

Part VIIIIC—Defence Honours and Awards Appeals Tribunal

Division 1—Preliminary

110T Definitions

In this Part:

Chair means the Chair of the Tribunal.

defence award has the meaning given by the regulations.

defence honour has the meaning given by the regulations.

eligible service means:

- (a) service in the Defence Force; or
- (b) service under the control, or at the direction, of the Defence Force or a member of the Defence Force.

foreign award means an honour or award given by a government of a foreign country, or by an international organisation.

inquiry means an inquiry under Division 4.

lawyer means a person who is enrolled as a barrister, a solicitor, a barrister and solicitor, or a legal practitioner, of a federal court or a court of a State or Territory.

procedural rules means the procedural rules made under section 110XH.

reviewable decision has the meaning given by section 110V.

review of a reviewable decision means a review under Division 3.

Tribunal means the Defence Honours and Awards Appeals Tribunal established by section 110U.

Tribunal member means a member of the Tribunal, including the Chair.

Tribunal proceeding means:

- (a) a review of a reviewable decision; or
- (b) an inquiry.

Division 2—Establishment and functions of Defence Honours and Awards Appeals Tribunal

110U Establishment of Tribunal

- (1) The Defence Honours and Awards Appeals Tribunal is established by this section.
- (2) The Tribunal has the privileges and immunities of the Crown.

110UA Functions of Tribunal

The functions of the Tribunal are:

- (a) to review reviewable decisions in accordance with Division 3; and
- (b) to inquire into matters concerning honours or awards for eligible service in accordance with Division 4.

110UB Tribunal and Tribunal members not subject to direction

Except as provided by this Part (including the procedural rules) or another law of the Commonwealth, neither the Tribunal, nor any Tribunal member, is subject to direction from anyone in relation to the performance or exercise of the Tribunal's or member's functions or powers.

Division 3—Review of decisions by the Tribunal

110V What decisions are reviewable?

- (1) A *reviewable decision* is a decision (whether made before or after the commencement of this Part) in relation to which the following conditions are satisfied:
 - (a) the decision is or was a refusal to recommend a person or group of persons for any of the following in relation to eligible service:
 - (i) a defence honour;
 - (ii) a defence award;
 - (iii) a foreign award;
 - (b) the decision is or was made:
 - (i) by or on behalf of the Minister, or a former Minister (a *former Defence Minister*) whose ministerial responsibilities included defence or matters related to defence; or
 - (ii) by a person within the Department, or a former Department of State of the Commonwealth that was administered by a former Defence Minister; or
 - (iii) by a person within the Defence Force, or an arm of the Defence Force;
 - (c) the decision is or was made in response to an application.
- (2) However, a decision is not a *reviewable decision* if the decision:
 - (a) was made before 3 September 1939; or
 - (b) relates to service rendered before 3 September 1939.

110VA Who can apply for review?

An application for review of a reviewable decision can only be made by the person, or one or more of the persons, who made the application referred to in paragraph 110V(1)(c).

110VB Review of decisions by the Tribunal

Decisions relating to defence honours

- (1) If an application is properly made to the Tribunal for review of a reviewable decision relating to a defence honour, the Tribunal:
 - (a) must review the decision; and
 - (b) may make any recommendations to the Minister that the Tribunal considers appropriate.

Note 1: The Tribunal does not have power to affirm or set aside the decision.

Note 2: Formal requirements relating to decisions etc. of the Tribunal are dealt with in section 110XE.

Decisions relating to defence awards and foreign awards

- (2) If an application is properly made to the Tribunal for review of a reviewable decision relating to a defence award or a foreign award, the Tribunal must review the decision and:
 - (a) affirm the decision; or
 - (b) set the decision aside and:
 - (i) substitute a new decision (being a decision to recommend a person or group of persons for a defence award or a foreign award); or
 - (ii) refer the matter to a person determined by the Tribunal, for reconsideration in accordance with any directions of the Tribunal.

Note: Formal requirements relating to decisions etc. of the Tribunal are dealt with in section 110XE.

- (3) The Tribunal may also make any recommendations to the Minister that the Tribunal considers appropriate and that arise out of, or relate to, the Tribunal's review under subsection (2) of a reviewable decision.
- (4) If, under subsection (2), the Tribunal sets aside a reviewable decision and substitutes a new decision then, unless the Tribunal determines otherwise, the substituted decision:
 - (a) is taken to be a decision of the person who made the reviewable decision (except for the purpose of any review of the substituted decision, whether by the Tribunal or otherwise); and

- (b) has effect, or is taken to have had effect, on and from the date determined by the Tribunal.
- (5) If, under subsection (2), the Tribunal sets aside a reviewable decision and refers the matter to a person determined by the Tribunal, for reconsideration in accordance with any directions of the Tribunal:
 - (a) the person must reconsider the matter accordingly; and
 - (b) if the person's decision on the reconsideration is a refusal of a kind described in paragraph 110V(1)(a)—the decision is taken to be a reviewable decision made by that person in response to an application made by the person or persons who made the application referred to in subsection (2) of this section.

Tribunal is bound by eligibility criteria that governed making of reviewable decision

- (6) In reviewing a reviewable decision, the Tribunal is bound by the eligibility criteria that governed the making of the reviewable decision.
- (7) The regulations may define or otherwise clarify the meaning of *eligibility criteria* for the purpose of subsection (6).

110VC Power to dismiss review applications

- (1) Despite section 110VB, the Chair may, in writing, dismiss an application for review of a reviewable decision if the Chair considers that:
 - (a) there is another process for review, by the Commonwealth, of the decision, and it would be preferable for the decision to first be reviewed by that process; or
 - (b) the question whether the person, or group of persons, concerned should be recommended for the defence honour, defence award or foreign award concerned has already been adequately reviewed (whether by the Tribunal or otherwise); or
 - (c) the application is frivolous or vexatious.
- (2) The Chair's power under subsection (1) to dismiss an application for review of a reviewable decision may be exercised at any time,

Part VIII Defence Honours and Awards Appeals Tribunal

Division 3 Review of decisions by the Tribunal

Section 110VC

whether before or after the Tribunal has started to review the decision.

- (3) A dismissal under subsection (1) is not a legislative instrument.

Division 4—Inquiries by the Tribunal

110W Minister may direct Tribunal to hold inquiry

- (1) The Minister may, in writing, give the Tribunal a direction to hold an inquiry into a specified matter concerning honours or awards for eligible service.
- (2) If the Minister gives the Tribunal a direction under subsection (1), the Tribunal:
 - (a) must hold an inquiry into the specified matter; and
 - (b) must report to the Minister on the outcomes of the inquiry.

Note: Formal requirements relating to decisions etc. of the Tribunal are dealt with in section 110XE.
- (3) The report to the Minister may include any recommendations that the Tribunal considers appropriate and that arise out of, or relate to, the inquiry.
- (4) A direction under subsection (1) is not a legislative instrument.

Division 5—General provisions relating to operation of the Tribunal

110X Role of the Chair

- (1) The Chair is the executive officer of the Tribunal and is responsible for its overall operation and administration.
- (2) The Chair may, in writing, delegate all or any of his or her functions or powers to another Tribunal member.
- (3) In performing functions or exercising powers under a delegation, the delegate must comply with any directions of the Chair.

Note: See also sections 34AA and 34AB of the *Acts Interpretation Act 1901*.

110XA Constitution of Tribunal for Tribunal proceedings

How the Tribunal is to be constituted

- (1) Subject to this section, for a particular Tribunal proceeding, the Tribunal is to be constituted by one or more Tribunal members determined by the Chair.
- (2) If the Tribunal proceeding is an inquiry, the Tribunal must be constituted by 3 or more Tribunal members.
- (3) The Chair must also comply with any requirements of the procedural rules relating to the constitution of the Tribunal for Tribunal proceedings.

What happens if the Tribunal is constituted by more than one Tribunal member

- (4) If the Tribunal is constituted by more than one Tribunal member, the following provisions have effect:
 - (a) the presiding Tribunal member is:
 - (i) if the Chair is a member of the Tribunal as so constituted—the Chair; or
 - (ii) otherwise—the Tribunal member who is directed by the Chair to preside;

- (b) a decision of the majority of the Tribunal members who constitute the Tribunal prevails;
- (c) if there is no majority, the decision of the presiding Tribunal member prevails.

Formal requirements for determinations and directions

- (5) A determination or direction by the Chair under this section must be in writing.
- (6) A determination or direction by the Chair under this section is not a legislative instrument.

110XB What happens if a Tribunal member stops being available

When this section applies

- (1) This section applies if:
 - (a) a Tribunal member (the *unavailable member*) constitutes, or is one of the Tribunal members who constitute, the Tribunal for the purpose of a Tribunal proceeding; and
 - (b) before the proceeding is completed:
 - (i) the Tribunal member stops being a Tribunal member for any reason; or
 - (ii) the Tribunal member is not available for the purpose of the proceeding for any reason; or
 - (iii) the Tribunal member is prohibited by section 110XG from continuing to take part in the proceeding; or
 - (iv) the Tribunal member is directed by the Chair not to continue to take part in the proceeding.

Chair to direct course of action

- (2) The Chair must either:
 - (a) direct that the Tribunal proceeding be started afresh; or
 - (b) direct that the Tribunal proceeding be completed.

If Chair directs that proceeding be started afresh

- (3) If the Chair directs that the Tribunal proceeding be started afresh:

Section 110XB

- (a) the Chair must, in accordance with section 110XA, determine the Tribunal member or members who are to constitute the Tribunal for that purpose; and
- (b) subject to paragraph (c) of this subsection, the Tribunal, as so constituted, must start to deal with the proceeding afresh; and
- (c) the Tribunal, as so constituted, may have regard to any record of the proceeding before the Tribunal as previously constituted (including a record of any evidence given or submissions made).

If Chair directs that proceeding be completed

- (4) If the Chair directs that the Tribunal proceeding be completed:
 - (a) if the unavailable member constituted the Tribunal—the Chair must direct another Tribunal member or Tribunal members to constitute the Tribunal for the purpose of completing the proceeding; or
 - (b) if the unavailable member is one of the Tribunal members who constituted the Tribunal—the Chair must:
 - (i) direct the remaining Tribunal member or Tribunal members to constitute the Tribunal for the purpose of completing the Tribunal proceeding; or
 - (ii) direct a Tribunal member or Tribunal members to constitute the Tribunal for the purpose of completing the Tribunal proceeding.
- (5) If subsection (4) applies in relation to a Tribunal proceeding:
 - (a) if the Tribunal proceeding is an inquiry—the requirement in subsection 110XA(2) that the Tribunal must be constituted by 3 or more Tribunal members does not apply; and
 - (b) a direction under subparagraph (4)(b)(ii) of this section may be given to any Tribunal member (including the remaining Tribunal member or one of the remaining Tribunal members); and
 - (c) the Tribunal, as constituted in accordance with a direction under subsection (4) of this section, must complete the Tribunal proceeding; and
 - (d) for the purpose of completing the Tribunal proceeding, the Tribunal, as so constituted, may have regard to any record of the proceeding before the Tribunal as previously constituted

(including a record of any evidence given or submissions made).

Formal requirements for directions

- (6) A direction by the Chair under this section must be in writing.
- (7) A direction by the Chair under this section is not a legislative instrument.

110XC Summoning persons to give evidence or produce documents

- (1) The Tribunal may summon a person to attend before the Tribunal to give evidence or produce documents for the purpose of a Tribunal proceeding.
- (2) A person commits an offence if:
 - (a) the person has been given a summons under subsection (1); and
 - (b) the person fails to comply with the summons.

Penalty: Imprisonment for 6 months or 30 penalty units, or both.

- (3) Subsection (2) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

- (4) Without limiting subsection (3), it is a reasonable excuse for a person to refuse or fail to give evidence or produce a document if giving the evidence, or producing the document, would tend to incriminate the person.
- (5) A person summoned under subsection (1) is entitled to be paid the same fees, and allowances for expenses, as apply under section 67 of the *Administrative Appeals Tribunal Act 1975* in relation to persons summoned under that Act. The fees and allowances are payable by the Commonwealth.

110XD Protection of confidential or sensitive evidence or submissions etc.

- (1) The Tribunal may make an order prohibiting or restricting the publication of any of the following if the Tribunal is satisfied that it

Section 110XE

is desirable to do so, whether for reasons of confidentiality or sensitivity:

- (a) evidence given, documents produced or submissions made to the Tribunal in relation to a Tribunal proceeding;
- (b) the names and addresses of persons giving evidence, producing documents, or making submissions to the Tribunal in relation to a Tribunal proceeding;
- (c) the whole or any part of any decision or report made or given by the Tribunal, or the Tribunal's reasons for any such decision or report.

Note: Formal requirements relating to decisions etc. of the Tribunal are dealt with in section 110XE.

- (2) A person commits an offence if:
 - (a) the person engages in conduct; and
 - (b) the person's conduct contravenes an order made under subsection (1).

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

110XE Formal requirements relating to decisions etc. of the Tribunal

Decisions etc. to be in writing

- (1) Decisions, orders, determinations, reports and recommendations of the Tribunal must be in writing.

Review decisions

- (2) The Tribunal's decision on the review of a reviewable decision must include a statement of the Tribunal's reasons for its decision.
- (3) Subject to any orders under section 110XD:
 - (a) the Tribunal must cause a copy of its decision on the review of a reviewable decision to be given to the person or persons who applied for the review; and
 - (b) the Tribunal may also give a copy of its decision on the review of a reviewable decision to any other person that the Tribunal considers appropriate.

Inquiry reports

- (4) Subject to any orders under section 110XD, the Tribunal must cause a copy of its report on an inquiry to be published on the Tribunal's website or by another means that the Tribunal considers appropriate.

110XF Protection of Tribunal members and other persons

- (1) A Tribunal member has, in performing his or her functions or exercising his or her powers as a Tribunal member, the same protection and immunity as a Justice of the High Court.
- (2) A person representing another person before the Tribunal has the same protection and immunity as a barrister has in appearing for a party in proceedings in the High Court.
- (3) A person summoned to attend, or appearing, before the Tribunal to give evidence or make submissions has the same protection, and is (in addition to the penalties provided by this Part) subject to the same liabilities, as a witness in proceedings in the High Court.

110XG Disclosure of interests by Tribunal members

When this section applies

- (1) This section applies if a Tribunal member who constitutes, or is one of the Tribunal members who constitute, the Tribunal for the purpose of a Tribunal proceeding has or acquires any interest (the **potential conflict**) that conflicts or could conflict with the proper performance of the member's functions in relation to the proceeding.

Note: Failure to comply with the requirements of this section is a ground for termination: see section 110YH.

If the Tribunal member is the Chair

- (2) If the Tribunal member is the Chair:
 - (a) the Chair must disclose the potential conflict to the Minister, and to all persons who appear or have appeared before the Tribunal in the Tribunal proceeding; and
 - (b) the Chair must not continue to take part in the proceeding unless the Minister consents in writing.

Section 110XH

If the Tribunal member is not the Chair

- (3) If the Tribunal member is not the Chair:
- (a) the Tribunal member must disclose the potential conflict to the Chair, and to all persons who appear or have appeared before the Tribunal in the Tribunal proceeding; and
 - (b) the Tribunal member must not continue to take part in the proceeding unless the Chair consents in writing.

Consent is not a legislative instrument

- (4) A consent by the Minister or the Chair under subsection (2) or (3) is not a legislative instrument.

110XH Procedural rules

- (1) After consulting the other Tribunal members, the Chair may, by legislative instrument, make procedural rules (not inconsistent with this Part) in relation to the practice and procedure to be followed by or in relation to the Tribunal.
- (2) Without limiting subsection (1), the procedural rules may provide for the following:
- (a) the constitution of the Tribunal for Tribunal proceedings;
 - (b) how the work of the Tribunal is to be allocated between the Tribunal members;
 - (c) the nature or form of Tribunal proceedings (for example, whether proceedings are to take the form of a hearing, and whether a hearing is to be in public or private);
 - (d) the circumstances in which a person may be represented by a lawyer or other person in a Tribunal proceeding;
 - (e) how applications are to be made to the Tribunal;
 - (f) requiring lodgment with the Tribunal of material relating to the making of reviewable decisions that are the subject of applications to the Tribunal;
 - (g) how evidence is to be given, or submissions are to be made, to the Tribunal;
 - (h) how people are to be summoned to attend before the Tribunal;
 - (i) any other matters that the Chair considers necessary or convenient.

- (3) The procedural rules must be complied with in relation to Tribunal proceedings.

Division 6—Tribunal members

110Y Constitution of Tribunal

The Tribunal consists of the following Tribunal members:

- (a) the Chair of the Tribunal;
- (b) a minimum of 6, and maximum of 10, other Tribunal members.

110YA Appointment of Tribunal members

- (1) The Tribunal members are to be appointed by the Minister, in writing, on a part-time basis.
- (2) The instrument of appointment of a Tribunal member must specify whether the member is appointed as the Chair of the Tribunal, or as one of the other Tribunal members.
- (3) In making appointments, the Minister must have regard to the desirability of:
 - (a) reflecting a diversity of expertise, experience and gender among the Tribunal members; and
 - (b) the Tribunal members being independent of those who usually make reviewable decisions.
- (4) A person is not eligible to be appointed as the Chair if:
 - (a) the person is, or has at any time been, a member of the Defence Force rendering continuous full-time service; or
 - (b) in the Minister's opinion, the person does not have an appropriate level of security clearance.
- (5) A person is not eligible to be appointed as one of the other Tribunal members if:
 - (a) the person is, or has at any time within the previous 12 months been, a member of the Defence Force rendering continuous full-time service; or
 - (b) in the Minister's opinion, the person does not have an appropriate level of security clearance.

110YB Period of appointment

- (1) A Tribunal member holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.
- (2) Subject to subsections (3) and (4), a Tribunal member is eligible for reappointment as a Tribunal member.
- (3) A person must not hold office as Chair for more than 6 consecutive years.
- (4) A person must not hold office as one of the other Tribunal members for more than 6 consecutive years.

110YC Acting appointments

Appointment of acting Chair

- (1) The Minister may, in writing, appoint a Tribunal member to act as the Chair:
 - (a) during a vacancy in the office of Chair (whether or not an appointment has previously been made to the office); or
 - (b) during any period, or during all periods, when the Chair:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

Appointment of other acting Tribunal members

- (2) The Chair may, in writing, appoint a person to act as a Tribunal member (other than the Chair):
 - (a) during a vacancy in an office of Tribunal member (other than the Chair), whether or not an appointment has previously been made to the office; or
 - (b) during any period, or during all periods, when a Tribunal member (other than the Chair):
 - (i) is acting as the Chair; or
 - (ii) is absent from duty or from Australia; or
 - (iii) is, for any reason, unable to perform the duties of the office.

Section 110YD

Note: See also section 33A of the *Acts Interpretation Act 1901*, which contains extra rules about acting appointments.

- (3) In appointing a person to act as a Tribunal member, the Chair must have regard to the desirability of:
- (a) reflecting a diversity of expertise, experience and gender among the Tribunal members; and
 - (b) the Tribunal members being independent of those who usually make reviewable decisions.

Protection from invalidity

- (4) Anything done by or in relation to a person purporting to act under an appointment under this section is not invalid merely because:
- (a) the occasion for the appointment had not arisen; or
 - (b) there was a defect or irregularity in connection with the appointment; or
 - (c) the appointment had ceased to have effect; or
 - (d) the occasion to act had not arisen or had ceased.

Determining whether there is a vacancy in an office of Tribunal member

- (5) For the purpose of:
- (a) a reference in this section to a vacancy in an office of Tribunal member; or
 - (b) a reference in the *Acts Interpretation Act 1901* to a vacancy in the membership of a body;
- there are taken to be 10 offices of Tribunal members in addition to the Chair.

110YD Other employment

A Tribunal member must not engage in any paid employment that, in the Minister's opinion, conflicts or may conflict with the proper performance of the member's functions.

110YE Remuneration

- (1) A Tribunal member is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Tribunal

member is to be paid the remuneration that is prescribed by the regulations.

- (2) A Tribunal member is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

110YF Leave

- (1) The Minister may grant leave of absence to the Chair on the terms and conditions that the Minister determines.
- (2) The Chair may grant leave of absence to any other Tribunal member on the terms and conditions that the Chair determines.

110YG Resignation

- (1) A Tribunal member may resign his or her appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

110YH Termination

- (1) The Minister may terminate the appointment of a Tribunal member for misbehaviour or physical or mental incapacity.
- (2) The Minister may terminate the appointment of a Tribunal member if:
 - (a) the Tribunal member:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the Tribunal member fails, without reasonable excuse, to comply with section 110XG (disclosure of interests by Tribunal members); or

Section 110YI

- (c) the Tribunal member engages in paid employment that, in the Minister's opinion, conflicts or may conflict with the proper performance of the member's functions.
- (3) If the Chair ceases to be eligible for appointment (see subsection 110YA(4)), the Minister must terminate the appointment of the Chair.
- (4) If a Tribunal member (other than the Chair) ceases to be eligible for appointment (see subsection 110YA(5)), the Minister must terminate the appointment of the Tribunal member.

110YI Other terms and conditions

A Tribunal member holds office on the terms and conditions (if any) in relation to matters not covered by this Part that are determined by the Minister.

Division 7—Miscellaneous

110Z Regulations

Without limiting the generality of section 124, the regulations may make provision for or in relation to any of the following:

- (a) any fees that are to be payable in relation to applications to the Tribunal;
- (b) prohibiting the disclosure of information obtained by the Tribunal, a member of the Tribunal or a person assisting the Tribunal;
- (c) proof of decisions or orders of the Tribunal.