



# OFFICE OF THE STATE CORONER

## FINDINGS OF INQUEST

**CITATION:** **Inquest into the deaths of James Thomas Martin, Robert Hugh Frederick Poate, Stjepan Rick Milosevic**

**TITLE OF COURT:** Coroners Court

**JURISDICTION:** Brisbane

**FILE NO(S):** 2012/3191, 2012/3192, 2012/3194

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**FINDINGS OF:** John Lock, Deputy State Coroner

**CATCHWORDS:** Coroners: Inquest, Australian Defence Force, war in Afghanistan, insider attacks (Green on Blue), mentoring operations, risk assessments, risk mitigation, Australian Defence Force inquiries and investigations

## REPRESENTATION:

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The family of Robert Poate:  
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The family of Stjepan Milosevic:  
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## Introduction

1. On 28 August 2012, call-sign India 21 (a platoon unit of 24 Australian soldiers), which was part of Mentoring Team Bravo (MT-B), left their patrol base at Sorkh Bid, in Uruzgan province in southern Afghanistan, and travelled by road to Patrol Base (PB) Wahab.
2. PB Wahab was occupied by a Tolay (a company of Afghan soldiers). The purpose of the Australian soldiers' mission was to mentor the Afghan National Army (ANA) members who were based at PB Wahab.
3. There was a very substantial threat of insider attack by Afghan soldiers on coalition forces throughout Afghanistan at any time, but there had been a spike of such attacks in the month of August 2012.
4. The Australian soldiers knew little about PB Wahab before they left. When they arrived it became apparent the Australians would need to share space with some of the Afghan soldiers who were in nearby accommodation. They were surrounded by guard towers, but due to lack of personnel in the Australian unit, the Afghan soldiers manned all the towers at night.
5. Members of the Australian platoon set out on a patrol with the Afghan soldiers the next day on 29 August 2012. The conditions were oppressive with the heat reaching 50+ celsius during the day and lowering to only 38 degrees during the night. On their return to the base later that day, the platoon commanding officer Lieutenant (LT) Dominic Lopez allowed the soldiers to change out of their combat uniform into physical training gear, consisting of a t-shirt and shorts. For security of the Australian unit, a single guard in body armour (a roving piquet), but also wearing physical training gear underneath, was posted to patrol along the area where the Australians had set up their accommodation.
6. During the evening, some Afghan soldiers came into the Australian area and sat with some of the Australian soldiers who were playing cards or board games. The Australian soldiers included Sapper James Martin, Private Robert Poate and Lance Corporal Stjepan (Rick) Milosevic. One of the visiting Afghan soldiers was Zabet (Sergeant) Hekmatullah.
7. Hekmatullah left the Australian area, ostensibly at a time when he was rostered for guard tower duty. It is now apparent he collected an M-16A2 assault rifle and ammunition. He returned to the base of one of the guard towers at about 9.45pm. At the time, the roving piquet was at the other end of his patrol area and Hekmatullah fired almost 30 rounds into the group of Australians who were only 5 metres away. Sapper Martin and Private Poate died immediately and Lance Corporal Milosevic died soon after whilst being evacuated for medical treatment. Two other soldiers were wounded.
8. Hekmatullah fled and escaped. He was given some protection and assistance by the Taliban and ended up in Pakistan. A little over a year later on 2 October 2013, he was arrested and handed over to the Afghan authorities.
9. Hekmatullah was charged with murder of the three Australian soldiers and the wounding of the other Australians. He was found guilty, essentially on his own admission, at a trial in the Supreme Court of Afghanistan. He was sentenced to the death penalty but it is unknown at the time of writing as to whether that penalty has been carried out.

## **Personal backgrounds of the deceased**

### **Sapper James Martin**

10. James Thomas Martin was aged 21 when he died. He was born in Perth in Western Australia. His family described James as an intelligent, physically active, well rounded person, with a great sense of fun. He was self-reflective and empathetic by nature.
11. He enlisted in the Australian Army at age 19. His time at Army recruit training camp was marked by his determination to draw out the best in himself and those around him. His mates from training credit him with being their 'rock' and the one who supported them and encouraged them to get through the tough times.
12. During his training at the School of Military Engineering and subsequently with posting to the 7<sup>th</sup> Combat Engineer Squadron, he became highly skilled in the area of detection of Improvised Explosive Devices. He had a strong personal sense of being responsible for creating a safe passage for his mates.
13. James deployed to Afghanistan in June 2012. During the course of his Army service he received a number of honours and awards.
14. James is survived by his mother Suzanne Thomas, sister, Holly and brother, Angus and grandparents, Ralph and Lucille Thomas. The family are all very proud of his achievements, but mostly of the kind of man he grew into and the person he chose to be. He was protective and loving to his family and they miss him daily.

### **Private Robert Poate**

15. Robert Poate was aged 23 when he died. He was the only son of Hugh and Janny Poate and brother to Nicola. The family resided in Canberra where he attended Canberra Grammar School. He was described as an intelligent student and all-round athlete with a particular interest in rugby. His love of adventure and the outdoors was a strong influence on his decision to join the Australian Army in 2009. He had an infectious personality and was popular with his mates.
16. He deployed to Afghanistan in June 2012. He was a crew commander of a Bushmaster vehicle and routinely was the lead vehicle in convoys and patrols; a position described as one where only the most reliable were placed. In his eulogy, the Commanding Officer of 6<sup>th</sup> Battalion described Robert as *a highly qualified soldier known for having outstanding leadership potential. Since enlisting in 2009 he had been awarded a number of honours and had completed a promotion course for section commander in 2011. He was always dependable and ready to do whatever was required of him. Private Poate will be remembered as a very popular and highly skilled soldier of the Australian Army.*
17. Robert's family continue to be devastated at losing him, but are also very proud of his service to his country.

### **Lance Corporal Stjepan Milosevic**

18. Stjepan Rick Milosevic was aged 40 when he died. He is survived by his partner, Kelly Walton, and two daughters, Sarah and Kate.

19. Stjepan enlisted in the Australian Army in 2008 at age 36. His potential was quickly identified and in a short period of time he was promoted to Lance Corporal becoming a light armoured vehicle crew commander. He was a highly qualified soldier with a strong future. He was awarded the *Most Outstanding Soldier* during his training, and during his Junior Leader's course was presented with the award for the *Trainee of Merit*.
20. He was courageous, committed and an immensely proud soldier. He was very much liked and a respected member of his regiment. In his 4 years of service he served in Iraq and Afghanistan. He was awarded a number of honours and awards during his period of service.
21. He was a devoted family man and is sorely missed by his family and comrades. His family remain forever proud of him.

### **Jurisdiction for a coroner to investigate and hold an inquest**

22. During the course of the coronial investigation and inquest, many people expressed surprise that a Queensland coroner was investigating the circumstances of the deaths of soldiers who died overseas in a war context. It is apparent this coronial inquest as well as the 2008 NSW inquest in the case of Private Jacob Kovco are rare examples of an Australian civilian inquiry into overseas deaths occurring in a combat zone. The Kovco case was controversial and that death occurred in circumstances involving the soldier's own weapon. The United Kingdom has conducted a number of inquests in relation to deaths occurring on overseas military operations, although the jurisdiction in the UK is different and inquests are mandatory in most of those cases upon repatriation of the body to the UK.
23. Although the deaths of the Australian soldiers occurred outside of Australia, section 11(4) (b) of the *Coroners Act 2003* provides that jurisdiction to investigate such deaths in Queensland can be given to a coroner on direction to the State Coroner by the Minister for Justice and Attorney General to have the deaths investigated, whether or not the death is a reportable death as defined in the Act. Such direction was given in writing on 3 September 2012 by the Hon Jarrod Bleijie MP, the Attorney-General and Minister for Justice.
24. The Australian Defence Force (ADF) has entered into a Memorandum of Understanding with the Queensland State Coroner and State Coroners in each of the States and Territories concerning the overlapping responsibilities of each organisation relating to deaths of an ADF member occurring either within or outside Australia, and over which the coroner has jurisdiction. The MOU acts as a guide to the conduct of investigations to minimise duplication and facilitate effective collaboration. The subsequent investigation by this office was conducted on that basis.
25. Section 29 of the *Coroners Act 2003* provides that a coroner must not start or continue an inquest where someone has been charged with an offence in which the question of whether the accused caused the death may be an issue.
26. In this case it was uncontested that Hekmatullah shot the three soldiers with an M-16A2 assault rifle at approximately 9:45pm on 29 August 2012. Two of the soldiers died instantaneously and one died whilst being retrieved for medical attention. Hekmatullah was tried and convicted of murder according to the law of Afghanistan. Records obtained from the Afghanistan authorities confirm that at

no time did he contest that he fired the shots. He was sentenced to death and although it is understood there has been an application made by him regarding the imposition of the death sentence, there is certainly no question that he is contesting the essential facts of the case. On that basis, I determined there was no question in issue as to whether Hekmatullah caused the death of the three soldiers and the inquest was able to proceed. No-one submitted otherwise.

27. A number of ADF and Defence related investigations into the circumstances of the deaths of the three soldiers were conducted. A Chief of Defence Force Commission of Inquiry was not held despite that being requested by the families. The families of the three soldiers then requested an inquest. After conducting my own initial investigation, I considered there were sufficient unresolved issues of concern to warrant holding an inquest.

### **The issues for the inquest**

28. The inquest was opened at a pre-inquest hearing on 14 February 2014. The issues for the inquest were determined at an early pre-inquest hearing to be:
  - a. The findings required by s. 45(2) of the *Coroners Act 2003*; namely the identity of the deceased persons, when, where and how they died and what caused their deaths;
  - b. The adequacy of the Australian Defence Force's risk mitigation plan (and execution of that plan) to prevent insider attacks on the deceased persons' platoon at PB Wahab, Afghanistan; and
  - c. Whether any recommendations can be made to reduce the likelihood of deaths occurring in similar circumstances or otherwise contribute to public health and safety or the administration of justice.
29. One of the considerable difficulties faced in managing the investigation and subsequent inquest, was that some of the material to be considered at the inquest arguably had national security implications. This difficulty had the real potential to cause significant challenges, particularly if the hearing was to remain open and transparent. At subsequent pre-inquest hearings, a number of consequential orders were made for the fixing of the contents of the brief of evidence, its distribution and how unredacted versions of the brief were to be dealt with.
30. At subsequent pre-inquest hearings, submissions were made by the legal representatives for the families regarding widening the scope of the inquest.
31. I determined the appropriate starting point for this inquest related to the orders contained in the document known as Fragmentary Order 13 (FRAGO 13). FRAGO 13 was promulgated by the International Security Assistance Force (ISAF) in the lead up to Ramadan and Eid in 2012, specifically to address the perceived increase in the threat of insider attacks. FRAGO 13 stated that it establishes new orders and reinforces force protection measures already in place and the document references previous operational orders and plans from NATO/ISAF. On that basis, I determined it was reasonable to assume FRAGO 13 incorporated lessons learned, not only from Australian deaths and casualties in insider attacks, but from similar attacks right across the Afghan theatre of operations. FRAGO 13 introduced requirements, most notably the 'Guardian

Angel' requirement and new risk assessment requirements, which were not in place at the time of previous insider attack incidents.

32. I specifically determined in a written decision dated 15 September 2014 that the following issues *would not be examined* in the course of the inquest:
  - a. Issues concerning the applicability of the Commonwealth workplace health and safety legislation regime in a theatre of war;
  - b. Whether Australia should have been participating in ISAF intelligence gathering and dissemination and the extent to which such participation occurred;
  - c. The need for involvement of Australia in aspects of the recruiting process of soldiers to the ANA;
  - d. The overall strategy whereby Australia was focused upon the conduct of mentoring operations; and
  - e. The training of those who were superior in rank to the deceased soldiers and the extent of the training administered to those who held positions of command or supervision within the ADF, particularly with respect to the obvious perils that would be faced.
  
33. Counsel Assisting also identified a number of sub-issues, which would be considered at the inquest as follows:
  - a. Orders specifically relating to insider threats which were received from Combined Team-Uruzgan (CT-U) or Regional Command South (RCS), specifically FRAGO 13, and whether they were implemented or fully implemented;
  - b. Whether mission-specific risk analysis was performed and whether it informed mission planning;
  - c. Whether intelligence threat pictures were communicated, and whether they were communicated with sufficient context to allow them to guide operations on the ground;
  - d. Whether there were sufficient communications from PB Wahab back to higher headquarters to enable effective understanding of troop disposition and force protection measures in place;
  - e. Whether the order of battle was guided by the potential of insider attack danger;
  - f. Whether MT-B personnel had sufficient understanding of the guardian angel concept; and
  - g. Whether the Defence processes of investigation and explanation, approximating coronial processes, were sufficient.



## Management of sensitive national security information

34. A large volume of material was gathered during the course of the investigation. The protection of classified national security information was a significant challenge for the conduct of the investigation. As well, the Commonwealth made claims of public interest immunity on a selected number of documents. Some documents were clearly sensitive, which was not disputed. Other documents seemed less sensitive but there were aspects to those documents, which the Commonwealth sought to be excluded from public release. Some of that information appeared to be innocuous but I received a detailed affidavit from the then Chief of Defence Force, General David Hurley, setting out the reasons why even innocuous material can be utilised by the enemy if put together by way of a mosaic analysis. Ultimately, I was convinced<sup>1</sup> that I should accept the opinion raised by General Hurley, and put in place the arrangements to protect certain information.
35. In essence, the legal representatives for the families were provided with a redacted brief of evidence and allowed access to an unredacted version at secure ADF facilities with restrictions on removing notes taken and copying. In that regard, it was noted that counsel for the ADF were on similar restrictions. Counsel Assisting (both of whom already had the requisite national security clearance) had access to the material at our office, although the material was secured when otherwise not being used by them, in a security safe, which met national security criteria, and was operated by the Queensland Police Service Coronial Support Unit. Any notes made by Counsel Assisting referencing classified material also remained secured. Subsequently, all parties were provided by the Commonwealth with computers and printers, which met national security protocols at the secure locations.
36. Whatever may be said about the challenging processes put in place to manage that material, it must be recognised that upon request my office was given access to a large range of relevant material by the ADF. It was fortuitous that the Office of the State Coroner had on board two experienced ADF legal officers (currently reservists), as lawyers assisting the coroner. With their knowledge of defence force jargon and acronyms, as well as an understanding of ADF processes and military doctrines, the investigation was ably and professionally conducted by them and the issues defined. Their knowledge, experience and plain hard work assisted in narrowing the extensive documentation potentially available, to a manageable level. I recognise and thank Mr De Waard and Dr Marinac for their dedication and professionalism in this challenging task.
37. From the families' perspective and for their legal advisers there were also significant challenges. In the first instance, the families were not legally represented, but the Commonwealth made a decision to fund their legal representation after representations were made to the Prime Minister.
38. It was anticipated that at the inquest there would be periods where the court would be closed for the hearing of evidence where national security implications might be touched on. Redacted and unredacted versions of the transcripts of each day's evidence were also to be made available with restricted access. I had

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<sup>1</sup> In submissions made by the Commonwealth a number of High Court of Australia decisions were cited giving support to the proposition that requires a Court to attach proper weight to the views of a senior, qualified and informed opinion in support of an application for protection of confidential government information

feared the inquest would be heavily truncated with large portions of the evidence heard in private. That did not eventuate and I recognise this was largely due to the professionalism of the legal representatives from all sides. Accordingly, the inquest was largely held in open court.

39. I have also received detailed submissions from Counsel Assisting; each of the legal representatives for the families, and from the Commonwealth. I have made those submissions publically available upon request to persons who I consider have sufficient interest to receive them. This was largely to ensure there was open and transparent access to all views being put. The submissions are at odds with each other in many respects, and there is nothing surprising about that. The submissions nonetheless have been of great assistance to me.

## **Military related investigations**

40. A total of five military related investigative processes were conducted.
41. Within hours of the shootings, an ISAF team known as a JCAT (Joint Casualty Assessment Team) undertook an investigation into the incident. The Afghan National Army also undertook its own investigation. Reports were prepared in both instances. Given those reports were not within ADF control, a limited version of the JCAT report was placed in evidence and no copy of the ANA report was able to be placed in evidence. I have seen those reports and there is nothing in them which is surprising or irreconcilable with other evidence before the inquest.
42. The Australian Defence Force Investigative Service (ADFIS) also conducted an initial evidence-gathering exercise and produced a number of statements from witnesses and photographs. ADFIS does not conduct a full investigation but seizes evidence and conducts preliminary fact finding. In such circumstances, ADFIS primarily investigates whether there were any potential serious disciplinary issues that may have arisen.
43. The ADF, as part of its usual investigation process conducted a Quick Assessment. This process is put in place to establish quickly the known facts and what further action might be taken. It is not an administrative decision making process. Lieutenant Colonel (LTCOL) Trent Scott appointed Major (MAJ) Travis Gordon to be the Quick Assessment officer. There has been considerable criticism about the appointment of MAJ Gordon, given he was the commanding officer that deployed India 21 on its mission.
44. In retrospect, it would have been preferable that an independent person was appointed. However, I accept there were some practical difficulties faced by LTCOL Scott in having someone on the ground quickly who could attend to that assessment. I have found no evidence that the Quick Assessment process conducted by MAJ Gordon impeded any ongoing or later investigations.
45. Shortly afterwards an Inquiry Officer was appointed to hold an Inquiry in accordance with the *Defence (Inquiry) Regulations 1985*. Inquiry Officers are appointed by the ADF and the scope of the inquiry is determined by the ADF. The powers of an Inquiry Officer are extensive and include the power to compel ADF members to answer questions. An Inquiry Officer inquiry is not open to the public and witnesses are not examined by legal representatives.
46. The Inquiry Officer recommended that the holding of a Commission of Inquiry was unnecessary. That recommendation was passed on to the Minister for

Defence. The Inquiry Officer found no systemic issues or deficiencies. Four recommendations for administrative/disciplinary action were made concerning individuals. The administrative actions were initiated but ultimately not imposed. Disciplinary action was taken in respect to two individuals but not arising from the inquiry.

47. The Inquiry Officer's report was disclosed to the families of the three deceased soldiers, at first in a redacted form, and then subsequently unredacted at an ADF facility, although they were not able to take a copy. The families were unhappy with the Inquiry Officer's findings and his report. That was no doubt compounded by their initial access being given to a heavily redacted version of the report (without annexures).
48. Much of the fact finding contained in the Inquiry Officer's report was helpful to me and it played a key role in the direction taken of the subsequent investigation by my office. It was included in the brief of evidence in relation to the inquest. Although the investigative process conducted by the Inquiry Officer and some findings made were the subject of critical review, this is not a matter that I will make any comment about. The Inquiry Officer has the immunity of a High Court judge and could not be called as a witness at the inquest. On that basis, I consider it would be unfair to make any comment adverse or otherwise, without him being given an opportunity to respond. What I can say is that the Inquiry Officer's report was sufficiently transparent in its *unredacted* form for my office and Counsel Assisting to engage in the next level of investigation and with some guidance and direction as to the potential issues that needed investigating.
49. The families of the three deceased soldiers were unsatisfied with the Inquiry Officer's conclusions and they requested a Chief of Defence Force Commission of Inquiry be conducted. A Commission of Inquiry functions like a tribunal. The Chief of Defence Force determines who the civilian president is, decides whether the inquiry should be held in private or public, as well as the scope of the inquiry.
50. Commissions of Inquiry can be expensive and can be resource intensive. The regulations applicable to COIs require the ADF to provide legal representation for parties before the Commission of Inquiry.
51. Under the *Defence (Inquiry) Regulations*, as were applicable in 2012, it was mandatory for the Chief of Defence Force to hold such an inquiry, with a civilian president, into all service-related deaths, *unless* the Minister for Defence directed the Chief of Defence Force not to hold one. The decision in this case was to not hold a COI. It seems cost was but one of the factors.
52. Since July 2014, administrative responsibility to conduct preliminary inquiries into service deaths was transferred to the Inspector-General Australian Defence Force (IG-ADF). From July 2015 the *Defence Legislation Amendment (Military Justice Enhancements-Inspector-General ADF) Act 2015* has been passed and deaths of this type will no longer fall under the statutory presumption of a Chief of Defence Force COI, but instead the IG-ADF will investigate and advise the Chief of Defence if a COI should be held. The IG-ADF is an independent statutory officer appointed by the Minister to examine failures of military justice and is answerable to the Minister and the Chief of Defence Force. It is unclear as to how this investigation process will work in practice, particularly considering the concerns expressed by the families in this case as to the investigations carried out by the ADF.

53. According to the evidence of COL Waddell, it is apparent that COIs have not been held for any combat deaths on operations for some time, with only one COI appointed out of a potential 31 'operational deaths' over the past five years. The one COI that was held into an operational death involved the loss of a major piece of capital equipment and this appears to have been a driving factor in the decision to hold a COI. In other operational deaths in combat, COIs have not been considered partly because it was not an unexpected outcome of deploying troops to a warzone that there would be fatalities.

### **Oral evidence heard at the inquest**

54. I have taken into account all of the documentary evidence both in its redacted and unredacted form that has formed the brief of evidence. I did not hear oral evidence from all witnesses referred to in that material. Oral evidence was heard from the following persons:
- a. Colonel James Waddell, the Director of the former Chief of Defence Force Commission of Inquiry Cell;
  - b. Sergeant Adam Burke (Platoon Sergeant of the 'India 21' platoon);
  - c. Lieutenant Dominic Lopez (Platoon Commander of the 'India 21' platoon and since promoted to a Captain);
  - d. Private Samuel Mathieson (Intelligence Officer, Mentoring Team Bravo and since promoted to a Corporal);
  - e. Major Travis Gordon (Officer Commanding, Mentoring Team Bravo);
  - f. Lieutenant Colonel Trent Scott (Commanding Officer of the 3 Royal Australian Regiment Task Group and since promoted to a Colonel);
  - g. Major David Broughton (Intelligence Officer, Combined Task Unit - Uruzgan);
  - h. Squadron Leader Darrell May (Intelligence Officer, CTU Uruzgan);
  - i. Captain Martin Wray (Intelligence Officer, 3 Royal Australian Regiment Task Group);
  - j. Doctor (Group Captain reservist) Graeme Peel, Principal Health Officer (J07) at Head Quarters Joint Task Force 633 in 2005;
  - k. Lieutenant Colonel Sean Faulkner, the sponsor of Joint Task Force 633 Standing Instruction (Personnel) 60-1 *Work Health and Safety Management in the Middle East Area of Operations*, which was extant at the time of the incident; and
  - l. Brigadier Roger Noble (Commander 3 Brigade, Deputy Operations and Planning Officer at Head Quarters International Security Assistance Force Defence, Kabul from November 2011 to December 2012).

## **Background to Australia's involvement in Afghanistan**

55. Afghanistan has a long history of conflict over many centuries littered with examples of invasions from outside forces and internal conflict due to its diverse mix of people.
56. In 1979, the Soviet Union invaded Afghanistan and spent most of the next decade unsuccessfully fighting insurgents. After the Soviets left, a civil war ensued with the Taliban eventually assuming government but with a substantial part of the country controlled by the Northern Alliance (a loose alliance of a number of ethnic groups), which continued the civil war.
57. On 11 September 2001, the infamous attacks on New York occurred. The attacks were carried out by Al-Qaeda, which had established training camps in Afghanistan with the approval of the Taliban. The United States invaded Afghanistan in October 2001.
58. The Taliban were quickly removed from power but have maintained a guerrilla war ever since. An interim authority was put in place to govern the country.
59. The United Nations Security Council established the International Security Assistance Force (ISAF) to assist Afghanistan's transition to stability and security. The North Atlantic Treaty Organisation (NATO) subsequently assumed leadership of ISAF.
60. Although Australia is not a member of NATO, it has been a contributor to ISAF from the beginning and contributed land, sea and air forces. Australia withdrew its land forces in late 2002 but Special Forces returned in 2005. Australia withdrew most of its forces by the end of 2013 and by the end of 2014, ISAF formally ended combat operations. It is not necessary to detail the involvement of the ADF in Afghanistan. Without doubt, our defence personnel have performed their duties, as tasked by their political masters, bravely and professionally. Forty one (41) Australian lives have been lost and many more wounded.
61. The Taliban do not operate in a traditional military fashion. They do not wear uniforms. They reside in their community. They co-opt civilians and civilian infrastructure when engaging in operations. Afghanistan's mountainous terrain and inhospitable climate, combined with the weak allegiance of its tribal and ethnically divided society, has arguably made the task of a military victory against the insurgents all but impossible.
62. Afghanistan was and remains a very dangerous war environment. In a war context, risk of death or wounding can never be eliminated, but it may be minimised with proper assessment and planning. For ADF personnel, there were many threats. Improvised Explosive Devices (IED), direct and indirect fire, and accidents are obvious examples. These threats were far greater in number than insider attacks; having caused most of the deaths and casualties; and each required their own specific risk mitigation response.
63. In 2006, the role of Australia's forces changed to one of a primary role of military mentoring, based in Uruzgan province. Mentoring in this context is somewhat of a loosely defined concept but it involved the use of ADF personnel to assist with the training and development of Afghan forces. This included performing combined military operations with Afghan forces on the basis that the Afghan

forces would then gradually assume more responsibility for planning and conducting those activities.

64. The inquest heard often about the importance of the development of closer interpersonal relationships between Australian and Afghan forces as part of its mentoring activities. Indeed it was asserted that the development of good personal relations and rapport with the ANA was a specific risk mitigation strategy to minimise the risks of insider attacks.
65. Insider attacks (green on blue) involved members of ISAF or the ANA taking up arms with the intent to kill or wound members of their allies. Insider attacks may be the result of deliberate infiltration by insurgents or may be as a result of opportunistic efforts of one person precipitated by some other factor, such as a cultural insult or argument.
66. In the context of mentoring operations, insider attacks were particularly devastating and disruptive to the mission. It is difficult to develop trust if the mentoring group has to constantly treat the mentored forces as threats. This created an obvious tension in mentoring successfully through close contact, whilst at the same time protecting the troops from external and internal attack.
67. Insider attacks were at first not a significant issue, but from 2008, the incidence of insider attacks increased significantly and in August 2012, the number of attacks reached their zenith.
68. To mitigate against insider attacks, a number of responses were considered. Recruitment screening of new members to the ANA was one such response, but with the massive recruitment taking place and involvement of ethnically diverse groups, this was never going to realistically provide a viable risk management strategy for the ADF.
69. Specific information and intelligence about known sympathisers was certainly a viable strategy but not all insider attacks were as a result of direct Taliban infiltration of the ANA.
70. Where none of that information was available in a reliable form, the tension still remained as to whether immediate protection of allied forces was required, even if that impacted on the mentoring mission. In that context the concept of 'force separation' by physically isolating ADF personnel from Afghan personnel when they are not working together, is one option which will be referred to in some detail in this decision.

## **Pre-deployment training**

71. MT-B was raised as part of a Task Group under the general leadership of 3 Battalion, Royal Australian Regiment.
72. The Task Group assembled in Australia to undergo force preparation training prior to deployment and undertook Mission Readiness Exercise/Evaluation to consider whether the group was adequately prepared to undertake its mission.
73. On departure from Australia, the Task Group did not immediately proceed to Afghanistan but to the Middle East where additional force preparation and training continued.

74. The position of the ADF is that this force preparation training included preparation for the threat of insider attack. The adequacy of this component of training was disputed.
75. The evidence before the inquest supports that at one level, insider threat specific training did take place and I accept that there was some reference to the insider threat during training exercises. Some witnesses were unable to recall that training. I am not convinced that evidence is sufficient to make a conclusion that the training did not take place. Any training that took place would have occurred some years ago. The witnesses' focus at the inquest was on the tragic events that occurred, not on what had preceded, and a court environment with the stress that can bring, in my view, could make those answers unreliable.
76. Some evidence given at the inquest might suggest the training formed a significant component of the overall force preparation and that it was particularly sophisticated. Other evidence suggested otherwise. The content, extent and adequacy of insider threat training was not a focus of my investigation and it would be inappropriate for me to make a determination on the issue of the extent and adequacy of this aspect of pre-deployment training one way or the other.
77. What I can say is that should there be future mentoring operations undertaken by Australian forces, the ADF should review the training that exists to ensure it is indeed 'World Best Practice' (as was suggested by Brigadier Noble) and meets the 'gold standard' as characterised by LTCOL Scott.

### **The prevalence of insider attacks in August 2012 and ISAF's response**

78. There had been an increase in insider attacks throughout Afghanistan in August 2012. The reasons for this were linked by ISAF to the Holy Month of Ramadan, which concluded on 19 August 2012 and was closely followed by the Festival of Eid Al-Fitr. There was also some intelligence suggesting there were numerous 'Fatwas' in place suggesting ISAF forces were a direct target for insider attacks.
79. It is not necessary to analyse the strength and/or weaknesses of the information referred to above. That was the responsibility of ISAF, which clearly thought the threat was real and serious (no doubt reflected in the increased Green on Blue deaths suffered by ISAF forces across the whole of the theatre of operations that month). ISAF responded to the threat by issuing Fragmentary Order 13 (FRAGO 13) on 13 August 2012.
80. FRAGO 13 cannot be set out or discussed in its entirety in this public record because of claims of national security implications on some parts of the document. There was a number of key requirements of FRAGO 13 but in general they included:
  - A general requirement to continue mentoring with the ANA ensuring the promotion of cultural awareness and respectful treatment of the Afghan forces but with increased awareness and increased force protection status;
  - Deliberate risk assessment of both missions and infrastructure should be undertaken, with a specific focus on insider threats; and

- Protective steps such as force separation and the use of 'Guardian Angels' were to be implemented.

## **Risk mitigation planning for India 21's deployment to Patrol Base Wahab**

81. The deployment of India 21 to Patrol Base Wahab was part of a larger mission/operation known as the 'Baluchi-Dorafshan surge' to encourage Afghan forces to reassert dominance in that part of Afghanistan. It was considered that during the period of Ramadan, the ANA had slowed their tempo of operations against the insurgents. India 21's mentoring mission was to encourage the ANA unit at PB Wahab to *increase the rate of effort from the patrol bases* or as one witness stated to *take up the fight*. Two other patrol bases, PB Qudus and Samad, were also to be occupied simultaneously by other platoons within MT-B for the same purpose.
82. An Operational Order (OPORD) was developed for the operation and signed off by MAJ Gordon (the Officer Commanding MT-B) and issued on 20 August 2012. The OPORD made no reference to insider attack measures to be taken in the event of an insider attack ('Actions On') or any of the requirements of FRAGO 13.
83. During the inquest, there seemed to be some inconsistency in the evidence as to whether FRAGO 13 was binding on Australian forces. Whatever may be the resolution of that aspect of military law, it is sufficient to say that much of the content of FRAGO 13 in fact made its way into two Task Orders issued by MT-B on 13 August 2012 (TASKORD 067\_12) and on 27 August 2012 (TASKORD 067.1\_12). Both of these orders cite FRAGO 13 as the basis of each Task Order. The orders required a number of things to be done. Again it is not possible to cite what those orders set out in any detail, but I am satisfied they referenced FRAGO 13 and duplicated many of its requirements.
84. The implementation of the FRAGO/Task orders seems to have fallen principally to the Executive Officer (a Major) who reported directly to the Commanding Officer at Headquarters for the 3 Royal Australian Regiment Task Group, being LTCOL Scott. The Executive Officer's name cannot be published and he was excused by me to attend at the inquest and to give evidence for medical reasons.
85. The Executive Officer did provide a statement to the ADF Inquiry Officer and a further statement was provided to the inquest (some of which may now be considered unreliable). What can also be gathered about the efforts of the Executive Officer at the time is contained in a series of emails he sent to various persons, including LTCOL Scott, between 13 and 26 August 2012. The focus of the requests by the Executive Officer was that certain intelligence-related assessments should be undertaken. The reviews were to focus on the following questions:
  - a. In your opinion what makes your patrol base vulnerable to Green on Blue?;
  - b. What do you seek from Regional Command to assist in mitigating the Green on Blue threat?; and
  - c. Does the ANA leadership at the local level assist to deter or mitigate Green on Blue?



86. An email sent by the Executive Officer on 22 August 2012 to LTCOL Scott, was the subject of some conjecture as to how much should or should not be read into it, given we were in the unfortunate position of not being able to question the writer of the email about the content and the reasons for it being sent. For that reason, I cannot be definitive about determining the background and reasons for the email, but in my view there was an unmistakable sense of frustration being expressed by the Executive Officer about the lack of priority afforded to the requirements of FRAGO 13. In the email, amongst other matters that I am unable to detail, the Executive Officer notes:
- a. LTCOL Scott had required him to determine which of the requirements of FRAGO 13 were realistic and which were not realistic, and that he had determined that the majority of tasks contained within the FRAGO were realistic; and
  - b. He was instructed by LTCOL Scott not to include certain tasks.
87. As part of the FRAGO 13 requirements, the Executive Officer requested what is known as a Tactical Infrastructure Review (TIR) be conducted for each of the patrol bases being visited, including PB Wahab. This task fell to MAJ Gordon but the TIR for PB Wahab had not been completed by the time India 21 left. MAJ Gordon completed the TIR on 28 August 2012, the day before the deaths.
88. MAJ Gordon was of the opinion that where there had been no previous deployment to a patrol base, a TIR was to be completed within 24 hours of arrival. It is noted in the directions of the Executive Officer that there was a one-off requirement for a TIR to be completed 'prior to deployment'. PB Qudus and Samad had previously been visited by MT-B forces and a TIR was completed for those patrol bases before deployment. MAJ Gordon gave evidence that in a subsequent conversation with the Executive Officer it was agreed the TIR for PB Wahab could be submitted within 24 hours of arrival. In respect to Qudus and Samad the threat of insider attacks was considered to be low and noted as such in the TIR, although it is clear there was some degree of force separation able to be achieved at those bases.
89. No unit from MT-B had been to PB Wahab before. To MAJ Gordon and LT Lopez, this was not a significant issue as they accepted that military forces would often have to operate with less than optimal information. However, it must also be accepted that the more one knows about a location, the more risk management strategies can be considered.
90. As the evidence now shows, there had been earlier patrol(s) to PB Wahab by other ADF units during other deployments, which were not part of the 3<sup>rd</sup> Battalion. Earlier records concerning PB Wahab were unable to be accessed by MT-B. It is also apparent that the previous mentoring task force that handed over to 3 RARTG and which had visited the base did not hand over any information about PB Wahab. Further, the evidence now suggests ADF engineers actually built or assisted in building, PB Wahab.
91. The layout of PB Wahab was such that segregation from ANA forces was not possible because, although the majority of the ANA forces occupied barracks at one end of the compound, there were also a number of buildings occupied by ANA personnel at the area of the compound that the Australians were intending to occupy. This was also the entry and exit point for the vehicles with three guard

towers. For the other two bases there was some capability to segregate and separate the forces.

92. MAJ Gordon's ultimate TIR threat assessment for PB Wahab remained low. On the face of the TIR, he has premised this assessment on a number of assumptions about certain dress state and weapons state (which I am unable to set out specifically) being in place and that no ANA were to be allowed in the Australian area (matters referred to in FRAGO 13 and reflected in the associated ADF task orders). A review of the TIRs completed for each base is remarkably similar in content and has all the hallmarks of a 'cut and paste' approach. It seems that the content of the TIR for PB Wahab was completed based on an assumption it was similar to other Patrol Bases.
93. Further, the completion of the TIR was being conducted at a time when India 21 was in fact present at PB Wahab, but MAJ Gordon did not ask LT Lopez specific questions about the situation on the ground. Evidence before the inquest was that the TIR document was not one that would have been disseminated down to the platoon level and was one sent up to headquarters as a risk assessment document. I had a distinct sense it was more a 'tick and flick' process by MAJ Gordon than a genuine risk assessment process. Of some concern is that this document would have given an impression to those in headquarters that an adequate risk assessment had been completed and no further action needed to be taken.
94. It is unclear as to why MAJ Gordon or indeed those higher up the chain of command would consider it appropriate to deploy a unit to a patrol base, which they knew very little about but particularly where the evidence suggests there was no particular immediacy about deploying to PB Wahab, at that point in time. Deployment could have waited until all these risk assessment processes had taken place.
95. As well, the intelligence officers assigned to each mentoring team were assigned to produce insider threat assessments for each of the patrol bases. The threat assessment was in a particular format and according to PTE Mathieson came from an overall direction from higher headquarters that every patrol base in Afghanistan would have a threat assessment conducted in that format. He understood it would be quality checked by a superior in his technical intelligence chain of command and then reviewed higher up the chain of command and compared with other patrol bases. That assignment was only allocated a few days prior to deployment. The threat assessment for PB Wahab was completed by PTE Mathieson a few hours before the attack on 29 August 2012. He assessed the threat risk as HIGH, essentially based on the configuration of the patrol base making it difficult to ensure force separation. PTE Mathieson had little information to go on other than the aerial satellite photographs. He checked for other information, to no avail, and in particular there was no information available that previous mentoring task forces had been to PB Wahab. PTE Mathieson's assessment was not based on any intelligence indicating there was a specific risk or threat, for example that a known sympathiser was present.
96. PTE Mathieson had also deployed to another one of the patrol bases and was virtually sitting next to MAJ Gordon at that base. They did not share any information regarding the simultaneous Tactical Infrastructure Reviews and Threat Assessments they were conducting. This may be a reflection on their differences in rank, although I agree with Counsel Assisting in their submissions where they suggest PTE Mathieson was an impressive witness and they did not

think PTE Mathieson would have been less forthcoming due to rank disparity. PTE Mathieson sent his completed risk assessment to his immediate supervisor at Sorkh Bid, which was appropriate. It was not relayed to LT Lopez at PB Wahab.

97. Analysing the evidence summarised above supports a conclusion there was some disconnect in dissemination of information at a number of levels PTE Mathieson was conducting a risk assessment as required by his superiors in intelligence. MAJ Gordon was completing a TIR as directed from his superiors on largely the same information but neither seems to have known what the other was doing and both sets of information was intended initially for further up the chain of command and not down to the platoon level. I do not include the actions of PTE Mathieson in saying this and do not think there was any failure on his part to escalate his HIGH risk assessment directly to India 21 as the document was not intended to go there.
98. The significant failure was in not ensuring LT Lopez was aware of the increased insider attack risk and the requirements for force separation and other protective strategies that were to be put in place as a result of FRAGO 13 and the associated task orders. This starts with his officer commanding and those further up the chain of command.
99. The Inquiry Officer's report made observations confirming this point when he stated *However, I remain concerned as to whether they were adequately prepared to succeed their mission and, in this, I consider they were provided too little guidance and direction regarding the force protection arrangements that were expected to be employed at PB Wahab. That is I consider there was inadequate command direction because of the clear difference between the force protection arrangements MT-B had at FOB Sorkh Bid and that MT-B force elements had achieved at other patrol bases, to the situation at PB Wahab where India 21 could not/did not establish a separate secure area for Australian forces.*
100. As well, there was some confusion about the role of the 'Guardian Angel' concept as should have been operating at PB Wahab. The term was used during the inquest and in the material interchangeably at times with that of a bodyguard, sentry, or a piquet. MT-B and LT Lopez were operating off the term as it was defined in Standard Operating Procedure 207 (SOP 207). SOP 207 was the tactical level operating procedure relating to the threat of insider attack and the ability to mitigate that threat when on a base. SOP 207 makes orders about dress state and weapons state and also provided that no ANA were to be allowed in the Australian area. It also required the implementation of a 'Guardian Angel' to protect Australian forces when undertaking mentoring tasks. SOP 207 defines this person in the singular. This was the SOP for insider attacks that LT Lopez was aware of.
101. FRAGO 13 changed this in that the Guardian Angel concept was expanded to act as an armed buddy team, in other words there should be more than one piquet employed. This was how the concept was defined in the Australian Task Orders developed in response to FRAGO 13. However, those Task Orders were not supplied to LT Lopez. LT Lopez said in evidence he would not expect to receive the Task Orders per se but would have expected to have been told by his Officer Commanding MAJ Gordon, of the substance of what was required by the order. LT Lopez said he was not told about the entire substance of the order.
102. In fact, the situation is that at the time of the deployment to PB Wahab:

- a. The Operational Order for the patrol endorsed by LTCOL Scott did not refer to FRAGO 13 or the increased risk of insider attack;
- b. Neither LT Lopez nor SGT Burke had seen FRAGO 13 or the associated Australian Task Orders;
- c. LT Lopez was not told about the substance of the Task Orders;
- d. No Tactical Infrastructure Review (TIR) for PB Wahab had been put in place;
- e. The TIR that was eventually completed rated the risk of insider attack as low, but this was based on the assumptions there would be some degree of force separation and certain dress and weapon states in place;
- f. LT Lopez was unaware of the TIR assumptions for force separation and dress and weapon state;
- g. LT Lopez was unaware of the expectations of MAJ Gordon regarding the minimum level of force protection to be put in place, chiefly because he was not briefed about this by MAJ Gordon; and
1. LT Lopez was unaware of the changed requirement that the Guardian Angel concept required the use of armed piquets acting as a buddy team.

### **India 21's deployment to Patrol Base Wahab**

103. As has been noted, LT Lopez knew very little about PB Wahab. Apart from an aerial photograph, there was very little information about the layout of the base. LT Lopez did not consider this to be a particular impediment as the gap in information was appreciated during planning and he accepted he would have to deal with the realities on the ground upon arrival at the patrol base.
104. LT Lopez stated that at no time was he told to inform anyone if complete force separation was not achievable. He said this was in line with all of their training and operations at the time, as separation was not mandatory and certainly he did not consider it a reason to abort a mission. LT Lopez was unaware that FRAGO 13 specifically stated that previous practices should be reviewed in light of the insider threats and he was not aware of the enhanced requirements for active and passive security measures.
105. The Australians arrived at PB Wahab during the afternoon on 28 August 2012, and the Platoon Commander, LT Lopez and the Platoon Sergeant, SGT Burke, went forward to greet the Afghan leaders and make arrangements.
106. The base was shaped like a figure 8, with an open area at each end, joined by a much narrower 'neck'. The Afghan end of the base consisted of a number of substantial buildings including barracks and headquarters and was overseen by guard towers. This end of the compound also had entry/exit points for personnel, each with a ground-level guard post.
107. To the other end of the compound there were two buildings and three guard towers. This end also included an entry and exit point for vehicles.

108. The two ends of the compound were at substantially different elevations and the end of the compound the Australians ultimately occupied was substantially higher. Given this area was some distance away from the main accommodation of the Afghan soldiers, this was a sensible decision.
109. The arrangements agreed upon at arrival were that the Australians would occupy flat ground on the high end of the base but would share that space with some Afghans who would remain in an accommodation building. The Australians would man one of the base's guard towers by day, but the Afghans would man them all by night. SGT Burke indicated in his evidence that he was uncomfortable with this arrangement, but he lacked the personnel to man all three towers at the Australian end of the base. LT Lopez was also concerned that any force protection measures put in place had to be sustainable over the 10 day period for tasks both inside the wire and outside the wire. LT Lopez made a decision to not require those Afghan personnel to relocate due to not wanting to upset the forces they were intending to mentor. This meant force separation was compromised.
110. The Australians settled in and the vehicles were placed such that a 'harbour' area for sleeping and administration was set up. LT Lopez radioed his OC, MAJ Gordon, to advise that the Australians were 'secure'. MAJ Gordon, who had another two platoons at other patrol bases, did not question LT Lopez further. MAJ Gordon's explanation for this was that he had trust in LT Lopez's abilities and he did not wish to micromanage him. It should be noted that this was at a time when MAJ Gordon was still completing the TIR in relation to PB Wahab but with limited information about the base. Accepting that whilst on patrol, radio communications might be kept brief, some further brief discussion about the layout of the base and what other security arrangements were put in place could easily have taken place.
111. On the first night, LT Lopez posted a guard in an armoured vehicle, to protect the Australians, with a person on radio duty in another vehicle.
112. The following morning, the Australians and Afghans set out on their first joint patrol. After the completion of the patrol, the Australians returned that afternoon, and began their 'evening routine' of cleaning and maintenance.
113. On the second night (on 29 August 2012), LT Lopez posted a guard (a roving piquet) being a single guard in body armour (and physical training uniform – i.e. a t-shirt and shorts), patrolling at ground level along the side of the Australian encampment.
114. Many of the other soldiers changed from combat uniform into their physical training uniforms. Some wore thongs as footwear. LT Lopez had allowed this, as they had been out working in the searing 50+ degree heat all day, and the night was only expected to drop to 38 degrees.
115. The decision by LT Lopez and SGT Burke to allow the platoon to dress in PT gear was the subject of some contention as to whether this was appropriate. It is understandable that given the environmental conditions, the continued wearing of a combat uniform was likely to be uncomfortable and even unhealthy in the medium-term.
116. The TIR assessment, which of course was not provided to LT Lopez, included an assumption/requirement that the Australians should adopt a particular dress

state in the ANA compound. The dress state specified certainly did not include PT gear.

117. The Inquiry Officer formed the view that wearing PT gear was inappropriate and would have given an indication that the soldiers were in a very relaxed state of force protection and may have given a potential attacker the clear impression that the Australians were a soft target as they were not in a state of readiness to defend themselves.
118. LT Lopez and SGT Burke were subsequently disciplined for having allowed the roving piquet to patrol with his body armour over his PT gear.
119. Some of the Afghan soldiers came by to visit, sharing an improvised gym area, wandering into the Australian sleeping and administration area, and later sitting with the Australians who were playing cards or board games. The decision to allow a degree of mingling with the Afghan forces was no doubt considered helpful in establishing positive relations between the Australian and Afghan forces. The problem in this case was that the mingling was not only occurring in common areas occupied by both forces but was occurring within the area set up for the Australian soldiers' administration and sleeping. LT Lopez told the Inquiry Officer he was unhappy about the closer interaction taking place in the administration area, but did not feel he could speak out then and he was going to speak to the Tolay commander later.
120. One of the visitors to the Australian area on the evening was Hekmatullah. An area of concern for the families was to the effect that Hekmatullah may have been known to have Taliban connections. The evidence about that issue comes from various sources, none of which are compelling or capable of being tested. In any event, it is likely many people in Afghanistan have some familial relationship to the Taliban. Whatever may be the true position as to Hekmatullah's connection to the Taliban, I am satisfied that Hekmatullah was not known to the ADF as being a specific threat.
121. It was also submitted by counsel for the Poate family that biometric enrolment of personnel in Hekmatullah's unit may have assisted in preventing the attack, however biometric enrolment is in my view an unrealistic expectation given the size of the ANA and in any event would not have inevitably uncovered any link of Hekmatullah to the Taliban.
122. Hekmatullah's motivation to attack the Australians is also unknown. There is some evidence from media and other sources quoted in his trial that there was a religious motivation. It is difficult to assess if this is a true motivation or some other form of self-serving statement to support promoting himself with the status of a martyr.
123. The position of the ADF at the inquest and confirmed by Brigadier Noble in his evidence is that Hekmatullah was a calculating, considered, determined and competent attacker who executed a plan against the defences he saw. Their position is that a change in the defensive posture may not have prevented the attack then or at some later time and that the only way to have avoided the attack is to not have gone to PH Wahab at all.
124. What can be said about the above view is I do not know how *calculating, determined and competent* Hekmatullah was or whether this was purely an opportunistic attack at a time when the Australians presented themselves as a

soft target. It cannot be known what Hekmatullah may or may not have done if a much stronger defensive posture was before him. However, it is arguable to say that the stronger the defensive posture, the stronger the incentive to not attack at that time.

125. What we do know is Hekmatullah had socialised earlier with the Australian soldiers in the gymnasium area and then later entered into the Australian administration area. As a result of this level of access no doubt he was able to undertake a detailed reconnaissance of the Australian position. He knew where the Australian soldiers were and what they were doing. He knew they were largely all in their PT gear. He knew they were not wearing combat uniform or wearing body armour, their weapons were not immediately to hand. He would have had the opportunity to observe there was only one roving picquet.
126. We do know Hekmatullah got up and left the area, as he was required for guard duty. Being on guard duty gave him the opportunity to be armed and again approach the vicinity of where the Australians were harboured. He obtained an M-16A2 assault rifle, and a magazine containing 30 rounds of ammunition.

### **The insider attack, which caused their deaths**

127. At about 9:45pm local time, Hekmatullah then walked towards one of the guard towers, took a covered position, and began firing his weapon at the Australians. He fired almost all of the 30 rounds in his rifle from a distance of around five metres away. Lance Corporal Milosevic, Private Poate, Sapper Martin and two other Australians were shot, some of them multiple times. Private Poate and Sapper Martin died immediately, and Lance Corporal Milosevic died shortly after his subsequent evacuation by helicopter. Two Australians being SGT Burke and the roving picquet fired in response at the guard towers (as it turned out the wrong targets), while Hekmatullah fled and escaped.
128. Fortunately, the Australians were able to secure the area reasonably quickly and without any return fire from the ANA. It is evident that the deceased soldiers and the wounded then received timely and appropriate first aid and every effort was made to save them. The efforts to evacuate them were timely and efficient.
129. After these events, ISAF halted all mentoring activities for a time, and when mentoring resumed, greater force protection activities were to be in place with greater numbers of troops employed. Further forays to PB Wahab ceased. The security posture was now changed such that force protection took priority over mentoring. Arguably, that is what FRAGO 13 had already determined should have been the case.

### **Autopsy results**

130. After the Australian soldiers were repatriated to Australia, post-mortem examinations were conducted at the Forensic and Scientific facilities in Brisbane.
131. Sapper Martin was shot several times in the chest and left arm. The autopsy report noted the chest wounds caused fatal chest and abdominal injuries.
132. The autopsy report for PTE Poate indicates he sustained a number of gunshot wounds to the left upper arm, the torso and the left leg. One shot caused severe injury to his skull and brain, which were inconsistent with life.

133. Lance Corporal Milosevic was shot once in the chest, causing severe damage to his heart. Immediately after the shooting he was still indicating vital signs. He was transferred to Tarin Kowt by helicopter, departing approximately 30 minutes after the shooting commenced. He was transferred to surgery and attempts were made to save him, but these attempts were unsuccessful and he was declared deceased approximately 40 minutes after arrival at Tarin Kowt.

## **Conclusions on the issues**

134. In reaching my conclusions it should be kept in mind that a coroner must not include in the findings or any comments or recommendations statements that a person is or may be guilty of an offence or is or may be civilly liable for something. The focus is on discovering what happened, not on ascribing guilt, attributing blame or apportioning liability. The purpose is to inform the family and the public of how the deaths occurred with a view to reducing the likelihood of similar deaths.

135. The impact of hindsight bias and affected bias must also be considered when analysing the evidence. Hindsight and affected bias can occur where after an event has occurred, particularly where the outcome is serious, there is an inclination to see the event as predictable, despite there being few objective facts to support its prediction.

136. It is also my experience in inquests where there are negative outcomes, there is often evidence of poor communication that contributes, and usually not just one example or one event but a number of such events. As a result, critical information is lost, not communicated, or falls between the cracks and is therefore not considered.

137. Keeping all those factors in mind, I will now consider the issues required for my determination.

### ***The adequacy of the ADF's risk mitigation plan (and execution of that plan) to prevent insider attacks on the deceased persons' platoon at PB Wahab***

138. The submissions of Counsel Assisting, largely supported by the legal representatives of the families, is that there were a number of systemic deficiencies, which contributed to the soldiers' deaths. Counsel Assisting have submitted there were six main systemic deficiencies. I have already dealt with the first of these being the adequacy of force preparation training. This was not an issue that was the focus of my investigation and the evidence is such that I cannot determine that issue one way or the other.

139. The next five systemic matters are more closely related to the events unfolding in August 2012 and deal with mission planning in the context of the orders recognising there was an increased insider attack threat. They were:

- The mission planning for deployment to Patrol Base Wahab gave insufficient attention to the insider threat;
- The information relating to Patrol Base Wahab was deficient;
- There was inadequate utilisation of intelligence resources by command;
- There was inadequate communication between the Platoon and the Company, particularly after the Platoon arrived at Patrol Base Wahab; and



- There was inadequate force separation and force protection at Patrol Base Wahab
140. The ADF submissions are essentially these. The cause of death was solely due to the actions of Hekmatullah. The ADF played no role in causing the death and therefore there ought not be criticism of the ADF or its members. Alternatively, if that is not accepted, in any event there were no systemic deficiencies evident and therefore there should be no criticism of the ADF or its members.
  141. In considering broadly the basis of the ADF submissions, it is accepted the medical causes of death directly related to the shots fired upon the soldiers by Hekmatullah.
  142. However, it is also my task to find not only the cause of death, but how the soldiers died.
  143. At the time Hekmatullah fired his weapon, India 21 was set up in a patrol base they knew little about; were in a very relaxed dress state; had been mingling with ANA soldiers over a number of hours; force separation was severely compromised; and they had one roving piquet to protect them.
  144. The coronial investigation and subsequent inquest pondered the question as to how that state of affairs came to be, particularly when there was meant to be an increased alertness at that time to insider attacks and plans were to be in place to deal with minimising the risk of insider attacks. Was it simply a matter of the platoon leaders literally letting their guard down or were there some other factors that contributed to that state of affairs?
  145. It is a truism that wars are dangerous states of affair and deaths and injuries will occur. I accept the proposition that insider attacks, when considered over the whole period of the Afghanistan war, were not the greatest threats facing ISAF forces. Greater threats came from IEDs and indirect (rocket and mortar fire) and direct (small arms) fire. I therefore also accept, that looking at the overall picture, the risk of an insider attack occurring was generally low as compared to these other threats. However, when an insider attack occurred, the risk of serious injury and death was high.
  146. The very nature of insider attacks make them very unpredictable and difficult for defence forces to plan against, particularly where the military operation and strategy involved close contact with forces from where the insider attack may come. But plan they must.
  147. LT Lopez spoke about positive atmospherics as being an important aspect to the risk minimisation strategy for insider attacks. Arguably there was an over emphasis of positive atmospherics at the expense of force protection. LT Lopez understood the tension but appears to have placed too much weight on positive atmospherics. This was also the position of LTCOL Scott and no doubt this filtered down to LT Lopez and others during mission preparation and execution.
  148. Then we come to August 2012. There had been a significant spike in insider attacks against the allied ISAF forces leading up to and in that month. So what happened? ISAF did their analysis and decided to up the ante in planning for risk minimisation of insider attacks. It issued FRAGO 13.

149. The ADF had an obligation at that point in time to implement the important elements of FRAGO 13. The Executive Officer certainly endeavoured to take the issue seriously and made a number of efforts to ensure the subsequent Task Orders included many of the requirements of FRAGO 13. There appeared to be some resistance to taking the issue seriously enough to change the strategy of mentoring whereby rapport and development of interpersonal relationships took some priority over force separation. The email to LTCOL Scott by the Executive Officer may be an example of that tension. That seems to have filtered down when MAJ Gordon was attending to mission planning and then the TIR. I do not suggest insider attacks were being dismissed by the ADF hierarchy as a threat, just that the increased threat and risk minimisation measures as set out by FRAGO 13 were not taken as seriously as it demanded.
150. The first opportunity to consider the requirements of FRAGO 13 in relation to operational matters should have been during the Military Appreciation Process undertaken by MAJ Gordon (who knew about the contents of FRAGO 13) with his platoon commanders before the deployment occurred. The result of this was the OPOD for the mission. There is no reference in the OPOD to insider threats or increased force protection as demanded by FRAGO 13. The reason for this is it was not discussed during the planning for the mission as LT Lopez stated he was not aware of the FRAGO or its requirements. The mission OPOD was endorsed by LTCOL Scott.
151. The second opportunity came at an intelligence level. Intelligence units within the ADF gather information with the intent to supply this information to headquarters to augment the Task Group planning process as well as day-to-day monitoring. The request made to PTE Mathieson to compile a threat assessment for insider attacks was triggered on receipt of FRAGO 13. It was noted in evidence that CAPT Wray was wanting to establish a robust baseline assessment to be developed over a period of time and in hindsight believes this could have been developed over the 12 months prior to FRAGO 13. FRAGO 13 did not specifically state this assessment was to be completed but CAPT Wray took it as an implied task.
152. Intelligence reports generally were said to support both the planning process for the mission and the operation as it unfolded. PTE Mathieson forwarded his assessment up the line to his superior. CAPT Wray stated the document was not the final document and needed review by others. On his evidence, the threat ultimately may have been assessed as moderate, except the attack intervened and there was now knowledge of a specific threat. The process of the assessment was such it was not a document to be utilised immediately for planning purposes. In that respect, I do not find this particular intelligence gathering should be categorised as a systemic failure in dissemination of information. The proximity in time between the HIGH risk assessment and the attack might seem compelling, but it is largely coincidental.
153. However, it was open to PTE Mathieson to have provided his HIGH risk assessment to MAJ Gordon or to discuss it with MAJ Gordon directly given they were at the same patrol base and there was a platoon that had just arrived at PB Wahab. It should be noted PTE Mathieson based his opinion largely on the same information at the disposal of LT Lopez and MAJ Gordon and not on a specific threat.
154. It was agreed by MAJ Gordon there was a communication issue evident in that he and PTE Mathieson did not share this information between themselves. It is

unlikely that even if PTE Mathieson had provided this information immediately to LT Lopez and MAJ Gordon, this would have prompted a change in the force protection strategy on the ground or the outcome. However, it is an example of an opportunity to reconsider their position that went astray.

155. The third process was in the form of Tactical Infrastructure Reviews. The intelligence assessment could have formed part of the TIR being conducted by MAJ Gordon but it does not seem the matter was discussed with PTE Mathieson or that MAJ Gordon had seen a copy of the assessment. It appears neither MAJ Gordon nor PTE Mathieson knew that each of them was considering a similar assessment at about the same time. That does indicate a level of disconnect between intelligence and operational processes.
156. MAJ Gordon did not, prior to deployment, sit down and discuss with LT Lopez the photographs on which PTE Mathieson may have formed his assessment. He says he discussed with LT Lopez some aspects of the plan for attending the base including options as to whether he would occupy inside or outside of the base.
157. After LT Lopez arrived at PH Wahab, MAJ Gordon did not ask anything about the patrol base other than being told the platoon was secure. MAJ Gordon then completed the TIR. He says this was based on the knowledge there was a set of standard operating procedures (SOP) and he relied upon LT Lopez not having made any variations to these SOPs on the ground. MAJ Gordon stated he made the assumption that in saying the base was 'secure', LT Lopez was comfortable with the insider threat and how he mitigated it. In other words, there was virtually no exchange of information about the security position on the base.
158. It is apparent the TIR for PB Wahab was based on an earlier TIR assessment for one of the other bases being visited and essentially a 'cut and paste' from that document. That base, PB Qudus, had significant differences in respect to the force separation that could be achieved. There was no attempt to suggest on the TIR for PB Wahab that it was based on limited information. MAJ Gordon said in evidence the TIR was to inform higher headquarters about the patrol bases and he was not sure of the specifics as to why it was to be filled out.
159. The efforts to conduct the risk assessment planning for insider attacks, as directed by the terms of FRAGO 13 and the subsequent Australian Task Orders were uncoordinated and I had the distinct impression it took on a largely 'tick and flick' process and hence not taken seriously by MAJ Gordon and arguably by LTCOL Scott. LTCOL Scott as Commanding Officer had overall command responsibility and was required to ensure adequate force protection before the mission deployed. The results were to be passed up the chain of command to headquarters. None of the results of these efforts, as imperfect as they were, reached the platoon level – the ones who were at risk. Rather, the troops on the ground were to be informed of any situational change through orders before deployment or radio orders once they were deployed. No such orders were passed down.
160. None of the above assessment is dependent on hindsight bias. It is an uncontroverted fact that the platoon leaders had no knowledge of the force protection issues raised by FRAGO 13 or the force separation measures it required be put in place. It was this state of affairs that led the investigation and inquest to try and determine why.

161. One aspect of this relates to information about PB Wahab - there was little but there should have been much more. The ADF have recognised that their information systems between Battalions should have picked up that this was not the first time ADF forces had been to PB Wahab. What that information may have provided is unknown and possibly little. However, it may have provoked some discussion or consideration at various levels during planning for the mission as to the layout and how force protection and separation could be achieved, rather than leaving it to the platoon leader on the ground when he arrived. This was an example of a piece of information that fell between the cracks.
162. The overall mission was to deploy to three bases simultaneously, and each patrol was provided with about the same number of soldiers. There have been submissions made that the mission was under-resourced with personnel. This largely relates to the ability of the Australians to man the guard towers. I am not convinced that even if the planning for the mission had more information about the base this would have changed the personnel resources provided to the platoon. Probably it should have promoted discussion, but I suspect the mission would have still proceeded. It is only with hindsight, that more troops should have been deployed to provide sufficient troops to man the guard towers and other guards for protection.
163. LT Lopez and SGT Burke, as the leadership team, made personal errors of judgement on the ground. In the first instance this involved permitting the soldiers to be in a relaxed dress state and permitting a relaxed force separation approach, by allowing ANA soldiers to mingle within the Australian administration area.
164. The second error was the decision to have only one roving piquet on duty. The decision to employ only one roving piquet arguably went against basic military training and it was accepted by LTCOL Scott and Brigadier Noble that the utilisation of two roving piquets would have represented best or better practice. Orders aside, the decision to post only one roving piquet meant there was no reserve or back-up.
165. Some of their other decisions, such as not manning the guard towers and the harbouring of their camp were inevitable and they should not be criticised for this. I accept it would have been preferable for there to be more personnel, but that was what they were faced with on the ground and they made their decisions accordingly. The real problem with not manning the guard towers is not so much that this was where an attack would come from, because they were facing outwards to protect from external threats, but in hindsight it gave ANA forces a reason for being in the area with weapons. Manning the towers would have removed that potential hazard. As well the single roving piquet was placed in an unreasonably difficult position given the Afghan carriage of weapons, there being no set routine, and he had no basis to challenge the ANA approaching the Australian area with weapons. In fact, the evidence indicated the roving piquet was mainly focussing on the potential for theft of personal belongings and equipment of the Australians.
166. LT Lopez and SGT Burke should not be criticised for not aborting the mission. There were no startling objective reasons to do so and in a practical sense, with a soldier's focus on succeeding in the mission, I would expect there would not be many platoon leaders who would have abandoned the mission in these circumstances, absent knowledge of a specific threat. It is only with hindsight that the presence of a potential threat in Hekmatullah is known.

167. However, LT Lopez and SGT Burke also appeared to me to be consummate soldiers. They obey orders.
168. If they had received an order or direction that required them, at this point in time in August 2012, to consider very carefully force separation; to ensure the dress state of their soldiers met a certain criteria, and to have an armed buddy system rather than one guard protecting the soldiers, they would have obeyed or they would have raised their concerns that they could not comply with the officer commanding. As LT Lopez and SGT Burke agreed in evidence this would have brought about communication with MAJ Gordon and a two-way discussion would take place to resolve the issue.
169. LT Lopez and SGT Burke did not have those orders, directions or even guidance, and simply put, they should have. Headquarters received FRAGO 13. This highlighted the extra security measures required. ADF Task Orders were put in place endeavouring to implement FRAGO 13. The Executive Officer's material suggests there was some resistance up the chain of command to implementing all aspects of FRAGO 13. The TIR completed after deployment had all the hallmarks of a 'tick and flick' risk assessment process with a document to be utilised up the chain of command and not down to the platoon level. None of the requirements for increased force protection issues were discussed at platoon level or formed specific orders.
170. This state of affairs indicates a failure at a number of levels in the chain of command to form and implement a plan to ensure the soldiers on the ground received appropriate orders and guidance with respect to force protection. It is evident MAJ Gordon and others higher in the command structure including LTCOL Scott did not give the implementation of the increased force protection regime as promulgated by FRAGO 13 and the Australian Task Orders any particular priority.
171. Would any of this have made a difference? I cannot say with any certainty. What I can say is that faced with orders and guidance, LT Lopez is likely to have ensured that:
- a. At least a proportion of the soldiers were not in a relaxed dress and weapon state;
  - b. Would have placed more restrictions on ANA soldiers visiting their camp; and
  - c. Would have had an armed buddy system of guards in full body armour and combat uniform, patrolling the perimeter and entrance of the harboured camp.
172. Would that have stopped Hekmatullah? I do not know and no-one can know. What we do know is he would have seen a quite different defensive setup and posture compared to the relaxed state of affairs he had seen during the afternoon and early evening. That may very well have deterred him from attacking then, or if it did not, the greater readiness of the platoon could have provided more opportunity to take more immediate defensive action, which could have prevented at least some of the deaths.
173. Counsel Assisting identified five issues, which if borne out suggested the ADF's risk mitigation plan for insider attack and implementation was inadequate. The

narrative and analysis above leads me to a conclusion in considering each of those issues, that this was the case. Whether this is evidence of a failing in the system in this particular incident or a general systemic culture or problem, I cannot say. I am only dealing with this one tragic incident, however at the very least this case now needs to be examined by the ADF to ensure that if there are any lessons to be learnt for future operations, they are learnt, and if there are systemic problems they can be addressed.

### ***Should Defence improve the way in which they deal with families of deceased?***

174. Submissions were made that in future, families should be provided with unredacted copies to Inquiry Reports and access to supplementary material relied upon. I am not satisfied I should make such a recommendation as it is apparent such a broad approach is not consistent with the inevitable security and national security implications.
175. However, the ADF should consider whether there are a number of lessons to be learnt from this case as to the proper approach that should be given to families in these tragic cases. The families were clearly unhappy with how the ADF handled its interactions with them and the perceived lack of transparency at many levels. That compounded their distress and suspicions that the process was not transparent. The level of redactions in the documents made available only added to that perception and was clearly unhelpful in providing some form of closure. The ADF dispute this, but that is what the families perceived the case to be.
176. Open disclosure processes have been put in place in other investigative regimes. Hospital deaths are but one example I have had some experience with. What I have learnt in that context is there are good open disclosure processes where positive outcomes are evident and then those where the process produces a negative outcome. To be effective, open disclosure has to become part of the culture of the organisation, requires planning and needs to be conducted by appropriately trained persons.
177. The ADF should reflect on this case and perhaps others where good and negative outcomes have been evident in their interactions with families and consider if it is necessary to develop or improve on an open disclosure process that is based on transparency and therapeutic principles.

### ***Should a Defence or Commonwealth coronial jurisdiction be established?***

178. The families were dissatisfied with the decision to not hold a Commission of Inquiry. I was concerned about that decision myself. I have been involved in a number of concurrent investigations in relation to deaths of service personnel where COIs have been held. COIs are particularly suited to consider the nexus of service issues to why or how the person died, and consider with some degree of expertise any underlying defence issues that a coronial investigation may be unable to investigate or consider. COI's findings can assist the coroner in their investigation and perhaps narrow the issues for consideration in any later inquest or enable findings to be completed without holding an inquest. In one particular case, I worked closely with the Commissioner and Counsel Assisting and conducted an inquest and provided findings on the circumstances of the death of a defence member prior to the COI sitting to assist the COI in its deliberations as to service issues. In two other cases, the COI report enabled me to make

findings without holding an inquest. That is not to say there cannot be some improvement and with the new investigation arrangements commencing a few months ago, vigilance will be required.

179. COL Waddell stated that defence inquiries do not seek to replicate the function of a coroner. I note in the submissions of the families they agreed that the transparency and independence of the coronial process and particularly the inquest assisted them and also the greater Australian public to gain insight into the intricate circumstances of these tragic events.
180. There were many challenges this investigation and inquest faced, particularly with respect to the gathering of evidence and then producing the evidence in such a manner that it did not encroach into national security areas. There were a number of interlocutory hearings dealing with those issues. In the end the inquest was conducted largely openly and transparently with few closures of the court to hear evidence where national security issues were likely to be discussed. Despite the challenges, as one of the submissions noted, they were not insurmountable. However, the case was very resource intensive for my office.
181. Counsel Assisting suggested in their submissions consideration should be given for implementation of a Defence Coronial system. This was rejected by the ADF and the families. I agree with those submissions to the extent a Defence Coronial system is not warranted.
182. A Defence Coroner and/or a Commonwealth Coroner is not a new concept and has been discussed at various levels, including within the Department of Defence<sup>2</sup> and by state coroners over recent times<sup>3</sup>. If one was implemented there may be support from other jurisdictions.<sup>4</sup>
183. My first thoughts did consider whether a Commonwealth Coronial system would add value to the existing State jurisdictions by dealing with deaths involving a wider federal jurisdiction than defence cases. Upon reflection of my experience in this case, I consider the existing system is workable and adding another layer of jurisdiction may be unnecessary, although it is an issue where reasonable minds will differ and should not be taken off the table for future discussion.
184. However, this case and others where there are federal issues requiring investigation, can involve significant resourcing considerations for State jurisdictions. As an alternative to a separate federal coronial jurisdiction a funding model could be considered to compensate State jurisdictions carrying out investigations/inquests in cases with a particularly strong Commonwealth nexus.

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<sup>2</sup> Project Fulcrum 2012

<sup>3</sup> Proposed in the decision of the Inquest into the death of Dianne Brimble but rejected by the Commonwealth. A Commonwealth Coroner was not proposed by then State Coroner of NSW Magistrate Jerram in her submission in 2013 to the Parliamentary Committee on Social Policy and Legal Affairs.

<sup>4</sup> I have discussed the issue informally with the Queensland State Coroner who informs me there would be some support for the concept amongst other State Coroners.

## Findings required by s. 45

### **Sapper James Martin**

***The Identity of the deceased –***

Sapper James Thomas Martin

***How he died –***

Sapper Martin died in the course of his duty as a member of the Australian Defence Force as a result of gunshot wounds deliberately inflicted upon him by a member of the Afghan National Army.

***Place of death –***

Patrol Base Wahab, Baluchi Valley Region, Uruzgan Province, AFGHANISTAN

***Date of death–***

29 August 2012

***Cause of death –***

1(a) Multiple gunshot wounds

### **Private Robert Poate**

***Identity of the deceased –***

Private Robert Hugh Frederick Poate

***How he died –***

Private Poate died in the course of his duty as a member of the Australian Defence Force as a result of gunshot wounds deliberately inflicted upon him by a member of the Afghan National Army.

***Place of death –***

Patrol Base Wahab, Baluchi Valley Region, Uruzgan Province, AFGHANISTAN

***Date of death–***

29 August 2012

***Cause of death –***

1(a) Multiple Injuries, due to, or as a consequence of;  
1(b) Gunshot wounds to the head and trunk

### **Lance Corporal Stjepan Milosevic**

***Identity of the deceased –***

Stjepan Rick Milosevic

***How he died –***

Lance Corporal Milosevic died in the course of his duty as a member of the Australian Defence Force as a result of gunshot wounds deliberately inflicted upon him by a member of the Afghan National Army.



<b>Place of death –</b>	Multinational Base, Tarin Kowt, Uruzgan Province, AFGHANISTAN
<b>Date of death–</b>	29 August 2012
<b>Cause of death –</b>	1(a) Gunshot wound to the chest

## **Comments and recommendations**

### ***Australian Defence Force***

185. In relation to future overseas mentoring operations, I recommend that the Australian Defence Force:

- a. review the training provided to ensure that cultural sensitivity and maintaining rapport is appropriately balanced with the requirements of force protection against insider attacks;
- b. review their hand over / take over processes to ensure that key information, such as intelligence regarding locations visited by previous rotations is always passed on to incoming rotations;
- c. review their methods of storing intelligence information to ensure that key information regarding previous rotations is readily accessible by all levels of the chain of command that require it;
- d. review their processes regarding communication of higher level orders to ensure that key risk mitigation measures are implemented from the top down to tactical level standard operating procedures;
- e. review the way in which intelligence and command can more effectively interact and communicate for the purposes of risk mitigation planning prior to a mission.

186. In relation to consultation with families of the deceased members in future, I recommend that the Australian Defence Force:

- a. consider its open disclosure/methods of communication with families policy to ensure it incorporates best practice based on transparency and therapeutic principles whilst acknowledging the need to ensure national security implications are also addressed; and
- b. consider whether the views of families can be taken into account when determining any final level of inquiry (i.e. whether to hold a CDF Commission of Inquiry).

### ***Commonwealth Coronial Jurisdiction or alternative funding model***

187. I recommend the Commonwealth Attorney-General place on a forthcoming agenda of a meeting of the Law, Crime and Community Safety Council an item for discussion between the Commonwealth and the States and Territories as to:

- a. Whether a funding model should be introduced whereby the Commonwealth contributes to the costs of investigations and inquests in coronial cases where Commonwealth/Federal issues are prominent.

I offer my condolences to the families and friends of James Martin, Robert Poate and Stjepan Milosevic. I close the inquest.

John Lock  
Deputy State Coroner  
Brisbane  
22 September 2015