

[REDACTED]

**REPORT OF AN INQUIRY OFFICER
POSSIBLE CIVILIAN CASUALTIES FROM
CLOSE AIR SUPPORT STRIKE AT [REDACTED] AFGHANISTAN
ON 28 APR 09**

References:

- A. Instrument of Appointment dated 8 May 2009
- B. Terms of Reference dated 8 May 2009
- C. ADFP 6.1.4 *Administrative Inquiries Manual* of Jun 06

Appointment and Terms of Reference

1. I, having been duly appointed by CJOPS LTGEN Mark Evans to inquire into and report upon the circumstances of the incident involving the [REDACTED], in accordance with the Terms of Reference attached to the instrument herein submit my report.

Conduct of the Inquiry

2. After appointment as Inquiry Officer, I received from HQ JOC and HQ CJTF 633 staff documents relevant to the inquiry, which are annexed to this report, as the TOR require [REDACTED]. I put two questions about the conduct of the inquiry to HQ JOC staff and the questions and answers are annexed to this report [REDACTED].

3. I conducted this inquiry simultaneously with the inquiry into another incident which the Appointing Officer also assigned to me. In view of the common evidence relating to organisation, staff process and the operational environment and in order to avoid conducting two or more interviews with witnesses involved in both matters, I interviewed some witness about both matters in one interview. The practical consequence of that is that the record of their evidence annexed to this report includes, in addition to the material obtained for this inquiry, some matters relevant only to the other inquiry [REDACTED]).

4. In obtaining evidence from witnesses, I generally spoke briefly with them before beginning my formal interviews and I also received briefings from staff who did not give evidence in the inquiry, to inform myself more fully of the context of the incident. These briefings were consistent with the evidence obtained from witnesses.

5. Sound recordings were kept of the interviews and the Inquiry Assistant was present, except where matters classified [REDACTED] were discussed. This was because the Inquiry Assistant is not cleared above that level. It would also not have been practicable to transmit, have transcribed or incorporate into this report those parts of the evidence with the required degree of security. I took brief notes for the purpose of the record of those parts of the inquiry. I consider that this report accurately reflects the effect of that evidence without requiring higher classification. I do not consider that

[REDACTED]

[REDACTED]

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more detailed records of those parts of the witnesses' evidence are required, though I am available to provide more detail, if necessary.

6. Because the witnesses were on operations, there were occasional interruptions in the interviews, and some of these are not explained in the recorded parts. There was no discussion of the evidence or any other irregularity in these breaks. Otherwise, the procedures required by [REDACTED] have been observed. I waived the formalities of interviewing and sound recording in my discussions with [REDACTED]. Notes were taken during the interview by the Inquiry Assistant [REDACTED]. The [REDACTED] Legal Officer [REDACTED] who was a witness in this inquiry was also present. Because the information about this inquiry which [REDACTED] gave was information which he had earlier communicated with that witness, I do not consider that there was any irregularity in his presence and I do consider that it was more sensitive to speak with the [REDACTED] in the presence of an officer already known to him.

7. I also interviewed a US serviceman [REDACTED] (the [REDACTED]) who sought permission to do so from his embassy in Canberra. A copy of References A and B were provided to him on his request (made releasable [REDACTED]). The members of the [REDACTED] crew involved in the incident [REDACTED] coincidentally were at [REDACTED] during our stay and they gave a brief and answered questions without written records. Their brief and the questions they answered confirmed the nature of my findings.

8. I did not consider that the evidence suggested adverse findings against any person involved in the incident and so I did not issue any notices of proposed adverse findings. For security reasons it was not possible either to visit the site of the incident or to meet with local nationals who might have been able to provide information relevant to the inquiry. This limitation was, in my opinion, unavoidable but its effect is ameliorated by the availability of maps, imagery and plans, the information from [REDACTED] and intelligence reporting.

Background

9. The [REDACTED] conducted OP [REDACTED], a [REDACTED] operation from [REDACTED] Mar - [REDACTED] Apr 09. The aim of OP [REDACTED] was to conduct [REDACTED] operations against insurgent (INS) targets [REDACTED].

Circumstances of the Incident

10. At approximately [REDACTED] Apr 09 eight individuals were observed acting suspiciously along a footpad in the area of [REDACTED]. [REDACTED] and the [REDACTED] were called to the [REDACTED] once the suspicious activity had been identified. The [REDACTED] was also summoned once it became likely that a kinetic strike would be ordered. A second asset, a [REDACTED] was also supporting the engagement for the duration of the task. The group was observed for over three hours while [REDACTED]. Once authorization had been received from the [REDACTED],

[REDACTED]

[REDACTED]

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the target was engaged with [REDACTED] was that possibly seven enemy were KIA. Subsequent [REDACTED] revealed that four people were KIA and two wounded.

11. Later on the morning of 28 Apr 09 [REDACTED] informed [REDACTED] of the strike that had occurred earlier that morning. [REDACTED] then advised the [REDACTED] had already been approached by people from that area claiming that the individuals killed had been farmers doing agricultural work at night. [REDACTED] then informed [REDACTED] about the incident [REDACTED] and initiated a [REDACTED] for [REDACTED].

Planning and Decision Process Leading to the [REDACTED] Engagement

12. It is worth touching briefly on the communications infrastructure used by the [REDACTED] when prosecuting this type of target with this type of asset. [REDACTED] was of poor quality and that in the [REDACTED] poor and very intermittent. The best quality feed is available to the [REDACTED] crew's imagery analysts [REDACTED], who also have the ability to [REDACTED]. Communications between the [REDACTED].

13. This was not a pre-planned engagement, rather the [REDACTED] asset had been [REDACTED] allocated to, OP [REDACTED] for this period. It was utilized for [REDACTED] development in a non-permissive area of interest because intelligence had indicated the possible presence of a [REDACTED]. Once suspicious activity had been observed and the [REDACTED] and [REDACTED] had been summoned, the activity had been [REDACTED] and the legality of a kinetic strike had been established, the [REDACTED] needed to wait until he had been able to confirm battlespace deconfliction before the target could be engaged. It was this process that accounts for the time between initial suspicious activity being observed and the first strike.

14. A broad sequence of events, taken from the [REDACTED] shows the information received during, and the decision-making process for the activity (a [REDACTED] of the area in question is attached as page 2 of [REDACTED]):

[REDACTED] DE Suspicious activity assessed by [REDACTED] as 'probable IED related activity'

[REDACTED] DE Digging observed with 5-6 people lurking and two people acting as possible force protection. Assessed to be IED emplacement.

[REDACTED] DE [REDACTED].

[REDACTED] DE [REDACTED] requests update from [REDACTED] as to direct link to [REDACTED] IED emplacement

[REDACTED] DE [REDACTED] advises one person appearing to lay command wire. Nil [REDACTED] on site.

[REDACTED]

[REDACTED]

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[REDACTED] DE [REDACTED] requests updated assessment from [REDACTED] regarding their observations.

[REDACTED] DE [REDACTED] advises 5 pax in current location, 1 pax headed to [REDACTED]. Observed 4 x digging loc, activity includes digging, tactical movement and laying command wire.

[REDACTED] DE [REDACTED] authorizes strike onto [REDACTED] IED emplacement team.

[REDACTED] DE [REDACTED] launches [REDACTED] onto four INS

[REDACTED] DE [REDACTED] launches [REDACTED] at two INS in treeline, one INS moves away.

[REDACTED] DE [REDACTED] lost

[REDACTED] DE [REDACTED] authorizes follow-on strike on [REDACTED] insurgent.

[REDACTED] DE [REDACTED] re-engages initial location with [REDACTED].

[REDACTED] DE [REDACTED].

Disposition and Mission of ADF Elements Involved in the Incident

15. No ADF elements were in the vicinity of the strike location at the time of the targeting. The [REDACTED]. The lengthy delay in authorizing the release of weapons was largely due to the time it took to achieve [REDACTED]. The closest coalition asset was a [REDACTED] element approximately [REDACTED] southeast of the engagement site.

Disposition of Insurgents in the Vicinity of the Incident

16. [REDACTED] is considered to be a non-permissive area where insurgents are active. In this type of campaign, it is impossible to describe the 'disposition' of insurgents given their operating procedures. Intelligence had indicated the possible presence of an insurgent [REDACTED] in the area being observed.

Knowledge or Assessment that Civilians Were Likely to be Present

17. The indication given by the [REDACTED] was that the personnel they were viewing were taking part in IED activity. The [REDACTED] were asked whether they had assets who could verify the activity being conducted, however, the risk was deemed too great in that area at that time [REDACTED] and the request was denied [REDACTED].

18. During the targeting process, concerns that the activity being viewed may have been night time agricultural work were raised with [REDACTED] by the [REDACTED] and the [REDACTED]. [REDACTED] believed that, in accordance

[REDACTED]

with his understanding of [REDACTED], the activity may have been night-time irrigation work, given that the allocation of water rights in this area required people to work their fields at night if that was their allocated time to access water. He also had concerns after plotting the area on [REDACTED] that the area being described as a track was a footpad and that they appeared to be setting IEDs in the aqueducts which he thought unusual.

19. The [REDACTED] had phoned the [REDACTED] in the [REDACTED] who advised the [REDACTED] to let the [REDACTED] know of his concerns. Fearing that [REDACTED] may not approach the [REDACTED] due to his rank and relative inexperience, [REDACTED] also raised the issue with the [REDACTED] after speaking to the [REDACTED].

20. [REDACTED] was also aware of the [REDACTED] regarding night time agricultural work, but weighed the advice he was receiving from his [REDACTED] with the advice he got from the [REDACTED]. This included the fact that there was no [REDACTED] exhibited (farmers at night normally use a [REDACTED] having described the laying of a [REDACTED] (which does not resemble any form of agricultural activity) and that the activity was occurring at what he considered to be [REDACTED].

21. At one point the [REDACTED] consulted with his [REDACTED] at the [REDACTED] as to his opinion, but the [REDACTED]. The [REDACTED] did not specifically question the [REDACTED] as to whether they may have been observing agricultural work, pointing out that on three occasions [REDACTED] received confirmation from the [REDACTED] that the personnel being observed were conducting IED laying activity. The [REDACTED] actions prior to authorizing the strike are summarized in an e-mail from him to the Inquiry Officer ([REDACTED]).

22. The [REDACTED] is a [REDACTED] and an experienced [REDACTED] with four tours of Iraq where he had previously engaged IED teams utilising [REDACTED]. He said that what he saw on the [REDACTED] was consistent with IED laying activity he had observed during tours in Iraq in areas with similar topography and vegetation to [REDACTED]. He also advised that he asked the [REDACTED] on his voice communications to confirm that they were not seeing agricultural work prior to seeking authority from [REDACTED] to engage the target ([REDACTED]).

Method Used to Assess the Risk of Civilian Casualties

23. After [REDACTED] has been obtained, the methodology used to assess the likely risk of civilian casualties is the [REDACTED]. The nature of the weapons effects allows engagement to occur utilizing an authorized [REDACTED] observer approved by a TF commander of [REDACTED]. In this case, the [REDACTED] went through the [REDACTED] process and utilized the [REDACTED] and [REDACTED] to confirm that there were no civilians within a 500m radius of the aim point.

Details of Casualties Arising from the Incident

24. In an environment such as Afghanistan it is often very difficult to determine with absolute certainty the identity and affiliation of casualties. This incident is such a case. Following any such engagement the [REDACTED] seeks [REDACTED] through a variety of means. [REDACTED] environment where the engagement took place precluded ground truthing [REDACTED]. The competing claims that they were either civilians or insurgents are supported by the following evidence:

a. Evidence they were Civilians.

- i. [REDACTED] reporting [REDACTED] that four people were killed at [REDACTED] while irrigating their fields.
- ii. Reports from [REDACTED] sources claiming that the people killed were farmers irrigating at night [REDACTED].

b. Evidence they were Insurgents.

- i. The [REDACTED] provided by the [REDACTED]. The [REDACTED] are well aware of agricultural patterns of life in the AO, and regularly turn down requests for [REDACTED] based on their assessment of activity they are viewing as agricultural work. The [REDACTED] was viewed with the [REDACTED] and it provided strong evidence to support the conclusion they were engaged in IED activity.
- ii. Whilst not conclusive, the fact that if conducting irrigation at night they were not using a [REDACTED], despite the fact there was only a 6% moon that set at [REDACTED].
- iii. [REDACTED] report claiming that the people killed in the bombing were insurgents [REDACTED].
- iv. During an interview conducted with the Inquiry Team, [REDACTED] said that the villagers' inability to provide further details about the deaths other than names, and their unwillingness to persist in seeking compensation [REDACTED] of the Australian claim that the deceased were laying IEDs were not consistent with villagers who were reporting legitimate civilian casualties. [REDACTED], who he claimed was associated with the Taliban.

c. Neutral Evidence

[REDACTED]

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- i. The lack of secondary explosions during the strike neither adds to, nor detracts from the available evidence. The size of the ordnance dropped during the engagement, the physical spread of the diggings and the quality of the material typically used by insurgents in Afghanistan to make IEDs means that it is unlikely that any explosives would have been detonated by the engagement if they had been present [REDACTED]
- ii. The [REDACTED] assesses that the level of interest shown by [REDACTED] INS [REDACTED] is above that shown if the deceased had had no INS connections. It could equally be argued that as this was the first kinetic strike in the area for a long time, the level of interest would be commensurate with the rarity of the event.

25. While the identities of the individuals is not known for certain, based on the [REDACTED] and [REDACTED] interview it is likely that they were:

- a. [REDACTED];
- b. [REDACTED];
- c. [REDACTED]; and
- d. [REDACTED].

Compliance with ADF ROE and VCDF Targeting Directive

26. [REDACTED].

27. Although the witnesses did not refer in their evidence to or rely in their reasoning on other [REDACTED] ROE ([REDACTED]), I consider that the actions could also be regarded as complying with [REDACTED], the evidence clearly established reasonable grounds for identifying the members of the group involved in the incident as laying or setting an IED, [REDACTED].

28. [REDACTED] to the [REDACTED] ROE requires members to observe any additional restrictions in targeting which a targeting directive for the operation imposes. The [REDACTED] Targeting Directive ([REDACTED]) is the relevant directive for OP [REDACTED] but does not, as applied to the facts in this incident, impose any additional restrictions. As a consequence, the compliance I have found with the [REDACTED] ROE also amounts to compliance with the [REDACTED] Targeting Directive.

Compliance with Other Documentation - ISAF ROE and SOPs

[REDACTED]

[REDACTED]

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29. [REDACTED], in his evidence ([REDACTED]), referred to regarding the [REDACTED] ROE and SOPs ([REDACTED]) as [REDACTED] because of the [REDACTED] need to use [REDACTED] assets and [REDACTED] view of the requirements as applicable to [REDACTED] elements. [REDACTED] also referred to the [REDACTED] ROE and the procedural requirements of [REDACTED]. Accordingly, although the [REDACTED] ROE are, in their own terms the authority for use of force by [REDACTED] members, it is necessary to consider the [REDACTED] ROE and applicable SOPs in relation to this incident.

30. First, OP [REDACTED] in general, and the phase during which the incident occurred in particular had CONOPS and ROE approval, that is, [REDACTED] staff had effectively requested and obtained approvals from the authorised [REDACTED] commanders and staff for both the conduct of the operation as planned and for the use of force under [REDACTED] ROE [REDACTED]. No approval was required under [REDACTED] ROE for the use of force in [REDACTED]. The approval to apply [REDACTED].

31. Secondly, the actions of [REDACTED] members complied with the relevant requirements of [REDACTED] SOP [REDACTED], in that the operation and ROE for the operation were appropriately approved and the requirements for positive identification, observation of pattern of life in the area, offensive application of ROE and [REDACTED] were met. A report into the incident from HQ [REDACTED] advises that the HQ [REDACTED] Legal Adviser was present in the HQ [REDACTED] targeting cell at the time of the attack and advised that the engagement was in accordance with the [REDACTED] ROE.

32. In accordance with the level of the [REDACTED] damage estimated, target engagement authority was held in the [REDACTED] and the authority was exercised appropriately. [REDACTED]. I also note that, since the incident, the difficulty of different interpretations of [REDACTED] among troop contributing nations, has resulted in approval for [REDACTED] ROE [REDACTED]. I also note that the [REDACTED] appears to have complied with [REDACTED] reporting requirements generally and in relation to possible collateral damage ([REDACTED]) and to have been sensitive to the concerns in the most recent [REDACTED] Tactical Directive ([REDACTED]).

The Manner in Which ADF TTP were Applied During the Incident and Weaknesses or Deficiencies in ADF TTP, Policies, Equipment, Practices or Training Relevant to Operations of this Kind

33. The requirements of [REDACTED] were followed. The [REDACTED] conferred with his staff advisers throughout the process, received advice from the [REDACTED] that the strike would be in accordance with the ROE, made [REDACTED] of the target and utilized an appropriately qualified and certified [REDACTED].

[REDACTED]

[REDACTED]

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34. Dynamic and immediate targeting of insurgents [REDACTED] is a complex process, particularly in the case of Afghanistan where INS and their anti-coalition activities can be difficult to differentiate from LN and their normal pattern of life. Afghan society, with its poor communications, proclivity for rumours and a Taliban who seek to exploit INS deaths by claiming they were civilians engaged in innocent activity is a difficult place to establish the truth of events. The non-permissive nature of parts of the AO where strikes occur and the Muslim requirement to bury bodies as soon as possible after death, also makes definitive [REDACTED] a difficult if not impossible task.

35. There is consequently a very heavy responsibility on commanders and their staffs whenever they take a decision to engage targets to make sure that they understand the targeting process intimately, for the consequences of not doing so are enormous. The [REDACTED] Directive points out the possibility of individual criminal responsibility for failing to comply with legal obligations, and directs ADF legal advisers to be involved in all stages of the targeting process. At the same time there is no formal training provided to these same legal advisers on targeting in the complex Afghanistan coalition context, [REDACTED]. Both the [REDACTED] stated that they had been given presentations on targeting in Australia and during their handover in Afghanistan, but had not been tested procedurally ([REDACTED]). Their testing in kinetic targeting essentially began once they began conducting targeting operations for real.

36. The experience levels of the individuals concerned ensured that the appropriate decisions were made on this occasion. It is however anomalous that the [REDACTED] under the [REDACTED] command who will use deadly force on operations are exercised and evaluated in this prior to deployment yet the [REDACTED] who are also likely to use deadly force are neither trained nor tested in it. They receive static briefs on weapons systems' capabilities and ROE and may talk through scenarios, but there is no mounting authority exercising or evaluating them. While the processes are learned through experience on the job ([REDACTED]), this situation potentially leaves the [REDACTED] vulnerable in two areas. Firstly, early during a deployment, an untrained and untested decision-making process will react relatively slowly and a fleeting opportunity to kill a [REDACTED] or INS may be missed. Secondly, if in the future a targeting error is made, individuals will suffer the consequences, the enemy will gain an IO victory and the ADF will be open to criticism for failing to provide an adequate level of training and evaluation for those responsible for the kinetic targeting decision-making process prior to deployment.

37. [REDACTED] requires legal officers to provide advice to the targeting process, so it would seem appropriate that legal officers deploying with the [REDACTED] in the future should be provided with some formal, operationally-focused individual training in the subject with an emphasis on [REDACTED] dynamic targeting ROE considerations in the Afghanistan context. The targeting process in Afghanistan, with its requirement to meet [REDACTED] ROE and its emphasis on dynamic targets involving a short decision-making cycle can be difficult to understand at first. Given that the key targeting staff in, there should be a formalized period of pre-deployment training for the [REDACTED] targeting staff so that they are trained in, and certified on, specific

[REDACTED]

targeting scenarios before they have to face them for real in theatre. This should include significant input from the [REDACTED] in-theatre to ensure the latest scenarios they are likely to face are included.

Conclusion

38. This inquiry resulted from claims initially expressed to the [REDACTED] that civilians had been killed during a [REDACTED] strike at [REDACTED] on the night of 27/28 Apr 09. Reports of varying reliability support this claim, while other reports of varying reliability refute the claim. Supporting the view that the FAM engaged were insurgents laying IEDs are the facts that the [REDACTED], experienced in local patterns of life, provided positive identification of this act on three separate occasions, the lack of a light source during a moonless period and the [REDACTED] own opinion that the petitioners' actions did not accord with those of people who had lost farmers genuinely attending to their fields at night. On the balance of probabilities then, it is very likely that the people engaged were laying IEDs.

39. The actions of the [REDACTED] personnel that night complied with the ROE governing immediate targeting. The [REDACTED] acted on [REDACTED]. When he received advice from his [REDACTED] challenging the [REDACTED] identification, he took all reasonable steps to confirm in his own mind that he was targeting INS laying IEDs. The HQ [REDACTED] legal officer also remotely observed the action and agreed that the engagement was in accordance with [REDACTED] ROE and appropriate.

40. The experience level of the individuals concerned meant that this kinetic targeting mission was conducted appropriately against a [REDACTED] IED team. The Inquiry has highlighted the fact that, while [REDACTED] staff are responsible for authorisation of kinetic targeting while in Afghanistan, they are neither trained nor certified in the kinetic targeting process before they deploy. From a duty of care perspective this short fall needs to be addressed.

Recommendations

41. It is recommended that:

- a. **no** conduct warrants further investigation by the Australian Defence Force Investigative Service;
- b. **no** administrative action be taken against any person;
- c. **no** changes are required to the methodology for assessing the risk to civilian casualties in this type of operation;
- d. **no** adjustments are required to TTPs to minimize the risk of civilian casualties in the future;

[REDACTED]

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- e. no act of grace payments are justified;
- f. legal officers deploying with the [REDACTED] in the future be given formal training in kinetic targeting procedures prior to deployment, with an emphasis on kinetic targeting procedures under [REDACTED] ROE in support of [REDACTED] operations;
- g. future [REDACTED] command groups be given formal instruction and be certified in kinetic targeting procedures they are likely to face in Afghanistan with the personnel they will be deploying with and conducting targeting during their operational tour; and
- h. you note the unclassified executive summary of this report ([REDACTED]).

[REDACTED]

Colonel

Inquiry Officer

23 June 2009

Annexes:

- A. Chief of Joint Operations, Instrument of Appointment of Inquiry Officer (with enclosures) of 8 May 2009
- B. [REDACTED]
- C. [REDACTED]
- D. [REDACTED]
- E. [REDACTED]
- F. [REDACTED]
- G. [REDACTED]
- H. [REDACTED]
- I. [REDACTED]
- J. [REDACTED]
- K. [REDACTED]
- L. [REDACTED]
- M. [REDACTED]
- N. [REDACTED]
- O. [REDACTED]
- P. [REDACTED]
- Q. [REDACTED]
- R. [REDACTED]
- S. [REDACTED]

[REDACTED]

[REDACTED]

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T. [REDACTED]
U. [REDACTED]
V. [REDACTED]
W. [REDACTED]
X. [REDACTED]
Y. [REDACTED]
Z. [REDACTED]
AA. I[REDACTED]
BB. [REDACTED]
CC. [REDACTED]
DD. [REDACTED]
EE. [REDACTED]
FF. [REDACTED]
GG. [REDACTED]
HH. [REDACTED]
II. [REDACTED]
JJ. [REDACTED]
KK. [REDACTED]
LL. [REDACTED]
MM. [REDACTED]

[REDACTED]