



Australian Government

Defence Honours and Awards Appeals Tribunal

Ferguson and the Department of Defence [2015] DHAAT 02 (03 February 2015)

File Number(s) 2014/008

Re **Lieutenant Wayne Henry Ferguson RANEM**
Applicant

And **Department of Defence**
Respondent

Tribunal Professor David Horner AM (Presiding Member)
Brigadier Kevin O'Brien CSC, (Retd)

Hearing Date 12 December 2014

DECISION

On 03 February 2015 the Tribunal decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Lieutenant Wayne Henry Ferguson RANEM is not eligible for the award of the Australian Service Medal 1945-75 with Clasp 'SE ASIA'.

CATCHWORDS

Australian Service Medal 1945-75 with Clasp 'SE ASIA'

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VB(2), 110VB(3)

Australian Service Medal 1945-75 Letters Patent and Regulations 1995

Australian Service Medal 1945-75 Regulations 2001

REASONS FOR DECISION

Introduction

1. The applicant, Lieutenant Wayne Henry Ferguson RANEM (Leut Ferguson), seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate) that he is not eligible for the Australian Service Medal 1945-75 (ASM 45-75) with Clasp 'SE ASIA'.
2. On 31 March 2005, Leut Ferguson wrote to the Directorate 'requesting an assessment to be undertaken for any outstanding awards for himself'. On 7 December 2005 the Directorate advised Leut Ferguson that he had received all the awards that he was entitled to, at that point in time. This response did not refer to him being eligible for the ASM 45-75 with Clasp 'SE ASIA'.
3. In its response on 7 December 2005 the Directorate included a copy of DEFGRAM No 233/2001 dated 2 July 2001, which outlined the policy regarding double medalling and the award of clasps for the ASM. Leut Ferguson states that at that time he 'accepted the response from the Department'. He did not think any more about the issue until he received a copy of signal ADHQ R250500Z dated September 2006 which announced the award of the ASM for service in East Timor with the Clasps 'EAST TIMOR' and 'TIMOR-LESTE'.
4. On 21 February 2008, Leut Ferguson emailed the Directorate to query the ASM policy concerning Clasps 'EAST TIMOR' and 'TIMOR-LESTE'. On the same day, Leut Ferguson wrote to the Parliamentary Secretary for Defence Support, and Mr Tony Corcoran of the Defence Ministerial and Executive Support area responded to Leut Ferguson on 1 April 2008, spelling out the policy.
5. On 16 April 2014, Leut Ferguson applied to the Defence Honours and Awards Appeals Tribunal (the Tribunal) for a review of his eligibility for the ASM 45-75 with Clasp 'SE ASIA', and also for a review of the Department of Defence's current policy regarding the award of the Clasps 'FESR' and SE ASIA'.

Tribunal Jurisdiction

6. Pursuant to s110VB(2) 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 to refuse to recommend a person for a Defence award in response to an application. The role of the Tribunal is to determine whether the decision of the Directorate is the correct and preferred decision having regard to the applicable law and the relevant facts. It is not the role of the Tribunal, when reviewing a decision, to review the actual policy or to determine whether the policy is flawed or in need of review. But under s110VB(3) the Tribunal may also make recommendations to the Minister that the Tribunal considers appropriate and that arise out of, or relate to, the Tribunal's review of a reviewable decision.

Conduct of the review

7. In accordance with its *Procedural Rules* 2011, on 14 May 2014, the Tribunal wrote to the Secretary of the Department of Defence informing him of Leut Ferguson's application for review and requesting that he provide a report. On 11 August 2014, the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report the Directorate confirmed its position that Leut Ferguson's service did not meet the eligibility criteria for the award he sought. On 20 August 2014 the Tribunal forwarded a copy of the report of the Directorate to Leut Ferguson for comment. On 25 August 2014 Leut Ferguson provided a written reply.

8. The Tribunal met on 14 November 2014 when it considered the material provided by Leut Ferguson and the Directorate. The Tribunal conducted a hearing on 12 December 2014 when it heard oral evidence from Leut Ferguson by telephone, and from Mr Tony Sillcock of the Department of Defence.

The Australian Service Medal 1945-1975

9. The ASM 45-75 is an Australian award instituted by Letters Patent on 22 February 1995 'for the purpose of according recognition to members of the Defence Force, and certain other persons, who rendered service in non-warlike military operations'. The Schedule sets out the *Regulations Governing the Award of the Australian Service Medal 1945-1975* (the ASM 45-75 Regulations), which states:

The medal may be awarded to a member of the Australian Defence Force who rendered service as such a member while posted to or serving as a member of the Australian element of the *declared operation* for a period of 30 days, or for periods amounting in the aggregate to 30 days.

10. Regulation 3 states that the Governor-General, on the recommendation of a Minister may declare a non-warlike operation in which members of the Defence Force were engaged, between 3 September 1945 and 16 September 1975, to be a *declared operation*. Regulation 4 of the ASM 45-75 Regulations sets out the conditions for the award of the medal as follows:

Conditions for award of the Medal

4.(1) The Medal may be awarded to:

- (a) a member, or former member, of the Defence Force; or
- (b) a person in a class of persons determined by the Minister for the purposes of these Regulations;

who served in connection with a declared operation.

4.(2) The conditions for the award of the Medal are determined by the Governor-General on the recommendation of a Minister.

4.(3) The Medal may only be awarded to a person who fulfils the conditions for the award of the Medal.

4.(4) An initial award of the Medal to a person is made in the form of the Medal with a clasp denoting the declared operation for which the Medal is being awarded.

4.(5) A subsequent award of the Medal to the person may only be made in the form of an additional clasp to the Medal.

11. On 7 June 1995, the Governor-General, acting under the provisions of paragraphs 6 and 7 of the ASM 45-75 Regulations, made a determination in respect of the Medal in which paragraph 6 refers to further awards as follows:

Further awards

6. A further award or awards for subsequent service in another area or areas is recognised by the presentation of an additional clasp or clasps. The clasp or clasps are attached to the ribbon...

Australian Service Medal 1945-1975 with Clasp ‘FESR’

12. On 23 March 2001, the Governor-General determined the conditions for the award of the ASM 45-75 with Clasp ‘FESR’. The Governor-General declared at paragraph (b):

that non-warlike operations in which members of the Australian Defence Force were engaged in, namely participation by ships of the Royal Australian Navy in the Far East Strategic Reserve that commenced on 2 July 1955 and ended on 31 October 1971, and during such period as those ships were formally allocated or assigned to the Far East Strategic Reserve, to be a *declared operation* for the purpose of the Regulations.

13. The Governor-General then determined the conditions for the award of the medal, which included members who were posted or who served as a member of the Australian element of the declared operation or members who served as part of the contribution of a foreign Defence Force to the declared operation. The Determination also includes rules for ineligibility at paragraph (d):

a member of the Australian Defence Force is not eligible for an award of the Medal where:

a separate award of the Australian Service Medal 1945-75 with Clasp ‘SE ASIA’ has been awarded.

Australian Service Medal 1945-1975 with Clasp ‘SE ASIA’

14. On 8 June 2001, the Governor-General acting under Regulation 3 of the ASM 45-75 Regulations, revoked the Declaration and Determination made on 23 March 2001 and declared a number of non-warlike operations to be ‘a *declared*

operation for the purpose of the Regulations'. That declaration, as is relevant to Leut Ferguson's application, stated at paragraph (b):

that the following non-warlike operations in which members of the Australian Defence Force were engaged with elements of the South East Asia Treaty Organisation; the Australia, New Zealand and the United States (Pacific Security) Treaty; Far East Strategic Reserve; the United Nations; the Australian, New Zealand and United Kingdom (ANZUK); Five Power Defence Arrangement; and Australian Army Survey Operations in South East Asia during the following periods to be a *declared operation* for the purpose of the Regulations:

(vi) participation by ships of the Royal Australian Navy in the ANZUK Forces that commenced on 30 October 1971 and ended on 14 March 1975, and during such periods those ships were formally allocated or assigned to those Forces.

and at paragraph (d):

determine, for the purposes of this determination, that a person is not eligible for an award of the Medal where;

(i) a separate award of the Australian Service Medal 1945-75 with Clasp 'FESR' has been awarded.

Background to operational service for the ASM 45-75 with Clasps 'FESR' and 'SE ASIA'

15. The British Commonwealth Far East Strategic Reserve (FESR) was established in 1955 to deter against communist Chinese aggression in South East Asia and confront continued armed Malayan communist terrorism. Australia announced its decision to contribute units from the Navy, Army and Air Force to the FESR in April 1955. The government agreed that the Navy contribution to the FESR could be:

employed in defence of the Federation of Malaya and Singapore and of the sea communications in the Malayan area against external aggression... (and) as far as possible, HMA ships allocated to the Strategic Reserve be detailed for flag showing duties in South East Asian waters in order that their participation in the Strategic Reserve may be fully appreciated in the countries in this area.¹

16. The FESR remained in place for the next 16 years, but with the emerging British Government policy of their withdrawal from East of Suez by the end of 1971 the British Government sought to maintain a 'modest permanent force' in the South East Asia region.

¹ *Directive for the Attachment of H.M.A. Ships to the Far East Fleet for Service with the Strategic Reserve*, Department of the Navy 13779 dated 21 December 1956 in Major General The Hon. R F Mohr, RFD ED (Retd), *The Review of Service Entitlement Anomalies in Respect of South-East Asian Service 1955-75*, Commonwealth of Australia, Defence Publishing Service, 2000, Enclosure 1, Chapter 3.

17. A combined force from Australia, New Zealand and the United Kingdom (ANZUK) was proposed to allow for greater Defence efficiencies, as a deterrent to armed attack or the threat of such attack and to be integrated gradually with forces from Malaysia and Singapore. The term ANZUK was adopted for this combined force which came into being from 31 October 1971. ANZUK at its peak comprised approximately 9,000 personnel, the greater majority of whom came from Australia. Australia's military contribution to ANZUK, in addition to RAAF and Army units, included one Royal Australian Navy (RAN) escort permanently based in Singapore, with other RAN ships visiting the area for exercises from time to time.

18. As part of the changing circumstances in South East Asia, the Five Power Defence Arrangements (FPDA) also came into effect and replaced arrangements such as ANZAM² and the FESR³. The Five Powers were Australia, Malaysia, New Zealand, Singapore and the United Kingdom. ANZUK was the direct successor to ANZAM and FESR⁴ and while not an integral part of FPDA, it essentially operated as its naval element. ANZUK as a force was formally disbanded in December 1974⁵.

19. Australia's contribution to ANZUK had completely ceased by April 1975 and all activities were subsumed under the FPDA⁶. The period of qualifying service with ANZUK for the purposes of Australian medallic recognition is from 31 October 1971 to 14 March 1975.

Leut Ferguson's Service

20. Leut Ferguson enlisted in the Permanent Naval Forces as a rating on 3 January 1967. He progressed through the ranks from Able Seaman to Petty Officer until 8 August 1982, when he was selected for officer training. He was promoted acting Sub-Lieutenant and on 8 August 1984 he was promoted to the rank of Lieutenant.

21. He resigned his Commission in the full-time Navy on 8 January 1988 with the rank of Lieutenant having served 22 years and 321 days. On 9 January 1988 Leut Ferguson transferred to the Royal Australian Navy Emergency List of Officers (RANEM).

22. Leut Ferguson has been awarded the following medals and badges for his service:-

Australian Active Service Medal 1945-1975 with Clasp 'VIETNAM'
Vietnam Medal
Australian Service Medal 1945-1975 with Clasps 'PNG' and 'FESR'

² Australia, New Zealand and Malaya (ANZAM) was an agreement between those countries to exercise command through the ANZAM Chiefs of Staff Committee in time of war. Australia's responsibility was largely confined to the defence of sea communications. Edwards, Peter, *Crises and Commitments: The Politics and Diplomacy of Australia's Involvement in Southeast Asian Conflicts 1948-1965*, Allen & Unwin, Sydney, 1992, p 61.

³ The Five Power Arrangements and ANZUK. Defence Committee FPDA and ANZUK, Agendum 6/1972 dated 4 April 1972. NAA: A7942, F59.

⁴ Pfennigwerth, Ian, *Tiger Territory: The Untold Story of the Royal Australian Navy in Southeast Asia from 1948 to 1971*, Rosenberg Publishing, Sydney, 2008, p 242.

⁵ *Defence Report 1975*, AGPS, Canberra, 1975, p 8.

⁶ Five Power Arrangements – ANZUK. Cabinet Decision 823 dated 2 July 1973. NAA: A5931 CL285.

Defence Force Service Medal with First Clasp
National Medal
Australian Defence Medal
Republic of Vietnam Campaign Medal
Returned from Active Service Badge

23. Leut Ferguson's Service Record details that he served on board the following ships at the relevant periods for eligibility for the ASM 45-75 with Clasp 'FESR' or with Clasp 'SE ASIA'.

HMAS *Vendetta* (18 March 1968 to 19 September 1968) where he accrued 187 days towards the ASM 45-75 with Clasp 'FESR'; and

HMAS *Labuan* (6 April 1974 to 12 May 1974) where he accrued 37 days towards the ASM 45-75 with Clasp 'SE ASIA'.

24. HMAS *Vendetta* was deployed in South East Asia waters as part of the RAN force with the FESR from 7 March 1968 until October 1968, when she returned to Australia.

25. HMAS *Labuan* was deployed in South East Asian waters from 6 April 1974 to 12 May 1974. However, Defence contends that Leut Ferguson's service with HMAS *Labuan* cannot be counted for the ASM 45-75 with Clasp 'SE ASIA' because the Regulations state that this cannot be awarded if the Clasp 'FESR' has previously been awarded.

Leut Ferguson's Submission

26. In his submission Leut Ferguson stated that when he was awarded the ASM 45-75 with Clasp 'FESR' but not with Clasp 'SE ASIA' he queried this outcome with the Department of Defence and was sent DEFGRAM No233/2001 dated 2 July 2001. This outlined the policy regarding 'double medalling' and the award of clasps for the ASM.

27. Leut Ferguson accepted this response and thought no more about it until he received a copy of signal ADHQ R250500Z SEP 06 which announced the award of the ASM for service in East Timor with the Clasps 'EAST TIMOR' and 'TIMOR-LESTE'. The policy outlined in the signal allows the award of both clasps if a person had served in 'a second and separate rotation'. Leut Ferguson indicated that, in his opinion, this policy appeared to contradict the policy regarding the ineligibility for the award of the Clasp 'SE ASIA' if a member already had been awarded the Clasp 'FESR'.

28. Leut Ferguson sought clarification of the policy regarding the issuing of clasps for multiple tours and the apparent contradiction between the two policies. In a reply from the Parliamentary Secretary for Defence Support, Leut Ferguson was advised that the policy on 'double-medalling' remained extent and outlined the reasons why the Clasps for 'EAST TIMOR' and 'TIMOR-LESTE' were regarded as being for different specific military operations.

29. Leut Ferguson stated that he believed this explanation was flawed but took no further action. When he learned of the role of the Tribunal he believed this provided an avenue to redress the 'flawed' policy.

30. In arguing his case, Leut Ferguson stated that units assigned to the FESR from 1955 to 1971 were tasked with providing security to the region against internal and external threats. By contrast, units assigned the ANZUK Force from 1971 to 1974 had a different operational role. In the case of HMAS *Labuan*, this was to provide regional aid to Indonesia in the form of surveying and mapping projects. Service in the FESR in the 1960s was quite different from service in the ANZUK Force in the early 1970s. He argued that the Department's claim that this service was part of the 'one operation' is inconsistent with the award of Clasps 'EAST TIMOR' and 'TIMOR-LESTE' for service in East Timor.

The Directorate's Submission

31. In its submission Defence concentrated on the discrete issue of the Regulations, which stated that if a member were awarded the ASM 45-75 with Clasp 'FESR' they could not also be awarded the Clasp SE ASIA'. On that basis Leut Ferguson was not eligible for the ASM 45-75 with Clasp 'SE ASIA'.

32. In his evidence to the Tribunal Mr Sillcock from the Department of Defence sought to explain why there was no inconsistency in the policy. The background to the policy was set out in DEFGRAM No 233/2001 of 2 July 2001, which had been made available to Leut Ferguson. This documents states:

Whilst the elements which make up the Clasp 'SE ASIA' may have been independent agreements, they existed essentially with one aim – to provide security within the South-East Asia region. Additionally, the ANZUK force was created with the same aims as FESR and from existing FESR resources at the time. In effect, ANZUK was FESR under another name.

33. Mr Sillcock explained that the ASM with Clasp 'EAST TIMOR' was awarded to members who served on a series of operations in support of the establishment of an independent East Timor. The main commitment to East Timor finished in May 2004.

34. After the hearing Mr Sillcock informed the Tribunal that in fact a small number of personnel remained in East Timor, principally to maintain the Defence Cooperation Program contribution. He provided the following extract from the *Defence Annual Report 2004-05* for reference:

Australia's peacekeeping role in Timor-Leste, under Operation Spire, concluded with the end of the operation in May 2005, though Defence remains engaged with the United Nations there through the inclusion of three ADF personnel in a new mission known as the United Nations Office in Timor-Leste. Support will also continue in the form of the Defence Cooperation Program, in which 27 ADF personnel will provide training and advice to assist in the development of a sustained East Timor Defence Force to contribute to national and regional security. The ADF's involvement in Timor-Leste

commenced in 1999 and saw the deployment of more than 5,000 personnel over a period of five and a half years.

He concluded that the reference to 'rotation' is therefore correct. 'It is not considered that this changes the view that troops deployed for the operations conducted in East Timor and later in Timor-Leste could be considered to have been part of an ongoing operation.'

Tribunal Consideration

35. As noted earlier, the Tribunal considered that its task was to determine whether Leut Ferguson was eligible for the ASM 45-75 with Clasp 'SE ASIA' according to the Regulations for the Medal. It was not the Tribunal's task to review the policy to determine whether it was consistent with other Defence award regulations.

36. The Tribunal is satisfied that it is the intent of the Regulations that a member cannot be awarded the ASM 45-75 with Clasp 'SE ASIA' if they have already been awarded the ASM 45-75 with Clasp 'FESR'. On this basis, Leut Ferguson is not eligible for the ASM 45-75 with Clasp 'SE ASIA'.

37. With regard to the alleged inconsistency in Defence policy, the Tribunal noted that Defence gave substantial consideration to the issue of whether to award separate clasps for service in the FESR and ANZUK and that Defence had concluded that there was sufficient continuity between the forces deployed to the FESR and ANZUK that they should be considered to be one operation for purposes of the award of the ASM 45-75.

38. The Tribunal noted that according to the Defence signal announcing the conditions of the ASM with Clasp 'TIMOR-LESTE', eligibility for the ASM with Clasp 'EAST TIMOR' for service with the Defence cooperation program in East Timor after 2004 had been 'suspended'. It was only introduced through to 11 May 2006 after the award of the ASM with Clasp 'TIMOR-LESTE' was announced. The new deployment to Timor Leste began on 12 May 2006 when Australian troops were deployed to the island at the request of the Timor Leste Government. Members who served in this operation were awarded the ASM with Clasp 'TIMOR-LESTE'.

39. The Tribunal also noted that the Defence signal announcing the award of the ASM with Clasp 'TIMOR-LESTE' referred to 'a second and separate rotation'. The use of the word rotation carried the implication that service before 2006 and after 2006 was part of one operation for which there were separate rotations. The Tribunal considered that the use of the word rotation to be unfortunate, but did not conclude that the use of the word rotation indicated that the operations before and after May 2006 were necessarily the one operation.

40. After he received a copy of Mr Sillcock's later advice, Leut Ferguson replied that he believed that the ADF's deployment to the Timor region had direct parallels to the ADF's deployments to Southeast Asia. He said that Mr Sillcock's statement had not changed his view 'that the policy regarding the awarding of the Clasp 'SE ASIA

ASM 1945-1975 is flawed and inconsistent with the more recent policy regarding the award of Clasps for EAST TIMOR' and TIMOR-LESTE'.

41. The Tribunal noted, however, that the deployment of Defence Force elements to Timor Leste in May 2006 occurred at the request of the Timor Leste Government after the original deployment to East Timor had ended and was being perpetuated by only a small training and advisory element. The difference between the operations before 2006 and those after 2006 was such that the Government could justify the award of a new clasp.

42. The Tribunal accepted that historians or operational analysts might have varying views as to whether the forces deployed in the FESR and ANZUK were engaged in one or several operations. Defence has one view; Leut Ferguson has another. The Tribunal did not consider that the policy needed to be reviewed.

DECISION

43. The Tribunal has decided to affirm the decision of the Directorate of Honours and Awards of the Department of Defence that Lieutenant Wayne Henry Ferguson RANEM is not eligible for the award of the Australian Service Medal 1945-75 with Clasp 'SE ASIA'.