

**UNDER  
IN THE MATTER OF**

**THE INQUIRIES ACT 2013  
A GOVERNMENT INQUIRY INTO  
OPERATION BURNHAM AND RELATED  
MATTERS**

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**CLOSING SUBMISSIONS FOR NZDF FOLLOWING SEPTEMBER AND  
OCTOBER HEARINGS  
1 November 2019**

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## Introduction

1. On a number of occasions between 2010 and 2017, the New Zealand Defence Force (NZDF) represented to both the Minister of Defence and the public that the International Security Assistance Force (ISAF) had investigated allegations of civilian casualties arising out of Operation Burnham and had concluded that those allegations were “unfounded”. The NZDF accepts that these representations were inaccurate: in fact the true position was that there was a possibility of civilian casualties, albeit not caused by New Zealand troops, due to a misaligned gun sight on a coalition force helicopter. As will be discussed in these submissions, on each occasion there is a reasonable explanation for how the inaccurate statements arose. The NZDF accepts that it made a number of missteps in relation to its public statements regarding Operation Burnham, which resulted in the public and the Government being provided inaccurate information. This is deeply regretted. However, there was never an intention to mislead the Government or the public.
2. Further, the NZDF maintains that Operation Burnham itself was conducted professionally, and missteps in the provision of information concerning the Operation is a world away from the deeply serious allegations made about what occurred in Afghanistan that night.
3. In 2010, 2011, and 2014, the NZDF personnel who drafted and approved those statements genuinely believed that ISAF had concluded that there were no civilian casualties. There was no agenda; the NZDF was expressing what it understood to be the position.<sup>1</sup>

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<sup>1</sup> Transcript of Proceedings at page 73 (Sir Jerry Mateparae): “Had the information ... referred to civilian casualties being likely ... I would have informed the Minister that the allegations had some veracity to them ... I told the Minister all that I knew”. Transcript of Proceedings at page 171 (Commodore Ross Smith): “Had you joined all the dots immediately, tell us generally what you would have done then or said in the press release?” “I think our press release would be more aligned to Minister Coleman’s statement.” Transcript of Proceedings at page 305 (Brigadier Chris Parsons): “And if I’d thought there was a chance of civilian casualties then I would have reported that faithfully, as I reported faithfully what I saw.” Transcript of Proceedings at page 346 (Major General Peter Kelly): “Of course, had we seen the entire report, then our response would have

4. By 2017, when *Hit & Run* was released, the NZDF was aware of ISAF's conclusion that there may have been inadvertent civilian casualties. The NZDF took no issue with this conclusion. It had no reason to do so because it knew that, while any civilian casualty would be regrettable, the NZDF had not been responsible for any that may have occurred during Operation Burnham. In maintaining the position that the ISAF investigation concluded that the allegations of civilian casualties were "unfounded", in its immediate response to *Hit & Run*, the NZDF was responding for the first time to serious allegations of war crimes;<sup>2</sup> it was meaning to say that *those* allegations were unfounded.
  
5. In hindsight it is clear that the NZDF should not have reverted back to the 2011 language; it should have taken the time to express its position with more nuance. It ought to have used this opportunity to clarify that, while there may have been civilian casualties arising out of Operation Burnham, ISAF's investigation had concluded that any that may have occurred would have been inadvertent (as a result of a coalition helicopter gun not having been slaved correctly to its sight), that New Zealand troops had acted in accordance with the Rules of Engagement and the Tactical Directive<sup>3</sup> and, accordingly, that any allegations beyond inadvertent civilian casualties were unfounded.<sup>4</sup>

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been completely different." Transcript of Proceedings at 347 (Major General Peter Kelly): "We didn't get the report and that would have changed the entire tone of our correspondence with the Minister of Defence and the Government." Transcript of Proceedings at page 364 (Major General Peter Kelly): "I mean, had we received the report, we would have reflected their outcomes of the report into our notes to the Minister." Transcript of Proceedings at page 375 (Major General Peter Kelly): "Had they come back and said to us, and as the report goes on to say, there's a possibility of casualties, or likelihood it may have occurred, we would have reflected that in our reporting." Transcript of Proceedings at page 399 (Major General Peter Kelly): "Had the IAT report been provided to us, then we would have reported that in its ... entirety." See also Colonel Karl Cummins brief of evidence at paragraph 38 and Rear Admiral Jack Steer brief of evidence at paragraph 14.

<sup>2</sup> N Hager and J Stephenson *Hit & Run: The New Zealand SAS in Afghanistan and the meaning of honour* (Potton & Burton, 2017) at page 7: "So, were New Zealanders and their allies involved in war crimes? ... The authors conclude that there are reasonable grounds to suspect that New Zealanders and their United States allies were indeed involved in war crimes and other serious breaches of the laws of war."

<sup>3</sup> AR 15-6 report, Inquiry Bundle at page 128.

<sup>4</sup> Transcript of Proceedings at page 551 (Lieutenant General Tim Keating): "The IAT report dealt with the potential of Apache strayed rounds, misdirected rounds, from a slaved gun, impacting on buildings which may have contained civilians ... What was presented to me, at the time, was something quite different, very serious, New Zealand Defence Force troops deliberately targeted civilians and civilian property on a revenge attack."

6. While any allegation that the NZDF may have been responsible for any civilian casualty *is* unfounded, the NZDF regrets deeply the confusion that resulted from its repeated denial of the possibility of any civilian casualties having occurred during the Operation. However, the NZDF remains steadfast that there was never an intention to mislead or to conceal information from the Government or from the public.<sup>5</sup>
7. Its position remains that, in theatre, the New Zealand troops conducted themselves professionally and with great discipline in a hostile and challenging environment and that, at HQNZDF, there was no conspiracy and no 'cover up' but, rather, a series of missteps that, over the course of time, compounded one another.
8. Looking back, the NZDF is able to acknowledge a range of factors that contributed to the confusion over the years:
  - a. The NZDF, while in Afghanistan, and as part of the ISAF force, was subject to ISAF's standard operating procedures such that, in the event of allegations of civilian casualties, it was the ISAF IAT that formally investigated. While the NZDF conducted its usual post-operation processes to review the conduct of the operation, it would only commence a formal investigation if either the ISAF IAT or its own processes so warranted.<sup>6</sup> Following Operation Burnham, there was no suggestion of the NZDF having caused civilian casualties – indeed ISAF had advised that "there was no case to answer".<sup>7</sup> The NZDF's own processes did not suggest the trigger for a formal investigation

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<sup>5</sup> Transcript of Proceedings at page 632-3 (Lieutenant General Tim Keating): "It wasn't tidy. It was unprofessional. But it wasn't a conspiracy... a conspiracy from within, sir I take that as -- professional umbrage to that." Transcript of Proceedings at page 1171 (Air Marshal Kevin Short): "I just can't believe that it is thought of as a cover-up. There's two pieces that come to mind when I think of that. One is the professionalism and honesty of the cadre of very senior people in the New Zealand Defence Force and the values that we actually not just take out of a book but actually live by and have to demonstrate and - two - the fact that the effort to try and cover up this information... [What] we're seeing here ... I put down to just a series of wrong pieces of information, the change of staff, the time that's gone, our record keeping has ended up with us in a situation where we're at this Inquiry. And I do not see any of that as being part of a cover-up." Transcript of Proceedings page 163 (Commodore Ross Smith): "I did not intend it [the initial response to Hit & Run] to go out incorrect".

<sup>6</sup> Colonel Rian McKinstry brief of evidence at paragraph 36; Sir Jerry Mateparae brief of evidence at paragraph 28.

<sup>7</sup> Inquiry Bundle at page 94.

was reached either.<sup>8</sup> The net result was that, although a thorough investigation was carried out by the IAT and the NZDF received an informal indication of its findings as they pertained to NZDF personnel, the NZDF was not entitled to a copy of the resulting report and was not able to obtain a copy until a year later. As a result, the NZDF issued statements based upon its understanding – reasonable and genuinely held, but wrong – of what the investigation outcome was.

- b. Although he believed it to be true, Brigadier Chris Parsons conveyed to the NZDF a mistaken view of the outcome of the IAT report in 2010. That genuinely-held but mistaken view became the foundation for the Notes to the Minister in December 2010 and for the press releases issued in April 2011 and in June 2014. It was inaccurate but not unreasonable for members of NZDF to have relied upon the information they received from Brigadier Parsons.
- c. Brigadier Parsons' mistaken understanding of the IAT's conclusions was compounded by the December 2010 Ministerial briefing, which did not clarify that Brigadier Parsons had not read the entire IAT report and that the quote in the briefing was not taken from the IAT report itself.
- d. When the IAT report was received by the Director of Special Operations on or around 1 September 2011, although the Minister of Defence, the Hon Dr Wayne Mapp, was briefed accurately that, while the NZDF had not caused them, there may have been civilian casualties arising out of Operation Burnham due to a coalition gun not being correctly slaved to its sight,<sup>9</sup> a public statement was not made to correct the statement NZDF had issued in April 2011.

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<sup>8</sup> Transcript of Proceedings at 628 (Lieutenant General Tim Keating): "our obligations there as part of the NATO operation as being a partner in that, albeit a New Zealand ground force-led operation, was to look at the evidence that was presented, look at the inquiry conducted by the appropriate theatre authorities, and see if it triggered the requirement for New Zealand to conduct an independent investigation. It did not reach that threshold."

<sup>9</sup> Colonel James Blackwell brief of evidence at paragraph 28.

- e. Due to the compartmentalised nature of NZSAS operations (necessary for the security of information and of the troops in theatre), the fact that the IAT report had been received by the NZDF was not duly disseminated; there was no institutional knowledge that the NZDF held the IAT report.
- f. Furthermore, although the document was filed in two safes (the Office of the CDF and the Office of the Minister of Defence) and Colonel Jim Blackwell's evidence was that he retained a copy in a secure electronic system,<sup>10</sup> there was no system-wide document repository for classified material that enabled others in the organisation to be aware of the document's existence and whereabouts for the future.
- g. Together, these factors meant that the conclusions of the IAT report were not known and thus overlooked in the NZDF's response to the *Native Affairs* item which aired on Māori Television on 30 June 2014. On 1 July 2014, however, the Hon Dr Jonathan Coleman, speaking as Minister responsible for the NZDF, corrected the record. In those circumstances, the CDF would not also make a public statement repeating what the Minister had already said.
- h. In 2017 when *Hit & Run* was published, the immediate response from the NZDF was wrong. Although the conclusions of the IAT report were known by that point,<sup>11</sup> the language of the April 2011 press release was adopted without due analysis and qualification. What was *meant* was that, although there may have been civilian casualties arising out of Operation Burnham, the conclusions of the IAT report did not support an allegation that they were caused deliberately or that New Zealand troops bore any responsibility.<sup>12</sup> This more nuanced understanding of

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<sup>10</sup> Colonel James Blackwell brief of evidence at paragraph 12. See Transcript of Proceedings at 721-23 and 729 (Colonel James Blackwell).

<sup>11</sup> Transcript of Proceedings at page 550 (Lieutenant General Tim Keating): "So you knew about the IAT report?" "Yeah, but the context shifted. The story had shifted yet again."

<sup>12</sup> Transcript of Proceedings at page 547 - 549 (Lieutenant General Tim Keating): "If we look at it in the context of what I was responding to -- so in my mind, I was responding to the allegation of war crimes, which were against New Zealand Defence Force troops or in -- you know, even if I go to the point -- a lighter point, that the casualties were caused by NZDF actions ... those allegations were unfounded ...". "Could it have been clearer and said, you know -- and added but civilian

the IAT's conclusions should have been spelled out in the initial press release, as it was in the Government briefing the next day and on the CDF's return to the country later that week.

9. The fact that, in these different environments, mistakes were made is regretted deeply by the NZDF. It appreciates well the fact that, although New Zealand forces were not responsible for civilian casualties, it let the Minister and the public down in 2010 and 2011 when it mischaracterised the conclusions of the IAT report and that it did so again when it acted pursuant to short-lived mistakes in 2014 and 2017. But accurate information was provided relatively soon after it was needed in both 2014 and 2017, and improvements made to its document management systems now mean that such mistakes should be less likely to reoccur. Nonetheless, NZDF appreciates recommendations the Inquiry might make to build upon improvements made to date.

**Post Operation Burnham – preliminary allegations of civilian casualties and an ongoing investigation**

10. In the "hot wash" immediately after the New Zealand contingent returned to Camp Warehouse in the early hours of 22 August 2010, there was no discussion of potential civilian casualties because the New Zealand troops had no way of knowing at that time that some rounds from the coalition air support may have impacted a building near the helicopter landing zone.<sup>13</sup>
11. It was not until 26 August 2010, when Colonel McKinstry, through his participation in the IAT investigation, was given the opportunity to view footage from the AH64s and the AC-130 that he became aware of the possibility of rounds having fallen short.
12. The question though was: did the rounds that may have entered a building actually hit and kill or injure any civilians? No one within the NZDF or ISAF actually knew. That remains the case.<sup>14</sup> Evidence that

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casualties may have occurred as a result of the Apache gunship? Yes probably. And maybe that clarification, you know, in hindsight should have been there."

<sup>13</sup> Colonel Rian McKinstry brief of evidence at paragraphs 12 to 16.

<sup>14</sup> Transcript of Proceedings at page 67 (Sir Jerry Mateparae): when Sir Jerry Mateparae was asked whether he accepted that civilians probably did die in Operation Burnham albeit not from shots fired by NZDF, he responded "I don't know. I genuinely don't know". Transcript of Proceedings at

rounds fell short in an area where civilians had been observed provides evidence of the possibility of civilian casualties, but the significant quantity of information relating to the Operation – all of which has been provided to the Inquiry but only some of which has been able to be declassified – does not establish that those casualties occurred. Evidence of a possibility and evidence of an actuality are quite different things.

13. Allegations of civilian casualties were received from local sources, but that was to be expected. It occurred after every operation of this nature, in an effort to turn local support away from the coalition, or to access compensation. As Lieutenant General Keating put it in response to questions: ISAF forces were up against a “propaganda machine” from the Taliban to such an extent that, even if ISAF forces went to an Afghan village to deliver humanitarian aid, allegations of civilian casualties would be made.<sup>15</sup>
14. As Colonel McKinstry put it, the initial information, gained from a range of local sources, was “wildly inaccurate” and “still very raw”.<sup>16</sup>
15. Counsel Assisting put it to Colonel McKinstry that this information was at a level “acceptable as being sufficiently credible for the purposes of placing an individual on the JPEL list”. Colonel McKinstry replied, “I don’t entirely accept that, because I think we’re talking about two slightly different applications of the same level of certainty”.<sup>17</sup> The point is that a common grade might make the reliability of any two individual pieces of information comparable, however, when a large number of individual sources corroborate one another (as is the case with a the requirements for a JPEL listing), even where they are individually at a relatively low level of reliability, the cumulative effect is to give more credence to the total picture. This was not the case in the initial information coming in after Operation Burnham.

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page 247 (Colonel Rian McKinstry): “My view is, and stays, that the allegations are possible.” (emphasis added). Transcript of Proceedings at page 556 (Lieutenant General Tim Keating): “To this day, we don’t know if there were civilian casualties.”

<sup>15</sup> Transcript of Proceedings at page 528 (Lieutenant General Tim Keating).

<sup>16</sup> Colonel Rian McKinstry brief of evidence at paragraphs 19 to 21 and NZDF Bundle at pages 15 and 19.

<sup>17</sup> See Transcript of Proceedings at pages 222 – 223 (Colonel Rian McKinstry).



16. Although, for these reasons, it would have been fundamentally wrong to take the reports of civilian casualties at face value as credible, Colonel McKinstry passed on the information that he had received faithfully and accurately. He passed on, in his emails and in the accompanying tables of "uncorroborated human intelligence," the information that had been received.<sup>18</sup>
17. The intelligence summary tables attached to the emails recorded the information that had come in from various sources, not what the established factual position actually was. It included columns headed "likely killed", "possibly killed", "likely injured", and "missing". As further information came in, the tables were updated but, again, they were there to record allegations as they stood on a given day; not to suggest whether or not the allegations were able to be sustained. Just for example, as Brigadier Parsons recorded in his email of 8 September 2010,<sup>19</sup> certain alleged civilian casualties were reported to be the "sisters" of two key insurgents whereas it appears that the term "sister" may have been veiled speech to describe the target insurgents themselves. Similarly, while it was claimed that two females were injured and in hospital as a result of the operation, the District Governor, who had provided that information, later admitted that they were in fact military aged males.<sup>20</sup> Accordingly, while this raw information continued to be interrogated:
- a. The fact that someone was not noted in the table as an insurgent did not mean that, had they in fact been engaged, the rules of engagement were not followed;<sup>21</sup>
  - b. The key and overriding information is the outcome of the IAT investigation;<sup>22</sup> not the intelligence reports or the PRT reports

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<sup>18</sup> NZDF bundle pages 15 to 22 and 27 to 32.

<sup>19</sup> NZDF bundle page 77.

<sup>20</sup> See email from Brigadier Chris Parsons, dated 8 September 2010 at page 77 of the NZDF Bundle.

<sup>21</sup> Transcript of Proceedings at page 228 (Colonel Rian McKinstry): "So, as a matter of deduction, one to two people ... are civilians?" "No, I think that would be an incorrect deduction ... Because you're -- it's skipping over an entirely class of combatant ... there were a number of different ways that you could be involved in the insurgency, whether you're a member of the Taliban, or for that period of time, you were conducting actions that placed you in a position in which you would be targeted... I don't accept that."

<sup>22</sup> Transcript of Proceedings at page 55 (Sir Jerry Mateparae): "The IAT report is the authoritative report ... anything else is corollary to that." Transcript of Proceedings at page 391 (Major General

(which, amount to an individual's assessment<sup>23</sup> based upon raw, uncorroborated allegations from local sources whose reliability was not always verified and, as such, are intended to feed into, rather than be the entirety of, a complete understanding);<sup>24</sup> and

- c. There came a point where TF81 had to "draw a line"<sup>25</sup> on the basis that it could not get "much more fidelity on the BDA".<sup>26</sup> That is to say, due to what was "assessed to be circular reporting"<sup>27</sup> and that TF81 was immersed in ongoing operations, it did not have the time or resources to keep interrogating the raw allegations, it needed to get on with its future work, but wanted to obtain the IAT report – the results of an independent investigation - so that it had a clear answer.

18. Answers started to emerge. As Colonel McKinstry said in his email of Monday 6 September 2010:<sup>28</sup>

"COM IJC has been briefed on the findings of the Initial Assessment Team and he concurs that TF81 has no case to answer. ISAF SOF will be taking no further action in this matter, however there may still be some fall out for the aviation elements."

19. However, Colonel McKinstry, and relevant NZDF personnel, understood at that time that the IAT's work was "ongoing". As the email exchange forwarded by Colonel McKinstry to NZDF in Wellington on 3 September records:<sup>29</sup>

"It appears that the air spt aspect of that op in RC(N) is part of an ongoing investigation."

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Peter Kelly): "The IAT report is the factual conclusion, drawing together all the threads of the inquiry into an outcome."

<sup>23</sup> Transcript of Proceedings at page 227 (Colonel Rian McKinstry): "What I would say at that point is that the Intelligence Officer is making an assessment on what they understand from the intelligence."

<sup>24</sup> Transcript of Proceedings at page 377 (Major General Peter Kelly): "You could not put complete faith in intelligence reports because the sources and the means of verification is incredibly difficult ... This is not science".

<sup>25</sup> Transcript of Proceedings at page 230 (Colonel Rian McKinstry).

<sup>26</sup> Email from Colonel Rian McKinstry of 30 August 2010 – NZDF Bundle at page 43.

<sup>27</sup> Intelligence Summary Report of 26 August 2010 – NZDF Bundle at page 34.

<sup>28</sup> NZDF bundle page 57.

<sup>29</sup> NZDF bundle page 59.

20. That in turn led the report on the civilian casualty allegations forwarded to HQNZDF on 3 September 2010 to record:<sup>30</sup>

“ISAF initial assessment team (IAT) report still in progress... investigation into RWCAS is ongoing.”

21. The NZDF conducted its usual post-operation review processes – the “hot wash” and BDA, as well as gathering intelligence and reporting back to HQNZDF – but would only have conducted a second, formal investigation into allegations of civilian casualties if either the ISAF IAT or its own processes so warranted.<sup>31</sup> Following Operation Burnham, there was no suggestion of NZDF having caused civilian casualties – indeed ISAF had advised that the NZDF had “no case to answer”.<sup>32</sup> The NZDF understood that the IAT investigation into the coalition helicopter gun sight issue was ongoing,<sup>33</sup> but unrelated to the NZDF.

22. If the IAT report had recommended further investigation in respect of New Zealand actions, this would have been conducted, but New Zealand had no authority or reason to investigate actions of any other coalition forces.

23. In this context, and notwithstanding that evolving good practices since may inform New Zealand’s approach to any future deployments into coalition environments, in 2010, it was certainly reasonable for the NZDF not to see a need to conduct its own formal investigation. This was on the basis that ISAF’s procedures and mechanisms were applicable to New Zealand forces because New Zealand was part of the ISAF coalition and its operations were ISAF operations. Accordingly, ISAF’s investigation was New Zealand’s investigation too,<sup>34</sup> and, as

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<sup>30</sup> NZDF bundle pages 60 and 73.

<sup>31</sup> Colonel Rian McKinstry brief of evidence at paragraph 36. Sir Jerry Mateparae brief of evidence at paragraph 28. Transcript of Proceedings at page 628: “Our obligations there as part of the NATO operation as being a partner in that ... was to look at the evidence that was presented, look at the inquiry conducted by the appropriate theatre authorities, and see if it triggered the requirement for New Zealand to conduct an independent investigation. It did not reach that threshold.”

<sup>32</sup> NZDF Bundle pages 43, 57 and 59.

<sup>33</sup> NZDF Bundle page 73.

<sup>34</sup> Colonel Rian McKinstry brief of evidence at paragraph 38. Sir Jerry Mateparae brief of evidence at paragraphs 26 to 28. Transcript of Proceedings at page 52 (Sir Jerry Mateparae): “ISAF conducted the operation. ISAF conducted the investigation ... We didn’t have the capacity to do that.” Transcript of Proceedings at 1163 (Air Marshal Kevin Short): “Do you accept now that New Zealand should have done more to independently investigate?” “No ... My position is that the IAT

above, the NZDF understood that neither its own processes nor the ISAF IAT warranted further action on its part.

24. But what of the ISAF press releases? Ought they have alerted NZDF personnel to the fact that it was mistaken in thinking that the IAT investigation was ongoing and that a further investigation had been ordered, based upon information contained in the IAT report?
25. Two different ISAF press releases from subsequent days are set out on pages 70 and 71 of the Inquiry bundle,<sup>35</sup> causing confusion among witnesses, not least because the one at page 70 of the Inquiry bundle appears with a different date from the version of (what appears to be) the same document included at page 626 of the Inquiry bundle and which had been previously provided by the Inquiry to the NZDF.
26. Colonel Rian McKinstry's understanding was that it was the air assets, not the New Zealand ground force, that were subject to an ongoing investigation<sup>36</sup> but that this was all part of the ongoing IAT work.<sup>37</sup>
27. Whatever the case, the position as far as the NZDF was aware in early September was that the investigation process was ongoing but was soon to conclude. Certainly, NZDF personnel had received raw and unsubstantiated allegations of civilian casualties and they knew, from the 29 August 2010 ISAF press release, that ISAF had reported the IAT team as having "determined that several rounds from coalition helicopters fell short, missing the intended target and instead striking two buildings, which may have resulted in civilian casualties." But it did not know whether the rounds that fell short did in fact cause civilian casualties and it thought the IAT work was ongoing.<sup>38</sup> So, when it received what it understood to be the final IAT outcome it is reasonable

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and that team had been put together and had access and resources far beyond what the New Zealand Defence Force could do."

<sup>35</sup> Evidence of Major General Peter Kelly, page 27; Transcript of Proceedings at page 322-324 (Major General Peter Kelly). Transcript of Proceedings at page 70 (Sir Jerry Mateparae): "Up until very recently, I thought there was one report, that was the IAT report. That's the only report that I was aware of".

<sup>36</sup> NZDF bundle at page 59.

<sup>37</sup> Transcript of Proceedings at page 257 (Colonel Rian McKinstry): "So your understanding please, Colonel, of the word "ongoing"?, "That they're still looking into that."

<sup>38</sup> Colonel Karl Cummins brief of evidence at paragraph 19: "As I understood it, the ISAF press release was inconclusive; although the assessment team determined that several rounds fell short, it did not determine whether civilian casualties had ensued."

for the NZDF to have seen it as being conclusive; as trumping earlier reporting and information;<sup>39</sup> as meaning that it had transpired that the stray rounds had not in fact hit anyone.<sup>40</sup>

### **The IAT investigation outcome is conveyed to NZDF**

28. Brigadier Chris Parsons took over as Senior National Officer (SNO) in Afghanistan on 7 September 2010.
29. At that time, he understood the position to be that one of the helicopters had a gun that was not slaved correctly to its sight which resulted in rounds impacting on or over the roof of a building but that it was not yet known whether there had been unintended civilian casualties as a result.<sup>41</sup> Accordingly, his level of knowledge was the same as that of other relevant officers within the NZDF; untested reports of civilian casualties had been received, ISAF had issued a press release speaking of the rounds falling short but the ISAF investigation was continuing.<sup>42</sup>
30. What the relevant officers within NZDF were wanting to know was whether, when the IAT's ongoing investigation had concluded, they would be able to say whether or not the rounds that fell short had in fact caused civilian casualties.
31. On Brigadier Parsons' first day as SNO, he went to the ISAF joint command headquarters in Kabul to make a number of introductory calls. He was introduced to an officer he had not met before. He could not recall who that officer was but saw it as possible that he was part of the IJC legal team.<sup>43</sup> When Brigadier Parsons asked if he could see the IAT report, he was told that it was not yet cleared for release to New Zealand but that he could see a paragraph, which was described

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<sup>39</sup> Transcript of Proceedings at page 55 (Sir Jerry Mateparae): "the IAT report, is the authoritative report ... anything else is corollary to that." Transcript of Proceedings at page 334 (Major General Peter Kelly): "the information as we knew it was what Chris passed to us in that email. And, as I said, in my summary of evidence, it superseded all the other information and the press releases".

<sup>40</sup> Transcript of Proceedings page 407 (Major General Peter Kelly): "so here there was an understanding that civilian casualties may have occurred, but Chris' email to us answered that particular question, in our mind, in that his viewing of the report said no civilian casualties occurred."

<sup>41</sup> Brigadier Chris Parsons brief of evidence at paragraph 11(g) and (h).

<sup>42</sup> Brigadier Chris Parsons brief of evidence at paragraph 11(j).

<sup>43</sup> Brigadier Chris Parsons brief of evidence at paragraph 15.

to him as the "key finding." Standing next to the IJC officer, he was permitted to read that single paragraph which led him to be able to say, in his email back to the DSO at the end of the day:<sup>44</sup>

"Today I have sighted the accident investigation team's (AIT) conclusion into the claims of CIV CAS in Baghlan. IJC wasn't willing to release the report to us, so I cannot forward a copy. However, it categorically clears both gnd and air c/s of any allegations. It states that having reviewed the evidence there is no way that CIV CAS could have occurred. We already knew we were without fault, but the AWT has now also been cleared which is good news."

32. The most likely explanation for the fact that Brigadier Parsons understood that paragraph to clear both ground and air troops of any allegations (whereas, in fact, the overall conclusion in the report was only to clear the ground troops) is that there was a misunderstanding as between Brigadier Parsons and the IJC officer who spoke to him and showed him the report, and that he interpreted an acronym in line with one commonly-used meaning which made sense to him in the context of that paragraph, without the benefit of seeing another part of the report which defined that acronym differently.
33. As Brigadier Parsons said, the paragraph that he read and his contemporaneous conversation with the officer led him to believe – reasonably, in NZDF's submission – that the IAT report had categorically cleared both ground and air troops of any civilian casualty allegations. He understood that what he was reading was the overall conclusion; the key finding, not just a finding as it related to the ground forces. The IJC officer, on the other hand, may well have believed that he was telling Brigadier Parsons what he needed to know; that he was telling him of the conclusions insofar as they related to New Zealand alone, and not the outcomes for every part of the coalition which had participated in the Operation.<sup>45</sup>
34. It was put to Brigadier Parsons in cross-examination that he was saying that the IJC officer had not been telling him the truth regarding the

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<sup>44</sup> NZDF bundle at page 77.

<sup>45</sup> Transcript of Proceedings page 312 (Brigadier Chris Parsons): "where the misunderstanding may have arisen, if one did, was that I was asking in regards to the whole operation, and perhaps the IJC officer thought I was asking specifically to the New Zealanders and Afghans."

report's conclusions. Brigadier Parsons denied that multiple times,<sup>46</sup> accepting only "that would be one possibility," and going on to explain further: "unless he'd potentially misunderstood my question and was referring specifically to us" ("us" meaning the New Zealand troops).<sup>47</sup> When the question was put to him again – this time on the basis of an allegation that "you're being misled at this time by the Americans?" he said, again, "I'm not asserting that ... maybe a communications issue, he misinterpreted what I was saying and I misinterpreted what he was saying".<sup>48</sup> Brigadier Parsons was emphatic: "I haven't accused anybody of lying".<sup>49</sup> Much turned, in terms of Brigadier Parsons' understanding of what the paragraph he read was saying, on the use of the acronym "AF" in that paragraph. As he said in his brief of evidence he understood the acronym to refer to "air force".<sup>50</sup> What he did not know was that earlier in the report – on a page he was not permitted to see – the acronym "AF" was defined as "ground assault force".

35. In the first place, Brigadier Parsons' understanding was, it is submitted, an entirely reasonable view for a reader seeing only part of the report in isolation to take, having regard in particular to the contents of paragraphs 23 and 24 of his evidence where he refers to NATO definitions of "AF" being, frequently, to "air force". As those paragraphs of his brief and the supporting evidence show, there is no single, universally understood definition for the acronym AF, contrary to the impression that is conveyed by the glossary of military terms the Inquiry has recently published on its website. Moreover, Brigadier Parson's interpretation was entirely reasonable in the context of how the paragraph he was able to read is actually worded.
36. Documents were shown to Brigadier Parsons by Counsel Assisting to suggest that somehow his view might have been unreasonable.

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<sup>46</sup> Transcript of Proceedings page 284 (Brigadier Chris Parsons): "This person who was probably American lied to you?" "No I'm not saying that". Transcript of Proceedings page 291 (Brigadier Chris Parsons): "If you're saying you're being misled at this time by the Americans?" "So I'm not asserting that." Transcript of Proceedings page 292 (Brigadier Chris Parsons): "So you must be saying he misled you?" "I'm not going to assert that because it's possible that that's not the case." Transcript of Proceedings page 293 (Brigadier Chris Parsons): "He's compounded the lie, hasn't he?" "I'm certainly not going to accuse him of that."

<sup>47</sup> Transcript of Proceedings page 284 (Brigadier Chris Parsons).

<sup>48</sup> Transcript of Proceedings page 291 (Brigadier Chris Parsons).

<sup>49</sup> Transcript of Proceedings page 303 (Brigadier Chris Parsons).

<sup>50</sup> Brigadier Chris Parsons brief of evidence at paragraphs 22 to 26.

However, with just one exception (on page 9 of the supplementary bundle handed to him in an endeavour to make this point) they do not show the words "assault force" used as an acronym.<sup>51</sup>

37. But in any event, the only relevant question is: what did Brigadier Parsons, himself, reasonably understand at the time? He explained in cross-examination that he was not aware that "assault force" was abbreviated to "AF"<sup>52</sup> and confirmed in re-examination that he had seen the acronym "AF" used "frequently"<sup>53</sup> as an acronym for "air force".
38. Brigadier Parsons passed on what he – and any reasonable person in his position would have – understood. It was a position that was reinforced not only by what he was told when he visited the ISAF headquarters that day but by two other factors: that the two females said to have been injured and receiving hospital treatment were in fact military aged males, and "sisters" who may have suffered casualties were likely to be veiled references to the male insurgents Kalta and Nematullah.
39. Brigadier Parsons' evidence was tested forcefully under cross-examination and the reasonableness of the mistake was only reinforced. He accepted that:
  - a. He sent the 8 September 2010 email<sup>54</sup> in its emphatic terms, "a fraction too quickly";<sup>55</sup>
  - b. He could have expressed the issue "a little bit more clearly";<sup>56</sup>
  - c. The email was in fact wrong and that it misled;<sup>57</sup> and

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<sup>51</sup> Inquiry Additional Supplementary Material for September Hearing. Note also that while page 9 uses 'AF' as an acronym and defines it as Assault Force in line 5, line 11 of the same page states that "the AF conducted a call out...". 'AF' can also mean 'Afghan Force' and, as the call out was done by the Afghan Force, it appears that in this same document, the acronym AF may have been used to signify different things.

<sup>52</sup> Transcript of Proceedings page 299 (Brigadier Chris Parsons). See also Transcript of Proceedings page 301 (Brigadier Chris Parsons).

<sup>53</sup> Transcript of Proceedings page 313 (Brigadier Chris Parsons).

<sup>54</sup> NZDF Bundle page 77.

<sup>55</sup> Transcript of Proceedings page 296 (Brigadier Chris Parsons).

<sup>56</sup> Transcript of Proceedings page 296 (Brigadier Chris Parsons).

<sup>57</sup> Transcript of Proceedings page 296 (Brigadier Chris Parsons).



d. He did not have any particular agenda - "I was keen to get to the facts of the issue and I thought that I'd established them".<sup>58</sup>

40. But it was what it was. It was not an unreasonable construction. It was produced through a misunderstanding. It led to a chain reaction on the part of the NZDF personnel who drafted and approved statements, halted only when the IAT itself was revealed fully in the context of the 2014 media attention on Operation Burnham.

### **The mistaken view forms the basis of the December 2010 Notes to the Minister**

41. Major General Peter Kelly, the Wellington-based Director of Special Operations (DSO) at the time was included in all of the communications from the then-Senior National Officers Colonel McKinstry and Brigadier Parsons, and conveyed them to the CDF and, through the preparation of briefing notes from CDF, to the Minister in August and December 2010.

42. As Major General Kelly has explained in his brief of evidence, he was included in the communications from Colonel McKinstry relating to the allegations of civilian casualties and he conveyed that information faithfully to the Minister through CDF's Note to the Minister of 25 August 2010.<sup>59</sup>

43. Subsequent briefings for CDF followed information he received from Colonel McKinstry<sup>60</sup> leading Major General Kelly to the conclusion on 6 September that the IAT investigation was "ongoing" on the basis described already.<sup>61</sup> Accordingly, as at 6 September 2010, Major General Kelly saw the investigation as being "ongoing" and reported to the CDF on that basis.<sup>62</sup>

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<sup>58</sup> Transcript of Proceedings page297 (Brigadier Chris Parsons).

<sup>59</sup> Major General Peter Kelly brief of evidence at paragraphs 5 to 15 and NZDF bundle pages 23 to 26.

<sup>60</sup> Major General Peter Kelly brief of evidence at paragraphs 16 to 23.

<sup>61</sup> In paragraphs 26-27 above and further email of 3 September 2010, NZDF bundle page 59.

<sup>62</sup> NZDF bundle page 73.

44. He knew that, if circumstances warranted, New Zealand practice and the relevant ISAF SOPs would call for further investigation but didn't understand that to be the case here.
45. Accordingly, when he received Brigadier Parsons' email of 8 September 2010<sup>63</sup> he understood that that was it; **the** outcome.<sup>64</sup> He regarded it as updating and superseding earlier information that had been conveyed by Colonel McKinstry.<sup>65</sup> He regarded it as superseding the ISAF press release on the basis that, although there had been stray rounds, the IAT investigation had concluded that they had not caused casualties.<sup>66</sup> As he said in his 23 September 2010 email to the Military Secretary in the Minister of Defence's office, Group Captain Edward Poot:<sup>67</sup>

"It [a reference to the press release at page 71 of the Inquiry bundle] does note that the helicopter gun was slightly off, but we now know that no casualties were caused as a result."

46. That is a logical conclusion to have drawn. It became the basis for his advice to the Minister.
47. The only thing that might have alerted him to the fact that a further investigation had been ordered was the *Pajhwok Afghan News* report included amongst seven other news clippings that formed attachments to the 13 December 2010 Note to the Minister<sup>68</sup> and which included the following paragraph:

"The International Security Assistance Force Joint Command Monday ordered an investigation into allegations of civilian

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<sup>63</sup> NZDF bundle page 77.

<sup>64</sup> Transcript of Proceedings page 391 (Major General Peter Kelly): "The IAT report is the factual conclusion, drawing together all the threads of the inquiry into an outcome -- as we thought at that particular point in time what Chris saw was the conclusions from that inquiry". See also Transcript of Proceedings page 375 (Major General Peter Kelly): "until the whole investigation was pulled together and the conclusions were formed by the team, everything up until that point in time was just part of an ongoing inquiry." See also Transcript of Proceedings page 390 (Major General Peter Kelly): "The IAT's job was to pull that all together and provide a factual comment." See also Transcript of Proceedings page 401 (Major General Peter Kelly): "it was the report that drew all those threads together"

<sup>65</sup> Transcript of Proceedings page 334 (Major General Peter Kelly): "it superseded all the other information and the press releases".

<sup>66</sup> Major General Peter Kelly brief of evidence at paragraphs 30 and 31.

<sup>67</sup> NZDF bundle page 87.

<sup>68</sup> Inquiry bundle page 173, amongst the bundle of documents running from pages 171 to 177.

casualties during an August 22 operation in northern Baghlan province.

In a statement, the NATO-led force said The ISAF Joint Command commander had ordered the investigation based on information contained in the joint initial assessment team's report."<sup>69</sup>

48. These are words taken from the press release at page 70 of the Inquiry bundle. The news reports were assembled by another agency<sup>70</sup> and attached to the Minister's briefing note. Insufficient attention was paid to the words and Major General Kelly was left with his understanding that the IAT investigation (and its conclusion as reported to him by Brigadier Parsons) was the final word.
49. The advice that Major General Kelly received about the IAT outcome from Brigadier Parsons formed the basis of the Note to the Minister that he had participated in preparing.<sup>71</sup>
50. Major General Kelly accepted in cross-examination, that he should not have said that the SNO was "permitted to read the report" and should not have placed the words "having reviewed the evidence there is no way that civilian casualties could have occurred" in inverted commas.<sup>72</sup> He was quoting from what Brigadier Parsons said in his email about what it was that the IAT report had concluded; not from the IAT report itself.<sup>73</sup>
51. However, there was no intention on Major General Kelly's part to mislead.<sup>74</sup> It was wrong, it was not at the high standard it should have

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<sup>69</sup> Inquiry Bundle page 173.

<sup>70</sup> Inquiry Bundle page 172.

<sup>71</sup> NZDF bundle pages 164 to 166.

<sup>72</sup> Transcript of Proceedings page 333 (Major General Peter Kelly). Transcript of Proceedings page 351: "we should have said something like 'sighted the report' or the likes, to make it clearer... Should have probably acknowledged that the source of the quotation was the SNO in theatre, accepting that, and so that was another error."

<sup>73</sup> Peter Kelly brief of evidence at paragraph 35.

<sup>74</sup> Transcript of Proceedings page 333 (Major General Peter Kelly): "there was certainly no intent to deceive the Minister". See also Transcript of Proceedings page 370 (Major General Peter Kelly): "Look, it was inaccurate, but it wasn't our intent to be misleading." See also Transcript of Proceedings page 372 (Major General Peter Kelly): "There was no intent to mislead."

been, and Major General Kelly accepted full responsibility for that.<sup>75</sup>  
But it was not a cover up.<sup>76</sup>

52. As Major General Kelly accepted, it was essential that the NZDF was able to provide the most accurate information to the Minister, and as a consequence, to the public.<sup>77</sup> It saw this as being the most accurate information.
53. Counsel Assisting handed to Major General Kelly a document entitled "source of statements in 13 December 2010 Ministerial briefing." It is quite correct to say that content from the ISAF press release of 29 August 2010<sup>78</sup> was used in the 13 December briefing, as was content from Brigadier Parsons' email. That simply reflected the position. ISAF had passed certain information on and, as far as NZDF was aware, the IAT report then concluded that any stray rounds did not actually cause casualties.
54. Sir Jerry Mateparae took the information contained in the draft Note to the Minister, prepared by Major General Kelly and Colonel Thompson,<sup>79</sup> at face value. He believed the extract in the quotation marks to have been taken directly from the IAT report,<sup>80</sup> and accepted that the Minister too would think it was a direct quote from the report.<sup>81</sup>
55. As Sir Jerry said, he now appreciates that the Note "inadvertently mischaracterises the conclusions reached by the IAT report."<sup>82</sup>
56. Although "the setting is [that the] Minister has seen these press releases," Sir Jerry accepted that, with the benefit of hindsight, it would have been better if the Note to the Minister had referred to the ISAF

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<sup>75</sup> Transcript of Proceedings page 344 (Major General Peter Kelly): "I take full responsibility and accountability for my actions over that period". Transcript of proceedings page 351: ""you accept full responsibility ... for the accuracy of the 10 and 13 December 2010 briefings, correct?" "Yes, that's right."

<sup>76</sup> Transcript of Proceedings page 333 - 4 (Major General Peter Kelly): "That's not sloppy, is it ... It's misleading?" "No there was no intent to mislead in the drafting of this particular report, and our intent up to that time was to convey the information as we knew it."

<sup>77</sup> Transcript of Proceedings page 351 (Major General Peter Kelly).

<sup>78</sup> Inquiry Bundle page 71.

<sup>79</sup> Transcript of Proceedings page 342 (Major General Peter Kelly).

<sup>80</sup> Sir Jerry Mateparae brief of evidence at paragraph 19. Transcript of Proceedings page 33 (Sir Jerry Mateparae).

<sup>81</sup> Transcript of Proceedings page 34 (Sir Jerry Mateparae).

<sup>82</sup> Sir Jerry Mateparae brief of evidence at paragraph 18.

press release also<sup>83</sup> and accepted that the Note to the Minister was “clearly wrong” and “clearly inconsistent.”<sup>84</sup> However, he saw himself as passing on “the best information that I had.”<sup>85</sup>

57. Sir Jerry said, quite fairly, “there have been missteps in this, and there are obviously processes and procedures that would have -- could have improved the passage of information from the Defence Force to the Minister”<sup>86</sup> and he accepted that NZDF “did not provide all of the information to the Minister and the Prime Minister, from what I now see.”<sup>87</sup> But he and Major General Kelly were passing on what they had on the basis that the most up to date piece of information trumped that which had come before it.
58. Counsel Assisting have endeavoured to create the impression that, given the information that Colonel McKinstry had passed on, including the intelligence reports, and given the 29 August 2010 press release,<sup>88</sup> Brigadier Parsons’ email must have been “an incredible bolt of lightning out of the blue”<sup>89</sup> i.e. that it could not reasonably have been regarded as credible or conclusive; that it needed to be tested further; that it should not have been accepted at face value and that it should not have formed the conclusive NZDF position for Ministerial briefings and media responses. This was a theme put repeatedly to the witnesses.<sup>90</sup>

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<sup>83</sup> Transcript of Proceedings page 42 (Sir Jerry Mateparae).

<sup>84</sup> Transcript of Proceedings page 44 (Sir Jerry Mateparae).

<sup>85</sup> Transcript of Proceedings page 48 (Sir Jerry Mateparae).

<sup>86</sup> Transcript of Proceedings page 47 (Sir Jerry Mateparae).

<sup>87</sup> Transcript of Proceedings page 49 (Sir Jerry Mateparae).

<sup>88</sup> Inquiry bundle page 71.

<sup>89</sup> Transcript of Proceedings page 340 (Major General Peter Kelly).

<sup>90</sup> For example: Transcript of Proceedings page 46 (Sir Jerry Mateparae): “I do need to suggest to you ... that there was ... a surprising lack of questioning, or a lack of curiosity, by senior people at NZDF about the possibility of civilian casualties at this time.”; Transcript of Proceedings page 55 (Sir Jerry Mateparae): “But the point is that you elected to seize upon a second-hand relaying of a passage seen over someone’s shoulder ... over all other material that we now know you have, correct?”; Transcript of Proceedings page 65 (Sir Jerry Mateparae): “the NZDF hurried to leap upon Chris Parsons’ short email.”; Transcript of Proceedings page 294 (Brigadier Chris Parsons): “it was completely contrary to where he’d [Colonel McKinstry] got to.”; Transcript of Proceedings page 346 (Major General Peter Kelly): “So those oral briefings to Rian McKinstry and Chris Parsons you say are anecdote and of no reliability, but his hearsay report of four lines is written in stone?”; Transcript of Proceedings page 374 (Major General Peter Kelly): “What was the thought process which enabled you to ignore completely all of that reporting and information ... and accept unquestioningly a 14-line email from Chris Parsons? Can you help us with that?”; Transcript of Proceedings page 375 (Major General Peter Kelly): “Don’t you think that you displayed a remarkable lack of curiosity?”; Transcript of Proceedings page 377 (Major General Peter Kelly): “Turning a blind eye?”.

59. However, the NZDF's submission is that its position at the time was entirely credible. Allegations of civilian casualties were known to be frequently unreliable. This is a point that has been made already but, to add to it here, as Colonel Cummins said in response to questions from Mr Salmon,<sup>91</sup> reports of civilian casualties are often encountered and, when he first heard of the open-source reporting, he regarded them simply as things that he had heard many times before and it was common for allegations of that sort to be made after any ISAF operation.
60. Once more, the press release referred to rounds inadvertently hitting a building. This is evidence only that a building may have been hit, and not evidence that civilians were in fact hit by the stray rounds.<sup>92</sup> None of the other (classified) sources of information available to the NZDF, including hours of surveillance video footage from after the Operation, established that there had been civilian casualties. In this context, to view the information passed on from Brigadier Parsons as meaning that the rounds did not actually hit anyone is a credible view that this was in fact the bottom line.

**The mistaken view forms the basis for the April 2011 media release**

61. This view, understandable but mistaken, was the natural response when One News ran a story on the Operation on 20 April 2011.
62. With CDF in Gallipoli for ANZAC commemorations and the new DSO, Colonel Jim Blackwell, unavailable, Rear Admiral Jack Steer, the Vice-Chief of Defence Force (VCDF) and Colonel Karl Cummins, then Deputy Director of Special Operations (DDSO), were called upon to respond to the story.
63. They were not aware of the story until minutes before it went to air but they needed to respond promptly.

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<sup>91</sup> Transcript of Proceedings page 428 (Colonel Karl Cummins): "It was certainly, as I remember it, relatively commonplace to have allegations of civilian casualties made after, in this case ISAF or coalition, operations."

<sup>92</sup> Transcript of Proceedings page 751 (Colonel Jim Blackwell): "the civilians had exited the building. If they were entering the building and then the rounds terminated there, it would have been more probable."

64. VCDF approved a press release, likely prepared by Defence Communications, which included a sentence which read "The investigation concluded that the allegations of civilian casualties were unfounded".<sup>93</sup> This was consistent with their genuine view of the facts. A view that was wrong.
65. So, when Colonel Cummins said to VCDF in his email of 20 April 2011 attaching the draft press release "I have verified the facts", he would either have called someone like Brigadier Parsons or he would have reverted to Brigadier Parsons' email of 8 September 2010 and the December Notes to the Minister.
66. As Colonel Cummins and Rear Admiral Steer both said, they would never have allowed a press release to go out if they knew that it was based on incorrect information.<sup>94</sup>

**The IAT report was received by NZDF in 2011, logged, filed and the Minister was briefed – but it was not publicised**

67. Following the 20 April 2011 press release, the NZDF renewed its efforts to obtain a copy of the IAT report. The DSO, Colonel Blackwell, said that he "made it very clear to" the successive SNOs that he "was keen to get a copy of the report".<sup>95</sup> He wanted a copy for "completeness" of records and because he believed "it would provide a fuller picture of what occurred on the operation."<sup>96</sup>
68. Colonel Blackwell's evidence is that the IAT report arrived by secure email on 1 September 2011.<sup>97</sup> His recollection is that "immediately upon receiving the document"<sup>98</sup> on 1 September 2011 he "printed one copy off, which I took down to the Office of the CDF".<sup>99</sup> He recalls that he gave the IAT report, together with the Operation Burnham

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<sup>93</sup> NZDF bundle page 183.

<sup>94</sup> Colonel Karl Cummins brief of evidence at paragraph 39. Rear Admiral Jack Steer brief of evidence at paragraph 16.

<sup>95</sup> Transcript of Proceedings page 703 (Colonel Jim Blackwell).

<sup>96</sup> Transcript of Proceedings page 695 (Colonel Jim Blackwell).

<sup>97</sup> Transcript of Proceedings pages 701 and 707 (Colonel Jim Blackwell).

<sup>98</sup> Transcript of Proceedings page 676 (Colonel Jim Blackwell).

<sup>99</sup> Transcript of Proceedings page 726 (Colonel Jim Blackwell).

Storyboard, to the Deputy Chief of Staff, Colonel Mike Thompson, and “told him that the Boss [the CDF] and the Minister needed to see it.”<sup>100</sup>

69. The classified register of the OCDF safe records that, on 1 September 2011, two secret documents, described as the “Baghlan Province Brief for MINDEF” were marched in, with the DSO as originator. The register shows that one set of the secret documents was received on the same day by the Minister’s Military Secretary, Captain Chris Hoey, and another set was transferred to the safe of the Deputy Chief of Staff, Colonel Mike Thompson. With the passage of time, it is not known who made a second copy of the documents or who made the register entries.<sup>101</sup>
70. Although the register does not indicate that one of the two secret documents was a copy of the IAT report, Colonel Blackwell’s evidence is that its receipt was the impetus for him to take it to the Office of the CDF,<sup>102</sup> and that there must have been some “new and relevant information for the Minister”.<sup>103</sup>
71. Colonel Blackwell’s understanding was corroborated by Captain Hoey who, in cross-examination, indicated that he was “reasonably confident”<sup>104</sup> and “95% sure”<sup>105</sup> that the “Baghlan Province Brief for MINDEF” contained the IAT report and the Storyboard.
72. On 7 September 2011, Colonel Thompson registered the documents which he described as a “Briefing Pack on Civ Casualty - Kabul Aug 2010”<sup>106</sup> in his safe. He accepted in cross-examination that, in order to have provided that description, either he must have read the bundle beyond the first page or that someone had told him what it was.<sup>107</sup> However, he simply has no recollection of who gave him the bundle or

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<sup>100</sup> Transcript of Proceedings page 710 (Colonel Jim Blackwell).

<sup>101</sup> Colonel Jim Blackwell brief of evidence at paragraph 16.

<sup>102</sup> Colonel Jim Blackwell brief of evidence at paragraph 17.

<sup>103</sup> Transcript of Proceedings page 745 (Colonel Jim Blackwell).

<sup>104</sup> Transcript of Proceedings page 853 (Captain Chris Hoey).

<sup>105</sup> Transcript of Proceedings page 875 (Captain Chris Hoey). See also Transcript of Proceedings page 880 (Captain Chris Hoey): “we don’t know if in fact what you shredded on the 5th of December 2011 included the IAT report, do we?” “I’m quite sure it is”.

<sup>106</sup> NZDF bundle page 191.

<sup>107</sup> Transcript of Proceedings page 447 (Colonel Mike Thompson).



what he was told.<sup>108</sup> Colonel Thompson said that he didn't "disagree"<sup>109</sup> with Colonel Blackwell's account, and that "there's the potential they could have happened,"<sup>110</sup> but his sense is that the exchange (referred to in paragraph 68 above) would have stuck in his mind.<sup>111</sup>

73. After the IAT report was received and marched in to the OCDF safe, Colonel Blackwell remembers briefing both the CDF and the Minister of Defence.
74. Colonel Blackwell's evidence is that he simply told the CDF "what the IAT report had said."<sup>112</sup>
75. Colonel Thompson has no recollection of organising a briefing between Colonel Blackwell and the CDF on the IAT report but said "to be fair though, the DSO could see the CDF whenever he wanted to see the CDF, didn't need my intervention in it."<sup>113</sup>
76. The then CDF, Lieutenant General Rhys Jones, who was overseas between 2 and 16 September 2011,<sup>114</sup> does not recall being briefed on the IAT report and does not think he was briefed.<sup>115</sup> He also does not recall having read the IAT report or knowing that there was a copy of the IAT report at HQNZDF during his tenure as CDF.<sup>116</sup>
77. Lieutenant General Jones agreed in cross-examination that it was "inconceivable" that, if he had known about the IAT report, he wouldn't have done something about it.<sup>117</sup> In particular, he indicated that he would have "given it to quite a few staff members to analyse" and would have taken steps to address the inaccurate media statements.<sup>118</sup> To the extent that there may have been lapses or failures by his staff during

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<sup>108</sup> Transcript of Proceedings page 449, 951, and 952 (Colonel Mike Thompson).

<sup>109</sup> Transcript of Proceedings page 951 (Colonel Mike Thompson).

<sup>110</sup> Transcript of Proceedings page 953 (Colonel Mike Thompson).

<sup>111</sup> Transcript of Proceedings page 953 (Colonel Mike Thompson).

<sup>112</sup> Transcript of Proceedings page 769 (Colonel Jim Blackwell).

<sup>113</sup> Transcript of Proceedings page 956 (Colonel Mike Thompson).

<sup>114</sup> Lieutenant General Rhys Jones brief of evidence at paragraph 6.

<sup>115</sup> Transcript of Proceedings page 990 - 991 (Lieutenant General Rhys Jones): "From my recollection, from my knowledge, I was not briefed on it... I have no memory. I do not think I was briefed on the document, or had knowledge of the IAT report."

<sup>116</sup> Transcript of Proceedings page 989 (Lieutenant General Rhys Jones).

<sup>117</sup> Transcript of Proceedings page 991 (Lieutenant General Rhys Jones).

<sup>118</sup> Transcript of Proceedings page 989 - 990 (Lieutenant General Rhys Jones).

his time as CDF, Lieutenant General Jones was quick to “front up” to those.<sup>119</sup>

78. Colonel Blackwell explained in cross-examination that he did not talk to anyone other than Colonel Thompson and the CDF in HQNZDF about the IAT report: “No, it’s a classified ISAF report... Generally, SAS information is not shared widely in Headquarters. It’s generally for the purpose of the individuals who need to receive it. I wouldn’t make that information available to a whole bunch of other actors.”<sup>120</sup>
79. The “need to know” principle is a fundamental precept of security policy designed to protect classified information. Nonetheless, the NZDF acknowledges that this compartmentalisation of NZSAS matters that Colonel Blackwell describes, which was “well entrenched, having been in place for decades,”<sup>121</sup> together with the location of the Directorate of Special Operations within the NZDF’s overall structure at that time, resulted in the IAT report being completely overlooked by the VCDF in his email of 2 September 2011,<sup>122</sup> by the NZDF personnel who briefed the Hon Dr Jonathan Coleman on 28 June 2014, and by the Chief of Staff in his response to the *Native Affairs* item on 30 June 2014.
80. During cross-examination, a number of witnesses expressed their frustration with the compartmentalisation of Special Forces operations.<sup>123</sup> Lieutenant General Keating explained that, during his tenure as CDF, he made a number of changes to the Special Forces

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<sup>119</sup> Transcript of Proceedings page 993 (Lieutenant General Rhys Jones). See also Transcript of Proceedings at page 475 (Lieutenant General Rhys Jones): “I should have known at this time whether we had the document or not”.

<sup>120</sup> Transcript of Proceedings page 708 (Colonel Jim Blackwell).

<sup>121</sup> Air Marshal Kevin Short brief of evidence at paragraph 17.

<sup>122</sup> Inquiry October bundle page 92.

<sup>123</sup> Transcript of Proceedings at page 467 (Lieutenant General Rhys Jones): “So operations, particularly Special Forces operations were pretty compartmentalised and really a need to know basis.” Transcript of Proceedings at page 531 (Lieutenant General Tim Keating): “I was not satisfied with the way those operations had been compartmentalised, because I think we dropped a lot of our standard procedures. So you get missteps like this, which was information that perhaps wasn’t its fullest being passed to the Minister. You know, we’re sitting on documents in different parts of the organisation that should have been pulled together coherently.” Transcript of Proceedings at page 1155 (Air Marshal Kevin Short): “I think it’s a case of using a piece of information from theatre and hanging on to that that actually the compartmentalisation of Special Forces operations mean you haven’t got the same inject of what I call the planners, the analysis, the intelligence. Those pieces that feed into it. Because at the time it was so compartmentalised. You haven’t got the same oversight and injection of other views that go with it.”

control and command structure to "make sure we didn't do -- err in this way again."<sup>124</sup>

81. That is not to say that the IAT report was "buried."<sup>125</sup> The safe in which the bundle was placed was used to store "important classified material that was germane to Chris Hoey's role as the Director of Coordination."<sup>126</sup>
82. The net position on Colonel Blackwell's briefing of the CDF on the IAT report is that Colonel Blackwell is clear that he briefed the CDF, while Lieutenant General Jones cannot recall but believes that, had he been briefed, he would have recalled. The point cannot be taken further. But it is sufficiently clear that Colonel Blackwell briefed the Minister of Defence.
83. Colonel Blackwell's understanding is that, when he briefed the Minister in the days or weeks following receipt of the IAT report, the Minister had already familiarised himself with the IAT report.<sup>127</sup>
84. Captain Hoey's evidence, in this regard, is that he would have given the documents to the Minister "at the first, earliest opportunity"<sup>128</sup> because "anything relating to Afghanistan would have gone straight to the Minister."<sup>129</sup>
85. The evidence of the Minister of Defence, the Hon Dr Wayne Mapp, is that, while he does not disagree that the IAT report was marched in to his office,<sup>130</sup> he "wasn't actually aware that it was in my office"<sup>131</sup> and he has "no recollection of reading that document."<sup>132</sup> The Minister explained during cross-examination that he "got well behind in actually

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<sup>124</sup> Transcript of Proceedings page 531 - 3 (Lieutenant General Tim Keating).

<sup>125</sup> Transcript of Proceedings page 531 (Lieutenant General Tim Keating).

<sup>126</sup> Transcript of Proceedings page 96 (Commodore Ross Smith).

<sup>127</sup> Transcript of Proceedings page 748 (Colonel Jim Blackwell).

<sup>128</sup> Transcript of Proceedings page 856 (Captain Chris Hoey).

<sup>129</sup> Transcript of Proceedings page 851 (Captain Chris Hoey).

<sup>130</sup> Transcript of Proceedings page 1029 (Dr Wayne Mapp).

<sup>131</sup> Transcript of Proceedings page 1054 (Dr Wayne Mapp).

<sup>132</sup> Transcript of Proceedings page 1029 (Dr Wayne Mapp).

reading material from the safe<sup>133</sup> and that “maybe things got too busy.”<sup>134</sup>

86. Colonel Blackwell believes he was “completely frank” and “candid” when briefing the Minister;<sup>135</sup> he explained that the IAT report indicated that there was a possibility of civilian casualties.<sup>136</sup>
87. Colonel Blackwell’s recollection is that the Minister then asked for his personal opinion “of whether there were civilian casualties. My answer was very clear... I don’t have any evidence to suggest there were, but there may have been, because there were several rounds from the Apache from an incorrect gun slaving.<sup>137</sup> The Minister also inquired as to how a “helicopter gunsight worked with a slaved reticle”.<sup>138</sup>
88. When pressed by Counsel Assisting as to whether he downplayed the significance of the IAT report in briefing the Minister, Colonel Blackwell responded “I would have no reason to hide or obscure that.”<sup>139</sup> When pressed further on this theme,<sup>140</sup> Colonel Blackwell responded “I believe that Dr Mapp was fully aware of what I briefed him on.”<sup>141</sup>
89. When pressed a final time, Colonel Blackwell elaborated: “I’m not sure why I would. It clearly exonerated any activities of the ground forces, which were the soldiers that I was responsible for. If anything, I would be exceptionally motivated to make that information available to my leadership.”<sup>142</sup>
90. Dr Mapp’s recollection is broadly consistent with Colonel Blackwell’s evidence. In particular, he accepted that he was briefed by Colonel Blackwell who told him there was a possibility of civilian casualties and also that “there was no evidence that there actually had been civilian

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<sup>133</sup> Transcript of Proceedings page 1077 (Dr Wayne Mapp).

<sup>134</sup> Transcript of Proceedings page 1055 (Dr Wayne Mapp). Other witnesses also gave evidence of the very busy period: Colonel Jim Blackwell brief of evidence at paragraph 24.

<sup>135</sup> Transcript of Proceedings page 676 (Colonel Jim Blackwell).

<sup>136</sup> Transcript of Proceedings page 683 (Colonel Jim Blackwell): “There was a possibility of civilian casualties. And I accept that, and that’s what I briefed the Minister on ... I would have no reason to think anything differently.”

<sup>137</sup> Transcript of Proceedings page 750 (Colonel Jim Blackwell).

<sup>138</sup> Transcript of Proceedings page 748 (Colonel Jim Blackwell).

<sup>139</sup> Transcript of Proceedings page 715 (Colonel Jim Blackwell).

<sup>140</sup> Transcript of Proceedings page 779 (Colonel Jim Blackwell).

<sup>141</sup> Transcript of Proceedings page 780 (Colonel Jim Blackwell).

<sup>142</sup> Transcript of Proceedings page 808 (Colonel Jim Blackwell).

casualties.<sup>143</sup> Dr Mapp did not recall talking to Colonel Blackwell about the gun slaving but accepted that “it’s possible” that it happened.<sup>144</sup> Dr Mapp also did not recall getting “this sort of detail” about women and children being present.<sup>145</sup> Dr Mapp did accept, when asked by Counsel Assisting, that Colonel Blackwell briefed him “in a clear, proper, fulsome way on the implications of the IAT report.”<sup>146</sup>

91. Dr Mapp stated that he did not feel he needed to take further action<sup>147</sup> and accepted that he made a conscious decision not to correct the public record.<sup>148</sup> He took full responsibility: “any decisions made were my responsibility, not his”<sup>149</sup> and “the decisions made were my decisions. Not anyone else’s decisions. It wasn’t Jim Blackwell’s job to make the decisions on these matters. It was mine.”<sup>150</sup>
92. Colonel Blackwell echoed this sentiment: “I made the points known, and it was for the Minister and the CDF to determine what they would do with the points that I made.”<sup>151</sup> Similarly, when Counsel Assisting asked “Why didn’t NZDF come clean with the public at that point and make a public statement, can you answer that question?”. Colonel Blackwell replied: “Primacy of public statements generally are conveyed from the Office of the Minister of Defence, unless he delegates that to the Chief of Defence Force.”<sup>152</sup>
93. In any case, the NZDF acknowledges that, as then-CDF Lieutenant General Jones accepted, had the existence of the IAT been more widely known at that time within the organisation, steps could have been taken to address the inaccurate reference to the IAT in the 2011 media statement.<sup>153</sup>

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<sup>143</sup> Transcript of Proceedings page 1028 (Dr Wayne Mapp).

<sup>144</sup> Transcript of Proceedings page 1036 (Dr Wayne Mapp).

<sup>145</sup> Transcript of Proceedings page 1057 (Dr Wayne Mapp).

<sup>146</sup> Transcript of Proceedings page 1050 (Dr Wayne Mapp).

<sup>147</sup> Transcript of Proceedings page 1063 (Dr Wayne Mapp).

<sup>148</sup> Transcript of Proceedings page 1052 (Dr Wayne Mapp).

<sup>149</sup> Transcript of Proceedings page 1028 (Dr Wayne Mapp).

<sup>150</sup> Transcript of Proceedings page 1051 (Dr Wayne Mapp).

<sup>151</sup> Transcript of Proceedings page 676 (Colonel Jim Blackwell).

<sup>152</sup> Transcript of Proceedings page 780 (Colonel Jim Blackwell).

<sup>153</sup> See above paragraph 77, Transcript of Proceedings page 989 - 990 (Lieutenant General Rhys Jones).

94. The Military Secretary's classified register shows that the bundle containing the IAT report was shredded on 5 December 2011. Captain Hoey's evidence was that this was done as part of the general vacating of the Minister's Office. He elaborated on this during cross-examination: "I believe that the IAT report came across as part of the briefing pack for Jim Blackwell to brief the Minister on; that briefing had been completed. The original of those briefing documents would have been in HQNZDF. It would have been pointless returning it -- a copy of the document that they already had. So it was shredded."<sup>154</sup>

**An accurate account of the IAT's findings was given in response to renewed media coverage in 2014 but was overlooked briefly such that an incorrect account was given in the first instance**

95. The IAT report did not come to light again until three years later when a response to Jon Stephenson's *Native Affairs* documentary on Māori Television's was aired. The IAT was overlooked in the immediate media response.

96. The *Native Affairs* programme went to air at 8:35pm on Monday 30 June 2014. On the evening of the last working day before the programme, Jon Stephenson had emailed the NZDF, asking questions including whether the NZDF stood by the statement it had issued in April 2011.<sup>155</sup>

97. A series of emails within the NZDF on Friday 27 and Saturday 28 June 2014<sup>156</sup> resulted in the statement, issued on Monday 30 June 2014, which said that:<sup>157</sup>

"the NZDF stands by its statement made on 20 April 2011 and will not be making further comment."

98. As Commodore Ross Smith said,<sup>158</sup> he was asked to approve the draft statement because then-CDF Lieutenant General Tim Keating was on duty travel in Australia. The reason he approved it was because the 20 April 2011 press release was consistent with CDF Sir Jerry Mateparae's

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<sup>154</sup> Transcript of Proceedings page 898 (Colonel Jim Blackwell).

<sup>155</sup> NZDF bundle page 212.

<sup>156</sup> NZDF bundle pages 209 to 211.

<sup>157</sup> NZDF bundle page 213.

<sup>158</sup> Evidence of Commodore Ross Smith paragraphs 17 to 19.

note to the Minister of 10 December 2010, which had been signed off by the CDF at the time. He had no reason to question the veracity of that information.

99. In cross-examination Lieutenant General Keating agreed with Counsel Assisting's proposition that, when the *Native Affairs* response was approved by Commodore Smith, the NZDF had the IAT report.<sup>159</sup> It is correct that the NZDF had a copy of the IAT report in its possession by September 2011, but it is not correct that Commodore Smith was aware of its existence or of the conclusions reached, when the statement was approved. Commodore Smith's evidence is that he first became aware of the IAT report "on the evening of the 30th when the CDF rang me from Australia."<sup>160</sup> Air Marshal Kevin Short's position is the same; he first became aware of the IAT report when Dr Coleman - by way of his Political Adviser, Josh Cameron - brought it to his attention.<sup>161</sup>
100. Lieutenant General Keating, in agreeing to the statement that the NZDF had the IAT report when approving the *Native Affairs* response, had recently remarked to Counsel Assisting "we're sort of jumping around our timeline and I'm trying to see where we are now in the timeline" so it is likely that he was commenting on the NZDF's response to *Hit & Run* in 2017, at which point the conclusions of the IAT report were known.
101. As Commodore Smith said in response to questions, he saw the Note to the Minister as a "foundation", "source", and "definitive" document.<sup>162</sup> There was no evidence in his mind that shifted the

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<sup>159</sup> Transcript of Proceedings page 514 (Lieutenant General Tim Keating).

<sup>160</sup> Transcript of Proceedings page 979 (Commodore Ross Smith). See also Transcript of Proceedings at page 110 (Commodore Ross Smith): "I found out about it, or understood that we had it, following a telephone conversation I had with the CDF on the evening of the Monday following his phone call with Minister Coleman, following the broadcast of that Native Affairs programme."

<sup>161</sup> Transcript of Proceedings page 1116 (Air Marshal Kevin Short): "We should have been made aware, but we were not. My first understanding of that, actually having a copy of the report and even then the discussion - it was a summary report - was with Dr Coleman and that was in 2014." Transcript of Proceedings page 1135 (Air Marshal Kevin Short): "I was not ... until was it 8:30, 9:35 phone call, I didn't know there was information about an executive summary or that IAT report at all."

<sup>162</sup> Transcript of Proceedings pages 99 and 100 (Commodore Ross Smith).

position.<sup>163</sup> He saw an ISAF press release as less definitive than a Note to the Minister. However, the time frame that he had to work within did not allow him to undertake a fuller assessment.<sup>164</sup>

102. Further, in cross-examination he said that "I'm not suggesting that they [ISAF] were wrong; it's just that they were not definitive with regard to the question of civilian casualties."<sup>165</sup>
103. The then-Minister of Defence, Hon Dr Jonathan Coleman, received a briefing from NZDF about the Operation on the afternoon or evening of Saturday 28 June 2014. Lieutenant General Keating said he was unable to recall whether he personally briefed the Minister on that occasion.<sup>166</sup> He indicated, however, that if in fact he did meet with the Minister on that day he would have briefed him on the basis of the August and December 2010 Notes to the Minister because that was the only information he had personally reviewed about the operation at the time.<sup>167</sup>
104. This is consistent with the fact that the documents collated by the DSO analyst "for CDF/MINDEF on the weekend"<sup>168</sup> do not include the IAT report.
105. The NZDF's proposed response to the *Native Affairs* item was sent to the Minister's Office in the early afternoon of 30 June 2014 for its comments.<sup>169</sup> No concerns were raised by the Minister's Office with the NZDF at this point in time; the "lightbulb moment"<sup>170</sup> that Counsel Assisting identifies - namely, the realisation that the IAT report was at odds with the briefing and with the response to Jon Stephenson - did not happen until after the *Native Affairs* item had screened.
106. After the programme had aired, Air Marshal Kevin Short, who was then VCDF and Acting CDF in CDF Keating's absence, received a call from

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<sup>163</sup> Transcript of Proceedings page 100 (Commodore Ross Smith). See also Transcript of Proceedings page 106: "there was no evidence to suggest our statement from 2011 should be changed."

<sup>164</sup> Transcript of Proceedings page 100 (Commodore Ross Smith).

<sup>165</sup> Transcript of Proceedings page 100 (Commodore Ross Smith).

<sup>166</sup> Lieutenant General Tim Keating brief of evidence at paragraphs 9 and 10.

<sup>167</sup> Lieutenant General Tim Keating brief of evidence at paragraph 10.

<sup>168</sup> Inquiry October bundle page 112o.

<sup>169</sup> NZDF bundle at page 213.

<sup>170</sup> Transcript of Proceedings at page 1133 (Air Marshal Kevin Short).



the Minister of Defence's Political Adviser, Josh Cameron, telling him that the Minister's Military Secretary had that day taken a bundle of documents from NZDF headquarters to the Minister's office and that amongst them was the IAT report which concluded that there may have been civilian casualties.<sup>171</sup> Mr Cameron said to Air Marshal Short that the IAT report's conclusion that there may have been civilian casualties contradicted the briefing that the Minister of Defence had received on the Saturday.<sup>172</sup>

107. At the same time, CDF Keating, then in Australia, received a call from the Minister. The Minister referred to the IAT report and its conclusions being at odds with both the briefing he had received two days earlier and with NZDF's 20 April 2011 statement that had been repeated at the conclusion of the *Native Affairs* report.<sup>173</sup>

108. When CDF Keating relayed this conversation to Commodore Smith, Commodore Smith described his reaction in the following way:<sup>174</sup>

"My stomach sank, I was thinking "how did I not know we had this report?"

109. Under cross-examination, Commodore Smith reiterated the point: "the moment my stomach sank was the fact that a report existed which we did not know about"<sup>175</sup> and "my stomach sank when I was told that we had a report I did not know about".<sup>176</sup>

110. This is the very compartmentalisation/record-keeping issue referred to in paragraphs 78 to 80 above. The senior officers in the NZDF should have been aware of the report's existence at HQNZDF and of its conclusions. Had it been disseminated more broadly at the time and/or had the NZDF's records of the Operation been searchable in a timely way, the response to the *Native Affairs* item would have been entirely different.

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<sup>171</sup> Air Marshal Kevin Short brief of evidence at paragraph 11.

<sup>172</sup> CDF Short's notes are in the NZDF bundle on page 231.

<sup>173</sup> Lieutenant General Tim Keating brief of evidence at paragraphs 11 and 12, Commodore Ross Smith brief of evidence at paragraphs 23 to 25.

<sup>174</sup> Evidence of Commodore Ross Smith paragraph 26.

<sup>175</sup> Transcript of Proceedings page 156 (Commodore Ross Smith).

<sup>176</sup> Transcript of Proceedings page 163 (Commodore Ross Smith).

111. Commodore Smith and Air Marshal Short have both given evidence of their meeting with the Minister the next morning, on 1 July 2014. Their evidence of that meeting, and their contemporaneous notes<sup>177</sup> show that the Minister felt let down by his Saturday briefing, wanted to know when and how the NZDF got the IAT report, wanted the NZDF to interview the SNO from the time of the Operation to ascertain what he knew and how he had interpreted the IAT report, and wanted the NZDF to report back on those matters.
112. Much was made in the cross-examination of Commodore Smith of a suggestion that he was, as a result of the meeting with the Minister, to have conducted an "investigation" into when and how NZDF received the IAT report. That was not in fact the case.<sup>178</sup> As the evidence and notes of both Commodore Smith and Air Marshal Short show, the Minister wanted to know when and how NZDF received the report and asked NZDF to interview Colonel McKinstry, the SNO at the time of the operation, believing that he would hold the answers. So that is exactly what Commodore Smith did. Moreover, he went further and contacted Major General Kelly, the DSO at the time, as well as Defence Legal Services. As Commodore Smith's notes of the interviews with Colonel McKinstry and Major General Kelly show, neither had seen the IAT report, despite having looked for it and had no idea of when or how it arrived into the safe of Captain Hoey, the Director of Coordination. The email records show that Defence Legal Services were also unable to locate any trace of the report in their files.<sup>179</sup>
113. Certainly, Commodore Smith could have gone further and, as he said during cross-examination, with what he knows now it would have been prudent to look at the register for the OCDF safe.<sup>180</sup> But, contrary to

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<sup>177</sup> Evidence of Commodore Ross Smith paragraph 30 and his notes at page 239 of the NZDF bundle; brief of evidence of Kevin Short at paragraphs 13 to 17 and his notes at page 231 of the NZDF bundle.

<sup>178</sup> Commodore Ross Smith supplementary brief of evidence at paragraph 2: "I did not understand the Minister to be requesting a formal investigation into the matter ... I was simply following up a factual matter raised by the Minister".

<sup>179</sup> Inquiry October Bundle at page 119.

<sup>180</sup> Transcript of Proceedings at page 982 (Commodore Ross Smith): "No, I did not look at the registers, and as I stated in my supplementary Brief of Evidence, knowing now what I know, I probably should have."

the way in which it was put to Commodore Smith in cross-examination,<sup>181</sup> he was not asked to conduct a formal investigation.

114. It seems that Commodore Smith's inquiries focussed on those in the relevant roles in August 2010, when the IAT report was drafted, on the assumption that the report must have been received then.<sup>182</sup> It is for this reason that the matter was not raised directly with Colonel Blackwell who became the DSO in March 2011. Colonel Blackwell's evidence is that "If they'd asked me [whether I had obtained the IAT report], I would have, yes, I'd have no reason to tell them anything else".<sup>183</sup>
115. Commodore Smith was asked "where is the result of your investigation that went back to the Minister?"<sup>184</sup> to which he responded that the Minister probably received a verbal response from CDF.<sup>185</sup> Commodore Smith had earlier explained that "many of the briefings we do to Ministers is verbal ...Ministers get briefed often, formally, informally, telephone calls and face-to-face. There are not necessarily records every time a Minister is briefed."<sup>186</sup> Lieutenant General Keating's recollection is also that he verbally briefed the Minister.<sup>187</sup>
116. While CDF Keating had certainly, on his return to New Zealand, directed an investigation of the same point,<sup>188</sup> Commodore Smith regarded his

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<sup>181</sup> Transcript of Proceedings at page 132 (Commodore Ross Smith): "So did the Minister not demand an investigation and answers to this issue?" "He said he wanted answers to questions, and that's when I set about trying to find out." Transcript of Proceedings at page 136 (Commodore Ross Smith): "Surely there would have been a written note of the investigation that the Minister demanded about such an important matter."

<sup>182</sup> Transcript of Proceedings pages 134 and 135: "the source, noting the content of the IAT report, would have been either through the DSO, or from Rian McKinstry in theatre ... I thought I would have spoken to the people who would have received the document ... which would have been the DSO or the person who'd sent the document back. And the most likely person to have sent that back was Rian McKinstry." See also Commodore Ross Smith supplementary brief of evidence at paragraph 7.

<sup>183</sup> Transcript of Proceedings at page 799 (Colonel Jim Blackwell). See also Transcript of Proceedings at page 791 - 2 (Colonel Jim Blackwell): "I wasn't aware of what was going on at the time... But nobody rang me and asked me ... There's nothing to come clean about it. I'd made the report available on the 1st of September 2011."

<sup>184</sup> Transcript of Proceedings at page 135 (Commodore Ross Smith).

<sup>185</sup> Transcript of Proceedings at page 136 (Commodore Ross Smith).

<sup>186</sup> Transcript of Proceedings at page 98 (Commodore Ross Smith).

<sup>187</sup> Transcript of Proceedings at page 529 and page 532.

<sup>188</sup> Transcript of Proceedings at page 510 (Lieutenant General Tim Keating): "I asked for a thorough investigation to determine how that document came into the Office of Chief of Defence Force".

inquiries as being consistent with that direction and with the Minister's request for the SNO to be interviewed.

117. In any event, by this stage Minister Coleman had addressed the media on his way into a caucus meeting. He clarified the position in light of the IAT report. A number of media organisations reported what the Minister said, including that "there is absolutely no suggestion that New Zealand soldiers were involved in inflicting civilian casualties or deaths" but that "you probably can't rule out" the possibility of civilian casualties caused by a malfunctioning gun sight on a coalition helicopter.<sup>189</sup> By early afternoon that same day, there was communication from the Minister's Office that the Minister's "morale" had improved and that the matter was expected to "blow over fairly quickly".<sup>190</sup>
118. Should NZDF have said something to the media as well? Lieutenant General Keating was clear in his evidence that, in circumstances in which the Minister has made a public statement, it would have been unusual for NZDF to issue its own statement on the topic. As he said<sup>191</sup> the Minister took the lead in making a public statement and acknowledged that civilian casualties may have occurred. The Minister was speaking as Minister of Defence, responsible for the NZDF. Lieutenant General Keating went on to say that if the Minister has spoken on a topic, the CDF would not follow on that same topic unless directed to do so.
119. That understanding was reinforced by Air Marshal Short: "Mr Coleman makes a very clear statement, that overrides anything that would come out of the NZDF".<sup>192</sup>

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<sup>189</sup> NZDF bundle at pages 243 and 247.

<sup>190</sup> Inquiry October bundle at page 116a.

<sup>191</sup> Transcript of Proceedings at page 511 (Lieutenant General Tim Keating): "the Minister clarified it ... the Minister took the lead to make the public statement, and that's normally the case, and then we wouldn't then follow, and the Minister didn't direct me to. So, I work under Ministerial direction... If the Minister has spoken, you know, unless there is a clear direction on a matter such as this, I won't then follow unless I'm directed to do so specifically. So, to me, to the public, the matter had been clarified by the Government and the Minister." See also Transcript of Proceedings at page 525 (Lieutenant General Tim Keating): "the Minister's statement to the public, settling the matter that civilian casualties may have occurred, ended the matter."

<sup>192</sup> Transcript of Proceedings at page 1124 (Air Marshal Kevin Short).

120. There had certainly been a series of media mis-steps in the hours following the airing of the *Native Affairs* programme. The IAT report had been missed in the first instance, leading to an incorrect statement, leading in turn, to the then-Prime Minister, Rt Hon John Key, providing incorrect information in a 7:16am interview on 1 July 2014 on First Line on News Hub.<sup>193</sup>
121. But, by the time of Minister Coleman's media statements later that same morning, the public record was straight.<sup>194</sup>

**An accurate account of the IAT's findings was given in response to the publication of *Hit & Run* in 2017 but incorrect information was given in the first instance**

122. When *Hit & Run* was launched on the evening of 21 March 2017, the CDF was on duty travel in Iraq and there was considerable pressure on the VCDF, as acting CDF, to provide an immediate response.
123. Air Marshal Short, having had an inkling that it was something the NZDF had reported on before,<sup>195</sup> inquired as to what had been said before. At 6:20pm,<sup>196</sup> the April 2011 press release - which stated that the ISAF investigation concluded that the allegations of civilian casualties were unfounded - was brought to his attention.
124. Air Marshal Short's evidence is that he "was concerned about continuing that line" but that he was "not sure what the statement should be".<sup>197</sup> Knowing that the CDF "would have to carry that forward on his return", Air Marshal Short sent the proposed response to the CDF for confirmation.<sup>198</sup>
125. The CDF confirmed the proposed response.<sup>199</sup> In cross-examination, Lieutenant General Keating accepted that he knew about the IAT

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<sup>193</sup> Inquiry Bundle Page 224 in which the Prime Minister said "there was a thorough review of the particular mission that the SAS had gone on and my understanding is that they refute the claims that they say that there were insurgents that were killed but that was it."

<sup>194</sup> NZDF bundle page 243.

<sup>195</sup> Transcript of Proceedings at page 1147 (Air Marshal Kevin Short).

<sup>196</sup> NZDF bundle page 261.

<sup>197</sup> Transcript of Proceedings at page 1148 (Air Marshal Kevin Short).

<sup>198</sup> Transcript of Proceedings at page 1148 (Air Marshal Kevin Short).

<sup>199</sup> NZDF bundle page 263.

report, but explained that the context had shifted;<sup>200</sup> “in my mind, I was responding to the allegations of war crimes ... that the casualties were caused by NZDF actions ... those allegations were unfounded.”<sup>201</sup>

126. While the ISAF investigation did conclude that New Zealand troops were not responsible for any possible civilian casualties, and that they had acted in accordance with the rules of engagement, it did not conclude that the allegations of civilian casualties were unfounded. Lieutenant General Keating accepted that the initial response to the book was inaccurate.<sup>202</sup>

127. Lieutenant General Keating made a number of further acknowledgements. In particular, he accepted that:

- a. the response to *Hit & Run* should have been qualified;<sup>203</sup>
- b. there was a lack of coherence in the NZDF’s response;<sup>204</sup> and,
- c. the NZDF’s handling of the press release was “less than professional”.<sup>205</sup>

128. The NZDF deeply regrets that its initial response to *Hit & Run* was to deny that civilian casualties may have resulted from Operation Burnham.

129. The statement was approved under intense pressure, without the time for due thought, analysis, and consideration, but there was no intent to mislead. The following morning Air Marshal Short briefed the Prime Minister, the Rt Hon Bill English, relaying the conclusions from the IAT

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<sup>200</sup> Transcript of Proceedings at page 550 (Lieutenant General Tim Keating).

<sup>201</sup> Transcript of Proceedings at page 547 - 548 (Lieutenant General Tim Keating). See also Transcript of Proceedings at page 544 (Lieutenant General Tim Keating): “Here was a serious allegation against the conduct of New Zealand troops, and the statement here, I believe, was to say that was unfounded.”

<sup>202</sup> Transcript of Proceedings at page 547 - 548 (Lieutenant General Tim Keating).

<sup>203</sup> Transcript of Proceedings at page 512 (Lieutenant General Tim Keating). He later reiterated the point, Transcript of Proceedings at page 549 (Lieutenant General Tim Keating): “could it have been clearer and said, you know -- and added but civilian casualties may have occurred as a result of the Apache gunship? Yes, probably. And maybe that clarification, you know, in hindsight should have been there.”

<sup>204</sup> Transcript of Proceedings at page 581 (Lieutenant General Tim Keating). See also Transcript of Proceedings at page 588 (Lieutenant General Tim Keating): “I think Defence could have been far more coherent.”

<sup>205</sup> Transcript of Proceedings at page 590 (Lieutenant General Tim Keating).

report, including that while New Zealand had not caused any civilian casualties, it was possible some had occurred.

130. Then-VCDF Short decided it best to take a "holding position" until CDF Keating had returned to New Zealand a matter of days later.<sup>206</sup>
131. On the CDF's return, the NZDF was able to clarify publicly that the ISAF investigation determined that a gun sight malfunction on a coalition helicopter resulted in several rounds falling short, missing the intended target and instead striking two buildings, which may have resulted in civilian casualties.<sup>207</sup>
132. The NZDF's discussion of the location of Operation Burnham was not, as Air Marshal Short explained, "a deliberate strategy to discredit the book, it was saying this is where we operated, this is what we did, this is how the mission was undertaken".<sup>208</sup> This point was reiterated by Lieutenant General Keating in his cross-examination: "there is no distraction in here. Quite the opposite [what] I was trying to point out, was the facts and evidence of what we did and where we operated and ... [the] operation we conducted."<sup>209</sup>
133. Equally, it was not an attempt to distance the NZDF from Operation Burnham, as Counsel Assisting suggested. As Air Marshal Short observed, quite properly, in response to the suggestion, "how can you distance yourself from the operation when you actually lay out all the facts about what happened in that operation".<sup>210</sup>
134. As it stated during Public hearing 1, the NZDF generally uses GPS coordinates in lieu of location names, because they are unique. The book *Hit & Run* contained incorrectly annotated satellite images of villages it named as Naik and Khak Khuday Dad where it claimed the NZDF had conducted operations. The NZDF conducted Operation Burnham in an area known as Tirgiran. It accepts that Tirgiran may also be referred to as Naik (or Dahane Nayak) and Khak Khuday Dad, and in that context, the NZDF's press release of 26 March 2017 could

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<sup>206</sup> Air Marshal Kevin Short brief of evidence at paragraph 33.

<sup>207</sup> NZDF Bundle at pages 287 - 288.

<sup>208</sup> Transcript of Proceedings at page 1143 (Air Marshal Kevin Short).

<sup>209</sup> Transcript of Proceedings at page 578 (Lieutenant General Tim Keating).

<sup>210</sup> Transcript of Proceedings at page 1144 (Air Marshal Kevin Short).

have been more carefully worded to clarify that it has never conducted operations at the locations in those incorrectly annotated satellite images in the book *Hit & Run*.<sup>211</sup>

135. Immediately on his return, CDF Keating regarded it as imperative to get clarity on the veracity of the allegations made in *Hit & Run*. He took a good many steps to ensure an accurate understanding of the position and an accurate portrayal of the position to the public. By way of summary:<sup>212</sup>

- a. On 21 March 2017, while overseas, he asked the Director of Legal Services, then-Colonel Lisa Ferris, to gather as much information as possible about the operation;
- b. He made a number of requests for information from Commodore Smith;
- c. He obtained a classified copy of the Air Weapons Team video footage and accompanying audio from the operation;
- d. He received and considered a briefing pack of the information obtained for him by the time of his return from Iraq on Saturday 25 March 2017;
- e. He met with the Minister of Defence Hon Gerry Brownlee and then with the Prime Minister, providing accurate information about the IAT outcomes;
- f. He put out a news press statement on *Hit & Run* that evening, acknowledging the possibility of civilian casualties;
- g. He held a press conference on 27 March 2017 and explained the position accurately;
- h. He issued further briefing notes to the Minister of Defence;

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<sup>211</sup> On 19 March 2019 one of the authors accepted a location error and asked the Inquiry to disregard those images (the NZDF notes that, as of 1 November 2019, those images remain available on the book's website).

<sup>212</sup> Lieutenant General Tim Keating brief of evidence at paragraphs 20 to 40.



- i. He briefed the Prime Minister again on 3 April 2017 following which the Prime Minister conducted a post-Cabinet conference;
  - j. Although the Prime Minister had decided not to conduct an Inquiry, then-CDF Keating continued with the fact-finding exercise he was undertaking to determine if there was anything missing, not wanting to leave any stone unturned;
  - k. He wrote to General Dunford, the Chair of the US Joint Chiefs of Staff, to request a declassification of the AWT video footage and accompanying audio;
  - l. He wrote to General Pavel, the Chair of NATO's Military Committee, to request a full copy of the IAT report (not then knowing that the report that NZDF had, while called an "Executive Summary", was in fact the full report);
  - m. He directed all material relevant to the Operation (correspondence, media releases and the like) to be consolidated into a single record to ensure consistency in the future;
  - n. He directed the New Zealand Defence Attaché in the Middle East to travel to Afghanistan to check whether there was any other material of relevance to the operation in ISAF headquarters that could be provided to New Zealand;
  - o. In early May 2017 he established a fact-finding team to gather more information, including from Major General Zadalis directly (who had conducted the IAT investigation);
  - p. A preliminary investigation by Military Police was conducted into the allegations in *Hit & Run* of mistreatment of Qari Miraj (the investigation concluded there was insufficient evidence to support the allegations).
136. It was only as a result of this further work that the NZDF became aware for the first time of a second investigation conducted domestically by the United States into discrete issues arising out of the Operation;

primarily whether the AWT video had been wrongfully edited by their forces, the investigation concluding that it had not.<sup>213</sup>

137. As Lieutenant General Keating made very clear in his evidence – in response to a range of questions suggesting that he was reluctant to cause embarrassment to the Government in 2014 given the upcoming election and that NZDF had “buried” the IAT report<sup>214</sup> – his integrity is vital to him and there was absolutely no conspiracy.<sup>215</sup>
138. It is, it is submitted, just not possible to say that the NZDF personnel were in some way involved in a cover-up. The reality is the antithesis of that. Lieutenant General Keating’s focus was to understand exactly what happened in Operation Burnham, to understand the nature of the investigations undertaken at the time and what they had concluded, to be clear on what had been said to the public. The NZDF purposefully made detailed information available to the public that recorded what had occurred.
139. Having said that, Lieutenant General Keating acknowledged openly that, during the seven-year timeline with which we are concerned here, the NZDF’s systems had let it down. As he said in response to questions from Sir Terence “a good system would [have contained detail about where the material came from]. I don’t believe we had a good system in those days.”<sup>216</sup>
140. Lieutenant General Keating spoke of systems improvements he had implemented: “What I did in moving on though, is then used this as a point to change the systems in NZDF ... we’re sitting on documents in different parts of the organisation that should have been pulled together coherently. That’s what I set about doing over the remainder of my time in SF, including directing that operations of this nature be conducted by the Joint Commander.<sup>217</sup> He also noted that he “took the operations out of the Office of CDF and took them out to Joint Headquarters where they have the staff and the processes and the

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<sup>213</sup> The Army Regulation 15-6 investigation, producing the report on page 89 of the NZDF bundle.

<sup>214</sup> Transcript of Proceedings page 531 (Lieutenant General Tim Keating).

<sup>215</sup> Transcript of Proceedings page 632 - 633: “It wasn’t tidy. It was unprofessional. But it wasn’t a conspiracy” (Lieutenant General Tim Keating).

<sup>216</sup> Transcript of Proceedings page 508 (Lieutenant General Tim Keating).

<sup>217</sup> Transcript of Proceedings page 529 - 531 (Lieutenant General Tim Keating) Note that it appears the reference in the transcript to ‘my time in SF’ was meant to be ‘my time as CDF’.

systems to ensure that documents like this get recorded in a coherent manner".<sup>218</sup>

141. He accepted that there were "a number of opportunities for NZDF to acknowledge the outcomes of the IAT report ... I think those opportunities were missed for a variety of reasons ... what we didn't have was irrefutable evidence of civilian casualties ... and I think that probably clouded our judgement."<sup>219</sup>

### **Concluding comments**

142. It is so very important to place these events in context; in the context of the vast number of NZSAS operations – often multiple each week – that took place during the three year period of Operation Wātea in Afghanistan. These operations, undertaken by professional NZSAS personnel in dangerous and volatile situations, involved feats and actions that can only be described as heroic. Of those that are in the public domain, the feats and actions included rescuing hostages and responding to terrorist attacks – such as those at the Hotel Intercontinental, the Grey Palace, or the British Council – and preventing many others. The operations involved partnering with local Afghan forces to assist the legitimate Government of that country to strengthen the rule of law and maintain security for its citizens, and defeat a terrorist insurgency with global reach. The NZSAS are held in high regard internationally for their professionalism and the contribution they made in Afghanistan which exemplified the values of the New Zealand Defence Force, shared by New Zealanders on whose behalf the NZDF serves: *Courage – Tū Kaha, Commitment – Tū Tika, Comradeship – Tū Tira, Integrity – Tū Maia.*
143. The NZDF can acknowledge a range of mistakes that it made in responding to allegations of civilian casualties between 2010 and 2017.

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<sup>218</sup> Transcript of Proceedings page 613 (Lieutenant General Tim Keating).

<sup>219</sup> Transcript of Proceedings page 503 (Lieutenant General Tim Keating).

However, it will not impugn the honesty and integrity of its senior officers. As Air Marshal Short observed:<sup>220</sup>

“It’s not the way I see the individuals who have served in the New Zealand Defence Force and who have held high positions. I see them as very open and honest and professional men who would do the right thing in the right circumstances.”

144. This the nub of it: open, honest, professional NZDF service personnel endeavouring to do what is right. Service personnel working in a fast-paced environment, overseeing hundreds of operations and dealing with vast numbers of documents. Service personnel who have no agendas of any kind but who have admitted openly to their involvement in events and actions that have caused confusion. Those events and actions are summarised in paragraph 8 above and are discussed throughout these submissions. They include mistaken views on the IAT report outcome, the use of inaccurate wording in early Ministerial briefings, the lack of a system-wide document repository for classified documents like the IAT report, compartmentalised reporting and consequent issues in having the report front of mind when that was what was needed. They include a lack of nuance in endeavouring to explain the point that allegations of civilian casualties *by New Zealand troops* were unfounded; repeating instead (and failing to recognise) an inaccurate line that the IAT report had concluded that civilian casualties, generally, were unfounded. This is a series of rolling, sometimes compounding, mis-steps. Each of them is truly regretted.
145. But they are well removed from the serious allegations that led to the establishment of this Inquiry; allegations of extreme wrongdoing on the part of NZDF personnel during Operation Burnham and subsequent operations. They are of a different nature altogether and, in all fairness, need to be viewed in that light and portrayed in that context. As mis-steps in the passage of information, they are a world away from the deeply serious allegations made about what occurred in Afghanistan during the nights of the operations in question. In the submission of the NZDF, it would be inappropriate for them to overshadow the

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<sup>220</sup> Transcript of Proceedings at page 1155 (Air Marshal Kevin Short). See also Transcript of Proceedings page 632 (Lieutenant General Tim Keating): I hold those people who were under my command, and many of them that you spoke to, to extremely high standards of integrity.”

extremely high regard in which New Zealand's service personnel are held and for which they can rightly be proud, and all that New Zealand, as a member of the international community, has achieved in Afghanistan through its Defence Force.

Dated: 1 November 2019

A handwritten signature in blue ink, consisting of several overlapping loops and lines, positioned above a horizontal line.

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**Paul Radich QC and Lucila van Dam**  
**Counsel for NZDF**