Australian Government

Defence Honours and Awards Appeals Tribunal

Foreign Affairs, Defence and Trade Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee members

It is with pleasure that I convey to you this submission of the Defence Honours and Awards Appeals Tribunal (the Tribunal) to the Foreign Affairs, Defence and Trade Committee *Inquiry into the Defence honours and awards system*.

In writing this submission, so far as practicable and relevant to the work of the Tribunal, we have attempted to address all aspects of the inquiry's terms of reference, although some aspects of those terms of reference are clearly more germane to our role than others.

All members and staff of the Tribunal have contributed to the development of this submission, and all members and staff have unanimously endorsed it.

We would be happy to assist the Committee in whatever way we can over the course of the inquiry, and would be pleased to elaborate on this submission either in writing or in a hearing of the Committee. The Tribunal's point of contact in relation to this submission is its Executive Officer, Mr Jay Kopplemann, on (02) 5131 6933.

Yours sincerely

Stephen Skehill
Chair
Defence Honours and Awards Appeals Tribunal
29 August 2024

The Tribunal in Brief

A Defence Honours and Awards Tribunal was first established as an administrative body in 2008, and the present Defence Honours and Awards Appeals Tribunal was later established as an independent statutory body on 5 January 2011, under Part VIIIC of the *Defence Act 1903* (the Act).

The Tribunal has two functions.

In its **review** function, the Tribunal can conduct a merits review of a decision of Defence that is a ***refusal to recommend*** a person for a defence honour (such as a gallantry or distinguished service decoration), a defence award (such as a medal granted for service in a campaign or to recognise long service), or a foreign award. Through this review function, the Tribunal allows Australian Defence Force members, veterans and their families to obtain timely, independent and thorough review of those decisions.

In its **inquiry** function, at the direction of the Minister, the Tribunal can inquire into matters relating to defence honours and awards and provide a report and recommendations to Government.

The Tribunal is an independent statutory authority. Tribunal members are not subject to direction by anyone in the performance of their duties as members. It is separate from the Australian Defence Force and the Department of Defence and is accountable to Government through the Minister for Veterans' Affairs and Defence Personnel. The Tribunal is not a court and it seeks to conduct its proceedings with as little formality as possible.

More detailed information about the Tribunal can be found on page 15, in response to item e) of the inquiry terms of reference.

Structure of this Submission

The Terms of Reference for this Inquiry require the committee to examine:

> *The integrity and efficacy of the Defence honours and awards system, with particular reference to:*
>
> *a) experiences of Australian Defence Force (ADF) personnel progressing through the honours and awards system;*
>
> *b) the effect of awards and honours on maintaining morale within the ADF;*
>
> *c) assurance of the integrity of awards to senior officers for conduct in the Afghanistan conflict;*
>
> *d) the effect of changes in criteria for some honours and awards from 'in action' to 'in warlike operations';*
>
> *e) the operation of the Defence Honours and Awards Appeals Tribunal, including any potential improvements;*
>
> *f) any potential improvements to the Defence honours and awards system; and*
>
> *g) any related matters.*

We have addressed each item of the terms of reference in the following pages.

Attachments

a) The integrity and efficacy of the Defence honours and awards system, with particular reference to experiences of Australian Defence Force (ADF) personnel progressing through the honours and awards system

Defence honours and awards recognise various kinds of service, and are issued following various administrative processes. Defence awards can be granted to recognise things like length of service or campaign or operational service, and defence honours can be granted for gallantry, distinguished or conspicuous service.

While governed by legislation, defence honours and awards are not created by the Parliament. Rather they are established by the Sovereign by Royal Warrant and accompanying Regulations, on the recommendation of the Prime Minister.

The Warrants and Regulations do not create entitlements in those who meet the eligibility criteria for any defence honour or award. Instead, defence honours and awards are issued in exercise of the executive discretion and, even where the eligibility criteria are met, may be withheld if there is adequate countervailing reason.

The Defence honours and awards system allows for honours or awards to be issued by the Governor-General or a delegate of the Governor-General:

- in response to an internal nomination within the ADF – by someone like a more senior officer;
- as a result of an automated process – such as a trigger in the ADF personnel database which recognises that a permanent serving member has reached a particular milestone for length of service;
- after an application to the Directorate of Honours and Awards within the Department of Defence by anyone, including but not limited to an ADF member or a veteran; or
- following merits review in the Tribunal, which can be sought by anyone who has made an unsuccessful application or nomination (so long as the service in question is after 3 September 1939).

In considering the experience of individuals in their dealings with this system, it is important to recognise that the necessary decision-making can be of widely varying complexity and thus the potential for dissatisfaction with outcomes can also vary greatly:

- Decision-making for awards relating to length of service is relatively straightforward with a only a very minor proportion of eligible cases being appealed in the Tribunal, and the points of contention are generally limited to fairly simple issues such as the computation of time served or the reasons for early discharge.

- Campaign and operational service award decision-making can be more complicated, with many more eligibility criteria that can be contentious, such as nature of service, temporal and geographic connection, and technical questions such as force assignment or reason for departure from the field of operations.

- And decisions relating to defence honours are far more complicated, involving highly conceptual and undefined issues of valour, gallantry, distinguished and conspicuous service.

Experience of Defence processes

By definition, all who apply to the Tribunal for review of Defence decisions are dissatisfied with the experience of the defence honours and awards system up to that point. Defence processes very large numbers of applications each year (17,000 on average, with a further 8,500 names assessed from nominal rolls). Despite very large numbers of departmental decisions, only about 25 to 30 applications for review by the Tribunal are lodged every year. As a result, the experience with Defence of those applicants who engage with the Tribunal cannot be viewed as representative of all who engage with the system as a whole. The following remarks must thus be viewed from that perspective.

Applicants for review by the Tribunal, having been subject to a refusal from Defence, occasionally express frustration in navigating the processes. We find that generally, the level of frustration expressed by an applicant increases in line with the complexity of the decision-making process relevant to the honour or award that is sought. All applicants for review express dissatisfaction with the decision itself – were it otherwise, they would not approach the Tribunal. However, some go further and allege additional failings by Defence such as obfuscation, lack of skill or attention to detail or, on occasions, impropriety.

It is thus important to stress that, while it might often disagree with Defence interpretations and arguments relating to certain aspects of the eligibility criteria, the Tribunal has no cause whatsoever to believe that Defence, either on a corporate or individual level, acts other than in good faith in administering honours and awards.

Similarly, those who make submissions to or appear before the Tribunal in its inquiry function often complain about their experience in seeking recognition of service to that point. Such dissatisfaction is generally the trigger for the Minister to direct the Tribunal to conduct an inquiry. A recent example of relevance was provided by the *Inquiry into medallic recognition of service with Rifle Company Butterworth*. Many of the 269 submissions to that inquiry made often very serious allegations against Defence in relation to recognition of that service between 1970 and 1989. After detailed analysis of those submissions and the evidence presented at public hearings, the Tribunal felt it appropriate to comment in its report to the Minister as follows:

> *….The Tribunal noted that a not-insignificant number of the submissions received from RCB veterans or the organisations representing them went beyond arguing against the Defence position that RCB service was 'peacetime'*

> *and very directly attacked the integrity of the Department of Defence and of its officers. A number of submitters also claimed that, in its conduct before the Tribunal, Defence had failed to comply with its obligations under the Commonwealth's model litigant principles.*
>
> *For this reason, it is important that the Tribunal state in the clearest of terms that it considered these attacks to be unwarranted and misplaced. The Tribunal had no reason to doubt that, corporately and individually, Defence approached the question of classification of RCB service with integrity and in good faith. While it is apparent, from the views set out in Chapter 7 and elsewhere in this report, that the Tribunal considered that Defence made multiple errors in its analysis and decisions, that implies nothing adverse to the ethical position of those involved.*

Having said that, we do note that the Directorate of Honours and Awards currently has a very limited outward-facing customer interface, and that enquiries to the Directorate, which might relate to especially sensitive material or require the serving member or veteran to revisit past trauma, are 'funnelled' through the broader Defence call centre. We understand that this call centre is not staffed by subject-matter experts, and possibly not all staff have received any or adequate training in trauma-informed care. We think the Directorate could take steps to improve its public interface in this regard, particularly with a view to avoiding any unnecessary exacerbation of any mental health issues to which an applicant may be subject.

Experience of Tribunal processes

Insofar as the Tribunal's processes are concerned, while some ADF members or veterans might naturally express disappointment when the Tribunal decides to affirm a Defence decision, in our regular pre- and post-hearing contact with applicants we find that they generally express satisfaction with the conduct of the Tribunal review process. Generally, the applicant will also express gratitude for the opportunity to discuss the administrative management and examination of their case with the Tribunal Secretariat, and the opportunity to personally discuss the substance of their case with members of the Tribunal at hearing.

On occasion, this gratitude extends to the Defence representatives at hearings, who are given an opportunity to elaborate on the reasons for Defence's position, and, generally, to answer questions posed by the veteran. In this latter regard, the Tribunal wishes to note that those officers and staff who represent Defence at Tribunal hearings are generally very respectful of and considerate to applicants.

Decisions of the Tribunal are reviewable in the Federal Court of Australia on a question of law.

In two cases in 2016 the Court dismissed applications for orders under the *Administrative Decisions (Judicial Review) Act 1976*[1]. While the Court in each case made some comments critical of the Tribunal's approach in the reviews it had conducted, it found that the Tribunal's decisions were in accordance with the law.

A further application for judicial review was lodged in 2020 but was discontinued by the applicant before it was heard by the Court.

[1] *McLeod-Dryden v. Defence Honours and Awards Appeals Tribunal* [2016] FCA 1138 and *McAuley v. Defence Honours and Awards Appeals Tribunal* [2016] FCA 719.

b) The integrity and efficacy of the Defence honours and awards system, with particular reference to the effect of awards and honours on maintaining morale within the ADF

In any organisation and consistent with the human condition, people desire to feel valued, respected and recognised for their contribution.

In the Defence context, clearly honours and awards can and should play a vital part in this, along with other forms of recognition such as badges (for example, the Infantry Combat Badge and the Army Combat Badge).

An effective honours and awards system can enhance not only morale within the ADF, but also family and public support for the ADF and thereby foster and promote ADF recruitment and retention.

In the view of the Tribunal, there are two particular issues that can impact on the effect that the system of defence honours and awards may have on morale within and respect for the ADF:

- consistency of decision-making, so that comparable service receives comparable medallic recognition – we discuss this issue further under item e) at page 15; and

- precisely what aspects of service are recognised by defence honours and awards.

In this latter regard, one clear issue with the present honours and awards that can undoubtedly impact morale is that, as the system currently stands, honours and awards recognise the fact of service, but not the potentially devastating impact that service can have on ADF members and veterans and their families.

In December 2021, the Tribunal completed the *Inquiry into recognition for members and families of members of the Australian Defence Force who are injured, wounded or killed in service* which it had been directed to conduct by the then Minister. Over the course of that inquiry, the Tribunal heard compelling evidence from veterans and families affected by trauma, physical and mental injuries and disease and death in or as a result of service.

This evidence and careful consideration led the Tribunal to the conclusion that none of the existing non-medallic forms of recognition for death, wounding or injury in service provides an adequate, personalised expression of recognition of, or the gratitude of the nation for, the sacrifice that the ADF member or veteran has made or that their family has endured as a result.

The Tribunal concluded that Australia lacks, but should have, an emblematic recognition of that sacrifice that can be publicly worn with commemoration and pride. The inquiry report detailed a proposal for new forms of recognition for ADF members and veterans who had been killed or materially injured or wounded in or as a result of their service, and for their families

No Government decision has yet been made on the recommendations arising from that inquiry.

While we understand that some senior office-bearers of a number of Ex Service Organisations (ESOs) have expressed some reservations about certain, limited aspects of the Tribunal's proposals for new recognition, we are not sure that those reservations would necessarily reflect the views of the 'rank-and-file' members of those organisations who might be the beneficiaries of the proposed new recognition.

If there remain any unresolved issues identified in consultation with ESOs or other stakeholders, the possibility exists for those matters to be referred back to the Tribunal for reconsideration and further recommendation, rather than delaying a decision any further.

As detailed in the report, there would be an associated cost in implementing the Tribunal's recommendations. However the Tribunal believes that cost would not be material in the broader Defence budget, the Department of Veterans' Affairs budget or the cost of other measures to foster and promote morale and encourage ADF recruitment and retention.

c) The integrity and efficacy of the Defence honours and awards system, with particular reference to assurance of the integrity of awards to senior officers for conduct in the Afghanistan conflict

At this point, it is important that we declare that:

- a member of the Tribunal, Major General Mark Kelly AO DSC (Retd), served as the Commander of Joint Task Force 633 in Afghanistan from January 2009 to January 2010 and was awarded the Distinguished Service Cross in recognition of that service;

- another member of the Tribunal, Brigadier Dianne Gallasch AM CSC (Retd), was awarded a Commendation for Distinguished Service in recognition of her Afghanistan service; and

- a number of members of the Tribunal, in the ordinary course of their former ADF service, had some involvement in the nomination of, or processing of nominations for, recognition of service in the Middle East, although such involvement was not as a decision-maker.

We understand from media reporting and observation of Senate Estimates proceedings that there is an ongoing interest in some sections of the veteran community for an examination of the legitimacy of Distinguished Service Decorations awarded to some senior officers in command positions for service prior to the amendment of the *Distinguished Service Decorations Regulations* in 2012. This is discussed further in our response to item d).

There have been a small number of approaches from veterans wishing the Tribunal to undertake such an examination. However, such an exercise would not fall within the scope of the Tribunal's review power as it does not relate to a ***refusal to recommend*** a person, or group of persons for the defence honours concerned.

It would nevertheless be open to the Minister to direct the Tribunal to inquire into that issue and make recommendations to the Government.

In the absence of such a referral, and the significant body of research and work that it would undoubtedly entail, the Tribunal is not able to make any comment on the legitimacy of the awards raised in those approaches, or the processes or the quality of decision-making that led to their issue.

d) The integrity and efficacy of the Defence honours and awards system, with particular reference to the effect of changes in criteria for some honours and awards from 'in action' to 'in warlike operations'

Again, in the absence of a referral from Government to consider this issue, the Tribunal is not best placed to offer any comment on this element of the Terms of Reference. However, we can make some observations concerning the interpretation of the terms 'in action' and 'warlike operations' based on our previous reviews and inquiries.

It is important to recognise that the decision as to what eligibility criteria are to apply for each honour or award in the Australian defence honours and awards system is a decision for the Sovereign, as the King or Queen of Australia, on the advice of the Prime Minister. Such decisions are not made by the ADF, the Department of Defence or Ministers sworn to the Defence portfolio.

The Distinguished Service Decorations, being the Distinguished Service Cross (DSC), the Distinguished Service Medal (DSM) and the Commendation for Distinguished Service were established by Letters Patent on 15 January 1991 for the purpose of recognising members of the Defence Force and certain other persons for:

- *distinguished command and leadership in action* (for the DSC); or
- *distinguished leadership in action* (for the DSM); or
- *distinguished performance of duties in warlike operations* (for the Commendation).

On 13 December 2011, the *Distinguished Service Decorations Regulations* were amended to omit 'in action' and insert 'in warlike operations' in respect of awards of the DSC and the DSM.

The terms 'in action' or 'in warlike operations' are not defined in the Regulations.

However, we note that, in reference to the Australian Gallantry Decorations, the departmental Defence Honours and Awards Manual (the DHAM) defines the term 'in action' as:

> ***In action*** *in a military context is the engagement between opposing forces. A member must be physically in a situation involving direct conflict between opposing forces to be determined to be 'in action'.*

In reference to the Distinguished Service Decorations, the DHAM defines 'in warlike operations' to be *those operations declared by the Governor-General to be warlike*.

The Tribunal has previously found these definitions to be largely unhelpful.

However, the following interpretations of these phrases can be observed from a review of relevant decisions of the Tribunal over the last eight years.

'in action'

In the context of the Australian Gallantry Decorations, in *Delgado and the Department of Defence re: Bloomfield [2018] DHAAT 11*, the Tribunal said:

> ***'In action'*** *is usually a relatively straight forward concept involving armed conflict in close proximity to or under the fire of an adversary. In this matter this is not the case as Lance Corporal Bloomfield's actions were not in contact with the enemy. The Tribunal addressed this issue with the Respondent during the hearing and noted the Army advice that despite the patrol not being in contact with the enemy, there was no question that they were on operations and that the threat of the enemy could be considered to be omnipresent.*

As noted by the Tribunal in *Delgado*, together with recognition of service 'in action', the Gallantry Decorations Regulations allow for gallantry decorations to be awarded for service that *occurred in circumstances similar to armed combat or actual operations and those concerned were deployed under military command*.

In *Hare and the Department of Defence [2019] DHAAT 13*, the Tribunal said:

> ***'In action'*** *is a straightforward concept involving armed conflict in close proximity to or under the fire of an adversary.*

Similarly, in *Gilbert and the Department of Defence [2019] DHAAT 02*, the Tribunal said:

> ***'In action'*** *is usually a relatively straight forward concept involving armed conflict in close proximity to or under the fire of an adversary.*

Various other reviews have observed that the term is *relatively straightforward* or *relatively easy to define*.

'in warlike operations'

In August 2023, the Tribunal completed its *Inquiry into medallic recognition for service with Rifle Company Butterworth.* In doing so, it observed that in 1993 the Cabinet agreed to definitions of 'warlike' and 'non-warlike' that were to uniformly govern each of conditions of service (such as leave and allowances), veterans' entitlements and medallic recognition. In 2018, the Minister for Defence approved 'updated' definitions of 'warlike' and 'non-warlike' and added a new definition of 'peacetime' service. However, the submission approved by the Minister stated that the new definitions should only apply to conditions of service and veterans' entitlements for future ADF service, and thus not to medallic recognition for ADF service.

The 1993 (and in the Tribunal's view, for the purposes of medallic recognition, the extant) definition of 'warlike' operations is:

Warlike
Warlike operations are those military activities where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties. These operations can encompass but are not limited to:

a. a state of declared war;

b. conventional combat operations against an armed adversary; and

c. Peace Enforcement operations which are military operations in support of diplomatic efforts to restore peace between belligerents who may not be consenting to intervention and may be engaged in combat activities. Normally, but not necessarily always they will be conducted under Chapter VII of the UN Charter, where the application of all necessary force is authorised to restore peace and security or other like tasks.

e) The integrity and efficacy of the Defence honours and awards system, with particular reference to the operation of the Defence Honours and Awards Appeals Tribunal, including any potential improvements

The Tribunal strives to improve the service it provides to ADF members and veterans, their families, and the Government. We thus welcome this opportunity for review of our operations through this Committee inquiry which we hope will see substantive and constructive engagement with the service and veteran community.

To assist the Committee in viewing the Tribunal in context, we attach at Attachment 1 a brief history of review of defence honours and awards, both prior to and following the establishment of the Tribunal. This history illustrates the importance of an independent review body in the administration of Defence honours and awards and the significant difficulties in the management of unresolved cases prior to the Tribunal's establishment.

The Tribunal is unique in many respects:

- As previously noted, defence honours and awards are not created under legislation passed by the Parliament, but under Royal Warrants and conferral is dependent upon an exercise of executive discretion rather than as a matter of entitlement – a list of the defence honours and awards within the Tribunal's jurisdiction is at Attachment 2.

- In its review function, it conducts merits reviews involving the two parties in a similar way to many other Commonwealth and state tribunals such as the Administrative Appeals Tribunal or the Veterans' Review Board (although the Department of Veterans' Affairs seldom appears at VRB hearings) . But, unlike other tribunals, it also has an inquiry function, which allows examination of a wide range of matters relating to honours and awards. In the past, these matters have covered subjects such as the propriety of collective recognition for particular operations, campaigns or other service, or broader policy issues such as the potential introduction of further recognition for ADF members and veterans and their families. Inquiries usually involve extensive consultation with the broader community and substantial research into the matters at hand.

- Unlike many other tribunals, applicants to the Tribunal are almost exclusively not supported by legal representation, though a small number are assisted by advocates (who seldom have a strong grasp of the nuances of the honours and awards system). As a result, the Tribunal and its Secretariat actively strive to be as 'applicant-friendly' as possible, to the extent that doing so is consistent with ensuring careful and thorough merits review and that neither party is unfairly advantaged or disadvantaged. As an example, the power of the Chair to unilaterally dismiss applications for review in particular circumstances is used very sparingly.

- Unlike other tribunals, there is no limitation on the categories of persons who may apply for review – anyone dissatisfied with a Defence decision on their

application for a defence honour and award may seek Tribunal review of that decision, whether or not they are themselves an ADF member or veteran.

- Unlike other tribunals, there is no time limit within which an application must be made to the Tribunal after a Defence decision is made.

- And there is no time limit on the service that might be considered by the Tribunal, so long as it was rendered after the commencement of the Second World War on 3 September 1939.

Beyond simply reaching decisions on individual appeals made to it, the operation of the Tribunal clearly can also have a normative effect on Defence's primary decision-making and its subsequent internal review after an appeal is lodged with the Tribunal. This is demonstrated by continuing improvement in Defence decision-making over the life of the Tribunal, Defence's application of lessons learned from Tribunal reports and decisions, and the relatively high concession rate of Defence refusals after lodgement of an appeal to the Tribunal. As shown in the statistics at Attachment 3, the number of concessions slightly exceeds the number of decisions that have been set aside by the Tribunal and replaced with a new decision.

Additionally, the recommendatory power of the Tribunal under section 110VB(3) of the Act has been useful in facilitating focus on rare, but nonetheless serious, systemic issues in Defence decision-making. An example is the gifting of thousands of Second World War campaign medals to the families of deceased veterans who were discharged from service for relatively inconsequential disciplinary reasons. These medals were withheld due to systemic issues with Defence's decision-making over many years that were brought to light in the conduct of one individual review before the Tribunal, which highlighted the need for further inquiry and recommendation.

The Tribunal works in a specialist area of the law that is a niche subject-matter steeped in military history and tradition. To enable the Tribunal to examine the wide range of issues that are brought before it, the Tribunal has a diverse membership, with a mix of very significant service experience and senior expertise in military law, administrative law, health, military history and government administration. A brief biography of each of the current members is at Attachment 4.

The Tribunal's review and inquiry processes allow for thorough, expert consideration of complex matters which may otherwise go unresolved. Some of these matters have garnered much public attention, including the successful resolution of the longstanding issues of recognition for the Battles of Long Tan and Fire Support Bases Coral and Balmoral during the Vietnam War, and the belated, but nonetheless richly deserved, award of the Victoria Cross for Australia to Ordinary Seaman Edward 'Teddy' Sheean VC during the Second World War. There has also been numerous other individual and collective cases that have been subject to less public attention, but have nonetheless been of immeasurable value to the veterans and families concerned. We expect that the Tribunal will continue to have an important role to play in the future, as ADF members and veterans from more recent operations transition to civilian life, or are in a better position to reflect on their service in their later years.

Work of the Tribunal to date

There have been 485 properly-made applications for review received since 2008. However, not all of these have resulted in a Tribunal decision. On being informed of an application for review or during the review process, Defence may reassess its position and decide to grant the honour or award being sought. This is consistent with Defence's obligation as a model litigant under the *Legal Services Directions 2017* – see the above comment on the concession rate. The number of instances of such concessions appears to be trending upwards over the last few years. A comparatively smaller number of matters have been withdrawn by applicants during the review process.

Thirty inquiries have been completed by the Tribunal since its establishment in 2008, with 24 of these completed between 2008 and 2015. A list of completed inquiries is at Attachment 5.

The Tribunal review process

On receipt of an application for review, the Tribunal checks that the application meets the requirements set out in the Act to ensure it has jurisdiction to proceed.

Once jurisdiction is confirmed, the Tribunal writes to the applicant formally accepting the application and providing them with additional detail of how their application will be dealt with from then, and suggestions about how they can prepare for the hearing.

At the same time the Tribunal provides a copy of the application to Defence, and seeks a report from Defence addressing the reasons for its initial decision and providing all relevant documentation.

When the Defence report is received, the applicant is provided with a copy and is invited to provide any comments they may wish to make on it.

The Tribunal then considers all of this material, and any additional research it elects to make, before setting down a date for a hearing.

Hearings are generally held in public, and may be conducted in person, via telephone, or by audio-visual link. The Tribunal's hearing environment is not an adversarial one in which each party 'argues' against the claims of the other. Rather, the Tribunal is an inquisitorial body, which uses the hearing as an opportunity to gather as much information as it can from each of the parties, and any witnesses, to assist it in coming to an informed and correct decision.

The hearing is an important opportunity for the applicant to personally discuss the circumstances of their service with the Tribunal (and Defence), and for the Tribunal to ask the applicant and Defence any questions it may have after having read through all the documents and research material, which is made available to both parties prior to the hearing.

We feel the hearing process is especially valuable, both in terms of gathering information that might assist the Tribunal in reaching its recommendation, and for the applicant to know that their application has been considered in detail by an independent, statutory decision-maker. During the hearing it is common for both the Tribunal and Defence to take the opportunity to thank a member or veteran for their service where that is appropriate, and it is considered that this aspect also adds to the value of the interaction with an applicant.

While the Tribunal does not hand down its decision on the day of the hearing, quite often a an applicant will explain at the end of the proceeding the value of the hearing to them, and express gratitude for the ability to make their point personally and to obtain a better understanding of why the initial decision was made, even though it was not in their favour.

After the hearing, the Tribunal prepares a written decision and detailed statement of reasons which is provided to the applicant, to Defence and, if appropriate, to the Minister. Twenty business days later, the report is published on the Tribunal's website.

If the applicant is seeking a defence award (such as a campaign or long service award), the Tribunal has the power to affirm Defence's decision, or to set it aside and replace it with a new decision. If the Tribunal's decision is to recommend issue of the award the applicant is seeking, Defence is then responsible for implementing that decision.

If the applicant is seeking a defence honour (such as a gallantry or distinguished service award), the Tribunal is required to make a recommendation to the Minister for Defence or the Minister for Defence Personnel regarding the review. This could be to affirm Defence's decision, or to set it aside and replace it with a new decision, which might include recommending issue of a defence honour. It is then up to the Minister to decide whether or not to accept the Tribunal's recommendation.

The Tribunal review process usually takes between three and six months to complete, but may take longer depending on the complexity of the review, any research that may be required, and any request by the applicant for further time.

The Tribunal inquiry process

From time to time, the Government refers general issues relating to Defence honours and awards to the Tribunal for inquiry and recommendation. When this occurs the Terms of Reference for the inquiry are established by Government.

The inquiry commences with a nationwide call for submissions to address the inquiry's Terms of Reference. Along with this call, the Tribunal usually engages directly with individuals and groups, such as ESOs, that are known to have an interest in the inquiry, and with Defence. The Tribunal then considers the submissions received. Depending on the nature of the inquiry, the Tribunal may publish submissions (or even evidentiary/research material) on its website, where the submitter consents to the Tribunal to doing so. Following receipt of submissions, public hearings will be held and some submitters may be invited to provide oral evidence.

Hearings for an inquiry are held in public unless the Chair of the Tribunal determines otherwise. Upcoming hearings are advertised on the Tribunal's website prior to the event. Submitters to the inquiry and any member of the public can attend the public hearings to observe and appropriately participate in the proceedings.

The Tribunal may invite a submitter, individual and/or representatives from a group or organisation to provide further evidence at or after hearing.

Once the hearings are complete, the Tribunal will make its deliberations and provide a written report to Government for consideration. Twenty working days after this occurs, regardless of whether or not Government has reached a decision in response to any recommendations of the Tribunal, the inquiry report is published on the Tribunal's website.

Unlike Tribunal reviews of decisions affecting individuals, Tribunal inquiries can potentially affect the interests of large numbers of ADF members or veterans (and their families). Because of this, the Tribunal seeks to appropriately adapt its inquiry review processes to ensure that all interested parties have an enhanced opportunity to participate in and influence inquiry outcomes.

For example, the most recent *Inquiry into medallic recognition of service with Rifle Company Butterworth* was relevant to up to 9,000 ADF members who rendered such service across the period 1970 to 1989. Attachment 6 outlines the extensive steps the Tribunal took to ensure that any of those individuals who wished to do so could be aware of and play a part in an inquiry that could directly affect them.

Improvements in Tribunal administrative processes

The Tribunal and its Secretariat are committed to a culture of ongoing improvement to the service that we provide to ADF members and veterans, their families, Defence and the Government.

This is illustrated by some recent improvements to the Tribunal's procedural and business processes that have been achieved without the need for any amendment of the Tribunal's primary operating legislation. These have included:

- review and updating of the Tribunal's Procedural Rules based on experiences of members and staff;
- creating written, tailorable guidance to presiding members of Tribunal panels to assist with the consistent conduct of hearings and to ensure all relevant procedural aspects are covered;
- development, adoption and revision of a Members Code of Conduct that is supported by a conflict of interest policy and a policy on managing unacceptable conduct;
- improved induction training covering a diverse range of subjects, including the Australian honours and awards system, eligibility criteria for certain awards, administrative law principles, and, consistent with the interim findings of the Royal Commission into Defence and Veteran Suicide, trauma-informed care;
- an informative brochure which gives applicants further detail about the review process and what they might do to improve their prospects of success. A video covering similar themes is currently in production;

- consistent with trauma-informed care principles, regular pre and post-hearing contact between the Tribunal Secretariat and the applicant, individually tailored to the nuances of each review;

- development and publication of an annual report, even though the Tribunal has no statutory requirement to do so;

- diversification of hearing options, with the capacity to hold hearings in person, by telephone or via audio-visual link;

- enhanced community outreach to promote awareness of the availability of Tribunal review amongst ADF members, veterans and others; and

- development of a protocol with Defence to ensure the Minister is properly briefed on Tribunal recommendations where there is a divergence between those recommendations and Defence's ongoing position.

The Tribunal is open to consider any suggestions for further improvements in its administrative processes that may emerge during the course of the Committee's inquiry.

Areas for potential improvement through legislative reform

We are now in a position, some 14 years since the establishment of the Tribunal in statute, to consider refinements to particular areas of the legislation that governs the role and function of the Tribunal in light of both experience and the successful resolution of a number of historical matters.

Our experience has highlighted a variety of issues with the present legislation. Some of these relate to pragmatic governance issues concerning the Tribunal's power to effectively process and dispose of applications made to it. Others raise significant questions of jurisdiction (like what service may be considered for recognition by honours or awards, who may apply for honours and awards and review of unfavourable decisions, and the time limits within which applications must be made).

Governance Issues

Compared to other Commonwealth, State and Territory tribunals, the provisions of Part VIIIC of the Defence Act establishing the Tribunal and regulating its operations are relatively "immature". In this section we raise a number or proposals for amendment of the Act.

Objective of the Tribunal

There is currently no statement in Part VIIIC of the Act that sets out the objectives of the Tribunal. In contrast, section 9 of the *Administrative Review Tribunal Act 2024* provides that:

The Tribunal must pursue the objective of providing an independent mechanism of review that:

(a) is fair and just; and

(b) ensures that applications to the Tribunal are resolved as quickly, and with as little formality and expense, as a proper consideration of the matters before the Tribunal permits; and

(c) is accessible and responsive to the diverse needs of parties to proceedings; and

(d) improves the transparency and quality of government decisiuon-making; and

(e) promotes public trust and confidence in the Tribunal..

We think that a similar provision should be included in Part VIIIC in relation to the Tribunal's review function, and that a corresponding provision should also be included to state an objective for the Tribunal's inquiry function, perhaps along the following lines:

In carrying out its inquiry function, the Tribunal must pursue the objective of providing the Minister with a report that addresses the matters that are the subject of the Minister's direction in a manner that:

(a) is comprehensive;

(b) has regard to all relevant considerations; and

(c) is informed by extensive research and consultation with other persons and organisations whose interests might be affected by findings and recommendations made therein.

Powers of the Tribunal to deal with applications made to it

In comparison with the legislation governing Commonwealth, State and Territory civil and administrative review tribunals, Part VIIIC of the Defence Act could be viewed as quite rudimentary. This is particularly so as the Act is very limited in its mechanisms for allowing the Tribunal to deal effectively with applications that fall outside the norm – for example, it contains no specific provisions for the conduct of directions hearings or for dealing with applications with limited prospect of success.

To that end, the Tribunal has developed a range of proposed enhancements to Part VIIIC which would encompass:

- allowing the Chair to formally reject an application for review on the ground that it has not been properly made;

- introducing legislative provisions for the withdrawal of an application to the Tribunal;

- introducing legislative provisions for the conduct of directions hearings and expanding the scope of directions that may be issued by the Tribunal;

- better defining the range of powers that may be exercised by the Tribunal during the course of a hearing;

- providing a power to split or combine applications for review (such as in cases where a number of applicants with common service, say, as members of a ships' company are seeking recognition for the same award for the same service);

- better defining the Tribunal's power to correct minor, non-substantive errors in its written decisions; and

- broadening the powers of the Chair to dismiss applications for review in the following circumstances:

    - where the parties consent;
    - where the applicant discontinues or withdraws;
    - where the applicant fails to appear at a hearing after appropriate notice;
    - where the decision to which the application relates is not reviewable;
    - if the parties reach agreement;
    - if the proceeding is misconceived or lacking in substance or has no reasonable prospect of success or is otherwise an abuse of process of the Tribunal;
    - where the applicant fails to proceed with an application or comply with a Tribunal direction;
    - if there has been a want of prosecution of the proceedings; and
    - if the Tribunal considers there is a more appropriate forum.

Attachment 7 is a table showing corresponding provisions in the legislation governing the current Commonwealth Administrative Appeals Tribunal and other State and Territory tribunals on which such amendments to the Defence Act could be modelled.

Annual report

While the Act does not require the Tribunal to produce an annual report, the Tribunal has recently begun preparing an annual report that is presented to the Minister and is then published on its website. We think that the Act should be amended to require the Tribunal to produce an annual report to the Minister, which would be tabled in Parliament consistently with annual reports of other governmental agencies.

Jurisdictional issues

Any person may apply at any time to the Directorate of Honours and Awards in the Department of Defence for medallic recognition of any service at any time by any person in the ADF. But an application to the Tribunal for review of an unfavourable decision made by Defence in response to such an application can only be made where the service in question was rendered on or after the commencement of the Second World War on 3 September 1939.

This means that decisions of the Department in relation to recognition of older ADF service are immune from independent merits review. The Tribunal believes that, as a matter of principle, that is wrong and that no departmental decisions on medallic recognition should be so sheltered. This is particularly the case because, the older the service, the more difficult and prone-to-error the decision-making usually is, because of the likely lack of first-person evidence and at times a paucity of contemporary documentary records.

However, the Tribunal does not believe that this necessarily requires that the Act should be amended to expand the Tribunal's jurisdiction by removing the 3 September 1939 limitation. Rather, it raises a more significant question.

How far back in time should Defence and the Tribunal be asked to look?

This is arguably the most contentious issue in considering the ambit of the Tribunal's jurisdiction and powers.

In August 2017, the Tribunal completed its *Inquiry into recognition for Far East Prisoners of War who were killed while escaping or following recapture* (the FEPOW Inquiry). Over the course of this inquiry, the Tribunal encountered difficulties obtaining and corroborating reliable contemporaneous evidence relevant to its consideration of these cases. The Tribunal observed that the youngest living operational veteran of that war would, at that time, be aged at least 90. For those reasons, the Tribunal report recommended that a limitation period be introduced with effect from 3 September 2020 for claims for medallic recognition with respect to veterans of the Second World War, which would have been 75 years after the cessation of hostilities. This would have allowed a three-year transition period for any un-submitted applications for recognition of Second World War service to be brought forward. The Tribunal's report also recommended that consideration be given to adopting an appropriate limitation period with respect to subsequent conflicts. While this recommendation and some others discussed below were accepted by the then Minister, draft legislation was never introduced to Parliament.

In 2020, shortly before his retirement, the former Chair of the Tribunal wrote to the then Minister for Defence Personnel expressing concern around a lack of progress in progressing these amendments. Mr Sullivan's letter suggested that the legislation could be amended to preclude, after an appropriate transitional period, applications for review of decisions relating to defence honours and foreign awards for service prior to 1975, which coincides with the introduction of the Australian honours and awards system. Such change would have removed the issue of the 'posthumous gap' between the Imperial Victoria Cross and the Mention in Despatches, and the use of the Australian honours system to recognise service, which was originally covered by the Imperial system. This would also have removed the ongoing examination of issues relating to the honours and awards system of the former Government of the Republic of Vietnam.

The logic underlying the Tribunal's FEPOW recommendation to 'close the books' on Second World War service because of evidentiary difficulties might also be applied to

service in the Korean War, but certainly would not apply to the Vietnam War or any later conflict. While it has resolved many contentious recognition issues concerning that conflict, the Tribunal continues to receive applications relating to the Vietnam War and in its experience there are often readily available first-hand witnesses or reports that mean that reliable decision-making is readily able to be achieved,

The logic underlying Mr Sullivan's alternative proposal to 'close the books' on all service prior to 1975 can, in the Tribunal's view, only be viable if there is a transition period of suitable length to allow all potential applications related to earlier service to be lodged. Given that applications for review in relation to Vietnam are still forthcoming, it would be unreasonable to summarily deprive those and later veterans of their current rights of review. The Tribunal believes that a transition period of some two to three years would be desirable before any 1975 cut-off came into effect.

Other alternative limitations on the service that might be raised for consideration under an application for review might of course be formulated, but in any such case we believe that a number of considerations must be paramount:

- History shows that very many veterans and others do not raise the issue of medallic recognition of ADF service for many years and even decades after that service has been rendered. This may be for many reasons such as:

  • it may only be after a full career that a former member reflects on what they have achieved;

  • serving members may not be prepared to take action that they think may be perceived as a challenge to more senior officers who have either not nominated them for recognition or who have refused an application for recognition;

  • service-related mental health problems may mean that a member or veteran is unable to cope with the process of seeking recognition for a considerable time;

  • equally the emergence of service-related mental health problems may itself give rise to a focus on recognition and those problems may be worsened if an application cannot be made and any refusal independently reviewed in a thorough and trauma-informed way; and

  • some families may become fully aware of the bravery displayed or service rendered by a member or veteran only after their death.

- A transitional period (of at least two to three years) should allow ADF members and veterans, their families and others to acclimatise to any new limitation on the age of service that may be raised and to conduct necessary research and preparation before lodging their application. This in turn would mean that there would need to be a prior program of effective engagement with the service and veteran community to ensure that, so far as possible, all ADF members and veterans are aware of the impending cut-off date for resolution of outstanding claims, and that they have the opportunity to make

application to Defence and to have any subsequent Tribunal appeals dealt with in a reasonable period; and

- Any such limitation on the age of service that may be raised should apply not just to applications for review made to the Tribunal but also to original applications for recognition lodged with the Department in order to preclude its decision-making being unjustifiably shielded from independent merits review.

These are difficult issues and, given that they would involve abolition or limitation of existing rights, there must be a question of whether it is really necessary for them to be resolved at all. That is, are the perceived problems of any real magnitude and, if left unresolved, might they not just simply go away with the passage of time?

In this regard, it is relevant to note that:

- the Tribunal receives only 20 to 30 applications per year; and

- since 2020 it has received only four applications relating to service in the Second World War but 32 applications relating to service in Vietnam.

Time within which an application for review must be lodged

Under the current legislative provisions, an application for review of an unsuccessful application to the Department of Defence may conceivably be lodged with the Tribunal up to 85 years after a refusal decision was made by Defence. This raises the possibility that, in the intervening period, potential eye-witnesses (who may be up to 103 years of age) may have passed away or their memories may have become unreliable, making review decision-making more difficult.

We therefore think that, after an application for conferral has been refused and notified by Defence, the person seeking recognition should be required to make application to the Tribunal within a reasonable period of time – such as six months - subject to the Tribunal having a discretion to grant leave to apply beyond that time in exceptional circumstances. This is consistent with review provisions in other Commonwealth and state tribunals.

However, because there are an unknown but possibly very large number of unsuccessful departmental applicants who have already been advised that they have a right of appeal to the Tribunal without any time limitation on lodgement, any such time limit should only apply to future decisions of the Department.

Who can make an application?

Currently, the legislation imposes no restrictions whatsoever on who may make an application for conferral of an honour or award or on who may apply for review of a decision made in response to that application.

Applications to the Tribunal are generally made by ADF members or veterans, but applications are also made by other parties such as family members, fellow veterans (not always witnesses or those in the veteran's chain of command), or even people

with no familial or other link to the veteran, such as historians, authors or keenly interested readers or researchers. There is no requirement for the veteran (or in the case of a deceased veteran the executor of their estate) to consent to such an application.

In this respect, standing to apply for Tribunal review is markedly different from the more usual situation in other merits review tribunals. The question is thus whether the present situation should be amended to define and limit those that may apply for review of Defence decisions on defence honours and awards.

In the view of the Tribunal, there is no pressing need to change the present standing rules despite their apparent very liberal nature. There is no evidence of applications being made by people without a genuine interest in securing recognition for service for ADF members, or doing so in a manner that is frivolous, vexatious or otherwise an abuse of the system. And, even if an application were considered frivolous or vexatious, the Act already permits the Tribunal Chair to dismiss such an application (section 110VC(1)(c)).

Moreover, limiting applications only to persons who had a clear and defined relationship to the ADF member would preclude from consideration what we regard as some very deserving service. We have had recent cases where parties with no family or service connection have pursued recognition for ADF members who really should have been, but had not yet been, recognised as national heroes.

Cancelled awards

Currently, no provision exists for a decision to cancel a defence honour or award to be directly reviewed by the Tribunal. However, if an honour or award is cancelled (such as for serious misconduct), there is the potential that the affected party may nonetheless apply to Defence to have that award reinstated. If that application is refused, the Tribunal would then have jurisdiction to review the matter.

We think that this situation is unwieldy and inappropriate, and that it should be streamlined. The circuitous course of securing review is unwieldy because it simply adds deterrence and delay to an affected ADF member or veteran securing independent review of a very significant decision. And it is inappropriate because, if such a case were brought before the Tribunal, it would in effect be reviewing a decision that had already been made by the Governor-General (or their delegate).

The seriousness of a decision to cancel a previously granted honour or award is such that we do not believe it would be appropriate to simply abolish the existing unwieldy right of review. Rather, we think that such seriousness instead underlines the importance of a right of independent merits review. While cancellation decisions may be taken very carefully and only after advice from very high levels within Defence, that advice is not thereby immune from the possibility of error.

The Tribunal therefore considers that it would be preferable, and more consistent with the principles of accountability and transparency in Government decision-making, to allow an application for review of a proposed cancellation to be directly made to the

Tribunal. Such an application should be required to be made within, say, 56 days of the affected party being advised of that proposed decision, with cancellation or withdrawal being deferred until the time for applying for review has expired or, where an application for review has been made, the process of review and subsequent decision-making has been completed. The Tribunal view after such a review would of course not be binding on the Minister or the Governor-General (or their delegate), but would better ensure that they were better able to take into consideration all relevant matters and would avoid the risk under the present arrangements that the Tribunal could come to a compelling but different conclusion on cancellation. This proposed mechanism would give additional assurance to the Minister in making a recommendation for cancellation to the Governor-General that such a recommendation was soundly-based, and would give additional assurance to the affected party that their views had been fully heard and considered.

Foreign awards

Under the current legislation, a foreign award is defined as *'an honour or award given by a government of a foreign country, or by an international organisation'.* This definition is so open-ended as to be uncertain in its scope. Further, the current provisions allow decisions taken in respect of foreign awards to be reviewed in the same manner as decisions relating to Australian defence awards. These arrangements are so loosely structured that a person may conceivably apply to Defence for recognition by way of a foreign gallantry award (such as an American Medal of Honor or a British George Cross) directly issued by a foreign government and subsequently seek to pursue a full merits review of Defence's decision in the Tribunal. It is certainly debatable whether the ramifications of this provision were fully understood by those who drafted the current legislation.

We propose that Defence decisions in respect of foreign awards should only be reviewable in the Tribunal where a foreign government has delegated a decision-making power to Defence to confer such awards. We also consider that the *Defence Regulation 2016* should be amended to specify which foreign awards may be appealable in the Tribunal.

Badges

As noted above, the Tribunal is able to undertake a merits review of Defence decisions of the Department of Defence or the services, where that decision is a refusal to recommend a person or group of persons for a defence honour or defence award.

Badges, including the Infantry Combat Badge, the Army Combat Badge and the Air Force Ground Combat Badge, are also a form of recognition of commendable ADF service. Their issue is administered by service headquarters, and decisions relating to these badges are not reviewable in the Tribunal (although their administration, but not their conferral, may be subject to a limited form of review consideration by the Defence Force Ombudsman).

Given the level of esteem many ADF members and veterans attach to these badges, and in the interest of accountability and transparency in decision-making,

consideration might be given to amending the legislation to allow the Tribunal to review decisions concerning eligibility for badges, along the same lines as the provisions for review of defence awards such as the Australian Defence Medal. If it was decided to expand the Tribunal's jurisdiction to cover the award of badges, in the view of the Tribunal, consideration should also be given to whether or not the jurisdiction should also extend to those commendations which are a form of recognition outside the scope of defence honours and awards.

f) The integrity and efficacy of the Defence honours and awards system, with particular reference to any potential improvements to the Defence honours and awards system

In addition to the suggestions made above for improvements in the current arrangements concerning the Tribunal itself, we suggest a number of avenues for improvement to the Defence honours and awards system more generally:

a) Introduction of new forms of recognition for ADF members and veterans, and families of members and veterans, who are injured, wounded or killed in or as a result of service, so that the defence honours and awards system recognises not only the fact of ADF service but also the potentially very serious impacts that such service may have on ADF members and their families[2];

b) as recommended in the report of the Tribunal's *Inquiry into medallic recognition for service with Rifle Company Butterworth*:

   a. taking steps to ensure that the aging cohort of Rifle Company veterans receive the correct entitlements under the *Veterans Entitlements Act 1986*, to reflect the non-warlike nature of their service, which has already been recognised as non-warlike by the award of the Australian Service Medal;

   b. a fundamental 'root and branch' review of the definitions of 'warlike' and 'non-warlike' service to make them more readily understandable, (as discussed at page 235 of the report – extracted at Attachment 8); and

   c. better liaison between the Directorate of Honours and Awards and the Nature of Service Directorate to ensure greater consistency in decision-making requiring application of those definitions (see also the extract at Attachment 8); and

c) development of a clear, carefully considered, and publicly available Government policy on managing instances of incorrect issue of defence honours or awards.

In relation to the suggestion at paragraph c) above, we note that, with the best will in the world, cases will inevitably arise in which it comes to attention that a defence honour or award has been issued to an individual or group of ADF members or veterans who did not meet the eligibility criteria for such recognition. For example:

- as identified in the report of the Tribunal's *Inquiry into eligibility for the Republic of Vietnam Campaign Medal*, there are a significant number of improperly

[2] In this regard detailed proposals for such new forms of recognition are set out in the report of the Tribunal's *Inquiry into recognition for members, and families of members who are injured, wounded or killed in or as a result of service*,

issued Republic of Vietnam Campaign Medals awarded to RAN veterans who served in Vietnam. These men served in the Australian destroyers that were attached to the US Seventh Fleet who provided diverse and sometimes traumatic service to the war effort in Vietnam. This involved shelling of enemy positions ashore and in one case, a destroyer was incorrectly attacked by American aircraft, resulting in a missile hit to the superstructure which killed one sailor and injured six others. Because of administrative error in calculating the period of such service, these men did not meet the minimum eligibility criteria for time in theatre, but were awarded the RVCM anyway; and

- recent Tribunal reviews in cases concerning the very brief service of HMAS *Manoora* in East Timor in 2000 highlighted that a number of individuals had been awarded Australian Active Service Medals for which they were not eligible.

We wish to stress in the clearest possible terms that, given the passage of time, we are not necessarily advocating that the incorrectly issued awards described in the above examples should now be cancelled or recovered. Rather, our focus is more on the optimal handling of any future incidents that might come to light.

As long ago as 1993 the Committee of Inquiry into Defence and Defence Related Awards (commonly known as the CIDA Inquiry) developed a series of principles to guide relevant decision-making. Amongst these was its third principle:

> *To maintain the inherent fairness and integrity of the Australian system of honours and awards care must be taken that, in recognising service by some, the comparable service of others is not overlooked or degraded.*

That principle is as relevant today as it was then.

There is currently no well-developed or comprehensive policy of which we are aware to guide Defence and Ministers in dealing with the very difficult question of what to do when such cases arise. Instead, it seems that decisions are made 'on the fly', and this runs the risk that they may be seen to lack a principled basis. Such perceptions would call into question the integrity and efficacy of the defence honours and awards system, which would be highly undesirable.

There may be many reasons why a defence honour or award is wrongly issued – ranging from fraudulent claims made in an application through to simple inadvertence in the interpretation of applicable eligibility criteria. A well-developed policy would countenance the spectrum of such possibilities and provide relevant guidance.

The Tribunal would be happy to participate in the development of such a policy and, conceivably, could be directed by the Minister to conduct an inquiry into the matter.

g) The integrity and efficacy of the Defence honours and awards system, with particular reference to any related matters.

The Tribunal makes no submission in this regard.

Attachment 1

History of the Tribunal

This Attachment contains a brief history of review of defence honours and awards, both prior to and following the establishment of the Tribunal. It sets out some of the reasons for the Tribunal's establishment, and underlines its continuing value to ADF members and veterans, to Defence and to Government.

The Imperial system of honours and awards had exclusive application in Australia until 1975, when the Whitlam government introduced the Australian system. The two systems operated in parallel until October 1992, when the Keating Government announced that Australia would no longer make recommendations for Imperial awards, and that all Australian citizens would be recognised exclusively in the future by the Australian system. This policy approach had been agreed by the Commonwealth and the states, and was submitted to Her Majesty Queen Elizabeth II, who agreed.

There was no avenue of review of decisions relating to defence honours or awards under the Imperial system.

In 1993, the Government announced that it intended to establish a comprehensive public inquiry into the Australian honours and awards system, including Defence honours and awards. Among a number of recommendations, the Committee of Inquiry recommended that Defence examine its internal decision-making processes and guidelines leading to the award of service medals.

In 1996, the Howard government set up an interdepartmental committee (IDC) to consider awards that were recommended at the highest level in Vietnam but were subsequently downgraded or struck out in Australia. The Official Secretary to the Governor-General sought advice from Buckingham Palace as to whether awards for service in Vietnam, as recommended by the IDC, could be made under the Imperial system. Following advice from Her Majesty's Private Secretary, the Governor-General in turn advised the Prime Minister, who decided that awards for the Vietnam end of war list would be made retrospectively from the Australian honours and awards system.

In response to further representations from the ex-service community, the Government appointed an independent panel to carry out a review and report to Government on any further action that may be required in respect of the Vietnam end of war list.

Subsequent inquiries were carried out by ad-hoc panels including:

- a review of the actions of Flight Lieutenant Garry Cooper on 18 and 19 August 1968 to determine whether his actions were worthy of a recommendation for the award of the Victoria Cross for Australia;
- a review of service entitlement anomalies, including medals, for South-East Asian service between 1955 and 1975;

- a review to consider recognition for Royal Australian Air Force personnel stationed at the Air Force base at Ubon, Thailand, during the Vietnam War;
- a review of post-armistice Korean service to consider the level of recognition of Australian service in Korea between 28 July 1953 and 26 August 1957; and
- a review of recognition for the Battle of Long Tan, which attempted to finalise the outstanding issue of gallantry awards for service in that battle.

Each of these reviews, almost all of which were brought about by clear dissatisfaction within the service or veteran community, clearly demonstrated the complexities associated with medallic recognition. In particular, the *Report of the Post-Armistice Korean Service Review* stated that:

> *'Complexity' and 'anomaly' are two of the words we have encountered most in the course of this Review. Given the high degree of interest that ADF members, both past and present, take in their medal entitlements, there is a case for reducing the complexity and increasing the transparency of the Australian Honours and Awards System, and increasing the effort devoted to prior consultation and explaining the System to its clients—many of whom are not able to cope easily with technical explanations.*

Among other things, the Review recommended the establishment of an independent, part-time military honours tribunal. It stated that such a tribunal would:

- overcome veterans' current sense of exclusion from the decision-making process;
- protect the important national institution of military honours from instability, undue political pressure and short-term decision-making;
- be able to recommend ways of making the process more transparent;
- provide a forum for independent advice to the Minister on any difficult remaining anomalies from past campaigns, on the institution of new medals, and on any major changes in the military honours system;
- avoid the need for further external reviews of specific medal issues; and
- require an adequately resourced and accommodated secretariat provided by the Department of Defence.

With the benefit of our experience, we consider these statements to be especially prescient.

During the 2007 election campaign, the Australian Labor Party unveiled its plan to form such a tribunal. The Defence Honours and Awards Tribunal was established on an administrative basis in July 2008 and, in February 2011, the present Defence Honours and Awards Appeals Tribunal was established, with bipartisan support, as an independent statutory body under Part VIIIC of the *Defence Act 1903.*

Attachment 2

Lists of Defence honours and awards in the Tribunal's jurisdiction

Australian Defence Honours

Victoria Cross for Australia

Star of Gallantry

Distinguished Service Cross

Conspicuous Service Cross

Nursing Service Cross

Medal for Gallantry

Distinguished Service Medal

Conspicuous Service Medal

Commendation for Gallantry

Commendation for Distinguished Service

Imperial Defence Honours

Victoria Cross (Imperial)

Companion of the Distinguished Service Order 5

Royal Red Cross (1st Class)

Distinguished Service Cross (Imperial)

Military Cross

Distinguished Flying Cross

Air Force Cross

Royal Red Cross (2nd Class)

Distinguished Conduct Medal

Conspicuous Gallantry Medal

Conspicuous Gallantry Medal (Flying)

Distinguished Service Medal (Imperial)

Military Medal

Distinguished Flying Medal

Air Force Medal

Queen's Gallantry Medal

Queen's Commendation for Brave Conduct

Australian Defence Awards

Australian Active Service Medal 1945–1975

Australian Active Service Medal

Vietnam Logistic and Support Medal

Australian Active Service Medal

International Force East Timor Medal

Afghanistan Medal

Iraq Medal

Australian Service Medal 1945–75

Australian General Service Medal for Korea

Australian Service Medal

Australian Operational Service Medal

Defence Force Service Medal

Reserve Force Decoration

Reserve Force Medal

Defence Long Service Medal

Australian Cadet Forces Service Medal

Champion Shots Medal

Australian Defence Medal

Anniversary of National Service 1951–1972 Medal

Imperial Defence Awards

Naval General Service Medal 1915–62

General Service Medal 1918–62

1939–45 Star

Atlantic Star

Air Crew Europe Star

Africa Star

Pacific Star

Burma Star

Italy Star

France and Germany Star

Defence Medal

War Medal 1939–45

Australia Service Medal 1939–45

Korea Medal

United Nations Service Medal for Korea

General Service Medal 1962

Vietnam Medal

Rhodesia Medal

Army Best Shots Medal

Queen's Medal for Champion Shots of the RAAF

Royal Navy Long Service and Good Conduct Medal

Royal Navy Volunteer Reserve Decoration

Royal Navy Reserve Decoration

Royal Naval Reserve Long Service and Good Conduct Medal

Royal Naval Volunteer Reserve Long Service and Good Conduct Medal

Royal Fleet Reserve Long Service and Good Conduct Medal

Meritorious Service Medal

Long Service and Good Conduct Medal (Army)

Efficiency Decoration

Efficiency Medal

Meritorious Service Medal (RAAF)

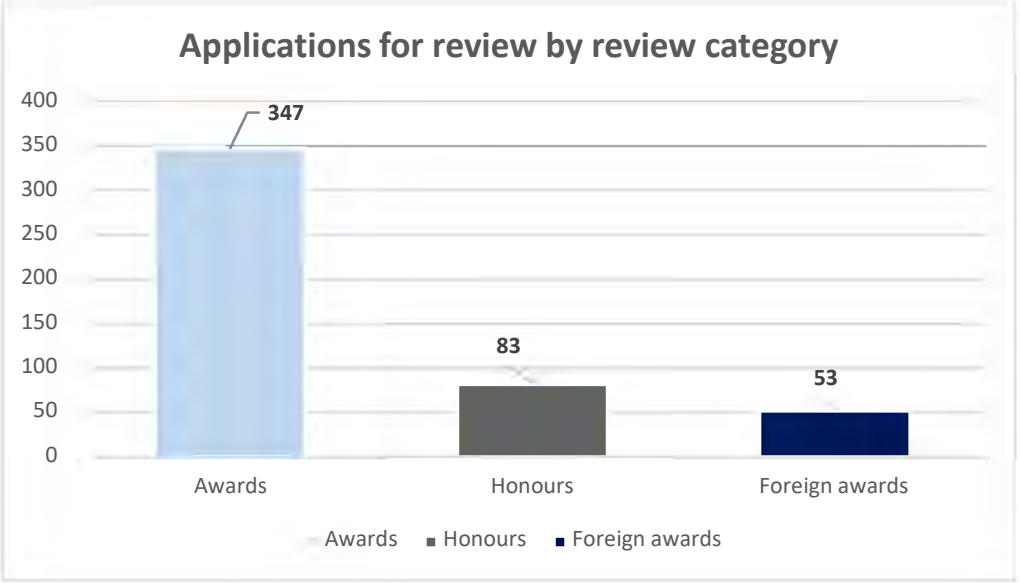
Long Service and Good Conduct Medal (RAAF)

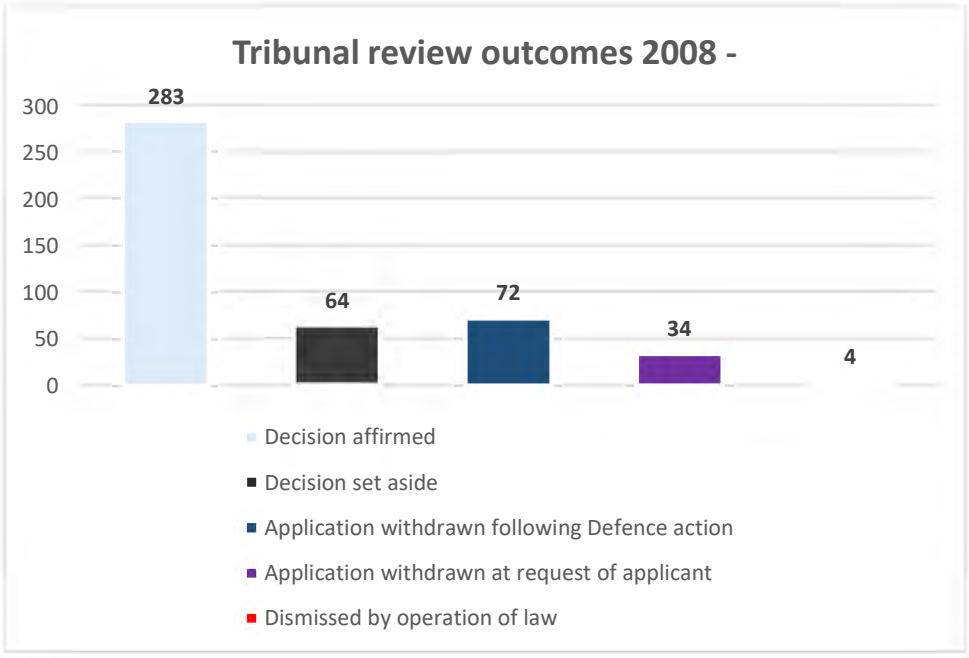
Air Efficiency Award

Cadet Forces Medal

Attachment 3

Statistics on Tribunal Reviews




Tribunal review outcomes 2008 -
300
250
200
150
100
50
0
283
64
72
34
4
Decision affirmed
Decision set aside
Application withdrawn following Defence action
Application withdrawn at request of applicant
Dismissed by operation of law

Attachment 4

Member Biographies

MR STEPHEN SKEHILL

Mr Skehill was appointed as the Chair of the Defence Honours and Awards Appeals Tribunal in 2020. Mr Skehill's career spans 28 years in the Australian Public Service and 23 years in private legal practice and consultancy. His public service positions have included Principal Member of the Veterans' Review Board, Australian Government Solicitor and Secretary of the Attorney-General's Department. As Special Counsel with the major law firm now known as King & Wood Mallesons he specialised in administrative law, air and space law and telecommunications law. He has also conducted numerous inquiries into public service structures, procedures and performance.

REAR ADMIRAL ALLAN DU TOIT AM RAN (Retd)

Rear Admiral du Toit was appointed to the Tribunal in May 2021. He retired from the Royal Australian Navy in 2016 after 40 years naval service. He was born in South Africa and entered the South African Navy in 1975. He joined the Royal Australian Navy in 1987. He commanded at all ranks including HMAS *Tobruk* during peacekeeping operations in Bougainville, the Australian Amphibious Task Group, the maritime interception force enforcing UN sanctions against Iraq, Combined Task Force 158 in the Persian Gulf, and Border Protection Command. He also served in a wide range of single-service and joint appointments ashore including Deputy Chief of Joint Operations and Head of Navy People. His final appointment was as Australia's Military Representative to NATO in Brussels.

Rear Admiral du Toit is currently chair of two defence industry companies. He is also a member of the Northern Territory Government's National Security Advisory Group. He has written and lectured on historical and contemporary defence and naval affairs both in Australia and abroad and has a doctorate from the UNSW Canberra where he is a Visiting Fellow and Adjunct Senior Lecturer. He served as President of the Australian Naval Institute from 2011 to 2013.

MS KAREN FRYAR AM

Ms Fryar was appointed to the Tribunal in July 2021. Ms Fryar recently retired after 26 years as a magistrate and coroner in the Australian Capital Territory. She had also previously been a presidential member of a number of ACT tribunals including the Mental Health Tribunal and the Guardianship and Management of Property Tribunal. Prior to being appointed to the bench of the ACT Magistrates Court, Ms Fryar's early legal career covered time in private practice, the Australian Government Solicitor and the ACT Legal Aid Office.

In January 2020 Ms Fryar was appointed as the President of the Legal Aid Commission (ACT), and she also currently convenes mediations in civil litigation.

BRIGADIER DIANNE GALLASCH AM CSC (RETD)

Brigadier Gallasch was appointed to the Tribunal in January 2023. She retired from full time Army service in April 2016 after 33 years as a logistics officer. She has commanded at all rank levels and has extensive joint and multi-national experience in personnel, training and logistics. Operational postings include the Deputy Commander of the Force Logistics Support Group, East Timor in 1999/2000, the logistics plans officer with Multi-National Force Iraq in 2008 and the foundational Australian Director General Transition and Redeployment in the Middle East in 2012. Her last full-time position was as the Commandant of the Royal Military College of Australia. Since transitioning from full time service her primary role has been as an Inquiry Officer for the Australian Defence Force.

AIR COMMODORE ANTHONY GRADY AM (RETD)

Air Commodore Grady was appointed to the Tribunal in July 2021.

Air Commodore Grady separated from Air Force in 2015 after 35 years of service as a pilot, with experience in rotary wing and strike aircraft. He has extensive command experience, principally within Air Combat Group and has filled a range of staff positions within Air Force, Air Command and the joint force. He has completed a number of operational tours in the Middle East. Air Commodore Grady has worked in Defence Industry, and holds two Masters degrees.

MS LOUISE HUNT

Ms Hunt was appointed to the Tribunal in August 2023. She is a lawyer and holds a statutory appointment as a part-time Member of the Veterans' Review Board. She is a member of the Law Council of Australia's Military Justice Committee.

Prior to her appointment to the Veterans' Review Board Ms Hunt's legal career in private practice encompassed professional liability and discipline matters. Ms Hunt is a serving Reserve Legal Officer in the Royal Australian Air Force. She has served for over 35 years and holds the rank of Group Captain. She performs work on behalf of the Inspector General of the Australian Defence Force.

Ms Hunt holds Bachelor Degrees in Law and a Master of International Law.

MR JONATHAN HYDE

Jonathan was appointed to the Tribunal in August 2023. He is an experienced barrister at the NSW Bar. He specialises in public and administrative law and is retained by a range of commonwealth and state government agencies and statutory authorities, including ASIC and the AFP. He has considerable experience in royal commissions, commissions of inquiry and coronial inquests, and represented Cricket Australia, Queensland Cricket, and Tennis Australia at the Royal Commission into Institutional Responses to Child Sexual Abuse. Between 2018 and 2020 he was counsel assisting the Australian Commissioner for Law Enforcement Integrity. He is co-author of "Anti-Money Laundering and Financial Crime in Australia" (Lexis Nexis).

Jonathan was previously a Judge Advocate and Defence Force magistrate appointed by the current CDF and is a former president of the NSW RSL Discipline and Conduct Tribunal. In 2006 he deployed to Iraq on Operation Catalyst. He is presently appointed as a part time Deputy President of the NSW Mental Health Review Tribunal which reviews patients that committed criminal acts but were found not criminally responsible as well as reviewing people to determine whether they have become fit to stand trial.

MAJOR GENERAL MARK KELLY AO DSC (RETD)

Major General Kelly was appointed to the Tribunal in July 2021. He retired from the Army in June 2010 after 36 years as an Infantry officer. His senior command appointments include: Commanding Officer, 1st Battalion, The Royal Australian Regiment; Commander 3rd Brigade; Commander 1st Division; Land Commander Australia; and Commander Joint Task Force 633. His operational service includes: Zimbabwe/Rhodesia in 1979/1980; East Timor with INTERFET in 1999/2000; in the Middle East Area of Operations including Iraq, the Horn of Africa and Afghanistan in 2003/2004 and 2009/2010. He also served as the Repatriation Commissioner at the Department of Veterans' Affairs from July 2010 until June 2019.

COMMODORE VICKI McCONACHIE CSC RAN (RETD)

Commodore McConachie was appointed to the Tribunal in January 2023. She served in the permanent Navy from 1984 to 2012 undertaking senior roles in both legal and non-legal capacities, including operational service in Iraq, being Head Navy People and Reputation, Director General Navy People and Director General ADF Legal Services and Commanding Officer *HMAS Kattabul*. From 2012 until 2020 she was Chief General Counsel to a Commonwealth government entity and, while undertaking that role, she was also a non-executive director for Defence Housing Australia from 2013 to 2019. She holds Bachelor degrees in Arts (History) and Law and a Masters degree in Law.

MAJOR GARY MYCHAEL OAM CSM (RETD)

Major Mychael was appointed to the Defence Honours and Awards Appeals Tribunal in January 2023.

Major Mychael enlisted into the Australian Regular Army in April 1979, after several Senior Leadership Group Regimental Sergeant Major appointments he commissioned to the rank of Major in January 2016 before transferring to the Active Reserve in September 2020. He has served in 3rd Battalion The Royal Australian Regiment, Parachute Training School, Soldier Career Management Agency, Headquarters 5th Brigade, Headquarters 2nd Division, Headquarters Forces Command, Headquarters Career Management Army and Australian Defence Force Parachuting School.

His Operational and Representational deployments include Malaysia, New Zealand, United Kingdom, the United States of America, Jordan, Afghanistan, and Middle East Area of Operations as Regimental Sergeant Major Joint Task Force 633, and on Operations Slipper, Accordion and Manitou.

AIR VICE-MARSHAL TRACY SMART AO (RETD)

BMBS, MPH, MA, Dip AvMed, FRACMA, FACAsM, FAsMA, FCDSS, FACHSM (Hon)

Air-Vice Marshal Smart is a physician, health leader, and retired Royal Australian Air Force (RAAF) senior officer. Her 35-year RAAF career included many overseas deployments and culminated in the role of Surgeon General of the ADF.

Air-Vice Marshal Smart is currently Professor, Military and Aerospace Medicine and Public Health Lead – COVID Response Office at the Australian National University. In addition, she is: President, Australasian College of Aerospace Medicine; Honorary Professorial Fellow, University of Melbourne; and Strategic Advisor – LGBTI Inclusion, Department of Defence. She is also a member of various advisory and steering groups, including: the Australian Space Agency's Technical Advisory Group on Space Medicine & Life Sciences; the Australian Football League's Mental Health Steering Group; the Health Security Systems Australia, Divisional Advisory Panel; the Australian War Memorial Development Project Veterans' Advisory Group; and the Australian Institute of Health and Welfare Veteran's Advisory Group

Attachment 5

List of completed inquiries

Report of the Inquiry into medallic recognition for service with Rifle Company Butterworth (2023)

Report of the Inquiry into unit recognition for Australian Defence Force service in Somalia (2022)

Report of the Inquiry into recognition for members and families of members of the ADF who are injured, wounded or killed in or as a result of service (2021)

Report of the inquiry into unit recognition for service with the RAN Helicopter Flight Vietnam (2018)

Report of the inquiry into unit recognition for service at the Battles of Fire Support Bases Coral and Balmoral (2018)

Report of the inquiry into unresolved recognition for Far East Prisoners of War who were killed while escaping or following recapture (2017)

Report of the inquiry into amending the eligibility criteria for the Republic of Vietnam Campaign Medal (2015)

Report of the inquiry into the refusal to issue entitlements to, withholding and forfeiture of Defence honours and awards (2015)

Report of the inquiry into unresolved recognition for service with the US Army Small Ships Section (2015)

Report of the inquiry into recognition for service with 547 Signal Troop, Vietnam (2015)

Report of the inquiry into the eligibility criteria for the Republic of Vietnam Campaign Medal (2014)

Report of the inquiry into unresolved recognition for past acts of naval and military gallantry and valour (2013)

Report of the inquiry into recognition for service with Operation GATEWAY (2012)

Report of the inquiry into recognition for service on Operation LAGOON (2012)

Report of the inquiry into recognition for service with Task Group Medical Support Element One (2012)

Report of the inquiry into recognition for service at RAAF Ubon (2011)

Report of the inquiry into recognition for Cadet Instructors (2011)

Report of the inquiry into Peacekeeping service (2010)

Report of the inquiry into recognition for service in Rhodesia (2010)

Report of the inquiry into recognition for service with Rifle Company Butterworth (2010)

Report of the inquiry into recognition for service in Papua New Guinea after 1975 (2010)

Report of the inquiry into service in Somalia (2010)

Report of the inquiry into recognition for Far East Prisoners of War killed while escaping (2010)

Report of the inquiry into recognition for Vietnam War entertainers (2010)

Report of the inquiry into recognition for service with the RAAF in Vietnam in 1975 (2010)

Report of the inquiry into service with SAS Counter Terrorism and Special Recovery services (2009)

Report of the inquiry into service at the Battle of Long Tan (2009)

Report of the inquiry into service with 4 RAR in Malaysia (2009)

Report of the inquiry into service with the US Army Small Ships Section (2009)

Report of the inquiry into eligibility for the Australian Defence Medal (2009)

Attachment 6

Inquiry into medallic recognition for service with Rifle Company Butterworth

Chapter 3

3.1 Following issue of the Minister's direction and terms of reference, the Chair of the Tribunal, Mr Stephen Skehill, allocated responsibility for the conduct of the inquiry to a panel comprising of Rear Admiral Allan Du Toit AM RAN (Retd), Air Commodore Anthony Grady AM (Retd) and himself. None of the panel had any previous material connection with RCB service and, importantly, none of the panel was a member of the Tribunal while it conducted an earlier ministerially-directed inquiry into the same subject matter between 2010 and 2011.

3.2 Because that earlier Tribunal inquiry had rejected the arguments put to it that RCB service was 'warlike', the panel made clear to all parties that it came to this inquiry with an open mind, free of any pre-conceptions. While it was of course bound to give consideration to the reports and findings of all the previous inquiries and reviews, including the previous Tribunal inquiry, it made no presumption about whether any of them had reached the right conclusion. It assured the parties that this report, when provided to the Minister, would be based squarely on all the evidence before it (which was significantly more than was before any of the previous reviews and inquiries) and on its independent assessment and analysis of that evidence. The panel had no hesitation in coming to contrary conclusions to those reached previously by any other body, including the earlier Tribunal panel.

3.3 The Tribunal placed advertisements seeking submissions in the national press and online on 23 April 2022.

3.4 The Tribunal received 269 submissions from 151 individuals and organisations, as listed at Appendix 1.

3.5 The Tribunal held meetings with interested parties and public hearings as listed in Appendix 2.

3.6 As is apparent from the chronology set out in Chapter 7, the issue of recognition for RCB service has been the subject of numerous reviews and inquiries over an extended period, both internal to the Department of Defence and independent of that Department. None of those reviews and inquiries found RCB service to be 'warlike', as it was consistently claimed to be over many years by those representing RCB veterans.

3.7 Because the subject of recognition for RCB service has been the subject of contention for so many years, it is in everyone's best interest that well researched, final and sustainable decisions can now be taken by Government. Whether or not those decisions find in favour of what is sought by those contesting present recognition and seeking greater recognition, it is in the best interests of RCB veterans, it is in the best interests of the ADF and the Department of Defence and it is in the best interest of the Government that the issue of RCB recognition be now resolved once and for all.

3.8 To that end, the Tribunal went to considerable lengths to ensure that it did all that was reasonably possible to allow final decisions to now be made by the Government on a sound basis. Integral to that was the necessity for all interested parties to have the fullest opportunity to put informed views to the Tribunal and to know of and comment on any contrary view.

3.9 Accordingly, rather than proceeding directly to hearings following the initially announced closing period for lodgement of submissions, the Tribunal took the following actions:

a. it identified a detailed list of the issues that it seemed to it were raised by the terms of reference and the submissions received;

b. it provided that list to the RCB representative bodies and Defence so that they could give consideration to those issues and be prepared to discuss them at hearing;

c. it published on its website all the submissions it received where it had consent to do so, so that all interested parties not only knew what had been said but also had an opportunity to lodge further or revised submissions, which a number of parties did;

d. it held a preliminary meeting with the RCB representative bodies and Defence to discuss how and when the hearings should best be held and whether there was more that it could do to ensure the effectiveness of the hearing process;

e. at the preliminary meeting the Tribunal gave a clear undertaking that it would not engage in discussion of the issues raised in this inquiry with any party outside the confines of a hearing attended by or accessible to each other party or their representative;

f. after the preliminary meeting, it provided the RCB representative bodies and Defence with a proposed agenda indicating the order in

which it intended to address key issues during the initial hearing;

g. it distributed to the RCB representative bodies and Defence the results of the research undertaken by the Tribunal's own staff – while much of that material was or should have been already known to those parties, there may have been some new material there that each party should have the right to see;

h. it held a preliminary meeting with officers of the Department of Veterans' Affairs to double-check its own understanding of the enormous complexities of the veterans' entitlements legislation and invited representatives of that Department to attend the first hearing of the inquiry in the hope that all parties could reach a common understanding on those matters;

i. it arranged for the hearings, when held, to be livestreamed so that interested parties had a further opportunity to know what was being said about their service and to lodge further submissions if they so wished, which a number of parties did;

j. it decided that there would be a break between the first day of hearings and subsequent hearings so that there could be a period for reflection on what was discussed on that first occasion, and so that no one was rushed in considering what more needed to be said;

k. it prepared a hearing resource pack which brought together extracts of various documents that it believed would be key to the matters under discussion at the first hearing;

l. it provided an agenda itemising the issues to be considered at subsequent hearings;

m. it agreed to requests by RCB representative organisations that they be allowed to call witnesses in support of their case notwithstanding that Defence had indicated that it did not contest material questions of fact contained in the submissions to the inquiry and did not seek an opportunity to question or cross-examine any submitter;

n. it called an expert witness in relation to the ROE issued to RCB and allowed all parties to question that witness and make submissions in relation to the evidence that witness gave;

o. it extended the period for receipt of written submissions to 15 May 2023 (and did not reject any of the very few submissions that were in

fact received beyond that date);

p. at hearings it allowed questions and comments from all those in attendance and not just those nominated to represent a party; and

q. it sought to conduct its hearings in as informal and conversational a manner as was possible, consistent with a proper examination of all relevant matters.

3.10. In this report, the Tribunal has included footnotes to cross-reference material in support of statements made in the text. In these footnotes the Tribunal has referred to publicly available sources such as Acts and Regulations, to submissions made to the inquiry, which are referred to by the Submission number published on the inquiry website, and to other documents that were shared with RCB representative organisations and Defence, which are referred to in footnotes by Document number. Documents in this latter category are available from the Tribunal Secretariat on request. The report also makes reference to a small number of other documents which were provided to the Tribunal subject to a restriction on publication (for example to protect the privacy of individuals). The Tribunal considered it not to be necessary to seek lifting of such restrictions as the documents in question were of no material relevance beyond that stated in the report. Finally, the report also refers to a small number of other documents that were not shared with RCB representative organisations but which also had no material relevance beyond that stated in the report.

Attachment 7

Proposed miscellaneous amendments to Part VIIIC of the Defence Act 1903 – Modernisation of DHAAT legislation	
Objective of the Tribunal	There is nothing in Part VIIIC that sets out the objective of the DHAAT. In contrast, section 2A of the Administrative Appeals Tribunal Act 1975 (Cth) provides that: 2A Tribunal's objective In carrying out its functions, the Tribunal must pursue the objective of providing a mechanism of review that: (a) is accessible; and (b) is fair, just, economical, informal and quick; and (c) is proportionate to the importance and complexity of the matter; and (d) promotes public trust and confidence in the decision-making of the Tribunal. It is proposed that a similar provision should be included in Part VIIIC in relation to the Tribunal's review function. A corresponding provision may also be included to state an objective for the Tribunal's inquiry function. It could be along the following lines: In carrying out its inquiry function, the Tribunal must pursue the objective of providing the Minister with a report that addresses the matters that are the subject of the Minister's direction in a manner that: (a) is comprehensive; (b) has regard to all relevant considerations; and (c) is informed by extensive research and consultation with other persons and organisations whose interests might be affected by findings and recommendations made therein.
General Conduct of Proceedings	It is further proposed that, in relation to its review function, there should be added a general statement of procedure along the lines of section 33(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), which is in the following terms: **33 Procedure of Tribunal**

	(1) In a proceeding before the Tribunal: (a) the procedure of the Tribunal is, subject to this Act and the regulations and to any other enactment, within the discretion of the Tribunal; (b) the proceeding shall be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and of every other relevant enactment and a proper consideration of the matters before the Tribunal permit; and (c) the Tribunal is not bound by the rules of evidence but may inform itself on any matter in such manner as it thinks appropriate. Section 33(1AA) of that Act further provides that the decision-maker whose decision is subject to review and "must use his or her best endeavours to assist the Tribunal". It is not considered necessary for this provision to be replicated in Part VIIIC as that obligation on Defence is already imposed by the Legal Services Directions made by the Attorney-General Under the *Judiciary Act* 1903. However, section 33(1AB) imposes an additional obligation in the following terms: (1AB) A party to a proceeding before the Tribunal, and any person representing such a party, must use his or her best endeavours to assist the Tribunal to fulfil the objective in section 2A. It is suggested that this would be a desirable addition to Part VIIIC as it would impose an obligation on applicants for review, without increasing the burden of the existing obligation on Defence.
Invalid applications	Part VIIIC makes no provision enabling the DHAAT to dispose of an application for review that has not been validly made to it. Other tribunals commonly have an express power in this regard – see, for example, section 44 of the *State Administrative Tribunal Act 2004* (WA) and section 95 of the *Civil and Administrative Tribunal Act 2014* (NT).

	It is thus suggested that a provision should be added along the following lines: (1) The Chair may reject an application on the ground that — (a) it is made by a person not entitled to make it; or (b) it does not otherwise comply with this Act.
Withdrawal of otherwise valid applications	Part VIIIC is silent on the question of whether an applicant may withdraw an application after it has been validly made and, if they do so, what consequences follow. Section 46 of the *Civil and Administrative Tribunal Act 2009* (Qld) provides an example of a provision which, it is suggested, might be mirrored in Part VIIIC. **46 Withdrawal of application or referral** (1) An applicant may… withdraw the applicant's application or referral for a matter before the matter is heard and decided by the tribunal. …. (2) If an applicant withdraws an application or referral, the applicant can not make a further application or referral, or request, require or otherwise seek a further referral, relating to the same facts or circumstances without leave of the tribunal.
Directions	Once a valid application for review is lodged, other tribunal legislation generally provides a power for the tribunal to issue directions designed to facilitate the orderly management and hearing of the application. For example, section 33 of the *Administrative Appeals Tribunal Act 1975* (Cth) is in the following terms: *Directions hearing*

	(1A) The President or an authorised member may hold a directions hearing in relation to a proceeding. *Who may give directions* (2) For the purposes of subsection (1), directions as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may be given: (a) where the hearing of the proceeding has not commenced—by a person holding a directions hearing in relation to the proceeding, by the President, by an authorised member or by an authorised officer; and (b) where the hearing of the proceeding has commenced—by the member presiding at the hearing or by any other member authorized by the member presiding to give such directions. *Types of directions* (2A) Without limiting the operation of this section, a direction as to the procedure to be followed at or in connection with the hearing of a proceeding before the Tribunal may: (a) require any person who is a party to the proceeding to provide further information in relation to the proceeding; or (b) require the person who made the decision to provide a statement of the grounds on which the application will be resisted at the hearing; or (c) require any person who is a party to the proceeding to provide a statement of matters or contentions upon which reliance is intended to be placed at the hearing; or (d) limit the number of witnesses who may be called to give evidence (either generally or on a specified matter); or (e) require witnesses to give evidence at the same time; or (f) limit the time for giving evidence or making oral submissions; or

	(g) limit the length of written submissions. It is suggested that provisions along these lines should be added to Part VIIIC.
Summons	Tribunal legislation generally confers on administrative tribunals a power to issue a summons for a person to give evidence or produce documents. Section 110XC in Part VIIIC already confers such a power and there is no perceived need for amendment.
Power of tribunal at hearing	Tribunal legislation commonly makes provision for the powers that may be exercised by the tribunal during the course of a hearing. For example, section 40 of the *Administrative Appeals Tribunal Act 1975* (Cth) is suggested as a useful model (albeit with some appropriate variations). It is relevantly as follows: **40 Powers of Tribunal etc.** (1) For the purpose of reviewing a decision, the Tribunal may: (a) take evidence on oath or affirmation; (b) proceed in the absence of a party who has had reasonable notice of the proceeding; and (c) adjourn the proceeding from time to time. *Oath or affirmation* (2) The member who presides at the hearing of a proceeding before the Tribunal: (a) may require a person appearing before the Tribunal at that hearing to give evidence either to take an oath or to make an affirmation; and (b) may administer an oath or affirmation to a person so appearing before the Tribunal.

	Power to take evidence (3) The power (the ***evidence power***) of the Tribunal under paragraph (1)(a) to take evidence on oath or affirmation in a particular proceeding may be exercised on behalf of the Tribunal by: (a) the presiding member in relation to the review; or (b) another person (whether or not a member) authorised in writing by that member. (4) The evidence power may be exercised: (a) inside or outside Australia; and (b) subject to any limitations or requirements specified by the Tribunal. (5) If a person other than the presiding member has the evidence power: (a) the person has, for the purpose of taking the evidence, the powers of the Tribunal and the presiding member under subsections (1) and (2); and (b) this Act applies in relation to the person, for the purpose of taking the evidence in the exercise of those powers, as if the person were the Tribunal or the presiding member.
Splitting or combining applications	It is also common for tribunal legislation to permit the tribunal to either combine separate applications or to split a single application into parts to facilitate the more effective hearing and handling of the matters raised. Applications made to the DHAAT not infrequently raise multiple matters – for example, by seeking a number of separate honours or awards for the same individual – where different considerations and processes might make it sensible to deal with aspects of the application separately. And on occasions the DHAAT has received multiple applications raising the same matter on behalf of multiple applicants, where separate hearings may be needlessly inefficient.

	It is thus suggested that a provision be inserted along the lines of the following sections of the *State Administrative Tribunal Act 2004* (WA)2: **51. Consolidating proceedings** (1) The Tribunal may direct that 2 or more proceedings that concern the same or related facts and circumstances — (a) be consolidated into the one proceeding; or (b) remain as separate proceedings but be heard and determined together. (2) The Tribunal's power to give a direction under subsection (1) is exercisable by a sitting member for either of the proceedings who is a legally qualified member. (3) If proceedings are consolidated, evidence given in the consolidated proceeding is admissible in relation to matters involved in either of the proceedings that were consolidated. **51A. Splitting proceedings** (1) The Tribunal may direct — (a) that any aspect of any proceedings be heard and determined separately; (b) that proceedings commenced by 2 or more persons jointly be split into separate proceedings. (2) The Tribunal's power to give a direction under subsection (1) is exercisable by a sitting member for the proceedings who is a legally qualified member.
Power to dismiss an application	Generally, the Administrative Appeals Tribunal and other comparable State and Territory tribunals have the power to dismiss an application in a wide range of circumstances, including: 1. Where the parties consent;

	2. Where the applicant discontinues or withdraws; 3. Where the applicant fails to appear at a hearing after appropriate notice; 4. Where the decision to which the application relates is not reviewable; 5. If the parties reach agreement; 6. If the proceeding is frivolous, vexatious, misconceived or lacking in substance or has no reasonable prospect of success or is otherwise an abuse of the process of the Tribunal; 7. Where the applicant fails to proceed with an application or comply with a tribunal direction; 8. If there has been a want of prosecution of the proceedings; 9. If the tribunal considers there is a more appropriate forum; and 10. If a party is conducting the proceeding in a way that unnecessarily disadvantages another party. In some cases, an applicant whose application has been dismissed under certain of these powers is precluded from lodging a further application raising the same issues without the leave of the tribunal – see, for example, *State Administrative Tribunal Act 2004* (WA) – section 49. In contrast the DHAAT has the power to dismiss and application only in the limited circumstances set out in section 110VC of the Defence Act, which is in the following terms: **110VC Power to dismiss review applications** (1) Despite section 110VB, the Chair may, in writing, dismiss an application for review of a reviewable decision if the Chair considers that:

	(a) there is another process for review, by the Commonwealth, of the decision, and it would be preferable for the decision to first be reviewed by that process; or (b) the question whether the person, or group of persons, concerned should be recommended for the defence honour, defence award or foreign award concerned has already been adequately reviewed (whether by the Tribunal or otherwise); or (c) the application is frivolous or vexatious. (2) The Chair's power under subsection (1) to dismiss an application for review of a reviewable decision may be exercised at any time, whether before or after the Tribunal has started to review the decision. (3) A dismissal under subsection (1) is not a legislative instrument. As a result, the current DHAAT power of dismissal covers only ground 9 and part of ground 6 above. It is proposed that Part VIIIC should be amended to allow the Tribunal to dismiss an application on most (if not all) of the grounds set out in 1-9 above.
Correction of errors	Tribunal legislation generally makes provision allowing the Tribunal to correct a minor error in its published decision or reasons. The DHAAT does not have an express power to do so and, while the need for such a power has only risen rarely in the past, it would be desirable to put the issue beyond doubt. For example, section 43AA of the *Administrative Appeals Tribunal Act 1975* (Cth) provides as follows: **43AA Correction of errors in decisions or statement of reasons** *Correction of errors*

	(1) If, after the making of a decision by the Tribunal, the Tribunal is satisfied that there is an obvious error in the text of the decision or in a written statement of reasons for the decision, the Tribunal may direct the Registrar to alter the text of the decision or statement in accordance with the directions of the Tribunal. (2) If the text of a decision or statement is so altered, the altered text is taken to be the decision of the Tribunal or the reasons for the decision, as the case may be. *Examples of obvious errors* (3) Examples of obvious errors in the text of a decision or statement of reasons are where: (a) there is an obvious clerical or typographical error in the text of the decision or statement of reasons; or (b) there is an inconsistency between the decision and the statement of reasons. *Exercise of powers* (4) The powers of the Tribunal under this section may be exercised by the President or by the member who presided at the proceeding to which the decision relates.

Attachment 8

Inquiry into medallic recognition for service with Rifle Company Butterworth

Recommendations

Recommendation 1:

That no further action should be taken with respect to medallic recognition for RCB veterans.

RCB service has received proper medallic recognition by the award of the Australian Service Medal and the Australian Service Medal 1945-1975. For the reasons set out in Chapter 18, it does not meet the eligibility criteria for, and therefore should not now be recognised by, the Australian Active Service Medal nor the Australian Active Service Medal 1945-1975.

Nevertheless, the value of RCB service must be acknowledged. RCB veterans were exposed throughout their service to a risk of attack on Butterworth Air Base by communist terrorists conducting an insurgency against the Malaysian Government. Had such an attack occurred, the consequences could have been severe. RCB service was not peacetime service and its role was not merely training. The proximate cause of RCB service was to enhance the defence of ADF personnel and assets in the event of a CT attack on the Base.

Recommendation 2:

That the 2007 'Billson instruments' should be formally revoked by the Minister in accordance with section 33(3) of the *Acts Interpretation Act 1901*.

Recommendation 3:

That the 'Billson instruments' should be replaced by re-drafted instruments and that once made, these new instruments should be registered as quickly as possible on the Federal Register of Legislation.

Because RCB service clearly meets the definition of 'non-warlike', it should attract the more favourable conditions applicable to such service under the VEA.

Those more favourable conditions were intended to be conferred by Minister Billson in 2007 but failed to be brought into effect by registration on the Federal Register of Legislation, initially because of administrative oversight in Defence and subsequently because of inadequate and wrong analysis within the Department.

While the Billson instruments could now be registered on the Federal Register of Legislation and thereby be allowed to come into effect, it would be preferable that they be formally revoked by the Minister in exercise of the power in section 33(3) of the *Acts Interpretation Act 1901* and replaced by re-drafted instruments. Those instruments should declare the entirety of RCB service to be 'non-warlike' as there is no rational reason why any part of that service should be declared to be the (albeit marginally) less favourable 'hazardous service'. Once made, these new instruments should be registered as quickly as possible on the Federal Register of Legislation.

Recommendation 4:

That no action should be taken to recognise RCB service by the award of either the Pingat Jasa Malaysia, the Returned from Active Service Badge or the General Service Medal 1918-62 with Malay Peninsula clasp.

Recommendation 5:

That consideration should be given to affording the same medallic recognition and veterans' entitlements to RAAF personnel who performed similar duties and were subject to the same or comparable risks as RCB veterans.

RCB veterans argued that RAAF personnel that served at Butterworth should be afforded equal treatment and, in its submissions and at hearing, Defence did not contest that proposition. The Tribunal did not conduct the detailed research that is necessary to confirm that position because its terms of reference were directed exclusively to RCB service. But, on the face of it, the Tribunal saw no compelling reason to withhold that recognition.

Those RAAF personnel should at least include RAAF Airfield Defence Guards, Security Police and any others of relevance.

Recommendation 6:

That extending 'non-warlike' VEA benefits to RCB veterans should not be delayed while consideration of RAAF personnel is conducted.

Recommendation 7:

That the Secretary of the Department of Defence and the CDF should mandate clear channels of coordination between the Nature of Service Directorate and the Directorate of Honours and Awards.

It became increasingly obvious to the Tribunal during the course of this inquiry that the Nature of Service Directorate and the Directorate of Honours and Awards had over a number of years acted in an uncoordinated way and that each had regarded the application of the terms 'warlike' and 'non-warlike' within their areas of responsibility as unrelated to the application of the same terms in the other's area of responsibility. This has led to the frankly absurd position where it has been asserted that the same terms bear different meanings in different contexts, notwithstanding that in 1993 Cabinet clearly approved the then-Minister's submission that they were to be commonly defined, and notwithstanding that there has since been no properly informed Cabinet or ministerial decision to change that common position.

The Nature of Service Directorate reports through the military chain of command. The Directorate of Honours and Awards reports through the civilian departmental chain of authority. This 'silo' structure means that, under present arrangements, coordination can only be effected at the Secretary/CDF level. That is clearly inappropriate – officers of that seniority should not be distracted by what is fundamentally a routine administrative matter. Less senior officers in the respective chains of command and

authority should be clearly designated as responsible for ensuring coordinated and consistent application of these basic concepts.

Recommendation 8:

That a fundamental 'root and branch' review of the definitions of the terms 'warlike', 'non-warlike' and 'peacekeeping' should be undertaken to make them each more meaningful and more readily understood.

Recommendation 9:

That, pending the outcome of that review, Defence be instructed that the 1993 definitions be applied for all purposes to all service prior to the Minister's approval of the 2018 definitions, and that the 2018 definitions should be applied for all purposes to all service after that date.

As things stand at present, the 2018 definitions apply to nature of service decisions on terms and conditions (and apparently veterans' entitlements) for all post-2018 deployments, but the 1993 definitions continue to apply for medallic recognition of all pre-2018 and post-2018 deployments. There is no apparent reason as why that should be so. It appears to have arisen only because of the lack of mandated coordination between the two directorates.

But simply applying the 2018 definitions to all post 2018 deployments for all purposes would not be the best outcome. The 1993 definitions clearly evince a graduated scale of likelihood of casualties as service moves from 'peacetime' though 'non-warlike' to 'warlike'. In contrast, the 2018 definitions of 'non-warlike' and 'peacetime' each state that there is 'no expectation of casualties', thus losing the illuminating concept of different likelihood.

Perhaps more fundamentally, none of the definitions contain as much 'granularity' as they might ideally do. For example, the 1993 definition of 'hazardous' simply states that such service involves *a degree of hazard above and beyond that of normal peacetime duty*, without any indication of the magnitude of that degree – should a mere scintilla of difference be sufficient?; should the degree of difference be 'material'?; or, as the NOS papers suggested from time to time, should hazardous duty be *substantially more dangerous than normal peacetime operations*?

The definitions would additionally each benefit from a greater use of definitions to give greater clarity to their meaning and to remove ambiguities such as those highlighted in the Tribunal's analysis in this report.

That the present definitions have allowed Defence and the Tribunal to come to so diametrically opposed views on the application of the 1993 and 2018 definitions of 'peacetime' and 'non-warlike' suggests that all of the 1993 and 2018 definitions require reconsideration to include greater granularity, more consistent terminology, and more use of definitions and guidance notes.

Recommendation 10:

That consideration should be given to adopting the matrix used by New Zealand, or some other matrix, to align threat/risk assessments with medallic recognition.

In conducting this Inquiry, it became clear to the Tribunal that the process employed by the New Zealand Defence Force to determine medallic eligibility provides for a more graduated and granular correlation and that its adoption might be beneficial in the Australian context.