



Australian Government

Defence Honours and Awards Appeals Tribunal

Saunders and the Department of Defence re: Terry [2018] DHAAT 03 (9 May 2018)

File Number 2017/005

Re **Mr Ian Saunders OAM** on behalf of **Private Lionel Terry**
Applicant

And **The Australian Army** on behalf of the **Department of
Defence**
Respondent

Tribunal Mr Mark Sullivan AO (Presiding Member)
Mr David Ashley AM
Mr Graham Mowbray

Hearing Dates 8 February 2018 (Perth)
1 March 2018 (Canberra)

DECISION

On 9 May 2018 the Tribunal recommended to the Minister that he affirm the decision of the Minister for Defence Personnel of 30 May 2017, to accept the recommendation of the Chief of Army, that no further action be taken to recognise Private Lionel Terry's actions in Korea on 25 January 1953.

CATCHWORDS

DEFENCE HONOUR – *Victoria Cross for Australia*

LEGISLATION

Defence Act 1903 ss110T, 110V(1), 110VB(1)
Defence Force Regulations 1952 – Regulation 93B and Schedule 3
Defence Regulation 2016 – s85
Victoria Cross Regulations, Commonwealth of Australia Gazette (CAG)
No S25 of 4 February 1991
Gallantry Decorations Regulations, Commonwealth of Australia Gazette (CAG)
No S25 of 4 February 1991

REASONS FOR DECISION

Introduction

1. On 26 July 2011, Mr Ian Saunders OAM (Mr Saunders) provided a submission to the Tribunal's *Inquiry into unresolved recognition for past acts of naval and military gallantry and valour* (the Valour Inquiry) seeking the award of the Victoria Cross (VC) for Private Lionel Terry. Private Terry is presumed to have died in action on 25 January 1953 in Korea. Private Terry's body has never been recovered.¹ Private Terry was recognised by the award of a posthumous Mention in Dispatches (MID) on 10 June 1955.²
2. Mr Saunders is the son of Private John Phillip Saunders who is presumed to have died during the same action. His body was also not recovered.^{3 4}
3. Along with a submission from Mr Saunders to the Valour Inquiry, submissions seeking recognition for Private Terry were received from Lieutenant Colonel Ted Chitham MC OAM (Retd), the then Secretary of the Royal Australian Regiment Corporation.⁵
4. On 30 May 2017, the Hon. Dan Tehan MP, Minister for Defence Personnel, wrote to Mr Saunders advising him that the Chief of Army had reviewed Private Terry's case and recommended that no further action be taken to recognise his actions in Korea on 25 January 1953. This recommendation was accepted by Minister Tehan.⁶
5. On 8 June 2017, Mr Saunders applied to the Tribunal for a review of the Minister's decision.⁷

Conduct of the review

6. In accordance with its *Procedural Rules 2011*, the Tribunal wrote to the Secretary of the Department of Defence on 15 June 2017, informing him of Mr Saunders' application for review and requested a report on the material questions of fact and the reasons for the decision made in relation to Mr Saunders' application. The Tribunal also requested that the Secretary provide copies of documentation relevant to the reviewable decision and that he provide a copy of Private Terry's service record.
7. On 1 August 2017, the Directorate of Honours and Awards (the Directorate), on behalf of Defence, provided its report, which had been prepared by Army Headquarters.⁸

¹ Website: Roll of Honour, Lionel John Terry, <https://www.awm.gov.au/collection/R1714801>, accessed 29 September 2017.

² London Gazette 40506, p3379.

³ Website: Roll of Honour, John Phillip Saunders, <https://www.awm.gov.au/collection/R1714320>, accessed 29 September 2017.

⁴ Valour Inquiry Submission 130, Mr Ian Saunders OAM.

⁵ Valour Inquiry Submission 104, Lieutenant Colonel Ted Chitham (Retd).

⁶ Letter, MC17-001000, The Hon. Dan Tehan MP, 30 May 2017.

⁷ Form, Application for Review of Decision, signed 8 June 2017.

8. The report was forwarded to Mr Saunders who provided his response and comments on 6 September 2017.⁹

9. On 8 February 2018, the Tribunal conducted a hearing in Perth with Mr John Mackay, the only surviving eye witness to Private Terry's action. This hearing was recorded and electronic copies of the recording were provided to Mr Saunders and to Defence prior to the second hearing.

10. On 1 March 2018 the Tribunal conducted a second hearing in Canberra, where the applicant participated by telephone and which was attended by the Defence representatives. At the request of the Tribunal, further material was provided by Mr Saunders following the hearing.

Tribunal Jurisdiction

11. Pursuant to s 110VB(1) 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 the Minister or a person within the Department of Defence 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 set out in Part 1 of Schedule 3.¹⁰ Included in the defence honours set out in Part 1 is the VC.

12. The Tribunal is satisfied that Mr Saunders' submission on 26 July 2011 to the Valour Inquiry constitutes an application as defined in s110V(1)(c) of the Defence Act. The Tribunal also considered that the Minister's decision that he accepted the Chief of Army's recommendation that no further action be taken to recognise Private Terry's action in Korea on 25 January 1953 constituted a refusal to recommend Private Terry for the VC, therefore satisfying the requirements of s110V(1)(a) and (b) of the Defence Act. The Tribunal therefore has jurisdiction to conduct the review.

Private Terry's service

13. On 27 August 1951, Lionel Terry, a 20 year old miner from Coburg, Victoria, enlisted in the Regular Army Special Reserve, and in doing so volunteered for K (Korea) Force. Private Terry embarked for Korea from Japan on 4 August 1952, and was taken on strength of the 3rd Battalion, the Royal Australian Regiment (3 RAR) the following day. He was allotted to 3 Platoon, Alpha Company (A Coy) under command of Captain John Trennery. Sometime after joining A Coy, Private Terry was given instruction in the use of communications equipment and was subsequently employed as a radio operator.

⁸ Letter, DH&A/OUT/2017/0141, Ms Margot Kropinski Myers, 1 August 2017.

⁹ Email, Mr Ian Saunders OAM, 6 September 2017 2:09 PM.

¹⁰ Under Section 85 of the *Defence Regulation 2016*, the *Defence Force Regulations 1952* continue to apply to an application made, or a process begun, under those regulations before their repeal on 1 October 2016.

14. In late December 1952, 3 RAR relieved 1 RAR on a steep ridgeline known to the Koreans as Kowang San, or on military maps as Hill 355. The position was also called 'Little Gibraltar' due to its resemblance to that British territory.

15. Hill 355 overlooked a broad valley to the West of the Samichon River. At 2030 on 24 January 1953, a patrol led by Lieutenant Francis Smith made its way through the 3 RAR forward positions and out into the valley towards the Chinese positions on the hills opposite. Included in this patrol was Private Terry. Shortly afterwards a fierce fire-fight broke out between Chinese troops and the Australians, during which Private Terry was killed in action. His body was never recovered.

16. On 25 January 1953, Private Terry was recorded as missing in action. He remained attached to 3 RAR until 8 November 1954 when his case was transferred to 1 Reinforcement Holding Unit, at which time he was recorded as still missing. On 15 February 1955 he was noted in his service records as '*Presumed to be dead on or after 25 Jan 53 (CAR 1099 of 14 Feb 55 refers)*'.

Private Terry's MID

17. Private Terry's citation for the MID reads:

'On the night of 24/25 Jan 53 PTE L.J TERRY was a member of a fighting patrol of eighteen men. During the night a neighbouring patrol was completely encircled by an estimated reinforced company of enemy, and PTE TERRY's patrol went to its assistance.

During the ensuing fire fight PTE TERRY was wounded, but he still remained an effective fighting member of the patrol. At a critical stage when the patrol was being heavily attacked from the flank PTE TERRY observed twenty enemy coming at the patrol from the rear. PTE Terry immediately called for assistance and despite his wounds charged this group of enemy firing his Owen gun and throwing grenades. This shock action effectively stopped the enemy advance and allowed the patrol to move forward again unhindered. PTE TERRY was not seen again after this charge.

By his complete devotion to duty and personal sacrifice PTE TERRY made it possible for his patrol to break cleanly from an overwhelming superior enemy and extricate itself with its wounded'.¹¹

18. The initiating officer was Major Charles Newton, Commander 3 RAR, and the final recommending officer for the award of the MID was Lieutenant General Sir Henry Wells, Commander, British Commonwealth Forces Korea (BCFK).

¹¹ Citation form, 4 March 53, Private L.J. Terry, AWM 119, 379.

Recognition for Private Terry's service

19. For his Army service Private Terry was awarded the following defence honours and awards:¹²

- Mention in Despatches
- Australian Active Service Medal 1945-1975 with Clasp 'KOREA'
- Australian General Service Medal for Korea (Korea Medal)
- United Nations Service Medal Korea
- The United States of America Distinguished Unit Citation

Eligibility Criteria for Gallantry Awards

20. **Contemporary Gallantry Awards.** Australian service personnel received honours and awards under the Imperial system until February 1975 when the Government introduced the Australian system. The two systems – the Imperial and the Australian – then operated in parallel until October 1992 when the Government announced that Australia would no longer make recommendations for Imperial awards.¹³ The eligibility criteria for gallantry awards in the Australian system are governed by regulations made under Letters Patent. Each of these awards is made by Instrument signed by the Governor-General, on the recommendation of the Minister.

The Victoria Cross for Australia. The VC 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 pre-eminent acts of valour or self-sacrifice or display extreme devotion to duty.*¹⁴

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 pre-eminent act of valour or self-sacrifice or extreme devotion to duty in the presence of the enemy.

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

¹² The Defence Report stated that Private Terry was awarded the Mention in Despatches, the Australian Active Service Medal 1945-1975 with Clasp 'KOREA', the Korea Medal, the United Nations Service Medal Korea, the United States of America Distinguished Unit Citation and the Returned from Active Service Badge.

¹³ Prime Minister of Australia Media Release 111/92 dated 5 October 1992.

¹⁴ *Commonwealth of Australia Gazette No. S25 – Victoria Cross Regulations* - dated 4 February 1991.

*According recognition to members of the Defence Force and certain other persons who perform acts of gallantry in action*¹⁵

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

Conditions for the 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.

Private Terry's reported actions

22. The Official History of Australia in the Korean War 1950-53 provides the following description of the action in which Private Terry is presumed to have been killed in action and also mentions the possible consideration for the award of the VC:

‘Another final major Australian patrol action of the winter period took place on the night of 24/25 January, when Lieutenant FC Smith of A Company, 3 RAR, led another attempt to capture a Chinese prisoner. Lieutenant Colonel Hughes ordered Major J.V. Norrie, Officer Commanding A Company to send a strong fighting patrol. Norrie selected Smith to lead the patrol deep into enemy territory to raid a Chinese standing patrol, and they had planned the operation together during 23 January. They decided that the snatch party should be small to have any chance of success. A veteran of many patrols, Sergeant E.J. Morrison, and four others, including Private Terry were selected to enter the Chinese trenches protected by two groups of 13 men. The target area was situated nearly 2 kilometres to the north-west of 3 RAR's westernmost defences on Hill 355. A line of trenches ran southwards from the main Chinese line, 2 kilometres north of Hill 355, to link up with the Chinese defences on Hill 227. It was decided, on the basis of intelligence and previous patrol reports, to make a raid at a point where these trenches descended a spur to the north side of the valley between the main Chinese line and Hill 227.

The patrol departed at 7 p.m on 24 January, moving carefully down the frozen slopes of Hill 355 for 700 metres to the north, and then turned west across a low ridge for 800 metres to a point where Smith and twelve of his men established a firm base to protect the withdrawal route. The others moved north for 500 metres and the second group of thirteen, commanded by Corporal F.L. Mackay, formed another base on a small spur. Morrison

¹⁵ *Commonwealth of Australia Gazette No.S25 – Gallantry Decorations Regulations – dated 4 February 1991*

led the snatch group 600 metres further to the west, where they reached the Chinese trench line at 1020 p.m. Morrison ordered his companions to take cover on an embankment at the trench and he jumped in to reconnoitre. He was challenged by two enemy sentries who opened fire. Morrison killed them both. Surprise had now been lost and nearby Chinese began to fire on the group. Morrison climbed out of the trench, led his group back 30 metres and called in artillery fire onto the enemy positions.

Just then Smith's group was attacked by a Chinese platoon. Morrison heard the noise of the encounter and, in accordance with previously laid plans, withdrew to Mackay's group and led them to assist Smith. They saw large numbers of Chinese moving around nearby. Smith's group repelled the attack but was almost immediately attacked again, on three sides, by a Chinese company. Morrison directed carefully pre-arranged artillery and mortar fire onto the enemy approach routes to Smith's position to seal it off from further attacks and hastened forward. When within 200 metres of Smith's position, Morrison saw another group of twenty Chinese approaching. He calculated that in the confusion of the battle the Chinese would either not see his group or mistake them for other Chinese. The Australian's took up fire positions and waited until the Chinese were right on top of them. They opened fire at a range of two metres, killing all the Chinese before they could fire back. Some of the enemy dead fell across the Australians as the latter were still firing.

In the meantime, Smith's group was being overwhelmed and he ordered his men to withdraw. Only a few men moved. Smith was hit by a concussion grenade and never seen again. Three of his men, Privates C. Gale, D.M Murray and T.J Whiting, escaped from the Chinese by rolling downhill out of the battle. All night they lay deep in enemy territory, waiting for enough light for them to see their way back to the Battalion's position. They returned at 1.30 p.m. Murray and Whiting had been wounded.

After Smith's group had been overrun, the Chinese turned their attention to Morrison's party. When he saw large numbers of enemy approaching, he withdrew the group eastwards onto the ridge which they had crossed during the second stage of their outwards journey. He encountered six Chinese who were occupying the crest, and realising that unless he could dislodge them his withdrawal route was cut, he and Mackay hurled themselves forward, killing all six in hand to hand fighting. Morrison reorganised the group and they continued to the east, pursued by increasing numbers of Chinese. Two platoon sized groups separately attacked the Australians' flank from the south, and a third attacked the rear of the patrol.

Each of these attacks was beaten off, with heavy loss to the enemy. Morrison led two charges against the flank attacks and (*emphasis added by the Tribunal*) Private L.J. Terry, who had been wounded earlier in the night, led another against the attack from the rear. Terry charged into a group of twenty Chinese, hurling grenades and firing his Owen gun. The Chinese stopped short and dispersed, but Terry was not seen again.

The Chinese then ceased their attacks and withdrew, leaving the Australians to make their way back to the Battalion defences, 800 metres to the south, unmolested. They returned at 1.15 a.m. Of the eighteen men in Morrison's party, three were missing, three were being carried on stretchers, and five were walking wounded. Ten of Smith's group were missing. With thirteen missing and ten wounded as total casualties for the operation, it had been an expensive and vain attempt to take a prisoner. However, Morrison estimated that the patrol killed at least eighty Chinese, apart from those struck by the artillery and mortar he directed during the engagement. This fire had played a vital role in covering the Australian's withdrawal. Morrison was awarded the Distinguished Conduct Medal; Mackay a Military Medal; and Smith (*emphasis added by the Tribunal*) and Terry were posthumously mentioned in despatches. Consideration was given by Brigadier Daly and Lieutenant Colonel Hughes to recommending Terry for the Victoria Cross, but there were not sufficient witnesses to meet the requirements for this high award.¹⁶

The Applicant's submission

23. On 8 June 2017, Mr Saunders applied to the Tribunal for a review of the Minister's decision in respect of Private Terry's eligibility for the Victoria Cross for Australia.

24. In his application he stated:

The recommended citation comments of BCFKCIC Henry Wells justifies the review of the Defence Decision, particularly with references to 'self sacrifice' and 'stopped the enemy's advance and allowed the (15 member) patrol to move forward again unhindered. 18 of the 31 member patrol returned to the A Coy location at Hill 355, Little Gibraltar, Kowang-San. 7 Members of the patrol were POW and 6 are MIA including my father.

25. Mr Saunders included references from the article 'Bomber' by Olwyn Green and excerpts from the official history, in which he highlighted:

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The Defence report

¹⁶ Robert O'Neill, *Australia in the Korean War, 1950-53, Volume 11: Combat Operations*, Australian War Memorial and the Australian Government Printing Service, Canberra, 1985, pp258-260.

26. On 1 August 2017, the Directorate, on behalf of Defence, provided its report, which had been prepared by Army Headquarters.

27. The Directorate stated that Army Headquarters had completed a desktop assessment of the application by Mr Saunders and that the assessment had found no maladministration in the handling of the recommendation submitted at the time.

28. Army Headquarters explained the methodology by which the desktop review was conducted. It stated that:

*In reviewing submissions seeking retrospective consideration of medallic recognition, Army applies the guidelines used by the Defence Honours and Awards Appeals Tribunal in conducting the Inquiry into Past Acts of Naval and Military Gallantry and Valour. Specifically, Army undertakes an initial desktop review of the submission to determine whether there is sufficient authoritative evidence of a failure in due process according to the policies and procedures in place at the time of the cited action or service.*¹⁷

29. The Defence report went on to state:

*If due process had been followed, if there was no maladministration, and if there is no new evidence, then Army will recommend that the original decision remain unchanged.*¹⁸

30. The Defence report contained additional contemporaneous evidence.

31. The after action report (included in the Defence report) in respect of the above engagement says the following:

‘On 23 Jan Maj. J.W. Norrie, OC A Coy 3 RAR was briefed by his Commanding Officer to plan a patrol whose aim was to capture an enemy prisoner from a standing patrol well inside the enemy territory. After detailed consideration of all factors it was decided that the best method of carrying out this operation would be by stealth, but on the other hand in view of the deep penetration into enemy territory two hard hitting protective groups would be required. On this basis the period before the night of 24 Jan 53 was spent in detailed planning rehearsal.

At 1900 hrs on the 24 Jan 53 the complete patrol commanded by LT Geoff Smith left A Coy area. The patrol itself was organised in three groups, firstly the main group (*of five men, including Private Terry*) whose task it was to snatch the prisoner, commanded by SGT John Morrison, secondly the first protective party of 12 men commanded by LT Smith, and the second protective party of 12 men commanded by CPL Frank MacKay.

¹⁷ Report into Category 2 Public Submissions 104 and 130 regarding Private Lionel Terry, R27711572.

¹⁸ Ibid, paragraph 6.

The patrol moved out as a whole for the first 1000 yards when LT Smith's party was put down at a predetermined point. The remainder continued a further 1000 yards where Cpl McKay's party took up position. SGT Morrison and his snatch party of 4 proceeded a further 600 yards to the objective.

On arrival at the objective SGT Morrison put his party to ground along an embankment running immediately beside the enemy trench line. He then immediately jumped into the trench and was challenged twice by two enemy picquets. These two who appeared to be the only enemy in the immediate vicinity opened fire, so the SGT killed them. Immediately following this enemy weapon fire opened up from very close at hand. Having returned fire the SGT's group withdrew quickly along their withdrawal route for a distance of 30 yards and called down arty fire on the enemy positions.

At this juncture a fierce fire fight started on the feature occupied by Lt Smith's group and large numbers of enemy were seen moving in the area.

According to a pre-arranged plan the snatch group rejoined the protective group not involved in the fire fight in order that they may go to the assistance of the group involved. SGT Morrison taking charge moved the two parties towards the fire fight. Having gone 200 yards a further party of 20 enemy were seen approaching the area of the fight. SGT Morrison appreciated that this party would have to pass very close to his party. Realising in the confusion of battle that the enemy would either not see him, or mistake his group for friendly forces he quickly adopted suitable fire positions. He then allowed the enemy to approach right up to his position before opening fire. The enemy were taken by surprise and were all killed without opening fire. The enemy when hit fell in a number of cases on the troops actually firing.

At this stage the fire fight in LT Smith's area was dying down and in the moon light enemy troops could be seen moving over the feature. SGT Morrison saw that the enemy were now diverting their attention to his own group and he could see a large number of enemy approaching his area.

He then decided to withdraw to the high ground which led to his Coy locality. Reaching this high ground he heard another party of enemy approaching, and found six enemy in possession of the ridge line. Realising that his line of withdrawal was cut and that he was virtually surrounded he saw that his only chance of success lay in immediate aggressive action. Singling out the enemy group on the ridge line, he and CPL Frank McKay made a frontal attack killing the six enemy in hand to hand fighting.

Having done this he quickly organised his group and attempted to continue his withdrawal just below the crest of the ridge line. He proceeded for some 50 yards being continually harassed.

During the complete withdrawal SGT Morrison's group was attacked by platoon sized groups of enemy on two separate occasions from the right flank and one from the rear. These attacks were quickly broken up by immediate

counter attacks with Owen gunners personally led by SGT Morrison in the first two instances, and by PTE (Bomber) Terry in the case of the attack from the rear.

During these attacks the group that originally consisted of 18 suffered three missing in action, three stretcher cases, five walking wounded. Despite this high percentage of casualties it is considered that the aggressive action on the part of SGT Morrison and his group was entirely responsible for the successful evacuation of all wounded. This action so disorganised the enemy, who were numerically superior, that they disengaged and withdrew whilst the patrol group was still 500 yards from their Coy localities. This allowed the last part of the withdrawal to be completed without interference.

Three members of LT Smith's group previously reported missing made their way back to their Coy localities at approximately 1330 hrs 25 Jan 53. Debriefing of these three men, which was the sole source of first hand information of LT Smith's party disclosed that the initial fire fight as heard by SGT Morrison's groups was occasioned by a platoon sized attack against this group. This attack was repulsed but was immediately followed by a further attack thought to have been of company strength launched from three directions. It was after this attack that LT Smith ordered the withdrawal of this group. However himself and four others were the only ones seen to move. As the party withdrew LT Smith was seen to be hit by a concussion grenade. The three men lay up well in enemy territory all night and began their journey back in the early morning. The fourth man was apparently killed or captured by the enemy.

In this patrol action it is estimated that there were 80 enemy killed by small arms fire apart from the heavy casualties that must be expected from the intense artillery and mortar fire which was falling on the enemy forming up positions and which discontinued after SGT Morrison's group returned.¹⁹

32. The chronological sequence of events attached to the action report states that around midnight, after continual aggressive thrusts (by the group consisting of SGT Morrison and Corporal McKay's parties) the enemy appeared to lose control completely and finally broke contact outside the MLR (Main Line of Retreat). The sequence states that it is estimated that this group killed 60 enemy, not accounting for artillery and mortar fire, at a cost of 3 MIA and 8 WIA.

33. On 27 January 1953, Lieutenant Colonel Hughes ordered a Court of Inquiry be held into the fate of the missing 13 members of A Company from the patrol.

34. In respect of Private Terry, in his evidence to the Court of Inquiry, Sergeant Morrison said:

'The enemy threw grenades (all concussion) and as soon as they stopped the assault group charged over the ridge (Morrison and six others). In this action Private Terry was wounded in both legs, Privates Bromley and

¹⁹ Report, Patrol Action – 3RAR, AWM85, 4/49, Australian Army unit war diaries, Korea, 3 Battalion, the Royal Australian Regiment, January 1953.

Corporal McKay were also wounded, we pulled back onto the ridge and the enemy attacked from behind at the same time attacking further up the side. The assault group (intact) went forward to deal with the attack on the same flank and Privates Terry and McKay moved away from the assault group and clashed with the enemy coming in from our rear. These two soldiers were NOT seen again...

*I consider that Privates Terry and McKay are both dead as after a one minute fire fight they were not seen or heard of again.*²⁰

35. Private Horgan, the second witness to the Court of Inquiry stated:

*'on the night of 24/25th Jan 53 I was a member of the A Coy fighting patrol and was in CPL McKay's group of the forward base. After the snatch group rejoined us and we had move back and took up an all round defensive position Private Terry who was previously wounded (I heard him call out that he had been hit) had been assisted by two of his mates to a position approx. 2-3 yards to my left. As soon as the grenades started to come in his two mates rolled away but as I was in a small dug hole I stayed. I saw at least two grenades land on or within a few inches of Private Terry. A lot of grenades were coming in but Private Terry did NOT move after the grenades landed on or near him. I suddenly realised that the remainder of the patrol had gone and raced after them I did not see Private Terry use his weapon from the time his mates dropped him.'*²¹

36. Private Hales, the third witness to the Court of Inquiry stated:

*'on the night of 24/25 Jan 53 I was a member of Sergeant Morrison's part of the A Coy patrol. When we were up on the ridge and the enemy was attacking from the side and rear, I saw Privates Terry and McKay turn back towards our rear. Then I heard Owens firing and grenades going off. This firefight lasted about one minute. I cannot remember whether the last noise was an Owen firing or a grenade going off.'*²²

37. Other witnesses who gave evidence to the Court of Inquiry did not mention Private Terry in their evidence.

38. In its findings, the Court noted that the statements made on oath, in most cases varied considerably from original statements but the Court considered that the evidence produced and contained in the proceedings was as accurate as could be obtained. The Court also noted that with the exception of Sergeant Morrison all witnesses and other members of the patrol interviewed had to be continually cross examined to get out the full facts, and that most appeared very hazy on supplying the information required. The Court placed more credence on the statement of Sergeant Morrison where there was conflicting accounts.

²⁰ AWM114, 665/7/26, AMF Investigations and Courts of Inquiry into Personnel Missing in Action in Korea.

²¹ Ibid.

²² Ibid.

39. A report by HQ 28th Commonwealth Brigade on the action stated:

*'Three times the enemy attacked in platoon strength and three times the Sergeant and his men counter-attacked and moved on. While the second counter-attack was in progress a party of twelve to fifteen enemy appeared in the rear. A signaller who had been wounded in the legs in an earlier encounter gave the warning and with another man who was helping him, charged, throwing grenades and firing submachine guns. A number of the enemy went down, the remainder scattered and presented no further threat. The two men were not seen again. After the third attack the enemy broke and withdrew.'*²³

Further evidence included in the Defence Report – Discussion with Mr Mackay

40. As well as information regarding the process for recommending honours during the Korean War, the Defence Report details a discussion between the author of the report, Major Rutherford, and Mr (then Private) Mackay, who was captured by the Chinese following the engagement. Mr Mackay is a witness of the action involving Private Terry, and would have been a 'third witness' required for the award of the VC if he had been able to give evidence at the time of the Court of Inquiry (Mackay was not released until April 1953).

41. According to the Defence report, Mr Mackay has stated that late in the engagement, Sergeant Morrison and Privates Terry, Brady, Mackay and Horgan were attacked by large groups of Chinese, on both sides. Mr Mackay recalled that Terry, Brady, Horgan and himself turned and opened fire on the Chinese attacking from the rear. The Chinese were firing automatic weapons and throwing grenades at the four Australians who opened fire and charged straight at the Chinese. Mr Mackay reportedly did not recall anybody giving any words of command.

42. Mr Mackay said that the Chinese appeared to be momentarily stunned but soon began firing back and throwing grenades. According to Mr Mackay, Terry was the first to be hit. Fragments from a grenade lacerated his legs and he fell to the ground. He said that the undergrowth was almost waist height which limited the enemy's visibility and allowed the group to adopt firing positions. This enabled the Australians to maintain the surprise of their assault for a short period and gave them an opportunity to attempt to extricate the wounded Terry back to where the others were retreating up the hill.

43. Mr Mackay said that he and Brady tried to pull Terry to safety as Horgan, his only weapon a single shot .303 SMLE rifle, provided covering fire. At this the Chinese resumed their attack, throwing grenades and spraying the area with bursts of automatic fire.

²³ Report, *Patrol Action By 'A' Company, 3rd Royal Australian Regiment Night 24/25 January 1953*, NAA: MP927/1, A246/1/10.

44. Mr Mackay recalls that although he was wearing an armoured vest, he was shot in the chest and fell to the ground. Brady who was possibly also hit, lost his grip on Terry and the two of them dropped near a shell hole. At this moment another salvo of grenades landed near where the Australians lay. Mr Mackay and Brady managed to roll away but Terry was not so fortunate. Mr Mackay recalled that the grenades exploded and Private Terry and Brady were killed instantly. Mr Mackay stated that he was peppered with shrapnel from his feet to his chest and, in shock from the pain, was dragged away by the Chinese and taken prisoner.

45. The Defence report states that Mr Mackay's description of events as provided to the researcher differs on several points to those given during the inquiry called to investigate the circumstances of the missing patrol members. His recollection is that nobody gave the order to assault the attacking Chinese troops. According to the Defence report, the four men turned and rushed the advancing troops, firing their weapons and throwing hand grenades, which caught the Chinese by surprise and halted their momentum.

46. In a somewhat contradictory statement however, the Defence report states that 'Private Terry's actions are not in question'.

47. Defence went on to state that in considering Mr Saunders' submission it is clear that the actions of Sergeant Morrison's four man group enabled the other members of the patrol to successfully withdraw to the Australian position. However, Defence also stated that whether the group collectively made the decision to attack the Chinese or did so under instructions from Private Terry is unclear. Defence therefore recommended that no further action be taken in respect of recognition for Private Terry.

48. Defence concludes by stating that the contention that Private Terry had been considered for a VC but was denied due to the lack of a statement from the 'third witness' (Mackay), or that the failure was due to maladministration as a result in a delay in submitting his recommendation, is not supported by the evidence.

The hearings

49. Due to his advanced age Mr John Mackay was invited to give evidence at his residence in Perth on 8 February 2018. Copies of the oral record of evidence were provided to Mr Saunders and Defence for comment. The Tribunal is grateful for the assistance provided by Mr Mackay throughout the course of its review.

Mr Mackay's oral evidence

50. As noted above, Mr Mackay is the only surviving eye witness of the action involving Private Terry, and would have been able to give evidence at the Court of Inquiry into the action had he had not been in Chinese captivity at the time.

51. Mr Mackay spoke to the Tribunal about his war experience, which included service with the British Army in Egypt, France and Greece during the Second World War, his enlistment into the Australian Army and training for the war in Korea. He also spoke about his previous tour in Korea including fighting with 3

RAR and being wounded during the Battle of Kapyong. He described being in *'five to 10 major fights'* prior to the engagement on 24-25 January 1953. Mr Mackay stated to the Tribunal that he didn't know Private Terry well as *'he was from company headquarters'* and had only met him *'during rehearsals'*.

52. Mr Mackay talked the Tribunal through his memory of the engagement, which included the initial 'capture' of a Chinese prisoner, the sequence of action, Private Terry being wounded, his own wounding shortly afterwards, the deaths of Terry and Brady, the Chinese dragging away the Australian bodies, and of his own capture and captivity.

53. The Tribunal sought to identify when Private Terry was first wounded. The Tribunal established through the conversation with Mr Mackay that Private Terry had been wounded prior to Mr Mackay being himself wounded. Mr Mackay stated *'he was hit in the legs and sat down'*.

54. The Tribunal compared his account with the elements of the Defence Report concerning Mr Mackay's 'correspondence and conversations' with the Defence researcher. The Tribunal read Mr Mackay the elements of the Defence submission that related to his 'correspondence and conversations' with the Defence researcher and asked him the following questions: 'Did you charge the enemy'? Mr Mackay responded:

'it wasn't really a charge; the enemy were moving away from us – we just held our ground'.

55. The Tribunal asked 'did anyone take charge, or were you just doing your jobs'? He replied:

'No one gave orders – we just did our duty'.

56. Mr Mackay confirmed that when they opened fire on the Chinese it *'stopped them'* and that he and Private Brady had attempted to rescue the wounded Private Terry before he was wounded himself, but described this as being *'simpler'* than described.

57. Mr Mackay told the Tribunal that he felt *'awkward'* and *'I had no idea about the VC. Who am I to put the Kybosh?'*

58. The Tribunal asked Mr Mackay what put Private Terry above him or Private Brady and what distinguished Private Terry from the others. In a complicated answer, Mr Mackay did not identify anything that distinguished Private Terry and stated that *'fate had thrown them together'*.

59. The Tribunal informed Mr Mackay that Private Terry had been awarded a posthumous Mention in Despatches for the action and asked whether he thought this was sufficient recognition for his part in the action. Mr Mackay appeared surprised and not to be aware of the award. He commented however that Private Terry *'had given up his life'*.

60. During the Hearing Mr Mackay drew the Tribunal's attention to a letter he had written to Private Terry's sister around 1999. A copy of this letter was sourced by the Tribunal from the Australian War Memorial and was provided to Mr Saunders and Defence. The content of the letter appears generally consistent with the oral evidence provided by Mr Mackay. In part it reads:

There were continuous clashes at close quarters with the enemy so we moved towards our main positions.

We commenced moving up a spur line under increased enemy pressure. The three of us were bringing up the rear with the remnants in the front. There was myself, Bomber (referring to Private Terry) and Scouse (nickname).

After a burst of enemy small fire, Bomber called "I've been hit". I turned and ran back to Bomber, and so did Scouse. He was half sitting on the edge of another shell hole. Enemy heads were all over the ridge. All of us including Bomber were firing our submachine guns at them. Scouse and myself starting (sic) lifting Bomber up one on each side when a burst of fire knocked me to the ground. Another burst of fire killed Bomber and Scouse.²⁴

Mr Saunders' oral evidence

61. Mr Saunders gave oral evidence by telephone during the second hearing conducted in Canberra on 1 March 2018 and commenced by introducing his case.

62. The Tribunal asked Mr Saunders if he had considered the record of the Perth hearing with Mr Mackay. Mr Saunders informed the Tribunal that Mr Mackay's evidence was inconsistent with an earlier conversation he had with Mr Mackay, and with others, and that Mr Mackay has informed him that *he was unconscious* for some of the action. Mr Saunders placed considerable emphasis on this during his oral evidence. Mr Saunders informed the Tribunal that he didn't agree with the evidence provided by the Defence researcher, Major Rutherford, in the Defence report and also noted the inconsistencies with his conversations with Mr Mackay and the Tribunal Hearing with Mr Mackay on Perth on 8 February 2018. Mr Saunders informed the Tribunal that he had handwritten notes of this conversation with Mr Mackay. The Tribunal asked Mr Saunders to provide copies of the notes in their original form and Mr Saunders offered to type them for clarity. These notes were received by the Tribunal on 2 March 2018.²⁵

63. Mr Saunders talked the Tribunal through his involvement with the submission and application.

64. Mr Saunders forcefully asserted that the Commander BCFK, Lieutenant General Sir Henry Wells, would not have signed the citation for Private Terry's MID unless he had sufficient evidence to justify the wording of the Citation. Mr

²⁴ AWM PR/04757.

²⁵ E-mail, Mr Saunders to the Tribunal, 2 March 2018.

Saunders stated that he *'can't get (his) head around why the citation signed by Wells was not considered key evidence'*. Mr Saunders strongly stated that his submission was based on the Citation for the MID and stated *'where this is different to other evidence such as the Mackay hearing'*. Mr Saunders further stated *'there must have been other evidence'*.

65. Mr Saunders strongly questioned the Tribunal as to why Mr Mackay was not specifically asked during the Perth Hearing if he agreed with the wording in the Citation for Private Terry's MID.

Defence's position

66. At the hearing Defence was represented by its appointed representative, Brigadier Mark Holmes AM MVO. Brigadier Holmes is the Chief of Army's Representative on the Defence Historical Honours Review Board. Brigadier Holmes was supported by Ms Alex Stewart from the Directorate and Major Phil Rutherford from Army Headquarters.

67. Defence acknowledged Mr Saunders' extensive work and advocacy in supporting Korean veterans and the Korean conflict's unrecovered war casualties.

68. Defence discussed its interview with Mr John Mackay. Defence stated that Major Phil Rutherford interviewed Mr Mackay and included references in the Defence report. Defence stated that the Tribunal's hearing with Mr Mackay in Perth on 8 February confirmed the evidence gathered by Major Rutherford. Defence noted that *'the language differed slightly between Mr Mackay's conversation and what was formally recorded in the Research Report, the facts remain consistent with the citation for PTE Terry's MID.'*

69. Defence also discussed the delay in awarding the MID and stated:

'was as a result of following the procedure at the time, which required certain elements of identification and confirmation that the member had died. As this took a period of time, 27 months then elapsed before the award was finalised through the Imperial System. Her Majesty's approval was granted in June 1955.'

70. Defence spoke to the claims of an unfair quota system. Defence stated:

'there is evidence of a number of different award processes adopted over the Korean War, however at the time of the action involving PTE Terry and PTE Mackay an official process was functional and authorised. Australian War Memorial records attest to the process working effectively at the time and for others. The records of PTE Terry's award recommendation and eventual recognition of an MID are available and show a functioning procedure.'

71. Defence concluded by stating:

'In light of the research and the work of this further review Defence has not found any new evidence to support changing the decisions taken by the chain of command at the time and those responsible for conducting the award process during the Korean War.'

72. Defence highlighted:

'The Defence position is consistent with this historical consideration in recognising PTE Lionel Terry's brave actions with a posthumous award of a Mention in Despatches.'

73. The Tribunal asked Defence several questions for clarification.

Tribunal Consideration

74. **General.** The Tribunal is required to review decisions 'on the merits' and this requires an examination of the merits of the matter in dispute rather than the lawfulness of the decision under review.²⁶ The merits review necessitates consideration of the evidence and accordingly, the Tribunal conducts an independent review, and considers afresh the relevant facts, law and policy.²⁷ The Tribunal reviews the decision, and not the reasons for the decision. In doing so, there is no legal onus of proof and there is no presumption that the decision was correct.²⁸ The Tribunal is bound to make what it regards as the 'correct or preferable' decision.

75. The Tribunal is of the view that the actions by members of the fighting patrol under consideration on the night of 24 and 25 January 1953 in Korea constituted a significant feat of arms. The Tribunal determined that a number of members involved displayed bravery and gallantry, including Private Terry.

76. The Tribunal noted that while not central to the Application for Review, the Defence positions regarding the quota system for awards made during the Korean War and the delay in making the award of a posthumous MID to Private Terry are reasonable and supported by the available evidence. The Tribunal notes that no evidence was presented to repudiate the Defence position.

77. The Tribunal sought supporting evidence from Professor Robert O'Neill, the author of the official history.²⁹ The Tribunal sought background to the statement made within the text at page 260:

'Consideration was given by Brigadier Daly and Lieutenant Colonel Hughes to recommending Terry for the Victoria Cross, but there were not sufficient witnesses to meet the requirements for this high award.'

²⁶ Council of Australian Tribunals Practice Manual Dated 7 April 2006 Page 1.3.1.2

²⁷ Pearson, Linda, 'Merits Review Tribunals', in Creyke, Robin and McMillan, John, *Administrative Law-the Essentials, AIAL 2002, P68.*

²⁸ *McDonald v Director-General of Social Security* (1984) 1 FCR 354.

²⁹ Letter, Mr Jay Koppelman to Professor Robert O'Neill, 22 December 2017.

78. Despite research by Army and the Tribunal, a point of reference or source for this statement could not be identified.

79. Professor O'Neill replied to the Tribunal on 20 February 2018 stating:

*'I have re-read the relevant part of Vol 11 of my Official History of the Korean War, but I don't have any documentary material which relates to Lionel Terry's service, and, as it is around 40 years since I wrote that part of the Official History, I cannot contribute further in any authoritative way to the deliberation of the Tribunal in Terry's case.'*³⁰

80. The Tribunal noted the absence of evidence of any quota system in place regarding the award of the VC. The Tribunal also noted that Mr Saunders had not provided any supporting evidence, nor was any evidence available to the Tribunal that would support Mr Saunders' contention.

81. The Tribunal also considered that in the absence of a policy placing restrictions on the award of the VC to members of the Commonwealth forces, the officers who recommended Private Terry intended the award of the posthumous MID.

82. The Tribunal considered Mr Saunders' forceful assertion that:

'the Commander BCFKCIC, Sir Henry Wells, would not have signed the citation for Private Terry's MID unless he had sufficient evidence to justify the wording of the Citation and, where this is different to other evidence such as the Mackay hearing, there must have been other evidence.'

83. The Tribunal did not dismiss this assertion, noting that the nomination made at the time was recommended, supported and signed by senior officers in the chain of command. The Tribunal also noted that the nomination was specifically intended to make the award of a posthumous MID and determined that each part of the nomination was consistent in its intent.

84. The Tribunal also observed inconsistencies between the oral evidence provided by Mr Mackay during the 8 February hearing in Perth, his earlier discussion with Mr Saunders, the record of conversations and evidence contained in the Defence Report, and the wording in the citation for Private Terry's MID. The Tribunal found Mr Saunders' notes on his earlier conversation with Mr Mackay to be useful.

85. The Tribunal found Mr Mackay to be a reliable and lucid witness. The Tribunal gave weight to the fact that Mr Mackay is the only available eye witness to the action. Where the accounts differed, or inconsistencies arose, the Tribunal preferred Mr Mackay's first hand oral evidence presented at the 8 February hearing.

86. The Tribunal considered Mr Saunders' question to the Tribunal as to why Mr Mackay was not specifically asked during the Perth hearing if he agreed with

³⁰ Email, Professor O'Neill to the Tribunal, 20 February 2018.

the wording in the Citation for Private Terry's MID. The Tribunal considered that each element of the Citation was put to Mr Mackay during the Perth hearing and that his replies properly examined the citation.

87. The Tribunal noted that the Court of Inquiry referred to in the Defence Report stated, in reference to the evidence from Private Horgan, that he was the only soldier available to the Court claiming direct knowledge of Private Terry's final moments (Private Mackay was a POW of the Chinese at the time of the Court of Inquiry):

'On the night of 24/25th Jan 53 I was a member of the A Coy fighting patrol and was in CPL McKay's group of the forward base. After the snatch group rejoined us and we had move back and took up an all round defensive position Private Terry who was previously wounded (I heard him call out that he had been hit) had been assisted by two of his mates to a position approx. 2-3 yards to my left. As soon as the grenades started to come in his two mates rolled away but as I was in a small dug hole I stayed. I saw at least two grenades land on or within a few inches of Private Terry. A lot of grenades were coming in but Private Terry did NOT move after the grenades landed on or near him. I suddenly realised that the remainder of the patrol had gone and raced after them I did not see Private Terry use his weapon from the time his mates dropped him.'

88. The Tribunal notes that it is probable that only Mr Mackay possessed a complete first-hand account of the action described in the Citation for Private Terry's MID.

Gallantry assessment

89. As set out above,³¹ in order to consider a person's eligibility for the VC, the Tribunal must identify acts of conspicuous gallantry, daring or pre-eminent valour, self-sacrifice or extreme devotion to duty. The Tribunal must be satisfied with the evidence to support a recommendation for such an award. The Tribunal must also be satisfied with evidence supporting recognition for other acts of gallantry in order to make a positive recommendation for any of the other Australian Gallantry Decorations.

90. The Tribunal carefully considered all the evidence it received, searching for acts of bravery, courage, gallantry, valour, leadership, and performance of an extraordinary nature, over and above that expected and exhibited by Private Terry's colleagues on 25 January 1953.

91. The Citation for Private Terry's MID said that despite his wounds he 'charged this group of enemy firing his Owen gun and throwing grenades'.³² There is no confirmation of this from the witnesses at the Court of Inquiry, but it is reported in the Official History and the HQ 28th Commonwealth Brigade report. Mr Mackay, the only witness to the Tribunal, when questioned on this was clear:

³¹ See paras 20-21 above.

³² Citation form, 4 March 53, Private L.J.Terry, AWM 119,379.

'it wasn't really a charge, the enemy were moving away from us – we just held our ground'.

92. The Official History also suggests that after being wounded, Private Terry assumed a position of leadership:

'Private Terry, who had been wounded earlier in the night, led another (charge) against an attack from the rear'.³³

The After Action Report stated:

'These attacks were quickly broken up by immediate counter attacks with Owen gunners personally led by ... PTE (Bomber) Terry in the case of the attack from the rear'.³⁴

This again is not consistent with Mr Mackay's evidence:

'No-one gave orders – we just did our duty'.

It is unclear whether Private Terry assumed any leadership role.

93. The Tribunal also examined whether Private Terry's actions were well out of the ordinary and beyond what would be expected in the circumstances. As noted above, Mr Mackay did not identify anything that distinguished Private Terry from the others and stated that *'fate had thrown them together'*.

94. The Tribunal determined that it had at its disposal inconsistencies from the only eye witness available, Mr Mackay, in discussions with the Applicant, the Defence Researcher and the Citation for Private Terry's MID, and an assumption by the Applicant that the wording in the Citation provides sufficient proof of a higher award. There were also significant differences between Mr Mackay's clear and lucid evidence and some of the official documents. Where there was such differences in evidence, the Tribunal placed greater weight on the evidence provided by Mr Mackay.

95. The Tribunal determined that there was insufficient reliable and objective evidence upon which it could make an assessment for further recognition for Private Terry.

96. The Tribunal is however of the view that the honour awarded to recognise Private Terry's gallantry, the posthumous Mention in Despatches, is clearly justified and on the available evidence, the most appropriate recognition for Private Terry's actions.

Tribunal Decision

³³ Robert O'Neill, *Australia in the Korean War, 1950-53, Volume 11: Combat Operations*, Australian War Memorial and the Australian Government Printing Service, Canberra 1985 P260.

³⁴ DHAAT Research Pack, Attachment D starting P49

97. The Tribunal recommends to the Minister that he affirm the decision of the Minister for Defence Personnel of 30 May 2017, to accept the recommendation of the Chief of Army, that no further action be taken to recognise Private Lionel Terry's actions in Korea on 25 January 1953.

98. The Tribunal's decision does not diminish the gallantry and bravery of the Australian soldiers who fought in Korea on the night of 24/25 January 1953, nor does it diminish the passion and commitment of Mr Saunders in advocating, recognising and supporting Australia's Korean War veterans.

99. The Tribunal recognises the input, cooperation and courtesy of Defence, as well as that of Mr John Mackay.