



Australian Government

Defence Honours and Awards Appeals Tribunal

Smith and the Department of Defence [2016] DHAAT 006 (18 March 2016)

File number (s) 2014/075

Re **Mr Clive A. Smith**
Applicant

And **Department of Defence**
Respondent

Tribunal Brigadier M. Bornholt, AM (Retd) (Presiding Member)
Mr G. Mowbray

Hearing Date 5 February 2016

DECISION

On 18 March 2016 the Tribunal decided to affirm the decision of the Department of Defence to not amend Mr Clive A. Smith's Certificate of Service to include the United States Armed Forces Expeditionary Medal and the United States National Defense Service Medal.

CATCHWORDS

DEFENCE AWARDS – Foreign Awards – the United States of America Armed Forces Expeditionary Medal - the United States of America National Defense Service Medal.

LEGISLATION

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

Commonwealth of Australia Gazette (CAG) No S 548 'Guidelines concerning the acceptance and wearing of foreign honours and awards by Australians' dated 22 December 1997

REASONS FOR DECISION

Introduction

1 The applicant Mr Clive A. Smith (Mr Smith) seeks review¹ of a decision by Mr Andrew Lovelock, the Assistant Director, Records Archives and Mail Services in the Department of Defence who, acting on the advice of the Directorate of Honours and Awards of the Department of Defence (the Directorate), decided to not amend Mr Smith's Certificate of Service to include the United States Armed Forces Expeditionary Medal (AFEM) and the United States National Defense Service Medal (NDSM).²

2. The advice provided by the Directorate indicated that the medals 'had been incorrectly awarded as they cannot be awarded to members of foreign Defence Forces' and that 'as these awards will not be approved by the Governor General they cannot be included on his certificate of service'.

3. Mr Smith served as a Leading Seaman Radar Plot in HMAS *Vendetta* during the ship's tour of duty with the Far East Strategic Reserve (FESR) from March to October 1961. During the deployment HMAS *Vendetta* exchanged twelve sailors including Mr Smith with the USS *Buck*.

4. Mr Smith claims that when the Vietnam Logistic and Support Medal (VLSM) was instituted³, he made application for the award based on his exchange to USS *Buck* having been 'operational'. He claims to have been told that there was 'no record of the exchange by Naval Records Section' and he subsequently wrote to the US Navy seeking 'confirmation that service on USS *Buck* qualified him for US medals'. Mr Smith was issued the AFEM and NDSM by the United States Bureau of Naval Personnel Retired Records Section on 25 November 1998.⁴

5. Over the next decade Mr Smith made several representations to have his certificate of service amended to include his service with USS *Buck* and acknowledgment that he had been awarded the medals.⁵ On 1 March 2012 in response to a Ministerial Representation by Mr Smith's local Federal Member, the Parliamentary Secretary for Defence advised him to make application under the *Freedom of Information Act* to have his service records amended.⁶ Mr Smith made application for the inclusion of the AFEM and NDSM on his certificate of service on

¹ Mr Smith Letter dated 30 June 2015

² Freedom of Information and Information Management Branch, Department of Defence FOI 238/11/12 dated 13 April 2012

³ The VLSM was gazetted in March 1993 so his 'application' is assumed to have occurred proximate to this date.

⁴ Bureau of Naval Personnel Retired Records Section Transmittal dated 25 November 1998

⁵ Mr Smith letter undated to Acting Director of Defence Support Operations (presumably written ~2008)

⁶ Parliamentary Secretary for Defence letter to The Hon Jenny Macklin MP dated 1 March 2012

9 March 2012.⁷ On 13 April 2012, Mr Smith was advised that his application was refused ‘as the medals had been incorrectly awarded’⁸.

6. On 30 June 2014 Mr Smith made application to the Tribunal for review of the decision by Mr Lovelock and seeking ‘retrospective permission ... to receive and wear ... the AFEM with Vietnam Clasp and the United States Defence Medal’.⁹

Tribunal Jurisdiction

7. Pursuant to s110VB(2) of the *Defence Act 1903* (the Defence Act) the Tribunal has jurisdiction to review a reviewable decision relating to a foreign award if an application is properly made to the Tribunal. The term *reviewable decision* is defined in s110V(1) of the Defence Act and includes a decision made by a person within the Department of Defence to refuse to recommend a person for a defence or foreign award in response to an application. The term *foreign award* is defined in s110T of the Defence Act as an honour or award given by a government of a foreign country, or by an international organisation.

8. The AFEM and NDSM are foreign awards and accordingly, the Tribunal has jurisdiction to review decisions in relation to these awards as the decision to refuse to recognise Mr Smith’s service as being eligible service for a foreign award was made by a person within the Department (Mr Lovelock). The role of the Tribunal is to determine whether the decision of the Department of Defence is the correct or preferable decision having regard to the applicable law and the relevant facts.

Steps taken in the conduct of the review

9. In accordance with the *Defence Honours and Awards Appeals Tribunal Procedural Rules 2011*, on 17 July 2014 the Tribunal wrote to the Secretary of the Department of Defence advising him of Mr Smith’s application for review and seeking a report on the reasons for the original decision and the provision of relevant material that was relied upon in reaching the decision.¹⁰ On 18 September 2015 the Directorate, on behalf of the Secretary, provided the Tribunal with the Defence submission in the form of a written report.¹¹ The Tribunal forwarded a copy of the Directorate’s submission to Mr Smith for comment on 23 September 2015.¹² Mr Smith provided comment on 5 November 2015 and in so doing further submitted that his service on USS *Buck* constituted ‘operational service in support of the war in Vietnam’ and implied that if he were not granted approval for the foreign awards, that he be ‘awarded the VLSM as recognition of my service’.¹³

10. The Tribunal met on 11 January 2016 and considered the material provided by Mr Smith, the Directorate and the Tribunal’s research staff. This later material

⁷ Request for Amendment of Records dated 9 March 2012

⁸ Freedom of Information and Information Management Branch, Department of Defence FOI 238/11/12 dated 13 April 2012

⁹ Mr Smith letter dated 30 June 2015

¹⁰ DHAAT/OUT/2014/836 dated 17 July 2014

¹¹ DH&A/OUT/2015/0198 dated 18 September 2015

¹² DHAAT/OUT/2015/573 dated 23 September 2015

¹³ Mr Smith Letter dated 5 November 2015

included relevant guidelines and regulations, Mr Smith's Record of Service, HMAS *Vendetta* Reports of Proceedings April – July 1961, file correspondence – Exercise Pony Express and Deck Logs – USS *Buck*. This material was also sent to Mr Smith.

11. Mr Smith was invited to give oral evidence (by telephone) to the Tribunal which he did on 5 February 2016 at a hearing conducted in Canberra. Prior to the hearing Mr Smith provided a further email submission which summarised his previous correspondence and asserted that Chapter 35 of the Defence Honours and Awards Manual provided the grounds for retrospective approval of his US medals.¹⁴ At the hearing, Mr Smith advised the Tribunal that some of the research material that had been forwarded to him in January was not legible. This material was forwarded to him again, and he was advised to provide comment if any by 26 February 2016. On 25 February 2016 Mr Smith asked for a further week to respond and this was granted. On 11 March 2016 the Tribunal received a further submission from Mr Smith requesting consideration of his additional comments and points which he believed provided further clarity in support of his initial claims.¹⁵

Decision Under Review

12. The Tribunal notes that Mr Smith seeks review of the decision by Mr Lovelock to not amend his Record of Service to include the AFEM and the NDSM. The Tribunal determined that Mr Lovelock in effect has decided that Mr Smith is not eligible for these foreign awards. The Tribunal therefore considered that the central issue was whether or not Mr Smith is eligible for the AFEM and the NDSM and, that his entitlement to wear the awards will turn on his eligibility. Given that Mr Smith has also sought the VLSM as an alternative to the foreign awards and noting that the Directorate has not had an opportunity to comment on this option, the Tribunal decided that it would also examine his eligibility for the VLSM.

Foreign Awards

13. Foreign Governments confer honours or awards on Australian Defence Force (ADF) personnel in recognition for gallantry on operations, bravery in civil actions or for meritorious or outstanding service. Awards recognising operational service may also be made. The *Guidelines Concerning the Acceptance and Wearing of Foreign Honours and Awards by Australians* was approved by Her Majesty the Queen and issued on 5 December 1997.¹⁶ The guidelines were amended on 8 August 2012 with the inclusion of a schedule of approved countries and awards¹⁷, however as this amendment postdates the decision made in relation to Mr Smith's eligibility, the 1997 guidelines are the correct legislation for this matter.

14. The guidelines state:

...

¹⁴ Mr Smith Email '*US Medals – Summary to Submission*' dated 1203 4 February 2016

¹⁵ Mr Smith undated Letter received by the Tribunal on 11 March 2016

¹⁶ *Commonwealth of Australia Gazette (CAG) No S 548 'Guidelines concerning the acceptance and wearing of foreign honours and awards by Australians'* dated 22 December 1997

¹⁷ *Commonwealth of Australia Gazette (CAG) No S 159 'Guidelines concerning the acceptance and wearing of foreign honours and awards by Australians'* dated 12 October 2012 – Paragraph 3

2) ... *Australian citizens may accept and wear foreign awards when an offer is made by the Head of State or the Government of a country with which Australia maintains diplomatic relations ...*

15. The Tribunal noted that in 2009, the Chiefs of Service Committee agreed to a set of principles that would apply to the acceptance of foreign honours and awards. These principles informed the policy detailed in the Defence Honours and Awards Manual. Relevant to Mr Smith's claims is the policy in the manual regarding 'third country deployments' which is the lexicon used to describe personnel involved in exchanges with other countries.¹⁸ The policy states:

... ADF personnel deployed on operations whilst on a third country deployment may be offered a foreign campaign or operational service award by the host nation for this service ... a member who receives or is eligible to receive, an Australian campaign or operational service award will not be given approval to also wear a foreign award for service on third country deployment within the same operational area. The foreign award may be retained however as a memento of their service...

The Armed Force Expeditionary Medal (United States)

16. The AFEM was instituted on 4 December 1961 by Executive Order.¹⁹ The medal 'is awarded to members of the U.S. Armed Forces who, after July 1 1958, participated in U.S. Military operations, U.S. Operations in direct support of the United Nations, or U.S. Operations of assistance for friendly foreign nations.'²⁰ The eligibility criteria for the award of the medal are contained in Department of Defense Manual 1348.33 and include:

- ...
1. (a) Personnel Eligible. *The AFEM may be awarded to members of the U.S. Armed Forces ...*
 - (c) Degree of Participation. *...must have been permanently assigned ... in direct support of the operation for 30 consecutive days ...*
 - (d) Foreign Military Personnel. *The AFEM is not authorized for award to foreign personnel.*
- ...

The National Defense Service Medal

17. The NDSM was instituted in 1953 to be awarded to members of the Armed Forces of the United States whose active military service during designated periods 'merits special recognition'.²¹ It was 'intended to be a "blanket campaign medal" issued to any member of the U.S. Military who served during a designated time period

¹⁸ Defence Honours and Awards Manual Volume 1, Chapter 35, Paragraph 35.16

¹⁹ US Executive Order 10977 – Establishing the Armed Forces Expeditionary Medal

²⁰ United States Department of Defense Manual 1348.33 Volume 2 (November 23, 2010) (incorporating Change 2, May 15, 2015) Paragraph 4.a.

²¹ US Executive Order 10448 – Establishing the National Defense Medal

for which a “national emergency” had been declared’.²² Eligibility criteria for the award of the medal are contained in Department of Defense Manual 1348.33 and include:

- ...
1. (a) General. *The NDSM is awarded to anyone who serves on active duty in the U.S. Military during the authorized time periods ...*
 - (b) Korean and Vietnam War. *Awarded for honourable active service as a member of the U.S. Armed Forces ... between January 1, 1961, and August 14, 1974 ...*
 - (d) Foreign Military Personnel. *The NDSM is not authorized for award to foreign personnel.*
- ...

Vietnam Logistic Support Medal

18. The VLSM was instituted by the Australian Government on 24 February 1993 to recognise individuals who rendered service in support of the Australian Armed Forces in operations in Vietnam between 29 May 1964 and 27 January 1973.²³ The conditions for the award of the medal include:

- ...
4. (1) *The Medal may be awarded for service of one day or more in the area of operations of Vietnam during the relevant period:*
 - (a) *as a member of the crew of a ship or aircraft operating in support of the Australian Armed Forces; or*
 - (b) *while attached to a unit or organisation operating in support of the Australian Armed Forces; or*
 - (c) *while attached to, or serving with, a unit of the Australian Armed Forces or allied forces as an observer.*
 - (2). *The Medal may be awarded to persons who at the time of their service:*
 - (a) *were members of the Australian Armed Forces; or*
 - (b) *were integrated with the Australian Armed Forces.*
 - (3). *A person who has been awarded the Vietnam Medal, or who is eligible for the award of the Vietnam Medal, is not eligible for the award of the Vietnam Logistic and Support Medal.*
- ...

The Far East Strategic Reserve

19. The Malayan Emergency lasted from 1948 to 1960. During that time units from the three Australian services were deployed to Malaya or its waters. Australian

²² United States Department of Defense Manual 1348.33 Volume 2 (November 23, 2010) (incorporating Change 2, May 15, 2015) Paragraph 14.a.

²³ *Commonwealth of Australia Gazette No S 79, Vietnam Logistic and Support Medal Regulations*, dated 10 March 1993

military personnel who took part in the Emergency were awarded the Australian Active Service Medal (AASM) 1945-75 with Clasp 'MALAYA'. The British Commonwealth Far East Strategic Reserve (FESR) was established in 1955 to deter communist Chinese aggression in South East Asia. Australia contributed Navy, Army and Air Force units to the FESR. Their primary role was to defend the Federation of Malaya and Singapore against external aggression. This included 'flag showing duties in South East Asian waters in order that their participation in the strategic Reserve may be fully appreciated in the countries in this area'.²⁴

20. While the primary role of the units deployed as part of the FESR was to deter Chinese aggression, they could be deployed on a secondary role, namely to fight Communist Terrorists within Malaya. As it turned out this secondary role became the main activity of most of the Army and RAAF units. Navy units were involved in supporting operations against the Communist Terrorists on an ad hoc basis. Members of these units received the AASM 1945-75 with Clasp 'MALAYA'.

21. Members of units that conducted operations to fulfil the primary role of the FESR also received the Australian Service Medal (ASM) 1945-75 with Clasp 'FESR'. The FESR remained in place after the end of the Malayan Emergency in 1960 and later devolved into the Australia, New Zealand and UK Force, and later again into the Five Power Defence Arrangements which included forces from Malaysia and Singapore.

22. The Declaration and Determination under the ASM 1945-75 Regulations that establishes the ASM 1945-75 with Clasp 'FESR' allows for award of the medal to members of the ADF who:

- c. (ii) *'... rendered service ... as part of the contribution of a foreign Defence Force to the declared operation while on secondment or exchange with the foreign Defence Force ...'*²⁵

...

Mr Smith's Service Record

23. Mr Smith enlisted in the Permanent Naval Forces on 31 January 1956 at 17 years of age. On 28 January 1957 he was engaged for a six year fixed period of service. His service record indicates his major sea postings were in HMAS *Vendetta*, including from 26 November 1958 to 13 July 1959 and again from 16 December 1960 to 23 November 1961. He discharged from the Permanent Force on 27 January 1963 at the expiration of his engagement holding the rank of Leading Seaman.

24. Mr Smith enlisted in the Royal Australian Naval Emergency Reserve on 12 February 1965 and discharged when his engagement expired on 11 February 1970.

²⁴ Directive for the Attachment of H.M.A Ships in the Far East for Service with the Strategic Reserve, Department of Navy 13779 dated 21 December 1956 in Major General The Hon R.F. Mohr, RFD ED (Retd), *The Review of Service Entitlement Anomalies in Respect of South east Asian Service 1955-75*, Commonwealth of Australia, Defence Publishing Service, 2000, Enclosure 1, Chapter 3.

²⁵ *Commonwealth of Australia Gazette No. S 102* dated 27 March 2001

During his oral evidence he indicated that he continued to serve as a contractor and in a reserve capacity until 1994.

25. According to Mr Smith's Navy Certificate of Service, he was awarded the:

- Australian Active Service Medal 1945-75 with Clasp 'MALAYA';
- Naval General Service Medal 1915-62 with Clasp 'MALAYA';
- Australian Service Medal 1945-75 with Clasp 'FESR';
- Reserve Force Medal with First, Second and Third Clasp;
- National Medal with First Clasp;
- Australian Defence Medal,
- Pingat Jasa Malaysia; and
- Returned from Active Service Badge.²⁶

Mr Smith's Submissions

26. In March 1961 HMAS *Vendetta* departed Sydney for a six-month tour of duty with the FESR. Mr Smith was a member of the ship's company.

27. Mr Smith claims that during the deployment he embarked aboard USS *Buck* in July 1961 and left Subic Bay for Singapore 'via their station which was the area off the coast of South Vietnam'. He claims to have been 'considered to be an active operational member of the crew' during his entire time on board. He claims that whilst operating off the coast of Vietnam:

*'...USS Buck was called in to stand by to provide Gunfire support to ground forces requiring support in South Vietnam...'*²⁷

28. He stated that 'we secured from "action stations" after receiving notice that the ground crews were safely back at their base'. He said that shortly thereafter he was transferred back to HMAS *Vendetta* 'by Jackstay'.

29. As previously stated, he subsequently made application for the VLSM based on his exchange having been 'operational'; and when his application was refused, he made an enquiry to the US Navy who issued him with the AFEM and NDSM on 25 November 1998.²⁸

30. Mr Smith states that he made a submission to the 'FESR (Mohyr) (sic) inquiry' and during his attendance he was verbally advised by Commander Tim Bloomfield RAN that he would need to seek permission to wear the foreign awards on a uniform but not on 'civilian dress'. Following receipt of the ASM 1945-75 with Clasp 'FESR' he commenced to seek approval for his foreign awards to be worn.

31. In his submission Mr Smith provided several photos of various senior officer's medals to support his assertion that there is:

²⁶ Permanent Navy Certificate of Service dated 26 March 2010; see also Department of Defence Submission dated 18 September 2015

²⁷ Mr Smith Letter dated 30 June 2014

²⁸ Bureau of Naval Personnel Retired Records Section Transmittal dated 25 November 1998

‘...adequate precedent for foreign medals to be worn in conjunction with Australian medals. Many Senior Officers and high profile persons wear foreign medals and decorations...’

32. Mr Smith’s submission also included extracts from the Report of Proceedings from HMAS *Vendetta* from May 1961 which confirms that an exchange of personnel occurred and an extract from the US Navy Institute also supporting the fact that an exchange of personnel between USS *Buck* and HMAS *Vendetta* occurred during Exercise Pony Express in 1961. Mr Smith’s submission received on 11 March 2016 asserted that whilst the Report included the fact that there was a transfer of personnel, ‘... nowhere ... is it recorded when these exchanges took place...’.²⁹

33. On 1 September 2014 Mr Smith made several assertions in support of his claim that he was eligible for the awards and that the decision was incorrect.³⁰ His assertions, some of which are based upon his own internet research included:

‘...the NDSM does not specify that it can be awarded to US citizens exclusively ... it will be noted that the Medal of Honour ... is awarded to US military personnel only...’

‘...no such distinction is made in relation to the criteria for the award of the NDSM or the AFEM ...’

‘...there was no Australian Medal applicable for that period of time therefore there was no question of the possibility of “double dipping” ...’

‘... there is ample precedent for foreign medals being worn by ... both past and current serving Defence force members...’

34. In his letter of 5 November 2015 after reviewing the Defence submission, Mr Smith states that:

*‘...there seems to be no dispute that USS *Buck* did perform operational duty in support of the Vietnam War whilst I was serving onboard the vessel ...’³¹*

35. He further stated that:

‘... I did serve in action with an allied defence unit in support of the war in Vietnam my service has not recognised by the ADF...’

‘... my service must be equivalent to that of ... other recipients whose service was recognised by the award of the VLSM...’

‘... the Tribunal should ‘recommend that the Governor General exercise his prerogative to grant me retrospective permission to wear the US medals ...’

²⁹ Mr Smith undated Letter received by the Tribunal on 11 March 2016

³⁰ Mr Smith Letter dated 1 September 2014

³¹ Mr Smith Letter dated 5 November 2015

36. Mr Smith's submissions are best summarised by the conclusion to his 1 September 2014 letter where he states:

'I request that the above matters be taken into consideration of the granting of retrospective approval to receive and wear the medals issued to me by the US Navy, in accordance with the current policy.'

37. During his oral evidence Mr Smith acknowledged that Exercise Pony Express occurred in the April – May 1961 period but he was adamant that his period on USS *Buck* commenced in July 1961. Relying on the 'Cruise Book'³² he stated that whilst USS *Buck* and HMAS *Vendetta* were berthed together in Subic Bay in the first week of July, he was asked by the Captain if he would like to be exchanged with USS *Buck* which was to sail the next morning and that he would transfer back to HMAS *Vendetta* when the two ships reunited a few weeks later in Singapore. Mr Smith told the Tribunal that the USS *Buck* was involved in 'flag showing' in the vicinity of Vietnam at the time.

38. Mr Smith said that he embarked USS *Buck* the next day and sailed from Subic Bay on the 6th or 7th of July 1961. He stated that he was treated as a normal member of the crew with full responsibility of the position he occupied. He said that the ship conducted firing exercises 'as ships normally do' over the next two days as the ship sailed towards Vietnam. He stated that a few days later the ship was called to 'battle stations to provide fire support to US ground troops who were in contact with the Viet Cong'. He stated that he was removed from his operational role and acted as a medical orderly as US regulations precluded foreign personnel from being able to participate in actual firing engagements. He indicated that the engagement did not proceed as the ground force reported that they were safe and that he was told that HMAS *Vendetta* would come and retrieve him from USS *Buck*. He said that he transferred back to HMAS *Vendetta* by hi-line transfer the next day and was told on arrival that he was not to mention his exchange due to political sensitivities. He was told to 'forget you ever left this ship' and he stated that he never spoke about it again until the 1990s when he discovered that the VLSM had been created and he wanted recognition of his service on USS *Buck* in support of the Vietnam war. He stated that 'I served in action therefore I should get it'.

39. Mr Smith indicated that he made application for the VLSM and became angry when he received a dismissive response from the Navy Medals Office which advised him that as there was no record of his exchange he was not eligible for the medal. He said that he was particularly unhappy when he was told that 'the problem with some of you old fellows is that with the passing of time you start to believe that things happened that didn't really happen'. He said that as a result of that response he wrote to the US Navy to seek clarification of his service on USS *Buck* and they in turn sent him the two medals. He then commenced the process of attempting to get the medals recognised and added to his certificate of service and then approval to wear them with his other decorations.

³² A Cruise Book is a journal sometimes produced by a ship's company to commemorate an overseas deployment.

The Directorate's Submission

40. The Defence submission, dated 18 September 2015, indicates that following Mr Smith's application through the *Freedom of Information Act 1982* to have his Certificate of Service amended, the Directorate provided advice to the Case Officer, Mr Elliott Bator who in turn provided that advice to the decision maker, Mr Lovelock. The advice provided by the Directorate was:

*'... I have checked US Department of Defence Policy and have found that these awards have been incorrectly awarded as they cannot be awarded to members of foreign Defence Forces. Mr Smith may keep them as a memento of his service however they will not be approved for wear ... as these awards will not be approved by the Governor-General they cannot be included on his certificate of service.'*³³

41. The submission also indicates that Mr Bator consulted with the Navy People Career Management Agency who advised that:

'... if they (the medals) have not been recognized by the ADF and approved by Defence Honours and Awards they will not be included on the Certificate of Service ...'

42. Acting on this advice, Mr Lovelock decided not to amend Mr Smith's Certificate of Service and advised him that the medals had been awarded 'in error'.

43. The Defence submission indicates that there was no relevant Australian authority for the issue of the AFEM or the NDSM as the awards have never been offered to the ADF. The authority for the issue of the awards is identified in the submission as US Executive Orders and the submission notes that the eligibility criteria for both awards states that the medals are:

'not authorized for award to foreign personnel'.

44. The Directorate conducted a further assessment of Mr Smith's eligibility for the foreign awards on 18 September 2015.³⁴ This reassessment relied upon the 2012 amended guidelines for the acceptance of foreign awards by Australians.³⁵ The Directorate noted that these guidelines included a schedule of approved countries and awards and that the AFEM and NDSM were 'not included on the list'.

45. The submission concluded that Mr Smith was not eligible for the AFEM and NDSM as he 'was not a member of the United States Military as required by the eligibility criteria' for the medals.

³³ Defence Submission DH&A/OUT/2014/1159324/AF22457976 dated 18 September 2015

³⁴ Ibid. Paragraph 23

³⁵ Commonwealth of Australia Gazette No. S159 – *Guidelines concerning the acceptance and wearing of foreign honours and awards by Australians (approved by Her Majesty The Queen August 2012)* dated 12 October 2012

The Tribunal's Consideration

46. The Tribunal carefully considered all the material placed before it. In the hearing with Mr Smith he confirmed his enlistment and discharge dates from the Permanent Naval Force. He also confirmed that he was a member of the ship's company of HMAS *Vendetta* and that she departed Sydney in March 1961 for a six-month tour of duty with the FESR. He also confirmed that during the deployment the ship participated in Exercise Pony Express, a major Southeast Asia Treaty Organization (SEATO) amphibious training exercise that took place in the South China Sea from 14 April to 7 May 1961. The exercise included several coalition vessels including HMAS *Vendetta* and USS *Buck* operating together.

47. The Tribunal notes that central to Mr Smith's contention is the claim that he:

'embarked aboard USS Buck in July 1961 and left Subic Bay in the Philippines destined for Singapore'.

48. **Mr Smith's Service on USS *Buck*.** The evidence provided is not clear on how or when Mr Smith embarked USS *Buck* however what is clear is that HMAS *Vendetta* conducted work up training for Exercise Pony Express in early April 1961 and anchored in Manila Bay at 0830 hours on 20 April 1961 where she joined the other exercise participants and made ready to sail.³⁶

49. Relying on the deck logs, the Tribunal was satisfied that USS *Buck* sailed from Subic Bay at 0736 hours on 21 April 1961 and anchored in Manila Bay shortly thereafter 'with ships of the Australian and English Navies'.³⁷ At 0730 on 22 April 1961 the ships sailed from Manila Bay as part of Combined Task Force 261 which was the designated combined force for participation in Exercise Pony Express.³⁸ The Task Force sailed south to the area of British North Borneo where it conducted an amphibious assault against a fictitious enemy force on 1 May 1961 as the main activity on the exercise.³⁹ Relying on a statement by the Captain of HMAS *Vendetta* that he had taken the opportunity to 'exchange 8 RP's and 4 other ratings with their opposite numbers in USS *Buck* for varying periods throughout the exercise', the Tribunal was satisfied that an exchange of personnel had occurred during the period and that RAN Radar Plotters served on USS *Buck* during the exercise.⁴⁰ The Tribunal dismissed Mr Smith's assertion that '... nowhere ... is it recorded when these exchanges took place...', as it was clear that the exchanges occurred before the Report of Proceedings was written and this was in May 1961.⁴¹

50. The Tribunal noted that Mr Smith was adamant that his period of exchange commenced in July 1961 and was not part of Exercise Pony Express. During the

³⁶ Report of Proceeding – HMAS *Vendetta* for the month of April 1961 – Paragraph 20 and 21

³⁷ Log Book of the USS *Buck* - DD-761 Deck Log 21 Apr 61 and 22 Apr 61

³⁸ Ibid. Deck Log 23 Apr 61

³⁹ SEATO Military Exercise Pony Express Exercise Order MS/206/5/61 dated 16 March 1961 and Press Release dated 27 April 1961

⁴⁰ Report of Proceeding – HMAS *Vendetta* for the month of May 1961 – Paragraph 9

⁴¹ Mr Smith undated Letter received by the Tribunal on 11 March 2016

hearing, the Tribunal examined the USS *Buck*'s Deck Log for the period 1-13 July 1961 and discussed this with Mr Smith.

51. The Tribunal noted that according to HMAS *Vendetta*'s Report of Proceedings for July 1961, she was berthed in Manila from 1-6 July 1961, sailing from there to Subic Bay on 6 July 1961.⁴² On 7 July 1961 she set sail for Singapore where she arrived on 11 July 1961. USS *Buck* arrived in Subic Bay on the morning of 5 July 1961 and remained there until the morning of 8 July 1961 when she commenced patrol exercises in the 'local area'. The Deck Log of 7 July 1961 records the presence of HMAS *Vendetta* moored with USS *Buck* on 6-7 July 1961.⁴³ The Deck Logs from 8-12 July 1961 record that USS *Buck* continued to conduct patrol exercises in the 'local operations area South China Sea' until 18 July 1961 when she set sail for Japan. The Tribunal discussed each of the eight hourly location records from the USS *Buck* with Mr Smith and indicated that the most easterly point the ship reached in the period 6 – 12 July was some 800km from the coast of Vietnam. The Tribunal encouraged Mr Smith to plot the course himself if he wished to see exactly where the ship was at the time he asserted he was aboard.

52. In his later submission he contested this indicating that '... on the afternoon of being called out to assist ground forces we were in visual sight of the coast of Vietnam'.⁴⁴ He also asserted that for medal entitlements, the US Navy Operational Area '... extended some 200+ miles east of the coast of Vietnam ...' and that during his time aboard USS *Buck* he spent '... one day within the operational area ...' which he had calculated was '... approximately one day steaming time from Subic Bay...'.⁴⁵

53. The Tribunal noted that Mr Smith stated that 'I was transferred (back) to HMAS *Vendetta* by Jackstay transfer'⁴⁵. Hi-line transfers of personnel are corroborated in the USS *Buck* Deck Log of 26 April 1961 which states that at 1045 hours the ship was:

*'... maneuvering to close HMAS Vendetta (D-08) for hi-line transfer. 1118 alongside Vendetta. Hi-line detail is set. Secured the hi-line detail. 1145 on station ...'*⁴⁶

54. A further hi-line transfer of personnel between the two vessels occurred at 0851 hours on 1 May 1961.⁴⁷ Whilst Mr Smith claimed during the hearing that not all hi-line transfers would be recorded in logs, the Tribunal noted that where these transfers involved personnel and not equipment, it appeared that they were in fact recorded in the log. The Tribunal noted that there was no record of hi-line transfers from USS *Buck* in the period 6-12 July 1961.

55. The Tribunal relying on the Deck Logs of USS *Buck* from 26 April to 1 May and 6 to 12 July 1961, and noting that HMAS *Vendetta* sailed from Subic Bay to Singapore between 7 and 11 July 1961, was satisfied that it was not possible for Mr

⁴² Report of Proceeding – HMAS *Vendetta* for the month of July 1961 – Paragraph 12

⁴³ Log Book of the USS *Buck* - DD-761 Deck Log 7 July 1961

⁴⁴ Mr Smith undated Letter received by the Tribunal on 11 March 2016

⁴⁵ Mr Smith Letter dated 30 June 2014

⁴⁶ Log Book of the USS *Buck* - DD-761 Deck Log 26 Apr 61

⁴⁷ Log Book of the USS *Buck* - DD-761 Deck Log 1 May 61

Smith to have served aboard USS *Buck* in July 1961 or to have been in the vicinity of the coast of Vietnam or to have been transferred back to HMAS *Vendetta* by hi-line in the period 7 to 12 July 1961. The Tribunal was however satisfied that Mr Smith did complete an exchange on the USS *Buck*, in all likelihood commencing in Subic Bay on 22 April 1961 as a part of Exercise Pony Express with the exchange concluding when he returned to HMAS *Vendetta* by hi-line transfer on 26 April 1961.

56. The Tribunal, having reviewed the Reports of Proceedings of HMAS *Vendetta* and the Deck Logs of USS *Buck* was satisfied that during the exchange, the USS *Buck* was involved in normal operations in support of the training exercise.

57. The Tribunal could find no evidence to support Mr Smith's assertions that he was aboard USS *Buck* in July 1961 or that the ship provided support to land based operations in Vietnam during that month. As previously stated, the Deck Logs reveal that the most easterly point recorded by the ship in July was 800km from the Vietnamese coast.⁴⁸

58. The Tribunal found on the balance of probabilities that Mr Smith served for approximately five days aboard USS *Buck* during Exercise Pony Express in the South China Sea in April 1961 whilst his parent ship (HMAS *Vendetta*) was deployed as part of the FESR. The Tribunal considered that Mr Smith's recollection of his exchange and his duties on-board USS *Buck* were credible and reflected the realistic nature of the exercise including the activities leading up to the amphibious lodgement onto British North Borneo. The Tribunal found that Mr Smith's assertion that '...there seems to be no dispute that USS *Buck* did perform operational duty in support of the Vietnam War whilst I was serving onboard the vessel...' could not be sustained as the ship did not sail within 800km of the Vietnamese coast in April or July 1961.

59. **Mr Smith's Eligibility for Foreign Awards.** The Tribunal reviewed the eligibility for the issue of the AFEM or the NDSM and confirmed that the eligibility criteria for both awards state that the medals are 'not authorized for award to foreign personnel'. The Tribunal also reviewed the guidelines for the acceptance of foreign awards by Australians and noted that the current guidance does not include the AFEM or the NDSM and, whilst this list of awards was not available at the time the decision was taken to refuse Mr Smith's claim, the Tribunal was satisfied that the medals had not been previously accepted as if they were, they would have been listed during the amendment process.

60. The Tribunal reviewed Mr Smith's claims that his internet research had concluded that there was no distinction regarding the award of the AFEM and the NDSM 'to US citizens exclusively' and found that his claim could not be sustained as the correct authority for the award of the medals is the Executive Orders supported by the United States Department of Defense Manual 1348.33 which clearly states that there is in fact exclusivity as the medals are 'not authorized for award to foreign personnel'. During the hearing Mr Smith acknowledged these restrictions when he was pointed to the relevant Executive Orders.

⁴⁸ Log Book of the USS *Buck* - DD-761 Deck Log 9 Jul 61

61. The Tribunal reviewed Mr Smith's assertion that '... there is ample precedent for foreign medals being worn by ... both past and serving personnel...'. The Tribunal noted that the evidence Mr Smith relies upon in making this assertion are photographs he tendered of various senior officers including previous Chiefs of Defence Force and Chief of Navy. The Tribunal notes that these officers do wear foreign awards however there is no evidence that the medals in question including the AFEM and NDSM are being worn. In any event the Tribunal did not accept that precedent was a justifiable factor in determining eligibility for foreign awards. Entitlement is determined by the eligibility criteria for each particular award. The Tribunal has no discretion in relation to eligibility criteria. Eligibility is determined in each matter according to its own facts. The Tribunal therefore dismissed Mr Smith's assertions regarding precedent.

62. The Tribunal reviewed Mr Smith's claim that '...there was no Australian Medal applicable for that period of time therefore there was no question of the possibility of "double dipping"'. The Tribunal dismissed this claim as it was previously noted that Mr Smith was recognised for his service during the deployment in question through the award of ASM 1945-75 with Clasp 'FESR'. The Tribunal noted that current policy regarding third country deployments would in all likelihood preclude approval of foreign awards in this circumstance as Mr Smith had received an operational service award for his deployment to the FESR. The policy states:

*... a member who receives ... an Australian campaign or operational service award will not be given approval to also wear a foreign award for service on third country deployment ...*⁴⁹

63. The Tribunal examined Mr Smith's claim that Chapter 35 of the Defence Honours and Awards Manual provided the grounds for retrospective approval of his US medals.⁵⁰ The Tribunal noted that Mr Smith's claim is in relation to the approval process for medals which are presented to individuals 'Outside Diplomatic Channels' which is addressed at paragraph 4 of the Manual. The policy states:

'Foreign honours or awards presented to ADF personnel without prior notification may be accepted by the member to avoid giving offence to the foreign government or organisation. In order to officially wear the award on ADF uniform, application should be made as soon as possible to Directorate of Honours and Awards (DH&A) seeking retrospective approval'.

64. During the hearing Mr Smith said that he 'was fighting a losing battle under the current policy' and that it appeared that application of the 'outside diplomatic' provision was 'the only avenue open to him'. The Tribunal noted that this policy is in fact the policy that was used by the Department to assess his 2012 application and as a result, the appropriate delegate had decided that he would not support the application. The Tribunal was not able to support Mr Smith's claims particularly as there was no evidence to suggest that the medals he had been given were as a result of operational service – his period on board USS *Buck* was in all likelihood during Exercise Pony

⁴⁹ *Defence Honours and Awards Manual*, Volume 1, Chapter 35, Paragraph 35.16

⁵⁰ Mr Smith Email 'US Medals – Summary to Submission' dated 1203 4 February 2016

Express - the ship did not close on the coast of Vietnam and he was recognised for this particular service through the award of the ASM 1945-75 with Clasp 'FESR'.

65. **The VLSM.** The Tribunal also examined whether Mr Smith met the eligibility criteria for the VLSM. In so doing the Tribunal noted that the conditions for the award of the VLSM required an individual to render service in support of operations in Vietnam between 29 May 1964 and 27 January 1973.⁵¹ The Tribunal relying on Mr Smith's record of service noted that he discharged from the Permanent Naval Forces on 27 January 1963. There is no evidence to suggest that he served in an operational unit in support of the Vietnam war during his subsequent engagement with the Royal Australian Naval Emergency Reserve. During the hearing Mr Smith agreed that he did not meet the eligibility criteria for the VLSM and indicated that he was in fact restating his assertion that the VLSM commencement date should have been 1960 'as it was for the Republic of Vietnam Campaign Medal'. The Tribunal did not support Mr Smith's assertion. The mandated commencement date for the VLSM is 29 May 1964 and Mr Smith was discharged from the Permanent Naval Force 16 months before this date. As a result, the Tribunal formed the view that Mr Smith is not eligible for the award of the VLSM.

Finding

66. For the reasons stated above and relying on Executive Orders, exclusivity provisions in the United States Department of Defense Manual and cognisant that there is no evidence that Australia has ever been offered or accepted the AFEM or the NDSM, the Tribunal finds that Mr Smith is not eligible for these awards. Accordingly, the Tribunal finds that the decision of the Department of Defence to refuse to amend Mr Smith's Certificate of Service to include the AFEM and NDSM is the correct decision.

67. The Tribunal notes that the guidance for acceptance and wearing of foreign awards provides for Mr Smith to wear the AFEM and NDSM on his right breast at private functions or at services of commemoration or at ceremonies held in connection with the United States and encourages him to do so.⁵²

DECISION

68. The Tribunal affirms the decision of the Department of Defence to not amend Mr Clive A. Smith's Certificate of Service to include the United States Armed Forces Expeditionary Medal and the United States National Defense Service Medal.

⁵¹ *Commonwealth of Australia Gazette No S 79, Vietnam Logistic and Support Medal Regulations*, dated 10 March 1993

⁵² *Commonwealth of Australia Gazette No. S 159 – Guidelines concerning the acceptance and wearing of foreign honours and awards by Australians (approved by Her Majesty The Queen August 2012)* dated 12 October 2012 – Paragraph 7