COMMONWEALTH OF AUSTRALIA

JOINT STANDING COMMITTEE

ON

FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Reference: Military justice procedures

BRISBANE

Friday, 29 May 1998

OFFICIAL HANSARD REPORT

CANBERRA

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Members:

Senator MacGibbon (Chair)
Mr Ted Grace (Deputy Chair)

Senator Bourne	Mr Bob Baldwin
Senator Ferguson	Mr Bevis
Senator Sandy Macdonald	Mr Brereton
Senator Margetts	Mr Bradford
	Mr Brough
	Mr Dondas
	Mr Georgiou
	Mr Hicks
	Mr Lieberman
	Mr McLeay
	Mr Price
	Dr Southcott
	Mr Taylor

Matters referred for inquiry into and report on:

(1) The adequacy and appropriateness of the existing legislative framework and procedures for the conduct of:

(a) military boards of inquiry;

(b) military courts of inquiry; and

(c) Defence Force discipline.

(2) Without limiting the scope of the inquiry, the committee shall give consideration to:

(a) the needs of the Australian Defence Force in peace and in the conduct of operations within Australia and overseas;

(b) the constitutional and legislative framework within Australia, and

particularly precedents established by the decisions of the High Court of Australia;

(c) the Judge Advocate General's annual reports; and

(d) other reports including, but not limited to, reports of the Parliament, the Commonwealth and Defence Force Ombudsman's annual report for the 1996-97 financial year and reports from relevant overseas jurisdictions.

WITNESSES

JOINT STANDING COMMITTEE ON FOREIGN AFFAIRS, DEFENCE AND TRADE

(Defence Subcommittee)

Military justice procedures

BRISBANE

Friday, 29 May 1998

Present

Senator MacGibbon (Chair)

Mr Bevis

Mr Ted Grace

Mr Hicks

Subcommittee met at 1.46 p.m.

Senator MacGibbon took the chair.

CHAIRMAN—I declare open this public hearing of the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade. This hearing is part of an inquiry presently being conducted by the Defence Subcommittee into Military Justice Procedures. The terms of reference for this inquiry direct the subcommittee to examine the legislative framework and procedures for the conduct of military boards and courts of inquiry in addition to disciplinary procedures primarily under the Defence Force Discipline Act of 1982.

There has been considerable media and public interest in military inquiries and in aspects of military discipline over the last few years. Most notable are the results of the 1996 Black Hawk helicopter accident. It is also an outcome of a number of other incidents. As this committee begins to examine these matters, the Australian Defence Force is currently conducting another high-profile board of inquiry into the calamitous events aboard the HMAS *Westralia* two weeks ago. It may prove instructive for the committee to follow the progress of that board of inquiry to provide a current perspective on the process. In the course of this inquiry, the committee will conduct a number of public hearings and will speak with serving and retired members of the Australian Defence Force, government agencies, members of the public and the legal profession. The committee hopes to table its report on this reference towards the end of the year.

I wish to take this opportunity to remind witnesses that this inquiry is a serious matter aimed at rectifying deficiencies in Defence's processes and procedures. It should not be viewed as an opportunity to pursue longstanding differences with specific individuals within the Department of Defence, however justly founded the grievance. The committee will view unfavourably any attempts by witnesses to misuse the protection of parliamentary privilege to make defamatory comment against named individuals. I also remind representatives of the media that remarks made at this hearing are not afforded the protection of parliamentary privilege until authorised by the committee at the completion of the day's program of hearings.

[1.47 p.m.]

ELLIS, Ms Kay Hamilton, 44 Rickman Parade, Woorim, Bribie Island, Queensland 4507

CHAIRMAN—On behalf of the subcommittee, I welcome Ms Kay Ellis. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect for which proceedings of the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. The subcommittee prefers that all evidence be given in public, but if at any time you wish to give evidence in private, you may ask to do so and the committee will give consideration to your request. We received your submission and it was authorised for publication. Are there any additions or corrections you wish to make to your submission?

Ms Ellis—Not at this time.

CHAIRMAN—I now invite you to make a short opening statement if you would like to.

Ms Ellis—I would like to say that I welcome the opportunity to appear before the committee because this is a matter obviously that has been in my thoughts for the last 7½ years since the accident and 6½ years since the board of inquiry report was first—it was not made public; that is the point—since the public statement was issued which stated what the causes of the Boeing 707 accident were.

The main thrust of my submission is that I believe an independent investigation is the only way in which fatal military accidents must be investigated and that a board of inquiry is not an appropriate means of investigating such accidents. There are a number of reasons for that on which I have elaborated in my submission and about which I will be happy to answer questions. There is only one other thing. I do not know whether it is appropriate to do it now or later, but I would like to make some comments about the ADF's submission to this inquiry, which obviously I have only read since they have been published. Is it an appropriate time now?

CHAIRMAN—Yes, you may do that at the start if you like, or we can do it through the hearing. I think now is as good a time as any.

Ms Ellis—Having read the ADF's submission, I focused on a couple of points. They seem to say that the need for an internal inquiry was based on two points: that they wanted to devolve the responsibility as low as possible so that the solutions could be implemented at the levels which would be most appropriate and that it was necessary to have internal inquiries so you could quickly determine the action to be taken. From my

reading of the submission, those are the only two defences that they had for the need for internal inquiries.

On the first point, I do not think it is appropriate when there is a fatal military accident because I think it has become fairly evident and obvious in the last inquiries that we have had since the 707 accident that those problems are not initiated at such a low level; they usually come from a much higher level. So I do not think that argument stands up. The fact that they want to quickly determine action to be taken at those levels—if we look back at the 707 inquiry, the kind of quick action that they talked about was that they had an initial investigation. After five days they gave an initial accident report, which was submitted. After three months that final report was given to the BOI. After another three months the BOI reported to Air Commander Australia, who had convened the board of inquiry so that he could review it. After another six months a public statement was issued about the cause of that accident. So in total, 12 months had gone past before any public statement was made about that, and it was not actually until two years afterwards when a coroner's inquest was held that military personnel actually found out for the first time how and why that aircraft crashed and it was another six months or so after that before the RAAF published an accident review of that. If that is an example of timely action, I think it leaves a lot to be desired.

I note with interest that the ADF says that a board of inquiry is an internal management tool. I agree with that completely and in my submission that is exactly what I have said—that if there is a fatal military accident it needs to be investigated openly and independently so that the findings, the cause of that accident, can be published so that everybody knows what happened. After that, if the military wants to have its own internal administrative board of inquiry to look at remedial action or to look at anything arising from that, then it is entirely appropriate.

As far as the terms of reference go, I also note with interest that they say that it is important that the commander who is doing the investigation does not become distracted by delving into incidental or extraneous issues and that these should not be included. In other words, they are saying that before the inquiry is held they are going to decide which issues do not have anything to do with it. I think they would be fairly brave to do that. An accident investigation is supposed to be broad ranging. You are not going to limit your terms of reference before you even start.

They also mention that there are regulations in place when any evidence comes forward that affects a person who is senior to the president of the board and that they have regulations in place for that so that that can be dealt with. In my submission, I told in great detail how they were able to circumvent those regulations. So just because the regulations are in place does not mean to say that they cannot be circumvented by semantics and by clever tactics. That is all I have to say on the ADF submission.

CHAIRMAN—Yours is a good submission to the inquiry and you have raised the

matter of independence, and that is at the heart of many of the submissions that we have looked at. I wonder if we can start by looking at how independence could be applied to AITs, BOIs and coroners' inquests. Could you give the committee an overall view of how you view the handling of a major accident such as this as it was done in the case that you were so intimately involved with? You mentioned time, but how do you suggest the whole process could be improved?

Ms Ellis—I think the only way it can be handled is with a completely independent accident investigation. It cannot be controlled by the military, and there are a number of reasons for that which I have elaborated on. But the basics of how it should be handled—my suggestion is that that is very easy, because we already have an independent aircraft accident investigation body and it is called the Bureau of Air Safety Investigation.

CHAIRMAN—Some of us who are airmen have some criticisms of BASI and its independence and objectivity, too.

Ms Ellis—Well, it is independent from the military. That is the main thing.

CHAIRMAN—It has a great deal of technical ability; that is true.

Ms Ellis—The thing is that there are certain broad principles in accident investigation. There is no doubt about it that BASI leads the world in some of its investigation practices. The model which I went into elaborated on the whole issue of organisational accidents of which the 70 was a classic case, as the Directorate of Flying Safety now preaches to its members, but that is not the way it was portrayed when the first accident investigation—the BOI—came out. As far as I can see, it does not matter who it is as long as it is independent from the military—from the organisation that has the accident. If you are involved in the organisation in any sense, then it is not independent and you have a vested interest in the outcome of that accident investigation.

CHAIRMAN—Let us look at the accident investigation team—the first body to arrive on the field. Were you satisfied with the operations of the AIT?

Ms Ellis—There were a number of minor problems with the AIT, but in general the AIT got to the nub of the matter fairly quickly because, as I say, they actually stated that there were some important issues of documentation. They identified—within a few short weeks really—that there were factors outside the flight deck that caused this accident, that it was not a straight case of pilot error, and they mentioned some of those. They got a couple of things wrong when they said that the pilot had not had any experience in doing this kind of manoeuvre. But that was a minor thing. They did not interview a wide number of witnesses. So in general, the AIT was conducted fairly well.

CHAIRMAN—In the scheme, as you see it, of an independent body—a BASI equivalent or BASI doing it—do you see a need to retain an AIT?

Ms Ellis—There are still incidents and accidents that happen in the RAAF—in the military. The accident investigation team will still investigate an accident even if someone is not killed. So there could conceivably be an accident where someone is not killed but there might be serious injury and so on. I guess that if it is called an accident investigation team it is supposed to investigate accidents, but if it were not called that—if it was about air safety occurrences, which includes an incident or an accident, so it does not necessarily have to end up with a hole in the ground, it could investigate. That could be its role—that it investigates incidents. As soon as you involve a death, which just opens up all sorts of other legal things, my belief is that it should be completely independent.

CHAIRMAN—We are looking at this from an ADF point of view. A BASI-type organisation is fine for an aircraft accident, but there is the navy and the army involved as well, and you do have accidents. What I am leading to is that if you set up this independent body—whatever you call it—will it replace both the AIT and the BOI in the system with one body, or do you still see the need for an immediate response in the form of an AIT and then a board of inquiry, whether it involves BASI for air accidents or whether it involves some other format for a land or a maritime accident? Do you see what I am getting at?

Ms Ellis—Yes. If you look at the way BASI operates, they have to go out and initially find out very quickly what happened in an accident because there are implications for all other users of that type of aircraft. So they have the same quick response. So I would see that it would replace that. With a fatal accident, I would see that BASI or whoever it is—an independent accident investigation team, response or whatever—would go out and do the whole thing, and they would do it from beginning to end. With the AIT you have certain people who are trained accident investigators who do the accident investigation part of it. In this case, they knew there was going to be a BOI, because this was a major accident with major ramifications. So they did not do a complete accident investigation anyway. It was an abbreviated one, because they knew it was going to be followed by a BOI, which would go into a lot more depth and interview far more witnesses who were involved than just the people who were involved in the immediate scene of the accident. So I would see that, yes, whoever it is—BASI or whatever—would go in and do the investigation from start to finish. In the States they have a National Transportation Safety Board which investigates all transport accidents. They do not investigate military accidents, as far as I understand it, but it is a different thing in the States because you have a greater number of people. The Australian Defence Force is very small. It is very incestuous in a lot of ways. But the point is that they have a transportation safety board that can look at all transportation accidents. Maybe there should be a similar thing for the ADF. This is the accident investigation body. It is independent from the military. The main thing is that it has to be independent from the military. At the moment the military board of inquiry is convened by military authority. That military authority takes all the reports of the BOI, looks at them, reviews them, and comes out with their own version of events.

Mr BEVIS—When you say 'independent of military', do you mean outside the Department of Defence or answerable to someone else in the chain of command that is at least to a greater extent independent? What do you have in mind?

Ms Ellis—They have to be answerable to the Minister for Defence, basically, because if it is a RAAF accident they cannot be responsible to the chief of air force, because he still has it in his control as to what happens to this report.

Mr BEVIS—An inspector-general type of role?

Ms Ellis—Yes. I am not sure of the exact mechanism, but I know that the whole process initially has to be out of the hands of the military. What the military does about it—just like BASI will have this report here, the Bureau of Air Safety Investigation report—is go into all sorts of different aspects of management and organisational factors. So that would be presented to the RAAF or whoever it is, and they might decide that we need to have a BOI because there is a particular aspect in here about the management. We have to understand how this happened. How did we let this get to this stage? That is what I mean about—as the RAAF says—an internal management tool. It is not an investigation process into a fatal accident. Just to go back onto that point about the accident investigation team—it is accident investigators who have been trained, but the board of inquiry is simply people from all over the defence forces. They may be pilots, navigators or engineers, but they are not trained accident investigators.

CHAIRMAN—You are suggesting now that you want an independent investigating authority in the case of air accidents—like a BASI organisation?

Ms Ellis—It would be similar.

CHAIRMAN—But then there would be overarching a board of inquiry on top of that, would there?

Ms Ellis—No, not on top of it. That is a separate issue.

CHAIRMAN—If we do have a body, for example, within defence which is quarantined from the hierarchical structure, which is possible to do, and we gave that body the authority or compelled that body to make its reports public, then any intervention from the superior officer would not be possible, would it?

Ms Ellis—If the report was made public and was published as this report is here—that is the problem. When we got the public statement about the 707 accident, it said that the inquiry process found that these were the causes of the accident. That really meant that an accident investigation team came up with a report, a board of inquiry came up with a report, and then Air Commander Australia, which was the convening authority, went through that. It took him five months to do that. He went through that report and

expunged those comments which were inconvenient and which were damning and he inserted other statements. So when it says that the inquiry process found this, that is incorrect. This is the first time that that information has been made public. That is the whole point. If the report has to be made public, then it is not possible for any senior officer to tamper with that report and put out something which is misleading and inaccurate.

CHAIRMAN—The committee does not have access to the BOI, and we have not seen the Air Commander Australia's report. You are suggesting that it is quite different in its findings from the BOI's findings?

Ms Ellis—Yes. I put some of the examples in my submission in an appendix. I gave examples of where the board of inquiry said that these rules had not been followed, and he completely expunged that actual reference so that it did not appear anywhere.

CHAIRMAN—Why would the air commander have done that?

Ms Ellis—Because he was implicated. These orders had not been actioned. They were orders which came from air commander himself, and they had not been actioned. Therefore, he was technically responsible for the accident because he had not made sure that those orders had been followed up. In fact, that was the problem, because the president of the board of inquiry was a group captain who should not have been the president of the board of inquiry anyway, and he made that fact known to his superior officers by telephone and by letter saying, 'I should not be the president because I am implicated in this. I was in the chain of command just prior to this accident'—

CHAIRMAN—He was the squadron commander, was he not?

Ms Ellis—This was Group Captain Harris, who had been the OC of 86 Wing, which is the parent wing to 33 Squadron. He was still in the chain of command even when—

CHAIRMAN—Why could he not take himself out of the—

Ms Ellis—He tried to.

CHAIRMAN—Why was that overruled?

Ms Ellis—It was overruled because the air commander decided that they had someone in there, and they just had to make sure that he did the right thing. By their choice of phrases—by saying, 'We are confident that you will do a good job and you will be impartial, and we have every faith in you. I have talked this over with the chief of air staff and he is quite happy for you to be the president of this inquiry'—he obviously was being told subtly, 'Just do the job.' He then came in and said, 'I have evidence before me

that implicates a senior officer to me.' In that case, what is supposed to happen—and it says it in black and white in these regulations to which the Defence Force submission refers—is you should dissolve the board of inquiry and you should then appoint a president who is higher in rank than the person who is affected. And in that case it would have had to be a person who was higher in rank than the air commander himself—an air vice marshal. The only person who was higher in rank than he was was Air Marshal Funnell, the chief of air force.

Now that had huge ramifications—to say that we think that a senior officer, Air Commander Australia, who was functionally responsible for the 707s, was responsible. He was implicated in that accident because there were certain orders that had not been issued and had not been followed up. Again, discussion between the chief and Air Commander Australia just said, 'No, we have taken all this into consideration, but we don't think that has any bearing on it.' The regulations are written to say that that person has to have been directly related to the cause of the accident—directly related. They said, 'It is not directly related to the cause of the accident at all. It is only a peripheral issue; therefore, we do not have to abide by these regulations.'

After the accident, they even went further than that. They talk about what should happen when an officer of rank senior to the president is affected. They say, 'We should elevate the commander of the president,' et cetera. The intention of that arrangement is 'to ensure that investigations and inquiries are invariably controlled at an organisational level higher than those functional areas of the service to which causal factors may be traced'. After the accident they changed these defence instructions and said, 'The intention of this arrangement is to ensure that . . . unless otherwise directed by CAS.' Basically, they were justifying their own actions. They added something else to make legal what they had done.

CHAIRMAN—Surely this is something in which there would have been many prior examples of the same sort of case—some systemic training failure, for example, in the army, the battalion exercise. It would reflect, by the same sort of logic, on the land commander. You might be in a position where you have to put the chief of the army up, the navy, where there are similar institutional problems. How has the service addressed that in the past?

Ms Ellis—Nobody has known about it. That is the point. This is the first time.

CHAIRMAN—This is the very first time.

Ms Ellis—This is the first time that people really have been made aware of it, because there has been only one other accident where the wife actually belonged to the service. She was an administrative officer and did not really know much about flying operations. Obviously, for whatever reasons, the board of inquiry came out and said, 'This is what happened.' Fine, it has been accepted. It is only that in this case three of us were serving wives. Two of us were air traffic controllers with some experience who had been

around the air force for a while. We knew a little bit about the system. We knew a little bit about the background of the 70 accident. We knew there were problems. We knew there were deficiencies. We did some investigations of our own. We pushed for a coroner's inquest. It was only really because I contacted the coroner's office and said, 'Are you going to accept the RAAF board of inquiry report as to the cause of the accident?' They said, 'Well, why?' I said, 'I have these concerns.'

It was really only because the investigating officer there had a few suspicions and because of the fact that I pushed this that more came out of that particular inquest than any other inquest that had been held for any military accidents in the past—because of the inside knowledge that we had. I know personally of a few other examples where the reasons for the accidents have not simply been pilot error, but that is what has been portrayed. In relation to the F111 accident that happened, during the inquest in September—the one in Guyra—the accident investigation team reported that it could not find out why the aircraft crashed. It basically put it down to pilot error, because he had obviously made some sort of mistake. That is what gets put across to everybody. I know personally the parents of that person. They were very unhappy about that whole report.

You have to look at the recommendations that come out of that accident to give you a clue as to other things that have been involved. If it was a case of straight-out pilot error, you would not have to change your procedures. You would not have to do anything, would you? The pilot made the mistake; he did not follow procedures; he did not do what his supervisors told him. If you look at the recommendations of that accident, it says that we had better review our categorisation and currency requirements, we should come up with a standard patter that should be used in this manoeuvre, we should have some abort procedures documented in SOPs, we should come up with a formal risk management process, commanders of flying squadrons should ensure that their air crew have current employment standards, and flight authorisation responsibilities must be complied with.

If it was just straight-out pilot error, you would not have to recommend all those things. You have to read between the lines. If you are a next of kin and you receive that report and you do not know anything about the air force, you will say, 'Okay, well what am I going to do about that? Who do I appeal to?' Who do you go to? There is no mechanism for Mr and Mrs Cairns Cowen to say, 'I am not happy about this. Don't you think that if you've come up with all these recommendations there must have been something wrong? There is something wrong with the squadron. There is something wrong with the wing.' Who do they go to apart from the media?

CHAIRMAN—Getting back to your case, you are, in effect, telling the committee that you are happy with the conduct of the BOI. It is what happened afterwards that is your principal concern.

Ms Ellis—Apart from the fact that the president was too close to the matter to be involved—in his own words—he was hamstrung in investigating a lot of the things

because if he had to go back through the history he would be investigating himself, because he was the officer commander.

CHAIRMAN—What about the terms of reference of the BOI?

Ms Ellis—The terms of reference of the BOI were carefully framed really. Just going back to the president, he was not able to investigate anybody of higher rank than himself. That is the upshot of when they said, 'Just keep investigating the accident. We don't think it is related to anybody higher in rank.' He could not call in Air Commander Australia to the inquiry and get him to answer questions. He was not permitted to do that. The terms of reference were such that they were supposed to see if anybody had been negligent in this matter, if anybody directly caused the accident. No-one had directly caused the accident. Very few people, apart from the people on the flight deck, directly caused the accident.

CHAIRMAN—What was the finding of the BOI?

Ms Ellis—The BOI said they were performing a manoeuvre that was inherently dangerous and they did not recover from that manoeuvre. The BOI stated that that was a fact. They crashed. They put down a lot of other things. They mentioned that the procedures and documentation were not up to scratch.

CHAIRMAN—That was one of the findings of the BOI, was it?

Ms Ellis—Yes. There were quite a number of findings of the BOI. But when the review process took place, they subtly changed some of those and amended them.

CHAIRMAN—How did it come about that the air force was engaged in an endorsement practice for which it had no training procedures?

Ms Ellis—There were no procedures written.

CHAIRMAN—Why were there no procedures?

Ms Ellis—Because no-one had bothered to write them.

CHAIRMAN—The air force has flown hundreds of different types of aircraft. Some of them have been very dangerous on endorsement training. There has always been a manual laid down for that particular type.

Ms Ellis—The problem was that there was a bit of a history—

CHAIRMAN—Why was the air force operating an aeroplane here for at least 10 years that had a history of greater than 30 years in operation civilly without a training

manual for what an endorsement involved?

Ms Ellis—It was not exactly an endorsement.

CHAIRMAN—What was it then?

Ms Ellis—It was training for an upgrade to qualified flying instructor that would be conducted by the Central Flying School later. Those procedures had been done. When the 707 was introduced into the RAAF it came straight from Qantas. Qantas taught them procedures. Qantas gave them some of their manuals. It then had to be air force-ised to be one of the air force aircraft. But in true fashion, a lot of the things were just not done. They imported a lot of Qantas procedures. They just did not get around to writing these procedures for asymmetric training, even though they were written for the Hercules, the Caribou and for the 748. They just had not got around to documenting them in detail, but it was common practice for them to be practised.

CHAIRMAN—Let us move on from there. When it went to the air commander there was quite a long delay, and you believe the thrust of the BOI findings were changed by the air commander?

Ms Ellis—Yes.

CHAIRMAN—What happened when it went from the air commander to the Chief of Air Staff as he was then?

Ms Ellis—He did some other amendments as well to subtly change the wording of the cause of the accident. I think he was the one who said the manoeuvre was inherently dangerous.

Mr BEVIS—Before we move off the BOI, I have a couple of questions about the BOI procedures. It is not an uncommon practice for BOIs to make recommendations about disciplinary action that the board believes should be initiated. Do you have a view about whether that is an appropriate function for BOIs to also carry out as distinct from an investigation of the accident?

Ms Ellis—The trouble is that the BOI is broad ranging. It is the judge and jury. It has such a broad range.

Mr BEVIS—I understand that that is the way it happens. In terms of what this committee might see as changes to the current system, is it in your mind a useful thing for the board to have that role of identifying the facts of the accident, as best it can determining what caused it, and, in addition, making recommendations about what disciplinary action should be taken? Is that a beneficial function for the one body to undertake at the one time? Is it in your view a better thing for them to be separated? If

you do not have a view, that is fine. I am interested in your experience.

Ms Ellis—That is fine if the BOI wants to do that. I have no problems with that. What I do have a problem with is the BOI investigating the whole accident in the first place. I do not even want to touch the whole disciplinary matter thing because I think it is an absolute minefield. I had views that were perhaps stronger immediately after the accident when I wanted someone to be made accountable. That is the main thing: no-one has been made accountable for this.

CHAIRMAN—But if you are going to make people accountable, then you have to have a disciplinary procedure in place.

Ms Ellis—That is fine. I have no problem with that, but you cannot even get to first base if you do not even have a prior, open, independent accident investigation, because you do not know all the facts. They did not bring out all of the facts of the organisational factors that caused this accident. They could not, because they belong to the organisation.

Mr BEVIS—Can I go to the question then of the independent inquiry? It does not relate to just whether it is a 707 or whether it is air force; we are looking at it across the board. Again, it is not an uncommon practice to appoint people to a board to investigate an accident who have some comparatively recent experience in that type of activity. So if it is a 707 accident, you will find people with experience involved with the squadron or the wing. If it is a Black Hawk accident, you will find people with experience in rotary wing. If it is a submarine accident, you will find people on the board who have had command of submarines or been in that sort of role. So you can go down the list. Once you do that, and there are all sorts of good reasons why you want someone there who has some background in it, in a force of our size, as you commented before, it becomes increasingly difficult to get someone who may not have been in the chain of command at some point in time when material evidence before the inquiry was relevant. Do you see a way around that? I have to say that it seems to me to be a bit of a catch-22, unless you determine that you do not need or do not want people who have experience in the craft that has been the subject of the inquiry.

Ms Ellis—I think that it is completely irrelevant. If you look at BASI, they go out and investigate some Robinson accident or some really strange obscure aircraft type. No-one has probably even seen it, let alone flown it. That does not mean to say that they cannot investigate the accident, because you have certain principles of investigation of accidents that just run across the board, whether it is a train, a plane, a boat, whatever. You do not need to have experience of that. The only person who had any experience on the 707 was the president of the board, and he had flown it some years ago. There was nobody else who could have actually participated in that board who had 707 experience because the only persons who were left in the air force who had flown that aircraft were in that squadron. That was the problem: everybody kept leaving to join Qantas and

Cathay. So it was completely irrelevant. All the other people on the board had never flown the 707. They had probably sat in the passenger seats, and that is about it. It is irrelevant.

You do not need that kind of expertise on the actual board itself. Certainly, you will call in specialists just like you will call in a medical specialist and you will call in the fire specialist to investigate the Westralia. You bring in specialists where you need specialist knowledge. They do not need to be specialists to sit on a board or to sit on an investigation team.

Mr BEVIS—If that were accepted, would it not then also follow that you could do away with an entire military inquiry altogether and just have a civilian inquiry?

Ms Ellis—That is exactly it. If it is not BASI, because the BASI at this stage cannot investigate navy accidents or army land accidents, yes, why not just have a civilian accident investigation board that investigates these accidents, because the principles of accident investigation are general. Once you have done an accident investigation course, you could go and investigate a building blowing up or whatever. That is the thing. When you read any of the literature that is all about accident investigation, human error and all of those sorts of things, they do not just talk about aircraft accidents, they talk about nuclear disasters; the principles are exactly the same. Therefore, you do not need to be an expert. In the coroner's inquest, Mr West was not an expert. He had probably never even sat in the cockpit of an aircraft.

CHAIRMAN—Were you happy with the coroner's inquiry?

Ms Ellis—Very happy, because it was the first time that we were able to actually bring out a lot of the facts about what led to this accident. The coroner himself came out and said all of the things that we had hoped to come out of a board of inquiry, which we knew would not come out because it was an internal inquiry. He basically said that there were systemic failures, that the commanding officer of the squadron had to bear some responsibility for the accident because he was their immediate supervisor and commander, that there were organisational failures, there was lack of documentation, lack of procedures, lack of supervision—all of the things where we said, 'Yes, this is what led to the ultimate steps that caused that accident.'

Mr BEVIS—To get it unambiguously clear in my mind, what you are saying is that accident investigations do not require people who have any prior knowledge of the platform or the equipment in the accident?

Ms Ellis—No.

Mr BEVIS—That is your view?

Ms Ellis—No, but as I said, you have specialists who might provide specialist

advice. As I said, the coroner did not have any specialist knowledge and he was able to come up with a completely independent, unbiased report that really let everybody know that this was not a case of pilot error, which is what the air force had tried to put across. It is just unfortunate that all of these other things were incidental. They used all those terms, they used all the correct semantics—aggravating conditions, general circumstances—and people unwittingly contributed.

CHAIRMAN—Could you substitute a coronial inquiry for a board of inquiry or something like that in the light of your experience?

Ms Ellis—I see it fairly clear that we need to have both because they have different focuses. If I had just been Tim's wife and I was not in the air force and did not know anything about this investigation, I would not have had anything to contribute to a board of inquiry or to an accident investigation of any sort, because I know nothing about the aircraft, I know nothing about the squadron—all the things that preceded the accident. So that accident investigation would have just gone on normally. Just as it would with an aircraft crash tomorrow, BASI would go and investigate it. They would not come and ask me as the pilot's wife to contribute to that investigation. That is not my role. Theirs is to go and find out what caused the accident and come up with some findings.

The coroner's inquest is looking at the cause of the accident and it is also looking at any people who contributed to that, but it is the only forum in which the next of kin actually has any rights. I can go along to the coroner's office, which I did. I said, 'I have these concerns.' I gave them a submission. They came to my house and interviewed me. Hearsay is acceptable: you do not have to follow the rules of evidence. It is a search for the truth. They do not limit themselves and say, 'We are looking only for the direct factors.' They say, 'We are going to take anything that comes our way. We are looking for the truth here.' As I said, it is the only opportunity that the next of kin actually have to voice their concerns.

That is fairly important, too. Even though I tried to participate in the BOI, they just said, 'No, we do not want to interview you.' They did not tell us anything about what was happening. They did not keep us up to date. We were virtually excluded from the entire process. All right, that is fine, but you have got to have some means by which the next of kin can address some of the concerns. A coroner's inquest is not an accident investigation process. There needs to be an accident investigation process first.

Mr HICKS—Once that is over, what happens next? What is the next step?

Ms Ellis—Once the accident investigation has taken place and there is a published report?

Mr HICKS—Yes.

Ms Ellis—So they publish a report and everybody can see it. Then the air force might go away and say, 'We need to establish a board of inquiry because there are certain concerns we have in here to address. They have identified some shortcomings here in this particular organisation. We need to address those. Perhaps a board of inquiry is an internal means of coming up with the best action and then maybe we will address the matter of military discipline for those people involved.' Once BASI does an investigation into an accident, they still have a coroner's inquest. That is just the normal procedure. In the civilian world, you have those two processes: here is an accident investigation, here is a coroner's inquest, which happens when anybody dies.

CHAIRMAN—You say in your submission when you relate to the review of the special adviser Funnell that the wording of the minute and the public statement was carefully chosen to support the unfounded assertion that the causes of the accident were entirely related to the crew's action. Do you wish to qualify that or do you mean it as it stands there? That is saying that the cause of the accident was entirely as a consequence of the crew's action.

Ms Ellis—That is right. That is basically—

CHAIRMAN—That is a fair summation of what the special adviser, the chief of staff, said?

Ms Ellis—Yes. He said that the aircraft crashed because he carried out an inherently dangerous manoeuvre and that he failed to recover the aircraft. So that is the cause of the accident. Then he just goes on to say, 'By the way, there are a few circumstances relating to that', but the impression was given, 'This is the reason for the accident. So we can all rest assured that the cause of that accident has ended with that crew. They are dead. Therefore this accident will not ever happen again because it was entirely related to them.'

CHAIRMAN—How did the air force get itself into the position that it was doing asymmetric flying in a sweptwing aircraft to start with?

Ms Ellis—Because they did not—

CHAIRMAN—Irrespective of the suicidal height.

Ms Ellis—No, it is not suicidal. This is one of the points that really annoys me about a report that was in an Australian aviation magazine that said that it came from the coroner's office. It said they were flying too low. They were not flying too low for that manoeuvre normally. That might be a lot of people's personal opinion, but if there had been a slight divergence from their control flight, as happens in Hercules, Caribous and 748s, that would be normal. There were no procedures written down. There was a history of someone teaching somebody else how to do this and someone teaching somebody else

how to do this. So procedures were handed on by word of mouth, not because procedures were not written down.

CHAIRMAN—But this type of aeroplane has been in service since the late 1950s and asymmetric flying is just not carried out in them.

Ms Ellis—We all know that now, Senator.

CHAIRMAN—No, we knew that 30 years ago. I am asking: how did the air force get itself in a position that it alone did not know what everyone knew?

Ms Ellis—That is right. That is, obviously, the question that we asked ourselves over and over again.

CHAIRMAN—That is clearly at variance.

Ms Ellis—The coroner stated that no formal structures were put in place. So he basically said that the RAAF was behind everybody else in the world in terms of knowing about the characteristics of the Boeing 707. They did not put in place any mechanisms to collect information from overseas. They could have got information from the USAF, which operates 70s.

CHAIRMAN—I do not want to retry the case, but fundamentally your argument is that the conclusions reached at the end of the day by the chief of the air staff—namely, that it was the crew's actions—were not really supportable and therefore the system by which he arrived at that process was flawed? Is that a fair statement?

Ms Ellis—Yes. That was his own personal opinion and Gration's.

CHAIRMAN—This was the opinion that carried the day? This was the final statement by the air force coming from the chief of the air force?

Ms Ellis—That it was the crew's fault. There was just one other point that I wanted to make. The coroner understood that these people were not acting on their own behalf. They were not just saying, 'What will we do today?' The air force failed to train and inform these people adequately. Therefore, the chief of the air staff should have been saying, 'They might have gone and done this'—

CHAIRMAN—We are not really interested in the outcome in a technical sense; we are interested in an outcome in so far as whether the investigative process reached the right conclusion. You are telling us quite conclusively that you believe it did not and you think it would have reached a better conclusion had it been an independent inquiry?

Ms Ellis—Even though the coroner's inquest was not really investigating the

accident as such—it was looking at the cause of the accident—it came out with all of the right things just in doing its own investigation. That was the independent investigation which came up with what the real causes of the accident were.

CHAIRMAN—Are there any other significant points that you would like to bring to the attention of the committee?

Ms Ellis—Can I comment on the Black Hawk inquiry very briefly? When it came out that that was going to be an open inquiry, I thought initially that that was a very good move, because at least then everybody had a chance to go along and see what went on. The next of kin and anybody who wanted to could go along and listen to that inquiry. Supposedly, it was an open board of inquiry. It has since been proved, of course, that it had its own problems with the president. Once again, history repeats itself. That person should not have been the president of that inquiry. Surprise, surprise! It was an internal inquiry. 'Let's charge a whole lot of people.' Surprise, surprise, we have charged the wrong people. 'Everyone has got up in arms so we'll drop all of those charges. We will not look for the people who really were responsible. We'll just forget the whole thing.' It had its own problems, too.

I went along to one of the days of that inquiry in Sydney. I could not believe the bank of lawyers there. I think it introduced other problems. As soon as you made it an open board of inquiry, everybody ran for cover. They got lawyers to protect them. That is one thing that was in stark contrast. The people who were killed were actually represented by lawyers. We had no such luxury. No-one was at the initial investigation into this accident—at the BOI—to stand up for those five guys. There wasn't anybody there. I was not allowed to go and say anything. There were certainly no lawyers involved. No-one was there to represent those people. So we go to the other extreme and we have an open board of inquiry and a mountain of lawyers. That brought its own problems.

With the *Westralia* inquiry we have an open inquiry. That is good. We have some civilians on the board. That seems to be good, but exactly what is their role? Are they watchdogs? Are they there to make sure that this whole process goes in accordance with a normal inquiry? This is being convened by a military authority. Will that report be published or submitted to the person who convened that inquiry—the chief of the navy—to have a look at it before he releases it? When you have an internal inquiry, you still have a whole lot of problems. My investigation over the last seven years leads me to believe that the only way is to have an independent investigation initially for the accident. A military fatal accident must be investigated by a body that is external to the military. What you do from there I do not know.

CHAIRMAN—One of the difficulties raised with me is having a coronial inquiry and a board of inquiry and both of them recommending that charges be laid or something like that. In essence, you really have to give the disciplinary powers to one body or the other, do you not?

Ms Ellis—If that board or whoever it is has the power to make recommendations about disciplinary charges, they cannot be overridden by any senior officers. That is what happened with the 70. They said that somebody really should have been charged with negligence for what they did not do, but Air Vice Marshal Gration again said, 'No. I think that's unwarranted. I don't agree with that.' So it was overridden anyway.

CHAIRMAN—That leads to another area that we have not touched on today but which has been a matter of concern to the committee, and that is the relationship between the Defence Force Discipline Act and civil legislation and charges under both of them. But we have run 10 minutes past time. Thank you very much for your attendance before the committee this afternoon, Ms Ellis. You will be sent a copy of the transcript of your evidence to which you can make corrections of grammar. I do not think there are any questions that Hansard requires of you with respect to spelling or any evidence you have given. Thank you very much.

[2.39 p.m.]

OTUSZEWSKI, Mrs Genia Gail, 81 Dartmouth Street, Coopers Plains, Queensland 4108

CHAIRMAN—On behalf of the subcommittee, I welcome Mrs Otuszewski to the inquiry. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the significance or the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. I also remind you of my warning on opening this inquiry this afternoon that this inquiry should not be misused as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege. The subcommittee prefers that all evidence is given in public, but should you at any stage wish to give any evidence in private you may ask to do so and the committee will give consideration to your request. We received your submission and it was authorised for publication. Are there any additions or corrections to that submission which you wish to make?

Mrs Otuszewski—No, there are not.

CHAIRMAN—Would you like to make a short opening statement to the subcommittee?

Mrs Otuszewski—I would. Included with my submission was a copy of a letter that I had sent off to the chief of army and also to Bronwyn Bishop's office. I think that precis-ed what had happened up until I got to meet the Minister for Defence Personnel and also the chief of army. It has been a long 3½ years. I would like to thank the committee for allowing me to speak today. It has been very difficult, because I know this committee has its limitations. I understand what the limitations are. I am not sure whether I should fill you in any further as to what the letter said and also what was sent off to the chief of staff. It is hard to know what I am supposed to say or do. I am unsure of what to do or say.

CHAIRMAN—We appreciate that it is very difficult for you to be here, Mrs Otuszewski. We would like to ask you a few questions about your impressions about how the whole affair was conducted and whether you think it ended up with the right outcomes, in your opinion.

Mrs Otuszewski—I was listening to the previous witness, and I concur with a lot of the things that she said, although we had slightly different circumstances. She referred to an open inquiry. We did have an open board of inquiry into Jacinta's death, and there certainly were drawbacks there. But we were afforded every courtesy while we were in that inquiry. We did have lawyers and people there so that we could put our point across

on behalf of Jacinta. Jacinta was represented by a lawyer at that board of inquiry. The process itself, as far as we were concerned, at that point in time was fine, because we were kept informed all the way through the process and we expected the outcome that we were told at the end of the inquiry. We expected that to happen. We always expected that there would be something done according to the report which was printed as a result of the inquiry.

I guess from there we saw the civilian side of things which were necessary as a side sort of issue and we were always led to believe that, regardless of any civilian action, the disciplinary action referred to in the inquiry report would be effected. Unfortunately, that did not eventuate. When the person who shot Jacinta was acquitted in the civilian court, the answer that I was given from the army when I then approached them was that that is the end of the matter really because he was found not guilty in a civilian court. That was not satisfactory and it still is not satisfactory to me. I am a public servant myself. I work for a public service department and we have people who are sacked on privacy issues alone, let alone for shooting people. I could not understand why they could not find something under which to discipline this person when they had assured us that that would happen regardless of any civilian inquiry.

Apart from that, I feel that the judicial process itself is a complete shemozzle. As far as I am concerned, they go to the expense of having a military board of inquiry; they publish a report, findings and recommendations; it goes to the chief of whatever defence person it is—in this case it was chief of army—and he makes a decision based on what his legal advisers tell him and that is the end of it. There is no court of appeal; there is nowhere you can go; there is nothing you can do except chase it up on a personal level or go to the minister. In my opinion, the minister in this case was totally ineffectual in what she did. Because of protocol, the Minister for Defence did not want to speak to me because Mrs Bishop is the portfolio holder for personnel.

So the process is appalling, in my opinion. There is just nowhere for a civilian to go to get anything done to force them to act even on their own inquiry recommendations—the board recommendations. To me it is a just a waste of taxpayers' money having an inquiry board.

CHAIRMAN—How can we make it better? Are you suggesting that it ought to be an entirely civilian process or not?

Mrs Otuszewski—I understand because I work with legislation myself. I also studied at great length the Defence Force Disciplinary Act in order to try to find something in there to force the army to do something. I understand there are two different types of legislation. So if we are going to have a civilian inquiry, then legislation would have to be enacted to empower that and I do not know how that would happen. I believe that, if we have open inquiries and we have civilians on that board, which is happening with the *Westralia* at the moment, they must be empowered to enforce whatever

recommendations the committee puts forward at the end of the report.

That can be done under the Defence Force Disciplinary Act. I believe that the civilians who are on the board are actually sworn in to be able to have that power during the time they serve on that board. I do not think that needs legislation changing. I do not think the answer is a civilian board because it is too complicated to change the legislation.

CHAIRMAN—Putting that aside for a moment, we had a case where the person was charged through a civilian process and no disciplinary action was taken. Without being unkind, are you suggesting that we ought to have two goes at this? Do you see my point? You are saying, 'We put it through the civilian court; they found there was no action to be taken, therefore I want the Department of Defence to take some action.' I think you can only have one system or the other.

Mrs Otuszewski—I do understand what you are saying and I accept that, but I do not know how you would do that. I believe that there should be some way—you see, you are dealing with experts and non-experts. We went through the civilian trial process and not at any time did I feel that a member of the jury understood the military procedures. So I cannot see how you could have a civilian process entirely so that people could understand how the military works. You are working with a certain culture here and it is not something that general people understand. It is only when you start digging into it that you start to understand the culture. I take your point that yes, he was found not guilty in a civilian court, but the fact of the matter is that he broke the army's rules, all of the procedures, all of the safety procedures and all of the things that he had been taught for 20 years to abide by, and the civilians did not understand that.

There are two separate types of law there. In the civilian court he got off beyond reasonable doubt because his lawyer was able to plant doubt that Jacinta could have caused her own death. The military board of inquiry was looking at specific actions that he took which broke military law, and that is what he did. He effectively broke all the laws that he had been taught to abide by—all the safety laws. The other issue is that the defence forces as a whole do not seem to be accountable under OH&S legislation. They do not seem to have anybody there.

CHAIRMAN—Yes, they are.

Mrs Otuszewski—Nothing was done about this under breaking of occupational health and safety rules and laws. I approached Comcare, which is the body that oversees that for Defence and for the Commonwealth Public Service. They produced a report which went on to the Commonwealth's safety and rehabilitation commissioner. I was unable to get the report in its entirety so it is in too much gobbledegook for me to read it through. I have to apply to the minister if I want the whole thing. That went to the Commonwealth safety and rehabilitation commissioner and it stopped dead.

This man in his job broke safety rules. What happens there? Where does that go? Breaches of safety are followed up, but it stopped dead. It took me months to get a copy of the report through Comcare because Defence held it up at its end because it had to notify people mentioned in the report. It took four months for me to get a copy of the report under FOI, and even then parts were blacked out so I cannot even follow it properly. So what happens under OH&S? Are they not accountable under OH&S?

CHAIRMAN—They spend hundreds of millions a year to comply with it in many ways.

Mr BEVIS—A lot of people have come along and said that military inquiries do not get the results because they are not independent and that when terrible things occur, particularly when fatalities occur, we should take out it out of the military's hands and put it in the civilian courts. Your experience is, if I understand you correctly, really the opposite of that, to say in this instance at least that the civilian courts did not comprehend the peculiar military aspects of it. I guess the quandary for the committee and I suppose for legislators generally is that, when you have diametrically conflicting views about the best way to investigate tragedies, it is a bit hard to know when you draw the line. Do you have any thoughts about where you think it is appropriate for the civilian courts independent of Defence to make their inquiries and judgments and for military processes to play a part, bearing in mind that I do not think that the public would want to engage in double jeopardy for someone just because they are in uniform?

Mrs Otuszewski—Yes, I think there are. I think the problem in our particular case was the jury rather than the judiciary. I believe it was the members of the jury who did not understand the military thing. I certainly think that there is room for a board of inquiry to be done in a civilian sense, provided they had access to experts and to people who could advise on the peculiarities of the military. Personally speaking, because I have had a lot to do with the culture and have spoken to people—I mixed with people rather than the rest of my family who were there in the court—from the beginning I knew that he was going to get off in there because there were just blank looks on the faces of the jury.

What was the significance of this evidence? When the expert witnesses were on the stand, they were just absolutely bamboozled by what was being said, whereas anyone who had any knowledge of the weaponry, the culture and the basic safety procedures—the procedures they had to go through, even the writing up of standing orders and the preparation for any of those things—completely understood the significance of the evidence. That went past the jury and it would go past most people I would suggest unless you understood. The judge himself had a military background and certainly the lawyers involved did and they understood, but I just do not think you can have a jury in those instances.

Mr BEVIS—Taking up the point you just made, if it was to go to a civil inquiry of experts, whether that is judges or some board or whatever—I guess it is all

hypothetical—if you go through that process and you end up with the same outcome, I guess what you are saying is that, if you go through that process, you are less likely to end up with the same outcome.

Mrs Otuszewski—Yes, I believe so. I think you are taking out the risk of people not really understanding. Normally with a civilian trial, they take people in to go on a jury and that can be anybody from the community. They are given a background and generally they understand what is happening in their own community. The Defence Force is a different community and people do not understand how it operates, so they cannot be expected to make a judgement on their procedures or their safety protocols and all the rest of it. They do not even begin to understand the culture. It is a separate community; it lives on its own.

The jury was at a loss, and that is where I think it fell down with us. If it had been an informed jury or an informed panel, the man would not have got off in a civil trial—not in a fit. Even his own lawyer in his summation admitted that he had actually breached safety. So for that alone he should have been held accountable.

Mr HICKS—So what you are saying is that you either have an expert jury or you do not have a jury but you just have a board of inquiry made up of people who are perhaps not in the military but military experts?

Mrs Otuszewski—I think you have to have a mix. I think you would have to have people who have a military background or were in the military. I do not think you need a jury. I think you need a board. I do not know how you would do that if you were going civil, because that is the way our process is—that it is a jury. But I do not believe that you need it. I think it complicates matters.

I was quite satisfied with the military board of inquiry, the way it was set up and the way it was conducted. There were little things that I felt could have been bettered in that process, such as the gathering of evidence. I have no experience of other boards of inquiry. But because of the time frame, it was only a matter of weeks from when Jacinta was killed to when it was set up. I felt they had done a fairly good job. The only thing that I can criticise in their gathering of evidence was that I do not feel that they did enough on checking his actual military experience and background. That is something that would have been done with a longer process. If they had done that, it might have been different and they might have been a little stronger in their recommendations for disciplinary action.

CHAIRMAN—One of the criticisms that has been raised of boards of inquiry is that they are closed, they are not open to the public—like the Black Hawk and the *Westralia* ones—and people therefore cannot attend; they do not even know the terms of reference. Did you feel that was a limitation in your case?

Mrs Otuszewski—No. We had a totally open board of inquiry.

CHAIRMAN—And you had opportunities to present evidence?

Mrs Otuszewski—Certainly did. We had the lawyer who was actually advising the board. We had an officer assigned to us who liaised with that lawyer if we had anything which we wanted brought forward, which we did. And any point that we brought up, he certainly listened to. He was the person who advised us on what the recommendations were likely to be from the board. He was also the person who advised us on how the military would act on those recommendations regardless of the civil outcome. So certainly we had nothing to complain about in the way that we were treated. There were some funny things that happened. For instance, the person who shot Jacinta sat beside us the first day. That was very distressing, and he attempted to intimidate us. We spoke to our liaison person, Major Mortensen. She approached his lawyer, and he was moved. So there were little things like that. He then sat opposite us. There was a walkway between us, and my husband and son-in-law were there. I sat on the outside so that we could keep some sort of control. We had to ask for him to be moved again. But we never had any trouble. Anything that we asked of them, they provided for us, and we certainly had any questions that we needed to know answered. So I think you have to have an open board of inquiry. But I do think that it was convened a bit quickly and there was not always enough evidence gathered. They do not need to act so quickly in future. I think they need to be more prepared.

CHAIRMAN—From a human relations point of view, apart from your disappointment at the disciplinary outcome, do you have any criticism of the Department of Defence in the way they handled you as a mother?

Mrs Otuszewski—Absolutely. They have done absolutely nothing. Anything that has happened I have had to push for, I have had to call for. The only thing that we received from the army from human relations perspective was that they actually did send out a person to help us with the funeral—not to help us with the funeral arrangements but to assure us that they would pay for the funeral. Apart from that, any sort of action has had to be taken by me.

For instance, I found out that the person who killed Jacinta was driving a taxi and was receiving money from the army. I found this out through my sources, and I was terribly distressed by this. So I rang the community relations representative in Canberra and asked what could be done about that, because I found it appalling. It was like he was getting a reward—a double wage—for killing our daughter. I had a very sympathetic hearing. I then asked for them to look into his background, because I had been told some things about him that I felt they should investigate. I was appalled that he was still serving in the army, with what I had found out. So I asked them to take action. I never heard anything back from them. I rang again a few weeks later to find out what had happened, and I was told that it was perfectly okay for him, because he had been driving a cab as an

extra job while he was in the service, and while he was on this pension it was okay for him to do it. His psychiatric report had been that he needed to do that for his health. I felt that he was a possible risk to the community, because if the psychiatrist's report was such that he needed to drive a cab, I felt that was fairly flawed—or possibly flawed. And it was not an independent psychiatrist; obviously it was an army psychiatrist who made the recommendation. But nothing was done about it. So I was terribly upset by the whole thing. Then I was given a number to contact in Brisbane if I needed to look into counselling for the family, but that was it.

Mr BEVIS—The evidence that came out in the processes that you have referred to in your submission identified breaches of procedure that should have been followed. I understand that one of your concerns is that, to your knowledge, army has not taken any action in relation to those breaches of procedure in respect of sergeant whoever.

Mrs Otuszewski—I believe he has probably left the service now. When I had my interview with defence chief General Sanderson last year, I was informed that he had applied under medical grounds for a medical discharge and that had been disallowed. In my meeting with Mrs Bishop she quoted from a letter from General Sanderson to her—she told me she would send me a copy of that, but I am still waiting for the copy—to the effect of what had actually happened. I presume that would answer some of my queries. I do not know.

Mr BEVIS—As a general application, as distinct from the specifics of your case, if there is a civilian inquiry into a matter, and even if it is a remodelled one where you have experts who are doing the inquiry, is it an acceptable arrangement for defence to subsequently, irrespective of what may be found in the civilian corps, conduct its own disciplinary action for breaches of disciplinary rules? It is like the first question I asked you—the really hard part about the circumstances in which you found yourself, apart from the obvious personal loss, in terms of the procedure and the structure. What do you do with two heads of power—a civilian power doing its thing and a military power with its set of rules—and how do you try to make sure that they operate effectively without overlapping and without placing military people in double jeopardy? I do not want to try to put words in your mouth, but is it fair to say that if there are military rules which are not the subject of the civilian hearing, those military rules should then be the subject of military consideration?

Mrs Otuszewski—Absolutely. That is what I was trying to get them to do—to actually look in their act—not just quote two sections of it which brought into play the double jeopardy rule, but look in their act and see if there was something there that he could be disciplined under, and I believe that there was.

Mr BEVIS—For example, the occupational health and safety which you mentioned earlier?

Mrs Otuszewski—Yes, the breaches of safety alone. The man was found not guilty of criminal negligence. There were eight charges which made up the charge of criminal negligence. There were lots of actions that led up to that criminal negligence which were peculiar to the military, such as swapping roles on the day, such as not acting on a direct order—all of those sorts of things which could have counted from the military perspective. It was not just the fact that he was found not guilty of shooting Jacinta; it was all the things that were peculiar to the miliary that led up to that action that should have been attended to by the military, and I always believed that. I believed that he may get off with the actual shooting, because of the doubt there, but not all the things that he did to break the army rules. They were military rules—not just safety breaches but military rules. They have standing orders for a reason. He was appointed to a position that day. He did not keep that position. He was sent to set up a range. He was not sent to conduct a shoot. Those sorts of things are what I tried to explain to the chief of army. They are peculiar to the military.

CHAIRMAN—Thank you very much for a personally very difficult interview on your behalf. You will be sent a copy of the transcript of the evidence you have given, which you may correct for grammatical errors. Once more, thank you very much for coming along.

Mrs Otuszewski—I would like to thank the committee for this chance to appear here. Thanks for your time.

[3.18 p.m.]

JOHNSTON, Mr Robert David, PO Box 44, University of Queensland, St Lucia, Queensland 4067

CHAIRMAN—I would like to welcome Mr Robert Johnston to the hearing of the committee.

Mr Johnston—I would like to tell the committee that I am a former flight lieutenant in the Royal Australian Air Force.

CHAIRMAN—You are appearing in a private capacity?

Mr Johnston—Yes.

CHAIRMAN—I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of parliament. I also remind you of my warning on opening this inquiry this afternoon that this inquiry should not be misused as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege.

The subcommittee prefers that all evidence is given in public, but should you at any stage wish to give any evidence in private you may ask to do so and the subcommittee will give consideration to your request. We received your submission and that was authorised as evidence for the inquiry. Are there any additions or corrections to that submission?

Mr Johnston—No.

CHAIRMAN—Do you wish the evidence to be given in camera or in public?

Mr Johnston—Public is fine.

CHAIRMAN—I invite you now to make a short opening statement before we proceed to questions.

Mr Johnston—In addition to what I have already indicated in my submission, I think that in many respects the provisions of the current investigative processes that are available to people within the RAAF, particularly those who are seeking resolution of grievances, are probably quite adequate. The problem I have experienced is that in many cases senior officers do not observe the standing processes of procedural fairness and

natural justice that would normally apply to most investigations. Were they to be encouraged to apply those conventions, then I am quite sure that there would be a greater measure of justice afforded to people who, for one reason or another, have sought some sort of service investigation. My principal experience is not so much with disciplinary matters but with administrative investigations. From what I have seen, the normal conventions of fairness and openness are rarely observed. I have personal feelings about why that might be the case. I will probably share those with you after.

CHAIRMAN—Your submission basically deals with the accountability of the defence department in relation to personnel matters. You have the Defence Force ombudsman, the AAT as well as appeals directly to the minister and through members of parliament. Do you think it is the people, or is it the process that is the problem or is it a mix of both?

Mr Johnston—I think it is the people. I think the process is probably a process has been adopted as a tried and proven process in civilian matters. I do believe that this could probably be properly implemented within a military framework and environment. I do not believe that there is sufficient scrutiny of the conduct of individuals who conduct these investigations. I think that is where the problem lies. There are particular instances that are peculiar to military service that enable senior officers to disregard the normal basics of procedural fairness and get away with it. I would be happy to speak to you about those.

CHAIRMAN—What you are suggesting to the committee is that the framework in which the procedures are in place is satisfactory but that the unit commander or somebody who does not see that procedural fairness or natural justice is instituted forms a block on any higher appeal. Is that what you are saying?

Mr Johnston—Yes.

CHAIRMAN—How can we get over that?

Mr Johnston—To begin with, I think there is an institutional problem within the Defence Force that requires that certain special measures be taken to see that people comply with the normal requirements of natural justice. I will give a brief example. I made a complaint some two or three years ago about a particular matter. That complaint was made to a group captain. It was a serious matter. It involved a serious offence. That particular group captain asked to speak to me about that particular matter after he had investigated it the following Monday. I had an interview that very afternoon with my CO, who told me that the group captain had changed his mind: he did not want to discuss that particular matter with me any more. I think the group captain was aware of the serious implications of that particular complaint. I then took that matter to my CO who told me not to worry about the matter any further. I then took the matter to an air commodore who promised that there would be an investigation into that matter. That investigation was

subsequently stopped. I was never told why. I then had the matter taken to the Minister for Defence Industry, Science and Personnel, Mrs Bishop. She said that there would be an inquiry into that. I believe that that inquiry went for some months. Interestingly enough, the people who were involved in that particular offence were not spoken to. Neither was I. The findings of that particular investigation were completely at odds with all the evidence that was undertaken.

In another complaint that was made at the same time, I was questioned for four or five hours. I was told that other people would have the opportunity to also be questioned in regard to that particular matter. Certain statements were made, which were quite damaging to me, which were never put to me but which found themselves placed in the final report. That report was quite damaging to me. I thought that it was very odd that these particular matters were never discussed with me. The particular gent who was commissioned to investigate the matter, as it turned out—I found out later—was a friend of the fellow he was investigating. The review that was done of that particular investigation was also undertaken by a fellow who I believe is a friend of the chap who conducted the investigation. It seemed to me that there was very little impartiality in the whole affair.

Also, I was subsequently put before a medical board, which was convened to evaluate my medical state. They were required to make their own judgments of my medical state and also to make some reference to a statement by my CO, also a statement by a consulting specialist and also some comments that I had to make. In all three cases, it would appear that both the medical specialist and the CO felt that I was not unreasonably disturbed by the conduct of those particular investigations. Yet the medical board found, completely at odds with the evidence that was presented to them, basically that I was not fit to remain in the RAAF, as a result of the complaints that I had made. Yet the complaints that I made were based on very observable facts.

I took these matters back to Mrs Bishop's office. I was advised that they were really unable to come to an independent judgment of the matter, because they were constrained to follow the advice that was given to them by the senior officers in the RAAF. The funny thing was that the fellows in the RAAF who had been given the task of investigating the matter were actually involved in some of the problems. The chap who was the project manager of the whole investigation had been described in our initial complaint as the principal architect of my problems, yet he was never removed from the case. So I felt really from the outset that it was very unlikely that I would ever obtain a proper independent assessment of my particular complaint.

I am sure that there is a great measure of sympathy from people within those departments whom I have just spoken to at length about the whole case, but I think they feel that they are really unable to deal with the matter properly. I think that the matter, if you get back to its original cause, was a result of a lack of objectivity and a lack of adherence to very basic principles of natural justice and procedural fairness. I have been

kept in the dark.

As to that particular investigation that was held, they would not tell me the terms of reference of that investigation. They would not let me see what anyone else had said. I was not allowed to see the findings and recommendations of that particular investigation. All I received was a brief letter from an air commodore which was quite disturbing. When I asked whether or not I would be able to have that matter reviewed, and you normally are able to have these matters reviewed, I was told that as the investigation was dated more than two months earlier, I was unable to have the matter reviewed. They suggested perhaps I might like to take the matter to some sort of other independent authority like the ombudsman. I spoke to the ombudsman and they said that they are very much pressed at the moment for time and they would rather intervene in matters only once it was apparent that every other avenue of examination was extinguished.

Mr HICKS—It is obvious you went right up through the ranks to put your case and then you finally got to the minister's office. Unfortunately, the minister is guided by the senior officers, which is natural. What would you see would be a circuit-breaker between the military and the minister's office? Naturally enough, the only advice that the minister can take, that I would see, would be from the senior officer.

Mr Johnston—I think in this particular instance they might have exercised sufficient care to see that the fellow who was put in charge of the investigation was not actually named in the investigation in the first place. The particular chap who has had the carriage of this investigation from the outset was described by my solicitor as the principal architect of my problems. We have brought this particular matter to Mrs Bishop's attention and she seems hamstrung in some respect, unable to deal with it. I am unsure why.

Mr BEVIS—Mr Johnston, you made reference to an approach made to an air commodore that led to an investigation that was subsequently stopped. I have a couple of questions about that. How do you know that your approach to the air commodore produced an investigation? Were there approaches to you? Did things follow?

Mr Johnston—Our particular air commodore in charge of our particular unit produced a calendar that had a photograph of himself in a flying suit next to his aircraft. At the bottom there was a message to the effect, 'If you have any problems with life in the RAAF or any matters that you think I should be aware of, please do not hesitate to bring them to my attention.' He was in Amberley for the training command conference in late 1995. I waited for him in the officers mess where he would go of a night-time. On one particular evening, after he had left the bar but before he had reached the lavatory, I asked him if I could speak to him. I did not want to have to speak to him in the company of other senior officers. I spoke to him for about a quarter of an hour. He was very kind, he put his arm around me, he took me outside—I was quite upset by the whole thing—he said, 'This is shocking' and said that there would be an investigation about the matter.

Not the morning after, but the morning after that, I think, I was asked to visit my CO. My CO was very angry that I had made this particular complaint. He was so angry that he was moved to violence and asked me would I stand outside his office for a quarter of an hour while he composed himself. When I re-entered, he said, 'If you ever make another complaint about me or about life within this unit, I will charge you.' He did not say what he would charge me with. He then said that the air commodore had spoken to him and said that there would be an investigation. He nominated the fellow who was to investigate it; it was a Wing Commander Johnston, who I think was an air traffic controller in Melbourne and one of the air commodore's staff officers. I was then told not to bother hurrying the matter, that they would come up in their own time to conduct this investigation. I was left in no doubt about the feelings of my CO, who felt that I had been very disloyal. I had brought these matters to his attention previously and he had done nothing about them. So I did not feel that it was inappropriate for me or unfair of me or cowardly or anything like that to have brought these matters to the attention of the air commodore. That particular air commodore was subsequently posted shortly after to a position in Canada and I never heard anything more of my investigation.

Mr BEVIS—So your suspicion is that the investigation halted with the transfer of the air commodore?

Mr Johnston—Yes. I think actually before he left, I think he decided that that particular investigation would have been damaging to air training command and possibly to some extent to his command of that particular training command.

Mr BEVIS—You have mentioned a couple of examples where allegations that were detrimental to you were permitted to be recorded without you first being given the opportunity to even know about it, much less respond to it. Is that in your experience a widespread practice in defence disciplinary arrangements?

Mr Johnston—I think in my particular circumstance the fact that I had made very serious allegations to the minister greatly angered many senior officers who, I think, would have much preferred it had I brought the matter to their attention. The fact was that I had brought the matter to their attention but they had decided not to deal with it. I think that they were very angry with me. I believe that the terms of reference were framed in such a way that the investigation was perhaps more into myself than into my complaints. I believe that it was found necessary to discredit me in order that my complaints may be extinguished.

I became immediately concerned when I was sent to visit a RAAF psychologist. I have an administration background and I know that when people are sent to visit a RAAF psychologist, it is normally with the intention of obtaining some sort of opinion that the fellow is no longer fit or suited to remain in the RAAF. It is described as 'incompatible with service life'. In many respects, I do not consider that I am incompatible with service life. I have always sought to uphold service requirements and service regulations. I

discussed the matter with a lawyer—with a legal officer, in fact, in the army—who said, 'You had better get some sort of independent assessment as well, because they could be doing a job with you.' I was referred to a clinical psychiatrist by an army doctor the same day that I went to see the RAAF psychologist. As it turned out, the RAAF psychologist said—and I think that you might have a copy of it in my submission—that I was a conscientious and decent officer and that the problems that I was experiencing were really related to the fact that my complaints had never properly been examined. The psychiatrist said that I was very upset about the whole matter and that I should have some weeks off work.

As soon as I presented the certificate to my CO to obtain some leave, he suggested that it would be better that I went before a medical board. I knew that his intention was that if he could not get rid of me administratively, he would have me medically boarded out.

Shortly thereafter, I was put before a medical board which was chaired by my CO, who was a RAAF policeman, not a RAAF doctor. I realised as soon as I walked in that it was going to be very difficult for me. At the end of that medical board, I was invited to make a statement in rebuttal of the findings and recommendations of that medical board, but they would not give me their findings and recommendations. They said that I should make my statement, but they were not prepared to release theirs. I got an independent civilian solicitor to write to Mrs Bishop and ask for them to release theirs. To this date, they have never been released to me. The only way I was able to get a copy of what had been written, particularly by my CO, whose comments were greatly valued by the board, was to have my medical file transferred to the army at Victoria Barracks. The lieutenant colonel for whom I was working at Victoria Barracks said, 'Here is your medical file. Photocopy whatever you like.' That was in accordance with the requirements. I am entitled to see whatever I can. Once I had obtained those documents, that medical board seemed to lose some influence. It petered out and the matter was held in abeyance until there was a subsequent medical board.

Mr BEVIS—What was the time gap?

Mr Johnston—It was about a year. I did not think the medical board was particularly fair. At the time, I had some sort of gastrointestinal disorder which precluded me from taking the medication which I had been prescribed. I rang up one day about a week before the medical board and said that I had diverticulitis, that I was unable to take my tablets and that I felt that any particular finding that the medical board may make may not be correct because I was unable to take my medication. They got back to me a couple of hours later and said, 'Don't worry about that. We'll see you anyway.' I think in many respects their mind was made up.

Mr BEVIS—You included with the documentation a copy of Air Commodore Espeland's letter to you that was a result of one of the inquiries. I am not exactly sure

where this particular inquiry fits within the context of the other things you have been talking about. Firstly, could you shed a bit of light on that? The substantive question is: how do you view that inquiry and the outcome?

Mr Johnston—That inquiry was very interesting. That inquiry was requested by my solicitor in April 1996. I received numerous responses from the minister.

Mr BEVIS—Can I just interrupt you. I have just been reminded that that document is a confidential submission. I am not seeking in this forum to go into it in any detail.

Mr Johnston—That particular investigation was requested by the minister. It seemed not to get started for a period of about five or six months. As the matter had taken five or six months, I thought it was strange that they happened to select someone to conduct the investigation who happened to be a friend, and declared himself to be a friend, of the fellow who was the principal senior officer who was investigating it. I thought it was funny that they would go to such lengths to pluck a fellow out of retirement to conduct an investigation into one of his friends. This chap said that he was not prepared to tell me the terms of reference. He did say that he would get back to me about the matter, but he never did. Am I answering the question?

Mr BEVIS—The substantive part was how you regarded that inquiry outcome? Do you think it addressed the matters that you sought investigation of?

Mr Johnston—It seemed to go for months and months. I had discussions with two senior officers and my solicitor had discussions with one other senior officer, all of whom indicated very clearly to us that they had very serious reservations about the conduct of that inquiry and that they felt the whole thing was a set-up. It was very interesting. I was very disturbed by it. I spoke to my solicitor, who said, 'Look, it is probably important that you have some sort of independent investigation or assessment of this inquiry and you probably require a judicial review by a Federal Court judge. That may cost you in excess of $40,000.' I looked at that and I thought about the whole thing. I realised—

Mr BEVIS—He offered his services; he was willing to take some of that money from you, I imagine?

Mr Johnston—I presented him with a lot of background information. From his discussions with ministerial representatives, he was firmly of the opinion by that stage that there would be no proper resolution of the matter. There was very little doubt in his mind. I have never had any misgivings about his advice. I believe it was sound advice—unpalatable perhaps, but sound.

Mr BEVIS—Forgive my cynicism.

Mr Johnston—Yes. I spoke to a squadron leader in training command who was connected with the matter. She was a staff officer. I said to her, 'Look, be careful with this particular matter. I suggest that if you are offering any assistance or any advice to the air commodore before he signs this matter you bear in mind that this may be the subject of some sort of judicial review.' I felt that if I was to advise them of that very early in the piece I may obtain the objectivity and fairness that I would otherwise have to pay a lot of money for. Once they heard that, instead of winding up the inquiry and releasing the findings and recommendations, it was sent off to air force office in Canberra to be reviewed by their legal officers. It was there for quite some months. I kept asking for copies of it and they kept writing back to my solicitor saying, 'We are not prepared to release this matter until the time that it has been properly reviewed.' All we ever got was the letter from Air Commodore Espeland, which was drafted by the legal officer who reviewed the whole matter.

I had a lengthy conversation with this lieutenant commander when he was in Brisbane. I told him that I was never given the opportunity to defend myself against the allegations that had been made against me. I told him that as the investigator was a friend of one of my COs it seemed strange to me that he be invited to conduct the investigation. Thirdly, I thought that the solution that they had arrived at whereby this particular CO had been what they described as censured was meaningless in that he had also been promoted and censured. I think that was meant, in many respects, to send a clear message that, whilst he had been found perhaps to have breached certain defence regulations regarding harassment and victimisation, he had in real terms received a pat on the back. By the way, during the course of the investigation I believe the air commodore was also promoted and received a mention in the Australia Day honours. I think there had been no real justice in the matter. To me, it was a pretty hollow victory.

Having completed that, there was a further attempt to disgrace me and discredit my allegations by having me put before a medical board and finding effectively that I had lost the balance of my mind, which I do not believe was ever the case. I concede that I was upset and annoyed by the matters, but I did not think they had to go so far as to discredit me in that way. I did not think it was necessary. I thought it was very heavy handed.

CHAIRMAN—Mr Johnston, how should the process be changed to overcome these shortcomings? What is your recommendation?

Mr Johnston—The interesting matter that concerns me is that there have been legal officers involved in the conduct of my case from the very outset—people who you would think would be aware of the principles of natural justice and procedural fairness—who have consistently denied me those requirements to a fair investigation and hearing. I think the only reason they are prepared to do that is that they recognise that, if they are found to have behaved improperly like that, there was no penalty involved; as I said, they may be censured and promoted. There is no accountability. There is no punishment for people who really know better. In many respects, these are not people who are unqualified

investigating officers; these are senior RAAF and navy legal officers who have been prepared to ignore the very basic tenets of natural justice in order to manipulate outcomes which are favourable to their management superiors.

At the very outset of this matter, I was taken aside by a wing commander whom I know quite well and whom I am quite sure has my best interests at heart. He said to me, 'Don't bother to argue the toss about this. Don't bother to complain. They will get you in the end. You cannot beat the system.' I know that when we join the Defence Force there is a certain expectation that we must subordinate certain rights that normal members of the community have for the good of the service. Perhaps that is necessary. We can be posted here or there. We have to obey instructions from superior officers or we can be charged. It is a very matter-of-fact sort of approach. I think that is well understood by most people in the Defence Force.

The problem is that I think people have tended to carry that military ethos of discipline and obedience over into the judicial aspects within the Defence Force. For example, in a personnel matter it is made quite clear to servicemen that your particular preferences regarding where you would like to work and what you would like to do are always taken into consideration. However, the needs and requirements of the service must be taken as paramount and your particular requirements, even though they may be taken into consideration, are subordinate to those. I think it is the same in the military justice arena. They are quite happy to have matters investigated, but where it becomes likely that a finding would be damaging or detrimental to the efficiency or the image of the service, I think certain obligations of fairness and so on are abused so that particular outcomes can be reached which save the service any particular embarrassment or harm.

That is seen as part and parcel of service life. I do not think that is a new thing; I think that has been going on for some time. I once spoke to a squadron leader in Melbourne about this particular matter. I said, 'Look, I think it is unfair. How come this matter has taken so many months to get started and yet I notice that the people who are being interviewed are not even interviewed under oath?' She said to me, 'Robert, do you really think it would make any difference whether or not these people were put on oath?' I was left in absolutely no doubt that things as they are, particularly in modern days in the military, people cannot afford to be seen to be not supporting the system. If you are seen to have separated for one reason or another from the system, your end is very near. There are no half measures, I believe.

In my particular case, I made a complaint about a particular thing which I thought was quite serious. The legal arm of the service, the administrative arm and the medical arm all joined in a uniformed approach to discredit me and separate me from my job. It took them two years but, after some consistent effort, they achieved their outcome.

CHAIRMAN—Is there anything additionally relevant to this that you would like to put before the committee?

Mr Johnston—I cannot think at the moment. I think I have covered it.

CHAIRMAN—I think you have covered the points.

Mr Johnston—It is a state of mind. When I spoke of a culture of fear, there is actually a culture of fear within the RAAF. People are afraid to talk about things that are seen as being disloyal. People are frightened into making statements and failing to do things that they know they should do. Experience shows that, if you are caught having made an admission or having done something that was incorrect or downright illegal, if you can demonstrate that your motives were some misguided belief that you are somehow saving the service from some sort of problem, be it personnel or otherwise, then you are excused for your conduct or perhaps even rewarded.

CHAIRMAN—Thank you very much for your attendance here today. You will be sent a copy of the *Hansard* to which you can make corrections for grammatical error. Thank you once again for appearing this afternoon.

[3.54 p.m.]

HERRICK, Mrs Diana Margaret, c/- Unit 34A Magic Mountain Apartments, Great Hall Drive, Nobby Beach, Queensland, 4218

HERRICK, Mr Ronald George, c/- Unit 34A Magic Mountain Apartments, Great Hall Drive, Nobby Beach, Queensland, 4218

CHAIRMAN—On behalf of the subcommittee, I welcome Mrs Diana Herrick and Mr Ronald Herrick to this hearing. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in the respective houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. I also remind you of my warning on opening this inquiry this afternoon that the inquiry should not be misused as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege.

The subcommittee prefers that all evidence is given in public, but should you wish to give any evidence in private, you may ask to do so and the subcommittee will give consideration to your request. We received your submission and it was authorised for publication. Are there any amendments or corrections that you wish to make to that submission?

Mrs Herrick—Not at this stage, no.

CHAIRMAN—I invite you now to make a short opening statement if you would like to.

Mrs Herrick—My son died in Phuket whilst on leave from Malaysia on 5 July 1996. We feel that both the military police and the Thai police investigations were not thorough and also that the second investigation conducted by Lieutenant Colonel Griffin was the army investigating the army. They virtually had no intention of altering the course of events. Key witnesses were not interviewed in the first investigation and neither were they interviewed in the second one. Hotel phone records have never been released to us or, as far as we know, to the army—at least, it makes no mention of them in its report. We were never told the truth from the beginning when we were first informed of my son's death and the story kept changing from day to day.

Even though the soldiers made a statement, there is no written evidence that they were ever interrogated during both army investigations; only statements were made. As far as I know, from the army's point of view, other witnesses were not interviewed and statements compared. Three days were allowed for a visit for an investigation in Thailand to interview several witnesses, which did not give them time to conduct a proper

investigation. If a similar thing had happened in Australia—there has never been a time limit given as long as the people are interviewed or witnesses contacted. Some investigations go on for years and years, whereas in my case a time limit was given. Even witnesses whom we ourselves had managed to interview in Phuket were never interviewed by federal police or the army.

In September 1997 some records from the Southern Pacific Hotels were given to us, in particular a hotel fax which definitely stated times of events, particularly with reference to Private Eeles and Corporal Harris. These times are in direct contrast with some of the soldiers' statements, particularly Private Eeles and Harris. All of the soldiers were given the all clear to leave Phuket well before an autopsy or the information was given to the Thai police. In fact, the all clear was given on 6 July when an autopsy still had not been performed. My son has been made out to be a drunkard, disorientated and foolhardy, which on the second investigation Lieutenant Colonel Griffin's reports most highly recommended him. Even though he has had some drink on particularly special evenings, at no time have I seen my son unable to know what he was doing or disorientated.

Information has been held back. Since September 1996 we have been requesting X-rays, hospital records, police reports, police photographs, and we still have not received them. We have requested them through the army and the department of foreign affairs. This month we called in to Bangkok to see Interpol and to see the general of police there. Their attitude has been completely different. They are quite willing to help to obtain these X-rays, et cetera and yet our own Australian personnel have not been able to provide us with any of this information.

Therefore, I feel that we have not been able to really clarify any of this situation because information has been held back. In particular, it seems to me that the army is just trying to prove its point—that it found it an accident—yet it has no more proof than I have that it was not. It seems to me that Professors Lusby and Moynihan, who were given certain documentation, found that it was likely that my son died from brain damage that was not reported in the autopsy. My private opinion is that it could have been either of these things that had caused my son's death. Therefore, I feel that the army are just trying to prove their point that it was an accident when there is no proof either way.

CHAIRMAN—Thank you very much, Mrs Herrick. It is a very sad event for you to have lost your son in this way. It was not very pleasant reading your submission. Can you identify the shortcomings in that first inquiry where the military police and the Thai police made their first investigation? Where do you think that fell down?

Mrs Herrick—I did not mention that one of the main points was that we feel that negligence was a big part in our son's death—from the soldiers Eeles and Harris and the hotel. The main reason was that the military police were invited to help, but they did not see the other side of the story. They did not interview any Thai witnesses whatsoever. We

have been told that this was because it was Thai jurisdiction. But on the other hand, the Thai police were quite willing for them to help in other ways. They were quite willing for them to help with the soldiers' interviews. They listened to all the scenarios of why they thought it was an accident, but they did not see the other side of the story—listening to witnesses' stories. Apparently they did not notice the difference in times of events from the hotel; otherwise this would have been looked at in more detail. Even in the second investigation quite a few things were brought out that they had not investigated further. A lot of the things that have been said are contradictory. You have statements where the military police are not satisfied with the Thai police investigation and on another report they are satisfied. The Thai Police were drinking whisky in one interview and they did not follow up certain things, and yet other statements say that they were quite happy with it. I just feel that if it had been in Australia there is no way that it would be a satisfactory investigation.

CHAIRMAN—It was essentially, from a legal point of view, a matter for the Thai authorities, because it was a death in a foreign country and, therefore, it came under their jurisdiction. So the opportunity of the Australian Defence Force to operate there legally is somewhat circumscribed.

Mrs Herrick—At the time, the investigation was being treated as a murder or homicide and, therefore, the military police were quite willing to step in for the wellbeing of the soldiers present. It was stated by Mark Webster, the vice consul, that under the circumstances it was appropriate that the military police help out in this situation. As far as I am concerned, the Thai police, from all statements I have read, were quite willing for them to help. Yet as long as the military police had the soldiers out of Thailand very quickly, that was all that mattered, whether or not justice was done.

CHAIRMAN—Are you implying that the military police were protecting the soldiers?

Mrs Herrick—I feel that way, yes. I do not think it was a thorough investigation.

CHAIRMAN—What evidence do you have of that?

Mrs Herrick—When you read all the statements by McGarry, Webster and Tims, things were not followed up properly. Mark Webster stated that there was a period of 20 minutes when Private Burke was missing from the bar, and nothing was done about that. Nothing was checked further. Yet their statements said that they were not informed of this information and, if they had been, they would have checked it. But the statements are contradictory in what they are saying—via the interpreter—that they were notified of these differences. I just do not feel that it was investigated properly at all in any way. If they were to come up with a statement, which they do, that it was definitely an accident, all witnesses should be interviewed. Even the Thai police did not interview witnesses who were guards. There were three guards on duty on the night of the incident and only one of

them was interviewed. If this was in Australia this would not be allowed to happen at all.

CHAIRMAN—Going back a couple of minutes, you made the point that it was a Thai civil investigation. In one sense the fact that your son was in the army is really no different from my case as a civilian being there if the same thing had happened. The legal processes in Thailand would have been exactly the same. But you are hinting that somehow or other the Australian military police may well have influenced the Thai police, are you? You said that the Thai police were investigating a homicide or a murder as their starting point and that the Australian military police got the other soldiers out of the country very quickly—that was one of their interests. Do you think there is any evidence that the Australian military police attempted to influence—or, in fact, influenced—the Thai police force in any way at all?

Mrs Herrick—I believe so.

CHAIRMAN—How would they have done that?

Mrs Herrick—If it was a homicide—and apparently that opinion was not changed until 25 July—they did not even wait for an autopsy. They had no other evidence before the soldiers left the country. In that case, if there was any doubt, when would they have interviewed the soldiers again? Surely if it had been anybody but soldiers they would have been remanded there or not allowed to leave until a proper investigation was conducted.

Mr BEVIS—Two of the things that are in your letter to us have intrigued me about the conduct of the inquiry. You refer to Wassana Udtha, who was with the soldiers when they returned in the early hours of the morning, I think. As to the fact that that person was not interviewed by any of the various investigating authorities, whether they were Thai or Australian—have you ever been given a response as to why that happened, and why what would seem to be an interesting and useful witness was not approached by anyone?

Mrs Herrick—I believe she was interviewed originally by the Thai police but there is nothing in the recordings to say what her statement was. We have actually spoken to people where she worked, and a lot of information given was that she saw far more than was stated to the police, but the military police never interviewed her at all. They never interviewed any Thai witnesses in the first investigation whatsoever.

Mr BEVIS—You have raised that with Australian authorities. Do they have a different view of the facts, or a reason why it is not relevant to see her, or some procedural problem with having sought her views on what transpired? Any response?

Mrs Herrick—No.

Mr BEVIS—In a similar vein you refer to what you understand to be differences

in the evidence between some of the statements of the soldiers in the inquiry and some of the other statements relating to what happened that night—discrepancies in timing of events—and the fact that the hotel telephone records would shed some light on the accuracy of these statements, but that has not been sought. Have you received a response from any of the Australian investigating authorities about whether they agree that those telephone records would be useful and why they have not sought them?

Mrs Herrick—Yes. Lieutenant Colonel Griffiths said they would be useful, but we have never seen anything of them at all. It was never in the report. We have now asked the Thai police for their records and any other records that they can find. According to some of the Thai police statements, they fit in with the hotel's description of times that things happened. Yet Private Eeles and Corporal Harris state that they looked at their watches and it was a certain time. In the second investigation it was virtually fobbed off that there were discrepancies in the time, that 10 or 15 minutes here or there does not matter. But they were very exact—Private Eeles and Corporal Harris—in the times they recalled. Yet the police state that they were called at 6 o'clock and told that someone had died in the hotel. We were told that my son died on the way to the hospital. We were told that, in the statements by Private Eeles and Corporal Harris, they were awoken by the hotel receptionist at five to six. These things are all contrary. We believe that those two soldiers were negligent in their duty towards another soldier. They were offered transport to use to take my son to the hospital, which they did not do. They did not get him a taxi or anything, never mind an ambulance. When we went to Interpol, apparently it was mentioned by the police that there was a matter of payment for the ambulance that was being considered.

Mr BEVIS—By who, sorry?

Mrs Herrick—By either the ambulance people or the hotel. A matter of payment was the main consideration. If an ambulance could not come, why did they not take him to the hospital themselves? First of all, you do not move anybody who is injured if you can avoid it, but if they were not going to get any medical treatment—one of them stated that he thought he was hit by a car. The other stated that he thought my son was in a brawl. If you have seen the photographs of my son's injuries and read about them, you would realise that it would be very hard to say that he did not need any attention whatsoever.

Mr BEVIS—His room mate, Davis or Davies—I cannot find much reference to what he had to say. He was out to it, was he? He was asleep through all this?

Mrs Herrick—No, he did make a statement. He was the only one who made a statement before they left Phuket.

Mr BEVIS—I am not sure what was in it. It is not referred to. I do not pick it up as having contributed anything to shed light on what transpired.

Mrs Herrick—I do not think he had any knowledge of what happened until the soldiers, Eeles and Harris, took him to the room 1706 where he was staying. Then he tried to help in every way to perform CPR, et cetera.

Mr BEVIS—Procedurally—leaving aside your personal grief—what procedures should governments put in place in relation to deaths of Australian service personnel abroad that occur in non-combat circumstances, particularly like this? What should have been done differently? What things should have been available to you that were not?

Mrs Herrick—I think it should have been treated as though it was not just a civilian case because he was on leave. It was not as though he had gone to some far-off country on his own accord, trekking around the globe to some place where the government might suggest that tourists do not go. It was on leave to a known destination for soldiers to frequent when they are in that area. Therefore, I think it was part of the army's duty of care to find out what had caused the incident.

Mr BEVIS—Is your concern the procedures that were followed or the fact that the people who were doing this did not do it as thoroughly as you think it should have been done?

Mrs Herrick—As far as the investigations are concerned?

Mr BEVIS—The investigations by the Australian authorities—

Mrs Herrick—I do not think they were thorough at all. In fact, Mark Webster, vice-consul, states that he did not think it was thorough. He certainly was not impressed by the Thai authorities and also by the MPs. He felt that there should have been more checking of certain events.

CHAIRMAN—I draw the inference from reading your submission that you are not satisfied that it was an accident. You think it may have been murder. How can this be dealt with, though? It is a matter for the civilian authorities in Thailand. Are you suggesting that the Australian Defence Force should investigate this as a murder and investigate the companions of your son? In that case we get into the difficult legal proposition of having two authorities looking at the one alleged crime.

Mrs Herrick—Looking at the incident myself—I have checked the area, everything about the hotel, everything that went on in the evening. I have no reason to believe that it was a Thai national who had anything to do with it. If it was not an accident—I have no proof at this stage that it was not—I believe that there was negligence on the part of the soldiers and on the part of the hotel.

CHAIRMAN—In so far as rendering first aid and getting assistance is concerned?

Mrs Herrick—Getting assistance, yes. I believe that there should have been a board of inquiry so that the soldiers made their statements on oath, rather than a statement just being taken. One of them was undertaken in Phuket. The others were taken in Malaysia after they had left the incident. As far as I can see, there is no Thai person involved. If there was foul play at all, it was on the part of an Australian soldier. There is no other reason. At that time in the morning, there would be hardly any staff on duty. The hotel was only 40 per cent to 50 per cent occupied. There certainly is no reason at all why a Thai national would have anything to do with it. If he was going to be mugged or anything happen, it would be in between leaving the bar and entering the hotel. He entered the hotel uninjured. He was able to walk up and down stairs, into a lift. He was not disorientated as suggested by the second investigation. He managed to get from the bar, in the right door, up the stairs, in the lift, down the stairs again and back up to the seventh floor. I feel that if it was not an accident, then only the soldiers would have been involved—by some sort of drunken brawl, something he may have known, some motive linked to something he may have known about drugs. Anything could have caused some words or something that may have caused some sort of fight or something to that effect.

CHAIRMAN—In your opinion, did you have adequate opportunity to put your views to the defence investigating authorities at any time or at all times?

Mrs Herrick—The stories I had from the beginning kept changing. There were different stories coming from all angles. If I had not gone to Phuket in September 1996, I would not have known that there was a suspicion of foul play by any of the soldiers. In fact, when I went to Phuket, I was under the impression that it was probably a mugging by a Thai national or something like that. I had never been to Phuket before. I was thinking of Bangkok. I thought that maybe something had happened like a robbery gone wrong and maybe he had been knocked over the balcony and left to die because it had gone wrong. It was more like a robbery. I had no suspicion of any soldiers involved whatsoever.

I was quite prepared to believe that it was an accident. But when we arrived there, everything we had been told was different. It was a different situation. We were told that there is a knee-high balcony and that is why it was an accident. We were told that he fell over a knee-high balcony. It was not a knee-high balcony at all. We were told that it was wet and slippery. It was a wet evening, but it was a surface that was not slippery at all. It was pebblecrete. Nothing that we were told fitted in. We were told that he died on the way to the hospital. We were told that by one of the army chaplains originally. When we went to Townsville to see where my son lived, et cetera, we were half told by the chaplain, 'Your son may have died in the hotel.' When he saw the look on my face, he changed it: 'Or on the way to the hospital.' Everything that was stated was different from what appeared when we arrived at the scene. That was when I was really suspicious. I thought there may have been an incident originally when my son had been the victim of an attempted robbery. He still had his watch on, so it could not be that.

That was the only suspicion that I had. I had no suspicions of any soldiers or that it was a murder investigation at all until I went there. Even the hotel staff did not believe it was an accident. This was in September 1996. It has been referred to in the second investigation that this was just a rumour. But they did not believe it was a rumour. They just laughed when they said, 'What have you been told?' I said, 'An accident', and they laughed.

That is not the attitude of people who believe that it was an accident. There was nothing in any way to prove that he could fall over a balcony of this height. Even the Thai police, when we went to see them in Chalong, had stated that in their opinion he fell from the fourth floor walking up the stairs from the fourth floor—one flight of stairs. They did not agree with the military police verdict.

So there is nothing that fits in at all. I would just like the soldiers to be put on oath, and not words from the vice-consul and all the other people involved, particularly to do with the army, to see what would be said under oath and to make it clear to me why there are time differences, why they are saying things that are disproved by the hotel and the police and what is the reason for it. Is it just to cover up negligence or is there more to it than that? There are just so many avenues that have not been explored.

CHAIRMAN—Thank you very much for your evidence, Mr and Mrs Herrick. You will receive a copy of *Hansard* in due course to which you can make grammatical corrections. Thank you very much for coming along this afternoon.

[4.28 p.m.]

MACKELMANN, Mr Grahame Douglas

CHAIRMAN—On behalf of the subcommittee, I welcome Mr Grahame Mackelmann. For the benefit of *Hansard*, would you please state the capacity in which you appear for the subcommittee?

Mr Mackelmann—I am here because of the board of inquiry investigation into the death of my son, Craig Mackelmann, in the RAAF Mirage in 1986.

CHAIRMAN—Thank you. I must advise you that the proceedings here today are legal proceedings of the parliament and warrant the same respect which proceedings in respect of houses of parliament demand. Although the subcommittee does not require you to give evidence on oath, you should be aware that this does not alter the importance of the occasion. The deliberate misleading of the subcommittee may be regarded as a contempt of the parliament. I also remind you of my warning on opening this inquiry this afternoon that this inquiry should not be misused as an opportunity to make defamatory comment against named individuals under the protection of parliamentary privilege. The subcommittee prefers that all evidence is given in public but should you at any stage wish to give any evidence in private, you may ask to do so and the subcommittee will give consideration to your request. We received your submission and it was authorised for publication. Are there any additions or corrections to that submission that you wish to make?

Mr Mackelmann—There could be some additions, dependent upon what you may require for a short discussion. As you are aware—certainly you, Senator MacGibbon—this is a continuing matter. I am right now before the Administrative Appeals Tribunal. There have been three sitting days and we go back again on 23 June. The president of the board of inquiry is held over. He has appeared on two days. There is some alarming evidence—'revelation' may be the word rather than 'evidence'—and there are two particular matters that I would like to talk about here today.

As you would understand, I have to be careful that I do not become sub judice to that AAT tribunal hearing and finding, but I feel that I could talk about the matter of the three days that we have sat already and I can refer to the transcripts of those three days. I do have those transcripts with me and I offer those for copy if your committee so desires. There are some astounding revelations in those three days of transcript.

CHAIRMAN—Would you like to make a short opening statement to cover that area?

Mr Mackelmann—Yes, if I may. Following upon the submission, the most important thing that came out of the Durack inquiry of last year, 1997, was coupled with

disclosures in the ombudsman's report of 1991. On both occasions the president of the board of inquiry had advised that he viewed film—cinefilm—from the two returning aircraft, namely, White 1 and White 2 of that firing detail. The FOI application that I subsequently submitted rotated around that film and it was in two parts. I called for, firstly, the original tape recordings from the Williamtown tower, both air traffic control and GCI frequency, which covered the take-off of the formation and the working of the formation on the working frequency at the time of the incident. Secondly, I called for that returned film.

In 1991, at interview with the ombudsman, the president of the board of inquiry said two things: firstly, that he had viewed this film from the returning aircraft, White 1 and White 2; and, secondly, that after viewing that film, it was destroyed. He said similar in 1997 to Senator Durack, retired, who conducted the independent investigation at the direction of Minister McLachlan. At first-stage application on FOI for those two things, the answer came back, 'Not able to supply either. The tapes cannot be located', and then in the case of the film, 'There never was any film because the guns were never fired on that detail.' I took that to stage 2. It was reviewed by Air Vice Marshal McCormack and the finding by him was exactly the same: no tapes can be located. I am sorry, they supplied me with a tape, a short extract of a tape on cassette from the Williamtown tower, which has been looked at by some experts. It has been firmly confirmed now that it has been manipulated. It was over speed to the degree where we could not read it. In the case of the film—and this is the important part—Air Vice Marshal McCormack also found that there never had ever been any film and the reason was that the guns had never been fired.

I wrote back immediately and said, 'That is totally incorrect because the Mirage has a two-pressure gun firing switch.' In fact, the first pressure on the gun firing switch starts the camera and the second position, the second pressure, fires the guns. It is also very well established that it is a very, very hair trigger. A pilot under tension hardly ever takes first pressure and fires camera only. Most Mirage pilots would agree that it is always bang—camera and guns at the same time. However, that was the reason that there was no film because the guns had never been fired.

Now, we have to go back to the report as I have given it to you, which clearly indicates that the ombudsman did some things which I wanted. Firstly, he called for the accounting of ammunition returned, and there was never any. In fact, I have a letter that says that that accounting of returned ammunition was kept in a notebook and the notebook is lost. The second thing that I called upon him to do was interview the correct armament people who worked on those returning aircraft, the people who actually disarmed those gun packs. He interviewed six people. They were all the wrong people.

I have been able to establish that as fact because I have the EE500, the engineering document, and I have that covering the day of the accident, the previous day and the day after. In the case of White 1, the offending aircraft, the gun pack was downloaded and signed off by a Corporal Wydro. Wydro has never been located ever within 12 years. I

called upon the ombudsman to do that. He did not. He interviewed the wrong people. I called upon Mr Durack to do it. He did not. To this very day Wydro, the man who downloaded that aircraft, has never been located and never been interviewed.

After 12 years, under an FOI application, we now have a letter signed by Air Vice Marshal McCormack that says that the guns were never ever fired and there never was any film. I took it to stage 3. It has been before the tribunal in Brisbane for the last 2½ months. There have been three sitting days. The last one was on 18 May—last Monday.

Going back to day 2, under cross-examination the president of the board of inquiry denied totally point blank that he had ever said to the ombudsman in 1991 or to Mr Durack in 1997 that he had ever viewed this film from the returning aircraft. We called upon the defence department through its representative, the office of the Crown Solicitor, to make available the tape of interview that Mr Durack conducted with the president. In fact, the leader of the first investigation—the AIT—was now Air Commodore Kindler.

You will see in the report that that investigation was kept from me for six years. The crux of this issue rotates around the fact that the air force kept from me for six years the AIT. The real point at issue here is that we have two transcripts of the one radio tape transmission from the Williamtown tower. At the very point of this incident, the board of inquiry manufactures seven seconds. They have elongated the tape by seven seconds, which places this offending aircraft one mile further back than he physically was.

CHAIRMAN—How do you know they edited the tape?

Mr Mackelmann—I have got two printed transcripts. I can show you those. In fact, I think you have a copy. I think I forwarded it to you.

CHAIRMAN—Yes, but I am asking you for proof.

Mr Mackelmann—It can be shown in fact on the transcripts of the two tapes.

CHAIRMAN—I have seen the two transcripts. But they are photocopies of what?

Mr Mackelmann—They are in the full document. I could show you the full board of inquiry and the full AIT. I have them in my bag.

CHAIRMAN—That is probably not germane to the inquiry as we have it at the moment.

Mr Mackelmann—The crux of this issue is that the board of inquiry produced a transcript of that radio tape that was different from the transcript produced by the AIT at the first inquiry.

Getting back to what happened at the AAT hearing, I think what I have explained so far falls into place. Quite simply, when I produced this fact everyone went to ground. I firmly believe that the film exists.

Mr BEVIS—That it exists or existed?

Mr Mackelmann—I believe it still exists. I believe 100 per cent that the film still exists. It is too valuable to have been destroyed.

Mr BEVIS—It may be too valuable to have been kept, too, depending upon your point of view?

Mr Mackelmann—Yes. I see the point that you make. My assumption is that it still exists. I would be most surprised if it does not. However, we have the president of the board of inquiry denying that this film ever existed at all. Before the tribunal he has committed perjury, and it can be proven. He said quite clearly on day 2 that he did not say this to Mr Durack and in fact that Mr Durack misunderstood him. He was asked whether he considered Mr Durack silly—that was the word used—and he agreed. On day 3, we obtained the tape of interview, and at four separate places on the tape of interview he states quite firmly that, yes, he viewed the film.

Mr BEVIS—I assume that tape that refers specifically to his viewing the film is in the transcript of the AAT hearing?

Mr Mackelmann—Yes, it is. It is in the full transcript of day 3. We played the tape in full on the morning of Monday the 18th.

Mr BEVIS—I would be interested to see that.

Mr Mackelmann—I have it with me. Anything that you require I can make available for photocopying. I have a little tape recorder with me. I can play you two excerpts, if you so desire, right now. I have got one marked at the very spot where he says, 'I viewed the film of the returning sortie.'

Mr BEVIS—No, I was not going to do that. But I certainly would be interested to read that AAT transcript.

Mr Mackelmann—I have got as much as you need. He goes on: 'There were four separate places in the tape'- Mr Durack comes back to it—'that confirm that you have viewed the film of White 1 and White 2.' 'Yes.' Then he gives a reason why he viewed the film—he wanted to inspect the banner. He wanted to see the quality of the banner for two reasons: firstly, to see whether anyone had fired; and, secondly, to see whether Craig may have flown into and hit the banner accidentally. Of course, the banner was dropped at sea. If you read the full board of inquiry you see that White 1, the leader of the formation,

within two minutes of sighting the splash—the first thing he thought to do was to call the tug to drop the banner. In his statement, his reason for doing that is that he thought the tug may be needed for search and rescue. The difference between flying around in a Lear jet with a piece of rag hanging out the back and not having it there would be about five litres an hour perhaps.

CHAIRMAN—And about 200 knots as well?

Mr Mackelmann—Perhaps, but speed is not a necessity when you know the location.

CHAIRMAN—You are certainly not going to circle wreckage in the water towing a banner half a mile behind you.

Mr Mackelmann—Not necessarily. I think the banner was far too valuable to drop. In this case, there were two—certainly one—FA18s over the site within the first three minutes. Maple 578 was there within three minutes. I must make you aware of that point.

CHAIRMAN—We are not here to retry the events in any way at all.

Mr Mackelmann—I understand that.

CHAIRMAN—We are interested in the processes that have led you to be highly critical of the system. We had an AIT. We had a BOI. You have talked at length about the BOI. Then we had a coronial inquiry, did we not?

Mr Mackelmann—Yes, we did. I would like to go back to the board of inquiry and the setting up of that instrument.

CHAIRMAN—Were you happy with the AIT?

Mr Mackelmann—I did not read it for the first six years. No, I am not happy with it. It is a very, very edited version.

CHAIRMAN—In a nutshell, in your judgment where was that deficient?

Mr Mackelmann—It was not a full document. The AIT is the official investigation carried out by flying safety. They are the experts in aviation. They are equal to or supposedly better than BASI in civil air. Those expert air accident investigators prepared a document of no more than about eight or nine pages. But more importantly, the board of inquiry seems to have been set up too quickly. On 18 May, in the transcript of day 3, in the cross-examination the president of the board of inquiry states that he was on Williamtown two days after the accident. He was on Williamtown before he had been

officially appointed by Air Vice Marshal Radford. The document of appointment is included in the forerunner to the board of inquiry.

CHAIRMAN—Who was the convening authority for the board of inquiry?

Mr Mackelmann—Air Vice Marshall Radford.

CHAIRMAN—The Air Commander Australia?

Mr Mackelmann—He was the Air Commander Australia at that time.

CHAIRMAN—Were you satisfied with the terms of reference of the BOI?

Mr Mackelmann—Yes, I was. But they were not carried out. They were not carried out in two areas. The most important one was that the fourth term of reference called for all evidence to be taken under oath, and that did not occur. In fact, in part of the transcript for the day 3 hearing before the AAT just last week the president admits some fairly alarming statements about how he conducted his inquiry regarding the taking of evidence.

CHAIRMAN—The president of the board of inquiry was on the airfield two days after the accident. Did he have any administrative role anywhere in the squadron or the wing? In other words, was there a conflict of interest in the selection of the president of the board of inquiry?

Mr Mackelmann—I cannot say that. I do not know where you would extract that evidence.

CHAIRMAN—What was the posting of the president of the board of inquiry?

Mr Mackelmann—I am not sure how he got there. He was there five days before he should have been, according to the paperwork.

CHAIRMAN—He was not a former CO of the squadron?

Mr Mackelmann—No. His only claim to fame was as a former Mirage pilot. But he had not flown since 1974. We are looking at an accident in 1986.

CHAIRMAN—I see. It is most likely that there is no conflict of interest charge administratively that can be laid against the president of the board of inquiry. That is all I am seeking to establish.

Mr Mackelmann—I would add that he seemed to be there too soon. Was he there for a reason? Keep in mind that the AIT had been on the base only for some 24 or 36

hours. They fundamentally had to know what had caused this accident. Supposition must be that the board of inquiry was placed there very quickly to start taking over. Quite clearly in his evidence before the AAT the president says just that, that he was on the base. I have adduced evidence to say that the AIT was still there on the base. He denies that he ever spoke to them. He denies that he ever took any evidence from them. Although later in cross-examination he says, 'Hey'—he uses 'hey' and 'yep' quite a lot during the interview—'What have you done with the tape?', that was a question which seemed to come into his mind very quickly in the middle of question time as a question which had come to him from the AIT, with him already having said that he had nothing to do whatsoever with the AIT; he was there to run his own inquiry.

Of course, that is illogical. We have got the best investigators in the Commonwealth, supposedly, from DFS investigating an accident. The experts trained in accident investigation supposedly never conferred with the president of the board of inquiry. That is nonsense—absolute nonsense. If it occurred, that needs to be investigated thoroughly.

Moving on from there, the most important thing—and this is something that must be raised before the committee—is what has come out of this hearing before the AAT. I represented myself on day 1. On day 2, I was represented by a QC well known in Brisbane, Mr Tony Morris. On day 3, just last week, I represented myself; Mr Morris was busy on another matter.

On every occasion, both when I was doing it and when Mr Morris was doing it, we came up against a brick wall more than 10 times by interjection from the crown barrister representing the defence department who said clearly, 'You cannot question on matters pertaining to the board of inquiry because the president of the board of inquiry is protected under regulation 61 of the Defence Act.' Regulation 61 of the Defence Act says that a president of a board of inquiry is entitled to the same protection as a High Court judge.

When you read the transcript you will see that on day 3, on 18 May, I objected to this very, very strongly. The point that I made to the tribunal—Mr Beddoe—was that under regulation 61 this man may be afforded the same rights as a High Court judge, but already there was strong evidence to indicate that he had done things outside the terms of reference and even outside the norm of commonsense. But more importantly, he was seeking protection behind this regulation 61 when there were so many other important matters to be discussed, including the fact that he had perjured himself in the place just one hour earlier.

The only way we could get the amount of evidence that we have adduced—and I have to say to you that there is an alarming amount of it and we have got around it rather well—is by not talking about what the president did during his investigation and/or preparation of his board of inquiry report but what he has since said in interviews both with the ombudsman and with Mr Durack in particular. It was in that area that we were

able to adduce most of our answers. But the legal block was there on every occasion that we got back to talking about timing on the banner, whenever we got close to the real problem—the manipulation of the tape, the fact that there were two transcripts of one single radio tape and the fact that there are statements in the board of inquiry which are totally incorrect, which can be proven.

For instance, the timing from when White 1 calls in 'live' behind Craig who had called in 'live' without an 'off safe' call until the time that he flies through the banner and calls 'off safe' is 12 seconds. Physically he could not have flown the distance in 12 seconds unless he was operating that aircraft at 750 knots. The attack speed is 450 knots. The board of inquiry is simply wrong. But we were not able to get there. We were not able to do that simply because of the protection of regulation 61.

Mr BEVIS—One of the things that has intrigued me about all of this is that you raise what are, at least in my mind, still unanswered questions—the films, the ordnance not being checked, the people who actually did that not being interviewed, the transcripts and so on. Yet this is one of the most investigated cases—I suspect it is probably the most investigated case—that the committee has before it. There has been the AIT, the board of inquiry, a coroner, an ombudsman and a special ministerial appointment.

Mr Mackelmann—Correct, and I can answer your question very easily.

Mr BEVIS—I have difficulty reconciling the two unless there is a grand conspiracy, and I am not one given to conspiracies as a normal course of events.

Mr Mackelmann—That is answered very quickly: I suggest that you read the three days transcript.

Mr BEVIS—This is the AAT hearing?

Mr Mackelmann—Yes. Read the three days transcripts and just see the way the president has conducted himself. All of these inquiries have always rotated around the president. The president is the man who has run up all of this lengthy account with the Commonwealth. The evidence is here that the president has lied. He has either lied right down the line to the ombudsman and to Mr Durack or he is lying now before the AAT. All of these inquiries have always had—

CHAIRMAN—I would prefer you did not use that description about the president.

Mr Mackelmann—I am sorry?

CHAIRMAN—I would prefer you did not use that.

Mr Mackelmann—Sir, I am sorry, but he has already perjured himself, and it has

been proven.

CHAIRMAN—You can say he has perjured himself if that is your allegation, but I would prefer you did not use the word in a defamatory sense.

Mr Mackelmann—I have great difficulty in speaking about him in any other way, and I have given him the benefit of the doubt for 12 years at this stage.

CHAIRMAN—I remind you of the warning I gave that I am not prepared to tolerate defamatory comment against individuals under parliamentary privilege. That has been a rule that we have had right through this hearing. I understand your strong feelings in this case, but it is one of many in which very strong feelings are involved and we would just like to—

Mr Mackelmann—The difference, of course, is that I have the evidence, and it is contained in the transcripts.

CHAIRMAN—You can still say that you have reservations about his accuracy or something like that.

Mr BEVIS—There has also been the coroner's inquest, which is separate from the military as well. The thought in the back of my mind is that either a number of people have been snowed in the process or a number of people are involved in deliberately seeking to keep the truth from being exposed.

Mr Mackelmann—The simple answer there, in fact, is that there would be no more than four or five people who would really know what did happen. None of the ground crew would know because it is normal on a daily operation for aircraft to come back into the armament bay having fired their guns. Those crews are on line to download guns. They never get to talk to the pilots.

Mr BEVIS—But they would as a routine have a record of what armaments were on it when it went out, what armaments—

Mr Mackelmann—None of those records are available. They are all lost and/or destroyed.

Mr BEVIS—This is part of the thing, as I say. That is just one example, as is the audio transcript discrepancies and the film. There is a series of these things.

Mr Mackelmann—I agree with you. All I have ever done is ask for those things and none of them are available. Nothing!

Mr BEVIS—Do you have any idea why such an effort would have been made to

prevent what in your view are the facts coming to light? Why would the process not work the way we all understand it is supposed to work? Why would they not find out the cause?

Mr Mackelmann—Yes, I agree with you. I had thought that the process would be a logical one, but the real reason here is that the offending pilot was a RAF attachment pilot and within a few months he had gone back to England. The simple answer here, in my opinion, is that at a very high level it was decided that they did not really want the problem. I think that sums it up very quickly. Just to answer the rest of that question, the ground staff would have no idea that there was a problem when they downloaded those aircraft.

Mr BEVIS—No, but the point is that, when weapons were fired, which is one of the points of contention, there should be as a routine a record of armaments.

Mr Mackelmann—You see, there should be lots of things. For instance, the first thing that the AIT should have done when it arrived at Williamtown was impound those aircraft, impound the guns and carry out a full and proper inspection. Under cross-examination before the AAT, Kindler says that that was never done; the board of inquiry president says that it was never done. In fact, there was a weekend—you see the accident was at 12.32 p.m. on a Friday and everyone went away for the weekend. The aeroplanes were all downloaded and locked away. No-one did anything until Monday morning. It is all in the AAT transcript.

There were no proper investigations of any area. Aircraft were not impounded; aircraft guns were not inspected. The only people who would really know what happened—and I am sure they do—are the commanding officer of the squadron—keeping in mind that Riley was one of his supervisory pilots. He was a flight commander, which is another reason why he was protected perhaps. No-one else on the base except the two investigators and their immediate associates would have a clue. And I subpoenaed and I have already produced before the AAT Flight Lieutenant Alexander, who was the assistant to the board of inquiry. Under cross-examination he admitted on day 1 that yes, he had viewed the film.

Mr BEVIS—You have not been able to find Mr Wydro?

Mr Mackelmann—No. He is the man I need. The Commonwealth should have been looking for Mr Wydro back in 1991. The ombudsman was so instructed that he should be found and nothing ever happened. Mr Durack was so told in 1997 and nothing has ever happened. My information is that Wydro left the force and, in fact, was out of the country. I tried to contact him. The information I had was that he was working in Dubai for British Aerospace. I did write to Dubai but the letter came back with a few hieroglyphics on it about nine months later. It never reached him. I have not been able to locate him since. That man has the answers.

CHAIRMAN—If we go back to the inquiry process itself—the AIT and the BOI—I am sorry that you were not here earlier in the afternoon because the first witness was in relation to the Boeing 707 accident. There was clearly dissatisfaction on the part of the witness with the conduct of the BOI in that case, but it was redeemed by the coroner's inquiry where the wives of the deceased pilots and aircrew had an opportunity to put their case. Admittedly they were without legal representation, but they put their case and had all points that concerned them considered by the coroner. How exhaustive was the coronial inquiry—which I have never seen—into the Mirage accident?

Mr Mackelmann—It was very exhaustive in one area only. You must keep in mind that the AIT had been kept from me for six years. So before the coroner—and you do not like the word 'lied', but the evidence presented by the Royal Australian Air Force before the coroner was deceptive, because the only evidence that they presented came out of the board of inquiry.

CHAIRMAN—Did you get an opportunity to address the coroner or appear at the coronial inquiry?

Mr Mackelmann—Yes, I did. My wife and I were represented then by Mr Morris, who was a very junior barrister in 1986. The most important aspect of the coronial inquest was that we proved the board of inquiry to be totally wrong—and the coroner so found—on alcohol. Two-thirds of the board of inquiry document rotates around the dining-in night that all pilots of 77 Squadron attended the night before. Quite clearly, our son was denigrated by that board of inquiry. In fact, there were two charges of a breach of air force orders laid upon him. The board of inquiry clearly said that when he flew at midday the next day he was 0.02 BAL.

CHAIRMAN—How would they know that?

Mr Mackelmann—They took evidence from some 24 witnesses who had seen the drinks partaken.

CHAIRMAN—Was a clinical test done?

Mr Mackelmann—They did not have a body, did they? They lost the pilot.

CHAIRMAN—I understood you to say that the BOI alleged that there was a blood alcohol level of 0.02.

Mr Mackelmann—Yes, it did. They took witness statements from roughly 24 witnesses who had been at the dining-in night and they came up with a list of drinks of which Craig had partaken.

CHAIRMAN—There was an inference from that that he had a blood alcohol

level?

Mr Mackelmann—They came up with a determination that, dissipating at the normal rate, Craig would be 0.02 the next day at midday. Using exactly the same evidence, we presented an expert witness, in the form of the Queensland Government Medical Officer, before the coroner. We used exactly the same evidence as the air force had used. Two things came out of that. It was firmly established that not only was Craig zero when he flew, but he had been zero BAL for more than eight hours before he started engines. The second thing that came out of it was that the air force doctor, Dr Pinkstone, admitted that he had made a mistake. It is in the transcript of the coronial inquest, and the coroner so found.

We devoted all of our time—five sitting days over almost two years—to establishing all of that before the coroner. There was a further problem on structure. I firmly proved that a loose canopy key—the air force admitted to finding some loose tools in the aircraft before it took off that day—could have been on board the aircraft and could have moved through the fuselage and could have caused the full flying control jam. We devoted quite a bit of time to that. In fact, I had accessed an old Mirage fuselage. Strangely enough, it was donated to the Commonwealth as a fuselage by the president of the board of inquiry, who landed at Tullamarine in 1974 after he had forgotten to put the wheels down. That aeroplane never flew again. It is ironic that he was the man who did it.

I accessed the fuselage of this aircraft. It was in a fellow's backyard in Melbourne in 1987. It was ideal for our examination. Having been landed wheels up, all the bottom skins were off the fuselage. The engine had been removed and most of the stainless steel inner heat shields had been removed, so I had full access to the frames. We were able to establish beyond doubt that there was a hole in the engine bay inner skin which would allow access of tools—the canopy key being one of seven tools in the crash kit—about the size of a seven-inch spanner. It could get through that hole. It could then travel through the frames some 14 feet to the leading edge of the wing where it would jam a bell crank. The flying controls are still mechanical from the cockpit back down through the leading edge of the wing and they become hydraulic out in the trailing edge. We proved all that before the coroner with a series of 36 photographs. We had photographed areas of a Mirage which even RAAF engineers had never seen.

Mr BEVIS—What did the coroner conclude?

Mr Mackelmann—He agreed with everything we presented, but with the rider that, unless the wreckage could be recovered, no firm proof could ever be established. Of course, I agree. The wreckage is 75 miles offshore from Williamtown just off the continental shelf, same depth as the *Titanic*, 12,500 feet.

In about 1988, I had written to the then defence minister, Mr Beazley, who received advice from the chief of the air staff—and I have those letters—that it was

physically impossible—technically impossible—to recover the wreckage. The coroner had said that it should be found. With that in mind, I found three private operators worldwide who could do the job, and the Defence Department were so advised. In the meantime, I had a letter from the Pentagon, signed by Admiral Griffiths, US navy, which said, 'Yes, the US navy could do it.' In fact, he inferred that they would love the job; they would love it as a training exercise. Defence Department advice to Mr Beazley and subsequently to the next one, Senator Ray—and again now, by the way, to the current minister—has always been 'technically impossible'. The opportunity to recover that wreckage has been there since 1988, and the defence department will not—or does not want to—recover that wreckage.

Simply, the wreckage should be recovered on more than three counts. Firstly, there is a very good chance that you will find the bell crank of the flying controls jammed by the canopy key or a similar tool, but the canopy key is the one because jacking pads were a bit bigger and probably would not do the job. The canopy key certainly would. The second one, of course, is a shoot-down, and you would be looking for bullet holes in sections. Of course, you can do two things there. A ricochet off the banner—which is not unusual, by the way; it could be that Craig shot himself down—a ricochet off the metal part of the banner, particularly the heavy weight which keeps the flag flying upright, could come back through the canopy or through a leading edge or through any flying surface. That possibility is there. But if you recovered a leading edge section with bullet holes in it, you would establish that. If you recovered a trailing edge section or a fuselage side with bullet holes in it, you would know that someone else did it. So there are two reasons.

Mr BEVIS—Getting hold of the film would be a bit cheaper and quicker, though.

CHAIRMAN—Let us get back to what the inquiry is about, that is, the faults in the present system. You have clearly identified in your judgment that there are faults in the way the BOI was conducted. How can that be overcome in the future? Is the answer through some sort of independent investigatory body?

Mr Mackelmann—Absolutely, and that is the major problem.

CHAIRMAN—How do you see that being organised or set up?

Mr Mackelmann—With great difficulty. Over the years I have tried to get BASI involved. In fact, right now on this AAT investigation I have asked BASI to provide me with one or two former Mirage pilots who could be of some major use in answering two or three questions in two or three separate areas of Mirage operation. BASI wants to keep away. In fact, the answer I get from individuals—and it is always the same—is: 'We are afraid for our jobs.' I kid you not. It has been said to me more than 10 times. So to answer your question, Senator MacGibbon, I do not know whether you can use BASI either to investigate—

CHAIRMAN—In principle, you would agree that there is a good case for an independent investigatory authority?

Mr Mackelmann—Absolutely. It must be that way. For the entire life of the Royal Australian Air Force—and I can only talk in this area; I cannot talk about the other services—every aircraft accident that I am knowledgeable of—and I know of most of them; I was flying air force in 1952, and I read most of the historical ones—whenever possible, has been written off to pilot error and/or something rather than the truth. While they are investigating themselves nothing is ever going to change. If you read the transcript of these three days you will understand why. Until that does change we will never progress in this country.

The second point is that to give an untrained man, particularly in legal ability, the opportunity to run an investigation the way that he sees fit—and that is very evident in these transcripts: the way that he sees fit, not even the way that he was instructed to do it—when he is an untrained legal man, and then give him the right to be protected as a High Court judge is totally absurd. The constitution needs to be changed. It has been said by this tribunal—Mr Beddoe—on more than three occasions in these transcripts that simply it is a constitutional matter and you cannot proceed with these questions.

CHAIRMAN—You might remind him that a High Court judge did appear before a Senate committee.

Mr Mackelmann—Thank you for that information. It is something that I did not know. Simply, I have spoken around and over the issue at length, and I was very forceful in the p.m. of Monday the 18th.

CHAIRMAN—What about the matter of transparency? Even if you set up an independent body, do you think it should be open to the public in its deliberations?

Mr Mackelmann—Absolutely. That was very apparent in our coronial inquest. I would like to take that matter just a little further, too. I had great difficulty getting even the board of inquiry—as I said, they kept the AIT from me for six years. They really did not want to give me the board of inquiry. It was only two weeks before the first sitting day of the coronial inquest that the board of inquiry was made available to me. We knew about it three months earlier because we had a telephone call from a police sergeant in Newcastle who already had the document. It was so alarming that my wife and I jumped in the motor car and drove to Newcastle, to be confronted by a sergeant who said, 'We'd better do this as a hand-up, because your son was indiscreet.' That was the first time we knew there was a problem. Never had we been told that there was. The commanding officer on day one said, 'Well, there was a dining-in night the night before, but that is squared away. Your son was definitely not involved in any way.' Suddenly there was a problem and the police sergeant in Newcastle is saying, 'We'd better do this as a hand-up. We'll get rid of this in two hours for you, Mr and Mrs Mackelmann, because your son

was indiscreet.'

Subsequently, we have proven that everything in the board of inquiry was completely unfactual. We have so proven before the coroner. The Mackelmann family has been living with this for 12 years. We have been subjected to all of these inquiries. The ombudsman's inquiry in 1991 was a forced inquiry because I was complaining bitterly to Mr Beazley, who agreed to set up the ombudsman. What we find is that the ombudsman was deliberately deceived. I do not complain about what Mr Beazley has done, because he was deceived. I believe that ministers are still being deceived by the defence department.

You are here looking at past injustices. I have to tell you that it is still going on today. I have current letters here where it is still going on. In fact, I have a letter of just a week and a half ago from the Crown Solicitor's office. I had better tell you this bit. I called for the transcripts of the interviews that Mr Durack conducted with Kindler and Ford, the two men in question. That was an FOI application directly to minister McLachlan in about May-June of last year. The accompanying letter back with the FOI supply was that the minister has agreed to supply the transcripts in full. I got eight pages on Ford and three pages on Kindler. The three pages on Kindler were not a transcript. In fact, they were in the narrative in the present tense. On one page it appears—and I think that is in my hand-up to you—where Kindler says, 'I am asked . . . I have answered.' He wrote it himself. In the case of Ford, eight pages were supplied. We obtained the taped transcript, which we played last Monday, the 18th. The Crown Solicitor prepared a written transcript of that tape. There are 43 pages of the transcript.

Minister McLachlan has been deceived by the Defence Department within the last nine months. I have to say to you that the letter comes with Mr McLachlan's signature on it, 'I have decided to hand you the transcript in full.' I got eight pages. We proved last week that there were 43. Do not for one moment think that you are looking at past injustice. It is still going on.

CHAIRMAN—That is why we are holding this inquiry—to try to identify the shortcomings in the present system.

Mr Mackelmann—You have a lot. I hope you can do something about it.

CHAIRMAN—I know we have. We have them over a very wide range of issues also.

Mr BEVIS—I will look forward to the response of Defence to this range of issues, because I think your case is intriguing.

Mr Mackelmann—It is incredibly intriguing. I commend to you that you read in total the three days transcript before the tribunal and, more importantly, that you read the next one, which occurs on 23 June.

CHAIRMAN—Thank you very much for your attendance here this afternoon.

Mr Mackelmann—Thank you for your time.

CHAIRMAN—You will be sent a transcript of your evidence by Hansard, and you can make grammatical corrections. Thank you for your time.

Mr Mackelmann—These transcripts need to be photocopied. Is there a facility here to do that?

CHAIRMAN—Yes, we can do that this afternoon.

Mr Mackelmann—I am prepared to make that available. Thank you all.

Resolved (on motion by **Mr Bevis**):

That the subcommittee authorise for publication the evidence taken by it in the public hearings today.

CHAIRMAN—Thank you very much for your attendance this afternoon. I formally declare this meeting closed.

Committee adjourned at 5.18 p.m.