

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

LTCOL P WILKINSON, representing Soldier 2
LTCOL B GREEN, representing Soldier 14
LTCOL T BERKLEY, representing Next of Kin
LTCOL F HOLLES, representing PTE Kovco's Parents
COL L YOUNG, representing PTE Kovco

0944 WEDNESDAY 26 JULY 2006
DAY 11

The transcript has been checked and cleared for operational security issues.

TRANSCRIPT VERIFICATION

I hereby certify that the following transcript was made from the sound recording of the above stated case and is true and correct

Signed.....  Date26.07.06.....(President)

Signed.....  Date26.07.06.....(Recorder)

Signed.....  .. Date26.07.06.....(Transcriber)

Signed.....  Date26.07.06.....(Transcriber)

Signed.....  Date26.07.06.....(Transcriber)

Kovco 26/07/06

5 PRESIDENT: Thank you, ladies and gentlemen, please be seated. Good morning, Colonel. Good morning, ladies and gentlemen.

COL GRIFFIN: Good morning, Mr President, Members. Recall Soldier 2, may it please you, sir. And we resume in open session.

10 PRESIDENT: Indeed.

<SOLDIER 2, recalled and reaffirmed:

[0945]

15 COL GRIFFIN: Sir, I have some further imagery to show to the witness, as foreshadowed. I'm also going to put to him some photographs that are now available before LTCOL Wilkinson concludes his examination. For the record, what I'm going to show to Soldier 2 are photographs from
20 Exhibit 101 that was placed in evidence. We can only provide this in hard copy, sir. So if they could be distributed to the witness and to Counsel and the Board; thank you, learned Secretary. It's an extract from Exhibit 101. We're also going to show on screen some of the photographs from Exhibit 41.

25 MAJ JOLLY: 30, sir.

30 COL GRIFFIN: I beg your pardon, Exhibit 30, being the SIB evidence of the video imagery taken in the Kuwaiti mortuary facility, and as I understand his evidence, in the presence of Soldier 2. Could you put that up, please, MAJ Jolly. Would you indicate the photograph numbers that are being shown, please, MAJ Jolly.

35 MAJ JOLLY: Sir, this is photo number 53. This is photo 59. This is photograph 61 and photograph 65.

40 COL GRIFFIN: Soldier 2, were you present when those photographs were taken by the SIB? They're actually photographs taken from a video image, as I understand it, that were taken?---Yes, I was, sir.

Now we will play to you, Mr President, Members, a video taken at the mortuary facility, the Kuwaiti mortuary facility at Al Sabah Hospital in Kuwait.

45

VIDEO SHOWN

5 COL GRIFFIN: Mr President, Members, the quality of that video audio is not good. But one might say that it reflects the environment in which it was taken. It's not of course evidence under oath or affirmation. It was taken by the liaison officer board manager, MAJ Young, who can swear to it that it's his production. If necessary, we can take that step, otherwise I tender it.

10

PRESIDENT: Any opposition to the tender?

COUNSEL REPRESENTING: None, sir.

15

#EXHIBIT 108 - VIDEO OF MORTUARY IN KUWAIT

20 COL GRIFFIN: Soldier 2, there is evidence before the Board that people have described that mortuary facility as noisy, dirty, disgusting, chaotic. Having just seen the video to refresh your memory about the place, do you disagree with any of those statements about that environment?---No, I don't, sir, and at the time when we were there there was also a large group of, I believe them to be locals, moving in and out of the morgue as well. I believe that there was another body being sealed at that time, which made it even more chaotic.

25

30 MAJ Jolly, if you could just return to those photographs from Exhibit 30, please, and put up the sequence. Now, would you agree with me that as you look at PTE Kovco's body there, he has a neck brace and paraphernalia around his - medical paraphernalia around his face and mouth?---Yes, sir.

35

If you'd look at the photograph of the Bosnian that is before you, would you agree with me that he doesn't have the neck brace or the other material around the mouth area and that he does have a moustache?---Yes, sir.

40

Are you able to say whether or not you noticed those differences between the time you saw PTE Jacob Kovco at the military mortuary facility when the SIB took those photographs and the next occasion at the Kuwaiti Morgue? Did you - - -?---No, I did not notice the difference.

45

Are you able to say why you didn't recognise, for example, the fact that this body had a moustache?---The - obviously the environment that I was

in at the time had a bearing on it, the fact that I wasn't - I didn't feel like I wanted to have a detailed look at the body as well, as I've already described. Basically those - those factors there, sir.

5 Looking at that image of Jacob Kovco there before you now, do you recognise him as being the soldier that you saw on your normal daily activities?---He definitely doesn't look like Jake, sir.

10 It's the case, is it not, that he has material going over the area of his mouth and indeed protruding up to the upper lip where one would grow a moustache?---Yes, sir.

15 Thank you, if you could turn that image off. Those are the further matters that I wished to put to Soldier 2, sir, before LTCOL Wilkinson.

PRESIDENT: Yes, thank you. Other people at the Bar table, does that require you asking further questions of this soldier?

LTCOL HOLLES: No, sir.

20

LTCOL BERKLEY: It does for me, sir. I just want to ask one thing.

<EXAMINATION BY LTCOL BERKLEY

[1002]

25

LTCOL BERKLEY: Soldier 2, I can see that you're obviously distressed by reliving this, but can I ask you this: we saw a video image of a person who was saying that there were three people there to identify the body and that the - at least one of them asked for the whole body to be exposed. What do you say to that?---I have no recollection of the body bag being completely opened up, sir.

30

35 Do you affirm your evidence yesterday that it took a matter of seconds, the identification process?---Yes, sir.

And you affirm that you weren't invited to be part of it?---I was present at the time but I wasn't asked to identify the body, sir, no.

40

Thank you very much. I have nothing further, sir.

COL GRIFFIN: That has prompted one question that I omitted to ask, sir.

45

<EXAMINATION BY COL GRIFFIN

[1003]

COL GRIFFIN: That individual who showed the refrigerator doors in the mortuary facility, did you recognise him?---Yes, sir.

5

He was a man there on the day - - -?---He was present at the time, yes, sir.

He showed two refrigerator doors, one at the far end and one further down where another Australian man was indicating that PTE Kovco's body had gone in on the first - when it had been taken to that facility, one of the central fridges as opposed to the one at the far end. Do you have a recollection of which fridge the body was put into and which fridge the body that you saw was taken out of?---I'm pretty sure when we took Jake there he was put into the fridge towards the rear - the rear wall. I cannot - cannot recall which fridge the body that was presented came out of, sir.

10
15

Thank you, sir.

PRESIDENT: LTCOL Wilkinson?

20

LTCOL WILKINSON: Yes, sir, just a few matters before we cease to put this witness through this ordeal.

25

<EXAMINATION BY LTCOL WILKINSON

[1004]

LTCOL WILKINSON: I wonder if the witness could be shown Exhibit R106; that's his redacted statement, please, if he could have that in front of him. Thank you.

30

I just have one question about the incident itself, Soldier 2. I wonder if you'd go to paragraph 23 of your statement?---Yes, sir.

35

And in the second last sentence you say that you recall that you wanted to ensure that Soldiers 17 and 19 were not left alone. Now, I take it you weren't referring to them being left alone in the room, is that correct?---No, sir.

40

What did you mean? What did you mean by being - you didn't want them to - - -?---After they had been - obviously what they'd been through and been down to visit Jake, they were mounting their duty some time afterwards. I wanted to make sure that for their own welfare that they weren't left alone, so somebody was to remain with them to prevent them taking any adverse actions in any way.

45

So you were concerned about their welfare?---Yes, sir.

And you wanted them looked after?---Exactly.

5

I take it because of the horrific incident that they had just been through. Okay, thank you. At paragraph 27, and indeed yesterday you gave evidence of your awareness of your role in general terms and you were of course - and you've given evidence that you're aware of the duty statement?---Yes, sir.

10

The document called the "Escort of Deceased Persons Duty Statement" and that only refers to ensuring the correct assignment of a casket, is that correct?---Yes, sir.

15

At any stage were you ever the only person involved in the various morgues and various situations where the casket was placed?---No, sir, there was always somebody else with me.

20

So were there Defence officials with you?---Yes.

And of course at Al Sabah there were also civilian - - -?---Yes.

25

And who were the civilians that were with you at Al Sabah?---The Embassy representative.

The Embassy representative?---Or the consul.

30

And that's Mr Adams?---Yes, sir.

And then there was the Kenyan representative?---That's correct, sir.

Mr Nasser?---Yes.

35

Just as an aside, was Mr Nasser in that video that we saw earlier?---I'm not sure, sir. I don't think I could actually recognise him. That person in that video spoke a lot better English than Mr Nasser.

40

At paragraph 38 of your statement, the second sentence - and you're standing there in the Al Sabah Morgue and you say that nothing about the body jumped out at you. You didn't see a moustache - - -?---No, sir.

- - - on the person in that casket?---No, sir.

45

In that bag. If somebody had said, "Did Jake have a moustache?" what

would you have done?---I have answered - he didn't have a moustache so I would have answered "no". And I can only assume that I would have, you know, as they spoke I would have paid more attention.

5 But that didn't happen?---No, sir.

Certainly Mr Adams didn't say anything about that?---No, sir.

10 And neither did Mr Nasser or anybody else. And there are two other defence officials in the room?---Correct.

When the - in the morgue, and they didn't say anything about that either?---That's correct, sir.

15 Now, at paragraph 39, you talk about Mr Adams, the Embassy official. Was he a mature man?---Yes, sir.

How old would you say he was?---I'd put him at late 40s to early 50s.

20 So he was pretty old?---Yes.

Did he appear to know what he was doing?---Yes, sir.

25 Did he present to you as a person that was experienced in these sorts of things?---Yes, sir, he seemed to have a calm approach to what was going on.

He looked at the body?---Yes, sir.

30 He had a copy, did he not, of the passport photo?---I believe so, sir, yes.

You've seen that passport photo on numerous occasions?---Yes, I have.

Does the passport photo of Jake have a moustache?---No, sir.

35 Did Mr Adams say anything to you about the difference between a passport photo and Jake, and the issue of whether there was a moustache or not?---No, sir.

40 You say in paragraph 39 that he appeared to be satisfied that the body was Jake's. In any event, at any stage, either before or indeed after his examination, did he tell you to make sure it was Jake?---No, sir.

45 At any stage has anybody specifically instructed you that it was your role, that it was your job, to ensure that the body was Jake's?---No, sir.

Or indeed that it was solely your responsibility?---No.

5 At paragraph 40 you refer to Mr Nasser's role and he says that his staff knew what they were doing and that you trusted him. What do you mean? What did your trust entail?---He - I don't think he works at the morgue, but through his capacity from Kenyon he seemed to have an authoritative position over those staff members and he didn't seem perturbed in any way about the way that they were going about their business.

10 In fact he told you that they knew what they were doing, the staff knew what they were doing?---Yes.

15 Finally, in paragraph 42 you've come back to Melbourne and of course you've found out that the body isn't Jake's at all, it's somebody else's. You say there that you were devastated. What do you mean by that? What were your feelings when you discovered it?---Well, I was aware that the family was going to be present there, both Jake's family and Shelley. And I was obviously aware that they were going through a rough patch at that time having their son and loved one brought back. Then hearing about what had happened was obviously going to cause them even more anguish. So, you know, I was extremely upset about being part of something that had caused them even more anguish.

25 You're not talking about self-pity, you're talking about your devastation for others?---I felt extremely sorry to, you know, any further heartache that was going to be caused to the family.

30 Sir, I have no further questions.

PRESIDENT: Thank you. Anything further, Colonel?

COL GRIFFIN: No, sir, thank you.

35 PRESIDENT: Thank you. The morgue we saw in the video, for want of a better phrase, I got the impression that it had been spruced up. Am I right?---Yes, sir, it appeared to have been. When I was there obviously, as I said, it was even - it was a lot busier than that. There were locals moving around inside, et cetera, and people were stepping over the trolleys that were scattered around, et cetera. It was extremely busy at the time and that looked - on the video it looked a lot cleaner than what it was when I was there.

45 Anything arising out of that, gentlemen?

COUNSEL REPRESENTING: No, sir.

PRESIDENT: Thank you. You may stand down.

5

<WITNESS WITHDREW

[1013]

10 COL GRIFFIN: Sir, mention has been made of a Mr Nasser who was
present at the proceedings. Your Terms of Reference require the Board to
report on the unavailability of any evidence. I'm going to tender a letter
to you which I'll read onto the record. It's a letter to me. It's from the
Australian Embassy Kuwait dated 22 July 2006 addressed to
15 COL Michael Griffin, Counsel Assisting, PTE Jacob Kovco Board of
Inquiry:

20 *Dear COL Griffin, On 19 July 2006 I made a telephone call to
Mr Nasser of Gulf Agency, which is the local agent for Kenyon
International, to confirm the understanding of the PTE Jacob
Kovco Board of Inquiry that he was not prepared to make a
formal statement to the Inquiry regarding his involvement in the
repatriation of PTE Jacob Kovco's remains. Mr Nasser
immediately passed the phone to his manager, Mr Alan Almeida.
I told Mr Almeida that I was calling to ask whether Mr Nasser
25 would be prepared to make a statement to the Inquiry.*

30 *Mr Almeida said that Gulf Agency had already made a statement
to BRIG Elizabeth Cosson's inquiry and had been given to
believe that that was to be the extent of their involvement in the
matter. Gulf Agency did not therefore wish to be involved any
further. I noted that the present Inquiry was a separate
investigation. He repeated that Gulf Agency did not wish for any
further involvement in the matter.*

35 *I conveyed this information by telephone to MAJ Young on
21 July 2006. MAJ Young requested I write this letter to you to
confirm my advice to him about this matter.*

40 *Yours Sincerely, Dr Ralph King, Ambassador.*

I tender the document, sir.

PRESIDENT: Any opposition to the tender of that document?

45 COUNSEL REPRESENTING: No, sir.

5 **#EXHIBIT 109 - LETTER FROM THE AUSTRALIAN EMBASSY
KUWAIT DATED 22/07/06 ADDRESSED TO COL MICHAEL
GRIFFIN, COUNSEL ASSISTING, PTE JACOB KOVCO BOARD
OF INQUIRY**

10 COL GRIFFIN: I have a further document, sir, which is a statement of
Soldier 33. For reasons beyond the control of himself and the Board,
Soldier 33 is unable to attend to give evidence even though he has
returned from the theatre for other reasons that I don't propose to go into
at this stage. However, he is the person who returned PTE Jacob Kovco's
15 body to Sydney and who made the identification in the Kuwait morgue
before PTE Jacob Kovco was properly returned to Australia. I will read
from page 8 of his statement:

20 *I had known Jake a while. He was almost impossible to recognise
when I looked in the body bag. If I did not know him and had to
identify him from a photo I could not have done it. All the colour
had left his face. He had bandages and hospital equipment on
him still. The escorting officer should not be made a scapegoat
for the mix-up. Anyone could have gotten the initial identification
25 wrong. It is imperative that someone who knows the deceased do
the identification. It also needs to be remembered that
identification by facial features will not always be possible.
Sometimes other features will need to be relied upon, for
example, in the case of a grenade death.*

30 Soldier 33, as you'll see from the matrix, sir, is the Company Sergeant
Major of the SECDET. I tender that statement which has already been
distributed to Counsel Representing.

35 COUNSEL REPRESENTING: No objection, sir.

PRESIDENT: Is there any opposition to the reception of that document?

40 COUNSEL REPRESENTING: No, sir.

#EXHIBIT 110 - STATEMENT OF SOLDIER 33

45 COL GRIFFIN: There is also a redacted version for public
documentation.

PRESIDENT: There will be a classified version of the document.

5 COL GRIFFIN: Thank you, sir. We now have a specialist witness who -
and I ask that we take a short adjournment, sir, to prepare for the evidence
of that witness.

PRESIDENT: Yes, thank you.

10

ADJOURNED [1019]

15

RESUMED [1109]

MAJ HYDE: Mr President and Members, I call Prof Alexander
McFarlane.

20

<PROF ALEXANDER COWELL McFARLANE, sworn [1110]

25

<EXAMINATION-IN-CHIEF BY MAJ HYDE

MAJ HYDE: Prof McFarlane, could you state your full name and
occupation for the record?---Yes. My full name is Alexander Cowell -
spelt C-o-w-e-l-l, McFarlane, and my position is as Professor of
30 Psychiatry at the University of Adelaide and I'm currently in the role as
the Director of the Adelaide Node of the Centre of Military and Veterans
Health.

35 For the purposes of giving evidence today, have you been shown a copy
of Annex F to Chap. 7 of the Administrative Inquiries Manual?---Yes.

40 Could I now get you to outline in some detail your professional
experience and qualifications?---Yes, I graduated in medicine from the
University of Adelaide in 1975 and completed my specialist training in
psychiatry in 1980, and I've been in an academic position since that time.
I've been a Professor of Psychiatry since 1990. My area of particular
interest is that of disasters and traumatic stress. I commenced my major
research in 1993 after the Ash Wednesday bushfires. That has
subsequently led me to be involved in various other sorts of traumatic
45 events and since approximately 1995 I've had a significant involvement in

the military and I'm a member of the Specialist Reserve of the Air Force and I hold the rank of Group Captain. In that role I am the advisor in matters to do with mental health for the Director General of the Health Services Division. In terms of my other clinical experiences, I have had various positions including the Clinical Director of the North West Adelaide Health Service in Adelaide, which was a mental health service for approximately 500,000 people. I also was the head of the Department of the Psychiatry at the University of Adelaide for approximately ten years and changed into this current position approximately a year ago. I have had a variety of roles in professional bodies including the President of the International Society for Traumatic Stress Studies, which is the professional society which is involved in dealing with the effects of traumatic events and I also hold the LAUFER awards for scientific excellence which is awarded by that society. My involvement in medico-legal matters actually goes back to the 1983 bushfires but I've been involved in many matters both in Australia and overseas, jurisdictions including matters to do with - in the United Kingdom, Northern Ireland and New Zealand.

20 Thank you, Professor. Now, for the purposes of giving evidence today before this Inquiry, have you produced a report?---Yes, I have.

Do you have that report with you?---I do.

25 In addition to that have you also produced a curriculum vitae setting out your qualifications, et cetera?---I do.

And do you produce both those documents to this Inquiry?---Yes, I do.

30 I tender the report of Prof Alexander McFarlane, dated 27 July 2006 together with the curriculum vitae and the annexures to his report, and I'll go through those in due course.

PRESIDENT: I take it counsel have seen those?

35 COUNSEL REPRESENTING: Yes, sir.

PRESIDENT: Is there any objection to the report?

40 COUNSEL REPRESENTING: No, sir.

PRESIDENT: Marked as Exhibit 111.

#EXHIBIT 111 - REPORT OF PROF AC McFARLANE AND CURRICULUM VITAE

5 MAJ HYDE: Mr President, could I indicate that there is a redacted version of the Professor's report. There are some operational secrecy matters contained in that report and they have been blacked out in the usual fashion. So perhaps if one of them could be given a classified marking.

10 PRESIDENT: Yes, there will be a redacted and classified version. I take it everybody is comfortable with that approach?

COUNSEL REPRESENTING: Yes, sir.

15 MAJ HYDE: Professor McFarlane, for the purposes of producing your report, were you provided with certain materials?---Yes, I was.

20 Could you tell the President what those materials were?---Yes, the first document was the medical records of PTE Kovco from the Australian Defence Force. I was provided with three copies of those records. There was the statement of Soldier 17; there was the floor plan of room 8 in the Australian Embassy accommodation area in Baghdad; the fourth document was the statement of Soldier 16; fifthly, there was the private diary of PTE Kovco; sixth, there was a copy of the transcript of the New South Wales Police interview with Soldier 17; the seventh matter was the copy of the transcript of the New South Wales Police with Soldier 19; there was the police statement of Shelley Kovco; the ninth matter was the copy of the evidence of transcript of examination of Soldier 17; the tenth was the psychology record from the Australian Defence Force of PTE Kovco; the 11th was the service record of PTE Kovco; the 12th matter was 95 photographs, titled, "The matter of the death of PTE Kovco, forensic case 1104859"; the 13th matter was photographic supplement case reference OP CATALYST 0806. Subsequently, I've seen the statement of Soldier 2 and the statement of Mrs Kovco.

35 Thank you. For the purposes of preparing your report and reaching your ultimate conclusions, you've mentioned that you've had access to the diary of PTE Kovco. Can you tell the Board in what that was material to your assessment process?---It was material to my assessment process in several ways. When trying to ascertain whether a person may or may not have committed suicide, there are two issues that one needs to ascertain. The first one is their proximate mental state; in other words, their mental state in the day and hours preceding the point of their death. The second issue is I guess a more longitudinal perspective or long term perspective

of the individual given that the contents of a diary might give you some indication of a particular state of mind and, in particular, one would be interested in the issue as to whether they had any symptoms that might be indicative of a psychological disorder. One is also interested in the question as to whether there are other risk factors that might increase the probability of an individual who may have attempted or successfully suicided.

In addition to the journal, you were also provided with statements of various other personnel who were located in Baghdad at the same time as PTE Kovco. What is the significance of being provided with material of that nature?---The significance of that material is that again it allows you to make some assessment of the individual's mental state. The majority of the information in those statements pertained to PTE Kovco's state of mind in the day or days immediately preceding his death and they are useful in that they may provide information or evidence that would allow you to make a judgment about a state perturbation or distress that is an important issue to assess in determining whether somebody may or may not have killed themselves. The other side of it is that there are other obviously matters that need to be taken into account in relation to a matter such as PTE Kovco's death in terms of risk behaviour and those accounts also describe his general state of mind that allows one to make some assessment about those issues.

Could you explain for the Board what the usual indicia of depression are? ---Well, depression can present in several forms. In current psychiatric practice we use the criteria that are developed by the American Psychiatric Association and are reflected in a volume called the Diagnostic and Statistical Manual of the American Psychiatric Association which is currently in its fourth edition.

Depression, first of all, presents in several ways. The first one is as a major depressive disorder. Major depression is the more severe form of depression and that diagnosis is only made if a person has a pervasive disturbance of mood which lasts for at least two weeks. On occasions people may not directly complain of depression, they may complain of irritability or a general sense of fatigue or not being able to function.

One then looks for a number of other symptoms which include matters such as sleep disturbance, loss of energy, loss of motivation, suicidal thinking. Individuals can have vegetative change where they may have a loss of appetite or sometimes people have increased appetite which is reflected in their weight. People's attention or processing is affected. They have disturbance of memory and concentration. These symptoms are a significant cause of distress and dysfunction to the individual. So

one is looking for a general pattern that will incorporate some of but not necessarily all of those symptoms.

5 In the more severe forms you can have psychotic depression. In psychotic depression people will have delusions that tend to be of a nihilistic variety. What we mean by that they are very negative beliefs. Sometimes people, for example, may believe that they are rotting or dying. They may have paranoid delusions. Depression also exists in more minor forms and one such category is an adjustment disorder with depressed mood. Such
10 depression is more reactive to an immediate circumstance and doesn't cover the same gamut of symptoms as I referred to with a major depressive disorder.

15 The third variety of depression that we look for is a disorder called dysthymia. This is where an individual doesn't have the same severity or intensity of mood disturbance in a major depressive disorder but it's long standing sense of negativity that is chronic. One doesn't make that diagnosis if it occurs in the presence of a major depressive disorder.

20 Now, were any of those indicia present on your analysis on any of the materials that you were provided with for the purposes of preparing your report?---No, the only matter - well, I think that needs to be answered in two ways. The first question is, were there any of those symptoms or
25 manifestations present in the days, weeks or month prior to PTE Kovco's death. The only matter that he referred to in his personal diary was a sense of irritability. That occurred on one day in response to a specific circumstance and isn't the pattern of irritability that one would associate with depressions. There was no evidence on my reading of him having any sustained or suicidal thinking. The second question, however, arises
30 as to whether there was a previous episode that he'd had some four years ago which he referred to in his diary. I can't remember the exact word. I think it was "bad patch" was the way he referred to it.

35 Now, that was a single entry and that would simply point to the question as to whether he may or may not have had some significant symptoms at that time. But there was nothing else of any substance that I came across in his diary.

40 You've talked about the indicia of depression. Are you able to give the Board any explanation as to whether there's a correlation between depressive illness and suicide?---If I can just go back a step. Depression is only one of a number of psychiatric disorders that are associated with suicide. The more severe disorder such as schizophrenia have a significant association with suicide. Bipolar disorder, both in the manic
45 and depressed phases have a significant risk of suicide. I'm not sure if I

mentioned post-traumatic stress disorder. Panic disorder has an association with suicide. Alcohol abuse has an association with suicide. So it isn't only with depression that one is interested in this matter.

5 Notwithstanding your comments would it be a fair assessment to say that none of those indicia were present in terms of him being at risk of suicide?---That would be my view.

10 Did you identify any events that may have - and that is events in the weeks prior to his death that may have impacted on his level or capacity to concentrate?---Yes, I believe that there were several matters that arose in the context of his personal reflections in his diary.

15 Could I ask you to deal firstly with the one that you've identified on page 10 of your report, that is the entry on 18 April 2006?---Yes.

Perhaps if you could just indicate to the Board the nature of that event?---Yes. The entry that MAJ Hyde is referring to relates to an entry in the diary where PTE Kovco says:

20

Towards the end of my shift I saw the end results of combat for the first time. Three Iraqi soldiers came in with gunshots -

25 and then he went on to describe their reactions, yelling and moaning in agony:

30 *It was actually quite surreal, actually seeing the wounds and pain of combat. One thing really made me feel for their plight was when they arrived at the checkpoint in their vehicle and then had to be searched as well as clearance from the Americans to allow them through.*

35 He then went on to comment about how the injured soldiers colleagues had to listen to the anguish of their friends and comrades. The reason why I think that's an important observation because - there are two issues. The first one is that it creates a reality in PTE Kovco's mind of the risks and the associated horror and distress that individuals feel both if they are either wounded or they witness the wounding of their colleagues. And the second issue is that such a matter quite frequently plays upon the mind of the individual in the hours and days that follow.

40
45 When you say that it plays on their mind in the hours and days that follow, is there any significance to that in the circumstance surrounding PTE Kovco's death that you're aware of?---Well, I think one of the important issues is that if you're in an environment where you have to maintain a

high degree of vigilance and external focus on threat, this really creates a reality in your mind as to what you're dealing with and in one sense it might make you more externally focused but the other side of it is that at times you might find yourself lapsing into a recollection of what you saw,
5 so it might distract you from the task at hand.

Were there any other factors that you identified that may have caused him to be, if I can use the term "distracted" prior to his death?---Well, he recollected in his diary on two matters. The first one was some issues that
10 had occurred with his family at home and the second issue was that he had felt very irritated with his Section Commander on one particular - the one particular incident.

Could I ask you to turn, if I may, to page 10 of your report, and in particular the heading, "Overall Comment". You state there in a summary fashion your conclusions. Could you just detail for the Board what those are?---Yes. I must say that it was a privilege to actually read
15 PTE Kovco's diary because I think he did provide some very poignant reflections on the state of mind of how soldiers adapt and cope in a combat environment. He particularly at a number of points reflected on both the risks to him of being killed, but also on how he dealt with situations where he had to cope with threat. These included an incident where a mortar had landed 150 metres away from him and also when he'd ridden as a shooter on an armoured vehicle going out into the red zone.
20

What I sort of noted in reading his diary was the way that his sense of vigilance had changed when he returned from his duty in the red zone to when he was placed on piquet duties at the Australian Embassy, because he perceived that to be an environment of a significantly lower degree of
25 threat. I think that's a pertinent matter for the Board to consider because obviously if the Board were to find that he died as a consequence of an accident, his vigilance about risk is one of the factors that could have led to some accident occurring. I believe that his diary did provide some insights into his general assessment and his risk taking.
30

You talk about a higher threat and lower threat environment and that he moved from one to the other. In terms of concentration, why would it be that a move from a higher area of threat to a lower area of threat might affect someone's thinking?---Well, if I can just give an example. I mean,
35 if people have driven long distances they are more likely to have fatal accidents closer to home than they are in any part of the journey and it's because often their vigilance will lapse because they almost sort of believe that they are home and critical errors of judgment can occur in that environment.
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5 With obviously dealing with firearms, there needs to be a constant degree
of anticipation of the risk of accidental discharge. If you've moved from
an environment of high threat to an environment of low threat what you
have to try and maintain in that low-threat environment is an equal
preoccupation with your concern about the handling of firearms as you
might have in the high-threat environment. In my view, it seemed that on
the day of his death PTE Kovco was in a somewhat playful state of mind,
particularly in the moments or the hour prior to his death, but also it
appeared there was another point where he may have been in a less than
vigilant state with a soldier when he was coming off duty at the point
10 where he was supposed to have been unloading and clearing his weapons.

15 Can I now ask you to turn to page 4 of your report, and in particular the
heading "Diary Entry On 21 March 2006". You'll see there that you've
set out the fact that PTE Kovco had an unnerving dream and you set out in
full that particular diary entry. I'd like to ask you what, if anything, you
make of the reference to the following: that is, where he says:

20 *Now, don't get me wrong, I have no intention of shooting myself.*

Are you able to tell the Board whether that particular statement had a
relevance for you in your assessment in determining whether he or may
not have caused the injury to himself deliberately?---Well, yes, it clearly
did. I mean, this is really obviously an extraordinary dream for this man
to have had and having had that dream, his reflection on it is particularly
noteworthy because at that point he'd made some allusion to having
contemplated doing this to himself in a conscious state of wakefulness.
He obviously would have been highly concerned. The fact that he
actively disavows a thought of suicide I think is an important negative
statement that he has made.
30

On the following page, that is, page 5, you say for the Inquiry:

35 *The question arises as to whether this component of the journal
could be indicative of some suicidal thinking. Given his mood as
reflected in his diary, there is nothing to suggest this. His entries
are orientated to the future.*

40 What is the significance of someone's intentions or thoughts being
orientated to the future?---Suicidal individuals will often have a sense of
hopelessness or nihilism about the future. In reading his diary one of the
issues that I was looking for was whether this was a man who was looking
forward with a sense of anticipation to future events in his life. Clearly at
various points he did make those sorts of positive reflections. That would
45 be very unusual in an individual who's got suicidal thoughts, because in

fact the very nature of suicide is that there is no hope or point in life.

5 Could I now ask you to turn to page 7 of your report and the heading
"Diary Entry on 3 April 2006". Could you explain for the Board why
you've considered that entry to be significant and the correlation between
that entry and your comment under that particular entry, that is, your
reference to his inability to understand how people kill themselves in a
violent way?---Yes. This entry refers particularly to a massive VBIED,
10 which is a vehicle borne improvised explosive device, which blew up at
checkpoint 12 for the green zone. What he reflected upon was his - well,
he was obviously trying to understand or empathise with the individuals
who drive these vehicles. He basically said that he couldn't understand
why an individual would want to do this. Again I think this is an
interesting opportunity to have some sense of what might have been in
15 PTE Kovco's mind about the issue of suicide. I mean, he specifically
says:

20 *I can't understand why these people would want to kill themselves
in such a violent way just to kill other people. They have a
fucked-up way of thinking. And I think the quicker they are
exterminated the better.*

25 Now, if I can move to a different topic which is also the subject of
assessment and analysis in your report. That commences I think at
page 17. This component of the report relates more to matters concerning
Soldier 2. Could you outline for the Board in a general sense what it is
that you've identified in your report concerning the identification process
carried out by Soldier 2 in particular?---Well, this morning, Mr President,
I had an opportunity to read the statement of Soldier 2. I wasn't aware of
30 those facts when I wrote my report. And I think my comments here are
actually more relevant than when I actually wrote this report. There are
two issues about Soldier 2: firstly, that he immediately came into room 8
in the melee that followed PTE Kovco's injury - obviously that would
have been very distressing and traumatic circumstances for anybody to
35 walk into; the second issue was that he was subsequently required to
identify the body. There are two issues. The first one is the ability of
people to accurately identify faces that they have seen in highly stressful
circumstances, and it's I guess not very reassuring to the criminal justice
system, but the accuracy of facial identification is much lower than people
40 would like to believe.

45 There was a very interesting experiment done by a colleague in the US
several years ago and they've been involved in research with the Special
Services over there. Part of the Special Service training is where the
individuals, the service men, are basically subject to mock interrogation.

Obviously one part of military training is to try and increase people's ability to function and cope in circumstances in interrogation and torture so that they can protect important information. In this particular experiment they got a group of - I think it was around 400 people who had been through this training and they had been subjected to two forms of interrogation. The first form of interrogation was much more intense and involved some degree of physical threat to the individuals; the second form of interrogation was what was called "soft" interrogation. I guess that would probably be more akin to the sort of investigation and interview that might occur in a police investigation.

The day of completion of this training, these individuals were then taken into a room and were asked to identify their interrogators. In the situation of the hard interrogation, they made an accurate identification only 30 per cent of the time, which is extraordinarily low when you think about this is just in the days that followed the incident. That information was presented in several ways. At one point they had 15 instructors standing in front of the soldiers. In another situation they showed individual photographs and then they had a sequence of photographs all presented together and they looked at the accuracy of identification in those three different environments. Basically, the soldiers were not good at identifying at who had undertaken the hard interrogation.

With the soft interrogation, the accuracy went up to 60 per cent but that still involves a 30 per cent error. I think this is relevant because what it shows in the matter of PTE Kovco is that an individual such as Soldier 2 may, even though PTE Kovco was obviously an individual known to him, when he then subsequently has to look at a body and identify a face, the same neural mechanisms that were relevant in the Morgan study are likely to have come into play.

The second body of research that's pertinent is there's been a large amount of neuro-imaging research done in the last decade looking at people with post-traumatic stress disorder. Essentially, what that research aimed to do is to try and identify the areas of the brain that are involved in processing traumatic memories and to see whether they are similar to individuals who don't get post-traumatic stress disorder. What is actually shown is that there are quite different patterns of neural circuitry involved. This is research that I've also been involved in.

The second relevant issue about that body of research is that the areas that are involved in processing traumatic memories are exactly the same neural circuits that are involved in facial identification. In facial identification, in fact one very important part of you knowing or recognising the person you see is the familiarity of the emotion that you associate with a face. In fact,

there's one disorder called Capgras syndrome where people have a delusion that the person, for example, their wife, is actually not their wife. They might look like their wife but they are convinced the person is not their wife. Research with people with that particular disorder has shown
5 in fact the disruption of function of the nucleus in the brain is called the amygdala. This is one of the critical parts of the brain that's involved in activation of facial recognition. In individuals with post-traumatic stress disorder, that particular nucleus doesn't activate in the same way as in normal people, and it's been shown that in facial recognition tasks, people
10 with post-traumatic stress disorder perform differently. I think it's pertinent to this matter because it suggests that individuals who have had a significant traumatic exposure are at risk of making accurate facial identifications because the very neural circuitry that they depend upon isn't functioning in the same way.

15 Professor, in relation to Soldier 2, what, if any, traumatic event are you aware that he was subjected to in this process that is, in the death of PTE Kovco?---The first matter is him coming into the room and being involved in the immediate attempts at resuscitation and evacuation and also, from
20 what one could gather from his personal statement, he tried to take some degree of control of the scene of the death; for example, he moved the firearm, I understand, because he perceived there to be a risk to other people who were obviously attempting to provide assistance to PTE Kovco. The second issue is that his statement refers to him obviously
25 finding the process of repatriation and the events that followed distressing and preoccupying. He was then obviously involved in the identification of the body at the last point of repatriation and his statement commented that he really felt somewhat distressed at that point - I can't remember the exact words - but he found it a difficult environment.

30 One can predict that, obviously having to look at PTE Kovco's body, what that may make him do is immediately think of the circumstances where he came into the room and saw obviously PTE Kovco in a very precarious state and obviously there was blood and distressed people. One could
35 predict that that's where his mind may well have gone when he again had to look at a body, which in fact was not to be PTE Kovco's, but how his mind in a sense was not able to focus in a cold, unemotional way on the task of the facial identification, but his mind is likely to have been drawn back into those other issues.

40 One of the things that I also found noteworthy in reading all of the soldiers' statements in the immediate aftermath, nobody commented about the entry wound. In fact, Soldier 2 was the only person who specifically commented about the wound; everybody else commented about the blood.
45 Again, it's one of the interesting things about the way that people describe

these events is often a remarkable lack of articulation of the facts and it's almost people's attempts to really not focus on the awfulness of what they see.

5 You've talked about post-traumatic stress disorder. I assume your evidence is that there would have been a significant element of stress on Soldier 2 simply by virtue of going into the room and dealing with the aftermath of that tragic event?---That's correct. Perhaps just to enlarge a little, obviously one emotion that would certainly come into play at that point would be one of horror and also a sense of helplessness about the attempt to intervene, which obviously proved unsuccessful.

15 Professor, could I ask you to turn to page 31 of your report, and in particular the first paragraph on that page. You've said there in relation to the difficulties of maintaining family relationships in that particular environment, you've gone on to say that - well, perhaps if you could explain to the Board the thrust of what you're saying there in that paragraph?---Let me just - perhaps if I just read it into the transcript and then comment on it:

20

From a psychological perspective his death, if it is found to be by accident, was a consequence of the impact of threat perception on him -

25 I'm sorry, I think I've misled you. I'd like you to talk about the previous paragraph?---Right. The previous paragraph. Right, sorry.

Which starts on - - -?---The previous page.

30 - - - the prior page?---Yes. So my conclusion was that PTE Kovco didn't appear to suffer from any particular psychological disorder or to have been in a suicidal state of mind at the time of his death:

35 *His private entries in his diary suggest more the preoccupation of a man dealing with the threats of being in a warlike zone that pose significant risks to his safety and welfare. In the midst of this environment he was trying to maintain what appears to have been an intimate and caring relationship with his family. The difficulties that he refers to would appear to represent little more than the normal anxieties and conflicts that occur in family life.*

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45 What I was reflecting on was that his diary is, you know, I guess a very intimate juxtaposition of the thoughts of a man trying to adjust to being in a war zone where there's obviously a significant risk of death and injury which requires a particular state of mind that's about survival and

5 vigilance. And I guess one of the differences about warfare in the modern
age is that a soldier also is able to contact and speak to family in ways that
obviously wasn't the case in previous times. As a consequence, he was
very aware of the intimate day-to-day matters that were occurring in his
10 family and one matter that had occurred in the days immediately
preceding his death was a minor conflict between his mother and his wife
over her involvement with his children, and he was obviously trying to
manage that at a distance, which was obviously difficult. And it seemed
to me that what he was dealing with in those circumstances and his
15 reactions were no more than, you know, happened in many households
and would otherwise be considered unremarkable.

I have nothing further for this witness.

15 PRESIDENT: LTCOL Wilkinson?

LTCOL WILKINSON: Thank you, sir, just a couple of matters.

20 <EXAMINATION BY LTCOL WILKINSON [1153]

LTCOL WILKINSON: Professor, I appear for Soldier 2 who's present
and sitting next to me. If I could take you to page 20 of your report. On
25 page 20 you start - you summarise the literature that relates to
identification matters. I might say that I'm pleased that in fact you did
summarise that information because most of that information could have
been written in a different language, as far as I was concerned. But
certainly in the summary you say this:

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*The systems involved in a facial recognition are the same neural
systems that are involved in the processing of traumatic
memories. Traumatic stimuli have the capacity to disrupt the
process of contextual information. The process of witnessing
PTE Kovco's face by individuals who were known to him, as part
of the body identification process will activate these circuits in
the brain and the horror and distress of the individuals combined
with the obvious signs of injury manifest in PTE Kovco's face is
likely to have disrupted the underlying integrity of these neural
systems and their accuracy in the facial recognition task.*

In the next paragraph, the last sentence:

45
*The impact of the emotional response to viewing the face by an
individual who had a personal relationship with the dead*

individual will disrupt the functioning of the neural circuitry that is essential to correct identification.

And the next paragraph, starting the second sentence:

5

The traumatic injury of a face, as was the case with PTE Kovco, is likely to provoke an avoidance response to the immediacy of the horror of witnessing the dead person and this further process is likely to create a significant error rate in facial recognition.

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In the next paragraph, about a third of the way down:

To put it simply, traumatised individuals find it difficult to carry out recognition tasks with any degree of accuracy.

15

A little further down:

The impact of traumatic stress precisely disrupts those parts of the brain whose function is critical for carrying out the process of accurate facial identification. This vulnerability is likely to account to a significant degree with the incorrect body identification of PTE Kovco, presuming this was based upon individuals being asked to look at the face and make a positive identification. The reflex of desire to look away from horror combined with the effects of stress on brain circuitry makes the accuracy of this process vulnerable to substantial error.

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Professor, it sounds to me as though these are physical reactions, this is a physical process that occurs in the brain, would that be correct?---Well, that's correct. For every thought and feeling we have there is an underlying physical process that involves the activation of a variety of different networks.

30

And I guess then you're suggesting that perhaps it's unavoidable or maybe hard to avoid in the circumstances?---Well, I think there should be an anticipation of the potential for error.

35

Indeed, is there a human tendency to minimise exposure to the dead?---Very much so. There is a natural tendency for people to try and look away from horror if they really feel that it's a personal - at a personal level. At the same time obviously we have a fascination with awful events but often that really is only to those events which we don't feel any identification with. Once we become personally involved we - you know, it's a profound part of human psychology to try and shut out, you know, the crescendo of distress that's triggered in those circumstances.

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And so he may well have been subconsciously or even consciously minimising his exposure by just glancing at the body the last time?---That's correct.

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What about tiredness and stress, are these compounding factors in this - and compound the possibility of error in these sorts of situations?---Well, obviously there is sleep deprivation and a general sense of stress are important factors that contribute to errors of judgement.

10

What about assumptions? Is it true that people see what they expect or what they assume they will see so that even if the actual visible evidence is different that they're perhaps recognising or making assumptions that are different?---Well, that's a very general statement. Perhaps if I could just clarify it a little.

15

Sure?---The way that our brain works is essentially to screen out vast amounts of information. Our brain is actually an instrument that - it's major function is to ignore and to forget and - I mean, because if we didn't we would be absolutely overwhelmed by information. I mean, I'm sure as people are sitting here they're not focusing on the sensation in their shoes and feet until I mention it. The whole brain is established to try and shut out information so that often judgements we make are approximations to the fact, and if you combine that in this particular circumstance with the emotional dimension of the horror that the - looking at the face is likely to provoke, it in a sense doubles the risk of error.

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You've already indicated that you're aware that Soldier 2 was in the room. I just want to put some other facts that he was involved in to see whether you think that these would exacerbate that recognition error situation in him. He knew the Private obviously as a member of the platoon and would see him every day on many occasions. As you've said, he was involved in the incident. He was involved in helping with the stretcher. He had to then report it to his higher headquarters and he arranged for photos, photographs, to be taken by another soldier soon after the incident. He was appointed as an escort with virtually no specific direction at all. He was dealing with the bearer party, two of whom were Soldier 17 and 19 and they were all very emotional. He also had concerns for the other members of the platoon that he'd left back in Baghdad and what they were thinking about. He'd had, as I say, interrupted sleep over a period of about three days and, perhaps even more pertinently, had seen the body on three or four occasions at different morgue situations between Baghdad and Kuwait. Would those added features also create problems in this recognition process that then occurred on his last observation of the body?---Well, I think you've raised a series of issues. The first one is his

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personal relationship with PTE Kovco. I think that is an important issue. I mean, I think the act of witnessing the face of a dead person with whom you have no prior relationship is a very different act than witnessing the face of an individual who you know. I'm not sure what Soldier 2's
5 relationship with PTE Kovco was, but at some level it was a personal relationship. Obviously a soldier in his position has a sense of responsibility for his men as well. That's a further matter that is likely to have come into play in this situation.

10 Obviously, again given his position, a second matter for Soldier 2 is his attempts to look after others and to manage the general situation. A third matter is that quite apart from the issue of dealing with the acute injury in the repeated witnessing of the body, there are post-mortem changes that will occur and there are some peculiar sort of differences in faces that
15 occur after death. I mean, again I'm not sure at what time the photographs were taken that I witnessed, but it is likely that there can be some post-mortem changes and appearance of the face actually might change in its appearance in the days that follow.

20 Then obviously at the final point Soldier 2 has to carry out the identification process. There's the added component that you describe of his sleep deprivation, the stress of having to deal with the cortege, I guess just the simple fact of travelling out of Baghdad into Kuwait. So that there are a variety of matters that then sort of compound upon themselves.

25 So therefore it's understandable that there might have been an identification problem?---Well, I'm aware that the US have passed a special Act of Congress to collect biological samples from all deployed personnel to assist in the process of identification.

30 Which leads me to my last topic, and I'm not sure whether you're in a position to be able to answer this now. But given the problems with identification that we've identified, how can the ADF improve the escort's role, or indeed anybody associated with repatriation?---Well, I obviously
35 need to limit my comments to my area of expertise. But I guess the first point is relevant to the one I just made, that this special Act of Congress was passed to try and address the issue and to really bring body identification into the 21st century, which is really about the use of DNA. The second issue is that from the area of my expertise I think the risk of
40 error should be identified. Because of my involvement in this field, and particularly my involvement in disasters, you become very aware of the errors of human judgment that contribute to major catastrophes.

45 I think one of the interesting areas that have been largely ignored is the lessons that have been learned from what we know about the way that

traumatic events are contemplated and processed and building those into understanding risk and decision-making errors. In one of my roles I've I guess tried to get people in DSTO interested in looking at the impact of those decision-making issues on the human factor interface with machinery and alarm signals. I've been surprised by the lack of interest in that question.

If I were going to do something to try and prevent this area I think it would be to take a much broader perspective in human factors errors that occur in environments of threat. One of those clearly is about body identification. You could make recommendations such as that an individual who didn't have a close approximate relationship to the individual but did know the individual and equally wasn't immediately in their death might be the person who should carry out the body identification. It would be my view that would decrease the risk of error.

The other issue that I think should be dealt with is that, for example, that piece of research that Morgan conducted I think identifies that stressed individuals have a significant capacity for misidentification and we should have a series of secondary checks. Clearly PTE Kovco had a tattoo, for example, and the procedure I believe should have focused not just on facial identification, because I think facial identification is particularly prone to error, but would be the identification of those secondary characteristics in the process.

But you can imagine I suppose from Soldier 2's point of view lifting the body out of the bag in order to examine that tattoo might have been a traumatic experience in itself?---Well, given his personal relationship, and I'm not sure what training he had in handling of dead people. But again that is another issue where it is possible to train people in dealing with corpses that minimises the adverse impact on the individuals who have to do it. I'm not sure what training he had in that regard.

Thank you, Professor, no further questions.

PRESIDENT: Thank you. LTCOL Green.

LTCOL GREEN: Nothing, thank you, sir.

PRESIDENT: LTCOL Holles.

LTCOL HOLLES: Thank you, sir.

<EXAMINATION BY LTCOL HOLLES

[1208]

5 LTCOL HOLLES: Mr McFarlane, I just have one proposition to put to you which consists of two parts. Your findings are based on the presumption that PTE Kovco's fatal wound was self-inflicted?---Where my conclusions are pertinent to that issue I've tried to put that presumption in my report; that's correct.

10 You were not asked, nor did you consider, a situation where another person inflicted, accidentally or otherwise, the fatal wound?---That proposition wasn't put to me and I wasn't asked to address that question.

15 Thank you. Sir, that concludes the questions I have on behalf of Mr and Mrs Kovco.

PRESIDENT: Thank you. LTCOL Berkley.

LTCOL BERKLEY: I have no questions, sir.

20 PRESIDENT: Thank you. COL Young.

COL YOUNG: Mr President, may I just have permission to approach Counsel Assisting?

25 PRESIDENT: Certainly.

COL YOUNG: Thank you for that, sir.

30 <EXAMINATION BY COL YOUNG [1209]

35 COL YOUNG: Professor, my name is COL Young. I act on behalf of the interests of PTE Kovco, his interest and reputation. LTCOL Wilkinson has just touched on this in relation - and you've mentioned the US Act of Congress. I assume they were having difficulties and moved at a high level to do something about that. You've told us you're a Group Captain in the Reserve?---That's correct.

40 Are you aware of any writings in the ADF touching upon identification of bodies?---No, I'm not.

45 Is it an area that you could assist the ADF if you were approached and asked to perhaps develop a protocol on how proper identification might be carried out?---I could assist them in that regard, yes.

Is that something you'd be interested and prepared to get involved in?---If I was asked I would be more than willing to offer my assistance.

5 Nothing further, thank you, sir.

PRESIDENT: Thank you. MAJ Hyde.

10 <EXAMINATION BY MAJ HYDE

[1211]

MAJ HYDE: Just one more topic, if I may, Mr President, Members. Prof McFarlane, in your report you've touched on environmental stress
15 factors, if I can use that term, and the effect on decision-making processes. Is there anything that you can offer to the Board in terms of further information that might assist the ADF in its approach to individuals making decisions in stressful environments. Perhaps if you just comment on that first?---Well, Mr President, I think the - I'm not quite clear of the
20 question - sure of the question - but let me make one comment here. I think one of the critical challenges for any individual in combat is trying to rank risk and to function in the face of threat. One of the issues that I think often leads to - and this is very true of civilian life - is that people often have peculiar biases in their risk appraisal. I mean, for example, in
25 East Timor the soldiers were more worried about the adverse effects of pesticides and their impact on them rather than getting malaria. Now, I can tell you I would much rather have a hefty mist of a pesticide than get cerebral malaria. Malaria is one of the great killers of the world and I would do everything I possibly could not to get malaria. But there are
30 people who would choose to avoid the pesticide.

Is that something that perhaps a soldier is conditioned to think?---Well, absolutely and I think society often has a very peculiar assessment of risk. With the ADF it actually has been running a campaign about the risks to
35 ADF members of getting killed in motor vehicle accidents. I think there's something like - and I'm not sure of the exact number. It's something like 63 individuals in the ADF died between something like 1994 and 2000 in motor vehicle accidents. MAJGEN Arnison in a personal conversation with me on one occasion - and this was prior to the Sea King accident -
40 said that it was actually safer for members of the ADF to be deployed than to live in Australia. It's because they were in an environment where there's very careful risk management. Now, you wouldn't - you know, if you asked the average individual whether individuals in the ADF were at risk by being deployed into warlike zones compared with living in
45 Australia of course they'll say they'd be more at risk in warlike zones. I

5 think that's an example of how, you know, often we don't really sort of balance risks correctly. Equally, the military has always presumed that you get killed by the enemy. It has taken a long time for people - I mean, the Crimean War really started the lesson for people to know that in fact as many people die in war from illness and disease as they do from enemy fire. I could still tell you of errors that get made in the ADF because the risks to people's health get underestimated and appropriate risk appraisal isn't undertaken of health risks.

10 So I think combat environments do create very interesting challenges to decision-making. Particularly individuals who are under threat do develop particular biases that often minimise their awareness of the familiar. Now, the most familiar risk to a soldier is the risk of accidental discharge. There are so many procedures that are in place, but that's the
15 thing that you last think is going to happen to you when you're under fire from an enemy. In that environment it's very easy to I think downplay that risk and to almost see the weapon as your friend, you know, rather than your potential enemy. I think these are the sorts of matters that need to be contemplated because I think we're beginning to understand a lot
20 more about the sort of the matrix of the way that emotion infiltrates what should be logical decision-making in recent times.

Are you able to comment on what sort of training or awareness of this particular issue of the environment versus the decision or the environment
25 affecting the decision-making process?---Well, the way that that gets dealt with is by very careful training and SOPs in the ADF. But at the more subtle level I don't believe that it's addressed as thoroughly as it might be.

30 Thank you.

PRESIDENT: Any further questions?

COUNSEL REPRESENTING: No, sir.

35 PRESIDENT: Thank you, Professor, you may stand down. The Board is most grateful to you.

40 <WITNESS WITHDREW [1216]

PRESIDENT: Is there any other witnesses available to us?

45 COL GRIFFIN: Not at the moment, sir.

PRESIDENT: Very well.

5 COL GRIFFIN: Forgive me for interrupting, Mr President, but I understand that there may be an application that Counsel have foreshadowed with me that possibly could be made after the luncheon adjournment, if not now.

LTCOL HOLLES: I'm happy to make it now if it assists the Court.

10 PRESIDENT: It's within the contemplation of the Board to declare or find that Soldier 2 is no longer a person affected by these proceedings; in other words, releasing him from these proceedings. Before we take that step we would invite submissions from Counsel Assisting and from
15 Counsel Representing so that we might do that. We might come back to that particular issue after the adjournment. Is there an application from Counsel Representing that they wish to make at some stage?

LTCOL HOLLES: Sir, I can indicate that my clear, unequivocal
20 instructions are that the release of Soldier 2 would be supported.

PRESIDENT: I won't at this moment invite any other comment. I thank you for that. Half past 1.

25 **LUNCHEON ADJOURNMENT** [1218]

RESUMED [1341]

30 PRESIDENT: The application or the suggestion that I foreshadowed for the contemplation of the Board before we adjourned - does anybody wish to make any comment or submissions on that topic?

35 LTCOL BERKLEY: None from me, sir.

COL GRIFFIN: Sir, it may be of assistance to you if I put the matters now that I foreshadow and allow LTCOL Wilkinson and the other counsel to conclude after that.

40 PRESIDENT: I notice that Soldier 2 is not with us.

LTCOL WILKINSON: Yes. He thanks you for that indication, sir, but he has had to catch his flight.

45

PRESIDENT: I had a feeling he might have come in from elsewhere. Yes, thank you, Colonel.

5 COL GRIFFIN: Sir, as I understand it, he's returning to his duties. In my submission, that's appropriate on the evidence you have to date. There remains evidence to come in respect of whether or not Soldier 2 may be affected before the Board. You have of course his evidence, you have the oral evidence of others, you have physical evidence, photographic evidence, and you've now heard expert evidence on psychiatric and behavioural science human factors issues. There is still evidence of people who were present with him at the time of the identification of what was in fact the Bosnian man rather than PTE Jacob Kovco, those persons being Soldier 34, whose statement has been distributed but not put into evidence yet. Another person who was mentioned as being present - I can use that person's name - his name is WO Hunter. He no longer serves in the theatre, he's back in Australia.

20 You have the advice just received from the Ambassador that Mr Nasser from the agency, who was present, has declined the invitation to assist the Board with his evidence. However, we propose to provide the opportunity for the contractor, Kenyan International, to have a representative give evidence to the Board. And most particularly there remains the evidence of the Consul, Mr Adams, the Australian Consul from the Kuwait Embassy, who was present at the time that the body was placed in the casket for consignment home as the remains of PTE Jacob Kovco. Mr Adams has provided us with a draft document but has declined to sign it until such time as he gives his evidence, and I'm attempting to arrange for a video link for him to give evidence from Kuwait next week.

30 Given those factors, you may consider it appropriate to release Soldier 2 but to provide for his counsel to remain, represent him until such point in time as that evidence is concluded before you make a decision as to whether or not you release him as an affected person rather than releasing him to go about his duties as you've indicated your intention to do today.

35 PRESIDENT: Yes, thank you. The evidence that you propose to call, as it focuses on the failure to properly identify the body, is it going to implicate or potentially Soldier 2, for want of a better phrase, any worse or any deeper than it does now?

40 COL GRIFFIN: Because Mr Adams hasn't adopted the statement, I'm unable to give you a positive statement to that effect one way or the other because until - I can't attribute any evidence to Mr Adams until he squares up to it before the Board, sir.

45

PRESIDENT: I take it his draft doesn't say anything more damning about Soldier 2?

5 COL GRIFFIN: It talks about the interaction he had at the scene with the various persons present but because there are various iterations of his evidence, as I understand it, there is a - well, I know that there purports to be a record of an interview between he and BRIG Cosson contained in the Cosson report which I understand Mr Adams does not adopt and indicates that it is in fact inaccurate. You will observe from the statement of
10 Soldier 33 that you received this morning that he took the same view with the record of interview that purports to a record of his interview with BRIG Cosson and rejects the accuracy of that material.

15 Therefore, it would be inappropriate and unfair for me to attribute a version of events to Mr Adams at this point in time until he adopts the draft statement that he's prepared, but there have been various iterations of his evidence and it may be better to wait until he presents his evidence in person under oath.

20 PRESIDENT: Thank you. LTCOL Wilkinson.

LTCOL WILKINSON: Sir, in light of that, all I'd now have to say is that if the Board is prepared to release my client - in other words, that no adverse findings will be made against him at all, notwithstanding the
25 evidence that hasn't been presented and indeed the evidence that has already been presented. If the Board is prepared to do that, he thanks you and I thank you and I'll withdraw. But if that's not the case, then I'll stay here until such time as that evidence has been presented.

30 COL YOUNG: Mr President, might I be heard?

PRESIDENT: Certainly.

35 COL YOUNG: Given the brief that I hold and some of the questions I've put to Soldier 2 and given the foreshadowed evidence that Counsel Assisting has just put to you, my position is that I believe Soldier 2 should remain a potentially affected person. We're talking about a week or so I think before this further evidence would be called. So I wouldn't be prepared to go along with him being released at this stage.

40 PRESIDENT: Would you anticipate evidence coming forward which would further implicate or more deeply implicate Soldier 2 in the events of identification at the morgue?

45 COL YOUNG: There may well be if the consular official says something

further. You will recall that I suggested to Soldier 2 that with some initiative he might have made a better fist of it and it may be that the consular official will say something that's not currently in his statement.

5 PRESIDENT: Does anybody else want to make any contribution?

COUNSEL REPRESENTING: No, sir.

10 PRESIDENT: The contemplation of the Board is perhaps premature and we will not release him at this stage. After those witnesses have been called we'll again return to the topic.

COL GRIFFIN: Would you continue with your view, sir, to release him to return to his duties?

15 PRESIDENT: Indeed.

COL GRIFFIN: Thank you, sir. Are there any other witnesses or any other applications?

20 LTCOL HOLLES: There is one other matter, sir. Sir, I make an application for the return of Soldier 14 to give evidence in person before the Inquiry. I can indicate this: that on my current and anticipated instructions, together with Soldiers 17 and 19, Soldier 14 remains the one
25 other witness whom it is proposed to cross-examine in any detail, if at all, in relation to the events that occurred in Iraq on 21 April this year. Sir, I can indicate that this application is the last I anticipate making in relation to the return of anybody. I say that unequivocally, sir.

30 Sir, Soldier 14 is represented before the Inquiry by my learned friend LTCOL Green. Whilst he was not involved in the immediate circumstances which occurred at about 1615, 1620 on that afternoon. He was certainly involved in a number of events which occurred before that which are relevant to the Board's considerations. If you go to pages 182
35 et sec of the unclassified part of the transcript, you will see the evidence that he gave initially in the first couple of days of the hearing back in June this year.

40 His situation is this, sir, that he has made two statements, as indeed many of the witnesses have. The difference with this statement and the other statements is that he resiles from a series of propositions which he advanced in the statement made to the service police from the position he takes in the statement he then made with the assistance of his then
45 counsel. They are matters of significance to the Inquiry. They are matters which, in my respectful submission, are best dealt with by that individual

being cross-examined in person before the Inquiry, just the same as I respectfully submit that Soldier 2's presence at the Inquiry increased significantly the capacity of the Board and of the other persons here present to understand what his evidence was about.

5

There are a significant number of matters which will need to be put to Soldier 14. They involve physical evidence which is before the Board by way of exhibit. I refer specifically to the - without limiting it generally - walk-around demonstrated by the SIB but done by one of the soldiers from the detachment. There are a number of other matters which I wish to put to him. If I could take you specifically to - - -

10

PRESIDENT: Can I just interrupt you, Colonel. If one of the military members could go outside and ask the people who are outside to be very, very quiet. Thank you, Colonel.

15

LTCOL HOLLES: I'll take you specifically to what he said in his second statement, sir. At the top of page 185, as reported on 21 June:

20

On 30 April 2006 I provided the statement to the Military Police Special Investigations Branch (SIB) in relation to various matters. Annexed hereto and marked with the letter A is a copy of that statement which is unsigned. That statement sets out in main what I told the SIB, although this statement clarifies several points that appear to have been dialogued by the SIB.

25

You will remember, gentlemen, the cross-examination by me of SGT Hession in which he said that certain parts of the statements had been templated and that was a concession made after pointing out to him the extraordinary similarities in the words between I think some dozen or so different statements that have been taken. This is not such an example of templating because this is evidence which, as I understand the material, this soldier gives individually. In my respectful submission, that evidence needs to be tested. That is, what he means by the term "dialoguing" and, in my respectful submission, that is best done by him attending in person for cross-examination.

30

35

Later down that page at about line 20:

40

My SIB statement reads: "The buddy system has been employed on every operation". This is not correct.

He talks about the Solomon Islands. Line 36:

45

Para 11 of my SIB statement reads: "At all times when clearing

weapons the buddy system is to be employed”.

He then goes on to say:

5 *This does not accurately reflect what I told the SIB.*

At line 35 of page 186:

10 *We'd been joking together as we finished duty and I suspect that*
he was hurrying to get through (blank) so he could hold the door
closed to me. There is a possibility that Jake could have
unloaded his weapons from the other side of the door which was
out of my view. After he let me through we walked (blank)
15 *together and I, although I do not remember looking at his F88, I*
believe that had the magazine still been on the F88 I would have
noticed it.

20 There is no indication there as to whether or not he checked the pistol,
looked at the pistol to see whether a magazine was on it. There is a body
of evidence which he gives about seeing PTE Kovco silent cocking the
weapon. That is curious for a number of reasons. He says first of all that
he's not seen that done before. He doesn't really know what it achieves
but he seemed to have a name for it. He seemed to know what the process
is.

25 Given the evidence last week from the SIB about the destruction of the
crime scene, given the evidence from the technical people from the
military about the interchangeability of slides, given the fact that the first
time the Inquiry becomes aware as to whether the weapon was unloaded
30 or otherwise - I withdraw that, whether the weapon had a loaded magazine
on it or otherwise was when SGT Hession from the witness box indicated
that he in fact had unloaded a loaded magazine from the weapon. There
are many, many, many gaps in the evidence at this stage.

35 Most of those gaps are matters which are relevant in a cross-examination
properly done of Soldier 14. In my respectful submission, the best way
that that cross-examination could be done is if he were returned to appear
to give evidence personally before this Board of Inquiry.

40 Sir, I can indicate to you that really he together with Soldiers 17 and 19, as
I said earlier, are the only three witnesses which, on my instructions, my
clients regard as critical to the determination of the issues with which they
are concerned. It may well be in the scheme of things that if Soldier 14 is
45 returned for cross-examination there is no need for any cross-examination
of any or all of the remaining persons who potentially might be called to

5 give evidence before the Inquiry so far as the events in Baghdad are concerned. It might be that simply the statements themselves would be sufficient. I don't make that submission with any great strength of force but simply as an observation that might assist in the way in which the Members of the Board come to their conclusion.

10 Sir, although he was not present in the room, Soldier 14 is just as critical to the issues to be determined by the Inquiry as Soldiers 17 and 19. I accept what you've said earlier about the operational imperatives, I accept what you've said earlier about the case law on the subject, I accept that there are many examples of evidence being taken by video link, but can I say that putting all of those issues in the balance, this Inquiry is best served by hearing from Soldier 14 just as the determination was made, and for pretty much the same reasons, if I can use that expression, as the Board has determined that it should hear in person from 17 and 19.

15 Unless there is something further with which I can assist, those are my submissions.

20 PRESIDENT: Yes, thank you. LTCOL Wilkinson, do you wish to make any contribution?

LTCOL WILKINSON: No, sir.

25 PRESIDENT: LTCOL Green?

30 LTCOL GREEN: Thank you, sir. Sir, Soldier 14 does not oppose the application that he be brought back to Australia. However, Soldier 14 says that if he is brought back to Australia it be done on the understanding that at the conclusion of his involvement with this BOI he be allowed to return to theatre. Sir, he is very concerned about the state of his section and the undermanning of his section particularly if Soldiers 14 and 19 are brought back at approximately the same time.

35 Having said that, on the understanding he is allowed to return to the section at the conclusion of his involvement, sir, he doesn't pose any objection.

40 PRESIDENT: I don't think there would be any suggestion that he wouldn't go back, would there?

LTCOL HOLLES: No, sir, not from - - -

45 LTCOL GREEN: No. He has a concern however that - - -

PRESIDENT: Counsel Assisting, would it cause any great inconvenience if we brought him back a week after the other two?

5 COL GRIFFIN: Sir, I'm sorry, I'm unable to answer that question as to the operational impact but, as I understand it, as a consequence of your decision this afternoon, Soldier 2 will return essentially crossing over with Soldiers 17 and 19 coming out. So they lose two and get - if you like, they lose two Privates and get one Sergeant back. The consequence I think is that Soldier 14 would not be able to travel on the same flight that
10 Soldier 17 and 19 are on because they've already commenced their movement.

So it would be a further rotation. Given what we've heard about the ROCL periods of break, a brick of four is already interfered with by two.
15 This doesn't seem to increase the detriment to that brick of four because it's already - - -

PRESIDENT: The brick is no longer almost - - -

20 COL GRIFFIN: Indeed.

PRESIDENT: LTCOL Berkley, any comment that you want to make?

25 LTCOL BERKLEY: Sir, I support my learned friend LTCOL Holles' application. It seems to me that the key factual issue for Soldier 14 is what happened or didn't happen at the beach at call sign D. Of course my clients are interested in that. For the reasons espoused in making the application for the return of Soldier 17 and 19, I would think that it's important evidence, it's evidence we want to get right in the best and
30 optimum circumstances because, as we can tell already from the factual matrix, it has a flow-on effect what happened at the beach at D.

It would be one of the critical factual findings the Board may have. For that reason, that it should be given in the optimum conditions to receive
35 evidence and to have the evidence tested, should it be required to be tested, I support that application.

PRESIDENT: Thank you. COL Young.

40 COL YOUNG: Yes, sir, I support the application. The evidence of Soldier 14 already you might find that some of his evidence is adverse to PTE Kovco and his actions. You might find that Soldier 14's evidence or his actions or inactions contributed to a loaded weapon being in room 8, in the accommodation block. That might be a critical finding that you make.
45 We've seen from Soldier 2 being here the very - despite what we've been

given by way of cases and comments, the very real difference between seeing witnesses face to face and seeing them on video, the opportunity interact with those people to talk to them properly. I think, as I've said before, irrespective of what the Bar table might say about it, you have to ask yourselves the question of how you can best make your findings. This is a witness I believe that you should hear face to face.

PRESIDENT: COL Griffin.

COL GRIFFIN: Mr President, there's one quite significant practical effect of this. LTCOL Holles has indicated to you that this is the last witness that he will be asking to hear from by means of returning the witness to Australia. Distributed to Counsel for some weeks now, or certainly at least a week, are the affidavits of the people who are in theatre. I would ask for some time for indications from Counsel as to which witnesses they want to hear from. I've had no indication in respect to any of those persons. It may be of significance to your consideration of this decision in terms of the cost and the effect on the unit if this is just another drip feed in the returning of people.

LTCOL Holles has indicated to you that's not the case from his position, but it would assist me greatly if Counsel could now indicate whether or not there are other people that they take this view on that they require or that they will maybe making application to hear from in person rather than by video than those that I've indicated.

PRESIDENT: I think I'll take a unilateral stance, Colonel. If anybody wants people in person, ie brought out of theatre, they're going to notify COL Griffin by close of business tomorrow afternoon or hereon after not be heard.

LTCOL HOLLES: Sir, if I could indicate I don't wish to hear - I will not be making any further applications and, so far as I'm concerned, I'm content for the affidavit material which has been provided to be given to the Board. I don't require any of those persons to be further led - - -

PRESIDENT: I was making the comment of course to the Bar table at large.

LTCOL HOLLES: I appreciate that, sir.

COL GRIFFIN: And I'm obliged to LTCOL Holles for that indication; thank you.

PRESIDENT: Indeed is it proposed to call these people by video-link or

do we not need to hear from them except by affidavit?

5 COL GRIFFIN: Sir, I don't propose to call any of them except on the affidavit. There is still Soldier 30 who has given evidence in the last round of videoconference and there is the two witnesses in relation to the repatriation process and also Mr Adams, the consul. It was envisaged that they would give their evidence by video. So that three remaining video witnesses, Soldier 30 - whether or not anybody wants to further examine by video, perhaps that indication could be given as well.

10 LTCOL HOLLES: The advantage of hearing Soldier 2 was that a lot of the questions that might have otherwise been asked of Soldier 30 don't need to be asked.

15 PRESIDENT: Can I make a similar indication. Apart from the people that Counsel Assisting has already indicated will be called by video-link, if there's anybody else that you want to cross-examine or see on video-link, we are to have their names to Counsel Assisting by close of business Friday. Otherwise they will not be called, they will be dealt with by way of statement only.

20 COL YOUNG: Sir, with respect and without cavilling with what you've just said, I take it there would always be an exception in the event of some surprise evidence coming forward.

25 PRESIDENT: If there's some unforeseen circumstance, something which I don't now know about and you don't now know about of course.

30 COL GRIFFIN: By way of example, sir, the DNA on the trigger.

PRESIDENT: Exactly.

35 COL GRIFFIN: The two soldiers being returned who are yet to be tested provided they volunteer to be tested. Those are the sorts of hiccups that are unforeseen that I think COL Young is suggesting and my application would be that that be an exception.

PRESIDENT: Of course.

40 COL GRIFFIN: Thank you very much, sir.

45 PRESIDENT: Now, the question of course of LTCOL Holles' application. The Board requires that Soldier 14 be returned to Australia for the purposes of giving evidence before it. I am a little bit concerned as to the operational imperatives. At this point in time the Board is

5 programmed, if that's the right way of putting it, to sit until the end of August. I'll leave it to Counsel Assisting to liaise with the operational commanders as to when would be the optimum time with the least distraction to the unit to in fact return the soldier to Australia. If that turns out to be three weeks' time, so be it.

COL GRIFFIN: May it please you, sir. I'll attend to that this afternoon.

10 PRESIDENT: Very well. Are there any other applications or witnesses we can deal with this afternoon?

15 COL GRIFFIN: No, sir. We can return with a further specialist witness of the same specialisation that we had today tomorrow morning who's travelling to join us.

PRESIDENT: 10 o'clock tomorrow?

COL GRIFFIN: Thank you, sir.

20 PRESIDENT: Very well, 10 o'clock tomorrow.

25 **MATTER ADJOURNED AT 1411 UNTIL
THURSDAY 27 JULY 2006 AT 1000**

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