



FEDERAL COURT OF AUSTRALIA

**After Dinner Speech
delivered at the
Army Administrative Inquiries Cell
Annual Conference Dinner
Brassey Hotel, Barton, Canberra**

Thursday 7 June 2012

**The Honourable Justice Logan RFD
A Judge of the Federal Court of Australia**

On 23 December 1916, during the closing phase of the Battle of Magdhaba, in the Sinai Peninsula, 29 year old Captain Mervyn Bournes Higgins, Adjutant of the 8th Light Horse Regiment, was killed in action.¹ Captain Higgins was the only child of Mr Justice Henry Bournes Higgins of the High Court of Australia and his wife, Mary Alice.² He was an Oxford University graduate (BA) and a member of the Inner Temple and the Victorian Bar.³ He was also one of the few officers to have survived the valiant but disastrous dismounted charge of the Light Horse at The Nek at ANZAC Cove on 7 August 1915.⁴

Captain Higgins was but one of over 60,000 Australian servicemen who were killed during World War I. Nor was Mr Justice Higgins unique amongst the Australian

¹ Field Service Death Report dated 12 February 1917, Australian Army Service History File, Higgins, Mervyn Bourne, Captain, National Archives of Australia, Series B2455, <http://recordsearch.naa.gov.au/scripts/Imagine.asp>, accessed 5 June 2012 (M B Higgins Service File), p 11.

² Rickard, John, 'Higgins, Henry Bournes (1851–1929)', Australian Dictionary of Biography, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/higgins-henry-bournes-6662/text11483>, accessed 5 June 2012.

³ Enlistment Form, M B Higgins Service History File, p 7.

⁴ P Burness, *The Nek*, Kangaroo Press, 1996, p 123. 8th Light Horse Regiment formed part of the formation, 3rd Light Horse Brigade, the units of which took part in the charge.

judiciary in the loss of a son. For example, of the then 8 New South Wales Supreme Court judges, 6 had sons who enlisted. Of these, almost all were wounded and 3 were killed.⁵

On 28 March 1917, Higgins J had occasion to write from his Melbourne chambers to the Officer in Charge of the AIF Base Records Office, also located in Melbourne.⁶ The exact successor to that office is the Central Army Records Office within the Soldier Career Management Agency. In the letter and in response to a telephone call from his wife, Higgins referred to advice from that official, which had evidently come to his wife's attention, that his son's effects from Egypt had been sent to Dromana. Higgins maintained a seaside home, "Heronswood" at Dromana on the Mornington Peninsula. He stated, "The position is very painful; ordinary care would have shown my ordinary residence as being at 'Doona', Glenferrie Road, Malvern. As matters stand, I don't know to whom to address myself to get the goods. Perhaps your officers will know. An early correction of the mistake will be appreciated by us."

The response from the Base Records Office of 2 April 1917⁷ was defensive, although not uncaring. The author stated and regard to Captain Higgins' enlistment paper⁸ confirms that the only next of kin address which he had given was care of his father at the High Court in Melbourne. The author continued that "all communications from you" have dated from 'Heronswood'" and that, consequently, when the effects came to hand, this is where they were sent. He concluded by advising that arrangements had been made for the effects to be collected from there and returned to Melbourne for delivery to Doona. Higgins' comment concerning "ordinary care" was not unreasonable. An exercise of common sense, certainly in 1917 and probably even now, tells against the likelihood of that a High Court judge would daily commute from a locale on the Mornington Peninsula into inner city Melbourne.

⁵ Opening Remarks of Bathurst CJ to the University of Technology Law School Symposium, "The Legal Profession and the Defence Force: Historical Connections", Sydney, 24 March 2012: [http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst240312.pdf/\\$file/Bathurst240312.pdf](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst240312.pdf/$file/Bathurst240312.pdf), accessed 5 June 2012.

⁶ M B Higgins Service History File, pp 119-120.

⁷ M B Higgins Service History File, p 118.

⁸ M B Higgins Service History File, p 7.

In the meantime and before he had received this response, Higgins J wrote on 31 March 1917, again from his Melbourne chambers, to the then Minister for Defence, Senator Pearce.⁹ He writes on a “matter painful to myself and my wife, because other parents of deceased soldiers may be treated similarly”. Twice in the letter he refers to Captain Higgins as “my boy”. His grief is truly palpable. He relates being informed by “base records people” that Dromana is his registered address and that it is not, or at all events that he has not registered it. He records that two of the four boxes of effects did arrive there and asks rhetorically why should he have the “painful duty” of casting about for the others?

Senator Pearce annotated the letter with a request to the Secretary, “For inquiry and report”. Captain Higgins’ file discloses that there was no elaborate inquiry, only careful, urgent and sympathetic attention by the Secretary and staff officers whose rectification actions overtook that proposed in the Base Records Office letter of 2 April 1917.

There is no record on Captain Higgins’ file of any formal investigation into his death, only a “killed in action” annotation on his record of service form and a completed pro forma field service death report, the military equivalent of a death certificate. Greater detail concerning the circumstances of his death is provided by the records of the Australian Red Cross Society Wounded and Missing Enquiry Bureau files. In response to questions from relatives or friends, Red Cross volunteers made inquiries concerning the fate of a soldier from those members of his unit passing through hospitals or consequential inquiries of other soldiers based on leads provided by this initial means.

Examination of the file concerning Captain Higgins¹⁰ discloses:

- (a) Differing accounts of his cause of death – gunshot wound to the head in most versions but one account states that he was shot in the chest;

⁹ M B Higgins Service History File, pp 114-115.

¹⁰ Australian Red Cross Society Wounded and Missing Enquiry Bureau file 1DRL/0248: <http://www.awm.gov.au/collection/records/1drl0428/2/133/4/1drl-0428-2-133-4-1.pdf> accessed 7 June 2012.

- (b) Differing accounts as to whether he was killed instantly or died about half an hour after being wounded, on a stretcher in the course of being evacuated; and
- (c) Differing accounts as to what he was doing at the time of his death – observing with two senior officers the final phase of the assault from a rampart in most; leading his men in another and bringing up ammunition in yet another.

Reading the accounts together, it is tolerably clear that Captain Higgins was killed instantly by a gunshot wound to the head while observing the last phase of the attack but the version which has passed into the Official History¹¹ is that he was killed leading his men.

Captain Higgins was buried in the field by a military chaplain the day after he was killed.¹²

Almost 90 years later, on 21 April 2006, also in the Middle East, 25 year old Private Jacob Kovco also died from a gunshot wound to the head.¹³ He was a member of 3rd Battalion, The Royal Australian Regiment, deployed to Baghdad as part of a combat team protecting Australian Embassy officials in Iraq. He was buried not in the field but at Sale in Australia following a funeral attended by the Prime Minister and Senator Pearce's successor as Minister for Defence, The Hon Brendan Nelson MP, the Chief of the Defence Force, the Chief of Army, a 300 person honour guard drawn from his unit, his grieving family and hundreds of other mourners. There was a 3 gun salute as well as a fly past by military aircraft.

¹¹ Official History of Australia in the War of 1914–1918 Volume VII – The Australian Imperial Force in Sinai and Palestine, 1914–1918 (10th edition, 1941) Author: H S Gullett, p 225. Digital copy: <http://www.awm.gov.au/collection/records/awmohww1/aif/vol7/awmohww1-aif-vol7-ch14.pdf> accessed 7 June 2012.

¹² M B Higgins Service History File, p 12 – entry in Record of Service.

¹³ Wikipedia entry in respect of Jacob Kovco: http://en.wikipedia.org/wiki/Jacob_Kovco (Wiki Entry, accessed 6 June 2012). Having checked the footnoted sources for this entry, the summary in it appears to me to be accurate. Save where separately footnoted, the Wiki Entry is the source for the portion of the speech in relation to PTE Kovco.

On this occasion, the Australian military misplaced not the deceased soldier's personal effects but the deceased soldier's body. Private Kovco's funeral was delayed because the body initially repatriated to Australia was not his but that of a Bosnian civilian contractor. In the days immediately following the incident, the Defence Minister gave 3 differing accounts as to how Private Kovco had died. Recalling the accounts of Captain Higgins' death, such confusion is not unknown but the fog of war was surely much fainter in Iraq in 2006 than in the Sinai in 1916.

There were two formal inquiries into his death; initially, by a board of inquiry under the *Defence (Inquiries) Regulations* and, following a complaint by his grieving mother alleging a cover up, by the New South Wales Coroner. The conclusion of each inquiry was broadly the same – death by misadventure while mishandling a service pistol.

There was a separate inquiry by the then most senior female officer in the Australian Army, Brigadier Elizabeth Cosson, into how it was that the Army repatriated the incorrect body. She mislaid a draft of her report at a Melbourne airport passenger lounge from whence it apparently came into the possession of the radio journalist, Mr Derryn Hinch with much attendant publicity. Brigadier Cosson was later promoted, recognised in National Honours and now holds a senior position in the Department of Veterans' Affairs.¹⁴

The contrasts and similarities between these two active service deaths and the sequels to those deaths are stark and say much about how our society and its Army have changed over the last century. Time and perhaps also judicial reticence does not permit me to reflect in detail on how much they say, so I shall confine my reflections just to some which relate to the occasion for this gathering.

A body such as an Army Administrative Inquiries Cell (AAIC) was not to be found in the Order of Battle of the AIF or in the Australian Military Forces during the First World

¹⁴ Wikipedia entry in respect of Elizabeth Cosson: http://en.wikipedia.org/wiki/Elizabeth_Cosson (Accessed 6 June 2012) Having checked the footnoted sources for this entry, the summary in it appears to me to be accurate.

War. The ability competently to conduct an investigation, formal or otherwise, was then expected to be a skill required to be possessed by every general service officer. Routine inquiries were the province of a junior officer with the more detailed and intricate being the province of field rank and senior officers. Some sixty years after Captain Higgins' death, when I undertook my initial general service officer training at an Officer Cadet Training Unit (OCTU), this remained the case. I was recently reminded of that when moving house when I came across my old OCTU Investigations Study Guide, carefully filed away against the contingency, happily one which never came to pass, of being needed one day.

In the recently furnished report of the HMAS Success Commission of Inquiry under the presidency of my former and much respected Federal Court colleague, the Honourable Roger Gyles AO, QC, the following observations are made:

- 3.4 *I can see the benefit of having a pool of trained, accredited and experienced inquiry officers available to be appointed to conduct Inquiry Officer Inquiries into serious or complex incidents and complaints. I can also see that there might be occasions when it would be useful to have individuals not subject to ordinary command available for the purpose. Once detached from active duties, however, these individuals would become increasingly out of touch with operational circumstances, and that would affect their capability and the credibility of the result. Both direct costs and indirect costs would be incurred in removing experienced personnel from active duties. I have assumed that the pool would not consist of lawyers. There is an ample supply of external lawyers, including Reserve Officers, capable of conducting inquiries where the choice of a lawyer is appropriate. Furthermore, an external lawyer can act as an inquiry assistant, as was the case in the Wark inquiry.*
- 3.5 *There are distinct strands in the Working Group's proposals for change. One is expertise. Another is administrative convenience. Another is independence. It is the last of these that is prompting the proposal for external control of inquiries. The reaction to such a proposal will be influenced by the philosophy of the audience. Some will be instinctively against the military investigating the military; others will be instinctively against civilian interference in military affairs.*

- 3.6 *I am not able to judge whether the deficiencies in the present arrangements are sufficient to justify such a policy change. A word of caution might not be out place. Much of the impetus for change of this kind has come as a result of agitation by those who claim to have been badly treated and who have persuaded others outside the military to take up their cause. It is possible that undue attention to such cases skews proper perspective: the squeaky wheel usually receives the oil.*¹⁵

I respectfully agree with each of these observations, most especially the last.

I would add this.

The opportunity cost of inquiries such as those conducted into the death of Private Kovco is considerable, never more so than at a time when our national defence budget as a proportion of GDP is as low as it was during what, in hindsight and even in prospect, was a period of wilful neglect in the years immediately preceding the Second World War.¹⁶ We delude ourselves if we think that such types of inquiry, whatever their virtues, may never also contain an element of societal self-indulgence or that they are in any way apt, during a period of more intensive and pervasive conflict, for inquiries into subjects such as the death of Private Kovco or a succession of Defence Department matters since then.

There is, I respectfully suggest, a risk with bodies such as the AAIC that they may generate both at a political level and within general service officer ranks the notion that the conduct of difficult inquiries concerning sensitive issues of public interest is something that can be “contracted out”. That carries with it a further risk of creating a most undesirable “them and us” divisiveness within the officer corps. There are singular risks with any such divisiveness, especially if the “them” becomes civilians and the “us” the armed forces. The subjects concerning inquiries and administrative decision-making which you are covering in your conference are most worthwhile but they are also

¹⁵ HMAS Success Commission of Inquiry, Commonwealth of Australia, 2011, Part 3, Recommendations, para 3.4 to 3.6, footnote references omitted.

¹⁶ P Kelly, Military Spending Slumps to 1930’s Level, The Australian, 11 May 2012: <http://www.theaustralian.com.au/news/opinion/military-spending-slumps-to-1930s-level/story-e6frg74x-1226352458112> (Accessed 7 June 2012)

subjects, I respectfully suggest, which, in degrees of detail related to prospective rank, need to form part of the syllabus for first appointment and at Staff College.

In truth, in the profession of arms, as with all learned professions, there must be an ethos that difficult inquiries and related difficult decisions concerning peer conduct are a particular responsibility of those holding rank within the profession. In the profession of arms this is a function of command. Leadership in a disciplined force requires an intolerance of unacceptable professional conduct and a proactive, rigorous assertion, throughout the chain of command, of the importance of the societal expectation that officers will faithfully translate that ethos into practice without fear, favour or affection. None of this is to deny the fundamental feature of civilian control over the military, which is the only basis upon which a standing army is permissible under our system of government.¹⁷ But that control must encourage and insist upon that ethos, not subvert or diminish it.

For the judiciary who, by virtue of Chapter III of the Constitution, form part of the system of civilian control, that translates into a principled restraint in relation to the judicial review of any decision entailing a value judgement made in the command and control of the Australian Defence Force.

¹⁷ Found in s 68 of The Constitution, which gives the command in chief of the Defence Force to the Governor-General as The Queen's representative, who in turn acts only on the advice of Ministers responsible to a democratically elected parliament.