

COMMISSION OF INQUIRY INTO THE LOSS OF HMAS SYDNEY II

Before The Hon TRH Cole AO RFD QC

Held at Level 5, 55 Market Street, Sydney

Counsel Assisting: CMDR J Rush RFD QC RANR
 LEUT M Vesper RANR

On Friday, 30 May 2008, at 10am
(Day 1)

1 THE PRESIDENT: I have been appointed by the Chief of the
2 Defence Force, Air Chief Marshal Houston, to inquire into
3 and report upon circumstances associated with the loss of
4 HMAS Sydney II in November 1941 and the consequent loss of
5 life and related events subsequent thereto. The Instrument
6 of Appointment will be exhibit 1.

7
8 EXHIBIT #1 INSTRUMENT OF APPOINTMENT

9
10 THE PRESIDENT: Flight Lieutenant, would you please read
11 the instrument document?

12
13 FLTLT MONK: Defence (Inquiry) Regulations, Chief of the
14 Defence Force, Commission of Inquiry.

15
16 Pursuant to regulation 109 of the
17 Defence (Inquiry) Regulations 1985, I, Air Chief Marshal
18 Allan Grant Houston, AC, AFC, Chief of the Defence Force,
19 appoint a Commission of Inquiry constituted by the
20 Honourable Terence Rhoderic Hudson Cole, AO, RFD, QC.
21 Pursuant to Regulation 112 of those Regulations the
22 Honourable Terence Rhoderic Hudson Cole, AO, RFD, QC shall
23 be President of such Inquiry. The Inquiry will have the
24 following terms of reference:

25
26 To inquire into and report upon
27 circumstances associated with the loss of
28 the HMAS Sydney II in November 1941 and
29 consequent loss of life and related events
30 subsequent thereto.

31
32 Pursuant to Regulation 115 I direct that the
33 procedures of the Commission of Inquiry be as determined by
34 the President who is hereby authorised to issue such
35 procedural directions as he considers appropriate.

36
37 In accordance with Regulation 116 the President may
38 inform himself on any matter relevant to the Inquiry in
39 such manner as the President thinks fit.

40
41 Pursuant to Regulation 117, hearings of the Inquiry
42 shall be in public subject to the power of the President to
43 determine that part of the Inquiry is to be conducted in
44 private.

45
46 Pursuant to Regulation 119 of those Regulations,
47 I direct that all oral evidence to be given before the

1 Commission shall be on oath or affirmation.

2
3 Signed AG Houston AC, AFC, Air Chief Marshal, Chief of
4 the Defence Force, Appointing Authority, 28 March 2008.

5
6 THE PRESIDENT: Thank you. Some have questioned the need
7 for or appropriateness of this Inquiry. Whilst it is not
8 my function to justify its establishment, there are sound
9 reasons for its creation. Each of the Prime Minister,
10 Mr Rudd, the Deputy Prime Minister, Ms Gillard, and the
11 Chief of Defence Force, Air Chief Marshal Houston, have
12 spoken of the need to endeavour to solve what has been
13 described as Australia's greatest maritime mystery. They
14 have also spoken of the need to provide answers to
15 questions and issues raised by members of the families of
16 those who perished. Those questions centre upon how it
17 came about that Sydney II was lost in battle and lost
18 without any survivors.

19
20 I agree with the observations made by each of the
21 Prime Minister, the Deputy Prime Minister and the
22 Chief of Defence Force. May I add the following: the loss
23 of Sydney II resulted in the loss of 645 persons who died
24 in the service of our country, Australia. As
25 Admiral Robertson reminded at the HMAS Sydney Memorial
26 Service on 24 April, more servicemen were lost in this
27 single incident than were lost by Australia in the whole of
28 the Korean war. More servicemen were lost in this incident
29 than were lost by Australia in the whole of the Vietnam
30 war. And more servicemen were lost in this incident than
31 were lost on the Kokoda Trail. One-third of all sailors
32 lost by Australia in World War II were lost in this single
33 sinking. Yet the circumstances of the military engagement,
34 and the reasons for the tragic loss of life suffered,
35 especially by Australia, remain uncertain. No country
36 which is respectful of its military personnel or military
37 traditions or of its national history can allow such a loss
38 to remain unexplained when circumstances have occurred
39 which may allow, for the first time, an explanation of the
40 circumstances of their deaths.

41
42 Australia, as a nation, and the Navy, as a service,
43 should also give consideration to the feelings and
44 expectations of relatives and dependants of those who lost
45 their lives. Those relatives are entitled to assume that
46 Australia will do all it can to establish the circumstances
47 in which the deaths occurred. To quote the words of

1 Dr Michael McCarthy, an early and persistent campaigner for
2 finding Sydney II, the failure to do so would strike "at
3 the heart of the notion of service to one's country and the
4 possibility of making the ultimate sacrifice in times of
5 dire need".
6

7 Much is known of the loss of Sydney II and her
8 encounter with the German raider HSK Kormoran, which also
9 sank with the tragic loss of 81 lives. However, much
10 remains unknown. There has never been a military inquiry
11 into the loss. There was, between 1997 and 1999, a federal
12 Parliamentary Inquiry which reviewed the then known
13 circumstances of the loss. The outcome of that Inquiry was
14 indecisive. As the Parliamentary Report made clear, the
15 Committee 'did not aim to examine in minute detail the
16 technical dimensions of the engagement.' The Committee
17 decided 'to limit its comments and conclusions to those
18 matters on which it itself took direct evidence and felt
19 able to comment. The loss of Sydney II has also been the
20 subject of much research and many publications. However,
21 no prior inquiry or research has had the advantage of such
22 factual knowledge as may be gleaned from the finding of the
23 two vessels, which finding occurred in mid-March 2008.
24

25 The finding of the Sydney II and the Kormoran, their
26 location and the obtaining of visual footage of their
27 condition, allows, for the first time: an analytical
28 assessment of the damage suffered by Sydney II; a deduction
29 based on empirical evidence and expert assessment of the
30 immediate cause of the sinking of Sydney II; and a
31 comparison of the accounts of the battle provided by the
32 German survivors with the now observable damage suffered by
33 both ships. This comparison may enable reasoned
34 conclusions to be drawn regarding the veracity of their
35 accounts. Importantly, it may also allow for a deduction
36 to be made, based on such facts as can now be established,
37 as to why there were no survivors from Sydney II.
38

39 In much past literature on the loss of Sydney II,
40 there has not been a sufficient distinction drawn between
41 established fact, legitimate and justifiable deductions
42 from such facts, and surmise. There has been much
43 speculation and conjecture.
44

45 Some authors have commenced with a premise which, by
46 selective use of material, they have sought to establish.
47 It is my objective to provide to the Chief of Defence

1 Force, to relatives of those lost, and ultimately to the
2 Australian people and those interested overseas, an
3 independent, reasoned, fact-based account of the events
4 relating to the loss of Sydney II. I will bring impartial
5 objectivity to my assessment of the material before me.
6 Whatever the report may find, it is my hope that it will
7 enable those affected by the loss to put the past behind
8 them.

9
10 The Inquiry will be conducted as an open inquiry
11 unless national security or similar considerations require
12 otherwise. I cannot at present conceive of any
13 circumstances arising preventing publication of all
14 material. All material upon which my report will be based
15 will be made public.

16
17 A public website within the Defence Force website has
18 been established, and on that website will be placed
19 progressively all material tendered by Counsel Assisting
20 and admitted into evidence, and transcripts of all
21 hearings.

22
23 There is a significant research task to be undertaken
24 to distil from archival records documentary material of
25 relevance. Archives in Australia, the United Kingdom,
26 Germany and probably Japan and the United States of America
27 are being and will be searched. As the process proceeds,
28 material will be progressively tendered so that all
29 interested parties may consider it in a timely fashion. In
30 addition, there will be public hearings at which
31 I anticipate evidence will be called regarding the location
32 of the sunken vessels and debris, the visual images
33 captured of those vessels and debris, interpretation of the
34 damage suffered by the vessels, the probable effect of such
35 damage on Sydney II, the immediate cause of her sinking,
36 and the likely effect of both the damage sustained and the
37 circumstances of the sinking on the prospects for the
38 crew's survival. This will involve issues of considerable
39 technical complexity. I mention that some 47 hours of
40 video film and some 1400 stills have been taken and require
41 analysis. I caution those who have seen only a minute
42 sample of these films from drawing conclusions before the
43 whole of the material is properly analysed and made public.

44
45 I anticipate there will also be called evidence
46 regarding the international law of war and the conventions
47 of war applicable in 1941, and aspects of the

1 responsibilities of commanding officers and others at that
2 time.

3
4 Whilst there were no survivors from Sydney (II) after
5 its engagement with Kormoran in November 1941, there still
6 survive persons who served on Sydney II prior to that time.
7 A number of such persons have been located and statements
8 obtained from them, and I anticipate taking evidence from
9 those persons. Inquiries made in Germany have resulted in
10 four survivors of Kormoran indicating that they are willing
11 to assist with this Inquiry, and one suggests that there
12 may be a considerable number of other survivors from whom
13 evidence might be obtained. However, the Commission has
14 also been advised that many of those prospective witnesses
15 are in frail health, and to obtain their evidence it will
16 be necessary for evidence to be taken from them in Germany.
17 I am informed that the oldest Kormoran survivor is 96 years
18 of age. It obviously will not be possible for persons of
19 frail disposition to give evidence in normal
20 commission-type hearings. Where it is necessary, I will
21 attend at the residences of these aged sailors and
22 survivors to take their evidence, both in Australia and in
23 Germany. In those circumstances, all such evidence will be
24 recorded and hopefully videotaped, and such evidence will
25 be tendered and placed on the website. It will be the
26 responsibility of Counsel Assisting me to ensure that all
27 aspects relating to the circumstances of the encounter and
28 subsequent events are explored to the fullest extent
29 possible with such witnesses. This aspect is to be given
30 high priority because of the ages of those who might be
31 able to give valuable evidence to the Inquiry.

32
33 The inability to find Sydney II and Kormoran for such
34 a long period has resulted in various conjectures and
35 hypotheses being advanced regarding the circumstances of
36 the sinking and the absence of survivors from Sydney II.
37 These conjectures will be addressed where necessary by oral
38 and documentary evidence, and conclusions regarding them
39 included in my report.

40
41 The public, Naval historians and other persons who may
42 have factual material which may be of relevance to my
43 inquiry are invited to provide the Inquiry with such
44 material. The Inquiry website indicates the manner in
45 which such material may be forwarded. I note that the
46 Parliamentary Inquiry conducted between 1997 and 1999
47 received 19 volumes of submissions totalling some 4,900

1 pages. The Parliamentary Report, the transcripts of
2 evidence called before that Inquiry and the submissions
3 placed before its Committee have been received and will,
4 I anticipate, be tendered to this Inquiry and considered by
5 me. Accordingly, I do not wish to receive submissions
6 repetitive of those submissions. In due course, I will
7 call for submissions from interested persons based on the
8 material tendered before me.

9
10 The distillation of the archival material and the
11 interpretation of all the images obtained to date of the
12 vessels and debris will take some time. This Commission
13 has not yet received that material, and it is thus not
14 possible to give any estimate of when technical analysis of
15 that material will be complete to a stage sufficient for it
16 to be placed before me for consideration. Similarly, there
17 is ongoing work being carried out to determine whether the
18 remains of a seaman disinterred from a grave site on
19 Christmas Island, having been buried there in February
20 1942, was a sailor from Sydney II. On the assumption that
21 the sailor was from Sydney II, it will be necessary to
22 examine the circumstances in which the loss of Sydney II
23 became known to military authorities and the search
24 response for survivors. This is necessary for the purpose
25 of determining whether a different response might have
26 located this or any other survivors from Sydney II who
27 might have survived immediately after its sinking.

28
29 I publish procedural directions for the conduct of the
30 Commission of Inquiry, and these directions will be
31 exhibit 2.

32
33 EXHIBIT #2 PROCEDURAL DIRECTIONS FOR THE CONDUCT OF THE
34 COMMISSION OF INQUIRY

35
36 THE PRESIDENT: As will be seen from those directions,
37 Counsel Assisting me will present all evidence to the
38 Inquiry. Accordingly, I invite all persons who believe
39 that they have material which may be of assistance to
40 contact the Commission's solicitor. The directions may be
41 amended in the future to accommodate any procedures
42 necessary for the efficient conduct of the Inquiry should
43 circumstances so require.

44
45 Commander Rush, do you seek leave to appear?

46
47 CMDR RUSH: I do, sir. I have been appointed senior

1 counsel to assist the Commission of Inquiry and I seek
2 leave today, sir, to appear with Lieutenant Vesper.

3

4 THE PRESIDENT: Yes, that leave is granted to you and
5 those who are assisting you.

6

7 CMDR RUSH: Thank you, sir.

8

9 THE PRESIDENT: Are there any other applications for leave
10 to appear? Yes, Commander Rush?

11

12 CMDR RUSH: Sir, briefly, Counsel Assisting have commenced
13 upon the task of gathering the evidence to fulfil the
14 objective that you enunciated in your opening. That is, to
15 provide an independent, reasoned, fact-based account of the
16 evidence and circumstances relating to the loss of
17 LEANDER Class Light Cruiser HMAS Sydney II on 19 November
18 1941.

19

20 The obtaining of evidence from elderly witnesses is a
21 high priority. Any failure to act with sufficient
22 timeliness in relation to these witnesses has the potential
23 to deny you the opportunity of consideration of oral
24 evidence that is not only relevant but is contemporaneous
25 to the events under scrutiny.

26

27 Persons who served on Sydney II prior to her loss on
28 19 November 1941 have been contacted and interviewed by
29 Counsel Assisting. Arrangements are being made to enable
30 the taking of their evidence in the month of June. This
31 will require the Commission of Inquiry to travel interstate
32 for hearings, including hearings, as you have said, in the
33 homes of some of the witnesses because of the matters you
34 have referred to of age, physical infirmity and fragility
35 of health. Such hearings cannot be in open session.
36 However, as soon as possible after the taking of such
37 evidence, it will be posted on the website of the
38 Commission of Inquiry.

39

40 Similarly, arrangements are presently being made
41 for the contacting and interviewing of the survivors of
42 HSK Kormoran for the purpose of obtaining their evidence in
43 Germany. A number of German witnesses have indicated a
44 preparedness to cooperate with the Commission of Inquiry
45 for the purpose of giving evidence. Others, with the
46 assistance of the Military Attache in the Berlin Embassy,
47 are in the process of being contacted. I anticipate the

1 interviewing and the taking of evidence concerning these
2 witnesses will occur in June and July of this year.
3

4 As you have indicated, sir, this morning, documentary
5 records provide vital evidence concerning many of the
6 matters for your consideration. Counsel Assisting are in
7 the process of obtaining documents likely to give important
8 contemporary detail to issues and events concerning the
9 loss of Sydney II. The search for and obtaining of
10 relevant contemporary records and documents covers many
11 areas. Ships' logs, signals, ships' records of
12 proceedings, Admiralty and other instructions, intelligence
13 reports, interrogation records and accounts, personnel
14 histories and records are just some of the categories of
15 documents that are being obtained. The research involves
16 consideration of records not only in Australia but in the
17 United Kingdom, Germany, the USA and potentially other
18 countries. Work is currently being undertaken so as to
19 locate and provide to the Commission of Inquiry key
20 documents including documents not previously identified
21 from National Archives Admiralty, archives in the United
22 Kingdom, and also from German naval archives and other
23 German sources. We are taking steps to ensure, for the
24 first time, accurate translation of some of this material.
25

26 In the research and investigation conducted by
27 Counsel Assisting we are constantly mindful of the
28 necessity of evaluating the established facts and
29 circumstances not with the benefit of hindsight but by
30 constantly focusing upon and applying the knowledge and
31 standards of the day to the analysis to be undertaken.
32

33 The genesis of this Commission of Inquiry was the
34 discovery of the two ships in March of this year off the
35 Western Australian coast. The successful search was
36 conducted by the not-for-profit organisation "Finding
37 Sydney Association", in conjunction with international
38 shipwreck investigator Mr David Mearns; the search received
39 significant financial support from the Commonwealth
40 Government. The photographic images of Sydney II and
41 Kormoran, both still and video, are yet to be provided to
42 the Commission of Inquiry. Once provided, this material
43 will be the subject of thorough technical analysis. The
44 Commission of Inquiry has engaged the Defence Science and
45 Technology Organisation who will work with the Royal
46 Institute of Naval Architects in the examination of this
47 material. Both organisations bring a range of outstanding

1 expertise to this detailed and technical analysis.
2 I anticipate this expert report will provide important
3 matters for your consideration in relation to a number of
4 critical questions that must be addressed by the Inquiry.
5

6 The examination of the photographic and video material
7 for the purpose of expert opinion will be time consuming.
8 It was hoped that the photographic and video imagery would
9 be provided to the Commission of Inquiry by the end of May.
10 Further delay in the provision of the material has the
11 potential to put back the completion date of this
12 Commission of Inquiry.
13

14 As you have indicated in your opening comments,
15 Mr President, because of the circumstances surrounding the
16 loss of HMAS Sydney, a number of theories and accounts have
17 been asserted over the years as to the loss of Sydney II
18 without any survivors. The theories include assertions of
19 a third party involvement in the battle; that there has
20 been a cover up; a conspiracy to conceal the truth as to
21 the loss of Sydney II for a variety of reasons; that whilst
22 the loss of Sydney II was due to the engagement with
23 Kormoran, the accounts of German survivors as to the nature
24 of the engagement of Kormoran with Sydney and the aftermath
25 of the battle cannot be relied upon.
26

27 Counsel Assisting will ensure these matters are
28 examined thoroughly and impartially, with the expectation
29 that such review will provide the basis for a complete and
30 objective account of the circumstances of the loss of ship
31 and life.
32

33 No-one should doubt the enormity of the task to be
34 undertaken. That task will be approached from the
35 Counsel Assisting point of view with a determination to
36 ensure, insofar as it is possible, that all relevant
37 material is put before you for consideration so as to
38 enable full compliance with the terms of reference.
39

40 In the course of research conducted by
41 Counsel Assisting over recent weeks, we have become aware
42 of potentially important records, including letters,
43 photographs, records of interviews and the like held by
44 private individuals. We have sought and generally speaking
45 received great cooperation in the provision of this
46 material to the Commission of Inquiry. The Commission of
47 Inquiry has the power to compel the production of such

1 material and, if necessary, Counsel Assisting will seek to
2 use that power so as to ensure potentially relevant
3 evidence is considered by this Inquiry.
4

5 In advertisements placed in daily newspapers in each
6 State over the past three weeks, notice has been given of
7 today's hearing. The advertisement called upon any person
8 who sought leave to appear to provide reasons in writing to
9 the Secretary of the Commission as to why such leave should
10 be granted. No person has sought leave to appear.
11 Further, in the notice, members of the public interested
12 were invited to make written submissions as to the
13 circumstances of the loss of Sydney II. A number of
14 persons have indicated they intend to provide such
15 submissions. Some have already been received. At this
16 stage, there is no closing date for such submissions. A
17 closing date for submissions will be later publicly
18 notified.
19

20 I wish to make it clear, Mr President, that because no
21 person has sought leave to be represented before the
22 Commission of Inquiry should not be taken as meaning that
23 there will be any lack of rigour in the assessment of
24 evidence, be it oral or written, that comes before the
25 Commission of Inquiry. The Inquiry is inquisitorial in its
26 nature. The task of Counsel Assisting is to gather,
27 produce and, where necessary, test and challenge evidence
28 before the Inquiry. In all respects, this task will be
29 comprehensively undertaken by Counsel Assisting.
30

31 At this early stage of the Inquiry process, it is not
32 possible to say whether any person or persons will be
33 affected by evidence before the Inquiry or by submissions
34 of Counsel Assisting. The task of gathering and assessing
35 and tendering evidence is still in its comparative infancy.
36 Such matters need to be considered with great care and a
37 full knowledge of pertinent evidence. Should such a
38 situation materialise, Counsel Assisting will advise of
39 such evidence and ensure the fullest opportunity is given
40 to any such person to provide submissions or provide
41 evidence in response to those submissions.
42

43 Mr President, Counsel Assisting have met and discussed
44 with interested individuals and associations the most
45 efficient method of informing relatives and next of kin of
46 those who lost their lives in Sydney II of the progress of
47 the Commission of Inquiry. It has been suggested this

1 would be best achieved by way of a newsletter. We
2 understand there is a register of those who have expressed
3 an interest based on family ties. It is hoped that with
4 the cooperation of the Navy this register can be used as a
5 basis for the provision of information concerning the
6 Commission of Inquiry to families and next of kin.
7 Nevertheless, the website of the Commission of Inquiry will
8 remain the primary source of information concerning the
9 Inquiry. It will be updated throughout the course of the
10 Inquiry so as to provide key information and relevant
11 dates.
12

13 A link to the Commission of Inquiry website is located
14 on the defence website. A Google search entering the words
15 "Sydney Inquiry Defence" will lead to the Commission
16 website.
17

18 Sir, at the conclusion of today's proceedings,
19 I request that the Commission of Inquiry adjourn to a date
20 to be fixed for public hearing. I anticipate that over the
21 course of coming months, and before public hearings, much
22 material will be gathered, tendered and posted to the
23 website. At this early stage of investigations, I am not
24 in a position to inform you, Mr President, of a precise
25 date for the commencement of public hearings, save to say
26 I do not anticipate it being before late 2008 or early
27 2009. They are the matters I wished to raise by way of
28 opening statement, Mr President.
29

30 THE PRESIDENT: Yes, thank you. Very well, the Commission
31 will adjourn to a date to be fixed. Thank you.
32

33 AT 10.30AM THE COMMISSION OF INQUIRY WAS ADJOURNED
34 TO A DATE TO BE FIXED
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