1. The central task of the Commission at this stage is to determine the facts and circumstances surrounding the killing of 34 people by the South African Police Service (SAPS) on 16 August 2012.

2. We represent the families of 21 of those killed. The families' names and further particulars have been provided to the Commission.

3. We shall invite the Commission to find that all our clients' loved ones were unlawfully killed by the SAPS.

4. We understand the SAPS to contend that it opened fire on our clients' next of kin out of necessity. More particularly, we understand it to be alleged that –
4.1 certain strikers were shot while they ran, armed with pangas and machetes in close formation, towards SAPS lines at crime scene 1, with the apparent intent to attack the officers stationed there; and

4.2 other miners were shot while they resisted arrest, allegedly with fire-arms, at a small koppie at crime scene 2.

5 However, the police version is contradicted by much of the independent documentary evidence so far disclosed to this Commission.

6 For example, the SAPS’s version is completely at odds with Post-Mortem reports, introduced by the evidence leaders, which show that no less than 14 of the striking miners were shot from behind, many in the back or in the back of the head. This evidence, which we understand is unlikely to be contradicted, is wholly inconsistent with the claims of necessity that the SAPS will advance.

7 In the event, this Commission must consider whether, in the circumstances, it is competent for a policeman to shoot someone in the back, and then plead, rationally, self-defence.

8 We submit not.

9 Whatever the truth of that tragic day, it cannot be that the SAPS could not have acted differently. It could and should have brought the day, and indeed, the gathering, to an end peacefully, and without loss of life.
We will contend that, on the contrary, every step taken by the SAPS leading up to and including 16 August 2012 not only made the workers’ deaths foreseeable, but, in the end, made those deaths the most likely result.

We will show that, while disarming and dispersing the miners may not have been an illegitimate objective, the manner and timing of the SAPS’ attempts to do so inevitably invited death and injury.

It appears that little attempt was made to negotiate directly, reasonably and meaningfully with the workers gathered on the large Koppie, known colloquially as “the Mountain”. Instead, the commanders on the scene sent in National Union of Mineworkers (NUM) and Association of Mineworkers and Construction Union (AMCU) officials to discuss their labour demands. SAPS officers on the scene must have known that the workers were not under the immediate control of either NUM or AMCU. To rely exclusively on NUM or AMCU to negotiate with the miners was wholly inappropriate. At that stage, the situation was a public order issue, not a labour issue, and should have been treated in a manner consistent with recognised best practice in public order situations. It was not.

It appears that, immediately prior to the killings, no direct order to disperse was issued to the striking miners, failing which the police would move in, disarm and arrest them. Nor was there an ultimatum issued,
requiring the miners to lay down their weapons, nor were the miners given any opportunity to comply with any such order.

Instead, after what it describes as a “show of force” – which could only have heightened tensions at the scene – the SAPS sought to encircle and entrap the workers. A barbed-wire fence was placed around the Mountain, blocking the miners’ most likely dispersal route to the Nkaneng informal settlement. It was this event, and this event alone, which precipitated the movement of the strikers off the Mountain. They had no choice but to move, in numbers, directly toward police lines. They were given nowhere else to go.

In these circumstances, death and injury were depressingly predictable. Less predictable was the fact that many of the miners would be shot in the back, and in the back of the head, apparently while trying to escape. The use of automatic weapons was in itself astonishing, especially in the absence of any indication that the miners possessed more than three firearms and in the absence of any suggestion that they had threatened to use them.

The Independent Police Investigative Directorate (IPID) has disclosed documents and statements to the Commission in which chilling allegations are made. They contain accounts of injured miners being shot dead by the police while they lay prostrate on the ground, in the immediate aftermath of the first volley of police fire. It is a matter for
comment that these harrowing accounts of extra-judicial execution are more consistent with the injuries disclosed on the Post-Mortem reports than the explanations so far advanced by the police. They call for an answer, if an answer can be given.

17 With the leave of the Commission, we shall introduce and rely upon national and international instruments dealing with public order policing and crowd control. We shall invite the Commission to find that SAPS conduct on 16 August fell far short of these standards, and, in many respects, blatantly contradicted them.

18 With the leave of the Commission, we shall introduce expert evidence relating to the miners' fatal injuries and to the inappropriateness of the SAPS' approach to the gathering on the Mountain.

19 In the end, we shall submit, the timing and manner of the SAPS response to the gathering on the mountain was aggressive, misguided, disproportionate, unreasonable and unlawful.

20 Further, while the primary responsibility lies with the SAPS, Lonmin must also share the blame.

21 Its response to the Rock Drill Operators (RDOs) at the centre of the strike ranged from the feckless to the imperious. Finally, Lonmin abrogated all responsibility to the national government.
Prior to June 2012, Lonmin’s response to the RDOs’ apparently well-founded complaints of disproportionately low pay, was to hold them to a collective agreement negotiated with the NUM. Lonmin insisted on engaging with the RDOs within existing collective bargaining structures.

In June and July 2012, however, Lonmin changed tack and openly engaged with the RDOs outside union structures. On 3 August, it offered the RDOs a modest increase in some of their allowances. When the RDOs rejected this offer, Lonmin accused them of acting outside union structures and refused to engage with them – remarkably self-serving, inasmuch as Lonmin negotiated with the RDOs outside existing union structures and then dumped them when they did not accept its offer.

The evidence will show, overwhelmingly, that all the striking RDOs said they wanted as a precondition to dispersal from the Mountain was a meeting with Lonmin’s management to discuss their grievances. We shall, if necessary, lead evidence that the miners repeatedly assured their families that all they were waiting for was for Lonmin to arrange a meeting with the Strike Committee.

Lonmin consistently refused to arrange such a meeting, even when it became obvious that substantial violence might ensue without one.

Instead, it instigated and escalated an excessive security response. Its letters to the Minister of Minerals and Energy are telling. In one of them, dated 13 August 2012, Lonmin’s Chief Commercial Officer calls for the
state “… to bring its might to bear . . . using resources at its disposal, to resolutely bring the situation under control.” Subsequent events give that letter an inflection that is as sinister as it is tragic.

27 Whether or not a meeting with Lonmin would have averted the deaths of 16 August, Lonmin’s failure to consider meeting with representatives of the striking workers was a tragically lost opportunity in the days leading up to the massacre. Lonmin was patently more interested in crushing the strike than in understanding its causes.

28 Notably, after the massacre, Lonmin did agree to negotiate with a committee of representatives elected from among the striking workers on the Mountain. Those representatives travelled to Rustenburg where they negotiated with Lonmin management and ultimately agreed the wage increase that ended the strike. What ultimately happened shows that a resolution was always possible, provided that Lonmin was willing to engage consistently and fairly with the workers. It is most unfortunate that it took the terrible events of 16 August to press Lonmin to do so.

29 In examining the root causes of the strike and the massacre, we shall respectfully seek to introduce evidence from Gavin Hartford, an expert on the socio-economic circumstances underlying the mining industry. Mr Hartford will say that, at the heart of the Marikana strike lies an economic and social crisis in mining communities. At the root of the crisis is the migrant labour system, which can be traced back to the 1880s, and
which sustained the economic base of the Apartheid regime, and has remained substantially unreformed in the 18 years since the advent of a democratic South Africa. We point out that all of our clients are sustained by migrant labour, and that some of the other miners killed on 16 August were migrant labourers from Lesotho and Swaziland.

30 Mr Hartford will say that the specific migratory and housing conditions of migrants have lead to a double economic burden of sustaining households both in rural family homesteads and immediately adjacent to the mines; that collective bargaining processes and institutions have failed dismally to address the causes of discontent in mine labouring communities; and that mine company management is complicit in this failure.

31 Mr Hartford will say that solving the underlying causes of labour unrest at Marikana require a radical re-think of the future of migrant labour, of collective bargaining and of manager / employee relations at the mine level.

32 Mr Hartford will say that there is an urgent need to promote greater freedom of association at mines like Lonmin as the first step towards restoring the legitimacy of the collective bargaining system.

33 What happened on 16 August was not the unfortunate result of a dispute between two labour unions. Indeed the attempts by some to reduce the massacre to failings within the NUM or AMCU are either unfortunately
misguided or mischievous, or both. The evidence is that neither union had much control over the striking workers or the Committee that represented them. NUM and AMCU members were shot in more or less equal measure.

The massacre was the grimly predictable result of the deeply entrenched poverty in which migrant labourers are held, an undemocratic workplace, broken collective bargaining procedures and institutions, high-handed mine-management and a militarised, trigger-happy police force. It would be unfortunate indeed, and would tragically obscure the truth our clients seek, were either the NUM or AMCU be made to take responsibility for far-reaching structural and policy failings which throw South Africa’s social and economic crisis into sharp relief.

It remains a matter of regret that our clients were not transported to Rustenburg for the first three days of the Commission’s hearings. Even now, three of our client families have been left behind in the Eastern Cape. The state was apparently not equal to the simple logistical task of transporting them to Rustenburg in time for the resumption of the Commission’s hearings. It is furthermore most unfortunate that the state has limited our clients’ attendance at the hearing to one person per family. The state’s justification – that it lacks the resources to do more – is flimsy, especially given its lavish expenditure on its own representation before the Commission. The Evidence Leaders’ team comprises of 3
Amongst the statements taken from our clients, is the story of Zameka Nungu. She lost her husband on 16 August. She says that the custom at Lonmin when a worker is killed is for the job left vacant to be offered to a family member. So she is now preparing to leave her 5 children – Tshepiso (aged 17), Nowili (aged 13), Sizwe (aged 12), Xolile (aged 9) and Noxolo (aged 3) to go to work at Lonmin. Those children have accordingly lost their father to the police, and their mother to the migrant labour system. They now require a searching examination, and a full explanation, of the circumstances which press on them the sad prospect of a parentless childhood.

We respectfully submit that the Commission owes them nothing less.

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21 October, 2012