

**FORM 37**

Rule 60(1)

**FINDING INTO DEATH WITH INQUEST**

*Section 67 of the Coroners Act 2008*

*(Amended pursuant to Section 76 of the Coroners Act 2008)*

**Court reference:** 2276/08

**Inquest into the Death of CHAS(CHARLES) BIRCH**

Delivered On: 28th January, 2011

Delivered At: Coroners Court of Victoria at Melbourne

Hearing Dates: 7th, 8th September, 2009; 2nd July, 2010

Findings of: Coroner Paresa Antoniadis SPANOS

Representation: Sergeant David DIMSEY, Police Coronial Support Unit,  
assisting the Coroner.

Mr Nigel BIRCH, the Deceased's father on behalf of the family

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*Section 67 of the Coroners Act 2008*

**Court reference:** 2276/08

In the Coroners Court of Victoria at Melbourne

I, PARESA ANTONIADIS SPANOS, Coroner,

having investigated the death of:

**Details of deceased:**

Surname: BIRCH  
First name: CHAS(CHARLES)  
Address: 7 Bishop Street, Kingsville, Victoria 3012,

AND having held an inquest in relation to this death on 7th, 8th September, 2009, and 2nd July, 2010 at the Coroners Court of Victoria sitting at Melbourne Magistrates Court

find that the identity of the deceased was CHAS(CHARLES) BIRCH also known as CHAS (CHARLES) NIGEL BIRCH born on the 9th January, 1973,

and death occurred on the 28th May, 2008,

at/outside 10 Latrobe Street, Melbourne, Victoria 3000,

from: 1a. MULTIPLE INJURIES

in the following circumstances:

**INTRODUCTION**

1. Mr Birch was a thirty-five year old married man who resided with his wife Ms Jessica Lauda and infant son Lloyd. He held a Ph. D in law, was a published author and the principal of his own law firm "Charles Birch Solicitors", 5/530 Little Collins Street, Melbourne. His main area of professional expertise was commercial law. Mr Birch and his wife appear to have had no significant financial problems. According to his family and acquaintances, Mr Birch was intelligent, personable and outgoing. He enjoyed the company of family and friends and was known to drink to excess on occasions. In recent times, he had reduced his alcohol consumption and had started a personal training regime to improve his health and fitness.

2. After work on 28 May 2008, Mr Birch met up with a group of male friends in the city. After shouting them dinner at one establishment, and having drinks at a second, they returned to

the "Mantra on the Park Hotel" at 333 Exhibition Street, Melbourne, where three of the group who were visiting from New South Wales were staying. After more drinks in the room and a telephone conversation telling his wife he would be heading home soon, Mr Birch left his companions shortly before 11:00pm. They knew he should not drive as he had had too much to drink, that he did not have access to a vehicle and assumed he would be taking a taxi home.

3. Shortly before 11:10pm, passers-by found Mr Birch lying on the pavement outside the multi-level carpark at 10 Latrobe Street, Melbourne, which was adjacent to and accessible directly from the Mantra Hotel. They rendered assistance to Mr Birch and called emergency services. One of them was a nurse who attempted cardiopulmonary resuscitation until ambulance officers arrived at the scene at about 11:15pm. They found no signs of life and confirmed that Mr Birch was deceased. Police also arrived and commenced their investigations of Mr Birch's death, initially in the belief that he was the victim of a hit-and-run accident, later tending to the conclusion that he had fallen from level 7 of the car park.<sup>1</sup>

4. This finding is based on the totality of the material the product of the coronial investigation of Mr Birch's death, that is the original brief compiled by Detective Sergeant Mark Franklin from the Melbourne Crime Investigation Unit of Victoria Police, additional statements and materials subsequently obtained by him, the statements and testimony of those witnesses who testified and any documents tendered though them during the inquest, and the written correspondence and/or submissions made by Mr Nigel Birch up to an including his last submission dated 15 November 2010. All this material, together with the inquest transcript, will remain on the coronial file.<sup>2</sup> I do not purport to summarise all the material/evidence in this finding, but will refer to it only in such detail as is warranted by its forensic significance and in the interests of narrative clarity.

#### PURPOSES OF A CORONIAL INVESTIGATION

5. The primary purpose of the coronial investigation of a *reportable death*<sup>3</sup> is to ascertain, if possible, the identity of the deceased person, how death occurred, the cause of death and the particulars needed to register the death - effectively, the date and place where the death occurred.<sup>4</sup> In order to distinguish *how* death occurred from the *cause* of death, the practice is to refer to the latter as the *medical* cause of death, incorporating where appropriate the *mode* or

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<sup>1</sup> The circumstances in which Mr Birch died will be canvassed in greater detail below. This is only an introductory summary of matters which were uncontentious, at least after consideration of the brief of evidence compiled by Det Sgt Franklin.

<sup>2</sup> Since the **Coroners Act 2008** became operational on 1 November 2009, access to the coronial file may be sought pursuant to section 115 of the Act.

<sup>3</sup> The *Coroners Act 1985* required certain deaths to be reported to the coroner for investigation. Apart from a jurisdictional nexus with the State of Victoria, the definition of a reportable death includes all deaths that appear "*to have been unexpected, unnatural or violent or to have resulted, directly or indirectly, from accident or injury*". Clearly, Mr Birch's death falls within this definition.

<sup>4</sup> Section 19(1) of the *Coroners Act 1985* which applies to the coronial investigation of Mr Birch's death, notwithstanding the passage of the *Coroners Act 2008* - see transitional and saving provisions. References to legislation which follow are to the provisions of the *Coroners Act 1985* unless otherwise stipulated.

*mechanism* of death, and the former as the context, or background and surrounding *circumstances*. These circumstances must be sufficiently proximate and causally relevant to the death, and not merely circumstances which might form part of a narrative culminating in death.<sup>5</sup>

6. A secondary purpose of the coronial investigation arises from the coroner's power to report to the Attorney-General on a death; to comment on any matter connected with the death they have investigated, including matters of public health or safety or the administration of justice; and to make recommendations to any Minister or public statutory authority on any matter connected with the death, including public health or safety or the administration of justice.<sup>6</sup> Whilst the *Coroners Act 1985* which governs the investigation of Mr Birch's death does not explicitly refer to the purpose of any such coronial reports, comments or recommendation, the implicit and generally accepted purpose, is the prevention of similar deaths in the future.<sup>7</sup>

7. It should be noted that a coroner is specifically prohibited from including in a finding or comment, any statement that a person is or may be guilty of an offence. This gives rise to something of a paradox, as a coroner is also under an obligation to report to the Director of Public Prosecutions, if at the conclusion of a coronial investigation, the coroner believes that an indictable offence has been committed in connection with a death.<sup>8</sup>

#### FINDINGS AS TO UNCONTENTIOUS MATTERS

8. Some matters required to be ascertained, if possible, were uncontentious and a number of witnesses were not required to attend the inquest on this understanding. Mr Birch's identity was not at issue, nor was the date and place of death. I find as a matter of formality that Chas (Charles) Birch, also known as Chas (Charles) Nigel Birch, born on 9 January 1973, late of 7 Bishop Street, Kingsville, died outside 10 Latrobe Street, Melbourne, at about 11:10pm on Wednesday 28 May 2008.

9. Nor was there contention around the medical cause of death. A full postmortem examination or autopsy was performed at the Coronial Services Centre, Southbank, by Dr Haputhanthrige Dhammika Wasanthi Ariyaratna, an Overseas Fellow in Forensic Pathology employed at the Victorian Institute of Forensic Medicine (VIFM) at the time.<sup>9</sup> Dr Ariyaratna

<sup>5</sup> See for example *Harmsworth v The State Coroner* [1989] VR 989; *Clancy v West* (Unreported 17/08/1994, Supreme Court of Victoria Harper, J.)

<sup>6</sup> See sections 21(1), 19(2) and 21(2) of the *Coroners Act 1985* regarding "reports" "comments" and "recommendations" respectively.

<sup>7</sup> This is to be contrasted with the "prevention role" explicitly articulated in the Preamble and Purposes of the **Coroners Act 2008** - for example section 1(c) states that one of the purposes of the Act is "to contribute to the reduction of the number of preventable deaths and fires through the findings of the investigation of deaths and fires, and the making of recommendations by coroners;"

<sup>8</sup> Sections 19(3) and 21(3) of the *Coroners Act 1985*.

<sup>9</sup> The autopsy was supervised by Associate Professor/Dr David Ranson, then Deputy Head of the Victorian Institute of Forensic Medicine, who co-signed Dr Ariyaratna's autopsy report - Exhibit U, the balance of the brief, at page 306. In response to concerns raised by the family, Dr Ranson met with Mr Nigel Birch and discussed aspects of the medical investigation of his son's death, and subsequently provided a report (Exhibit M) and testified at inquest (transcript pages 172-184).

found no natural disease which was likely to have caused or significantly contributed to death.<sup>10</sup> He identified a number of traumatic injuries, including a fractured skull with subdural and subarachnoid haemorrhages, lacerated liver and left kidney, contused thyroid, adrenals and lungs and multiple limb and other fractures. He attributed the cause of death as "*multiple injuries*" and commented that the pattern of injuries was suggestive of a fall from a significant height. He further commented that while "*There was no evidence to suggest any other persons were involved in the death. However on pathological grounds, a pushing like event cannot be completely excluded...*"<sup>11</sup>

10. The results of toxicological analysis of postmortem samples also undertaken at VIFM detected ethanol/alcohol at a concentration of 0.20g/100mL, or 0.20% BAC, and no other common drugs or poisons.<sup>12</sup> For illustrative purposes only, I note that this is four times the legal limit for a fully licenced driver. Dr Ariyarathna commented that such a blood alcohol level would cause significant intoxication and alteration in mental state, but that it was still possible for an individual to perform a variety of physical activities.

11. Dr Ranson viewed CCTV footage depicting Mr Birch on the level 8 car park (**and walking down towards level 7**) shortly before his discovery on the pavement below. He testified that the footage was not of sufficiently high resolution to allow even an informal assessment of his level of intoxication based on movements. He was unable to say whether Mr Birch was intoxicated at the time by reference to the footage; did not believe the behaviour depicted necessarily indicated significant mental illness or like disturbance; but did not exclude the possibility that he was intoxicated and/or affected by a degree of mental disturbance at the time.<sup>13</sup>

12. Dr Ranson also testified about the expected effects of a blood alcohol concentration of 0.20%. He described this as a significant level where you would expect impairment of motor skills (fine motor skills in particular) and decision making, subject to any tolerance or habituation arising from the individual's drinking history. That is, an individual who was practiced at making, say, telephone calls whilst at that level of intoxication might not have difficulty performing the task, but might struggle with a new or unfamiliar task.<sup>14</sup>

13. Like Dr Ariyarathna, Dr Ranson concluded that the major pattern of injuries sustained by Mr Birch was indicative of a fall from a height. He also testified that an earlier altercation with or without injury could not be excluded on purely pathological grounds. A number of questions were put to Dr Ranson about the findings at autopsy and, to a lesser extent, at the scene, in an effort to ascertain if the evidence favoured a finding that Mr Birch fell, jumped or was pushed from a height. The unambiguous effect of his evidence is that there are simply too many unknown variables to allow him to express a preference for any particular scenario, based solely

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<sup>10</sup> He did identify coronary artery atherosclerosis, around 50% in the anterior descending artery.

<sup>11</sup> Exhibit U pages 316 & 318 for a summary of these injuries.

<sup>12</sup> Exhibit U pages 321-324. See also Dr Ranson's evidence at transcript pages 177 and following as to the inferences to be drawn from the absence of other common drugs or poisons.

<sup>13</sup> Exhibit M and transcript 175 and following.

<sup>14</sup> Transcript pages 176-177.

on his expertise as a forensic pathologist.<sup>15</sup> His evidence, whilst more detailed, was entirely consistent with Dr Ariyaratna's comments in this regard.<sup>16</sup>

#### HOW DEATH OCCURRED - SECTION 19(1)(b)

14. In common with many coronial investigations, the main focus of the investigation of Mr Birch's death including the inquest was on how death occurred. This was driven in particular in the family's disbelief that Mr Birch could have intentionally taken his own life. There was no evidence from either family or friends that he had threatened or intimated that he might take his own life, that he was felt under any professional or personal pressures, or that he felt unhappy or depressed.<sup>17</sup> Mr Nigel Birch submitted in the strongest terms that his son was not the sort of person who would resort to suicide, that he was a lateral thinker who would see any problems, and certainly problems of the sort the police investigation had identified, as challenges, and would set about finding a solution.<sup>18</sup>

15. As discussed during the inquest, it is not unusual in the coronial jurisdiction, that a person intentionally takes their own life without any prior declaration to friends or loved ones of their intention to do so, without any apparent change in behaviour or mood and without leaving a suicide note or other unambiguous indication of their intention.<sup>19</sup> In these circumstances, the police investigation focussed on events on 28 May 2008 and the role played by his companions, identifying potential suicide stressors, whether personal or professional, ascertaining whether any third parties had a motive for involvement in his death, access to the car park and the possibility of an accidental fall. The evidence relevant to each issue overlaps to some extent, but for convenience, will be discussed below under the following headings:

- events on 28 May 2008
- potential suicide stressors
- motives for third party involvement in Mr Birch's death
- access to car park, and,
- an accidental fall

#### EVENTS ON 28 MAY 2008

16. Mr Birch's companions on 28 May 2008 were a combination of old friends, new acquaintances and new or potential clients. Mr Claudio Gastaldello was a high school friend who had re-established a friendship with Mr Birch about five years earlier when he/his company

<sup>15</sup> Transcript page 178 and following.

<sup>16</sup> See **paragraph 9** above.

<sup>17</sup> See for example the evidence of Ms Jessica Lauda (Exhibit E & transcript page 64), Mr Nigel Birch (Exhibit F), Mr Phillip Stagliano (Exhibit I & transcript page 139), Mr Christian Freidus (Exhibit J & transcript page 149), Ms Yingbo Liu (Exhibit K & transcript pages 161-165).

<sup>18</sup> Reiterated throughout the inquest by Mr Nigel Birch but see, for example, Exhibits F & G & transcript pages 85-86.

<sup>19</sup> Transcript page 300.

became a client. He socialised with Mr Birch regularly and was also well known to Ms Lauda.<sup>20</sup> His brother and business associate Mr Secondo Gastaldello also knew Mr Birch from high school but had only socialised with him a few times since he had become the company solicitor.<sup>21</sup>

17. Mr Dominic Sergi was one of three New South Wales visitors staying in Room 812 at the Mantra Hotel. About two months earlier, he had been introduced to Mr Birch by Mr Claudio Gastaldello.<sup>22</sup> Mr Sergi had driven down from New South Wales with Mr Domonic Barbaro who also knew Mr Birch through Mr Claudio Gastaldello but had only met him once or twice before.<sup>23</sup> The third of the New South Wales visitors and last of the group dining together that night was Mr David De Marco who met Mr Birch for the first time that night.<sup>24</sup>

18. Accepting as natural some variance in witness accounts as to details such as times, particularly when intoxicated to some degree, the evidence of these witnesses is broadly consistent up until Mr Birch's departure from Room 812.<sup>25</sup> There are two areas of inconsistency thereafter which are noteworthy.

19. The first concerns Mr Claudio Gastaldello accompanying Mr Birch to the lift. According to his own statement he walked him to the eight floor lift and said goodbye.<sup>26</sup> This sits comfortably with his brother's statement but not with his brother's evidence at inquest where he appeared to distance his brother from the lift and minimise the time he was out of the room and potentially alone with Mr Birch.<sup>27</sup> Mr Sergi's statement is silent on this issue, but his evidence at inquest was along the lines of Mr Secondo Gastaldello's.<sup>28</sup> Mr Barbaro's account in his statement is that he "*just saw both of them leave and Claudio said he is going to get in the lift and go downstairs with Charles and that Charles was going to get a taxi to go home. The rest of us stayed in the room when Claude took Charles downstairs. I just saw them go out the door of the room. Claudio was out of the room for not even five minutes*".<sup>29</sup> At inquest Mr Barbaro wanted to correct his statement in this regard and effectively testified that Mr Claudio Gastaldello did not leave at all but only held the door open for Mr Birch and was back inside within a minute or so.<sup>30</sup> Mr De Marco's statement merely refers to Mr Birch leaving after saying goodbye without any reference to anyone accompanying him, and does not testify about this issue at inquest.

20 His statement is at pages 15-18 of the brief, Exhibit N. He was the only one of the group who did not testify at inquest as he had relocated permanently to Italy.

21 Exhibit A.

22 Exhibit B. I note that Mr Sergi referred to his contacts with Mr Birch as purely "social" where Ms Yingbo Liu understood he was a new or at least potential client. This may have of course have been Mr Birch's hope. Compare transcript pages 28 and 162-164. See also Mr De Marco's evidence at transcript page 57 **where** he refers to "business".

23 Exhibit C.

24 Exhibit D.

25 Transcript page 191 where Det Sgt Franklin identifies this as the critical point in the time line.

26 Exhibit N page 16.

27 Exhibit A page 3, to be compared with transcript page 11-13.

28 Exhibit C and transcript page 27.

29 Exhibit C page 2.

30 Transcript pages 36-37.

20. According to Ms Lauda's evidence, the morning after her husband's death, Mr Claudio Gastaldello told her that he had said goodbye to him when he was already in the hotel lift and then returned to the room.<sup>31</sup> Mr Stagliano testified about a similar but slightly more detailed account he was given by Mr Claudio Gastaldello the following day - *'he escorted Charles out to the elevator, kissed him on both cheeks, put him in the elevator - which is common ... Didn't see whether he went up or down, the doors closed and he just walked away'*.<sup>32</sup>

21. The second area of inconsistency is about who left the room to buy cigarettes shortly after Mr Birch left and could have potentially followed and/or encountered him. There is general agreement that Mr De Marco left perhaps ten minutes later to get cigarettes. However, Mr Claudio Gastaldello stated that Mr Barbaro accompanied Mr De Marco. Mr Barbaro also stated that he accompanied Mr De Marco but retracted this aspect of his statement at inquest.<sup>33</sup> Conversely, in his statement Mr De Marco states that he was alone when he went out for cigarettes, found the shop closed, noticed police and ambulance nearby and approached them, denied that he had seen anything when asked by the police, returned to the room somewhat in shock and left a second time with Mr Barbaro to go to the 7-11 where he paid cash for the cigarettes. When pressed about his best recollection, he said that he did not have a good recollection but agreed that his memory was better on the night, that he had no reason to lie and that if it was in his statement it was true.<sup>34</sup>

22. I am satisfied that all five witnesses who had spent the night with Mr Birch were intoxicated to some extent as well as shocked and that this affected their ability to recall events clearly. I am also satisfied that **the four witnesses who made statements on the night** were separated and interviewed separately by police to minimise the risk of collusion.<sup>34a</sup>

23. That there was an attempt at the inquest to minimise the time Mr Claudio Gastaldello spent alone with Mr Birch outside the room was obvious. I am satisfied that he spent a few minutes alone in Mr Birch's company while seeing him to the lift, waiting with him for its

<sup>31</sup> Exhibit E page 5 and transcript page 66.

<sup>32</sup> Transcript page 141.

<sup>33</sup> Mr Claudio Gastaldello's statement, Exhibit N page 17 - *"After a short time, Dominic and David went downstairs to get some cigarettes..."*; Mr Secondo Gastaldello, Exhibit A page 3 - *"About ten minutes after Charles left, David De Marco left the room to buy some smokes. I told David that there was a 7-11 store nearby on the corner..."*; Mr Sergi, Exhibit B page 2 - *"Dave told us he was going to get some cigarettes and shortly after he left, maybe ten or fifteen minutes but I'm not sure of the exact time..."*; Mr Barbaro, Exhibit C page 2 - *"After that at approximately 12:00 to 12:30am I went to get a packet of cigarettes with David De Marco at 7-11 down the road, a couple of blocks down on Exhibition Street. Dave paid for the cigarettes there with cash I think. On the way down to the 7-11 we saw the Police in the street..."*; Mr De Marco, Exhibit D page 1 - *"After 10 minutes or so I left the room to go and buy a packet of cigarettes at the shop on the corner, I can't recall the name. When I got there the shop on the corner was closed so I keep walking along Exhibition Street. I noticed that there was an ambulance and police ..."*

<sup>34</sup> Exhibit D and transcript pages 47 and following. When Mr Nigel Birch specifically put to him that he and Mr Barbaro followed Mr Birch out of the room and caused him harm and/or were involved in a conspiracy to do so he denied this - transcript page 59.

<sup>34a</sup> **That is all those who were in Mr Birch's company that evening/night apart from Mr Secondo Gastaldello who had already gone home by the time police arrived to take witness statements. Police were however well aware that he was also a witness as his presence earlier had been disclosed in all four statement - Exhibits B, C & D and Exhibit N/page 15.**



arrival, and saying their farewells. This does not amount to evidence that he had anything to do with Mr Birch's death, but does amount to a window of opportunity for such involvement.

24. The various accounts of who left the room for cigarettes and what course they followed are also difficult to reconcile, however, the account which sits most comfortably with all others is that given by Mr De Marco himself in his statement, and effectively (albeit somewhat tortuously) adopted by him at inquest. Again, this does not amount to evidence that he or Mr Barbaro had anything to do with Mr Birch's death, but does amount to a window of opportunity for such involvement.

#### POTENTIAL SUICIDE STRESSORS

25. As part of his investigation of the circumstances surrounding Mr Birch's death, Det Sgt Franklin identified a number of matters which he considered potential suicide stressors, particularly when taken in combination. He expressed the opinion that his investigations of the last six months or so of Mr Birch's life indicated that he was jeopardising his professional and personal life and that his actions were not those of a rational and highly intelligent individual.

26. Mr Birch's mobile phone records were examined and revealed frequent contact at all hours with a number listed in his contacts as "Gary Knight". Investigation revealed that this number was registered to Ms Yingbo Liu, his Office Manager, who told police that they had been in a relationship with Mr Birch since she started working for him in June 2007, that they had strong feelings for each other, and had discussed a future together.<sup>35</sup> Det Sgt Franklin believed that this relationship was a source of personal pressure on Mr Birch, but Ms Liu's evidence at inquest belied this belief.<sup>36</sup>

27. Whether a suicide stressor proper, or an indication of a personality unravelling, Det Sgt Franklin cited an incident apparently occurring on 12 February 2008. Police were called to Glen Iris regarding a fare evasion by a passenger who had booked in the name of "Charles" but were unable to find him. Later they were called back to the same area where Mr Birch had smashed the front window of a property, was ranting at the residents and refusing to leave. He was wearing a suit, appeared heavily intoxicated and was labouring under the misapprehension that the property was his home.<sup>37</sup> He was arrested for being drunk and the residents did not wish to proceed with criminal charges. According to Mr Freidus, Mr Birch told him about this incident and admitted that he had taken the drug "MDMA" (also known as liquid ecstasy), had become confused and aggressive and had been arrested after trying to break into a house which he believed to be his own.<sup>38</sup>

28. The extent of Mr Birch's drug use is not clear beyond this incident. Apart from the one instance discussed with Mr Freidus, Mr Birch's family were unaware of any illicit drug use. The only other witness who could speak to this issue was Mr Steven Dellapenna. Initially refusing to

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<sup>35</sup> Exhibit K and transcript page 160, Exhibit N page 167.

<sup>36</sup> Transcript pages 159-160.

<sup>37</sup> Statement of Const David Bartlett at pages 127 and following of Exhibit N.

<sup>38</sup> Exhibit J page 3.

provide a statement to police, he nevertheless told them that Mr Birch had been using drugs for "a while", that he would access drugs at parties they attended, and that he had seen him use drugs on occasions, including cocaine. He refused to provide further information about the frequency of Mr Birch's drug use or the identity of his supplier.<sup>39</sup>

29. Mr Dellapenna was in custody for drug-related matters when he testified at inquest. He stated that he had worked in Mr Birch's law firm for a short time in 2004, but that more recently he was only referring clients to him, mainly for minor criminal offences.<sup>40</sup> He knew about the dinner on 28 May 2008 and had no concerns for his safety - *"If I had have thought there was a problem, I would have been there."*<sup>41</sup> On oath he denied having any knowledge of drug use by Mr Birch<sup>42</sup> and refused to answer some questions on the basis of the right against self-incrimination. He had last seen Mr Birch on the morning before he died and had no concerns for his welfare.<sup>43</sup> Like all other witnesses who knew him, Mr Dellapenna was shocked and did not believe that Mr Birch had taken his own life.<sup>44</sup> Significantly, he agreed that Mr Birch may have been trying to contact him shortly before 11:00pm to ask for a lift home. The overall impression was that Mr Dellapenna knew more than he was prepared to say about Mr Birch's life but there was insufficient evidence to find that he had any involvement in his death.

30. One of the clients referred by Mr Dellapenna to Mr Birch was Mr Domenic Morabito who initially refused to provide a statement but eventually did so through his solicitors.<sup>45</sup> In early January 2008, in the course of representing Mr Morabito, Mr Birch was alleged to have removed \$12,000 cash from his client's home in circumstances which left him open to charges of possessing proceeds of crime and perverting the course of justice. He was interviewed in relation to these charges on 14 March 2008 and a brief submitted by Sergeant Pixie Fuhrmeister for authorisation of a prosecution.<sup>46</sup> As at the date of his death, no charges had been laid. However, if such charges had been found proven, Mr Birch's ability to practise as a lawyer might well have been at risk, and it is this eventuality which Det Sgt Franklin considers a potential suicide stressor.

#### MOTIVES FOR THIRD PARTY INVOLVEMENT IN MR BIRCH'S DEATH

31. One of the bases for the family's concerns that Mr Birch's death was suspicious arose from his involvement in two police investigations. Det Sgt Franklin obtained statements from police officers involved in those investigations in order to ascertain if Mr Birch was at risk because of his preparedness to assist police. Det Sen Const Michael Kearnes from Victoria Police Crime Tasked Operations provided a statement regarding allegations of extortion with threats to kill and blackmail made by Mr Michael Bains and Mr Badr Arafan, the alleged victim

39 Exhibit N page 169.

40 Transcript page 117.

41 Transcript pages 118, 128. Consistent with Ms Liu's evidence that he was something of a debt collector (enforcer) for Mr Birch, in relation to their criminal referrals.

42 Transcript pages 120, 130.

43 Transcript page 121.

44 Transcript pages 123-124.

45 Exhibit P.

46 Exhibit N pages 130-141.

being Mr Hasan Rifat, a friend and longtime associate of Mr Birch. This investigation commenced in December 2007 and Mr Birch's statement was made over consecutive Saturdays in April. During his interactions with Det Sen Const Kearnes, Mr Birch never expressed any fear of either of the alleged offenders. Nor did he appear suicidal. Det Sen Const Kearnes stated that he did not believe that Mr Birch's death resulted from deliberate acts by or on behalf of Mr Bains or Mr Arafan.<sup>47</sup>

32. The second investigation involved a complaint made in June 2007 by Mr Birch on behalf of some clients that an employee of the Department of Immigration and Citizenship had demanded payment from them in exchange for the facilitation of a visa. The statement provided by Federal Agent Hamilton conveys the view of the investigating officer that Mr Birch's role was limited to the initial referral and that there was nothing in the course of the investigation that gave rise to any circumstances of retribution or concerns as to his safety.<sup>48</sup>

#### ACCESS TO CAR PARK

33. Even a cursory reading of the transcript reveals that access to the car park, and levels 7/8 in particular, was a major preoccupation during the inquest.<sup>49</sup> Prior to the inquest, I attended the car park during daylight hours to familiarise myself with its layout and to better understand the evidence. Mr Nigel Birch and other family members and friends attended the car park to try to ascertain what happened.<sup>50</sup> Photographs of the car park were included in the brief and finally, CCTV footage of Mr Birch in the car park taken moments before his death was also available and viewed by a number of witnesses.<sup>51</sup> This footage was obtained from movement activated cameras trained mainly on access points to each level of the car park.

34. I will not attempt to describe in words here what is better depicted in the photographs and CCTV footage. Suffice to say that the car park is a multilevel car park immediately to the rear and west of the Mantra Hotel. It was ordinarily accessible via a dedicated lift from inside the hotel, and to members of the public, by driving or walking in, in the usual way. After 9:00pm access was limited to hotel patrons. Having heard at length from Mr Nigel Birch, Det Sgt Franklin and Acting Senior Sergeant Noella Bannon on the issue of access to the car park and the operation of the CCTV cameras,<sup>52</sup> I find it possible that a person intending to do harm to Mr Birch could have accessed the car park, either by entering prior to 9:00pm and remaining hidden, lying in wait as it were, or by entering from the hotel even after 9:00pm. Putting aside the need to know that Mr Birch was going to be there or to have followed him there, I find it improbable that such a person would not have been captured by the CCTV cameras at some point.

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<sup>47</sup> Exhibit N pages 124-126.

<sup>48</sup> The employee pleaded guilty and was sentenced in the County Court to eighteen months imprisonment and released on a three year good behaviour bond pursuant to Commonwealth legislation. Exhibit S. See also Det Sgt Franklin's summary at transcript page 302.

<sup>49</sup> Transcript pages 132 and following for example.

<sup>50</sup> Mr Freidus, Mr Papalia, Mr Stagliano for example all attended, as did Mr Nigel Birch on several occasions.

<sup>51</sup> Exhibit N pages 192-217 for photographs and pages 232-240 for still from the CCTV footage.

<sup>52</sup> Exhibit's O, Q & R, transcript pages 188 and following and Mr Nigel Birch's various submissions, esp Exhibit H and accompanying photographs of the car park.

35. The question of access to the car park also involves consideration of the relevant window of opportunity in terms of time. The times which follow are not of course synchronised and some variance between the various clocks should be assumed. The evidence supports a finding that Mr Birch was still in the hotel room when he last spoke to his wife on his mobile at 10:46:47pm<sup>53</sup> and told her he would be leaving in ten minutes. The evidence also supports a finding that he left a short time after this conversation ended and he had said his farewells to those in the room.

36. The next timed sighting of Mr Birch is on the CCTV footage which shows him at 10:56pm (and for about 45 seconds thereafter) walking from the east or hotel side of the rooftop carpark (level 8) to the western wall, looking over the wall briefly before walking down the ramp to level 7 towards the south wall while taking off his suit jacket. As the footage does not show him using his mobile, it is probable that his attempts to contact Mr Dellapenna between 10:54:03 and 10:56:34pm<sup>54</sup> occurred just before the CCTV camera were activated by his movement into its field.

37. The other known parameter is the call to emergency services which was made at 11:07:41pm by one of the passers-by who found Mr Birch on the pavement immediately adjacent to the south side of the car park.<sup>55</sup> This allows approximately ten minutes at the outside between the time Mr Birch is last captured on the CCTV footage to the time he is found on the pavement. According to the evidence of Det Sgt Franklin and A/g Sen Sgt Bannon both of whom reviewed the CCTV footage for the relevant period, no other person is depicted.<sup>56</sup>

#### AN ACCIDENTAL FALL ?

38. According to his father, Mr Birch suffered from a fear of heights which may have contributed to his accidental death. For the short time that Mr Birch is captured on the CCTV footage, he appears to be moving purposefully, without any obvious incapacity from intoxication or otherwise. One interpretation of the footage, is that it depicts Mr Birch choosing the best place from which to jump. The western wall abutted another building with a drop of only three metres or so to the adjoining roof, whereas from the southern wall immediately above where he was found, the drop was some eight storeys.<sup>57</sup> On another view, he may have been waiting for a lift and simply looking at the view or at passing traffic in Latrobe Street.

39. Police found Mr Birch's suit jacket neatly folded on the south wall of level eight of the car park, near its south-east corner, immediately above where he was found.<sup>58</sup> Despite police

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53 Exhibit N at page 257 - part of the mobile phone records.

54 Ibid.

55 Exhibit N at page 174 for event chronology from "000" & statement of Mr Shamsabadi who placed the call at page 1.

56 Exhibits L, O and R and transcript page 163.

57 That is approximately eight storeys in height between the top of the side/wall of level 7 to the ground below. This is not a reference to level 8 or the rooftop level of the carpark. See photos of the car park in Exhibit N esp at pages 208-210.

58 See photos of the car park in Exhibit N esp at pages 213-214.

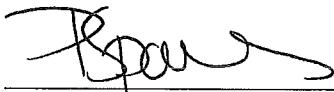
efforts to search the location, Mr Birch's wallet was not found until the family assisted by Mr Stagliano searched the car park on 31 May 2008. Mr Stagliano found the wallet in a "metal pocket" for want of a better description, adjacent to the place where the jacket was found on the night. It is these finds together with the pathologist's appraisal of Mr Birch's injuries which supports a finding that he jumped or fell from level eight of the car park. Based on his experience investigating other deaths in similar circumstances, Det Sgt Franklin expressed the opinion that leaving his wallet and jacket behind like this was consistent with an intention to take his own life.<sup>59</sup>

40. Finally, there is the unsent text message saved in draft on Mr Birch's mobile - "*Them thy gils me*". Unfortunately, the message was only discovered after the mobile had been in police custody for some time, and the mobile was returned to the family in September 2009. It is Mr Nigel Birch's strongly held belief that this message was drafted by his son when he was under duress and related to his death and that it was intended to signify 'they try to kill me' or words to this effect.<sup>60</sup> As explained by Det Sgt Franklin in evidence, the message was saved in draft and originally date/time stamped 23:02:53 on 28 May 2008.<sup>61</sup> I accept that the message is significant because it supports a finding that Mr Birch was still alive at this point. However, the message itself is indecipherable and I am not prepared to make any findings based on an interpretation of the message itself as this would necessarily involve speculation on my part.

#### CONCLUSION

41. The evidence summarised in paragraphs 38 and 39 above is, in my view, consistent with as opposed to indicative of an intention on the part of Mr Birch to take his own life. The weight of the other evidence which I have outlined above does not support a finding that he intentionally took his own life, nor does it support a finding that any other person was involved in his death. Whilst the possibility of accident cannot be excluded, I do not find this probable in all the circumstances. Mindful that it is somewhat unsatisfactory to leave matters unresolved to this extent, I am nevertheless compelled by the state of the evidence to make no finding as to Mr Birch's state of mind when he jumped or fell to his death.

42. I find that Mr Birch died at or about 11:00pm on 28 May 2008 from multiple injuries sustained in a fall from a height, namely from the **level 7** car park at 10 Latrobe Street, Melbourne.



PARESA ANTONIADIS SPANOS  
CORONER

Date: Delivered 28 January 2011; First amended 14 February 2011; This amendment made 5 August 2011 - as indicated in bold in paragraphs 8, 11, 22 41 and 42; footnotes 16, 22 and 34a; and re-numbering of paragraphs 21 to 42 inclusive.

<sup>59</sup> Transcript page 209-2012.

<sup>60</sup> Mr Nigel Birch's written submissions esp 19/07/10 and 20/09/10.

<sup>61</sup> Transcript page 308 and following.

