

IN THE CORONERS COURT  
OF VICTORIA  
AT MELBOURNE

Court Reference: COR 2018 2338

**FINDING INTO DEATH WITH INQUEST**

*Form 37 Rule 63(1)*

*Section 67 of the Coroners Act 2008*

**Inquest into the Death of JOHN WILFRED WARNER**

Delivered On:	10 JANUARY 2022
Delivered At:	CORONERS COURT OF VICTORIA 65 KAVANAGH STREET, SOUTHBANK
Hearing Dates:	25-29 OCTOBER 2021
Findings of:	CORONER PHILLIP BYRNE
Counsel Assisting the Coroner:	Mr. Lindsay Spence Principal In-House Solicitor Coroners Court of Victoria
The Warner Family:	Ms Stephanie Wallace of Counsel instructed by Robinson Gill
Chief Commissioner of Police:	Mr Ron Gipp of Counsel instructed by the Victorian Government Solicitors Office (VGSO)
Senior Sergeant Stephen Burt:	Mr Morgan Mclay of Counsel instructed by Minter Ellison

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I, PHILLIP BYRNE, Coroner having investigated the death of JOHN WILFRED WARNER and having held an inquest in relation to this death between 25-29 October 2021 (inclusive) find that the identity of the deceased was JOHN WILFRED WARNER, born on 21 May 1938, and the death occurred on 18 May 2018 at The Alfred Hospital

**from:**

**I (a) COMPLICATIONS OF MULTIPLE INJURIES (OPERATED), SUSTAINED IN A MOTOR VEHICLE INCIDENT (PASSENGER)**

Pursuant to section 67(1) of the **Coroners Act 2008** I make findings with respect to **the following circumstances:**

**BACKGROUND**

1. John Wilfred Warner, 79 years of age at the time of his death, resided with his wife Mrs Carole Warner within the suburb of Mount Eliza.

**BROAD CIRCUMSTANCES SURROUNDING DEATH**

2. On 14 April 2018, Mr Warner was a front-seat passenger in a vehicle being driven by Mrs Warner in an easterly direction on Old Mornington Road, Mount Eliza. Mrs Warner pulled up and became stationary at the lights at the intersection of Old Mornington Road and the Nepean Highway as the lights applicable to her were red. The intersection is a cross intersection with Old Mornington Road to the west and Humphries Road to the east. Mrs Warner intended to cross the Nepean Highway to travel east on Humphries Road.

3. While stationary at the intersection Mrs Warner observed a Holden Commodore pass through the intersection of Nepean Highway travelling at a very high speed, closely followed by a marked Victoria Police Highway Patrol vehicle (callsign Somerville 620 being driven by Senior Constable Damian Young).
4. Shortly after these two vehicles passed through the intersection the traffic lights turned green for traffic heading east on Old Mornington Road, Mrs Warner entered the intersection on the green light.
5. When Mrs Warner reached approximately the middle of the northbound lanes on the Nepean Highway her vehicle was impacted on the driver's side by the unmarked Holden Commodore Evoke sedan being driven in a northerly direction on the Nepean Highway by Senior Sergeant Stephen Burt. The vehicle being driven by Senior Sergeant Burt was a secondary pursuit vehicle. There is contention as to whether the secondary pursuit vehicle driven by Senior Sergeant Burt was being driven under "lights and sirens", a contention I will address later in this finding.
6. As a result of the collision Mr Warner sustained serious injuries and was conveyed to the Frankston Hospital and subsequently transferred to the Alfred Hospital where scans demonstrated bilateral rib fractures, a sternal fracture, a T8 3-column fracture and left medial malleolus fracture. Mr Warner underwent surgery on 19 April for the spinal fractures. Post-surgery, following a period in the ICU at the Alfred, on 5 May Mr Warner was discharged back to Frankston Hospital for rehabilitation. However, following significant deterioration in his condition Mr Warner was re-admitted to the Alfred. Following treatment on the ward Mr Warner's condition deteriorated; he was transferred to the ICU with altered conscious state and hypoxia. On 18 May Mr Warner became tachypnoeic, was palliated and died later that day.

## **REPORT TO THE CORONER**

7. Mr Warner's death was appropriately reported to the coroner. The matter was initially with the then State Coroner Judge Sara Hinchey. Presumably, in light of the circumstances where Mr Warner sustained the injuries in the context of a police pursuit Judge Hinchey, being aware the Major Collision Investigation Unit (**MCIU**) was involved in the investigation, directed an autopsy. The directed autopsy was performed at the Victorian Institute of Forensic Medicine by Forensic Pathologist Dr Gregory Young. In late October 2018 Dr Young provided to the Court a comprehensive fourteen-page Autopsy Report in which he advised the cause of Mr Warner's untimely death was:

## **I(a) COMPLICATIONS OF MULTIPLE INJURIES (OPERATED), SUSTAINED IN A MOTOR VEHICLE INCIDENT (PASSENGER)**

I include in this finding two pertinent comments made by Dr Young in his report, he wrote:

*“The autopsy confirmed the presence of multiple rib and sternal fractures, as well as an operated fracture of the T8 thoracic vertebra and a left ankle fracture. Bronchopneumonia was seen in the right lung. The heart showed signs of ischaemic heart disease, and there was also evidence of congestive cardiac failure.”*

And:

*“Bronchopneumonia can develop as a complication of injuries, particularly rib and sternal fractures, due to relative immobility and pain, leading to impaired respiration and cough reflexes. Physiological stress imposed by injuries and surgery may also lead to exacerbation of pre-existing medical conditions, including ischaemic heart disease and heart failure.”*

### **FURTHER INVESTIGATION**

8. Prior to the matter being re-allocated to me it lay in abeyance pending a formal determination as to whether Senior Sergeant Burt was to be charged with a criminal offence arising from the conduct of his driving leading up to the fatal collision with Mrs Warner's vehicle.
9. Subsequently, on advice from the Director of Public Prosecutions to whom police investigators had referred the matter, a decision was taken that criminal proceedings against Senior Sergeant Burt would not be pursued.
10. In March 2020 an electronic coronial brief of some 500 pages, initially prepared with the prospect of a prosecution, was lodged with the Court. Having examined the brief of evidence and by then being advised Senior Sergeant Burt would not be charged with a criminal offence, I enlivened the investigation which had lain in abeyance.
11. It was clear that the matter would need to proceed to formal inquest. Consequently, I referred the matter to the Court's Principal In-House Solicitor, Mr Lindsay Spence, with a view to him taking the role of counsel assisting at inquest.
12. Prior to listing the matter for full inquest I listed it for a Mention/Directions Hearing with a view to discussing with the interested parties the scope/parameters of the proposed inquest. At that hearing I also hoped to settle a list of witnesses and seek to establish whether Senior Sergeant Burt was likely to be separately represented.

## PRELIMINARY HEARINGS

13. The Mention/Directions hearing proceeded on 21 January 2021 at which time Mr Spence appeared to assist. While I would have preferred the hearing to proceed in the traditional way with the representatives of the interested parties in open court, the restrictions introduced to reduce the prospect of COVID-19 transmission resulted in the hearing proceeding on WebEx. In any event, the hearing proceeded. I advised the parties of the likely scope/parameters of the proposed inquest and further advised primary focus would be on Senior Sergeant Burt's driving as he approached the Old Mornington Road/Nepean Highway intersection.
14. As indicated at the conclusion of the first Mention/Directions hearing on 21 January 2021 the matter was listed for a second Mention/Direction hearing on 19 April 2021. At this hearing Mr Spence again appeared to assist the Court, Ms Stephanie Wallace appeared for the Warner family, Mr Ron Gipp appeared for the Chief Commissioner and Mr Morgan McLay appeared on behalf of Senior Sergeant Burt. The matter proceeded through a combination of in-person and remote WebEx appearances.
15. Between and following the two preliminary hearings further investigations were undertaken, including a forensic audio analysis of D24 communications concerning whether there was activation of sirens on Senior Sergeant Burt's vehicle, together with further material from Dr Hardiman, the collision reconstruction expert.
16. Mr Spence had prepared a "proposed scope" for the inquest which contained four specific issues he and I had previously discussed, that being:
  - The manner of Senior Sergeant Burt's driving immediately prior to the collision; and
  - Mrs Warner's driving when she entered the intersection; and
  - What warning devices were activated by Senior Sergeant Burt throughout the pursuit, particularly as he approached the intersection where the collision occurred; and
  - Relative to the timing of the collision, when was the direction to terminate the pursuit given.

Counsel for the parties accepted these were the likely areas of contention.

## THE INQUEST

17. The formal inquest ran over five days commencing Monday 25 October 2021 through to Friday 29 October 2021 when I heard oral submissions. At the inquest I heard viva voce evidence from:

- Senior Constable Damian Young (Leading Senior Constable Karl Stracke was unavailable due to a medical issue), driver of the primary pursuit vehicle; and
- Mrs Carole Warner; and
- Mr Roy Hunter and his daughter Suzanne Hemington, passengers in Mrs Warner's vehicle; and
- Ambulance Victoria paramedic Ms Emma Mincher-Jones; and
- Mr Clayton Douglas, an eyewitness to the fatal event;
- Dr Jenelle Hardiman (formerly Mehegan), a collision reconstruction expert with the Victoria Police Forensic Services Department; and
- Senior Sergeant Stephen Burt.

18. In this finding I propose to focus upon what I consider the principal issue of contention – Senior Sergeant Burt's driving as the secondary pursuit unit proximate to the collision. However I think it important to refer to events that occurred prior to that critical time.

19. On Saturday 14 April 2018, Senior Constable Damian Young and Leading Senior Constable Karl Stracke commenced at 2pm assigned to the Somerville Highway Patrol tasked to traffic duties. Senior Constable Young was driving a fully marked grey Holden 'SS' Commodore, classified as a 'Gold Class' Highway Patrol vehicle whilst Leading Senior Constable Stracke was the observer (callsign Somerville 620).

20. Senior Sergeant Stephen Burt commenced the same afternoon as the afternoon shift Divisional Supervisor for the Southern Metro Division 4 Region at 2pm working from the Frankston Police Complex. Senior Sergeant Burt was driving a silver unmarked Holden Commodore Evoke sedan, classified as a 'Silver Class' vehicle and was driving alone without an observer (callsign Frankston 265).

21. The Holden Commodore Evoke was unmarked and fitted with covert emergency red and blue flashing lights. In the front of the vehicle was a small unit at the bottom centre of the

windscreen inside the vehicle which displayed alternating red and blue flashing lights forward. The light bar was approximately 18 centimetres wide. At the rear of the vehicle emergency lights were fitted to the parcel shelf on the driver's side. This light bar was approximately 20 centimetres wide and displayed alternating red and blue flashing lights rear of the vehicle. A green LED was fitted to the instrument cluster panel and was activated when the emergency lights were turned on. The vehicle was fitted with a 100-watt siren and speaker which was located behind the front bumper bar grille. It was tested to produce 120db when activated. The emergency lights and sirens were activated by a three-stage toggle switch located in the centre console between the automatic shift and the Police Radio. The switch was fixed in a specific mould and had three settings (i) Off; (ii) Lights; and (iii) Lights and Sirens.

22. Prior to their shift commencement, Senior Constable Young and Leading Senior Constable Stracke received their tasking and were informed of a silver Holden Commodore sedan, described as a VX model or similar displaying stolen Western Australian registration plates, with the vehicle and occupants wanted in relation to aggravated burglaries, thefts as well as the ramming of a Police Highway Patrol vehicle. This vehicle was also wanted in relation to a number of evade police incidents where the driver had failed to stop upon a police direction being issued. The Officers were also informed of another silver Holden Commodore sedan described as a VZ model wanted for similar incidents.
23. Approximately 3.03pm police communications despatched a job to the Mornington Divisional Van (callsign Mornington 303) in respect of an erratically driven silver Holden Commodore bearing Western Australian registration plates on Bungower Road. Approximately 3.11pm the Mornington 303 Divisional Van observed the vehicle on Bungower Road and attempted to intercept the vehicle, however the Holden Commodore failed to stop and Mornington 303 did not engage in a pursuit with the incident classified as an 'evade police'.
24. Approximately 6.52pm Frankston 302 observed a silver Holden Commodore sedan bearing Western Australian plates north on Fletcher Road. Frankston 302 broadcast '*we haven't attempted to intercept it, but he definitely knows we were behind him, so he's just gone through a red and just turned right onto Beach Street now, headed east*'. Frankston 520 immediately requested support from the Air Wing and Canine Units whilst Frankston 302 maintained observations on the vehicle. Frankston 302 lost sight of the vehicle at the roundabout at Ashleigh Avenue and Beach Street.

25. As a consequence of that sighting Carrum Downs 251 Supervisor requested Somerville 620 to commence patrolling Frankston in an attempt to locate the vehicle. Despite numerous police vehicles patrolling the area including Somerville 620 for a period of time they were unable to locate the silver Holden Commodore sedan bearing Western Australian registration plates.
26. Approximately 8.12pm Somerville 620 being driven by Senior Constable Young parked their Highway Patrol vehicle in a small carpark on the Nepean Highway opposite the Caltex Service Station in Frankston where they conducted static radar duties. At 8.15pm Somerville 620 observed a silver Holden Commodore sedan travelling in excess of the signposted 60km/h speed limit southbound along the Nepean Highway. At that time neither Senior Constable Young nor Leading Senior Constable Stracke were able to confirm the registration of the silver Holden Commodore. Senior Constable Young drove the Highway Patrol vehicle across the break in the median strip and accelerated south along the Nepean Highway in the last known direction of the silver Holden Commodore reaching a speed of 124km/h.
27. Leading Senior Constable Stracke at 8:15:53pm informed police communications *'Yeah we're just doing 'static obs' for this VX. We've just had a silver VX, couldn't see the rego, but its heading up Oliver Hill at quite a rate, if you'd give the heads up to Mornington units'*.
28. At this time Senior Sergeant Burt was driving on the Nepean Highway southbound up Oliver's Hill towards Mornington. Upon hearing Somerville 620s broadcast Senior Sergeant Burt pulled to the side of the road and observed the silver Holden Commodore pass his vehicle followed by Somerville 620 after which Senior Constable Burt pulled in behind Somerville 620.
29. Somerville 620 lost sight of the vehicle for a period of time however around the intersection of Nepean Highway and Old Mornington Road, Senior Constable Young caught up with the silver Holden Commodore that was now driving just above the signposted 80km/h speed limit and was displaying Victorian registration TJB-609. At this time Senior Constable Young had NOT activated the lights or sirens on the Highway Patrol vehicle. Leading Senior Constable Stracke entered the vehicle's registration into the Mobile Data Terminal (MDT) that informed that the registration plate on the Holden Commodore was listed as stolen.



30. Leading Senior Constable Stracke at 8:16:59pm broadcast *'620, yeah we've got up behind him, at Old Mornington Road, I don't think it's going to be the same car, this one's got Vic plates. I'll get you to run it when we get a little bit closer. Tango Juliet Bravo 609'*.
31. Senior Sergeant Burt at 8:17:20pm broadcast *'Yeah 265, I saw the car, I'm with them now, it's not the one'* with Leading Senior Constable Stracke broadcasting in reply *'Yeah, this one's coming up as stolen plates so I'd say it is gonna be our car, we'll ... wait til we get another unit a little bit closer to us, we're just coming up to ..... looks like we're gonna be heading up Mount Eliza Way, I take it, yep, it'll be the car, he's just about to take off'*.
32. The silver Holden Commodore sedan then turned right from the Nepean Highway into Mount Eliza Way followed by both Somerville 620 and Frankston 265. As Senior Constable Young turned right he activated the lights and sirens on Somerville 620 and attempted to intercept the Holden Commodore. The Holden Commodore refused to stop and accelerated away with Leading Senior Constable Stracke at 8:18:19pm broadcasting *'Somerville 620 in pursuit, this will be the vehicle, does 265 want us to pursue it?'*.
33. Senior Sergeant Burt immediately broadcast *'265, affirmative at this stage'* and claimed to have activated his lights and sirens on the unmarked police vehicle and joined the police pursuit as the secondary unit, with Somerville 620 as the primary unit.
34. Senior Constable Young continued to pursue the silver Holden Commodore south-west along Mount Eliza Way with the MDT GPS of Somerville 620 recording the speed of the Highway Patrol vehicle reaching 105km/h before reducing to 82km/h as the vehicles headed into Mount Eliza Village. At this time a member of the public was driving their vehicle, a white Nissan Dualis, in the same direction along Mount Eliza Way and, upon hearing the sirens, slowed and indicated to turn left into Davies Avenue to move out of the way. As that driver was moving to the left, the driver of the silver Holden Commodore moved to the right to pass that vehicle and in doing so impacted with the rear driver's side bumper of that vehicle. Leading Senior Constable Stracke broadcast at 8:18:29pm *'620 we're coming into central ... Mount Eliza, he's just, he's just hit a car, he's gone to the wrong side of the road, Mount Eliza Way, just coming up to ... Canadian Bay'*.
35. The driver of the silver Holden Commodore crossed to the incorrect side of the road a short distance from Canadian Bay Road and entered the intersection of Mount Eliza Way and Canadian Bay Road and turned right without indicating. The driver then returned to the correct side of the road and headed north-west on Canadian Bay Road for a short distance of approximately 60 metres before making a wide right turn around the end of the centre

concrete median strip and returning to Mount Eliza Way. Senior Constable Young and Senior Sergeant Burt followed in their respective Police vehicles however remained on the correct side of the road.

36. Senior Constable Young broadcast at 8:18:46pm *'we're just out the front of the hotel, we're now heading west towards the beach ... now we're doing a u-turn going back to Mount Eliza Way, one head on board, traffic's very light ... now we're going north again on Mount Eliza Way, back towards Old Mornington'*. At the intersection of Canadian Bay Road and Mount Eliza Way the driver of the silver Holden Commodore turned left and headed north-east along Mount Eliza Way back towards the Nepean Highway being pursued by both Somerville 620 and Frankston 265. Senior Constable Young broadcast at 8:19:06pm *'620, speed is 80, Gold licenced driver, Gold vehicle, heading back towards the Nepean Highway'*. This resulted in the D24 Operator broadcasting *'Roger that, Mornington units copy the last?'* and Senior Sergeant Burt immediately broadcasting *'265, Air Wing please'*.
37. Somerville 620 had their moving mode radar operating throughout the pursuit and recorded the maximum speed of the silver Holden Commodore along this stretch of roadway north-east along Mount Eliza Way as 123km/h in a signposted 60km/h zone whilst the MDT GPS of Somerville 620 recorded the maximum speed of the Highway Patrol vehicle as 117km/h.
38. As the silver Holden Commodore and Somerville 620 approached the intersection of Mount Eliza Way and the Nepean Highway, Leading Senior Constable Stracke activated a personal 'Go-Pro' Device that commenced recording the remainder of the police pursuit. The silver Holden Commodore turned left onto the Nepean Highway heading northbound with both Somerville 620 and Frankston 265 in pursuit. There was at the time no other traffic northbound until the vehicles approached the intersection of the Nepean Highway with Old Mornington Road. Senior Constable Young broadcast at 8:19:28pm *'Somerville 620, we got up to 123 'k's' on Mount Eliza Way, just coming back to Nepean Highway, now heading north on Nepean Highway, zero traffic'*.
39. The D24 Operator confirmed at 8:19:37 *'North on Nepean Highway'* followed immediately by Mornington 251 broadcasting *'Mornington 251, can we just confirm that Frankston 265 is the pursuit controller?'*. Senior Sergeant Burt broadcast in reply *'Yeah I'm engaged in the pursuit, so I'm secondary vehicle, so I need another pursuit controller please'* with Mornington 251 immediately broadcasting in reply *'Mornington 251, Pursuit Controller'*.

40. At that time Somerville 620 was heading northbound on the Nepean Highway approaching the intersection with Old Mornington Road (on the left) and Humphries Road (on the right). MDT GPS data from Somerville 620 recorded the speed of the Highway Patrol vehicle to be between 129-146km/h northbound along the Nepean Highway whilst Somerville 620's radar recorded the maximum speed of the silver Holden Commodore to be 152km/h.
41. Leading Senior Constable Stracke broadcast at 8:19:56pm '*Somerville 620, speed is one three five in the 80 zone, coming up to Humphries Road. Still zero traffic, roads dry*'. As Senior Constable Young approached the intersection with Old Mornington Road/Humphries Road he reduced his speed to approximately 100km/h and also observed that the traffic control signals had turned amber northbound.
42. Leading Senior Constable Stracke broadcast at 8:20:08pm '*Speeds up to one five two, coming up to Humphries Road ... we're dropping down to one four zero ... through ambers on Humphries Road ... standby, he's going the wrong side of Nepean Highway towards Olivers Hill*'.
43. The silver Holden Commodore entered the intersection of Nepean Highway and Old Mornington Road/Humphries Road on the amber light and crossed to the incorrect side of the road travelling north in the parking lane of the southbound lanes of the Nepean Highway. Senior Constable Young entered the intersection just as the traffic control signals turned red and immediately terminated the pursuit, decelerated, turned his lights and sirens off and brought the Highway Patrol vehicle to stationary outside 656 Nepean Highway.
44. Senior Sergeant Burt was a distance behind Somerville 620, at this time of the pursuit and approached the intersection of the Nepean Highway and Old Mornington Road/Humphries Road whilst the traffic control signals were red.
45. At the same time Mrs Warner was stationary eastbound on Old Mornington Road at the intersection of the Nepean Highway and Old Mornington Road/Humphries Road. Mrs Warner was driving a silver Mitsubishi Lancer sedan with her husband, John Warner seated in the front passenger seat, Roy Hunter (brother-in-law to Mrs Warner) and Suzanne Slattery (Hemington) (Roy's daughter) seated in the rear passenger seats. Mrs Warner had stopped at the red traffic control signals waiting to travel straight ahead eastbound through the intersection and into Humphries Road. At that time there were no other vehicles waiting at the intersection and Mrs Warner was the first and only vehicle waiting. Whilst waiting all of the occupants of the Mitsubishi Lancer observed both the silver Holden Commodore and Somerville 620 drive through the intersection at speed.

46. Mrs Warner, in respect of Somerville 620, stated that *'I knew it was a police car due to the police logos on the side of the car and the car had its flashing lights and I heard the sirens'*. Within two seconds of Somerville 620 entering the intersection, the traffic control signals eastbound turned green giving right of way to Mrs Warner. Mrs Warner glanced to her right and upon not seeing anything drove into the intersection straight ahead towards Humphries Road. At the same time Senior Sergeant Burt entered the intersection against the red traffic control signal with the front passenger side of his vehicle impacting heavily with the front driver's side of Mrs Warner's vehicle.
47. At 8:20:20pm Mornington 251 broadcast *'Mornington 251, Terminate'* and at 8:20:30pm the audible termination alert was activated. At 8:20:32pm Leading Senior Constable Stracke broadcast *'Somerville 620 still uh ... he's in the stopping lane, parking lane, speed 150 plus, down the wrong side, down the Nepean Highway, down Oliver's Hill'* followed by Mornington 251 broadcasting *'Somerville 620, confirm pursuit terminated'* with Somerville 620 broadcasting *'Affirmative, you should have us stationary'*. Once these radio transmissions have concluded Senior Sergeant Burt then broadcast *'Frankston 265, I've been involved in a Code 12 at Mount Eliza Way and Nepean Highway'*.

#### **FINDINGS IN RESPECT OF ISSUES OF CONTENTION**

48. Save for a short period of time, when due to some confusion when Senior Sergeant Burt transitioned from pursuit controller to the secondary pursuer, I accept Mr Gipp's submission on behalf of the Chief Commissioner that the pursuit by Somerville 620 was in compliance with the Victoria Police Pursuit Policy. I am satisfied the decision to initiate a formal pursuit was warranted and taken at an appropriate time; perhaps even more importantly the pursuit was unilaterally terminated by Senior Constable Young when to continue to pursue became far too dangerous when the vehicle being pursued crossed to the incorrect side of the road and proceeded at high speed down the Nepean Highway in the wrong direction. Senior Constable Young terminated the pursuit shortly prior to the pursuit controller formally calling for the pursuit to be terminated.
49. I conclude that short period without a formal pursuit controller, while not in strict compliance with pursuit policy, had little or no bearing on how the pursuit proceeded and certainly not in relation to the events proximate to the collision.

50. I propose at this stage to make a finding as to Mrs Warner's driving. I am satisfied she entered the intersection at an appropriate speed on a green light. I am further satisfied that she did not slow down once she entered the intersection, but proceeded and accelerated normally, intending to cross over the highway into Humphries Road on the green light. I am also satisfied neither Mrs Warner or the two surviving passengers in her car observed the approach of the vehicle driven by Senior Sergeant Burt prior to the collision. Later in this finding I will further address the issue of the entry onto the highway at Old Mornington Road being somewhat obstructed to vehicles travelling north on Nepean Highway, the direction of travel of Senior Sergeant Burt. I make these two findings at this early stage to enable me to focus upon what from the outset has been my principle focus; Senior Sergeant Burt's driving conduct proximate to the collision.
51. Before turning to that principal focus of my investigation I make the following comment. Although emergency vehicles when engaged in urgent duty driving are not required to comply with a number of road traffic rules (see Rule 305 *Road Safety Road Rules 2009*), for instance complying with the relevant speed limits and proceeding through red lights, there is an overarching obligation to exercise a duty to take reasonable care to other road users, urgent duty driving, even under lights and siren does not provide "carte blanche;" there is a powerful duty of care owed. The VPMP Urgent Duty Driving explicitly reinforces this obligation, stating '*in all urgent duty driving situations the priority is safety first. This includes the safety of all members, the occupants of any vehicles involved and the members of the public*'.
52. One critical uncontested issue is that as he came around the bend approaching the Old Mornington Road intersection, Senior Sergeant Burt observed the traffic lights applicable to him were red and remained red until he actually entered the intersection. It is not in dispute that Senior Sergeant Burt approached the intersection of the Nepean Highway and Old Mornington Road fully aware and cognisant that he was approaching against the red traffic control signal where he did not have right of way. Another significant matter is the fact Senior Sergeant Burt knew this intersection extremely well having been transferred to Frankston as a Sergeant in 1994 and having also lived locally for at least the past 23 years.
53. I turn now to the principal focus of my investigation - Senior Sergeant Burt's driving proximate to the point of impact.

54. A post-collision investigation was undertaken by Detective Sergeant Dr Jennelle Hardiman (formerly Mehegan) of the Forensic Services Department, Victoria Police. Dr Hardiman is a recognised collision reconstruction expert. On the morning of 16 April 2018 Dr Hardiman attended at the Victoria Police Transport Services Branch where she examined the Holden Evoke sedan involved in the fatal collision driven by Senior Sergeant Burt.
55. In her formal statement of 23 May 2018 Dr Hardiman said she connected the Bosch CDR software to the airbag control module and downloaded a 28-page report. Dr Hardiman advised the report included five seconds of pre-crash data including accelerator pedal position, service brake application, engine revolutions per minute, throttle position and significantly, from my perspective, especially the speed of the vehicle at various stages during the five seconds. The data enabled Dr Hardiman to determine the distance the vehicle was from the point of impact for the five seconds pre-crash at 0.5 second intervals.
56. At pages 4 – 7 of Dr Hardiman’s formal statement (pages 125 – 128 of the coronial brief) are five tables which contain critical objective information/data. The significance of this information is that rather than me seeking to encapsulate it in my finding, I think it preferable, lest something be lost or misconstrued in the translation, that I annex a table combining all of objective data, distance calculations made by Dr Hardiman and subsequent relevant comments [Annexure A refers].
57. On 17 April 2018 Dr Hardiman, with a MCIU colleague, attended the scene of the collision. At page 9 of her statement Dr Hardiman wrote:

*“Based on my calculations of the distance travelled by the Holden sedan as it approached the intersection using the data obtained from the CDR download, I was present in the vehicle when a series of photographs were taken by Detective Leading Senior Constable Hardiman at 0.5 second intervals showing the vision of sight for the driver of the Holden sedan as it approached the intersection.”*

At pages 10 – 14 of Dr Hardiman’s statement (pages 131 – 135 of the coronial brief) are photographs described as “Figs” 4 through to 13 which demonstrate the distance Senior Sergeant Burt’s vehicle was from the impact and the speed at which it was travelling during the five seconds leading up to the impact. Again rather than me seeking to describe what is demonstrated in the photographs I annex them to the finding [Annexure B refers].

58. As well as the speed at which Senior Sergeant Burt was travelling, the photographs assist in understanding the compromised line of sight he had of a vehicle stationary at the lights prior to proceeding into the Nepean Highway from Old Mornington Road. The photographs also demonstrate that the vision of a driver of a vehicle stationary at the lights on Old Mornington Road looking to the right prior to entering the intersection was compromised due to both shrubbery on the southwestern corner together with the bend in the roading to the south of the intersection.
59. I accept the objective data downloaded from the airbag control module recovered from Senior Sergeant Burt's vehicle, in combination with the subsequent analysis undertaken by Dr Hardiman, to find critical aspects of Senior Sergeant Burt's driving conduct prior to the collision, including vehicle speed, distance from collision and braking application.
60. Upon her attendance on 17 April 2018 at the scene of the collision Dr Hardiman also sought to establish precisely where on the roading Senior Sergeant Burt was as he approached the intersection. Senior Sergeant Burt claimed to have been entirely in the right lane as he approached the intersection. Examining the physical tyre marks and scuffs on the road surface Dr Hardiman formed the view that Senior Sergeant Burt's vehicle very shortly prior to impact was not entirely in the right lane, but was likely "straddling" the left and right lanes. In evidence at inquest Dr Hardiman indicated that use of the term "straddling" meant that *'in my opinion, the vehicle wasn't wholly in one lane or the other. It was certainly predominantly in the right lane, so the passenger side of the vehicle was ah near to the centre of the dividing line. But ah in my opinion, slightly to the left, so that the passenger side of the vehicle was ah slightly to the left of the two lanes. Predominantly the vehicle was in the right lane, but not wholly'*.
61. I accept Dr Hardiman's evidence in that regard and conclude Senior Sergeant Burt was mistaken as to his position on the carriageway shortly prior to impact. I am satisfied that at least a portion of his vehicle was in the left lane of the northbound carriageway.
62. I am somewhat comforted by the evidence provided by Dr Hardiman flowing from the data downloaded from the airbag control module as I view this evidence as objective, and do not have to exclusively rely upon, and make some assessment of, the credibility and reliability of the evidence of the witnesses contained in both their statements or viva voce evidence that I would have had to rely upon in the absence of the critical data provided by the download.

63. The fundamental thrust of Senior Sergeant Burt's evidence is that he observed Mrs Warner's vehicle enter the intersection and slow down, resulting in him assuming she had observed his approach and she therefore proposed to stop and give him right of way. However, late in his evidence Senior Sergeant Burt made what I view as a very significant concession when he said:

*"I made that assumption and clearly got that assumption wrong and I regret that."*

The point I make is, in my view there was no reasonable basis for Senior Sergeant Burt to make that assumption as the evidence satisfies me that neither Mrs Warner, who I viewed as both a credible and reliable witness, nor her passengers ever saw Senior Sergeant Burt approach let alone made a decision to give right of way to Senior Sergeant Burt. I reiterate I do not accept Mrs Warner slowed after entering the intersection; I conclude she maintained a constant rate of acceleration throughout.

64. The next issue I address relates to whether during the pursuit Senior Sergeant Burt was under "lights and siren" as required by the Victoria Police Manual Pursuit Policy.

65. I accept, and it was not in contention, that Senior Sergeant Burt had activated the internal flashing red and blue lights on the vehicle he was driving. Those police flashing lights are distinctly different from the flashing lights on the highway patrol vehicle being driven by Senior Constable Young. Contention surrounds whether Senior Sergeant Burt had the siren on during the pursuit. An eyewitness to the fatal event said he had the radio in his vehicle loud and did not hear a siren in relation to either the primary pursuit vehicle or that driven by Senior Sergeant Burt. Consequently, this witness does not assist.

66. In respect of the occupants of the primary pursuit vehicle, Somerville 620, Senior Constable Young's evidence likewise does not assist in resolving the question in respect of siren activation. Leading Senior Constable Stracke was not available to give evidence so that he was unable to be examined on this issue. I accept in his written statement he claimed as they conducted the u-turn after entering the Mount Eliza Village, he momentarily sighted Senior Sergeant Burt's vehicle and the lights and siren on the vehicle were activated. However, in the circumstances where his evidence could not be tested, although I do not reject it, his evidence outright carries less weight and will be taken into account in the context of the other evidence on this issue.



67. In an endeavour to determine whether the secondary pursuit vehicle driven by Senior Sergeant Burt had activated the siren when he became a pursuit vehicle, at the suggestion of Mr Spence, the Court commissioned a forensic audio analysis of the D24 radio transmissions between Senior Sergeant Burt and D24. This analysis was undertaken by Mr Justin Humphries of Phoenix Sound Studio. Mr Humphries submitted an expert opinion in a highly technical report. Mr Humphries conducted a forensic audio analysis upon three transmissions made by Senior Sergeant Burt pre-pursuit, two transmissions made during the pursuit and two transmissions made after the pursuit/collision. Senior Sergeant Burt during the pursuit made only two radio transmissions, the first being '265, Air Wing please', the second being 'Yeah I'm engaged in the pursuit, so I'm secondary vehicle, so I need another pursuit controller please'.
68. Again so nothing is lost or misconstrued I do not propose to seek to encapsulate his conclusions, but in this finding I include an excerpt from his report under the heading "Conclusion." Mr Humphries wrote:

*"Comparing the technical details of "Exhibit 12.mp3" and "radio test.wav" shows that both files have different audio file formats and sample rates. However, the recorded frequency range and sonic quality are essentially the same for both files.*

*The siren detected from "radio test.wav" (Exhibit 22) was isolated and analysed. It has a low frequency from 342Hz to a high frequency of 1740Hz and its pattern cycle (0.325 seconds) and was easily detectable (FIG. 1). When other simultaneous events occur throughout the transmissions (ie. talking, noise), the siren pattern was still identifiable both aurally and visually (FIG. 2). For each transmission throughout "radio test.wav" the siren was detectable.*

*Analysis of the marked-up sections from Exhibit 13 [marked up].pdf, of audio file "Exhibit 12.mp3" shows no detectable siren as there was in "radio test.wav". When focusing on the frequency range area where a siren could be present (see highlighted areas), there was no indication of a siren or part of. Even though some of the transmissions are relatively short, particularly during the pursuit, there would still be enough time for part of a siren to occur and be detected if present.*

*In conclusion, from the analysis and comparison of "Exhibit 12.mp3" marked-up broadcasts and the reference transmissions contained within the audio file "radio test.wav", there seems to be no identifiable siren within Senior Sergeant Burt's transmissions before, during and after the pursuit." (my emphasis)*

69. Turning to the other evidence on this issue – particularly that of Senior Sergeant Burt. As submitted by Mr Spence, there are inconsistencies in the evidence he gave in viva voce evidence. On several occasions claiming to be sure he had sirens on throughout, but when the issues surrounding the sound analysis of the two D24 transmissions were put to him Senior Sergeant Burt retreated from his previous unequivocal position stating he may have activated the siren after the second transmission. It is to be borne in mind the entire pursuit took place over a very short time, two minutes give or take a second or two. The relevant D24 transmissions occurred at the 55-second mark and the second at the 1 minute 27 seconds mark of the pursuit.
70. Having assiduously considered the evidence pertinent to this issue, particularly what I will call the objective evidence based on the forensic audio analysis, I am satisfied on balance, that Senior Sergeant Burt's siren was not activated during the pursuit. I add, I am not suggesting Senior Sergeant Burt was lying, he may well have believed he activated the siren, I am merely saying in the "hurly burly" of a police pursuit he was mistaken.
71. Leaving aside Senior Constable Young's appropriate unilateral termination of the pursuit, I turn to considering the significance of the formal "terminate pursuit" announcement made by Mornington 251, the pursuit controller. In relation to the fatal impact it is virtually impossible to say whether it was broadcast immediately before, at the time of impact, or marginally thereafter. Which ever way one looks at it, its timing is not critical because in my considered view the timing in relation to impact left Senior Sergeant Burt no time to terminate as secondary pursuer or alter his progress, the "die was cast." It is clear the audio alarm to terminate was transmitted after the collision and therefore has no critical significance. On the available evidence there is no suggestion that Senior Sergeant Burt continued to engage in the pursuit in formal contravention of a direction to terminate.

## CONCLUSIONS – IN SUMMARY

72. I conclude there is no basis whatsoever to make an adverse comment, let alone a finding, against Mrs Warner.
73. Nor is there any basis to make an adverse comment or finding against the primary pursuer Senior Constable Damian Young; it was entirely appropriate to seek to apprehend the driver of the silver Holden Commodore displaying a stolen number plate in the context of the prior repeated interactions Victoria Police had recently had with a vehicle matching that description (and known to be switching registration plates).
74. I conclude the pursuit was initiated at an appropriate time, and more importantly, was terminated appropriately when the level of risk to all road users became too high to continue. In relation to those aspects the pursuit was in compliance with the pursuit policy.
75. However, in relation to Senior Sergeant Burt's part in the pursuit, for the reasons I have provided at some length earlier in this finding, I conclude Senior Sergeant Burt approached the intersection of Old Mornington Road and the Nepean Highway, an intersection he knew well, proposing to enter and pass through the intersection against a red light, at significantly too fast a speed in the circumstances to enable him to avoid the collision with Mrs Warner's vehicle, which he mistakenly believed had observed his approach and would give way.
76. Although as stated earlier, I do not consider it critical, I conclude that whilst he may have thought he activated not only lights but also sirens at the commencement of his role as secondary pursuer, Senior Sergeant Burt did not activate the sirens.

## FINDING

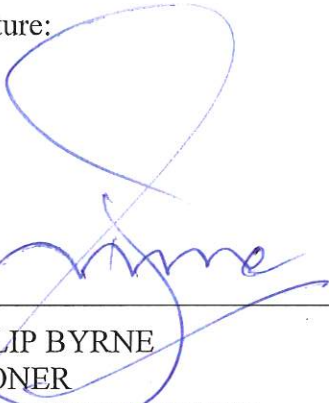
77. I formally find John Wilfred Warner died in the Alfred Hospital on 18 May 2018 from multiple injuries sustained when a passenger in a motor vehicle driven by his wife Mrs Carole Warner on 14 April 2018 was struck by a Victoria Police motor vehicle engaged in a police pursuit driven by Senior Sergeant Stephen Burt at the intersection of the Old Mornington Road and the Nepean Highway. Senior Sergeant Burt entered the intersection in the circumstances described above.

## DISTRIBUTION OF FINDING

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

- Mrs Carole Warner, Senior Next of Kin
- Mr Roy Hunter and Ms Suzanne Hemington, Vehicle Passengers
- Mr Shane Patton APM, Chief Commissioner of Police
- Senior Sergeant Stephen Burt
- Detective A/Sergeant Peter Romanis, MCIU, Coroner's Investigator

Signature:



PHILLIP BYRNE  
CORONER

Date: 10 JANUARY 2022



# **ANNEXURE A**

**PRE-CRASH DATA & SUBSEQUENT CALCULATIONS & INTERPRETATIONS FROM AIRBAG CONTROL MODULE**

<b>TIME</b>	<b>ACCELERATOR PEDAL, % FULL</b>	<b>SERVICE BRAKE</b>	<b>SPEED, VEHICLE INDICATED km/h</b>	<b>DISTANCE FROM IMPACT</b>	<b>DISTANCE NEEDED TO STOP</b>	<b>RELEVANT COMMENTS</b>
-5.0sec	0	On	118 km/h	135.55m	60.9m	'Between 5.0 seconds and 3.5 seconds before the collision, the Holden sedan was under braking at an average rate of 2.4m/s <sup>2</sup> ie. gentle braking, this is not considered to be heavy braking (heavy/emergency braking 0.9g)
-4.5sec	0	On	114 km/h	119.16m	56.9m	
-4.0sec	0	On	109 km/h	103.33m	52.0m	
-3.5sec	0	On	105 km/h	88.19m	48.2m	
-3.0sec	12	Off	104 km/h	73.61m	47.3m	
-2.5sec	29	Off	103 km/h	59.17m	46.4m	'Between 3.0 and 2.0 seconds before the collision, the driver was not braking and had his foot on the accelerator. He was not actually accelerating the vehicle though. The vehicle speed essentially remained at a constant speed but slowed from 105km/h to 103km/h over 1.5 seconds.
-2.0sec	0	On	103 km/h	44.86m	46.41m	'Between 2.5 and 2.0 seconds before impact, the driver of the Holden applied braking. The driver remained on the brakes up until impact. Between 1.5 and 1.0 second before the collision, the driver braked at a rate of 0.9g (maximum braking). On average in the last 2.0 seconds before impact the deceleration rate of the vehicle was 0.59g (heavy braking).
-1.5sec	0	On	86 km/h	30.55m	32.35m	
-1.0sec	0	On	70 km/h	18.61m	21.43m	
-0.5sec	0	On	64 km/h	8.89m	17.91m	

# **ANNEXURE B**



Fig 4. Image looking north on Nepean Highway, Mount Eliza, 135 metres south of the impact location at 118 km/h (5 seconds)



Fig 5. Image looking north on Nepean Highway, Mount Eliza, 119 metres south of the impact location at 114 km/h (4.5 seconds before impact)





Fig 6. Image looking north on Nepean Highway, Mount Eliza, 103 metres from impact at 109 km/h (4.0 seconds)



Fig 7. Image looking north on Nepean Highway, Mount Eliza, 88 metres from impact at 105 km/h (3.5 seconds)



Fig 8. Image looking north on Nepean Highway, Mount Eliza, 73 metres from impact at 104 km/h (3.0 seconds)



Fig 9. Image looking north on Nepean Highway, Mount Eliza, 59 metres from impact at 103 km/h (2.5 seconds)



Fig 10. Image looking north on Nepean Highway, Mount Eliza, 44 metres south of impact 103 km/h (2.0 seconds)



Fig 11. Image looking north Nepean Highway, Mount Eliza, 30 metres south of impact 86 km/h (1.5 seconds)



Fig 12. Image looking north on Nepean Highway, Mount Eliza, 18 metres south of impact at 70 km/h (1.0 seconds)



Fig 13. Image looking north on Nepean Highway, Mount Eliza, 8 metres south of impact at 64 km/h (0.5 seconds)