

IN THE CORONERS COURT
OF VICTORIA
AT MELBOURNE

Court Reference: COR 2007 2402

FINDING INTO DEATH WITH INQUEST

Form 37 Rule 60(1)

Section 67 of the Coroners Act 2008

Inquest into the Death of: GARY BRIAN WILFERT

Delivered On:	1 st April, 2015
Delivered At:	Coroners Court of Victoria 65 Kavanagh Street SOUTHBANK Vic 3006
Hearing Dates:	27, 28, 29, 30 November and 3 December 2012
Findings of:	PETER WHITE, CORONER
Representation:	Mr S Stafford for Worksafe Mr P Halley for Consolidated Property Services Mr A Lindeman for CBD High Rise Pty Ltd Ms Oberdan for CBD High Rise Pty Ltd on 3 December 2012
Police Coronial Support Unit	Sergeant D Dimsey

I, PETER WHITE, Coroner having investigated the death of GARY BRIAN WILFERT

AND having held an inquest in relation to this death on 27, 28, 29, 30 November and 3 December 2014

at Coroners Court MELBOURNE

find that the identity of the deceased was GARY BRIAN WILFERT

born on 19 November 1971

and the death occurred on 25 June 2007

at Intensive Care, Royal Melbourne Hospital, 300 Grattan Street, Parkville 3050

from:

1 (a) HEAD INJURIES SUSTAINED IN AN INDUSTRIAL ACCIDENT¹

in the following circumstances:

The Accident

1. Shortly after 9.12.40 am on Sunday 24 June, Gary Wilfert, a Work Supervisor who had earlier been engaged on a window cleaning task carried out on behalf of his employer, CBD High

¹ The examining pathologist, Dr Shelley Robertson stated in her initial report (exhibit 13 page 7), that Venlafaxine was found at post mortem at a level, which was in the therapeutic range.

Dr Robertson further reported that, *'While venlafaxine has been shown not to affect psychomotor, cognitive or complex behaviour performance, it may impair judgement or motor skills and its role as a contributing factor in the causation of this accident cannot be excluded'*.

The deceased also had underlying significant coronary disease. *This may have produced sudden incapacity thus contributing to the accident.*

[See also the evidence of Mrs Charlotte Wilfert from transcript page 437, concerning how her husband had successfully used prescription medication to deal with his depressive illness, since he was first diagnosed in 2003. See also his medical records at exhibit 12(b)]

In a second report Dr Robertson offered (exhibit 13 page 8), that based upon information received from Mr S Zmak, of Worksafe Victoria, concerning the course of conduct undertaken by Mr Wilfert in,

'removing his safety harness and walking on non weight bearing trap doors.'

meant that it was unlikely that he had suddenly become incapacitated as a result of his underlying coronary disease, but that he may have been suffering from impaired judgement arising from either his use of venlafaxine, or from his underlying condition for which venlafaxine was prescribed, *'such as depression.'*

Dr Robertson then formally gave an underlying cause of death, which attributed his use of Venlafaxine and his depressive illness, as factors contributing to his death.

I have now further considered her evidence on these matters as well as Mr Wilfert's medical records as set out at exhibits 12(a) and (b), and Counsels submission. I further note his wife's evidence that Mr Wilfert regularly attended his GP clinic, and followed their instructions 'to the letter', together with her evidence that he was a devoted family man who always took his work seriously, which latter matter was corroborated by his work colleagues. (See in particular the evidence of Francis Comber and Robert Bizley).

In all the circumstances and having regard to the standard of proof, I find that Mr Wilfert died from head injuries without contributing factors, (and exclude from the finding a reference to either Venlafaxine or Depressive Illness as a 'possibly' contributing factor).

Rise Pty Ltd (CBD), was found unconscious on the footpath in front of the former Southern Cross Building site, at 121 Exhibition Street, near the corner of Bourke and Exhibition Street.²

2. Mr Wilfert had arrived at the scene at 7.33 am, and can be seen in the Elevated Work Platform basket, (EWP) and approaching the underneath the grill area at 8.07 am, having earlier loaded equipment into the EWP. Due to obstruction the view does not show, when he first opened a grill and entered the glass bottoms area, but does show that he returned to ground level at 8.58 am. Mr Wilfert can next be seen re-entering the EWP at 9.05 am, and again elevating the platform basket towards the grill.³
3. Later his safety harness was located on the grill floor immediately adjacent to that section of the glass bottoms, near to the position from which Mr Wilfert is known to have fallen. An inspection of the available CCTV does not reveal how it came to be there.⁴
4. Shakira Ryan, a pedestrian witness to the Sunday work, observed a person (Mr Wilfert) standing in an area behind glass, immediately adjacent to an area of internal window, situated some six meters above the footpath and cleaning the internal outer window surface, while apparently standing on the framework within. At this time she also noticed that he was standing with his legs spread widely, which I note is consistent with his straddling two louvre's and resting on their outer frames, at the time of her observation.⁵
5. Thereafter it is probable that Mr Wilfert inadvertently put his weight on a then closed louvre resulting in the bolt, which held that louvre in place, giving way, - causing his fall through the then vacant space and onto the bitumen footpath below. As above, he can be seen falling to the ground at approximately 9.12 am.

² The building had been built by Multiplex Pty Ltd and that company retained control of the maintenance of the building, while contracting the cleaning duties to Consolidated Property Services, (CPS). CPS did the internal cleaning and contracted the external cleaning initially to Hi Glaze Pty Ltd, and later to CBD. See further discussion at paragraph 17 below.

³ See written record of time dated CCTV, in attachment to exhibit 10, showing pavement beneath elevated vent area from which Mr Wilfert fell, and also transcript from page 407.

⁴ The fact that Mr Wilfert took his harness (together with cleaning aids and materials), into the elevated grill area suggests that he intended to use the harness while there. The evidence does not establish whether there was a suitable position within the grill, to anchor his harness. Further while the evidence tends to establish that Mr Wilfert worked within the grill for nearly one hour before he fell, it does not establish whether while so working he attempted to or was able to, anchor his harness during that period.

⁵ See transcript page 361-62. Mrs Shakira Ryan further testified that,

'I heard the thump. I didn't actually see him in motion falling. I heard him hit the ground. I actually saw the trap door open and I guess I just computed that Oh its fallen open and he has dropped what he was using to work with and I thought he had dropped some clothing. I didn't actually see him fall'.

6. Consistent with this version of the event, a Mr Ronald Williams, a car park manager, who was also in the vicinity at the time of the accident, heard a '*thump*' sound and a moment later, having turned towards the noise, saw a bucket hit the ground and water splash out of the bucket on to the pavement.⁶
7. Mr Wilfert was attended to by a passerby, and an ambulance arrived soon after. He was admitted to the Intensive Care Unit (ICU), at the Royal Melbourne hospital, suffering from a severe head injury with commuted skull and facial injuries and a diffuse brain injury, injuries described as, '*not compatible with life*'. He was put on life support, which was later withdrawn. He passed away in the ICU at 8.45 pm the following day.
8. Mr Wilfert was regarded as a careful worker and a responsible family man, who was well thought of by his employer and workmates.

Issues

9. The principal issues which have arisen for consideration during this inquest are as follows:
 - 1) Was the proposed system of work relating to the task to be undertaken by Mr Wilfert, as safe as was reasonably practicable, to control the risk of his falling through or past the steel frames, whilst carrying out the task.
 - 2) Was the proposed system of work the subject of an adequate risk analysis, written or otherwise.
10. The evidence also calls for comment on the following matters:
 - 1) Whether building designers have an obligation to ensure that building designs are safe for persons employed to maintain them.
 - 2) What if any recommendations should be made, arising from the circumstances of Mr Wilfert's death.⁷

⁶ See exhibit I, page 2. Having regard to the observations of Mrs Ryan, Mr Williams and exhibit 2(h), as well as the remainder of the evidence, it appears that Mr Wilfert, working alone, had entered the EWP basket at ground level and then elevated the EWP to a position underneath a louvre, near the Bourke/Exhibition Street corner, which louvre he then opened. He then took the EWP basket to a level immediately beneath the opening, so created.

From this position, it further appears that he climbed into the building to continue his cleaning while moving along the louvres in a westerly direction. Later one of the louvre's, which can also be seen in an open position (exhibit 2(h)), appears to have given way as described above, causing Mr Wilfert to fall through the opening so created, and to the ground below.

⁷ See submission from Mrs Wilfert.

The Workplace

11. Mr Wilfert and his team had been tasked by his employer (CBD), to complete the outer wall window cleaning. The team were to clean all external windows on the 41-story building.
12. Later he also received a request from Mr Griscti the manager of Consolidated Property Services Pty Ltd, (CPS) the lead cleaning contractor at 121 Exhibition St, to undertake the additional cleaning of the inner panels of the bottom most glass, (the glass bottoms), which request he accepted. We also know that this request came on or after the 21st of June 2007, as Mr Griscti contacted CBD Director, Mr Robert Bizley on this day, asking that the glass bottom cleaning be added to the original job. Mr Bizley referred Mr Griscti on to Mr Wilfert as it was Mr Wilfert, who had been left in charge over this period, while Mr Bizley was in Darwin on holiday.⁸
13. It is also relevant that by the afternoon of Saturday 23 June 2007, the inner and outer surfaces of the curtain wall had been cleaned, which left only the glass bottoms to be completed. On the evidence the Saturday work had included the use of an EWP to clean the lower outer glass windows, and this work had been undertaken by Mr Wilfert and co worker Michael Driver, and was the subject of a written risk analysis, (not recovered).⁹

Michael Driver, further testified that Mr Wilfert told them on the Saturday afternoon that he intended to come in and complete the work on the glass bottoms, the following day, Sunday June 24.

Discussions with Mr Bizley as to the cleaning of the glass bottoms.

14. I note that the glass bottom cleaning had, been contracted by Mr Griscti and Mr Wilfert, for completion by Saturday 23rd June 2007, together with the rest of the earlier contracted external window cleaning.¹⁰

⁸ Robert Bizley was the managing director of CBD High Rise Pty Ltd, and Mr Wilferts employer. CBD employed 8 cleaners including Mr Wilfert, Mr Francis Comber and Mr Driver. Mr Griscti was an area manager employed by Consolidated Property Services Pty Ltd, which company was contracted to provide management services at 121 Exhibition Street.

⁹ See evidence of cleaner Michael Driver at transcript page 130. The risk analysis documentation, not recovered, was the subject a comment by Counsel for CBD, at transcript page 120, where several possible explanations for the absence of the analysis document, were offered.

¹⁰ See incident report prepared by Mr Mark Guinea, Consolidated Property Services HR Manager at exhibit 2(g) page 1. See also statement of Robert Bizley to Jim Kent on the 29th of March 2008. At page 6 of that statement, (page 8 of 90 of Mr Kents report), Mr Bizley states that Mr Griscti rang him on the 21/06/2007, some three days before the accident to ask him to extend the original job to include the internal glass area, the glass bottoms, in the cleaning contract. He states

15. It is further relevant that on the available evidence Mr Bizley was regularly in touch with Mr Wilfert, during his absence from Melbourne and that he later gave variable information concerning their discussions about the additional work in respect of the glass bottoms.
16. In his first signed statement to police made on the day of the accident, (which version was later retracted), Mr Bizley was said to have told police that on Friday the 21st, he and Mr Wilfert had discussed the work to be undertaken on the glass bottoms, and Mr Wilfert's plan was to complete the work over the weekend.

*'This area would be 25 feet off the ground. I said to him not to worry, but he wanted to finish it off.'*¹¹

In a later statement on this same issue, this one provided to a Mr Jim Kent, the private consultant later employed by solicitors for CBD High Rise Pty Ltd, Mr Bizley, (again the Managing director of CBD) stated:

'I continued my holiday and although I spoke to Gary Wilfert on several more occasions the cleaning of the windows wasn't raised by Gary, nor did I think to ask any further about it.

*When I look back on this matter it didn't occur to me that the bottoms were to be cleaned'.*¹²

Direction given by Mr Bizley, as to how the cleaning of the glass bottoms should take place

17. In this same statement, I further note that Mr Bizley offered that two weeks prior to the commencement of the job, he had attended the site with Mr Wilfert his work supervisor, to discuss work methods to be used to complete the whole project.

*'The work required was routine other than on the north side face of the low rise, where this incident occurred, as a result of the unusual design of the building at this location.'*¹³

At this time according to Mr Bizley, he and Mr Wilfert further discussed how the internal cleaning at this particular location, i.e. the glass bottoms, should proceed, this I note, not

that Mr Griscti was typically very demanding and wanted the job done at no additional charge and that as he was on holiday, he asked Mr Griscti to make his request to Mr Wilfert, whom he had left in charge.

¹¹ See exhibit 8. See also report of Mr Kent at exhibit 13, page 69 of 90.

¹² Robert Bizley to Jim Kent, of exhibit 8(a) at page 6.

¹³ Ibid at page 4.

withstanding the fact that the taking on of responsibility for such additional work was not being contemplated by either CBD, or any of its staff, at that time.¹⁴

18. I also note that this additional work was not included in the Purchase Order issued by CPS to CBD, which spoke only of the external cleaning of all windows.¹⁵ It was also not included in any relevant JSA, which was the formal risk assessment document, required to be completed before the work commenced.¹⁶
19. It is also the case that the existing and pressing need to clean the glass bottom area, had come through his superiors, to Mr Gristi's attention,- this in the setting of the failure of a Mr Darren Barry's company, Hi Glaze Window Cleaning Australia Pty Ltd, to earlier complete the cleaning of the glass bottoms, and the disruption this had apparently caused to building tenants. These events had led Mr Gristi to sever ties with Mr Barry and to search for a new contractor, and it was in these circumstances that he sought to (additionally), engage Mr Bizley and CBD Pty Ltd, who were already on site, to also do this work.

¹⁴ Ibid at page 4-5. According to Mr Bizley, the system of work he had proposed be undertaken by Mr Wilfert and his team, reference the glass bottoms, was for the team to clean the inside or interior glass panels, (the bottoms), of the lowest section of curtain wall, by the use an EWP, which was to be deployed to elevate a cleaner from the surface of the pedestrian footpath in Bourke street, to a position under each of the louvers, i.e. some six meters above the footpath.

From this point and while remaining within the EWP basket the cleaner was to slide the bolt undone holding each of the louvers in place, which was then immediately above him. Thereafter he was to lower the louvre on its hinges, at an angle of 90 degrees to its original position, thereby allowing access to the bottom of each of the glass interior curtain wall panels.

Again, according to Mr Bizley, the proposed system of cleaning was to take place by the cleaner reaching in while remaining within the EWP, i.e. without transferring his person (or weight) to the metal louvers. This was supposed to occur with the aid of a bucket of water, and cleaning tools and tool extensions.

Importantly, the suggested process was to be carried out in respect of each of the steel frames, with each frame to be opened in this manner and following completion of cleaning in that area, with the cleaner then closing each frame and descending and moving the EWP to a position below the next frame. Thereafter he would again elevate the basket and open the next steel frame, before cleaning the glass bottom above that position. Further, the cleaner was to remain in the basket of the EWP at all times, and to carry out the work while wearing a fall restraint harness, which was to be fixed by lanyard to the EWP. The lanyards in use on this job were of one meters length, thereby limiting movement of the user to one meter from the EWP.

¹⁵ Ibid at page 3.

¹⁶ See discussion at footnote 9 above, concerning the missing risk documentation.

20. It is further relevant that this part of the work, (the cleaning of the glass bottoms), had earlier been identified to Mr Griscti, by Mr Barry sometime earlier, as an area of difficulty. Specifically Mr Barry described that he found some of the locking pins on the lower glass wall as,

*'either missing or broken.'*¹⁷

21. I further note that an inspection of the area soon after the accident, by consultant Mr Kent, confirmed the poor condition of surrounding bolts and latches.¹⁸

Findings

22. Having further considered all of the evidence including Mr Bizley's evidence of his various recollections of these events, plus Counsels submissions, I find that it is more probable than not, that the matter of the glass bottoms and Mr Wilfert's intent to finish the work over the weekend, was discussed over the phone by the two, and was therefore known to Mr Bizley before that work commenced, i.e. as Mr Bizley's now retracted statement exhibit 8, suggests.

23. I am also satisfied that it was in these circumstances that Mr Wilfert came in on the Sunday morning to complete the recently added part of the job, and that he did so without a clear understanding of the dangers previously identified to Mr Griscti by Mr Barry, concerning the poor condition of the louvre frames and the bolts, which held them in position.

24. In so finding I note that the evidence establishes that both Mr Bizley and Mr Wilfert were in regular contact during Mr Bizley's absence and that there was no reason for the matter of the glass bottoms to have been discussed by the two, before it was raised by Mr Griscti, i.e. on or after 21 June some few days after Mr Bizley's departure. It is also the case that there was good reason for both to discuss it after that time.

25. Having further regard to the timing of their alleged visit to the workplace, (some two weeks before the work commenced), and Mr Bizley's allegedly detailed conversation with Mr Wilfert, and the content of the work order under consideration at that time, I also find that Mr Bizley has failed to satisfy me that his earlier direction to Mr Wilfert dealt specifically with the narrow question of how he, Mr Wilfert was to carry out the cleaning of the glass bottoms, such direction being entirely remote from the objectives of both men at that time.

¹⁷ See exhibit 2(i), a letter to Mr Griscti, dated 8/9/2006.

¹⁸ See footnote 5 above and the Kent report at exhibit 13, page 22 of 90.

26. I also find that although only temporarily in charge of the job, Mr Wilfert took on the task as an addition, and without the benefit of a formal risk analysis.¹⁹ I find that he did so as he was keen to complete the companies first job on site, within the time stipulated by Mr Grisetti, (his employer's new client and the lead cleaning contractor at the site), and before the return of Mr Bizley the following day.
27. It is also relevant that he did so having told co-worker Michael Driver of his intent to complete the work on the Sunday, and having earlier mentioned to fellow co-worker, Francis Comber, that he knew that the work would be both awkward and time consuming.²⁰

Was the proposed system of work safe?

28. As set out above, this was the first time Mr Wilfert's company, CBD, had entered into an agreement with Contracted Property Services Pty Ltd, to do the window cleaning work at 121 Exhibition Street.
29. Mr Bizley further testified that Company policy dictated that at least two employees were required to undertake the task being carried out by Mr Wilfert, at the time of his fall.²¹
30. His additional evidence was that Mr Wilfert had been counselled about this issue on a previous occasion, when he was said to have broken this rule.²²
31. I note here that subsequent to the accident resulting in Mr Wilfert's accidental death, a new and safer system of work was introduced. Under this approach, the interior glass panel bottoms were instead cleaned, while the cleaner stood on the decking immediately above the glass bottoms and reached down from that position.
32. Such an approach, in practise at the time of inquest, was viewed as safe and effective by those concerned, this for the reason that it allowed the cleaner, to approach the glass bottoms downwards from above, without the need to use the EWP basket, or to be limited in movement by the harness while the cleaning continued.²³

¹⁹ See discussion below at paragraph 32.

²⁰ See exhibit 13 page 40.

²¹ The importance of a '*second pair of eyes*' is elaborated on in the evidence of expert witness, Mr Allan Beacom , set out below.

²² See transcript page 318 -319 at lines 26-11.

²³ Such a change was seen as both time and labour saving. It also permitted the cleaning of the glass bottoms without the inconvenience to staff arising from the need for the particular cleaner to frequently move while within the EWP, in and out of the area around the glass bottoms, and up and then down to the pavement below.

33. I further note that the Victorian Workcover Authority's position was that use of the EWP, together with a body harness and attached lanyard, i.e. the so called 'old' system, constituted a safe system of work. It is also the case that the Authority viewed the system as consistent with the requirements of the Occupational Health and Safety Act.²⁴
34. I find however that in fact, little or no planning had gone into the preparation for the cleaning of the glass bottoms and that Mr Wilfert was left to his own devices with an uncertain plan, and in broad ignorance of the danger, he faced. Further, I find that the 'old' system was never formally adopted by CBD in respect of the glass bottoms, and it follows therefore that a safe plan was not in place at the time of Mr Wilfert's accident.

Was the proposed system of work the subject of an adequate risk analysis?

35. It was not in dispute that the old system for undertaking cleaning at 121 Exhibition had been recorded by CBD on Job Safety Analysis, (JSA) documentation, commonly prepared by the Company before the commencement of each job.²⁵
36. Co-worker, Mr Driver stated that he believed the relevant JSA, (which was not specific to the internal glass bottoms), applied equally to both the internal and external walls.
37. As above however I find instead that the particular task of cleaning the inside of the glass bottoms curtain façade did not form part of the original written order as between CBD and the Building Manager, CPS, as importantly the risks involved in this particular task were quite unique to the task itself.
38. Again, as set out above it is also relevant that the CPS manager Mr Griscti had contacted Mr Bizley about cleaning the inside glass bottoms, during the job and that he was only then asked by Mr Bizley to speak to Mr Wilfert about the matter, as he Mr Wilfert was in charge of the business at that time.
39. Again, it is further the case that the subsequent investigations carried out by Mr Kent confirmed that the sliding bolt mechanisms on the series of grill hatches, which needed to be individually opened to gain access for cleaning each particular area while remaining harnessed

²⁴ See Victorian Workcover Authority submission to the Coroner at page 5, and exhibit 13 appendix 4(b).

²⁵ See again discussion at footnote 9 above as to the fact that this documentation was not presented in evidence.

to the EWP, - were considered inadequate for a number of reasons. Some of the sliding bolts did not operate and could not be opened, and were otherwise damaged.²⁶

40. I also note the evidence of Mr Griscti, who testified that he conducted an inspection of the building, together with the Director of CBD Robert Bizley.

41. Mr Griscti stated:

“During our inspection I specifically pointed out the vented area and told Robert (Bizley) that this was the most difficult part of the job. I told him Darren had already done this part of the operation with a scissor lift and specifically told him that there were faulty latches. I told Robert how I thought the job should be done safely. I described how previously I had seen the other contractor Hi Glaze perform this task. That is, use the scissor lift to lift the two specialist window cleaners up to the metal grates, unlatch and open the grates, then use the elevated work platform, clean the window using a squeegee on a pole from the platform. When the window is clean, lower the platform, latch up the metal grate, and move to the next window/grate.”²⁷

42. Mr Bizley agreed with this account in his own testimony and that the inspection had taken place from street level. He stated that Mr Wilfert was present at the inspection although Mr Griscti did not suggest in his statement that Mr Wilfert had in fact also been present. Mr Bizley further testified that the hatches were flimsy in design and,

‘the bolts were too small for their application given the over all dimensions and weight of the hatch,’

43. As above and relevantly Mr Wilfert also had a later conversation with co-worker Mr Comber during work on the Friday, in which both acknowledged that the louvres were not safe to stand on.²⁸

44. I further note the observations of Ms Shakira Ryan, referred to above, concerning Mr Wilfert’s positioning of his feet, while standing on the steel frames. The further evidence of Mr Allan Beacom is also relevant. He testified that if Mr Wilfert was, unable to access the

²⁶ See discussion at paragraphs 15-16 of the written submission of CBD Pty Ltd and the additional evidence of Mr Darren Barry referred to at paragraph 16-17 above.

²⁷ See statement to Work Cover at exhibit 13 (brief) at page 90 and 91.

²⁸ See exhibit 13 page 40. Mr Francis Comber had 12 years experience working in the industry and was the lead hand at CBD. (He described himself as the third in command after Mr Wilfert).

glass bottoms while remaining separately anchored via his harness and lanyard, because the shutters were faulty - that it was incumbent upon him to stand back and reassess his strategy.

45. He should additionally have had '*a few pairs of eyes*' to assist with his reassessment. If they (such persons) were collectively not happy with any alternative strategy, that the task should have been put off until all were satisfied that the work could be carried out safely.²⁹
46. On all of the evidence then I find that a relevant written risk assessment concerning the pending work, had not been undertaken before Mr Wilfert commenced work on the Sunday morning. I further find that any such JSA documentation which had earlier been prepared, in respect of the bulk of the external cleaning work did not apply to the glass bottoms section - a specific task with special requirements and one which was only added after work commenced.
47. Having so decided, and having particular regard to the evidence of Mr Comber, I am also satisfied however that by the time he reached the point of entering through the first louvre, that Mr Wilfert, an experienced window cleaner and supervisor, had had a sufficient opportunity, and also good reason, to closely examine the condition of the louvers. Further, to have obtained an idea of the danger involved in his leaving the EWP or alternative anchor point, and the relative safety of his lanyard harness, for the louvers with their inadequate latches and bolts.

Conclusion

I find that it is more probable than not that when he commenced work on the Sunday morning, Mr Wilfert took his harness to the vicinity of the glass bottoms intending to use same. In so doing I find that he was relying on his own nous and experience in the industry, rather than any properly constructed risk assessment. I also find that he had either not specifically been informed or remained broadly ignorant of the degree of deterioration of the lever bolts, when he began that work. After commencement and upon his elevation he may, or may not have observed their condition, before he commenced his task.³⁰

²⁹ See the evidence of Mr Allan Beacom a civil engineer, who is employed by Workcover Victoria as the manager of its division of Construction Health and Safety Operations. His evidence on this and other matters is set out below.

³⁰ See discussion of this issue in the CBD submission to the inquest at paragraph 15. I further note that the positioning by Mr Wilfert described above, while standing behind the glass bottoms (as described by Mrs Shakira Ryan), tends to support the CBD submission that he had some awareness of the fragility of the louvers, before he forsook his harness/lanyard connection, and commenced or later undertook his cleaning task, without that protection.

However, risk assessment is an ongoing process. It continues as long as the task continues. In this instance, Mr Wilfert, who was sufficiently experienced to assess risk was duty bound to continue to assess that matter as the job continued.

I further find that the presentation of risk as it appeared to Mr Wilfert, before he reached the point of leaving the EWP, (and potentially his harness), and putting his weight on the horizontal louvre frames, was, or should have been sufficient to inform him of the perils associated with the method of job completion, he had settled upon.

It is also relevant that this was the first time that CBD Pty Ltd had undertaken this task and given the lack of relevant experience at this site, that it was additionally appropriate that Mr Wilfert proceed in a conservative manner, this notwithstanding any need to delay the work that might arise from that course of action.

While I remain understanding of the circumstances in which he found himself, it must always be remembered that office window cleaning, is an innately dangerous task. I find that in such circumstances Mr Wilfert should have stood back and re-assessed his response in a properly conservative manner. The evidence does not suggest that this occurred and I conclude therefore that his decision to proceed without delay and without a sufficient risk analysis, and the use of a harness and the assistance of a colleague, was itself a careless course of conduct, which contributed significantly to his fall.

COMMENT

Pursuant to section 67(3) of the **Coroners Act 2008**, I make the following comment(s) connected with the death:

- 1) **Do building designers have an obligation to ensure that building designs are safe for persons employed to maintain them.**

There are two regulatory regimes relevant to this question. The first is the building regulatory system in Victoria and the second is under the OHS Act and OHS Regulations.

First, in relation to the building regulatory regime, the owner of land or its agent must apply to a Registered Building Surveyor ("RBS") for a building permit to construct a structure such as the building. Under s 24(1) of the Building Act 1993 ("Building Act"), the RBS must not issue a building permit unless s/he is satisfied that the building work and building permit will comply with the Building Act and the *Building Regulations 2006* ("Building Regulations"). Regulation 109 of the Building Regulations states that the Building code of Australia ("BCA") is incorporated into the Building Regulations. The BCA is a code

pursuant to which various minimum criteria for the construction of buildings are codified. The BCA contains both 'Deemed to satisfy' provisions where specific construction techniques, if replicated, are deemed to comply. Alternatively, the BCA allows an alternative building solution if it meets the performance requirements of a given building element constructed for a particular purpose.

In the present case, the building regulatory regime would apply to issues including ingress, egress, fire safety and structural integrity of building elements.

The interaction of the two regimes is dealt with briefly in guidance material "Designing Safer Buildings and Structures" 1st Edition December 2005 ("Guide"), which was issued as an education tool prior to the obligation under section 28 of the OHS Act commenced on 1 July 2006. Section 28 states:

Duties of designers of buildings or structures

(1) A person who designs a building or structure or part of a building or structure who knows, or ought reasonably to know, that the building or structure or the part of the building or structure is to be used as a workplace must ensure, so far as is reasonably practicable, that it is designed to be safe and without risks to the health of persons using it as a workplace for a purpose for which it was designed.

Penalty: 500 penalty units for a natural person;
 2500 penalty units for a body corporate

(2) An offence against subsections (1) is an indictable offence.

As Mr Beacom³¹ stated, section 28 of the OHS Act goes further than the building regime and requires the designer to anticipate the building as a workplace. Section 28 places the obligation on designers "...*who know, or ought reasonable to know that the building...is to be used as a workplace*".

The Guide advises at page 6 that this duty extends to "*maintenance, repair, service and cleaning activities*." Mr Beacom stated that largest impact of section 28 is likely to relate to the safe design aspect of buildings in regards to roof access, and façade maintenance activities.

³¹ Mr Beacom, a WorkSafe employee, was the manager of Operations for Construction Health and Safety Operations, FOR WorkSafe, Victoria.

Mr Beacom also stated that Part 3.5 of the OHS Regulations 2007 and the requirements of the OHS Act would relate to any window cleaning activities that:

- (i) Require permanent plant such as Building Maintenance Units to be installed;
- or
- (ii) Make provision for temporary plant such as swing stages

These provisions place an obligation to design plant, coupled with the identification of hazards associated with use of the plant, and the provision of information regarding safe use, and the training of operators.

In particular, after wide industry consultation, WorkSafe issued a compliance code 'Prevention of Falls in General Construction' dated September 2008. That Code referred directly to section 28 of the OHS Act and stated:

Designers of buildings or structures have a duty to ensure, so far as is reasonably practicable, that buildings or structures are designed to be safe and without risks for people using them as workplaces. This duty applies to the intended end use of the building or structure, including routine cleaning and maintenance, but does not extend to the construction phase.

I am satisfied then that there is already in place a clear statement of the legal responsibility of designers and architects, which is sufficient to ensure that buildings are designed with due regard to occupational health and safety.

2) **What if any recommendations should be made arising out of Mr Wilfert's death.**

The statistical data collected by Workcover Victoria, and tendered through Mr Beacom, is informative. From this material we know that since the incident there had, at the time of inquest, been a total of 9 notifiable incidents relating to window cleaning. None of these resulted in fatality, and that a total of 6 of the 9, involved falls from a ladder.³²

Working from ladders is also dealt with under the current regulatory regime.

I further note that the focus of the Building Code of Australia (BCA) is to ensure designers of buildings and structures achieve acceptable standards of structural sufficiency, safety, health and amenity. In addition to BCA compliance, designers must also comply with section 28 of the OHS Act, which imposes additional regulatory provisions in relation to occupational health and safety.

³² See transcript page 417.

Worksafe Victoria has developed a guidance document called Designing Safer Buildings and Structures, which has a section dedicated to assisting designers to implement a safety in design process.³³ From the above and having regard to Section 28 of the Occupational Health and Safety Act, and to the safe workplace objectives included in the BCA, I conclude that the evidence before me falls short of establishing a failing of the regulatory scheme relevant to building design and occupational health and safety. It follows that it would be inappropriate to make any recommendation in this case.

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

The Family of Gary Wilfert.

The Property Manager, 121 Exhibition Street, Melbourne.

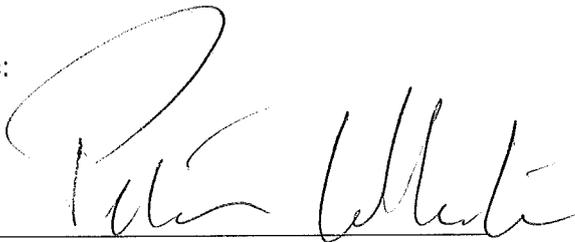
The Managing Director, CBD Highrise Pty Ltd.

The Managing Director Consolidated Property Service Pty Ltd.

The Chief Executive, Victorian Workcover Authority. .

The Chief Executive of the Building Commission, Melbourne.

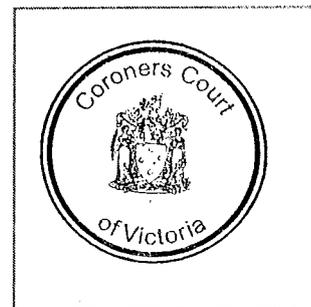
Signature:



PETER WHITE
CORONER

Date:

13/4/15



³³ See exhibit 11(a).