Australian Government

Defence Honours and Awards Appeals Tribunal

Kenneth Stephens and the Department of Defence [2012] DHAAT (18 October 2013)

File Number	2012/008
Re	**Kenneth Stephens** APPLICANT
And	**Department of Defence** RESPONDENT
Tribunal	**BRIG Gary Bornholt AM, CSC (Retd) (Presiding Member)** **Dr Jane Harte** **Mr Kevin Woods CSC, OAM**
Hearing Dates	19 November 2012 25 March 2013

DECISION

On 18 October 2013 the Tribunal decided to:

a) **set aside** the decision of the Department of Defence to refuse to recommend Mr Archibald Lawrence Boyes and Mr John Thomas Boyes for the awards to which they had established an entitlement;

b) **substitute** its decision that both Mr Archibald Lawrence Boyes and Mr John Thomas Boyes be recommended for the award of their Second World War Medal entitlements including The Australia Service Medal 1939-45, and those medals be issued; and

c) **recommend** in accordance with the provisions of Section 110VB (3) of the *Defence Act 1903* to the Minister for Defence, that the Tribunal be directed to undertake an Inquiry to determine the extent to which Imperial and Australian awards or entitlements have been improperly forfeited or withheld, since 1939, in the Royal Australian Navy, the Australian Army and the Royal Australian Air Force, and to formulate recommendations to correct any injustices identified arising from the improper forfeiture or withholding of these awards.

CATCHWORDS

DEFENCE AWARD – refusal to recommend the award of Second World War Medal entitlements to Mr Archibald Lawrence Boyes and Mr John Thomas Boyes, campaign awards improperly withheld.

LEGISLATION

*Defence Act 1903 – ss*110T, 110V(1)(a)(ii), 110VB(2)

Defence Force Regulations 1952 - reg 93C and Schd 3

The Australia Service Medal 1939-45 Royal Warrant

Medal Regulations

The 1939-45 Star
The Africa Star
The Defence Medal
The War Medal 1939-45

REASONS FOR DECISION

Introduction

1. On 28 and 30 March 2013, the Applicant, Mr Kenneth Stephens (Mr Stephens), the nephew of Mr Archibald Lawrence Boyes (Mr Archibald Boyes) and Mr John Thomas Boyes (Mr John Boyes) (both deceased), applied on their behalf to the Directorate of Honours and Awards of the Department of Defence (the Directorate) to obtain the Second World War medal entitlements of Mr Archibald Boyes and Mr John Boyes that were withheld after the end of the Second World War.

2. The Directorate wrote to Mr Stephens on 2 and 3 May 2011, refusing the applications and advising him in each letter that *'due to the nature of your uncle's service he does not qualify for any awards as his entitlement to service awards was denied'*. The advice also quoted Defence's policy as requiring '*the person affected* (to be) *still living and able to make a personal application. Any claim to restoration lapses on the death of that person'*. The awards were therefore not recommended for issue.

3. On 15 April 2011, the Hon Mark Butler MP, the Member for Port Adelaide, made a representation on behalf of Mr Stephens to the then Parliamentary Secretary of Defence, Senator the Hon David Feeney. Mr Stephens also wrote separately to the Directorate on 19 May 2011 and 13 June 2011. Senator Feeney responded on 6 July 2011 to all of this correspondence reiterating the Directorate's previously stated position.

4. Mr Stephens applied to the Tribunal on 9 August 2011 and 31 January 2012 to review the Directorate's decision to refuse to recommend Mr Archibald Boyes and Mr John Boyes for their Second World War campaign awards.

The Tribunal's jurisdiction

5. The Tribunal has jurisdiction to hear and determine Mr Stephens's application for review; see ss110T, 110V(1)(a)(ii), 110VB(2) of the *Defence Act 1903* and reg. 93C of the *Defence Force Regulations 1952*.

Steps taken in the conduct of this review

6. On 19 April 2012, in accordance with the Tribunal's Procedural Rules, the Chair of the Tribunal, Mr Alan Rose, wrote to the Secretary of the Department of Defence, Mr Duncan Lewis, advising Defence of Mr Stephens's application for review and invited Defence to make submissions and provide the Tribunal with any material on which it sought to rely. A written submission was received from the Directorate on 22 May 2012.

7. Mr Stephens was provided with a copy of the Directorate's written submission and he was invited to respond and submit any further material he may have in support of his application. Mr Stephens provided written comments on the Directorate's submission on 15 June 2012.

8. On 8 August 2012, after consideration of Defence's response and the comments received from Mr Stephens, the Tribunal sought further information from Defence which was received on 10 October 2012. This information was shared with Mr Stephens on 18 October 2012, though some of the information provided by Defence was redacted to protect the privacy of some individuals named in the correspondence.

9. The Tribunal met in Canberra on 19 November 2012. During its meeting the Tribunal considered the material provided by Mr Stephens and the Directorate. The Tribunal followed this meeting with a private hearing at which oral submissions were made by Mr Stephens and the Directorate. Mr Stephens also tabled a further written submission at the hearing.

10. The Tribunal Secretariat then undertook further research and discussions with the Directorate which revealed on 23 January 2013 several files that were under the control of the Directorate that contained a large amount of relevant material that had not previously been provided to the Tribunal for consideration. On 12 February 2013, the Tribunal met in Canberra to consider this additional material obtained from Defence files. The Tribunal decided that since some of this material might be adverse to Defence's case, it would need to conduct a further hearing with the Directorate to clarify some apparently longstanding issues and seek answers to certain questions. The Tribunal wrote to the Directorate on 24 February 2013 with specific questions.

11. The Tribunal conducted a hearing in Canberra on 25 March 2013 which was attended by the Directorate. The additional documents and an audio recording of the hearing were provided to Mr Stephens who submitted comments that were received on 18 April 2013.

12. On 16 May 2013 the Directorate submitted written clarification of some parts of its 25 March 2013 oral submission to the Tribunal. This material was provided to Mr Stephens who responded on 19 June 2013.

13. The Tribunal met on 17 May 2013 to further consider all material and submissions. As a consequence, the Tribunal wrote to Defence requesting further clarification of its policy. Defence responded on 24 June 2013. This material was provided to Mr Stephens on 18 September 2013. He responded on 15 October 2013.

Background to the Application

14. After the conclusion of the Second World War, the Australian Army introduced a policy that gave it the discretion to determine that medal entitlements could either be forfeited by veterans who had already received medals or withheld if the medal had not yet been issued. Forfeiture or withholding of entitlements occurred where a soldier had been convicted of specified offences, had been discharged dishonourably or had been discharged under the provisions of certain military regulations.

15. Mr Archibald Boyes and Mr John Boyes both served in the Second Australian Imperial Force (2nd AIF) and were purported to have been discharged dishonourably and under the provisions of certain military regulations. As a consequence, the medal entitlements for which they had previously qualified as at their respective discharge dates from the Army in 1944 had been withheld since sometime after 1946.

Subsequent requests in 1950 and 1973, along with the most recent request in 2011, for the entitlements to be restored and the medals issued, were all refused.

Mr Archibald Boyes's Service

16. Mr Archibald Boyes enlisted in the Australian Army on 10 July 1940 and was allocated to the 2nd/48th Battalion. He embarked for overseas service on 17 November 1940. He served in North Africa and the Middle East from 17 December 1940 until 27 January 1943. During that time he took part in the defence of Tobruk; the fighting at El Alamein including the series of attacks at Tel el Eisa; and garrison duties in Palestine and Syria. Records show that up until September 1942, Mr Archibald Boyes had been convicted of 15 military offences. On 5 September 1942, Mr Archibald Boyes appeared before a Field General Court Martial charged with the following military offence:

> *Deserted His Majesty's Service, in that he, at Egypt absented himself without leave from 0800 hours, 4 August 1942 to 1715 hours, 8 August 1942 with the intent to avoid such service.*

17. Mr Archibald Boyes was found by the court to be not guilty of desertion but was found guilty of being absent without leave. He was sentenced to undergo detention for six months. The Court Martial did not impose the punitive forfeiture of any medal entitlements.

18. Mr Archibald Boyes's sentence was suspended on 11 January 1943 and he was released from the 1st Australian Detention Barracks in Egypt. Mr Archibald Boyes, along with the rest of his Battalion, embarked for passage back to Australia on 27 January 1943 and disembarked at Sydney on 27 February 1943.

19. On the return passage to Australia Mr Archibald Boyes was charged with two military offences. As a consequence, the suspension of his previous sentence was revoked and on arrival in Australia he completed the remainder of the sentence in detention. Mr Archibald Boyes subsequently served in the Army for another year, assigned to 6 Aust Base Ordnance Depot in Australia, during which time he was charged with a number of military offences. He was administratively discharged from the Army on 22 May 1944 under Australian Military Regulations and Orders (AMR&O) 184(I)(e) '*that he is considered to be unsuitable for any further military service on account of discreditable service*'.

20. Mr Archibald Boyes had met the eligibility criteria for all of the awards to which he became entitled by June 1942. His service record shows that sometime after 1946 his entitlement to each of those awards, listed below, was withheld:

- The 1939-45 Star;
- The Africa Star;
- The Defence Medal;
- The War Medal 1939-45; and
- The Australia Service Medal (ASM) 1939-45.

Mr John Boyes's Service

21. Mr John Boyes enlisted in the Australian Army on 1 December 1939 and was allocated to the 2nd/10th Battalion. He embarked for overseas service on 5 May 1940. He initially served in the United Kingdom, then in the Middle East from 31 December 1940 until 11 February 1942 during which time he took part in the defence of Tobruk. After a period of garrison service in Palestine and Syria, Mr John Boyes returned to Australia with the rest of his Battalion, arriving in Adelaide on 29 March 1942. Records show that up until 8 December 1943 Mr John Boyes had been convicted of 20 military offences, none of which occurred during the period he was engaged in combat operations. On 8 December 1943 Mr John Boyes appeared before a District Court Martial in Cairns charged with the following military offences:

a. when on active service using insubordinate language to his superior;

b. when on active service disobeying a lawful command given to him by his superior officer;

c. when on active service using threatening language to his superior officer; and

d. when on active service striking his superior officer.

22. Mr John Boyes was found guilty on the first three offences and not guilty on the fourth offence. He was sentenced to and completed field punishment for 28 days and forfeited all ordinary pay for 28 days. The Court Martial did not impose the punitive forfeiture of any medal entitlements.

23. On 3 April 1944, Mr John Boyes was charged with another military offence. On 22 April 1944 he was administratively discharged under Australian Military Regulations and Orders (AMR&O) 184A(I)(k) '*by reason of numerous convictions he is considered to be incorrigible*'. While this discharge reason was crossed off his Service and Casualty Form, the Regulation is nevertheless referred to on his Discharge Certificate.

24. Mr John Boyes had met the eligibility criteria for all of the awards to which he became entitled by January 1941. His service record shows that sometime after 1946 his entitlement to each of those awards, listed below, was withheld:

- The Africa Star;
- The Defence Medal;
- The War Medal 1939-45; and
- The ASM 1939-45.

25. The Campaign Awards stamp in Mr John Boyes's service record does not include an indication that he had qualified for the 1939/45 Star. Upon review this appears to be in error since he served for the qualifying period of six months in an operational command as defined by Command Paper 6833 of June 1946[1] and the

[1] Command Paper, Committee on the Grant of Honours, Decorations and Medals, Number 6833, His Majesty's Stationery Office, London, 1946.

Dedman Paper of 1948.[2] The Tribunal therefore considers that he has also established an entitlement to that award.

26. Mr John Boyes's service record also indicates that he was issued the Returned from Active Service Badge on his discharge.

The Medal Regulations and Eligibility Criteria

27. The eligibility criteria set by the Commonwealth[3] for the awards to which Mr Archibald Boyes and Mr John Boyes have established an entitlement are as follows:

a. The 1939-45 Star qualification requires six months service to be rendered in an operational command during the period 3 September 1939 to 2 September 1945.

b. The Africa Star is granted for operational service of any duration in North Africa from 10 June 1940 to 12 May 1943.

c. The Defence Medal is granted to members serving for six months in non-operational areas subjected to enemy air attack, or loosely threatened. This includes the United Kingdom from 3 September 1939 to 8 May 1945 and North Africa from 13 May 1943 to 8 May 1945. It is also available to members of Australian services for certain service in the Northern Territory; for twelve months non-operational service in Australian Forces overseas from or outside Australia; and to members of certain Mine and Bomb disposal units.

d. The War Medal 1939-45 is granted to full-time personnel of the Armed Forces, wherever their service during the war had been rendered. It was generally subject to a 28-day qualification period. Operational and non-operational service counted as qualifying service for this Award.

e. The ASM 1939-45 was granted on completion of 18 months full-time duty in the Australian Armed Forces at home or overseas between 3 September 1939 and 2 September 1945. In 1998 the 18 months qualifying period was reduced retrospectively to 30 days full-time or 90 days part-time service. The Royal Warrant specified that only those who have received, or would be entitled to receive an honourable discharge are eligible. The Royal Warrant also delegated authority to the Governor General to cancel and annul the award, and also to restore any Medal which may have been forfeited. The Governor-General could also make regulations to carry out the purposes of the Royal Warrant.[4]

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[2] *Summary of Award Conditions of Campaign Stars, the Defence Medal and War Medal*, issued by the Authority of Minister of State J.J. Dedman MP, Australian Government Printer, Melbourne, 1948.

[3] Ibid (with the exception of the ASM 1939-45)

[4] Royal Warrant for The Australian Service Medal 1939-45, 30 August 1949

Previous Consideration of Withheld Entitlements

28. Prior to the application by Mr Stephens in 2011, previous requests to issue the medal entitlements of Mr Archibald Boyes and Mr John Boyes were as follows:

a. In January 1950, Mr John Boyes submitted an application for his medal entitlements to be issued. This application was refused by the Officer in Charge of Central Army Records Office on 14 October 1952. The reason given was that '*by reason of the nature of your discharge you are not eligible to receive any awards*'. This letter was returned unclaimed on 12 November 1952.

b. On 7 September 1973, Mrs J. Stephens (sister of both Archibald and John Boyes) requested the medal entitlements of Mr Archibald Boyes and Mr John Boyes be issued. This application was refused by the Officer in Charge of Central Army Records Office on 17 September 1973. The reason given was that '*due to the nature of their discharge* (they) *are not eligible to receive any campaign awards*'.

EVIDENCE AND ARGUMENTS

Mr Stephens's Case

29. The essence of Mr Stephens's written and oral submissions is that the Army service of both Mr Archibald Boyes and Mr John Boyes included combat action at the defence of Tobruk. As veterans, they should be properly recognised and their medal entitlements should be restored and issued.

30. The first argument of Mr Stephens is that as a result of their distressing childhood, Mr Archibald Boyes and Mr John Boyes were both chronic alcoholics when they joined the Army and that condition was exacerbated by their service. This, combined with probable post-traumatic stress inevitably resulted in the disciplinary problems they displayed. Almost all offences were related in some way to the consumption of alcohol.

31. The second argument of Mr Stephens is that Mr Archibald Boyes and Mr John Boyes '*have war service plaques on their grave sites … so Veterans* (sic) *Affairs has approved their entitlement to war service pensions*', thereby recognising their war service. It follows that their war service should equally be recognised by their medal entitlements being issued.

32. The third argument of Mr Stephens is that both brothers were found not guilty of the court martial offences. Subsequent advice that disciplinary action had led to the forfeiture of the medals was incorrect and therefore a miscarriage of justice had occurred.

33. The fourth argument of Mr Stephens is that Mr John Boyes had been awarded a Returned from Active Service Badge which had not been withheld. It follows therefore that the entitlement to withheld service medals should be restored.

Department of Defence's Case

34. In its first written submission, the Directorate noted that the authority for withholding of medal entitlements in the immediate post-war period was the Director of Personal Services (DPS) letter 53095 of 9 July 1946, entitled *War Medals (in Commemoration of a Campaign: Withholding of Grant: Forfeiture and Restoration)*. Minor amendments to this instruction were advised in DPS letter number 2719 of 2 February 1948. This authority, it argued, was reinforced later, in September 1951, when instructions pertaining to the forfeiture and restoration of awards for members the Australian Military Forces (AMF) were promulgated in Military Board Instruction (MBI) 148/1951, *Awards - Medals - Forfeiture and Restoration.* This was amended on 7 December 1951. (A full discussion is set out in Annex B.)

35. The Directorate noted that the service records of Mr Archibald Boyes and Mr John Boyes each had been stamped with a 'Campaign Awards' stamp which in both cases identified that their respective entitlements to campaign awards had been withheld. The reason on each record is 'e' and 'k' respectively. These reflect the clauses of the AMR&O under which they were each discharged. Both are stamped with DPS 53095 as being the authority for this action. The Tribunal observed that MBI 148/51 is also cited on the records as the authority for withholding the entitlements.

36. The Directorate submitted further that the legal basis for Defence's decisions on Mr Stephens's application, was Defence Instruction (General) Personnel 31-8 (DI(G) PERS 31-8) *Forfeiture, restoration and replacement of decorations, medals and war badges* made on the joint authority of the Chief of the Defence Force and the Secretary under respectively the *Defence Act 1903* and the *Public Service Act 1999.* DI(G) PERS 31-8, paragraph 15, states that '*a member or former member of the ADF may apply to have forfeited awards restored*'.

37. The Directorate submitted that DI(G) PERS 31-8 was updated by its policy statement of 2005 which required the person affected by the forfeiture to be still living and that person must make a personal application for restoration of the forfeited entitlement. In addition, this policy states that applications on behalf of a deceased former member are not considered. The Directorate submitted that this 2005 policy was designed to allow the individual affected to present their perspective of events that led to the forfeiture of the awards. The Directorate considers this to be essential when assessing applications for restoration. In the Directorate's submission of 18 May 2012 and in other subsequent oral and written submissions, the Acting Director of the Directorate, as the 'prescribed authority', submitted that Defence cannot therefore uphold Mr Stephens's application to have Mr Archibald Boyes's and Mr John Boyes's award entitlements restored.

38. In a supplementary submission on 16 May 2013, the Directorate also submitted that it had sought to uphold decisions made contemporaneously with the events to which they referred in the belief that the punishments handed down (such as withholding entitlements) were done legally and within the powers of the authorities

of the time. It was also submitted that Defence does not support applying today's standards and values to review decisions made at the time of past conflicts and operations.

39. Further in that submission, the Directorate also stated that decisions *'to forfeit or withdraw* (sic) *award entitlements as a result of Courts Martial and summary proceedings... should generally be left alone and upheld*'.

40. The Directorate also submitted that the responsibility for administration of Second World War medals was vested in the government of each dominion country participating in the Imperial award system. In Australia this was devolved by Government to each individual Service Medals Office through the Minister of State for Defence, the Hon John J. Dedman MP. The single service arrangements remained in place until 1997, after which the Directorate assumed responsibility to administer the awards. The Directorate stated at the Hearing on 25 March 2013 that there was no provision for delegation in the Warrants and Command Papers authorising the awards.

THE TRIBUNAL'S CONSIDERATION

41. The Tribunal undertook extensive research into the background of the arguments submitted and the various Defence regulations and policies that had developed over time. This revealed a far more complex set of circumstances relating to the forfeiture and withholding of Second World War medal entitlements than those presented by either Defence or Mr Stephens. To understand how regulations and policies evolved and the basis for the development of successive approaches, the Tribunal considered the context within which these were framed and followed the history of the honours and awards systems in Australia and the United Kingdom as they related to forfeiture and withholding of medal entitlements. Those considerations are discussed in Annex A – Award of Imperial Medals to Australians – Basis in Australian Law and Annex B – History of Forfeiture of Medal Entitlements and should be read in conjunction with the following paragraphs which contain the conclusion the Tribunal has reached on each major issue.

Forfeiture and withholding of medal entitlements

42. At the end of the Second World War, Defence distinguished between awards that were forfeited (issued then later withdrawn and cancelled) and those that were withheld (never issued). In both cases there was no question that the individual's eligibility for the award had been fully established. The Tribunal acknowledges that the use of the terms "forfeiture" and "withholding" has become blurred in Defence since the late 1940's. Today it is still reasonable to use "forfeit" to refer to the removal from a person of an award already issued and in their possession. But for a person from whom the issue of an award has previously been withheld to forfeit the award entails the making of a further discretionary decision to cancel the person's entitlement. So the post 1950's "blurring" in Defence has in effect purported to remove an existing eligibility.

Imperial Awards

43. **Qualification for awards.** Mr Archibald Boyes and Mr John Boyes qualified for and became entitled to the respective Imperial awards established by the prerogative instruments for service in the Second World War and the ASM 1939-45.

44. **Regulations that applied at time of discharge.** In 1944, at the time of discharge of Mr Archibald Boyes and Mr John Boyes, AMR 799 (1943) and Royal Warrant for the Pay, Appointment, Promotion and Non-Effective Pay of the (British) Army 1940 (Royal Warrant 1940), as read mutually supplemental were the only instruments with application to forfeiture and restoration of Imperial awards.

45. **Validity of Instructions.** The Tribunal found that MBIs and other instructions and orders purportedly made to regulate forfeiture and restoration of awards from 1946 into the 1960's were inconsistent with the provisions of AMR 799 (1943) and Royal Warrant 1940. Those inconsistent provisions therefore could have no application and cannot validly be used as a basis for ordering the forfeiture of entitlements established under the prerogative instruments. (See discussion in Annex B.)

The Australia Service Medal 1939-45

46. **Qualification for award.** Mr Archibald Boyes and Mr John Boyes met the qualification criteria set out in the Royal Warrant for the ASM 1939-45.

47. **Honourable Discharge.** The Royal Warrant for the ASM 1939-45 requires that to be eligible for the award a person must be eligible to receive, or have received an honourable discharge. Mr Archibald Boyes and Mr John Boyes were not discharged by sentence, discharged with ignominy by sentence nor discharged by summary award as prescribed by AMR 189 which would have prevented them from being treated as being honourably discharged. AMR 190 further required that if a soldier was discharged under any of the circumstances in AMR 189 there was a need for the discharge certificate to record that such a discharge took place. At the very least it would be expected that words such as 'misconduct' or 'dishonourable discharge' would be entered at the time of discharge if not on the soldier's Discharge Certificate, then at least on his Service Record.

48. No such entries were made on any of the records of Mr Archibald Boyes and Mr John Boyes, either at the time or later. Part of the reason for the Directorate's refusal to recommend the awards was because it had been presumed that Mr Archibald Boyes and Mr John Boyes had been dishonourably discharged. There is no basis in fact for that presumption.

49. The Tribunal therefore can only reasonably conclude contrary to the position of the Directorate that in the absence of any regulations or definitions made pursuant to the Royal Warrant for the ASM 1939-45, if a soldier is not discharged dishonourably with the appropriate entries made on his records at the time, then he must be treated legally as having been honourably discharged.

Reviewing the Circumstances of Discharge

50. The Tribunal's research revealed that over time, widespread inconsistencies were evident in the methods used to apply provisions for forfeiture and restoration of awards. In the case of Mr Archibald Boyes and Mr John Boyes the Tribunal assessed their circumstances judged against the relevant criteria (set out in Annex A paragraph 7), which were applicable at the time. Neither was discharged as a consequence of judicial decision or misconduct, nor is there any evidence that their respective commanding officers sought their discharge consequent on the misconduct of either Mr Archibald Boyes or Mr John Boyes.

51. Mr Archibald Boyes and Mr John Boyes were both discharged administratively for reasons that did not trigger the discretionary legal basis in AMR 799 (1943) and the Royal Warrant 1940 for the Military Board or any other authority to order the forfeiture of any awards. As such there was never any forfeiture, merely a withholding or failure to issue. In other words there was an unwillingness to take the final discretionary step to recognise their eligibility, which undoubtedly existed.

52. The Service Record stamps cited the authority for withholding the awards as DPS 53095 of 9 July 1946 and MBI 148/51. These documents were invalid insofar as they were not consistent with the regulations for forfeiture and restoration as prescribed by AMR 799 (1943) and Royal Warrant 1940 and the withholding was therefore done illegally.

DI(G) Pers 31-8

53. DI(G) PERS 31-8 was made pursuant to the relevant provisions of both the Defence and Public Service Acts and had never been legally amended by the purported 2005 policy statement. The Tribunal considered that as such it should proceed on the basis that the policy document upon which to make a preferable decision regarding Mr Stephens's application was the unamended 2002 DI(G) PERS 31-8. This in effect means there is no need for the applicant to be living or to appear before the 'prescribed delegate'. In other words Defence had no basis for refusing in the first instance, to process Mr Stephens's application.

54. The Tribunal also concluded that even if the 2005 policy statement was properly authorised, to apply it to Mr Stephens's application was not consistent with Defence's own retrospective policy position. In its 16 May 2013 submission, the Directorate said that '*if a retrospective application of a policy is required, it is done so that the entitlements of those who may have previously benefited are protected without prejudice*'. This policy position would invalidate the application of any prejudicial provisions of DI(G) PERS 31-8, the purported 2005 policy statement and the later *Defence Honours and Awards Manual 2012*, as they relate to Imperial awards and to Mr Stephens's application. The Tribunal concluded that in purporting to introduce the posthumous policy provisions in 2005, Defence acted illegally going well beyond and not in accordance with any of the eligibility conditions applicable to Second World War awards.

55. In any case, DI(G) PERS 31-8 and any amendments that may have been made to it could only apply when considering claims made in respect of forfeitures that have been properly ordered in accordance with AMR 799 (1943) and the Royal Warrant 1940. Restoration of an entitlement or award 'at the discretion of the

prescribed delegate', as provided for in DI(G) PERS 31-8, can only occur where entitlements or awards have been legally forfeited or withheld. This is not the case for Mr Archibald Boyes and Mr John Boyes and therefore DI(G) PERS 31-8 does not apply.

Authority to Delegate, Review and Decide

56. DI(G) PERS 31-8 appointed the Director of Honours and Awards as the 'prescribed delegate for forfeiture and restoration of Imperial awards'. The Tribunal sought to confirm what authority existed to make that delegation and the consequent authority for the Director to make discretionary decisions. The Directorate submitted that while there is no instrument of delegation, its authority emerged from the 1997 Defence Reform Program and no formal delegation in respect of forfeiture was ever provided to the Director. The Directorate submitted that its authority arose from CDF authorising DI(G) PERS 31-8 in 2002.

57. In the Tribunal's view there is no authority to delegate to officers of Defence outside of the provisions of the Royal Warrants, the Dedman Paper, AMR 799 (1943) or the Royal Warrant for the ASM 1939-45. Defence has no delegated authority to permit it to introduce new discretionary provisions, limitations or amend eligibility criteria that would remove the already established rights of former soldiers. Therefore Defence as the relevant administrative authority can only refuse to restore entitlements with respect to Imperial awards that were properly forfeited or withheld in accordance with provisions in the Warrant, the Regulations and as a result of offences listed at clause 2(a) - (c) of MBI 102-1.

58. However, under the authority of the extant 1995 Instrument of Delegation to the Governor-General, while it has not done so, if Defence now saw the need it could formally request the Governor-General to vary existing or introduce new eligibility criteria in the prerogative instruments, and promulgate regulations to govern provisions for forfeiture and restoration, of relevant Second World War Imperial awards. The Governor-General could also be requested to make regulations under the ASM Warrant from which executive instruments could be promulgated. Such regulations could for example define honourable discharge for the purposes of the Warrant.

Past Restoration of Forfeited and Withheld Entitlements

59. In its research to try to discover comparable circumstances to the Boyes's cases, the Tribunal identified a number of applications for restoration that were submitted to the Directorate between 2002 and 2005 that were deferred and not processed until the introduction of the more restrictive 2005 policy statement. These applications were then treated as if they had been lodged after the promulgation of the purported 2005 policy statement, and were subsequently denied. The Directorate confirmed that no claims for restoration of entitlements have been approved since 2005.

60. Following a request for the full record of all Defence decisions on applications to restore withheld and/or forfeited entitlements to awards prior to the introduction of its 2005 policy statement, and any that have been made since 2005, Defence advised that it was not in a position to provide the full record. However, the Tribunal was

provided with access to a range of records relating to withheld and forfeited awards and their restoration. These records included:

a. files from the previous Army Medal Section, which contain correspondence with applicants between 2003 and 2004 seeking restoration of forfeited entitlements,

b. electronic copies of letters sent between 2002 and 2005 to applicants seeking restoration of forfeited entitlements, and

c. policy files on forfeiture and restoration.

61. The Tribunal examined a sample of some 120 claims for restoration that had been dealt with by Defence in the period 2002 to 2005, which led to identification and review of a smaller number of other claims by members or their families. Where a member's service record had been digitised, the Tribunal could examine more closely the circumstances that led to their discharge, and the handling of award entitlements. This applied to 28 of the above claims. In the case of the other 92 claims, the Tribunal was able to review the correspondence sent back to the applicant from Defence that showed the outcome of the Directorate's consideration.

62. The Tribunal confirmed that notwithstanding the limited amount of available information, the sample showed many inconsistencies and anomalies in the way claims for restoration of withheld or forfeited awards have been handled over that relatively short space of time. These are summarised below:

a. Changes to policy have resulted in considerable variations between how claims were treated over time;

b. There has been an inconsistent approach to the award of the ASM 1939-45; and

c. There has been a lack of awareness of what constituted properly forfeited awards and withheld entitlements.

63. The Tribunal considers that more widespread anomalies are likely to exist as a result of the various Australian policies relating to forfeiture and restoration of entitlements, than only those discovered in the case of Mr Archibald Boyes and Mr John Boyes.

Mr Stephens's Submissions and Arguments

64. The arguments put forward by Mr Stephens (see paragraphs 29-33) were largely mitigatory in nature. The Tribunal has no jurisdiction in respect of the Returned from Active Service Badge. Nor is the matter of recognition of veterans' entitlements relevant in this case since the Tribunal is only concerned with medallic recognition. There is no argument to suggest that the service rendered by Mr Archibald Boyes and Mr John Boyes did not meet the eligibility criteria for the awards.

65. On the matter of the courts martial convictions, the Tribunal found that there was no affect in this case. Neither Mr Archibald Boyes nor Mr John Boyes were convicted of the offences prescribed in the AMR 799 (1943) or Royal Warrant 1940. Nor did any judicial body impose any sentence that could be construed as a

circumstance that would initiate the Military Board's discretion to order the withholding or forfeiture of medallic entitlements or awards.

Defence’s Submission and Arguments

66. The arguments put forward by Defence proceeded on the basis that decisions made at the time were valid and should be upheld. There is no evidence before the Tribunal that Defence in assessing Mr Stephens’s application ever examined the validity of the basis of those decisions. Defence did not consider the substantial amount of material that led to the 1985 COSC conclusions, or understand the complete change in policy direction those conclusions introduced, even though they had formed Defence’s interim procedures and guidelines for its Forfeiture and Restoration Policy up to 2002. There was no evidence provided to the Tribunal to indicate that Defence had developed any clear and objective guidelines consistent with the AMR 799 (1943), Royal Warrant 1940 or MBI 102-1, to review claims. Instead the various Directors, over time, seem to have simply used personal discretionary judgements which have not been consistently applied. Nor was there any understanding that the Director’s ‘discretion’ to restore an award or issue a withheld entitlement can only apply in cases where such an award has been properly forfeited or withheld as prescribed by the regulations.

67. The policy statement issued by the Directorate in 2005 was the basis upon which the application by Mr Stephens was refused in the first instance, because Mr Archibald Boyes and Mr John Boyes were both deceased. Defence was unable to confirm that the policy statement was ever properly authorised by CDF and Secretary. However, Defence confirmed that the policy was not introduced as an authorised amendment to DI(G) PERS 31-8. It was instead implemented as staff guidance for processing claims. The Tribunal noted that if the policy had been introduced officially, applying its retrospective provisions in respect of refusing posthumous claims would raise doubts about Defence’s stated understanding of the application of the *Acts Interpretation Act 1901*.

THE TRIBUNAL’S FINDINGS

68. The Tribunal’s examination of Defence policy files revealed that the subject of forfeiture and restoration of Second World War Imperial awards has had a long and difficult history, with many changes in policy approach, but with few changes to the applicable law.

69. In the case of Mr Archibald Boyes and Mr John Boyes, they were eligible for the awards for which they properly qualified. Those awards were withheld under the provisions of their administrative discharge as opposed to any punitive measure. The weight of evidence before the Tribunal can only lead to a conclusion that most of the policies introduced by Defence over a long period of time were of doubtful validity.

70. There has been no discrimination between entitlements properly forfeited due to convictions for specified offences listed in AMR 799 (1943) and Royal Warrant 1940 on one hand and misdemeanours resulting in administrative discharge on the other. In addition it is clear that improperly authorised instructions and policies that were inconsistent with regulations have emerged over time and have influenced

decision makers. Under such circumstances, it is not possible for fair, consistent and sustainable decisions to be made about the restoration of entitlements to awards or the issuing of those temporarily withheld. When this is combined with questionable policy that lacks beneficial application in retrospect, and denies any person other than the living original individual to make a claim (although this provision has not always been consistently applied), it is not reasonable to conclude that retaining the status quo will result in correct and preferable decisions being made.

71. Defence argued that the Army policy change in 1996 was bad precedent that should not be repeated, but Defence could not point to evidence to support that opinion. Defence also said that it had not considered the 1985 COSC decisions when it developed its current policy, even though the 1985 COSC decision was referred to as Defence's 'interim policy' in the introductory paragraph of DI(G) PERS 31-8. Contrary to Defence's view, the Tribunal found that the 1996 Army policy was largely consistent with AMR 799 (1943) and Royal Warrant 1940. The criteria used to determine restoration claims were fair and sustainable. As the basis for determining Mr Stephens's application, the Tribunal used similar criteria but based directly on provisions in AMR 799 (1943) and Royal Warrant 1940 along with the Warrant for ASM 1939-45. These are detailed in Annex A paragraph 7.

72. From the material before it in this case, the Tribunal is satisfied that forfeiture of Second World War awards is invalid if ordered for reasons other than those contained in the mutually supplemental AMR 799 (1943) and Royal Warrant 1940, which were both applicable at the time. It also follows that discretionary restoration can only apply to cases in which awards have been properly forfeited. In all other cases, there is no basis to refuse to recommend and issue an award for which an entitlement has been established.

73. The Tribunal was unable to accept as valid, any of the additional policy reasons put forward by Defence in justification of its not exercising the final discretionary decision necessary for Mr Archibald Boyes and Mr John Boyes to be issued with their awards. This continuing failure to properly recognise their service and withholding the issue of the awards has no legal basis and is unjustified.

74. The Tribunal found that the Service Records or Discharge Certificates of Mr Archibald Boyes and Mr John Boyes do not on their face identify a legal basis that satisfies the prescribed requirements of AMR 799 (1943) and Royal Warrant 1940. Without such authority, the withholding of their entitlements is invalid and their medals must now be issued.

75. The Tribunal found that the lack of regulations and no clear and properly authorised definition of 'honourable discharge' meant that consistent decisions would be problematic on withholding awards of the ASM 1939-45 and reviewing claims for restoration, on the basis of a discharge that was not 'honourable'.

76. In that regard and with respect to the ASM 1939-45, the Tribunal found that Mr Archibald Boyes and Mr John Boyes were neither discharged by sentence, discharged with ignominy by sentence, discharged by summary award nor for misconduct. They were discharged administratively and there was no annotation on their records to support any conclusion that they were dishonourably discharged. Their medals must now be issued.

77. The Tribunal concluded that the Defence decision should not be upheld because it was based on instructions that were not consistent with the relevant warrants and regulations of the time. This resulted in entitlements of Mr Archibald Boyes and Mr John Boyes being improperly withheld. The purported 2005 Defence policy statement was not a properly authorised and promulgated amendment to DI(G) PERS 31-8 and as such cannot be held as having any authority. The use of the 2005 policy statement by Defence had the effect of denying due process by introducing restrictive provisions that applied retrospectively, in contravention of Defence's stated application of the *Acts Interpretation Act 1901*. Additionally, the Tribunal found that DI(G) PERS 31-8 provides for discretionary restoration of awards that were legally forfeited or withheld. Its provisions cannot be applied to the circumstances of Mr Archibald Boyes and Mr John Boyes since the decision to withhold their entitlements was *null and void ab initio*.

78. The withholding or failure to issue awards, purportedly based on policy and legal authority was wrong and the various decisions over the years, taken by Defence, have been unjustified and unsupported by any legal authority. This has been known within Defence at least since the 1985 COSC considerations. The number of Second World War veterans or veterans of later wars who might have been improperly denied their entitlements to awards is not clear and is beyond the scope of this review. The Tribunal identified irregularities in the Army, and it follows that there are likely to be similar irregularities in the Navy and the Air Force since each had separate regulations and instructions. Given the potential for widespread injustice to exist, the Tribunal decided to bring this matter to the attention of the Minister for further consideration.

THE TRIBUNAL'S DECISION

The Tribunal decides to:

a) **set aside** the decision of the Department of Defence to refuse to recommend Mr Archibald Lawrence Boyes and Mr John Thomas Boyes for the awards to which they had established an entitlement;

b) **substitute** its decision that both Mr Archibald Lawrence Boyes and Mr John Thomas Boyes be recommended for the award of their Second World War Medal entitlements including The Australia Service Medal 1939-45, and those medals be issued ; and

c) **recommend** in accordance with the provisions of Section 110VB (3) of the *Defence Act 1903* to the Minister for Defence, that the Tribunal be directed to undertake an Inquiry to determine the extent to which Imperial and Australian awards or entitlements have been improperly forfeited or withheld, since 1939, in the Royal Australian Navy, the Australian Army and the Royal Australian Air Force, and to formulate recommendations to correct any injustices identified arising from the improper forfeiture or withholding of these awards.

Annexes:

A. Award of Imperial Medals to Australians - Basis in Australian Law

B. History of Forfeiture of Medal Entitlements

ANNEX A

Award of Imperial Medals to Australians – Basis in Australian Law

Imperial War Medals

1. Imperial war medals were established by the Sovereign primarily to recognise service by British servicemen and extended to servicemen from other parts of the Empire that participated in the relevant campaigns. Eligibility for those Imperial war medals was provided for by prerogative instruments such as Royal Warrants and Letters Patent. These are legal instruments issued under the royal prerogative of honour recognised in common law both in the United Kingdom and Australia. Such prerogative law making in Australia is now exercised by the Queen or more often by the Governor-General on the advice of the Prime Minister or another Minister. By contrast other Commonwealth executive lawmaking such as Statutory Rules (Regulations) are made under the authority of section 61 of the Constitution and the provisions of particular Acts of the Parliament by the Federal Executive Council.

2. From the earliest days of the Commonwealth the Australian defence forces have under the Constitution been administered through the provisions of the *Defence Act 1903* and subordinate legislation, instructions and orders made pursuant to that Act. By contrast the administration of the British armed forces depended for its regulation far more on the use of prerogative instruments. In Australia, laws made under the *Defence Act 1903* provide the authority for the command, control, regulation and administration of the Defence Force. Those provisions are implemented through succeeding levels of executive instruments which include Regulations (AMR&Os) from which subordinate instructions (such as MBIs) and other orders draw their authority. Each successive executive instrument must not be inconsistent with the provisions set out in the higher level instrument. It is through this system that the discipline of the Australian Army was regulated. Despite some suggestions to the contrary, prerogative instruments such as Royal Pay Warrants that set terms and conditions for members of the British armed forces had no force and effect with respect to service in the Australian armed forces. The provisions of those Pay Warrants were, however, looked at in Australia as an indication of movements in British policy.

3. Forfeiture of awards occurs as a result of members of the Australian Defence Force having been convicted of certain prescribed offences. These matters clearly fall into the administration of discipline in the Australian Defence Force, and in Australia such forfeiture and restoration of awards is subject to regulation by executive instruments made under the *Defence Act 1903*, not, as in the United Kingdom, through the exercise of the prerogative power of the Sovereign. The use of the prerogative power has played no role in the administration of discipline in the Australian Defence Force.

4. There have also been arguments put that the exercise of the royal prerogative of honour during the Imperial period (up until the commencement of the Second World War following passage of the *Statute of Westminster Adoption Act 1942* which had retrospective operation from 1939 and other executive changes flowing from the Balfour Declaration in 1926) required the British rules on forfeiture and restoration of

war medals to be applied in Australia. The validity of these arguments to the legal position in Australia under its Constitution before 1939 was very doubtful but there is no question that from 1939 onwards the only legal provisions on forfeiture and restoration were provided by the provisions of the *Defence Act 1903* and the relevant Australian Military Regulations (AMR) 799 and 800 as amended from time to time.

5. *Australian Military Regulations Division 2 - Medals and Decorations 1927*, explanatory clause 1334, stated that with respect to the forfeiture and restoration of medals, in the provisions of the Royal Warrants and any regulations made under the Royal Warrants that purported to extend to the Australian Military Forces could be used as an aid to understanding the relevant Australian Military Regulations. Explanatory clause 1334 not being a Regulation has no legal effect, but its inclusion indicates how the military authorities at the time saw the AMRs being interpreted. The clause remained extant through and beyond 1957.

6. There is provision in AMR 9(2) for clause 1334 to be implemented by reading both the Royal Warrants and the AMRs as mutually supplemental except where a contrary intention is expressed. The Australian legal position is made clear in AMR 9 (3) which states that; *'except to the extent to which they are expressly applied by the regulations made under the D.A.*[*Defence Act 1903*]*, no provision of the King's Regulations or of the Pay Warrant… shall apply to the Military Forces whether on war service or not'*.

7. Reading both the Royal Warrants and AMR 799 (1943) as mutually supplemental instruments, the forfeiture of awards or entitlements could only be properly ordered, at the discretion of the Military Board, under any of the following circumstances:

Royal Warrant 1940

a. **Officer and Soldier** - convicted for treason, sedition, mutiny, cowardice, desertion or disgraceful conduct of an unnatural kind.
b. **Soldier** - has not rendered approved service (defined in the Warrant as deserted from the service, suffers death by sentence of court martial, or is discharged for misconduct occurring during the operations for which the medal is granted).

AMR 799 (1943)

c. **Soldier** - is by sentence of court martial, sentenced to death, penal servitude, imprisonment, discharged with ignominy from His Majesty's service or discharged from the Defence Force.
d. **Soldier** - is by sentence of a civil court, sentenced to death, penal servitude or imprisonment.
e. **Officer** - is by sentence of court martial, sentenced to death, cashiered or dismissed from His Majesty's service or from the Defence Force.
f. **Officer** - is by sentence of civil court sentenced to death, penal servitude or imprisonment.
g. **Officer** - Commission is cancelled for misconduct.

8. It is clear from the provisions above that forfeiture of awards and entitlements can only arise as a consequence of a judicial process, except in two circumstances, both of which involve misconduct. While misconduct is not specifically defined in

regulations, it is provided for under the Royal Warrant 1940 in the case of a soldier who is '*discharged for misconduct occurring during the operations for which the medal is granted*' and AMR 799 in the case of an officer whose '*commission is cancelled for misconduct'*.

9. AMR 189(A) explanatory clause 270(1) provides for discharge in consequence of misconduct. That clause states that:

> *when a CO not having power, or not having exercised power to discharge, considers it desirable that a soldier should be discharged in consequence of an offence or other misconduct, he will apply to the formation… commander. The CO will state whether the soldier is thought to have misconducted himself with a view to discharge.*

10. AMR 190A(1) further requires that the cause of discharge must be entered on the soldier's discharge certificate. Of the 21 reasons for discharge listed in that Regulation, four are directly relevant to the criteria found in AMR 799 and the 1940 Royal Warrant. They are: *(vi) by sentence of dismissal, discharge, or discharge with ignominy, by a court martial; (xviii) having been guilty of misconduct; (xx) having, during his service, been sentenced to penal servitude or imprisonment; or (xxi) having been found by a prescribed court to have been convicted of a disgraceful or infamous crime or to be of notoriously bad character*. To affect forfeiture of entitlements as a result of misconduct, '*having been guilty of misconduct'* must be stated clearly as the reason for discharge on the Discharge Certificate.

The Australia Service Medal 1939-45

11. The Australia Service Medal 1939-45 was established by Royal Warrant on 13 August 1949. It was granted for completion of 18 months full-time duty in the Australian Armed Forces at home or overseas between 3 September 1939 and 2 September 1945. Unlike Imperial awards that were subject to eligibility criteria prescribed in the Dedman Paper, the ASM 1939-45 eligibility criteria were prescribed in its Warrant. It is the only award that prescribes the nature of a soldier's discharge as one of the eligibility criteria. Clause 6 of the Warrant states that '… *Only those who have received, or would be entitled to receive, an honourable discharge shall be eligible…*'.

12. Notwithstanding this criteria, over time there have been inconsistencies in the way that claims for restoration of this award were handled. Sometimes delegates have applied the clause 6 provision to deny the restoration of other awards which have no such provision, while also not restoring the ASM 1939-45. On other occasions, the other awards have been restored, but the ASM 1939-45 has not. On other occasions, the ASM 1939-45 has been restored without consideration of the nature of discharge. The Tribunal was unable to find and Defence confirmed that no Regulations have been made for the ASM 1939-45. In the absence of such Regulations, there is no provision to introduce executive instructions such as MBIs or other orders to define honourable discharge for the purposes of the Warrant. In addition, without such a definition, inconsistencies have arisen in respect of how the nature of discharge was interpreted.

13. It can be concluded from both the 1985 COSC decision and the 1996 Army policy that Defence has two categories of discharge; honourable and dishonourable. In its submissions to the Tribunal, Defence however confirmed that it does not have any definition for dishonourable discharge. There were no specific regulations governing dishonourable discharge in 1944 when Mr Archibald Lawrence Boyes and Mr John Thomas Boyes were discharged. However, soon after the ASM 1939-45 was established in 1949, MBI 115/49 (as amended 8 Dec 1950) was authorised and revoked all previous instructions. While not made pursuant to the Warrant, it appears to reflect the sentiment of the time and is useful in understanding the background to including the type of discharge as an eligibility criterion. It listed the mandatory circumstances under which dishonourable discharge would apply to a soldier as being: sentenced by court martial to discharge with ignominy or discharge from the Defence Force; discharged or dismissed by the Governor General under DA 44(2); or as a result of a finding made under DA 141. In addition, if a soldier was discharged under AMR 184(A) *then the endorsement "dishonourable discharge" will be added after the reason for discharge*. At the very least, although not prescribed by regulation, it would also be expected to have been written on the soldier's Service Record.

14. In the absence of a soldier being discharged in the circumstances outlined above or 'dishonourable discharge' being written on certificates and records at the time, it could be reasonably concluded that the soldier's discharge was therefore 'honourable'.

ANNEX B

History of Forfeiture of Medal Entitlements

Forfeiting and Withholding of Medals and Entitlements

1. If an officer or a soldier was convicted of certain offences, the Military Board could, at its discretion, order the forfeiture of awards. For those awards already issued, forfeiture or loss of the award would apply. In the case of an entitlement to an award having been established but the award not yet issued, rather than forfeit that entitlement, the Military Board could order the withholding of the entitlement.

2. Since the 1940s, the use of the term 'withheld' has ceased and it seems that it was replaced in general usage by 'forfeited' being applied to both circumstances. Although this has effectively blurred the discrete difference between the two terms, the wording used in regulations such as AMR 799 (1943) is an example of the use of 'forfeited' in both cases, where it says '*the Military Board may... order to be forfeited any war medal, awarded to any person... which is in his possession or to which he is entitled...'*.

3. A broad examination of available service records of soldiers whose awards were either forfeited or withheld, based on correspondence made available by the Directorate in January 2013 shows that in the clear majority of cases, awards were simply withheld (not issued) at the end of the Second World War rather than forfeited. This is probably because the members concerned were administratively discharged some years before the eligibility criteria for the awards were promulgated in the prerogative instruments, and the medals actually issued.

Forfeiture of Medal Entitlements up to 1939

4. Provisions for the forfeiture of medal entitlements as they relate to Australia have their origins in the beginning of the First World War. Imperial war medals were granted by command of the Sovereign. The British practice at the time, and subsequently, was to promulgate provisions for forfeiture and restoration of war medals in *Royal Warrants for the Pay, Appointment, Promotion and Non-Effective Pay of the Army* (Royal Warrants). Army Council (UK) Instructions to administer the awards were then written to strictly comply with those Royal Warrants. The 1914 Royal Warrant set out the original provisions for forfeiture and restoration of war medals. Mandatory forfeiture of all medals and decorations (except the Victoria Cross) would occur if a soldier was found guilty by a court martial of desertion or fraudulent enlistment; was discharged with ignominy, or expressly on account of misconduct, or on conviction by the civil power, or on being sentence to penal servitude, or for giving a false answer on attestation.

5. At the conclusion of the First World War application of these provisions in respect of the Australian Imperial Force (1st AIF) were prescribed in Australian Military Regulations (AMR) 1109. A Royal Warrant in 1920 amended the 1914 Warrant provisions. Due to the large number of cases of forfeiture and restoration involved at that time, the Australian Defence Department sought approval of the Army Council (UK) for the Military Board (Australia) to exercise the discretionary

powers to decide cases of restoration then vested in the Army Council (UK). In doing this, it was made clear by the Australian authorities that there was no desire or intention to depart from the provisions for the issue and forfeiture of medals that were set out in Royal Warrants. In 1922, in a cable to the Australian Military Board, the Army Council (UK) agreed to those conditions and delegated power to the Military Board to restore forfeited war medals.

6. In 1927 AMR 799 and 800 were made pursuant to the *Defence Act 1903* and subsequently issued by Australia and applied only to the 1st AIF. These regulations specified the conditions governing forfeiture and restoration of war medals as set out in the Royal Warrant current at the time. In contrast to the British provisions covered by the Army Council (UK) delegation, the Australian regulations also added additional criteria for forfeiture that had not been specified in the Warrant, namely, that '*a soldier... who is discharged with ignominy or for misconduct... Shall forfeit all war medals of which he is in possession or to which he is entitled*'. The Army Council Instructions (UK) made under British legislation and not the Royal Prerogative, did not apply in Australia and could not override AMR 799.

Forfeiture of Medal Entitlements 1940 - 1960

7. In 1940, subsequent to the raising of the 2nd AIF, a new Royal Pay Warrant was issued giving discretion to the Army Council (UK) to withhold entitlements or to order forfeiture of an award only as a result of those offences specifically stated in the Warrant. This provision was set out as follows:

> *1227. (a) every soldier who has been convicted of an offence of the following nature,* (namely)*, treason, sedition, mutiny, cowardice, desertion or disgraceful conduct of an unnatural kind... shall be liable at the discretion of Our Army Council to forfeit any war medal of which he may be in possession or to which he may be entitled.*

8. In 1942, prior to the enactment of the *Statute of Westminster Adoption Act 1942*, doubt arose as to the propriety but not the legality of the provisions in AMR 799 and 800 that clearly went beyond the explicit provisions of the extant 1940 Royal Warrant. At that time, the Judge Advocate General advised the Attorney General that '*it would appear that it is hardly proper for the Commonwealth to be dealing (in a different way from the UK) with a gift (of Imperial war medals) by His Majesty*'. It was suggested that both AMR 799 and 800 (1927) be repealed but if not they should be amended to conform strictly to the 1940 Royal Warrant.

9. In 1943, AMR 799 (1927) was repealed and a new Regulation inserted in its stead. In accordance with AMR 9A, prior to 1943 the mutually supplemental 1940 Royal Warrant and AMR 799 (1927) applied. From 1943, the mutually supplemental 1940 Royal Warrant and AMR 799 (1943) became the basis for determining the forfeiture of Imperial awards as they applied to the 2nd AIF. This gave the Military Board discretionary authority to order forfeiture of war medals already awarded or those to which a person was entitled, only in the following circumstances:

Royal Warrant 1940

a. **Officer and Soldier** - convicted for treason, sedition, mutiny, cowardice, desertion or disgraceful conduct of an unnatural kind.
b. **Soldier** - has not rendered approved service (defined in the Warrant as deserted from the service, suffers death by sentence of court martial, or is discharged for misconduct occurring during the operations for which the medal is granted).

AMR 799 (1943)

c. **Soldier** - is by sentence of court martial, sentenced to death, penal servitude, imprisonment, discharged with ignominy from His Majesty's service or discharged from the Defence Force.
d. **Soldier** - is by sentence of a civil court, sentenced to death, penal servitude or imprisonment.
e. **Officer** - is by sentence of court martial, sentenced to death, cashiered or dismissed from His Majesty's service or from the Defence Force.
f. **Officer** - is by sentence of civil court sentenced to death, penal servitude or imprisonment.
g. **Officer** - Commission is cancelled for misconduct.

10. Forfeitures of Imperial awards or entitlements ordered subsequent to 1943 for Australian soldiers would consequently be invalid if they were made for reasons other than those stated above. Any MBI that was issued in respect of forfeiture would also only be valid insofar as it was consistent with those provisions.

11. In June 1946, by command of His Majesty, the British Prime Minister, First Lord of the Treasury and Minister for Defence presented to the British parliament, a paper, commonly referred to as Command Paper 6833, outlining the conditions of award of the campaign stars and medals for those full-time members of the British armed forces and foreigners who had served with British forces, during the Second World War. The document contained no reference to forfeiture or restoration of awards.

12. Subsequent to the promulgation of Command Paper 6833, an Australian instruction entitled *War Medals (in Commemoration of a Campaign): Withholding of Grant: Forfeiture and Restoration* was issued by the Director of Personnel Services (DPS) to O2E (which became Army's Central Army Records Office – CARO). Defence in its submission stated that this Instruction was used as the Australian authority in the immediate post-war period for forfeiture of medal entitlements. The instruction was purportedly based on the provisions of the 1940 Royal Warrant, but took no account of the provisions of AMR 799 (1943). In fact it is more consistent with the repealed AMR 799 (1927). It combined into a single provision for withholding entitlements, all of the circumstances prescribed in the 1940 Royal Warrant relating to officers along with those relating to soldiers. The Instruction was not made under any MBI which was consistent with AMR 799 (1943) and the 1940 Royal Warrant and as such cannot be held to have any basis for the purposes of the administration of the awards except where it is consistent with AMR 799 (1943) and the 1940 Royal Warrant.

13. In 1947 a Schedule was issued by Command of the Army Council (UK) which retrospectively amended the 1940 Royal Warrant. It revised the regulations governing the forfeiture and restoration of war medals. This Schedule did not bring about any consideration in Australia to amend AMR799 (1943). As an Army Council (UK) document it has no authority in Australia and in any case, since it refers to discharge of soldiers under provisions of the King's Regulations, it can have no standing in accordance with AMR 9(3).

14. The eligibility criteria to qualify for Imperial awards as far as Australian forces were concerned were drawn directly from Command Paper 6833 and supplemented with Australian specific qualifications for the Defence Medal. They were published in December 1948 by the Australian Minister of State for Defence, the Honourable John J. Dedman MP, in the *Summary of the Conditions of Award of the Campaign Stars, The Defence Medal and the War Medal* (known as the Dedman Paper). This gave the Australian Government's approval to the conditions under which Australian forces could qualify for Imperial awards instituted under the prerogative. The Dedman Paper as was the case with Command Paper 6833 contained no reference to forfeiture or restoration of awards.

15. In 1950, a Royal Warrant for the Grant, Forfeiture and Restoration of Medals (UK) replaced the corresponding provisions of the 1947 Schedule. This 1950 Royal Warrant introduced a provision for British reserve soldiers who had been discharged on account of misconduct under King's Regulations 1940. The 1950 Royal Warrant did not bring about any consideration in Australia to amend AMR799 (1943). In any case, since it refers to discharge of soldiers under provisions of the Kings Regulations, the 1950 Royal Warrant also can have no standing in accordance with AMR 9(3).

16. Also in 1950, Australian Defence legal advice pointed out inconsistencies between a draft MBI being developed and AMR 799 and 800. This advice suggested (wrongly) that the regulations AMR 799 (forfeiture) and 800 (restoration) could not properly override instruments and instructions issued under the prerogative power. The advice however failed to include the need for MBIs to be consistent with provisions contained in the AMRs. Regardless of this, in September 1951, instructions pertaining to the forfeiture and restoration of awards for members the Australian Military Forces (AMF) were approved and promulgated in MBI 148/1951, *Awards - Medals - Forfeiture and Restoration*.

17. On 7 December 1951, MBI 148/1951 was amended with a further provision which stated that a soldier:

> *who has been discharged from the Military Forces for any of the reasons specified in AMR 184(1) or AMR 184(A)(1) and such discharge is recorded in his record of service as being on account of misconduct during his service, or discreditable service, or is classified as "dishonourable discharge" ... will forfeit any campaign star, commemorative war medal and clasp, of which he may be entitled by his service up to the date of conviction, ... dismissal ... or discharge.*

18. MBI 148/1951 and its amendment however were not consistent with the criteria for forfeiture of awards and entitlements prescribed in the mutually supplemental 1940 Royal Warrant and AMR 799 (1943). If new criteria and changes to discretionary authority needed to be made and promulgated in an MBI then AMR

799 (1943) should have been amended to provide the necessary authority for such a change. An MBI can only be valid insofar as it is consistent with the AMR from which it derives its authority.

19. AMR 799 and 800, which had not been otherwise amended since 1943, were both repealed in 1955. The Tribunal could not find any evidence that this resulted in consequential amendments to any of the subordinate MBIs and Orders which had been made under the purported authority of those AMRs.

Forfeiture of Medal Entitlements 1960 - 1985

20. There was no replacement AMR governing forfeiture and restoration of Imperial awards introduced after AMR 799 was repealed in 1955. In the absence of an AMR, MBI 102-1 *Awards – Medals: Forfeiture and Restoration* was promulgated in 1963 in pursuance of the general processes of control and administration of the Military Forces conferred on the Military Board by the *Defence Act 1903*. MBI 102-1 could therefore be held to be valid. It provided for the circumstances in which war medals were to be forfeited. Its retrospective application (clause 9) was specifically restricted to '***offences*** *committed subsequent to 2 Sep 39*' (emphasis added) and therefore can only be applied retrospectively to forfeitures as a result of:

> [clause 2(a)] *convicted of treason, sedition, mutiny, cowardice, desertion, or disgraceful conduct of an unnatural kind;*
>
> [clause 2(b)] *who has, by sentence of court martial, been cashiered, dismissed from Her Majesty's Service, discharged with ignominy from Her Majesty's Service, dismissed or discharged from the Defence Force; or*
>
> [clause 2(c)] *whose commission has been cancelled or has been retired and such retirement is recorded in his record of service as being on account of an offence or misconduct of any kind during his service.*

21. MBI 102-1 then added two additional sub-clauses which were reasons for discharge, not offences, and therefore cannot be retrospectively applied under the provisions of clause 9. The preserved entitlements established by a soldier under the prerogative instruments, unaffected by AMR 799, and retained up to 1963 are not affected by the making of MBI 102-1. The rights of entitlement accrued under the repealed AMR 799 are preserved in accordance with the *Acts Interpretation Act 1901*.

22. Since MBI 102-1 was a valid instruction, forfeitures made after 1955 and before 1963 could only be ordered where they were consistent with the provisions of paragraph 20 (above). Forfeitures ordered after 1963 such as those that may have arisen in Vietnam, were valid if made in accordance with the provisions set out in MBI 102-1.

23. In its research, the Tribunal discovered a Defence file that contained comprehensive Departmental legal advice in 1969 regarding aspects of Australian procedures related to the forfeiture and restoration of campaign stars and war medals in general, and in particular those procedures that applied to the ASM 1939-45.

24. This legal advice proceeded on the same basis as the advice rejected in 1950 (see paragraph 16 above) which suggested (wrongly) that AMRs made under the

Defence Act 1903 could not properly override instruments and instructions issued under the prerogative power.

25. In 1970, the then Defence Military Law Sub-Committee examined and reported on the forfeiture and restoration of war medals. It derived much of its position from the 1969 legal advice discussed in paragraphs 23 and 24. It noted that it was not possible to satisfactorily establish the basis for the authority upon which provisions were made relating to the forfeiture and restoration of war medals.

26. Having determined that past procedures were of doubtful authority, the Sub-Committee recommended that a new Royal Warrant should be issued in respect of the grant, forfeiture and restoration of war medals. The Warrant would allow for the Governor-General to make Regulations to govern forfeiture and restoration in the past and in the future. It would also bring into alignment the disparate provisions of each of the Services.

27. On 14 July 1983, the Chiefs of Staff Committee (COSC), chaired by the Chief of Defence Force, considered Report No 4/1983 of the Service Personnel Policy Committee concerning the forfeiture and restoration of war medals. This report addressed matters that were raised as a result of Defence's consideration of a preliminary draft Australian Royal Warrant prepared by the Attorney-General's Department.

28. Defence legal advice in December 1984 suggested that AMR 799 was made in pursuance of the *Defence Act 1903*, and it prescribed circumstances under which members of the Army forfeited war medals. It followed that notwithstanding the absence of provisions in Command Paper 6833 or the later Dedman Paper on forfeiture, AMR 799 conferred sufficient authority for forfeitures of medals. Accordingly it was advised that the forfeitures made before 1955 that were affected in accordance with AMR 799, were valid.

Forfeiture of Medal Entitlements 1985 – 2002

29. The Tribunal noted that the 1984 legal advice, discussed above seems not to have influenced subsequent Defence consideration. A few months later in February 1985 the COSC proceeded on the basis that there were in fact doubts as to the validity of Service Orders previously made in respect of the forfeiture and restoration of war medals. The COSC decided the following:

a. Forfeiture would be mandatory in cases which bring disgrace to the Service but it was unacceptable that a dishonourable discharge would automatically attract forfeiture of medals. Dishonourable discharge, in itself, even if it includes violence, is not considered to justify mandatory forfeiture of war medals. Medals should be forfeited on conviction of an offence which is considered to be so disgraceful that it would be improper for the offender to retain a medal; medals which have been subject to mandatory forfeiture should not be restored.

b. Decisions on forfeiture and restoration of war medals will be made only within the highest ranks of each Service. CDF and the Chiefs of Staff should be reviewing authorities for decisions concerning the forfeiture and restoration of medals.

c. The individual Service's Chiefs of Personnel are authorities to decide, in cases where discretion is allowed, whether medals shall be forfeited, and whether forfeited medals shall be restored.

d. Forfeiture of all medals should be mandatory in respect of acts which involve aid to the enemy and the following offences:

    i. treason;

    ii. receiving or assisting a person known to be guilty of treason; or doing nothing to prevent commission of the offence by a person known to intend committing treason;

    iii. treachery;

    iv. inciting mutiny;

    v. assisting prisoners of war to escape;

    vi. sabotage;

    vii. aiding an enemy or intent to assist the enemy; communicating with an enemy, whether or not with intent to assist the enemy;

    viii. taking part in a mutiny.

30. The Tribunal noted that the 1985 COSC consideration was the first time that records show Defence at the highest level, since the Second World War, comprehensively addressing the shortcomings of the forfeiture and restoration system.

31. At the Tribunal hearing in March 2013, the Directorate confirmed that 1985 was the last time that Defence leadership considered this issue formally. The provisions agreed by the COSC, as outlined above, were used as Defence's interim policy for forfeiture and restoration of awards until 2002. The COSC decision however was never promulgated as an authorised Defence or Service instruction under the *Defence Act 1903*.

32. Subsequent to the 1985 COSC decision, the proposed Royal Warrant was never progressed. In 1990, the Assistant Secretary of Defence's Legal Branch, Mr Stephen Brown (who had authored the earlier 1984 legal advice see paragraph 28 above) advised that a Royal Warrant was not necessary. Brown instead advised that existing Service instructions should be revoked and in their place, a Defence Instruction (General) should be introduced.

33. During this time, the three Services continued to administer their own awards, in accordance with their own instructions, which were different from one another.

34. The Directorate in its 16 May 2013 submission, provided the Tribunal with Defence legal advice from 1991 by Major D.W. Daley which confirmed that the then Assistant Chief of Personnel - Army (ACPERS-A) had requested an instrument to enable the delegation of power to restore forfeited war medals. While legal opinion at the time advised that a formal instrument was not required, it went on to also advise that the ADF had no discretionary powers in relation to the forfeiture or restoration of

war medals. The opinion was that any forfeiture of war medals was invalid if ordered for reasons other than those contained in the Royal Pay Warrants applicable at the time. This advice was clearly wrong. It is not clear from the records what was then done with this issue until 1994.

35. In 1994, the then ACPERS-A, Major General J.P. Stevens, conforming with the 1985 COSC decisions and subsequent to Brown's 1990 and Daley's 1991 legal advice, issued instructions to his staff outlining how forfeiture and restoration matters were to be handled by the Army. These instructions were not made pursuant to the *Defence Act 1903* but were nevertheless developed into policy in 1996.

36. In 1995 Prime Minister Keating sought and gained approval from the Queen for the Sovereign's power to be delegated to the Governor-General, on the advice of the Australian Government, to amend the conditions, as they applied to Australian Defence Force members, of Second World War awards specified in both Command Paper 6833 and the Dedman Paper, and also for the ASM 1939-45. This delegated power was later used to make amendments to the qualifying conditions for the 1939-45 Star, the Africa Star and the Pacific Star.

37. The Tribunal noted that this appears to be the only time that Australia had formally requested such an authority to amend the conditions for Second World War awards as set out in prerogative instruments.

38. In 1996, soon after the Queen's approval (outlined above), and in continuation of Major General Stevens's 1994 policy direction, the Army began to restore Second World War campaign awards that had been forfeited or withheld. The policy directed that restoration could be made to persons whose purported forfeiture was not due to the range of specified, serious offences, or was not affected by the Army Council or Military Board in accordance with the prescribed circumstances set out in the 1940 Royal Warrant. The Tribunal noted that the Army policy linked back directly to the 1940 Warrant rather than any intervening Regulation such as AMR 799, or Instruction such as MBI 148/51 or MBI 102-1.

39. The Army policy, in directing the restoration of forfeited medal entitlements to soldiers who had purportedly forfeited them, used the following criteria:

a. For the ASM 1939-45 forfeiture was only valid if affected by the Governor-General, or in cases of dishonourable discharge.

b. For Command Paper 6833 medals, since there was no provision in either the 1931 or 1940 Warrants for mandatory forfeitures, any mandatory forfeitures purportedly effected by the Military Board were not valid. Discretionary forfeitures affected by the Military Board and only in accordance with the prescribed circumstances set down in the 1940 Warrant (see next sub paragraph) were valid.

c. The purported forfeiture did not result from a conviction for any offence of: treason, assisting treason, treachery, inciting mutiny, assisting POW to escape, sabotage, aiding the enemy, communicating with the enemy, mutiny, sedition in war, cowardice, desertion (in the face of the enemy), disgraceful conduct of an unnatural kind.

40. In implementing its policy, the Army sought information relating to former members who, due to the nature of their discharge, forfeited their entitlement to awards. Army then proceeded to consider and approve hundreds of claims for restoration. Defence confirmed that everyone who had been subject to forfeiture of awards was not considered by the Army because only those who had submitted applications from the start of the restoration policy in 1996 were reviewed. Any prior applications were not reviewed nor were individual service records retrospectively examined. New applications had to be made.

Forfeiture of Medal Entitlements - 2002 to present

41. In 2000, Defence advised the Minister for Veterans' Affairs that the Army's policy approach to restoration of forfeited entitlements was to be the basis for a new defence instruction. In 2002, *Defence Instruction (General) Personnel 31-8* [DI(G) PERS 31-8] was made pursuant to the *Defence Act 1903* and promulgated. DI(G) PERS 31-8 carried forward the decisions of the 1985 COSC. Its introduction stated that '*in 1985…, following careful consideration, COSC recommended that interim procedures, in accordance with Defence Force guidelines, be introduced and those procedures have been used to date*'. It did not however include any guidelines for dealing with forfeiture and restoration other than at clause 12 which states that '*it is not envisaged that there would be any requirement to forfeit any Imperial awards as this action would already have been taken at the time of the member's discharge from the Australian Armed Forces. However, due to contemporary policy, it may be appropriate to restore some previously forfeited entitlements*'.

42. DI(G) PERS 31-8 nominated the Director of Honours and Awards as the 'prescribed delegate for forfeiture and restoration of Imperial awards and badges'. In exercising the discretion of the delegate, the Director was unable to specify what consistent criteria, if any, were used over time in every case to assess claims or whether there was any consideration as to the validity of such criteria when applied to Imperial awards. Nor was there evidence provided to show that any consideration was given as to whether awards had been properly forfeited in the first instance. Instead there had been a general presumption that all forfeited and withheld entitlements had occurred correctly. Nevertheless, it appears that from the introduction of this policy in 2002 to 2005, restoration occurred in most cases, regardless of whether the applicant was the member involved or the member's relative or beneficiary.

43. In 2005, a policy statement was issued by the Directorate which purported to vary the provisions of DI(G) PERS 31-8. There was no formal amendment of the Instruction, but a new restrictive posthumous policy provision was introduced by the Directorate. This required that claims for restoration of forfeited entitlements would only be considered where the person affected was still living and able to make a personal application for the restoration.

44. It was submitted that when the Directorate forms a policy… '*it will always be staffed back through the three Services and Defence Legal. DI(G) PERS 31-8 was established through this process in 2002*'. The Tribunal observed that indeed there was evidence of very wide consultation in 2002 and again prior to the promulgation of the later *Defence Honours and Awards Manual 2012*. However, the Directorate was unable to provide any evidence to substantiate that the 2005 policy statement was

properly considered in this way or authorised by the CDF and Secretary. In any case it was never promulgated as a properly authorised amendment to DI(G) PERS 31-8 and as such cannot be held to be valid.

45. Defence's current instruction on the restoration of Defence honours and awards, the *Defence Honours and Awards Manual 2012*, requires applications for restoration to be made by the person who established the entitlement to the awards and prohibits applications being made on behalf of deceased persons. This is not consistent with arguments put by Defence throughout the course of this review – that entitlements of those who may have previously benefited are supposed to be protected without prejudice. In any event, the provisions of the Manual could only apply to claims made in respect of forfeitures that have been properly ordered in accordance with AMR 799 (1943) and the Royal Warrant 1940.