

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

1023 MONDAY 18 SEPTEMBER 2006
DAY 36

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.....  Date18/09/06.....(President)

Signed.....  Date 18/09/06.....(Recorder)

Signed.....  Date 18/09/06.....(Transcriber)

Signed.....  Date 18/09/06.....(Transcriber)

EXHIBIT LIST

Number	Description	Page No.
	EXHIBIT C211 - MEDICARE RECORDS OF PTE JACOB KOVCO	1740
	EXHIBIT 212 - STATUTORY DECLARATION FROM MAJGEN KELLY	1740
	EXHIBIT 213 - SIGNAL RE GENERIC MODIFICATION PROCESS FOR 9 MM PISTOL	1740
	EXHIBIT 214 - PTE KOVCO'S COMPETENCY LOG	1742
	EXHIBIT C215 - NATIONAL WELFARE COORDINATION CENTRE FILE OF CORRESPONDENCE RELATING TO THE INCIDENT	1742
	EXHIBIT 216 - SUMMON ISSUED TO THE CHIEF OF STAFF HQJOC	1742
	EXHIBIT C217 - SUMMONS ISSUED TO THE CHIEF OF ARMY .	1743
	EXHIBIT 218 - PTE KOVCO'S PMKeyS PRINTOUT	1743
	EXHIBIT 219 - CORRESPONDENCE CONCERNING ONE OF THE TERMS OF REFERENCE.....	1743
	EXHIBIT 220 - MILITARY POLICE CONTINUITY STATEMENT	1744
	EXHIBIT 221 - MILITARY POLICE STATEMENT OF PREVIOUS USER OF 9 MM PISTOL.....	1744
	EXHIBIT 222 - STATUTORY DECLARATION FROM COL HADDAD.	1745
	EXHIBIT C223 - SERIES OF EMAIL PRINTOUTS CONTAINED IN A BINDER OF EMAILS EXCHANGED BETWEEN MRS SHELLEY KOVCO AND PTE JACOB KOVCO	1745
	EXHIBIT 224 - PRESS RELEASE PROMULGATED BY DEFENCE ENTITLED.....	1746

5 PRESIDENT: Yes, sir, good morning all, good morning Colonel.

COL GRIFFIN: Good morning Mr President, Members. Mr President, we have some further documentary evidence to place before you this morning. Unless there are any other matters that you wish to deal with, sir, I'll proceed to do that now.

10 PRESIDENT: No, please proceed.

COL GRIFFIN: This is a substantial volume of material which has been compiled during the previous week where we've conducted our audit of evidence for the Terms of Reference. Some of the material is already in evidence and we have now the original documentation to substitute in place of the copies that are in as exhibit. Other material relates to matters which have been produced by the various commands and Chiefs of Service in respect of previous incidents or related incidents. Some of that material is classified. It's all available for viewing by Counsel Representing and will be made available to them this morning and, sir, I would ask for an adjournment to achieve that purpose in due course before Counsel are invited to make addresses to you.

25 The Secretary has the material before her and I will now read through the covering list that has been prepared of the material seeking to deal with the tender or the substitution as appropriate.

30 PRESIDENT: Thank you.

COL GRIFFIN: The first item of material is the documentation relating to the repatriation of PTE Jacob Kovco. It's already in evidence as Exhibit 204 and these are the originals which we will substitute for that exhibit and it will require a continued classification. So that continues to be Exhibit 204, sir.

PRESIDENT: Is everybody comfortable with that substitution and that approach.

40 COUNSEL REPRESENTING: Yes, sir.

PRESIDENT: Make it so.

45 COL GRIFFIN: The next item of material concerns correspondence with Medicare in response to request for information as to any medical

assistance that PTE Kovco may have sought, either in or outside of Military service and that material has not been tendered and I tender it now, sir, again with a classified prefix because it relates to his personal medical information.

5

PRESIDENT: Any objection to the tender of that document in a classified form?

COUNSEL REPRESENTING: No, sir.

10

COL GRIFFIN: Sir, I should make the point for transparency that there is nothing arises in that material over and above any evidence that you already have before you, that is to suggest that PTE Kovco had, in any way, been accessing external medical services.

15

PRESIDENT: Yes, sir, very well. It will be marked as Exhibit 211.

20 **#EXHIBIT C211 - MEDICARE RECORDS OF PTE JACOB KOVCO**

COL GRIFFIN: The next item is a statutory declaration from MAJGEN Kelly, the Land Command Australia in respect of the direct liaison aspects between the Military Police and 633, again a classified exhibit number, sir.

25

PRESIDENT: Any opposition to the tender of that document?

30 COUNSEL REPRESENTING: No, sir.

PRESIDENT: Yes, marked as Exhibit 212, classified.

35 **#EXHIBIT 212 - STATUTORY DECLARATION FROM MAJGEN KELLY**

COL GRIFFIN: The next document is a signal issued in respect of the modification process for the 9 mm pistol, that is generic modification that has been discussed in evidence. That's not a classified document, sir and I tender it.

40

PRESIDENT: Any opposition to that or any comment?

45

COUNSEL REPRESENTING: No, sir.

PRESIDENT: Marked as Exhibit 213.

5

**#EXHIBIT 213 - SIGNAL RE GENERIC MODIFICATION
PROCESS FOR 9 MM PISTOL**

10 COL GRIFFIN: The next document, sir, is a competency log for
PTE Kovco and there are a couple of matters contained in the document
that I'll draw to your attention if I might have it. As the name indicates,
Mr President, Members, a competency log is an official booklet which is
15 maintained for each individual in the Defence Force setting out the
qualifications and history of training. This particular document contains a
number of items which bear the heading "AC344-1", which is a
Department of Defence document record of attainment. One record of
attainment, which has been certified on 25 June 2004, is the record of
attainment for PTE Jacob Kovco in respect of the training and
20 qualification on the 9 mm pistol.

You yourselves, Mr President, Members, have recently undergone this
training and experience. You'll recall that your program consisted of a
two-day training program. This record of attainment for 2004 indicates
25 that the on-the-job training that was conducted at that time for that
qualification was for one day. That course was actually conducted on 15
June 2004. Further records of attainment contained in there indicate that
PTE Jacob Kovco completed his infantry initial employment training for a
period 17 June 2002 until 23 August 2002 at the School of Infantry.

30

The document sets out a substantial description under the heading
"Operate Equipment" of the variety of weapons that that training consisted
of at the School of Infantry. It indicates that PTE Kovco completed 25
days of field training and completed his employment training as a
35 rifleman. It may be of relevance to you that under the substantial section
detailing the equipment learned to be operated in that training is the Styre,
the Minimi machine gun, a direct fire support weapon, the 40 mm grenade
launcher, the F1 grenade and a variety of other weapons. The 9 mm pistol
is not part of that training.

40

There is, similarly, a record of attainment for PTE Kovco's Army recruit
course conducted at the Army Recruit Training Centre from 26 March to
12 May 2002. Again the document sets out the weapons training that was
conducted for that course. Again there is training with the Styre rifle and
45 the Minimi machine gun. There is no training with the 9 mm pistol. Of

interest to the Board is the word picture for PTE Kovco.

5 *PTE Kovco approached the course with an enthusiastic attitude
and quickly adapted to Army life. He was an active and
interested participant in training who related well to his peers
and instructors. PTE Kovco developed very good soldierly
10 qualities and demonstrated an excellent attitude towards Army
life throughout his recruit course. He worked very well as a
member of any team grouping and made a noticeable
improvement to team performances. He has proven himself to be
a hardworking team member with a consistently positive attitude
toward all of his training. PTE Kovco achieved all the recruit
course competencies to an excellent standard. PTE Kovco has
15 displayed an excellent blend of enthusiasm and desire to learn.*

The other document of relevance in this series of qualifications, sir, is the
statement of attainment for the basic sniper course that PTE Kovco
attended. He was not successful in the course, however, it demonstrates
that he achieved competency in four of the five requirements and only
20 missed out on one, which was not to do with weapon handling, and he was
recommended for attendance at the next course. Sir, I tender the
competency log.

25 PRESIDENT: Any comment to be made there?

COUNSEL REPRESENTING: No, sir.

30 **#EXHIBIT 214 - PTE KOVCO'S COMPETENCY LOG**

COL GRIFFIN: The next bundle of material, sir, is the National Welfare
Coordination Centre file of correspondence relating to this incident. It
contains matters of privacy concerning the next of kin, and I ask that it
35 have a classified restriction on that basis.

PRESIDENT: Any comment there?

COUNSEL REPRESENTING: No, sir.

40 PRESIDENT: Any demur to the classification?

45 **#EXHIBIT C215 - NATIONAL WELFARE COORDINATION
CENTRE FILE OF CORRESPONDENCE RELATING TO THE**

INCIDENT

5 COL GRIFFIN: The next document is the summons, sir, that you issued to the Chief of Staff HQJOC and response thereto.

PRESIDENT: Is there any comment about the tender of that document?

10 COUNSEL REPRESENTING: No, sir.

#EXHIBIT 216 - SUMMON ISSUED TO THE CHIEF OF STAFF HQJOC

15 PRESIDENT: How many more documents have we got, Colonel, in round figures?

20 COL GRIFFIN: About another seven, sir.

PRESIDENT: I make the comment I'll presume that everybody is comfortable with these documents being tendered unless I hear a chorus of voices from the Bar table.

25 COL GRIFFIN: I've given a general indication to Counsel Representing this morning, sir, of the content of this material, and I believe none of it is objectionable from their view.

30 PRESIDENT: Thank you.

COL GRIFFIN: The next document is the summons issued to the Chief of Army under your signature and returned to the same.

#EXHIBIT C217 - SUMMONS ISSUED TO THE CHIEF OF ARMY

40 COL GRIFFIN: If that could be given a classified exhibit number, sir, as it relates to some material that is operational.

PRESIDENT: It's classified.

45 COL GRIFFIN: The next document is an updated copy of PTE Kovco's PMKeyS printout, that is, his Defence service record.

#EXHIBIT 218 - PTE KOVCO'S PMKeyS PRINTOUT

5 COL GRIFFIN: The next document is correspondence concerning one of
your Terms of Reference; that is, whether or not PTE Kovco was a
contributor under the Defence Force Retirement and Death Benefits Act or
the Military Superannuation Benefits Act. The email contains the answer
to that question, sir.

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**#EXHIBIT 219 - CORRESPONDENCE CONCERNING ONE OF
THE TERMS OF REFERENCE**

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COL GRIFFIN: The next document is another substitution, that is, the
substitution of an original document for copies that are presently in
evidence as Exhibit 205, being the unit medical record.

20 PRESIDENT: They'll be substituted.

COL GRIFFIN: Thank you, sir. The next document is a Military Police
statement or actually the next two documents are Military Police
statements describing the history of the particular weapon, that is, the
25 9 mm pistol that was the subject of this incident, and describing its history
and - - -

PRESIDENT: This particular pistol?

30 COL GRIFFIN: This particular pistol, sir, yes. So there are two
statements; one is a continuity statement and the second one is a statement
from the person in the 1st Battalion who was previously issued this
particular pistol.

35 PRESIDENT: I see. Can they go in together or do they need to be
separated?

COL GRIFFIN: If they could be separate, sir.

40 PRESIDENT: Yes, very well. The first one with the - - -

COL GRIFFIN: Is the continuity statement.

45 **#EXHIBIT 220 - MILITARY POLICE CONTINUITY**

STATEMENT

5 COL GRIFFIN: The next one is the person who actually had the weapon.

PRESIDENT: What I'll call the previous user.

10 #EXHIBIT 221 - MILITARY POLICE STATEMENT OF PREVIOUS USER OF 9 MM PISTOL

15 COL GRIFFIN: The next document, sir, is a statutory declaration from COL Haddad, the Colonel Operation Support at Land Headquarters, containing further information in respect of the direct liaison communication between Military Police and Headquarters 633.

PRESIDENT: Is that an open document?

20 COL GRIFFIN: It's an open document, sir.

PRESIDENT: Very well.

25 #EXHIBIT 222 - STATUTORY DECLARATION FROM COL HADDAD

30 COL GRIFFIN: Sir, I should indicate that I incorrectly said that the stat dec from the Land Commander Australia was classified. That should of course be an open document.

PRESIDENT: Yes, very well, we'll make it an open document then.

35 COL GRIFFIN: Thank you.

PRESIDENT: That's Exhibit 212.

40 COL GRIFFIN: The final matter, sir, is a series of email printouts that are contained in a binder. These are emails exchanged between Mrs Shelley Kovco and PTE Jacob Kovco. You've heard of those materials in evidence. They exist in the DVDs, which are the actual contents of the hard drive, but these are provided for ready access. But again, because of their personal nature, sir, I'd ask that they be given a classified restriction.
45

PRESIDENT: Yes, very well.

5 **#EXHIBIT C223 - SERIES OF EMAIL PRINTOUTS CONTAINED
IN A BINDER OF EMAILS EXCHANGED BETWEEN
MRS SHELLEY KOVCO AND PTE JACOB KOVCO**

10 COL GRIFFIN: Now, Mr President, I'll just make the note for the record
that last Thursday, 14 September 2006 you issued a further direction in
respect of the continuing protection of the identities of ADF personnel
serving in the Middle East Area of Operations. You also indicated in that
15 direction that the previous protection for the identities of the Security
Detachment IX members no longer applies because of their return to
Australia. As a consequence of that, I am arranging or have arranged for
the preparation of a new or amended callsign matrix to be substituted for
Exhibit C5. That will happen during the course of the day, sir, so that we
continue to protect those persons who are offshore who have been named
in the proceedings.

20 PRESIDENT: We're going to continue the same numbering of course.

25 COL GRIFFIN: We'll just stay with those same numbers, yes. But
henceforth the persons who have been returned to Australia will be
identified by their names, although it's possible of course because of the
compilation of the transcript and other documents that there will continue
to be also a reference to their callsign numbers.

30 PRESIDENT: Indeed. I can imagine much confusion if we abandon the
callsign completely.

35 COL GRIFFIN: The next matter, sir, that I wish to touch upon is the
recent publicity and reporting in respect of inappropriate imagery that has
appeared on the Internet. I raise this matter, sir, because it's reported that
the imagery relates to the misuse and mishandled or inappropriate
handling of weapons by ADF members in the theatre of operations. I will
read to you a press release that has been promulgated by Defence this
morning. The heading is "Inappropriate Imagery". I quote:

40 *After being made aware of emerging public video hosting
websites or blog websites, the Chief of the Defence Force,
ACM Angus Houston, has directed an investigation into a small
number of individual images which show inappropriate
behaviour. The behaviour in these few images displays cultural
45 insensitivity, a disregard for operational security and*

inappropriate handling of weapons and is not condoned or sanctioned by Defence in any way. These images come from the period from late 2003 through to 2005.

5 I tender the entire press release, Mr President.

PRESIDENT: Any opposition to that document?

10 COUNSEL REPRESENTING: No, sir.

#EXHIBIT 224 - PRESS RELEASE PROMULGATED BY DEFENCE ENTITLED "INAPPROPRIATE IMAGERY"

15 COL GRIFFIN: Mr President, thank you, sir. The content of that release and the reported imagery is relevant to your Terms of Reference. I do not have any evidence or information other than that that I just described to you. I have asked that material be made available in due course and if it is
20 of relevance, then it would be a matter that you would need to take into consideration. As I understand it from the press release, the material predates substantially this deployment, which is from March until September 2006. But lest there be any overlap of personnel or any correlation between actions and places, then it may be that it will become
25 relevant for your proceedings. As soon as I have that information to hand, if anything is relevant, then it will need to be placed before you.

PRESIDENT: Thank you.

30 COL GRIFFIN: Mr President, and Members, I confirm that the production of evidence, subject to my last remark, for the Board has now concluded. Unless there are further matters that you wish to consider, I now propose to make a closing address to you on a number of issues.

35 PRESIDENT: Any comment about Counsel Assisting commencing his address forthwith?

40 COL YOUNG: Sir, I wonder if I could just clarify the last Exhibit 224, the press release Counsel Assisting touched on. If there were to be further evidence produced to the Board, that would I imagine require the Board to resit and have Counsel Representing available again to make any comment on new evidence.

45 PRESIDENT: I've got to say my initial reaction is that I don't want to go there. That would hardly come as a shock or surprise to anybody. But if

for some reason we need to go there, we'll obviously have to start that particular phase of the exercise afresh. Let's hope we don't find ourselves in that situation.

5 COL YOUNG: I'm not looking forward to doing that myself, sir, but I think it's important that it be on the record.

COL GRIFFIN: Just to close on the point, sir, if I didn't make it plain I apologise for doing so. But it would certainly not be my intention to attempt to place evidence before the Board in closed session or without
10 having the opportunity for affected persons to be heard or comment on it.

PRESIDENT: One accepts that as of course.

15 COL GRIFFIN: Thank you, sir.

PRESIDENT: Yes, thank you, Colonel.

COL GRIFFIN: Sir, the Australian Defence Force Publication 06.1.4, which is the Administrative Inquiries Manual, provides for Counsel Assisting to make a final address. Significantly, paragraph 7.44 of the manual states:

25 *It is not the role of Counsel Assisting the Board to present a case to the Board, nor to attempt to influence the Board's findings.*

Were it otherwise, my address to you would be structured differently. Paragraph 7.45 of the manual provides for Counsel Representing affected persons to address the Board following my address and for you to offer
30 me the opportunity to reply to their addresses. The manual requires me to address you on the categories of evidence, any special aspects of particular evidence that the Board must decide, what facts have been proved by the evidence, how facts are proved, the assessment of witnesses by the Board, inferential reasoning, the relevance of rules of evidence, hearsay evidence,
35 the onus of proof and the treatment of affected persons. It is also my role to review the Terms of Reference, talk to you about your report and sum up aspects of the evidence.

40 My address to you will draw largely from a tried and tested precedent, namely the charge to the Blackhawk Board of Inquiry by the then GPCAPT Kirkham QC which, to my knowledge, has been the basis of almost all closing addresses to Boards of Inquiry in the intervening 10 years and which has withstood the scrutiny of numerous legal reviews.

45 That charge included the direction that the Board should accept Counsel

Assisting's advice on the law. The Blackhawk Board and most other Boards have been comprised of non-lawyers, this is not such a Board. You, Mr President, are a lawyer and furthermore you have held Judicial Office. A decision on the law is a matter for your judgment.

5

However, because you are a three-member Tribunal, comprising of two non-lawyers, I am required by the ADFP to address you on matters of law and I will do so as it may be of some assistance to all three of you. In the event that you, Mr President, take a different view on a matter of law, I advise you to place that view on the record so that Counsel may address you and the Board Members on the point in this open forum and for the benefit of any subsequent legal review and for the consideration of the New South Wales Coroner.

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15

If either of us happens to be in error in anything we say about the law, there are ways and means of dealing with such error in review. However on consideration of the evidence, you and you alone are the judges of the facts in this Inquiry. I reiterate that ADFP06.1.4 stipulates that:

20

The role of Counsel Assisting the Board of Inquiry is not to present a case to the Board or to attempt to influence the Board's findings.

25

You must decide your findings according to all of the evidence. That does not mean that you must accept all of the evidence, but it does mean that you must consider all of the evidence. Having considered it, you then make judgments as to which parts of it you are prepared to accept and to act upon and which parts you are not prepared to act upon.

30

The evidence in this Inquiry is comprised of a number of categories. The first of these is what was said on oath or affirmation by the witnesses called during the course of the Inquiry, that is, the answers that they have given to the questions which were put to them. In this regard, it is important to remember that it is the answer and not the question that is evidence in this Inquiry. Where any invitation to a witness to speculate has resulted in a speculative answer, such answer should, in the absence of other evidence on the subject, be subject to a very critical analysis by the Board in deciding whether it should play any part in your deliberations.

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40

Similarly, you may take into account in weighing the evidence the fact that the evidence was elicited by leading questions, particularly in circumstances where the witness's answer is seen to be self-serving. This is opposed to the situation where leading questions may have been used in a form of cross-examination by Counsel to elicit matters disadvantageous to a witness. In the end, the weight you accord a witness's testimony is

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entirely a matter for you.

5 Having said that, there is a substantial body of evidence that has been adduced in the course of the Inquiry. That body includes the first category of evidence I have just described to you which is contained in the more than 1700 pages of transcript and the others that I will come to in a moment. On the basis of that material, it is open to you to conclude that answers relevant to almost all of your Terms of Reference could be found from within that body of material.

10 The second category of evidence comprises the exhibits. There are some 220-odd exhibits in the proceedings. They include photographs, videotape recordings, affidavits, orders and plans, manuals and directions, diagrams and statements which have been tendered through witnesses and as you are aware, have in many instances, been the subject of discussion with a number of witnesses.

15 The affidavits and statutory declarations have been submitted without opposition by Counsel Representing. This has been done partly as a time saving exercise. It is important to remember that the affidavits and statutory declarations are sworn evidence. Those affidavits constitute evidence which has not been challenged and may be accepted by the Board of Inquiry, even if Counsel for represented persons say that they do not necessarily accept the correctness of the content of those affidavits and statements.

20 This material is to be weighed with the rest of the evidence and a conclusion reached as to what weight you, as the Board, will accord to it. If the preponderance of other evidence is to the contrary, then that is a factor to consider in evaluating the weight to be given to that material.

25 The point that I make is that the affidavits are in evidence and any reservations expressed by Counsel Representing in respect of such evidence is in no way constraining on your acceptance of the material if it is otherwise judged to be worthy of acceptance.

30 There are two other categories of evidence. You have had the benefit of receiving formal instruction in the characteristics and handling of the 9 mm self-loading pistol and you have participated in and past tests of elementary training and have undertaken a qualifying range shoot with the weapon.

35 The other category that you've also received is opinion evidence from a variety of expert witnesses and a considerable volume of evidence obtained in other investigations, including that produced by the Homicide

5 Squad of the New South Wales Police and the New South Wales Forensic Services Group. That is the totality of the material and evidence upon which you must base your findings. You are assisted in that regard by the transcript of the proceedings. You must look at the evidence and make judgments about it.

10 Now, you do that objectively and you go about that task in an intellectual way and you decide ultimately what the proper finding or findings ought to be. In assessing the evidence and the weight which you will accord it, you may have regard to your service knowledge and professional experience. You must not however substitute your service and professional knowledge for the evidence which is before you, nor use it to fill in gaps or any inadequacies in that evidence.

15 It is appropriate to warn you against allowing any emotional considerations of any kind to intrude into your deliberative processes. When I speak of emotional considerations, I mean sympathy or bias or prejudice. All of us by virtue of being human beings are subject to various such feelings and attitudes. We are sympathetic to various people or causes or to people in various situations. We have biases one way or another in favour of people and we have prejudices of one kind or another against other people. It is part of being human. My concern is to warn you against allowing those aspects of your human nature to intrude into your deliberative process. What is required is an objective an unbiased analysis of the evidence.

20 I advise you that the comments and arguments of Counsel appearing for represented persons are not evidence. So far as the arguments by Counsel are concerned, if any particular argument seem to you to accord with the evidence and seems to you to be a commonsense and sensible argument, then by all means adopt it and treat it as part of your own reasoning process in coming to your conclusions. But, if any particular argument does not fulfil those criteria, then you are free to reject it and indeed in such a case, you should.

35 Nothing which such Counsel has said to you about the evidence is, in any sense, binding on you and nothing which they may have said to you about the law is, in any sense, binding on you.

40 Now, while I have indicated that anything I say about the law should be accepted by you, any comments that I make on any of the evidence is, in no sense, binding upon you at all. It is in a different category to what I say about the law.

45 Anything at all that I say about the evidence or the facts is in exactly the

same position as what the other Counsel say to you, it is not binding on you in any way at all. You must decide what facts have been proved by the evidence.

5 You may find a fact proved in one of two ways. Firstly, by accepting direct evidence about the facts and secondly, by drawing an inference. When I speak of direct evidence, I am speaking of a situation where a witness directly testifies to a fact, for example, if a witness said that last night at a hotel he saw A hit B over the head with a bottle, that is direct
10 evidence. In such a case, you make an assessment of the direct evidence and decide whether or not you accept it. You have to make an assessment of those witnesses and of the evidence that they have given you.

15 In making that assessment, you use your commonsense and your experience of the world. You apply the same tests that you apply day in and day out in deciding what you believe and what you don't believe of what people tell you. You take into account such things as the demeanour of the witness, the likelihood of what the witness says as being correct, how and what the witness says fits in with the general picture which is
20 painted by other evidence, the consistency of what a witness says about a particular topic or inconsistencies in the evidence of the witness, whether a witness has been evasive in answering questions, whether the witness has been concerned to protect himself or others. You take all of those sorts of things into account and such other matters and seem to you to be
25 relevant and then you make an assessment of the witness.

Now, the fact that a witness is an honest witness does not necessarily lead to the conclusion that you would act upon his or her evidence. Because, whilst the witness may be an honest witness in his or her evidence, the
30 evidence may be unreliable for a number of reasons. For example, a person might be honestly trying to identify precisely what he observed on a day, but because of location or other matters, he may not have been in a position to give an accurate account of what occurred.

35 In making an assessment of witnesses who give direct evidence you may accept everything a particular witness says and act upon it or you may reject everything that a particular witness says. Or you may accept some parts and reject other parts. In other words, it is not a question of accepting everything that a particular witness says or rejecting everything
40 that a particular witness says. You look at the whole of what that witness says and you decide what parts of it you are prepared to accept and to act upon and what parts of it you are not prepared to act upon.

45 Now, what I've been saying to you about the assessment of witnesses, namely that the witness may be perfectly honest in what he or she says

and yet not be reliable because of memory defects or a variety of other things, is equally applicable to witnesses who are referred to as expert witnesses.

5 An expert witness is someone who is permitted to give evidence of
opinion. Ordinarily, witnesses cannot express opinions in the course of
giving evidence. They can only speak of the facts being what they saw
and heard. However, people who are suitably qualified are permitted to
express opinions. For example, in these proceedings, various medical and
10 mental health professionals, forensic and ballistic specialists and others
have expressed opinions on the basis of their expertise. Again, it is for
you to assess what they say. You do not accept what they say as being
necessarily correct simply because they are experts. They are witnesses
and you assess their evidence as you assess everybody else's evidence and
15 you may accept what they say and act upon it, or you may reject it. You
make the judgment and decide whether you are prepared to act upon it.

I am required by the manual to give you a direction about inferential
reasoning, that is the drawing of an inference from an established fact.
20 There is nothing magical about this process, we do it every day. A
common example of this often given to juries in formal court proceedings
is the example of a man who is observed to be in Sydney at 12 noon and
then observed to be in Melbourne at 3.30. Once you are satisfied that it
was appropriate to accept those two facts, you could then draw an
25 inference that he must have gone to Melbourne by aircraft, that would be a
proper inference to draw.

However, it would not be open to you to draw the inference that he had
travelled by a particular airline. In the absence of further facts, that would
30 simply be speculation. To give you another classic example, if in going
out at 10 o'clock on morning you check your letterbox and find it to be
empty, but coming back at 12 o'clock find it to have letters in it, then you
could reasonably draw the inference that the postman came to your house
that day, some time between 10 and 12 because that would provide an
35 explanation for the other two facts. That would be a logical explanation
for the two facts which are otherwise established.

However, before you could draw the inference, you would have to be
satisfied of the foundation facts which provide the basis for drawing such
40 inference, that is, that the letterbox was empty at 10 o'clock and that there
were two letters in it at 12 o'clock. Therefore, before drawing an
inference, you must be satisfied that the foundational facts, that is, that the
basis for drawing the conclusion, have been established.

45 However, that is not the end of it. You must thereafter ask yourself

whether there is any explanation for the basic facts other than the inference that you are minded to draw.

5 Continuing with the second example, suppose you looked at the letters which you found in your letterbox at 12 o'clock and found that they were addressed to you at 68 Smith Street, whereas your address is actually 58 Smith Street. You may then consider that the postman may not have brought those letters at all, rather he might have dropped them into 68
10 Smith Street and the people living there, aware that you live at 58 Smith Street, have done the right thing and dropped those letters in your box.

Therefore, where there are two competing inferences open to you on a basic set of facts, then it would be inappropriate in the absence of some further evidence to draw an inference at all.

15 However, continuing with example 2, if you looked at the letters and saw that neither had a postage stamp on it, you would then be able to conclude that your initial theory that the postman delivered the letters was incorrect because they would not have come through the postal service at all. It
20 would be clear that they had been dropped in privately. You could then draw the reasonable inference that the postman had not delivered the letters, that they had been dropped in privately.

In summation, you shouldn't draw an inference unless you are satisfied it is the only proper inference to draw, that is, that it is the only reasonable inference open on the facts.

Now, whilst the Board is not bound by any rules of evidence, you should nonetheless be careful about accepting hearsay, that is, evidence of a
30 statement made to a witness by a person who is not himself called as a witness when the object of the evidence is to establish the truth of what is contained in the statement.

There have been some matters in these proceedings that have come from witnesses which are reports of what another person has told them. Where
35 that material is intended to establish the truth of what was contained in the statement, it falls within the hearsay rule. The objection usually advanced against the reception of hearsay evidence is that such evidence is often unreliable and there is no opportunity to cross-examine the maker of the
40 relevant statement.

Now, in proceeding such as this, an Administrative Tribunal, you are able to accept hearsay evidence. The uses and abuses of hearsay evidence in
45 Tribunals were discussed in a decision of the High Court *Re Pochi v Minister for Immigration & Ethnic Affairs* (1979) 26 ALR 247.

Brennan J said at pages 256 to 257 that those principles in respect of the criticism of hearsay evidence:

5 *Do not mean of course that the rules of evidence creep back through a domestic procedural rule. Hearsay has a wide scale of reliability and there is no reason why logically probative hearsay should not be given credence.*

10 However, the important point to bear in mind is that the hearsay must have some probative value, otherwise it would be irrational to base a decision upon it.

15 Suffice to say that hearsay was properly admitted in these proceedings, but it should be treated with great caution. You should be reluctant to base a significant finding on hearsay evidence alone, particularly where that finding adversely impacts on an individual. Similarly, you should be reluctant to prefer hearsay to the sworn and tested evidence of a witness. As I've just mentioned to you, this Board is exercising an investigative administrative jurisdiction.

20 *The rules of natural justice require that any findings made in the exercise of such jurisdiction must be based upon some material that tends logically to show the existence of facts consistent with the finding, and further, that the reasoning of the Board supportive of the finding is not logically self-contradictory.*

I've quoted there from a Privy Council decision, Mahon v Air New Zealand 50 ALR 193.

30 In other words, what the Court is saying there is that the evidence on which any findings are based must have some probative value. Certainly any adverse finding that you may make in respect of any person should be based on evidence of probative value in the sense that I have described to you, and such evidence should be reflected in the Board's written findings. Speaking more generally, it is desirable that the evidence upon which all of the Board's findings are based should be recorded, at least in general terms, in your written finding.

40 In the event of significant inconsistencies in the evidence you should record in your finding your reasons for preferring one version over another or if you are unable to resolve the inconsistency you should record such inability. Boards of Inquiry have a duty to act fairly where their report might affect adversely a legal right or interest, for example, a person's military, personal or professional reputation. Accordingly, there is a need for probative evidence to support such findings. The authority

for that proposition is the High Court decision of *Annetts v McCann* (1990) 170 CLR 596.

5 If your deliberations indicate that your findings may adversely affect a person, then you will need to look for convincing proofs regarding such conclusions. You are required by the Defence (Inquiry) Regulations to inform persons not present before the Board of any evidence by which they are adversely affected and to invite them to be heard. Now, where
10 this has not been done, then you may not make an adverse finding in respect of that person.

If in the course of your deliberations it becomes apparent that you would wish to contemplate such a finding against a person who has not been given the opportunity to be heard, it would be necessary for you to reopen
15 the Board to accord that right. This is not a criminal trial and you do not have to reach your conclusions on the basis of the criminal standard of proof, namely that you are satisfied of your conclusion beyond reasonable doubt. Rather, what is known as the civil standard of proof must be applied. This is known as proof on the balance of probabilities, that is, a
20 finding that on the evidence it is more probable than not that some fact occurred or some action was engaged in.

Because of the gravity of the consequences flowing from any adverse finding against a person, it is appropriate that I direct you as to the
25 approach that you should take relative to your collective satisfaction of the proofs required. The direction normally given in similar circumstances is as follows. This comes from a High Court decision, *Briginshaw v Briginshaw* (1938) 60 CLR 336 from the judgment of his Honour Dixon J. This is a lengthy quote, but it is a very important matter and I will read it
30 to you verbatim:

*When the law requires the proof of any fact, the Tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical
35 comparison of probabilities independently of any belief in its reality. No doubt an opinion that a state of facts exists may be held according to indefinite gradations of certainty. This has led to attempts to define exactly the certainty required by the law for various purposes. Fortunately, however, at common law no third
40 standard of persuasion was definitely developed. Except upon criminal issues to be proved by the prosecution, it is enough that the affirmative of an allegation is made out to the reasonable satisfaction of the Tribunal. But reasonable satisfaction is not a state of mind that is attained or established independently of the
45 nature and consequence of the fact or facts to be proved.*

5 *The seriousness of an allegation made, the inherent unlikelihood
of an occurrence of a given description or the gravity of the
consequences flowing from a particular finding are
considerations which must affect the answer to the question
whether the issue has been proved to the reasonable satisfaction
of the Tribunal. In such matters reasonable satisfaction should
not be produced by inexact proofs, indefinite testimony or indirect
inferences.*

10 Therefore, although a person may be subject of adverse comment by the
Board on the basis of the Board's satisfaction on the balance of
probabilities that the evidence supports such a finding, nonetheless,
because of the potential gravity of the consequences flowing from the
15 finding the evidence on which such finding is based should be subject to
the most careful scrutiny by the Board to ensure that such a finding is
supported by such evidence.

20 Having said all that, you will recall that earlier I advised you that in the
final analysis you are not bound by any rules of evidence. Defence
(Inquiry) Regulation 50 states that:

25 *Subject to the Regulations, a Court of Inquiry (and thus a Board
of Inquiry) shall conduct its inquiry without regard to legal forms,
is not bound by any rules of evidence and may inform itself on
any matter relevant to its inquiry in such manner as the Court (or
Board in this case) thinks fit.*

30 It is because of this that there has not been any significant number of
objections in these proceedings to some of the evidentiary material, which
in ordinary Court procedures would be the subject of objection.
Nonetheless, whilst it is open to you to proceed without regard to the rules
of evidence, you should not so proceed in relation to your deliberations
that may result in any adverse findings against any person. You should
35 proceed in such deliberations on the basis of the best evidence and any
inferences which may properly be drawn from such evidence.

40 Speaking generally, it would be desirable in coming to your findings to,
wherever possible, rely on direct evidence of any particular fact or thing.
You may consider that the best way to do this is to work through the
Terms of Reference considering what evidence you have heard in respect
of each of the matters listed therein. Paragraph 1(d) of the Terms of
Reference and 4(a) and (b) effectively require the Board to consider
factors which may have contributed to the cause or causes of death.
45 Whether any matter being an act or omission was causative of the death or

a necessary precondition of the death is a question of fact for the Board to be resolved by the application of the Board's collective commonsense.

5 The concept of causation is not readily reducible to a satisfactory formula. That said, some assistance may be gained by the application of what is known in the law as the "but for" test, that is, by posing the question, would the incident have occurred but for the existence of a particular act or omission? A negative answer to that question may mean that there is a causal link between that act or omission and the happening of this particular incident.

10 However, while such a test may be useful, the decision to be made by the application of commonsense is whether an identified act or omission was so connected with the incident that as a matter of ordinary commonsense and experience it should be regarded as a contributing factor and cause of it. There may be a number of such contributing factors relevant to the incident and your role is to identify any such causes and their relevance to the incident.

15 It is not part of your responsibility to identify the relative importance of such contributing factors or causes or to rank them sequentially in order of importance. It is sufficient merely to identify any causal factors that you find connected with this incident. You may, however, find it useful to organise them in some neutral manner, for example, chronologically. You are required and you should approach your deliberations collectively. However, in the event that you are not in agreement on a particular fact or finding, paragraph 7.86 of the Administrative Inquiries Manual provides as follows:

20 *Where the members of a Board of Inquiry cannot agree on a report, the President is to arrange for each member individually to submit a report setting out their findings and, if the Board of Inquiry is authorised to do so, their recommendations. Those reports are then to be submitted to the appointing authority.*

25 Your ultimate report is likely to be the subject of significant scrutiny from interested persons. It may be subjected to a legal review and will likely be considered by the New South Wales Coroner. Whilst time constraints are important, you should have regard to these matters and so construct your report that it will not be found wanting by such scrutiny or legal review and so that it will serve long term as a guide to the prevention of similar incidents with the potential loss of life of service personnel, and also that it reflect the very significant endeavours that you and others associated with the Inquiry, including the witnesses, have made to date.

45

It is now my function to review for you the evidence in these proceedings. I do not propose to repeat all of it, I'm sure you'll be pleased to hear. And for operational security reasons there are some aspects that I cannot refer to in this open forum. However, I will attempt to summarise significant
5 issues and I will do that by cross-referencing and working through the Terms of Reference. The fact that I may not cover some matters that the Board considers important should in no way diminish the importance of those matters in your estimation.

10 You are charged with the ultimate determination of the facts and it is what you conclude to be the facts and what you conclude are the inferences which may be drawn from such facts that matters, not what Counsel's view is. If our summation is helpful, accept it. If you disagree with my summation, although I trust it will be accurate, then make your
15 conclusions as to the facts. But in the event of any differences of view, I suggest that you reconfirm by looking at the transcript and exhibits.

To assist you in that endeavour Counsel Assisting have prepared some documents; a table of witnesses with the date and transcript reference for
20 each witness's appearance, a time line of events and an aide memoire of what we consider to be the salient evidence relevant to each term of reference. I hand those documents up to you now. Thank you, Madam Secretary. They've also been made available for Counsel Representing.

25 Sir, I don't tender these documents, they're simply provided as aide memoires and it may be that they're simply there for assistance rather than as evidence in their own right.

30 PRESIDENT: Thank you. I take it everybody is comfortable with that approach.

COUNSEL REPRESENTING: Yes.

35 PRESIDENT: I see that there's been considerable effort put into these particular documents and whoever the guiding hand behind the scenes was for that, I'm very grateful.

40 COL GRIFFIN: Thank you, sir. The week's adjournment did allow us the opportunity to audit and pull together as much of this material. For that reason, the general summation of the evidence that I will now give to you is not as otherwise exhaustive as it might have been. I'll turn to the Terms of Reference now which require the Board to inquire into and report upon under the heading "General 1A", when, where and in what
45 manner the injury to and death of the member occurred.

On 21 April 2006 at the Australian Embassy in Baghdad where he was on duty as part of Security Detachment IX PTE Jacob Kovco completed his shift at 1500 hours Baghdad time. As you can see from the time line document that is before you, the embassy closed circuit television security camera footage shows PTE Kovco leaving the building shortly after that at about 1503 hours in the company of two persons who have been identified as PTE Carr and PTE Johnson.

PTE Kovco returned to room 8 in the accommodation area located within the embassy premises which he shared with PTE Johnson and PTE Shore. All three members remained in the room and there is no evidence before you of anyone else entering the room prior to the incident. PTE Shore and PTE Johnson had planned to go to the gymnasium at 1600 hours, but this was delayed by agreement between them to 1615. After the members had returned to the room from their shift duty all three removed their combat body armour and equipment and were in various states of dress. The evidence is that PTE Johnson was sitting on his single bed, that PTE Jacob Kovco was standing alongside his upper bunk of the double bunk that he shared with PTE Shore and that PTE Shore was initially on the lower bunk and later moved to his locker at the other end of the small room.

There is evidence that there were dedicated weapon cleaning stations within the embassy premises. However, you have also heard evidence that some soldiers cleaned their weapons in the rooms. There is no evidence before you to suggest that PTE Kovco was cleaning his pistol in the room at the time. You have evidence that PTE Kovco and PTE Johnson were in fact each using their laptop computers. PTE Shore did not have a computer. Music was playing by means of PTE Shore's iPod player located in the vicinity of the refrigerator.

There is evidence that all three of the soldiers were from time to time singing and PTE Kovco was what has been described as skylarking. You'll recall the evidence about him pulling up his shorts. All three of the soldiers had F88 Styre rifles and PTE Kovco and PTE Johnson also had secondary weapons, namely the 9 mm pistol. The evidence is that PTE Kovco routinely placed his self-loading pistol in its thigh holster and located it at the end of his bunk bed by hanging it on the bedpost. You have in evidence the exhibit which is displayed on the board before you at the moment, Mr President and Members, showing the photograph taken shortly before the incident, that is, in the days preceding, by PTE Shore which indicates PTE Johnson reclining on his bed with the laptop computer. The evidence is that to the right side of the picture is PTE Kovco standing in the position that was his practice to access the laptop computer on the top bunk. You'll see reproduced in the extracted section of the photograph the pistol in its thigh holster positioned and

hanging from the top of the bunk bedpost.

5 You have evidence that PTE Kovco had been communicating via email with his wife, Mrs Shelley Kovco, at this time concerning a camera he had sent home and that this correspondence was unremarkable. You have evidence of his discussion to that effect with PTE Shore and PTE Johnson and you also have the physical evidence tendered to you this morning of those email transmissions which were recovered from PTE Kovco's laptop by Ms Richards of the New South Wales Police Services, which 10 confirms the normal nature of the content of those conversations consistent with the evidence that has been presented by PTE Shore and PTE Johnson about what PTE Kovco had been doing during that hour or so in the room.

15 The evidence is that the members were singing to a song by a band called The Cranberries. Shortly after the song concluded PTE Shore moved from the locker to the refrigerator to get a drink. The evidence is that PTE Johnson remained seated on the bed still using his computer. PTE Shore has given evidence that he bent over and opened the fridge and 20 as he did so he heard PTE Kovco say something, but could not make out what was said. The evidence is that at this time both PTE Shore and PTE Johnson were not looking at PTE Kovco. Suddenly a shot rang out.

25 You'll see from the time line based on the Australian Embassy CCTV footage of people running from the accommodation area to the guard house and the evidence of several persons present, including CPL Saunders, who was just outside the door of room 8, SGT Hoekstra and PTE Volkofsky. The shot was fired very shortly before 1608 hours Baghdad time. The ballistics evidence is that it was PTE Kovco's pistol 30 issued to him on 1 March 2006 that fired at a distance no greater than 5 centimetres from the right side of his head.

The medical evidence is that the injury he sustained was a non-survivable gunshot wound. There was no evidence of any defensive or other 35 unexplained injuries to PTE Kovco, apart from some minor abrasions that one would expect to find on an infantry soldier. PTE Shore's evidence - and here I refer to the transcript at page 722 - is that he spun around and saw PTE Kovco falling after he heard the shot. He was asked:

40 *When you say you saw him falling down, was he facing in a particular direction when you saw him falling? By that, I mean was he facing his bunk or was he facing toward the back of the room or toward the front of the room?---Just when he was falling directly down I believe he was facing towards his bunk.*

45

5 *You say that he fell. Did he crumple or did fall forward or backward? Can you describe the fall that you saw and how much of the fall you saw?---When I turned I just simply remember him not moving, falling in any direction besides straight down in a very, like, awkward position. The way he went down was straight down, just arms falling down by - in front of him, just collapsing basically.*

10 PTE Johnson's evidence is that he was sitting on his bed and was looking at his laptop at the time the shot rang out and he did not see PTE Kovco fall at all.

15 Various New South Wales Police forensic experts have examined room 8 and the pistol in question and have reconstructed the trajectory of the projectile from their recovery of it from the ceiling of the room. On the board before you, Mr President and Members, is the sketch plan of the ballistic expert's reconstruction of the trajectory and the position of PTE Kovco. That reconstructed trajectory is not inconsistent with the evidence of PTE Shore given in his record of interview with the New South Wales Police at question 369 and thereafter, which is Exhibit 23 in these proceedings.

20 That evidence of PTE Shore is that PTE Kovco was about two paces back from the bunk when he saw him collapsing. This is also consistent with the statement he gave to the quick assessment officer. Now, the reconstruction has PTE Kovco facing the rear wall, that is, the stylised figure that you'll see on that plan is facing somewhere between if the rear wall is 12 o'clock, somewhere between 12.00 and 1.00. PTE Shore's evidence is that PTE Kovco was facing towards his bunk when PTE Shore saw him after the shot. But at a point when he had already commenced collapsing and on PTE Shore's evidence, "was halfway through the fall". That's at transcript page 728, line 10.

25 Now, you have evidence from various sources of the desperate efforts to save PTE Kovco's life, including his evacuation to the nearby US 10 Combat Support Hospital and evidence of the final poignant moments of his life surrounded by his mates. The formal certification of death given by the US treating doctor is in evidence, along with the hospital's clinical notes. You have confirmation from the New South Wales Chief Forensic Pathologist, Dr Duflou of the US doctor's opinion that this was a non-survivable injury.

30 Term of Reference 1(b) requires to you report upon a chronological account of the circumstance of the incident, I will not recount the chronological circumstances, the timeline has been provided to assist you

for that purpose.

5 Term of Reference 1(c) requires you to report upon the identify and particulars of all persons directly or indirectly involved in the occurrence of the incident. You have the soldier matrix before you which sets out the identity of all those persons.

10 Term of Reference 1(d), the cause or causes of the death of the Member. These matters will be dealt with in further detail when I consider Term of Reference 4(a) and (b).

15 Term of Reference 1(e), whether the deceased was on duty and if so, the specific type of duty being performed at the time of the incident. You had the evidence of MAJ Tyrrell and LT Croft respectively PTE Kovco's Company Commander and Platoon Commander, that PTE Kovco was specifically chosen by them from a list of Reserves. LT Croft's evidence is that PTE Kovco was placed in a new section for this particular duty at the embassy and the evidence of the Section Commanders, CPL Scott and McKenzie describe the specific type of duty the PTE Kovco had been performing that day and just prior to the time of the incident.

25 Due to its classified nature, Mr President and Members, I won't go into the detail of that, but you have considerable evidence describing and you also have PTE Kovco's PMKeyS printout which makes it plain that he was performing operational service in a warlike environment whilst he was on duty.

30 Term of Reference 1(f) relates to whether or not he was employed on continuous full-time duty and was a contributor to one of the two superannuation and death benefit systems. The evidence you have in Exhibit 11, being the PMKeyS printout, makes it plain that he was employed on continuous full-time duty as a permanent member of the Defence Force and that he was a contributor to the MSBS scheme. That has been further confirmed in the email from MAJ Paine that was tendered in evidence this morning.

40 Term of Reference 1(g) requires you to report upon the medical history and emotional wellbeing of the Member prior to his death. Now, the medical files are in evidence, classified Exhibits 202 and 205 and these documents show clearly that PTE Kovco was fit for deployment. There is no evidence of any adverse medical condition contained in that material.

45 In relation to PTE Kovco's emotional wellbeing prior to his death, you have evidence of two eminent mental health professionals, Professors McFarlane and Mitchell. Both of them have examined his medical history

and independently concluded that he did not have, or suffer from, any pre-existing psychiatric illness and those reports are in evidence at Exhibits 111 and 112.

5 Along with that is a very considerable body of evidence from his fellow soldiers that PTE Kovco appeared to be his normal and happy self prior to his death.

10 Term of Reference 1(h), any reasons by the Board is unable to, or it is not reasonably practicable to, obtain any relevant evidence. Now, you have evidence from various witnesses of the following: PTE Kovco's body was washed, his clothes were destroyed, room 8 was cleaned prior to examination by the New South Wales Police but after examination by the Military Police, PTE Shore and Johnson's clothes were washed,
15 PTE Johnson's F88 Styre rifle was cleaned, various items were removed from room 8 prior to its examination by the police, the hard drive on PTE Kovco's laptop computer failed during analysis by the New South Wales Police, the Kenyon subcontractor being GAC Limited refused to give a statement or evidence to the Board and the US Commanding
20 Authority would not allow video to be taken of the theatre mortuary evacuation point. But I hasten to add that the General gave ever other assistance possible, included unrestricted access to the premises and allowing interviews with the relevant personnel.

25 I turn now to Term of Reference 2, under the heading Pre-Incident Issues. 2(a) requires you to inquire into and report upon, the qualifications and experience of the deceased and of any other person directly involved in the incident to the extent that such matters are relevant to the occurrence of the incident.

30 The qualifications and experience of PTE Kovco are set out in his PMKeyS printout at Exhibit 11 and also in the Competency Log that has been tendered this morning. Additionally, you have evidence from MAJ Tyrrell about PTE Kovco's qualifications and experience. Similarly
35 you have evidence from SGT Hoekstra as well as PTE Carr, PTE Johnson and PTE Shore about their own qualifications and experience which is also supplemented by the evidence of MAJ Tyrrell about them. The evidence is that PTE Kovco was a fully trained Infantry Soldier with several years experience and that the persons directly involved in the
40 incident had similar levels of training and experience.

45 However, you may wish to consider the difference in the amount of time that PTE Kovco and the other soldiers had carried and trained with the pistol by contrast to their training and experience with the F88 Styre rifle which is primary weapon. There is evidence that some soldiers had a very

5 different attitude to the pistol, its carriage and degrees of weapon readiness than they had to their primary rifle. You have yourselves qualified on the weapon after a two day course, double the amount of time that these people had in their training in 2004. This may be an area for training and policy development in which you would consider making recommendations.

10 I have included in the aide memoire what I believe to be an exhaustive statement of the various exhibits relating to this particular aspect of the evidence. Suffice to say that there is no evidence of any specific inadequacy in any of these materials governing the handling of the training for this activity.

15 I turn now to 2(b), the adequacy of all orders, instructions, procedures, documents and manuals governing the handling of weapons to the extent that they are relevant to the circumstances of the incident.

20 Again in the aide memoire are all the materials relating to these various instructions and again there is no evidence of any specific inadequacy in any of these materials governing the handing of weapons particularly with respect to the modification of this particular pistol and you have in evidence this morning, the statement of the person who last used this particular weapon.

25 The adequacy of the briefings and the compliance with these materials is another matter and I will turn to that now. It is Term of Reference 2C which requires you to inquire into and report upon the form, content and adequacy of weapons handling, briefings and briefing materials relevant to weapons in accommodation areas.

30 You have the evidence of the Command Group, that is MAJ Tyrrell, LT Croft and also of some of the junior NCOs about the form, content and effect of the briefings, along with the briefing material relevant to the incident. There is also the evidence of MAJ Tyrrell and LT Croft about
35 the predeployment training which was conducted for the Unit, including the training relevant to the SLP and briefings on the buddy system and degrees of weapon readiness at the embassy.

40 Now, the evidence is that briefings followed the usual verbal orders group format, descending through the Unit hierarchy from the OC firstly to the Platoon Commanders, then from the Platoon Commanders to the Section Commanders and thence to the soldiers. You heard evidence that this is the standard method of relaying information in an Infantry Unit.

45 The content of the relevant briefings was based, you've heard, on the Unit

SOPs. However, there is some evidence to suggest that some of the briefings were inadequate in relation to SOPs and degrees of weapon readiness as these were not fully understood or even known by some of the soldiers that you heard from.

5

Term of Reference 2(d) requires you to report upon the extent to which there was compliance with the orders, instructions, procedures, documents, manuals and briefings described in the previous subparagraphs.

10

The evidence for these matters comes largely from the statements and testimony of the soldiers that you heard from in person, namely PTE Carr, PTE Johnson and PTE Shore. You will recall the evidence of a deliberate disregard of Standing Operating Procedures regarding degrees of weapon readiness at position D and of inappropriate handling of the 9 mm pistol by PTE Kovco and others. There is also the evidence from LCPL Cook and CPL Scott of their observations of inappropriate handling of the pistol by PTE Kovco.

15

20

I now turn to the heading Post Injury, Term of Reference 3 which requires you to report upon the medical treatment provided to the deceased post injury. There is considerable evidence concerning the medical treatment provided to PTE Kovco following the injury. This comes in the form of direct evidence from PTE Shore and LCPL Cook who are both combat first-aid trained as well as documentary evidence in the form of clinical notes from the US hospital and the expert opinion of the treating doctor, US Lieutenant Colonel.

25

30

The next heading is The Incident, Term of Reference 4(a) requires you to report upon the primary and contributory causal factors in the incident. There is evidence of the following possible causes: a failure to clear the pistol according to the SOPs. You have evidence that at a particular checkpoint, being I in the morning, there was a requirement for a particular degree of weapon readiness. You know on the evidence that PTE Kovco performed duty at that place, but you do not have any evidence of clearance after he left that particular position.

35

40

Further, you have the evidence of PTE Carr that PTE Kovco did not utilise the buddy system with him and that he did not utilise the buddy system with PTE Kovco when they dismounted duty from the other checkpoint at 1500 hours. Thus there is the possibility that the weapon remained in the action condition or some other condition where it would be in a dangerous state after one or more of those checkpoint duties and that the failure to clear the pistol or to participate in the buddy system may have left the weapon in that particular state as of the time of dismount

45

from duty.

5 There is also the possibility that it remained in the loaded condition in the accommodation area or somehow came to be in the loaded condition in the accommodation area. But the evidence you have is that the pistol was found after the incident with a magazine containing 12 live rounds. Another possibility for the cause of the incident is inappropriate weapons handling in the room. Evidence relevant to this possible cause is the position of the wound, the diary entry of 21 March concerning PTE Kovco's dream of shooting himself, the reconstructed trajectory which you have produced by the ballistic section, the evidence of an absence of third party intervention, the stovepipe condition in which the weapon was found and here you have the evidence of two experts, Detective Inspector Hoffman and Detective Sergeant Snow of the New South Wales Police that that condition is typical, in their experience, of self-inflicted injury.

20 There is also relevantly the history of the misuse of the weapon and a lack of awareness of lethality by this weapon as described by the Section Corporal. And you also have Professor McFarlane's expert evidence about the effect on vigilance for personnel moving from a high threat environment to a lower threat environment.

25 One other possible cause is mechanical failure. You have the evidence of Detective Inspector Hoffman as to this particular pistol being tested under the, what you might consider, rigorous customs regulation safety requirements and his opinion that the weapon was functioning normally and that the safety mechanism was efficient.

30 Term of Reference 4(b) requires you to report upon the likely medical cause or causes of death of the deceased, noting that the final determination for the cause of death is a matter for the state coroner. There is a substantial volume of evidence as to the medical cause of death being a non-survivable gunshot injury to the head. Several medical practitioners and paramedics attended PTE Kovco. You have sworn documentary and oral testimony from those medical personnel. Moreover, you have the expert opinion of the Chief Forensic Pathologist, Dr Duflou confirming a non-survivable injury.

40 4(c) requires you to report on the extent to which any recommendations made in previous Boards of Inquiry and investigations regarding weapon handling incidents were not implemented at the time of the incident. The sworn evidence of COL Peterson is that there are no outstanding recommendations from previous ADF Boards of Inquiry and/or investigations regarding similar deaths or incidents and you also have, as

tendered this morning, the responses to the summons issued to the various authorities in that regard.

5 The next heading is Post Incident Issues, Term of Reference 5 requires
you to report upon the performance and adequacy of all post incident
procedures, including security of the scene of the incident, casualty
notification, reporting procedures and the repatriation of the deceased.
Several agencies and individuals were involved in post incident
procedures. These ranged from immediate evacuation, through the
10 desperate attempts to save PTE Kovco at the US hospital, the Military
Police investigation, the mortuary handling of PTE Kovco's body, the
failed return of his body to Australia, the issuing of the casualty and
FATICAS notification and the Defence Community Organisation
involvement with the next-of-kin as well as the mental health support to
15 the ADF members. You have evidence on these matters from various
persons with firsthand involvement.

20 There is evidence that certain of the matters relating to the security of the
scene of the incident and the quality and extent of the Military Police
investigation were less than optimum. Similarly, there is the tragic mix up
in the return of PTE Kovco's body. These may be areas in which you
would consider recommendations to deal with any future incidents.

25 The evidence concerning the reporting procedures comes from the
NOTICAS, the FATICAS, the incident report, the evidence of
BRIG Symon of what he told senior officers in Australia and the various
statements of those officers, including the briefing notes to the Minister of
Defence which are attached to CDF Statement which is Exhibit 209. A
consistent theme in all of this material was the minimum reporting of the
30 known facts surrounding the death of PTE Kovco and repeated cautioning
against speculation.

35 As to the security of the scene of the incident, the evidence is that
PTE Kovco's body was washed, his hands were not bagged for gunshot
residue testing, his clothes were destroyed, the room was cleaned,
PTE Shore and Johnson's clothes were washed and the pistol was returned
to Australia in a box. Now, in respect of these matters, the expert
evidence, both medical and forensic is, the washing was a necessary
aspect of the lifesaving attempts and the placing of bags on the hands
40 would not normally form part of that treatment. The US hospital
destroyed PTE Kovco's clothes. As to the gunshot residue, the New
South Wales expert Ms Hales said that the washing of both the clothes and
the room had no bearing on her analysis because she would have expected
the room and the clothing to have returned positive results for gunshot
45 residue given the environment, the weapons related duties of the soldiers

and the close confines of the room.

5 As to the DNA, Ms Franco, the New South Wales expert gave evidence of successful DNA testing and matching. You heard evidence from the New South Wales Police Ballistics that they recovered the projectile from the ceiling and a trajectory reconstruction was completed which is before you in evidence.

10 Soldier 47, the SIB Captain who is still in theatre, gave you evidence that the use of the box, and this evidence is uncontested, the use of a box was a standard international procedure for the transporting of weapon exhibits.

15 As to the repatriation issue, the evidence is that SGT Hoekstra escorted the wrong body back to Australia. SGT Hoekstra described observing the sealing of a body in a coffin for transport to Australia and stated:

The attention that I paid was cursory.

20 With SGT Hoekstra at the time was the Australian Consul, Mr Adams, also the Kenyon subcontractor and the ADF movement staff as well as the mortuary staff. Mr Adams' evidence is that he did not have the responsibility to identify the body. You may consider that this is supported by the Department of Foreign Affairs and Trade Consular Guidelines which are in evidence before you.

25 The evidence is that the other ADF members stepped back from the coffin at the time that the body was produced. The subcontractor declined the opportunity to provide evidence to this Inquiry. However, the evidence of Mr Jensen, the Chief Executive Officer of Kenyon International, is that the identification of the body was not the role of Kenyon or their subcontractor. You may consider that this view is supported by the Work Authorisation Agreement, the Kenyon contract, the subcontractor's statement to BRIG Cosson which is in evidence before you and the evidence of WGCDR Guerin, HQJOC who in fact tasked Kenyon and gave you his evidence about that and confirmed the content of the Work Authorisation Agreement.

40 The Board received evidence from MAJ Tyrrell that he tasked SGT Hoekstra to escort the body of PTE Kovco back to Australia. He said that SGT Hoekstra knew PTE Kovco and that SGT Hoekstra was:

a mature and experienced senior NCO who was the most suitable member of the Unit for this duty.

45 You heard evidence from BRIG Symon that SGT Hoekstra was most

suitable to perform this duty. BRIG Symon observed that when he first saw him on the early hours of the morning of 22 April '06, that SGT Hoekstra was:

5 *A ghost walking.*

10 However, the Brigadier further observed that everyone was tired at the time. The evidence is that SGT Hoekstra had a period of 24 hours available to him for rest before departing Baghdad with the body on the evening of 23 April '06.

15 There is the evidence of LCPL Cook and PTE Carr and Shore that they and other members of the bearer party whilst in Kuwait, urged SGT Hoekstra to identify and ensure that the correct body was returned to Australia.

20 The Board heard evidence from Mr Adams who observed that the body presented had a moustache. Mr Adams also said that he saw SGT Hoekstra stand beside the coffin and look at the body and he made no comment.

The Board has the post-mortem photographs, Exhibit 81, that show PTE Kovco did not have a moustache at the time of his death.

25 However, as to SGT Hoekstra's capacity or ability to identify the body, the Board has the expert evidence of Professor McFarlane, also Dr Duflou and COL Murphy, the Director of Psychology Corps on the difficulties of using visual identification as the sole means of body identification, particularly in circumstances where there is an injury to the head and face and where the deceased is known to the person conducting the identification.

30 The next heading is "Other Issues". Term of Reference 6 requires you to report upon whether the death of the deceased was caused or partly caused by (a) the act, omission, neglect, carelessness or misconduct of any person. PTE Kovco was shot at close range whilst in room 8 located in the accommodation area within the grounds of the Australian Embassy in Baghdad. With him in room 8 at that time were PTE Shore and PTE Johnson. PTE Shore was asked if he shot PTE Kovco. He denied doing so. PTE Johnson was asked if he shot PTE Kovco. He denied doing so.

35 PTE Carr, whose DNA profile appears on PTE Kovco's pistol and magazine, was asked if he shot PTE Kovco. He denied doing so.

40 PTE Shore and PTE Johnson were interviewed by the Military Police on

45

30 April 2006, that is, nine days after the incident. During those nine days they had had the opportunity to be together for a considerable period of time as the bearer party. They were later interviewed by the New South Wales Police on 10 May 2006, some 19 days after the incident. However, 5 they were both questioned by the quick assessment officer, MAJ Willetts, the morning after the incident, on 22 April 2006 at about 0930 hours Baghdad time.

10 The Board has that material before it at Exhibit C145. That information is substantially consistent with the statements later provided by the members to the Military Police, to the New South Wales Police and in sworn evidence before this Board. Approximately one hour before the incident PTE Kovco and PTE Carr dismounted duty. The unit Standing Operating Procedures provide for a buddy system for the safe clearance of weapons 15 at that time before returning to the accommodation. PTE Carr did not apply the buddy system clearance of his weapon, nor did he apply the buddy system clearance in relation to PTE Kovco's primary and secondary weapons.

20 You will recall the Section Commander's evidence - here I refer to the transcript at page 1050, 1061 and 1062 - to the effect that on dismount from that particular place of duty where there is a double change there is an obligation for both off-going members to clear each other's weapons. On PTE Carr's evidence PTE Kovco did not apply the buddy system 25 clearance of his weapons. PTE Carr's evidence is that he believed that PTE Kovco did not have sufficient time to clear both of his weapons before he went through the door and held it closed from the other side.

30 There is no other evidence before you as to whether or not PTE Kovco in fact cleared his pistol at that time or indeed at any other time on the day. Given the discharge of the pistol, it is apparent that PTE Kovco's pistol was loaded and in the action condition at some time in the accommodation area. That is contrary to the SOPs. During the hearing there was significant agitation of evidence concerning the presence of PTE Carr's 35 DNA profile on PTE Kovco's pistol.

40 You'll recall that PTE Shore, PTE Johnson and PTE Carr all returned to Australia and all underwent voluntary testing of DNA samples. You'll recall that PTE Shore and PTE Johnson both participated in voluntary records of interview with the New South Wales Police. You'll recall that PTE Carr declined the request of the New South Wales Police to participate in a record of interview. When asked to account for the DNA sample test results PTE Carr offered the possible explanation that his 45 DNA was present on the pistol as a result of secondary transfer.

The evidence of the DNA expert, Ms Franco, is that it is possible for secondary transfer to occur. However, based on the research literature and her own laboratory's testing, in her opinion she would expect PTE Kovco's DNA contribution to be equal to or greater than PTE Carr's, and this was not the case in her test results on the slide and the grip. PTE Carr denied ever handling PTE Kovco's pistol. Neither PTE Shore nor PTE Johnson's DNA profile was found on the pistol.

At transcript page 1533 Counsel Representing Mrs Judy Kovco put it to PTE Carr that he shot PTE Kovco based on the evidence of PTE Carr's DNA profile on the pistol. PTE Carr denied this accusation. Furthermore, PTE Volkofsky gave uncontested evidence that PTE Carr was present in the room that they shared together at the time that the shot rang out. This evidence is also consistent with the testimony of PTE Johnson and PTE Shore who said that they were the only people present in the room with PTE Kovco at the time the pistol discharged.

You also have the evidence of CPL Saunders. His evidence is that he was on his way to the room and about to open the door to tell them to keep the noise down when the shot rang out and that a matter of seconds after the shot he opened the door and saw only PTE Shore, PTE Johnson and the stricken PTE Kovco. No-one else did he mention in the room. The expert forensic opinion is that the injury was consistent with a self-inflicted wound. This opinion was given by Detective Inspector Hoffman and Detective Sergeant Snow.

Their opinions were based on the physical evidence that included the location of the wound, the distance of the muzzle from the wound, the tissue damage, the gunshot residue patterning and the stovepipe effect of the spent cartridge. In particular, transcript page 915 and Exhibit 94 deal with these matters of evidence. An inference that may possibly arise from this evidence is that PTE Kovco was handling his loaded pistol when it discharged. However, you will recall that both Detective Inspector Hoffman and Detective Sergeant Snow stated explicitly that they were not preferring an opinion that the shot was intentional and that the harm was intentional, and that they would defer to expert psychiatric opinion on that point.

The Board has evidence that PTE Kovco was confident and experienced in the handling of weapons and had been trained and qualified on the pistol. However, the Board also has the evidence of his Section Commander and section Second in Command that they had had cause to reprimand him whilst on deployment for inappropriate handling of the pistol. I refer there to CPL Scott and LCPL Cook. There is also related evidence on PTE Kovco's handling of the pistol where PTE Carr has

described observing a process which he called silent cocking conducted by PTE Kovco. PTE Carr said this was done by PTE Kovco some few days prior to the shooting.

5 You have heard the expert evidence of WO2 Nayda and
LTCOL Saddington that this practice is not Defence Force doctrine or
training and is a dangerous practice. The Board also observed a physical
demonstration by WO2 Lankshear that the process of silent cocking as
described by PTE Carr is impossible in that a 9 mm round is ejected when
10 the pistol is reassembled in the manner that PTE Carr told you he saw
PTE Kovco perform. The evidence of that is the video demonstration at
Exhibit 175.

15 There is no evidence of any other act, omission or misconduct causing or
contributing to the death of PTE Kovco. The Board should have regard to
the expert psychiatric evidence. Both Prof McFarlane and Prof Mitchell
told you that notwithstanding the 21st March diary entry of the dream
about PTE Kovco shooting himself, PTE Kovco displayed none of the
indicators of suicidal intention and in their opinions there is a very low
20 probability that PTE Kovco intended to commit suicide.

Associated with this is the evidence from Prof McFarlane regarding the
human factors aspect of moving from a perceived high threat
environment, such as being on patrol, to the perceived lower threat
25 environment of the embassy and the possible reduction in vigilance
associated with that change. Term of Reference 6(b) requires you to
report upon the use of drugs or alcohol in relation to the cause of death.
Very simply, you have the evidence of Dr Duflou, the chief forensic
pathologist for New South Wales, that non illicit drugs or alcohol were
30 detected in PTE Kovco.

Term of Reference 6(c) was the death caused or partly caused by
non-compliance with orders, instructions or safety procedures. You may
conclude from the evidence of SGT Hession, Mr van der Walt, another
35 ballistics expert, and Detective Sergeant Snow that there was
non-compliance with orders, instructions and safety procedures because
PTE Kovco's pistol was in the accommodation area in a condition that
was dangerous and allowed it to be fired. You may conclude from the
evidence of PTE Carr that there was non-compliance with the buddy
40 system when he and PTE Kovco dismounted from duty and PTE Kovco's
weapons and his own were not cleared in a buddy process.

45 Term of Reference 6(d) asks if the death was caused or partly caused by
any inadequacy in the individual training of an ADF member or the
collective training of ADF personnel as it relates directly to this incident

5 or its post-incident actions. There is no evidence to suggest any inadequacies in the training of PTE Kovco or any other relevant Security Detachment member. However, you have the evidence that the pistol had not been used extensively by some Security Detachment members such as PTE Carr and PTE Johnson before this deployment.

10 Indeed, you have evidence that by comparison with their primary weapon, the F88 rifle, these infantry soldiers had limited experience of and confidence in the pistol. This may be an area in which you would consider recommendations to improve training. The training of ADF personnel in proper identification, escort and repatriation duties appears to have been on the evidence underdeveloped and poorly planned. You have evidence of recent changes introduced by the Chief of Defence Force to remedy this situation and it may be another area for recommendations that you could make in respect of development of that policy and training.

15 Similarly, the evidence about the incident site preservation has demonstrated a deficit in training and awareness of such matters in the Defence Force. Again, you have evidence that the Chief of the Defence Force has introduced command and control measures to rectify this shortfall by placing trained investigators in theatre. However, this also may be an area for you to make further recommendations for policy development and training.

20 Term of Reference 6(e) was the death caused or partly caused by any equipment limitation, malfunction or failure. You have evidence that this particular pistol was purchased by the Defence Force only in 2002. You also have now in evidence a history of the pistol and its assessment of its function by the previous user, as well as the technical inspection report. The weapon has no history of malfunction. It was found to be in a satisfactory working order by the New South Wales Police with an efficient safety mechanism. You will recall the New South Wales Police evidence about the rigorous customs regulations by which it was tested and you may conclude on that evidence that there is no equipment limitation, malfunction or failure.

35 6(f) was the death caused or partly caused by any weakness in relevant systems or methods of control? You have the evidence that SECDet IX Standing Operating Procedures were not well-known or understood by some soldiers and that amendments to the SOPs were not documented or formally promulgated other than by oral briefings. You may consider that this is possibly a weakness in the system and method of control, particularly in relation to the degrees of weapon readiness at the embassy given the variety in the evidence you received from soldiers of what was required of them at certain checkpoints.

5 You have the evidence of MAJ Tyrell that there is no extant doctrine or
general instruction instituting formally the buddy system for weapons
clearances. There is some evidence that the buddy system in use at
SECDet IX was not considered compulsory by the soldiers in all
circumstances. Again this may be a further area in which you would
consider recommendations for policy development and training.
10 Similarly, the ADF repatriation policy and use of civilian contractors to
repatriate deceased ADF members demonstrates evidence of a
comprehensive policy document that had recently been written before the
incident by MAJ Byway, from whom you heard.

15 However, the evidence indicates that that thorough policy document was
not in fact well-known or applied. Again you have evidence of recent
remedial action taken by the Chief of the Defence Force to attempt to
ensure that this doesn't happen again. However, you may also consider
this to be further ground for a recommendation for training, development
and policy drafting.

20 Term of Reference 7(a) requires you to report upon whether or not the
next of kin of the deceased have been advised of their eligibility to submit
claims for compensation in accordance with current guidelines. You will
have received evidence from the DCO about advice given to the next of
kin and I understand that Mrs Shelley Kovco is proposing to make a
25 statement to the Board in which she will cover those matters as well as
those set out in Term of Reference 7(b). 7(b) indicates whether or not
there is any outstanding action required. You have the evidence of
Ms Janet Stodulka as to the DCO activities in that regard from which you
could conclude that there is no outstanding action required of members or
30 units.

Term of Reference 8 requires you to report upon any inadequacy revealed
in the course of the Inquiry of any training, orders, instructions,
procedures or publications which, while not a causal factor of the incident,
35 the Board considers should be brought to the attention of the appointing
authority. In this regard, I mention the evidence of delays in the
investigative process. As mentioned earlier, the Military Police were not
able to attend the scene until 96 hours after the incident because they had
to travel from Australia to Iraq, and the New South Wales Police were
40 also held up. You have in evidence the time lines from both
organisations and you may conclude from that that much of the delay
resulted from the travel requirements.

45 In any event, at Exhibit 160 you have the Chief of the Defence Force's
directive issued on 14 May 2006 in which he has put in place measures to

5 prevent similar delays in the future. You have evidence of potential contamination of the incident scene due to personnel entering the room and interfering with clothing, personal items, equipment and the pistol. There is evidence of a lack of understanding of the need to secure incident sites and preserve forensic evidence. Again this is an area you may wish to make recommendations for policy development. Similarly with the ADF mortuary affairs and repatriation issues which are not fully developed, documented and promulgated.

10 Finally, under this Term of Reference I repeat the observations in respect of the apparent significant disparity in the amount of time spent in training and handling of the pistol for infantry soldiers, and others indeed, on operations by comparison with the F88 rifle, which is their primary weapon. This may also be an area in which you will consider
15 recommendations for training and policy development.

Term of Reference 9 requires you to report upon any relevant issues raised by the next of kin of the deceased and other relevant authorities relating to the incident and post-incident procedures and inquiries. I understand that
20 Mrs Shelley Kovco and her father, Mr David Small, wish to raise some relevant matters directly in addresses to the Board, as was done recently by Mrs Judy Kovco. It may be that those issues will be raised in those addresses.

25 Unless I can assist you further, Mr President and Members, that completes my address.

PRESIDENT: The Board is content and thanks you.

30 COL GRIFFIN: Thank you, Mr President. I note the time. It may be appropriate to adjourn to allow now Counsel Representing to absorb the documentation that was distributed this morning before returning to address you.

35 PRESIDENT: Will an hour give them enough time to do that or do they need a bit more time than that?

COL GRIFFIN: I suspect that perhaps 1400 might be more appropriate as the earliest time for - - -

40 COL YOUNG: I'd support that suggestion.

PRESIDENT: The Board has got to do some reading too of course.

45 LTCOL HOLLES: Sir, it would be my wish to address you first thing

tomorrow morning, if that accommodates my learned friends LTCOL Green and LTCOL Wilkinson.

5 PRESIDENT: We'll see how the day develops. I can't guarantee you that at the moment, Colonel, because if we've got time this afternoon I'll invite you to address perhaps on less contentious issues this evening. We'll just see how the matter flows. I'm concerned to use as much of the hearing time as we've got as I can without wishing to disadvantage you in any way. It's a bit of a balancing act.

10 LTCOL HOLLES: I'd simply say, sir, that my experience is the more time spent in preparation the shorter I am.

15 PRESIDENT: I think COL Griffin is living walking and talking proof of that this morning.

20 LTCOL GREEN: Sir, before we go on, do I take from what has just fallen that I will follow LTCOL Holles, because that would be my application, bearing in mind that he would be somewhat of a Prosecutor and I would be somewhat of a Defendant in these proceedings, as I perceive the way the issues are falling.

25 COL GRIFFIN: Sir, your practice notes indicates that the batting order, for want of a better term, is in accordance, firstly, with represented ADF members in descending order of rank, which would indicate LTCOL Wilkinson going first on behalf of SGT Hoekstra, and then LTCOL Green on behalf of PTE Carr and then, according to the practice note, the next of kin representatives concluding with COL Young for the deceased PTE Kovco. That's as it presently stands, Mr President.

30 PRESIDENT: I propose to continue that. If, however, LTCOL Holles raises a matter which I take the view or you take the view that you should answer - - -

35 LTCOL GREEN: Yes, sir.

PRESIDENT: - - - I'll give you the opportunity to do that.

40 LTCOL GREEN: Thank you, sir.

45 PRESIDENT: I think I've got to say this to you, LTCOL Green: one of the things which is exercising the Board's mind, and no doubt it's exercised yours - and I'll formally say it out loud - is just what onus your client had under the buddy system. To me, that's a very live issue. I don't think I can say much more about that.

5 LTCOL GREEN: The reason why I raised that issue, sir, was that ordinarily - I appreciate what the practice note says - but ordinarily it would be the prosecutor - and I perceive that, as I've indicated LTCOL Holles would be somewhat of a prosecutor in this respect - would go first. That's why I was in effect inviting an application or inviting the reversal of what would otherwise be the ordinary - - -

10 PRESIDENT: I don't propose to go down that route because I propose to pay, for want of a better phrase, the next of kin the courtesy of going last.

LTCOL GREEN: I'm in your hands, sir.

15 PRESIDENT: 2 o'clock then.

COL GRIFFIN: Thank you, sir.

20 **LUNCHEON ADJOURNMENT** [1237]

RESUMED [1414]

25 PRESIDENT: Yes, thank you Colonel.

30 COL GRIFFIN: Mr President, before the next address, can I just draw to your attention the substituted callsign matrix in lieu of the return of the SECDET IX members has been prepared with advice from HQJOC and I now substitute that for the existing Exhibit 5. I believe the Secretary has that and has made it available to the Board and to Counsel Representing.

35 PRESIDENT: Yes, thank you. Is everybody comfortable, any comment required?

COUNSEL REPRESENTING: Yes, sir.

PRESIDENT: Yes, thank you.

40 COL GRIFFIN: Thank you, sir, I have nothing else.

PRESIDENT: Yes, thank you. LTCOL Wilkinson.

45 LTCOL WILKINSON: Thank you, sir. President and Members of the Board, last week I received a document referred to as a Notice To A

Potentially Affected Person and it says this, to Soldier 2:

5 *The issues contained in Annex A are within the contemplation of the Board and it is possible that an adverse finding affecting you may be made, you are invited to put any submissions with respect to items contained in Annex A to the Board, however, you are not obliged to do so.*

10 It is signed M A Griffin, Colonel Counsel Assisting. I can indicate that I have instructions to respond to this notice.

PRESIDENT: Thank you.

15 LTCOL WILKINSON: Which then states at Annex A:

Issue 1, that Soldier 2 failed in his duty to escort the remains of PTE Jacob Kovco from Iraq to Australia.

20 In support of that issue, there is evidence presented and that was outlined by Counsel Assisting this morning and just to refresh your memories, he said that there was evidence that:

25 *Soldier 2 describes observing the sealing of a body in a coffin for transport to Australia and stated "The attention that I paid was cursory".*

Evidence that the body subsequently identified by the Victorian Coroner:

30 *To be a Bosnian national of 44 years of age with a moustache.*

Evidence that the post-mortem photographs that show PTE Kovco did not have a moustache at the time of his death. Evidence that the Australian Consul, Mr Adams observed:

35 *That the body had a moustache, he saw Soldier 2 stand beside the coffin and look at the body and make no comment.*

Evidence of Soldier 30 that he tasked Soldier 2 to escort the body of PTE Kovco back to Australia, that Soldier 2 knew PTE Kovco:

40 *That Soldier 2 was a mature and experienced senior NCO who was the most suitable member of the Unit for this duty.*

45 Evidence of BRIG Symon that Soldier 2 was suitable to perform this duty and that he had a minimum of 24 hours rest before departing Baghdad

with the body, pm 23 April '06 and finally, evidence of Soldier 14, Soldier 17 and Soldier 4:

5 *That members of the bearer party, whilst in Kuwait, urged Soldier 2 to identify and ensure that the correct body was returned to Australia.*

10 President and Members of the Board, I propose to respond to each of those evidentiary matters in my submission. And again, just to repeat that submission that Soldier 2 failed in his duty to escort the remains of PTE Jacob Kovco from Iraq to Australia. It's my submission that SGT Hoekstra was only required to escort the casket containing PTE Kovco's body, he was not responsible for ensuring the body was Jake's which is implied in the issue as stated. That is, he was not required to and therefore did not have a duty to identify Jake's body.

20 Having said that, SGT Hoekstra took it upon himself to involve himself in the identification process and this he did despite the fact that he was under no obligation to do so. It is also my submission that for the reasons that I am about to present to the Board, the Board should not make any adverse findings against SGT Hoekstra. The evidence in support of the issue refer to both identification issues and the tasking or SGT Hoekstra's role and I propose to discuss his role first and then identification issues.

25 MAJ Tyrrell stated that the choice of escort was between the CSM WO 2 Cuming and SGT Hoekstra and that the latter was an experienced and mature and senior NCO. His position in the Platoon was such that he would normally expect to be given this type of task. MAJ Tyrrell had a very limited involvement in the process. He said the only instruction he gave was to "stay with Jake", but he provided no other tasking to SGT Hoekstra and this appears at transcript page 969.

35 MAJ Tyrrell also stated that he was not aware of any instructions relating to repatriation or mortuary affairs. SGT Hoekstra initially had a discussion with WO2 Cuming who did not provide him with any specific instructions or tasking and that appears in his statement which is Exhibit 110.

40 LT Croft said he had no involvement in the selection process. He was told by MAJ Tyrrell who was to go and he also did not have any knowledge of repatriation instructions or process and did not issue any instructions or responsibilities to SGT Hoekstra, including identification; transcript page 1019.

45 Soldier 45 stated that he did not provide any briefings or instructions to

SGT Hoekstra and in fact he said he did not speak to him much at all; transcript page 1303.

5 Soldier 47 stated that SGT Hoekstra was present when the photos were taken at the US morgue at Kuwait. He only had a casual conversation with SGT Hoekstra as he did not believe that he was an integral part of the investigation; transcript page 1328. He also observed that he “looked tired and a bit upset”.

10 BRIG Symon spoke to SGT Hoekstra who “looked fatigued”. He in fact described him as “a ghost walking”; transcript page 4109. And also he stated that he intended that SGT Hoekstra have a minimum of 24 hours rest before departing Baghdad, there is no evidence to confirm that in fact he had that amount of rest.

15 BRIG Symon stated that he did not articulate or specify exactly what he wanted SGT Hoekstra to do; transcript page 1400. And in relation to a possible responsibility to identify, he agreed that it was his understanding that the role of the escort was to consign the casket and not the identification of remains; transcript page 1410.

25 SGT Hoekstra did not receive any written instructions until he was given a copy of Exhibit 134, the Duty Statement and he was given that by the CSM of HQ JTF 633, WO Doherty. He did not receive any specific advice on how to perform the task. He did not receive any training in the role. He was only aware of his role in general terms. He was aware of the instruction in the Duty Statement which refers to ensuring the correct consignment of the casket. He gave evidence that he was aware that nothing in that statement required him to identify PTE Kovco’s body. That’s in his statement, Exhibit 106.

35 At no stage had anybody specifically instructed him about his role and that it was his responsibility to identify the body, with one exception; no ADF Member has provided any evidence that they knew what the role of an escort was in any precise way.

40 Soldier 45 had some familiarity with one instruction, the Mortuary Affairs Plan, but apart from MAJ Byway, nobody appears to have had any familiarity with the relevant instructions. Nobody, apart from MAJ Byway appears to have had any training or instruction in Mortuary Affairs in general or repatriation in particular.

45 The main instructions appear in Exhibit 100 which is the Cosson Report. Land Warfare Procedures - General (Mortuary Affairs), Annex Y, in repatriation of ADF remains from outside Australia. Annex CC provide

details of the role of escort but do not refer to any requirement for the escort to identify a body.

5 COL McManus referred to this possible deficiency in the briefing of
escort officers. He stated that the escort officer was given a task as an
escort officer; at transcript page 1464. If identification was an issue, the
escort officer should be given a more thorough briefing. He said this issue
is being considered in a rewrite of the relevant instructions. Soldier 39
10 stated that he considered that the escort having a role to identify was self-
evident; transcript page 1563. But when it was pointed out that there were
no instructions to this effect he agreed that this was a deficiency. He
agreed that further guidance on the escort's responsibilities was needed in
rewrites of policy; at transcript page 1564.

15 MAJ Byway may be described as the Army, if not the ADF's, principal
expert on mortuary affairs. She was the officer of the Land Warfare
Procedure - General (Mortuary Affairs) and her evidence referred to a
difference between identifying remains and dealing with remains that have
already been identified; transcript page 1614. She stated the escort's duty
20 is the custody component of that. She agreed that there was nothing in the
duty statement or the instruction that she authored that require the escort
to identify a body; transcript page 1633.

25 In a statement outlining her recommendations at transcript 1631 she said
this:

30 *The intent of escorts always has been and continues to be
custodians only. I think we need to emphasise that. If people who
are not qualified or trained to be in a mortuary environment, then
people need to ensure that commanders and subordinates stick to
that escort duty statement. I think stepping outside that duty
statement is vulnerable to error.*

35 It should also be noted that MAJ Byway agreed with the evidence of
COL Murphy, D Psych, that the escort should not be too closely
associated with the deceased or the incident. Finally, as far as the role of
escort is concerned, the evidence of LTCOL Pearce was of significance.
She stated that she believed that MPs were the most appropriate members
to undertake that role because of their training and experience in both
40 preserving evidence and providing continuity of evidence back to its home
location; transcript page 1163.

45 *Clearly these members would be preferable to an untrained,
inadequately instructed Platoon Sergeant who is personally
connected to the deceased.*

5 In relation to the identification process, the identification of PTE Kovco's body had already occurred several times on its journey and prior to the Al Sabah incident. The identification had been properly dealt with. All the appropriate documentation, particularly the death certificate, had accompanied the body on the journey. Now, whilst not his direct responsibility, SGT Hoekstra was brought into the identification process. However, there were always other Defence personnel and civilians at each stage of the repatriation.

10 At Al Sabah there was the embassy official, Mr Adams, and the Kenyon representative, Mr Nasser. The only time anybody actually asked SGT Hoekstra to check PTE Kovco's identification was either at the Baghdad International Airport only, according to SGT Hoekstra, or possibly again in Kuwait if you accept the evidence of Soldiers 14, 4 and 15 17. SGT Hoekstra denies that he was again told to identify PTE Kovco in Kuwait. But whether he was told more than once or not, as he stated, he was aware of the concerns of the bearer party and made his best efforts to identify Jake's body.

20 Ultimately, the final effort he made was not sufficient, and he admits that. However, there were reasons for that, and I'll be discussing those in a few moments. At Al Sabah SGT Hoekstra admits to a cursory examination for the reasons outlined in his statement. He was at least prepared to admit 25 that he did not make a detailed study of the body. He stated that nothing jumped out at him. He didn't see the moustache that both Exhibits 81 and 101 show was present on the Bosnian, Mr Sinanovic.

30 If Mr Adams had something like, "Did PTE Kovco have a moustache?" as SGT Hoekstra stated in his evidence, he would have paid far more attention. SGT Hoekstra was relying on the more experienced Mr Adams. He appeared to know what he was doing. You have heard that he had experience at this sort of thing. As COL Murphy, D Psych, said, SGT Hoekstra was probably relying on the concept of an authoritative 35 gradient; transcript page 1586.

40 In other words, the fact that SGT Hoekstra may have felt that Mr Adams had great responsibility in this domain and he may have believed that the body identification process was really Mr Adams' responsibility. Mr Adams acknowledged that it was implicit in his role of sealing a coffin that he knew who was in it; transcript page 873. He looked at the body and he had a copy of the passport photo. There was a moustache on the passport photo. He didn't say anything to SGT Hoekstra about the body or the face in particular.

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5 He was in fact prepared to admit that if he had mentioned the moustache it might have changed the situation; transcript page 883. Mr Adams appeared to be satisfied that the body was PTE Kovco's. In any event, at no stage either before or after his examination did he tell SGT Hoekstra that he should ensure it was PTE Kovco. Despite Mr Adams' evidence to the contrary, no ADF member told him that it was SGT Hoekstra's responsibility to identify PTE Kovco. It would be my submission that you should accept or prefer the evidence of CAPT Donovan and WO Hunter on this point.

10 Mr Adams stated that SGT Hoekstra's silence indicated to him that he was satisfied that SGT Hoekstra was confirming the identification of PTE Kovco. It's a matter for the Board as to whether you accept that his silence was, as Mr Adams described it, tacit approval, or whether, given Mr Adams' experience and position, he should have perhaps made more of an effort to confirm PTE Kovco's identification. It must be remembered that he didn't say anything either. As to SGT Hoekstra's silence, there is evidence that his silence may have been something else entirely. And I will be discussing that in a few moments.

20 The Board has also heard evidence from SGT Hoekstra that Mr Nasser, the Kenyon representative, seemed to be in control. He had all the documents and he spoke of the competence of the staff. SGT Hoekstra stated that he trusted him to do his job. It's a matter for the Board as to whether you agree with the Kenyon chief executive officer, Mr Jensen, that his company through its subcontractor did not have any singular responsibility for the failed repatriation. What was of significance from his evidence, as far as SGT Hoekstra is concerned, was his confirmation of the limitations of visual recognition and the lack of in-depth experience that exists in the Australian Defence Force; transcript page 1690. The unreliability of visual recognition was also made very clear to the Board by the evidence of Dr Duflou; at transcript page 258.

35 The fact that SGT Hoekstra remained silent and did not pay a great deal of attention was made understandable in the light of the psychiatric evidence from Prof McFarlane and the evidence from COL Murphy. Prof McFarlane provided evidence of a number of factors that might explain why SGT Hoekstra did not take a more active role in that unfortunate final transfer at Al Sabah. He said there is a lessened ability of people to identify others following stressful circumstances; in this case, SGT Hoekstra's involvement that resulted in Jake's death.

45 The process of the repatriation itself was a distressing and preoccupying thing. The neural systems in the brain that involve facial recognition have had their integrity disrupted. There is an avoidance response, a reflex to

look away. This, combined with the effects of stress on brain circuitry, makes accuracy vulnerable to substantial error. He agreed it was normal to minimise exposure to the dead. And his personal relationship to PTE Kovco combined with the need to retain control of the situation. In addition, stress and tiredness all compounded the situation.

COL Murphy also gave evidence of the psychological issues that may have come into play whilst SGT Hoekstra was at Al Sabah. I've already referred to the authority gradient, that is, the concept that SGT Hoekstra may have felt that Mr Adams had a greater responsibility in this domain. COL Murphy also referred to the fact of wishing to limit exposure to the dead, which he described as an innate human need; transcript page 1586. A combination of fatigue and stress and the effect of these factors on performance were also matters he considered relevant to SGT Hoekstra on that day.

COL Murphy advised the Board that the task of body recovery and identification requires training or direction on the difficulties that may be faced; transcript page 1587. He also agreed that whilst it may be important that a member of the unit be involved in escort duties, that member should not have to be responsible for identification; transcript page 1595. All these explain why SGT Hoekstra may not have been in an appropriate state of mind on that last occasion.

When he said in his statement that he was "not in the mood to have a good look" it was not, as might be suggested, that he couldn't be bothered. His mood was his psychological state as described by Prof McFarlane and COL Murphy. The fact that he did not look at Jake's body properly on that last occasion is a situation that he does not resile from or seek to lay blame elsewhere. As he said in his statement, he was devastated and he has sincerely apologised for the heartache that was caused to the family. I therefore request that the Board make no adverse findings against SGT Hoekstra.

PRESIDENT: Thank you, Colonel. LTCOL Green.

LTCOL GREEN: Thank you, sir. Sir, I've prepared written submissions. There are two versions of this, one of which is a redacted version, the other one is a slightly classified version. Sir, I hand up to you four copies of my written submissions. Madam Secretary has also got the redacted copies. Unless you have any questions of me, sir, I don't propose to say anything more.

PRESIDENT: I would then propose that we adjourn for 15 or 20 minutes to absorb this and then come back to you.

LTCOL GREEN: Thank you, sir.

PRESIDENT: I take it everybody is comfortable with that.

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COL GRIFFIN: Yes, sir, thank you.

10 **ADJOURNED**

[1436]

RESUMED

[1500]

15 PRESIDENT: Yes thank you. LTCOL Holles.

20 LTCOL HOLLES: Sir, before I move to any closing addresses, there's a matter which concerns me; my learned friend LTCOL Green has made submissions on behalf of Soldier 14. Prior to lunch he indicated that if I were to make submissions in which he felt his client's interests had been somehow or other sullied, he would, with your permission, have the right of reply.

25 Now, the situation is that written submissions have been made on behalf of PTE Carr, Soldier 14. In address this morning, Counsel Assisting raised a number of issues about PTE Carr, specifically they were that he didn't apply the buddy system which LTCOL Green has addressed. He also raised issues about the silent cocking which PTE Carr gave sworn testimony he saw and Counsel Assisting indicated that the evidence really was that that process was impossible. My learned friend has made no issue with that.

30 He raised, that is Counsel Assisting, raised the issue about the presence of DNA on the slide, the magazine, the grip, I think, he didn't mention, but it was also found possibly on the trigger. And again my friend, with great respect to him, has not chosen to address any of that issue in his submissions.

35 There has been no attempt to address any of the issues raised by the evidence of Ms Franco in her evidence on secondary transfer. Now, it would seem that on one view of it my friend doesn't wish to address any of those issue and if that's the case, I'd invite him to say so. If it is to be the case that I address on those issues and then he seeks a secondary address or an address in reply, then in effect he's having two bights of the cherry, if I can be so bold as to use that expression.

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5 My understanding is that when one addresses one as expected to raise all those issues which might reasonably be within the providence or interests of your client to put forward at that stage, rather than in effect to attempt to try and split the case. What in effect would be happening, unless there is some assurance from my friend he doesn't seek to address subsequently on any of these issues, is that he would be achieving what you, sir, specifically directed was not to happen this morning; that is that I would address first followed by his address.

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PRESIDENT: I take your point, but I suspect LTCOL Green is responding to a notice.

LTCOL GREEN: Yes, I am, sir.

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PRESIDENT: And responding to the notice alone.

LTCOL GREEN: Yes, sir.

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LTCOL HOLLES: He might also consider, sir, that he - well, there were a number of issues raised by Counsel Assisting this morning. Is it his case that he abandons those issues as well or does not seek to be heard on those issues also? Because if it is the case, then I'd ask to consider whether an address in reply to anything I might say might be appropriate because they are firmly on the record at this stage, given Counsel Assisting's address this morning.

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PRESIDENT: Do you want to make any comment, Colonel?

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COL GRIFFIN: Yes, thank you, sir. There are two separate issues arise here; one is the principal enunciated by the Privy Council that I averted to in my address to you this morning in the case of Mahon v Air New Zealand, that is that findings must be based on probative evidence and that people have the opportunity to be heard and the Inquiry's manual and the other case of Annetts v McCann, the High Court decision which indicates that where an administrative body be minded of the possibility of making findings adverse to an individual, then the body is required to put the person on notice to that possibility and provide them with the opportunity to be heard.

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Acting on your instructions, that is you and the Members, I prepared the notice for Soldier 14, that is PTE Carr, setting out those matters that were in the contemplation of the Board, as I understand it, where possible adverse findings could be made and LTCOL Green, in my submission quite properly, has responded to those matters set out in the notice.

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5 The second issue that falls from what LTCOL Holles has raised with you
is broader matters that I have touched on in my address to you on the
evidence. Those are not matters, as I understand it, that the Board has in
contemplation making any adverse findings and as a consequence they
were not placed in the notice to LTCOL Green and quite properly, given
the ambit requirement of Annetts v McCann, that is that counsel
representing affected persons may address on matters that the Board has
raised with them as possibly being adverse, he has limited his address to
10 those factors in the notice.

15 The other matters that I raised are matters of evidence, questions of fact
before you. It's a matter entirely for LTCOL Green whether or not he
wishes to canvas those matters, but given that they are not in
contemplation of the Board making adverse findings, then he is not
obliged to. If others seek to make submissions to you in respect of those
matters, it is open to you to allow LTCOL Green to respond to those
matters in my submission if that arises, but given that this is a proceedings
of transparency and fairness, I see no reason why you could not allow him
20 to respond to matters. They are already on the table in terms of factual
matters that I raised with you, but as I understand it, there is no obligation
on him to address those because they are not in the notice that you gave
him.

25 PRESIDENT: I'll ask the rhetorical question; if having heard
LTCOL Holles the Board forms the view that perhaps we should have
given Soldier 14 a notice about X, we should then adjourn to allow him to
respond to a notice about X and give him a notice.

30 COL GRIFFIN: That would be the case in my view, sir, yes.

PRESIDENT: I think that would be my view also, subject to any
comment that anybody else wants to make.

35 COL GRIFFIN: What is required to be done though, sir, is that this is not
a forum where people can simply conduct a process of linking accusations
without evidence, there requires to be an evidentiary basis for matters.
There is no evidentiary basis on the material that I canvassed with you this
morning to support anything of the sort that I understand LTCOL Holles
40 to be possibly foreshadowing here and it will depend entirely on his
address to you on the matters of fact and evidence that are before you.

PRESIDENT: Any response, LTCOL Holles?

45 LTCOL HOLLES: Sir, there are a number of facts before the Board

5 which go very much to the credit of PTE Carr. Now, my learned friend,
COL Griffin raised some of those in his address this morning. The credit
of PTE Carr is a critical issue in a number of ways: (1) most of the direct
evidence against PTE Kovco as to non-compliance with Standard
Operating Procedures on 21 April 2006 comes from PTE Carr. The Board
will in due course need to consider what weight it places upon the
evidence of PTE Carr before it can make a finding one way or the other on
any of the issues relating to allegations of mishandling of PTE Kovco's
pistol through the unload point, et cetera.

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15 In many ways the credibility of PTE Carr is essential to the Inquiry and its
findings, at least so far as what happened or did not happen, what might
have happened or what might not have happened in room 8 later that
afternoon. Now, without going into issues in the address, but the fact is
that PTE Carr has given evidence about seeing silent cocking earlier in the
period at the embassy. Despite being shown the video, he stuck to the
evidence that he'd given, despite it in fact being demonstrated to him that
it was physically impossible for him to have seen what he swore he did.

20 You will recall that he said his last contact with PTE Kovco was when
PTE Kovco ran ahead and held the door closed for him. Yet the video
evidence clearly shows them following Indian file towards the
accommodation. The version given by him as to the possibility of transfer
of DNA material from the grip on the megaphone to the pistol doesn't
25 bear close examination for two reasons. First of all, the evidence by
Ms Franco as to the extraordinary unlikelihood that would occur.
Secondly, there is no evidence whatsoever that the pistol was out that day.
In fact the evidence is all that it remained holstered.

30 But even if it was out, it doesn't explain the preponderance of DNA
material, I should say, that is, the greater amount of material on the slide is
PTE Carr's, not PTE Kovco's. His DNA is also on the grip and, as I
understand the evidence, on the magazine, the butt plate and possibly the
trigger.

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PRESIDENT: Do I take from that that you're going to attack Carr's
credibility in a rather vigorous way?

40 LTCOL HOLLES: You may assume, sir, that I intend to address the
Board on those evidentiary matters and they are matters which are on the
record. It's not my role, nor is it my function or is it my intention to
extrapolate any scenarios from those proven facts or scientific opinions.
Indeed, it may be that in the ultimate they ask more questions than they
answer.

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PRESIDENT: I think that's the understatement of the afternoon.

5 LTCOL HOLLES: But the fact is that those matters to which I have averted are proven facts before the Board or they are uncontroverted matters of scientific opinion. The majority of those were referred to by my learned friend COL Griffin this morning in his address to you. Are they matters which LTCOL Green does not intend to address upon, which he abandons any potential for address upon? It would be, with great respect to LTCOL Green, naïve to think that the Counsel Representing
10 Mr and Mrs Kovco would remain silent on issues such as that.

PRESIDENT: But ultimately LTCOL Green's client has been given a notice requiring to answer certain possible findings, and he's responded to those possible findings. That's as far as the Board has gone.
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LTCOL HOLLES: That's fine as far as it goes, sir. But I don't want to be in a position where I address, LTCOL Green responds and then I'm seeking to readdress to cover issues which have been the subject of a response.
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PRESIDENT: But at this point of time, at this moment, the Board does not have in contemplation matters outside that notice.

LTCOL HOLLES: Sir, as I understand it, you also issued notice against PTE Kovco. Is that not the case?
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PRESIDENT: Indeed we have; regrettable.

LTCOL HOLLES: Is it not the case that the matters in that notice flow wholly, if not substantially, from the evidence of PTE Carr?
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PRESIDENT: I take your point.

LTCOL HOLLES: So the evidence of PTE Carr is in effect critical to the issues in those notices or that notice on PTE Kovco. It's the credibility of that evidence which underpins the force of the notices.
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PRESIDENT: Anybody else want to make any contribution?

40 COL YOUNG: Sir, if I could make an observation. I'll certainly be mentioning PTE Carr's DNA being on the pistol. I'm not sure how far I'll go with that, but you might find yourself in a situation where LTCOL Holles makes submissions, LTCOL Green responds and LTCOL Berkley makes submissions, LTCOL Green responds, right
45 through to myself. So that's a further complication that might have to be

sorted out before we proceed. I'm not sure what the answer to that is. I can give you an outline of the things I would be saying.

5 PRESIDENT: I would be amazed if you hadn't mentioned the DNA on the pistol, both of you; indeed you have an obligation to do so. LTCOL Berkley, do you wish to make any contribution?

LTCOL BERKLEY: Not at this stage, sir, no.

10 PRESIDENT: LTCOL Wilkinson.

LTCOL WILKINSON: No, sir.

PRESIDENT: COL Griffin.

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COL GRIFFIN: Well, as I understand what's being put to you, sir, is that because Counsel Representing, one or more of the next of kin and the deceased, may say some things that challenge the credit of another affected person, that they're not ready to proceed or that they require LTCOL Green to do something further or they require the Board to do something further. What that actually is is not plain to me at the moment. So I don't know what is being put to you other than that people are concerned that they may be attacking the evidence of a witness.

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25 PRESIDENT: As I perceive it, there is potential for an attack to be made upon the credibility of PTE Carr. As a matter of fairness, it would seem that his Counsel should have the opportunity to respond to that. That said, is it not common in courts throughout this city at this very moment witnesses are having their credibility attacked and they have no right of response in the ordinary criminal courts? That said, Carr has been served with a notice which requires him to answer a particular question or series of questions.

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Counsel has attempted to do just that. Indeed, the rules of the exercise are that he's limited to that, and he's responded to that. The fact that we find Carr's credibility in a particular way doesn't necessarily amount to an adverse finding. Would anybody demur to that? Because in every court every day people's credibility are attacked and we believe X over Y. What I'm wondering out loud is if we hear from other Counsel Representing and they attack Carr and we get a response from LTCOL Green as to that attack, do we need to take that any further beyond that?

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COL GRIFFIN: Sir, there are two points that you make and, with respect, they are both valid. First of all, what we're in at the moment is submissions. The time for evidence has past. As was indicated earlier,

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this is submissions from Counsel on the evidence that you have already received. Submissions are just that, they are nothing more than attempts by people representing affected persons to put their side or their version of that evidence or persuade you in another way.

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As you correctly identify, Mr President, it is quite common for a fact finding Tribunal to prefer one version or one account of evidence over another. That does not necessarily necessitate that that is an adverse finding against the version or the account that is not preferred. It is simply that for the reasons that you may or may not articulate in your findings - - -

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PRESIDENT: Or in this particular case what, might I suggest, are some unanswered questions.

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COL GRIFFIN: Indeed, sir. So whether or not it's appropriate for LTCOL Green to respond is a matter that you can consider at the time were it the case that he makes any application for you to be heard further. But until you hear the submissions of Counsel, in my submission, there is no reason to take any further steps than the notice that you already have done.

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PRESIDENT: Any further contribution?

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LTCOL HOLLES: Sir, just two things. The first is that there has already been an attack on PTE Carr's credibility by Counsel Assisting in his closing address in that it was specifically pointed out that the version given of the silent cocking was a physical impossibility and that the explanation for the transfer of the DNA lacked cogency and credibility. Now, true it is that those issues are not the subject of notice, but the mischief in that is this: that my friend's submission as to why there should not be a finding adverse to his client is based in large measure upon an acceptance of the credibility of his client, accepting PTE Carr's version of events in certain circumstances. For example, the distribution of the SOPs, et cetera, et cetera, et cetera.

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It is an exercise fraught with danger if one attempts to separate the core issue of PTE Carr's credibility from the submissions prayed in his defence in relation to the specific aspects of the notice but to ignore the matters raised by Counsel Assisting and flagged by LTCOL Green and I in relation to other issues. The thread of Carr's credibility runs right across all of these submissions. It's trite for me to tell you that if you disbelieve a witness on one particular aspect of evidence or if a witness has demonstrated to be inaccurate or untruthful in relation to one particular aspect of evidence, it heightens the likelihood that other pieces of that

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witness's evidence are going to be accepted or not accepted, as the case may be.

5 It is in my respectful submission an artificial exercise to attempt to separate the aspects of the notice and the response which lies largely upon the credibility of Carr from the other issues which go to Carr's credibility and say, "Well, I've answered one but I'm ignoring the others." The other issue is, as my friend COL Young pointed out, we can have a process of reductio ad absurdum where - and, you know, somebody has to go first. 10 I'm used to doing that. I don't have a problem with doing that. But it needs to be done in a context where there is some certainty as to what material I need to cover.

15 PRESIDENT: Yes, thank you. Anything further?

COL GRIFFIN: Yes, sir. I just need to correct the record. It's just been put by my friend LTCOL Holles that there was an attack by me on the credibility of PTE Carr and suggested that his evidence was lacking in cogency and credibility; that is, that I said that. I was at pains not to say 20 anything like that in my address. I did not mention the credibility or the quality of the evidence of PTE Carr. I pointed out the video demonstration that was shown. You'll recall the transcript where I demonstrated that video to PTE Carr and put it to him and he responded accordingly.

25 That's the first point; there has been no attack by me on his credibility. I have simply referred to the evidence that is in these proceedings. Secondly, I was at pains to set out in the classic direction that when it comes to the assessment of evidence by witnesses, that that is a matter for 30 you and the members, that you may accept the entirety of a witness's evidence, you may reject the entirety of a witness's evidence, you may accept some parts of it, you may consider a witness to be honest but still reject some parts of that witness's evidence because of the circumstances surrounding the recall and the - indicates circumstances and other indicators relating to the matter about which the witness is giving 35 evidence.

40 At the moment, as I understand it, Counsel are concerned, or at least one Counsel is concerned, about what might happen as opposed to what the evidence is. My advice to you again is that the addresses of Counsel are not evidence; you already have the evidence before you. This process we're in now is for them to make submissions to you about the matters that interest them and interest their clients and about the evidence that is before you. It may be that they'll seek to persuade you on the credibility 45 of one or more witnesses. That is a matter that you take account of in

your fact finding, just as you do with any other of the four categories of evidence that I described to you. That's all I have at the moment, sir.

5 PRESIDENT: Yes, thank you. I'm not going to require LTCOL Green to go into the question of what I'll call credibility at this point in time. I use the words "at this point of time" with some deliberateness. He was required to respond to the notice and he elected so to do. The question of the credibility of course we give to Carr is ultimately a matter for the Board. No doubt people will try to persuade us as to the weight and the
10 credibility we should or should not give him and just how far or how much we are prepared to believe or not to believe. That indeed is the role of Counsel.

15 Now, I propose to allow LTCOL Holles to - he was talking earlier about adjourning the matter so he could prepare his matters to consider. I propose to take the adjournment almost immediately to allow LTCOL Holles to consider the situation that's developed and the scope of his submissions, and indeed LTCOL Berkley and COL Young the same. If at the end of - I'm tempted to do this: to allow everyone to address,
20 leaving LTCOL Green to the side, and then at the end of that if he feels moved to protect or attempt to persuade the Board on the question of his client's credibility and his credibility alone, I would then invite him to talk to us.

25 That of course invokes the potential for a around the circle we go yet again. I'm not terribly keen on that at all and I hope we don't find ourselves in that situation. That's a very open-ended suggestion. I think this one is probably the one I can come up with which is as fair to LTCOL Green's client as I can make it, yet giving everybody the
30 opportunity that they should have. If anybody has got a better thought, I'm certainly prepared to hear it. Very well then, 9.30 tomorrow morning, LTCOL Holles?

35 LTCOL HOLLES: Certainly.

**MATTER ADJOURNED AT 1530 UNTIL
TUESDAY 19 SEPTEMBER 2006 AT 0930**