that Mr Parker was the IC in relation to each request received by his crew on 3 and 4 January including the Ford flooding incident.
76. It is apparent that the flooding was dealt with by the police and SES, ad hoc as a part of 'business as usual' and that police and SES staff were less than intimately familiar with the operation of the EMMV.⁷³

Mr Loweke Drives into the Ford

77. At approximately 1:50 am. 4 January 2016, the SES Rescue Truck and its crew, Ms Welsh and Mr Parker and Mr Rawlinson left the Golden Valley Highway and went back to the Ford to see if water had subsided. There they discovered that the water flowing across Delatite Road was approximately 1.5 metres deep and that the Signs had not been deployed nor the road blocked. The Rescue truck left the Ford and returned to the depot.
78. At about 1.53 am. 4 January, the rescue truck left the depot to attend to another task and drove along Wimble Street. At the Delatite Road roundabout Mr Parker, who was driving the truck, gave way to what turned out to be Mr Loweke's car as it drove along Delatite Road through the Wimble Street roundabout and north down Delatite Road to the Ford. No attempt was made by the SES crew to stop or follow Mr Loweke's car down Delatite Road nor were the trucks blue and red flashing lights activated. Mr Parker referenced in his statement dated 15 January 2016, that it was not uncommon for people to drive around Seymour to see the flood waters.

⁷³ This description contains no pejorative and I use it vis-à-vis the formal structure of the EMMT.

79. While the Rescue Truck was stationary at the roundabout at the intersection of Wimble Street and Delatite Road facing south, Mr Parker watched Mr Loweke's car in the rear-view mirror drive north in Delatite Road towards the Ford. In his statement dated 4 January 2016, Mr Parker said that at this time he knew that the Ford was impassable, that water over the road was approximately 1.4 metres deep and that 'Road Closed' signs had not been opened. Mr Parker saw the brake lights of Mr Loweke's car go on for approximately 3 – 4 seconds; he thought that the car was stopping and then he saw water splashing on both sides of the car. Mr Parker thought that the car had driven into the water 'at some speed.'
80. Mr Parker drove the Rescue truck "...with a sense of urgency..." down Delatite Road to the Ford where he saw Mr Loweke's car "...halfway off the side of the road on the downstream side just after the flood level indicator."⁷⁴ Mr Rawlinson described seeing Mr Loweke's car being pushed off the Ford by the water even before he got out of the rescue truck. Mr Rawlinson went to the rear of the rescue truck, obtained a rope, and went back to the front of the truck to give the rope to Mr Parker. By then, said Mr Rawlinson the car had already washed off the Ford into the creek.
81. Mr Parker walked into the water on the Ford and tried to throw an end of the rope to Mr Loweke. Mr Loweke was unable to grab the rope and his car slid further down-stream – being pushed by the water. The car turned, and facing downstream came to rest against a tree and began to fill with water. Mr Parker grabbed Mr Loweke's arm through the passenger-side front window of the car but couldn't hold on. Mr Loweke's car completely submerged. Mr Parker put his right leg into the car for Mr Loweke to grab but he didn't. Mr Parker was forced back out of the water. Mr Parker described these events in considerable disturbing detail in the second of the statements made to police dated 15 January 2016.⁷⁵
82. Mr Rawlinson described Mr Parker standing in water that was up to his armpits at one stage. At one stage Ms Welsh who was trying to deliver a windshield breaking device to Mr Parker slipped off the top of an embankment and Mr Rawlinson managed to drag him back out of the water. Mr Rawlinson estimates that it was approximately five minutes between when they pulled up at the Ford and the car submerging.

⁷⁴ Statement of Kris Parker dated 4 January 2016 pp.1-2. (Exhibit 13).

⁷⁵ Exhibit 13.

Review of the Application of the Emergency Management Response Framework vis-à-vis the Flooding in and around Seymour

83. Superintendent Howard, Officer in Charge State Emergency Response Coordination Division of the State Emergencies and Support Command, provided a statement which was tendered and became Exhibit 24.
84. In his statement Superintendent Howard described emergency management in Victoria as a “...*complex structure*” and explained the requirements of a complex web of documents set-out in the Emergency Management Manual Part 7 of which identified the SES as the control agency for floods.
85. Superintendent Howard’s statement goes on to nominate State Emergency sub-plan (“SERP”) endorsed on 31 January 2012 as relevant to these events as well as the Mitchell Shire Flood Emergency Plan dated May 2013, a sub-plan of the Mitchell Shire Municipal Emergency Management Plan.⁷⁶
86. Superintendent Howard refers to the EMMV being augmented by the:
- (a) State Emergency Response Plan,
 - (b) Joint Standard Operating Procedures,
 - (c) Operational Plans; and
 - (d) Associated Documents.
87. Superintendent Howard set out the emergency management framework and described the application of the framework to the flooding in an around Seymour on 3 and 4 January 2016. Superintendent Howard applied the emergency response arrangements in place and explained that an Incident Emergency Management Team (“IERC”) made-up of the following was ‘indicated’;
- (a) Identification of an Incident Controller by Vic SES,
 - (b) Identification of a Police Commander,
 - (c) Identification of an Incident Emergency Response Coordinator, and

⁷⁶ Inquest Brief pp. 596 and 731 respectively.

- (d) Identification of emergency management team representatives from the Mitchell Shire Council and VicRoads.

88. The complexity of the various instruments applying to emergency management revealed by Superintendent Howard's statement place a considerable burden on those dealing with emergencies, possibly late at night and in stressful situations. Victoria Police have created the Victoria Police Emergencies Handbook as a starting point for reference in all matters of emergency management.⁷⁷

89. I note a 'Police Debrief Report' dated 19 April 2016 drawn by Inspector Glenn Woolfe⁷⁸ referred to a 'debriefing at the Seymour Police Station on 3 March 2016'. This document is brief but refers to the Sergeant Shaw being in Charge of police overnight 3 – 4 January 2016 and of the few resources at his disposal. There is no reference to him having sought more resources including from Senior Sergeant Donovan. There is no reference to the EMMV framework having been implemented nor does the report contain reference to consideration of whether it ought to have been, although one of the 'Issues' identified was 'Functional Management/Control (as incident controller). The report contains recommendations that the MERC and MERO review of flood plans to ensure adequate provision for action during flash flooding and an irrelevant matter dealing with Oracle's supposed need for a 10-digit telephone number.

MITCHELL CITY COUNCIL – RESPONSE TO EVENT AND INQUEST

90. The Council has taken steps to come to grips with opportunities to review its treatment, processes and procedures in relation to the Ford and how it deals with request for assistance in particular through the 'After Hours Duty Officer'. Such responses are detailed in the written submissions made on behalf of the Council by Dr Freckleton QC and include:

- (a) The locks holding the Signs closed have been replaced with nuts and bolts.
- (b) The Council Flood Emergency Plan⁷⁹ has been updated detailing the flow of water in and around Seymour after heavy rain including at Whiteheads Creek.

⁷⁷ Statement of Superintendent Nigel Howard Exhibit 24 [29]-[32].

⁷⁸ Inquest Brief pp.1081-1084.

⁷⁹ A Sub-plan of the Council's Municipal Emergency Management Plan.

- (c) The installation of an Automated River Height Monitoring Station together with automatically deploying associated road signs on each side of the Ford on Delatite Road. The Monitoring Station incorporates a system where-by when water levels at the Ford reach nominated levels messages are automatically sent to Victoria Police and Victoria SES.
- (d) Considering a structural upgrade to the Ford as a part of Capital Works Program to reduce the likelihood of inundation of the Delatite Road.
- (e) A review of the design standard for upgrade of The Ford.
- (f) As a part of a review of how Council deals with provision of services ‘after hours’ the development of a Duty Officer Statement incorporating:
 - i. a formal ‘role description’ and articulation of duties including a ‘call log’;
 - ii. a requirement that Duty Officers familiarise themselves with the Flood Emergency Plan; and
 - iii. regular meetings of those who undertake the ‘after-hours duty officer’ role to engender discussion of the function and practices required of the role and to create a forum at which improvements to operations may be raised and considered.

91. The Council submitted that its conduct reduces the potential for recurrence of the events and circumstance that led to Mr Loweke’s death.

CONCLUSION

92. Given that Ms Liepa had met a number of requests for assistance from the council up until about 10.30pm on 3 January there is no reason to think that she could not have met the request that the ESTA operator tried to make during the First Telephone Call to Oracle had it been put through to her. It may be recalled that when Ms Liepa spoke to the ESTA operator shortly after midnight that there seemed to be some confusion about the time at which ‘the call came in’. Any such confusion would likely not have occurred had the First Call to Oracle been put through to Ms Liepa.

That said there is no evidence of Ms Liepa being confused about what she intended to do shortly after taking the call at midnight. Had Delatite Road been closed, or indeed the Signs deployed shortly after 10.33pm⁸⁰ it is at least possible that Mr Loweke's death would have been prevented.

93. Had Delatite Road been closed, or indeed the Signs deployed shortly after midnight⁸¹ it is at least possible that Mr Loweke's death would have been prevented.
94. Had an interim warning of the danger posed by the Ford been put in place pending arrival of any Council resources Mr Loweke's death may have been prevented.
95. The likelihood of Mr Loweke's death being prevented is higher if Delatite Road had been closed than if the Signs were deployed. On 4 January Mr Loweke drove past signs warning of: Delatite Road being subject to flooding, the road becoming 1 lane, and of the existence of the Ford, when he drove north on Delatite Road from Wimble Street immediately before he drove into the Ford. Whether he would have seen the Signs, had they been deployed, and what he would have done if he had, is simply not now knowable. Had the road been closed as Mr Stead explained that it had in the past when the Ford flooded, Mr Loweke's death is likely to have been prevented.

Management of the Ford

96. Each instance of flooding overnight 3-4 January 2016 could have been managed as separate instances of flooding, or all instances could have been aggregated to one flood incident, or indeed managed simply as various instances of water over the road. The EMMV provisions could have facilitated management of these events or management could have occurred as a part of a 'business as usual' approach.
97. The evidence reveals that the EMMV process may have been implemented to manage the floods around Seymour. There are certainly references in the evidence including the transcript to police and SES staff using some EMMV titles and acronyms although much of this seems to come ex-post-facto, for example in written statements and in viva voce evidence referring to who would have occupied a designated role. It may be that the EMMV structure was partially implicitly but not apparently effectively employed.

⁸⁰ Perhaps not even 'shortly' afterward given that Mr Loweke drove into the Ford some 3.5 hours later.

⁸¹ Perhaps not even 'shortly' afterward given that Mr Loweke drove into the Ford some 2 hours later.

98. It is essential for the proper functioning of the EMMV process that individuals who adopt a role or to whom a role is allocated explicitly inform others involved in the management of the emergency that they are fulfilling that role. Further, when meetings - known by what-ever name or acronym occur, it is essential that they be explicitly declared to all who take part as such. A degree of formality introduced by adoption of the EMMV structure to the management of emergencies including requests for resources being made to a MERO and coordinated by a MERC may facilitate a timely provision of resources and recognition when sought resources are provided as expected. It is clear from the material that police (Sergeant Shaw) and SES staff (Messrs Parker and Rawlinson) at least knew that shortly after 1.00am, that is when Sergeant Shaw and Mr Rawlinson returned to the Goulburn Valley Highway after having visited the Ford, that despite requests to the Council for resources having been made that these requests had not been met. They saw that the Signs had not been deployed and Delatite Road had not been closed. But the request for assistance was not reiterated.
99. Bearing in mind that Mr Loweke drove into the Ford something just less than an hour after Sergeant Shaw and Mr Rawlinson were last at the Ford and that according to her statement at this time Ms Liepa was asleep, ‘chasing up’ the last request to the Council for assistance at Delatite Road made at about midnight, may have resulted in the Signs being deployed or Delatite Road being closed before Mr Loweke drove into the Ford about 50 minutes later.

Interim Warning of the Dangers Posed by the Ford

100. Sergeant Shaw gave evidence that if he had had additional resources that he “...*most likely would have...*” deployed them to Delatite Road until Council signage had been deployed.⁸² Despite Sergeant Shaw, and Mr Parker having access to superior officers from whom they could have sought further resources, no further resources were requested. Sergeant Shaw was unable to provide a reason why he didn’t make such a request although he suggested that his knowledge of potentially available resources led

⁸² T.320.

him to believe that obtaining them would have been difficult and by the time they arrived, the flooding would have subsided.⁸³

Sergeant Shaw also gave evidence that had he decided to close Delatite Road, he, himself could have obtained ‘witches hats’ and deployed them.⁸⁴ He said that he would have been able to obtain ‘witches hats’ to deploy them at the Ford and that doing so may have been an option with the benefit of hindsight, “...*but at the time, um getting police vehicles, obviously somewhat difference of witches hats would be flashing light et cetera is – ah – deemed to be more effective in warning the traffic down on Emily Street or Goulburn Highway.*”⁸⁵

101. Senior Constable Brown gave evidence that he didn’t think it necessary to close Delatite Road because “...*I could have used it [witches’ hats] but with all the other signage and the fact that the water was fairly obvious, at least to me, um, there is no indication that that would have stopped them.*”⁸⁶ Dealing with questions about using a stationary police vehicle as a warning Sergeant Shaw said that it was more important to use police vehicles in this way to warn road users at Emily Street / Goulburn Valley Highway⁸⁷ and he was clear when he gave evidence that he didn’t think that it was necessary to obtain a police car and park it at the Ford with the emergency lights flashing.⁸⁸

102. Sergeant Shaw also gave evidence that he didn’t contact his supervisor Senior Sergeant Byers and seek more resources because he didn’t believe they were needed.⁸⁹

103. Mr Freckelton QC asked Sergeant Shaw about Delatite Road from Wimble Street to the Ford and the signs beside the road with reference to the photographs commencing at p.498 of the brief.⁹⁰ Those photographs show Delatite Road during daylight. Sergeant Shaw gave evidence that there was a light on Delatite Road where the truck in photograph 19 is parked⁹¹ and that ‘on the evening’ when he was on Delatite Road at the

⁸³ T.321.

⁸⁴ T.315.

⁸⁵ 315.-316.

⁸⁶ Senior Constable Brown said that he believed that the ‘witches’ hats’ that the police had were all being otherwise used on that night. T.204.

⁸⁷ T.315.

⁸⁸ T.325-326,

⁸⁹ T.322.

⁹⁰ T.337.

⁹¹ Inquests Brief p.500.

sign in photograph 20 he had visibility of the Ford area “...*you are starting to get a picture of it from there.*”⁹²

Sergeant Shaw gave evidence that by the time he was in the vicinity of the “Road Narrowing Sign” and the ‘Ford’ sign in photographs 20-23⁹³ he was able to see “...*white caps and quite large um pieces of timber floating down the Delatite river [sic?] there and um like large – um – not whole crowns of trees but substantial bits of tree limb with the leaves still attached as such.*”⁹⁴ Sergeant Shaw gave evidence that it was approximately twenty meters from the ‘Ford’ sign to the Ford and approximately forty metres from the ‘Road Narrowing’ sign to the Ford. I note that the photographs show that ‘Ford’ sign is partly obscured by trees even in photograph 22⁹⁵ Sergeant Shaw gave evidence on the night of 3 January that by the time he got to the ‘Ford’ sign there was a very clear view of the Ford and he could see the ‘depth signs’ and the chevrons.⁹⁶ Sergeant Shaw gave evidence that by the time he got to the ‘Ford’ he could see “...*whitecaps, considerable water and debris at the ford...the chevrons and depth markers...*” and that there was no doubt in his mind that at least it was quite unsafe to try to drive through the ford.⁹⁷

104. Whether Mr Loweke saw the signs and ignored their warnings, or he didn’t see them is unknown and now unknowable. How wide the flow of water over the Ford was is unclear although Senior Constable Brown gave evidence that it was “...*probably 30 metres in distance. Quite a large length of water. It wasn’t just a little bit over the road. Um, and as you come down your lights shine off it. So, you can see it.*”⁹⁸ That there were signs warning of the Ford that Mr Loweke should have seen and considered is also clear.

105. That Mr Loweke should not have driven into the water to cross at the Ford is clear.

Why he didn’t stop at the Ford is not known and now cannot be known. Axiomatically he drove past the signs I referred to in paragraph 9(b) – (d) and could, at some point in time have seen the chevrons and depth measure. How far away he was from the water

⁹² T.338.

⁹³ Inquest Brief pp.501.-502.

⁹⁴ T.339.-340.

⁹⁵ T.502.

⁹⁶ T.344.

⁹⁷ T.345.

⁹⁸ T.204

across the road when he saw them is unknown. Mr Parker's evidence makes clear that Mr Loweke applied the brakes of the car probably before the car got into very deep water.

I say that because in his statement Mr Parker refers to seeing the car's brake-lights come on for 3-4 seconds and a very short time later noticing water splashing on both sides of the car twice as high as the car. Mr Parker said that this indicated to him that the car entered the water at some speed. The only thing that can be said is that Mr Loweke began to brake the car, probably before it entered the water.

106. I have no doubt that Sergeant Shaw's assessment that there was no need for an interim warning to be placed at the Ford was sincerely made and based on his considerable policing experience including his local knowledge of Seymour. That Sergeant Shaw and Mr Parker understood the torrent flowing across the Ford was a danger to road users is uncontroversial. Sergeant Shaw's assessment that there was no need for an interim warning was based on his belief that Delatite Road was unlikely to be used or used much late at night on 3 January 2016 and early in the morning of 4 January and that any users would be locals who would have known of the dangers posed by the Ford particularly after heavy rain. The basis of Sergeant Shaw's assessment was logical and reasonable.

107. It may be that the risk of a road user driving into the Ford was relatively low, but it must also have been clear that anyone who did drive into the Ford would be in mortal peril as would any passengers. When a low risk of an event occurring is combined with an understanding that the result of that unlikely event manifesting may be fatal, the risk assessment cannot be decided simply on the basis of there being a low risk of it occurring.

108. That which needs to be done to mitigate the risk must also be assessed; the ease with which risk can be mitigated must be considered. In this case Delatite Road could easily have been closed causing little inconvenience. Apparently without much trouble extra resources may have been requested and deployed as an interim measure warning of the danger posed by the Ford pending the expected arrival of council resources. I am conscious that I have the benefit of hindsight, distance and time.

109. It would have been prudent for Sergeant Shaw or Mr Rawlinson to have ensured that Delatite Road was closed, or a suitable warning of the danger posed by the Ford put in place until requested council resources were provided.
110. During their meeting on the Goulburn Valley Highway at about 1.05am on 4 January after Sergeant Shaw and Mr Rawlinson came back from the Ford, Mr Parker and Sergeant Shaw knew that requested Council resources had not been deployed to Delatite Road but did not discuss putting an interim measure in place or reiterate the request. As a representative of the CA in relation to ‘water over the road at the Ford’⁹⁹ had Mr Parker disagreed with Sergeant Shaw’s decision about the need to place an interim warning at the Ford he could have expressed that disagreement to Sergeant Shaw or escalated the matter to his supervisors or both. Had an interim measure been put in place it is possible that Mr Loweke’s death would have been prevented.
111. An interim warning may not have been necessary, had the Oracle operator facilitated contact between the ESTA operator and Ms Liepa – The First Call to Oracle at about 10.33pm 3 January. The Oracle telephone operator’s explanation that he could not then ‘log’ a request for assistance without a 10-digit return telephone number was established to be incorrect. Whilst Oracle subsequently facilitated communication between ESTA and Ms Liepa, if that communication had occurred shortly after 10.33pm rather than shortly before midnight, Ms Liepa may have been more able to deploy council resources and Mr Loweke’s death may have been prevented.
112. Formal implementation of the EMMV management of the Flooding in and around Seymour on 3 and 4 January 2016 may have helped. The formality of utilising this structure and process, including the allocation of roles and tasks, may have led to Delatite Road being closed in time to prevent Mr Loweke’s death. Requests to the Council would have been made by CA, IC or the MERC to the MERO. The involvement of the framework inculcates a certain accountability that may not be present when ad hoc management is employed. Allocation of explicit roles and specific tasks reduces the likelihood of an ordered task being forgotten or simply going unanswered.

⁹⁹ Closing Submissions on Behalf of the Victoria State Emergency Service dated 8 November 2019 [22].

113. I note that Sergeant Shaw and Mr Rawlinson and Mr Parker were aware at about 1.00am (or shortly thereafter), approximately fifty minutes before Mr Loweke drove into the Ford that the requests for Council assistance hadn't been provided and I further note that a renewal of the request for such assistance was not made either by police or SES staff through ESTA or the MERC, to the MERO or otherwise.

114. I note that submissions for the SES concede that it was the control agency for the water over the road and the Ford. Neither Sergeant Shaw nor Mr Parker refer to this issue in their statements, but Mr Rawlinson refers to the policeman with whom he went to the Ford (Sergeant Shaw) was "...contacting someone to close the road."¹⁰⁰ Sergeant Shaw gives evidence about the notes he took during this event. One entry refers to a EMT meeting he conducted with Mr Parker at 12.50am at the Goulburn Valley Highway which refers to them discussing '...the depth of Delatite Road.'¹⁰¹ These notes contain no reference to him having reiterated a request to the Council for resources.

115. Ms Liepa had been busy that night providing Council resources as a result of the flooding in and around Seymour from approximately 6.30pm. At some time, she telephoned her manager Ms Johnson who told her that if things became serious that the police would escalate and perhaps contact the MERO. Ms Liepa seems to have adequately dealt with the demands placed upon her right up until about midnight when she was awoken from a deep sleep by a call taker at Oracle and asked to call '000'. When she did, she was asked about providing resources to Delatite Road. I have set-out the transcript of that call in the body of this finding. Unfortunately, Ms Liepa inadvertently fell asleep again before she provided the resources requested. Ms Johnson gave evidence that she believed that Ms Liepa had the necessary qualifications to fulfill the 'After Hours Duty Officer Role' albeit that Ms Johnson conceded that Ms Liepa did not have experience in allocating Council resources during an emergency although for at least part of the night on 3 January Ms Liepa dealt with competing demands on her time. That Ms Liepa fell asleep without completely dealing with the request for assistance is seriously regrettable. On the basis of the material provided to the Court clearly, she acutely feels that regret.

¹⁰⁰ Statement of Carey Lee Rawlinson dated 19 January 2016. P.2.

¹⁰¹ T.384 – 385.

116. I note that in her statements Ms Liepa refers to performing the Duty Officer Role ‘as an act of goodwill because the Council was short of staff’ and to her having raised concerns because she hadn’t done it before and wasn’t trained or experienced. Ms Liepa refers to not having received written instructions about what was required of her or how to respond to telephone calls. She did not, she states receive a written job description. Despite these concerns Ms Liepa appears to have adequately performed the role up until she had to deal with the request for assistance at about midnight.

117. Ms Johnson gave evidence that the role of the ‘After Hours Duty Officer’ was set-out in version 4 of the ‘Duty Statement’. Ms Johnson conceded that this Duty Statement did not refer to all applicable key responsibilities and duties. Mr McIntosh conceded that Ms Liepa should have been better briefed for the role. Mr McIntosh gave evidence that those performing the ‘After Hours Duty Officer Role’ now are briefed on the role and its responsibilities, albeit that the content of this briefing is not formally set-out in Council documents. I note that Exhibits 15 – 16 deal with the Council’s ‘After Hours Duty Officer’ position description and duty statement. The Council’s approach to staffing this role is now more considered than it was at January 2016.

118. Simply because Mr Loweke drove his car into the flooded ford does not mean that Sergeant Shaw’s assessment that the risk of a person driving their car into the Ford was low, was wrong. However, that risk assessment ought to have taken into account the mortal danger that the flooded Ford presented to road users, the relatively simple ways in which that danger could have been mitigated and such methods of mitigation ought to have been more assiduously considered. A call to the Council seeking resources without at least monitoring that anticipated resources were actually provided was inadequate. At the latest when Sergeant Shaw and Mr Parker came to know at about 1.00am on the 4th that the Council had not responded to requests for resources at the Ford they ought to have put measures in place warning road users of the danger posed by the flooded Ford or at least re-iterated their request to the Council or indeed both.

119. I accept the Council’s submission that Council action as set-out in paragraph 62 their written submission ‘...*reduces the potential for the events of 3 and 4 January 2016 to recur.*”

120. The evidence makes clear that the role of Council After Hours Duty Officers involves some and perhaps some considerable stress including in relation to allocating Council Resources during, at least potentially life-threatening emergencies. I consider it desirable that such officers receive specific training to help them perform that complex and sometimes arduous role effectively and efficiently. The role of a MERO is, axiomatically, one performed during an emergency and to the extent that the Council MERO's have not had the specific training to which I have here referred to I propose to recommend that they be so trained.

121. Mr Loweke's death was a tragedy that with the considerable benefit conferred by hindsight may have been prevented at a number of points. The coroner's role is to find facts and reduce the number of preventable deaths; it does not include the attribution of blame or criminal responsibility or civil liability. Had police and SES staff assiduously pursued blocking Delatite Road between Wimble Street and the Ford it is at least likely that it would have been achieved before Mr Loweke drove into the Ford and his death there-by prevented. I have referred to the complexity of assessing risk and what constitutes appropriate mitigation, and I will make some recommendations about this, in some ways, inscrutable exercise.

FINDINGS

122. Pursuant to Section 67 of the Act I find that:

- (a) The identity of the deceased is Max Edward Loweke born 3 January 1953.
- (b) The cause of Mr Loweke's death was downing.
- (c) Mr Loweke drowned when on 4 January 2016 the car that he was driving was washed off Delatite Road Seymour at the Whiteheads Creek Ford, and the car sank in the circumstances I set out in this Finding in paragraphs 92 -121.

RECOMMENDATIONS

123. Pursuant to Section 72 of the Act I recommend that:

- (a) Victoria Police and Victoria State Emergency Services consider augmenting emergency management training to provide that when an emergency (“The Emergency”) is being managed by the provisions of the *Emergency Management Act* (“the Act”) and The Emergency Management Manual (“the Manual”) that all organisations and personnel involved be explicitly informed that The Emergency is being managed pursuant to the Acts and The Manual and of:
 - i. Which Organisation is the Control Agency.
 - ii. The names of those appointed to or adopting defined roles for the purposes of managing the Emergency such as the Incident Controller (or in the case of Victoria Police the Police Commander and Police Forward Commander), Incident Emergency Response Team, Incident Emergency Response Coordinator, Municipal Emergency Response Coordinator, the Municipal Emergency Response Officer, etc.
 - iii. At meetings conducted within and across organisations involving those referred to in ii above the meetings be explicitly declared as Emergency Management Team Meetings, minuted and that such minutes list the names of people appointed to or adopting the defined roles referred to in ii above.
- (b) Those employees of emergency services who may adopt the role of Incident Controllers, and in the case of Victoria Police those who may fulfil the role of Police Commander and Police Forward Commander undergo formal risk assessment training.
- (c) Victoria Police and Victoria SES and other relevant parties engage in regular practical exercises – mock emergencies, conducted in a realistic fashion and including in regional areas rehearsing the implementation and use of the EMMV management structure in the circumstances of various forms of emergencies

PUBLICATION

Pursuant to section 73(1B) of the Act, I order that this Finding be published on the Coroners Court of Victoria website in accordance with the rules.

DISTRIBUTION

I direct that a copy of this finding be provided to;

Alan Loweke, Senior Next of Kin,

Eric Loweke, Senior Next of Kin,

The Chief Commissioner of Police, Victoria Police,

Emergency Services Telecommunications Authority,

Victoria State Emergency Services,

Mitchell Shire Council,

Oracle Customer Management Services; and

Detective Leading Senior Constable Bronwyn Grant, Coroner's Investigator, Victoria Police.

Signature:



DARREN J BRACKEN

CORONER

Date: 8 December 2021

