

TRANSCRIPT OF PROCEEDINGS
UNCLASSIFIED

AUSTRALIAN DEFENCE FORCE

AUSTRALIAN ARMY, VICTORIA BARRACKS, NSW

INQUIRY INTO THE DEATH OF
PTE JACOB BRUCE KOVCO

PRESIDING:
GPCAPT W COOK, President

COL M CHARLES, Board Member
MR J O'SULLIVAN, Board Member

COL M GRIFFIN, Senior Counsel Assisting
MAJ E JOLLY, Counsel Assisting
MAJ J HYDE, Counsel Assisting
MAJ A BELKIN, Counsel Assisting

COL C McCONAGHY, representing Affected Persons
LTCOL T BERKLEY, representing Next of Kin
LTCOL F HOLLES, representing PTE Kovco's Parents
COL L YOUNG, representing PTE Kovco

0922 TUESDAY 20 JUNE 2006
DAY 2

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5 PRESIDENT: Good morning, COL Griffin, are you with us?

MAJ HYDE: MAJ Hyde here, sir. Good morning to you.

10 PRESIDENT: Good morning, Major, are you going to continue with your - - -

MAJ HYDE: Yes, I will. Are you happy for him to continue under his former oath or would you like him resworn?

15 PRESIDENT: I would like him resworn, please.

<SOLDIER 17, resworn:

[0923]

20 <EXAMINATION BY MAJ HYDE, continuing

25 MAJ HYDE: Mr President and Members, I'll continue on with reading onto the record the police service statement that I was about to commence yesterday at the finish of proceedings.

PRESIDENT: Thank you.

30 MAJ HYDE:

35 *My full name is (blank). I am currently 23 years of age. I am a private in the Royal Australian Arm Infantry Corps. I am posted to Support Company, 3 Royal Australian Regiment, 3RAR (Para), Holsworthy Barracks, Holsworthy, New South Wales, where since September 2001 I have been employed as (blank). I successfully completed the basically Rifleman Course 2001, Basic Parachute Course 2003, deployed to East Timor 2002, Mortar Course 2003, Sniper Course 2005.*

40 *I also completed my Force Preparation Deployment Training conducted in Holsworthy Barracks, Sydney, New South Wales and Enoggera Barracks, Brisbane, Queensland prior to deploying to OP CATALYST, Baghdad, Iraq. As part of that training I was trained and was being qualified on all weapons used during the deployment. Those weapons included the M79 grenade launcher,*

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5 MAG 58 machine gun, F1 hand grenade, 56 mm short-range anti-
armour weapon (SRAAW), rocket launcher F88 Austyre, F89
Minimi, 9 mm self-loading pistol, F88 grenade launcher
attachment (GLA), 50 calibre sniper rifle, SR98 sniper rifle, SR25
10 sniper rifle, and was familiarised in the operation of the 50
calibre machine gun. I can recall that the 9 mm pistol that I was
trained and tested on during my force deployment training was a
9 mm (blank). During my deployment, my 9 mm was issued
through the Q Store located at (blank), Baghdad, and at that
15 stage the pistols were (blank). I handed my (blank).

20 On 14 March '06 I deployed with 3RAR PARA on OP CATALYST
where I was posted to SECDET IX, Australian Security Forces,
Baghdad, Iraq. I am currently being employed as (blank). I
15 occupied (blank) accommodation area of Australian Embassy,
Baghdad, Iraq, (blank) that room with (blank) and PTE Kovco
who were members of my section. Since that time I have been
accommodated in room (blank) and I share that room with
(blank) whilst in Baghdad on deployment (blank).

25 During my deployment it is a requirement task dependent that we
are required to complete tests of efficiency training (TOET) on all
weapons. However, specifically on the weapons (blank) TOET on
the F88 Austyre 9 mm self-loading pistol and F89 Minimi
30 machine gun, F88 GLA, 56 SRAAW. Whilst in the (blank) more
emphasis is placed on the (blank). However, if we are going to or
tasked to complete tasks within the (blank), a complete TOET
would be conducted on all weapons systems and, in my case, I
would also conduct TOET on the specific sniper weapons
35 allocated to the task.

40 I have personally conducted TOET training (blank) since being
deployed to the Embassy detachment. I myself have been to a
live-fire range whilst in Baghdad on (blank). I am currently
15 employed at the SECDET IX Detachment, Australian Embassy,
Baghdad, Iraq, and the current manning is (blank). The
protection of the Embassy is achieved by maintaining (blank). All
security positions have been allocated a name and a position or
station in and around those grounds. Those positions are called
20 (blank). Each of these security positions have a designated
(blank) promulgated through Standard Operating Procedures
(SOP). Additionally (blank).

25 Within the Embassy grounds there are weapons clearance points
at the (blank). At all times when clearing weapons the buddy

5 system is to be employed. At all times when a weapon clearance is conducted all weapons held by the soldier are to be cleared which includes side arms (pistols). The buddy system has been employed since the start of OP CATALYST including the pre-deployment training and on every other operation that I have been on. All rosters in relation to the duties and piquet timing for my section are done by my (blank), and are promulgated by a (blank) whereby he reads the timings out and we copy them down.

10 About 1330 hours on 30 April '06 I had a conversation with (blank) of the Special Investigation Branch. As a result of that conversation, (blank) showed me a computer-generated topographical representation of the Australian Embassy grounds and buildings contained within. Whilst viewing this document I indicated with a penned X the location of my accommodation. Attached to and forming part of this statement is that topographical representation of the Australian Embassy.

20 On 21 April '06 I was employed as a (blank) Australian Embassy Detachment, SECDET IX, and I was located at the Embassy (blank). I can recall seeing a person I know to be PTE Jacob Bruce Kovco on several occasions throughout the day as PTE Kovco shared the same room. I awoke at 0615 hours and when I returned from the shower room I woke them and PTE Kovco and (blank) and conducted our morning routine. I can recall that PTE Kovco was his normal self throughout this process (blank).

30 I believe that PTE Kovco started on the (blank). I can recall seeing PTE Kovco several times throughout the day. However, we only would have been passing each other on our way to the next security position and would only have shared a brief hello and goodbye.

35 I have known PTE Jacob Kovco for approximately four years after first meeting him in 2002 when he first came to the battalion. I joined the 4th Company in 2004 and PTE Kovco joined in 2005. I can describe Kovco as being about 185 cm tall, with light brown coloured hair and of medium to heavy build. I do not believe he has any tattoos.

40 Since that time I have known him I would consider us to be really good friends. I would describe him as being a good humoured, jovial, a bit of a larrikin, a professional soldier, and that he had a family with a wife and two kids and he was a devoted and happily married man. I can recall that when PTE Kovco ever spoke

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5 about his wife and kids he always spoke very highly of them. I have never witnessed or known him to partake in the use of any drugs, nor have I had any reason to suspect such activity. However, I am aware from social (blank) function that he does enjoy a social drink of alcohol. In saying that I am not aware if he ever drank to excess on regular occasion. He was an extremely active person who enjoyed maintaining his physical fitness.

10 I can confirm that at no time have I ever heard PTE Kovco every mention anything in relation to conducting any form of self-harm. I can state that since I have known PTE Kovco he always handled his weapon in an experienced way and never displayed any form of behaviour that I would have considered to be unsafe.

15 On 21 April '06, are we completed out piquets and returned to our accommodation block, I returned to my room and changed into a pair of shorts and T-shirt. (Blank) and PTE Kovco changed into shorts and T-shirt as well. About 1600 hours I started to play music from my iPod (with speakers pretty loud) and I believe the band was the Cranberries. I can recall that we (all three) were singing along with the songs being played and I had my laptop out on my bed and checking for emails. I said to (blank) that at 1615 hours we were going to the gym. This was between 1605 hours and 1610 hours and I recall that PTE (blank) then got up from his bed and knelt down in front of the fridge to get a drink ready to take with him. I can recall that PTE Kovco was not going to go to the gym with us.

30 I can describe the layout of the room as follows. The room was a demountable cabin with thin wooden walls and a thin steel corrugated roof. The outside walls are lined with corrugated iron as well. It is one of (blank) similar rooms that have been established for SECDET Detachment at the Embassy. There was a doorway facing north (wooden door). To your immediate right is small bar fridge. Next to the bar fridge is a set of bunk beds which are flush against the eastern wall and are occupied by PTE Kovco (on top) and (blank). The head of the bunk beds was at the southern wall and at the end of the bunk was a locker that faced the window (north). Next to that was a locker that was another locker on the eastern wall and opened towards the west. On the northern wall was a window and air conditioning unit and under the window was a small desk. Next to the desk was my single bed with the head of the bed against the northern wall. At the foot

end of my bed there were two lockers on the western wall which opened to the east. The overall size of the room was fairly small.

5 *About 1600 hours, as I was sitting on my bed with my feet on the floor facing an easterly direction with my laptop on my lap in the process of shutting my computer down, I can recall that we were still singing along with the song and singing in a fashion that was mimicking some of the artists by pretending to sing in a high-pitched voice. We were laughing as we sang and having a good time.*

10 *I can recall that PTE Kovco was standing in front of his bunk bed facing east, using his laptop computer which was located on his bed. I can also recall that PTE Kovco always hung his holster and 9 mm pistol on the bed frame of the bunk directly opposite to where I was sitting. PTE (blank) was kneeling in front of the bar fridge facing south and the bar fridge door was open. As my computer was shutting down I was looking at the computer screen. I was aware of where PTE Kovco and PTE (blank) were but I was not looking at them. I can recall that I did not see any movement made by PTE Kovco and within a second or two of the song finishing I heard a noise that at first I thought was a cap or fire cracker going off. Almost instantly PTE Kovco fell to the floor with his feet at the southern end of the room and his head landed at the base of my bed.*

15 *PTE Kovco's head and his upper torso were facing west and his lower torso and legs were lying flat on the floor. I jumped up and placed my right hand under PTE Kovco's head because I saw a lot of blood. I yelled out as loud as I could for someone to get a medic. PTE (blank) then gave me a shell dressing and I placed that under his head. The door to my room then opened and I saw a person I know to be PTE (blank). I yelled at (blank) to get a shell dressing and he yelled at someone else who I could not see to get one.*

20 *Shortly after, he gave me another shell dressing and in turn a second one. I then said to PTE (blank) to grab PTE Kovco's head. At that stage the person I know to be LCPL (blank) entered the room. LCPL (blank) is a trained combat first aider (CFA). LCPL (blank) assisted PTE (blank) and me in treating PTE Kovco. There was a lot of movement at the doorway, however, I cannot recall who it was. I can recall a lot of voices and a lot of yelling but, again, I cannot remember exactly what was said or by whom.*

5 *All through this, PTE Kovco lay motionless and did not respond to either the spoken word or touch. I felt for his pulse and located a very weak pulse in the neck area. At some stage someone produced a stretcher and, under the command of LCPL (blank), we lifted PTE Kovco on to the stretcher and began to move him outside. I recall that we carried him out the doorway, then turned right and walked down the passageway that separates the accommodation hut and exited that area via the gap in the concrete barriers.*

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15 *When we exited the concrete barriers there was a medical gator waiting for us and we placed the stretcher on to the space provided. PTE Kovco was then driven to the 10th Combat Support Hospital (10CSH), which is about (blank) away.*

20 *I can honestly state that I did not see PTE Kovco remove his pistol from his holster within the room and I am unaware how he shot himself. The only way I thought he may have done it was in a joking fashion because of the song we were singing and the way we were singing it (in a female/homosexual way), that he pulled his pistol from his holster and placed it against his head in a manner to almost say, "This is so gay I would rather be dead," and without realising his pistol was in the (blank) condition and carrying rounds he had pulled the trigger. I have no evidence to support this theory and I did not see PTE Kovco do it, but it is the only way I can explain how he shot himself.*

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30 *I have seen on this operation that action being done by other people. I have seen people pointing their pistols at others and pulling the trigger whilst joking around. This behaviour is something that I have always found to be completely inappropriate and any person I have seen do this I have immediately corrected them. In saying that, I have never seen PTE Kovco do this.*

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40 *I stayed at the Embassy and (blank) hopped on to the back of the gator along with (blank). I can recall seeing (blank) and (blank) administering CPR on PTE Kovco as the gator left the Embassy grounds.*

45 *From there I returned to the accommodation area. I can recall that (blank) was in the room and told me to get my battle gear out of the room without touching anything else. As my F88 weapon had blood and other matter on it, (blank) told me to use PTE*

Kovco's weapon instead and to leave mine there. I can vaguely recall (blank) taking some photos of the room. I was allowed to remove limited equipment and personal gear before the room was secured.

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I can further recall that it was only when I returned to the room that I saw the 9 mm pistol lying on the floor next to PTE Kovco's head. I can recall that the pistol was lying with the barrel facing south and the ejection port was faced out. At no time did I touch the pistol lying on the ground

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After a short time, (blank) returned and spoke to everyone and informed us that PTE Kovco was going to die and if we wanted the opportunity to say goodbye, we could. We then started to make our way to the hospital. (Blank) mentioned that we should get a flag and a unit beret. Once at the hospital, we went into the ER and I said my goodbyes. At that time the ANF and unit beret had been placed on PTE Kovco. I then went outside for a while. I believe that the other guys slowly filed through the ER and did similar actions.

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A short time later, (blank) came outside and informed us that PTE Kovco wasn't breathing on his own and needed a machine to help him. (Blank) further stated that they are going to turn the machine off and that PTE Kovco has been moved to a separate room so we can say our goodbyes. We then all moved into that room and stood around PTE Kovco. An American padre was also present and he led us in The Lord's Prayer. It was decided that the machine was going to be switched off. We all stood around PTE Kovco. (Blank) said some words, followed by a few other members of the (blank). I am unaware who started it, but someone started the unit song and everyone joined in and sang along.

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We then slowly moved out and returned to the Embassy. I have heard the term Allah Akbar before and that was during our intelligence brief prior to being deployed. I am under the belief that it means "God is the Greatest," and is said before terrorists kill themselves. I have never heard anyone from (blank) using this phrase in a joking fashion whilst we have been deployed.

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About 1435 hours on 30 April '06 I had a further conversation with (blank) of the Special Investigation Branch. As a result of that conversation, (blank) asked me to sketch a drawing of the condition of the room when I first got there and of the location of

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the people in that room. Attached to and forming part of this statement is that sketch.

5 *Statement recorded and signature witnessed by SECDET IX, Australian Embassy, Baghdad, Iraq, on 30 April '06, about 1445 hours.*

That completes the reading of the Service police statement, Mr President.

10 PRESIDENT: Thank you, Major.

MAJ HYDE: Mr President, you will recall that in the course of reading that statement a further document was identified, that is, a hand-marked sketch by Soldier 17. It might be a convenient time for him to identify
15 that. You'll see that it wasn't attached to the Service statement. I'll ask that he identifies it and I propose tendering it.

PRESIDENT: Yes, thank you.

20 MAJ HYDE: Soldier 17, I've just handed to you a diagram sketch identifying a room. Can you indicate for the Board whether that is a diagram that you've marked?---Yes, it is, sir.

Does your signature appear at the foot of the page?---It does.

25 I tender the document.

PRESIDENT: Any opposition to the tender of that document, the
30 reception of that document?

COUNSEL REPRESENTING: No, sir.

PRESIDENT: To be marked as Classified 15.

35 **#EXHIBIT C15 - SOLDIER 17'S DIAGRAM OF INCIDENT ROOM**

40 MAJ HYDE: Mr President and Members, if it's a convenient time, I propose showing a short DVD. We can do that this end. It's a small amount of film of a room set up in the fashion that PTE Kovco's room was set up at the time of the incident.

45 **DVD SHOWN**

PRESIDENT: Does the video have sound?

5 MAJ HYDE: No, it doesn't, Mr President, and there are OPSEC considerations.

COL HOLLES: Sir, might the witness be asked if this is a purported re-enactment or whether it's simply a demonstration of something else?

10 PRESIDENT: Is this a re-enactment, Major, or some other activity?

MAJ HYDE: Mr President, it's not a re-enactment and that is one of the reasons that there is no sound. We don't propose to re-enact. It is simply some footage of the room and it gives you an idea of the layout of the room. That is the only thing that we'd invite you to take from a viewing of this video.

20 PRESIDENT: Yes, thank you. The quality of the picture could best be described as fair. Ultimately is the original video being made available to us at some later time?

MAJ HYDE: Yes, it will, and that won't to the moment, Mr President. As I understand it, there is a copy that's available to you there but there were some technical difficulties with it and that's the reason that we've played it in this fashion. But it will be made available.

PRESIDENT: Thank you.

30 MAJ HYDE: Mr President, I would propose asking this witness whether that is a room located at the Embassy. I'll ask Soldier 17 to identify whether that is or is not and I then propose to tender the video, if that's convenient.

35 PRESIDENT: Yes, please proceed.

MAJ HYDE: You have just seen a video played on the screen. Are you able to tell the Board whether that is the room that you were in at the time of the incident or some other room?---It's the same room that we were in, sir.

40 Could I ask you to consider whether it is the same room layout or the actual same room?---It's the exact room that - I'm sure.

45 I tender the video.

PRESIDENT: Is there any opposition to the tender of that?

COUNSEL REPRESENTING: No, sir.

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#EXHIBIT C16 - VIDEO OF ROOM WHERE INCIDENT OCCURRED

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MAJ HYDE: Mr President, could I now invite you to have played the SIB video of the room layout?

15 PRESIDENT: Yes, thank you. As I understand it, MAJ Jolly is attempting that as we speak. If you would standby, please.

20 MAJ HYDE: Mr President, can I just clarify that there are perhaps some unpleasant images that may appear on this next segment of film. As I understand it, I have an indication from MAJ Jolly that the next of kin and family are happy to have it played in open Court but I should clarify that and flat that as a possible issue.

25 PRESIDENT: I'm hopeful that the Counsel Representing have seen the video?

COUNSEL REPRESENTING: Yes, sir.

PRESIDENT: And in turn the family is content for us to play it?

30 COUNSEL REPRESENTING: Yes.

MAJ JOLLY: Are you happy for me to play it now, sir?

35 PRESIDENT: Subject to any comment from the Bar table?

COUNSEL REPRESENTING: No.

PRESIDENT: Carry on, Major.

40 MAJ JOLLY: There is no audio for OPSEC reasons.

PRESIDENT: The video is starting now.

45 MAJ HYDE: Thank you, sir.

VIDEO SHOWN

5 MAJ JOLLY: Sir, I have to stop it there because - it was about to finish -
when it finishes, it reverts back to the original image of it and that image
is not to be shown.

10 PRESIDENT: Thank you. The members of the press may have noticed,
as the video opened, there was a label on the door with some names on
that door. Those names, please, are not to be published. We are very
keen to protect the security of the individuals who were in that room and I
formally direct that those names not be published. I thank the press for
their consideration.

15 Thank you, MAJ Hyde.

MAJ HYDE: Mr President, if it's convenient, we'll simply mark that
video for identification at this stage and it will be proved more formally in
due course.

20 PRESIDENT: Very well, then, is everybody content with that course?

COUNSEL REPRESENTING: Yes.

25 PRESIDENT: It's marked MFI A.

#MFI A - DVD OF INCIDENT ROOM

30 MAJ HYDE: Mr President, if I can also indicate that the witness
currently in the box has not viewed that video footage and I just make that
point for the benefit of the Board and for Counsel Representing.

35 I know propose, if it's convenient, to have viewed seven photographic
images. Again, can I indicate, Mr President, that they are quite unpleasant
and may be upsetting to some people.

40 PRESIDENT: Again, I take it that the Counsel Representing the family
have seen these images and they're content for us to see them?

LTCOL HOLLES: I haven't seen these images, sir.

45 LTCOL BERKLEY: I haven't seen them. Perhaps a short break, sir, so
we can - - -

5 PRESIDENT: Perhaps we might take a short adjournment. MAJ Hyde, the representatives of the family haven't yet seen the pictures. I propose to take a five or 10 minute adjournment now to allow them to do that before we show them in the wider forum. We'll take an adjournment.

ADJOURNED [1004]

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RESUMED [1022]

15 PRESIDENT: Thank you, MAJ Jolly, please continue. I take it there's no opposition from the family?

LTCOL BERKLEY: No, sir.

20 LTCOL HOLLES: No, sir.

PRESIDENT: Thank you.

25 **PHOTOGRAPHS SHOWN**

MAJ HYDE: That's the end of it, sir.

30 PRESIDENT: Thank you, MAJ Hyde, we've seen those photographs now and you might continue.

MAJ HYDE: If they could be marked for identification and we'll prove them more formally in due course.

35 PRESIDENT: Anybody got any opposition to that course?

COUNSEL REPRESENTING: No, sir.

40 PRESIDENT: They will be marked as MFI CB.

#MFI CB - SEVEN PHOTOGRAPHS

45 MAJ HYDE: I now propose to ask Soldier 17 some further questions and

I'll proceed with that now.

5 Soldier 17, could I ask you whether you can recall who first went into your room following the finish of your duty on 21 April?---I'm not entirely sure, sir, I think it was myself.

LTCOL BERKLEY: I'm sorry, that's really poor hearing.

10 PRESIDENT: We have very little volume from the witness, so if the witness could speak up, please.

15 MAJ HYDE: Yes, he'll do that. Soldier 17, I think you've just given evidence that you went into your accommodation first. Do you recall how long you were there before you were joined by either Soldier 19 or PTE Kovco?---I'm not entirely sure how long, sir, probably five minutes at the most.

20 Who was it that first came into the room after yourself?---I wouldn't have a clue, sir, I don't remember.

Do you remember how long it was before PTE Kovco and Soldier 19 came into the room after you entered?---The exact time, sir, I couldn't say, to be honest.

25 What is the next thing that you remember that occurred in that room? I would like you to think about what activity you were doing first, what activity PTE Kovco was doing first and what activity Soldier 19 was doing first?---As best I can recall, sir, went in and turned my laptop on. I don't remember who came in next but I know usually what happens, Jake
30 turns his laptop on as well and then Soldier 19. When we finish work, usually about an hour, give or take, we go to the gym just before dinner and we usually get changed straight away.

35 Could you tell the Board whether you occupy a single bed or do you occupy one of the bunks?---Single bed, sir.

40 When you opened your computer, can you tell the Board where you were seated, if indeed you were seated?---Yes, sir, I was seated on the end of my bed closest to the door.

Can you say what your first recollection of PTE Kovco was at the time you were looking at your computer?---What do you mean, sir?

45 Well, I mean, what do you recall him doing? What is your first memory of him doing on return - on his returning to the accommodation?---Taking

his - because you've got to take all your body armour off and he usually just placed it next to his locker, so I think he took it off and then got his laptop out and turned it on.

5 When you say that he got his laptop out, did you see him do that?---No, sir.

At any stage did you see him using his laptop?---Yes, I did, sir.

10 Whereabouts was he using his laptop?---On the top of his bed.

Are you able to say at what position on the top of his bed the laptop was located?---Not exactly to me, sir, more towards the window end of the room but not right at the footage there.

15 When you say "the window end of the room", do you mean the wall - do you mean away from the door?---Yes, sir.

20 Are you able to say how long he was using his laptop in approximate time?---Roughly three-quarters of an hour, sir.

Were you speaking to him whilst he was using his laptop?---Yes, sir, on and off, because we were singing as well.

25 You say that you were singing, did you have music on or were singing independently of that?---No, sir, we had music on. We had my iPod on and we had it on shuffle.

30 When you say you had your iPod on, were you playing music over speakers?---Yes, sir.

Can you tell the Board whether those speakers were producing a significant degree of sound or was it on quietly?---It was pretty loud, sir, for the size of the room.

35 You say that the music was on "shuffle" - I take it that it was not one single album that was being played?---Soldier 19 was changing around but when it happened the Cranberries were playing and as in "shuffle" I mean it doesn't play from first, second, third, it just goes one, maybe 20, then back to two.

40 Was it a Cranberries album or was it - - ?---Yes, sir.

45 - - - the complete album. Was that your album or someone else's?---Yes, it was mine, sir.

Whilst you were singing was it only in relation to one song?---No, sir. As a song came on, if we knew it - because not all of us know every song. Whoever knew it, or if we all knew it we would just sing.

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Are you able to tell the Board what Soldier 19 was doing in the period that you were singing in the room with PTE Kovco?---To the best of my knowledge, sir, I think he was just basically getting unchanged, playing with the iPod, changing the songs up. Besides that I couldn't tell you what he was doing, sir.

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I think you have said in your evidence, that is the statement that's been read onto the record, that you were talking amongst yourselves, and I want to direct your attention to a conversation prior to you hearing - can you tell the Board as best you can what, if any, conversation you had with PTE Kovco?---Yes, sir, we were talking about when we used to be C Company together or - obviously all three of us used to be in C Company, and we were talking about previous bosses we had, a Lieutenant, just - and platoon zones that we had, just basically talking about bush trips, people within our platoons, and basically what we just used to get up to. That's about it, sir.

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Was PTE Kovco participating in that conversation?---Yes, sir.

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Did he know the person that you were talking about as well?---Yes, sir.

Did Soldier 19 participate in that conversation?---Yes, sir.

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Did he also know the person that was the subject of the conversation?---Yes, sir.

How long prior to this incident was that conversation?---Probably no more than five minutes, sir.

35

Prior to this particular conversation were there other conversations that you had with PTE Kovco?---Not that I can recall, sir. We were all talking about the same thing when we were in the room.

40

Whilst you were having this conversation did PTE Kovco have his back to you or was he facing you or was he doing some other thing?---On and off, sir, because I know he was reading an email from Shelley because he was talking - like in between talking about our old platoons and that, he was talking about a webcam that he bought off the locals that he sent back to Shelley and he said something about it wasn't in a box. He forgot to check it. And then probably a minute or two later he goes - he says to us

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that it actually was in the box so he didn't look in it properly, just joking around, and that's really all we were talking about, sir.

5 How long after that conversation did you hear the round?---I wouldn't be able to tell you, sir.

Are you able to say whether it was less than five minutes?---Probably more, sir.

10 Are you able to say whether it was less than ten minutes?---Yes, probably less than ten minutes.

15 When he initially indicated to you that the camera appeared not to have been in the box, what made you think that he was communicating with Shelley, his wife?---At the time I didn't think he was but when he said - like a minute or so later that it actually is in the box, then I thought he was using MSN chat because he wouldn't be able to get an email back that quick. That's why I thought he was talking to you. I'm not sure if he was but - - -

20 At any stage did he tell you that he was using MSN chat?---No.

Or something of that nature at that time?---No, he didn't, sir.

25 Whilst he was indicating to you that the camera may not have been in the box that he'd sent to Shelley, what were you doing?---I was just checking emails from my girlfriend, sir.

30 Were you still in the seated position on your bed?---Yes, sir.

At any stage did you move from your bed?---No, sir.

35 Is it the case that you sat on your bed for some time with your laptop on your knee?---Yes, sir, pretty much the whole time, because when I first got there obviously I took my boots off and - so basically, when I walked in, turned it on, took my armour off - turned my laptop on, sorry, took my armour off and then took my boots off and shirt and then sat on my bed.

40 Are you able to tell the Board whether there were any activities in addition to the singing, that is was PTE Kovco simply singing along and using his laptop on his bunk or were there other activities involved as well?---No, sir, just singing basically and talking on the computer.

Did you (dropout) PTE Kovco - if I can use the term “skylarking” - in any fashion as any of the Cranberries songs were being played?---What do you mean by “skylarking”?

5 Well, were you simply singing along, the three of you, to - and making fun of a particular song? Were there any actions that accompanied that?---No, sir, we were basically just making a kind of song, and singing and - best way I can put it, in a girl’s voice - the best girl’s voice we could do, because she’s got a high voice and the way she was singing the song
10 that we were making most fun of it sounded like she was singing in pain, so we made the best effort we could to basically take the piss out of her, sir.

15 When you say “we made the effort to take the piss out her”, does that include PTE Kovco?---Yes, sir.

Do you have a recollection of him doing that?---Yes, sir.

20 Did you see him and hear him doing that?---Yes, sir.

Was he doing anything else at that time?---No, not that I can recall, sir.

25 Did he have his back to you or was he facing you when he was singing along in that fashion?---On and off, sir, obviously because sometimes emails take a while to load and all at the same time he’s singing and playing on the computer, so he’d turn around every now and then, make fun of the song, turn back around. Like, we weren’t singing for the whole time, just on and off, like in between mucking around with the computer.

30 When you were singing along, you’ve talked about the words that PTE Kovco had to say about a camera not being in a box, which came first, the singing or the comments about the camera in the box?---I’m not sure, sir. I think it was singing.

35 At the end of the song, do you have a picture in your mind as to what PTE Kovco was doing?---I think he was still on his laptop, sir.

40 Whereabouts did he store his 9 mm?---He has it in a holster that he bought from the locals and he puts it on the top of his bed closer to the window, furthest from the door, because the beds obviously have poles coming out of all four corners and he just hangs it over it like you would a shirt on a coat hanger, basically.

45 Are you able to say with the holster being hung over the bedpost whereabouts the weapon would be in relation to PTE Kovco’s body, that

is, if he's standing up, is it at waist height, chest height, or some other?
---Probably around - because he's pretty tall compared to the bed - about chest, somewhere in between the chest and shoulder region.

5 When it's hanging from that fashion, is the muzzle pointing in some direction?---Yes, sir, it's down, pointing towards the ground usually.

Is it directly towards the ground or at an angle?---Sort of an angle, not straight down, sort of - I don't know, whatever that angle is.

10 About 45 degrees?---Somewhere roughly around that. It usually downwards towards the window way.

15 You've told the Board about a conversation that you thought PTE Kovco was having with Shelley. Did he seem annoyed or angry when he first thought that the camera might not have been included in the box that was sent back to Australia?---No, he just laughed about it and basically just said - am I allowed to swear, sir?

20 Yes. Please use the exact words that he said?---He said:

Fuck, I'm a bit of a dumb cunt, I thought I fuckin' didn't put in.

25 That's basically around about what he said, but he was laughing about it, sir. Just because it's free post so it doesn't matter. Because basically he thought the locals ripped him off because when he bought it he didn't check the box.

30 Roughly how much would this item have cost; are you able to say?---About \$US10.

Between the time that he said that and his next comment - firstly, can you say what his next comment was?---Not exactly, sir.

35 Do you remember whether it was about the camera?---I think it was. That's how I thought he was talking about it because he goes - he said, firstly he said he didn't put it in there and I don't know if Shelley told him that basically it wasn't in the box, however she knew. Then he goes, like the cunts had ripped him off, and then I think he found it in the room. So
40 that's how - - -

You think he found the camera in the room?---Yes.

45 Or you think that he realised - - -?---Actually, no, sorry, it was actually in a box. He said that Shelley didn't check it properly.

And you understood from that that the camera had been found?---Yes.

5 Did he appear relieved or happy when he found that out?---No, he just laughed, he just thought it was funny.

10 I think you've said, and correct me if I'm wrong, that that conversation and the finding of the camera was approximately five minutes, was it, prior to the shot?---Yes, roughly five, 10 minutes, sir.

15 Can you tell the Board what Soldier 19 was doing at around the time this conversation was occurring?---I think, sir, he was just, like I said, changing songs and stuff and singing with us, because when we were having the conversation, it wasn't just directed at me, it was directed at both of us, Soldier 19 and myself. So we were both - all three of us were talking about it.

20 You've told the Board that you have - it was an iPod with speakers?---Yes.

Whereabouts is that located in the room?---It moves around; that day it was on top of the fridge.

25 The fridge is near the door?---The door, yes.

Did you recall Soldier 19 changing songs from time to time?---Yes, sir.

30 How many times do you think that he in fact did that; are you able to say? ---No, I couldn't tell you, sir.

More than once?---Yes, probably a few times. Because obviously with all albums you're not going to like every song. If you don't like it - if someone doesn't like it in the room you just skip it.

35 Is there a remote control to do that or do you have to go to it?---You have to physically touch it, sir.

40 Are you able to say whether the music had stopped at the time the shot rang out or was it still playing?---I honestly can't remember, sir.

Do you recall which track of The Cranberries album was playing at the time of the shot?---The last - - -

45 I'll withdraw that, at about the time of the shot?---The last song that I remember is called "Dreams." I didn't actually know what it was called at

the time but, after it happened, they said - when we did the first interview with whoever came out, I can't remember who it was, they wanted to know what song it was so we went back and burnt a whole CD for the investigator and gave it to them. Then we found out what the name of the
5 song was and that's how I know what song it was, sir.

How confident are you that that was the last song that was played?
---Pretty confident, sir. Because when the door opened, the first person
10 came in, there wasn't music playing. That I can remember, sir.

I'll ask you to answer this question in a timeframe of 15 minutes prior to the shot. Were you still checking your emails and using your laptop computer?---Yes, sir.

15 From time to time were you looking up at PTE Kovco and Soldier 19?
---(No audible response)

Do you recall having any additional conversations with Soldier 19, whether it be about going to the gym or other things?---No, we basically
20 just - like we were talking obviously about our bosses and stuff and myself and Soldier 19 were talking about the gym because that's usually when we go, about an hour after work so you can cool down. But that's the only other conversation that we had.

25 Is it the case that PTE Kovco was or was not going to go to the gym with you?---Wasn't.

Does he usually go to the gym with you?---No, sir.

30 What time did you originally plan to go to the gym?---I think it was around quarter past 4.

At any stage during the singing of any of the songs, did you have a recollection of PTE Kovco turning from facing his laptop on the bunk to
35 face you?---Yes, sir, on a few occasions.

How many occasions do you think that occurred?---I wouldn't be able to tell you, sir.

40 Do you recall whether PTE Kovco was singing in a high-pitched voice at all, singing of the songs?---Yes, sir, we all were.

Did you notice whether PTE Kovco was mimicking or making fun of the song by pulling his shorts up high above his waist? Did you see that?
45 ---Yes, I did, sir. He used to do it all the time. It was pretty funny.

5 What would he do?---I'm going to swear because of - because he used to have really big testicles, sir, he used - because you get the Army issued PT shorts with the built-in undies and they're real small, so he used to joke around by pulling them up to one side so his testicles would hang out and pretend to sing really loud. It was just something funny he used to do all the time.

10 Do you recall whether he did this on the day of the incident?---Yes, I'm pretty sure he did, sir.

Do you have a specific recollection of him doing that?---Yes, I'm pretty sure he did, sir.

15 And I take it that you were laughing?---Yes, we were all laughing. He was laughing too. It's just something funny he used to do all the time and everyone thought it was funny, sir.

20 Was Soldier 19 laughing as well at the time?---Yes, sir.

Are you able to tell the Board how long before the shot rang out that this occurred?---I wouldn't have a clue.

25 Are you able to say whether it was less than five minutes?---I couldn't honestly say, sir. I don't remember how long it was.

30 You simply remember that this was one of the antics that occurred after you returned to the accommodation?---Yes, sir. Because it was all in context, sir, because obviously we're talking about our old boss and he used to be a lifesaver and it's probably not relevant but we used to call him "Smoking' Joe" because we used to think he smoked marijuana. I don't know if he did but - and that was all in the context of making fun of him because we'd seen a picture of him before he joined the Army with dreadlocks and he's an officer so we were just making fun of him as well.
35 It was all in the context of the day.

40 Are you able to tell the Board anything else about that conversation about "Smokin' Joe"?---Not really, sir, he's just - he used to be one of our bosses when we were in C Company and he was a pretty good bloke, everyone got along with him. He was - and you could - he was an officer that you could get along with as a friend and you'd be able to take the piss out of him and he'd take the piss out of you. And we just used to have jokes with him all the time, and I still know him. We still keep in touch and he's gone out of the unit about three years ago, I think.

45

I think we'll leave "Smokin' Joe"?---Yes, sir.

5 At some point you heard a sound. Can you describe the sound that you heard, and I'm not talking about the music?---Yes. Basically, sir, I just heard a loud bang and I thought it was a firecracker, I don't know why, but that's just what I thought it was.

10 When you heard that sound, do you recall whether the music was still playing?---I don't - I don't recall that, sir.

15 You say that you thought it was a firecracker, prior to hearing that sound had you looked up from your laptop to see what Soldier 19 was doing or what PTE Kovco was doing?---No, sir, last time I saw him was - Jake was still on his computer and Soldier 19 was getting a drink and that's basically just before I heard the shot.

20 You say that Soldier 19 was getting a drink. Did you look up to see him getting a drink? That is, did he pass in front of your bed to get to the fridge which was by the door?---No, sir, I think he was still there from changing the iPod around and like - because when you type you're obviously looking at the computer and you can still see out the side but I wasn't really paying much attention to what they were doing because you don't do that.

25 You said a moment ago that when you're looking at your computer you can still see what's going on in the room, is that what I understood you to say then?---To an extent you can, sir. Like, when you're in the room together you're doing your own thing. Like you're not paying attention to what everyone else is doing because we just finished the day, we were just relaxing. So I don't - like still now I don't pay particular attention to what anyone is doing in the room.

35 Soldier 19's bed, was that on one or other of the bunks that are in the room?---Yes, it's part - it was part of Jake's bed. They had a bunk. Jake was on the top and Soldier 19 was on the bottom.

40 You say that - and I think you're suggesting that you've got some peripheral vision even if you don't look up from your laptop. Is it the case that you could see in your peripheral vision prior to the sound of the shot Soldier 19 going to the fridge? And are you able to tell the Board whether you had any peripheral vision of what PTE Kovco was doing at about the time you observed Soldier 19 going to the fridge?---Not really, sir, like - from last time I saw him he was standing in front of his computer.

Did your peripheral vision at that time allow you to see whether he was still at his bunk bed doing something on his bunk?---Yes, sir, to - like I said, to the best of my knowledge I think he was still there. Like, I'd - if you're asking me did I see him go for his pistol, no, I didn't.

5

No, I wasn't asking you that. What I'm asking you is just prior to the shot sounding could you see that he was still located standing up near his bed facing away from you or was he - - -?---Yes, sir, to the best of my knowledge that's where I last saw him.

10

At the time that you heard the shot, are you able to say whether Soldier 19 was in the process of standing up or was he still down getting something out of the fridge?---I couldn't honestly tell you that, sir.

15

At the time that you heard the shot, I take it you immediately looked up?---Yes, sir.

20

And what is it that you first observed when you looked up?---I heard the shot and I looked straight up, and Jake wasn't standing there, and then - because I looked up, obviously, and I didn't see him there and I looked around and basically his head was probably about 30 cm from my foot and I saw him there.

25

Did you see him falling after you heard the sound of the shot or did you simply see him on the ground?---I saw him on the ground.

30

At the time that you heard the shot were you in the process of closing down your laptop or had you already done that?---I was in the process, sir. I was signing out of email. I was just waiting for it.

When you first looked up from your laptop and saw PTE Kovco on the ground, did you see where Soldier 19 was at that particular point in time?---Sir, I think he was at the fridge still.

35

Had he stood up by the time Jake was on the ground?---I'm not sure, sir.

I'll move to a different topic, if I may. Have you ever observed PTE Kovco handling weapons?---Yes, sir.

40

That's something that you observed him do on many occasions?---Yes, sir, it's part of our job.

45

Have you ever seen him mishandling whether it be a 9 mm pistol or any other weapon?---No, sir.

Is it the case that after this incident you had a conversation with Soldier 14, and take a moment to look at the callsign matrix?---Yes, sir.

5 Using the callsign matrix, can you tell the Board, as best you can recall, in an “I said”, “He said” fashion, what it was that was said in that conversation?---Afterwards, sir, we were trying to figure out in our own mind what happened before all the investigators came through and stuff. And basically Soldier - like, because obviously your pistol needs to be at [blank] for it to shoot and we were wondering how did it get to that state. 10 So I was having a conversation with Soldier 14 and I think some - the initial person who wanted to get a rough idea of what happened before the investigators was asking the same question, and I said “No”, and I was speaking for Soldier 14 and I asked him has he seen it, and he said, “Yes” and he told me and we said that he’d seen was Jake pulled his pistol to 15 pieces, which is take off the receiver and pull the barrel out, strip it basically, and then when he was putting it back together, put a round in the chamber, reassemble it, release the working parts and then at - and put a mag on, that means the pistol is at [blank], because your safety is on, and then take the mag off, cock it, and the round comes out, he has to 20 [blank] it, and then back to [blank].

Is that a reference to what is generally known as [blank] Yes, sir. It’s basically - obviously not so much urban, but if you’re out bush for some reason you’re weapon is [blank], Styre as well, and you need [blank] it, 25 that’s how you can silent cock the weapon so the enemy can’t hear you. It’s the same as a pistol. And another way is you can hold the breach back on the 9 mm, slide around into the chamber, ride the working parts forward and then put a mag on and you’ll be obviously at [blank]

30 When you had this conversation with Soldier 14, did he tell you on what day he had observed this conduct; that is, what is at the Embassy or was it at another location?---He said it was at the Embassy, sir, but he didn’t say what day.

35 How long - and I’ll ask you just to give a rough indication - had you been at the Embassy prior to the incident on 21 April?---I think two weeks, sir, I’m not exactly sure. I can’t honestly say how long but roughly I think two weeks.

40 Did Soldier 14 tell you whether this was something he had observed whilst on shift; that is, whilst working with him at the Embassy?---Yes, sir. He said he saw it while he was working with him on duty.

45 I’ll ask you to be careful about naming positions?---He said he was on position D when he observed it.

5 You've told us about a conversation you had with Soldier 14. Is it the case that after the incident other people have come to you and indicated that they have made observations of a similar nature to the one that you've just described?---No, sir, no one else has come to me.

10 You've given a record of interview with the New South Wales Police. I think that record of interview was recorded. Do you remember - I know you've had a few interviews - specifically that particular one?---Not really, sir, it was a fair while ago.

15 Do you remember telling the New South Wales Police about people - and I'm not talking about PTE Kovco but people generally - playing quick draw. Perhaps if you can tell us what quick draw is first?---Basically people practice quick draw in case you get a stoppage on your main weapon. So obviously if you're in a contact, people shooting at you, you're shooting back, your main weapon, obviously your Styre, gets a stoppage, you need to be able to pull your pistol out as quick as possible to return fire, otherwise you'll get shot as well.

20 Whilst you say that that is something that's practised, would it be fair to say that it's also practised in the lines; that is something that happens from time to time, whether it's correct or not, it is something that happens; would you agree with that?---Yes, sir.

25 Thank you, Mr President, I think I'm almost finished, but could I have a moment to check?

30 PRESIDENT: Yes, certainly. Whilst we have a moment, can I just make a comment to the press. You would have heard Soldier 17 talk about degrees of weapon readiness and the phrase *[blank]* and *[blank]* They're restricted phrases and usage and I would ask that you not mention those in your reporting and, indeed, for the purpose of the exercise, I direct that they not - the phrases *[blank]* and *[blank]* not be reported. I would like to think that you could understand the sensitivities there.

Thank you, Major.

40 MAJ HYDE: Soldier 17, if I could return to the room, if I may, I do have a couple more matters that I need to ask you about. What was Soldier 19 doing during the singing phase, if I can use that term, whilst you were in the room, as best you can recall?---Basically just singing as well, sir. I don't exactly know what he was doing.

45 All right, but you're recollection is that he was singing along as well?

---Yes, and I think mainly what he was doing was choosing songs and stuff like that.

5 Do you have a specific recollection of seeing PTE Kovco's pistol prior to the shot sounding in the room on that day?---I think it was hanging where it usually hangs. I can't exactly say that it was there but I think it was there.

10 You have a vague recollection of it being - - -?---Yes, because I know his shoulder holster was there so I assume the pistol was in there.

15 Prior to the shot sounding on the 21st, in the period from when you first came back into the room after duty for the discharge, at any stage did you see PTE Kovco handling the 9 mm?---No, sir.

I take it from that answer that you didn't observe him cleaning it in the room?---No, sir.

20 Any recollection of whether Soldier 19 handled the pistol?---Not to my knowledge, sir.

By that I mean PTE Kovco's 9 mm?---Not to my knowledge, sir.

25 That's the examination-in-chief, Mr President.

PRESIDENT: Thank you, Major. I take it there's some questions from the Bar table.

30 LTCOL McCONAGHY: Yes, sir, there are.

PRESIDENT: LTCOL McConaghy.

35 LTCOL McCONAGHY: Mr President, I have an application to make very shortly, and I believe it's appropriate that I make this application as early as possible. I intended to make it immediately after evidence-in-chief but one matter has been raised by this witness that I should explore prior to making the application. I just believe it's more convenient to do it as soon as possible because it might save, if my application is successful, considerable time and cross-examination of this witness and other witnesses.

40 So if you would allow me to commence my cross-examination. When I reach the point where I would explore this one issue that I need to, then I'll cease the cross-examination and make my application.

45

PRESIDENT: Continue.

LTCOL McCONAGHY: Thanks, Mr President.

5

<EXAMINATION BY LTCOL McCONAGHY

[1108]

10 LTCOL McCONAGHY: Soldier 17, in your evidence-in-chief, MAJ Hyde was taking you through - before I go on, Soldier 17, my name is LTCOL McConaghy and I'm representing the interests of Soldiers 2 and 14?---Yes, sir.

15 Your attention was brought to conversations that you had had with Soldier 14 after the incident and, as I understand your evidence, it was you and he speaking about how this tragic affair might have come about. Do you recall giving that evidence a few minutes ago?---Yes, sir, I do.

20 How long after the incident did you have the conversation with Soldier 14?---I have no idea, sir. I know it was - I think it was within a week because they initially sent an officer, whose name I can't recall, out because apparently the Chief of the Army wanted to know a rough idea of what happened. In talking to everyone else within our callsign, we're trying to figure out ourselves how it could have happened. Obviously
25 myself and Soldier 14 are close friends and we had the conversation and that's what he told me, sir.

30 So it was not on the day of the incident but within about a week of it?---I think so, sir.

35 On your understanding of what Soldier 14 was telling you was that he recalled seeing PTE Kovco take his weapon, that is, the 9 mm pistol, to a certain weapon state - let's not worry about what state it was - and he manipulated it in a particular way at one of the various posts in and around the Embassy. Is that the effect of what your evidence was?---Yes, it was, sir.

40 Your understanding was that what Soldier 14 was talking you through at that time was an incident that or something that he saw happen before the day of the incident?---Yes, sir. He told me that he seen it obviously prior to the incident and he didn't say anything about the day of the incident, sir.

45 So was your understanding of what he was telling you that he wasn't speaking about something he saw on the day of the incident but something

that had occurred prior to that day, before that day ?---Yes, sir.

All right, thank you, Soldier. Sir, that's the matter that I wanted to clear. I now want to make my application.

5

PRESIDENT: Is it a matter that we should do in the presence of the witness or otherwise?

10 LTCOL McCONAGHY: Probably not in the presence of the witness, sir, but the nature of my application is that I'm making application now that Soldier 14 be excused from further attendance as a potentially affected person. Whether he's called as a witness or not is obviously a matter for Counsel Assisting and yourself. But my application will be that he should, on the evidence that we've received to date, no longer considered
15 a potentially affected person.

I believe that I can make this submission in open hearing, if that's what you wish. The area that I'll need to cover basically encompasses the evidence that was given by the first witness yesterday and dealing with the
20 issue of the buddy system. You might recall yesterday I asked some questions about that. Therefore, unless Counsel Assisting has any concern about whether the question/answer, during that phase of my cross-examination, constitutes a breach of OPSEC, then I would submit that we could deal with this in open hearing. If, however, there is an OPSEC
25 concern, then the Board would have to be closed because I intend to read on to the record, or re-read, I suppose on to the record the question/answer from that passage of that witness's evidence.

Also, sir, what I'll be intending to do is draw your attention to, firstly,
30 what as I understand is Counsel Assisting's position in respect of Soldier 14 and, having been briefed by Counsel Assisting before this Board commenced, my understanding of the aspect of the evidence or material that was potentially going to be called before this Board relates to some things that were said by Soldier 14 in his statement to Military Police. I
35 have the edited copy of that statement and it would be my intention to read that into the record as setting out the extent of my understanding of Counsel Assisting's position in relation to potential evidence which may be damaging, if I can use that term, to the interests of Soldier 14.

40 The statement in its edited form doesn't have much editing whatsoever, there are only a couple of words that are edited out and it is quite capable of being made sense of because we don't have too many blankety blanks and it's fairly easy to follow in its edited form.

45 So that's what I would propose to do and that would be the evidence that,

apart from a couple of other matters which have already been dealt with in open Court, I would be taking you to. It would be a matter for you and Counsel Assisting in relation to the issue of whether this can be done in open proceedings or whether the Board needs to closed.

5

PRESIDENT: I'm a little bit reluctant to enter into that at the moment because I of course haven't received or know anything about the statement that was alleged to have been made to the Military Police. It is not part of the record at all, the evidence at this time.

10

LTCOL McCONAGHY: It isn't; that's correct, sir. However, it has been disclosed to Counsel Representing, specifically myself, and, as I said, as I understand it, it is the sum total of the evidence which may be called by Counsel Assisting which may potentially have an affect on the interests of Soldier 14. It's my submission this sort of application should be made at the earliest possible opportunity once all the relevant evidence is in or identified.

15

PRESIDENT: I think they're the magic words, once all the available evidence is in; we haven't heard from Soldier 14 yet.

20

LTCOL McCONAGHY: No, sir, however, if I read on to the record with the consent of Counsel Assisting - and if Counsel Assisting agrees that this is the extent of the evidence that's against him that's made him a potentially affected person, then, for the purposes of this application, in my submission it would be quite appropriate and timely to allow me to make the application and to determine whether or not he should continue to be a potentially affected person. My submission is at this stage, on the evidence of the first witness, there is no longer any reason why he ought to be so considered.

25

30

PRESIDENT: I would like to hear from Counsel Assisting. I don't know whether, MAJ Hyde, you wish to take that role at this point of time or whether you may pass the baton to COL Griffin.

35

COL GRIFFIN: Thank you, sir, it's COL Griffin here. I'll respond to the application and advise you, if I may.

PRESIDENT: Certainly.

40

COL GRIFFIN: Firstly, could I ask that the witness be excused while I respond.

PRESIDENT: I was going to ask you that. Witness, would you please stand down and you might like to go away somewhere comfortable and

45

we'll come back to you after we have this legal argument?---No worries, sir.

5 <WITNESS WITHDREW

[1116]

COL GRIFFIN: Thank you, sir, for the opportunity to make some comments. Can I indicate to you, firstly, that the first witness that you
10 heard from yesterday only became available to us very late in the proceedings. He had been on some - absent on duty. The statement that LTCOL McConaghy has just referred to you is the reason why I had advised you originally that, erring on the side of caution, procedural fairness and protections be put in place so that this particular soldier could
15 be identified as a possibly affected person and have legal representation, and that his interests be protected before the proceedings commenced.

Of course, the decision is one for you and the Members to consider on the evidence that you've heard to date. As I understand the application, it's to
20 make Soldier 14 no longer an affected person. The consequence of that, of course, is that he therefore forfeits any of the protections built in in a procedural fairness sense that would be accorded to him otherwise. If those are his instructions - as clearly they are and his counsel is making that application to you - then it's not one that I would propose to stand in
25 the way of. It's a decision for the individual himself in consultation with his counsel.

I note only that you are yet to hear any evidence from the person himself. If he chooses to no longer have the protections of being an affected
30 person, then I propose to call him very shortly after this witness or the next witness is called, and I would ask that, in the normal course of events, he be made available for that purpose.

The facts are these, as I understand them to be from the evidence presently
35 before you, that there is a system in place under the SOPs, however, as the witness indicated yesterday, there is no formal instruction in respect of what is known as the buddy system; the buddy clearance. There is no precise stipulation in that portion of the SOPs that was drawn to your attention by the witness yesterday as to who is required to do what. The
40 witness spoke more in terms of an intention and a spirit rather than actual obligations, although you may conclude that you can distil from that that there was a clear intent of what each party is required to do in a buddy system. You have just received evidence that Soldier 14 observed a certain type of conduct by the deceased on duty within the same premises
45 very shortly before his death. It's a matter for you whether or not you are

of the view that his conduct subsequent to that, which you are yet to know about because you haven't heard evidence of what followed from that, may attract adverse comment.

5 However, it's a matter for the individual and counsel and you have that application and I am unable to point to any evidence other than the evidence from the witness himself in the statement and I understand LTCOL McConaghy proposes to put that statement to you now and it's open to him to do so, sir. You may wish to hear that and hear the rest of
10 the application. I do not oppose that course of conduct.

PRESIDENT: Very well. We will invite LTCOL McConaghy to read that onto the record.

15 LTCOL MCCONAGHY: Sir, before I do that, I ought to just indicate that the application that I make is on the evidence that has been given and the evidence which on all of the material is proposed to be given, and your ruling will be based on that. If at a subsequent time, whether it be through the evidence of Soldier 14, if he's called by Counsel Assisting or any
20 other person, there is evidence which was not available at this time or reasonably seen on material that has been available to Counsel Representing or Counsel Assisting, then you can, at any time, remake - if I can use that term - the individual as a potentially affected person.

25 So simply by his being relieved for excused of being one at this time, which, in my respectful submission, ought to be done at the earliest possible opportunity, when circumstances are correct for such a course of action to occur, doesn't mean that he can't be put back into that position if evidence drops out from a witness which none of us are aware of at the
30 moment. But on material to date and the evidence that has already been given and proposed evidence, if this would, in my submission, be the appropriate time for you to make the initial ruling in relation to it.

35 Having said that, sir, the evidence that I understand which - or the information that Counsel Assisting has that I understand has out of an abundance of caution by Counsel Assisting led to a recommendation by him to you to make Soldier 14 a potentially affected person is contained at the third page of a service police statement given by Soldier 14 and I read from the redacted or edited version of that particular statement:

40 *I can recall that PTE Kovco walked ahead of me and at that time we were having a verbal joke. I can recall that PTE Kovco walked ahead of me (about 10 metres) and entered the door to (blank). I did not see PTE Kovco clear his weapons at the
45 clearance point and I am sure that he could not have done as he*

5 *entered the doorway as I walked around the corner and began to clear my weapons. The clearance of weapons when done properly takes at least 10 to 15 seconds and I was only 5 to 7 seconds behind him. I know I did not check his weapons using the buddy system and he did not check mine. After clearing my weapons I tried to enter the door but PTE Kovco was holding the door closed and wouldn't let me through.*

10 Sir, I stop there. Earlier in the statement there is talk of some banter that was going on between the two of them after they'd finished their piquets and that's referring to a continuation of the banter.

15 *After a short time PTE Kovco let me through and we continued walking through the facility to the main entrance and onto our accommodation block. I did not speak to him about weapon clearance. I have know PTE Jacob Kovco for approximately three years after first meeting him on the sniper pre-selection course in 2004. I joined Support Company in 2004 and PTE Kovco joined in 2004. I can describe Kovco as being about 180 cm tall, with medium brown coloured hair and of medium build. I believe he had a tattoo on his back.*

25 Contained in that passage, sir, as I understand it, is the potential evidence that has, out of an abundance of caution, taken Counsel Assisting to make certain recommendations to you. I draw your attention against that evidence, sir, to the evidence that was given yesterday by the first witness during cross-examination by me. Firstly, I should say I take you to Counsel Assisting's evidence - and if you have a copy of the transcript it's at page 25 at point 34. Counsel Assisting said:

30 *If you could just limit your evidence to the buddy system, then, please, and tell the Board what you mean by that?---Yes, sir. The buddy system is a procedure that I decided that we would implement as a standing procedure within the combat team that assists members to have the correct degree of weapon readiness and to avoid a negligent discharge of the weapon.*

Would you read the entry at 161.8.1, please?---The entry says:

40 *161.8.1 The buddy system is to be applied by all SECDET IX personnel when changing degrees of weapon readiness. The buddy system requires personnel to be observed by their buddy as they carry out a change of degree of weapon readiness to ensure that the correct drill is conducted in order to avoid unauthorised discharge or negligent*

discharge.

Are you aware, Soldier 30, of any Defence Instruction (General) -

5 Then the transcript records a video link dropout and there doesn't seem to
have been anything recorded going back to answering that question. So
my recollection is that there was some evidence from that witness to the
effect that he was unaware that there was Defence Instruction or other
formal policy. However, I dealt with that issue in my cross-examination,
10 in any event, and if I could take you to that, sir, at page 42, at point 29 -
I'm not going to read my question but basically I'm asking the member to
consider the buddy system and to explain it more fully to the Board. At
point 37 the answer:

15 *Sir I'm unaware of any specific direction regarding anything
known as the buddy system or anything that is similar to it. There
may well be one, but I'm unaware of it. You're correct in saying
that it was at my discretion to employ the buddy system and I did
so based on the fact that I - I believed that one of the most
20 important parts of my job was to ensure my own force protection.
In fact that is the intent of my senior command here on this
operation.*

25 Over the page at point 11 there was some other question/answer but it's
not relevant to my application. Then at 11 I asked this question:

30 *Thank you for that. And briefly to my next question, when you say
"someone nearby" is it someone nearby who becomes your buddy
or is it the case that the buddy is someone who has been
designated and fixed indefinitely?---No sir, it's not a fixed buddy.
That wouldn't work because we don't always move around in
pairs. It is - the spirit of the buddy system is that every soldier is
responsible for the condition of their own weapon. You are also
responsible to find a buddy at the point in time when you - when
35 you go to the degree of weapon readiness Manly. That can be - - -*

Then I asked the question:

40 *So - I'm sorry, I cut across you, please finish?---Sir so that could
be anyone who is nearby or who you are travelling with or who is
on duty with you to do that.*

45 Sir, the relevant SOP is Exhibit C8. The effect of the evidence, very clear
evidence given specifically and intentionally as answers to two questions
is that it's the weapon handler's responsibility to ensure that a weapon is

clear properly when changing degrees of weapon readiness and not the buddy. Secondly, it is the weapon handler's responsibility to locate a buddy when the need arises to change to a lower degree of weapon readiness.

5

Given that this evidence and those two unassailable (inaudible) have come from witness one who was the person ultimately responsible for that system. There can, in my submission, be no doubt, then, that there is no obligation or onus, legal requirement or otherwise on the person who was the buddy to do anything other than be available once sought by the person who is clearing their weapon to perform a certain task.

10

For instance, in this circumstance, PTE Kovco could have - and we don't know this and it doesn't matter for the purposes of my submission whether it's so or not, just as a hypothetical - found a buddy at any stage between where he was as he dismounted that last duty and to his accommodation.

15

The potential evidence from Soldier 14 places him in the position of being a person who may have been a buddy if he was called upon by PTE Kovco. There is no evidence that that's the case, that he was called upon, and there is no obligation for him to do anything in relation to PTE Kovco's weapons when they dismounted duty, quite clearly from the evidence of the OC.

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That being the case, sir, and there being nothing else that brings this member before this Board as a potentially affected person, it's my submission that you would not contemplate making an adverse finding against Soldier 14 on this evidence. You would not contemplate at the end of the evidence called by Counsel Assisting of issuing a notice in respect of it, and there is - - -

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PRESIDENT: Can I stop you, Colonel, and share a thought with you, which you may care to respond to. Isn't there not some potential for criticism from the Board, not because your client didn't check Kovco's weapon but indeed because he didn't insist that Kovco check his as part of the buddy system, as clearly he should have?

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LTCOL McCONAGHY: There's no evidence at the moment that the member didn't have his weapon checked by another buddy as there were other people present. This is only a hypothetical and we're working on the material as to hand at the moment. These are not my instructions, I must point out, I don't have specific instructions on this. But on this hypothetical that you're putting up, any position could be the buddy of a person who's clearing their weapon. It's, I suppose, an issue of who was

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the most appropriate at that particular time.

5 On the statement that I've put before you which proposes to be the
evidence of Soldier 14, PTE Kovco moves very quickly away from their
last position and was holding, if you like, in a jovial - and we're not
saying any other way, and soldiers do joke around in a bantering way, in a
jovial way, in a friendly way, holding him from entering a particular
10 building and therefore the circumstances that were occurring at that time
according to Soldier 14 were being driven by PTE Kovco. In those
circumstances, and bearing in mind that there is no policy, no direction,
no - - -

15 PRESIDENT: Surely, Colonel, if the major in charge of the detachment
simply says, "This is the way we are going to operate," there endeth the
lesson.

20 LTCOL McCONAGHY: Sure, but he hasn't said that, sir. In fact, what
he said is that it is the responsibility of the person who's weapon is to be
cleared to obtain (inaudible); very clearly his evidence. There is no, in my
submission, other way of viewing that very clear and very direct evidence.
It is the individual's responsibility and of course it's every soldier's, I
submit, responsibility to clear their weapon.

25 PRESIDENT: You're not going to get an argument from me on that one.

LTCOL McCONAGHY: So, sir, potentially, what possible criticism
could there be of Soldier 14 in those circumstances?

30 PRESIDENT: COL Griffin, is there any comment you want to make?

COL GRIFFIN: Yes, sir, thank you. May I say with respect that you've
identified the critical issue. It is the responsibility on the member himself,
Soldier 14, in terms of the buddy system that's set out there in the SOP at
161.8:

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Requires personnel to be observed by their buddy.

40 As I understand the statement that's just been read out to you, PTE Kovco
was Soldier 14's buddy and there was an incumbent responsibility on each
of them to ensure that the other cleared their weapon.

45 Whilst the issue about the instruction would be technically correct, in my
view, were you considering a Defence Force Discipline Act prosecution or
a charge for failing to comply with an order, yes, the instruction could be
construed in the manner just put to you by LTCOL McConaghy. But this

is not such a matter; this is an administrative proceeding in which you may make findings based on the conduct of individuals over and above criminal or discipline offences.

5 There is a clear intention, as was articulated by the witness yesterday, of
the responsibilities of individuals. You've heard evidence this morning
that Soldier 14 had in fact observed on the duty in the very recent time the
similar activities that have been described about the handling of the
10 weapon by the deceased and you may come to some findings in respect of
responsibilities on Soldier 14 for the clearing of his own weapon as well
as PTE Kovco's. But at the moment you don't have the benefit of the
evidence of Soldier 14, other than what has been put to you in the Service
Police statement.

15 So in my respectful submission, it is open to you to still be of a mind that
you may, on the evidence available to you, potentially make findings
adverse to Soldier 14. Those are my submissions, sir.

20 PRESIDENT: Thank you, Colonel. Other members of the Bar table, do
you wish to make any comment?

25 LTCOL HOLLES: Sir, I do, I simply say this: Soldier 30 has not been
the subject of cross-examination, and that is clearly a relevant point in
your consideration. Again, Soldier 14 has not been cross-examined, there
have simply been excerpts of his statement placed before the Service
tribunal.

30 I neither support nor oppose my friend LTCOL McConaghy's application,
but I simply place that before the Board so they're aware of my position.
It is my intention to cross-examine Soldier 14 on a number of issues and it
may be, as a question of procedural fairness, that I would be remiss if I did
not inform the Board that I would prefer that he be protected during the
course of that cross-examination.

35 COL YOUNG: The only thing I would say, Mr President, is that I would
certainly want Soldier 14 available to give evidence and to be cross-
examined.

40 PRESIDENT: LTCOL Berkley?

LTCOL BERKLEY: Nothing to say, sir.

45 PRESIDENT: LTCOL McConaghy, I'm of the view, and I will put it as
simply as I can, that your application is premature and you may or may
not, depending on the way the evidence falls, wish to renew it at a later

time.

LTCOL McCONAGHY: Thank you, sir.

5 PRESIDENT: Thank you, Colonel. I note the time; is this a convenient time to take a short adjournment?

COL GRIFFIN: Yes, thank you, Mr President, that would be of value to us; if we could return in around 12 minutes' time. Would that be
10 convenient?

PRESIDENT: Around about, by my watch, 10 to 12.

15 **ADJOURNED** [1140]

RESUMED [1220]

20 PRESIDENT: Before we proceed with the video link to Baghdad I understand there's some concern amongst the media present about some issues that have occurred during the day and at other times and perhaps I ought to expand on a few things and perhaps re-emphasise or restate a
25 couple of things.

There is a total, total ban on bringing recording devices into this building. I myself have to surrender my mobile phone as I arrive and indeed as would the Chief of the Defence Force. If he were to arrive in this building
30 he would surrender his mobile phone. That's not a simple matter of paranoia. Without going into the finer details, because it would be most inappropriate for me to do so, there is an enormous amount of electronic equipment in this building and its surrounds which would be compromised by the presence of a mere simple mobile phone. The same
35 goes for recording devices, Dictaphones, tape recorders and the like.

This building has a classification, an accreditation, and if that accreditation is compromised by a mobile phone or other things coming in here, the accreditation fails which then means this building cannot
40 function as a Land Headquarters and its ability to frankly control the Australian Military is compromised. That, of course, ladies and gentlemen, is simply unthinkable. I acknowledge that the modern reporter relies very much on his or her recording devices, mobile phones and the like, but that's the way it must be. I can understand your frustration at not

having these tools. But nevertheless, to compromise this building is unthinkable.

5 You may recall we made some decisions about the degrees of weapon readiness. The actual degrees of weapon readiness themselves are not so sacrosanct. The concern is the degrees of readiness of the weapon at a particular point with the Embassy and at a particular time within the Embassy. We don't want people to know that a particular point within the Embassy a weapon is at a particular state of readiness. The reasons for
10 that are obvious. It takes time to get a weapon from a particular readiness to another readiness. We don't want people to know exactly what we're up to there and again, it wouldn't take a great deal of thought to see that one through.

15 I understand there's been a request for release of the editing sanitised documents and we are going to develop within the next hour or so - and I use the words "or so" as something of a copout because it may take a little longer than that - a protocol whereby we can release the sanitised documents to you but they will need to be returned after you've used
20 them. There are some problems with that which I won't go into at the moment but we have a logistical problem, a mechanical problem, but something will be worked out there and ultimately you will be allowed to see the written statements that have been tended to this place in the open Court, not whilst in closed session of course.

25 The videos and the photographs that you have seen are classified secret and will not be released. You may say, "We've seen them, why are they classified secret?" They have been classified secret from Baghdad and I am frankly, ladies and gentlemen of the press, not about to second guess
30 the command in Baghdad.

MAJ Jolly, are there any other comments that I need to make or any other areas you would like me to cover?

35 MAJ JOLLY: No, thank you, sir, you have done that.

PRESIDENT: Thank you, COL Griffin, as you can see we have had to make some things clear with the press and we might now continue with our Board's proceeding.
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COL GRIFFIN: Thank you for that, sir, and I'll ask the witness to return to this chair now.

45 <SOLDIER 17, recalled on former oath: [1226]

<EXAMINATION BY LTCOL MCCONAGHY, continuing

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LTCOL MCCONAGHY: Sir, I will continue cross-examination.

PRESIDENT: Please do.

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LTCOL MCCONAGHY: I should advise though at this stage that a considerable amount of my cross-examination will involve matters of operational security.

15

PRESIDENT: Can you confine your cross-examination to non-classified material at least until lunch time and if you do go into classified material perhaps you might signal so that we can close the forum.

20

LTCOL MCCONAGHY: Sorry, sir, I can't. It's woven in and out of my cross-examination.

PRESIDENT: I had a fear that things might go that way.

LTCOL MCCONAGHY: There is no way I can do it.

25

PRESIDENT: I appreciate the inconvenience to the people in Baghdad but given that perhaps now might be a moment to take the luncheon adjournment. How long, Colonel, would you anticipate being with this witness?

30

LTCOL MCCONAGHY: At least half an hour, sir, perhaps three-quarters of an hour.

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PRESIDENT: If we take the adjournment now and resume at 1.30 Australian time and the press have then got perhaps another 40 minutes after that where they might be allowed to join us. Would that be a fair call?

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LTCOL MCCONAGHY: Yes, sir, from my perspective but of course there are other members at the Bar table who may - - -

PRESIDENT: Are other members of the Bar table likely to enter into OPSEC matters?

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COL HOLLES: For my part it's almost inevitable.

COL YOUNG: I don't believe I will, sir, but I may need to.

5 LTCOL BERKLEY: Sir, I'm the same as COL Young, my cross-examination is planned for non-OPSEC matters, however they may arise but wouldn't know of course.

10 PRESIDENT: Yes, very well. I think I can say to the press for the first hour at least after the luncheon adjournment will be closed. After that we may be closed, we may not, and I can't be any more precise than that, I'm afraid.

Colonel, does it cause you any inconvenience if we take the adjournment now - or any further inconvenience if we take the adjournment now?

15 COL GRIFFIN: Mr President, only to indicate to you that we must cease again because of operational requirements. At 1520 your time we will lose the video link and cannot continue after that point.

20 PRESIDENT: Thank you. I think that's one of those things we're going to have to live with.

COL GRIFFIN: Yes, sir.

25 PRESIDENT: We'll take the adjournment now until 1.30.

<WITNESS WITHDREW [1229]

30 LUNCHEON ADJOURNMENT [1229]