



Australian Government

Defence Honours and Awards Appeals Tribunal

Harris and the Department of Defence [2015] DHAAT 12 (13 March 2015)

File Number(s) 2014/065

Re **Mr James Harris**
Applicant

And **Department of Defence**
Respondent

Tribunal Brigadier M. Bornholt AM (Retd) (Presiding Member)
Air Commodore M. Lax OAM, CSM (Retd)

Hearing Dates 23 January 2015 (Mr Harris)
13 February 2015 (Defence)

DECISION

On 13 March 2015 the Tribunal decided to:

- a) **affirm** the decision of the Department of Defence that due to the nature of his discharge from the Royal Australian Navy, Mr James Harris' entitlement to service awards was forfeited;
- b) **set aside** the decision of the Department of Defence not to restore the awards of the 1939-45 Star, the Africa Star and the War Medal 1939-45 and **substitute** its decision that the awards of the 1939-45 Star, the Africa Star and the War Medal 1939-45 be restored to Mr James Harris, and those medals be issued.

CATCHWORDS

DEFENCE AWARD – 1939-45 Star, Africa Star, War Medal 1939-45, Australia Service Medal 1939-45

LEGISLATION

Defence Act 1903 – ss 110T, 110V(1), 110VA, 110VB(2)
Defence Force Regulations 1952 - Reg 93C and Schd 3

Air Ministry Order AMO 755/1943, August 1943
Campaign Stars and the Defence Medal (1945 UK Command Paper)
United Kingdom Command Paper 6833 of June 1946
A Summary of the Conditions of the Award of the Campaign Stars, the Defence Medal and the War Medal (The Dedman Paper), December 1948
Australia Service Medal 1939-45 Royal Warrant
Kings Regulations and Admiralty Instructions Vol 1 – Articles 587, 589 and 1938
Defence (Personnel) Regulations 2002 – Reg 86
Naval Defence Act 1910 – ss 3, 20, 31, 36
Naval Forces Regulations 1935 – Reg – 37, 116
Imperial Naval Discipline Act 1866 – s 19, 23, 24, 52, 54 and 56

REASONS FOR DECISION

Introduction

1. The applicant, Mr James Harris (Mr Harris), a former member of the Royal Australian Navy (RAN), seeks review of a decision of the Directorate of Honours and Awards of the Department of Defence (the Directorate), that his entitlement to Service awards for his WWII war service was forfeited due to the nature of his discharge. Mr Harris lodged an application for his World War II awards (1939-45 Star, Africa Star; The War Medal 1939-45 and the Australia Service Medal 1939-45 (ASM 1939-45)) on 15 December 2012. His application was rejected by the Directorate on 4 July 2013 ‘due to the nature of your discharge from the Royal Australian Navy’.

2. On 18 November 2013, Mr Harris wrote to the Directorate attempting to establish the ‘nature’ of his discharge. On 22 January 2014 the Directorate advised that his application would be ‘held in abeyance pending the outcome of the Withholding and Forfeiture inquiry’.¹ On 28 March 2014 Mr Harris again wrote to the Directorate to emphasise that he wanted details regarding his discharge so that ‘I can respond to and repudiate any misinformation’.²

3. On 14 April 2014, Mr Harris or the Directorate (it is unclear which) applied for Mr Harris’ service records, a copy of which were sent to Mr Harris on 15 April 2014. The letter from Defence stated in part that: ‘As you were never formally discharged from the RAN, an administrative discharge was undertaken on your behalf by ADF Records Enquiries’. This administrative discharge was back-dated to 29 December 1941.

4. On 19 May 2014, Mr Harris lodged an application with the Tribunal seeking a review of the decision by the Directorate to refuse his entitlement to his Service awards.

Tribunal Jurisdiction

5. 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 Directorate made a decision to affirm its earlier decision that Mr Harris forfeited his entitlement to his World War II awards and decided that those awards should not be restored to him following his application. Reg 93C of the *Defence Force Regulations 1952* defines a *defence award* as being those awards set out in Part 2 of Schedule 3. Included in the defence awards set out in Part 2 are the World War II service awards. Therefore the Tribunal has jurisdiction to review this decision.

¹ DHA AF16700116 – S4049 dated 22 January 14. This document was not in the Defence report but was provided by Ms Harris during the hearing on 23 January 15.

² This document was not in the Defence report but was provided by Ms Harris during the hearing on 23 January 15.

Steps taken in the conduct of the review

6. In accordance with its *Procedural Rules* 2011, on 27 May 2014, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Harris' application for review and requesting that he provide a report. On 23 October 2014, the Directorate, on behalf of the Secretary, provided the Tribunal with a report. In that report, the Directorate confirmed its position that Mr Harris had forfeited his entitlement to service awards due to the nature of his discharge and that his service record did not provide evidence that he would be eligible to have those medals restored. On 29 October 2014 the Tribunal forwarded a copy of the report of the Directorate to Mr Harris for comment. On 16 November 2014, Mr Harris made a number of comments on the Defence report and asked the case go before the Tribunal.

7. The Tribunal met on 15 and 22 January 2015 to scope the review. The Tribunal heard oral evidence from Mr Harris (who was attended by his daughter Ms Julie Harris) on 23 January 2015. On 13 February 2015, the Tribunal heard oral submissions from the RAN and the Directorate. Present at the Defence hearing were:

- Captain Brad White RAN - Director, Navy People Career Management Agency (NPCMA)
- Mr Keith McLackland - Staff Officer Separations³, NPCMA
- Mr Brett Mitchell - Defence Honours and Awards Directorate
- Lieutenant Tristan Skousgaard – Chief Legal Advisor to the Head of Navy People and Reputation - Observer
- Ms Alex Stewart – Assistant Director of Tribunal Submissions, Defence Honours and Awards Directorate - Observer

9. Mr Harris and his daughter Ms Julie Harris were unable to be present or attend by telephone at the Defence hearing due to Mr Harris' hospitalisation. An oral transcript of the hearing was subsequently provided to Ms Harris.

10. During its meetings the Tribunal considered the material provided by Mr Harris and the Directorate.

Eligibility Criteria for World War II Service Awards

11. **The 1939-45 Star.** The 1939-45 Star is granted for service in operations during the period from 3 September 1939 to 2 September 1945. For Navy: 'the qualification is six months service afloat in areas of active operations... from the 10th June 1940 to the 8th May 1945, anywhere at sea'.⁴

12. **The Africa Star.** The Africa Star is granted for operational service of any length in North Africa from the date of entry of Italy into the war on 10 June 1940, up to the date of the cessation of operations against the enemy in North Africa on 12 May 1943. For Navy, 'service anywhere at sea in the Mediterranean between the 10th June 1940 and the 12th May 1943... qualifies for the Africa Star'.⁵

³ Title changed from 'Discharges' to 'Separations' in 2013.

⁴ The War Office Command Papers *Campaign Stars and Commemorative Medals Instituted for the 1939-45 War dated 11 June 1948* Part 1, Para 3 (a)(iii).

⁵ *Ibid.*, Para 25 and 29.

13. **The War Medal 1939-45.** The War Medal 1939-45 is to be granted to full-time personnel of the Armed Forces wherever their service during the war has been rendered. A 28 day qualification will be adopted. 'Service between 3rd September 1939 and 2nd September 1945, inclusive, will qualify wherever rendered ... The War Medal will be granted in addition to the Campaign Stars and the defence medal, if earned'.⁶

14. **The Australia Service Medal 1939-1945.** Following the conclusion of the Second World War in 1945, the Australian Defence Committee recommended that Australia institute a medal of its own in connection with the war, and that such a medal be awarded, not only to members of the Australian Forces, but also to selected civilian organisations. An 18 month qualifying period for full time personnel was recommended for those who served between 3 September 1939 and 15 August 1945.

15. On 17 January 1946 Cabinet approved that a 'medal be instituted for all members of the Defence Forces of the Commonwealth of Australia who participated in the 1939-1945 war; these to include members of the Mercantile Marine, Civil Air pilots, members of the Comforts Funds and Red Cross Funds, and to include both men and women'.⁷ Subsequently His Majesty King George VI instituted the Australia Service Medal 1939-45 by Royal Warrant on 30 August 1949. The Royal Warrant was published in the *Commonwealth of Australia Gazette* in November that year.⁸ There is provision in the Warrant for the Governor-General to make Regulations to carry out the purposes of the Warrant, but no Regulations have ever been made. Pertinent to this review, the Warrant in part states:

1) *The persons eligible for the Medal shall be those of Our faithful subjects and others, male and female, who between the 3rd September 1939 and the 2nd September 1945, rendered the required service in the Australian Armed Forces, in the Australian Mercantile Marine or as civil members of the Royal Australian Air Force Reserve who served as aircrew in civil aircraft in operational areas.*

2) *Representatives of philanthropic bodies, official press correspondents, official photographers and other civil personnel attached to the Armed Forces in an official capacity for full-time duty in uniform shall also be eligible.*

3) *Eligibility shall not be affected by the grant of any other general award for service in the war of 1939-45...*

4) *Only those who have received, or would be entitled to receive, an honourable discharge shall be eligible. (Highlight added for clarity)*

5) *The period of qualifying service for full-time duty shall be eighteen months at home or overseas.*

...

⁶ *Ibid.*, Para 111, 113 and 114.

⁷ Cabinet Agendum No 1002A: Proposal for an Australian Decoration, National Archives of Australia (NAA): A816, 66/301/251.

⁸ *Commonwealth of Australia Gazette* No. 91 dated 30 November 1949.

16. The power to vary the conditions of the 1949 Royal Warrant was delegated to the Governor-General in 1995 by way of an exchange of letters between Prime Minister Paul Keating and Her Majesty the Queen. This delegated power was used in 1996 to reduce the qualifying period for the Australia Service Medal 1939-45 from eighteen months to 30 days for full time service; and from three years to 90 days for part-time service.⁹

Mr Harris's Service Record

17. Mr Harris' Record of Service shows that he was mobilized by proclamation in the Royal Australian Naval Reserve on 3 April 1940 at the age of 18. He entered for a period of 'two years or duration of war and six months thereafter whichever is the greater'.¹⁰ His address on entry is recorded as 37 Jennings Street, Matraville, NSW and this is also recorded as the address of his Next of Kin – his wife to whom he was married on 12 November 1940. His rank was Ordinary Seaman. He was promoted to Able Seaman on 3 April 1941. His annual efficiency and character assessments in 1940 and in 1941 were both 'satisfactory' with character assessments of 'very good'. His second and final efficiency assessment was conducted on 29 December 1941.

18. Mr Harris attended initial training at HMAS *Cerberus* before being posted to the war ship HMAS *Stuart* from 12 November 1940 to 30 October 1941. This ship saw operational service in the Mediterranean from early 1940 to 22 August 1941 before returning to Australia on 27 September 1941. Mr Harris was aboard the ship on operations from approximately December 1940 to 22 August 1941.¹¹

19. After his return to Australia, Mr Harris was posted to HMAS *Kuttabul* in Sydney on 31 October 1941. Mr Harris' Record of Service concludes on 29 December 1941 with the annotation 'Run 29.12.41'.

20. Mr Harris' Naval medal card is annotated with the words 'Service over' and 'Service complete'. The second page of his medal card is consistent with his record of service.

21. For his Navy service Mr Harris had not previously claimed and has not received any awards.

Mr Harris' Submission

22. Mr Harris in his written submissions and oral evidence indicated that he enlisted in the Royal Australian Navy and after initial training, was assigned to HMAS *Stuart* from 12 November 1940 to 30 October 1941. The ship returned from operational service in the Mediterranean on 27 September 1941. He was then posted to HMAS *Kuttabul* in Sydney. At that time, HMAS *Kuttabul* was an impressed ferry used as a dormitory.

23. Mr Harris stated that following disembarkation from HMAS *Stuart* in September 1941, he was given leave for a period of time. At the conclusion of the leave he was

⁹ *Commonwealth of Australia Gazette* No. S 309 dated 21 August 1996.

¹⁰ This equates to a termination date of 2 March 1946.

¹¹ The exact date he boarded HMAS *Stuart* is uncertain as he travelled to the Mediterranean by transport ship which departed Sydney on 14 November 1940.

posted to HMAS *Kuttabul* on 31 October 1941 where he performed administrative duties including messaging and signal delivery. At this time he was advised that he would be reassigned to the cruiser, HMAS *Canberra*. On the day he was due to board, he was advised that he would be first required to attend a naval gunnery course in Melbourne.

24. In early December 1941 Mr Harris approached his chain of command at HMAS *Kuttabul* and requested deferment of his course or transfer of the training to Sydney due to his wife's health. He advised that his wife was pregnant and had been warned by doctors that with a strong family history of eclampsia¹², she was a high risk of suffering this condition during her confinement. He stated that he thought HMAS *Kuttabul* was an administrative unit where sailors were posted awaiting formal reassignment. He believes that his immediate superior was probably a Petty Officer clerk.

25. Mr Harris stated that he had been reporting for duty on a daily basis to HMAS *Kuttabul* whilst awaiting a decision on deferment and in late December 1941 was advised that his deferment had been approved. He stated that he was told:

*Deferment had been granted but it would be without pay and that he should think about getting another job.*¹³

26. He believes it was the Petty Officer who told him that his deferment had been approved.

27. Mr Harris was married on 12 November 1940 and commenced living with his wife and her parents at 37 Jennings Street, Matraville at that time. His service records confirm this address for his wife as his Next of Kin on enlistment. Mr Harris stated that this is also the address to which he returned when he arrived back in Sydney and that he remained at that address until sometime in 1943 when he moved to his own home 'just across the road' at 45 Jennings Street, Matraville. Ms Harris produced electoral roll extracts which confirmed these details.

28. Mr Harris stated that after the advice regarding deferment he was not called back to serve in the Navy nor did he receive any papers sending him to gunnery school. He stated that he was not receiving Navy pay so after a period of time (possibly by July 1942), he applied for and obtained employment in Sydney at the Navy Graving Docks¹⁴ where he remained working for the duration of the war. He stated that he was desperate for money and that:

*I assumed that I had been automatically discharged from the Navy as I had been told to get another job and I was not being paid.*¹⁵

¹² Eclampsia is a life-threatening complication of pregnancy that causes a pregnant woman to develop seizures or coma, it is more commonly known as toxemia of pregnancy. www.emedicinehealth.com accessed on 15 February 2015.

¹³ Harris, oral submission at Hearing on 23 January 2015.

¹⁴ The Captain Cook Graving Dock was originally a Navy project. The dock was built between Garden Island and Potts Point. Construction commenced in July 1940 and was completed in 1944. At the time it was a project on a scale with the Sydney Harbour Bridge. www.navyhistory.org.au accessed on 15 February 2015.

¹⁵ Harris, oral submission at Hearing on 23 January 2015.

29. Mr Harris said that he was comfortable that he was still shouldering his share of the war effort as he remained employed in the Navy Graving Dock construction project where his pre-war plumbing apprenticeship skills were valuable and necessary.

30. During the hearing, Mr Harris produced evidence that in May 2013 he had applied for and was granted a Department of Veterans' Affairs (DVA) disability pension and associated entitlements as a result of his Navy war service. He had not previously sought DVA support despite being made aware that he would have automatically qualified for full support from 1992.

31. In response to the question of why he had not previously sought his medals he stated it was:

*simply because I had no need of them, just as I never had reason to seek my discharge papers.*¹⁶

32. When pressed on this issue he spoke of his father's service in WW1 and how he (his father) had never worn his medals. He stated that he made application for his medals in 2012 as his great-grandchildren wanted to march wearing the medals that he understood he had earned by way of service to his country. He advised that whilst he was never a regular participant in Anzac Day commemorations, he had retained regular contact with his shipmates, particularly those who remained in the Sydney area during and after the war.

33. Mr Harris first became aware that there was an issue with his service record when following his application for his medal entitlement, he was advised by the Directorate in July 2013 that:

*due to the nature of your discharge...your entitlement to service awards was forfeited.*¹⁷

34. Mr Harris sought clarification of the nature of his discharge in letters to the Directorate dated 18 November 2013 and 28 March 2014.¹⁸ On 15 April 2014 the Defence Archives Centre wrote to Mr Harris advising that 'as you were never formally discharged from the RAN, an administrative discharge was undertaken on your behalf by ADF Records Enquiries' and a copy of his discharge 'in absentia' paperwork was attached. The discharge had been executed on 15 April 2014 but back dated, taking effect retrospectively on 29 December 1941.

35. After lodging his appeal with the Tribunal, Mr Harris received the Defence Submission dated 23 October 2014 for comment and it was at this time that he became aware that he had in essence been classified by the Navy and the Directorate as a deserter through the use of the term 'Run'. Until this time he had assumed that he had been automatically discharged at the completion of his service in December 1941.

¹⁶ Harris, oral submission at Hearing on 23 January 2015.

¹⁷ DHA – S/4049 dated 4 July 2012 (assumed to be the incorrect date – should read 4 July 2013)

¹⁸ These letters were not included in the Defence Submission and were tabled by Ms Harris during the 23 January 15 hearing.

36. In his response to the Defence submission and during his oral evidence, Mr Harris strenuously refuted the assertion made by the Directorate that ‘these awards were withheld as his service records stated that he was a deserter, and his Royal Australian Naval Reserve Record of Mobilized Service card was marked with “Run”’. In relation to the assertion that he had deserted, Mr Harris stated:

Common-sense would surely dictate that, should I be thinking of deserting ... I would have disappeared, making sure I could not be found. The fact that I remained living at 37 Jennings Street, Matraville (clearly shown on my record) from 1940 to 1943 ... must surely prove I was not running anywhere.¹⁹

37. He further stated:

Presumably, had I ‘run’, a warrant for my arrest would have been issued and the military police would have come straight to the address where I was living, in which case I was clearly and visibly available and would have been taken into custody.²⁰

38. Despite being almost 93 years of age and in poor health, at the oral hearing Mr Harris presented as a genuine, articulate and proud sailor. He stated that he was bewildered that the Navy would treat him in this way and that his honour and integrity had been called into question. Mr Harris concluded his submissions and his oral evidence by categorically disputing that he ‘Ran’ or deserted and that he wished to claim his entitlement to his Service medals.

The Directorate’s Submission

39. In its written submission to the Tribunal, the Directorate confirmed that Mr Harris had first made application for his service awards on 15 December 2012 and that his full service records and medal card had been examined by a medals assessor who had confirmed that he had no entitlement to any awards due to the nature of his discharge. The submission did not make reference to correspondence of 18 November 2013, 22 January 2014 and 28 March 2014 wherein Mr Harris was attempting to ascertain what the nature of his discharge may have been. The Directorate indicated that Mr Harris contacted NPCMA on 14 April 2014, however during oral evidence it became more likely that contact with NPCMA was made by the Directorate leading to an administrative discharge decision which was formally made a day later on 15 April 2014.

40. The Directorate in its submission stated under ‘Findings on Material Questions of fact’ that:

On 3 April 1940, Mr Harris enlisted in the Permanent Naval Force for a period of two years or duration. There is no date of discharge on Mr Harris’ service record however it has been stamped with ‘N.E DIS R’. It is reasonable to infer that, based on other information contained in his service records, DIS-R is an abbreviation for ‘Discharged – Run’.²¹

¹⁹ Harris, written submission dated 16 November 2014.

²⁰ Harris, written submission dated 19 May 2014, Appendix ‘C’.

²¹ Defence Submission, 23 October 2014, paragraph 20.

41. The submission confirms that Mr Harris qualified for the 1939-45 Star, the Africa Star and the War Medal 1939-45 whilst serving on HMAS *Stuart* but states that he is not entitled to these awards as:

...these awards were withheld as his service records stated that he was a deserter, and his Royal Australian Naval Reserve Record of Mobilized Service card was marked with 'Run'.

42. The Defence submission also assesses Mr Harris' entitlement to the Australia Service Medal 1939-45 and makes a similar finding that his service had qualified him for the award but he was not eligible as 'his records state that he was a deserter'. This finding also emphasises that his eligibility was declined because 'desertion would be considered as not an honourable discharge, and therefore Mr Harris is not eligible for the ASM 1939-45'.

43. The Defence submission indicates that the Directorate in making its re-assessment sought advice from the Staff Officer Discharges NPCMA on 2 June 2014 regarding Mr Harris' discharge. The advice provided was:

... if Mr Harris' service record reflected 'Run' it would have originally reflected 'Deserter' than marked as 'Run' later and this reflects Absence Without Leave ... Mr Harris did not legally discharge from the PNF until 2014 when he was ... 'Terminated in Absence' ... previously the member would have had to report to a Navy Establishment and then been discharged with 'Service No Longer Required' ... precluding Mr Harris from gaining his awards.²²

44. The Defence submission, relying on *Kings Regulations and Admiralty Instructions 1938* – Article 589-8, indicates that the Directorate during its reassessment had examined provisions for restoring Mr Harris' forfeited medals but found that his 'service record did not provide evidence that he would be eligible to have the 1939-45 Star, the Africa Star or the War Medal 1939-45 restored under the regulations'.²³

45. The Defence written submission concludes that despite Mr Harris having qualified for the subject awards, he is not eligible to receive them due to the nature of his discharge.

46. On 2 February 2015 the Directorate forwarded to the Tribunal a document they had recovered from the National Archives which was a letter dated 2 September 1946 returning an arrest warrant for Able Seaman James Harris which had been issued to the Queensland Police in January 1942. During the hearing with Navy on 13 February 2015, the Navy opined that the warrant was in all likelihood sent to all states and only the Queensland warrant was ever returned. The Navy stated during the hearing that there was the likelihood that the actual warrant did not contain the alleged offender's address. Records produced by Navy indicated that several hundred of these warrants were issued for an extensive list of missing servicemen during and after the war. In any case, at the

²² Defence Submission, 23 October 2014, attachment 12.

²³ Defence Submission, 23 October 2014, paragraphs 28-29.

end of the war the warrants were cancelled vide ‘...all in a state of desertion as at 31st December, 1945, NOT to be claimed and warrants to be cancelled...’.²⁴

47. On 12 February 2015 the Directorate forwarded a number of other documents to the Tribunal which included Mr Harris’ certificate of service, conduct record and pay records. These documents confirmed the majority of the detail already contained on the service record including the address of the Next of Kin and Mr Harris’ address – 37 Jennings Street, Matraville. A letter which was sent from HMAS *Penguin* to the Captain’s Office at HMAS *Cerberus* on 31 January 1942 confirmed that Mr Harris had been ‘discharged’²⁵ to HMAS *Cerberus* on 29 December 1941 as a deserter. The pay records further confirmed that he had been posted to Flinders Naval Depot on 29 December 1941; the expert witness confirmed at the hearing that Flinders Naval Depot was also HMAS *Cerberus* and that ‘discharged to Cerberus’ meant posted to HMAS *Cerberus*. Accordingly, Mr Harris’ last unit was HMAS *Cerberus*, not HMAS *Kuttabul* as disclosed on his service record.

Oral Evidence from the Directorate and the Navy

48. On 23 January 2015, the Tribunal requested a hearing with the Navy to discuss Mr Harris’ record of service and the actions taken by the Navy to process his discharge in 2014. The Tribunal provided Navy with both of Mr Harris’ submissions, the Directorate submission and a list of 21 questions to be discussed at the hearing.

49. The oral evidence confirmed that HMAS *Kuttabul* was an administrative unit based in Sydney in 1941 where sailors were posted ‘awaiting allocation’ to other ships. It was also their billeting station. The Navy confirmed that it was likely that the daily routine would have been sedentary in nature and there would have been significant numbers of people being controlled and accounted for by Navy clerical staff.

50. The Navy and Directorate did not support Harris’ contention that it was highly likely that if an individual was absent without leave, the Naval or Military Police would have been used to search for the missing individual and would have probably attended the Next of Kin address. The Navy stated that due to the number of missing servicemen, the fact that there were no Naval police, and that the Military Police were Army, meant they were more likely to have been busy with their own service and perhaps did not have the capacity to pursue everyone to whom their attentions were directed, despite Mr Harris’ proximity to HMAS *Kuttabul*.

51. The Tribunal also suggested that given Japan had entered the war in early December 1941, there would have probably been considerable confusion in the vicinity of Navy establishments in Sydney Harbour and given Mr Harris’ age at the time, limited experience and low rank, there was a possibility that he was simply forgotten. The witnesses were ambivalent about the likelihood of this assertion as it related to Mr Harris.

52. In relation to Mr Harris’ service record, the oral evidence confirmed that the annotation on the record ‘DIS R’ meant ‘Discharged Run’. The Directorate confirmed

²⁴ *Office of the Navy* 452/201/1587 dated 30 May 1946.

²⁵ “Discharged” in Navy parlance is similar to “posted” wherein the individual is discharged from one entity or ship to another.

that in their original and subsequent assessments they had relied on this annotation to assert that Mr Harris was a deserter and therefore not entitled to his awards. The Directorate also confirmed that 'Approved Not to be Claimed for Further Service', was a standard clause used for all missing persons which provided that should they subsequently be recovered, that they would not be forced to return to service.

53. In relation to the processing of Mr Harris' application and the sequence of events post the application in December 2012, the oral evidence confirmed that the original decision made in July 2013 that Mr Harris was not entitled to his awards 'due to the nature of your discharge ... your entitlement to service awards was forfeited', was in hindsight a poor choice of words which may have been better expressed. Both the Directorate and the Navy confirmed that in any case there was little likelihood that they would have probed further into a discharge such as this unless there was evidence pointing towards contested or unusual circumstances.

54. The oral evidence confirmed that in all likelihood, once Mr Harris' application was reviewed in 2013 and his records were requested from the Defence Archives Centre, the Centre would have enacted standard operating procedures and, where an absence in excess of 30 years had been established, they had automatically processed a discharge in absentia. This ultimately led to the 'Discharge in Absentia' decision of 15 April 2014 under Regulation 86 of the *Defence (Personnel) Regulations 2002*.

55. The Tribunal next questioned Navy about the nature of Mr Harris' discharge under the 2002 Regulations. In relation to why Mr Harris was not provided with procedural fairness in the decision to use Regulation 86, the Tribunal pointed to Australian Business Rule 10 'Termination in Absence'. This rule at Chapter 22 requires that:

...a sailor should be provided with a termination notice and given an opportunity to provide a statement of reasons, before a termination decision is made...

56. Mr McLackland, the Staff Officer Discharges stated that the rule indicates that due process 'should' be provided and that there was therefore not an actual requirement to provide such process. He further stated that he had dealt with several cases where former sailors had come forward later in life seeking to be discharged as they had lived with the burden of guilt since they had deserted. He did not consider that the Harris case would be any different, assuming that a similar circumstance may have existed.

57. The Tribunal sought to canvas the possibility of using other regulations (such as regulation 81) for the discharge given the Navy were now aware of Mr Harris' circumstances. However they were reluctant to pursue any change due to the number of amendments to regulations which had occurred since the end of the war.

58. The Tribunal discussed with Navy whether or not they accepted, *prima facie*, that on the balance of probability it was more likely than not that Mr Harris' account of events was true and accurate. The Navy stated that there was no dispute regarding Mr Harris' service in the Mediterranean and his statement that on return to Australia he was probably required to attend a gunnery course. The Navy however indicated that there was no evidence to support the statement that he had sought a deferment or that such arrangements had been made. The Navy view was that if he had made application to support his wife's medical condition, there would have been a paper trail and

Mr Harris would have been given some manner of written direction or approval to proceed on leave. In the absence of such direction, the Navy stands by the assertion that Mr Harris did indeed desert. The Director NPCMA further stated that in his view, 'Mr Harris was not eligible as the awards were not gazetted until after the war, and, despite Mr Harris serving in 1940-41, he had deserted before the medals were gazetted and therefore was not entitled to recognition'.²⁶ The Tribunal noted that this was not the case as the medals were created in 1943 with ribbons issued and subsequently authorised in 1946.²⁷

Consideration of the Law

59. The Tribunal next considered the law relating to Mr Harris' discharge and the forfeiture of his World War II awards.

60. **Discharge.** On 15 April 2014 Defence purported to administratively discharge Mr Harris pursuant to Regulation 86 of the *Defence (Personnel) Regulations 2002*. Regulation 86 provides:

86 The Chief of an enlisted member's Service may terminate the enlisted member's service in the Defence Force if the enlisted member has been absent without leave for a continuous period of more than 3 months.

61. For this provision to apply Mr Harris had to be an enlisted member. Regulation 9 states that these Regulations relate to, amongst other things, the discharge of a member *who is enlisted on or after the commencement date* of the Regulations. Mr Harris joined the PNF on 3 April 1940 for two years or the duration of the war plus six months, whichever was greater. The war ended on 2 September 1945 and six months from that date was 2 March 1946. In 1941 the *Naval Defence Act 1910* (ND Act) provided in ss. 20 and 31 that Mr Harris was liable to continuously serve in the Permanent Naval Forces (PNF) including on active service for the period of his enlistment.

62. The *Naval Forces Regulations 1935* also applied to Mr Harris. Regulation 116 states that a member of the PNF *shall be compulsorily discharged* when he has completed his period of service. In spite of the fact Mr Harris' period of enlistment ended on 2 March 1946, it did not appear that the Naval authorities formally recorded his discharge on that date. If Mr Harris had not been discharged earlier, by operation of Regulation 116 Mr Harris was compulsorily discharged on that date. Therefore Mr Harris ceased to be an enlisted member of the PNF on 2 March 1946 at the latest, when his period of service ended and he was compulsorily discharged. Thus Regulation 86 could not apply to him.

63. **Absent Without Leave/Desertion.** Regulation 37 provided that members of the Naval Service *shall in all things obey the orders and directions of the Naval Board*. In 1941 section 36 of the ND Act applied the *Imperial Naval Discipline Act 1866* (IND Act), the *Kings Regulations* and the *Admiralty Instructions* (KR & AI) with certain modifications to the Naval Service. It appeared that the Naval Board relied on the IND

²⁶ Captain White, Oral Hearing, 13 February 2015.

²⁷ The Air Ministry Order AMO 755/1943 dated 3 August 1943.

Act and the KR & AI in 1941 in relation to a member of the Naval Service being absent without leave (AWL) or deserting.

64. In s.3 of the ND Act the term 'active service' is defined as *service in or with a force which is engaged in operations against the enemy*. It is not in issue that Mr Harris was on active service in 1941. In evidence Mr Harris said that he returned to his family and obtained another job at the end of December 1941. On 29 December 1941 the Naval administration recorded on Mr Harris' file 'RUN' indicating that he was presumed to have deserted. The IND Act deals with desertion in s.19 which provides:

Every person subject to this Act who shall absent himself from his ship or from the place where his duty requires him to be, with an intention of not returning to such ship or place, or who shall at any time and under any circumstances, when absent from his ship or place of duty, do any act which shows that he has an intention of not returning to such ship or place of duty shall be deemed to have deserted, and shall be punished accordingly; that is to say,

(1) ... (not applicable)

(2) If he has deserted under any other circumstances, he shall be punished with penal servitude or such other punishment as is hereinafter mentioned; and in every such case he shall forfeit ... all annuities, pensions, gratuities, medals and decorations that may have been granted to him

65. Section 23 deals with persons who are AWL. The penalty does not provide for forfeiture of medals. According to s.24 a person who is AWL for a period of one month *shall be liable to forfeiture of wages and other benefits as the Naval Board from time to time by regulations prescribes*.

66. Section 52 listed the punishments that could be inflicted for an offence under the IND Act ranging from 'death' to 'minor punishments'. The second last punishment (10) was forfeiture of a number of benefits, allowances as well as medals and decorations granted. According to section 56 if an offence was not a capital offence or not committed by an officer, the officer in immediate command of the person charged, could try the person summarily. Section 54 provides that if an offender has avoided apprehension, the time limit for being tried or punished does not apply.

67. Article 587 of the KR & AI incorporates the definition of deserter in s.19 of the IND Act. In this case, *a person subject to the Act, which shows intention on the part of such person not to return to a ship or place of duty* is a deserter. Under Article 587.2, if the person returns *before the expiration of seven days* he can be considered an absentee. Because Mr Harris was absent for longer than seven days he was deemed to be a deserter.

68. Article 589 of the KR & AI sets out the procedures to be followed when a person *absent(s) himself from his duty without leave* without good and sufficient reason. If the person has not returned within seven days his file is to be marked 'RUN'. Paragraph 6 of A. 589 provides that all medals and decorations granted to the person are forfeited to the Crown unless the tribunal by whom he is tried, orders otherwise or the Admiralty directs. Paragraph 6a states *a deserter who is not reclaimed is disqualified for the grant of a medal or decoration not already awarded for service prior to the desertion*. Mr Harris was not reclaimed, that is returned to Naval Service because he was not located.

69. The Captain of HMAS *Cerberus* (Mr Harris' last unit), had the authority to discharge a person from the Naval Service after three months absence. Mr Harris had 'RUN' marked on his file most likely at HMAS *Cerberus*. As a result Mr Harris' file was referred to be dealt with summarily because he was still absent. This meant that there was no time limit restricting when this matter could be dealt with by the Navy. It would appear that at a subsequent date a summary hearing was held on the papers by a duly constituted tribunal and the charge of desertion was found proven. His discharge from the Naval Forces appeared to come into effect on 2 March 1946 (the expiration of his term of enlistment) by inserting 'Dis R' on his service records. Pursuant to s.19 of the IDN Act the medals and decorations that may have been granted to Mr Harris were forfeited. The tribunal who made the decision decided not to direct otherwise.

Tribunal Consideration

70. The Tribunal carefully considered all the material placed before it including written submissions and oral evidence. There is no dispute regarding Mr Harris' service on HMAS *Stuart* in the Mediterranean or that he qualified for the 1939-45 Star, the Africa Star, the War Medal 1939-45 and the ASM 1939-45. Minor inconsistencies regarding his last posted unit are not material. At issue is whether he forfeited these awards and this depends on whether he was found guilty of the charge of desertion.

71. According to the Regulations at the time, unauthorised absence for up to seven days was recorded as AWL. After seven days it was presumed that the person had deserted and the file was marked 'RUN'. This was a presumption, not a finding that the offence had been made out. If there was no contact from the person the matter would be referred for a hearing - a Court-Martial or summary hearing. There was no time limit on when these matters could be heard if the person was not found. It was only at a hearing that a finding of guilt could be made. Such a finding can be made on the papers alone by a duly constituted tribunal, which could be one person and the alleged offender does not need to be present.

72. The Tribunal found that Mr Harris was not tried or convicted by Court-Martial, but he was found guilty by a tribunal of desertion. This was evidenced by the notation 'Dis R' on Mr Harris' file. The Tribunal found that Mr Harris had been discharged from the Navy in 1946 at the expiration of his term of enlistment.

73. The Tribunal noted that the last entry in Mr Harris' service record is the annotation 'Approved not to be claimed for further service in R.A.N. Vide 452/201/1587, 14/6/46'. The Tribunal asked Navy to produce this document which they furnished during the oral hearing. The document is Naval Board Circular Memorandum No. 77 dated 14 June 1946 and relates to Outstanding Warrants for Naval Deserters. Through this document the Tribunal found that Mr Harris' status had in all likelihood been reconsidered in June 1946 when this annotation was placed on his record. The Tribunal therefore considered that Mr Harris had in fact been appropriately dealt with according to the prevailing law after his absence was originally recorded in 1942.

74. Nevertheless, the Tribunal considered that Mr Harris' record of service revealed a capable young sailor who was consistently assessed as having a very good character and an unblemished conduct record. He completed 20 months of effective service including 11 months aboard HMAS *Stuart* in the Mediterranean area of operations in

1940-41. The Tribunal considered that it was unlikely that a sailor with a record like this would deliberately desert.

75. The Tribunal considered that the statement from Mr Harris regarding the approval of his request for deferment, where he recalls that he was told that his 'deferment had been granted but it would be without pay and that he should think about getting another job', was likely to be an accurate statement despite the passage of time and the lack of any documentary evidence in support of this statement. The Tribunal considered that given his age at the time, lack of experience and low rank, he in all likelihood would have reported directly to a Senior Non-commissioned Officer and he (Harris) would have accepted that what he was told was properly authorised and not subject to question.

76. The Tribunal considered the evidence that he was later employed at the Navy Graving Docks only a few kilometres from his last unit to be compelling support of his statement that he had been told to 'think about getting another job' as his pay had ceased. The Tribunal also considered that if Mr Harris had been a fugitive, it was most unlikely that he would seek employment and work in an area so close to his last unit and that he would continue to make social contact with his former ship mates.

77. The Tribunal considered that the fact he remained living at 37 Jennings Street, Matraville supported his assertion that '...common-sense would surely dictate that, should I be thinking of deserting ... I would have disappeared, making sure I could not be found. The fact that I remained living at 37 Jennings Street, Matraville (clearly shown on my record) from 1940 to 1943 ... must surely prove I was not running anywhere'.

78. The Tribunal considered that Mr Harris' assertion regarding why the Military Police had not pursued him at the recorded address that he had 'run' to was persuasive. Despite the Navy indicating during oral evidence that the Military Police at the time were likely to be over committed with other missing servicemen, the fact that Mr Harris was residing only nine kilometres from his last stated unit was in the Tribunal's opinion, a significant factor in establishing his credibility.

79. However, the Tribunal considered that Mr Harris also had obligations to the Navy at the time of his absence. The Tribunal considered that Mr Harris would have been well aware of the direct threat posed to Australia by the Japanese in early 1942. The media and most Australian citizens would have been well aware of the fall of Singapore and bombing of Darwin in February, stationing of United States troops in Australia in March and April and the submarine attack in Sydney Harbour in May where HMAS *Kuttabul* was sunk. The Tribunal considered that in these circumstances it would have been reasonable for Mr Harris to come forward and ask whether he was needed for further service by the Navy given he was originally seeking 'deferment'. The Tribunal noted that by him not coming forward, it would be enough for a finding of desertion to be made out and indeed it was.

80. The Tribunal considered the fact that Mr Harris did not seek to access his DVA entitlements until 2012 to be a further pointer to both his character and his integrity. Had he applied in 1992 when he could have accessed his age related entitlements he would have been significantly better off financially and, arguably, from a medical support perspective.

81. The Tribunal considered that Mr Harris' oral evidence provided under oath, was compelling and that on the balance of probability, his account of events leading up to his 'deferment' on 29 December 1941 and his account of actions at the time and immediately afterwards, is more likely than not to be accurate. Regardless, the Tribunal finds that Mr Harris' was lawfully classified as a presumed deserter by the Navy in 1942, found guilty of desertion at a later date by a tribunal and discharged in 1946.

82. The Tribunal considered that the decision taken by the Staff Officer Discharges at NPCMA to discharge Mr Harris pursuant to Regulation 86 of the *Defence (Personnel) Regulations 2002* was unnecessary. He had already been discharged from the PNF.

83. The Tribunal considered that the evidence provided by Navy and as written on Mr Harris' record of service confirmed that Mr Harris enlisted for a specified period of service on 3 April 1940 for a period of two years or for the duration of the war plus six months. The Tribunal found that Mr Harris was discharged in 1946 and his medals were correctly forfeited in accordance with KR&AIs prevailing at the time. The Tribunal noted that it does not have the authority to rescind or remake the discharge decision.

84. The Tribunal considered that at all times, the Navy and Directorate personnel involved in the decision making in relation to Mr Harris acted in good faith. The decisions that were taken were understandable and were based on what in ordinary circumstances would have been considered to be reasonable. This review has provided Mr Harris with the opportunity to explain how he came to be absent and the Tribunal is satisfied that on the balance of probability, Mr Harris' account is an accurate reflection of what occurred in December 1941 and immediately thereafter.

85. The Tribunal finds that Mr Harris qualified for the following medals:

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

86. However, as the entitlement to the ASM 1939-45 relies upon an honourable discharge as stated in the Royal Warrant, the Tribunal finds that Mr Harris is not eligible for the award of the ASM 1939-45.

87. In regards to the other three medals, the Tribunal finds that under the law applying at the end of World War II, the medals were correctly forfeited. The Tribunal also finds that this was a decision made by a properly constituted tribunal at the end of the war. That tribunal decided not to exercise the discretion that Mr Harris not forfeit the medals.

88. The Tribunal next considered the case for restoration. The current and pertinent policy in place at the time Mr Harris made his application in December 2012 is the Defence Honours and Awards Manual, Volume 1, Chapter 46. The applicable sections state:

46.17 Restoration of a forfeited entitlement reinstates the right of an eligible member to have, and wear, an award. Restoration will only be considered in

cases where the person affected is still living and that person makes a personal application for restoration of the forfeited entitlement. Applications on behalf of a deceased member cannot be considered.

46.18 *The prescribed authority does not have the authority to restore an award that has been subject to mandatory forfeiture or forfeited as a result of the findings from a Court-Martial or civil court.*

89. For the purposes of restoration, the Tribunal notes that Mr Harris is still living, has made a personal application for restoration of the forfeited entitlement, has not been subject to mandatory forfeiture and has not been convicted by a Court-Martial or civil court.

90. The Tribunal was persuaded that Mr Harris was genuine in his belief that he had 'done the right thing' and was simply following directions given him by the Navy authorities despite the chaos that ensued in Australia in early 1942. By working in the Navy Graving Dock, Mr Harris assumed he was doing his bit for the war effort. The Tribunal noted that this was the first time Mr Harris had explained what had happened. When the matter went before a tribunal in 1942, Mr Harris was not present (he had not been found) and the matter was heard on the papers. The Tribunal accepts Mr Harris' explanation and finds that he has been deprived of his medals for most of his adult life. He has never worn the medals he earned because of his war service and thus he has never had his service publicly acknowledged. In the Tribunal's opinion it is time for Mr Harris' medals to be restored to him so that he can pass them on to his family.

Finding

91. The Tribunal finds that Mr Harris' 1939-45 Star, Africa Star and War Medal 1939-45 were forfeited under discretionary powers in 1946 and for the reasons stated above, they should now be restored.

DECISION

92. The Tribunal has decided to:

- a) **affirm** the decision of the Department of Defence that due to the nature of his discharge from the Royal Australian Navy, Mr James Harris' entitlement to service awards was forfeited;
- b) **set aside** the decision of the Department of Defence not to restore the awards of the 1939-45 Star, the Africa Star and the War Medal 1939-45 and **substitute** its decision that the awards of the 1939-45 Star, the Africa Star and the War Medal 1939-45 be restored to Mr James Harris, and those medals be issued.