

TRANSCRIPT

LEGISLATIVE COUNCIL ENVIRONMENT AND PLANNING COMMITTEE

Inquiry into the 2022 Flood Event in Victoria

Melbourne – Wednesday 6 December 2023

MEMBERS

Ryan Batchelor – Chair

David Ettershank – Deputy Chair

Melina Bath

Gaelle Broad

Jacinta Ermacora

Wendy Lovell

Samantha Ratnam

Rikkie-Lee Tyrrell

Sheena Watt

PARTICIPATING MEMBERS

John Berger

Ann-Marie Hermans

Joe McCracken

Evan Mulholland

Rachel Payne

WITNESS

Tony Pagone, Chair, Maribyrnong River Flood Review.

The CHAIR: Welcome back to the committee's hearings for the Inquiry into the 2022 Flood Event in Victoria.

For the benefit of our next witness, all evidence that we take is protected by parliamentary privilege as provided by the *Constitution Act 1975* and the provisions of the Legislative Council standing orders. Therefore the information you provide during the hearing is protected by law. You are protected against any action for what you say during this hearing, but if you go elsewhere and repeat the same things, those comments may not be protected by privilege. Any deliberately false evidence or misleading of the committee may be considered a contempt of Parliament.

All evidence is being recorded, and you will be provided with a proof version of the transcript following the hearings. Transcripts will ultimately be made public and posted on the committee's website.

I might ask committee members to introduce themselves, and we will start with those who are joining us online – Jacinta or Gaelle.

Gaelle BROAD: Gaelle Broad, Member for Northern Victoria.

Jacinta ERMACORA: Hello. Jacinta Ermacora, Western Victoria Region. Hello, Tony.

Sheena WATT: Good morning. I am Sheena Watt, Northern Metropolitan Region.

Samantha RATNAM: Morning. Samantha Ratnam, Northern Metropolitan Region.

David ETTERS HANK: David Ettershank, Western Metro. Good morning.

Wendy LOVELL: Wendy Lovell, Northern Victoria.

Rikkie-Lee TYRRELL: Rikkie-Lee Tyrrell, Northern Victoria Region.

The CHAIR: I am Ryan Batchelor from the Southern Metropolitan Region and Chair of these proceedings. Thank you, Mr Pagone, for joining us today. The custom is to invite you to make an opening statement of no more than 10 minutes, if you should so choose.

Tony PAGONE: Sure. Thank you. Well, I suppose the only things that I really want to say by way of opening are things that you probably know already. That is that the role of the panel that I chaired was essentially to do a review for Melbourne Water. It was not backed up by statutory powers of any kind, so I had no powers of compulsion. I could not call anyone to assist, and that meant that the evidence that we obtained was necessarily limited to the extent that we could not test evidence, we could not demand that people give evidence and things like that. That said, we had a strong degree of cooperation, which was very good.

I have no personal expertise in anything to do with water beyond being a consumer as a drinker of sparkling water. Indeed my role on the panel was essentially to provide kind of probity issues to ensure that there was around the work being done by the experts a sense of objectivity and impartiality and so on, which I think actually succeeded. But they are stories for boozy nights rather than an organisation like this.

Wendy LOVELL: We are happy to have a boozy night.

Tony PAGONE: I do not think there is anything in particular that I need to say beyond that the sum total of my knowledge about the flood is in the report, and indeed my personal knowledge about it all is a little bit less than the report, because the experts did a lot of the writing. So if you ask me questions about the Manningham end level you will be met with, 'Deary me, yes, that was explained to me. At the time that I wrote that I seemed to have an understanding of it.'

There are two things that I suppose you do need to realise. The terms of reference were not written by me, and therefore we were constrained by them. The Flemington wall was a major feature of the terms of reference, and

as you would have read from the report, we are not able to indicate anything about the impact of the Flemington report. I am more than happy to flesh that out if you want to ask questions about that aspect of it. And of course the other big impact was to the retirement village, for want of a better name, where there are some questions still to be resolved. I do not have answers to those questions. I have identified what we thought might have been the issue there. In what your committee does it needs to be careful because there is a lot of damage and there is a possibility for somebody to commence proceedings, and one does not want to go the wrong way unnecessarily on that. I think that is probably all I need to say by way of opening.

The CHAIR: Thank you very much. Members are going to have about 8½ to 9 minutes each, depending on how succinctly we conclude at the end of the period; I am trying not to cut people off, but that is about how long we are going to have. I might start. We just heard from Minister Shing, the Minister for Water, who advised us, from what I understood, that Melbourne Water are completing their revised, updated modelling on what is happening in the Maribyrnong, which is going to be available in April. I understand from her evidence that Melbourne Water has written to the panel seeking, or urging, the panel to consider reconvening to consider the updated modelling. Have you made a decision as to whether that is likely or not?

Tony PAGONE: All of that is accurate. Whether it is likely may depend upon the timing. The exercise will be, from my point of view, useless if I do not have, particularly, Mr Babister and Professor Maier, because they are the ones who understand the intricacies of the panel and the intricacies of the modelling. The modelling is as intricate as any algorithm that you find in a computer and possibly more so. The fact that it is taking well over a year to produce suggests that it is particularly complicated. From the discussions I have had with them it is likely that once the task commences, on the assumption that the model is ready in April, there will be a bit of time for going backwards and forwards. Both of the panel members have got some commitments in May, which may cause logistic difficulties to complete it in time. We think we can do it in time if the model is prepared promptly and we get on the job immediately. As you will have seen, we actually got on the job for this one immediately and produced our report faster than expected. So efficiency is something that we – I think you can assume that we will do it quickly if we can. That is a longwinded answer to your question. The likelihood is yes, but I did not want to say it is certain.

The CHAIR: Understood. Obviously we are constrained by the reporting date requested of us by the Legislative Council, so we have a mind to efficiency as well as thoroughness, as I am sure you can appreciate. Having read the report, and one assumes parts of the report were written by technical experts, it appears from reading it that they know what they are talking about.

Tony PAGONE: Absolutely.

The CHAIR: Now, as we do more, reading their analysis is useful, so we would absolutely value that.

Tony PAGONE: I have had to spend a bit of time with the three of them, as you would imagine, and they are very, very impressive people.

The CHAIR: Just more broadly, one of the tasks that you had was obviously doing an independent inquiry into the life of the operations of a statutory authority and how they conduct their business, do their work. How did you find Melbourne Water's engagement with your panel and process?

Tony PAGONE: That is a difficult question to answer because it is so general – the question – but I will try to do so. I found them really fully engaged. They constantly said and honestly said that they wanted to make sure that there was learning out of the process, so I found them fully cooperative at all times and good to deal with. They gave us whatever we needed up-front. I did not find them being backwards or being reluctant to provide information of any kind at any stage, so fully cooperative.

The CHAIR: Did any other government departments or agencies pose any challenges in terms of their cooperation with you? If I can try and narrow the question a little bit, did you find anyone who was not cooperative in the conduct of your review – from a government agency perspective?

Tony PAGONE: I understand. And forgive me if I cavil a little bit with the word 'cooperative', because I do not really want to be throwing stones at people, and people may have had very good reasons for the positions that they adopted. So perhaps if I can answer it slightly differently, without throwing stones. The Maribyrnong council – it would have been nice to have had information from. There was one witness that we had, whose

name appeared in the papers, who was really very, very helpful initially and was to give evidence before us in one of the public sessions, and he pulled out at the very last minute. Quite what was going on there I do not really know, but that was a bit unfortunate, because at an informal level he had been really terribly helpful – really had a lot of information at his fingertips. We had that informal conversation really on the very first day that I had met with my other panel members, and we were kind of doing a general familiarisation and scoping issue so that we did not sit down with him with a view to getting information out of him. Mr Wright was the man's name.

The CHAIR: And that was from Maribyrnong City Council?

Tony PAGONE: I am sorry, Moonee Valley; I apologise.

The CHAIR: Moonee Valley?

Tony PAGONE: Yes. And that was unfortunate; otherwise we found them generally helpful. Whatever we asked for we got. I am not sure whether you would regard the Victoria Racing Club as a government agency. They too were very helpful, although they were always flanked by lawyers. Indeed the first meeting we had with them was essentially with the lawyers. They were careful in their responses, but understandably. I mean, it is not intended to be critical of them. There was a huge amount of damage across the road and across the river, and they needed to be careful about what they said.

The CHAIR: And based on your interactions particularly with Melbourne Water, do you think that they have the capacity and the capability to implement the recommendations that you have made?

Tony PAGONE: Sure. If by capacity you mean the technical knowledge and competence, then the answer is yes. Whether that is a matter of resources, the answer is I do not know – I do not know how well resourced Melbourne Water in fact is. All government departments tend to be a little bit under-resourced. Melbourne Water do need to be, I think, better resourced, because on one view the 2022 flood is a warning bell. Changes are happening out there. I do not want to enter into the big debate about climate change, but the environment just changes all the time. Just look at any mountain: once upon a time the mountain was not there; it popped up, because the earth does things. If the predictions are as we expect them to be, the flood plain is likely to be more flooded, and we have got a lot of construction going on in that area.

The CHAIR: All right. My time is about up. I might leave it there and pass to Mr Ettershank.

David ETTERS HANK: Thank you, Chair. Thank you, Mr Pagone, for attending today. Much appreciated.

Tony PAGONE: My pleasure.

David ETTERS HANK: The committee has confronted rather conflicting views as to I guess both the processes and ultimately responsibility around the Rivervue Retirement Village and that LSIO line and suchlike. I guess I am curious, perhaps to start off with – I mean, you sort of provided us with some words of caution I think in your presentation with regard to this question. Did I interpret that correctly?

Tony PAGONE: Well, I think I did use the word 'caution'. From my point of view I need to be responsible rather than cautious. I do not want anything I say to be regarded as an indication that I have formed a view about fault. There does seem to have been some miscommunication about the processes that ultimately led to the relevant heights at which they could build, the elevation at which they could build, and we were not able to get to the bottom of that. We deal with that I think in paragraph 80-something-or-other, where we give our best estimate of what we think happened, but I do not know what happened. I mean, I do not know why it was that at one stage there were recommendations by Melbourne Water about energy flow and then subsequently it becomes a different level. But that does have a result in the floor levels at which it was being able to be built, and we were not able to get to the bottom of that.

David ETTERS HANK: Okay. As a person who picks their words carefully and interprets words carefully, I am interested in your use of the term 'miscommunication' there as a possible issue.

Tony PAGONE: Well, only because we do not know – I like your questions; they are open-ended, so one needs to be careful in how one responds to them.

David ETTERS HANK: I promise you there is no entrapment intended. We are just trying to get to the basis of what has actually happened.

Tony PAGONE: Sure. So we were interested to see – because we were asked to look at the effects, and plainly one of the effects was a whole bunch of houses over the other side of the river had been very dramatically damaged, and we wondered how that could possibly have been the case. We had known that there had been a change to the flood overlay, that it was excluded from that, and again we were curious to find out how that had come about. Was it that it ceased to be within the LSIO? And the more we looked into it, we saw that way back early in the process there had been a Melbourne Water recommendation that would have, had it continued to be on an energy flow, continued to have required a higher level of floor plan. Now, that at the time, I am told by my experts, was relatively unusual. How it came about that the ultimate approvals were given on a different basis I just do not know.

David ETTERS HANK: Can I pick you up on a question there? You can write what I know technically in this area on the back of a matchbox and still have room for advertising. In terms of just reality tests looking at Rivervue, it seemed to me that one reality test would be that the agreed LSIO was significantly lower than previous flood levels that had swept through that area. I mean, did that strike you as kind of weird that people would ignore actual flood results from the last 20 or 30 years in forming that new view on the flood level for Rivervue?

Tony PAGONE: It certainly seemed something that required inquiry. The problem is that to adopt a view that is weird, or whatever the adjective was, would require something that I as a former judge and former practising lawyer would hesitate to embrace, even with the protections that come with being here.

David ETTERS HANK: Again, in your opening comments you expressed an elegantly understated frustration, if I can use that expression, for your limited powers to actually require answers.

Tony PAGONE: No, I was not frustrated; it was just that that was the position. The reason I would go into that in some length in the report is that I did not want people to think that we had made a sort of judicial inquiry where things had been tested. It was not a frustration at all. On the contrary, in many respects it was less burdensome than I have had to do as a judge, where you do have to make hard findings on the evidence and draw inferences. So I am interested to hear that you should interpret it as frustration. It was not intended to convey that, Mr Ettershank.

David ETTERS HANK: I followed your work closely for three years on the royal commission into aged care –

Tony PAGONE: Oh, don't remind me!

David ETTERS HANK: so I appreciate the detail that you have the capacity to address. I am sort of curious in terms of your comments earlier both with regard to the limited powers and also the comments in the report itself, where you discuss out of scope and those sorts of contexts. I guess if you could wave a magic wand, would there be particular areas that you would like to drill into further arising from your experience in the review process?

Tony PAGONE: Well, I think the two big areas that were not fully explored – and I do not really know enough about the circumstances when the terms of reference were being devised, so it is not intended as a criticism – having gone into the process, the two areas where really one would say 'Mmm, it'd be nice to find out more about this' are how the Rivervue levels came about. The impact of that, as I am sure you will have seen, is not just in theoretical numbers or abstract numbers. If you go, as I am sure you have, and talk to the people and see the people involved, this is a group of relatively vulnerable individuals at a stage in life when they need peace and quiet and certainty and so on.

David ETTERS HANK: Yes, absolutely, and an atrocious planning outcome at the end of the day.

Tony PAGONE: Well –

David ETTERS HANK: Oh, my apologies.

Tony PAGONE: I will hesitate on embracing the word 'atrocious' if you do not mind –

David ETTERSHANK: Absolutely.

Tony PAGONE: but a planning result that they certainly had not expected. And there are flow-on things, pardon the pun, that go on with that, which are: what are you going to do with this place? There are a whole bunch of people who really – again, I have not seen the evidence that they have given to you, but what we were told by people was: ‘We are anxious. Every time we look out the window and it starts raining, we’re anxious.’ I can well understand that with people, and it would be good to make them not feel anxious, so that is one area.

The second area that one really would look at from a governance point of view, and I suppose I did not put as many punches in it as one might have, is that I do not really know but it is probable that the Flemington wall had relatively little impact itself – probable. At least I am prepared to assume that. But what I thought was really odd was there was no system in place within the VRC, or anywhere else for that matter, to evaluate whether the Flemington wall had the impact that it was supposed to have beyond the racecourse. So they are happy enough to say the racecourse was saved – tick – but mitigation work was being done in order to mitigate the impact. I do not wish to say that it was not effective, because the impression was that it was effective and did not produce much damage itself. But that there was nothing in place within the VRC or elsewhere in government to ensure that what was done to mitigate actually mitigated struck me as a potential deficiency that one should, from the point of view of legislatures and government, want to look at.

David ETTERSHANK: Thank you.

The CHAIR: Ms Lovell, do you want to go now?

Wendy LOVELL: Yes. Thank you. We have heard evidence from some previous Melbourne Water employees that at least five of the 15 recommendations in your report and in particular recommendations 1, 2, 3, 5 and 10 are actually items or actions that Melbourne Water used to do on a regular basis 20 years ago. I am just wondering firstly whether you are surprised to hear that, and if you can provide any further comment on that.

Tony PAGONE: Well, I was not aware of it in quite those terms; I did not know that. I am not surprised to hear that, because all government departments tend to be a little bit squeezed over time. But I would have thought that Melbourne Water is a really significant part of the safety of this community, and if they have stopped doing it, they should do it again.

Wendy LOVELL: Okay. Right. Thank you very much. Did you, in your investigations, look at the approval process for the Flemington wall or even the approval processes for the reclassification of the land at Rivervue? I mean, for instance, the Flemington wall was put there, as you said. It was supposed to have other mitigation things, but if it had not been there, the racecourse – much as we love the Melbourne Cup, and we would hate to see the Spring Racing Carnival not happen – would have provided 1.5 million cubic metres of flood mitigation to that community. So did you look at the approvals processes at all, going back in history?

Tony PAGONE: We did, and I think we set out the processes that we went through. We did look at the approval process, and I think we set out in broad terms what that process had been. So the answer to your question is yes.

Wendy LOVELL: Yes. So did you find there to be anything perhaps curious in those approvals processes, or did you find them to be totally aboveboard?

Tony PAGONE: What we saw did not cause us any concerns about whether the process had been adequately followed. But you see in the processes that when an application was made it was originally not just ticked off, and both a couple of the councils and Melbourne Water came up with what they said should happen, which led, ultimately, to mitigation approvals. So it did seem as though the process had gone through aboveboard, to use that expression, and that there had been external experts that had advised about the process. What we do not know is whether the impact was greater than should have been expected, and that is because we do not yet have the Jacobs modelling, and we will not until April.

Wendy LOVELL: Thank you. Terrific. Melbourne Water is actually quite unique in the state in that it is both a water retailer but also the catchment manager for their catchment, whereas in other areas, perhaps in my local area, there is Goulburn Valley Water, which is the retailer, and Goulburn Broken catchment manage the

waterways. But Melbourne Water is both those things. I am interested to know if you looked at that, if you have any views on that and whether you thought that maybe should be separated out, as it is in the rest of the state?

Tony PAGONE: Well, the answers to your first two questions are no, and the answer to the last bit is that I do not have a particular reason to know whether separating them out would produce a different outcome, so I do not have a view about it.

Wendy LOVELL: Just going back to the approvals for Rivervue and the change – well, you were saying that area of land was not to be built on, it later became eligible to be built on and the properties that were flooded almost exactly matched the area that was not to be built on. Did you look at that approvals process, and were you satisfied that Melbourne Water had given the right advice in reclassifying that land?

Tony PAGONE: Well, that was really the point of the discussion I was having with Mr Ettershank's questions. We did look at the processes, but I am not in a position to be able to say that its advice was right or wrong because of the restrictions and limitations upon the processes that I had. But I must say, I thought we laid out as clearly as we could what we had done and the extent to which somebody might want to take the ball and continue to run with it to find out more and ask questions.

Wendy LOVELL: Terrific. Thank you. That is all I have, Chair, so I am happy to cede the time to either Sam or David if they want.

The CHAIR: I will come to that in a minute. Ms Watt.

Sheena WATT: Thank you very much for being with us today and for all your work that has indeed brought us here to ask you some questions. I want to ask about climate change. We know that climate change is having an increased effect with extreme weather events. You did mention not wanting to go into that, but you do go into this in the report. Can you take us through the detail in your recommendations about how Melbourne Water should take climate change into account?

Tony PAGONE: Well, the short answer is it needs to take it into account. When approvals are given and whenever it exercises powers – including the questions that were being asked of the minister earlier on about the release of water – it just needs to take into account that that is happening, whether that is because of emissions or for other reasons. That was the bit that I do not want to get into, because people, some of whom seem reasonable enough, have different views about the causes and the human contribution to it. But there is no doubt at all in my mind that there is climate change, whatever the ultimate cause, and that area is going to be increasingly affected. We were not specifically asked to deal with the kinds of issues that I think you are asking me to articulate, so I cannot –

Sheena WATT: Is it within the terms of reference of the inquiry?

Tony PAGONE: Yes. So we could really leave it as broadly as we did, but there needs to be a consideration. All you need to do is go out and have a look at the construction that is going on around that area – not just there but above. Every time you build and every time you use land it has an impact. The water has got to go somewhere, and if you are starting with areas that are already a flood zone and you are building up the river where it is not a flood zone, then you are going to have an impact further down. That means that there does need to be a broader and more consistent consideration of what on earth we are doing with things that we have just assumed we can live with, without the consequences.

Sheena WATT: I appreciate that. Thank you. When hearing from residents in affected areas and those impacted by the floods, did you find there was a high degree of understanding of flood risks before the event, or do you think there might be some improvements to be made with respect to people's understanding, for those that live in the higher risk areas? Could you talk to us about what you found?

Tony PAGONE: Sure. Well, I mean, we did not set about doing a survey into knowledge pre and post, so all I can really do is give you my impression.

Sheena WATT: Well, that would actually be very helpful.

Tony PAGONE: And my impression is that people were surprised by what happened. That is to say, they did not appreciate the flood risk, but to be fair to everybody, the Bureau of Meteorology and Melbourne Water

on the day, and a number of the councils, were surprised. I mean, everyone went to bed that night thinking there was not going to be a problem, and the amount of rain in the area most affected that night was ultimately not the main cause. The main cause was the water was coming down from higher upstream in saturated areas and it was no longer able to be picked up, as it were – not in fact picked up, but absorbed, by the ground and the river. So it is a little bit unrealistic. I do not mean that critically, you understand, Ms Watt, but it is a bit unrealistic to think that the people would really have an appreciation of what happened, given that the experts – Bureau of Meteorology and Melbourne Water and some of the councils – did not think it was going to happen either.

Sheena WATT: I think that is just a reflection about the level of understanding in regional communities versus metropolitan communities –

Tony PAGONE: Sure.

Sheena WATT: and that has certainly come out in previous witnesses, so I am just sort of reflecting on that as I hear that. Now I just want to ask about the Flemington Racecourse flood wall. You found through a high-level visual comparison that the impact of the flood wall on the extent of the flooding did not appear to be significant. Can you talk to us about that finding? How confident are you in that position that you have got? I am just –

Tony PAGONE: Well, I am not sure that I would regard it as a finding, as such, because –

Sheena WATT: Okay. More ‘something to note’, then, perhaps?

Tony PAGONE: Yes, sure. It is just a matter of, you look at it and you see the width of the river and you see how high the thing has gone up the flood wall and you look across to the other side of the river and you think, ‘Well, if it’s gone up that much, the impact overall is unlikely to have been a major factor.’ But that is guesswork in the most extreme. I have got no idea, and until the Jacobs report modelling comes out we will have no idea whether it is a bit or a lot.

Sheena WATT: I think that is not long to go now, but thank you very much for that one. Are there any recommendations that you think are more urgent to implement than others?

Tony PAGONE: We tried to put them in some form of order.

Sheena WATT: Oh, okay. Take it as ordered by urgency?

Tony PAGONE: Pretty much, yes.

Sheena WATT: Okay, I am happy with that. I am not sure how we are going for time, but I might come back if necessary.

The CHAIR: Yes, that is fine. We will do that. Dr Ratnam.

Samantha RATNAM: Thank you, Mr Pagone, for being here today and for the considerable work and effort you have put in over the last few months to consider what is a very pressing issue for the community. In terms of the problems and events you were asked to investigate by this independent panel process, do you have a view about whether the processes established around this independent review and its terms of reference were the best way to investigate such events, or is there a more preferred or effective approach? The reason I ask that is because we have had evidence before this inquiry about who then took responsibility post the event for analysing and assessing the adequacy of the response, and we have been considering should it be parliamentary inquiries, should it be a matter of course for governments just to do their own review work, or independent reviews are the best mechanism? I appreciate you might not be able to answer that in full, but any views you have that you are able to share I would appreciate.

Tony PAGONE: Sure. Well, it depends on what it is that is to be reviewed, I suppose. I was not involved in the setting of the review terms of reference at all, so it came to me as a fait accompli, and I am actually reminded that the day after the report became public knowledge a hydrologist – who I think his name is Mr Crapper; I do not mean to be disrespectful if I have got the name wrong, but –

Samantha RATNAM: No, that is right.

Tony PAGONE: He was very critical of the report in the sense that he said, 'Great report, but it's what you'd expect an expert to have come up with without all of the investigation.' That was the report that I read in the newspaper. So depending upon the exercise, and Mr Crapper's approach might be the best way to do it – that is to say, get an expert to come in who knows what it is that you are looking at and then come up with an answer. If one is to review how the approvals came to be given on the change in the LSIO in the Rivervue area, that would I think require a more forensic process with a board of inquiry with powers of a board of inquiry so that one cannot be told, 'Well, I'm not turning up to answer any questions.' And I do not say that critically, because if I were acting for some of the parties involved, as a lawyer I would have said to them, 'Well, I don't think you ought to turn up because you never know what you're going to be asked, and it's voluntary.'

Similarly with insurance issues, I saw some, if I may say so, surprising commentary about concerns about insurance, some of it directed to poor old Melbourne Water. Insurance companies have got requirements of their insureds, and if their insureds go off and make public statements that cause liability to arise, that may put at risk the insurance policy, and it therefore puts at risk the people who are supposed to benefit from a payout. So when one is critical about, for example, Melbourne Water being cautious, if they were – I am not saying they were but if they had been, or Tigcorp as they might have been; I have got no idea, but possibly – one needs to realise that actually there are two sides to that coin, and one side is that actually the people who you want to benefit from the potential payout may be the ones who suffer if something gets said in inadvertently.

I have strayed from your question, but it depends on what you want to investigate.

Samantha RATNAM: That is okay. Thank you. And some different options – thank you very much. As has been referenced previously, Melbourne Water is doing updated modelling on the impact of the flood wall, due in April, and have said they are going to ask the panel to reconvene to review their assessment. You have spoken about the expertise that you had for this investigation, which is appreciated. Do you believe that once that modelling is issued the review panel has adequate expertise, independent of Melbourne Water, to do that assessment process?

Tony PAGONE: My impression is yes. Professor Maier and Mr Babister have extraordinary credentials. The one thing you can assume, or perhaps you cannot assume, is not a word of what is in the report went in without me drilling them. The first drafts have all well and truly been thrown out, but I was satisfied that they fully understood, and I cannot think of anybody better.

Samantha RATNAM: Great. That is good to know. That gives us confidence too. Another question: recommendation 8 from your inquiry was that Melbourne Water should take into account land use change in its flood modelling – so, for example, when greenfield sites become housing. Melbourne Water responded by saying that they take this into account when updating flood models and that when significant land use change is proposed, this can trigger updates, but flood models are only updated once every 10 years. Do you have a view on whether you think this commitment by Melbourne Water is enough to satisfy that recommendation you made or the panel made?

Tony PAGONE: Well, no, I do not have a view whether it is enough. That really is a matter within the realm of the experts. I followed their advice to me about the timing – obviously the more frequently the better you would think. On the other hand, it gets to a point where if it is too frequent it does not really add enough information. So you have got to have a balance between frequency and wastefulness. That is what the experts told me, that is what I have said, and I accept that.

Samantha RATNAM: Thank you very much. In response to your recommendation 13, Melbourne Water committed to investigating how floor levels were reduced at the Rivervue Retirement Village and said that it expects this investigation to be finalised by the end of the year. Do you know if this investigation will be made public or if you will have any involvement in it as the independent review panel, or is that going to be a separate process?

Tony PAGONE: So there are three questions.

Samantha RATNAM: Yes. Will it be public?

Tony PAGONE: Will it be public? I have got no idea, but I doubt it.

Samantha RATNAM: Okay.

Tony PAGONE: What was the next one?

Samantha RATNAM: Will you have any involvement as the independent review panel?

Tony PAGONE: Not that I believe. I doubt it.

Samantha RATNAM: Okay. I think they were the two questions.

Tony PAGONE: There was a third, but never mind.

Samantha RATNAM: It is going to be finished by the end of the year, but that is what we are assuming, that it is going to be finished by the end of the year.

Tony PAGONE: It may be. That is likely to be a trigger for litigation, I guess. Whether it will be made public or not I have no idea, but it may depend upon very complicated reasons. Plainly there was damage and plainly the damage was connected, rightly or wrongly – I am not saying the damage was caused by the actual flood level, but there is a relationship between the flood level and the damage. So whatever gave rise to the decision about that is likely to be keenly looked at by somebody affected. It is not rocket science.

Samantha RATNAM: Thank you very much. I think I have only got 30 seconds on the clock, so I will cede that time. Thank you very much, I appreciate that.

The CHAIR: Thanks, Dr Ratnam. Mrs Broad.

Gaelle BROAD: Thank you. Hello, and thank you for joining us today. Look, a few questions, and you have touched on this briefly. Initially Melbourne Water excluded early warning systems in urban planning and government policy from its terms of reference for the Maribyrnong River flood review. Why was that the case?

Tony PAGONE: I have no idea. I had no involvement in the terms. I am guessing now. You need to ask the people who drafted it why it was excluded. I am assuming the reason was that they wanted a focused inquiry into the specific areas that they asked us to look at and within a reasonable time frame, but that is a guess.

Gaelle BROAD: I guess you may not be able to answer this question then, but were Minister Shing, Minister Symes or any government departments consulted regarding the terms of reference of the flood review?

Tony PAGONE: Not the faintest idea.

Gaelle BROAD: That is fine. You mentioned Melbourne Water being in need of better resources. What steps or strategies will be employed to ensure that the recommendations are implemented, and how will this progress be monitored?

Tony PAGONE: No part of my assignment included implementation processes, but I imagine that one way would be for this committee to keep a watchful eye over what Melbourne Water does.

Gaelle BROAD: Moving forward, if a similar thing was done in future, would you suggest that part of that initial process is the follow-up?

Tony PAGONE: I do not want to tell politicians how to suck eggs, but in theory this is what responsible government is supposed to do. It is supposed to be the government – that is to say, ministers – that are overseeing the process, ultimately answerable to Parliament. That is the way the system is supposed to work.

Gaelle BROAD: I agree wholeheartedly. One of the findings of the report recommended Melbourne Water should undertake more regular reviews of flood models, considering the best estimates of climate change. That is kind of looking forward. I guess we have had considerable representations made by former employees of Melbourne Water, and they have pointed out some of the discrepancies in the flow rate tables. That recommendation is looking at flood models considering the future, but did you actually look at the flood models considering historical data and the accuracy of that data?

Tony PAGONE: We did not evaluate the accuracy of the data. That would have been a difficult task. We certainly looked at historical models, and indeed we set out the process that was undertaken when setting out generally how the modelling worked. So the answer is yes, we did look at the historical process that was in place, and the view that we took was it should happen more frequently.

Gaelle BROAD: It was a question asked this morning by Samantha Ratnam. Minister Shing said she would certainly look into the accuracy of the information, because of some of the information we have received and Darraweit being referenced, you know, that floods occurred. Some of that data has been removed from the analysis, which has meant that the level is much lower than the actual reality of what happened. So would you support, I guess, a further conversation looking at the analysis of that to ensure that Melbourne Water does have accurate information today?

Tony PAGONE: Well, I certainly support the idea that Melbourne Water should have accurate information.

Gaelle BROAD: Okay. Now, also I guess the report recommended implementing flood forecasting at intervals of less than 2 hours and to consult with the Bureau of Meteorology to develop rainfall forecasts more frequently than every 6 hours. I am just interested in how that came about. What sort of evidence or impact did you hear that initiated that recommendation?

Tony PAGONE: Well, again, I think we have set out the evidence in detail. In broad terms the problem is that information is supplied to the Bureau of Meteorology and it takes a period of time to run its model, and then that gets supplied to Melbourne Water. It needs to run its model, and again there is a trade-off that takes place. If you run these things with a super speed, you are likely to be doing things that are wasteful. On the other hand a 6-hour gap, as we saw on this occasion, was just too long because everybody went to bed, and the next modelling occurred at a time of day – because 6 hours had elapsed and they had lost the time. That was the evidence on the day, which we have set out. It needs just to be done faster in critical times like this. And again, it is not rocket science. What you could have are signposts so that in circumstances where you have the rainfall that you were having upstream you might say, ‘Okay, we’ve got a potentially volatile situation. Here is an occasion where we ought to do the modelling – run the modelling program – faster than the 6-hour period,’ so then you are not doing it every 6 hours every day, on lovely sunny days, when you have got drought and no water anywhere. I think I have answered your question, but if not, have another shot.

Gaelle BROAD: Yes. So I guess it is appropriate to the period that it relates to and doing it at a more regular basis – because yes, we did hear that people were getting text messages in the early hours of the morning. In that area, being Maribyrnong, being a very fast-flowing catchment, I guess more regular forecasting is very much needed.

I am interested too in your thoughts, as you are a former judge of the Supreme Court and Federal Court, I understand, just on the separation of powers between government and our statutory authorities. Like with Melbourne Water, John Thwaites had been a minister in the Labor government, Minister for Water, and then he was appointed chair of Melbourne Water, and he stepped down just in September this year. But the state Ombudsman has been conducting a two-year investigation and has found that 30 former Labor advisers or ministers have been appointed to public service or senior public servant roles. Do you think –

The CHAIR: Sorry, Ms Broad, I am just trying to figure out how this is relevant to the terms of reference of the inquiry.

Gaelle BROAD: It is very relevant in that with this particular event John Thwaites was involved in the flood wall, and then he had to step aside – we heard that from Nick Wimbush – I guess because of his role being in the ministry and then being involved as chair of Melbourne Water. So do you think that there should be more of a separation so that there are not decisions made by government and then you have got the implementation by public servants?

The CHAIR: You can choose to answer that as you see fit. The time for this block of questions has expired, but I will let you answer it if you wish to do so.

Tony PAGONE: Look, separation of powers is really important to government within the Westminster system; it is absolutely fundamental. I am not sure that there was any lack of separation in this instance, and I

am not sure that there needs to be any more separation than there was in this instance. But beyond that, I do not see how I can answer the question from the basis of any position as a judge, let alone from this inquiry.

The CHAIR: Thank you, Ms Broad. Ms Ermacora, do you have any questions?

Jacinta ERMACORA: Hello. No, I do not.

The CHAIR: Okay. That is fine. Mrs Tyrrell has ceded her time to Mr Ettershank, so I will go to him.

Tony PAGONE: You are back.

David ETTERS HANK: I am back. Lovely to see you again. If I could go to the recommendations, and particularly the response from Melbourne Water, there was one that kind of stunned me, which was your recommendation 2, that they should calibrate their flood models, which did not seem to me to be particularly courageous other than in-your-face obvious. Their response to that was:

It is already a requirement of Melbourne Water's technical specifications for flood modelling to calibrate models to observed ... Australian Rainfall ...

Did you form a view in terms of your recommendation to calibrate? Clearly, as I understand it from your report, the absence of calibration was a critical fail point. Then they say, 'We already did it.'

Tony PAGONE: Well, I must say, I read their response as embracing the recommendation rather than not embracing it. The way I read that response was: 'Yes. We take that on board.' I do not think they were saying that any of the conclusions that we had reached were not well founded.

David ETTERS HANK: In their reply they used the past tense.

Tony PAGONE: Yes, I know. But I was not there to fix up their grammar.

David ETTERS HANK: Okay. Good answer. This is the first time I have ever had a chance to ask questions of a judge in a setting like this, so I am relishing the opportunity, sir. Perhaps a more general comment: looking at the totality of the Melbourne Water responses to your recommendations, how do you feel about how they have come back to you?

Tony PAGONE: I really do like your questions – they are terrific. My impression of the people that I dealt with is that they were really keen to learn from what happened. They seemed to be knowledgeable and competent. I must say I was generally impressed that the bunch of people that I had interactions with knew what they were doing at that kind of level. To me they seemed genuinely – and I do not mean any negative implication – keen to learn from the process and to move forward, because my impression was they were acutely aware of the impact it will have on people if they get it wrong. And they seemed very acutely aware of the fact that everything we were going to do, one way or another, was going to be made public, so they ensured the processes were followed as best they could be. So I have no personal criticism to levy at any of the people that I dealt with, but that was not my brief, so –

David ETTERS HANK: I guess I am asking not at that personal level but more in terms of how you feel with regard to the adequacy of their overall response to the body of recommendations that you put up.

Tony PAGONE: I think by and large their response was to be expected. That is not answering your question, but –

David ETTERS HANK: It could be seen as damning with faint praise.

Tony PAGONE: Look, to be blunt, and I do not want to end up having a fight with you, but you ask questions with a sting to them, where there will be a word like 'adequacy'. To answer the question about adequacy, without wishing to engage in sort of hand-to-hand combat or arm wrestle with you, I have been a lawyer for 50-odd years, and when I see words like 'adequacy', I can think of 600 different alternatives and combinations with it, and I hesitate. I am not trying to avoid the question; I am trying to work out how best to deal with it. We were asked to do a job. They made sure that we were completely divorced, separate, from their processes. They responded to our questions fully, and I had no reason to assume at any stage that they were not

being full and cooperative and open, and similarly their responses afterwards seemed to me to be – I do not mean to damn them with faint praise, but you did ask a difficult question: was it adequate?

David ETTERSHANK: I appreciate there is not –

Tony PAGONE: Give me a couple of days and pen and paper and I will give you an evaluation of adequacy.

David ETTERSHANK: Please do. We will take that one on notice, shall we?

Tony PAGONE: We will not.

David ETTERSHANK: You keep on throwing little sparkly things in front of me and I cannot but follow them.

Tony PAGONE: You are the one who is throwing the sparkles. Control this fellow, Mr Chair.

The CHAIR: How is he possibly controllable?

David ETTERSHANK: You talked about, arising from the review of the Rivervue decision, the potential for litigation.

Tony PAGONE: Of course.

David ETTERSHANK: And given your pretty significant expertise in that field, could I ask you to speculate perhaps on whether or not such litigation could ultimately have liability questions for Melbourne Water?

Tony PAGONE: Potentially of course it could. Look, it depends on what is found to have been the cause, and if the cause is found to be a fault and if the fault is caused by somebody in Melbourne Water, then of course there is a potential liability. But I have got no idea. That is a pure guess.

David ETTERSHANK: Okay. That is valid. So we accept that that is within the realm of possibility – we will not go to adequacy, we will just go with possibility –

The CHAIR: So is everything, though, isn't it?

David ETTERSHANK: Absolutely – everything is a possibility. I guess there is an issue that has come up. If indeed Melbourne Water does have potential liability, Melbourne Water has adopted a practice, or seems to be in the process of adopting a practice, with planning applications in the Maribyrnong township area where they are, as the referring authority, requiring an indemnity from a claim by planning permit applicants, and as the referring authority they obviously have a lot of power in that equation. I am wondering your thoughts as to the appropriateness or otherwise about that.

Tony PAGONE: My thoughts in what capacity?

David ETTERSHANK: As an observer of life and –

Tony PAGONE: I am not here to be an officious busybody – I think that is what Lord Denning referred to it as – I am here because I was chair of an independent panel. I am happy to answer those questions, but my private views are to be kept in my bosom.

David ETTERSHANK: So did section 137 indemnity agreements cross your path during the inquiry at all?

Tony PAGONE: No, they did not.

David ETTERSHANK: Okay. All right. Moving on then, there is a fascinating section in your report at 117 where you talk about what actually happened by way of communications on 13 and 14 October.

The CHAIR: You have got another 2½ minutes from Ms Lovell as well.

David ETTERSHANK: Wonderful. Thank you. The deeply disturbing part of the story was that on the morning of the 13th the flood risk was rated at major.

Tony PAGONE: Yes.

David ETTERSHANK: It was then dropped to moderate in the afternoon.

Tony PAGONE: Yes.

David ETTERSHANK: And when people went to bed with that 8 o'clock it was still at moderate.

Tony PAGONE: Yes.

David ETTERSHANK: And then of course it was increased to major at 2.40 am –

Tony PAGONE: Yes.

David ETTERSHANK: when of course –

Tony PAGONE: Everyone was asleep.

David ETTERSHANK: Absolutely – tucked in bed. I have read very carefully the commentary that follows on from that chronology, but did you form a view as to how such a sort of catastrophic miscalculation or miscommunication – perhaps a better way to put it – could have occurred?

Tony PAGONE: The rain from up the river was falling upon sodden ground and had nowhere to go but down. That was the problem.

David ETTERSHANK: You referred to Mr Crapper's work before, and he has certainly been a very vociferous advocate.

Tony PAGONE: Not his work, but the report that appeared in the newspaper –

David ETTERSHANK: Right, okay. He has provided extensive commentary.

Tony PAGONE: particularly his commentary upon me.

David ETTERSHANK: Oh, I must have missed that bit. He talks about the need for Melbourne Water to have not concentrated on the Keilor gauge but rather to have looked further upstream into Deep Creek.

Tony PAGONE: Maybe.

David ETTERSHANK: No particular thoughts in that regard?

Tony PAGONE: No.

David ETTERSHANK: Okay. All right.

The CHAIR: You do not have to use your time if you do not want to.

David ETTERSHANK: Okay. I think I will leave it there. And thank you very much.

Tony PAGONE: Thank you very much. It has been a pleasure.

The CHAIR: At the conclusion of the proceedings, I might just ask: is there anything else arising out of the course of the report findings that you think in particular the committee needs to turn its mind to and you have not had the chance to emphasise today?

Tony PAGONE: Well, if I have not emphasised it, then I will take the opportunity to say so. There is a bunch of people in the Rivervue development for whom there are some real, present and ongoing issues, and they are complicated and they deal with how they can rebuild, how they can modify. There are some complicated legal questions about whether if they have got modifications they can continue to, as it were, live

in an area that is at risk or whether once they have been affected they ought not to be able to rebuild at all. A lot of these people, I am told, are having difficulties with insurance – personal insurance. There are issues about them. There are issues about whether more mitigation should be done for them.

I must say that they are areas that should be looked at. There are also some things that we did not look at. I mean, for example, we talked about the impact of the lorry going through the property of the business as an aftershock. I do not know if you have had the benefit of seeing that. I mean, that was extraordinary, the impact that occurred there, and that seemed to be a clear miscommunication between whoever it was that was directing traffic. That should never have happened. Presumably you have had evidence about how it was obvious that a lorry going whizzing down even at a slow speed was likely to have an impact upon the buildings nearby. That seemed to have been a clear failing within the system.

The CHAIR: Mr Pagone, thank you very much for the evidence you have given today.

Tony PAGONE: My pleasure.

The CHAIR: We hope that your experts are able to reconvene promptly in April. You will receive a copy of the transcript of today's proceedings to review before it is published on our website. With that the committee will take a break until 12.30 pm.

Witness withdrew.