



FINDING OF INQUEST

An Inquest taken on behalf of our Sovereign Lady the Queen at Adelaide in the State of South Australia, on the 3rd day of July 2008 and the 16th day of October 2008, by the Coroner's Court of the said State, constituted of Mark Frederick Johns, State Coroner, into the death of Wah Aun Chan.

The said Court finds that Wah Aun Chan aged 27 years, late of 20 Peake Terrace, Waikerie, South Australia died at the River Murray, Sturt Highway, Waikerie, South Australia on or about the 11th day of September 2006 as a result of freshwater drowning. The said Court finds that the circumstances of his death were as follows:

1. Introduction and reason for Inquest

- 1.1. On 11 September 2006 Mr Chan, who was then a citizen of Malaysia, was the driver of a Toyota sedan, South Australian registration UVC-894, when he was stopped at a random breath testing (RBT) station 3 kilometres east of Waikerie on the Sturt Highway. Three uniformed police officers were on duty at the station site. There were four female passengers in the Toyota sedan with Mr Chan. In circumstances which will be explained in more detail shortly, Mr Chan was required by a police officer to place himself in a police vehicle. Mr Chan resisted the police officer's attempts to place him in the vehicle and ran away from the vicinity. Searches were made by police in an attempt to find Mr Chan and apprehend him however these were unsuccessful. On 20 September 2006 a body was located in the River Murray at Holder Bend, Waikerie. The body was found to be that of Mr Chan.
- 1.2. The police officer who attempted to apprehend Mr Chan was exercising powers pursuant to the Migration Act 1958 (Commonwealth). The police officer was exercising a power pursuant to section 189(1) of the Act which provides that if an

officer¹ 'knows or reasonably suspects that a person in the migration zone ... is an unlawful non-citizen, the officer must detain the person'. The migration zone is relevantly defined by the Act to include the States of Australia including, obviously, South Australia. The expression 'unlawful non-citizen' means, amongst other things, a non-citizen who does not hold a Visa that is in effect². A non-citizen is in turn defined as a person who is not an Australian citizen³. Mr Chan was unable to produce a Visa that was in effect on 11 September 2006. In fact his Visa had expired in late August of that year. He was an unlawful non-citizen on 11 September 2006. This was verified by checks carried out by police officers on that day. Accordingly, the police officer was in the process of apprehending Mr Chan pursuant to an authority conferred upon him under a law of the Commonwealth and was also evading apprehension by the officer. Although it is not entirely clear how soon after this incident Mr Chan met his death, it is my opinion, having regard to all of the circumstances that Mr Chan was continuing to evade apprehension by South Australia Police at the time of his death. Accordingly, his was a death in custody within the meaning of paragraph (b)(ii) and (c) of the definition of that expression in the Coroner's Act 2003, and an Inquest was required to be held pursuant to section 21 of that Act.

- 1.3. A very thorough and helpful investigation was conducted by Detective Senior Sergeant Kinsman. In some cases, following a rigorous investigation such as that carried out by Detective Kinsman, it is possible to conduct an Inquest using as evidence only affidavit material. In other cases, despite the completion of a thorough investigation, issues remain to be explored that can only be properly considered after hearing oral evidence from one or more witnesses. In this case, with the benefit of Detective Senior Sergeant Kinsman's very thorough investigation, I have found it possible to deal with this matter without the need to hear oral evidence from any of the witnesses.

2. The events of 11 September 2006

- 2.1. Constable Ian Stanley is stationed at the Waikerie Police Station. He was on duty on 11 September 2006 at the RBT station with his colleagues, Sergeant Miller and Senior

¹ The expression officer is defined by the Migration Act to include a police officer of a State

² See sections 13 and 14 of the Migration Act 1958

³ See section 5 of the Migration Act 1958

Constable McGurgan. I take the following information from his record of interview⁴. The officers had set up the RBT station on the Sturt Highway adjacent to Woody's Variety Store about 3 kilometres east of Waikerie. The station was established on the northern side of the road. Constable Stanley stopped a Toyota Camry which approached the station from a westerly direction. Constable Stanley asked the driver to submit to an alco-test. He described the driver as appearing to be really nervous and reluctant to stop. According to Constable Stanley the car kept rolling forward as though the driver wanted to take off. The alco-test was negative and Constable Stanley asked the driver for his driver's licence. The driver appeared not to understand completely, and Constable Stanley asked him for his passport. This was produced. Constable Stanley explained that he requested the passport because there had been recent experience in the local service area of 'immigrants up here working illegally'⁵. Constable Stanley sought the assistance of Sergeant Miller to examine the passport.

- 2.2. In addition to the driver, who turned out to be Mr Chan, there were four female passengers in the car. Other evidence showed these women to be Korean passport holders who had appropriate Visas and were entitled to work within Australia.
- 2.3. Senior Constable McGurgan went to a police vehicle and started making checks through Berri Communications with the Immigration Department, having noted that there was no Visa in the passport⁶.
- 2.4. According to Constable Stanley, a person called Tanya Conley who lived in a house approximately 400 metres to the east of the RBT station drove her vehicle up to the station and stopped. She informed Sergeant Miller that there was an Asian male crouched under a tree in the front of her property. Sergeant Miller and Constable Stanley then took one of the police vehicles to follow this matter up. Senior Constable McGurgan was left to deal with Mr Chan and the four women.
- 2.5. Constable Stanley said that he and Sergeant Miller drove to the property of Ms Conley and found an Asian man crouched next to a tree. They asked him for his identification and he produced a Malaysian passport. He and Sergeant Miller did some checks over the police radio in relation to that man as well. They then received

⁴ Exhibit C25c

⁵ Exhibit C25c, page 2

⁶ See Exhibit C24a, statement of Senior Constable McGurgan

a communication via the police radio from Senior Constable McGurgan who said that the women had informed him that they were working at a meatworks in Waikerie. Sergeant Miller and Constable Stanley then drove to the meatworks with the man from the Conley property. They attended at the meatworks, Constable Stanley remaining in the car with the Malaysian man and Sergeant Miller entering the office to speak to the manager. The manager identified the man in the vehicle and acknowledged that he was working at the meatworks. Sergeant Miller established that he had been working at the meatworks for several weeks. Constable Stanley then received a call on the police radio from Senior Constable McGurgan who sounded anxious and was calling for backup and help. Constable Stanley and Sergeant Miller drove back to the RBT station. They found Senior Constable McGurgan holding a jumper and wheezing and coughing.

- 2.6. In the meantime, Senior Constable McGurgan had been advised by Berri Communications that Mr Chan was an unlawful non-citizen because he had overstayed his Visa and that he was to be detained pursuant to the Migration Act. Senior Constable McGurgan said that Mr Chan appeared to overhear this communication and moved away from Senior Constable McGurgan to the other side of the police vehicle. Senior Constable McGurgan then attempted to make contact with Sergeant Miller and Constable Stanley but was unable to activate the police radio getting only a 'beeping noise'. He then approached Mr Chan and had the following conversation:

'McGurgan Immigration state that you are illegal at the moment. Do you understand?
Chan Okay, okay in a minute.
McGurgan You have to take a seat in the police vehicle. Do you understand?
Chan Not now.'

At this point Mr Chan had his mobile phone to his ear but did not appear to be talking into it. Senior Constable McGurgan then said:

'McGurgan I will tell the person on the phone, they can help explain it.
Chan No.'

Senior Constable McGurgan then took hold of Mr Chan's right arm and said:

'McGurgan You are under arrest for being unlawful. I am detaining you for immigration. You must get in the car.'⁷

According to Senior Constable McGurgan after he took hold of Mr Chan the latter stiffened and held himself rigid⁸. He kept pulling back and moving around and kept holding the phone to his ear. Senior Constable McGurgan repeatedly informed him that he was under arrest and had to go with him. At this point one of the Korean women came up to Senior Constable McGurgan and Mr Chan. He asked her to assist in settling Mr Chan and she did not respond, merely appearing to be distressed. Mr Chan appeared to have finished using his mobile phone and his resistance intensified. Senior Constable McGurgan said that Mr Chan pushed him in the chest and pulled away. Senior Constable McGurgan took hold of him again but Mr Chan's jumper started to pull off. Mr Chan lashed out at Senior Constable McGurgan with his arms. Senior Constable McGurgan had drawn the capsicum spray and told Mr Chan that he would be sprayed if he did not stop. Mr Chan appeared very aggressive and continued to lash out. Senior Constable McGurgan pointed the spray and discharged it at Mr Chan. The spray appeared to be carried off by the wind and Mr Chan ducked his head. The jumper then came right off Mr Chan and he fell to the ground. The can was then struck by Mr Chan's foot. Mr Chan then got to his feet and ran west along the verge of the Sturt Highway. Senior Constable McGurgan yelled for him to stop. Mr Chan looked around but then ran off. Senior Constable McGurgan observed Mr Chan run down the western side of Woody's Variety Store and then lost sight of him. Senior Constable McGurgan did not pursue Mr Chan because he himself was affected by the capsicum spray. He returned to the police vehicle and advised Police Communications what had happened. When he last saw Mr Chan the latter only had a pair of long pants on. His jumper and sandals were left next to the police vehicle. Senior Constable McGurgan said that when Sergeant Miller and Constable Stanley arrived he informed them what had happened and they went looking for Mr Chan. Senior Constable McGurgan stayed with the police vehicle, trying to get over the effects of the spray. He said that the spray appeared to affect his breathing, causing him to wheeze.

⁷ Exhibit C24a, page 3

⁸ Exhibit C24a, page 4

2.7. The encounter between Mr Chan and Senior Constable McGurgan was observed by Anita Wood, the co-proprietor of Woody's Variety Store. She made a statement which was admitted as Exhibit C19a. She said that she observed Senior Constable McGurgan telling Mr Chan to get into the car and repeated this about ten times, getting louder as he got towards the end. Mr Chan continued to hold his mobile phone and ignored Senior Constable McGurgan. She observed Senior Constable McGurgan take hold of Mr Chan and Mr Chan's resistance. She noted that when Senior Constable McGurgan first took hold of Mr Chan by his jumper, the former was not being rough but was merely holding Mr Chan. Nothing in her statement suggested that Senior Constable McGurgan used anything more than reasonable force for the purposes of attempting to detain Mr Chan. I find that Senior Constable McGurgan used only reasonable force and that his resort to capsicum spray was reasonable in the circumstances, as he had made repeated attempts to persuade Mr Chan to cooperate. Furthermore, I find that Senior Constable McGurgan was under a duty to detain Mr Chan according to the provisions of the Migration Act (Commonwealth).

2.8. The transmission made by Senior Constable McGurgan immediately after Mr Chan had run away was followed up less than a minute later as follows:

'McGurgan Yeah ah 50 he's been sprayed then jumped over the um the edge of the cliff near Woody's. Not off the cliff just run down the hill.'⁹

2.9. In some respects, Senior Constable McGurgan's choice of words was unfortunate in that he made reference to Mr Chan jumping over the edge of a cliff. In fact, Mr Chan did not jump off a cliff, but merely over an embankment or ledge behind Woody's, which is approximately 2 to 3 metres in height. Mr Chan obviously was not in any way injured by this manoeuvre, as he was able to move away from the ledge within a very short amount of time. Searchers on the scene soon after found no evidence of him in the vicinity of this point. However, other evidence suggests that Mr Chan did in fact fall over a cliff overhanging the River Murray some distance from the ledge to which Senior Constable McGurgan was referring. However, Senior Constable McGurgan was not in a position to observe Mr Chan fall over the cliff itself. Indeed, this was not observed by any person, and those involved in the subsequent search for Mr Chan assumed that he had escaped from the vicinity and was hiding himself. The

⁹ See Exhibit C1y which is a transcription of police radio transmissions relevant to this incident

search which ensued proceeded on the assumption that Mr Chan was alive and well and deliberately concealing himself. None of the people involved in the search had any reason to believe that Mr Chan had come to any grief. The searchers assumed that he had either made his way along the southern side of the River Murray to Waikerie, or had escaped into nearby vineyards or plantations, or possibly that he had made his way down to the river, and swum across to the opposite bank.

3. The search for Mr Chan

- 3.1. Sergeant Miller and Constable Stanley then went to the rear of Woody's Variety Store to conduct a search for Mr Chan. They searched the area behind the store and did not see anyone. Constable Stanley went to an area to the north-west of the RBT site between Woody's Variety Store and the River Murray. In the vicinity of this location he heard noises in reeds which were growing on the sloping ground between the ledge to which I have already referred and the cliffs to the north of Woody's Variety Store on the southern bank of the River Murray. Constable Stanley informed Sergeant Miller of what he thought he had heard. He said that he thought the noise was 'heading in a westerly ... direction'¹⁰. Sergeant Miller then made his way to a pump house which was north-west of Woody's Variety Store and near the top of the cliffs on the southern side of the river. He searched the immediate area of the pump house and then climbed onto the structure and viewed the river's edge on both sides of the river and did not see anything or anyone¹¹.
- 3.2. By this point it was approximately 3:40pm. Senior Sergeant Langton then attended at the location having been alerted to the events by police radio. A number of theories were put forward by the officers who had then gathered in the vicinity of Woody's Variety Store. The possible options were that Mr Chan was hiding in the bushes, that he might have climbed down a ladder near the pump house to the river itself, or that he had run back to Waikerie along the top of the cliffs on the southern side of the river. It was decided that Sergeant Miller and Constable Stanley would take the Korean women back to their residential premises in Waikerie and see if Mr Chan had arrived there. Sergeant Miller and Constable Stanley left Woody's Variety Store and attended at 20 Peake Terrace, Waikerie which was the address at which Mr Chan was said to be staying. They took with them the four Korean women. They conducted a

¹⁰ Exhibit C25c, page 7

¹¹ See Exhibit C26b, statement of Sergeant Miller

search of the house and located personal property that revealed that both Mr Chan and the other Malaysian man were staying in that house. They conducted a general search of the Waikerie township looking for Mr Chan and after approximately 15 to 20 minutes they returned to the flat and conducted a further search. However Mr Chan was still not present. They then made their way back to Woody's Variety Store looking for possible routes back that might have been taken by Mr Chan. They spoke to the ferry operator to ascertain if Mr Chan had swum to the northern side of the river and attempted to get back to Waikerie via the ferry¹².

- 3.3. At Woody's Variety Store, Senior Sergeant Langton and Senior Constable McGurgan had remained at the scene. They were joined by two other officers, Senior Constable Triplett and Senior Community Constable Agius who had attended from Barmera. They were briefed by Senior Sergeant Langton and Senior Constable McGurgan as to the circumstances and where to search. Senior Constables Triplett and Agius proceeded to search the area of scrub behind Woody's Variety Store, bounded by the Sturt Highway on the south and the cliffs of the River Murray on the north, in a westerly direction towards Waikerie. They searched this area walking approximately 50 to 80 metres apart for a distance of approximately 500 metres over a period of 60 minutes.
- 3.4. At around this time Senior Sergeant Langton decided to contact the Country Fire Service to seek assistance in searching for Mr Chan. He spoke with CFS Group Officer Michael Arnold who described the conversation in a statement¹³. Mr Arnold was asked if the CFS could launch a boat and search the cliff near Woody's Variety Store for anyone walking or running. Mr Arnold said that he informed Senior Sergeant Langton that CFS would launch a boat at Holder's Ramp which was east of the area but Senior Sergeant Langton suggested that they launch a boat at Waikerie and look along the top of the cliffs as they moved towards Woody's Variety Store as the person in question lived in Waikerie and might be walking back along the track that way.
- 3.5. Mr Graeme Ward was the Captain of the Waikerie CFS. He said that at about 4:20pm he received a phone call from the police requesting assistance to search for Mr Chan. He arrived at Woody's Variety Store at about 4:34pm and received a briefing from

¹² See Exhibit C25c, Record of Interview of Constable Stanley

¹³ Exhibit C6a

Senior Constable McGurgan. Mr Ward understood that the CFS was to carry out a search of the bank area from the rear of Woody's Variety Store towards Waikerie. Soon after this Mr Ward informed Senior Sergeant Langton that he had a crew walking along the riverbank searching that area.

- 3.6. Soon after this, Senior Sergeant Langton and Senior Constable McGurgan spoke with the other Malaysian man¹⁴. They requested that person to make contact with Mr Chan on Mr Chan's mobile telephone. This person attempted to do so but stated that Mr Chan must have turned his phone off. Senior Constable McGurgan then attempted to contact Mr Chan by the same means but received a 'person not available message'¹⁵. After this, the Malaysian man was taken to Berri police station for detention.
- 3.7. Senior Constable McGurgan then searched the rear of Woody's Variety Store. He went from the eastern side of Woody's Variety Store and started to make his way west. He located some bare footprints in that area which appeared to travel in a westerly direction, however he soon lost those prints. He noticed the CFS boat travelling directly below him at this time. He made his way to the top of the hill again and re-emerged on the western side of Woody's Variety Store.
- 3.8. A CFS crew launched a boat at Waikerie and travelled upstream towards Woody's Variety Store. Initially they travelled on the northern side of the river so they could obtain a good view of the cliff tops to see if anyone was walking along the edge. There are a number of areas along that stretch of river where the cliffs have collapsed and these were also checked to ensure that no-one had fallen from those areas. Approximately 100 metres west of Woody's Variety Store the boat travelled 'right up against the bank, nosing along'¹⁶. The boat searched for a distance of 200 to 300 metres to the east of the Woody's Variety Store. The boat moved up and down the river a number of times in this vicinity and searched a clump of trees where the body of Mr Chan was eventually located at the southern bank of the river. They continued to search the river until the search was called off but located nothing. They looked for signs of flattened grass on the river banks without success.
- 3.9. Shortly after 5pm Mr Ward despatched a CFS crew from the Waikerie end of the cliff top to walk along a walking trail in an easterly direction towards Woody's Variety

¹⁴ Who had been detained outside Ms Conley's house

¹⁵ Exhibit C24a, page 6

¹⁶ Exhibit C6a, statement of Michael Arnold

Store. At 5:04pm Sergeant Miller spoke with Senior Constable McGurgan and Mr Ward about the progress of the search and ascertained that nothing had been located. He then contacted Senior Sergeant Langton by police radio and asked if he had any other duties for them to perform. He also advised Senior Sergeant Langton of the extent of the search conducted by the CFS after which Senior Sergeant Langton said that the search could be stood down. The following radio communications relate to this:

'Miller	Vixen 50 to Mitre 5
Langton	Waikerie Mitre Send
Miller	Yeah roger Craig we've picked up Danny. Is there any other task you want us to do. We've um gone back to the house again and gone through again and there's still the same people there no new ones no newcomers.
Langton	Have you ah seen CFS recently
Miller	Yes they're still out the back of um Woody's
Langton	Roger I don't think there is anymore we can do at the moment
Miller	Yeah roger we'll go back and stand them down then.
Langton	Roger thanks.' ¹⁷

The Operations Log attached to Mr Ward's statement indicates that the search concluded at 5:12pm¹⁸.

- 3.10. At the conclusion of the search all police members attended at the Waikerie Police Station where a debrief was conducted. This was conducted by Senior Sergeant Langton and took the form of a general conversation. Those present included Senior Constable McGurgan, Constable Stanley and Sergeant Miller. No other agencies were present. It was noted that the Department of Immigration officials would attend Berri the next day to deal with the man in custody and conduct an investigation into Mr Chan. Senior Constable McGurgan reiterated that after Mr Chan escaped he ran to the rear of Woody's Variety Store and jumped off the ledge at the back of the store and headed towards Waikerie on an angle. All persons present thought that Mr Chan had escaped and was hiding from the police. Constable Stanley repeated that he heard noises in the reeds and that was what orientated the search towards the west.

¹⁷ Exhibit C1y, pages 23 and 24

¹⁸ See Exhibit C13c

- 3.11. No further search was conducted for Mr Chan that night and no further enquiries were made. Senior Constable McGurgan completed and submitted the appropriate documentation to record the use of the capsicum spray.
- 3.12. I note that sunset that day was at approximately 6pm. In my view the decision to call off the search at 5:12pm was entirely justifiable and appropriate.
- 3.13. On 12 September 2006 Senior Sergeant Langton contacted the meatworks and was informed by the Manager, Mr Victor Tuhoro, that Mr Chan had not attended for work that day. Officers from the Department of Immigration attended at the Waikerie Police Station that day and were briefed about the incident. They were also provided with Mr Chan's passport. Senior Constable McGurgan completed a police incident report relating to Mr Chan, reporting him for assault police and escape custody. The police incident report was PIR07/D43589¹⁹.
- 3.14. It was assumed by Senior Constable McGurgan, and generally accepted by other police officers, that Mr Chan was not unduly affected by the capsicum spray and had hidden or escaped from the area and did not want to be located by the police. In effect, the search was not one for the rescue of a person thought to have fallen into a river but a search for a person thought to have escaped police custody when detained under the Migration Act (Commonwealth). In my opinion, the efforts made for a search in these circumstances were more than adequate. They are set out with admirable detail in Detective Senior Sergeant Kinsman's report which was admitted as Exhibit C1c. That report more than amply demonstrates the extent of the search. A further report provided by Detective Senior Sergeant Kinsman by way of an addendum was admitted as Exhibit C1d. It shows that the person to whom Mr Chan was speaking on the phone while Senior Constable McGurgan was attempting to persuade him to get into the police vehicle was another Malaysian national called Kiang Giap Khaw, a lawful non-citizen now living in Sydney. He was working at the meatworks at the same time as Mr Chan. On the day in question Mr Chan drove Mr Khaw to work. At about 3:30pm Mr Khaw was approached by Mr Chan who asked him if he wanted to go home. Mr Khaw could not go home as he had to work late. Mr Chan, another Malaysian man and the four Korean women left together. Approximately 15 minutes after they left Mr Chan phoned Mr Khaw stating that he had been stopped by the police and asking if Mr Khaw could get the work supervisor

¹⁹ See Exhibit C24d

to speak to the police. Mr Khaw knew that Mr Chan was an unlawful non-citizen and said that he did not think the supervisor would help him and he should try and work something out for himself. Mr Chan then hung up the phone. Subsequently, Mr Khaw phoned a man by the name of Hanson, an employment agent that he, Mr Chan and the others had used to obtain employment as packers at the meatworks at Waikerie. Mr Hanson informed Mr Khaw that Mr Chan had phoned him also. Mr Hanson informed Mr Khaw that he overheard the police telling Mr Chan to get into the car. Mr Chan asked Mr Hanson if he ran away from the police would they shoot him. Mr Hanson told Mr Chan that as long as you do not use violence the police will not shoot you and that if he got a chance to run, Mr Chan should just run away.

3.15. From this I conclude that Mr Chan decided, on Mr Hanson's advice, to run away if he got an opportunity to do so. Despite being sprayed with capsicum spray he was not severely affected and was able to get away from Senior Constable McGurgan. In all likelihood he continued running after jumping over the ledge referred to earlier in these reasons and maintained a course to the north-east behind Woody's Variety Store. At this point he fell over the cliff proper and probably hit some rocks before falling into the river. The post-mortem report²⁰ records that Mr Chan had suffered a fractured lumbar spine. It is likely that the lumbar fractures were the result of falling down the cliff face or perhaps impact with a shallow, submerged rock in the water. According to Dr Heath there was no obvious trauma to the lumbar spinal cord. Nevertheless, it is possible that the deceased may have experienced temporary or transient paralysis of the lower limbs following the fracture of the lumbar spinal column even in the absence of obvious macroscopic trauma to the spinal cord. This would have hampered efforts to swim and contributed to death by drowning.

3.16. Toxicology tests showed a blood alcohol concentration of 0.059% however this was regarded as attributable to post-mortem putrefication. No other common opiates or other common drugs were detected.

4. Conclusions

4.1. I conclude that all police officers, and particularly Senior Constable McGurgan, acted appropriately on 11 September 2006 and immediately thereafter.

²⁰ Exhibit C2b

5. **Recommendations**

- 5.1. In his helpful investigation report Detective Senior Sergeant Kinsman suggests that the relevant authorities give consideration to the erection of warning signs in the vicinity of the cliff immediately behind Woody's Variety Store using international symbols which could be understood by non English speakers. I refrain from making a recommendation to this effect in the absence of a detailed consideration of all other similar locations where cliffs near to the River Murray are to be found in proximity to public thoroughfares such as the Sturt Highway. However, in deference to Detective Senior Sergeant Kinsman, I draw this matter to the attention of the District Council of Loxton Waikerie.

Key Words: Death in Custody; Drowning

In witness whereof the said Coroner has hereunto set and subscribed his hand and

Seal the 16th day of October, 2008.

State Coroner