



Australian Government

Defence Honours and Awards Appeals Tribunal

Bradford and the Department of Defence Re: MacRobert [2016] DHAAT 28 (12 August 2016)

File Number(s) 2015/026

Re **Mr John Bradford** on behalf of **Lieutenant Ian MacRobert, RANR(S) (deceased)**
Applicant

And **The Royal Australian Navy** on behalf of **the Department of Defence**
Respondent

Tribunal Mr Mark Sullivan, AO (Presiding Member)
Brigadier Mark Bornholt, AM (Retd)
Air Vice-Marshal John Quaiife, AM (Retd)

Hearing Date 21 June 2016

DECISION

On 12 August 2016 the Tribunal decided to recommend to the Minister that the decision by the Chief of Navy to not recommend Lieutenant Ian MacRobert, RANR(S) for a gallantry award for his conduct during the first air raid on Darwin on 19 February 1942 be affirmed.

CATCHWORDS

DEFENCE HONOUR – *Commendation for Gallantry – Gallantry Decorations – World War II – Royal Australian Navy – Darwin bombing*

LEGISLATION

Defence Act 1903 – ss 110V(1), 110VA, 110VB(1)
Defence Force Regulations 1952 – Reg 93B Sch 3
Commonwealth of Australia Gazette No. S25, Gallantry Decoration Regulations
dated 4 February 1991

REASONS FOR DECISION

Introduction

1. The applicant, Mr John Bradford (Mr Bradford) seeks review of a decision by the Chief of Navy (CN) to not recommend Lieutenant Ian MacRobert, RANR(S) (Lieutenant MacRobert) for a gallantry award ‘for his conduct during the first air raid on Darwin on 19 February 1942’.¹ Lieutenant MacRobert was on the Darwin waterfront on 19 February 1942 when the first Japanese air raid took place. He gathered volunteers and led them in a launch to rescue between fifty and one hundred men who were in the water or clinging to the piles of the jetty.² Despite being cited for his actions, his nomination was not recommended by the First Naval Member of the Australian Commonwealth Naval Board (ACNB) Vice Admiral Sir Guy Royle, RN as the recommendation was submitted outside the promulgated deadline for submissions.

2. On 28 June 2011, Mr Bradford made a submission to the Tribunal’s *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry) regarding a number of former members of the Royal Australian Navy, including the late Lieutenant MacRobert. Mr Bradford’s submission sought a posthumous Commendation for Gallantry as he believed that Lieutenant MacRobert’s 1942 nomination was denied ‘because of an inflexible approach in applying existing regulations’ and that in the post-war period he was allegedly ‘overlooked or forgotten’.³

3. On 14 March 2013 the Australian Government referred the submission to the CN through the Chief of the Defence Force for consideration. On 23 September 2014 CN, acting on advice contained in a review conducted by Doctor David Stevens of the Sea Power Centre – Australia (the Stevens’ Review), referred the submission back to the Tribunal via the Parliamentary Secretary to the Minister for Defence (the Parliamentary Secretary) to ‘conduct a merit (sic) review of the nomination for Lieutenant MacRobert’.⁴ The Stevens’ Review indicated that ‘the review team does not agree that the submission supporting an award for Lieutenant MacRobert should be categorised as maladministration’ and that the submission contains no ‘new or compelling evidence that would warrant a merits review’.⁵ The Stevens’ Review indicated that the 1942 decision taken by the First Naval Member to deny Lieutenant MacRobert’s nomination due to a ‘lapse of time’ reflects ‘due process’ and not maladministration.⁶ On 5 March 2015 the Parliamentary Secretary asked the Tribunal to review the submission and Lieutenant MacRobert’s actions ‘as a separate merit (sic) review’.⁷ On 30 June 2015, the Tribunal wrote to Mr Bradford regarding the Parliamentary Secretary’s advice and asked whether he would like to proceed with a review of recognition for Lieutenant MacRobert, and invited him to submit further

¹ Mr Bradford’s Application for Review of Decision dated 22 July 2015

² Extracts from the Citation for Gallantry submitted by CO HMAS *Melville* on 7 September 1942

³ Mr Bradford email dated 7 December 2015 covering document titled ‘*A case for recognising the gallant conduct of Lieutenant Ian MacRobert, RANR(S) at Darwin on 19 February 1942*’

⁴ CN/OUT/2014/1259 dated 23 September 2014

⁵ Decision Brief for CN dated 9 April 2014, Paragraphs (ii) and (vi)

⁶ Ibid. Paragraph 6

⁷ Parliamentary Secretary to the Minister for Defence MA14-001989 dated 5 March 2015

information. In a letter dated 22 July 2015, Mr Bradford confirmed he would like the review to proceed.

Tribunal Jurisdiction

4. Pursuant to s110VB(1) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) and includes a decision made by a person within the Department of Defence or the Minister to refuse to recommend a person for an honour or award in response to an application. Regulation 93B of the *Defence Force Regulations 1952* defines a defence honour as being those awards set out in Part 1 of Schedule 3. Included in the defence honours set out in Part 1 is the Commendation for Gallantry.

5. The Tribunal considered that Mr Bradford's submission to the Valour Inquiry and subsequent application for review of decision dated 22 July 2015 constituted an application as defined in s110V(1)(c) of the Defence Act, and that the CN's referral of the matter back to the Tribunal for review on 23 September 2014 constituted a refusal to recommend Lieutenant MacRobert for a gallantry award (later identified as the Commendation for Gallantry) therefore satisfying the requirements of s110V(1)(a) and (b) of the Act.

6. Therefore the Tribunal has jurisdiction to review decisions in relation to this award. In accordance with s110VB(1) of the Defence Act, as the matter under review is a defence honour, the Tribunal does not have the power to affirm or set aside the decision but may make recommendations regarding the decision to the Minister.

Conduct of the review

7. In accordance with its *Procedural Rules 2011*, on 30 July 2015, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Bradford's submission on behalf of Lieutenant MacRobert and requested a report on the material questions of fact and the reasons for the decision made in relation to Lieutenant MacRobert's eligibility for the Commendation for Gallantry.⁸ The Tribunal also requested that the Secretary provide copies of documentation relevant to the reviewable decision and that he provide a copy of Lieutenant MacRobert's service record.

8. Rather than provide a report or the service record as requested, Navy provided the material relied upon by the CN in making his 2014 decision. The material included the Stevens' Review and supporting briefing papers. Less than one page of the Stevens' Review related to Lieutenant MacRobert and no evidence was produced to support the findings.

9. On 11 November 2015 the Tribunal provided the Navy sourced material to Mr Bradford for comment.⁹ On 7 December 2015 he responded by email and

⁸ DHAAT/OUT/2015/435 dated 30 July 2015

⁹ DHAAT/OUT/2015/682 dated 11 November 2015

included a document titled ‘*a case for recognising the gallant conduct of Lieutenant Ian MacRobert, RANR(S) at Darwin on 19 February 1942*’.¹⁰

10. The Tribunal Secretariat conducted further research into Lieutenant MacRobert’s actions and the administration of his nomination for gallantry. The research included access to material available in historical records, the National Archives of Australia and official histories – material that appeared to have also been accessed by Mr Bradford but not by Navy.

11. The Tribunal met on 5 May 2016 and considered the material provided by Navy, Mr Bradford and the Tribunal’s own research. The Tribunal confirmed the scope of the review, the decision under review and jurisdiction.

12. The Tribunal noted that the Valour Inquiry had addressed the issue of retrospective honours and awards.¹¹ The Valour Inquiry developed guidelines that would be able to be applied in any later reviews and the Tribunal noted that Doctor Stevens and CN had used this guidance in reaching the recommendation and decision on eligibility for Lieutenant MacRobert.

13. The guidelines suggest that the first step in examining retrospective honours should be the conduct of a review to determine whether due process had been followed. This step should include ‘an attempt to determine whether there is a case of maladministration and whether new evidence has come to light’. The guidelines suggest that if due process had been followed, there was no maladministration, and if there was no new evidence, the original decision should remain unchanged.

14. The guidelines provided that if there was a case of maladministration or if compelling new evidence had appeared that was not available at the time of the original decision, the next step would be ‘the conduct of a merits review’. In conducting the merits review, the Valour Inquiry recommended that consideration be given to the inability to award retrospective honours in the Imperial system and that awards made in the Australian system should be subject to assessment of the evidence relevant to ‘the standards and regulations of the time’.

15. Notwithstanding this guidance, it should be noted that s110VB of the Defence Act requires the Tribunal to undertake a merits review of all reviewable decisions, where an application for review has been properly made. The Tribunal therefore decided to firstly conduct a process review of Mr Bradford’s claims and, even if a case of maladministration could not be proven, the Tribunal would also conduct a merits review of Lieutenant MacRobert’s eligibility for the Commendation for Gallantry for his actions in saving the lives of ‘many seamen and wharf labourers’ in Darwin Harbour on 19 February 1942.¹²

16. The Tribunal noted that in accordance with its *Procedural Rules 2011* the hearing into this matter would need to be conducted in public and accordingly,

¹⁰ Mr Bradford email dated 7 December 2015 covering document titled ‘*A case for recognising the gallant conduct of Lieutenant Ian MacRobert, RANR(S) at Darwin on 19 February 1942*’

¹¹ Defence Honours and Awards Appeals Tribunal, Report of the *Inquiry Into Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour* dated 21 January 2013, pp91-92 [8-48]

¹² Extract from the Citation for Gallantry submitted by CO HMAS *Melville* on 7 September 1942

Mr Bradford was invited to provide evidence at a hearing to be held in Canberra on 21 June 2016. Navy was represented at the hearing by Mr John Perryman, the Senior Navy Historian. Mr Brett Mitchell of the Directorate also gave evidence at the hearing.

Lieutenant MacRobert's Service Record

17. Lieutenant MacRobert was born in Wigtownshire, Scotland on 24 May 1907. He joined the Marine Department of the Chinese Maritime Customs Service in 1928 and remained with the Service until 1941. He enlisted in the Royal Australian Naval Reserve (Seagoing) on 18 December 1941 and was appointed as a Probationary Temporary Lieutenant.¹³

18. On 22 January 1942 Lieutenant MacRobert was posted to HMAS *Melville* (the RAN Shore Establishment Darwin) as the Assistant to the King's Harbour Master.¹⁴ He left Darwin on posting on 19 April 1942 and subsequently completed a number of different shore and sea going postings until his appointment was terminated on 20 October 1945 and he was demobilized at the end of the war. He passed away in 1977.

19. Lieutenant MacRobert's Service Record does not indicate what awards he received for his service.

Historical Background

20. On 19 February 1942 mainland Australia came under attack for the first time when Japanese forces mounted two air raids on Darwin. In the first attack, which began just before 10.00am, heavy bombers pattern-bombed the harbour and town. Dive bombers escorted by Zero fighters then attacked shipping in the harbour, aerodromes and the hospital. The attack lasted 40 minutes. A second attack began an hour later and involved high altitude bombing of the Airbase at Parap. The two air raids killed at least 243 people and 300-400 were wounded. Twenty aircraft were destroyed, eight ships at anchor were sunk and most civil and military facilities in Darwin were destroyed.¹⁵

21. Among the stricken shipping were the merchant vessels *Neptuna* and *Barossa* which were berthed at Stokes Hill Wharf to unload their cargoes. The *Neptuna* was carrying a cargo of depth charges, ammunition and oil. A confrontation between sailors and wharf workers over who was to unload the shells was ceased when the first bombs of the attack fell on the wharf, destroying sections of it and killing and injuring

¹³ Record of Service – NAA:A6769 MACROBERT I.

¹⁴ The shore establishment HMAS *Melville* was originally a naval depot - named HMAS *Penguin V* - which opened in Darwin in January 1935 with a primary mission of operating as a naval reserve facility. On 1 August 1940 HMAS *Melville* was commissioned. By the time of its commissioning, the needs of wartime Darwin had seen naval facilities grow until they were spread throughout the town. The original offices had grown to encompass accommodation facilities, a refuelling station, administrative buildings and harbour amenities. HMAS *Melville* was a busy place during World War II, surviving the 64 Japanese bombing raids and servicing hundreds of ships. *A Brief History of HMAS Melville* by Lieutenant Tom Lewis, Naval Historian of the Northern Territory - www.territorystories.nt.gov.au accessed 21 March 2016

¹⁵ National Archives of Australia Factsheet 195 – The Bombing of Darwin.

waterside workers. Oil pipes on the wharf and connected to *Neptuna* ruptured, spraying burning fuel across the wharf and ships.¹⁶

22. The *Barossa* was carrying wooden pilings for a new wharf in Darwin Harbour and had begun unloading at the time of the attack. When the bombs began to fall she was unable to move as she was hemmed in by other vessels. A concerted effort by sailors resulted in the ship, which was on fire from burning oil, being towed clear of the wharf.

23. After a series of near misses, the *Neptuna* received a direct hit from a bomb and was engulfed by flaming oil which was erupting from wharf-based pumps that had been damaged in the attack. Towards the end of the raid the *Neptuna's* load of depth charges detonated causing a huge mushroom cloud which rained debris across the harbour. Fifty-four crew aboard *Neptuna* died in the attack.

Lieutenant MacRobert's Actions

24. **The Official History.** The Tribunal was unable to find evidence that Lieutenant MacRobert was ever mentioned in any official histories of the Second World War.

25. **Citations.** The only official accounts of Lieutenant MacRobert's actions on 19 February 1942 are contained in two citations – the first written by MacRobert himself on 16 April 1942 to cite his colleague, Leading Seaman Ericsson for his actions; and the second written by MacRobert's Commanding Officer, Commander E. Tozer, RAN, CO HMAS *Melville* on 7 September 1942 which cited Lieutenant MacRobert.

26. **Leading Seaman Ericsson.** Leading Seaman Ericsson was an off duty crew member of HMAS *Platypus* who volunteered to assist Lieutenant MacRobert in his rescue attempts.¹⁷ The citation was sent by Lieutenant MacRobert to Leading Seaman Ericsson's Commanding Officer at HMAS *Platypus* with a copy of the letter also sent to the Commodore-in-Charge, Darwin.¹⁸ The citation states:

'... when the first stick of bombs fell across the Railway Jetty he (Ericsson) was wounded by splinters ... when the bombing ceased, three civil aviation employees and myself ran the small civil aviation launch to the outer jetty, where the crews of the Neptuna and Barossa were stranded, together with wharf labourers. One trip to the jetty clarified the situation. Over one

¹⁶ Website – The Bombing of *Neptuna* and *Barossa*

<http://tlf.dlr.det.nsw.edu/learningobjects/Content/R11346/object/r9701.html>, accessed 21 March 2016

¹⁷ HMAS *Platypus* was re-commissioned as a training ship on 26 February 1941. In May 1941 she proceeded to Darwin and was present in the harbour on 19 February 1942 when the Japanese attack occurred. She remained in service as Base Ship, Darwin, until 1 January 1943 when she sailed for Cairns where she again served as Base Ship until May 1944. On 5 January 1945 following refit, she left Sydney to proceed to New Guinea for service as a Repair and Maintenance Vessel. HMAS *Platypus* paid off into reserve on 13 May 1946. <http://www.navy.gov.au/hmas-platypus-i>, accessed 21 June 2016

¹⁸ Officer-in-Charge and Commodore-in-Charge, Darwin are the same person – Commodore C.J. Pope, RAN, who although formally appointed as the Officer-in-Charge in early 1942, appears to have also referred to himself as the 'Commodore' in Charge.

hundred men were clinging to the piles under the jetty and flaming oil from burst oil pipes was pouring on them. The Neptuna was fiercely ablaze and there was a likelihood of her cargo exploding at any moment. To expedite the removal of these men, some of whom were wounded, I called for hands to man the larger civil aviation launch, then moored off the jetty. Leading Seaman Ericsson appeared and at once volunteered, in spite of the danger from 4 inch H.E. shells exploding on the deck of the Neptuna, swam off to the launch and thereafter conducted himself, although wounded, with commendable coolness and courage. His physique enabled him to pull many men bodily out of the water who otherwise would have drowned through wounds and exhaustion. Several trips were made and the wounded carried to trucks ... some time after the raid I verbally reported the above to Commander Tozer ...'.¹⁹

27. The Commodore-in-Charge Darwin sent Leading Seaman Ericsson's nomination to the Secretary of the Naval Board who supported the recommendation and sent it to the Admiralty on 12 May 1942.²⁰ Ericsson was awarded the Mention in Despatches (MID) on 3 November 1942.²¹

28. **Lieutenant MacRobert.** The Tozer citation for Lieutenant MacRobert was written on 7 September 1942. The citation states:

'... On 19th February, Lieutenant MacRobert was sheltering on the waterfront when the air raid on the harbour took place. He observed the jetty hit and ships hit and liable to sink. He immediately called for volunteers to man the civil Aviation launch to pick up survivors. With Leading Seaman E.M. Erricson (sic) and I think the Captain of USS Preston, he took the boat away and was instrumental in picking up between fifty and a hundred men who were in the water or clinging to the piles of the jetty. He made several trips and was rounding the bow of the Neptuna when she blew up and ships in the harbour were being bombed and machine-gunned during the earlier trips. The boat was not sunk but Lieutenant MacRobert suffered severe shock. Throughout he displayed great courage and ability in handling his boat and it was largely due to his coolness and leadership under exceedingly trying conditions that the lives of many seamen and wharf labourers were saved ...'.²²

29. The nomination with the citation attached was sent to the Secretary of the Naval Board by the Naval Officer-in-Charge, Darwin on 10 September 1942.²³

The Chain of Command for Recommendations

30. The Valour Inquiry noted that during the Second World War, honours recommendations for members of the Royal Australian Navy serving in Australia

¹⁹ Letter from Lieutenant MacRobert (Assistant to King's Harbour Master) to CO HMAS *Platypus* dated 16 April 1942 – NAA MT1214/1,448/201/1403

²⁰ Naval Headquarters Darwin N.T.142/2 dated 21 April 1942 - NAA MT1214/1,448/201/1403

²¹ The Secretary of the Navy 026381 dated 12 May 1942 - NAA MT1214/1,448/201/1403

²² Commanding Officer HMAS *Melville* 0229/2 dated 7 September 1942 to the Naval Officer-in-Charge, Darwin – NAA:MT1214/1,448/201/1403

²³ Naval Officer-in-Charge Darwin N.T.142/2 dated 10 September 1942 - NAA: MT1214/1,448/201/1403

were passed through the member's chain of command to the ACNB and then passed to the Admiralty who made a recommendation to the Sovereign regarding the level of award.

31. On 17 February 1942 (two days before the Darwin raid), Commonwealth Navy Order 43/42 (CNO 43/42) was issued by the Secretary of Navy Office on the authority of the Australian Chief of Naval Staff (and the First Naval Member), Vice Admiral Sir Guy Royle, RN. The Order stated:

‘...

1. *Recommendations for immediate recognition of valour, gallantry or distinguished conduct in the presence of the enemy or in other circumstances should be forwarded by Commanding Officers of HMA Ships through their administrative authorities as soon as possible after the incident.*

2. *Recommendations for the award to officers and men of Honours and Decorations, including Mention in Despatches, for outstanding qualities of command, leadership, zeal and devotion to duty should reach Navy Office by 1st January and 1st July in each year.*

3. *The nature of the award is not to be suggested.*

4. *Recommendations are to include the following details: -*

- a) *Full names, ranks or ratings and official numbers.*
- b) *The precise nature and quality of the action, enterprise, conduct or achievement should in each case be clearly defined.*
- c) *Decorations already held.*

...²⁴,

32. The citation describing Lieutenant MacRobert's actions was completed by his Commanding Officer, CO HMAS *Melville*, Commander E. Tozer RAN, on 7 September 1942. As required by CNO 43/42, the letter was sent to Tozer's administrative headquarters, Naval Headquarters Darwin, commanded by the Naval Officer-in-Charge, Darwin, Commodore C.J. Pope, RAN. The letter stated that Commander Tozer was:

‘submitting the following circumstances attending the meritorious conduct of Lieutenant MacRobert ...’,

and indicating that:

*‘these facts have only just come to my notice otherwise a report would have been rendered at an earlier date’.*²⁵

²⁴ Commonwealth Navy Order 43 of 17 February 1942

33. In accordance with CNO 43/42, Commodore Pope sent the citation and recommendation for ‘Recognition of Services’ for Lieutenant MacRobert to the Secretary of the Naval Board on 10 September 1942.²⁶ The letter stated that:

‘It is concurred in that Lieutenant MacRobert is deserving of commendation for displaying great courage, coolness and leadership, under exceedingly trying conditions and whilst in great personal danger.’

34. On 25 September 1942 a note was written on Commodore Pope’s letter of 10 September 1942 by the Secretary of the ACNB, Mr George Macandie indicating that the First Naval Member had decided that no further action would be taken as the recommendation had been submitted outside the CNO 43/42 required six-month timeframe. The note said:

*‘Seen by 1st Naval Member who has decided that owing to lapse of time, no further action can be taken on this matter for an operational award. Matter will be kept in view if officer’s name is brought forward subsequently for any reason’.*²⁷

35. There is no evidence to suggest that this letter and the recommendation was either returned to the Naval Officer-in-Charge, Darwin or ever considered again as suggested in the note.

Mr Bradford’s Submission to the Tribunal’s Valour Inquiry

36. Mr Bradford’s submission to the Valour Inquiry sought retrospective recognition of nine Naval officers and sailors including Lieutenant MacRobert.²⁸ The submission indicated that ‘with assistance from civilians, Leading Seaman Ericsson and Lieutenant MacRobert, RANR(S) had rescued many men from the waters of Darwin Harbour during the first raid on Darwin of 19 February 1942’. The submission referred the Tribunal to Douglas Lockwood’s book – *Australia’s Pearl Harbour*²⁹ for an account of the action and indicated that Lieutenant MacRobert had recommended Ericsson ‘and the latter’s MID was duly awarded on 3 November 1942’.

37. The submission indicated that ‘for reasons unknown, there were delays in MacRobert being recommended for an award’ with the result that the recommendation ‘did not meet the deadline of 1 July 1942’. Mr Bradford repeated the note from the Secretary of the Naval Board which provided the First Naval Member’s decision that he would not take further action due to ‘lapse of time’ and that the matter could subsequently be ‘brought forward’ for any reason.

²⁵ Commanding Officer HMAS *Melville* 0229/2 dated 7 September 1942 to the Naval Officer-in-Charge, Darwin – NAA:MT1214/1,448/201/1403

²⁶ Naval Officer-in-Charge Darwin N.T. 142/2 dated 10 September 1942 - NAA:MT1214/1, 448/201/1403

²⁷ Ibid.

²⁸ Defence Honours and Awards Appeals Tribunal, *Inquiry Into Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour*, Submission 86, Mr John Bradford, dated June 2011

²⁹ Douglas Lockwood, *Australia’s Pearl Harbour: Darwin 1942*, Cassell Australia, 1966.

38. Mr Bradford stated that:

'Immediately following WW2 there was an 'end of war list' which should have enabled MacRobert to have his claims for an award to be re-considered. It wasn't'.

39. In concluding his submission in relation to Lieutenant MacRobert, Mr Bradford quoted the former Governor-General Sir Zelman Cowen who had served in Darwin in 1942 and wrote the foreword of Mr Bradford's book. He claimed that Sir Zelman said that he considered the First Naval Member's decision 'to deny recognition on the grounds that the recommendation was out of time was an unimaginative and rigid application of rules'. In his application for review, Mr Bradford clarified that the Governor-General actually wrote:

'Ian MacRobert's acts and conduct were denied recognition on the grounds that the recommendation was out of time. I agree with Mr Bradford that this was an unimaginative and rigid application of rule'.³⁰

The Defence Submission

40. Navy considered Mr Bradford's submission to the Valour Inquiry in regard to Lieutenant MacRobert together with eight other applications. The material relied upon by the CN in making his decision was the Stevens' Review.³¹ The Stevens' Review indicated that the Tribunal's own assessment guidelines from the Valour Inquiry had been used in the conduct of the review of the submissions. Doctor Stevens also relied upon archival material held in the Sea Power Centre and the author's personal knowledge of naval history and secondary published materials. No attempt was made to seek supplementary information from submitters or to extend the search for original documentation to external institutions such as the National Archives of Australia.

41. Doctor Stevens stated that Mr Bradford 'provides no other evidence of maladministration and no new and compelling evidence regarding Lieutenant MacRobert's actions on the day of the raid'. Doctor Stevens concludes that a command decision to deny Lieutenant MacRobert's nomination was duly taken by the First Naval Member who was:

'... the commander with the fullest view of the larger picture, and ultimately responsible for the decision made ...'.³²

42. In reaching the decision to not recommend Lieutenant MacRobert for a gallantry award, the CN noted the decision brief recommendations that:

'... none of the received submissions warrant a merits review on the basis of either maladministration or compelling new evidence'.³³ and

³⁰ Application for Review of Decision dated 22 July 2015

³¹ CN/OUT/2014/1259 dated 23 September 2014

³² Ibid.

³³ Decision Brief for CN dated 9 April 2014

‘... the review team does not agree that the submission supporting an award for Lieutenant MacRobert should be categorised as maladministration’.

43. During the hearing, the Senior Navy Historian indicated that he had recently taken a whole new approach to the application and, whilst agreeing with Doctor Stevens’ conclusion that there was no maladministration, he was of the view that the Nominating Officer, Commander Tozer, and the Recommending Officer, Commodore Pope were key to the outcome. He opined that Lieutenant MacRobert, in citing Leading Seaman Ericsson, did not seek to promote his own part in the action and it was therefore plausible that both Tozer and Pope were unaware of the significance of MacRobert’s actions at the time the Ericsson recommendation and others were made. The Senior Navy Historian was of the view that given the chaos and pressures of the environment in the months after the initial bombing, both officers may only have become aware of Lieutenant MacRobert’s actions after they had had time to reflect. The Historian opined that this was the reason the recommendation was not raised until more than six months had passed. He further stated that in his view, the fact that the two senior Naval Officers in Darwin had chosen to raise Lieutenant MacRobert for recognition was clear evidence that the nomination was both credible and warranted serious consideration.

44. The Senior Navy Historian stated that if Navy were to reconsider their 2014 recommendation (based on the Stevens’ Review) after a more detailed review of the available facts, a deep consideration of MacRobert’s individual characteristics and a better understanding of the environment in Darwin in the months after the bombing; there was a possibility that they would perhaps arrive at a different conclusion. He stated that in his view, the matter required a merits review. The Tribunal indicated that a merits review was what was being done now, based on direction by the Minister.

45. The Directorate also indicated at the hearing that in relation to the compilation of the Navy End of Hostilities List (EOHL) for the South West Pacific, they had reviewed several files and discovered directions from the Admiralty for the compilation of a list, but could find no evidence that an actual Navy wide, deliberate consideration had occurred. The Directorate also noted that the number of awards for the Navy in the period late-1945 to mid-1946 was relatively small in comparison to Army, probably reflecting the smaller ratio of sailors to soldiers.

Mr Bradford’s Submission

46. Mr Bradford’s application for review sought that Lieutenant MacRobert be awarded the Commendation for Gallantry. In stating his case, Mr Bradford drew on his 2011 submission and used extracts from previously published works (including his own) to highlight the supposed inconsistencies in how the Imperial gallantry system was applied to the Royal Australian Navy in the Second World War.³⁴

47. Mr Bradford opined that the First Naval Member’s decision in relation to Lieutenant MacRobert:

³⁴ Mr Bradford email dated 7 December 2015 covering document titled ‘A case for recognising the gallant conduct of Lieutenant Ian MacRobert, RANR(S) at Darwin on 19 February 1942’

‘... could only be described as an extremely unsympathetic and bureaucratic view of Pope’s recommendation ...’³⁵

and

‘... his decision not to respond sympathetically and favourably to MacRobert’s claims for recognition “owing to lapse of time” can only be viewed as being pedantic in the extreme ...’³⁶

48. Mr Bradford further stated that there was some evidence that deadlines had been overlooked in other theatres and Services in bestowing gallantry awards. He also opined that any subsequent re-consideration of Lieutenant MacRobert’s nomination was impacted by a ‘loss of continuity’ as a result of the change of First Naval Member in June 1945 and that he (Lieutenant MacRobert) was not re-considered in the post-war years:

‘...can only be regarded as a totally unnecessary oversight on the part of senior naval authorities in Australia’.³⁷

49. He reiterated this view regarding the change of the First Naval Member and the concomitant loss of continuity during the 21 June hearing.

50. Mr Bradford also discussed the compilation of the respective ‘End of War Lists’ and concluded that in Lieutenant MacRobert’s case:

‘... it now seems unlikely that instances of unrecognised gallantry, such as MacRobert’s, were requested by Royle to be placed in an “End of War List”’,³⁸

and:

‘... wherever the truth may lie in this matter, it all seemed manifestly unfair on MacRobert who was overlooked for deserved recognition through no fault of his own’.³⁹

51. During the hearing Mr Bradford reiterated his written submissions and in response to questions as to why he thought Lieutenant MacRobert had been nominated more than six months after the action, Mr Bradford stated that he had no idea why this was the case.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Oral Submission, Defence Honours and Awards Appeals Tribunal Hearing, 21 June 2016

³⁹ Ibid.

The Australian Honours System and the Commendation for Gallantry

52. Australian service personnel received honours and awards including gallantry awards under the Imperial system until February 1975 when the Government introduced the Australian system. The two systems – the Imperial and the Australian; then operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards:

*Her Majesty The Queen has indicated her view that it is appropriate that Australian citizens should be recognised exclusively by the Australian system of honours ... accordingly I have consulted with the Premiers of States and we have agreed that Australian Governments, both State and Commonwealth, will henceforth cease to make recommendations for British honours...*⁴⁰

53. Prior to 1991, Australians were considered for gallantry awards generally under the auspices of Imperial Royal Warrants. As the Tribunal is unable to make recommendations relating to Imperial honours, it may only review eligibility for contemporary gallantry awards and any review will be subject to an assessment of the evidence relevant to ‘the standards and regulations of the time’.

54. **The Commendation for Gallantry.** Gallantry decorations were established by Letters Patent on 15 January 1991 for the purpose of:

*‘according recognition to members of the Defence Force and certain other persons who perform acts of gallantry in action’.*⁴¹

55. The Commendation for Gallantry is governed by Regulations set out in the Schedule:

...

Conditions for award of the decoration

...

3. (3) *The Commendation for Gallantry may be awarded for other areas of gallantry in action which are considered worthy of recognition.*

4. *Each decoration may be awarded posthumously.*

...

Making of awards

7. *Awards of a decoration shall be made by the Governor-General on the recommendation of the Minister.*

...⁴²

56. During the hearing on 21 June, Mr Bradford in response to questions as to why he had asked for the Commendation for Gallantry stated that he had wanted to

⁴⁰ Prime Minister of Australia Media Release 111/92 dated 5 October 1992

⁴¹ *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations*– dated 4 February 1991

⁴² *Ibid.*

ensure the level of award was not greater than that provided to Leading Seaman Ericsson (the MID) and that he had not considered other levels of award or the suite of distinguished service awards.

The Process Review

57. Relying on the Service Record, the Tribunal was satisfied that at the time of the action, Lieutenant MacRobert was officially posted to HMAS *Melville* and that this unit was under the administrative command of Naval Headquarters in Darwin.

58. The Tribunal noted that the process for the nomination of Australian Navy personnel for gallantry awards at the time of the action was governed by CNO 43/42 issued by the Secretary of the Navy. The Tribunal noted the Navy oral evidence that they had reviewed the fact that the Order was signed just two days prior to the bombing of Darwin and that they had determined that despite this proximity, there was evidence that the Order had been received and was used for other recommendations related to the bombing.

59. The Tribunal noted that the issue of whether or not the Naval Board had the lawful power to issue orders had been addressed in *the Inquiry Into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards*. The report of this Inquiry stated:

*The Australian Parliament had the power to make laws for the Armed Forces, which it did by passing the Defence Act. The Defence Act set up the Military Board and the Naval Board and authorised the Governor-General to make regulations for the discipline and good government of the Army and the Navy. Later similar provisions were made for the Air Force. The regulations (the AMRs [Australian Military Regulations], Naval Regulations and the AFRs [Air Force Regulations]) authorised the Military Board, the Naval Board and the Air Force Board to make orders for the governance of the Army, Navy and Air Force respectively. The Military Board made orders in the form of Instructions for the administration of the Army and the Naval and Air Force Boards made Orders for the Navy and Air Force. ... All these laws including the subordinate legislation were valid.*⁴³

60. The Tribunal was therefore satisfied that CNO 43/42 was a lawfully enforceable Order which created the process and procedures for the granting of Honours and Awards to the Royal Australian Navy from 17 February 1942. The pertinent part of the Order required that:

*'... Recommendations for the award to officers and men of Honours and Decorations, including Mention in Despatches, for outstanding qualities of command, leadership, zeal and devotion to duty should reach Navy Office by 1st January and 1st July in each year ...'*⁴⁴

⁴³ Defence Honours and Awards Appeals Tribunal, Report of the *Inquiry Into the Refusal to Issue Entitlements to, Withholding and Forfeiture of Defence Honours and Awards* dated 7 September 2015, p88 [4]

⁴⁴ *Commonwealth Navy Order* 43 of 17 February 1942

61. The Tribunal noted that to accord with the requirements of CNO 43/42, recommendations for actions on 19 February 1942 'should' have reached Navy Office (in this case the ACNB) by 1 July 1942. The Tribunal was satisfied that the recommendation for Lieutenant MacRobert was raised by his Commanding Officer on 7 September 1942 and received by the ACNB on 25 September 1942. Accordingly, it did not meet the requirements of CNO 43/42.

62. The Tribunal noted that the recommendation for Lieutenant MacRobert included the statement by Commander Tozer that:

'... these facts have only just come to my notice otherwise a report would have been rendered at an earlier date',⁴⁵

63. The Tribunal was not satisfied that Commander Tozer or for that matter Commodore Pope could have been unaware of Lieutenant MacRobert's role in the rescue operations until as late as September 1942. Commodore Pope had reviewed and supported Leading Seaman Ericsson's recommendation which clearly articulated the role Lieutenant MacRobert had played in the rescue on 19 February 1942. The citation for Ericsson also included a statement by MacRobert that:

'... some time after the raid I verbally reported the above to Commander Tozer ...',⁴⁶

64. The Tribunal considered that if Commodore Pope had considered Lieutenant MacRobert worthy of recognition at the time, it would have been open to him to seek a report on the matter from MacRobert's Commanding Officer.

65. That it took six months for Commander Tozer to raise the nomination was in all likelihood a response to the notification by message on 30 August 1942 that a number of awards from the 19 February air raid (including the award of the MID to Commander Tozer himself) had been approved by the King.⁴⁷

66. The Tribunal noted that other awards for gallantry during the 19 February 1942 raids were correctly raised by respective unit Commanding Officers and processed through Naval Headquarters Darwin to the ACNB where they were considered and forwarded to the Admiralty and resulted in the award of various decorations including Leading Seaman Ericsson's MID.

67. Noting that in some instances in other theatres and in other circumstances, gallantry nominations had been raised through Reports of Proceedings⁴⁸; for completeness, the Tribunal reviewed the Report of Proceedings for HMAS *Melville*

⁴⁵ Commanding Officer HMAS *Melville* 0229/2 dated 7 September 1942 to The Naval Officer-in-Charge, Darwin, NAA:MT1214/1,448/201/1403

⁴⁶ Letter from Lieutenant MacRobert (Assistant to King's Harbour Master) to CO HMAS *Platypus* dated 16 April 1942, NAA MT1214/1,448/201/1403

⁴⁷ Australia House London – Navy Office Message by wireless transfer sent on 30 August 1942, NAA:MT1214/1,448/201/1403

⁴⁸ Defence Honours and Awards Appeals Tribunal, Report of the *Inquiry Into Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour* dated 21 January 2013, p220, [17-92]

for the period 1 January to 31 March 1942.⁴⁹ There is no mention of the rescue or of Lieutenant MacRobert in the Report.

68. The Tribunal noted the Navy Historian's opinion that there was perhaps a chance that the nomination was not raised until much later until the Nominating and Recommending Officer had had time to reflect but considered that whilst this was plausible, the actual evidence suggested otherwise.

69. The Tribunal reviewed and discussed with Mr Bradford and the Naval Historian the note written on Commodore Pope's letter of 10 September 1942 by the Secretary of the ACNB, Mr George Macandie indicating that the '...matter will be kept in view if officer's name is brought forward subsequently for any reason'. Whilst Mr Bradford suggests that this was an implied direction that the matter be considered in the end of war considerations, the Tribunal was of the view that it was more likely that the First Naval Member's intention was for Lieutenant MacRobert to have his Darwin actions added to any subsequent recommendations for future actions should they arise. It appears they did not.

70. The Tribunal noted Mr Bradford's claim that 'immediately following WW2 there was an "end of war list" which should have enabled MacRobert to have his claims for an award to be re-considered'. He also indicated that the end of war Navy considerations were properly deliberated in the European theatre. The Tribunal noted the Directorate advice that the Admiralty had issued guidance to establish EOHL however they were unable to find any directions issued by the ACNB for these lists in the Pacific Theatre. The Tribunal noted that similar activities for the Army produced a 6 March 1947 Gazette for the South West Pacific with more than 2000 individual awards.⁵⁰ Accordingly, the Tribunal was satisfied that processes were in place for these end of war considerations and an opportunity would have existed for Lieutenant MacRobert to have been re-raised.

71. The Tribunal noted that Commodore Pope went on to be appointed as the Flag Officer in Charge - New South Wales in July 1946 and would have been in a position to have knowledge of and to act on any end of war honours administration at that time. Similarly, Commander Tozer returned to Darwin as the Naval Officer-in-Charge from 24 March 1945 to 12 December 1946 and would also have been in a position to participate in end of war administration. The Tribunal was therefore satisfied that if either officer felt strongly that Lieutenant MacRobert's actions in 1942 warranted further reconsideration during the end of war list deliberations, they both would have been in a position to raise an award recommendation for him at that time. They did not.

72. The Tribunal noted Mr Bradford's assertion that '... it now seems unlikely that instances of unrecognised gallantry, such as MacRobert's, were requested by Royle to be placed in an "End of War List"'. The Tribunal did not consider that it was Admiral Royle's responsibility to re-raise honours nominations he had not supported throughout his tenure as the First Naval Member. Contemporary practice and the practice used by other Services for the Second World War suggests that in

⁴⁹ *War Diary Period 1 January – 31 March 1942*, HMAS *Melville*, Darwin 31 May 1942 – AWM78:400/2 Parts 1-5

⁵⁰ *Supplement to The London Gazette* No 37898, dated Thursday 6 March 1947

most cases, the original Nominating Officers or Unit Commanders are expected to shoulder the responsibility for re-nominating individuals for EOHL.

73. The Tribunal noted Mr Bradford's evidence that deadlines had been overlooked in other theatres and Services in bestowing gallantry awards. Whilst the Tribunal accepted that this may have been the case, precedent does not create eligibility for awards. Each case is considered on merit and the recommending officer is able to exercise discretion in making decisions to support or reject nominations.

74. The Tribunal determined that whilst Mr Bradford may have considered that the decision by the First Naval Member 'was an unimaginative and rigid application of rules'; consideration of recommendations for honours was a discretionary matter and it was open to the ACNB to refuse to recommend Lieutenant MacRobert as the nomination was not in compliance with the authorised Order for the processing of awards.

Finding in Relation to the Process Review

75. The Tribunal finds that the process used to cite and consider Lieutenant MacRobert's actions on 19 February 1942 was appropriate and lawful and that the decision to not recommend a gallantry award as the nomination was not made in accordance with the applicable Order was a valid determination. The Tribunal was therefore satisfied that no maladministration had occurred in the processing of Lieutenant MacRobert's gallantry nomination in 1942 and that whilst he may not have been reconsidered for the EOHL, the officers who could have re-raised the award recommendation were in positions to do so should they have wished – the reasons that they did not will never be known.

The Merits Review

76. The Tribunal noted that both the CN and the Parliamentary Secretary requested the conduct of a merits review. A merits review requires the examination of the merits of the matter rather than the lawfulness of the decision under review.⁵¹

77. The Tribunal noted that guidance for merits review is detailed in the Valour Inquiry.⁵² This guidance states that the Tribunal, in the conduct of a merits review, is being asked to 'place itself in the shoes of the original decision-maker' and where the original decision-maker made a conscious decision not to make an award, the Tribunal 'was being asked to overturn that decision'. The guidance suggests that:

*'...if the evidence was exactly the same as that available to the original decision-maker, and if the Tribunal wished to recommend a revised award, it would need to overturn the original decision ...'*⁵³

78. The guidance indicates that if new evidence was available then the Tribunal would need to consider the 'precision, accuracy and truth of that evidence' and that

⁵¹ Council of Australasian Tribunals Practice Manual – 1.3.1.2 dated 7 April 2006.

⁵² Defence Honours and Awards Appeals Tribunal, Report of the *Inquiry Into Unresolved Recognition for Past Acts of Naval and Military Gallantry and Valour* dated 21 January 2013, p91 para 8-46

⁵³ Ibid.

the evidence would need to be ‘compelling and reliable’. Further, the guidance states that:

‘... if no decoration was recommended, and the Tribunal could be sure that there was no conscious decision not to make an award, then the Tribunal would be in the situation of the original decision-maker or recommender.’⁵⁴

79. The guidance concludes that the merits review revolves around the evidence and, if the Tribunal was persuaded that new evidence was valid, it then needed to ‘consider whether the evidence warranted a new or revised award, judged against the criteria applying at the time’.

80. For consistency and to protect the integrity of the honours and awards system, the Tribunal decided to conduct the merits review in accordance with this guidance.

81. **Evidence Available to the Decision Maker.** The evidence available to the ACNB when the First Naval Member elected not to progress the nomination included the citation for Lieutenant MacRobert and also the previously considered recommendation for Leading Seaman Ericsson. The Tribunal considered that the two citations were comparable and when taken together, provide a relatively accurate portrayal of the rescue itself and the roles of those involved. The Tribunal was therefore reasonably satisfied that the original decision-maker had sufficient evidence to make a discretionary decision regarding the recognition of Lieutenant MacRobert for his individual actions on 19 February 1942.

82. **Discretion.** The Tribunal noted that twelve Navy personnel were recommended for recognition of their actions on 19 February 1942 by the Naval Officer-in-Charge, Darwin in the aftermath of the air raid. Six honours were awarded, including MIDs for Leading Seaman Ericsson and Commander Tozer. The remaining six were never subsequently considered and did not receive an award.⁵⁵ The Tribunal was therefore reasonably satisfied that nominations for awards for conduct on 19 February 1942 were individually considered at various stages in the chain of command and discretion was used to determine which individuals would be recognised and at what level. The Tribunal considered that it was open to the ACNB to use discretion in relation to Lieutenant MacRobert’s nomination, notwithstanding the already established fact that it had been forwarded outside the stipulated date for nomination.

83. **The Citation.** The Tribunal noted that the recommendation for Lieutenant MacRobert gives a succinct background to the action and his role in the planning and execution of the rescue. It does not however describe any specific acts of gallantry although it clearly indicates that the situation was desperate. In the concluding paragraph it states that he ‘displayed great courage’. The Tribunal noted that the Commendation for Gallantry requires recognition for individuals who ‘perform acts of gallantry in action’.⁵⁶ The Tribunal was not satisfied that there was a clear

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations*– dated 4 February 1991

description of specific ‘acts of gallantry’ which would warrant the award of the Commendation for Gallantry.

84. **New Evidence.** The Tribunal noted that in Mr Bradford’s submission he provided what could potentially be considered to be new evidence. The submission included extracts from Mr Bradford’s own book *In the Highest Traditions* published in 2000.⁵⁷ The book used other references to source information including *Darwin Drama* by Owen Griffiths published in 1946⁵⁸ and a 1953 magazine *People* possibly written by Douglas Lockwood. The Tribunal noted that whilst these accounts provide more detail on the overall action and point to acts of bravery by other individuals, none of the accounts actually describe specific acts of gallantry by Lieutenant MacRobert.

85. Mr Bradford acknowledges the inconsistencies in the various accounts when he states:

‘Unfortunately there are a number of inconsistencies evident in the various accounts subsequently published on MacRobert’s and Ericsson’s exploits, these extending even to some of the official records. With the passage of the years and the deaths of the principle (sic) participants, the chance of piercing together precisely what happened is unlikely to be satisfactorily resolved.’⁵⁹

86. The Tribunal was not persuaded that the above accounts provided new evidence and, in the absence of any specific descriptions of acts of gallantry by Lieutenant MacRobert, the Tribunal determined that this evidence was not compelling and would not justify overturning the original decision.

87. During the hearing, the Tribunal asked for the submission of any new evidence which described specific acts of gallantry by Lieutenant MacRobert – none were presented.

Finding in Relation to the Merits Review

88. No previously missing, new or compelling evidence was produced that would cause the Tribunal to conclude that Lieutenant MacRobert’s actions were more substantial than are recorded in his original citation. The Tribunal finds that Lieutenant MacRobert’s actions on 19 September 1942 were undoubtedly courageous but did not meet the standard required for the award of the Commendation for Gallantry.

Conclusion

89. The Tribunal concluded that on both process and merits, the case was properly handled at the time, followed due process correctly and that Lieutenant MacRobert’s actions were in all likelihood determined not to meet the standard required to be recognised for gallantry.

⁵⁷ John Bradford, *In the Highest Traditions*, Seaview Press, 2000.

⁵⁸ Owen Griffiths, *Darwin Drama*, Bloxham and Chambers, 1946

⁵⁹ John Bradford, *In the Highest Traditions*, Seaview Press, 2000, p88

TRIBUNAL DECISION

90. The Tribunal decided to recommend to the Minister that the decision by the Chief of Navy to not recommend Lieutenant Ian MacRobert, RANR(S) for a gallantry award for his conduct during the first air raid on Darwin on 19 February 1942 be affirmed.