
FINDINGS of Coroner Olivia McTaggart following the holding of an inquest under the *Coroners Act 1995* (Tas) into the death of:

Brendan Mark Smith

Record of Investigation into Death (With Inquest)

*Coroners Act 1995
Coroners Rules 2006
Rule 11*

I, Olivia McTaggart, Coroner, having investigated the death of Brendan Mark Smith with an inquest make the following findings.

Hearing Dates

Inquest held at Hobart on 15, 16 and 17 October, written submissions received by 7 January 2019.

Appearances

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| Counsel Assisting the Coroner | J Ansell |
| Department of State Growth | P Turner |
| Downer EDI Works Pty Ltd (Downer) | M Fordham SC |

Introduction

1. Brendan Mark Smith was born in Tasmania on 18 November 1970 and was aged 44 years when he died on 9 February 2014. He married his wife, Rebecca Jill Brumby-Smith, in 1997 and there are two children of the marriage; Max and Isabelle, aged 14 and 10 years at the time of their father's death. The family lived together at 3 Carrington Drive, Margate.
2. Mr Smith is described as a loving husband, involved father and a sociable person with a large circle of friends. Mr Smith was of reasonably good health and had not suffered serious injuries, illnesses or hospitalisations.
3. Mr Smith was in employment for most of his post-school years and spent the majority of his working life employed as a plasterer. He was a self-employed

plasterer at the time of his death and had operated his business successfully for 24 years. He was widely regarded as a very hard worker producing high quality work. His work vehicle was a white Ford Courier utility, registration EV 1361 (“the utility”)

4. At about 3.10pm on Sunday 9 February 2014, Mr Smith was driving the utility northbound on Channel Highway at Margate. The Channel Highway is a regional highway that travels south from Hobart to Huonville, Tasmania. The Channel Highway starts from the end of Sandy Bay Road and travels south toward Huonville via Taroona, Kingston, Huntingfield, Margate, Kettering, Woodbridge and Cygnet.
5. As Mr Smith passed the driveway to 1520 Channel Highway, being the entrance to the rural property “Brookfield”, a large tree limb fell onto the utility and caused the roof of the cabin to crush inwards, tragically causing his death from head injuries. The tree was part of a stand of approximately 50 Eucalyptus Ovata (Black Gum) trees (from here on referred to as “the trees”). The stand covered a distance of over 350 metres, of which about 200 metres was north of Brookfield. The trees were located close (approximately 5 metres) to the western road edge of the Channel Highway. The trees were approximately 20 metres high, with some having multiple trunks creating a trunk circumference of over 3 metres. Being situated on the road reserve of a highway, the trees were the responsibility of the State.
6. At the time the tree fell onto the utility, the area was experiencing very powerful winds during a storm event.
7. Upon initial examination, the immediate circumstances surrounding Mr Smith’s death represented the rarest of fateful events, the occurrence of which could not have been foreseen. However, as the investigation progressed, evidence emerged that the stand of trees, (which included the tree responsible for Mr Smith’s death) had, in about the year 2000, been proposed for removal in the following years to accommodate road widening works in that particular area of the highway. In that location, the highway is

narrow, comprising a single lane in both directions, 3 metres and 3.4 metres wide respectively. A clear zone for safety of motorists was required which would ordinarily have necessitated removal of the trees close to the road edge.

8. The state department responsible for roads, and this road-widening project, was the Department of Infrastructure, Energy and Resources (“DIER”). DIER is now known as the Department of State Growth (“State Growth”).
9. It emerged in the documentary evidence in the investigation that there were numerous representations to DIER opposing removal of the trees on conservation grounds. At the time of the representations a commissioned assessment of the trees by DIER was obtained. The document evidencing the assessment indicated that many of the trees were in poor condition and posed a danger to motorists on the highway. It appeared that, as a result of the representations, DIER decided not to remove the trees. The documentation received in the investigation did not disclose what steps had been taken, if any, since that time to ensure that the trees did not present a risk to motorists. This issue, together with prolonged difficulties in obtaining relevant documentary evidence and uncertainty surrounding the obligations of DIER’s contractor, led me to hold a public inquest.
10. Therefore the principal issue at inquest was, pursuant to section 28(1) of the *Coroners Act* 1995, to find how death occurred and the circumstances surrounding death in the context of the known history of the trees.

Immediate circumstances surrounding Mr Smith’s death

11. On Sunday 9 February 2014, Mr Smith was at his home address in Margate, with his wife and their two children. They had spent the morning doing housework. In the afternoon, the weather had become stormy and windy. Mr Smith decided to go to the shop to get some necessary grocery items. Mrs Brumby-Smith said to him that he need not go out, but he insisted that he

would go in order to help her.

12. Max decided that he was going to go to the shop with his father. Ms Brumby-Smith believed that, due to the stormy weather, it was not necessary that Max also went and so she asked him to stay at home and help her with the washing. Max agreed to stay home. Mr Smith then drove away from his home address in his work utility at about 3.00pm. This was the last time that he was seen alive.
13. Mr Michael Smart was an eye witness to the events that followed. Mr Smart was travelling southbound on the Channel Highway in the vicinity of Margate. He described the wind at the time as “ferocious”. The traffic coming towards him was travelling at about 60 to 70 kilometres per hour.
14. At about 3.10pm Mr Smart observed a large tree fall from the western side of the roadway onto the road. A second or two later, he saw a larger gum tree fall slightly north of the first one, falling across the width of the roadway. Mr Smart stated that he became aware that there was a vehicle underneath the tree.
15. Mr Smart stopped his own vehicle and approached the utility. He observed that there was no noise coming from inside the utility. He tried to open the door, but was unable due to the damage to the cabin. He looked into the cabin at the driver and observed that he was a middle-aged male. He observed that the driver’s head was pushed forward onto his chest and had blood trickling from the ear. Mr Smart stated that there was no indication of breathing or any apparent signs of life from the male.
16. Shortly afterwards, Mr Smart and another person from a stopped vehicle placed a blanket over the utility to cover the deceased man from view. He called emergency services at 3.11pm.
17. At 3.26pm a police vehicle containing a single police officer, Senior Constable Richard Keygan, attended the scene from the northern side and found traffic banked up a considerable distance on the Highway in both directions. The

traffic appeared to be due to the road being blocked by a large tree. At the time, the wind was blowing extremely hard and tree branches were being blown onto the roadway.

18. Senior Constable Keygan observed the utility in the northbound lane of the Channel Highway. The utility was under a large tree, which appeared to have fallen from the western side of the road and landed on the roof.
19. An ambulance attended and Tasmania Fire Service personnel arrived shortly thereafter. Further police officers also arrived at the scene. Upon lifting the blanket, they observed a male in the driver's seat of the utility, deceased. No other person was present in the utility.
20. Police used traffic roadblocks to direct traffic away from the scene. Details of witnesses at the scene, including Mr Smart, were recorded by police. A Tasmania Fire Service member, Jim Mulder, who was in attendance at the scene was also a long-term friend of Mr Smith. He formally identified Mr Smith to police. Arrangements were made to notify Mrs Brumby-Smith.
21. Criminal investigation officers, forensics officers and crash investigators also attended to photograph and examine the scene in detail and to investigate the circumstances of Mr Smith's death.
22. Arrangements were made for a private contractor to assist with the removal of the trees from the roadway. This required the use of chainsaws and a tractor, fitted with a front-end loader. Once the tree had been removed from on top of the utility, Tasmania Fire Service members cut open the vehicle and Mr Smith was removed from the vehicle. He was photographed and then transported to the mortuary at the Royal Hobart Hospital.
23. Mr Smith's utility was loaded onto a tow truck and transported to the Tasmania Police garage compound.
24. On 11 February 2014 Mr Noel Clark, a transport inspector, inspected Mr Smith's utility at the Tasmania Police compound, at the request of crash investigators.

25. As a result of this inspection, Mr Clark deemed that the utility was in a roadworthy condition prior to the incident. No vehicle defects were identified, the tyres were of good condition and were inflated correctly, and the driver's seatbelt had been cut, likely indicating that it was being worn at the time of the crash.
26. On 13 February 2014, at the request of DIER, 12 trees in the stand were removed. The remaining trees in the stand were removed in May 2014.
27. Records requested from the Australian Bureau of Meteorology provide certified extracts of weather conditions from the three closest recording sites to the incident location, being Hobart (Ellerslie Road), Dennes Point (Bruny Island) and Grove (Grove Research Station). These records show the maximum recorded wind gusts for 9 February at each of these sites as being 130, 133 and 109 kilometres per hour respectively.
28. Ambulance Tasmania records indicate that it was notified, by telephone, of the incident at 3.11pm. It is reasonable to assume that the tree fell on the utility at approximately 3.08 – 3.09pm. The nearest Bureau of Meteorology observation site to the incident site, Dennes Point, indicated that the recorded wind conditions around that time were between 95 kilometres per hour up to gusts at 133 kilometres per hour.
29. The records above indicate that the wind gusts recorded at Dennes Point were primarily from a westerly direction, consistent with the direction from which the trees fell.
30. From the evidence in the investigation, I find that Mr Smith was travelling northbound on the Channel Highway from Margate towards Kingston. As he approached the stand of Black Gum trees on the western side of the roadway, a strong wind gust from a westerly direction caused a large tree, 14 metres in length, 1.25 metres in trunk circumference, to split off at the trunk and fall onto the roadway. This tree struck the rear of his utility, causing damage to the rear fibreglass canopy and causing debris to be strewn across the roadway. It is unlikely that Mr Smith was injured in this event.

31. Mr Smith continued to travel northbound for a further 21 metres before a second, larger tree, 22 metres in length and 1.88 metres in trunk circumference, also broke off at the trunk and fell across the roadway, striking the cabin roof of the utility. The tree fell with sufficient force to cause the utility's chassis to bend downwards in the centre and for the transmission to create gouge marks into the roadway. The size and weight of the fallen tree caused the utility to come to a complete stop within three metres. The tree caused extensive depression of the utility's roof and cabin, causing Mr Smith's death. Mr Smith died instantaneously and likely without any prior knowledge of what was to occur.
32. Toxicological testing of Mr Smith's blood indicated that no illicit drugs or alcohol were present in his body at the time he was driving. I am satisfied that he was driving at a speed and in a manner that was reasonable.
33. At the time of the incident the wind was unusually powerful. Interrogation of the Tasmania Police Radio Dispatch Services records revealed that there were 84 entries relating to wind hazards between 3.00pm and 4.00pm on 9 February 2014. Of these 84 entries, 24 related to power lines over roadways and 25 related to trees reported over roadways.
34. On 11 February 2014 the State Forensic Pathologist, Dr Christopher Lawrence, conducted an autopsy upon Mr Smith. Dr Lawrence identified that severe head injuries caused Mr Smith's death. I accept his opinion as to the cause of death.

Scope of Inquest

35. As part of the investigation into this matter, the investigating police officer, Senior Constable Keygan, was provided with a large number of DIER's records relating to the Channel Highway at Margate. The vast majority of these records relate to the period 2000 to 2003, and then again from January 2014 onwards (after the death of Mr Smith). All of the records available from State Growth were received as evidentiary exhibits at inquest. It also became

apparent that DIER contracted a company, Downer EDI Works Pty Ltd (“Downer”) to carry out road services. Downer’s extensive records were also obtained in the investigation, although the extent of that company’s responsibility for the maintenance of the trees was not clear. Ultimately, only a handful of these documents proved relevant.

36. The records revealed that the existence of the trees has, at least dating back to 2000, been a contentious issue, with some concerned members of the public lobbying for their removal on safety grounds, as well as others advocating for their retention and protection on both environmental and wildlife preservation grounds.
37. The focus of the inquest was therefore upon the matters relating to responsibility for the care and maintenance of the trees, history of the trees, and knowledge of their condition. The ultimate question in the inquest was whether Mr Smith’s death should or could have been prevented. The issues were identified as follows:
 - a) The condition of the trees at the date of Mr Smith's death;
 - b) The knowledge of DIER/State Growth about the trees and their condition from approximately the year 2000 onwards;
 - c) The knowledge of Downer about the trees and their condition from approximately July 2011.
 - d) Whether any, and if so what, maintenance or tree removal work was done to make the trees safe for motorists and members of the public from about 2002 onwards;
 - e) Which organisation had responsibility for maintaining the trees from about 2002 onwards;
 - f) The systems in place (including documenting of systems) from about 2002 onwards for inspection of roadside trees and for ensuring roadside trees did not pose a danger to motorists and members of the public;

- g) The condition of the trees when they were removed in April 2014, after Mr Smith's death;
- h) Whether the condition of the trees was such that some or all should have been removed before Mr Smith's death due to posing a danger to motorists and the public;
- i) The documentation available to assist the inquest with the above questions; and
- j) Current systems in place to inspect roadside trees and to ensure that they do not pose a serious risk to motorists and members of the public.

History of the Trees

38. The history surrounding the trees was gleaned primarily from the documentary evidence provided by DIER. There was no dispute about the general chronology of events and correspondence. I set it out as follows.
39. In the mid-1990s DIER undertook a planning study of the Channel Highway between Kingston and Huonville. The planning study made the recommendation to the State Government that there were no requirements to improve either the operational efficiency or the traffic capacity of the highway, but that a significant number of safety issues should be addressed. The proposed works (referred to as "the works") involved in the project were:
- (a) Construction of sealed shoulders 1.0 metre wide and table drains over the full length of the project;
 - (b) Correction of the pavement cross-fall to provide appropriate super-elevation for a speed of 80km/hour and to ensure water depths on pavement are acceptable;
 - (c) Providing turning facilities and improved sight distance at junctions; and
 - (d) Close, relocate and rationalise accesses.

40. As part of the works, the trees were proposed to be removed. The basis of the removal was that the trees were within the required 6 metre clear zone adjacent to the roadway.
41. At the inquest, Mr Graham Nichols, engineer and project manager for the works and employed by DIER (but now retired), gave evidence. He was involved in the design development, planning approvals and contracts for the works. His direct line of supervision was DIER General Manager (Mr Peter Douglas), the Deputy Secretary (Mr Chris Wells) and the Secretary of the Department. Mr Nichols gave sound and credible evidence about his involvement in the works. I accept the substance of the evidence given by him as correct, notwithstanding that he, (understandably given the passage of time) was unable to always be precise about dates and time frames. I also note that Mr Nichols gave evidence at short notice without having provided a prior affidavit, thus not allowing significant time to refresh his memory.
42. Mr Nichols helpfully explained, with the aid of the publication "*Rural Road Design*" (8th Ed. 2003) the concept of a clear zone and the importance of a clear zone in the works. That publication guide provides at p101 that:

'The most widely accepted form of risk management for roadside hazards is the clear zone concept. The clear zone is the horizontal width measured from the edge of the traffic lane that should be kept free from hazards to allow an errant vehicle to recover. The clear zone is a compromise between the recovery area for every errant vehicle, the cost of providing that area and the probability of an errant vehicle encountering a hazard. The clear zone should be kept free of non-frangible hazards where economically possible; alternatively hazards within the clear zone should be shielded. The clear zone width is dependent on speed, traffic volumes, batter slopes and horizontal geometry. It should be noted that the clear zone width is not a magical number and where possible hazards beyond the desirable clear zone should be minimised. Clear zone widths vary throughout the world depending on land availability and design policy.'

Therefore the removal of the trees was proposed solely to create a clear zone for the safety of the road users.

43. Included in the planning study was an environmental impact assessment conducted by Mr Philip Millin, environmental scientist. The study noted that *“all adjacent landowners have been consulted, in particular Hazell Bros who are a major landowner in the area and who have provided land for some of the tree replanting that is proposed. Another party that has been consulted with is the Margate Primary School – on the field trip we inspected some replanted trees that the primary school has done in association with Greening Australia”*.
44. To place the above passage in context, Margate Primary School students, supported by the school and organisation called “Greening Australia” had become involved with the “Swift Parrot Project” to help create a habitat and food source for the endangered Swift Parrot. It appears from the evidence that one or more teachers at the school were particularly instrumental in activating the students. In about 1998 the students planted a stand of blue gum trees, inside the boundary fence of the Brookfield Property (adjacent to the highway), as a supplement to the existing roadside stand of trees along the Channel Highway. On the evidence, the school’s interest in the trees was well known to DIER.
45. In August 2000, DIER planned to carry out the works. The works were the subject of a Parliamentary Standing Committee on Public Works report. No specific mention is made in the report of the proposal or requirement to remove the trees.
46. It should be noted at this point that much of the documentation surrounding the works, the environmental assessment and communication around the trees, was not located by DIER/State Growth over the course of the investigation. Mr Nichols gave evidence that further relevant documents

existed in the form of project files. However, these could not be produced and there was no clear avenues to locate them.

47. DIER has acknowledged that its record-keeping and storage systems were less than adequate. The evidence at inquest from the current General Manager of DIER/State Growth, Mr Shane Gregory, outlined that the procedures and file management within State Growth had changed significantly since the early 2000s and that all files are now contained on the “cloud” and are easily accessible. This file management system would have considerably assisted the coronial process.
48. From about the year 2000, as a result of the proposed commencement of the works, considerable community pressure was brought to bear upon DIER and the Minister for Infrastructure, Energy and Resources, Mr Paul Lennon, to retain the trees. The representations for retention of the trees came from groups and individuals and was in the form of correspondence and other forms of advocacy. The groups included, Bushcare Tasmania, Kingborough Landcare Advisory Group Inc (KLAG), the Lorax and the Margate Primary School. It also appears that The Greens party and/or the Tasmanian Conservation Trust was involved. The evidence is unclear as to the role of each organisation. Based upon the documentary evidence and the evidence of Mr Nichols, it is apparent that DIER consulted extensively throughout the project with representatives of the environmental groups.
49. On behalf of The Greens or Tasmanian Conservation Trust, advisor Michael Lynch expressed concern about the removal of the trees and the works generally. Mr Nichols gave evidence, which I accept, that this concern about the works was based upon an erroneous belief that the road was being widened to provide easier access to a proposed deep water jetty at Electrona.
50. The Margate Primary School featured prominently in the advocacy for the trees. There were also numerous letters sent by the Margate Primary School students and their teachers concerning the trees. The letters urged care in the works not to harm the young Blue Gums in the removal and also, in several

cases, pleading for the Black Gum trees not to be removed. It appears that they considered that the Black Gums could not be removed without harming the young Blue Gums due to their proximity to each other and the inability to lop the trees over the roadway to avoid damage to the blue gums.

51. Among many representations, the file discloses a letter from a Mr Andrew Crane, of Bushcare Tasmania. The letter made reference to the particularly high conservation value of the trees to the area. The letter highlighted that the Black Gum “... *is one of the highest priority vegetation types in this bioregion for conservation.*” Another letter, from Mr John Hamilton of the KLAG, written to the Minister, urged him to protect the trees due to their significance as a species and the fact that their flowers are an important food source to the “*endangered swift parrot during their migratory flights back to this part of the world to breed*”.
52. An outspoken environmental advocate referred to regularly in the DIER file was a Mr Michael Rowland, a teacher by profession. In 2000 he was linked to a number of environmental groups, inclusive of Greening Australia, the Cockle Creek Landcare Group and a group called “the Lorax”. It was not clear from the file as to the totality of his involvement with the trees, except that he was given significant input by DIER in consultations regarding their future.
53. Mr Rowland was located during the inquest and called to give evidence. His evidence was not useful or credible in many respects. He held himself out to have significant expertise in the Eucalyptus Ovata species. However, he said that he did not have formal qualifications but had “on the job” training working with Forestry and Parks and Wildlife. He described himself as having “more than adequate experience”. He made what appeared to be an unhelpful estimate of the age of the trees, suggesting that they were between 80 and 200 years old. He provided no cogent evidence to support this claim. Although he gave evidence that the Eucalyptus Ovata are particularly rare and worthy of conservation, he did not give detailed evidence of the conservation value of this particular stand of trees with reference to their condition, age or location. He said that they were remnants of a larger forest.

There appeared to be no thorough examination of the trees by him, although he said that he accepted that some of the trees exhibited “pretty unhealthy rot” and required removal. As further discussed, I do not consider this to be credible evidence.

54. I accept that Mr Rowland was present for one or more inspections of the trees after the 2001 assessment, as the DIER records. It appears that DIER’s main purpose of inviting him to the inspections or pruning/removal operations was to appease those lobbying to retain the trees and to possibly “negotiate” with him regarding any tree and limb removal. Mr Rowland himself gave evidence of significant participation in this process.
55. Mr Rowland agreed in questioning that he wished to have everything done to retain the trees. His evidence exhibited an overly-zealous quality. Regarding DIER’s decision not to remove the trees in around 2001, he said that he walked away feeling satisfied that a compromise had been reached by the erection of the barrier to stop the vehicles colliding with the trees. He said that there were definitely trees removed at this time. He said that he saw the evidence of their removal subsequently but could not say how many trees were removed. Although it is possible that trees were removed, it is also possible that Mr Rowland may have been confusing this with the 2003 pruning operations. Unfortunately I cannot rely upon his evidence to make findings of fact.
56. It was unclear, even on his own evidence, which groups or organisations seeking to protect the trees Mr Rowland represented. Although he indicated an affiliation with Greening Australia he said that he was not representing that organisation at an inspection of the trees in 2001. He was vague in respect of the other groups with which he was associated. He indicated that he had a “loose involvement” with KLAG. He agreed that he misled the media in representing that there was a formal organisation called “The Lorax”, when, in reality, it appeared to be a name created by him for his own purposes.

57. The pressure exerted by the environmental groups and individuals created significant complexity for Mr Nichols in progressing the works. This pressure was clearly a source of great stress to him at the time. It was clear from his evidence that, whilst the works were not complex from an engineering and construction point of view, the matter was highly political. As such, Mr Nichols was directed to consult comprehensively with the main environmental advocates. He outlined in his evidence that throughout his employment he had not experienced such pressure over a matter.
58. DIER briefed the Minister, Mr Lennon, about the community representations regarding the proposed removal of the trees. As a result, in November 2000, Mr Lennon decided that the trees would not be removed. Again, the documentation surrounding this decision appears incomplete. However, one available letter from Mr Lennon to Mr Hamilton in December 2000 stated, *inter alia*, “*I am pleased to advise that the design standards for construction of the works in the vicinity of Brookfield have been amended and the trees will not be removed.*”
59. To counteract the safety collision risk involved in the retention of the trees, DIER made a decision to separate the carriageway from the trees by fitting a “Brifen” cable fence to the road verge, to improve the safety of motorists and other road users.
60. As the trees would now remain, the risk of the trees or limbs falling onto the road and endangering motorists was clearly appreciated by DIER. At a time in or just before March 2001 it appears that DIER commissioned an inspection and report regarding the condition of the trees. There is no evidence that the trees had been formally inspected by DIER before this report was commissioned. Mr Nichols outlined that Mr Lynch had input into the process of commissioning the arborist’s report and he agreed to accept the results of the assessment. Mr Rowland appears to have commenced his main involvement at around the time that the report was received, with Mr Nichols giving evidence that Mr Rowland did not accept the conclusions of the report. I accept the evidence of Mr Nichols over Mr Rowland on this point.

61. The documentary evidence surrounding the commissioning of the report and tree inspection was incomplete. A document on the DIER file evidenced the inspection carried out on the trees which identified safety issues and recommended remedy actions. The document is undated and does not bear the name of the author. The identity of the person inspecting the trees, his/her qualifications and the date of the inspection is also not included. No other documents on the DIER file assist greatly in determining these matters conclusively.
62. The report, a one-and-a-half page list, is an abbreviated individual assessment of each tree in the stand, and outlines observations and concerns regarding individual trees. 50 individual trees were listed in the document, the majority of which were Black Gums. A summary of the contents of the report is as follows:
- 20 trees were identified as being of good health and were recommended for retention;
 - 13 trees were identified as being dangerous or unhealthy, and recommended for removal;
 - 10 trees were identified as having issues, however, were recommended for retention without any remedial action being taken;
 - 5 trees were recommended for trimming and retention;
 - 2 trees were identified as having issues and recommended for trimming and retention.
63. The DIER documentation does not specify exactly what work was conducted as recommended, although evidence shows that DIER did seek quotations with a view to some works being carried out, and that Mr Rowland was to be contacted as he *“would be interested in any pruning operations”*.
64. On or about 26 March 2001, at the Kingborough Council meeting, a councillor raised a recent event where a large limb had fallen from a tree located along

the Channel Highway, south of Fehres Road, being one of the trees the subject of this inquest. As a result, the Council resolved to send a letter to DIER outlining this incident. Mr Steven Kaczmarski, who was then the manager of Kingborough Council's Technical Services, made telephone contact with an employee of DIER about the incident.

65. On 26 April 2001 Mr Kaczmarski wrote a formal letter to DIER, again outlining the Council's concerns about the safety of the trees. He stated in the letter *"As I indicated, Council expressed concern that during recent high winds some large limbs fell onto the road verge. This could have been fatal, if the limbs fell onto a car"*. In the correspondence, he stated that the Council was concerned that the trees had regrown from old stumps, and that the new limbs on such trees can be subject to failure. Mr Nichols gave evidence that it was his belief, based upon reliable information that the trees had been cut down to stumps in 1964, due to rotting. The trees, he believed, were regrowth from those stumps.
66. On 8 May 2001 Mr Nichols responded to Mr Kaczmarski by re-iterating that the Department *"has been under considerable pressure from [various groups] to retain this stand of trees which is believed to (sic) a remnant of a much larger stand of Euc. Ovata."* Mr Nichols also advised that there had been a recent assessment of the safety of the trees made *"in company with"* Michael Rowland from Greening Australia. He stated that, pursuant to this assessment, dangerous limbs and trunks had already been removed on 4 May 2001.
67. Unfortunately there is no reliable evidence, documentary or otherwise, of what work was completed on 4 May 2001. Mr Nichols gave evidence that, at this time, he was directed not to remove trees due to the pressure being exerted upon DIER to retain them. I accept that he received such direction. Whilst some limb or tree removal may have been completed, I doubt that it was the full extent of the work as recommended in the assessment report.

68. As the works progressed, the Brifen roadside barrier was erected so that the trees could remain and there was no further evidence that indicated that the Minister's decision to allow the trees to remain was revisited.
69. Dated from 24 October 2001, the DIER file contained letters both sent and received by Mr Tim Wark, the manager of Westwood Properties Pty Ltd ("Westwood"). Westwood is the owner of the property Brookfield, whose boundary is adjacent to the trees.
70. The correspondence generally relates to Mr Wark outlining his concerns to DIER about the dangers of the trees based primarily on safety concerns regarding the trees blocking the vision of drivers accessing and egressing the Brookfield property at the nearby driveway. Mr Wark supported his claim for tree removal by referring to Australian Standards in relation to required roadway sight distances. Mr Wark made reference to the operation of an explosives business at Westwood, and highlighted the implications of a crash occurring at the driveway should it involve one of their vehicles.
71. In letters dated 11 September 2002 and 11 November 2002, Mr Wark reiterated his wishes to have an on-site meeting with DIER representatives to address the ongoing perceived safety issues. Though the safety references made by Westwood relate to the visual encroachment of the trees more so than the physical condition of the trees, the correspondence shows that there is no evidence to suggest that any on-site inspection ever took place between Westwood and State Growth prior to this date, as had been requested on several occasions by Westwood. Mr Wark's regular correspondence to DIER concerning the trees should have alerted DIER to the need for careful monitoring of the trees, as it had previously foreshadowed.
72. On 29 January 2003 there appears on the DIER file emails from Mr Robert Higgins of "LMRS Environmental Consultancy" to DIER referring to a complaint received from a member of the public, a Mr Jack Clarke, regarding the unsafe nature of the trees and the fact that Mr Clarke's friend recently had his windscreen damaged by a falling limb in high winds. There is little clue in

the evidence as to the role of Mr Higgins or LMRS consultancy, again highlighting the inadequate documentation to the inquest. This correspondence highlighted that, in the former assessment and the subsequent report, a majority of the trees were initially identified as being defective in terms of basal damage and fungus. However, only a limited number were recommended to be removed. Mr Higgins further stated that the remaining defective trees still remained, and that they continued to show signs of structural weakness. He stated in one email that *"...Mr Clark is quite correct in assuming that the trees pose a threat to the road and that the Department could be liable if damage or injury results."*

73. Mr Higgins could not, unfortunately, be located to give evidence about this matter and any involvement he may have had with advice to DIER regarding the trees.
74. On 31 January 2003, Mr Peter Todd, from DIER responded to the comments made by Mr Higgins by requesting a follow up inspection to determine the number of trees that remain an issue and to seek further advice on what direction should be taken.
75. On 14 February 2003 an internal DIER memo from Mr Brian Howell, Senior Technical Officer Asset Management, was written regarding the need for assessment and ongoing maintenance and specified no knowledge of what action was taken as a result of the individual tree report (which I assume to be the 2001 assessment report). In that memo, Mr Howell stated:

"I do not know what work was eventually done or what was achieved, however, ongoing management/maintenance of the road verge needs to include a regime for the trees (I understand that the contract warranty has expired). It would be appropriate to determine the present condition of the trees, life expectancy, and an ongoing management regime for maintenance of this section of the road reservation. This could include creation of new habitat here, or elsewhere, to compensate for any removal, should this prove necessary, and ensure no net loss of habitat.

“I have discussed the above with Jed Gillian who has advised that he may be able to assist with arranging for an assessment of the site.”

76. The evidence indicates that Kingborough Council also remained concerned about the safety of the trees. On 15 July 2003 correspondence between Mr Brian Stewart of Kingborough Council and DIER refers to on-site meetings at the scene between DIER representatives and council employees. Mr Stewart advised that the Council were supportive of trees being lopped and removed for safety reasons, and that the trees in question are showing signs of die-back and fungus. The correspondence shows that DIER and the council were still involved in contacting and consulting the environmental advocates, including Margate Primary School, to ascertain their views upon tree removal.
77. An undated document emanating from DIER concerning the trees was located with the documents referred to in the preceding paragraphs. It resembles in its text a media or public information script with no addressee. The document, in summary, advised that reports from an arborist and tree management officer have provided information on the present condition of the trees, their life expectancy and an ongoing management plan. It advised that most of the trees appear healthy but limbs were falling from some of the trees and signs of fungus and die-back have been detected which pose a potential safety hazard. It advised that one tree would need to be removed and several limbs cut back. It stated that *“Ongoing maintenance of these trees will be needed in future years to ensure safety”* and it referred to implementing an ongoing maintenance plan.
78. On 6 October 2003 DIER issued Additional Services Order R843 (“ASO 843”) to contractor CSR Emoleum Road Services. ASO 843 stated *“Please remove one (1) tree and trim others to ensure safety for motorists as identified on site with Robert HIGGINS (LMRS), Caroline GIFFORD and Barry HARDWICK (Kingborough Council) and Geoffrey Lewis of this department. Work to be carried out to an amount of \$4,876.00”*.
79. DIER, no doubt conscious of the sensitive nature of the issue, also produced

an Issues Brief to the Minister dated 7 October 2003. The Brief outlines the purported environmental and aesthetic value of the stand of trees, the original intention in 2000 to remove the trees during road improvements, and the subsequent decision not to remove them following community pressure. Further outlined is the recognition that, in 2000, some of the trees were identified as being affected by fungus and die-back, and that on-going maintenance of the trees would be required.

80. The Brief further stated that there have been several complaints about limbs dropping from the trees, and that one of the limbs punctured a vehicle's windscreen. It outlined that the deteriorated condition of the trees is known and one tree required urgent removal, with works planned to take place on 21 and 22 October 2003. Reference is also made to September 2003, where wet weather and high winds had been experienced, causing some tree failures.
81. On about 21 October 2003 the work as per ASO 843 was carried out as evidenced by a one line entry in Emoleum records provided by Downer.
82. On 22 December 2003 Mr Nichols wrote to Mr Wark declining to provide watering points for the young Blue Gums and stating that the trees are of future concern because of propensity to drop limbs on the highway.
83. After 2003 there is very little material relating to the trees on the DIER file (until Mr Smith's death). On 11 May 2005 Katrina Wark (wife of Mr Timothy Wark) from Westwood authored a letter to DIER forwarding the details of a near motor vehicle crash that occurred at the entrance to Brookfield. The near crash had been said by the driver of the explosives vehicle to have been caused by the trees to the south of the driveway obscuring his view. This letter might suggest that no work had been carried out on the trees.
84. Contrary to DIER's stated intentions and alleged plans, the evidence reveals, and DIER concedes, that no further decisions, actions, inspections or maintenance was undertaken in respect of the trees after one tree was removed and some limbs cut as per ASO 843. This is despite the very

concerning state of health of some of the trees, their apparent deterioration and consequent known risk to motorists.

Condition of trees at Mr Smith's death

85. As discussed above, it is difficult to determine, given the inadequate documentation and lack of witnesses, exactly what maintenance and removal work was completed in respect of the trees in the 15 years prior to Mr Smith's death, being the time during which DIER was aware of the danger posed by them. Certainly, one tree was removed and limbs cut in October 2003. However, given the uncertainty concerning tree removal in 2001, it is also difficult to know which and how many trees remained after that time.
86. Although one might presume that a government department would act upon written advice procured by it, such as that contained in the report concerning the health of the individual trees, in this case no confirmatory records were available that the work was completed as advised. Further, it is clear that the main advocates for retention of the trees, particularly Mr Rowland, were continually provided with information by DIER, under political pressure, and given opportunities to intervene in the decision making.
87. As submitted by counsel for the State, Mr Turner, at the very minimum a number of trees remained which continued to pose a known hazard to users of the highway. He submitted that even if all of the tree removal work was completed in 2001 and the further work in 2003 was sufficient to make the trees safe to motorists at that time, DIER was aware that the trees posed a continuing danger in absence of an ongoing, planned regime for assessment, maintenance and removal. This regime was not implemented at all in the 10 years leading up to the death of Mr Smith. As submitted by Ms Ansell, counsel assisting, it is not plausible to hypothesise that the trees showing evidence of disease returned to a state of health in that time.
88. Mr Nichols and Mr Wark, although not arborists, gave evidence of their inspections of the trees and their opinions. Mr Wark was a credible and articulate witness, with significant knowledge of the trees and the species

generally. He noted their tendency to become pithy at an early age and, at 50-60 years of age, to drop limbs. He observed that the trees dropped limbs, which he picked up on his property. He also observed limbs regularly on the road, particularly in October. He gave evidence that he believed that there was minor trimming to the trees on one occasion only. Mr Nichols gave evidence that, to his eye, they appeared pithy and the old stumps were visible.

89. An affidavit by Alister Hodgman dated 21 July 2015 was received in evidence at inquest. Mr Hodgman holds tertiary qualifications as an arboriculturalist and a quantified tree risk assessor. Mr Hodgman had prior knowledge of the trees involved in Mr Smith's death, having been a motorist travelling that section of roadway. He had not, however, been engaged to assess the trees at any time.
90. Mr Hodgman viewed photographs of the tree failures at the time of Mr Smith's death, provided to him by police. From the photographs, he was able to identify the trees as being of the species Black Gum and provide some general comments upon the health of the trees.
91. From the photographs alone, Mr Hodgman was unable to categorically determine the health of the trees, however, he stated that the trees had suffered failures consistent with having been caused by an extreme wind event. He stated that the condition of the wood on the trunks below the point of failure, and the subsequent tearing of the wood down the trunk, indicated that at least the wood below the point of failure is relatively healthy and decay-free.
92. From his previous knowledge of travelling past the scene, Mr Hodgman recalled that a number of the trees showed signs of dead wood, however, the majority of the crowns of the trees appeared healthy. He stated that some of the trees on the southern side of the Brookfield property driveway showed signs of concern, such as multi-stemming of the lower trunks, which he believed would have warranted closer inspection.

93. Mr Hodgman outlined that if he had been engaged to carry out an assessment on the stand of trees using the Quantified Tree Risk Assessment formula, he would have determined the risk factor to be 'Range 1', which is the highest risk category. This rating is made by having regard to the proximity to traffic flow, the speed limit of the section of road, and the amount of traffic flow per day on that road. He would then conduct a walk-through inspection of the trees, and determine their current condition and identify any defects that may cause tree failure. He would then determine what part of the tree would most likely fail and what the diameter of that section of the tree would be. He would then determine the risk factors and recommend management protocols.
94. Mr Hodgman outlined that if he had conducted such risk assessment on the stand of trees and found them to be healthy, he would recommend further assessments be carried out every three years.
95. Mr Hodgman noted that this stand of trees was very much exposed to any prevailing winds, which in turn increased the likelihood of storm damage and tree failure occurring. After viewing the Bureau of Meteorology records from the day of Mr Smith's death, Mr Hodgman was of the opinion that the wind speeds experienced in the area at that time were so high that it would be likely that healthy, defect-free trees could well fail.
96. Documents from Tree Dynamix Arboricultural Services relating to works carried out on the trees were tendered at inquest. Tree Dynamix was involved in the removal of the trees following Mr Smith's death.
97. The documents stated that Tree Dynamix were contracted at the request of Downer to carry out 12 tree removals the day following Mr Smith's death.
98. It appears from an article in the Mercury Newspaper obtained by Senior Constable Keygan that a petition calling for the removal of the trees and containing 1549 signatures was presented to Ms Jacqui Petrusma MP on about Monday 28 April 2014 and tabled in State Parliament.

99. DIER authorised the removal of all the trees, and work was completed by Tree Dynamix by June 2014. Tree Dynamix did not carry out any assessments or produce any reports relating to the condition of the trees. That firm had not carried out any assessments or work on the trees prior to Mr Smith's death. The documentation does not specify how many trees in total were removed, although the invoice for the work was in excess of \$93,000, suggesting substantial work was undertaken, consistent with removal of multiple trees.
100. Before the removal of all of the trees by Tree Dynamix, DIER was required to obtain approval under the Commonwealth *Environmental Protection and Biodiversity Conservation Act* 1999 given that the trees were listed as a habitat for a threatened species, being the Swift Parrot. Mr Gregory gave evidence that the permit was granted under the relevant legislation on the grounds that the trees were not a significant foraging habitat for the Swift Parrot due to the isolated nature of the stand and their position in surrounding farmland.
101. In the years between the proposal for the works and the death of Mr Smith, there is no evidence that DIER made any enquiries or any objective assessment of the validity of the environmental position in respect of the trees, nor of the expertise of the persons propounding the environmental arguments in respect of retention of the trees. The decision-making by DIER was based upon appeasing those proponents, even after 2003 when the foreshadowed risk eventuated in one instance causing damage to the windscreen of a motorist travelling on the highway.
102. Considering the general condition of the trees, the known safety risk to motorists in retaining the trees and the high volume of traffic on the highway, DIER ought, at the very least, to have continued to assess and maintain the trees on an ongoing basis to minimise the likelihood of damage and injury from falling limbs and trunks. If this had occurred, the risk of harm would have been reduced. However, there is no reliable evidence as to any defects in the tree that fell onto Mr Smith's utility as it was not subject to detailed

assessment before or after the event. There is also evidence that, in high wind events, healthy trees may fail.

103. The appropriate course of action by DIER was full removal of the trees at the time of the road works as required by the safety specifications for the works. This course ought to have been adopted at the outset. As submitted by Mr Turner, the compromise position involving retaining the trees (with some pruning) and erecting a wire safety barrier, did nothing to guard against the known risk of a tree or limbs falling onto the travelled part of the highway. That risk eventuated and resulted in Mr Smith's tragic death.
104. The pressure upon DIER to retain the trees upon conservation grounds created ad hoc and compromised decision-making, made without objective consideration of the actual environmental value of the trees. I accept that great care must be exercised in making critical findings with the benefit of hindsight, and knowing of the tragic outcome to Mr Smith. Nevertheless, that outcome represented a risk which had been within DIER's knowledge over many years.

The role of Downer

105. Considerable effort was made prior to inquest to investigate any role, duties and responsibility of Downer, DIER's contractor, in maintaining the trees to a standard safe for motorists. During the investigation phase it appeared, given the lack of DIER documentation, that Downer may have played a significant role and may have held documentation regarding maintenance of the trees. During the process of holding case management conferences regarding the issues of available documentation and responsibility for the trees, Downer provided its records. These comprised numerous large volumes. Upon analysis of Downer's obligations the following facts may be found which are not disputed by DIER/State Growth.
106. As at February 2014 road maintenance services for the southern region of Tasmania, including the Channel Highway, were the subject of a contract

between Downer and DIER commencing in 2011. An earlier similar contract was in place between Emoleum Road Services (which was subsequently taken over by Downer) which commenced in 1998 and concluded in 2008. Both contracts involved similar obligations upon Downer.

107. Downer's obligation under the contract was to provide "base services" and "minor works". The base services required Downer to maintain the "road portal" in respect of the roads within the contract. The road portal incorporates an area of 5.6 metres vertically clear of the road formation and 5 metres wide of the road centre (or one metre from the road line or marker). In the context of vegetation, one of Downer's obligations was to ensure that the portal area was free of encroachment of vegetation and to perform inspections of the road for "hazards" on a weekly or twice weekly basis. These inspections involved a road inspector driving and checking the road for hazards and obstructions. The inspectors had no expertise in assessment of trees or extensive training, and their work was based upon visual observation only.
108. Mr Neville Davie, a road inspector for Downer, gave evidence at inquest. He inspected the roadway and portal the day before Mr Smith's death. He found nothing obstructing the relevant part of the road and the records tendered in evidence supports this evidence. He also gave evidence that he noticed no issue posed by the trees in the six months before Mr Smith's death. He stated that it was not his obligation to get out of his car, but if he saw a limb by the side of the road he would be obliged to contact DIER. It appears that some of the trees may have been within the defined road portal but there was no obligation to make any reports in respect of the trees unless they noticed any limbs from the trees posing a danger to motorists, in which case there was an obligation to report this to DIER as requiring "minor works".
109. In summary, the scope of the contract did not oblige Downer to be responsible for a professional assessment of the health of the trees, and only to report any obvious hazards posed by the trees upon visual inspection from a moving vehicle.

The role of the Council

110. As may be apparent from these findings the Kingborough Council did not, in any way, have responsibility for or control over the highway or the trees. Nevertheless, the Council diligently brought concerns regarding the safety risk posed by the trees to DIER on several occasions in a timely manner.

The new system for inspection of roadside trees and vegetation

111. The death of Mr Smith highlighted the need for a targeted and systematic process of assessing risks associated with roadside vegetation, especially trees. As would be apparent from the above findings, before Mr Smith's death DIER had no formal mechanism or framework for assessing such risks. Further, the obligations of the contractors did not extend to such assessment. It can be seen that departmental decision-making regarding the removal, retention and maintenance of the trees was not apparently based upon a careful balancing of safety and conservation concerns using appropriate expert advice, but rather reactive to pressure. The decision-making was not adequately documented nor was there the follow-up systems that had been foreshadowed as necessary.

112. Mr Gregory provided a comprehensive affidavit in this investigation as well as giving oral evidence at inquest. He commenced his role as general manager of DIER in August 2012. He previously was employed by Downer as its State Manager.

113. He stated in his affidavit that the state, through State Growth, is responsible for state highways, comprising approximately 3800 kilometres of the road network. The highways are still maintained through contracts with various service providers, such as Downer, with tenders being called for at intervals of about five years.

114. Mr Gregory commented that, on occasions, the department faces difficult decision-making processes. He outlined that State Growth now has in place a

specific section for conducting environmental assessments and providing advice in respect of relevant projects. In my view, this approach represents sound practice and enables the department to be apprised of objective facts surrounding the environmental considerations of works projects.

115. Importantly, Mr Gregory said that Mr Smith's death provided the impetus for the state to create a formal framework for the purposes of assessing such risks. The assessment system is known as the *Risk Based Tree Management Framework*. Mr Gregory himself led this project which involved researching processes in other jurisdictions and bringing together, for Tasmanian purposes, the processes which appeared to be the most practicable means of formulating the assessment of risk. Mr Gregory stated that the system combines best practice tree management, being Quantified Tree Risk Assessment (QTRA) methodology, and road risk management systems. A copy of the department's 50-page *Risk Based Tree Management Framework* ("the framework") was tendered in evidence. The document appears comprehensive, well formatted and clearly worded. It does not appear difficult in its application.
116. The main purpose of the framework is to provide guidance to the contracted road inspectors to make a proper risk-based assessment of whether trees pose a potential hazard and, if so, to make a reasoned determination as to what should be done – including removing them. The framework requires consideration of such factors as the traffic volume on the particular roadway, the speed limit of the road, the diameter of the trunk of the tree, the angle of lean of the tree and other visual criteria. Once the required factors are taken into account the framework mandates the inspector to respond in a particular manner, including immediate remedial action, further monitoring or referral to an arborist.
117. Mr Gregory explained that the intention is, by the end of 2019, the state highway network will have been inspected initially by officers of the department and trees identified which should be removed and/or monitored.

118. Associated with the application of the framework, a comprehensive data recording and monitoring system has been developed. This system is owned by State Growth, rather than the contractors, and allows the department to properly monitor the tree risk assessments. The data from the system is also available to the contractors inspecting the trees at the time of their inspections. Mr Gregory stated that contractors are now being trained in the framework, including training by arborists, and that its implementation has been successful.
119. State Growth, and specifically Mr Gregory, are to be commended for their significant work in creating this new system and associated data management system.
120. Mr Smith's family expressed their gratitude to Mr Gregory for the implementation of such a process. They expressed the view that this was a positive outcome from the death of their husband/father. I agree that this is the case. Nevertheless, State Growth should continue to monitor the efficacy of the system to determine whether it should remain in place in the long-term and whether any change is required.

Conclusion

121. In this investigation, Senior Constable Keygan attended the scene of Mr Smith's death and remained extensively involved in what proved to be a lengthy investigation, requiring complex analysis of documentation. His work in the investigation was outstanding and I am greatly appreciative of his assistance.
122. I am also grateful to Ms Ansell, counsel assisting, and Sergeant Anthony Peters, coroner's associate.
123. Finally, I hope that the conclusion of this inquest may bring some peace to Mr Smith's family. I convey my condolences to them and to all Mr Smith's loved ones.

Dated 27 March 2019 at the Coroners Court in Hobart

Olivia McTaggart

Coroner