



IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: COR 2019 1982

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 63(1)

Section 67 of the Coroners Act 2008

Deceased:	Bak Mayer Cier DENG
Delivered on:	16 August 2022
Delivered at:	Coroners Court of Victoria, 65 Kavanagh Street, Southbank
Hearing dates:	23 & 24 November 2021
Findings of:	Coroner Sarah Gebert
Counsel assisting the Coroner:	R. Ajzensztat instructed by Lindsay Spence, Principal In-House Solicitor, Coroners Court of Victoria
Counsel for Mr Deng's family	M. Albert and R. Muchinguri instructed by D. Ajak of Ajak & Tut Lawyers
Counsel for Chief Commissioner of Police:	C. Fitzgerald instructed by K. Goldberg of Norton Rose Fulbright

TABLE OF CONTENTS

INTRODUCTION.....	1
THE CORONIAL INVESTIGATION	2
The coronial role.....	2
Mandatory inquest	3
Victorian Charter of Human Rights and Responsibilities	3
Sources of evidence.....	4
Body Worn Camera footage	5
RELEVANT BACKGROUND	5
Bak’s previous driving record.....	5
Events of 19 April 2019	7
Victoria Police Members.....	8
Operation NEXUS.....	8
CIRCUMSTANCES OF DEATH.....	8
IDENTITY OF THE DECEASED	16
CAUSE OF DEATH	16
Collection of blood sample and toxicology	17
Police Investigation.....	17
Scene Examination	17
Powers: Intercept/Vehicle Stop and Arrest	18
Intercept/Vehicle Stop	18
Power of Arrest.....	18
Other Options.....	21
Foot Pursuits	22
Risks of the foot pursuit.....	22
Data on foot pursuits.....	23
‘Equality is not the same’ report.....	25
Why did Bak flee the scene?	27
Submissions and Replies	28
FINDINGS	29

INTRODUCTION

1. Bak Mayer Cier Deng (referred to in my finding as Bak) was born on 1 January 1990 and was aged 29 years at the time of his passing. Bak was a member of the Dinka Tribe. He is survived by his mother Alual Weding Adeng Chol and siblings Mabany, Aruol, Angap, Adhar, Nyanut and Nyaling. Bak also had other siblings who shared the same father. Bak's father passed away in May 1996.¹
2. Bak was born in Khartoum, Sudan and came to Australia with his mother and sister Nyaling on 12 March 2006. Prior to arriving in Australia, the family spent time in Egypt. Bak was granted Global Special Humanitarian Status upon entry to Australia but, as he had not applied for a permanent visa following him leaving Australia,² he was considered to be unlawfully on shore from 19 March 2012.
3. Bak had completed a roofing apprenticeship and at the time of his passing was employed as an independent contractor. He was also developing a business with a friend to design and sell t-shirts and other items.
4. In addition, Bak was a rap artist with the name *Born Again King*. He had released songs on social media and had a love of music as well as telling stories through lyric. Bak's song *Lil Story* was played at the inquest and this was said to be *an autobiographical account of his life and experience* which had been uploaded ten days before his death.
5. Bak was featured in an SBS documentary titled *Tackling Crime with rhyme: Inside Australia's South Sudanese community* in October 2017. During this programme Bak talked about going down the *wrong path* in his early life but having later turned his life around.
6. At the time of Bak's passing he was in a relationship with Adiu Chol who said,

*"We had a good stable relationship, we never fought or argued. He was a blessing that came into my life. He was very sweet. ... His music was beautiful and all of his songs had meanings. He was doing it for the community, so they could hear his words. ... Bak enjoyed going out, he was very adventurous and we were planning on going skydiving. He also enjoyed cooking. Bak and I were planning a future and family together".*³

¹ Coronial Brief (CB) at p. 208.

² He did so on two occasions.

³ Statement of Adiu Choul dated 30 May 2019, CB at p. 100 - 101.

7. Bak's mother, who described him as having a "very special spot" in her heart, said,

*"Bak was a good role model for the younger children in the community. He had done a couple of short films and he put on dances for them. Bak is a very good person. He was very happy and grateful to be in Australia. He wanted to take his rapping a long way and he wanted to inspire the youth. I was very close to Bak, he was like a mother's boy".*⁴
8. Tragically, Bak passed away at the Royal Melbourne Hospital (**RMH**) on 20 April 2019⁵ following being struck by a motor vehicle on 19 April 2019. A police officer was engaged in a foot pursuit of Bak at the time of the incident.

THE CORONIAL INVESTIGATION

9. Bak's passing was reported to the Coroners Court as it fell within the definition of a reportable death in the *Coroners Act 2008 (the Act)* because he was in custody at the time and further, his death appeared to have been unexpected, unnatural or violent or to have resulted from accident or injury.⁶

The coronial role

10. Coroners independently investigate reportable deaths to find, if possible, identity, cause of death and the surrounding circumstances of the death. Cause of death in this context is accepted to mean the medical cause or mechanism of death. Surrounding circumstances are limited to events which are sufficiently proximate and causally related to the death.
11. Under the Act, coroners have an additional role to reduce the number of preventable deaths and promote public health and safety by their findings and making comments and or recommendations about any matter connected to the death they are investigating.
12. When a coroner examines the circumstances in which a person died, it is to determine causal factors and identify any systemic failures with a view to preventing, if possible, deaths from occurring in similar circumstances in the future.
13. In the coronial jurisdiction, the standard of proof applicable to findings is the balance of probabilities.⁷

⁴ Statement of Alual Chol dated 17 May 2019, CB at p. 35.

⁵ At 1.00pm on 20 April 2019, Bak was pronounced brain dead but was kept ventilated until his mother returned from overseas. His ventilator was removed on 29 April 2019.

⁶ Deputy State Coroner Caitlin English (as she then was) initially had carriage of this investigation.

⁷ Subject to the principles enunciated in *Briginshaw v Briginshaw* (1938) 60 CLR 336. The effect of this and similar authorities is that coroners should not make adverse findings against, or comments about, individuals unless the evidence provides a comfortable level of satisfaction as to those matters taking into account the consequences of such

Mandatory inquest

14. Bak died while police were attempting to arrest him. He was therefore regarded as a '*person placed in custody or care*' at the time of his passing.⁸ In these circumstances, an inquest was mandatory under s52(2)(b) of the Act.
15. The central focus of the inquest was whether the actions of police were appropriate. The inquest scope was as follows:
 - (a) Clarification of the circumstances which led to the death of Bak Deng on 20 April 2019.
 - (b) The appropriateness of the foot pursuit including but not limited to the appropriateness of the decision to initiate the foot pursuit and whether the applicable legislation, policies, guidelines, and/or training were complied with by Senior Constable McDonald (**S/C McDonald**).
 - (c) Whether there is a basis to suggest that the applicable legislation, policies, guidelines, and/or training relevant to the conduct of foot pursuits should be amended and if so, how.
 - (d) Whether there are any prevention opportunities arising from Bak's death.

Victorian Charter of Human Rights and Responsibilities

16. Section 9 of the *Charter of Human Rights and Responsibilities Act 2006* states that “[e]very person has the right to life and has the right not to be arbitrarily deprived of life”. This obligation to protect life has been interpreted as a procedural requirement that authorities effectively investigate deaths that occur in certain circumstances, including where a person has died in custody.

findings or comments. “*The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding, are considerations which must affect the answer to the question whether the issues had been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences ...*”. (pages 362-363)

⁸ (j) provides: “*person who a police officer ...is attempting to take into custody or who is dying from injuries sustained when a police officer ...attempted to take the person into custody*”.

17. In this case, Victoria Police assigned Inspector⁹ Pixie Fuhrmeister from the Homicide Squad to be the Coroner's Investigator. Inspector Fuhrmeister's investigation was oversighted by the Professional Standards Command (**PSC**) in accordance with relevant Victoria Police oversight principles.¹⁰
18. In addition, Counsel Assisting, Mr Ajzensztat, is an independent member of the Victorian Bar and was instructed by Mr Lindsay Spence from the Court's In-House Legal Service.
19. I noted that whilst a member of Victoria Police compiled investigative material on my behalf, the Court also undertook additional investigations and ultimately, I determined the scope of the inquest and which witnesses should be called to give evidence at the inquest.
20. In addition, the family were represented at all hearings and their views were sought in relation to the scope of the inquest as well as the witnesses to be called. An interpreter was engaged throughout the inquest.
21. The family were also asked to advise on any cultural matters the Court could accommodate in the running of the hearing to ensure that these matters were respected, where possible.

Sources of evidence

22. As part of the coronial investigation, Inspector Fuhrmeister prepared a comprehensive coronial brief. The brief comprises statements from witnesses including Bak's mother and girlfriend, the Victoria Police officers, Bak's friends and other witnesses who were present on 19 April 2019, the forensic pathologist who examined him, a treating clinician, investigating officers as well as other documentation. The Court also obtained Bak's medical records from the RMH.
23. The inquest ran for two days and heard evidence from four witnesses.¹¹ They were:
 - (a) S/C McDonald;
 - (b) Constable Michael Pook (**CONST Pook**);
 - (c) Detective Senior Sergeant Eric Harbis (**DSS Harbis**), PSC; and
 - (d) Senior Sergeant Andrew Sarvas (**Sen Sgt Sarvas**), Centre for Operational Safety, People Development Command, Victoria Police Academy.

⁹ She held the rank of Detective Senior Sergeant at the time of the incident.

¹⁰ Detective Sergeant Jason O'Connell statement dated 9 December 2019 set out compliance with the oversight principles.

¹¹ Inspector Fuhrmeister was provisionally on the witness list but was not required to be heard by me or any other party.

Body Worn Camera footage

24. S/C McDonald was wearing a Body Worn Camera (**BWC**) at the time of the incident which formed part of the evidence and was played at the inquest. The recording was started at approximately 7.12pm on 19 April 2019 and captured the intercept on that evening.
25. There is no doubt that the availability of the BWC footage in this case enabled the exchange between Bak and S/C McDonald (and what followed to a large extent) to be accurately documented in a way that eyewitness accounts may not have, and in circumstances where Bak was no longer able to give his version of events.
26. I received written submissions from Counsel Assisting, Counsel for Bak's family and Counsel for the Chief Commissioner of Police (**CCP**). Reply submissions were received on behalf of the family and the CCP.
27. This finding is based on the entirety of the investigation material comprising of the coronial brief of evidence¹² including material obtained after the provision of the brief, the statements and testimony of those witnesses who gave evidence at the inquest and any documents tendered through them, any documents tendered through 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 Bak's death. I do not purport to summarise all the material and evidence in this finding, but will refer to it only in such detail as is relevant to comply with my statutory obligations and necessary for narrative clarity.

RELEVANT BACKGROUND

Bak's previous driving record

28. Bak had never been the holder of a Victorian driver's licence. He had previously been charged with a number of drink driving offences and also unlicensed driving on three separate occasions. At the time of his passing, he was disqualified from driving a motor vehicle.

¹² Which also included photos and BWC footage.

29. According to Victoria Police records,
- (a) on 14 September 2011 Bak was convicted of exceeding the prescribed concentration of alcohol whilst driving with a blood alcohol content of 0.085%, careless driving and unlicensed driving. The offences occurred on 21 December 2008 when he was 18 years old. He was disqualified from obtaining a car licence or permit for 6 months and fined \$400; and
 - (b) on 28 June 2013 Bak was convicted of refusing or failing to undergo a breath test, unlicensed driving and driving an unregistered vehicle. The offences occurred on 6 January 2013 when he was 23 years old. He was disqualified from obtaining a licence for four years and fined \$1000; and
 - (c) on 31 May 2018 Bak was convicted of exceeding the prescribed concentration of alcohol whilst driving with a blood alcohol content of 0.208%, unlicensed driving and overtaking a vehicle when unsafe. The offences occurred on 18 January 2018 when he was 28 years old. He was disqualified from obtaining a licence for four years and fined \$2000.
30. An audio recording of the hearing on 31 May 2018 was obtained by the Court and the presiding magistrate can be heard saying to Bak that, although he would receive a fine on that occasion, should he commit another drink driving offence he would likely receive a jail sentence. The magistrate also warned Bak not to drive as he could be charged with driving whilst disqualified.
31. Bak was also found guilty of two other non-driving related offences in early 2015 for which he received penalties at the Sunshine Magistrates' Court without conviction.

Events of 19 April 2019

32. On Friday 19 April 2019, Bak spent time with his friends Susanna Manoah (also known as Nyankuer), Adot Kuol, Esra Atif Gobera (also known as Honey), Aguer Rual (also known as Steven and described as Bak's best friend)¹³ and Ajok Deng¹⁴ (also known as Marika). Bak planned to attend soccer practice but as it was Good Friday he discovered when he attended the grounds that it had not been formally scheduled.
33. The vehicle being driven that evening was a 2006 Black Ford Territory with registration number YJL619 which belonged to Aguer but was registered in Aguer's friend's name.
34. Aguer said,
*"We went in my car but I didn't drive. Bak ...asked me if he could drive and I didn't want to say no so I let him. I knew he didn't have a licence. I did have a licence though".*¹⁵
35. A witness observed the vehicle between approximately 5.30pm and 6.30pm in Biggs Street, St Albans where he observed the occupants for about 15 to 20 minutes.
36. Aguer said that they stopped in a park off Main Road, St Albans where they *"just chilled out talking for an hour or so and drinking our drinks"*. He said that they had purchased a *"slab of 24 Mercury Apple Ciders"*.
37. Aguer said,
*"Whilst we had been in the park, I think I had about 6 stubbies (bottles) of Mercury. I think Bak ...had about the same. He seemed ok and I didn't think he was affected by alcohol at the time".*¹⁶
38. Aguer said that after they left the park they picked up Susanna and then Adot. He said Bak was driving.
39. Esra said that they were driving back to an address in Point Cook to *"hang out"* and that there were six people in the car. She said, *"We were all drinking in the car. I was drinking passion pop and the boys were drinking Mercury beers"*.¹⁷

¹³ Statement of Esra Gobera dated 22 April 2019, CB at p. 65.

¹⁴ Referred to as Adud Deng in some statements. This individual did not give a statement for the investigation.

¹⁵ Statement of Aguer Rual dated 20 April 2019, CB at p. 68.

¹⁶ Statement of Mr Rual as above, CB at p. 68.

Victoria Police Members

40. On the same day, S/C McDonald and CONST Pook, a Brimbank Highway Patrol police unit with callsign Brimbank 633, were working in the Brimbank area on a shift from 2.00pm to midnight. S/C McDonald had been a member of Victoria Police since 2013 and CONST Pook graduated from the Victoria Police Academy on 11 February 2019. They were in a marked police vehicle and S/C McDonald was the driver. CONST Pook was a police member who was still under training and this was his first DTW¹⁸ station.

Operation NEXUS

41. S/C McDonald and CONST Pook were assigned to Operation NEXUS, an Easter long weekend road safety operation which commenced on 18 April 2019 and concluded at 11.59pm on Monday 22 April 2019. The relevant media release noted:

*“Victoria Police’s Operation Nexus will also target fatigue, along with speed, drink and drug driving, distraction and seatbelt compliance. All available police resources will hit the roads to target dangerous drivers, including local road policing units, general duties officers and other regional resources”.*¹⁹

CIRCUMSTANCES OF DEATH

42. At around 7.10pm on 19 April 2019, Bak was driving a 2006 black Ford Territory, registration number YJL619, east along Ballarat Road in Deer Park.
43. There were five passengers in the vehicle. The evidence suggests that Esra was in the front passenger seat, Aguer was in the second row on the left passenger side with Susanna in the middle and Ajok on the right side. Adot was likely sitting in the third row of seats at the back.
44. Around 7.10pm, Brimbank 633 with S/C McDonald and CONST Pook stopped in the centre turn lane of Ballarat Road near the Deer Park Hotel, facing west. It was at this time that S/C McDonald said he observed the Ford Territory travelling east on Ballarat Road. S/C McDonald called out the registration number as it approached. In his statement he says he

¹⁷ Statement of Ms Gobera as above, CB at p. 65.

¹⁸ “Victoria Police recruits receive 12 weeks training at the Police Academy and 19 weeks on-the-job experience at Dedicated Training Workplaces (DTW) before being assigned to their first station” (source: police.vic.gov.au).

¹⁹ Media Release, STOP, REVIVE AND ARRIVE ALIVE THIS EASTER WEEKEND dated Thursday, 18 April 2019.

wasn't sure why he picked that car to check but said, "*it was sort of an older car and it looked a little bit poor in condition.*"²⁰ CONST Pook said, the "*vehicle was old in appearance and at the rear of the vehicle there was a white panel which mismatched the other black panels on the car*".²¹

45. S/C McDonald said he observed at least three people - at least one in each of the front, middle and back seats - as the vehicle drove past.

46. At approximately 7.11pm (19:11:39 according to the reconstruction discussed in paragraph 47) CONST Pook entered the details of the Ford Territory into the Mobile Data Terminal (MDT) and, due to the result (received at 19:11:42 according to the reconstruction), S/C McDonald decided to intercept the vehicle. I note that it took approximately 3 seconds for the MDT to return the result which showed a previous *Field Contact* record.²² These results can be further interrogated on the MDT and it is clear from the evidence that this is what the police did in relation to the Ford Territory.²³

47. The Court was advised that the in-vehicle MDT equipment allows Victoria Police members to conduct database enquiries of the police LEAP and associated databases such as VicRoads. As part of the investigation attempts were made to ascertain what was displayed on the MDT inside the police car on 19 April 2019. A statement was obtained from Andrew Somers, Victorian Radio Network Architect at Motorola Solutions Australia Pty Ltd, for this purpose. Mr Somers reconstructed the information as displayed on the MDT and noted the following,

"Three vehicle registration checks were conducted prior to the check on YJL619. None of these produced any warnings or involvements. The second check was for a seemingly incorrectly entered registration number which was subsequently corrected in the third check.

The check on registration YJL619 at 19:11 returned a Vehicle Involvement record relating to a Field Contact. Following return of the Vehicle Involvement record, the Registration Details and Field Contact records were retrieved.

*The unit then created a Subject Stop Field Event from the Subject Stop Link on the Vehicle Registration Details response. The resulting event: P10094148617 was dispatched to the unit".*²⁴

²⁰ Statement of S/C Alistair McDonald dated 20 April 2019, CB at p. 48.

²¹ Statement of CONST Michael Pook dated 20 April 2019, CB at p. 57.

²² Statement of Andrew Somers dated 14 July 2021, at CB ps. 283-284.

²³ Statement of Mr Somers as above, at CB p. 282.

²⁴ Statement of Mr Somers as above, at CB ps. 278-279.

48. S/C McDonald said at the time he first observed the Ford Territory that Bak's "*driving at that stage was fine, I did not think he was committing any traffic offences at that stage. The reason I was intercepting was the previous involvement, the whereabouts or the field contact*".
49. In contrast, CONST Pook said in his statement to the Court that his attention was first drawn to the Ford Territory when S/C McDonald said the driver was not wearing a seat belt;²⁵ that he checked the registration of the Ford Territory on the MDT only after the police vehicle had performed a U-turn; and that when he checked the registration of the vehicle nothing was flagging on the vehicle. At inquest however, he said that he may have been mistaken about the chronology, but he did his best at the time to recollect the details. I note that S/C McDonald ultimately made the decision to intercept, and his evidence is clearly supported by the MDT reconstruction which showed a previous *Field Contact* record on the vehicle approximately 3 seconds after its details were entered. I further note that CONST Pook was the passenger of the vehicle, he was in training at the time, and it was his first station placement.
50. Following the *Field Contact* being displayed on the MDT, the police conducted a U-turn, so they were travelling in the same direction as Bak's vehicle. S/C McDonald activated his BWC whilst he was still in the police vehicle. It is apparent from the BWC footage that the 'Stop Subject' was requested on the MDT for the Ford Territory at 19:12:46 after they had made the U-turn.
51. The blue and red emergency lights were activated on the police vehicle to perform the intercept of the Ford Territory. At no stage was the Ford Territory being pursued by the police vehicle.
52. Bak responded and pulled the vehicle to a stop on Ballarat Road in the left-hand turn lane for Cairnlea Drive.
53. The police vehicle stopped behind Bak's vehicle in a position *bladed* out from the Ford Territory. S/C McDonald stated that this creates a safety corridor such that the area next to the intercepted vehicle is protected from oncoming traffic by the police vehicle, so the police can safely talk to the driver through the window and a driver who leaves the vehicle also has a safe space. S/C McDonald said it was standard procedure for all intercepts and is taught as part of driving training.

²⁵ CONST Pook said it "*seemed like a routine intercept to see if the driver has his seat belt on*".

54. S/C McDonald stated that as he walked up to the driver, he noticed that he didn't have a seat belt on.
55. The BWC footage shows that S/C McDonald approached the driver's side of the vehicle where he spoke to Bak shining his torch on to the other occupants of the vehicle as he approached. S/C McDonald observed that two of the occupants were drinking from a stubby bottle and there was a strong smell of alcohol coming from the car. CONST Pook observed that he "*could smell the overwhelming smell of alcohol coming from inside the car*".
56. S/C McDonald can be heard to commence the interaction by saying, "*Hello, what's your name mate?*" A review of the BWC footage documents that S/C McDonald asked Bak whether he had a licence to which he initially said "*not here*" but it was later clear that he didn't. S/C McDonald asked him why he wasn't wearing a seat belt to which Bak replied that he had just taken it off. S/C McDonald asked Bak to provide his name, date of birth and address which Bak accurately provided (as would later become known). S/C McDonald asked Bak a series of questions to verify his identity, including whether he had any previous involvements with police; whether he had ever reported a crime; whether he had ever been spoken to by police before or been given a ticket. Bak denied ever having been pulled over driving and that there was nothing in the car with his name, such as a bank card or student card, which could assist. S/C McDonald finalised the conversation by saying, "*I'll be back with you soon, I'll get you to wait here*".
57. At the same time, CONST Pook approached the vehicle from the passenger side and had a conversation with Aguer who CONST Pook said was not wearing a seatbelt. Aguer said in his statement to the Court that he "*didn't have [his] seat belt on but everyone else did*".²⁶
58. S/C McDonald and CONST Pook then returned to the police vehicle where S/C McDonald called for other units to see if a preliminary breath testing unit could attend. He indicated that he would be at the scene for a *little bit*. In his statement he clarified, "*I assumed at that stage that it was going to be an impound because he had told me that he didn't have a licence, so I didn't mind waiting for another unit to come with a PBT, and there was a strong smell of alcohol coming from the car. The other occupants were also drinking*".²⁷

²⁶ Statement of Mr Rual as above, CB at p. 68.

²⁷ Statement of S/C McDonald as above, CB at p. 51.

59. At inquest S/C McDonald said that at the time he left Bak's vehicle, he had a *suspicion* that Bak had given a false name but was *happy* to stay in the police car to confirm the identity by MDT and did not consider this *enough* for him to make an arrest at that time.²⁸
60. Whilst in the police vehicle CONST Pook informed S/C McDonald that one of the occupants was not wearing their seatbelt and S/C McDonald appeared to suggest on the BWC footage it was the same with the driver ("*yeah this guy wasn't...*"). S/C McDonald can be seen on the BWC footage starting to type Bak's details into the MDT in the police car.
61. Whilst the police were conducting checks on the MDT, it is apparent that Bak left his vehicle and the BWC footage shows him walking past the police vehicle on the footpath towards the Deer Park Hotel.
62. The evidence from Bak's friends suggest that Bak was concerned that he would be arrested because he did not have a driver's licence.
63. Esra said,
- "The police then walked back to his car to do some checks and Bak was saying that he thinks he should run. Bak has been suspended twice before for driving without a license. Bak does not have a license. I didn't tell him not to run, we really didn't stop him. We would normally stop each other from doing something wrong but we didn't his time"*.²⁹
64. Aguer said,
- "They walked to the police car and Bak decided to get out of the car and have a smoke. I was standing next to my door and Bak came around and stood with me. Bak was worried because he didn't have a licence – he told me that he was worried and he thought he would get arrested because he didn't have a licence"*.³⁰
65. Aguer was "*surprised*" when Bak ran off and said that Bak hadn't told him he was going to do it.

²⁸ T55, L 1-22

²⁹ Statement of Ms Gobera as above, CB at p. 65.

³⁰ Statement of Mr Rual as above, CB at p. 69.

66. Adot said,

*“Bak said in the car that he was going to do a runner. I disagreed. I said, ‘No, it’s not a good idea’.”*³¹

67. When S/C McDonald observed Bak leaving the scene, he left the police vehicle and started to yell out to him requesting that he stop (*“Bak, Bak, come here”*). It was at that time that Bak started to run continuing along the footpath towards the Deer Park Hotel, and S/C McDonald started to run in response.

68. S/C McDonald said, *“I chased this male as I hadn’t established his identification and I believed he provided me a false name. I believe I had an arrest power to establish his identity. I was suspicious that he also may have been a drink driver and driving without a licence”*.³²

69. S/C McDonald said at the inquest,

“Generally it’s very suspicious when someone is unable to provide you with anything whatsoever to verify the name that they’ve provided to you, so at that point I believed that he’d stated a false name to me, ..., and needed to perform an arrest to be able to establish his identity, to confirm – he stated that he was an unlicensed driver, but to confirm that he’d stated a false name to me and the status of his licence, which I then believed to be unlicensed”.³³

70. As to why he would not try to apprehend him later, he said,

“If I was to do that I’m not sure I would have ever been able to ascertain his identity as being the driver of that vehicle. And also the safety concerns. The fact that he may have been a drink-driver, it had the strong smell of alcohol coming from the car, and then [I] had the welfare concern in terms of the rest of the vehicle, with four or five other people in the vehicle just being left in the runway into the – of a 4 major road”.³⁴

³¹ Statement of Ms Kuol as above, CB at p. 77.

³² Statement of S/C McDonald as above, CB at p. 55.

³³ T 52 L 15-24.

³⁴ T 52 L 27-31 to T 53 L 15-24.

71. As to the risks he considered to Bak and himself in engaging in a foot pursuit, S/C McDonald said that he didn't consider it to be "overly risky". He stated at inquest,

"The traffic at the time was quite light, there was very little traffic on the road, which would be the main thing that would present a danger. And there's also very little reason for the person to put himself in danger if they were to be running away from me. There's nothing corralling that person from either – from just staying on the footpath or on the nature strip. There was nothing forcing that person to run out onto the roadway, for example. So I didn't perceive it to be a particularly risky situation. ... You know, as opposed to someone potentially running out onto the Ring Road during busy traffic, this is a very quiet road at that time of night".³⁵

72. S/C McDonald also denied, when asked by counsel for the family, that he treated Bak differently when he spoke to him (that is, when he called for him to stop) because of his race or the colour of skin.³⁶

73. CONST Pook also said, with respect to whether he treated the people in the car differently because of their race or the colour of their skin, that he did not and, *"I treat everyone the same, regardless of their ethnicity or their background".³⁷*

74. After briefly running towards the Deer Park Hotel, Bak changed his course and ran south across the two lanes of the east bound traffic on Ballarat Road and then started running west on the west bound lanes, appearing to try to cross that section of the road. S/C McDonald also changed direction to follow him.

75. S/C McDonald broadcast over the police radio the following,

"In a foot pursuit west bound on Ballarat Road from Cairnlea Drive".

76. Civilian witnesses estimated that S/C McDonald was approximately 10 to 20 metres behind Bak.³⁸

³⁵ T 53 L 9-20.

³⁶ T 62 L 3.

³⁷ T106, L 17-21.

³⁸ Statement of E. Alimovski dated 22 April 2019, CB at p. 87; Statement of D. Allen dated 20 April 2019, CB at p. 89.

77. One witness who was driving west along Ballarat Road observed the following,

*“This Sudanese man came to be about a metre away from the front of my car as he was continuing to run at an angle across the road. There are paddocks on this side of the road and I suspect he might have been heading to this area. I tooted my car horn at him. As I tooted, the Sudanese man sort of banana’d or peeled off to the medium strip which was all dark...”*³⁹

78. Aguer observed,

*“Our side of the road didn’t have much traffic and when he ran across there were no cars but the other side (coming out of the city) was busier, there were a lot of cars. I don’t know what Bak was thinking obviously but after he made it to the other side it looked like it was too busy to cross so he did a u-turn and crossed back over the barrier (it’s quite low so he just jumped it) and back onto our side of the road”.*⁴⁰

79. The evidence suggests that Bak ran alongside the west bound lane for 20 or 30 metres and then jumped the Amcor barrier adjacent to the western bound lanes to the centre median strip, following which he jumped the second Amcor barrier to end up on eastern bound lanes again. As he jumped into the eastern bound lanes he was struck almost immediately by a 2013 BMW X5 wagon travelling east in the right hand lane of the east bound traffic on Ballarat Road. As a result of the collision Bak landed in the left-hand lane for the Deer Park Hotel on Ballarat Road.

80. Aguer observed referring the BMW, “[Bak] *obviously hadn’t seen it and I didn’t even see it.*”⁴¹ S/C McDonald said referring to Bak that “*it didn’t appear that he’s looked at all to his left*”.⁴²

81. The driver of the BMW stated that as he came around the bend he observed a male on the road way and braked as fast and hard as he could. He immediately pulled over and stopped his vehicle.

³⁹ Statement of E. Alimovski as above, CB at p. 87.

⁴⁰ Statement of Mr Rual as above, CB at p. 70.

⁴¹ Statement of Mr Rual as above, CB at p. 70.

⁴² Statement of S/C McDonald as above, CB at p. 52.

82. S/C McDonald was still in the west bound lanes when the collision occurred and immediately crossed to where Bak had fallen. S/C McDonald was still pursuing Bak at the time he was struck. He estimated that he was 15 to 20 metres behind him when the collision occurred. He had been pursuing him for about 26 seconds.
83. S/C McDonald immediately broadcast an urgent request for an ambulance and attended with Bak to provide first aid.
84. Ambulance paramedics received a dispatch at approximately 7.19pm and arrived on the scene at 7.28pm. They provided medical assistance and at 7.51pm Bak was transported to the RMH arriving at approximately 8.22pm.
85. CT scanning of Bak's brain revealed significant skull fractures as well as haemorrhage. On 20 April 2019 the hospital conducted two sets of testing which resulted in an opinion that Bak was brain dead.
86. At this time, Bak's mother was overseas. His family in Melbourne requested that Bak be kept on a ventilator to enable his mother and other relatives to return home. The hospital also arranged for another opinion regarding Bak's condition at the family's request which was facilitated by the hospital and confirmed the original advice. Bak remained in hospital on a ventilator until about 2.50 pm on 29 April 2019 when the ventilator was removed.

IDENTITY OF THE DECEASED

87. On 29 April 2019, Jel Dominic Deng identified his step-brother, Bak Mayer Cier Deng, born on 1 January 1990.
88. Identity is not in issue and required no further investigation.

CAUSE OF DEATH

89. On 30 April 2019, Dr Michael Burke, specialist forensic pathologist at the Victorian Institute of Forensic Medicine (**VIFM**), conducted an autopsy and prepared a written report dated 21 August 2019.
90. Dr Burke formulated the cause of death as "*1(a) Head Injury in a Motor Vehicle Incident*".
91. I accept Dr Burke's opinion.

Collection of blood sample and toxicology

92. It is usual practice that a blood sample is taken from a deceased person upon admission to hospital. In this case, the sample assessed as part of the post-mortem examination was taken on 23 April 2019, rather than the admission sample of 19 April 2019. It became apparent that the earlier sample was not retained by the hospital who generally keep a sample for a period of seven days. There is therefore insufficient toxicological evidence to enable me to make any specific findings about the presence or absence or level of alcohol in Bak's bloodstream at the time of the incident, although I do have evidence from his friend that he was drinking alcohol in the hours before the incident.
93. The Court at that time did not anticipate that a deceased person would not come into its care within a 7-day period, following a report of death. As a result of this case, rather than waiting until the deceased person came into the Court's care, the Court now asks for a sample as soon as the case is reported.

Police Investigation

94. Immediately following the incident, the area was processed as a crime scene. The Homicide Squad, Major Collision Investigation Unit (**MCIU**) and PSC attended. The MCIU conducted a detailed examination of the scene.
95. S/C McDonald and CONST Pook underwent drug and alcohol testing which was oversights by PSC and produced negatives results. The members were separated and provided written statements in the presence of PSC.
96. The driver of the BMW complied with a request for breath and blood alcohol testing, also with negative results.

Scene Examination

97. Detective Senior Constable (**DSC**) Melanie MacFarlane, Collision Reconstruction and Mechanical Investigation Unit noted that at the collision location, Ballarat Road is a four lane road tending approximately east to west comprising of two lanes of traffic in each direction and divided by a grass and treed centre median down the approximate centre of the road. Adjacent lanes are separated by a single broken white line painted on the road surface. The area is mostly commercial with a posted speed limit of 80km/h.

98. On the northern side of the road, a left turn lane formed for entry to the Deer Park Hotel. Further east along the roadway is a bus bay and then further east again the intersection of Cairnlea Drive and Ballarat Road. This intersection is controlled by traffic control signals.
99. DSC MacFarlane concluded that the BMW was travelling between 48 to 59km/h, straddling the left and right lanes, at the time of the impact. Further, that it is likely that the BMW was travelling in the right lane and the driver had reacted to Bak running across his path by braking and steering to the left.

Powers: Intercept/Vehicle Stop and Arrest

Intercept/Vehicle Stop

100. The legislative power for vehicle intercept is found at section 59(1) of the *Road Safety Act 1986 (RSA)* and enables a police officer to intercept any motor vehicle that is on a highway. The driver of that motor vehicle is then required to produce their driver's licence and state their name and address when requested.
101. It is clear based on this provision that the police in this case had a power to intercept any vehicle, including the Ford Territory, regardless of the results of the MDT search or indeed whether an MDT search had been undertaken.

Power of Arrest

102. The CCP by written submission⁴³ prior to the inquest provided advice to the Court that a power to arrest in this case existed under section 76(1) of the RSA, which says that a police officer may arrest without warrant any person who,
- (a) within his or her view, commits an offence against any regulation made under clauses 42 to 49 in Schedule 2; and
 - (b) on being requested to give his or her name and address, refuse or fails to do so or gives a name or address which the police officer reasonably suspects to be false.

⁴³ Dated 30 July 2020.

103. The CCP indicated via this submission that when S/C McDonald approached the driver upon intercepting the vehicle, it was his belief that the driver was not wearing a seatbelt and that failure to wear a seatbelt falls within paragraph 102(a),⁴⁴ as noted above. And, based on the interaction with Bak S/C McDonald reasonably suspected that the name he provided was false.
104. At inquest S/C McDonald clarified that at the time he left Bak's vehicle, he had a suspicion that Bak had given a false name but did not consider this sufficient for him to make an arrest. However, once Bak fled the scene, he considered his suspicion was confirmed such that a power to arrest existed.
105. A review of the available evidence at the time S/C McDonald commenced a foot pursuit suggests that he:
- a. considered that Bak was not wearing a seat belt whilst driving, a belief supported by his comment on the BWC footage;
 - b. considered that Bak was driving without a licence based on Bak's own admission;
 - c. considered that Bak may have been drink driving given the observations he made of the vehicle at intercept; and
 - d. suspected that a false name had been given as Bak was unable to provide anything to verify his identity and subsequently took action to flee from the scene.
106. S/C McDonald also indicated at inquest that he held welfare concerns given the potential for further drink driving and, that a vehicle with four to five people had been left on a major road.
107. It was submitted on behalf of the family that as Bak appeared to turn around when S/C McDonald called his name and requested that he stop, this should have provided the verification the police needed as to identity. This was not a matter that was put to S/C McDonald at the inquest. It is not possible however to state with any clarity what Bak was responding to but in any event, I am unable to conclude that a gesture of this kind would satisfactorily verify the identity of a person who had been intercepted by police.

⁴⁴ r.264 of the *Road Safety Road Rules 2017*.

108. In submissions to the Court following consideration of the evidence at inquest, the CCP said that in addition to section 76(1) of the RSA, the further legislative basis for the arrest was section 458(1) of the *Crimes Act 1958*. The provision says,

“(1) Any person, whether a police officer or not, may at any time without warrant apprehend and take before a bail justice or the Magistrates' Court to be dealt with according to law or deliver to a police officer to be so taken, any person—

(a) he finds committing any offence (whether an indictable offence or an offence punishable on summary conviction) where he believes on reasonable grounds that the apprehension of the person is necessary for any one or more of the following reasons, namely—

(i) to ensure the attendance of the offender before a court of competent jurisdiction;

(ii) to preserve public order;

(iii) to prevent the continuation or repetition of the offence or the commission of a further offence; or

(iv) for the safety or welfare of members of the public or of the offender”.

109. The CCP submitted that implicit in S/C McDonald’s explanation was *“the need to prevent continuation or repetition of the suspected offences or further offences, to ensure the driver he was dealing with was dealt with for the offences he suspected, and for the safety of the public insofar as road safety was concerned”*.

110. The CCP further submitted that by failing to provide his licence as directed, and failing to obey the direction that he stay in the car or that he stop when directed, Bak committed offences contrary to sections 59(2) and 59(5) of the RSA which is a provision setting out the general duty of a driver or person in charge of a motor vehicle. In addition, the CCP submitted that providing a false name is an offence pursuant to section 59(2) of the RSA.

111. Having considered all the available evidence, I am satisfied that once Bak fled the scene, there was sufficient basis for S/C McDonald to form an opinion that he had given false details regarding his identity. I am further satisfied in those circumstances having regard to the matters set out in paragraphs 105 and 106 that a power to arrest was available under section 76(1) of the RSA and section 458(1) of the *Crimes Act 1958*.

Other Options

112. S/C McDonald did not believe at the time that he had any other options other than to pursue Bak. S/C McDonald said that even with hindsight,

“I still think that it was very important to ascertain his identity upon the night by arresting that person if that was – you know, the necessary way of going about it...”⁴⁵

113. He noted at inquest that he could have asked the registered owner for the identity of the driver, as they have an obligation under section 60 of RSA to identify a driver if an offence had been committed, but still considered that he needed to verify his identity at that time. It is apparent that there is no guarantee that asking a registered driver will be successful in any matter and further that the passengers of the vehicle are under no legal obligation to disclose the name of the driver.

114. S/C McDonald said,

“I believed I was doing the right thing at the time by trying to ascertain that person’s identity because I believed he’s committed offences and it’s necessary as part of our duties to do that...”⁴⁶

115. With respect to the possibility of utilising an IRIS device⁴⁷ on that night, which can be reviewed in real time at a scene to allow verification of a driver’s identity, there was no IRIS device in the police vehicle on 19 April 2019.

116. I also note that completion of the MDT enquiry by S/C McDonald, whilst he was in the vehicle, would only have confirmed that a person with Bak’s details existed on the system and was known to police. It would not have confirmed that it was the same person S/C McDonald was dealing with on 19 April 2019.

⁴⁵ T 55 L 31 – T56 L 1-3.

⁴⁶ T68 L 15-18.

⁴⁷ *“These devices support safer, smarter and faster policing as police officers can access real-time information when out in the field. The devices have a purpose-built application, ‘IRIS’, that enables police officers to perform location, vehicle, licence and person checks and view information from national databases, wherever they are”* (source: vic.gov.au)

Foot Pursuits

117. Sen Sgt Sarvas provided a statement to the Court and gave evidence at the inquest. He advised that there is no specific training regarding the conduct of foot pursuits, and that the *“safety principles that should go into a decision to engage in a foot pursuit are the same as a broad range of policing functions”*.⁴⁸
118. Sen Sgt Sarvas referred to the Operational Response Principles and the Tactical Options Model (**TOM**) which *“does not dictate how an incident is to be managed but supports and assists the decision-making process and can be used to assist incident resolution”*.⁴⁹
119. At inquest, Sen Sgt Sarvas said,
- “...it's subjective to the member's interpretation of the situation. It's very subjective. The member can see different things, experience different things, have different capabilities. And the member's experiences and capabilities would inform a police response relative to them”*.⁵⁰
120. Sen Sgt Sarvas stated that the *“over-riding consideration in the TOM is that a member’s response must be reasonable and proportionate”*.⁵¹

Risks of the foot pursuit

121. At the time the foot pursuit commenced S/C McDonald did not consider it to be *“overly risky”*. He noted that the road was quiet at that time of the night, that he was not corralling Bak in any way or forcing Bak onto the roadway nor was there any reason for Bak to put himself in danger.
122. The evidence from those who witnessed the incident, including Bak’s friend Aguer and S/C McDonald, was that Bak appeared to either - not check for any traffic to his left once he had jumped the Amcor barrier, or that he did not anticipate any vehicle coming from the left, noting that there was a bend in the road. It was also apparent from another witness who was driving west, as well as his friend Aguer, that he had earlier changed direction due to the presence of traffic travelling west, likely in order to protect his safety. In this context, there is no evidence to suggest that Bak was being careless about his own safety or wanted to place himself at risk.

⁴⁸ Statement of Andrew Sarvas dated 28 October 2020, at CB p. 252.

⁴⁹ Statement of Mr Sarvas as above, at CB p. 251.

⁵⁰ T132, L12-17.

⁵¹ Statement of Mr Sarvas as above, CB at p.251.

123. I note that there were many directions Bak could have travelled including a broad area away from any road, and that whilst it was dark, there was sufficient light on the road to see oncoming traffic. I further note that S/C McDonald was estimated to be some 10 to 20 metres behind Bak⁵² and that Bak had responded to police questions in a calm and coherent manner and did not appear to behave in a way that would have raised concerns about his cognitive ability or well-being or that he would have taken action to flee the scene.
124. In order to make any assessment of the decisions made by police on that night, I must put aside the adverse outcome, and only examine what was known at the time without the benefit of hindsight.
125. Having reviewed all of the circumstances, I consider that S/C McDonald undertook an appropriate risk assessment with respect to the conduct of the foot pursuit and could not have anticipated Bak's actions when he jumped the second Amcor barrier. Whilst I acknowledge that there was at least one other option open to attempt to verify Bak's identity at a later time (the success of which cannot be known), I am also satisfied that it was reasonable for S/C McDonald to have attempted an immediate arrest noting that in addition to the verification of identity, S/C McDonald also held other concerns.

Data on foot pursuits

126. Pursuant to section 72(2) of the Act, a coroner may make recommendations on any matter connected with a death or fire which the coroner has investigated. The Act specifically recognises that a recommendation may relate to public health and safety or the administration of justice. Consistent with the preamble of the Act, recommendations should be designed to reduce the likelihood of another death in similar circumstances, or to prevent a death from the same or similar causes.
127. A recommendation should respond to a clearly identified systemic issue which needs to be addressed. The making of recommendations must be evidenced-based. That is, a problem or issue has been clearly identified and, if a means of addressing that problem or issue has been proposed, that means should be an effective way of addressing it. Recommendations should ideally find support in the agency subject of the recommendation. I also note that the implementation of a coronial recommendation is not mandatory.

⁵² Statement of E. Alimovski dated 22 April 2019, CB at p. 87; Statement of D. Allen dated 20 April 2019, CB at p. 89.

128. I asked the Coroner's Prevention Unit⁵³ to provide advice to support whether there was a systemic issue arising from the conduct of foot pursuits by Victoria Police as they relate to incidence of death.
129. I was advised that in the previous 10 years, which was the focus of the study, there were no coronial investigations which could be said were similar to this investigation. This was unlike vehicle police pursuits which have been the subject of many coronial investigations and resulting recommendations.
130. This research was consistent with the evidence of Sen Sgt Sarvas who also said that there is no data or evidence indicative of death or injury arising out of foot pursuits being a systemic problem in Victoria.⁵⁴
131. With respect to the absence of policy or guidelines for police officers engaged in foot pursuits, it is difficult to imagine a broader range of scenarios which could arise in the context of a foot pursuit [whether that related to the individual being pursued or the nature of the environment involved or the reason for the foot pursuit]. There is no basis for the contention that foot pursuits are *likely to be outdoors and in the vicinity of roads*. I note that of the three coronial investigations highlighted by the CPU which featured foot pursuits, two occurred inside buildings in circumstances where both deceased persons fell whilst attempting to climb from one balcony to another, and the other, whilst outside, was not near a roadway and involved the deceased misjudging a barrier he was attempting to climb on the Southbank promenade.
132. With respect to the position of other jurisdictions, I note the 2021 Western Australian case involving the tragic passing of two teenagers (aged 16 and 17 years old) who were attempting to swim across the Swan River in circumstances where they had been the subject of a foot pursuit by police. The Coroner in that case⁵⁵ heard evidence, similar to the evidence of Sen Sgt Sarvas, that there were no policy or guidelines in WA for police officers engaged in foot pursuits:

⁵³ The Coroners Prevention Unit (CPU) was established in 2008 to strengthen the prevention role of the coroner. The unit assists the Coroner with research in matters related to public health and safety and in relation to the formulation of prevention recommendations. The CPU also reviews medical care and treatment in cases referred by the coroner. The CPU is comprised of health professionals with training in a range of areas including medicine, nursing, public health and mental health.

⁵⁴ T135 L30-31 and T 136 L1-2.

⁵⁵ Coroner Philip John Urquhart, [2021] WACOR 36.

“As to this absence, Superintendent Vivian explained:

‘I think just – every situation can be very dynamic and very unique. I’m not sure we can put a policy into every type of situation. Because every, I think, foot pursuit is also different in different surroundings and different dynamics. However, driving a car is a bit more specific.

Do you find unexpected risks can arise in a foot pursuit that would be more diverse than what might occur in the course of a driving pursuit? Is that right? ---

Yes.’

Similarly, Superintendent Dario Bolzonella stated:

‘...it is not possible to train police in every possible apprehension or arrest scenario they are likely to encounter in their career.’”

133. I note that no recommendations were made in that case to alter the position with respect to foot pursuits.
134. Having reviewed this matter as well as the available research I was unable to find any evidence of a systemic issue in relation to the conduct of foot pursuits which would permit me to make recommendations arising from the circumstances of the death. Nor was I directed to measures that could be undertaken to improve training or guidelines.
135. Publication of the finding to the CCP will however alert Victoria Police to a set of circumstances which can further inform and enhance the training of its members regarding these matters.

‘Equality is not the same’ report⁵⁶

136. *‘The Equality is not the same’* report is an important document, which was released by Victoria Police in December 2013. By way of background, in February 2013, after settling an Australian Federal Court allegation of racial profiling, Victoria Police issued a statement pledging that it would investigate its treatment of ethnic groups. Victoria Police agreed to:

*“(1) Engage community opinion in and undertake examination of: Policy and data collection on field contacts; and Cross cultural training of Victoria Police employees.
(2) Publish a public report on the results and actions arising from the examination by 31 December 2013”.*

⁵⁶ Equality (treating people the same) is not the same as equity (treating people fairly).

137. The report noted that in 2013 allegations of racial profiling led to extensive external consultation and a review of Victoria Police cross-cultural training practices with a need to enhance professional learning opportunities with a focus on human rights, bias in decision-making and enhanced communication being identified.
138. The report further noted that there was an expectation that Victoria Police members treat every member of the community with dignity and respect. The importance of communication style and the manner in which police approach members of the community was raised throughout the consultation process, with the focus on what is being communicated and how it is being communicated.
139. Further, a common theme was that police contacts need to be perceived as appropriate, fair and legitimate, as well as being appropriate, fair and legitimate. The report finding at that time was that there remained a strong perception of racial profiling by police amongst the community and that this was of critical concern for Victoria Police as the report stated that Victoria Police has a zero tolerance for any form of racial profiling. The report included a three-year action plan to improve Victoria police's responsiveness to diverse communities, strengthening community trust and confidence.
140. Reflecting on this report in the context of this case, there was no evidence (or claim) that the Ford Territory was intercepted as a result of the ethnicity of the occupants (and therefore that the vehicle was unfairly targeted), nor did the BWC footage indicate that S/C McDonald's approach to Bak lacked dignity or respect; or that the manner in which he spoke to Bak was not clear; or that Bak misunderstood the purpose of the intercept or what was required of him; or that Bak would have considered the intercept and the requests made by police as not being appropriate, fair or legitimate in the circumstances. I note that Bak had been intercepted by police whilst driving without a licence on three other occasions at which time similar requests would have been made by police and on each of these occasions charges were found proven.
141. There were no submissions made as to the relevance of this report in the context of the intercept on 19 April 2019 or what followed or, its basis for the police acting in a different manner on that day or, what they should have done differently. Having made those observations however, this does not otherwise diminish the importance of the report.

Why did Bak flee the scene?

142. Statements from Bak's friends who were his passengers in the Ford Territory suggest that Bak was concerned that he would be arrested as he did not have a licence. He was counselled against running by at least one of his friends. One friend called it, *a dumb move to run*.⁵⁷ Another said, *we normally stop each other from doing something wrong*. None of the four friends who gave statements suggested that he was fearful that he would suffer harm at the hands of police.
143. In contrast, written submissions on behalf of the family suggest that Bak *ran because he felt threatened by police and was fearful of what they would do to him, despite his compliance with the law*.
144. I was referred in part to Bak's song *Lil Story* which, as noted above, was played at the inquest. It was further put in submissions that a previous decision I made regarding this song should be *revisited or reversed* (without it being put as a formal application) as the song was evidence of Bak's *reaction to police chasing him, Bak's fear of police mistreatment* and, that Bak *likely apprehended a threat to himself*. No other evidence regarding this matter was put to the Court.
145. In contrast however to those written submissions, counsel for the family said during the inquest that,

*...the Court will appreciate having looked at the lyrics that there is a very brief passage about his experience in Australia and we do not seek to tender that for Your Honour to make a finding about that because you couldn't on the basis of the song lyrics. So it's not tendered for that purpose but it is tendered for the purpose that links with the Equality Is Not the Same Reports by Victoria Police.....*⁵⁸

146. The oral and written submissions appear to be contradictory and provide no proper basis for me to revisit my earlier decision. I agree with counsel for the family that I could not make findings on the basis of the song lyrics. In any event, regardless of the status of the song, I have considered the *Equality is not the same* report as requested in the course of making my findings.

⁵⁷ Statement of Susanna Manoah dated 20 April 2019, CB at page 75.

⁵⁸ T153 L13-20

147. I am also perplexed by the reference in submissions from the family to - Bak's compliance with the law and that "*there was no evidence that [Bak] had in fact committed any offence that day*". Bak clearly was not permitted to drive a vehicle in Victoria, not only was he unlicensed but he was disqualified from doing so.
148. The best available evidence as to why Bak fled the scene was obtained from his friends who were present immediately prior to him fleeing. I have no reason to doubt what they have said and no submissions have been received as to why their evidence should not be accepted.
149. In any event, regardless of Bak's motivation for fleeing the scene, the police could only speculate about his reasons based on the information available to them.

Submissions and Replies

150. The submissions and replies of the family and the CCP were not generally in agreement, either as to the circumstances leading to the death or the findings I should make.
151. I am however concerned that as a matter of *procedural fairness*, the submission and reply filed on behalf of the family include what would be regarded as unexpected criticism of the actions and credit of S/C McDonald in circumstances where these matters were not raised with the witness when he was questioned and as such he was not given an opportunity to respond to those criticisms. For example, S/C McDonald was not challenged at inquest about the reason he gave for intercepting the vehicle, or that he did not have an arrest power; or that he hadn't made a proper risk assessment (including that it was disproportionate), or that the decision to initiate a foot pursuit was not appropriate; or that his evidence was inconsistent or contradictory or embellished in some manner. Yet the submissions make those assertions.
152. As noted in submissions on behalf of the CCP, "*In fact no criticism of his action was put at all*".

FINDINGS

153. Pursuant to section 67(1) of the Act I find as follows:
- (a) the identity of the deceased was Bak Mayer Cier Deng born on 1 January 1990;
 - (b) Bak died on 20 April 2019 at Royal Melbourne Hospital, 300 Grattan Street, Parkville, Victoria, from *1(a) Head Injury in a Motor Vehicle Incident*; and
 - (c) the death occurred in the circumstances described above.
154. Bak elected to drive his friend's 2006 Ford Territory on Good Friday, 19 April 2019, aware that he did not have a licence and was disqualified from driving, having appeared at the Sunshine Magistrates' Court on 31 May 2018. The reason why Bak chose to drive in those circumstances is not evident but there is no information to suggest that there was an urgent situation, or that another driver was not available.
155. At the time of the intercept, Bak was committing offences by driving whilst unlicensed for the fourth time, driving whilst disqualified and on the basis of the evidence of Bak's friend who estimated that he had consumed six stubbies of Mercury Cider in the hours before the incident, possibly drink driving. I am not however able to make a finding about his blood alcohol content at the time of the intercept.
156. There was nothing during the course of the interaction with Bak captured on the BWC footage which suggested that he would flee the scene once police left his vehicle. There was also nothing to suggest that the police should have anticipated what Bak would do once they left his vehicle and in particular Bak's actions when he jumped the second Amcor barrier. I make no adverse comments about the actions of police that night, including the conduct of the intercept, arrest or foot pursuit.
157. There is also no evidence to suggest that Bak considered that he was risking his life by his actions or that he intended harm to himself or that he was being reckless about his own safety. Instead, the evidence of those who witnessed the incident was that he did not anticipate the BMW vehicle, following which a tragic accident occurred. I make no adverse comment in relation to the driver of the BMW.
158. Bak's action, by all accounts, was out of character. One of Bak's friend said, "*Bak is normally a really good guy. He is normally the one keeping us all on the straight and narrow*".⁵⁹

⁵⁹ Statement of E. Gobera as above 22 April 2019, CB at p. 66.

159. The events of 19 April 2019 were devastating and a young life has been lost to all that knew and loved him. I convey my sincere condolences to Bak's family who made a number of statements regarding his tragic, sudden and unexpected loss.
160. His mother said that she is *still in denial and disbelief* that she can no longer hold him her arms.
161. His brother Nyakinj said he was a *father figure and an angel in disguise, the purest soul, no number of words can express or do justice to the type of person he was.*
162. His sister Aruol described him as her *best friend and supporter* and that he was *more priceless than the most beautiful diamond* and was a *kind, strong, independent individual, wise and was very thoughtful.*
163. His sister Adhar said of his loss, *it affected me mentally and everything in my brain completely shut down.*
164. 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.
165. I further direct that a copy of this finding be provided to the following:
- (a) Alual Weding Adeng Chol, Senior Next of Kin
 - (b) Ajak & Tut Lawyers on behalf of the family
 - (c) Norton Rose Fulbright on behalf of the Chief Commissioner of Police
 - (d) Inspector Pixie Fuhrmeister, Coroner's Investigator, Victoria Police

Signature:



SARAH GEBERT

Date: 16 August 2022

NOTE: Under section 83 of the *Coroners Act 2008* ('the Act'), a person with sufficient interest in an investigation may appeal to the Trial Division of the Supreme Court against the findings of a coroner in respect of a death after an investigation. An appeal must be made within 6 months after the day on which the determination is made, unless the Supreme Court grants leave to appeal out of time under section 86 of the Act.
