



## Australian Government

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### Defence Honours and Awards Appeals Tribunal

#### **Fogarty and the Department of Defence [2016] DHAAT 05 (11 March 2016)**

**File Number(s)** 2015/020

**Re** **Mr Terence Fogarty**  
Applicant

**And** **Department of Defence**  
Respondent

**Tribunal** Mr M. Sullivan AO (Presiding Member)  
Brigadier M. Bornholt AM (Retd)  
Mr G. Mowbray

**Hearing Dates** 9 and 11 February 2016

#### **DECISION**

On 11 March 2016 the Tribunal decided to recommend to the Assistant Minister for Defence that the decision by the Parliamentary Secretary to refuse to set aside the posthumous award of the MG to Sergeant B.F. Diddams MG in 2013 and substitute this award with the VC be affirmed.

#### **CATCHWORDS**

DEFENCE HONOUR – *Medal for Gallantry – Victoria Cross - acts of gallantry – in action – hazardous circumstances – self-sacrifice – posthumous*

#### **LEGISLATION**

*Administrative Decisions (Judicial Review) Act 1977 – ss 3(1), 5(1),5(2)*  
*Defence Act 1903 – ss 110V(1), 110VA, 110VB(1)*  
*Defence Force Regulations 1952 – Reg 93B Sch 3*  
*Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations and Gallantry Decoration Regulations dated 4 February 1991*

## REASONS FOR DECISION

### Introduction

1. The applicant, Mr Terence Fogarty (Mr Fogarty) seeks review of a decision to award Sergeant Blaine Flower Diddams MG (Sergeant Diddams) the Medal of Gallantry (MG) after he was killed in action in Afghanistan on 2 July 2012. In a letter to the Governor-General dated 15 October 2013, he requested that the matter be reviewed with 'a view to awarding Blaine a Victoria Cross for Australia (VC)'. He claimed that the citation for the award of the MG was proof that Sergeant Diddams' actions 'satisfy the criteria for the award of the VC due to "self-sacrifice"'. He further claimed that 'failure to take this into account constitutes an error of law...'.<sup>1</sup> On 30 May 2014 Mr Fogarty stated that 'it is abundantly clear that Sergeant Diddams is legally entitled to the award of the VC and I formally request that you make such award forthwith'.<sup>2</sup>

2. On 21 January 2015 the Parliamentary Secretary to the Minister for Defence wrote to Mr Fogarty and explained the process of recommendation and approval of gallantry awards. He indicated in the letter that he was satisfied with the process.<sup>3</sup> In a further letter dated 28 April 2015 the Parliamentary Secretary informed Mr Fogarty that if he was dissatisfied with the responses he had received regarding his claims, he was able to seek review through the Defence Honours and Awards Appeals Tribunal (the Tribunal).<sup>4</sup>

3. On 15 June 2015 Mr Fogarty made formal application for the review of the decision to posthumously award Sergeant Diddams the MG, indicating that the 'honour he desired' was the VC.<sup>5</sup>

4. The application included reference to Lieutenant Adrian Doneley whose World War II Military Cross citation was provided by Mr Fogarty.<sup>6</sup> He claimed that this citation also clearly demonstrated 'errors of law' and accordingly he asserted that Lieutenant Doneley 'is entitled to the VC because "outstanding" is used in his citation'.<sup>7</sup> The Tribunal sought clarification that Mr Fogarty also wished to make application in respect of Lieutenant Doneley.<sup>8</sup> Mr Fogarty subsequently advised the Tribunal Secretariat verbally that he would not pursue the Doneley matter in parallel with the Diddams' review.

### Tribunal Jurisdiction and Decision under Review

5. Pursuant to s110VB(1) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision on defence honours if an application is properly made to the Tribunal. The term *reviewable decision* is defined

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<sup>1</sup> Fogarty letter dated 15 October 2013

<sup>2</sup> Fogarty letter to DHA dated 30 May 2014

<sup>3</sup> Parliamentary Secretary to the Minister for Defence MC14-003293 dated 21 January 2015

<sup>4</sup> Parliamentary Secretary to the Minister for Defence MC15-000398 dated 28 April 2015

<sup>5</sup> Application for Review of Decision dated 15 June 2015

<sup>6</sup> Fogarty submission 'Supplementary Information'

<sup>7</sup> Fogarty letter dated 15 June 2015

<sup>8</sup> DHAAT/OUT/2015/414 dated 16 July 2015

in s110V(1) and includes a decision made by a person within the Department of Defence or the Minister to refuse to recommend a person for an honour or award in response to an application. Regulation 93B of the *Defence Force Regulations 1952* defines a defence honour as being those awards set out in Part 1 of Schedule 3. Included in the defence honours set out in Part 1 is the Victoria Cross for Australia and the Medal for Gallantry.

6. The Parliamentary Secretary to the Minister for Defence in his letter of 21 January 2015 indicated that he was satisfied with the processing of gallantry awards, implying that he refused to recommend that Sergeant Diddams be reconsidered for a VC or to review Mr Fogarty's claims regarding errors of law.

7. The Tribunal considered that the application for review had been properly made, that both the VC and MG were honours subject to the *Defence Force Regulations 1952* and that the Parliamentary Secretary to the Minister for Defence had not recommended Sergeant Blaine Diddams for a VC as requested by Mr Fogarty, therefore the Tribunal has jurisdiction to review decisions in relation to this award. In accordance with s110VB(1) of the Defence Act, as the award is a defence honour, the Tribunal does not have the power to affirm or set aside the decision but may make recommendations regarding the decision to the Minister.

8. **Decision under Review.** The Tribunal, having reviewed Mr Fogarty's claims, correspondence from the Directorate of Honours and Awards of the Department of Defence (the Directorate), and the Parliamentary Secretary to the Minister for Defence, determined that the decision under review was the decision by the Parliamentary Secretary of 21 January 2015 to refuse to set aside the posthumous award of the MG to Sergeant Diddams in 2013 and substitute this award with the VC.<sup>9</sup>

#### **Conduct of the review**

9. In accordance with its *Procedural Rules 2011*, on 16 July 2015, the Tribunal wrote to the Secretary of the Department of Defence informing him of Mr Fogarty's application for review and requested a report on the material questions of fact and the reasons for the decision to award Sergeant Diddams the MG. The Tribunal also requested that the Secretary provide copies of documentation relied upon in reaching the decision and that he provide a copy of the relevant service record.

10. On 9 September 2015, Headquarters Joint Operations Command (HQJOC) provided a submission on behalf of the Secretary that included a timeline of the nomination process, copies of recommending officer reports and citations and Sergeant Diddams' service record.<sup>10</sup> The submission recommended that 'recognition of the actions of Sergeant Diddams on 2 July 2012 with a MG be affirmed'.<sup>11</sup> This material was sent to Mr Fogarty for comment on 14 September 2015.<sup>12</sup> He

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<sup>9</sup> Parliamentary Secretary to the Minister for Defence MC14-003293 dated 21 January 2015

<sup>10</sup> Ibid.

<sup>11</sup> Defence Submission dated 9 September 2015

<sup>12</sup> DHAAT/OUT/2015/546 dated 14 September 2015

responded on 21 September 2015 indicating that the issues he considered relevant 'will only be resolved by progressing to hearing'.<sup>13</sup>

11. [REDACTED]

12. [REDACTED]

[REDACTED]

13. [REDACTED]

14. [REDACTED]

15. The Tribunal met on 2 November and 14 December 2015 when it considered material provided by Mr Fogarty and Defence. The Tribunal confirmed the scope, the decision under review, jurisdiction and discussed privacy and confidentiality.

16. **Privacy and Confidentiality.** The Tribunal considered that Australia's ongoing involvement in Afghanistan continued to be a matter of national security and accordingly, this matter would require confidentiality restrictions. [REDACTED]

[REDACTED] As a result, and in accordance with *Procedural Rule 11*, the Chair of the Tribunal directed that subsequent hearings would be conducted in private. This information was passed to Mr Fogarty who was also advised that only those with appropriate security clearances would be able to give evidence and attend the hearing on 9 February 2016 and that he would be heard separately.<sup>15</sup> Further, in accordance with *Procedural Rule 15* as amended, the Chair directed that the reasons for decision were not to be made public and, in accordance with s110XD(1)(c) of the Defence Act, ordered that only

<sup>13</sup> Fogarty letter dated 21 September 2015

<sup>14</sup> [REDACTED]

<sup>15</sup> DHAAT/OUT/2016/003 dated 7 January 2016

details of the decision under review, Tribunal findings and the decision would be made public.<sup>16</sup>

17. Mr Fogarty wrote to the Tribunal on 31 January 2016 in response to the Directions and Orders claiming that his application:

*'is based on the facts that Administrative Law, in particular the ADJR [Administrative Decisions (Judicial Review) Act 1977], applies to Defence's determination of awards, there is no justification for separate Defence only hearing. The critical elements of my application rely on matters that are already in the public domain. There are no matters affecting National Security. Similarly, there is no justification for a restricted decision. The Tribunal's Directions show a clear bias towards Defence and against me'.<sup>17</sup>*

18. [REDACTED]

19. The Tribunal considered that Mr Fogarty's opinion regarding the procedures for the review was incorrect and that [REDACTED]

20. A hearing was conducted in Canberra on 9 February 2016 attended by retired Lieutenant Colonel Hawkins, the Nominating Officer for Sergeant Diddams' MG; Brigadier Fortune, the Special Forces representative on the Commander Joint Operations Command (CJOPS) Honours and Awards Board which had considered the Diddams nomination in 2012, Colonel Bennett the senior staff officer responsible for Personnel (J1) at HQJOC, Lieutenant Colonel Bishop from the Directorate of Administrative Law and Advisings in Defence Legal Division and staff from the Directorate and Army Headquarters. A hearing with Mr Fogarty was conducted in Canberra on 11 February 2016. This hearing was also attended by Lieutenant Colonel Bishop, staff from the Directorate and staff from Army Headquarters.

21. Following the hearing, Mr Fogarty wrote to the Tribunal offering his 'thoughts' and suggestions on what recommendations the Tribunal may wish to make to the Minister.<sup>18</sup> The suggestions included changing legislation to make Letters Patent subject to judicial review; that evidentiary procedures for Defence awards be reviewed 'by non-military legal people expert in Administrative Law'; that citations for awards be provided 'under oath', and that witnesses to incidents for which an award is being considered have 'technical detail' available to them. Receipt of the letter was acknowledged however the Tribunal chose not to accept Mr Fogarty's suggestions, preferring to only make recommendations within jurisdiction and specifically related to the decision under review.

<sup>16</sup> DHAAT/OUT/2016/004 – Orders and Directions in Relation to the review of a Defence Honour for Sergeant B.F. Diddams MG, dated 7 January 2016

<sup>17</sup> Fogarty letter dated 31 January 2016

<sup>18</sup> Fogarty letter dated 23 February 2016

22. Following the hearings and deliberations of the Tribunal, on 10 March 2016, the Chair revoked his earlier direction regarding the publication of the decision. On the same day, the Chair issued a new direction, directing that the reasons for decision would be published with suitable redactions to account for sensitivities and national security.

### **The Victoria Cross for Australia**

23. The Victoria Cross for Australia was established by Letters Patent on 15 January 1991 to be:

*'the highest decoration for according recognition to persons who, in the presence of the enemy, perform acts of the most conspicuous gallantry, or daring or per-eminant acts of valour or self-sacrifice or display extreme devotion to duty'.<sup>19</sup>*

24. The honour is governed by Regulations set out in the Schedule:

...

#### ***Conditions for award of the decoration***

3. *The decoration shall only be awarded for the most conspicuous gallantry, or a daring or per-eminant act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.*

4. *Each decoration may be awarded posthumously.*

...

#### ***Making of awards***

7. *Awards of the decoration shall be made, with the approval of the Sovereign, by Instrument signed by the Governor-General on the recommendation of the Minister.*

...

25. Prior to 1991, Australians were considered for the Victoria Cross under the auspices of the Imperial Royal Warrant originally made on 29 January 1856. Ninety-six Australians were awarded the medal. The last Australian to be awarded the Victoria Cross was Warrant Officer Keith Payne for gallantry on 24 May 1969 during the Vietnam War. Since the establishment of the Victoria Cross for Australia in 1991, the medal has been awarded four times:

- a. 2 September 2008 - Trooper Mark Donaldson who rescued an interpreter under heavy enemy fire in Uruzgan province in Afghanistan;
- b. 11 June 2010 – Corporal Ben Roberts-Smith who charged and destroyed two enemy machine gun positions in Shah Wali Kot in Afghanistan;
- c. 1 November 2012 – Corporal Dan Keighran who on numerous occasions deliberately exposed himself to enemy fire before drawing

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<sup>19</sup> *Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations*– dated 4 February 1991

fire away from an injured colleague in Uruzgan province in Afghanistan; and

- d. 22 June 2013 - Corporal Cameron Baird who repeatedly charged enemy positions and in so doing, drew fire away from his colleagues in Uruzgan province in Afghanistan. Corporal Baird was killed during the action and the medal was awarded posthumously.

### **Gallantry Decorations**

26. The Star of Gallantry, the Medal for Gallantry and the Commendation for Gallantry were established as Gallantry Decorations by Letters Patent on 15 January 1991 for the purpose of:

*'according recognition to members of the Defence Force and certain other persons who perform acts of gallantry in action'.<sup>20</sup>*

27. The honours are governed by Regulations set out in the Schedule:

...

#### ***Conditions for award of the decorations***

3. (1) *The Star of Gallantry shall be awarded only for acts of great heroism or conspicuous gallantry in action in circumstances of great peril.*  
(2) *The Medal for Gallantry shall be awarded only for acts of gallantry in action in hazardous circumstances.*  
(3) *The Commendation for Gallantry may be awarded for other acts of gallantry in action which are considered worthy of recognition.*
4. *Each decoration may be awarded posthumously.*

...

#### ***Making of awards***

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

28. The Star of Gallantry is the second highest military gallantry award in the Australian Honours System. It has been awarded seven times since 1991. The Medal for Gallantry is the third highest military gallantry award, more than 50 medals have been awarded since 1991. The Commendation for Gallantry ranks fourth and has also been awarded more than 50 times since 1991.

### **Processing of Nominations for Gallantry**

29. Chapter 7 of the Defence Honours and Awards Manual provides policy and guidance on the nomination and processing procedures for gallantry decorations.<sup>21</sup> The manual identifies the authority for the approval of decorations as *Commonwealth of Australia Gazette No. S25 of 4 February 1991 – Letters Patent and Regulations*. The guidance includes advice that nominations are to be assessed on merit with strict

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<sup>20</sup> *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991

<sup>21</sup> *Defence Honours and Awards Manual (DHAM) Volume 1 Edition 1*

attention paid to the criteria for the award and that there is to be no cascade effect in nominations.

30. Whilst the administration of nominations is divided into immediate, priority and periodic categories, the approval process is clear and consistent. A nomination for a gallantry award is made from the unit through the operational chain-of-command to the Australian Operational Joint Force Commander who makes a recommendation to the CJOPS. If the CJOPS is satisfied with the recommendation he will pass it to the Chief of Defence Force (CDF) to endorse the recommendation and forward to the Minister, for the Minister's recommendation to the Governor-General for approval. The Directorate's role in the process is the preparation of supporting documentation and facilitation of the nomination through the CDF and Minister.

31. The guidance states that 'at any point in the chain-of-command, a nomination may be upgraded, downgraded, rejected or remain intact'.

### **Sergeant Diddams' Service Record**

32. Sergeant Diddams enlisted in the Australian Regular Army on 24 April 1990. Following his initial employment training at Singleton he was posted to the First Battalion, the Royal Australian Regiment on 2 November 1990. He was posted to the Special Air Service Regiment (SASR) on 9 August 1995. He separated from the Army on 31 October 2004 but re-enlisted and returned to SASR on 5 February 2007. He was posted to SASR for the remainder of his career. He was a veteran of Australia's deployments to Somalia, East Timor, the Solomon Islands and completed six separate tours of duty to Afghanistan. He was promoted to Sergeant on 17 May 2011 whilst on his penultimate deployment to Afghanistan.

33. Sergeant Diddams was killed in action on 2 July 2012 on his seventh deployment to Afghanistan. He was serving as a patrol commander with the Special Operations Task Group (SOTG) in the Chora District of Uruzgan Province. He was awarded the Medal for Gallantry (Posthumous) in the Queen's Birthday Honours List of 2013 '*for acts of gallantry in action in hazardous circumstances on Operation Slipper in Afghanistan on 2 July 2012*'.

### **The Action**

34. Sergeant Diddams was the commander of a special forces patrol tasked to conduct a cordon and search operation in the Baluchi Valley. The patrol was inserted by helicopters on the morning of 2 July 2012. Shortly after the insertion, the patrol came under intense enemy fire and one man became pinned down. At 0950 hours Sergeant Diddams decided to conduct a flanking assault to relieve the situation and shortly after commencement, he was mortally wounded. Following a brief counter attack, Sergeant Diddams was dragged back to cover and evacuated by helicopter to Tarin Kowt. Sergeant Diddams was pronounced deceased at 1047 hours, having in all likelihood been killed instantly.

## **The Citation for the Medal for Gallantry**

35. The citation for the Medal for Gallantry was drafted by Sergeant Diddams' sub-unit commander for formal submission by his Commanding Officer (the Nominating Officer), Lieutenant Colonel J.G. Hawkins.<sup>22</sup> The citation describes Sergeant Diddams' actions in the initial firefight and then his 'fearless' leadership and disregard for his own safety during the outflanking manoeuvre where he was mortally wounded. The citation concludes that Sergeant Diddams 'displayed inspirational leadership and selfless courage in extremely hazardous circumstances'.

36. Sergeant Diddams' MG was announced in the Queen's Birthday 2013 Honours by the Official Secretary to the Governor-General on 10 June 2013.<sup>23</sup> The gazetted citation for the award states:

***Sergeant Blaine Flower DIDDAMS, deceased, WA***  
*For acts of gallantry in action in hazardous circumstances as a patrol commander, Special Operations Task Group Rotation XVII on Operation SLIPPER in Afghanistan on 2 July 2012.*

*On 2 July 2012, Sergeant Diddams displayed inspirational leadership and selfless courage in extremely hazardous circumstances. To support his patrol and ensure mission success, he knowingly exposed himself to draw fire and lead assaults on insurgent positions. His leadership and selfless acts of gallantry, which ultimately cost his life, were of the highest order and in keeping with the finest traditions of Australian special operations forces, the Australian Army and the Australian Defence Force.*

## **Mr Fogarty's Submissions**

37. Mr Fogarty wrote to the Governor-General on 15 October 2013 claiming that:

*'The citation accompanying the award of the Medal for Gallantry to Sergeant Diddams ... provides proof that his actions satisfy the criteria for the award of the VC (Self sacrifice)'*

38. He claimed that:

*'Failure to take this into account constitutes an error of law under ADJR Sec 5(1)(e) as defined by ADJR Sec 5(2)(b).'*

39. Mr Fogarty informed the Governor-General that decisions she made 'cannot be appealed under the ADJR; however the correctness, or otherwise, of the decision making process can be ruled on by you'. He stated that he appreciated:

*'that the recommendation would have been prepared by Defence and submitted to you (the Governor-General) for formal approval'.*

<sup>22</sup> LTCOL Hawkins Oral Evidence 9 February 2016

<sup>23</sup> Gazette Notice - C2013G00848 S 64, 2013 dated 10 June 2013

40. He concluded his letter by requesting that the Governor-General review the matter with 'a view to awarding Blaine (Sergeant Diddams) a Victoria Cross for Australia'.<sup>24</sup>

41. In response to this letter, the Director of the Australian Honours and Awards Secretariat at Government House informed Mr Fogarty that his letter had been sent to the Directorate for response.<sup>25</sup> She stated:

*'... the CDF determines eligibility for all defence honours and awards and then the Minister of Defence (Sic) puts forward recommendations to the Governor-General for approval.'*

42. On 30 May 2014 Mr Fogarty wrote to the Directorate explaining that the reason he wrote to the Governor-General was because he had believed that the decision she had made in relation to the award of the MG was not able to be appealed.<sup>26</sup> He indicated that the response from Government House:

*'clearly states that this is not the case and that such decisions are made by the CDF ... this clearly makes the decision appealable under the ADJR, as an 'error of law'. The legal significance of an 'error of law' is that the purported decision is void and needs to be 're-made' correctly'. (Highlight added for clarity)*

43. Mr Fogarty indicated that he had analysed Sergeant Diddams' citation in comparison to the last four recipients (Donaldson, Roberts-Smith, Keighran and Baird) and also examined legal precedent including Federal and High Court cases. He concluded that:

*'...it is abundantly clear that Sergeant Diddams is legally entitled to the award of the VC and I formally request that you make such award forthwith'.*

44. The Directorate informed Mr Fogarty that it was only responsible for coordinating nominations for gallantry and was not involved in the decision making process.<sup>27</sup> It stated that nominations for awards resulting from service on operations were the responsibility of HQJOC and accordingly, his submission had been sent to that area for consideration. The Tribunal noted that there is no evidence that a response was provided by HQJOC.

45. On 29 October 2014 Mr Fogarty wrote to the Federal Member for Fairfax (an adjoining electorate to Mr Fogarty's residential address at Northgate in Queensland).<sup>28</sup> In this letter titled 'Error of Law in not awarding VC to Blaine Diddams', he submitted that he was a past student of Saint Columban's College, originally located at Albion in Brisbane but now in Caboolture and, as a Vietnam veteran he had been attending Anzac ceremonies at the College since 2011. He stated that Sergeant Diddams was also a past student of the College. Mr Fogarty indicated

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<sup>24</sup> Fogarty letter dated 15 October 2013

<sup>25</sup> Government House letter dated 25 October 2013

<sup>26</sup> Fogarty letter dated 30 May 2014

<sup>27</sup> DHA letter dated 2 July 2014

<sup>28</sup> Fogarty letter dated 29 October 2014

that in 2012 and 2013, he had been actively involved at the College in the commemorations of Sergeant Diddams' sacrifice.

46. Mr Fogarty stated that:

*'...with the institution of the Order of Australia Awards, the Australian Gallantry awards came under Australian legislation ... the Australian Constitution assigns responsibility for interpreting legal matters to the High Court not the Australian Defence Force.'* (Highlight added by Mr Fogarty)

47. He sought the Federal Member's assistance to:

*'...negotiate this matter directly with the Minister for Defence who, according to the letter dated 25 October 2013 from the Directorate is the "Decision Maker"'*.

48. The Federal Member's office indicated it would pass Mr Fogarty's submission as a representation to the Minister for Defence.<sup>29</sup> This representation resulted in the 21 January 2015 response from the Parliamentary Secretary which indicated that he was satisfied with the operational awards process and the assessment of gallantry awards and that he would not set aside the posthumous award of the MG to Sergeant Diddams and substitute it with a VC.<sup>30</sup> He indicated that if Mr Fogarty was not satisfied he should approach the Tribunal.

49. Between February and May 2015 Mr Fogarty wrote to a range of Federal politicians including the Prime Minister, the Attorney General, various Queensland and Tasmanian senators, a media commentator and his local Member regarding his efforts to have Sergeant Diddams' award upgraded to a VC. The letters continued the general theme of 'errors of law' including the following statements:

*'...Defence doesn't accept that it has to make gallantry awards consistent with Australian Legislation, particularly the ADJR Act 1977',<sup>31</sup>*

*'...is the ADF subject to Australian legislation? ',<sup>32</sup>*

*'...Did the creation of the Order of Australia make gallantry awards subject to Australian legislation? ',<sup>33</sup>*

*'...the underlying issue in this matter is that Defence have not made their decisions consistent with the ADJR Act 1977. In fact, they don't even seem to be aware of this act... ',<sup>34</sup>*

*'...the Constitution confers power on the High Court to interpret legislation and to rule on disputes. No Australian Government Department is the final*

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<sup>29</sup> Office of Clive Palmer, MP, Member for Fairfax e-mail dated 1155 hours 3 November 2014

<sup>30</sup> Parliamentary Secretary to the Minister for Defence MC14-003293 dated 21 January 2015

<sup>31</sup> Fogarty letter to Senator Lazarus, Senator for Queensland, dated 18 March 2015

<sup>32</sup> Fogarty letter to the Prime Minister dated 29 March 2015

<sup>33</sup> Ibid.

<sup>34</sup> Fogarty letter to the Attorney General dated 4 May 2015

*determinant of whether their decisions have been made according to "law"',<sup>35</sup> and*

*'... Failure to take this (self sacrifice) into account constitutes an error of law under ADJR Sec 5(1)(e)...'<sup>36</sup>*

50. At the hearing on 11 February 2016, Mr Fogarty tabled an update to his previously provided 'Facts and Contentions' submission, a contents listing of the Tribunal papers and an opening statement. In his preamble to the opening statement he indicated that he was subject to a veteran's disability action in 2005 and as a result, he had subsequently been used to conduct research of disability claims by various advocates. He stated that he had completed over 45 research tasks over the past decade. He said that his assertions regarding 'errors of law' were a result of his Department of Veterans' Affairs experiences. His opening statement which he read to the Tribunal was a summary of his many previous assertions and claims. Additionally, he stated:

*'Whilst my application is in respect of Blaine Diddams, it is also about the application of Administrative Law to Defence procedures ... I should not have to argue the case for the application of Administrative Law, particularly the Administrative Decisions (Judicial Review) Act 1977'.*

51. He stated that he had reviewed the Defence submission, particularly the reasons for decision provided by HQJOC.<sup>37</sup> In so doing he asserted that as no formal witness statements were gathered by the unit in preparing the nomination for Sergeant Diddams then the process was flawed as it was based on 'assumptions'. He further asserted that as HQJOC had stated that after the nomination left the unit, the recommenders had 'no access to further detail or additional context', this implied the final decision maker (who he opined was the Parliamentary Secretary) did not have access to the 'primary evidence' on which to base his decision.

52. Mr Fogarty provided a number of further assertions in his opening statement, generally repeating material he had already provided to the Tribunal. Significantly he asserted that there was:

*'no evidence that Defence has even evaluated the evidence relating to Blaine's final actions against the VC Regulations'.*

53. Mr Fogarty concluded his evidence by providing six reasons why Sergeant Diddams should be awarded the VC. Five of these related to the wording of the last paragraph of the citation where he implied that as the previous four VC recipients were recognised for 'actions of the highest order' and Sergeant Diddams' citation also used these words, he should be given the same level of recognition. His final reason was that as the citation stated that the actions 'ultimately cost his life' this was 'self-sacrifice' and therefore he was legally entitled to the VC as one of the several conditions for the award is self-sacrifice.

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<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

<sup>37</sup> Defence Submission – HQJOC AM2281541 dated 9 September 2015

## Defence Submission

54. The Defence submission, prepared by HQJOC on 9 September 2015, outlines the decision-making process and reasons for the decision to posthumously award Sergeant Diddams the MG.<sup>38</sup>

55. **Process.** Sergeant Diddams was nominated for the MG by his Commanding Officer on 8 July 2012.<sup>39</sup> The nomination was 'supported, at level, through the entirety of the Defence operational honours and awards nomination process'.<sup>40</sup> The submission indicates that an operational Honours and Awards Board was conducted at HQJOC on 24 September 2012 where Sergeant Diddams' nomination was considered. As a result of this Board, Chief of Army and the Operational Joint Force Commander in Afghanistan were informed that the MG had been recommended for Sergeant Diddams and the nomination (without amendment or adjustment) was passed to the Directorate to prepare a brief for CDF endorsement.<sup>41</sup> The subsequent brief was sent to CDF on 27 September 2012. As Sergeant Diddams' death was the subject of a Defence Inquiry, the staff in CDF's office elected to hold the brief until the Inquiry was completed. On 25 January 2013 the CDF endorsed the brief and in so doing, made a minor amendment to the text of the citation, removing the words [REDACTED] from the end of the third paragraph.<sup>42</sup>

56. A Ministerial Submission with the CDF endorsed nomination was passed to the Parliamentary Secretary to the Minister for Defence on 6 March 2013.<sup>43</sup> On 14 March 2013, the Parliamentary Secretary sent the nomination to the Governor-General 'for consideration' and recommending that Sergeant Diddams be awarded the MG posthumously.<sup>44</sup>

57. **Reasons for Decision.** The Defence submission indicates that in relation to the initiation of the nomination for Sergeant Diddams, the Commanding Officer of the SOTG, Lieutenant Colonel Hawkins:

*'made the initial assessment on the appropriate level of recognition'.*<sup>45</sup>

58. The submission indicates that Lieutenant Colonel Hawkins:

*'was able to make this recommendation based on his professional military judgement and detailed understanding of the context in which the action took place ... in considering his recommendation Lieutenant Colonel Hawkins was able to draw on his personal knowledge through monitoring the action ... and he was also able to draw on direct personal communication with the individuals physically involved ... through formal operational debriefing processes and informal discussions with individuals'.*<sup>46</sup>

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<sup>38</sup> Ibid.

<sup>39</sup> Ibid. Enclosure 1 and 2

<sup>40</sup> Ibid. Paragraph 3

<sup>41</sup> Ibid. Enclosure 8

<sup>42</sup> Ibid. Enclosure 4

<sup>43</sup> Ibid. Enclosure 5

<sup>44</sup> Ibid. Enclosure 6

<sup>45</sup> Ibid. Paragraph 10

<sup>46</sup> Ibid. Paragraph 10 and 11

59. The submission indicates that as the subsequent recommending officers had no access to further detail or additional context, 'each level of review concurred with the assessment made by Lieutenant Colonel Hawkins and changes were of a minor editorial or grammatical nature'.<sup>47</sup>

60. During the hearing on 9 February 2016, Lieutenant Colonel Hawkins (Retd), the Nominating Officer in 2012, stated that when the patrol returned after the action he immediately conducted a debrief with them and with his Regimental Sergeant Major and Executive Officer also in attendance.<sup>48</sup> He stated that it was obvious to him and his senior staff that the action, and Sergeant Diddams' part in it, were 'worthy of some form of recognition'. He said that he 'pondered a couple of levels' of award including the Distinguished Service Medal (DSM) but never considered the VC. He said that he discarded the DSM as it was more appropriate that recognition be accorded to the combative nature of the engagement and the fact it was 'in action'.

61. When asked what experience he had in making recommendations and nominations for honours he stated that he had personally completed eight operational tours in various theatres and had made a total of six nominations for the MG and a similar number for DSMs. He said that of the six MGs he had nominated, five had remained at level through to approval. He stated that he 'drew on the combat actions of one of these which was a similar engagement to the Diddams action' in making his decision to recommend a MG. He stated that he had reviewed the criteria for the MG in making his decision but did not compare the citations of VC winners in signing off the nomination.

62. Lieutenant Colonel Hawkins stated that there was a distinct difference between the actions – in the VC cases, the individuals faced the very real possibility because of the threat, that

In Sergeant Diddams' case, there was great peril but the engagement was progressing favourably and there

He stated that this was not the case with Sergeant Diddams whose actions were undeniably gallant but 'did not reach the threshold of the VC'.

63. Brigadier Fortune who at the time of consideration of the Diddams nomination was the Special Forces representative on the CJOPS Honours and Awards Board, was also asked at the hearing what experience he had in making recommendations for honours and whether he was able to explain the difference between other contemporary nominations and the citation for Sergeant Diddams. He stated that he had successfully nominated a soldier for a MG in 2008. He stated that he had also been involved in the process of consideration of Corporal Roberts-Smith for the VC and that the key difference was that Roberts-Smith was involved in

<sup>47</sup> Ibid. Paragraph 12

<sup>48</sup> The Regimental Sergeant Major (RSM) is the senior soldier in the unit and, in this case, the Executive Officer was also a previous RSM.

repeated acts of great gallantry in stressful and perilous actions whereas Diddams' nomination was for a single act of gallantry. [REDACTED]

He noted that the nomination of Sergeant Diddams was carefully considered at the CJOPS Honours and Awards Board and the Commander ultimately supported it 'at level' and without alteration.

64. Colonel Bennett described the improvements made to the JOC process as a result of the ADF's experiences over the past decade and that considerations and decisions are now better recorded and minuted. Notwithstanding these improvements, he indicated that in his view the Diddams process was straightforward, that there had been no direction given by superiors regarding the level of award and that the nomination had not been referred back to the subordinate chain of command at any stage. He stated that all of the individuals in the recommending chain were satisfied that the MG was the appropriate level in the circumstances.

65. Lieutenant Colonel Bishop stated that Mr Fogarty's assertions of errors of law under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) were misconceived as the ADJR Act only applied to decisions 'under an enactment'. Lieutenant Colonel Bishop also stated that the Letters Patent for honours and awards are not enactments or Acts, but in fact 'prerogative instruments', and that decisions under such Letters Patent are therefore not subject to review under the ADJR Act.

### **Tribunal Consideration**

66. The Tribunal carefully considered all of the material placed before it including written submissions and oral evidence. There is no dispute about Sergeant Diddams' service record from his enlistment on 24 April 1990 until his death on 2 July 2012. There is no dispute that Sergeant Diddams was nominated for the MG and that it was considered by his operational chain of command. At issue is whether the nomination was correctly approved in accordance with the law and whether or not he should have been considered for and awarded the VC.

67. **Nomination for the MG.** The Tribunal examined the nomination process for the MG and noted that the Nominating Officer was the unit Commanding Officer and that he had significant previous experience in assessing subordinates' actions for gallantry awards. The Tribunal noted that he was advised by a deeply experienced command team with similar experience and that they had monitored the action as it occurred and then sought information from all of the witnesses to the action within one hour of the occurrence. The Tribunal was satisfied that there was no external or superior influence in deciding the level of the nomination. The Tribunal noted that Lieutenant Colonel Hawkins, as the Commanding Officer of the unit also consulted with Sergeant Diddams' immediate superior before making the nomination. He signed the nomination on the appropriate Form AD104 on 8 July 2012.

68. The Tribunal was particularly impressed with Lieutenant Colonel Hawkins' evidence. It is clear that he gave careful thought to the nomination and to the level at

which it should be set. Furthermore, the Tribunal is satisfied that he was aware of all relevant considerations and was not subject to any form of dictation.

69. Although not stated, it was clear to the Tribunal that Lieutenant Colonel Hawkins had considered 'self-sacrifice' in his decision making and reached a conclusion which was open to him to make in determining what level of award he would recommend as Sergeant Diddams' commander.

70. The nomination was recommended by the Commander of the in-theatre Joint Task Force on 27 August 2012. The Operational Commander was the CJOPS who convened an Honours and Awards Board on 24 September 2012 where the nomination was considered and subsequently recommended by the Commander. The CDF recommended the nomination on 25 January 2013 and signed a Ministerial Submission which was sent to the Parliamentary Secretary to the Minister for Defence on 6 March 2013. On 14 March 2013 the Parliamentary Secretary wrote to the Governor-General 'recommending' the MG be awarded to Sergeant Diddams for 'acts of gallantry in hazardous circumstances'.

71. In oral evidence Brigadier Fortune indicated that the Board was satisfied with the level of award and the Commander, advised by the Board, was satisfied that the actions warranted the MG. The Tribunal noted that the Board was extremely experienced in considering these matters with the Commander in his third year of tenure and the CDF in his second year of tenure. The Tribunal found that the nomination was correctly processed in accordance with policy and that those involved in the chain of recommendation were well experienced in making assessments of levels of award.

72. **Approval of the MG.** The Tribunal noted that one of Mr Fogarty's key initial assertions was that the citation for the MG 'provides proof that Sergeant Diddams' actions satisfy the criteria for the award of the VC (self-sacrifice)' and he is therefore 'legally entitled to the award of the VC'. He also contends that 'failure to take this into account constitutes an error of law under the ADJR'.

73. The Tribunal noted that in responding to Mr Fogarty's assertion, the Director of the Honours and Awards Secretariat at Government House stated '... the CDF determines eligibility for all defence honours and awards and then the Minister of Defence puts forward recommendations to the Governor-General for approval.' The Tribunal considered that Mr Fogarty's response incorrectly interpreted the advice as it relates to who makes eligibility determinations and who approves recommendations. Mr Fogarty stated:

*'... clearly states that this is not the case and that such decisions are made by the CDF ...'*

74. During the hearing with Mr Fogarty on 11 February 2016, this issue was discussed. The Tribunal indicated to Mr Fogarty that the statement that 'CDF determines eligibility' does not imply that he approves but means that he is able to set the eligibility criteria for awards through Determinations. The Tribunal also pointed out that the letter clearly states that the Minister 'puts forward recommendations' to the Governor-General 'for approval'. Mr Fogarty's response was:

*'... if I understood that to be the case I would not have gone through with all of this ...'*

75. The Tribunal was therefore satisfied that the initial advice was correct and had been misunderstood by Mr Fogarty. Defence does determine eligibility criteria for honours and awards where the Letters Patent and Regulations require elaboration and, when this is necessary, Determinations are issued by the CDF. The Letters Patent clearly state that the award is 'made by the Governor-General'.

76. **Error of Law.** Having made the incorrect interpretation regarding approval delegations Mr Fogarty then opines that as the decision to award the MG was allegedly made by the CDF and not the Governor-General, the decision is appealable under the ADJR Act, as an 'error of law' and as such, 'the decision is void and needs to be "re-made" correctly'.

77. The Tribunal discussed Mr Fogarty's claims regarding 'errors of law' during the hearing. The Tribunal pointed out that for decisions to be subject to the ADJR Act they must be made under an enactment. Letters Patent are not enactments, but a gift of the Sovereign and are prerogative instruments. Mr Fogarty stated that he understood Letters Patent to be a 'bill' and therefore subject to the ADJR Act. He did not concede but stated that he would need to conduct more research. He stated that:

*'... if I've been wrong, I've been wrong ...'*

78. The Tribunal noted that the CDF sent the Diddams nomination to the Parliamentary Secretary to the Minister for Defence on 6 March 2013.<sup>49</sup> On 14 March 2013, the Parliamentary Secretary sent the nomination to the Governor-General 'for consideration' and recommending that Sergeant Diddams be awarded the MG posthumously.<sup>50</sup> The Tribunal also noted that the Letters Patent for Gallantry Decorations contain Regulations which vest authority for the making of awards in 'the Governor-General on the recommendation of the Minister'.<sup>51</sup> The Tribunal noted that the Governor-General approved the award on 10 June 2013.<sup>52</sup> The Tribunal therefore found that the MG had been correctly approved in accordance with the Regulations by the Governor-General and that Mr Fogarty's assertions regarding an 'error of law' and voiding of the decision could not be sustained.

79. **Self-sacrifice and Legal Entitlement to the VC.** The Tribunal examined Mr Fogarty's assertion that Sergeant Diddams' actions and particularly 'self-sacrifice' make him 'legally entitled to the award of the VC'. The Tribunal noted that the Letters Patent for the VC have many conditions including self-sacrifice for according recognition to persons who in the presence of the enemy:

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<sup>49</sup> Defence Submission – HQJOC AM2281541 dated 9 September 2015 - Enclosure 5

<sup>50</sup> Ibid. Enclosure 6

<sup>51</sup> *Commonwealth of Australia Gazette No. S25 – Gallantry Decorations Regulations* - dated 4 February 1991, Clause 7

<sup>52</sup> *Gazette Notice - C2013G00848 S 64*, 2013 dated 10 June 2013

*'perform acts of the most conspicuous gallantry, or daring or pre-eminent acts of valour or self-sacrifice or display extreme devotion to duty'.<sup>53</sup>*

80. The Tribunal noted that defence honours including gallantry and distinguished service Regulations bestow upon the approving authority the discretion to make a decision based on the merits of each individual case and the guidance for assessment requires that nominations are assessed on merit.<sup>54</sup> By contrast, awards for service are not discretionary – an individual is either eligible in that they meet the criteria or they are not. The Tribunal considered that as Mr Fogarty had significant experience in the researching of matters relating to the Veterans' Entitlement Act, he may have been influenced by the 'entitlement nature' of that Act and was not familiar with dealing with matters which require discretion.

81. The Tribunal noted that 'gallantry' and 'distinguished service' are not defined in the Regulations and considered this to be appropriate as to do so would potentially remove the discretion available to the nominating and approving authorities. Some objective elements are present in the conditions, however for the most part, subjective judgements are required to be made by the Nominating Officer and those who subsequently support or recommend the nomination. The Tribunal discussed this with Mr Fogarty during the hearing and informed him of the experience of the Nominating Officer and the fact that he had used his experience to make a discretionary decision on the level of award.

82. The Tribunal noted that Mr Fogarty makes several assertions regarding the creation of the Order of Australia and linkages to gallantry awards.<sup>55</sup> The Tribunal found that these assertions were misguided. The Order of Australia honours were established in 1975 as a uniquely Australian order of chivalry to recognise Australian citizens and other persons for achievement or meritorious service. Defence honours are for servicemen and women and are administered by the Department of Defence. Each are discrete elements of the Australian honours system.

83. The Tribunal also noted that Mr Fogarty makes various assertions regarding the Imperial system of honours and awards including the requirement for three witnesses in support of VC nominations. The Tribunal considered that these assertions are not relevant as the Letters Patent for the VC and the Australian Gallantry Decorations dated 4 February 1991 as amended, define the conditions for the award of decorations and are the current and appropriate authority for the awards.

84. **Eligibility for the VC.** The Tribunal noted that Mr Fogarty indicated that he had analysed Sergeant Diddams' citation in comparison to the last four recipients of the VC and also examined legal precedent. He contends that Sergeant Diddams is entitled to the VC 'because the critical part of his citation is very similar to the citations of the other 4 VCs from Afghanistan'.<sup>56</sup> The Tribunal did not accept that precedent was a justifiable factor in determining eligibility for defence honours and awards. Eligibility is determined in each matter according to its own facts. The circumstances in which Sergeant Diddams found himself were different to other

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<sup>53</sup> *Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations* - dated 4 February 1991

<sup>54</sup> *Defence Honours and Awards Manual (DHAM) Volume 1 Edition 1*

<sup>55</sup> Fogarty letter to the Prime Minister dated 29 March 2015

<sup>56</sup> Fogarty Submission 'Facts and Contentions' dated 11 February 2016

individuals and his actions were also different. The threat, patrol procedures and individual reactions were different in each case. The Tribunal discussed the different threat scenarios faced by some VC recipients and contrasted these for Mr Fogarty with the threat faced by Sergeant Diddams.

85. The Tribunal reviewed the cited actions by Sergeant Diddams and the oral evidence provided by Lieutenant Colonel Hawkins and Brigadier Fortune. The Tribunal gave great weight to the statement by Hawkins that the standard did not meet the 'threshold for the VC'. His analogy that the threat conditions at the time of Sergeant Diddams' action were perilous [REDACTED]

[REDACTED] The Tribunal noted that Lieutenant Colonel Hawkins and Brigadier Fortune had both been personally involved in other nominations and therefore, the Tribunal was satisfied that they were well equipped to make an assessment of the nominated level of award. The Tribunal also gave weight to the experience of the CJOPS and the CDF who were also involved in the consideration of the level for Sergeant Diddams and had both been involved in the two most recent VC considerations (Keighran and Baird).

### **Findings**

86. The Tribunal found that Sergeant Diddams' nomination for the MG was considered by experienced officers, processed in accordance with policy and approved in accordance with the appropriate Regulations by the Governor-General. The Tribunal found that there was no error of law in the decision making process.

87. The Tribunal found that precedent was not a justifiable factor in determining the merit of a nomination for gallantry and that the actions which resulted in Sergeant Diddams being nominated for the MG, whilst undoubtedly gallant, were considered by experienced officers who determined that these actions did not meet the exceptionally high standard required for award of the VC.

88. For the reasons stated above, the Tribunal found that Sergeant Diddams was appropriately recognised for his gallantry in action in hazardous circumstances as a patrol commander in Afghanistan on 2 July 2012 through the posthumous award of the MG.

### **Allegation of Bias**

89. Mr Fogarty wrote to the Tribunal on 31 January 2016 and in his letter stated:

*The Tribunal's Directions show a clear bias towards Defence and against me*.<sup>57</sup>

90. During the hearing with Mr Fogarty the Tribunal asked him to substantiate his claim regarding bias – he said that he 'couldn't see what we were getting at as his application was based on administrative law'. He said that he now understood the reasons for imposing restrictions on the hearings and publication of the decision.

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<sup>57</sup> Fogarty letter dated 31 January 2016

## **DECISION**

91. The Tribunal decided to recommend to the Assistant Minister for Defence that the decision by the Parliamentary Secretary to refuse to set aside the posthumous award of the MG to Sergeant B.F. Diddams MG in 2013 and substitute this award with the VC be affirmed.