Australian Government

Defence Honours and Awards Appeals Tribunal

REPORT ON THE INQUIRY INTO RECOGNITION OF TASK GROUP MEDICAL SUPPORT ELEMENT ONE DURING 1990-91 (GULF WAR)

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LETTER OF TRANSMISSION

Inquiry into recognition of Task Group Medical Support Element One during 1990-91 (Gulf War)

Senator the Hon David Feeney
Parliamentary Secretary for Defence
Parliament House
Canberra ACT 2600

Dear Parliamentary Secretary,

I am pleased to present the report of the Defence Honours and Awards Appeals Tribunal for the *Inquiry into recognition of Task Group Medical Support Element One 1990-91 (Gulf War)*.

The inquiry was conducted in accordance with the Terms of Reference. The panel of the Tribunal that conducted the inquiry arrived unanimously at the findings and recommendations set out in its report.

Under the Tribunal's procedural rules, a copy of this report will be published on the Tribunal's website 20 working days after the day it is given to you.

I would be grateful for advice on your response to this report when available.

Yours sincerely

Alan D Rose
Chair
Defence Honours and Awards Appeals Tribunal

19 June 2012

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TERMS OF REFERENCE

The Defence Honours and Awards Tribunal shall inquire into and report on recognition for members of the Australian Defence Force who served with the Task Group Medical Support Element One on board United States Naval Ship Comfort in 1990-91.

In particular the Tribunal is to examine whether the service was such as to warrant the award of the Australian Active Service Medal.

The Tribunal is to determine its own procedures, in accordance with the general principles of procedural fairness, when conducting its inquiry as set out in these Terms of Reference. In this regard the Tribunal may interview such persons as it considers appropriate and consider material provided to it that is relevant to these Terms of Reference.

The Tribunal is to report, in writing, to the Parliamentary Secretary for Defence Support on the findings and recommendations that arise from the inquiry.

In making its findings and formulating its recommendations the Tribunal is to arrive at a fair and sustainable response to current and future claims for recognition. It is to maintain the integrity of the Australian honours system and identify any consequential impact any finding or recommendation may have on that system.

EXECUTIVE SUMMARY

1. Task Group Medical Support Element One (TGMSE 1) was part of the Australian commitment to the multinational military force established under the auspices of the United Nations Security Council in response to Iraq's invasion of Kuwait on 2 August 1990. TGMSE 1 was made up of 20 members of the Australian Defence Force (ADF) who were loaned to the United States Navy as part of the logistic arrangements in support of the Australian Task Group (AS TG) (TG627.4) in the '*Operation Damask*' area of operations. The members of TGMSE 1 served on United States Naval Ship *Comfort* (USNS *Comfort*), which was stationed in the Persian Gulf.

2. TGMSE 1 rendered service in the Gulf War from 16 September 1990 until 4 January 1991. In this period, coalition forces were building up in the area of operations while diplomatic pressure was brought to bear on Iraq through the passing of a series of resolutions by the United Nations Security Council. Coalition forces did not commence combat operations against Iraqi forces until after the expiration of a deadline of 15 January 1991 set by the United Nations for Iraq to withdraw its forces from Kuwait.

3. Members of TGMSE 1 were made eligible for the award of the Australian Service Medal (ASM) in recognition of their service on 20 November 1990, when the Governor-General declared the operation of the multinational military force in the Gulf to be a '*non-warlike*' operation under the *Australian Service Medal Regulations* 1988 (ASM Regulations). The declaration provided that the commencement of this operation was 2 August 1990.

4. The Tribunal was tasked to examine whether the service rendered by members of TGMSE 1 warranted the award of the Australian Active Service Medal (AASM), which would require the operation to be declared a '*warlike*' operation under the *Australian Active Service Medal Regulations* 1988 (AASM Regulations). On 26 February 1991, the Governor-General had declared that, from 17 January 1991, the operation of the multinational military force in the Gulf was a '*warlike*' operation under the AASM Regulations. In subsequent declarations of the Governor-General under the ASM Regulations and the AASM Regulations, the period of the previously declared '*non-warlike*' operation in the Gulf was stated to have ceased on 16 January 1991 and the period of the previously declared '*warlike*' operation in the Gulf was stated to have ceased on 28 February 1991. The members of TGMSE 2 and TGMSE 3 served during the period the Governor-General had declared the operation in the Gulf to be '*warlike*' and thereby became eligible for the award of the AASM.

5. The Tribunal received eight written submissions, and of these, six submissions were from claimants/supporters for increased recognition for the members of TGMSE 1. The Department of Defence contended in its submissions that the award of the ASM to members of TGMSE 1 was appropriate.

6. The claim for increased recognition for TGMSE 1 was based on four arguments:

1. Their service was warlike because the use of force was authorised;
2. Their service warranted greater recognition than that given to members of the AS TG, who also were awarded the ASM, because TGMSE 1 served in a different part of the Area of Operations (AO) and served under a different command structure as part of the US Navy Operation Desert Shield under circumstances of greater threat and expectation of casualties;
3. Their service was similar, in respect to threat of enemy action and expectation of casualties, to that of TGMSE 2 and TGMSE 3 whose members were awarded the AASM; and
4. Other countries recognised the service of their forces who served at the same time as TGMSE 1 that is, prior to 17 January 1991, with the same medal as those who served after 16 January 1991.

7. The approach of the Tribunal in its inquiry was to examine the circumstances in which the members of TGMSE 1 rendered their service, the provisions of the ASM Regulations and the AASM Regulations and the factors or criteria (if any) on which the recommendation was made that the Governor-General determine that the operation of the multinational military force in the Gulf was initially '*non-warlike*' and then '*warlike'* from 17 January 1991. In regard to the latter, the Tribunal was not provided with any information about the basis (including any applicable factors or criteria that may have applied at that time) on which these recommendations were made. However, the Tribunal was informed that since May 1993, the Department of Defence has regard to the criteria set out in its policy, the *'Medals' Policy – Australian Active Service Medal and Australian Service Medal'* when making recommendations under the Regulations. As these criteria also appear to be used by the Department when reviewing the nature of an operation for the purpose of the Regulations, the Tribunal has also had regard to them for the purpose of assessing whether the service rendered by members of TGMSE 1 warranted the award of the AASM.

8. On the basis of the material before it, the findings of the Tribunal are:

1. The use of force was not authorised for Australian forces while TGMSE 1 was serving in the Gulf;
2. The operation in which members of TGMSE 1 served was not a 'warlike' operation;
3. The service of TGMSE 1 might have been similar in many respects to that of TGMSE 2 and TGMSE 3 but the nature of the operation in which TGMSE 1 served was different because the use of force was not authorised while TGMSE 1 was deployed.
4. While the medallic awards made by other nations have no precedent value in the Australian system of honours and awards, the Tribunal notes that Britain, Canada and the United States did differentiate between those who served before the beginning of hostilities, on 16 January 1991, and those who served after that date.

RECOMMENDATION

9. The Tribunal recommends that there be no change to the medallic recognition of members who served with TGMSE 1.

REPORT

1. Establishment of Inquiry and Terms of Reference

Introduction

1. The Defence Honours and Awards Appeals Tribunal (the Tribunal) is established under the *Defence Act 1903* (the Act). Its functions are set out in s 110UA of the Act. The Minister may direct the Tribunal to hold an inquiry into a specified matter concerning honours or awards and the Tribunal must hold an inquiry and report, with recommendations, to the Minister.

2. On 11 March 2010, the then Parliamentary Secretary for Defence Support, the Hon Dr Mike Kelly AM MP, requested that the Defence Honours and Awards Tribunal inquire into and report on recognition of members of the Australian Defence Force (ADF) who served, in 1990-91, with the Task Group Medical Support Element One (TGMSE 1).[1] In particular, the Tribunal was requested to examine whether the service rendered by the members of TGMSE 1 warranted the award of the Australian Active Service Medal (AASM) with Clasp 'Kuwait'. The service of these members had already been recognised with the award of the Australian Service Medal (ASM) with Clasp 'Kuwait'.

3. The request arises from a 2007 letter of enquiry to the then Parliamentary Secretary for Defence Support, by Lieutenant Benjamin Stock RAN, a member of TGMSE 1, about the nature of service and recognition of service for TGMSE 1. That enquiry had initially been referred to the Department of Defence, which confirmed its view that the most appropriate medal for service with TGMSE 1 was the ASM with Clasp 'Kuwait'.

Members of Tribunal

4. The inquiry was undertaken by the following members of the Tribunal:
Mr John Jones, AM (Chair)
Ms Sigrid Higgins
Brigadier Gary Bornholt, AM CSC, (Retd)

Conflict of Interest

5. Vice Admiral Don Chalmers AO, RAN (Retd) was initially allocated by the Chair of the Tribunal as a member of the Panel to conduct the inquiry. Following the first meeting of the Tribunal Vice Admiral Chalmers stood down to avoid any

[1] At the time of this request, the Defence Honours and Awards Tribunal operated administratively. On 5 January 2011, on the commencement of the provisions in Schedule 1 of the *Defence Legislation Amendment Act 2010* (the Defence Amendment Act), the Defence Honours and Awards Tribunal (the old Tribunal) became the Defence Honours and Awards Appeals Tribunal (the new Tribunal, or the Tribunal). Part 1 of Schedule 1 of the Defence Amendment Act inserted a new Part VIIIC into the *Defence Act 1903* (the Defence Act), which contained the provisions for the establishment of the new Tribunal, its members and its powers and functions. The transitional provisions in Part 2 of Schedule 1 of the Defence Amendment Act provides that any inquiry commenced by the old Tribunal is to be completed by the new Tribunal in accordance with the provisions in Part VIIIC of the Defence Act.

possible conflict due to having served as the Task Group Commander in the Gulf at the same time as TGMSE 1. Brigadier Bornholt replaced Vice Admiral Chalmers.

2. Conduct of the Inquiry

6. The inquiry commenced on 24 July 2010 with advertisements being placed in the major national newspapers giving notice of the inquiry and calling for submissions.

7. The Tribunal received eight written submissions. Of these, six were from claimants/supporters for increased recognition for the members of TGMSE 1. These included a submission from Lieutenant Benjamin Stock and another from Captain Kerry Delaney RAN (Retd), the Officer in Charge (OIC) of TGMSE 1 (see Section 3 below).

8. Of the remaining two submissions, one called for increased recognition (the AASM) for the crew of HMAS *Darwin* for its deployment as part of Operation Damask 1. As this did not fall within the terms of reference, the Tribunal did not consider this any further.

9. The remaining submission was from the Department of Defence, which confirmed its opposition to the claim for increased recognition for members of TGMSE 1. A supplementary submission was also received from the Department of Defence in response to questions posed to it by the Tribunal. A list of submitters is at Appendix 1.

10. The Tribunal first met on 21 September 2010 to consider the written submissions.

11. The Tribunal conducted hearings in Canberra on 25 and 26 October 2010. It heard oral evidence from three of the individual submitters and three representatives of the Department of Defence. Details of the hearing days and witnesses called to give evidence before the Tribunal are provided at Appendix 2. After this meeting and throughout the course of the inquiry the Tribunal has undertaken additional research.

12. The Tribunal met again on 4 February, 7 June, 23 August and 1 November 2011 and 26 March 2012. Following its meeting in June 2011, the Tribunal sought additional information from the Department of Defence about the reasoning behind the award of the ASM subsequently being changed to an award of the AASM for those who had served in the operations in Namibia, Cambodia and Rwanda. A brief response was received from the Department of Defence on 20 July 2011.

3. Background

The Gulf War (1990-1991)

13. On 2 August 1990, Iraq invaded Kuwait. On the same day, the United Nations Security Council (UNSC) passed a resolution, under Articles 39 and 40 of the *Charter of United Nations* (UN Charter), condemning the invasion and demanding that Iraq immediately and unconditionally withdraw its forces from Kuwait and begin

immediate intensive negotiations to resolve their differences (United Nations Security Council Resolution (UNSCR) 660. See Appendix 3.

14. On 6 August 1990, the UNSC passed another resolution - UNSCR 661. A copy of this Resolution is also at Appendix 3. The Resolution, made pursuant to Chapter VII of the UN Charter, said that the UNSC determined that Iraq had failed to comply with UNSCR 660 and decided that Member States were to take measures to secure compliance by Iraq with UNSCR 660 and restore the authority of the legitimate Government of Kuwait. These measures included a decision that all Member States impose economic sanctions against Iraq.

15. At the same time US President George H. W. Bush announced that the US would launch a '*wholly defensive*'[2] mission, under the codename Operation Desert Shield to prevent Iraq from invading Saudi Arabia. The first US forces arrived in Saudi Arabia on 7 August 1990.[3] This was the beginning of the US Operation Desert Shield.

16. On 10 August 1990, the Australian Prime Minister, the Honourable Robert Hawke MP, announced the commitment of an Australian Task Group (AS TG) to the multinational force (coalition forces) '*to participate in the enforcement of the United Nations embargo against Iraq*', imposed under UNSCR 661.[4] The Prime Minister announced that the AS TG would consist of the warships, HMAS *Adelaide* and HMAS *Darwin*, and the supply ship HMAS *Success*. The operation was named Operation Damask and the area of operations was designated by the Chief of the Defence Force (CDF), pursuant to section 58B of the Act, as the sea areas contained within the Gulf of Suez, the Gulf of Aqaba, the Red Sea, the Gulf of Aden, the Persian Gulf (the Gulf) and the Gulf of Oman (Determination No. 3989). The frigates HMAS *Adelaide* and HMAS *Darwin* departed from Australia for the area of operations, on 13 August 1990, arriving in the Gulf of Oman on 2 September 1990.

17. On 21 August 1990, the Australian Government confirmed its decision to impose sanctions against Iraq in accordance with UNSCR 661.[5] On 25 August 1990, the UNSC passed a further resolution in regard to Iraq - UNSCR 665. A copy of this resolution is also at Appendix 3. The resolution called on Member States which were co-operating with the Government of Kuwait and deploying maritime forces (i.e. the coalition forces) in the area '*to halt all inward and outward maritime shipping, in order to ensure strict implementation*' of the economic sanctions of UNSCR 661. As mentioned above, the AS TG became part of the US led coalition maritime forces in the area.

18. On 11 September 1990, the CDF issued a Directive (CDF Directive 15/90) entitled: *'For the Provision of Medical Support for Operation Damask'*. The Directive, addressed to the three Service Chiefs, directed that 20 members from the

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[2] http://en.wikipedia.org/wiki/Gulf_War

[3] That force ultimately grew to more than 500,000 service men and women from the U.S. Army, Navy, Air Force and Marine Corps and it was supported by forces from 31 nations, including the Royal Australian Navy and the members of TGSME 1, 2 and 3. See U.S. Department of Defense News Article, of 22 February 2006, by Donna Miles "*15 Years After Desert Storm, U.S. Commitment to Region Continues.*" A copy of which is at http://www.defense.gov/news/newsarticle.aspx?id=14792

[4] House of Representatives Hansard 21 August 1990, page 1118.

[5] House of Representatives Hansard 21 August 1990, page 1118.

ADF were to be loaned to the US Navy as part of the logistic arrangements in support of the AS TG (TG627.4) in the Operation Damask area of operations. A copy of the CDF Directive 15/90 is at Appendix 4A. The loan of the medical members was to be implemented within the terms of the Cooperative Defence Logistic Support Agreement (CDLSA), signed on 4 November 1989, between the governments of Australia and the US. CDF Directive 15/90 also advised that the US authorities had agreed in accordance with the CDLSA to provide ADF members in the area of operations with access to US military medical services. The 20 members of the ADF who were loaned as a result of this Directive became TGMSE 1. They comprised 19 members of the RAN (seven officers and 12 medical branch sailors) and one Royal Australian Army Medical Corps officer.

19. The CDF Directive 15/90 included details of the command and control arrangements for the TGMSE 1. The Chief of the Naval Staff (CNS) was directed to nominate an officer, for appointment by the CDF, as the Commanding Officer. The appointed Commanding Officer was to be responsible to the CNS, or to a subordinate officer designated by CNS, for National Command matters. CNS was directed to '***assign command*** *(excluding national command matters) and technical control of TGMSE 1 to the Commanding Officer and the Senior U.S. Medical Officer embarked in the U.S. hospital ship as appropriate*'. (bold added)

20. On 16 September 1990, TGMSE 1 members departed Australia, by air. They arrived in Bahrain on 17 September 1990, at 2.30am local time. They were taken immediately to join the USNS *Comfort*, a US Navy hospital ship, which had deployed into the area a few days earlier.

21. On 18 September 1990, Captain Kerry Delaney was formally appointed OIC of the TGMSE 1. In his Directive No 20/1990, CNS assigned command (excluding national command matters and technical control) of TGMSE 1 to the Commanding Officer/Senior US Medical Officer of the designated US Navy hospital ship.[6] A copy of the CNS Directive No 20/1990 is also at Appendix 4B. Paragraph [9] of the CNS Directive states:

> '*The TGMSE is to be deployed in the USN hospital ship that by mutual agreement will also serve the AS TG and Logistic Support Element (LSE). This arrangement is not to be changed without my prior approval*'.

22. The members of TGMSE 1 joined USNS *Comfort* in the Persian Gulf. For most of the deployment of TGMSE 1, USNS *Comfort* remained on station in the Persian Gulf with only short periods in the Gulf of Oman as well as short periods alongside in Dubai and Abu Dhabi.

23. On 8 November 1990, the US President, in speaking to the nation, announced the United States would send more forces to the Gulf to give the Coalition a combined arms offensive capability. The President's order for additional troops on this day

[6] The Tribunal notes that this part of CNS Directive is at variance with the requirements of CDF Directive 15/90 in relation to technical control. Additionally, while the CDF Directive directed the appointment of a 'Commanding Officer', CNS Directive was also at variance changing the appointment title to 'Officer in Charge.'

marked the beginning of Phase II of Operation Desert Shield and its purpose was to enlarge the defensive forces into '*a potential offensive force*'.

24. On 29 November 1990, the UNSC passed a further resolution in regard to Iraq - UNSCR 678. A copy of this resolution is at Appendix 3. Acting under Chapter VII of the UN Charter, the UNSC demanded that Iraq comply fully with UNSCR 660 and all subsequent Resolutions and decided '*while maintaining all its decisions, to allow Iraq one final opportunity, as a pause of good will, to do so'* and:

> *'**Authorises** Member States co-operating with the Government of Kuwait, unless Iraq on or before 15 January 1991 fully implements. ... [UNSCR 660 and all subsequent Resolutions] ..., to use all necessary means to uphold and implement resolution 660 (1990) and all subsequent resolutions and to restore international peace and security in the area.'*

25. On 4 December 1990, the Australian Prime Minister announced Australia would make the AS TG available to participate in operations, should that be necessary, to eject Iraq from Kuwait.[7] In his announcement, the Prime Minister explained the meaning of the words '*all necessary means*', as used in UNSCR 678, as follows:[8]

> '*The words "all necessary means" carry a clear meaning in this resolution: they encompass the use of armed force to compel compliance with the Security Council's resolutions. The United Nations has often authorised the deployment of military forces to prevent conflict; but only once before has it authorised the use of armed force to compel compliance with its resolutions - in Korea, 40 years ago.'*

26. On 16 December 1990, the AS TG entered the Persian Gulf having been authorised by the Australian Government to exercise and operate with allied naval forces in preparation for operations of a kind contemplated and authorised by UNSCR 678. The ADF was also at this time authorised to participate in allied military planning.

27. As part of a scheduled rotation, TGMSE 2 embarked on board USNS *Comfort* on 3 January 1991 to replace TGMSE 1, which returned to Australia on 4 January 1991. TGMSE 3, which had been authorised by Government in December 1990 to supplement TGMSE 2 in preparation for possible combat operations, embarked on board USNS *Comfort*, in Bahrain, on 13 January 1991. Together TGMSE 2 and 3 was made up of 40 members and they remained on board the USNS *Comfort* until 15 March 1991. Captain M. J. Flynn RAN was appointed OIC of TGMSE 2 and 3.

28. Although each TGMSE comprised two surgical teams, they did not function as separate Australian entities while on board the USNS *Comfort*. Instead they were fully integrated into the Medical Treatment Facility on board USNS *Comfort.*

[7] House of Representatives Hansard, 4 December 1990 at page 4319.
[8] Ibid.

29. On 17 January 1991, when Iraq had failed to comply with UNSCR 678, the coalition forces commenced air and missile strikes against Iraq. Offensive operations on land began a few days later and continued until a ceasefire was arranged, on 28 February 1991.

The AASM and ASM Regulations

30. On 13 September 1988, by Letters Patent, Queen Elizabeth the Second established two medals as part of the Australian system of honours and awards. They were the AASM, for service rendered in '*certain warlike operations*' and the ASM, for service rendered in '*certain non-warlike operations*'. The award of these medals is governed by the *Australian Active Service Medal Regulations 1988* (the AASM Regulations) and the *Australian Service Medal Regulations 1988* (the ASM Regulations). A copy of each Regulation is at Appendix 5 and Appendix 6 respectively.

31. Regulation 4 of the ASM Regulations sets out the conditions for the award of the ASM. Sub-regulation 4(1) provides that the medal may be awarded '*for service in or in connection with a prescribed operation'*. Regulation 2 defines a '*prescribed operation*' to mean '*an operation in respect of which a declaration has been made under regulation 3*'. And Regulation 3 provides as follows:

> *'3. The Governor-General, on the recommendation of the Minister, may declare a non-warlike operation, in which members of the Defence Force are, or have been on or after 14 February 1975, engaged, to be a prescribed operation for the purpose of these Regulations.'*

32. Other than using the term '*warlike operation'* in substitution of '*non-warlike operation*' the provisions in the AASM Regulations are in the same terms as those mentioned above (see regulations 2, 3 and 4(1) of the AASM Regulations).

33. Accordingly, the essential difference between the two awards is that the ASM recognises service rendered in a '*non-warlike operation'* and the AASM recognises service rendered in a '*warlike operation'*. The Regulations are silent on the meaning of a '*non-warlike operation*' and a '*warlike operation*'. Whether an operation is '*non-warlike'* or '*warlike'* is dependent on a declaration being made by the Governor-General, on the recommendation of the Minister, to this effect.

34. The Governor-General has made a number of declarations, pursuant to these Regulations, for past and present operations of the ADF. In some cases, the declaration is an amendment or variation on an earlier declaration. There are also a number of examples where a particular operation declared by the Governor-General as a '*non-warlike operation*' under the ASM Regulations is revoked and substituted with a declaration under the AASM Regulations making that operation a '*warlike operation.'*[9]

[9] For example, on 13 November 2009, medallic recognition for service rendered on the HMAS *Canberra*, in OPERATION 'DAMASK VI', from 13 January to 19 January 1993 was changed from the award of the ASM to the AASM.

Medallic Recognition for Service in the Gulf during 1990 and 1991

35. On 20 November 1990, the Governor-General declared, pursuant to regulation 3 of the ASM Regulations, '*the multinational military deployment in the Persian Gulf in the period that commenced on 2 August 1990'* to be a prescribed '*non-warlike operation*' for the purpose of those Regulations. By reason of this declaration Australian service men and women who served in the deployment of the coalition forces in the Persian Gulf from 2 August 1990 were eligible for the award of the ASM if they served for the prescribed period of time.[10] A copy of this determination of the Governor-General is at Appendix 7. The Tribunal was not provided with any information about those factors or criteria (if any) on which the recommendation was made to the Governor-General to declare this operation as an operation falling within the terms of these Regulations.

36. On 26 February 1991, the Governor-General declared, pursuant to regulation 3 of AASM Regulations, *'the multinational military deployment in the Persian Gulf from 17 January 1991'* to be a prescribed *'warlike operation*' for the purpose of those Regulations. By reason of this declaration Australian service men and women, who served in the deployment of the coalition forces in the Persian Gulf from 17 January 1991, were eligible for the award of the AASM if they served for the prescribed period of time.[11] A copy of this determination of the Governor-General is at Appendix 8. Again, the Tribunal was not provided with any information about those factors or criteria (if any) on which the recommendation was made to the Governor-General to declare this operation as an operation falling within the terms of these Regulations

37. On 17 April 1991, the Governor General revoked the declaration of 26 February 1991 under the AASM Regulations and made a new declaration in regard to the military deployment in the Gulf. The new declaration declared *'the multinational military deployment in the Persian Gulf in the period that commenced on 17 January 1991 and ended on 28 February 1991'* as being a prescribed operation under the AASM Regulations. A copy of this determination of the Governor-General is at Appendix 9.

38. On the following day, 18 April 1991, the Governor-General revoked the declaration of 20 November 1990 under the ASM Regulation and made a new declaration in regard to the military deployment in the Gulf. The new declaration declared *'the multinational military deployment in the Persian Gulf in the period that commenced on 2 August 1990 and ended on 16 January 1991, and in the period that commenced on 1 March 1991'* to be a prescribed operation under the ASM

[10] See *Declaration and Determination for the Australian Service Medal,* 20 November 1990, *Commonwealth of Australia Gazette* No. GN48, 5 December 1990. The time prescribed in the declaration of the Governor-General was 60 days, or periods that amounted to 60 days. In 1998, this period of time was reduced to 7 days (see *Declaration and Determination for the Australian Service Medal,* 14 August 1998, *Commonwealth of Australia Gazette* No. S408, 18 August 1998.)

[11] See *Declaration and Determination for the Australian Active Service Medal,* 26 February 1991, *Commonwealth of Australia Gazette* No. GN11, 20 March 1991.

Regulation.[12] A copy of this determination of the Governor-General is at Appendix 10.

39. There have been further declarations of the Governor-General in regard to the Gulf campaign. At Appendix 11 are copies of the further declarations. The Tribunal was not provided with any information as to factors or criteria.

Veterans' Entitlements

40. The concepts of '*warlike'* and '*non-warlike*' service were inserted into the *Veterans' Entitlement Act 1986* (the VE Act) in 1997[13]. They were inserted as a new category of '*operational service*' on which veterans' entitlements under the VE Act are determined[14]. The terms '*warlike'* and '*non-warlike'* service are defined to mean '*service in the Defence Force of a kind determined in writing by the Defence Minister'* to be '*warlike service'* or '*non-warlike service.'*[15]

41. There are five other categories of '*operational service*' in the VE Act.[16] These categories pre-existed the introduction of the '*warlike'* and '*non-warlike*' category of operational service. The category relevant to this inquiry is the '*post World War 2 service in operational areas'*.[17] '*Operational areas'* is defined to mean an area described in column 1 of Schedule 2 during the period specified in column 2 of that Schedule.[18] Item 10 in that Schedule prescribes an area covering the 1990 to 1991 Gulf conflict, including the sea areas contained in the Persian Gulf and the Gulf of Oman and the period specified is from 2 August 1990 to 9 June 1991. The service rendered by the members of TGMSE 1, TGMSE 2, TGMSE 3 and the members of the AS TG fell within this operational area.

42. In 2002, due to perceived anomalies in access to veterans' entitlements under the VE Act, the then Minister for Veterans Affairs, commissioned an independent review. That review, chaired by the Honourable M J Clarke QC, reported to the Minister on 6 January 2003 (the Clarke report).[19] As pointed out at chapter 10.1 of the report, the VE Act makes provision for two major pensions, the disability pension[20] and the service pension[21]. Eligibility for a disability pension includes having rendered '*eligible war service'*[22], which is defined to include '*operational service'*. And eligibility for a service pension includes having '*qualifying service*',

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[12] See *Declaration and Determination for the Australian Active Service Medal (*made on 17 April 1991) and published in the, *Commonwealth of Australia Gazette* No. GN18, 15 May 1991 and *Declaration and Determination for the Australian Service Medal* (made on 18 April 1991) and published in the *Commonwealth of Australia Gazette* No. GN18, 15 May 1991.

[13] These concepts were inserted in the *Veteran's Entitlement Act 1986* (the VE Act) by the *Veterans' Affairs Legislation (Budget and Compensation Measures) Act 1997.*

[14] See section 6F of the VE Act.

[15] See section 5C of the VE Act.

[16] See sections 6A to 6E of the VE Act.

[17] See section 6C of the VE Act.

[18] See section 5B of the VE Act.

[19] See *Report of the Review of Veteran's Entitlements: January 2003* (conducted by the Honourable John Clarke QC (Chairman), Air Marshal Doug Riding AO DFC and Dr David Rosalky) (the Clarke report).

[20] See Part II of the VE Act and chapter 10.15 of the Clarke report..

[21] See Part III of the VE Act.

[22] See paragraph 7(1)(a) of the VE Act.

which is defined to include, some, but not every category, or aspect of a category of '*operational service'*.[23] In particular, it does not include '*non-warlike service.'* However, it does include '*warlike service*' and service rendered by a member of a unit of the Defence Force who was allotted for duty, outside Australia, in an area described in column 1 of Schedule 2 during the period specified in column 2 of that Schedule.

43. Although veteran entitlements under the VE Act are not relevant to medallic recognition, the Clarke report contains some important observations and comment about the concepts of '*warlike*' and '*non-warlike*' as used by the ADF since 1994 and their incorporation into the VE Act. At chapter 10.8 it is stated that they are terms the ADF has used, since 1994, to classify service for the purpose of pay and conditions. This classification was in accordance with the 1993 Cabinet agreement as to the meaning of '*warlike service'* and '*non-warlike service'*.[24] Cabinet also agreed to the establishment of a conditions of service framework for ADF personnel deployed overseas, which relied on the Minister for Defence, in consultation with the Prime Minister, making a declaration as to whether a '*deployment*' is warlike or non-warlike.[25]

44. The 1993 Cabinet agreed meaning of '*warlike service*' is stated to be military activities '*where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties*'. These *'operations'* (i.e. military activities) *'encompass but are not limited to:*

- *a state of declared war;*
- *conventional combat operations against an armed adversary; or*
- *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, peace enforcement operations will be conducted under Chapter VII of the United Nations Charter, and in these cases the application of all necessary force is authorised to restore peace and security'**.* (bold added)

45. The 1993 Cabinet agreement on the meaning of '*non-warlike service'* is stated to be '*those activities short of warlike operations where there is risk associated with the assigned tasks and where the application of force is limited to self-defence. Casualties could occur but are not expected.*' These *'operations'* were said to encompass but were not limited to:

- *'**Hazardous operations**[26] - activities exposing individuals or units to a degree of hazard above and beyond that of normal peacetime duty. These can include mine avoidance and clearance, and weapons inspections and destruction. Also covered are defence force aid to the*

[23] See section 7A of the VE Act.
[24] See chapter 10.9 and 10.10 of the Clarke report.
[25] See chapter 13.38 and 13.39 of the Clarke report.
[26] Although not relevant to this inquiry it is noted that '*hazardous service*' is defined in section 120(7) of the VE Act to mean service of a kind determined by the Minister for Defence to hazardous service.

civil power, service protected or assisted evacuations, other operations requiring the application of minimum force to protect personnel or property, and similar activities.

- ***Peacekeeping operations*** *- operations involving military personnel, without powers of enforcement, to help restore and maintain peace in an area of conflict with the consent of all parties. These operations can encompass but are not limited to: –*

  - *activities short of Peace Enforcement where the authorisation of the application of force is normally limited to minimum force necessary for self defence;*

  - *activities, such as the enforcement of sanctions in a relatively benign environment which expose individuals or units to 'hazards' as described above under hazardous;*

  - *military observer activities with the tasks of monitoring ceasefires, re-directing and alleviating ceasefire tensions, providing 'good offices' for negotiations and the impartial verification of assistance or ceasefire agreements, and other like activities; or*

  - *activities that would normally involve the provision of humanitarian relief.'*

46. The Clarke Committee used these descriptions in assessing alleged post-World War II eligibility anomalies in veterans' entitlements under the VE Act: see chapter 13 and 14 of the Clarke report. These anomalies are of no relevance to medallic recognition or the issues in this inquiry.

47. The Tribunal was informed by the Directorate of Honours and Awards that the descriptions of '*warlike'* and '*non-warlike'* military activities agreed by Cabinet in 1993 have been applied and continue to be applied by the Department of Defence, when making recommendations to the Minister on the nature of each overseas activity or operation in which members of the ADF are deployed for the purpose of determining benefits (e.g. veterans' benefits under the VE Act) and medallic recognition under the ASM Regulations and the AASM Regulations. To the extent these descriptions are relevant to medallic recognition, they are discussed more fully below in section 6.

4. Basis for claim and the regulations

Summary of submitter's claims

48. The claim for increased recognition for members of TGMSE 1 is set out in Section 5 of this report. In summary that claim principally relies on the following arguments:

Argument 1: Use of force was authorised prior to 16 January 1991 and, accordingly all deployments prior thereto were also warlike;[27]

Argument 2: TGMSE 1 was deployed under a different command structure and in a different location to that of the AS TG. The command structure and location of the TGMSE 1 members meant that they were integrated into US Operation Desert Shield, which was a warlike operation;

Argument 3: As a consequence of operating in a different location, the members of TGMSE 1 were subject to military threats (e.g. the presence of sea mines released into the northern Persian Gulf in December 1990) and there was an expectation of casualties. It was argued that the other ADF members deployed in Operation Damask during this period did not face the same threats.[28] It was also argued that the threats and expectation of casualties perceived by the members of TGMSE 1 was no different to that experienced by the members of TGMSE 2 and TGMSE 3 and should be recognised as such; and

Argument 4: Other countries, such as the US, Canada and the United Kingdom, recognised the service rendered by their service men and women as part of the coalition forces, from 2 August 1990, with the award of an active service medal.

5. Evidence and Arguments

The claimants

49. The evidence of the claimants was largely drawn from the comprehensive written submissions of Captain Kerry Delaney and Lieutenant Ben Stock, both of whom also gave oral evidence to the Tribunal.

50. The principal argument raised by each of these witnesses is that the '*operation*' and '*service rendered*' by members of TGMSE 1 were '*warlike*'.

[27] In summary it was argued that a state of war commenced on 2 August 1990 when Iraqi forces invaded Kuwait and the UN Security Council moved UNSCR 660. If not this date, it was argued that it came into existence on 29 November 1990, or 4 December 1990 - the former being the date on which the Security Council passed UNSCR 678 and the latter being the date on which the Prime Minister '*formally announced*' that the Government was prepared to make the AS TG available to serve in the coalition forces in accordance with UNSCR 678.

[28] It was pointed out that there was no command or working relationship between TGMSE 1 and the AS TG. The directives of the CDF and CNS had created a separate chain of command for TGMSE 1 to that of the AS TG. As pointed out in Section 3 of this report, the members of TGMSE 1 were loaned to the US Navy and command was assigned to the Commanding Officer of USNS *Comfort* except for national command matters and technical control, which were assigned to the Commander, Naval Support Command in Australia. The TGMSE 1 and the AS TG were both deployed within the operational area that had been declared by the CDF on 22 August 1990, pursuant to section 58B of the *Defence Act 1903*. However, until December 1990, the AS TG was located outside the Persian Gulf, in the Gulf of Oman, whereas TGSME 1 was deployed within the Persian Gulf, closer to Kuwait, as were TGMSE 2 and 3 subsequently.

51. Captain Delaney explained, by reference to the map he had included in his written submissions, that the deployment of TGMSE 1 aboard USNS *Comfort* was in close geographic proximity to Kuwait, an area remote from the AS TG which remained in the Gulf of Oman until the final days of TGMSE 1's deployment. He contended that at the time there was a perception within Australia that TGMSE 1 was geographically close to the AS TG. This he pointed out was incorrect. That is, the AS TG did not move into the same geographical area as TGMSE 1 until late December 1990 or January 1991. This was also the same geographical area where TGMSE 2 and 3 were subsequently deployed.

52. The claimants argued that since TGMSE 1 was on loan to and under the command of the US Navy, it was an integrated part of US Operation Desert Shield, the mission of which was to defend Saudi Arabia. The claimants contended this operation was the first phase of a single campaign with three phases; the defence of Saudi Arabia and enforcement of sanctions; the liberation of Kuwait; and post-ceasefire operations and sanctions. In support of their argument, the claimants pointed to the comment of the Prime Minister in January 1991 that the invasion of Kuwait (on 2 August 1990) was the '*act of war*' and on this basis the operations of which TGMSE 1 was a part, must have been warlike in nature.

53. Captain Delaney stated that the role of TGMSE 1 was: '*to support level 3 / 4 management of military casualties including CBR (Chemical, Biological and Radiological) and mass casualties*'. He said that this level of care is essential in or near the area of operations in a '*combat situation*' and this was how TGMSE 1 fulfilled its role while deployed on USNS *Comfort*. He also said that the extremely short time frame in which members were notified, posted and mobilised, and the classified nature of the arrangements meant the members of TGMSE 1 '*believed that they were "going to war"'*. In summary, Captain Delaney contended that in terms of duties, exposures to warlike threats and grave personal risk while serving on USNS *Comfort*, the service rendered by members of TGMSE 1 was equivalent to, and of longer duration than, the subsequent deployment of TGMSE 2 and 3 which had been declared to be '*warlike*'. [29]

54. Captain Delaney provided details of the types of casualties treated on USNS *Comfort* during the deployment of TGMSE 1. These included wounds from accidental shootings, vehicle accident casualties and high blood pressure due to physical or emotional stress. TGMSE 1 members also managed a number of patients, who subsequently died as a result of their injuries.

55. Captain Delaney asserted that the application of force was authorised as early as 25 August 1990, under the terms of UNSCR 665. He also argued that the US force, with which TGMSE 1 was integrated, abandoned its defensive posture of Operation Desert Shield on 8 November 1990 when President Bush ordered a significant increase to the number of deployed US combat troops, thereby moving US forces to an offensive posture. He also contended that the Australian Government decided, on 4 December 1990, to upgrade the role of the Australian Forces (i.e. the naval forces that had been deployed to the Gulf in August 1990) to a '*war footing*'.

[29] In his written submission to the Tribunal, Captain Kerry Delaney RAN (Retd), provided a copy of the citation of the Navy Unit Commendation, issued by the Secretary of the US Navy, to the Military Sealift Command. See figure 3.

56. Captain Delaney expressed his view that, based on Iraq's then known military capability and very recent history of initiating conflict, belligerence and disregarding the conventions of war, the Iraqi forces presented a real and immediate danger to the USNS *Comfort* and those who were aboard (including members of TGMSE 1). He mentioned specifically threats of sea mines, covert attacks by sea and air and a continuing expectation of mass casualties (including from CBR weapons). In this regard, Captain Delaney stated that some TGMSE 1 members exhibited features of what he referred to as a '*combat stress illness.*' In regard to the expectation of casualties, Captain Delaney referred to the '*intense and sustained battlefield casualty management training conducted on COMFORT in particular mass casualty exercises.*'

57. Lieutenant Stock gave similar evidence to that of Captain Delaney and relied on the same arguments. He also contended that the situation confronting members of TGMSE 1 was '*warlike*' in nature on the basis of threats and the numbers and nature of casualties treated on USNS *Comfort* during the deployment. He also emphasised that the service rendered by members of TGMSE 1 differed to that rendered by the members serving in the AS TG. He stressed that TGMSE 1 was embedded with the US Navy and operated in pursuit of different missions to that of the Australian ships and the members of the AS TG, and as a consequence were subject to greater and more serious threats.

58. Lieutenant Stock also stated firmly his view that the Gulf War started on 2 August 1990, when Iraq invaded Kuwait, rather than on 17 January 1991, when the coalition air offensive against Iraqi forces commenced. In his view TGMSE 1 was involved in a war, and therefore a warlike situation existed, throughout its deployment.

59. Lieutenant Stock argued that the medallic recognition of service of ADF members in Namibia, Cambodia and Rwanda provided clear and relevant precedents for the upgrade of the award of an ASM to an AASM.

60. Evidence supporting the claim for the award of the AASM to members of TGMSE 1, provided by other submitters, included similar arguments to those of Captain Delaney and Lieutenant Stock. One additional argument presented was that the members of defence forces of other nations who served in the Gulf War prior to 17 January 1991, received the same medallic recognition as those who served after that date.

Department of Defence

61. The Department of Defence submission to the Tribunal opposed the awarding of the AASM to the members of TGMSE 1. The principal argument for this view by the Department was stated to be that no authority for the use of force by the coalition forces (i.e. multinational military forces) was established during the deployment of TGMSE 1, since UNSCR 678 did not have effect until the passage of the deadline of 15 January 1991. Further, it was argued that the Australian Prime Minister only authorised the use of force by Australian forces to take effect from 17 January 1991.

62. Mr Pat Clarke and Mr Brett Mitchell of the Department of Defence, Directorate of Honours and Awards (DHA), appeared before the Tribunal to summarise the submission of the Department and to respond to questions on its

content. Their evidence was essentially along the lines contained in a letter written to Lieutenant Stock signed by the then Parliamentary Secretary for Defence Support, the Hon Dr Mike Kelly AM MP, and dated 26 October 2009 which was included in a submission to the Inquiry from Lieutenant Stock. A copy is included at Appendix 12.

63. As mentioned in Section 2 of this report, subsequent to the appearance of Mr Clarke and Mr Mitchell, the Directorate provided the Tribunal with a summary of the basis on which the award of an ASM was changed to the award of the AASM for service on each of several previous operations: the United Nations Transitional Authority in Cambodia (UNTAC) Operation; Operation Solace and the Second United Nations Operation in Somalia 1993-1995; Operation Tamar Rwanda 1994-1996; and the United Nations Transition Assistance Group (UNTAG) Namibia 1989-1990 Operation. When providing this information the Directorate said that the medallic recognition for these operations did not provide a precedent for the award of the AASM to TGMSE 1.

64. The letter to Lieutenant Stock of October 2009, mentioned earlier, also sought to explain the rationale by which the Defence Department found that TGMSE 1 should not be awarded the AASM.

65. In relation to the UNTAC Operation (1991 to 1993), the UNTAG Operation (1989-1990) and *Operation Tamar* (1994-95), the letter advised: '*Each of these operations have had the award of the Australian Service Medal replaced with the Australian Active Service Medal based on separate re-assessments of the missions, tasks, rules of engagement and operational risks associated with the deployments.*'[30]

66. In addition to the above, the letter also advised, in regard to *Operation Tamar* in Rwanda, that:

> *'I (Dr Kelly) am advised that Defence considers it inappropriate to compare ADF service on Operation TAMAR in Rwanda with ADF service on TGMSE One. The missions, tasks, rules of engagement and operational risks of the two deployments were significantly different. … Service on Operation TAMAR was classified as warlike under the construct introduced by Cabinet in May 1993. Consequently, Operation TAMAR does not provide a relevant precedent …'*[31]

67. In regard to Operation Solace in Somalia, the letter points out that '*service on land is recognised by the award of the Australian Active Service Medal, however service by Royal Australian Navy personnel onboard Her Majesty Australian ships in the operational area provides an entitlement to the Australian Service Medal.*'[32] The letter also says that this provided '*an appropriate precedent for the award of different medals based on the assessed operational risk...*'[33] Subsequent to the writing of this letter, the Tribunal (differently constituted to this inquiry) published its report '*Inquiry into Recognition of Australian Defence Force Service in Somalia Between 1992 and 1995*' (5 July 2010). In that inquiry, the Tribunal found that the award of different

[30] Letter from the Hon Dr Mike Kelly AM MP to Lieutenant Stock dated 26 October 2009 (received as part of a submission to the Inquiry from Lieutenant Benjamin Stock).
[31] Ibid
[32] Ibid
[33] Ibid

medals to members serving in the same area of operations at the same time was contrary to medallic principles. While the issues in this inquiry differ to those that were relevant to the Somalia inquiry,[34] it is noted that the Tribunal found that all units of the Australian force that had served in Somalia, be they combat or support units should be treated equally for the purpose of medallic recognition. It was on this basis that the Tribunal recommended the upgrade of the ASM with Clasp Somalia to the award of the AASM with Clasp Somalia to the HMAS *Tobruk* ship's company and the HMAS *Jervis Bay* ship's company.

6. Tribunal's Consideration of the Issues and Arguments

68. The Tribunal notes that the claimants are in agreement that the members of TGMSE 2 and TGMSE 3, who rendered service from 17 January to 28 February 1991, were appropriately recognised with the award of the AASM. The claimants also appear to agree that the members of the AS TG who rendered service as part of the AS TG during this period were also appropriately recognised with the award of the AASM. There also appears to be agreement that the members of TGMSE 2, TGMSE 3 and AS TG, who served from 17 January to 28 February 1991, had rendered service in a single operation that was appropriately declared to be a '*warlike operation'* under the AASM.

69. A critical issue in this inquiry is whether the '*operation*' of which TGMSE 1 was part, is more appropriately categorised as a '*warlike operation*' under the AASM Regulations as opposed to a '*non-warlike operation*' under the ASM Regulations. Central to this issue is the meaning of the term '*warlike operation*' and whether the circumstances in which the members of TGMSE 1 were deployed constituted an '*operation'* that meets the description of a '*warlike operation*'. The claimants argue it does. For the reasons set out below, the Tribunal is not persuaded by the arguments of the claimants.

Meaning of a '*warlike operation*' for the purpose of the AASM Regulations

70. The Tribunal notes that the Department of Defence website describes both the ASM and the AASM as being a campaign medal.[35]

71. In the *Report of the Committee of Inquiry into Defence Awards and Defence Related Awards* (1994), the Committee noted that the ASM and the AASM were introduced into the Australian system of honours and awards to continue the tradition (established under the Imperial system of honours and awards) of General Service Medals (GSM).[36] A GSM was instituted periodically to cover a distinct period of time and, as explained by the Committee, they were awarded to recognise service in '*minor campaigns and operations*', which did not warrant the issue of a separate

[34] The ADF in Somalia was a part of a joint force with a single command structure. This was not the case for the Gulf operation.

[35] http://www.defence.gov.au/medals/ The meaning of a '*campaign*' in a military sense was considered by the Tribunal in the following Reports: Defence Honours and Awards Tribunal Report, *Inquiry into Recognition of Australian Defence Force Service in Somalia between 1992 and 1995*, 5 July 2010 at [33] to [37] and Defence Honours and Awards Tribunal Report, *Inquiry into Recognition for Defence Force Personnel who Served as Peace Keepers from 1947 Onwards*, 1 November 2010 at [48] to [52].

[36] *Report of the Committee of Inquiry into Defence Awards and Defence Related Awards* (1994) See pages 9 and 81-83.

campaign medal. Accordingly, the GSM was awarded with a clasp to denote the prescribed '*campaign or operation'* in which the person had served within the period to which the medal related. Other than recommending the establishment of an ASM 1945-75[37] to recognise military service in a prescribed peacekeeping or non-warlike operation the Committee did not consider the distinguishing features between a '*warlike operation'* and '*non-warlike operation*.' The ASM Regulations and the AASM Regulations, as noted above, do not contain any guidance as to the distinguishing features between warlike and non-warlike operations. Nor did the Department of Defence provide the Tribunal with any guidelines as to the meaning of those terms prior to the descriptions, as agreed by Cabinet in 1993.

72. As indicated in Section 3 of this report, the Tribunal was informed by the Directorate that the 1993 descriptions agreed to by Cabinet have been and continue to be used for the purpose of making recommendations to the Minister in regard to medallic recognition under the ASM Regulations and the AASM Regulations. A copy of the document evidencing the agreement of Cabinet was not provided to the Tribunal. Instead, the Directorate provided the Tribunal with a copy of its own policy, which it asserted was consistent with the terms of that agreed to by Cabinet.[38]

73. The policy document is entitled '*Medals' Policy – Australian Active Service Medal and Australian Service Medal'* (the Medals' Policy), A copy of the policy is at Appendix 13. Paragraphs 1 and 5 of that policy are in the following terms:

> *'1. Awards of the Australian Active Service Medal (AASM) and the Australian Service Medal (ASM) are firstly linked directly to declarations of warlike and non-warlike service by the Minister for Defence. With respect to the AASM and a declaration of warlike service 'warlike' can only have one meaning and that is within the specified definition in Cabinet Minute No. 1691. …As the AASM is awarded for warlike service, it is policy that a request to the Governor-General to make a declaration of warlike service under the AASM Regulations will only be made if it can be supported by a ministerial declaration made in accordance with the Cabinet Minute. If this declaration does not exist, there is no basis on which the AASM can be awarded.*
>
> *2.* …
>
> *3.* …
>
> *4.* …
>
> *5.* ***Principle (sic) conditions underlying declarations.*** *The principle (sic) conditions underlying a declaration of service as 'warlike' or 'non-warlike' are the nature of the task to be performed and the specific mission of the operation. Essentially, the declaration of an operation has more to do with the degree of force to be employed to achieve the*

[37] On 11 December 1997, by Letters Patent, Queen Elizabeth the Second established the Australian Service Medal 1945-1975 and the Australian Active Service Medal 1945-1975. The purpose of these awards and the regulations governing them mirror those for the ASM and AASM. The only difference is that they relate to '*non-warlike operations*' and '*warlike operations*' in the period 3 September 1945 to 13 February 1975. Again, these Regulations contain no guide as to what constitutes a '*warlike operation*.'

[38] The Tribunal was informed that the policy in the document was agreed to on 28 June 2001, by the then Minister Assisting the Minister for Defence, the Hon Bruce Scott MP.

> *mission, and the rules of engagement to be followed, rather than the operational and environmental risks to deployed personnel. Therefore, in order for a deployment to be declared as warlike, it would require the existence of a warlike mission and warlike activities.'* (underlining added)[39]

74. The Tribunal understands that the reference to Cabinet Minute No. 1691 is a reference to the 1993 Cabinet agreed descriptions of '*warlike'* and '*non-warlike*' as contained in the Clarke report. Notwithstanding this, the Directorate strongly argued that these descriptions were of no relevance to the issues in this inquiry as they came into existence after the 1990 and 1991 declarations of the Governor-General in regard to the ADF operations in the Gulf.

75. The Tribunal finds it difficult to accept this argument, especially as the arguments of the claimants and the Directorate in regard to this inquiry are couched in terms of these descriptions[40]. In this regard, it is useful to again note the essential distinguishing features between a '*warlike operation*' and a '*non-warlike operation*'. Both are described as a '*military activity*'. Their distinguishing features in the 1993 agreed Cabinet descriptions are as follows:

> Warlike operation '***where the application of force is authorised to pursue specific military objectives and there is an expectation of casualties'***
>
> Non-warlike operation '***where there is risk associated with the assigned task(s) and where the application of force is limited to self- defence. Casualties could occur but are not expected'.***

76. For the purpose of this inquiry the Tribunal has approached the matters in issue by applying the abovementioned description of a '*warlike operation'*. As noted in the Medals' Policy, what is essential to declaring an operation as '*warlike*' is the existence of a '*warlike mission and warlike activities*'. Even if the operation in which members of the TGMSE 1 served was found not to be '*warlike*', no one has ever questioned the appropriateness of the operation having been declared '*non-warlike*' for the purpose of the ASM Regulations.

Claimant's argument 1: Use of force was authorised prior to 16 January 1991

77. The Tribunal finds that the terms of the UN Resolutions and the announcements of the Australian Government do not support the conclusion contended by the claimants that, prior to 16 January 1991 the coalition forces were authorised to use force other than the minimum force necessary for self-defence.

78. At a press conference on 10 August 1990, the Prime Minister, when announcing Australia's commitment to the coalition force in the Gulf area, described the primary purpose of that force as '*to enforce the blockade of Iraq and Kuwait and*

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[39] *Medals' Policy - Australian Active Service Medal and Australian Service Medal (undated).*

[40] As mentioned in section 3 of this report, the 1993 Cabinet agreed descriptions were also used in the Clarke report to assess alleged anomalies in veteran benefits under the VE Act, for service that had been rendered before 1993 and the introduction of the concepts of '*warlike*' and '*non-warlike*' in the VE Act.

… to protect the exports from other oil producing countries and to protect other trade in the Gulf'.[41] The inference to be drawn from this announcement is that use of force was limited by the terms of UNSCR 660.

79. On 21 August 1990 when addressing Parliament, the Prime Minister made the following remarks about the Iraqi invasion of Kuwait and Australia's response thereto:[42]

> '*Our ships are being sent to the Gulf region with a clear mission – to assist in enforcing economic sanctions. The Government has defined the way in which our ships will operate in fulfilling that mission – as I have said, identification, contact, interrogation and warning. Discussions are now under way with other participants to establish co-ordinating procedures and areas of operations. The operational role of our ships will be reviewed if necessary to ensure that they meet the aim of the deployment but our discussions so far have confirmed that their current roles will allow them to fulfil their mission with a sensible minimum of force … **I should make it clear here that our ships are not being sent to the Gulf region to attack Iraq. They will engage Iraqi armed forces only in self-defence***.' (emphasis added)

80. Although the '*ships*' referred to by the Prime Minister in his address to Parliament were the ships on which the members of the AS TG were deployed, the remarks equally applied to the members of TGSME 1 as they were also part of the same operation.

81. The deployment of TGSME 1 occurred after the UNSC adopted UNSCR 665 on 25 August 1990. That Resolution was in the following terms:

> '1. Calls upon *those Member States co-operating with the Government of Kuwait which are deploying maritime forces to the area to **use such measures commensurate to the specific circumstances as may be necessary under the authority of the Security Council** to halt all inward and outward maritime shipping, in order to inspect and verify their cargoes and destinations and to ensure strict implementation of the provisions related to such shipping laid down in resolution 661 (1990).*
>
> 2. Invites *Member States accordingly to co-operate as may be necessary to ensure compliance with the provisions of resolution 661 (1990) **with maximum use of political and diplomatic measures,** in accordance with paragraph 1 above*;' (emphasis added)

82. Consistent with the terms of UNSCR 665, on 1 September 1990 the Maritime Commander advised, by signal, the Commander of AS TG that his mission was '*to prevent the import or export of all commodities and products to or from Iraq or Kuwait*'.[43]

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[41] Transcript of News Conference, Parliament House, 10 August 1990, NAA: A1274, B90/00313.
[42] Statement by the Prime Minister, R.J.L. Hawke, *CPD*, H of R, 21 August 1990, pp. 1118–21.
[43] D Horner, *Australia and the New World Order: From Peacekeeping to Peace Enforcement: 1988–1991*, Cambridge University Press, Port Melbourne, 2011, page 319.

83. As mentioned in Section 3 above, UNSCR 678 of 29 November 1990 only authorised the use of force after 15 January 1991, if Iraq failed to comply with the earlier UN Resolutions. Again the commitment of Australia was consistent with the terms of this Resolution as reflected in the announcement of the Prime Minister, on 4 December 1990. In that announcement the Prime Minister said:

> '*... the government was prepared to make a naval task force available to serve with allied forces in operations authorised by UN Security Council Resolution 678 and, if conflict occurred, the ships would be available to participate. The task group was therefore permitted to enter the Persian Gulf to exercise and operate with allied naval forces in preparation for that role*'. [44]

84. Contrary to the contentions of Captain Delaney, this announcement of the Prime Minister cannot be construed to mean that the Australian forces, in the Gulf area, were on a '*war footing'* as of 4 December 1990. The announcement was no more than a statement that in the event Iraq failed to comply with UNSCRs and withdraw its forces from Kuwait by 15 January 1991, coalition forces were authorised to use '*all necessary means*' (including force) to give effect to that Resolution. That is, the authorisation of the use of force was conditional on the happening of an event in the future (i.e. the non withdrawal of Iraq from Kuwait by 15 January 1991).

85. The terms of the press release of the Prime Minister, dated 17 January 1991, provide further support for this conclusion. In that press release the Prime Minister said the following[45]:

> '*With profound regret, I must now inform you that the necessity which I foreshadowed in the Parliament five weeks ago has come about. As a consequence, therefore, the Australian Naval Task Force in the Gulf is now with other members of the United Nations co-operating in armed action to fulfil the United Nations resolutions to enforce the withdrawal of Iraq from Kuwait. I must emphasise from the outset – and it cannot be repeated too often or stressed too strongly – that this tragic necessity has one cause, and one cause only. And that is the invasion and occupation of the nation of Kuwait, a member state of the United Nations, by Iraq on 2 August last year – more than 5 months ago. That was the act of war – and since that time we have sought by means of peace to reverse that act of war*.'

86. The Tribunal is unable to accept the claimants' contention that decisions and actions to increase the numbers of US forces in the Gulf evidenced an authority to use force or the taking of an offensive posture by the US, thereby creating a warlike environment. An increase of forces can be made for a number of reasons and there is no evidence to indicate that the US made its decision for the purpose contended by the claimants.

87. The report, entitled '*Conduct of the Persian Gulf War: Final Report to Congress'* (April 1992), states that the decision by President Bush to increase the size of the US force in the Gulf was made because he wanted his national security advisers to be able to develop a strong military option to force Iraq from Kuwait should the

[44] D Horner, ibid, pages 392-3.
[45] Statement by The Prime Minister (the Hon R. Hawke MP), The Gulf, Thursday, 17 January 1991.

application of UN sanctions and diplomacy fail.[46] The US Report confirms that by October 1990, the US and its allies had deployed enough forces and material to deter Iraqi attack and defend Saudi Arabia from invasion, should that eventuate.

88. There is no evidence that use of force was authorised by the US under the auspices of Operation Desert Shield. Indeed the report to Congress quite clearly states that the US did not depart from its "deter and defend" objectives of Operation Desert Shield until 17 January 1991 when it began to force Iraq to withdraw from Kuwait.[47]

Claimant's argument 2: TGMSE 1 was deployed under a different command structure and in a different location to AS TG

89. On the material before it, the Tribunal accepts that the members of TGMSE 1 operated in a different location to the AS TG and that they were not part of the AS TG in an operational or practical sense. The Tribunal also accepts that the members of TGMSE 1 operated as part of the US Navy. However, for the reasons set out below, the Tribunal does not accept the contentions of the claimants that the members of TGMSE 1 were in effect '*assigned*' under the command of the US Navy, or that the US mission, Operation Desert Shield, was a conventional combat operation against an armed adversary.

Command of the ADF as part of a multinational military deployment

90. The intent expressed by the words '*assign command*' in the CDF Directive 15/90 (see paragraph 19 above), must be considered in the Australian context, where operational authority is given to a lead nation in a multinational military deployment (multinational coalition). In this regard, it is well accepted that this authority does not include the full command of Australian forces serving in the deployment of the multinational coalition. For example, it would not include the Commanding Officer of the lead nation being able to change the mission of the Australian forces or reassign the Australian forces, without the concurrence of the Australian chain of command. That is, these are matters remaining within the Australian '*national command*'. The purpose of retaining '*national command'* is to ensure that when operating in a multinational coalition, missions in which the ADF plays a part are undertaken in accordance with the directives and intentions of the Australian Government. This also ensures the prudent deployment of ADF personnel and equipment, and limits the deployment and conduct of Australian forces to within the operational authority specified by the Australian chain of command.

91. In this case, the specific and express exclusion of '*national command*' from that which was '*assigned*' to the Commanding Officer and the Senior US Medical Officer on the US Navy hospital ship in the CDF Directive is consistent with this accepted practice. What was '*assigned*' to the US Commanding Officer was a level of authority such as operational or tactical control and neither the US Navy Commander nor the Australian OIC TGMSE 1 could change the mission or reassign

[46] '*Conduct of the Persian Gulf War: Final Report to Congress*' (Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Public Law 102-25) (April 1992) at page 106.
[47] Ibid, at page 118.

the Unit, without concurrence from the Australian chain of command. That is, the OIC of TGMSE 1 could not participate in any US activity that did not accord with the directives of the Australian Government (e.g. an operation which authorised the use of force), without first consulting through CNS to CDF.[48]

92. Hansard records of Parliamentary statements and debates from August 1990 to the end of January 1991 are consistent with this finding. For example, in September 1990, the Minister for Defence outlined the constraints imposed should the use of force become necessary. These included the imposition of a chain of command in which the Maritime Commander and CDF had to concur before deployed Australian naval elements were authorised to open fire.[49] On 15 November 1990, the Foreign Minister clarified the command arrangements under which ADF force elements were to operate. He said that there was no joint command of the multinational naval task force and that there were well-established procedures for coordination among the participants in the force, reiterating that the Australian naval deployment in the Gulf was under Australian '*national command*'.[50]

93. Accordingly, on the material before the Tribunal, the members of TGMSE 1 were at all times ultimately under the command of the CDF, through CNS, even though in a day-to-day operational sense they were under the operational or tactical control of the US Navy. The same levels of command applied to the members of TGMSE 2 and TGMSE 3 and the AS TG. The Tribunal notes that CDF Directive 15/90 provided that the duration of the arrangement in regard to the reciprocal medical support was to be '*terminated upon the withdrawal of the AS TG.*'

Operation Desert Shield

94. US military objectives during Operation Desert Shield were to: (1) develop a defensive capability in the Gulf region to deter Saddam Hussein from further attacks; (2) defend Saudi Arabia effectively if deterrence failed; (3) build a militarily effective Coalition and integrate Coalition forces into operational plans; and (4) enforce the economic sanctions prescribed by UNSCR 661 and 665.[51] Although an environment of uncertainty was pervasive in the period prior to commencement of combat operations on 17 January 1991, in that the deployed US forces were fully prepared to fight shortly after arrival in the area of operations, such an eventuality never arose. The same level of uncertainty existed when the AS TG and TGMSE 1 were deployed.

95. Not only did the eventuality of combat not arise, the evidence indicates the US had no desire to engage in combat of any nature prior to 17 January 1991. In this regard, it is noted that up to 3 January 1991, President Bush, declared his willingness to '*go the extra mile for peace*' when he offered to send the Secretary of State to meet with the Iraqi Foreign Minister.[52] The meeting was held in Geneva on

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[48] This is consistent with Captain Delaney's Minute of 11 July 1991 to Captain W R Overton RAN: see Enclosure 2: '*Presentation to Personal Services Conference 1991 "TGMSE Experiences in Operation DAMASK"*, under the heading *Chain of Command*'.

[49] Senate Hansard, 13 September 1990 at page 2283. Such constraints are not imposed on ADF force elements deployed on warlike operations.

[50] Senate Hansard, 15 November 1991 at page 4253.

[51] '*Conduct of the Persian Gulf War: Final Report to Congress*' (pursuant to Title V of the Persian Gulf Conflict Supplemental Authorisation and Personnel Benefits Act of 1991-Public Law 102-25) (April 1992) at page 75.

[52] Ibid, at page 117.

9 January 1991, but to no avail. And it was not until 12 January 1991 that the US Congress passed a resolution supporting President Bush's decision to engage in combat and use force. This was a departure from the deter and defend objectives of Operation Desert Shield and focused on forcing Iraq to withdraw from Kuwait and signalled a new US operation, Desert Storm. This operation commenced on 17 January 1991 after the expiration of the deadline in UNSCR 678.

96. The US approach was similar to that adopted by Australia, which is perhaps best reflected in the statement the Prime Minister made to the House of Representatives on 21 January 1991. In that statement the Prime Minister placed on the record the train of events resulting in his decision, on 17 January 1991, to authorise the AS TG to participate in the operations under UNSCR 678 (i.e. to use all necessary means).[53] In regard to the timing of his decision and that of the allied military response the Prime Minister said the '*war did not begin on 17 January 1991. It began when Iraq invaded Kuwait. … It is a war that has been fought against the innocent people of Kuwait.*' More importantly, the Prime Minster went on to say that it was a war in which '*an allied military response began on only 17 January*' and none of the destruction caused to Iraq's military capabilities since then would have been necessary if Iraq had complied with the UNSCRs.

97. Accordingly, the Tribunal accepts that TGMSE 1 tasks involved treatment of US personnel who had been injured on Operation Desert Shield. However, no evidence was presented to support the claim that these injuries were as a result of conventional combat operations against an armed adversary. The evidence is that the injuries were as a result of accidents. Nor is there any other evidence of TGMSE 1 having been assigned to Operation Desert Shield.

Different area of operations

98. As mentioned in Section 3 of this report, CDF Directive 15/90, which gave rise to the deployment of TGMSE 1, expressly said that this group was to be loaned to the US Navy as part of the logistic support arrangements in support of the AS TG operating in the '*Damask area of operations'*. This area of operations was that contained in Determination No. 3989, made by the CDF, under the then section 58B of the *Defence Act* 1903, on 22 August 1990. That area of operations encompassed the Gulf of Suez, the Gulf of Aqaba, the Red Sea, the Gulf of Aden, the Persian Gulf and the Gulf of Oman, the land within those seas and parts of the Arabian Sea to be the '*area of operation*' for the Gulf campaign. Accordingly, TGMSE 1 and the AS TG were deployed within the same area of operations. The declared area of operations effectively remained the same during the deployment of TGMSE 2 and TGMSE 3.

99. The declarations made by the Governor-General under the ASM Regulations and the AASM Regulations in regard to the 1990/1991 Gulf campaign define the '*prescribed operational area*' as being that contained in Determination No. 3989.[54]

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[53] House of Representatives Hansard, 21 January 1991, page 2.

[54] *Declaration and Determination for the Australian Service Medal, 20* November 1990, *Commonwealth of Australia Gazette* No. GN48, 5 December 1990 at (b) and the *Declaration and Determination for the Australian Active Service Medal, 26* February 1991, *Commonwealth of Australia Gazette* No. GN11, 20 March 1991 at (b)(x). Subsequent Declarations made in regard to the Gulf campaign have continued to contain the same reference as to the prescribed area of operations.

Consequently, for the purposes of medallic recognition there is no distinction in the area of operations between the operation the Governor-General declared '*warlike*' and that which he declared to be '*non-warlike*'.

100. Accordingly, the Tribunal could not find any support from the claimants that TGMSE 1 was in a different area of operations to AS TG.

Claimant's argument 3: Threats and expectation of casualties

101. On the whole the Tribunal found discussions on this issue to be very confusing. Discussions focused on how hazardous the conditions in the area of operations were and the consequential risks of harm to those who rendered service within the area of operations. These matters appear to have been of relevance in a number of the examples the claimants raised where an operation previously declared to be '*non-warlike*' was subsequently declared to be '*warlike*'. It is not the role of the Tribunal in this inquiry to examine these examples, other than to again note (a) the degree of hazard and the risk of harm are not matters contained in the 1993 Government acceptance of the description of a '*warlike operation'*, (b)'*activities exposing individuals or units to a degree of hazard*' is included within the description of a '*non-warlike operation*', and (c) an operation can change from being '*non-warlike*' to being '*warlike*' where the criteria of a '*warlike operation*' are met.

102. The Tribunal accepts that the northern Persian Gulf region, where the members of TGMSE 1 were deployed, was geographically closer than the AS TG was to Kuwait. TGMSE 1 was also closer to the Iraqi forces.

103. There is evidence to support the claim that Iraq had launched some mines from southern Kuwait to drift free into the Gulf.[55] The exact date on which they were launched is not known. By 1 January 1991, six mines had been found. The first recording of a sighting of a mine was on 21 December 1990 and it was sighted in the Zuluf oil field.[56] At the time the USNS *Comfort* was stationed some 150 kilometres from this oil field. The ship left this station the following day and spent the rest of its deployment in Dubai, according to the written submissions of Captain Delaney.

104. The Tribunal accepts the evidence of the claimants that they undertook '*intense and sustained battlefield casualty management training*' while serving on USNS *Comfort*. However, this does not mean that there was an expectation of casualties in the relevant sense of determining whether the operation was '*warlike*'. The evidence is that, while there were casualties (some very serious) during the period in which the members of TGMSE 1 served, these were as a result of accidents and not as a result of any combat activity. Accordingly, the evidence supports a finding of a possibility of casualties prior to 17 January 1991, but not a finding that casualties were expected (i.e. more probable than not) during this period.

[55] Kevin M Woods, *Iraqi Perspectives Project Phase II, Um Al-Ma'arik (the Mother of All Battles): Operational and Strategic Insights from an Iraqi Perspective*, Volume 1, Alexandria: Institute for Defense Analyses, 2008 at page 183.
[56] Peter de la Billiere, *Storm Command: A Personal Account of the Gulf War*, London: Harper Collins, 1992 at page 255.

Claimant's argument 4: Medallic recognition for the same operation by other nations

105. It is well accepted that medallic awards of other nations do not have any precedent value in the Australian system of honours and awards. It is a matter for each nation to determine their own system of honours and awards. The honours and awards of another nation can nevertheless be informative when considering Australian honours and awards.[57]

106. In this regard the Tribunal notes that Britain, Canada and the United States each instituted a single campaign medal to recognise service rendered in the Gulf during 1990 and 1991.

107. British service men and women who served in the Gulf campaign between 2 August 1990 and 7 March 1991 were awarded the Gulf War Medal. Two clasps were issued, one to those who were in Kuwait as part of the Kuwait Liaison Team at the time of the invasion on 2 August 1990, and another to all who served in the area of operations between 16 January 1991 and 7 March 1991. Seven days continuous service was required to qualify for the latter clasp.

108. The Canadian Government awarded the Gulf and Kuwait Medal to all members of the Canadian Forces who served in the Gulf campaign. Eligibility for the medal differed depending on the period during which the Canadian serviceman or servicewoman served. Where service was rendered in the operations to defend against aggression and to liberate Kuwait (i.e. during the period of hostilities, between 16 January and 3 March 1991), service for one day or more in the area of operations was all that was needed to qualify for the medal. For service rendered in the area of operations otherwise (i.e. between 2 August 1990 and 15 January 1991 and between 4 March and 27 June 1991) a minimum of 30 cumulative days service was required in order to qualify for the medal.

109. The United States issued the Southwest Asia Service Medal for service in the Gulf campaign. Although the same medal is awarded for service between 2 August 1990 and 30 November 1995 three 'campaigns' are designated by bronze stars worn on the medal ribbon. The three campaigns are:

- Defense of Saudi Arabia – 2 August 1990 to 16 January 1991
- Liberation and Defense of Kuwait – 17 January 1991 to 11 April 1991
- Southwest Asia Cease-Fire – 12 April 1991 to 30 November 1995

110. While there are variations in dates and methods of differentiation in the award of this single medal in each nation, it is evident that Britain, Canada and the US have each distinguished between those who served prior to the commencement of combat operations, as authorised by UNSCR 678 (i.e. before 16 or 17 January 1991), and those who served after that date.

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[57] Defence Honours and Awards Tribunal report '*Inquiry into Recognition for Defence Force Personnel who Served as Peacekeepers from 1947 Onwards*', 1 November 2010 at [61].

111. Accordingly, contrary to the claim by the submitters, the Tribunal finds that the approach taken by Australia in the award of the ASM for service rendered prior to 17 January 1991 and the AASM for service rendered thereafter is consistent with that taken by Britain, Canada and the United States.

7. Summary of the Tribunal's Findings and Conclusions

112. In summary the Tribunal finds that:

(a) there is no evidence to support the claim that the use of force was authorised prior to 16 January 1991, when the pre-condition of UNSCR 678 came into effect, the pre-condition being that Iraq withdraw from Kuwait by 15 January 1991. Its failure to do so meant that '*all necessary means*' were to be used to give effect to such a withdrawal;

(b) the members of TGMSE 1 while operating as part of the US Navy, were not assigned under the full command of the US Navy;

(c) Operation Desert Shield was not a conventional combat operation;

(d) the members of TGMSE 1 were not in a different area of operations to the AS TG;

(e) there is no evidence of threats arising from combat activity in the area of operations during the period the members of TGMSE 1 rendered service in the Gulf;

(f) there is no evidence of an expectation of casualties within the Gulf during the period the members of TGMSE 1 rendered service. However, it is noted that there was risk associated with the assigned tasks of those who rendered service in the Gulf and there was a possibility of casualties; and

(g) the approach taken by Australia in awarding the ASM for service rendered prior to 17 January 1991 and the AASM for service rendered thereafter is consistent with that taken by Britain, Canada and the United States.

113. In conclusion, the Tribunal finds that the evidence does not support the claim of the submitters that the military operation in which the members of TGMSE 1 rendered service was a '*warlike operation*'.

114. While the operation was conducted pursuant to UNSCRs made under Chapter VII of the UN Charter, these UNSCRs did not authorise the use of force prior to the expiration of 15 January 1991. On this basis, operations prior to that date fail to meet an essential element of the 1993 Cabinet agreed description of a '*warlike operation*'. It is also the main distinguishing feature between the operations before and after 16 January 1991, when hostilities began between the multinational military force and the Iraqi forces. That is, the operation in which the members of TGMSE 1 served was not an operation where the application of force was authorised to pursue specific military objectives (i.e. a combat activity) and where, as a consequence, there was an expectation of casualties. Nevertheless, the Tribunal notes that it has not been

questioned that the military activity in which the members of TGMSE 1 rendered service was in an environment of great uncertainty, with risks associated in their assigned tasks and casualties were a possibility. It is these features, which appropriately support the operation having been prescribed as a '*non-warlike operation*' under the ASM Regulations.

RECOMMENDATION

115. The Tribunal recommends that there be no change to the medallic recognition of members who served with TGMSE 1.